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F18a

Appeal Filed: 11/7/2022
Action Deadline: 1/23/2023
Staff: Sarah MacGregor - SC
Staff Report: 12/2/2022
Hearing Date: 12/16/2022

STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

Appeal Number: A-3-PSB-22-0064
Applicant: Richard Mittry, Mittry Family Trust
Appellant: Tarren Collins and Erik Howell
Local Government: City of Pismo Beach
Local Decision: Coastal development permit application number P21-000015 approved by the City of Pismo Beach City Council on October 18, 2022.
Location: 171 Naomi Avenue in the St. Andrew's Tract neighborhood of Pismo Beach (APN 010-501-005).
Project Description: Demolition of an existing 1,960-square-foot one-story single-family residence and construction of a new two-story 3,648-square-foot single-family residence.
Staff Recommendation: No Substantial Issue

IMPORTANT HEARING PROCEDURAL NOTE

Please note that this is a substantial issue only hearing, and testimony will be taken only on the question of whether the appeal raises a substantial issue. Such testimony is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits), so please plan your testimony accordingly. Only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP)

application and will then review that application at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

The City of Pismo Beach approved a coastal development permit (CDP) to demolish an existing 1,960 square-foot one-story single-family dwelling and to construct a new 3,648 square-foot two-story single-family dwelling at 171 Naomi Avenue in the St. Andrews Tract Planning Area. The project is located on a 7,300 square-foot lot in a substantially built-out neighborhood consisting of single-family and multi-family residences located west of Highway 101 and upcoast of downtown Pismo Beach.

The Appellants contend that the approved project is inconsistent with City of Pismo Beach certified Local Coastal Program (LCP) standards related to the community character and neighborhood compatibility, and further contend that the CDP was not properly approved. After reviewing the local record, staff has concluded that the City-approved project does not raise a substantial issue with respect to the project's conformance with the LCP.

In terms of community character/neighborhood compatibility, the approved residence meets applicable numerical site design standards specified in the LCP for this neighborhood, including in terms of height, square footage, setback, second floor step back, and lot coverage. The City's analysis of neighborhood characteristics further shows that the approved project is not unlike recently approved and/or built projects in the neighborhood, including on larger lots such as this, and concluded that the project would not be outsized in comparison and would be complementary to the varied architectural aesthetic in this area. These conclusions appear reasonable and do not suggest a substantial issue of LCP conformance.

In terms of the CDP approval process, it is true that the project took a circuitous route through the City's process, and it is true that it was initially improperly approved by the City Council based on a condition that the LCP be amended to address LCP inconsistencies. That said, the City also subsequently processed, and the Commission certified an LCP amendment that modified certain site development standards affecting this neighborhood (related to building setbacks and second story setbacks), and the City Council then approved the CDP again subject to the as modified LCP standards (and without a condition requiring an LCP amendment), thereby constituting the City's final CDP action. Although the process was not perfect in that respect, ultimately the City Council, as the City's highest CDP authority, approved a CDP as measured against the LCP, finding the project LCP consistent, as is the LCP requirement. Thus, the CDP approval process, while imperfect initially, doesn't suggest a substantial LCP conformance issue either.

In sum, the City's approval is for a relatively minor residential project inland from the shoreline in a substantially developed residential neighborhood that appears to staff to be compatible with the character of the neighborhood as approved, and there is no

need to further reduce the project below/above LCP numerical maximum/minimum size and scale standards for LCP consistency. The project simply does not raise the types of coastal resource concerns that would suggest there exists a substantial issue in this case. As a result, staff recommends that the Commission determine that the appeal contentions do not raise a substantial LCP or Coastal Act public access conformance issue, and that the Commission decline to take jurisdiction over the CDP application for this project. The single motion necessary to implement this recommendation is found on page 5 below.

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EXHIBITS

- Exhibit 1 – Project Location
- Exhibit 2 – City Approved Project Plans
- Exhibit 3 – City Final Local CDP Action Notice
- Exhibit 4 – Appeal of City CDP Decision

CORRESPONDENCE

EX PARTE DISCLOSURES

1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that no substantial issue exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission would not take jurisdiction over the underlying CDP application for the proposed project and would not conduct further hearings on this matter, and that the local government CDP decision stands and is thus final and effective. To implement this recommendation, staff recommends a yes vote on the following motion which, if passed, will result in the recommended no substantial issue finding. If the motion fails, then the Commission will have instead found a substantial issue and will instead take jurisdiction over the subject CDP application for future hearing and action. The motion passes only by an affirmative vote of a majority of the Commissioners present.

Motion: *I move that the Commission determine that Appeal Number A-3-PSB-22-0064 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603, and I recommend a **yes** vote.*

Resolution to Find No Substantial Issue. *The Commission finds that Appeal Number A-3-PSB-22-0064 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

2. FINDINGS AND DECLARATIONS

A. Project Description and Location

The City-approved project is located at 171 Naomi Avenue, two houses and about 220 feet (at the closest point) from the immediate shoreline in the City of Pismo Beach on California's central coast. The project is located on a developed lot with an existing 1,960 square-foot one-story single-family residence with attached garage and pitched roof in the St. Andrews Tract Planning Area,¹ an established and essentially built-out residential neighborhood consisting of both single-family and multi-family residences located west of Highway 101 and north/upcoast of downtown Pismo Beach. The property is zoned by the City of Pismo Beach Local Coastal Program (LCP) Single Family Residential (R-1). The City-approved project involves the demolition of the existing home and construction of a new 2,852 square-foot two-story single-family dwelling with a flat roof, a 689 square-foot attached garage, and a 107 square-foot storage area (or a total of 3,648 square feet). See **Exhibit 1** for a location map and see **Exhibit 2** for the approved project plans and renderings.

¹ The St. Andrews Tract is also referred to by the LCP as Planning Area E.

B. City of Pismo Beach CDP Approval

On March 22, 2022, the City of Pismo Beach Planning Department approved a CDP for the proposed residence. The Planning Department approval was appealed² to the City Council which, after deliberation, upheld the approval and denied the appeal on April 19, 2022. The CDP for the project was then reapproved (or ‘ratified’ per the City’s terminology³) by the City Council on October 18, 2022, thus constituting the City’s final CDP action on the project. The City’s Final Local CDP Action Notice (see **Exhibit 3**) was received in the Coastal Commission’s Central Coast District Office on October 24, 2022, and the Coastal Commission’s ten-working-day appeal period for this action began on October 25, 2022 and concluded at 5 p.m. on November 7, 2022. One valid appeal (discussed below) was received during the appeal period.

C. Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. In addition, any local action (approval or denial) on a CDP for a major public works project (including a publicly financed recreational facility and/or a special district development) or an energy facility is appealable to the Commission. This City CDP decision is appealable to the Commission because the project site is located between the first public road and the sea, and within 300 feet of the seaward face of the coastal bluff.

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP and/or to Coastal Act public access provisions. For appeals of a CDP denial, where allowed (i.e., such appeals are only allowed in extremely limited circumstances – see description of appealable actions, above), the grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions.

The Commission’s consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the “substantial issue” phase of an appeal. The Commission is required to begin its hearing on an appeal, addressing at least the substantial issue question, within 49-working days of the filing of the appeal unless the applicant has waived that requirement, in which

² One of the appellants was Tarren Collins who is also an appellant in this Coastal Commission appeal as well.

³ See additional discussion on this point in the ‘CDP Approval Process’ section of this report.

case there is no deadline. Here, the Applicants have not waived the 49-working day deadline, and thus the Commission has until January 23, 2023, to take action on this appeal (i.e., no later than the Commission's December meeting since there is no January hearing).

The Coastal Act and the Commission's implementing regulations are structured such that there is a presumption of a substantial issue when the Commission acts on this question, and the Commission generally considers a number of factors in making that determination.⁴ At this stage, the Commission may only consider issues brought up by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such hearing is requested, a substantial issue is automatically found. In both cases, when the Commission does take testimony, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

If, following testimony and a public hearing, the Commission determines that the appeal does not raise a substantial issue, then the first step is the only step, and the local government's CDP decision stands. However, if the Commission finds a substantial issue, the Commission takes jurisdiction over the underlying CDP application for the proposed project, and the appeal heads to the second phase of the hearing on the appeal.

In the second phase of the appeal, if there is one, the Commission must determine whether the proposed development is consistent with the applicable LCP (and in certain circumstances the Coastal Act's public access and recreation provisions). This step is often referred to as the "de novo" review phase of an appeal, and it entails reviewing the proposed project in total. There is no legal deadline for the Commission to act on the de novo phase of an appeal. Staff will make a CDP decision recommendation to the Commission, and the Commission will conduct a public hearing to decide whether to

⁴ The term substantial issue is not defined in the Coastal Act. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no substantial issue..." (California Code of Regulations, Title 14, Section 13115(b)). Section 13115(c) of the Commission regulations provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a significant issue: (1) the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and the Coastal Act's public access provisions; (2) the extent and scope of the development; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretation of its LCP; and (5) whether the appeal raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

approve, approve with conditions, or deny the subject CDP. Any person may testify during the de novo phase of an appeal hearing (if applicable).

D. Summary of Appeal Contentions

The Appellants contend that the City-approved project raises LCP consistency concerns relating to neighborhood compatibility, and specifically that the mass, scale, and setbacks are inconsistent with the LCP requirements. Additionally, the Appellants contend that the City’s approval of the CDP was irregular, and did not conform with CDP approval requirements, including because the CDP was initially approved before the LCP was amended to modify certain site development standards that apply to this neighborhood. See **Exhibit 4** for the full appeal contentions.

E. Substantial Issue Determination

1. Community Character and Neighborhood Compatibility

The Appellants did not identify any specific LCP provisions in their appeal, but the LCP protects community character and neighborhood compatibility through a suite of standards applying certain design criteria and requiring visual compatibility with surrounding areas (for example, IP Section 17.124.140(A)(3) specifically states that an allowable contention for an appeal of a CDP decision is whether “the development is not compatible with the established physical scale of the area or is not consistent with the level and scale of development provided for in the area in the city’s certified local coastal program”). Some of the LCP compatibility standards are numerical and more objectively assessed (e.g., setbacks, heights, coverage, etc.), but others – and even inherently the numerical standards – are more subjective, which is not at all an unusual evaluation structure in LCPs on this issue. Thus, it is important to understand to what degree numerical standards are met, but also to what degree the site and/or context might suggest more subjectively that these standards should be more limiting.

On the first point, the City-approved project complies numerically with the LCP’s applicable site standards for the R-1 zoning district, including for minimum lot size, maximum building height, lot coverage, height, second floor massing, building area, and setbacks. Specifically:

	LCP Requirement	City-Approved Project
Minimum required lot size	At least 5,000 sf	7,300 sf
Maximum allowed lot coverage	At most 55% (4,015 sf)	33% (2,387 sf)
Maximum allowed floor area	86% of 2,700 sf and 60% of lot excess (5,082 sf)	86% of 2,700 sf and 28% of lot excess (3,648 sf)
Maximum allowed building height from high point on lot	At most 15 feet	15 feet
Maximum allowed building height from center of footprint	At most 25 feet	20 feet

Maximum second story	At most 80% of first floor (1,622 sf)	80% (1,620 sf)
Minimum front yard setback	At least 20 feet	24 feet
Minimum side yard setback	At least 4 feet	5 feet
Minimum rear yard setback	At least 10% of lot depth (but not required to be more than 10 feet)	11 feet 7 inches

Thus, as can be seen from the table, the City-approved project meets LCP numerical standards. At the same time, numerical minimums/maximums such as these are not entitlements to max out development, rather they are maximum and minimum standards that may be required to be less or more if required to make development LCP consistent. In other words, even though they provide the outer bounds of what can be found LCP consistent in terms of mass and scale, that determination is also discretionary (e.g., a maximum height of 25 feet just means that a residence can't be higher than that, but it may also be required to be lower than that if necessary to meet more subjective LCP requirements), which also introduces some subjectivity and as a rule into that otherwise objective numerical exercise.

To help assess this issue more holistically, the City also undertook an analysis to compare the size of the proposed residence with recently approved and built homes in the neighborhood, and the City found that the proposed residence was not unlike the larger homes recently approved/built in St. Andrews Tract.⁵ The City conducted an analysis of all homes in the neighborhood and found a range of 1,150 to 4,424 square feet in size, with many of the recently redeveloped homes being larger in size. Hence the City approved home is not atypical to the size of existing homes in the neighborhood. At the same time, it is fair to point out that the established neighborhood is made up of 112 residential structures, the vast majority of which are single-story. This data points to a neighborhood that is changing, with homes becoming larger over time. It is also not an atypical phenomenon in coastal neighborhoods up and down the state, including in other parts of Pismo Beach.

The City also found that the neighborhood includes an eclectic mix of architectural styles and one and two-story homes of a variety of styles and shapes. While the neighborhood's original homes were built in the 1960s as lower slung ranch-style homes, more recent development includes Spanish, modern, craftsman, Mediterranean, and Cape Cod styles. The City-approved residence employs a mid-century modern style of sorts with simple horizontal linear forms, including a flat roof, and exterior cladding of natural stone and wood veneers. Although somewhat boxier than most homes in the neighborhood, the neighborhood's identity in this respect is best described as eclectic, with no one style predominating.

⁵ These larger homes tend to be located on the larger lots in the neighborhood, and the subject lot is one of the larger parcels in the St. Andrews Tract at 7,300 square feet.

Perhaps as critical, the City-approved project will have extremely limited effect on the public, and publicly enjoyed coastal resources, beyond the limited degree to which views of the built residential environment at this location contribute to the value of the public view. In fact, the site is the third house in from the immediate shoreline along a stretch of homes extending perpendicular to the coastline, and the main public resource and attraction here are the expansive coastal views that open up at the shoreline well past this site at Memory Park, a linear public park along the bluff edge with picnic tables and benches and other public amenities located some 250 feet upcoast of this site. In other words, the City-approved residence, including because it is not atypical from others in the area and not atypical more broadly as it relates to the overall neighborhood, will not have a significant effect on the public at large, including with respect to public views. To the extent there may be questions for some on the margin as it relates to neighborhood compatibility, the lack of public coastal resource impacts is informative for the substantial issue determination.

In short, the City's character and compatibility conclusions seem reasonable and supported by evidence in this case, and the City's approval of a CDP for the proposed project does not raise a substantial issue of LCP conformance with respect to community character and neighborhood compatibility.

2. CDP Approval Process

The LCP provides that CDP decisions can be made at the Planning Department, Planning Commission, or City Council levels, with decisions at each lower such level appealable to the levels above, respectively, and where the City Council is the ultimate and highest arbiter for City CDP decisions. In this case, the Planning Department approved a CDP that was appealed to the City Council, and the City Council approved that CDP on April 19, 2022 subject to a condition that the LCP be amended to allow for the project to include a front setback of 24 feet and second story massing of 80% when the LCP that was in effect at the time would have dictated that the home's original front setback be maintained, in this case 51 feet, and the second story front elevation be setback 10 feet. However, CDP decisions are required to be found LCP consistent, and such consistency cannot be provided via changing the LCP to make it so. On the contrary, the LCP in effect at that time was the standard of review, not a potentially altered LCP, and the Commission has historically considered actions that include conditions to modify the LCP to allow consistency to be improper and *ultra vires*.^{6,7} In any case, the City never sent a notice of final CDP action for the City Council's April 19,

⁶ Where *ultra vires* is a legal term that describes when a body takes an action beyond its legal authorities. Here, the City can propose an LCP amendment, but the authority to ultimately approve and certify any such LCP change does not lie with the City, rather it lies with the Coastal Commission.

⁷ And the same applies to CDP approval that is conditioned to require other CDPs to be modified in some way to allow such development (see, for example, the Pebble Beach Company's Measure A project from the early 2000s).

2022 CDP approval, and thus no appeal period ever started or ran for that action.⁸ Subsequently, the City processed an LCP amendment to modify front yard setback and second story step back provisions applicable to the St. Andrews neighborhood, and that amendment was certified by the Coastal Commission on September 9, 2022.⁹ And ultimately the City Council subsequently voted again to approve the CDP for the project on October 18, 2022, based this time on finding LCP consistency as measured against the then as-certified LCP. The Commission then received the City's Final Local CDP Action Notice on October 24, 2022, triggering the ten-working-day appeal period, and leading to the appeal that is the subject of this report.

Thus, while it is true that the project took a circuitous route through the City's process, and it is also true that the CDP was initially improperly approved by the City Council based on a condition that the LCP be amended to address LCP inconsistencies, the City also subsequently processed and the Commission certified an LCP amendment that modified certain site development standards affecting this neighborhood, and the City Council then approved the subject CDP subject to the as modified LCP standards (and without a condition requiring an LCP amendment). That final City Council CDP action thus constituted the City's final action on this CDP application, not the prior improper decision, and it appropriately triggered an appeal process and the appeal that is before the Commission today. Although the process was not perfect in that respect, ultimately the City Council, as the City's highest CDP authority, approved a CDP as measured against the LCP, finding the project LCP consistent, as is the LCP requirement.

Finally, and perhaps as importantly, the process in question did not seem to hinder the Appellants' (or others') ability to participate in the requisite CDP and LCP decision making processes. On the contrary, these Appellants and many others participated in each of the above-described process, including the LCP amendment when it was considered by the Commission, and these Appellants appealed the decision that is the subject of this report to the Commission for consideration. In that sense, any CDP processing anomalies do not appear to have hindered participation. It is clear that the Appellants disagree on the outcome, but the process, while imperfect initially, does not appear to have resulted in an outcome that would be different than if the original April 19, 2022 City Council CDP decision had never been made.

For the above reasons the City's approval of a CDP for the proposed project does not raise a substantial issue of Coastal Act conformance with respect to the CDP approval process.

3. Conclusion

When considering a project on appeal, the Commission must first determine whether

⁸ Per the Commission's regulations, local governments are required to send such final action notices within 7 calendar days of a final CDP decision, where the Commission's receipt of such notice for appealable development (such as this) starts the Commission's 10-working day appeal period running.

⁹ See adopted Commission report at <https://documents.coastal.ca.gov/reports/2022/9/F10b/F10b-9-2022-report.pdf>.

the project raises a substantial issue of LCP conformity and/or Coastal Act public access conformity such that the Commission should assert jurisdiction over the CDP application for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue in terms of such conformance. The Commission's regulations lay out the following five factors that it may consider when determining whether the issues raised in a given appeal are "substantial" (14 CCR section 13115(c)): the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

In this case, these five factors support a conclusion that the City's approval of a CDP for this project does not raise a substantial issue of LCP conformance. In fact, as described above, the City has a reasonable and supportable record based on the facts and the law that the project can be found LCP consistent. The approved residence is an allowable use in the R-1 zoning district, it meets all applicable numerical site development standards, and it is generally not outside the bounds of the neighborhood's character. And importantly, the scope of the project is limited to a single residence inland from the immediate shoreline in a location where it does not affect any significant coastal resources. The City-approved project will have an insignificant effect on the general public's enjoyment of the coastal zone in this part of the coast and appears to raise local issues focused on a single neighborhood (and really just this location within it) as opposed to those of regional or statewide significance. And although the process was imperfect, as described above, and should not be emulated in the future, the ultimate outcome does not appear to have suffered as a result. To the degree there is any precedential value, it is the Commission's admonition against improperly approving CDPs that require LCP amendments. Thus, the five factors, both individually and when considered together, stand for a no substantial issue conclusion.

For the reasons stated above, the Commission finds that Appeal Number A-3-PSB-22-0064 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

3. APPENDICES

A. Substantive File Documents¹⁰

- City CDP Application File for P21-000015

¹⁰ These documents are available for review from the Commission's Central Coast District office.

B. Staff Contacts with Agencies and Groups

- City of Pismo Beach Planning Division