

**CALIFORNIA COASTAL COMMISSION**

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# F17a

Appeal Filed: 12/2/2021  
Action Deadline: None  
Staff: Alexandra McCoy - SC  
Staff Report: 1/21/2022  
Hearing Date: 2/11/2022

## STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION ONLY

**Appeal Number:** A-3-MRB-21-0078  
**Applicant:** Morro Bay Ventures LLC  
**Appellant:** Betty Winholtz  
**Local Government:** City of Morro Bay  
**Local Decision:** Coastal development permit application number 21-036 approved by the City of Morro Bay City Council on October 26, 2021.  
**Location:** 2783 Coral Avenue in the City of Morro Bay in San Luis Obispo County (APN 065-386-015).  
**Project Description:** Construction of five new residences on each of five vacant lots (totaling roughly one acre) and related development.  
**Staff Recommendation:** No Substantial Issue

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### 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 Morro Bay approved a CDP that authorized the construction of five homes on five lots totaling nearly one acre within the Cloisters residential neighborhood, a subdivision seaward of Highway 1 that was originally approved by the Commission on appeal in 1992 (CDP A-4-MRB-91-044). The Commission's 1992 approval authorized the subdivision of an 84.4-acre parcel into 120 residential lots, three open space lots, one 0.99-acre lot (intended at the time for future development of a fire station), and internal roads and other infrastructure. Individual residences have since been developed with separate City CDPs, and the neighborhood is now almost completely built out. The Commission's CDP was amended twice, the last time in March 2020 to allow for the subdivision of the 0.99-acre parcel previously identified for a fire station to instead be divided into up to five residential parcels and to allow for construction of necessary infrastructure.<sup>1</sup> The City then, via separate CDP approval that is the subject of this appeal, approved the construction of five residences, one on each of the five new lots, as well as related development such as landscaping and drainage. The homes would all be one-story and 14 feet in height, and range in size from 2,711 square feet to 2,808 square feet.

The Appellant raises two contentions with the City's CDP approval. First, the Appellant argues that the LCP's Implementation Plan requires the Planning Commission to hear CDP applications prior to the City Council, but that, in this case, the City Council heard and decided on the CDP for the project instead of the Planning Commission. And second, the Appellant asserts that the City Council did not properly consider the Commission's previous approval of the 5-unit subdivision and associated infrastructure in CDP amendment A-4-MRB-91-044-A2 in 2020. Specifically because that CDP authorized the five new lots as well as construction of infrastructure, but the City's staff approval did not include certain infrastructure specifically described in the project description. Thus, the Appellant contends that the City's approval did not include elements required by the Commission's CDP approval.

**After reviewing the local record, staff recommends that the Commission find the appeal contentions do not raise a substantial LCP conformance issue and decline to take jurisdiction over the CDP.**

With respect to the City's CDP process, the Planning Commission did review and approve a previous iteration of the project in 2018 (which was for a six-unit project instead of five), which was then appealed to the City Council. The City Council upheld the Planning Commission's decision and approved the project that same year. The project was then revised to include only five units instead of six, and the City Council

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<sup>1</sup> The Commission also approved an LCP amendment in 2019 to increase the number of residences allowed in the Cloisters neighborhood from 120 to up to 125 (LCP-3-MRB-19-0140-1), and thereby allow for the five-unit subdivision.

approved this modified project late last year. Thus, the Planning Commission did review and approve the project (albeit in a slightly modified form) and, because the Council had already heard the project on appeal, the Council determined that it would review and approve the modification. The City's action here does not appear to run counter to any LCP procedural requirements. As such, this appeal contention does not raise a substantial LCP conformance issue.

And with respect to the project's conformance with the Commission's 2020 CDP amendment approval, there is nothing in the record to suggest that it does not conform with it or otherwise raise any significant issues. As indicated above, that approval accommodated a 5-unit subdivision and the construction of related infrastructure, including a shared driveway and other site improvements. The City's approval here would simply authorize the actual construction of the five residences on those created lots. As the Commission found in its CDP approval for the subdivision in 2020:

*The lot is located near Highway 1 and about a quarter mile inland from the beach where the subdivision will have no significant impact on public access. The lot is relatively flat, is located slightly below Highway 1 elevation, contains no sensitive species, is bounded on three sides by residential development and by Highway 1 on the fourth side, and neither the subdivision (including the shared driveway and infrastructure) associated with this amendment nor potential future LCP-consistent residential development (subject to future CDP processes) is expected to lead to any significant coastal resource impacts.*

The City-approved project is consistent with the Commission's previous approval and, as predicted by the Commission in 2020, does not raise any coastal resource issues.

In short, the project is a fairly minor authorization of five new residences on five infill residential lots and does not give rise to any significant coastal resource concerns, and the Appellant's contentions about the CDP process and the relationship to the Commission's 2020 action do not raise substantial LCP conformance issues. Thus, staff recommends that the Commission find that the appeal raises no substantial LCP conformance issue and decline to take jurisdiction over the CDP application for the project. The motion to do so is found on **page 5** below.

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**EXHIBITS**

- Exhibit 1 – Project Location Map and Site Photos
- Exhibit 2 – City’s Final Local CDP Action Notice
- Exhibit 3 – Appeal of City’s CDP Decision

## 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-MRB-21-0078 **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-MRB-21-0078 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 Location and Description

The Cloisters is a residential neighborhood seaward of Highway 1 that was originally approved by the Commission on appeal in 1992 (CDP A-4-MRB-91-044). The Commission's 1992 approval authorized the subdivision of an 84.4-acre parcel into 120 residential lots, three open space lots, one 0.99-acre lot (intended at the time for future development of a fire station), and internal roads and other infrastructure. Individual residences have been developed with separate City CDPs, and the neighborhood is now almost completely built out. The Commission's CDP was amended twice, the last time in March 2020 to allow for the subdivision of the 0.99-acre parcel previously identified for a fire station to instead be divided into five residential parcels and to allow for construction of necessary infrastructure.<sup>2</sup> The City then, via separate CDP approval that is the subject of this appeal, approved the construction of five residences, one on each of the five new lots, as well as related development such as landscaping and drainage infrastructure. The homes would all be one-story and 14 feet in height, and range in size from 2,711 square feet to 2,808 square feet. See **Exhibit 1** for a location map and photographs of the site.

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<sup>2</sup> The Commission also previously approved an LCP amendment in 2019 to increase the number of residences allowed in the Cloisters neighborhood from 120 to up to 125 (LCP-3-MRB-19-0140-1), and thereby allow for the five-unit subdivision.

## **B. San Luis Obispo County CDP Approval**

On October 26, 2021, the Morro Bay City Council approved a CDP for the above-described residential project. The City's Final Local CDP Action Notice (see **Exhibit 2**) was received in the Coastal Commission's Central Coast District Office on November 16, 2021, and the Coastal Commission's ten-working-day appeal period for this action began on November 17, 2021 and concluded at 5 p.m. on December 2, 2021. 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 (Highway 1 and San Jacinto Street) and the sea.

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 case there is no deadline.

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.<sup>3</sup> At this stage, the Commission may only consider issues brought up by

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<sup>3</sup> 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

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 cases where 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 it occurs, 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 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 Appellant contends that the City's approval was improperly approved by the City Council and should have first been heard before the Planning Commission, and that the approved project does not adequately reflect the Commission's authorization for the subdivision in CDP amendment A-4-MRB-91-044-A2. More specifically, the Appellant argues that the LCP's Implementation Plan requires the Planning Commission to hear CDP applications prior to the City Council (IP Section 17.58.030), but that, in this case, the City Council heard the project instead of the Planning Commission. And the Appellant indicates that the City Council did not properly consider the Commission's

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issue" (California Code of Regulations, Title 14, (CCR) Section 13115(b)). CCR Section 13115(c) provides, along with past Commission practice, that the Commission may consider the following five factors when determining if a local action raises a substantial 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.

previous approval of the subdivision and associated infrastructure described in CDP A-4-MRB-91-044-A2. That CDP authorized both the five new lots as well as construction of infrastructure, but the City's staff report only mentioned the five new lots. Thus, the City's approval could have elements in conflict with the Commission's CDP approval. Please see **Exhibit 3** for the appeal contentions.

### **E. Substantial Issue Determination**

With respect to the Appellant's allegations regarding the project's CDP approval procedures, the LCP's IP specifies the applicable notice and hearing procedures for CDP applications. Section 17.58.030 states that, for projects appealable to the Coastal Commission, as this one is, CDP applications must have at least one public hearing:

***IP Section 17.58.030(C): Public Hearing Required for Appealable Developments.** At least one public hearing shall be held on each application for development within the appeal jurisdiction, thereby allowing any person the opportunity to appear at the hearing and inform the local government of their concerns regarding the project.*

For CDPs, the Planning Commission is the reviewing authority tasked with holding the public hearing (IP Section 17.58.030(D)(1))<sup>4</sup>, with its decisions being potentially appealed to the City Council (per IP Section 17.58.070).<sup>5</sup>

In this case, the Planning Commission did review and approve a previous, more-intensive iteration of the project in 2018 (which was for a six-unit project instead of five), which was then appealed to the City Council. The City Council upheld the Planning Commission's decision and approved the project that same year. However, subsequent to the Council's approval, and during the process to amend both the City's LCP and the Commission's CDP to provide for the project, the Applicant modified the project from 6 residences to 5. Because of this revision, the City Council reheard the project and approved it, as opposed to starting over again at the Planning Commission. Thus, the Planning Commission did review and approve the project (albeit in a slightly modified form) and, because the Council had already heard the project on appeal, the Council determined that it would review and approve the modification. The City's action here does not appear to run counter to any LCP procedural requirements. As such, this appeal contention does not raise a substantial LCP conformance issue.

And with respect to the project's conformance with the Commission's CDP approval, there is nothing in the record to suggest that it does not conform with it or otherwise raise any significant issues. As stated earlier, the Commission's 2020 approval of CDP amendment A-3-MRB-91-044-A2 provided for the subdivision of a nearly one-acre parcel into five lots and the construction of related infrastructure, including a shared driveway and other site improvements. The City's approval here would simply authorize

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<sup>4</sup> IP Section 17.58.030(D)(1) states, in relevant part: "...the Planning Commission shall hold a public hearing on the proposed development. The Planning Commission may approve, conditionally approve, or deny any application submitted according to the provisions of this chapter."

<sup>5</sup> IP Section 17.58.070 states, in relevant part: "Appeals of Planning Commission Action. Any aggrieved person, including the applicant, may appeal in writing the decision of the Planning Commission on a coastal development permit application to the City Council within ten days of the commission's action."



the actual construction of the five residences on those previously approved/created lots. As the Commission found in its CDP approval:

*The lot is located near Highway 1 and about a quarter mile inland from the beach where the subdivision will have no significant impact on public access. The lot is relatively flat, is located slightly below Highway 1 elevation, contains no sensitive species, is bounded on three sides by residential development and by Highway 1 on the fourth side, and neither the subdivision (including the shared driveway and infrastructure) associated with this amendment nor potential future LCP-consistent residential development (subject to future CDP processes) is expected to lead to any significant coastal resource impacts.*

The City-approved project is consistent with the Commission's previous approval and does not raise any coastal resource issues.

When considering a project on appeal, the Commission must first determine whether the project raises a substantial issue of LCP conformity or public access, 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 such a substantial issue. In the past, the Commission has considered the following five factors to decide whether the issues raised in a given case are "substantial": (1) the degree of factual and legal support for the local government's decision; (2) the extent and scope of the development as approved or denied by the local government; (3) the significance of the coastal resources affected by the decision; (4) the precedential value of the local government's decision for future interpretations of its LCP; and (5) 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.

As described above, the appeal contentions relate to the project's consistency with the LCP's CDP procedures and with the Commission's previous CDP approval authorizing the subdivision and related infrastructure. Accordingly, the City provided adequate factual and legal support for its CDP decision, and the first factor strongly supports a no substantial issue determination. Because the Appellant's appeal contentions were based exclusively on this question, this factor alone weighs strongly enough to support a finding of no substantial issue.

As to the scope and significance of the project, the project includes the construction of five residences on an infill site the Commission had previously identified as being appropriate for such development without coastal resource impacts. Thus, the second and third factors support a finding of no substantial issue because the extent and scope of development is small in the context of this built-out subdivision and the coastal resources affected by the City's decision are not significant.

As to precedential value, the City properly followed the LCP, and the fourth factor weighs against finding substantial issue. Lastly, the issues raised appear to be exclusively local and are not of regional or statewide significance and the fifth factor

also weighs against finding a substantial issue.

Taken together, all five factors weigh against a finding of substantial issue. Therefore, the Commission finds that the appeal contentions do not raise a substantial LCP or Coastal Act public access conformance issue and thus the Commission declines to take jurisdiction over the CDP application for this project.

### 3. APPENDICES

#### **A. Substantive File Documents<sup>6</sup>**

- City of Morro Bay CDP 21-036
- LCP Amendment LCP-3-MRB-19-0140-1
- CDP Amendment A-4-MRB-92-044-A2

#### **B. Staff Contacts with Agencies and Groups**

- Appellant
- City of Morro Bay

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<sup>6</sup> These documents are available for review from the Commission's Central Coast District office.