CALIFORNIA COASTAL COMMISSION
CENTRAL COAST DISTRICT
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV

F15a/F15b

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To: Commissioners and Interested Persons

From: Kevin Kahn, Central Coast District Manager
Esme Wahl, Coastal Planner

Subject: STAFF REPORT ADDENDUM for F15a and F15b (Bookout and Hadian SFDs)

The purpose of this addendum is to respond to the materials submitted by the attorney representing both Applicants (dated March 4, 2022, encompassing nearly 1,400 pages, and located in the correspondence package for this item), and by the Cambria Community Services District (CCSD) (received February 25, 2022 and located in the correspondence package for this item) after the staff report was distributed on February 18, 2022. Specifically, the Applicants' attorney makes a series of claims as to why the Commission should approve the two proposed projects, including that the Applicants have vested rights to develop their proposed residences and that they have an existing commitment with CCSD which exempts them from meeting required LCP standards (specifically, standards that require proof of an adequate water supply and no adverse effects to coastal watersheds, creeks, and riparian areas). The letter also states, among other things, that the projects are consistent with applicable native Monterey pine forest ESHA provisions. And in CCSD's letter they claim that they are not in violation of the conditions in their CDP that require ensuring that CCSD withdrawals from San Simeon and Santa Rosa Creeks do not result in adverse effects to their associated biological habitats.

Almost all of the assertions made in these two pieces of correspondence have already been addressed in the staff report; this addendum is to respond to certain points/assertions made by pointing out certain factual inaccuracies, and to point interested parties to specific sections of the report where these issues are more thoroughly addressed. Staff incorporates these responses into each of the staff recommendations (i.e., one for each project), so that adoption of the staff recommendations will include adoption of these responses as Commission findings in each case. The addendum does not change staff's recommendation in any way, which is still to deny the CDPs for both proposed projects.

1. LCP requirements

The Applicants' attorney makes a series of assertions regarding how the subject properties are exempted from making certain LCP findings regarding adequacy of water

supply. Specifically, the letter claims that the project is one of those described in LCP North Coast Area Plan (NCAP) Planning Area Standard B.4(A) as a type of pre-2001 project that is essentially grandfathered in and need not make any of the findings required by the LCP regarding proof of an adequate water supply and protection of San Simeon and Santa Rosa Creeks. As explained in detail beginning on page 8 in both reports, the Applicants are inaccurate in this assertion for two reasons. First, NCAP Planning Area Standard B.4(A) does not apply to these projects at all since the policy only applies to development within the Cambria Urban Reserve Line (URL) and these projects are located outside of the URL. Thus, the policy is an inapplicable standard of review and has no bearing on these projects for this reason alone. This is dispositive and is noted in the report on pages 2 and 22. The Applicants' attorney has not addressed this conclusive reason why the arguments related to NCAP Planning Area Standard B.4(A) are inapplicable.

And second, the Applicants misconstrue the nature of what this planning area standard means and provides for. It does not, as the Applicants assert, act as an LCP 'override' for certain projects from having to be consistent with the LCP and requiring them to be automatically approved regardless of Cambria's water supply situation. Rather, as explained on page 9 of both reports:

> *The Commission, in approving the LCP amendment in 2007, did not add any sort of override, including as to do so would be inconsistent with numerous Coastal Act policies and coastal resource protection principals. There is no language in these policies that explicitly point to any sort of override and such a drastic departure from consistency from Coastal Act resource protection policies cannot be found by implication. In fact, as succinctly stated by the Commission in its 2007 findings above, there was (and is) no water available for new development in Cambria.*

In short, although the Applicants' letter goes into some detail on these issues, the letter is both factually inaccurate on how the policy is to be applied, and even if the Applicants' interpretation were accurate, that policy plainly does not apply to development outside of the urban reserve line and both of these projects are outside of the urban reserve line.

2. CCSD commitments

The Applicants' letter asserts that "the Bookout and Hadian properties are and have been existing customers of the CCSD for over twenty years [and as] such, they are entitled to the same rights and allocations of other existing CCSD customers on the identical terms and conditions afforded all CCSD customers. The Applicants are legally entitled to share in the available CCSD water supply and cannot be subject to a de facto moratorium." In essence, the letter suggests that infrastructure has already been built with active flowing water to these properties. However, as explained on page 11 of both reports, the Commission is not aware of any CDPs that authorized the construction of water meters or their use at these properties. There is no mention of explicit authorization for the construction and operation/use of water meters in the conditions of approval of the 1997 subdivision that created the two parcels (whereas there is explicit

mention of electric, telephone, cable TV, and gas line installation).[1] Again, if the Applicants have been using water for irrigation and erosion purposes, then they have been doing so without the benefit of a CDP. This is being tracked as Violation Case Number V-3-21-0107. Please see report pages 11 and 33 for more information on this issue.

Further, CCSD's existing commitment list is part of their own protocols and bookkeeping for what types of projects are prioritized for new water service. It is not part of the LCP and thus not part of the legal standard of review for this CDP determination. Whether or not CCSD claimed they could serve these properties in 2001 has no bearing on the CDP determinations currently before the Commission. Similarly, the Applicants claim that the Commission here is trying to insert itself as some type of 'water master', directing who can use what water when and where, and impinging on the rights and responsibilities of CCSD in that regard. This is inaccurate, and shows a fundamental misunderstanding of the Commission's role under the Coastal Act and the LCP, and CCSD's role as a water purveyor. Under the applicable LCP water supply provisions, the Commission here (and the County preceding the Commission) is required to independently assess whether a proposed development, such as the two residential projects here, can be served by an adequate and sustainable water supply, including in relation to the manner in which that supply might lead to other sorts of resource harm (e.g., to the creeks). The Commission does not somehow become some sort of 'water master' in exercising that authority, rather it acts as an arbiter of what is and is not LCP consistent. To that point, although CCSD input is considered in such an exercise,[2] CCSD does not make the LCP determination, the Commission does based on its evaluation of the evidence. In that exercise, CCSD commitments do not simply supersede the LCP somehow (and CCSD is apparently adding commitments to serve all the time despite water supply issues – see report page 16).[3]

Relatedly, the Applicants' attorney again refers to a settlement between the developer and CCSD and characterizes it as somehow a "binding agreement" that requires the Commission to provide CDP authorization despite fatal LCP inconsistencies. It is an uncontroversial legal rule that settlements do not bind third parties, such as the Commission here. Whether CCSD or the developer were obligated to do something as a result of the settlement does not somehow entitle either party to a CDP that is otherwise inconsistent with the standard of review. Contrary to the Applicants' attorney's

[1] And, as explained on report page 11, the Commission has not to date even found a valid County CDP approval that ran a required Commission appeal period for the 18 lots' creation in the first place.

[2] Such as the CCSD will serves in these cases, that do not stand for evidence of LCP consistency (see report page 26).

[3] And to the Applicants' assertions that the Commission is somehow illegally imposing a water use moratorium were it to deny these two projects, two things are noted. First, there is an existing CCSD water use moratorium that dates to 2001 based on the water supply issues that existed then, and that still exist. That moratorium was and is an acknowledgment of the severity of the water supply issues in Cambria. And second, the Commission is not imposing any sort of water supply legal instrument, like a 'moratorium', rather it is evaluating LCP consistency, and is rightfully finding here that these projects cannot meet LCP water supply tests. That the facts suggest that there is not an adequate water supply available to serve even existing development in Cambria, let alone new water using development such as that proposed here, is simply the outcome associated with applying the LCP to proposed development.

assertions, a settlement agreement to which the Commission was not a party is not relevant to the question of whether a CDP should be granted.

3. Vested rights and takings

Similar to the discussion above, the Applicants also assert that they have vested rights to water, including based on a 1969 agreement between a previous property owner and CCSD that provided (upon the filing of a final subdivision map and upon payment by the previous owner to the CCSD) that CCSD would issue a Notice of Intention to Serve for the subdivision. However, this raises several issues. First, as explained on page 12 of the reports, the establishment of vested rights is a separate process that relates to a determination whereby pre-Coastal Act development may be recognized as being legally permitted before the Coastal Act, wherein it need not receive a CDP. It is an action separate from a CDP determination (i.e., the Commission does not adjudicate vested rights claims as part of CDP applications), and no vested rights application has been submitted in this case despite this explanation being provided to the Applicants via the substantial issue report on these appeals.

Second, an agreement that a water provider may provide water to serve future lots (including lots such as the two at issue here that didn't even exist until the 1990s and still do not have CDPs for actual residences on them) is not clearly determinative or persuasive as to whether there is a vested right. In addition, per the Applicants' submitted materials, the 1969 agreement was superseded by a subsequent agreement between the same parties in 1985 (after Coastal Act enactment), which provided more details regarding water service and the explicit requirement that "All construction on the proposed water system will be completed as soon as practical after the approval a development permit to be obtained by Leimert from the California Coastal Commission or the County of San Luis Obispo and the recording of Tract 543." Thus, it appears that the 1969 agreement was terminated, and the new agreement explicitly required CDP authorization for the construction of water infrastructure. Or at the very least, this raises questions as to the continued validity or relevance of the 1969 agreement. As explained previously, the Commission is not aware of any CDPs authorizing water meters or their use at the two properties. In sum, there is no clear valid vested rights claim to water supply in this case, and if the Applicants wish to pursue establishment of their vested rights, they must do so separately pursuant to California Code of Regulations Section 13201.

The Applicants also assert that denial of these projects will result in a taking by rendering these properties unusable. However, the Commission's denial of the proposed project would not result in a regulatory taking because any such claim is premature and denial of the project is due, in part, to the factual circumstance of lack of adequate water, rather than a regulatory prohibition. This is explained in detail beginning on Page 37 of the report, and an excerpt is added below:

> *Here, the cited LCP water supply and related creek protection provisions have the effect of a temporary prohibition on economic use, and as soon as the water supply is adequate and adequately protective of creek resources the prohibition would be deemed lifted. Moreover, Public Works Policy 1, CZLUO Section 23.04.430, and Coastal Watersheds Policies 1 and 2 are essential components*

of a comprehensive LCP planning tool that ensures that growth in Cambria is efficient and sustainable, not exceeding the community's resource carrying capacity. It also ensures the protection of significant resources, such as sensitive riparian habitat, and is intended to protect groundwater aquifers from adverse impacts such as seawater intrusion and subsidence. Thus, Public Works Policy 1, CZLUO Section 23.04.430, and Coastal Watersheds Policies 1 and 2, as "interim development controls", ensure successful development which does not run afoul of takings concerns, as recognized by Tahoe-Sierra. …

This position is also consistent with the reasoning by California Court of Appeal for the Fourth District in Charles A. Pratt Construction Co., Inc., v. California Coastal Commission, (2008) 162 Cal. App. 4th 1068 ("Pratt"). In Pratt, the plaintiff argued that the Coastal Commission's decision to deny a CDP based on lack of water, due to the requirements of the San Luis Obispo County LCP in that case as well, was an unconstitutional taking. The Court of Appeal upheld the Commission's denial of the CDP and found that it was not an unconstitutional taking. It stated that the plaintiff-applicant failed to cite any authority that: (1) denial of a development permit because of water supply constitutes a taking; or (2) the setting of priorities for water use in the face of an insufficient supply constitutes a taking. The court stated, "Even where the lack of water deprives a parcel owner of all economically beneficial use, it is the lack of water, not a regulation, that causes the harm" (Id). The court also found that an "intent-to-serve letter" from a community water supplier did not change the result because there is no rule that the water company's determination is definitive (Id). … As in Pratt, here it is the factual circumstance of lack of water in Cambria, not the regulation, that has delayed the Applicant's ability to develop the site.

4. 1990s-era staff correspondence

The Applicants reference letters from the early 1990s from former Commission staff in a way that is disingenuous and paints a picture that staff gave the "green light" for allowing the subdivision that purportedly created these parcels in the late 1990s. While staff was involved when the proposed subdivision was pending locally, such involvement was limited, and focused on determining whether an LCP amendment to change the Urban Services Line (USL) boundary would be required in order for CCSD to be able to potentially serve the new subdivision (because the LCP prohibits water line extensions outside the USL), and providing comments on the draft EIR regarding the need to protect native Monterey pine forest. The Applicant has warped previous staff's correspondence and created a story that Commission staff gave the green light on all development here, from the subdivision to subsequent houses on the subdivided lots.[4]

[4] On this point the Applicants also suggest that staff and the Commission agreed that such development was appropriate because the lack of appeals of County CDP actions reflected some sort of Commission acknowledgement and recognition that both the 1990s-era subdivision as well as subsequent residential development was LCP consistent, including in terms of water supply. This is inaccurate. For one, the lack of an appeal is not Commission acknowledgement that development is LCP consistent. On the contrary, there may be any number of reasons that an appeal is not filed, even when the Commission disagrees that a County-approved project was LCP consistent. The only acknowledgment of LCP consistency by the Commission is in taking actions, not in <u>not</u> taking actions on <u>non</u>-appeals. And the <u>only</u> County CDP (prior to these two applications) that was appealed to the Commission for residential development in this

The Applicant boldly states that, "in reliance on the determination made by Mr. Loomis, the County continued to process the subdivision application." Again, to clarify, the determination the Applicant is referring to by the Commission's previous Central Coast District Manager, Mr. Loomis, was a determination that an LCP amendment was not required to expand the USL to include Tract 1804 in order for CCSD to be able to serve the tract. That determination is completely unrelated to the question in front of the Commission now -- whether the proposed development on these individual parcels is approvable consistent with the LCP given water constraints and ESHA concerns.

5. Native Monterey pine forest ESHA

The Applicants' attorney's letter asserts that that project is consistent with the LCP's ESHA policies because "the impact to the Monterey Pine Forest would be mitigated through the Monterey Pine Forest Mitigation Program ('Mitigation Program')." The Monterey Pine Forest Mitigation Program is apparently part of the certified EIR for the County's 1997 approval of the subdivision that created these lots. The Program includes mitigation measures including replacing all removed Monterey pine trees with diameters of two inches or smaller and relocating the saplings, replacing all removed pine trees with diameters of six inches or greater with in-kind specimens at a four to one (4:1) ratio, and monitoring the health and maintenance of the relocated and newly planted trees annually for a minimum of three years. However, as explained in detail on page 27 of the reports, the certified LCP is the standard of review for these projects and not the Mitigation Program or the EIR. The LCP designates the site as ESHA and does not allow non-resource dependent residential development in ESHA. In other words, while the Mitigation Program helps implement certain CEQA provisions regarding minimizing and mitigating certain forest habitat impacts, the LCP does not allow such impacts for this type of development in the first place since the proposed residences are not allowed uses in this type of sensitive habitat.[5] No amount of mitigation as specified in the Program can overcome this LCP requirement. As such, for this reason alone and

subdivision was in 2019, when the Commission first found substantial issue, and then denied the CDP, for similar water supply and ESHA reasons as are applicable here. So the only Commission determination regarding the consistency of residential development in this subdivision on the relevant issues was that such development was not CP consistent. This is diametrically opposite of what the Applicant suggests. And further, as respects the 1990-era subdivision itself, and as described in the reports (see page 11), the Commission has not located evidence that the County subdivision CDP from the 1990s was ever reported to the Commission, nor that it ever ran a Commission appeal period without appeal (both of which are required for it to be effective). Absent an appeal period running, an appeal cannot be filed.

[5] In making these claims the Applicants attempt to substitute a CEQA pine forest impact analysis for an LCP pine forest ESHA analysis. CEQA allows for certain impacts when they are mitigated to insignificant levels. The LCP does not allow for non-resource dependent use in ESHA (and these proposed residential uses are not resource dependent) and as a result no amount of ESHA impact, no matter how small, is allowed. Even when resource-dependent uses are allowed in ESHA, the LCP standard is not keyed to mitigation, it is keyed to avoiding significant ESHA disruption. Here, the two projects would lead to 0.6 and 0.8 acres of native Monterey pine forest ESHA loss respectively (or 1.4 acres, or 61,000 square feet), and the loss of 70 and 50 native pine trees (or 120 total). Even were the residential uses to be allowed in native Monterey pine forest ESHA, which they are not, the proposed level of ESHA disruption is significant, and thus also prohibited by the LCP for this reason as well.

even independent of any water supply-related inconsistencies, the projects must be denied.

6. LCP Application

The Applicants' attorney's letter makes a series of claims that the Commission is being arbitrary in its application of the LCP as it relates to new development in Cambria, including allowing certain projects it "likes" while denying other ones that it doesn't. The letter points to the Commission's 2020 approval of a 33-unit 100% affordable housing project in Cambria (CDP A-3-SLO-19-0033, Peoples' Self-Help Housing) as evidence, stating that "the Commission's blanket statement of 'no available water supply' is flexible for certain political and social reasons.'" The Commission strongly disagrees with these contentions. The Commission analyzes each project for LCP consistency in a fact-specific manner depending on the particulars of the case. It is simply untrue that the Commission is arbitrarily applying certain policies for some projects. And, in fact, the Commission has been consistent in terms of its project decisions and findings over the years. Both staff reports describe in detail the Commission's history with Cambria's water supply (beginning on page 4 of both reports), including that the Commission has not approved a single-family residence in Cambria since 2002 some two decades ago all based on an LCP analysis rooted in on-the-ground facts. In fact, the only Commission CDP approval for residential use in the last 20 years in Cambria was the Peoples' Self-Help Housing project. In its approval, the Commission indeed found that that project raised some of the same water supply concerns as other types of new development in Cambria but was nevertheless able to approve it based on a factual analysis of the LCP's specific policies that seek to provide for affordable housing. The Commission found:

> *These policies, in isolation, direct that all new water connections within Cambria must be denied until a new sustainable water source is secured. That being said, the LCP also includes policies encouraging affordable housing that support providing some level of affordable housing even in light of the community's water supply problems if a program is developed to identify the appropriate amount of affordable housing that could be served. Although no such program has been developed, the LCP clearly recognizes the pressing need for affordable housing and clearly differentiates such affordable housing projects from other types of development, including as it relates to water supply.*

In addition, the Commission found that that project included a series of measures unrelated to CCSD's retrofit program (a program that has its own issues, as described in the reports on page 17), that further differentiated that project in the Commission's view (e.g., directly retrofitting existing residential buildings the Applicant owned, monitoring actual water use to ensure that at least a 125% offset is maintained at all times, etc.). In short, a 100% affordable housing project and a market-rate single-family residence are clearly different types of projects, and the LCP recognizes this fact by regulating them in a different framework. What the Applicants' attorney's letter suggests is an arbitrary application of the LCP is quite the opposite; the Commission has been consistent in its findings and conclusions on development in Cambria, and this consistency is rooted in an LCP analysis based on the type of proposed project.

And lastly, the letter makes the accusation that the Commission is somehow penalizing applicants by denying their projects not for any LCP inconsistency but rather out of displeasure with the CCSD, and that a Commission staff member told them of this. This is a rather serious accusation, with no evidence, and it has absolutely no merit. As explained above, the Commission's review, analysis, and decision making is one based solely on LCP consistency and nothing more. To suggest anything otherwise is misplaced and simply untrue.

7. CCSD Violations

In their letter, CCSD states that "Commission staff continues to assert, without supporting evidence, that CCSD withdrawals are negatively impacting creek environs" and that "CCSD has taken stewardship of the watershed very seriously". With all due respect to CCSD, the Commission disagrees with these statements and stands by the analysis provided in the report on these issues. As explained on pages 6 and 29 of the reports, the Commission's 1977 CDP 132-18 allows CCSD to extract water from San Simeon Creek on the express condition that these extractions do not adversely impact biological resources, and only allows extractions from Santa Rosa Creek wells if necessary to supplement CCSD's water supply in an emergency if/when water cannot be safely removed from San Simeon Creek (according to CCSD's records, water withdrawals from Santa Rosa Creek have occurred every year except one since 1988, when the records originally start). Specifically, the CDP includes the following requirements:

> *1. The permittee [CCSD] shall maintain water levels in the lower basin to sustain stream flow to the lagoon at the mouth of San Simeon Creek to maintain fish and riparian wildlife habitat.*
>
> *2. The permittee [CCSD] shall provide and operate as necessary, irrigation facilities to maintain riparian vegetation within district owned property.*

The most recent best available science[6] suggests the CCSD's extractions are significantly adversely affecting creek habitat,[7] which means that CCSD is not meeting the terms of the first requirement above. Put another way, their CDP-allowed water extractions aren't allowed when it leads to the types of creek impacts that are occurring, and continued extractions in such circumstance is a violation of the CDP. Further, the Commission is not aware of any offsetting irrigation measures being applied as directed above either, representing a similar CDP violation. And, again, this is all extensively described on page 29 of the reports.

And, to be clear, CCSD appears to acknowledge the state of these water supply issues otherwise, including declaring a Stage 4 Water Shortage Emergency, the most

[6] See "Santa Rosa Creek Watershed Management Plan" (CDFW, 2012); "South-Central California Steelhead Recovery Plan" (NMFS, 2013); "San Luis Obispo County Regional Instream Flow Assessment (SLO Instream Flow Study)" (Coastal San Luis Resource Conservation District, 2014); and "Santa Rosa Creek Steelhead Habitat and Population Survey" (California Conservation Corps, 2005).

[7] And to the Applicants' letter's assertions that no evidence has been provided documenting such resource damages due to water extractions, the Applicant is similarly directed to report pages 29-31.

restrictive in San Luis Obispo County to date, this past July. In its Stage 4 declaration, the CCSD:

> *…finds that the demands and requirements of water consumers cannot be satisfied without depleting the water supply of the CCSD to the extent that there would be insufficient water for human consumption, sanitation and fire protection.*

In other words, the existing supply to serve even existing development appears to be insufficient for other core community needs, reflecting on the nature of the supply. And that is even with extractions that lead to the types of creek impacts not allowed by the CDP. Similarly, the County Board of Supervisors declared water supply in Cambria to be at an Alert Level III under the LCP's resource management system over a decade ago, which means that the Board declared that demand exceeds available capacity, and the issue is only further exacerbated today. In other words, and as the Commission simply and succinctly stated in strengthening the LCP in 2007:

> *…new development in Cambria cannot be accommodated consistent with the Coastal Act absent a new water supply and a comprehensive analysis of the coastal resource protection requirements of San Simeon and Santa Rosa creeks, the underlying groundwater, and other coastal resources. ... In short,* ***adequate public water supplies are not currently available for new development in Cambria*** *(emphasis added)*

Given that available evidence suggests that the impacts from CCSD water extractions on the creeks' well-being have only become even more severe since 2007 (see above discussion), such a statement is even more true today.