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# Th12b

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 Action Deadline: 8/14/2023  
 Staff: Devon Jackson-SC  
 Staff Report: 7/21/2023  
 Hearing Date: 8/10/2023

## STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

**Appeal Number:** A-3-SLO-23-0020

**Applicant:** Roger Dick

**Appellant:** Los Osos Sustainability Group

**Local Government:** San Luis Obispo County

**Local Decision:** County coastal development permit number C-DRC2021-00145 approved by the San Luis Obispo County Board of Supervisors on May 16, 2023.

**Project Location:** 1153 11<sup>th</sup> Street in the northern portion of the unincorporated Los Osos community of San Luis Obispo County.

**Project Description:** Construction of a new single-story, 1,910 square-foot single-family residence with an attached 573 square-foot two-car garage on a mostly vacant lot.

**Staff Recommendation:** Substantial Issue Exists

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### IMPORTANT HEARING PROCEDURE NOTE

Please note that at the hearing for this item the Commission will not take testimony on staff's substantial issue recommendation unless at least three Commissioners request it. Commissioners may ask questions of the Applicant, aggrieved persons (i.e., generally persons who participated in some way in the local permitting process), the Attorney General, the Executive Director, and their proxies/representatives prior to determining whether or not to take such testimony. If the Commission does decide to take such testimony, then it is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits). 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

San Luis Obispo County approved a CDP that authorized the construction of a new roughly 2,500 square-foot single-story single-family residence with a garage on a vacant and almost 6,000 square-foot lot in a residential neighborhood in the northern portion of the unincorporated community of Los Osos in San Luis Obispo County. The appeal contends that the County-approved project is inconsistent with San Luis Obispo County Local Coastal Program (LCP) water supply and wastewater provisions, including those that require denial of new development where adequate water supply and wastewater services are not available.

With respect to water supply and wastewater services, the LCP requires that new development be served by adequate and sustainable water and wastewater services and requires denial of any such development should such key infrastructure to support development not be available. Los Osos is a community that has historically suffered from both an inadequate water source (including in terms of water supply from an over-drafted groundwater basin, and impacted water quality due to nitrate contamination) and an inadequate wastewater collection and treatment system (including leaking individual septic systems). The Commission recognized these constraints when it approved the CDP for the County's Los Osos Wastewater Project (LOWWP) in 2010, which authorized development of a new community wastewater treatment facility and supporting infrastructure to replace the community's reliance exclusively on septic systems that were to blame for many of these problems. However, due to potential growth inducement impacts of a new LOWWP (including impacts to community water supply when sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified), and the need to better proactively and comprehensively plan for potential growth, including to address and mitigate environmentally sensitive habitat area (ESHA) impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan), the Commission imposed a special condition (Special Condition 6) that prohibits LOWWP wastewater service to serve new development on vacant lots and significant intensifications of existing development unless and until the LCP is amended to identify appropriate and sustainable buildout limits, including identifying the amount of development that can be served by the groundwater basin without coastal resource harm. Although County and Commission staffs are continuing to collaborate on a Los Osos Community Plan to address these core growth/development issues through the LCP, at this time the LCP has not yet been amended to establish sustainable buildout limits (explicitly as it relates to water supply, wastewater services, and ESHA) for new growth in Los Osos. Thus, Special Condition 6's prohibition on providing wastewater services to serve new

development on vacant lots and significant intensifications of use/development, as is the case in this appealed project, is still in effect.

Here, although prohibited by Special Condition 6 at face value from providing wastewater services to support this project, the County argues that the now vacant property used to support a residence at one time, but it was demolished in May 2010<sup>1</sup>, and still has underground water infrastructure extending from the street and thus should not be understood as 'vacant' as it relates to Special Condition 6. However, while some of that history may well be so, it is clear that the remaining onsite water infrastructure alone does not make the site a developed site for the purposes of Special Condition 6, and even if it did, the site currently has zero intensity of water use and the County approval adds a new unit, which the Commission has historically considered to be an intensification of water use/development in multiple Los Osos appeals. In such a circumstance and given that the required LCP amendment to establish the types of LCP-allowed growth and development in the community remains incomplete, the County is actually prohibited from providing wastewater services to this site by the 2010 Commission CDP. Given the site is also located within the Regional Water Quality Control Board's septic system prohibition area, the project cannot satisfy its wastewater needs via some type of onsite system either. As a result, the County-approved project raises a substantial issue on this point.

And with respect to water supply, the County concluded that the project would be served from an adequate and sustainable water source because (1) the applicable water service provider (Los Osos Community Services District) indicated that it was ready and willing to serve the site/project (i.e., via a 'will serve' letter), and (2) the County concluded that the groundwater basin is no longer in overdraft, and that it now includes adequate water to support new growth, such as the appealed project, while not threatening resources associated with the groundwater basin or its sustainability to serve the community now and over time. In terms of the will serve letter, it is ostensibly based on the same kinds of water supply conclusions drawn by the County about the basin, but a will serve letter by itself is not sufficient to satisfy LCP water supply requirements, rather the degree of groundwater adequacy/sustainability must be demonstrated, and that evidence brought to bear on the applicable LCP questions. To that end, the County determined that the Los Osos groundwater basin is no longer in overdraft because its estimated sustainable yield is greater than the amount of water it actually yielded (at least as of 2022 data),<sup>2</sup> and thus there is adequate additional water supply to serve this project. However, there is still not community consensus on that

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<sup>1</sup> Per County Demolition Permit PMT2009-01815, and before the Commission's CDP approval for the LOWWP in June 2010.

<sup>2</sup> The Los Osos groundwater basin has been adjudicated and is overseen by the Los Osos Basin Management Committee (BMC) through the Los Osos Basin Management Plan (BMP). The BMC is made up of four members (Los Osos Community Services District, Golden State Water Company, S&T Mutual Water Company, and County of San Luis Obispo) who have developed the BMP as a means of addressing the community's water supply needs in an environmentally sustainable manner. The current BMC/BMP estimates that the 2022 safe yield for the basin is 2,380 acre-feet. The latest (2021) groundwater production estimate (2,000 AF) is 84 percent of the latest sustainable yield estimate (2,380 AF). The County concluded that because groundwater production from the basin is less than the basin's sustainable yield, the Los Osos Groundwater Basin is not in overdraft.

conclusion, and some continue to argue, including the Appellant, that the basin is still over drafted and essentially over tapped for even existing development, let alone accommodating new growth and development, and that current withdrawals are leading to adverse coastal resource harm as a result. Given that the data on which these determinations rest – both the County's and the Appellant's – is a work in progress, and heavily dependent on one's perspective on complex groundwater modelling analysis, it is difficult to conclude on water supply with certainty at this time. And really, ultimately, resolution of this issue in an LCP sense awaits the required LCP amendment that is planned to identify the parameters for allowable new growth and development in Los Osos, where that LCP amendment is the vehicle to draw such conclusions. And while the amendment is the subject of ongoing collaboration between Commission and County staffs, and the Los Osos Basin Management Committee (BMC), it has not yet been completed, let alone presented to the Commission, vetted, and ultimately certified as part the LCP through a public hearing. In other words, the updated LCP policy framework for understanding projects such as that appealed here in terms of community groundwater supply has not yet been completed, and questions remain as to whether this project can be served by an adequate and sustainable water supply, as is required for it to be approved consistent with the LCP. As a result, the County-approved project raises a substantial issue on this point as well.

Finally, staff notes three things. First, the Applicant and the County present interesting arguments as it relates to the history of this site supporting residential use in the past. It is not clear to staff at the current time that such arguments could be distinguishing to the level of avoiding a substantial issue on the merits, but they certainly warrant some additional analysis and review. Second, staff firmly believes that the CDP-required LCP growth/buildout plan for the community needs to be certified to provide greater certainty for potential development review, such as this appealed project, and to clear the limitations set by Special Condition 6. As indicated, staff is actively working with County staff as well as water purveyors and the BMC to understand drivers for groundwater basin health and the amount of water that can be extracted to serve new development in a manner without coastal resource harm, and expects that effort to conclude soon, likely before the end of the year. And thus third, staff recommended that the Applicant waive the requirement that the Commission hear this item within 49 working days to allow for additional analysis on the first point, and ultimately for progress to be made on the second, both of which are likely to materially affect project consideration, but the Applicant refused, instead demanding this substantial issue hearing. And based on staff's current analysis, as summarized above, there is a substantial issue at this time.

Staff therefore recommends that the Commission find that the appeal raises substantial LCP conformance issues and that the Commission take jurisdiction over the CDP application for the proposed project. If the Commission does so, then the de novo hearing on the merits of the CDP application would be scheduled for a future Commission meeting. The motion and resolution to affect this recommendation are found on page 6.

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**EXHIBITS**

- Exhibit 1 – Location Maps
- Exhibit 2 – County’s Final Local CDP Action Notice and County-Approved Project Plans
- Exhibit 3 – Appeal of County’s CDP Decision
- Exhibit 4 – Commission Staff Letters Regarding Special Condition 6 and New Development in Los Osos

## 1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of substantial issue would bring the CDP application for the proposed project under the jurisdiction of the Commission for de novo hearing and action. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in the future de novo review on the CDP application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of no substantial issue and the local action will become final and effective. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:*** *I move that the Commission determine that Appeal No. A-3-SLO-23-0020 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

***Resolution to Find Substantial Issue:*** *The Commission hereby finds that Appeal Number A-3-SLO-23-0020 presents 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 provisions of the Coastal Act.*

## 2. FINDINGS AND DECLARATIONS

### **A. Project Location and Description**

The County-approved project is located at 1153 11<sup>th</sup> Street in the northern portion of Los Osos in a residential neighborhood located less than one block inland from the Morro Bay Estuary and State Parks' and the County's El Moro Elfin Forest preserve. Los Osos is an unincorporated coastal community of about 15,000 residents that is located in central San Luis Obispo County at the southern end of Morro Bay and roughly due west of the City of San Luis Obispo. The Los Osos community is located directly adjacent to Morro Bay, which is a designated State and National Estuary that is well known as one of the most important biologic and wetland resources in California's coastal zone. Los Osos is mostly located atop an ancient dune system formed by centuries of wind-blown sand coming from the southern end of Morro Bay. As a result, the terrain consists primarily of gently rolling hills and sandy soils. The sandy soils of Los Osos, its connection to Morro Bay, and its generally mild marine climate have combined to produce a unique coastal ecosystem that is home to a wide variety of uniquely adapted plant and animal species, some of which are found nowhere else in the world.

The project site is currently vacant and undeveloped, other than an underground water connection from the street from a past home that was demolished in 2010. The County's approval authorizes the construction of a 1,910 square-foot single-story residence with an attached 573 square-foot garage (or a nearly 2,500 square-foot home altogether) along with related improvements on the 5,750 square-foot parcel, including a connection to the County's in-street wastewater lines, and wastewater service from the County's recently completed Los Osos Wastewater Project.

See **Exhibit 1** for a location map and **Exhibit 2** for the County-approved project plans.

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

On January 20, 2023, the San Luis Obispo Planning Department Hearing Officer approved a CDP for the above-described project on and that CDP approval was appealed locally by the Los Osos Sustainability Group. Subsequently, on May 16, 2023 the County Board of Supervisors denied the appeal and upheld the CDP approval. The County's notice of its final CDP action was received in the Coastal Commission's Central Coast District Office on June 5, 2023 (see **Exhibit 2**). The Coastal Commission's ten-working-day appeal period for this action began on June 6, 2023 and concluded at 5pm on June 19, 2023. One valid appeal was received during the appeal period (see **Exhibit 3**).

### **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 County CDP decision is appealable to the Commission because the project site is located between the first public road and the sea because the approved use is the not the principally permitted use for the site.

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. Here, the Applicant has not waived the 49 working day requirement, and thus the Commission has a deadline of August 14, 2023.

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 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, 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 County's CDP approval is inconsistent with LCP water supply and wastewater provisions, including those that require denial of projects where

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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 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.



adequate water supply and wastewater services are not available, asserting that such is the case at this time in Los Osos. Please see **Exhibit 3** for the appeal contentions.

## **E. Substantial Issue Determination – Public Services**

### ***Applicable LCP Provisions***

The LCP's Land Use Plan (LUP) is comprised of three components: the Framework for Planning document, which serves as a type of "roadmap" describing the County's coastal zone and how the rest of the LCP functionally works to regulate development; the Coastal Plan Policies document, which identifies the overarching coastal resource protection policies governing development throughout the coastal zone; and four area plans that identify additional policies specific to each of the LCP's four geographic areas (i.e., North Coast, Estero, San Luis Bay, and South County Area Plans). Los Osos is entirely subject to the LUP's Estero Area Plan (EAP).

The LCP's Implementation Plan (IP) consists of the Coastal Zone Land Use Ordinance (or CZLUO, Title 23 of the County Code). Per the LCP, LUP provisions generally prevail over IP provisions in cases of internal inconsistency or conflict, with some exceptions. Specifically, the LUP's Framework for Planning document states that if a policy listed in the LUP's Coastal Plan Policies document is implemented by an IP ordinance, the ordinance prevails in case of any conflict, and if a policy listed in an LUP area plan conflicts with a policy in the LUP Coastal Plan Policies document or an IP ordinance, the area plan policy prevails in both cases. Thus, for this site, any internal questions are to be resolved in favor of the Estero Area Plan. In addition, the LCP is also required to be read and interpreted consistent with the Coastal Act from which it derives its statutory authority.<sup>4</sup>

LUP Coastal Plan Public Works Policy 1 requires that development be served by adequate services, including as it relates to water and wastewater, and Public Works Policy 6 requires the County to use the LCP's Resource Management System<sup>5</sup> to help

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<sup>4</sup> See *McAllister v. California Coastal Commission* (2009, 169 Cal. App. 4th 912, 929), wherein the Sixth District Court of Appeal overturned a project approval by the Commission in the early 2000s interpreting an LCP ESHA policy to allow non-resource-dependent use (in that case residential use) and development in ESHA. The Court found that such an interpretation was improper, and that the LCP must be understood in relation to the requirements of Coastal Act Section 30240, from which LCP ESHA policies derive their authority, even if the LCP policies were drafted in a manner that provide an argument to allow a non-resource-dependent use in ESHA. In other words, the Court determined that an LCP cannot be read to allow non-resource-dependent development or use in ESHA, but rather that it must be understood first in terms of Section 30240 requirements, and more broadly that an LCP derives its statutory authority from the Coastal Act, and it must be understood in ways that are Coastal Act consistent, and not in ways that are not consistent with the Act. As a published appellate court decision, that decision requires the Commission to interpret LCPs, including the San Luis Obispo County LCP here, in that way.

<sup>5</sup> The LCP's RMS is a component of the LCP's LUP that provides one of the LCP's tools for identifying and addressing identified resource constraints and capacities (e.g., water supply and wastewater treatment capacities). The main purpose of the RMS is to provide the County and the general public with a systematic means of assessing resource constraints and capacities on a regular basis, including annual reassessments that allow the County to regularly update such assessments in relation to the best available information, and to identify measures to address such issues. The RMS currently categorizes each such resource evaluated in terms of supply and demand, and ultimately assigns a "Level of Severity" (LOS) designation to it ranging from none up through LOS levels I, II, and III, where each

identify when such services are available, and to prioritize when there is a scarcity of any such services. And IP Section 23.04.430 requires denial of CDP applications unless there is adequate water supply and wastewater services for the project. These provisions state:

**Public Works Policy 1: Availability of Service Capacity.** *New development (including divisions of land) shall demonstrate that adequate public or private service capacities are available to serve the proposed development. Priority shall be given to infilling within existing subdivided areas. Prior to permitting all new development, a finding shall be made that there are sufficient services to serve the proposed development given the already outstanding commitment to existing lots within the urban service line for which services will be needed consistent with the Resource Management System where applicable.*

**Public Works Policy 6: Resource Management System.** *The county will implement the Resource Management System to consider where the necessary resources exist or can be readily developed to support new land uses. Permitted public service expansions shall ensure the protection of coastal natural resources including the biological productivity of coastal waters. In the interim, where they are identified public service limitations, uses having priority under the Coastal Act shall not be precluded by the provision of those limited services to non-priority uses.*

**CZLUO 23.04.430 - Availability of Water Supply and Sewage Disposal Services.** *A land use permit for new development that requires water or disposal of sewage shall not be approved unless the applicable approval body determines that there is adequate water and sewage disposal capacity available to serve the proposed development, as provided by this section.*

In addition to these provisions, the LCP's Coastal Plan and the Estero Area Plan include additional provisions that speak to protecting the Los Osos Valley Groundwater Basin, as well as protecting against adverse impacts to wetlands, streams, riparian areas, marine habitats, and water supply and quality that are affected by the Basin, and that generally limit development to ensure protection of coastal resources. These provisions state:

**Coastal Watersheds Policy 1: Preservation of Groundwater Basins.** *The long-term integrity of groundwater basins within the coastal zone shall be protected. The safe yield of the groundwater basin, including return and retained water, shall not be exceeded except as part of a conjunctive use or resource management program which assures that the biological productivity of aquatic habitats are not significantly adversely impacted.*

**Coastal Watersheds Policy 2: Water Extractions.** *Extractions, impoundments and other water resource developments shall obtain all necessary county and/or state*

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successive level represents a higher degree of resource constraint. The Los Osos groundwater basin currently has LOS of III, meaning that, among other things, the use of the resource exceeds its capacity.

*permits. All pertinent information on these uses (including water conservation opportunities and impacts on in-stream beneficial uses) will be incorporated into the data base for the Resource Management System and shall be supplemented by all available private and public water resources studies available. Groundwater levels and surface flows shall be maintained to ensure that the quality of coastal waters, wetlands and streams is sufficient to provide for optimum populations of marine organisms, and for the protection of human health.*

***EAP Public Facilities, Services, and Resources: Areawide Water Supply.***

*Monitor water demand through the Resource Management System to assure that new development can be supported by available water supplies without depleting groundwater supplies and/or degrading water quality.*

***EAP Environmental, Cultural Resources Policy A: Areawide Water Quality.***

*Maintain, and where feasible, restore the quality and biological productivity of coastal waters, streams, wetlands, estuaries, and lakes in order to protect human health and maintain optimum populations of marine and other wildlife.*

***Los Osos Public Services Background***

The LCP and its EAP recognizes that Los Osos has long suffered from inadequate public services,<sup>6</sup> particularly related to water supply and wastewater capacity. The EAP states that “[p]erhaps no factor is of greater concern today than the future availability of potable water for Los Osos” and that “Los Osos is confronted with two basic problems[:] Groundwater extraction levels are rapidly increasing while groundwater quality is showing indications of possible deterioration.” Because Los Osos wastewater was traditionally handled through septic disposal within the same groundwater basin that supplies the community’s potable water, the EAP states the two issues are “closely interrelated” due to a combination of highly permeable soils, high groundwater tables, and extensive community development that led to inadequately treated septic discharges into ground and surface water. As a result, water supply and wastewater service questions have historically been inextricably linked in Los Osos.

The EAP acknowledges the community’s need to resolve the interrelated issues of water and wastewater, particularly in relation to the important coastal resources impacted by these issues, including to the groundwater basin, Morro Bay Estuary, and other sensitive habitats found throughout Los Osos. The EAP identified the need to create community-wide programs to deal with water and wastewater service constraints, but also recognized the need for any public services projects to identify the appropriate “extent and density of development and its impact on groundwater quantity and quality.”

Such service constraints in Los Osos are not new, but rather have been identified for decades as needing resolution. Beginning in the early 1970s, the Central Coast Regional Water Quality Control Board (RWQCB) and other health agencies began to raise environmental health and safety concerns regarding the use of septic systems in

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<sup>6</sup> The Commission in its past LCP and CDP actions associated with the San Luis Obispo County LCP has consistently understood “adequate” public services in relation to water and wastewater to mean that a sustainable water supply and adequate wastewater capacity exists to accommodate new development in a manner that will not lead to adverse coastal resource impacts.

Los Osos. The RWQCB took a series of steps to address these concerns, beginning with adopting an interim Basin Plan in 1971 that included a provision prohibiting septic system discharges in much of Los Osos after 1974. In 1983, the RWQCB subsequently determined that the situation was worsening, and adopted a wastewater discharge prohibition for a portion of the Los Osos area known as the Prohibition Zone. In 1988, the RWQCB also established a discharge moratorium that effectively halted all new construction and all major expansions of existing development until a solution to the septic tank pollution problem could be developed and implemented.

There were a series of attempts to address the identified ground and surface water pollution issues in Los Osos through construction and operation of a wastewater project. In 1990, the Coastal Commission approved an amendment to the Estero Area Plan that would have allowed a conventional wastewater collection and treatment plant on rural agricultural land off Turri Road, which was subsequently abandoned in favor of an alternative site at South Bay Boulevard and Pismo Avenue. A County-approved CDP for a wastewater treatment project at this site was appealed to the Coastal Commission, but ultimately no action was taken by the Commission to allow the community an opportunity to pursue potential alternative wastewater projects. In 1998 a local ballot measure formed the Los Osos Community Services District (LOCSD). The LOCSD pursued a new CDP for a conventional wastewater collection and treatment project for a plant in the middle of town at the Tri-W site along Los Osos Valley Road. The Commission approved an LCP amendment in 2002 to allow a wastewater treatment plant at that site. In 2004, the Commission, on appeal, approved the project with conditions. Project construction commenced at the Tri-W site in 2005, but a newly elected LOCSD board suspended construction and the project was abandoned.

In 2006, wastewater authority for the Los Osos area was returned from the LOCSD to the County. The County embarked on an extensive alternatives evaluation to evaluate potential solutions to deal with the disposal of the wastewater for existing development. The County ultimately approved the Los Osos Wastewater Project (LOWWP), which provided for the construction and operation of a community sewer system, including a treatment plant on 30 acres located about one-half mile inland of Morro Bay, collection/disposal/reuse facilities, and all associated development and infrastructure. The County's approval of a CDP and a CDP amendment for the LOWWP project were appealed to the Coastal Commission and, upon a finding of substantial issue, the Commission subsequently approved the project with a series of special conditions in 2010 (CDP A-3-SLO-09-055/069).<sup>7</sup>

Although the Commission recognized the immediate need for the LOWWP to resolve issues of groundwater contamination caused by the existing individual septic systems, the Commission also noted that the County had not done the planning necessary in order to determine the appropriate level of additional future development and growth within Los Osos that could be accommodated while avoiding coastal resource impacts, particularly regarding water supply and usage. As noted in the EAP, and in the

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<sup>7</sup> Due to the manner in which the County acted on the CDP for the LOWWP (an overall approval action followed by an amendment action to modify a portion of the project), there are two Coastal Commission permit numbers associated with the project.

Commission's approval of the LOWWP, the issues of water and wastewater are interrelated due to their impacts to the groundwater basin. Thus, a sustainable basin management program is critical to ensure that future development is limited to an environmentally sustainable level. The Commission was concerned with several potential growth inducement impacts of the LOWWP, including on a water supply for which sustainable pumping/use limits and the amount of development that could be supported within those limits had not been identified. The Commission was also concerned with potential growth inducement impacts to ESHA resources and found that there was a need to proactively and comprehensively plan for growth and mitigate impacts (including via a United States Fish and Wildlife Service-approved Habitat Conservation Plan (HCP)). With these concerns in mind, the Commission approved the LOWWP subject to Special Condition 6, which states:

***Wastewater Service to Undeveloped Properties.*** *Wastewater service to undeveloped properties within the service area shall be prohibited unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats.*

Per the Commission's findings:

*Special Condition 6 of this permit limits wastewater service to undeveloped properties within the service area unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits. This requirement builds on County conditions 86 and 92 requiring an HCP be prepared to address the potential for ESHA impacts as a result of community buildout. The HCP is intended to carry out LCP ESHA protection requirements and be effectively implemented before development of vacant land begins to occur and before providing service to undeveloped parcels. ...*

*Therefore, similar to the proposed project (i.e., via incorporated County condition 86), Special Condition 6 prohibits the provision of wastewater service to undeveloped properties within the service area unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats. [emphasis added]*

Thus, unless and until the EAP is amended to identify sustainable buildout limits, including in terms of water usage/supply and ESHA considerations, the County and its LOWWP is prohibited from serving undeveloped properties within Los Osos. Although County and Commission staffs are continuing to collaborate on a Los Osos Community Plan to address these core growth/development issues, at this time the LCP has not yet been amended to establish sustainable buildout limits (explicitly as it relates to water supply, wastewater services, and ESHA) for new growth in Los Osos. Thus, Special

Condition 6's prohibition on providing wastewater services to serve new development on vacant lots, as is the case in this appealed project, is still in effect.

The County has previously recognized that wastewater service to undeveloped parcels is currently prohibited, including through informational brochures that are distributed to Los Osos homeowners and prior denials of new sewer connections to undeveloped properties.<sup>8</sup> Additionally, Commission staff has repeatedly informed the County and property owners of the prohibition (see **Exhibit 4**), including to explain that Special Condition 6 was intended to limit any expansion of wastewater service to facilitate increased growth and development in the community and thus must be interpreted broadly. The Commission, too, has found that the CDP's prohibition on new wastewater service does not only apply to new development on completely vacant parcels, but also to projects that include significant intensifications of use and significant expansions on already-developed properties,<sup>9</sup> or where the property owners previously purchased wastewater or water saving credits.<sup>10</sup>

In short, the status quo is that undeveloped properties and significant intensifications of existing development are not allowed wastewater services, and thus must be denied.

While the wastewater disposal portion of Los Osos' two-part water supply and wastewater issues has begun to be resolved by the development and operation of the LOWWP, Los Osos has yet to definitively resolve its water supply issue. The Los Osos Valley Groundwater Basin has historically suffered from critical over-draft past its safe yield, presenting the natural environment and the community of Los Osos with a wide range of challenges, including potential increased costs for groundwater treatment, rendering wells unusable, threats to agriculture, and adverse effects to the surrounding wetlands and marine environment. To help address water supply issues, the Los Osos

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<sup>8</sup> See, for example, County CDP Application DRC2015-00092 (Novy SFD), denied by the County on September 2, 2016.

<sup>9</sup> See, for example, adopted Commission findings in Los Osos appeals/CDPs for ADUs and/or new SFDs in A-3-SLO-21-0004 (Wise Second Unit), A-3-SLO-21-0005 (Kimbell Second Unit), A-3-SLO-21-0007 (Bodine and Townsend Second Unit), A-3-SLO-21-0008 (Robertson Second Unit), and A-3-SLO-19-0180 (Shear Development SFDs).

<sup>10</sup> Los Osos residents have previously inquired whether properties that have secured wastewater or water saving credits (otherwise known as "Title I9 Retrofit Certificates") could be developed prior to the EAP update. In terms of wastewater credits, the RWQCB has indicated that any credits available from past actions were intended for properties that were already eligible to connect to the sewer. For example, if someone has a property that is eligible to connect to the community sewer system and wants to build prior to being hooked up to the sewer, then that person could utilize a credit to install a temporary septic system. However, as detailed above, only already-developed properties are eligible for sewer connections at this time and thus those properties would not need a temporary septic credit. In terms of water saving certificates, these certificates alone do not entitle one to development at this time. Although these water conservation certificates were previously issued to properties in the septic prohibition zone, the certificate does not guarantee the right to develop parcels upon completion of the sewer, but rather once the parcel is eligible to connect to the sewer system. As described above, the key threshold before wastewater service can be provided to any undeveloped property is certification of an updated Los Osos portion of the Estero Area Plan by the Coastal Commission.

Basin Plan<sup>11</sup> was drafted by the three Los Osos water purveyors<sup>12</sup> and San Luis Obispo County starting in 2015 as a means to better manage Basin water resources, and to establish appropriate safeguards and triggers that would help to determine when the Basin was no longer being over drafted and could be considered to be an available and sustainable water source, including because extraction no longer exceeded safe yield. The goal is to use the data obtained by the Basin Plan's annual monitoring reports to develop future growth rates and limits in Los Osos that can be implemented through the new Los Osos Community Plan (which would be added to the EAP).

The Basin Plan identified that the two main threats to the groundwater basin are water quality degradation and seawater intrusion. To address these threats, the Basin Plan has identified a series of basin metrics (such as nitrate levels, chloride levels, seawater intrusion, and groundwater levels) as a basis for understanding the health of the Basin. The Basin Management Committee<sup>13</sup> releases an annual groundwater monitoring report, which includes monitoring of these metrics and provides recommendations based on the results. The three water purveyors as well as the County, the Basin Management Committee, the public, and regulatory agencies use these metrics and the annual Basin Reports to help to objectively assess the health and sustainability of the Basin. As of the 2020 Annual Report, none of the metrics<sup>14</sup> had been met.<sup>15</sup> And the County continues to designate water supply constraints in Los Osos at the highest level of constraint (i.e., LOS III) in the LCP's Resource Management System, which indicates that the maximum safe yield of the basin has been met or exceeded, and that any further development will impact public health and safety. While the 2022 Annual Report identifies some good progress on the water supply/quality front (as explained subsequently and which help serve as the County's rationale for project approval), clearly, there still remain questions and uncertainties in terms of the groundwater basin's ability to support new development in a manner without coastal resource impairment.

### ***Appeal Contentions***

The Appellant contends that the County-approved project is inconsistent with the aforementioned groundwater resources and water supply policies. Specifically, the Appellant contends that public services within Los Osos are inadequate to serve new development because: 1) data show that the Basin is not a sustainable water source; 2) sustainable buildout limits must be identified in the Los Osos Community Plan and

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<sup>11</sup> In August 2008, an Interlocutory Stipulated Judgment (ISJ) between the Los Osos Community Services District (LOCSD), Golden State Water Company (GSWC), the S&T Mutual Water Company (S&T), and the County was approved by the Superior Court of the State of California for the County of San Luis Obispo. In 2015, under the ISJ, the Los Osos Basin Plan was created by these parties.

<sup>12</sup> LOCSD, GSWC, and S&T.

<sup>13</sup> Made up of representatives from LOCSD, GSWC, S&T, and the County.

<sup>14</sup> The 2020 target level set by the Basin Plan for groundwater elevation was 8 feet or higher; the chloride level target 100 mg/L or lower; and the nitrate level target 10 mg/L or lower.

<sup>15</sup> And to be clear, the Basin Plan currently does not have any LCP standard of review status, including as it is not a part of the LCP. Rather, it is one tool that can be used to help all parties to collectively understand the health of the Basin.

approved by the Commission before any further development is allowed; and 3) the Commission prohibited additional residential approvals without appropriate consideration of water supply and sewer limitations (imposed by Special Condition 6 in CDP A-3-SLO-09-055/069) (see **Exhibit 3**).

### **Analysis**

The County-approved residence would be served by water provided by the Los Osos Community Services District that is withdrawn from the Los Osos groundwater basin and would be provided wastewater services through the County's LOWWP. As explained above, the LCP requires CDP denial if there is a lack of either adequate and sustainable water supply or sewage disposal. The County found that both tests were met here, allowing approval. The appeal question is thus a simple one, namely is the evidence as clear as the County suggests or are there still questions about water supply and wastewater services that would suggest that the County may have erred in its analysis.

With respect to wastewater services, as explained above, the County is prohibited from providing wastewater services to vacant sites and/or significant intensifications of use. Here, the County argues that the subject site used to support a residence at one time, but that it still includes some underground water infrastructure and thus shouldn't be considered vacant (i.e., a residence existed at this location prior to 2010, but it was demolished at that time, and only underground water connections remain). Relatedly, the County argues that allowing wastewater services to the project is not dissimilar to the wastewater service connections that have been established to existing houses in the community as part of the LOWWP because there was a house here once (albeit over a decade ago). The County thus concludes that it can provide wastewater services to the site without running afoul of Special Condition 6's prohibition of sewer connections to serve vacant lots and/or intensifications of use. While interesting, the County's argument is not persuasive.

The whole purpose of the Commission's CDP requirement for an LCP amendment designed to establish allowed growth and development in the community in response to development constraints before such growth/development could be served by the LOWWP was to ensure that growth was not induced and facilitated by the LOWWP before such LCP provisions were in place to guide same, particularly as it relates to water supply and ESHA considerations.<sup>16</sup> This site does not currently include a house, and has not since 2010. Despite remnant water supply infrastructure, it is 'vacant' for all intents and purposes pursuant to Special Condition 6. In addition, there is no denying that there currently exists zero intensity of residential use on the site, and the County-approved project would add a residential unit. The Commission has been clear that adding a new residential unit is considered a significant intensification of use in Los Osos.<sup>17</sup> So even presuming the site isn't vacant, the approved project results in a

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<sup>16</sup> In terms of ESHA, including because the Commission has historically considered all of Los Osos to be ESHA, thus the CDP requirement that ESHA considerations be part of any LCP growth plan for the community, including being supported by a USFWS HCP, as described earlier.

<sup>17</sup> Again, see, for example, adopted Commission findings in Los Osos appeals/CDPs for ADUs and/or new SFDs in A-3-SLO-21-0004 (Wise Second Unit), A-3-SLO-21-0005 (Kimbell Second Unit), A-3-SLO-



significant intensification of use, thus precluding LOWWP service for this reason alone.<sup>18</sup> Thus the County is actually prohibited from providing wastewater services to this site by the 2010 Commission CDP. Given the site is also located within the RWQCB's septic system prohibition area, the project cannot satisfy its wastewater needs via some type of onsite system either. As a result, the County-approved project raises a substantial issue on this point.

And with respect to water supply, the County concluded that the project would be served from an adequate and sustainable water source because (1) the applicable water service provider (the Los Osos Community Services District) indicated that it was ready and willing to serve the site/project (i.e., via a 'will serve' letter), and (2) the County concluded that the groundwater basin is no longer in overdraft, and that it now includes adequate water to support new growth, such as the appealed project, while not threatening resources associated with the groundwater basin or its sustainability to serve the community. In terms of the will serve letter, it is ostensibly based on the same kinds of water supply conclusions drawn by the County about the basin, but a will serve letter by itself is not sufficient to satisfy LCP water supply requirements, rather the degree of groundwater adequacy/sustainability must be demonstrated, and that evidence brought to bear on the applicable LCP questions.

To that end, the County determined that the Los Osos groundwater basin is no longer in overdraft because its estimated sustainable yield is greater than the amount of water it yielded (at least as of 2022 data),<sup>19</sup> and thus there is adequate additional water supply to serve this project.<sup>20</sup> However, there is still not community consensus on that conclusion, and some continue to argue, including the Appellant, that the basin is still over drafted and essentially over tapped for even existing development, let alone

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21-0007 (Bodine and Townsend Second Unit), A-3-SLO-21-0008 (Robertson Second Unit), and A-3-SLO-19-0180 (Shear Development SFDs).

<sup>18</sup> And an argument that there once was a house there and thus there isn't such an intensification of use compared to pre-2010 times presumes that the house is still there. It is not.

<sup>19</sup> The current BMC/BMP estimates that the 2022 safe yield for the basin is 2,380 acre-feet. The latest (2021) groundwater production estimate (2,000 AF) is 84 percent of the latest sustainable yield estimate (2,380 AF). The County concluded that because groundwater production from the basin is less than the basin's sustainable yield, the Los Osos Groundwater Basin is not in overdraft.

<sup>20</sup> In addition, the County found that the project's required 2:1 water offsets/conservation measures would similarly ensure no adverse impacts to the basin, and that such new wastewater would go to the LOWWP and be reused. However, as the Commission has previously found in numerous CDPs and appeals in Los Osos (including those referenced in previous footnotes), there are multiple concerns with this approach, including that it does not address nor is it consistent with other LCP requirements that only allow a level of development commensurate with the safe yield groundwater extraction level, and because the efficacy and ability of retrofits to provide bona fide, long-term water savings have not been borne out. Furthermore, in areas with water supply limitations, simply offsetting a proposed development's estimated water usage does not mean that it can meet LCP water availability requirements. In other words, when a project is proposed based on water supplied from an already over-extracted Basin where the demand is already greater than its supply, such as the case here, even projects with offsets and retrofits cannot address that core problem and be found LCP consistent. Rather, the reviewing authority must affirmatively show that long-term and sustainable water supplies are ready and available to serve the proposed development.

accommodating new growth and development, and that current withdrawals are leading to adverse coastal resource harm as a result. Given that the data on which these determinations rest – both the County’s and the Appellant’s – is a work in progress,<sup>21</sup> and heavily dependent on complex groundwater modelling analysis, it is difficult to conclude on water supply with certainty at this time. And really, ultimately, resolution of this issue in an LCP sense awaits the required LCP amendment that is to identify the parameters for allowable new growth and development in Los Osos, where that LCP amendment is the vehicle to draw such conclusions. And while the amendment is the subject of ongoing collaboration between Commission and County staffs, and the BMC, it has not yet been completed, let alone presented to the Commission, vetted and certified as part the LCP through a public hearing. In other words, the updated LCP policy framework for understanding projects such as that appealed here in terms of community groundwater supply has not yet been completed, and questions remain as to whether this project can be served by an adequate and sustainable water supply, as is required for it to be approved consistent with the LCP. As a result, the County-approved project raises a substantial issue on this point as well.

### **Conclusion**

When considering a project that has been appealed to it, the Commission must first determine whether the project raises a substantial issue of LCP conformity, such that the Commission should assert jurisdiction over a de novo CDP for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP conformance. Section 13115(c) of the Commission regulations provides 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; 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, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may find substantial issues for other reasons. In this case, these five factors, considered together, support a conclusion that the County’s approval of a CDP for this project does raise a substantial LCP conformance issue.

The County found the proposed development consistent with applicable LCP water supply and wastewater service provisions, but, as described above, the County is actually prohibited from providing wastewater services to the project at this time, and there still remain significant questions about whether the project can be served by an adequate and sustainable water supply. As such, the County’s approval raises

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<sup>21</sup> Including as evidenced previously by the fact that the Basin Plan’s 2020 Annual Report showed noncompliance with the BMP’s chloride, nitrate, and elevation metrics. In other words, while the most recent data show improvement, the variation in this relatively short period of time suggests that there are still questions that Commission and County staff, the BMC, and water purveyors must further evaluate until broad conclusions on the basin’s sustainability can be affirmatively made.

questions regarding the factual and legal support to approve the project, suggesting substantial issue.

As to the extent and scope of this project, it is for single-family residential development, which can be considered relatively minor in scale, but the public service issues raised by the project affect the entire community, and its overall underlying groundwater basin's (and related resource's) health and sustainability. Thus, in that sense, the extent and scope of the issues are significant, and the significance of the appeal for the region is high, and thus these factors argue for a substantial issue.

In regards the significance of the coastal resources involved and the precedential nature of the County's decision, the underlying groundwater basin in Los Osos is a critical coastal resource not only for community water supply, but also for all of the related resources it affects, including in terms of streams and wetlands, and ultimately Morro Bay itself. And if a County decision here were to facilitate even more such decisions before the required LCP amendment to define allowable and appropriate growth is certified, that would be an unfortunate outcome. Thus, these factors also argue for substantial issue.

For the reasons stated herein, the Commission finds that Appeal Number A-3-SLO-23-0020 raises substantial LCP conformance issues in terms of public services (water supply and wastewater services) as they relate to LCP-required resource protection and takes jurisdiction over the CDP application for the proposed project.

### 3. APPENDICES

#### **A. Substantive File Documents<sup>22</sup>**

- File for Coastal Development Permit Appeal Number A-3-SLO-23-0020

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

- San Luis Obispo County Department of Planning and Building
- Los Osos Sustainability Group

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<sup>22</sup> These documents are available for review in the Commission's Central Coast District office.