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Staff: Devon Jackson - SC  
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Hearing Date: 10/10/2024

## STAFF REPORT CDP APPLICATION

**Application Number:** 3-23-0652  
**Applicant:** Ken Brinsko  
**Project Location:** Vacant roughly 3,000 square-foot oceanfront sandy dune lot between 1538 and 1558 Strand Way in the unincorporated community of Oceano in San Luis Obispo County (APN 061-061-040).  
**Project Description:** Construction of a new approximately 3,000 square-foot two-story single-family residence (about 2,500 square feet of living area and a 500 square-foot attached garage) and related development.  
**Staff Recommendation:** Approval with Conditions

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### SUMMARY OF STAFF RECOMMENDATION

The Applicant proposes to construct a new roughly 3,000 square-foot single-family residence on an undeveloped sandy dune property along Strand Way and fronting Pismo State Beach in the unincorporated community of Oceano in San Luis Obispo County. The primary Coastal Act concerns associated with the proposed development are with respect to environmentally sensitive habitat area (ESHA) protection and coastal hazards risks.

With respect to dune ESHA, the project is inconsistent with the Coastal Act because it proposes non-resource dependent development within such habitat leading to some 3,000 square feet of direct impact when both are prohibited. In terms of coastal hazards, while the site is located some roughly 450 feet from the ocean and protected somewhat from the dune system that fronts the project site, there still remains a certain amount of risk for developing in such oceanfront areas along the California coast. This is

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especially relevant given uncertainties with future sea level rise and the ways in which these fronting dunes will respond to it into the future. While the coastal hazards issues can be addressed by the Commission's typical suite of conditions (including those that require such risks to be internalized and that prohibit future shoreline armoring), no amount of conditions can turn this single-family residence into a permissible resource-dependent use without habitat impacts. As such, the Coastal Act directs that the CDP application be denied.

However, denial raises questions about whether doing so would result in an unconstitutional taking of private property without just compensation (which is not allowed by the State and Federal Constitutions as well as the Coastal Act). Here, and after conducting a full takings analysis, Commission staff believe that a court could conclude that the Commission's denial of a CDP for this project could result in an unlawful taking of private property. To avoid that potential outcome, staff recommends that the Commission allow for a modified project that addresses its Coastal Act inconsistencies as much as possible while allowing for a project that avoids such a takings. To do so, staff recommends a series of conditions to address such issues, including offsetting ESHA impacts via the payment of an in-lieu habitat mitigation fee (roughly \$30,000) directed to ongoing and proposed dune restoration just seaward of the Applicant's property, and including the aforementioned coastal hazards conditions as well as additional conditions to better protect resources (e.g., water quality protections, construction BMPs, vegetation requirements, etc.).

Although Coastal Act inconsistent, staff recommends approval with conditions in this case to avoid a potential taking. While the project is not allowed in dune habitat, it is also located within a mostly built-out residentially developed neighborhood on a small lot, and thus does not propose something exceptional or extraordinary for the site in relation to the adjacent context. Staff believes that a conditioned approval adequately addresses Coastal Act concerns in a takings context. The motion and resolution to implement staff's recommendation is found below on page 4.

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**EXHIBITS**

- Exhibit 1 – Location Map
- Exhibit 2 – Site Photos
- Exhibit 3 – Proposed Project Plans

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## 1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

**Motion:** *I move that the Commission **approve** Coastal Development Permit Number 3-23-0652 pursuant to the staff recommendation, and I recommend a **yes** vote.*

**Resolution to Approve CDP:** *The Commission hereby approves Coastal Development Permit Number 3-23-0652 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## 2. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

### **3. SPECIAL CONDITIONS**

This permit is granted subject to the following special conditions:

- 1. Revised Final Plans.** PRIOR TO ISSUANCE OF THIS CDP, the Permittee shall submit two full size sets of Revised Final Plans to the Executive Director for review and written approval. The Plans shall be prepared by a licensed professional or professionals (i.e., geotechnical engineer, surveyor, etc.); be based on current professionally surveyed and certified topographic elevations for the project area; and include a graphic scale. The Plans shall be substantially in conformance with the proposed plans (titled “Brinsko Submittal Plan Set 06.26.2023”, and dated received in the Coastal Commission’s Central Coast District Office on August 14, 2023; see **Exhibit X**) except that they shall be modified to meet the following requirements:
  - a. Permeable Surfaces.** Permeable materials shall be used in lieu of non-permeable treatments for the driveway, outdoor patios, all walkways, and any other exterior hard surfaces. This may include the use of permeable concrete or stone pavers, open-cell concrete blocks, porous pavement, or other pervious material that allows water to drain and percolate into the soil below.
  - b. Utilities.** All utilities shall be installed underground.
  - c. Stormwater and Drainage.** The plans shall clearly identify all stormwater and drainage infrastructure and related water quality measures, with preference given to natural BMPs (e.g., bioswales, vegetated filter strips, etc.). Such measures shall: (1) provide that all project area stormwater and drainage is filtered and treated to remove expected pollutants prior to discharge as much as possible; (2) retain runoff from the project onsite to the maximum extent feasible, including through the use of pervious areas, storage for onsite irrigation, percolation pits and engineered BMPs; and (3) be sized and designed to accommodate runoff from the site produced from each and every storm event up to and including the 85th percentile 24-hour runoff event (and in extreme storm situations (i.e., greater than the 85th percentile 24-hour runoff event storm) where such runoff cannot be adequately accommodated onsite through the project’s stormwater and drainage infrastructure, and any excess runoff shall be conveyed offsite in a non-erosive manner). All drainage system elements shall be permanently operated and maintained, and the plans shall identify all maintenance parameters for all such measures, including based on manufacturers’ recommendations, which shall be provided. It is the Permittee's responsibility to maintain the stormwater, drainage, and water quality protection infrastructure in a structurally sound manner and its approved state.
  - d. Construction BMPs.** The plans shall clearly demonstrate the BMPs that will be applied to ensure that coastal resources (including as it relates to the Oceano Dunes area) are protected against harm, including as required by Special Condition 2.
  - e. Landscaping.** Any landscaping, now or in the future, shall only consist of native and noninvasive plant species consistent with the mix of native species in the

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project vicinity. Such plants shall be drought-tolerant; genetically appropriate for the location (avoiding cultivars), soil, hydrology, and atmospheric conditions; sourced from locally collected seed (e.g., coastal San Luis Obispo County); and be appropriate species to the dune ecosystem. Outside irrigation shall be limited to the initial establishment period, using only drip or microspray systems, and herbicides, rodenticides, and fertilizers shall be prohibited. All such plants shall be kept in good growing condition and shall be replaced as necessary to maintain the approved vegetation over the life of the project. Regular monitoring and provisions for remedial action (such as replanting as necessary) shall be identified to ensure landscaping success.

All requirements above and all requirements of the approved Revised Final Plans shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with this condition and the approved Revised Final Plans.

2. **Construction Plan.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall submit two copies of a Construction Plan to the Executive Director for review and written approval. The Construction Plan shall, at a minimum, include the following:
  - a. **Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall minimize impacts on coastal resources, including public access/parking, including by maximizing use of the Permittees' property and outside of the public right-of-way for construction staging and materials storage as much as possible. Construction, including but not limited to construction activities, materials, and equipment storage, is prohibited outside of the defined construction, staging, and storage areas, including in the dune seaward of the Permittee's property.
  - b. **Construction Methods.** All construction methods to be used shall be clearly identified, and shall be required to protect coastal resources as much as possible, including identifying all methods to be used to keep construction areas separated from public use areas as much as possible (including through use of unobtrusive fencing and/or other similar measures to delineate construction areas), and including verification that equipment operation and equipment and material storage will not significantly degrade public access and views during construction.
  - c. **Construction Timing.** No work shall occur on weekends during the summer peak months (i.e., from the Saturday of Memorial Day weekend through Labor Day, inclusive) unless, due to extenuating circumstances, the Executive Director authorizes such work, subject to applying all possible measures to ensure maximum coastal resource protection. In addition, all work shall take place during daylight hours (i.e., from one-hour before sunrise to one-hour after sunset). Nighttime work and lighting of the work area is prohibited.

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- d. **Construction BMPs.** All erosion control/water quality best management practices (BMPs) to be implemented during construction to protect coastal water quality and other coastal resources shall be clearly identified, including at a minimum all of the following:
1. **Runoff Protection.** Silt fences, straw wattles, and equivalent apparatus shall be installed at the perimeter of the construction site to prevent construction-related runoff and/or sediment from discharging from the construction area, and/or entering into storm drains or otherwise offsite and/or towards the ocean. Similar apparatus shall be applied on the beach/shoreline recreational area for the same purpose when potential runoff is anticipated (and removed otherwise). Special attention shall be given to appropriate filtering and treating of all runoff, and all drainage points, including storm drains, shall be equipped with appropriate construction-related containment and treatment equipment.
  2. **Equipment.** Equipment washing, refueling, and/or servicing shall take place at appropriate off-site, level and inland locations (to help prevent leaks and spills of hazardous materials at the project area), and preferably on an existing hard surface area (e.g., Permittee's driveway, contractors' yard, etc.) or an area where collection of materials is similarly facilitated. All construction equipment shall also be inspected and maintained at a similarly sited inland location to prevent leaks and spills of hazardous materials at the project area.
  3. **Good Housekeeping.** The construction site shall maintain good construction housekeeping controls and procedures (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain (including covering exposed piles of soil and wastes); dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during wet weather; remove all construction debris from the project site; etc.).
  4. **Erosion and Sediment Controls.** All erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each workday.
  5. **Materials/Equipment Storage.** All construction materials and/or equipment shall be stored on the Permittee's property, except for necessary erosion and sediment controls and/or construction area boundary fencing.
- e. **Property Owner/Easement Holder Consent.** For any construction activities that may occur on properties (and/or on easements or similar legally defined areas) not owned by the Permittee, including but not limited to construction that requires equipment access on and/or across such other properties, evidence of review, approval, and consent from such property owners allowing such activities shall be provided, where such consent shall only be deemed to have been given if the consent is for development consistent with the terms and conditions of this CDP, including as it affects such properties.

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- f. **Restoration.** All areas impacted by construction activities shall be restored to their pre-construction condition or better within three days of completion of construction. Any native materials impacted shall be filtered as necessary to remove all construction debris.
- g. **Construction Site Documents.** Copies of the signed CDP and the approved Construction Plan shall be maintained in a conspicuous location at the construction job site at all times where such copies are available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the CDP and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.
- h. **Construction Coordinator.** A construction coordinator shall be designated to be contacted during construction should questions arise regarding the construction (in case of both regular inquiries and emergencies), and the coordinator's contact information (i.e., address, phone numbers, email address, etc.) including, at a minimum, a telephone number (with message capabilities) and an email that shall be made available 24 hours a day for the duration of construction, and that shall be conspicuously posted at the job site where such contact information is readily visible from public viewing areas while still protecting public views as much as possible, along with indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the contact information (address, email, phone number, etc.) and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry. All complaints and all actions taken in response shall be summarized and provided to the Executive Director on at least a weekly basis.
- i. **Construction Specifications.** The construction specifications, materials, and contracts shall include appropriate penalty provisions that require remediation for any work done inconsistent with the terms and conditions of this CDP.
- j. **Notification.** The Permittee shall notify planning staff of the Coastal Commission's Central Coast District Office at least three working days in advance of commencement of construction, and immediately upon completion of construction.

All requirements above and all requirements of the Executive-Director-approved Construction Plan shall be enforceable components of this CDP. The Permittees shall undertake development in conformance with this condition and the Executive-Director-approved Construction Plan.

- 3. **Dune Mitigation.** PRIOR TO ISSUANCE OF THE CDP, the Permittee shall either (a) restore at least 0.21 acres of dune habitat off-site, or (b) contribute a fee \$31,500 into an interest-bearing account held by an appropriate entity approved by the Executive Director for that purpose. In either case, the goal is to provide for off-site

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dune restoration resulting in high-quality and self-functioning dune habitat, and any such project shall meet appropriate dune restoration success criteria as outlined in an Executive Director-approved restoration plan (including invasive species removal, native plantings/seeding, at least 5 years of maintenance and annual monitoring, where monitoring, management, and maintenance shall continue until all success criteria in the approved plan are achieved, etc.). In the case of the fee, such funds shall only be disbursed if the Executive Director has approved, in writing, the use of the funds as being consistent with the intent and purpose of this condition.

4. **Coastal Hazards Risk.** By acceptance of this CDP, the Permittee acknowledges and agrees on behalf of itself and all successors and assigns, to all of the following:
  - a. **Coastal Hazards.** This site is subject to coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, storms, tsunamis, tidal scour, wave overtopping, coastal flooding, and their interaction, all of which may be exacerbated by sea level rise.
  - b. **CDP Intent.** The intent of this CDP is to allow for the approved project to be constructed and used consistent with the terms and conditions of this CDP for only as long as the development remains safe for occupancy, use, and access, without additional substantive measures beyond ordinary repair or maintenance to protect the development from coastal hazards.
  - c. **No Future Armoring.** No shoreline armoring (including but not limited to seawalls, revetments, retaining walls, gabion baskets, tie backs, piers, groins, caissons/grade beam systems, etc.) shall be constructed to protect the development approved pursuant to this CDP in the event that the approved development is threatened with damage or destruction from coastal hazards in the future. Any rights to construct such armoring that may exist under Coastal Act Section 30235, the San Luis Obispo County LCP, or any other applicable law, shall be waived, and no portion of the approved development qualifies as an “existing structure” for purposes of Section 30235.
  - d. **Public Trust.** This CDP does not allow encroachment onto public trust lands, and any future encroachment must be removed unless the Coastal Commission determines that the encroachment is legally permissible pursuant to the Coastal Act and authorizes it to remain. Any future encroachment would also be subject to the State Lands Commission’s (or other designated trustee agency’s) leasing approval.
  - e. **Assume Risks.** (1) All risks to the Permittee and to the property that is the subject of this CDP are assumed by the Permittee, including any injury and/or damage from coastal hazards in connection with this permitted development; (2) any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from coastal hazards are unconditionally waived; (3) the Commission, its officers, agents, and employees are indemnified and held harmless by the Permittee with respect to the Commission’s approval of the CDP against any and all liability, claims, demands, damages, costs (including costs

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and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to coastal hazards; and (4) all responsibility for any adverse effects to property caused by the permitted project is assumed by the Permittee.

- f. Comprehensive Sand Management Plan.** That the Permittee agrees to participate in any sand management plan developed for the dune areas seaward of Strand Way, including as may be developed by a homeowner's association or a geologic hazards abatement district, including contributing their fair share toward the costs of such program.
- 5. Coastal Hazards Response.** The Permittee is required to remove and/or relocate all or a portion of the development authorized by this CDP, and to restore the affected portion of the site, if any of the following occur:

  - a. Unsafe Conditions.** San Luis Obispo County or any other government agency with legal jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that some or all of the approved development is currently and permanently unsafe for occupancy or use due to damage or destruction from coastal hazards, and that there are no feasible measures that could make such development suitable for occupancy or use without the use of shoreline armoring.
  - b. Lack of Services.** Essential services to the site (e.g., utilities, roads) can no longer feasibly be maintained due to coastal hazards, including due to the degradation and/or failure of Strand Way as viable roadways, and/or degradation and/or failure of utilities serving the site. San Luis Obispo County and any other providers shall not be required to maintain access and/or utility infrastructure to serve the approved development in such circumstances.
  - c. Adaptation Planning.** Removal and/or relocation is required pursuant to LCP policies for sea level rise adaptation planning. Required removal and/or relocation shall require Executive Director approval of a plan to accommodate same prior to any such activities. In the event that portions of the approved development are damaged by coastal hazards before they are removed and/or relocated pursuant to the above criteria, the Permittee shall remove all recoverable debris associated with the development from such areas, and lawfully dispose of the material in an approved disposal site, all subject to Executive Director approval.
- 6. Real Estate Disclosure.** Disclosure documents related to any future marketing and sale of the subject property, including, but not limited to, specific marketing materials, sales contracts and similar documents, shall notify potential buyers of the terms and conditions of this CDP including, but not limited to, explicitly identifying all requirements associated with Special Conditions 4 and 5. A copy of this CDP shall be provided in all real estate disclosures.

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- 7. Other Authorizations.** PRIOR TO COMMENCEMENT OF CONSTRUCTION, the Permittee shall provide to the Executive Director evidence of other required authorizations for, or alternatively evidence that no such authorizations are needed, for the development authorized by this CDP (e.g., State Parks, CalFire, Oceano Community Services District, etc.) The Permittee shall inform the Executive Director of any changes to the project required by such entities, where such changes shall not be incorporated into the project until the Permittee obtains a Commission-approved amendment to this CDP, unless the Executive Director determines that an amendment is not legally required.
- 8. Future Permitting.** All future proposed development related to this CDP and this site shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required. The standard of review for any such CDP or CDP amendment shall remain the Coastal Act, with the San Luis Obispo County LCP providing non-binding guidance.
- 9. Minor Modifications.** Minor adjustments to the above conditions and their requirements may be allowed by the Executive Director if the Executive Director concludes that such adjustments: (1) are reasonable and necessary; (2) do not adversely impact coastal resources; and (3) do not legally require a CDP amendment.
- 10. Deed Restriction.** WITHIN ONE YEAR OF ISSUANCE OF THE CDP, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the parcel(s) governed by this CDP a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this CDP, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this CDP as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description and site plan of the entire parcel or parcels governed by this CDP. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this CDP shall continue to restrict the use and enjoyment of the subject property so long as either this CDP or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

## **4. FINDINGS AND DECLARATIONS**

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

The project site is located on a roughly 3,000 square-foot undeveloped property located between 1538 and 1558 Strand Way in the unincorporated community of Oceano (APN 061-061-040). Oceano is a small town of about 7,000 residents just south of the City of Grover Beach and adjacent to Pismo State Beach and the Oceano Dunes State Vehicular Recreation Area. Most of the town is located landward of Highway 1 and

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outside of the coastal zone, with the seaward side comprised of a few residential areas that parallel the beach centered along Strand Way, as well as the Oceano Airport, South San Luis Obispo County Sanitation District wastewater treatment plant, the Oceano Campground (part of Pismo State Beach), and the Meadow Creek/Arroyo Grande Creek lagoon. Fronting the homes along Strand Way is the northernmost remaining portion of the Guadalupe-Nipomo Dunes complex, one of the largest such intact dune systems in the world,<sup>1</sup> and the broad sandy beaches of Pismo State Beach further seaward. The project would be located between two existing homes on the sandy dunes, roughly 450 feet from the ocean. See **Exhibit 1** for a location map and **Exhibit 2** for photographs of the site.

The Applicant proposes to construct a roughly 3,000 square-foot two-story single-family residence, comprised of about 2,500 square feet of living space and an attached 500 square-foot garage, extending some 26 feet above finished grade. The project would disturb almost the entirety of the lot with either direct residential coverage or related construction disturbance, including about 250 cubic yards of cut and fill to create a level building area. The home would also include associated residential utility and drainage infrastructure, including a sewer connection (to the South San Luis Obispo County Sanitation District system) and a water connection (to the Oceano Community Services District system) to utilities in under Strand Way. See **Exhibit 3** for the proposed project plans.

#### **B. Standard of Review**

The proposed project site is located entirely within the Commission's retained jurisdiction (generally made up of since filled former tidelands/submerged lands), and the standard of review for this CDP application is Chapter 3 of the Coastal Act.

#### **C. Environmentally Sensitive Habitat Areas**

##### ***Applicable Coastal Act Provisions***

While the Coastal Act includes a mix of broad and specific provisions to address a variety of coastal resources, one of the more unique and seminal provisions is how it protects sensitive habitats. The Coastal Act states:

**Section 30107.5.** *“Environmentally sensitive area” means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

**Section 30240.** *(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation*

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<sup>1</sup> The Guadalupe-Nipomo Dunes Complex extends some 18 miles from southern San Luis Obispo County into northern Santa Barbara County, and it has been identified as one of the largest such intact coastal dune ecosystems in the world (including by the Nature Conservancy, see: <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/guadalupe-nipomo-dunes/>), and a federally designated National Landmark.

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*areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Thus, Section 30107.5 defines what constitutes an ‘environmentally sensitive habitat area’, or ESHA, including if such habitat is either rare or especially valuable due to a special nature or role in an ecosystem. For such qualifying habitats, Section 30240 then provides a strict multi-part test so as to ensure its protection. Namely, for development proposed in ESHA (see Section 30240(a)), as is the case here (see findings that follow on this point), the first test is whether such use is dependent on the habitat resource, commonly referred to as determining whether it is a ‘resource-dependent use’ (e.g., habitat restoration, scientific research/education, low-impact interpretive trails, etc.) because these are the only types of uses that are allowed in ESHA. If it is not resource-dependent, then it is prohibited in ESHA under the Coastal Act. If it is a resource-dependent use, then the next test is whether it would significantly disrupt any ESHA habitat values, where, if so, then it too is prohibited under the Coastal Act. In short, only a resource-dependent use that doesn’t in any way lead to significant disruption of ESHA habitat values is allowed within ESHA under the Coastal Act.

When the proposed development is proposed adjacent to ESHA (see Section 30240(b)), such development is required to be sited and designed so as not to lead to impacts that would significantly degrade such ESHA areas and is required to be compatible with ESHA in such a way as to ensure the continuing function of those ESHA areas. This Section 30240(b) test is designed to ensure that indirect degradation of ESHA is also appropriately avoided, and, depending on the type of proposed development and the type of ESHA involved, typically involves the use of making sure ESHA is appropriately buffered from such development (e.g., via setbacks, where the Commission has typically employed a minimum 100-foot buffer from most ESHA). It also ensures that appropriate parameters are prescribed for both the buffer and the development being approved (e.g., limitations on noise, lights, and activities, types of plants, domestic animals/pets, etc.). In short, only development that doesn’t significantly degrade or cause such ESHA areas to lose habitat value is allowed adjacent to ESHA under the Coastal Act.

In addition, Section 30240 is quite prescriptive in this sense, including using terms like ‘shall’ (i.e., ESHA shall be limited to resource-dependent use, shall be protected against significant habitat disruption/degradation, and shall be compatible with continuing habitat values) and ‘only’/‘any’ which leave no gray area (i.e., ‘only’ resource-dependent uses are allowed in ESHA, no amount of significant ESHA disruption is allowed, etc.), which evinces a strong letter and intent of the law to protect the most sensitive of habitats found in the coastal zone through a very strict analytic framework. Not only does this provide a clear standard for evaluating ESHA, but courts have also opined that that standard is essentially black and white and can’t be manipulated.<sup>2</sup> If it is ESHA,

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<sup>2</sup> For example, the appellate court’s published decision in the *Bolsa Chica* case (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 507) confirmed that, under the Coastal Act, the Commission cannot simply disregard ESHA resource-dependency requirements, and cannot simply allow for significant disruptions to habitat values by mitigating for those impacts, among other things. Rather, providing mitigation for impacts is not a sufficient justification for allowing development that is not

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there are simply very few Coastal Act consistent uses that can be provided in or near such areas.

#### **Consistency Analysis**

##### Background

Coastal dunes are one of the most important, vulnerable, and geographically constrained habitat types in California, where beach-dune complexes constitute just 2-3% of the State's landmass.<sup>3</sup> In fact, the Ocean Protection Council estimates that dune habitat is even more constrained than coastal wetlands, which are themselves quite constrained, where the estimated 58,000 beach-dune acres statewide actually constitutes only one-sixth of the area of coastal wetlands, underscoring the rarity of this habitat type.<sup>4</sup> Dunes form only under certain conditions where there is enough sand, and where appropriate wind energy and direction allow it. They are a dynamic habitat subject to extremes of physical disturbance, drying, and salt spray. The winds and shifting sands in dune habitats can cause the habitat characteristics and species at any given location to change on a relatively short or shifting timescale, so a particular area may have relatively higher or lower physical and/or biological complexity over time. This dynamic environment supports plant and animal species that have evolved strategies adapted to these dynamic conditions. For example, many dune plants have seeds that can remain dormant for extended periods of time until conditions allow for them to germinate. Many of the specially adapted plant and animal species and communities have become uncommon and are considered rare, endangered, or have a similar special status. The ability of these various resources to withstand such challenging conditions for long periods allows dune habitat, even severely disturbed dune habitat, to be restored relatively easily, whether through passive or active restoration efforts.

In addition to their ecological value, and particularly given their dynamism and oftentimes their position between the beach and inland development, coastal dunes are also an important nature-based resiliency solution to rising seas and flooding events.<sup>5</sup> Not only do they help to buffer wave action, but they also are a sand supply for eroding beaches. Numerous communities in California have undergone coastal dune restoration efforts to reap the benefits of their erosion protection and sand accretion functions.<sup>6</sup> As sea levels rise, dunes' persistence relies, among other things, on their ability to migrate,

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resource-dependent in the first place. Rather, Section 30240 protects the specific area of ESHA, not just its habitat value. And non-resource-dependent projects are not allowed within ESHA, even if off-site mitigation would theoretically replace lost habitat value.

<sup>3</sup> See, for example, Pickart, A. J., & Barbour, M. G., *Beach and dune* (Vol. 2007, pp. 155-179), Berkeley, CA, University of California Press (2007).

<sup>4</sup> See [https://www.opc.ca.gov/webmaster/media\\_library/2023/01/Annual-State-of-the-Coast-and-Ocean-Report-2022-508.pdf](https://www.opc.ca.gov/webmaster/media_library/2023/01/Annual-State-of-the-Coast-and-Ocean-Report-2022-508.pdf), page 20.

<sup>5</sup> And the Commission has found as much in previous CDP actions related to the dunes in question here (see, for example, the Oceano Dunes Coastal Development Permit 4-82-300 Review in 2021 where dune impacts were determined to be contributing to lost resiliency for the community of Oceano).

<sup>6</sup> See, for example, Johnston, K. K., Dugan, J. E., Hubbard, D. M., Emery, K. A., & Grubbs, M. W., *Using dune restoration on an urban beach as a coastal resilience approach*, *Frontiers in Marine Science*, 10, 1187488, (2023).

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which makes preserving undeveloped dune areas such as the proposed project site critical to coastal resilience.<sup>7</sup>

Given this understanding of dunes' rarity and especially valuable role, confined spatial ranges, habitat for special status species and sensitive natural communities, coastal resilience services, and overall aesthetic and character-defining features in the coastal landscape, dune systems, including degraded systems, have historically been considered ESHA by the Commission throughout the state.<sup>8</sup> And, in fact, the Commission has determined that the specific dune system within which the proposed project is located (i.e., the Guadalupe-Nipomo Dunes Complex) is ESHA as well, including in recent years in the Oceano Dunes Coastal Development Permit (4-82-300) permit review in 2021.<sup>9</sup> In sum, the Commission has a long history of finding dunes in general across the state qualify as ESHA, including this particular project area.

#### ESHA determination

Here, and in addition to their status as being part of the overall Guadalupe-Nipomo Dunes Complex, the project site consists of sandy substrate with characteristic morphology subject to the wind-driven processes of the larger dune system, and in this case, qualifies as coastal dune. Between 2020 and 2023, the Applicant's consultants conducted two biological surveys of the site.<sup>10</sup> These reports concluded that because the site had previously been disturbed, and because no special status biological resources were observed during the surveys, that the project site shouldn't be considered coastal dune ESHA. However, the Commission has an established history of finding dunes, even those disturbed and invaded by iceplant, to rise to the level of ESHA. Staff ecologist Dr. Rachel Pausch also notes that the current presence of iceplant does not preclude the ability of this parcel to support native and potentially sensitive dune vegetation or seedbank. As such, and while acknowledging the site in question is small and flanked by other residences, it still is a dune and contiguous with a much larger dune system that supports native vegetation and sensitive coastal foredune communities immediately seaward of the project. The dunes of this area also provide the other ecosystem functions previously discussed (e.g., coastal resiliency, character-

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<sup>7</sup> See, for example, Griggs, G., & Reguero, B. G. (2021). Coastal adaptation to climate change and sea-level rise. *Water*, 13(16), 2151.

<sup>8</sup> For just a few examples of CDP and LCP decisions finding dunes to be ESHA across the State, see City of Malibu LCP Amendment 1-07 (Malibu Bay Company), City of Oxnard LCP Amendment 1-05 (Oxnard Shores), Oceano Dunes CDP 4-82-300 Review, Huntington Beach Bike Lane (CDP 5-23-0291), and Monterey-Salinas Transit Bus Road (CDP 3-23-0288).

<sup>9</sup> As part of the Commission's 2021 CDP action, the Commission determined that essentially all of Oceano Dunes constituted ESHA, with the exception of the flat beach area north of Arroyo Grande Creek and seaward of the dunes adjacent to Strand Way: "The only areas not explicitly mapped and identified as ESHA in the County LCP are the sandy beach areas (that are not dune) at Pismo State Beach north of Arroyo Grande Creek to the City of Grover Beach city limits...". Thus, the dune area just seaward of the project site (on State Parks' property) was determined to be ESHA.

<sup>10</sup> See Appendix A for copies of both surveys dated December 2, 2020 and June 7, 2023 conducted by Kevin Merk Associates (KMA).

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defining aesthetic, relative ease of restoration, etc.). Dr. Pausch confirms the project site rises to the level of ESHA under the Coastal Act.

In short, the project is located within one of the largest coastal dune systems in California, the Guadalupe-Nipomo Dunes Complex. This dune system has been repeatedly recognized, including by the Commission, State Parks, and CDFW, as an important resource not only for San Luis Obispo County and its communities, but also for the state, and beyond, including for its role in supporting coastal resiliency. Coastal dunes are amongst the most constrained of coastal habitats, and subject to significant development threats across the state. As such, they are not only important for their resource values, as described above, but also for the way they help to promote and conserve biodiversity and resiliency in the face of global climate change. Put another way, the dunes here have inherent resource value, but they also have important strategic value for reaching local, statewide, and global conservation goals,<sup>11</sup> elevating the sensitivity and importance of this system in a Coastal Act sense.

#### ESHA impacts

The proposed single-family residence would result in roughly 3,000 square feet (0.07 acres) of direct permanent dune ESHA loss/impact, which is essentially the entirety of the parcel. Additionally, both construction and operational disturbances would also adversely affect adjacent ESHA because there would be no buffer provided between the proposed residence and the surrounding dune environment on the seaward portion of the property.

#### Coastal Act consistency analysis

As noted previously, the Coastal Act prohibits non-resource-dependent development within ESHA, prohibits any significant disruption of ESHA habitat values when development is within ESHA, and prohibits any significant degradation/lost habitat values when development is adjacent to ESHA.

Regarding the first test, the Commission has generally interpreted 'resource-dependent development' to be development that is required to be located within such habitat in order to function. Usually, there are only three types of development that so qualify: 1) habitat restoration (as this inherently must be in the habitat to meet its stated objectives); 2) scientific research and nature study (again, to study a particular habitat necessarily means one must be within in it in certain cases); and 3) low-intensity public access and recreation opportunities such as interpretive trails. The project is not a resource-dependent use that requires placement within dune ESHA and is in fact the construction of a private single-family residence that can be placed in any non-habitat

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<sup>11</sup> For example, in October 2020, Governor Newsom issued Executive Order N-82-20 which established a state goal of conserving 30% of California's lands and coastal waters by 2030 – known as the 30x30 initiative. The 30x30 goal is intended to help accelerate conservation of our natural resource areas to help meet three core objectives: to conserve and restore biodiversity, to expand access to nature, and to mitigate and build resilience to climate change. California's 30x30 commitment is also part of a complementary global effort to increase biodiversity conservation, including in the United States. In January of 2021, the Biden administration issued an Executive Order that also committed the United States to 30x30 through its America the Beautiful initiative.

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area. Therefore, the proposed residence is prohibited by the Coastal Act within dune ESHA.

As to the second test, as the previous discussion makes clear, the proposed project would significantly disrupt dune ESHA habitat values. The project represents a direct loss of dune habitat that has the potential to support a variety of rare and threatened species. The proposed project would lead to an estimated total permanent loss of roughly 3,000 square feet (0.07 acres) of dune ESHA to construction of the residence, eliminating that area as dune ESHA and committing it instead to residential development. This is undeniably a significant disruption of dune ESHA habitat function and value, and therefore the proposed residence is prohibited by the Coastal Act within dune ESHA for this reason as well.

In terms of the third test, again as the previous discussion makes clear, the proposed project would significantly degrade dune ESHA habitat values in the area adjacent to the residence itself as well, including as it includes no buffer from these areas. This would clearly be a significant degradation of dune ESHA and its habitat functions and values, and therefore the proposed residence is prohibited by the Coastal Act adjacent to dune ESHA also for this reason.

Finally, if the proposed project were otherwise consistent with Coastal Act ESHA provisions, the above-described dune ESHA impacts would require proportionate and offsetting mitigation. The Commission has typically required dune mitigation in an amount equal to 3:1, with such mitigation in the form of substantial restoration.<sup>12</sup> Substantial restoration is understood to alleviate the system from stressors and actively facilitate the return of a full suite of self-sustaining ecological functions. This may involve techniques such as manipulating landforms to return natural processes or eradicating non-native species and then revegetating with a robust palette of natives. Applying the 3:1 ratio for this project would yield about 9,000 square feet (3,000 square foot disturbance footprint times 3) of dune that must be restored off-site, or the payment of an in-lieu mitigation fee commensurate with the cost to do so. Recent Commission-approved projects with similar mitigation approaches have estimated costs of \$100,000-\$250,000 per acre for relatively simple restoration projects.<sup>13</sup> As applied to the Applicant's proposed project, such mitigation costs would be 9,000 square feet, or 0.21 acres of substantial restoration, costing some \$31,500. In calculating the cost per acre for this project, Dr. Pausch looked at past fees that were charged for similar projects in California, as well as examples provided by the Applicant. She determined that \$150,000 per acre would be appropriate here because this figure adequately

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<sup>12</sup> In recent cases, including for California-American Water and for the Monterey-Salinas Transit Bus Road, the Commission has required 1:1 of the 3:1 mitigation to be in the form of dune creation. Dr. Pausch does not believe that such requirement is necessary in this case given the very small degree of impact (only 3,000 square feet) within this specific area. In this case, she believes that a 3:1 substantial restoration requirement would be sufficient to adequately mitigate the project's dune impacts.

<sup>13</sup> Coastal Commission staff conversations with experienced dune restoration practitioners in California indicated that a relatively simple project can readily cost somewhere between \$100,000-\$250,000 per acre and that up to \$1,000,000 per acre is reasonable for complex or significantly degraded sites requiring significant engineering effort for components such as grading topography or removing debris and/or contaminated materials.

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incorporates the full cost of monitoring/reporting, maintenance, and field work for a restoration project of this scale within this particular dune area/system.<sup>14</sup>

In conclusion, the proposed project seeks to place a single-family residence into dune ESHA, where the proposed use in such habitat and its related impact are both prohibited by the Coastal Act. The proposed project is therefore inconsistent with the Coastal Act and specifically Section 30240.

#### D. Coastal Hazards

##### ***Applicable Coastal Act Provisions***

The Coastal Act establishes several requirements for new development to address coastal hazards, including minimizing risks to life and property, assuring stability and structural integrity, and requirements to maintain safety and stability over time, all without the reliance on shoreline armoring. These policies state:

***Section 30235.*** *Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.*

...

***Section 30253.*** *New development shall do all of the following: (a) minimize risks to life and property in areas of high geologic, flood, and fire hazard. (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. ...*

In other words, new development, such as the proposed residence here, must be sited and designed in such a manner so as to minimize risk and to not “in any way require the construction of protective devices” (Section 30253). This is because Coastal Act Section 30235 only allows such shoreline protective devices for a very limited subset of uses, including coastal-dependent development and other types of development that was in existence (i.e., ‘existing development’) when the Coastal Act went into effect on January 1, 1977.<sup>15</sup> For development built after this date, armoring is not a permissible way to

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<sup>14</sup> As noted, the Commission has seen a range of dune restoration projects from a low of \$100,000 to a high of \$250,000 per acre. In this case, based off estimates provided by the Applicant's consultants, and given that the envisioned dune restoration project seaward of the Applicant's property along Strand Way will likely occur in relatively intact dunes (along with the Commission's typical parameters for habitat restoration, including preparation of a habitat monitoring and mitigation plan, five years of annual monitoring and reporting, regular invasive management during those five years, and funds to cover the remediation costs of any underperforming areas), the Commission finds that in this specific case \$150,000 per acre is an appropriate in-lieu fee at this time.

<sup>15</sup> Including as identified in the Commission's adopted Sea Level Rise Policy Guidance, and recognized in CDP cases (see, for example, CDPs A-3-SCO-07-095/3-07-019 3-07-019 (Pleasure Point seawall), 3-09-025 (Pebble Beach Company Beach Club seawall), 3-09-042 (O'Neill seawall), 2-10-039 (Lands End seawall), 3-14-0488 (Iceplant LLC seawall), 2-17-0702 (Sharp Park Golf Course revetment), 3-18-0720

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abate and address coastal hazards risk, including since such development is subject to Section 30253's requirements to be built in a manner that avoids it. In short, new development, such as proposed here, must be sited and designed in such a manner as to be safe from coastal hazards risk and not employ armoring to do so.

#### **Consistency Analysis**

The proposed project is located on a dune fronting site near the ocean, and thus potentially subject to certain coastal hazards risks including erosion and ocean waves. In order to examine the relative risk of potential hazards, the Applicant's geotechnical consultants, Earth Systems Pacific, prepared a sea wave run-up analysis (see **Appendix A**). Using the assumptions specified in the Commission's Sea Level Rise Policy Guidance, including roughly 5.06 feet of sea level rise by 2123 to result in a 100-year stillwater elevation<sup>16</sup> of approximately 15.5 feet NAVD88, and the addition of a 3.3-foot wave run-up height, the report determined the 100-year wave run-up elevation including projected sea level rise to be about 18.8 feet NAVD88.

In addition, the report also analyzed the potential threat from tsunamis. According to the California Geological Survey Tsunami Hazard Area Map, the Applicant's consultants determined that the site is located within a tsunami hazard zone. To determine how tidal surge might impact the site during a tsunami they looked at the March 2011 Tohoku earthquake in Japan (8.9 magnitude) to see how it might impact the 100-year design stillwater elevation. Based on other research,<sup>17</sup> the Applicant's consultants added the largest tidal surge in the four hours following the Tohoku earthquake (i.e., estimated at 5 feet) to the 100-year design stillwater elevation (of 15.5 feet) for a predicted tsunami flood elevation of 20.5 feet.

The report concluded that because the finished elevation of the residence would be 26.3 feet (NAVD88),<sup>18</sup> and that because the 100-year sea wave run up elevation of 18.8 feet and predicted tsunami inundation elevation of 20.5 feet are lower than this, and also because the dune system fronting the proposed residence offers a natural buffer or sorts to prevent wave attack, the potential for future flooding at the site is very low. While this analysis is reasonable at this site, it is also possible that the development could be safe for longer or shorter than the Applicant's estimate, which is just a reality of developing within coastal dunes subject to coastal hazards, including in terms of the uncertainty that comes with analyzing the potential future effects of sea level rise. Put another way, there is a certain inherent amount of risk in developing along the California coast, and while the analysis described above shows the project is not located in a particularly vulnerable or flood-prone area today, that doesn't mean the risk is non-

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(Candau Armoring), 3-20-0166 (Wavefarer Partners LLC Armoring), 3-22-0440 (Casanova Armoring), and 3-22-1027 (Hofmann Seawall).

<sup>16</sup> Stillwater refers to the flood level not including the effects of waves (wave amplitude and wave setup) or tsunamis but including storm surge and astronomic tide.

<sup>17</sup> From Dean Wendt, who is the current Dean of the College of Science and Mathematics at Cal Poly San Luis Obispo and leads the San Luis Obispo Science and Ecosystem Alliance (SLOSEA).

<sup>18</sup> Note that the residence is proposed to use a standard perimeter foundation and is not elevated on piers or caissons, nor does it propose any form of armoring.

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existent, including into the future. To address such risks, and if the project did not otherwise raise dune ESHA approvability problems, the Commission typically imposes certain conditions of approval, including notice, disclosure, and acknowledgement of coastal hazards risks on the property for current and future buyers/owners, as well as certain adaptation planning requirements such as responding to hazards threats in a manner without shoreline armoring. Without such conditions (see also takings section that follows), the Commission cannot determine that the project meets Coastal Act Section 30253 tests.<sup>19</sup>

#### **E. Public Access and Views**

##### ***Applicable Coastal Act Provisions***

The Coastal Act protects and requires the provision of public recreational access, and maximizing public recreational access opportunities is a fundamental Coastal Act objective. Relevant provisions include:

***Section 30210.*** *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211.*** *Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

***Section 30212.*** *(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected...*

***Section 30213.*** *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred...*

***Section 30220.*** *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

***Section 30221.*** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

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<sup>19</sup> See additional discussion of these conditions subsequently in this report.

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**Section 30223.** *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

**Section 30240(b).** *Development in areas adjacent to...parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those...recreation areas.*

These overlapping Coastal Act provisions protect public recreational access to and along the beach/shoreline and to offshore waters for public recreational access purposes, particularly free and low-cost access. Specifically, Section 30210 requires the Commission to provide the general public maximum access and recreational opportunities, while Section 30211 prohibits development from interfering with the public's right of access. In approving new development, Section 30212 requires new development to provide access from the nearest public roadway to the shoreline and along the coast, save certain limited exceptions, such as existing adequate nearby access. Section 30213 protects lower cost forms of access, such as the free access available along the beach fronting the project site. Section 30220 protects coastal areas suited for ocean-oriented activities, such as the beach/offshore area here, for such purposes. Sections 30221 and 30223 protect oceanfront and upland areas, like this, for public recreational uses. And Section 30240(b) protects parks and recreation areas, like Pismo State Beach fronting the site, from degradation, and requires any allowed development to be compatible with the continuation of those areas. Finally, Section 30210's requirement to maximize access and recreational opportunities represents a different threshold than to simply provide or protect such access, and it is fundamentally different from other like provisions in this respect. Namely, it is not enough to simply provide access to and along the coast, and not enough to simply protect access; rather such access must also be maximized. This terminology distinguishes the Coastal Act in certain respects, and it provides fundamental direction with respect to projects along the California coast like this one.

Additionally, the Coastal Act provides that the scenic and visual qualities of coastal areas are resources of public importance that must be protected, and requires that new development protect public views and visual compatibility with the surrounding area. In highly scenic areas, such as the viewshed in which the proposed project is located, proposed development is also required to be subordinate to the character of its setting. Section 30251 states:

**Section 30251.** *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

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#### ***Consistency Analysis***

The community of Oceano includes numerous trails and paths that provide access to area beaches, which extend some 15 miles between Pismo Beach and Point Sal.<sup>20</sup> The dunes and beaches just south of the project site also extend some 2 miles inland, and all are part of the overall Guadalupe-Nipomo Dunes complex. Within this area, State Parks also operates their Oceano Dunes unit, which includes a total of almost 5,000 acres (for comparison, this size is nearly five times the size of Golden Gate Park in San Francisco), a portion of which is available for off-highway vehicle use, which remains a popular access activity.

The project site is within a mostly developed residential neighborhood that fronts and is visible from these popular public beaches and public use areas. In fact, there are series of public trails that provide vertical access to the beach from Strand Way in the vicinity of the project site (see Exhibit 1).<sup>21</sup> The proposed project site is located along Strand Way between two of these access points (i.e., between Sandpiper Lane and Surf Avenue). And while it appears that the site has historically provided for some public access to the dunes and beaches seaward of Strand Way, it does not appear substantial, and dune/beach access will continue to be available nearby fronting both Sandpiper Lane and Surf Avenue. In addition, while the project is likely to have some temporary public access disruptions during construction (e.g., construction noise, equipment storage, etc.), these issues can be addressed by the types of construction conditions the Commission typically requires to avoid/minimize such impacts. As a result, the project should not result in any significant impact to public coastal access or recreation at this site or in the project area if it were to be conditioned to do so (see also takings section that follows).

With regards to public views, the proposed project would result in the construction of a two-story roughly 26-foot-tall residence. While the project clearly introduces development next to and visible from a state beach, the residence will be built in a neighborhood that contains homes that are roughly the same size, including on either side of it (see photos in Exhibit 2). In that context, the residence doesn't necessarily introduce anything abnormal or visually jarring when compared with the status quo as seen from the beach side. From Strand Way, the proposed new residence would pretty much completely block the public view that's currently available across the property. At the same time however, each of the street and beach accessways mentioned above would continue to accommodate a similar public view. So while this project would result in more public view blockage than currently exists, in the context of this tightly developed neighborhood with multiple areas that provides some public view relief through the beach access points, the impact is not unreasonable. And, to be clear, all latent public view impacts can be addressed by typical conditions of approval (e.g.,

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<sup>20</sup> Some of which is made up of State Parks' Pismo State Beach and Oceano Dunes State Vehicular Recreation Area units, and others that are part of the Guadalupe-Nipomo Dunes National Wildlife Refuge.

<sup>21</sup> These beach access points include the western most terminus of McCarthy Avenue, Juanita Avenue, Sandpiper Lane, Surf Avenue, York Avenue, Utah Avenue, and the southern most ending of Strand Way itself.

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related to landscaping, placing utilities underground, etc.) were it to be conditioned to do so (see also takings section that follows).

However, without such conditions (see also takings section that follows), the Commission cannot determine that the project meets Coastal Act public recreational access and public view tests.

#### E. Potential Takings

As discussed above, the project site is subject to significant development constraints given that the entire parcel is located within ESHA, is subject to a certain degree of inherent coastal hazards threat, and is adjacent to a highly visible and popular state beach. And while the hazards, views, and access issues can be appropriately addressed via conditions of approval, no amount of conditions can turn this project into a resource dependent use permissible in dune ESHA. As such, and as described in detail above, the project cannot be found consistent with the Coastal Act and requires denial of this CDP application.

However, if and when the Commission considers denying a CDP application for a project, a question may arise as to whether the denial results in an unconstitutional “taking” of an applicant’s property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Consequently, the Commission must assess whether denial of a CDP for the proposed development could result in an unconstitutional taking of private property. If the Commission determines that a taking is possible, then Section 30010 allows the Commission to approve some amount of development in order to avoid such a taking, even if the approved development is inconsistent with Coastal Act provisions, provided Coastal Act inconsistencies are avoided/minimized as much as possible while still avoiding a takings.<sup>22</sup> On the other hand, if the Commission concludes that its action likely would not constitute a taking, then it may deny the CDP for the project while still complying with Coastal Act Section 30010. It is important to note, however, that in undertaking such analysis, the Commission is not a court, and it cannot ultimately adjudicate whether its action constitutes an unlawful taking as a matter of law. Only a court can make a final and determinative taking decision were the Commission’s decision to be challenged.

Per the Commission’s typical practice, Commission staff gathered a variety of

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<sup>22</sup> See, for example, CDP Nos. A-3-SCO-00-033 (Hinman); A-1-MEN-09-023 (Wernette), and 1-12-023 (Winget).

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documents to conduct the takings evaluation, including but not limited to a Chain of Title, information related to the fair market value and property costs of the land, and changes in use. In the remainder of this section, the Commission considers whether, for purposes of compliance with Coastal Act Section 30010, denial of a CDP for the proposed development could constitute a taking.

#### **General Takings Principles**

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.”<sup>23</sup> Similarly, Article 1, Section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.” The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories.<sup>24</sup> First, there are the cases in which government authorizes a physical occupation of property.<sup>25</sup> Second, there are the cases in which government merely regulates the use of property.<sup>26</sup> A taking is less likely to be found when the interference with property is an application of a regulatory program “adjusting the benefits and burdens of economic life to promote the common good” rather than a physical appropriation.<sup>27</sup> The Commission’s actions here would be evaluated under the standards for a regulatory taking.

The United States Supreme Court has identified two circumstances in which a regulatory taking might occur. The first is a “categorical” taking identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1014). In *Lucas*, the Court found that a regulation that denied all economically viable use of property was a taking without undertaking a “case specific” inquiry into the public interest advanced by the challenged regulation. The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless”.<sup>28</sup>

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. (Penn Central) v. New York* ((1978) 438 U.S. 104, 124). This test generally requires an examination of the character of the government action, the economic impact of the challenged regulation,

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<sup>23</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

<sup>24</sup> See *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523.

<sup>25</sup> See, for example, *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.

<sup>26</sup> See *Yee, supra*, 503 U.S. at pages 522-523.

<sup>27</sup> *Keystone Bituminous Coal Ass’n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, footnote 18.

<sup>28</sup> See *Lucas* at pages 1016-1017, and see *Riverside Bayview Homes, supra*, 474 U.S. at page 126 (regulatory takings occur only under “extreme circumstances”).

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and the extent of the regulation's interference with reasonable, investment-backed expectations.<sup>29</sup> In both *Lucas* and *Penn Central*, even where the challenged regulatory act falls into one of these categories, government may avoid a taking if the restriction inheres in the title of the property itself. In other words, when background principles of state property law (e.g., related to public nuisances or property title) require the same outcome as a government decision might, then the government decision does not constitute a taking.<sup>30</sup>

#### ***Unit of Property***

As a threshold matter, before a taking claim can be analyzed, it is necessary to define the unit of property against which the claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable legally created lot or parcel of property on which development is proposed. The issue is more complicated in cases where there are multiple lots or parcels with differing numbers of APNs (e.g., ten parcels making up a single APN), where there are questions about the legality of the lots/parcels/APNs, where the landowner owns or controls adjacent or contiguous land that are related to the proposed development, or combinations of all of the above. Under the U.S. Supreme Court decision in *Murr v. Wisconsin*,<sup>31</sup> reviewing courts must consider objectively whether reasonable expectations about property ownership would lead a landowner to anticipate that a property in question would be treated as a single unit or as separate tracts. First, courts give substantial weight to the property's treatment, in particular how it is bounded or divided, under state and local law. Second, courts look to the property's physical characteristics, including the physical relationship of tracts, topography, and the surrounding environment. Third, courts assess the property's value under the challenged regulation, with special attention to the effect of the burdened land on the value of other holdings.

In terms of the property in question in this case, it is made up of one APN that was acquired by the Applicant in 2020. The Applicant here proposes development that remains on the single APN. There is nothing that the Commission has seen in the record to suggest that the lot was not legally created (e.g., it is part of a neighborhood of similarly sized and substantially developed residential lots), and thus the underlying legal unit of property is made up of the single APN (061-061-040) and is the unit of property for this potential takings evaluation.

#### ***Takings Under Lucas***

The main question under *Lucas* is whether denial would render a property valueless where no productive or economically beneficial use of land is permitted. Key to that question is understanding the allowable uses of the subject property. Here, the LCP

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<sup>29</sup> See *Penn Central*, 438 U.S. at 134. In *Palazzolo v. Rhode Island* ((2001) 533 U.S. 606), the Supreme Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *Palazzolo*, rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*).

<sup>30</sup> See *Lucas*, 505 U.S. at pages 1028-1036.

<sup>31</sup> See *Murr v. Wisconsin* (2017) 137 S.Ct. 1933.

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land use designation for the site is Residential Multi-Family (RMF), which is intended to “provide areas for residential development with a wide range of densities and housing types including single-family dwellings, multi-family dwellings and mobile home developments” (see San Luis Obispo County Coastal Allowable Use Table & Definitions page 9). Thus, the LCP allows for the use of the property as a single-family residence, and the site is within a substantially developed residential neighborhood where it would seem reasonable to assume that a residence would be an allowed and economically viable use. Denial, or the requirement to solely allow resource-dependent uses on this property (e.g., habitat restoration or an interpretive trail), may result in a deprivation of all economically beneficial uses of property. Thus, the record is sufficient to determine that denial of the CDP for the proposed project could result in a categorical taking under *Lucas*.

#### ***Takings under Penn Central***

In addition to the *Lucas* analysis, a court would also consider whether the CDP denial would constitute a taking under the ad hoc *Penn Central* inquiry. This inquiry generally requires an examination of factors including the character of the government action, the economic impact of the challenged regulation, and the extent of the regulation’s interference with reasonable, investment-backed expectations.

#### **Reasonable Investment-Backed Expectations**

To evaluate whether the Applicant had a “reasonable and investment-backed expectation” that a residence could be developed on the property requires that expectations be measured objectively in terms of what a reasonable person might conclude about the developability of a site, and to what degree that expectation was backed by any actual investment. To analyze this question, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed as proposed by the Applicant, considering all the legal, regulatory, economic, physical, and other constraints that existed when the property was acquired.

Concerning whether the Applicant has a reasonable expectation to develop the site with a residence, the parcel was designated at the time of acquisition in 2020, as it is now, as Residential Multi-Family (which allows a variety of residential uses, including single-family residences), as are the surrounding parcels, and the neighborhood is essentially built out with single-family residences. In fact, single-family residences exist on either side of the vacant site, including homes that have also been constructed in ESHA. The Applicant should also have been aware, however, that the property was entirely in dune ESHA, and at the time the Applicant acquired the property it was subject to development constraints under the Coastal Act. The applicable Coastal Act provisions regarding ESHA have not changed since 1977 when the law came into effect and are the same laws that apply today. In other words, a reasonable person doing their due diligence to help determine what might be possible for this property prior to acquisition would appropriately have consulted the Coastal Act to understand the various requirements and constraints to development, particularly given the site is directly

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adjacent to the ocean and surrounded by a large dune complex.<sup>32</sup>

That said, when understood in the context of an existing residentially-developed neighborhood, and the fact that this property does not have any recorded deed restrictions/easements that prohibit or limit residential uses of the site, a court could find that the Applicant had a reasonable expectation to construct a residence on the property. The Commission also concludes that the Applicant could have a reasonable expectation to construct a residence of the size proposed here since many of the homes along Strand Way are two stories and roughly the same size, with some being larger and others smaller. As to whether the Applicant's expectation was investment-backed, the Applicant acquired the property in 2020 for \$925,000 (or about \$300 per square foot for this 3,000 square-foot undeveloped parcel), which is similar to land costs for other developed properties in the area.<sup>33</sup> In addition, and while not conclusive on its own, the Applicant was also able to obtain financing to construct the now proposed residence. Given these points, a court could conclude that there is evidence that the Applicant has a reasonable and investment-backed expectation to construct a house of similar size and location as those also located along Strand Way on either side of this property.

#### Economic Impact

The *Penn Central* analysis also requires an assessment of the economic impact of the regulatory action on an applicant's property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property's value, the landowner must demonstrate that the value of the property has been very substantially diminished.<sup>34</sup> Here, the assessed value of the property in 2024 is \$988,380,<sup>35</sup> while nearby lots also fronting the dune/beach along Strand Way with homes constructed on them are valued at roughly \$3 million.<sup>36</sup> Put another way, the construction of a home would likely significantly increase the value of the property, but it is still currently valued at \$1 million. While one could certainly argue that an applicant should not have had an expectation to develop an all-dune ESHA site with a home in the coastal zone consistent with the Coastal Act, that the land was and is thus currently significantly overvalued by the Applicant and the County Assessor, and that its true diminution in value due to a CDP application denial might actually be quite small, it is also true that a court could see things completely differently in light of the relatively developed nature of the neighborhood, and the site's location directly between two other large houses. It

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<sup>32</sup> A reasonable person would likely have also checked in with the Coastal Commission regarding the developability of the property, were the information received would have informed their opinion of it. However, in this case, the Applicant did not contact the Commission prior to acquiring the property.

<sup>33</sup> Ranging from \$553,123 (1558 Strand Way), to \$955,087 (1590 Strand Way) for the 2023-2024 tax year (per DataTree First American September 24, 2024).

<sup>34</sup> See *Tahoe-Sierra Pres. Council, Inc., supra*, (citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)); and *Rith Energy v. United States* ((Fed.Cir. 2001) 270 F.3d 1347 (applying *Penn Central*, court finds that diminution of property's value by 91% not a taking)).

<sup>35</sup> Per DataTree by First American September 24, 2024.

<sup>36</sup> Current prices for 1460 and 1612 Strand Way are \$2,950,000 and \$2,995,000, respectively (see Zillow.com September 24, 2024).

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appears possible, if not likely, that a court would find the diminution in value to be significant enough to result in a takings under *Penn Central*.

#### Character of the Government Action

The final prong of the *Penn Central* test is the character of the government action. If the Commission were to deny the CDP application in this case for the reasons identified above, the Coastal Commission advances a legitimate public interest to regulate proposed development pursuant to the Coastal Act, which protects coastal resources and requires that new residential development completely avoid ESHA and ESHA impacts. With the Coastal Act, the Legislature sought to protect coastal resources while allowing for orderly future development, provided it was consistent with the Act. In denying a CDP for such a project, the Commission's action would not be arbitrary or capricious, rather it would be rooted in fundamental Coastal Act goals, objectives, and requirements, all of which advance legitimate public interests and coastal resource protections relevant to this site. In other words, the character of the Commission's action strongly argues against a taking.

#### ***Exceptions to Takings***

Finally, a regulatory action does not constitute a taking if the restrictions are inherent in the title of the affected property. In other words, if "background principles" of state real property law would have led to the same outcome as a government action, then, even if other factors might suggest a taking, there is no taking.<sup>37</sup> These background principles include a state's traditional authority to prevent public nuisances and include real property constraints that preclude the proposed development (e.g., easements and deed restrictions).

California Civil Code Section 3479 defines a nuisance as follows:

*Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.*

California Civil Code Section 3480 defines a public nuisance as follows:

*A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.*

As a threshold matter, the Commission is not aware of any deed restrictions, easements, or other recorded restrictions that would prohibit construction of a house on the property.

While the proposed house would not constitute a public health type of nuisance per se

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<sup>37</sup> See *Lucas*, supra, 505 U.S. at pp. 1028-1036.

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(such as might a chemical factory that emits toxic waste onto the beach), and while a house is not an obvious public nuisance as a general rule, the nature of the proposed development on a historic sand dune next to a popular public beach has some potential to create a public nuisance. As discussed above, the site is vulnerable to sea level rise and other coastal hazards over the life of the proposed development. Development of the site, therefore, could contribute to damage of surrounding areas, which includes the popular Pismo State Beach and Oceano Dunes areas, under certain circumstances. For example, it is possible that if the structures were damaged by a storm, then debris could make its way onto the beach and/or into the ocean. While this kind of impact might result in a public nuisance at some point, it would depend on a number of factors and cannot be concluded with certainty at this time. The project may also result in impacts to the public beach viewshed both in its construction and over its project life. This poses a direct impact to the specific area where the house is located as well as cumulative impacts to the area and the larger coast of which this site is a part.

The above definition of a public nuisance includes “anything which is...an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any...public park” “which affects at the same time an entire community...or any considerable number of persons...” The public dunes and beach fronting the site here are all part of a significant and popular State Park, and all of these types of impacts could obstruct and interfere with – and in fact diminish – customary beach access use and dune/beach values for all users of this popular State Park area, and use of the public trust more broadly, especially over time. As such, the impacts could arguably lead to a public nuisance were they to come to fruition, though at this time such a conclusion is speculative. Therefore, there are arguments on both sides as to whether a public nuisance would result from the proposal and as a result that is not a clear defense to a taking claim.

#### ***Takings Conclusion***

There is clearly evidence that would support both sides of an argument over whether a denial of a CDP for the proposed project would be a taking. On balance, the Commission finds that a court is more likely to conclude that denial of the proposed project would constitute a take than to conclude otherwise. Thus, the Commission determines that a denial could result in a taking, and that pursuant to Section 30100 of the Coastal Act it should approve a modified project to avoid this outcome.

#### **F. Allowable Project to Avoid a Taking**

The Commission finds that the project as proposed is inconsistent with the Coastal Act. In light of the evidence that denying the proposed project could constitute an unlawful taking of the Applicant’s property without just compensation, pursuant to Coastal Act Section 30010, the Commission determines that the Applicant is entitled to a reasonable economic use of the property. Having reached this conclusion, however, the Commission also finds that the Coastal Act only instructs the Commission to apply the applicable Coastal Act provisions in a manner that will avoid an unconstitutional taking of property. It does not authorize the Commission to otherwise suspend the operation of, or ignore, the provisions of the Coastal Act in acting on this CDP application. Thus,

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the Commission must still comply with the requirements of the Coastal Act by conditioning the project in a manner that is as consistent with the Coastal Act as much as possible, while avoiding an unconstitutional taking.<sup>38</sup> In other cases, this has been described as providing for a development that is the least inconsistent with applicable Coastal Act provisions and the most protective of coastal resources as possible, including providing for offsetting and commensurate mitigation for unavoidable coastal resource impacts, while providing for a reasonable economic use.

In this case, given the takings analysis above, the Commission believes that reasonable investment-backed expectations support approval of a residential use. In addition, Commission staff considered the surrounding residential development, which includes a wide range of home sizes, indicating that the Applicant has a reasonable expectation to construct the proposed residence in terms of its size and scale. That is, while an argument could be made that the home should be smaller and reduced to the minimum necessary to avoid a taking (e.g., a 500 or 1,000 square-foot home), the lot is already quite small at only 3,000 square feet, the residence is not abnormally sized for this neighborhood (the two homes adjacent to the site are 904 square feet and 3,040 square feet), and thus requiring such a material change in the proposed home's size and design does not appear in this particular case to be necessary to provide for any significant coastal resource benefit. Thus, Special Condition 1 approves the proposed project, and includes the Commission's typical suite of conditions to make sure the home fits in with the established aesthetic of the neighborhood, including in terms of placing utilities underground and using drought-tolerant landscaping that is appropriate for the dune environment. Special Condition 2 includes the Commission typical suite of best management practices to protect water quality and other coastal resources during construction, including ensuring that such construction and construction equipment remain on the Applicant's property and outside of adjacent dune areas and limits public access impacts.

As for dune ESHA mitigation, construction of the proposed project would result in the permanent disturbance of the roughly 3,000 square foot parcel. Employing the Commission's typical 3:1 mitigation ratio would result in an obligation to substantially restore about 9,000 square feet, or 0.21 acres, of dune as offsetting compensatory mitigation. Thus, the Applicant can satisfy this obligation in one of two ways: by proposing and carrying out a 0.21-acre dune restoration project, or through payment of an in-lieu fee commensurate with the cost to do so for another dune restoration project. Fortunately, just such a project is envisioned in the dunes that front the Strand Way residences, including working in conjunction with State Parks, the County, and property owners to create a comprehensive dune restoration and public access program. Special Condition 3 therefore provides for either option in terms of a 0.21-acre dune restoration project or the payment of an in-lieu fee with a preference that it be used for this fronting dune project. In either option, the intent is to ensure that the fee is to provide for off-site dune restoration resulting in high quality and self-functioning dune habitat, including, at

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<sup>38</sup> Applying conditions of approval that result in such project modifications does not constitute a regulatory taking, even if they cause some loss of value (see *Penn Central*, supra, 438 U.S. at p. 130 (finding claim "untenable" that interference with an undeveloped property interest, while viable economic uses continued, constituted a taking)).

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a minimum, appropriate dune restoration parameters, including invasive species removal, native plantings/seeding, and 5 years of annual monitoring and maintenance. As conditioned, the project appropriately avoids a regulatory taking and ensures adequate dune mitigation.

With respect to coastal hazards, as outlined above, the proposed project site is subject to coastal hazards due to its location directly adjacent to the ocean. The Applicant's geotechnical report concluded that the proposed residence has a low chance of being subject to coastal hazards up until the year 2123. At the same time, however, it is entirely possible that the development could be safe for longer or shorter than the Applicant's estimate, which is just a reality of developing within coastal dunes subject to coastal hazards, including in terms of the uncertainty that comes with analyzing the potential future effects of sea level rise. But importantly, that is the Applicants' choice here, and provided that they internalize and accept such risks, including by avoiding any future armoring when endangered by coastal hazards at some point as required by Coastal Act Section 30253, then the public won't be forced to bear the coastal resource impacts associated with the choice to develop in a location like this that will almost certainly be affected by coastal hazards at some point.

As such, this approval is also conditioned to include the Commission's typical coastal hazards response and adaptation requirements, including requiring the Applicant to waive liability and assume the risks of developing in a hazardous location, to prohibit armoring, to prohibit public trust encroachment, and to include removal, restoration and/or relocation triggers that are tied to criteria that will define when it is no longer appropriate to maintain the project in light of coastal hazards. These criteria include if there are unsafe conditions, where a government agency with jurisdiction has issued a final order, not overturned through any appeal or writ proceedings, determining that any portion of the approved development is unsafe for occupancy or use due to coastal hazards, and that there are no feasible measures that could make such portion of the development suitable for occupancy or use without the use of shoreline armoring. Removal criteria also include if essential services to the site can no longer feasibly be maintained and/or provided to the site due to coastal hazards; if any portion of the approved development falls onto the beach, and/or into the ocean; and/or if removal of some or all of the approved development is required pursuant to LCP provisions associated with sea level rise adaptation planning. See Special Conditions 4 and 5.

In addition, the proposed project represents a unique set of facts, including with respect to this approval being based on a potential taking and not based on Coastal Act consistency. Thus, this CDP includes important terms and conditions reflecting the set of facts as they apply to this approval, including the required conditions of approval. In order to ensure that the terms and conditions of this approval are clear to the Applicant as well as any future owners, this approval requires that the CDP terms and conditions be recorded as covenants, codes, and restrictions against use and enjoyment of the properties, and for them to be explicitly disclosed in all real estate transactions (see Special Conditions 6 and 10).

Further, the project may require authorizations from other entities that might be expected to exercise authorization authority here. These entities may have

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requirements that would change the project in various ways. Thus, this approval is conditioned for evidence of other entities' authorizations, and for the Executive Director to assess to what degree such changes might require amendments to this CDP. See Special Condition 7.

In addition, the Commission herein fully expects to review any future proposed development directly related to this project and/or project area, including to ensure continued compliance with the terms and conditions of this CDP through such future proposals, but also to ensure that any such future proposed development can be understood in those terms. Thus, any and all future proposed development at and/or directly related to this project, this project area, and/or this CDP shall require a new CDP or a CDP amendment that is processed through the Coastal Commission, unless the Executive Director determines a CDP or CDP amendment is not legally required. See Special Condition 8.

Although a great deal of thought and planning has gone into the proposed project, including as it is affected by CDP terms and conditions, oftentimes minor unforeseen issues present themselves in coastal zone projects, particularly as construction gets underway, and it is important that the CDP is nimble enough to account for potential minor changes. Thus, minor adjustments to special condition requirements that do not require a CDP amendment or a new CDP (as determined by the Executive Director) may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources (Special Condition 10).

As conditioned, the Commission concludes that approval of the development addresses dune and other coastal resources associated with the proposed project as much as possible if residential development must be approved here to avoid a taking. As conditioned, the Applicant could construct a home similar in size to nearby homes and one that provides a reasonable economic use of the property. Accordingly, the Commission finds that the project, as conditioned, is as consistent as possible with the Coastal Act while avoiding a taking.

#### **G. California Environmental Quality Act (CEQA)**

CEQA Section 21080.5(d)(2)(a) prohibits a proposed development from being approved if there are feasible alternatives and/or feasible mitigation measures available that would substantially lessen any significant adverse effect that the development may have on the environment. San Luis Obispo County, acting as the CEQA lead agency, determined that the proposed project was exempt from CEQA (Section 15303 Class 3) in October of 2023.

The Commission's review, analysis, and decision-making process for CDPs and CDP amendments has been certified by the Secretary of the Natural Resources Agency as being the functional equivalent of the environmental review required by CEQA (CCR Section 15251(C)). Accordingly, in fulfilling that review, this report has analyzed the relevant coastal resource issues with the proposal and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources. All above findings are incorporated herein in their entirety by reference.

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Accordingly, the Commission finds that only as modified and conditioned herein will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA. If so modified, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

## **5. APPENDICES**

### **A. Appendix A – Substantive File Documents<sup>39</sup>**

- CDP Application 3-23-0652

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

- San Luis Obispo County Planning and Building Department
- California Department of Parks and Recreation

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<sup>39</sup> These documents are available for review in the Commission's Central Coast District office.