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| Appeal Filed: | 12/2/2023 |
| 49 th Day: | Waived |
| Staff: | JKN - SF |
| Staff Report: | 1/19/2024 |
| Hearing Date: | 2/9/2024 |

STAFF REPORT SUBSTANTIAL ISSUE DETERMINATION

Appeal Number: **A-2-MAR-23-0048**

Applicant: Brian Johnson Trust et al

Appellants: Terence Carroll; Marisa Atamian-Sarafian and Stephen Sarafian

Local Government: Marin County

Local Decision: Coastal Development Permit Number P3049 approved on November 7, 2023 after Marin County Board of Supervisors denied an appeal of the Planning Commission's approval on August 28, 2023

Project Location: A 15,200 square-foot vacant dune lot at 21 Calle Del Onda, just seaward of Highway 1 and just inland of the beach, in the unincorporated Stinson Beach area of Marin County (APN 195-162-49)

Project Description: Construction of a new 1,296 square-foot and 20-foot tall single-family residence with septic system, permeable parking area, decks, landscaping, and related site improvements

Staff Recommendation: No Substantial Issue

IMPORTANT HEARING PROCEDURAL NOTE

Please note that this is a substantial issue hearing only, and testimony will be taken *only* on the question of whether the appeal raises a substantial issue. Such testimony is generally limited to three minutes total per side (although the Commission's Chair has the discretion to modify these time limits), so please plan your testimony accordingly. Only the Applicant, Appellant, persons who opposed the application before the local

government, the local government, and their proxies/representatives are allowed to testify during this substantial issue phase of the hearing. Other interested parties may submit comments in writing. If the Commission finds that the appeal raises a substantial issue, then the Commission takes jurisdiction over the underlying coastal development permit (CDP) application and will then review that application at a future Commission meeting, at which time all persons are invited to testify. If the Commission finds that the appeal does not raise a substantial issue, then the local government CDP decision stands, and is thus final and effective.

SUMMARY OF STAFF RECOMMENDATION

Marin County approved a CDP authorizing the construction of a new 1,296 square-foot single-family residence with a maximum height of 20 feet, associated septic system, and site improvements including a new permeable paver driveway, decks, and landscaping on a 15,200 square-foot vacant, legal parcel located in dunes at 21 Calle Del Onda in the unincorporated Stinson Beach area of Marin County. The parcel is zoned 'Coastal, Residential, Two-family' (C-R2) where detached single-family homes are a principally permitted use for the zone. The site faces the sandy beach at Stinson Beach and is surrounded on its other three sides by other residences and associated residential uses.

The Appellants contend that the County-approved project raises Marin County Local Coastal Program (LCP) conformance issues related to coastal dunes, environmentally sensitive habitat areas (ESHA), floodplain development, beach encroachment, septic systems, shoreline armoring, geotechnical evaluation, and public access, and further contend that a takings approval is inappropriate. Staff has evaluated the local record and the Appellants' contentions and believes that the Commission should find no substantial issue in this case, not because there are no LCP consistency issues, because there are, but rather because the County appropriately approved a project to avoid a taking in the manner allowed for by law and the LCP.

In terms of LCP requirements, the LCP: prohibits development in coastal dunes and ESHA, protects such habitat areas from degradation, identifies biological analyses requirements, and requires adequate habitat buffers and commensurate mitigation where impacts cannot be avoided; requires buffers from sandy beach areas, including through a stringline analysis of adjacent development; identifies septic requirements, including in terms of setbacks; prohibits shoreline armoring to protect new development; prohibits development in the 100-year floodplain; and, regarding potential takings claims, provides an analytical process by which to evaluate such potential claims and to allow for approval of projects with LCP inconsistencies if required to avoid a taking of private property provided such approval provides for the least environmentally damaging development feasible in that context.

In this case the County-approved project is located in dune areas considered ESHA, in the 100-year floodplain, and it includes shoreline armoring (inland of the home for the septic system). In other words, the project is inconsistent on many levels with the LCP, as the Appellants allege. At the same time the County determined that a denial for these reasons could lead to a takings, and that approval of a residential project modified to

limit coastal resource impacts and LCP inconsistencies as much as possible was appropriate in this case. Staff concurs, and the County worked with the Applicant to reduce the size and scope of the proposed development by about half, to locate it about 20 feet further inland, to prohibit armoring (and to instead require Applicant assume the risks and agree to future removal if threatened by coastal hazards), and to require mitigation for project impacts in the form of dune restoration and a lateral public access easement on the seaward/beach side of the property.

In short, the County approved a reduced scale project, based on site-specific technical and other analyses, intended to avoid a takings, and that appears appropriate in this case. To put it another way, although there are clearly LCP resource issues associated with the approved development, as the Appellants allege, the LCP also allows for approval of this type to avoid a takings, and in this case these issues do not rise to the level of a substantial issue. In fact, if the Commission were to find substantial issue and take jurisdiction over the CDP application here, it would be faced with the same issues and would likely end up with a similar type of approval. As a result, staff recommends that the Commission find that **no substantial issue** exists with respect to the LCP and the Coastal Act's public access provisions, and that the Commission decline to take jurisdiction over the CDP application for this project. The single motion and resolution to do so is found on page 5 below.

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EXHIBITS

- Exhibit 1 – Location Map
- Exhibit 2 – Site Photos
- Exhibit 3 – County-Approved Project Plans
- Exhibit 4 – Marin County Final Local CDP Action Notice
- Exhibit 5 – Appeals of County CDP Action
- Exhibit 6 – Coastal Commission Staff Comments (dated March 31, 2016; June 30, 2016; March 16, 2021; August 5, 2021; November 22, 2021; and February 3, 2023)

1. MOTION AND RESOLUTION

Staff recommends that the Commission determine that **no substantial issue** exists with respect to the grounds on which the appeal was filed. A finding of no substantial issue would mean that the Commission would not take jurisdiction over the underlying CDP application for the proposed project and would not conduct further hearings on this matter, and that the local government CDP decision would stand and would thus be final and effective. To implement this recommendation, staff recommends a **yes** vote on the following motion which, if passed, will result in a finding of no substantial issue and adoption of the following resolution and findings, and the local action will become final and effective. Failure of this motion will result in a substantial issue finding and a future de novo hearing on the CDP application. The motion passes only by affirmative vote of a majority of the Commissioners present.

Motion: *I move that the Commission determine that Appeal Number A-2-MAR-23-0048 raises **no substantial issue** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and I recommend a **yes** vote.*

Resolution for No Substantial Issue: *The Commission hereby finds that Appeal Number A-2-MAR-23-0048 presents no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Marin County Local Coastal Program and/or the public access and recreation policies of the Coastal Act.*

2. FINDINGS AND DECLARATIONS

A. Project Description and Location

The proposed project is located on a 15,200 square-foot vacant parcel (APN 195-162-49) in the dunes at 21 Calle Del Onda just seaward of Highway 1 in a residential neighborhood of about 100 other homes, immediately inland of Stinson Beach, near the southern end of Bolinas Lagoon, in unincorporated Marin County. Although the site is currently vacant, it was previously occupied by a single-family residence until it was destroyed by a fire in 1985. The site is immediately adjacent to and encompasses a portion of the sandy beach and natural dune formations of Stinson Beach. The site is surrounded by single-family residences on the three sides that do not front the beach, and access to the residence would be provided via Calle Del Onda, which is perpendicular to, and immediately seaward of Highway 1. The parcel is zoned 'Coastal, Residential, Two-family' (C-R2) where detached single-family homes are a principally permitted use. Minimum setbacks in the C-R2 zone are 25 feet from the front property line, 6 feet from side property lines (or 10 feet if on street side), and 20% of lot depth to 25 feet maximum from the rear property line. Height limits for the zone require development to be no taller than 25 feet and limit floor area ratio (FAR) to no more than 30% of the lot size. In addition, the residence is proposed to be located within the VE FEMA flood zone (i.e., coastal areas with a 1% or greater chance of flooding and an additional hazard associated with storm waves), and the septic system is proposed to be located within the AO FEMA flood zone (i.e., an area with 26% chance of flooding

over a 30-year period) and in the Easkoot Creek floodplain. See **Exhibit 1** for a location map and **Exhibit 2** for photographs of the site and surrounding area.

The County-approved project would allow for the construction of a one-story 1,296 square-foot single-family residence, new septic system, and associated site improvements to include a new permeable paver driveway, decks, and landscaping. See **Exhibit 3** for the County-approved project plans.

B. Marin County CDP Approval

As part of the County and the Coastal Commission's ongoing local development review coordination process, Commission staff provided comments to the County regarding the proposed project when it was being considered locally, expressing concerns regarding potential impacts to ESHA, including dune habitat; siting of development in an area subject to significant coastal hazards and in the designated Easkoot Creek 100-year floodplain (where development is not allowed); and the need for property-related information and alternatives analyses to support any findings that development may need to be allowed to avoid a potential takings of the Applicant's property (see **Exhibit 6** for staff comment letters dated March 31, 2016; June 30, 2016; March 16, 2021; August 5, 2021; November 22, 2021; and February 3, 2023). The County's final CDP approval ultimately addressed many of Commission staff's concerns and recommendations, including incorporating: a prohibition on any future shoreline armoring; requiring a recorded and executed waiver of liability (holding the County, other governmental agencies, and the public harmless) in relation to coastal hazards; a requirement to provide dune restoration and monitoring; a requirement to dedicate a lateral public beach access easement on the seaward side of the property; and a requirement to record a deed restriction against the property to provide additional notice about CDP requirements and associated coastal hazard risks, as well as to require removal of the development if it is deemed unsafe for occupancy or use due to coastal hazards and when there are no measures that could make the development safe for use (without the use of prohibited shoreline armoring), or in the event that coastal hazards eliminate access to the site. In addition, the scope of the project was reduced from two-stories to one-story, from 2,454 square-feet to 1,296 square-feet, and the proposed detached garage was eliminated, the deck area and footprint was reduced from 528 square-feet to 252 square-feet, and the setback of the residence from the beach side was increased by 19 feet.

Specifically, on August 28, 2023, the Marin County Planning Commission approved CDP P3049 authorizing the above-described reduced scale residential development subject to the above-described terms and conditions. That decision was appealed to the Marin County Board of Supervisors, and on November 7, 2023 the Board denied the appeal and upheld the Planning Commission's approval. The County's notice of this final County CDP decision was received in the Coastal Commission's North Central Coast District Office on Tuesday, November 14, 2023 (see **Exhibit 4**), and the Coastal Commission's ten-working day appeal period for this action began on Wednesday, November 15, 2023 and concluded at 5pm on November 30, 2023. The Commission received two valid appeals (discussed below and shown in **Exhibit 5**) during the appeal period.

C. Appeal Procedures

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

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

The Commission's consideration of appeals is a two-step process. The first step is determining whether the appeal raises a substantial issue that the Commission, in the exercise of its discretion, finds to be significant enough to warrant the Commission taking jurisdiction over the CDP application. This step is often referred to as the "substantial issue" phase of an appeal. The Commission is required to begin its hearing on an appeal and address at least the substantial issue question within 49 working days of the filing of the appeal unless the applicant has waived that requirement, in which case there is no deadline for Commission action. In this case, the Applicant waived the 49 working day requirement.

The Coastal Act and the Commission's implementing regulations are structured such that a substantial issue is presumed when the Commission acts on this question unless the Commission finds that an appeal does not raise a substantial issue, and the Commission considers a number of factors in making that determination.¹ At this stage,

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

the Commission may only consider contentions raised by the appeal. At the substantial issue hearing, staff will make a recommendation for the Commission to find either substantial issue or no substantial issue. If staff makes the former recommendation, the Commission will not take testimony at the hearing on the substantial issue recommendation unless at least three Commissioners request it, and, if no such full hearing is requested, a substantial issue is automatically found. If the Commission does take testimony at this first phase, it is generally (and at the discretion of the Commission Chair) limited to three minutes total per side, and only the Applicant, Appellant, persons who opposed the application before the local government, the local government, and their proxies/representatives are allowed to testify, while others may submit comments in writing.

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

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

D. Summary of Appeal Contentions

The Appellants contend that the County-approved project raises LCP conformance issues primarily related to coastal dunes, environmentally sensitive habitat areas (ESHA), floodplain development, beach encroachment, septic systems, shoreline armoring, geotechnical evaluation, public access, and takings analysis problems, specifically arguing that denial of the CDP would not constitute a constitutional taking. In addition, the Appellants contend that a full geotechnical study is required but not provided, that significant coastal resources are affected by the decision, that the approval sets a dire precedent for future interpretations of the LCP, and that the approval raises issues of regional and statewide significance.

Overall, the Appellants' contentions are many and varied and can be summarized in more detail as allegations that the approved development does not conform to LCP policies: that prohibit development within coastal dunes or that adversely affects dunes and beach areas; that only allow resource-dependent development in ESHA, that

raises only local issues, or those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well.

require a buffer between ESHA and adjacent development, that require avoidance of impacts to ESHA, and that require habitat mitigation for unavoidable impacts to ESHA when the proposed development is a permissible use in ESHA and when there is no feasible alternative that would avoid impacts to ESHA (as residential development is not a permissible use in ESHA and the County did not consider alternatives, and no mitigation plan was submitted as part of the CDP application); that protect dune habitat, (with one appeal contending that the conditioned restoration plan would not mitigate that damage, and the other contending that no such plan was ultimately included as a condition of approval of the CDP); that prohibits development in the 100-year Easkoot Creek floodplain (and that this violates the AO Flood Zone Moratorium); that allows use of a stringline for establishing beach setbacks (because it was improperly applied and thus impermissibly allows encroachment on the beach); that requires a sewage disposal system to be approved by the applicable authority prior to the approval of a CDP (alleging that the original Stinson Beach County Water District (SBCWD) permit expired, that the EIR for the SBCWD permit is stale and deficient); that the design of the proposed septic system includes a concrete retaining wall that should be considered a shoreline protective device and thus is inconsistent with the LCP to that end; that requires a geotechnical study beyond an initial feasibility study (and thus that there are multiple geotechnical risks that have not been addressed); that protect public access; and that allow for a takings analysis to approve LCP inconsistent projects (alleging that the County's takings analysis was fundamentally flawed and conducted without factual evidence that supports the assertion that the approved development is the minimum necessary or least environmentally damaging as at no time did it examine or consider any alternative to the proposal). Finally, the Appellants also contend that this CDP is the first in the County to use the certified LCP takings provisions as a basis for approval and thus would set a precedent for future redevelopment along Stinson Beach as it is based on a flawed and cursory takings evaluation, and the County's action on this CDP tips the balance of these statewide issues entirely towards property rights instead of protection of the public trust. See full appeal contentions in **Exhibit 5**.

E. Standard of Review

The standard of review for considering these appeal contentions is the certified Marin County LCP (which is made up of a certified Land Use Plan (LUP) and a certified Implementation Plan (IP)) and the public access policies of the Coastal Act (which include Coastal Act Sections 30210 through 30224).

F. Substantial Issue Determination

1. Habitat Resources

Applicable LCP Provisions

The LCP includes a series of provisions designed to protect coastal dunes and environmentally sensitive habitat area (ESHA), including provisions that strictly limit development in and near such areas, including as follows:

LUP Policy C-BIO-2 ESHA Protection.

- 1. Protect ESHAs against disruption of habitat values, and only allow uses within those areas that are dependent on those resources or otherwise specifically*

provided in C-BIO-14 (Wetlands), C-BIO-15 (Diking, Filling, Draining and Dredging) or C-BIO-23 (Coastal Streams and Riparian Vegetation). Disruption of habitat values includes when the physical habitat is significantly altered or when species diversity or the abundance or viability of species populations is reduced. The type of proposed development, the particulars of its design, and its location in relation to the habitat area, will affect the determination of disruption. ...

4. Development proposals within or adjacent to ESHA will be reviewed subject to a biological site assessment prepared by a qualified biologist hired by the County and paid for by the applicant. The purpose of the biological site assessment is to confirm the extent of the ESHA, document any site constraints and the presence of other sensitive biological resources, recommend buffers, development timing, mitigation measures including precise required setbacks, provide a site restoration program where necessary, and provide other information, analysis and modifications appropriate to protect the resource.

LUP Policy C-BIO-3 ESHA Buffers.

1. In areas adjacent to ESHAs and parks and recreation areas, site and design development to prevent impacts that would significantly degrade those areas, and to be compatible with the continued viability of those habitat and recreation areas. ...

3. Establish buffers for terrestrial ESHA to provide separation from development impacts. Maintain such buffers in a natural condition, allowing only those uses that will not significantly degrade the habitat. Buffers for terrestrial ESHA shall be 50 feet, a width that may be adjusted by the County as appropriate to protect the habitat value of the resource, but in no case shall be less than 25 feet. Such adjustment shall be made on the basis of a biological site assessment supported by evidence that includes but is not limited to: (a) Sensitivity of the ESHA to disturbance; (b) Habitat requirements of the ESHA, including the migratory patterns of affected species and tendency to return each season to the same nest site or breeding colony; (c) Topography of the site; (d) Movement of stormwater; (e) Permeability of the soils and depth to water table; (f) Vegetation present; (g) Unique site conditions; (h) Whether vegetative, natural topographic, or built features (e.g., roads, structures) provide a physical barrier between the proposed development and the ESHA; and (i) The likelihood of increased human activity and disturbance resulting from the project relative to existing development.

LUP Policy C-BIO-7 Coastal Dunes. *Prohibit development in coastal dunes to preserve dune formations, vegetation, and wildlife habitats. ...*

LUP Policy C-BIO-9 Stinson Beach Dune and Beach Areas. *Prohibit development that would adversely impact the natural sand dune formation and sandy beach habitat in the areas west of the paper street Mira Vista and the dry sand areas west of the Patios. Prohibit development west of Mira Vista, including erection of fences, signs, or other structures, to preserve the natural dune habitat values, vegetation and contours, as well as the natural sandy beach habitat. ...*

Site development of other shorefront lots within the Stinson Beach and Seadrift areas outside of the natural dune formations, consistent with LUP Policy C-BIO-7. ...

IP Section 22.56.130I.H.3 Dune Protection. *Development of shorefront lots within the Stinson Beach and Seadrift area shall assure preservation of the existing sand dune formations in order to protect environmentally sensitive dune habitat, vegetation and to maintain the natural protection from wave runup which such natural dunes provide. Where no dunes are evident, new development shall, to the maximum extent feasible, be set back behind the first line of terrestrial vegetation. Development approvals for new projects located along such shorefront parcels shall be accompanied by findings, including mitigation conditions, establishing the project's design and location, minimizing the need for shoreline protective works, protecting sandy beach habitat, providing a buffer area between public and private use areas, protecting the scenic and recreational character of the beach and maintaining the public rights of access to and use of beach dry sand areas. Permits authorizing repair and maintenance to existing shoreline structures shall to the extent feasible, provide for the above standards and objectives.*

IP Section 22.64.050.A.1(d) Habitat Mitigation. *New development shall be sited and designed to avoid impacts to ESHA. If proposed development is a permissible use in ESHA, but there is no feasible alternative, including the no project alternative, that can avoid significant impacts to ESHA, then the alternative that would result in the fewest or least significant impacts shall be selected. Residual adverse impacts to ESHA shall be fully mitigated, with priority given to on-site habitat mitigation. Off-site or fee-in-lieu habitat mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site or where off-site habitat mitigation is more protective in the context of a biological analysis prepared by a qualified scientist and approved by the County of Marin. Any determination that is infeasible to mitigate impacts onsite shall be supported by written findings. Mitigation shall not substitute for implementation of the project alternative that would avoid impacts to ESHA.*

Allowable habitat mitigation shall occur in accordance with the provisions of C-BIO-20 (Wetland Impact Mitigation) for wetlands and the findings of a site assessment and shall be provided at a minimum ratio of 2:1 for on-site mitigation, 3:1 for off-site mitigation or 4:1 for an in-lieu fee where applicable. In determining required mitigation, the acreage of habitat impacted shall be determined based on the size of the approved development area, road/driveway area, and required fuel modification on the project site, as well as required vegetation clearance and other disturbance, if any, on adjacent properties. Habitat mitigation may be required at an adjusted ratio or through other appropriate techniques as commensurate with the extent of habitat disruption, based on the specific requirements of the ESHA as determined through the site assessment.

LUP Policy C-BIO-8 Stringline Method of Preventing Beach Encroachment. *In a developed area where most lots are developed and where there are*

relatively few vacant lots, no part of a proposed new development (other than an allowable shoreline protective device), including decks, shall be built farther onto a beachfront than a line drawn between the most seaward portions of the adjacent structures. Enclosed living space in a new unit or addition shall not extend farther seaward than a second line drawn between the most seaward portions of the enclosed living space of the adjacent structures.

Analysis

As described above, the Appellants contend that the County approved development is inconsistent with LCP policies that prohibit development within ESHA and more specifically coastal dunes, that require a buffer between ESHA and adjacent development, and that require avoidance of impacts to ESHA and habitat mitigation for unavoidable impacts. The Appellants highlight that the County's multiple long-range planning documents identify dunes as important in adaptation planning and emphasize their protection, restoration, and augmentation; contend the approved development does not avoid impacts to ESHA as required by the LCP; and that the County did not consider any alternatives to the Applicant's proposed development. In addition, one of the appeals contends that the Applicant has not provided any measures to preserve the dunes; that the mitigation plan required by the County would not adequately account for the damage the development will result in, and that the plan should have been required as part of the submitted CDP application, rather than requiring it to be submitted as a condition of approval. Similarly, the other appeal contends the County discussed the requirement for a mitigation plan but that such a plan was not ultimately included as a condition of approval of the CDP.

The LCP has requirements regarding development in proximity or close association to ESHAs, including that ESHAs must be protected against disruption of habitat values; development in ESHA is limited to only uses dependent on it; development in or near ESHA is subject to biological site assessments, including with respect to appropriate buffers, mitigation measures, and site restoration programs. In addition, development near ESHA is required to be designed to prevent impacts and to establish appropriate buffers to protect the ESHA. With respect to dunes, the LCP establishes development is prohibited in dune areas, is prohibited if it would adversely impact dune formation, and all new development should assure preservation of dunes at Stinson Beach. Finally, if no feasible project alternative would avoid impacts to ESHA, then the design should be the least impactful alternative, with full mitigation required for impacts that cannot be avoided (a 2:1 ratio required for onsite mitigation, 3:1 for offsite, and at a 4:1 ratio for a payment of in lieu fees). Lastly, development is not allowed to encroach on the beach or seaward of the line drawn from seaward most positions of adjacent development (and for enclosed living areas, no encroachment is allowed past a second line established for adjacent enclosed living areas).

To help identify and address dune ESHA issues, the Applicant provided a Biological Site Assessment (dated October 2019, with a supplemental addition to it dated October 4, 2021, both prepared by WRA Environmental Consultants.) In addition, the County's Planning Commission and Board of Supervisors staff reports, along with the project's Initial Study/Mitigated Negative Declaration (completed in 2020) and the County's response to comments received on it (completed in 2023), and the project's

supplemental environmental review and Subsequent Mitigated Negative Declaration, all identify, evaluate, and acknowledge the presence of dune ESHA and the significant impact the development would have on this sensitive habitat. In short, and despite claims to the contrary, the County record is pretty clear that the County considered the site to be dune ESHA.

As to the impact to this dune ESHA resource, the Appellants allege the County misconstrued the degree of impact,² but the record suggest otherwise. In fact, based on the project's 2021 constraints map (from WRA's 2021 supplemental analysis), approximately 0.2-acre of the 0.36-acre site is sand beach/dune, and approximately 0.16-acre is iceplant mats. Given that the iceplant area is simply a degraded dune area, and dunes constitute ESHA under the LCP, the entire site is either sandy beach area (nearest the beach) or dune ESHA. Put another way, the LCP does not allow residential development in either area, and thus residential development is not allowed on the site by the LCP's dune, ESHA, and beach area provisions. In other words, the County appropriately determined the site to be undevelopable, and further determined that the LCP would require CDP denial, for these reasons. However, at the same time the County determined that a denial for these reasons could lead to a takings, and that approval of a residential project modified to limit coastal resource impacts and LCP inconsistencies as much as possible was allowed by the LCP and appropriate in this case (see takings finding for additional discussion).

Toward that end, the County worked with the Applicant to reduce the size and scope of the proposed development by about half, to locate it about 20 feet further inland,³ and to require dune restoration on-site to offset project dune impacts.⁴ The approved development is thus set back to the area where the site topography transitions to a more level area inland of the beach (see **Exhibit 3**). To conclude, although the project does not avoid impacts to coastal dunes and ESHA, the development approved by the County did minimize the ESHA/dune/beach impacts as feasible if a residential project

² For example, one of the appeals contends that approximately 1,573 square-feet of the 15,200 square-foot lot is comprised of dune ESHA, and that the project would destroy over 1,100 square-feet of such dunes. This appeal goes on to note that County found that over 3,500 square-feet of the lot is outside of ESHA where development could be potentially sited to prevent impacts from flooding, but that the Applicant did not submit a more current constraints map than what was provided in 2021, which didn't clearly demonstrate where the project could be further reduced to be outside the flood zones and without impact to ESHA.

³ Inland of a stringline between existing structures on the adjacent properties (28 Calle del Onda upcoast and 26 Calle del Sierra downcoast), as well as inland of a more landward stringline measuring the general development trend more generally (because the house at 28 Calle del Onda significantly extends out onto the sandy beach). Despite the Appellants allegations, such a stringline approach is allowed by the LCP and the resultant siting ensures that the home is not located on the sandy beach area.

⁴ Contrary to Appellant contentions, the County did in fact incorporate the requirement to submit a Dune Restoration Plan, consistent with LCP requirements, as one of the conditions of approval (see Condition 8). As required by the County, such plan is required prior to issuance of a building permit, and is required to include: an inventory of dune habitat onsite, identification of dune contours, ice plant removal, planting of native dune species, monitoring at three-, five-, and ten-year intervals from the date of initial native plant installation, and minimum performance standards of the restored dune areas requiring provisions for further action if monitoring conducted by a qualified biologist indicates that initial restoration has failed and would require establishment of a new monitoring timeline.

were to be accommodated to avoid a takings. In short, the County approved a reduced scale project, based on site-specific technical and other analyses, intended to avoid a takings, and that appears appropriate in this case. Put another way, although there are clearly LCP resource issues associated with the approved development, as the Appellants allege, the LCP also allows for approval of this type to avoid a takings, and in this case these issues do not rise to the level of a substantial issue. In fact, if the Commission were to find substantial issue and take jurisdiction over the CDP application here, it would be faced with the same issues and would likely end up with a similar type of approval.

2. Coastal Hazards

Applicable LCP Provisions

The LCP includes a series of provisions designed to address coastal hazards without a reliance on armoring, including provisions that strictly limit development in and designated floodplain areas, including as follows:

IP Section 22.56.130I.L.2 Floodplain Development. Coastal project permit applications adjacent to streams which periodically flood shall include a site plan that identifies the one hundred-year floodplain (as described by the Army Corps of Engineers). Development of permanent structures and other significant improvements shall not be permitted within the limits of the one hundred-year floodplain.

LUP Policy IV. 30. Public Services and New Development. Stinson Beach. ...Development shall not be permitted within the 100-year floodplain of Easkoot Creek and shall otherwise conform with LCP Policies on septic systems and stream protection.

IP Section 22.56.130I.K.2(a) Standards and requirements for shoreline protective works. Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline process shall be permitted only when: Required to serve coastal-dependent uses or to protect existing structures (constructed before adoption of the LCP).

IP Section 22.56.130I.L.1.b. Geologic Hazardous Areas. Prior to the issuance of a coastal development permit for projects located in areas depicted by the Unit I LCP geologic hazards maps, the owner (applicant) shall: Submit along with the permit application, a report from a registered civil or structural engineer briefly describing the extent of potential geologic hazards and those construction, siting and other recommended techniques to mitigate those possible geologic hazards.

...

IP Section 22.64.140.A.1(d) Adequate public services. The application for development utilizing a private sewage disposal system shall only be approved if the disposal system: (1) Is approved by the Environmental Health Services Division of the Community Development Agency or other applicable authorities.

...

Analysis

The Appellants contend the approved development is inconsistent with LCP policies related to allowable development in a 100 year floodplain; allowable armoring; allowable septic systems (including in relation to required sign offs from the County's Environmental Health Services Division (EHS) and/or the Stinson Beach County Water District (SBCWD));⁵ and encroachment onto beach areas. Further, one of the appeals contends that a full geotechnical study is required to supplement the geotechnical feasibility study prepared in 2021, that multiple coastal hazard risks on the site have not been addressed, and thus that the proposed development has not shown it would not need new armoring now or in the future.

With respect to these contentions and as applicable to this case, the LCP does not allow development in the 100-year floodplain of Easkoot Creek, requires that proposed septic systems be approved by County EHS and/or other applicable authorities (such as SBCWD in this case), does not allow armoring to protect new development such as this, and requires a report from a registered engineer that describes the hazards present and recommends measures for siting and design to mitigate the hazards present.

In terms of the floodplain allegations, the septic portion of the development on the inland side of the site is partially located in the Easkoot Creek 100-year floodplain and partially within the FEMA AO flood zone, and the house and associated residential development on the seaward side of the site are located in the VE flood zone, as previously described (see **Exhibit 3** for a graphic representation). Thus, the entirety of the site is located in flood plain areas where the LCP prohibits development, and even if different components were moved around on the site, it would still be inconsistent in the same ways. Such inconsistencies would require CDP denial. However, at the same time the County determined that a denial for these reasons could lead to a takings, and that approval of a residential project modified to limit coastal resource impacts and LCP inconsistencies as much as possible was allowed by the LCP and appropriate in this case (see takings finding for additional discussion and see also conclusion to this section below).

In terms of the septic system sign-off allegations, it is important to note that Stinson Beach lacks public sewage collection infrastructure/sewer services, and thus individual development must rely on individual septic systems for this function. Normally, SBCWD requires at least a 100-foot setback for dispersal fields from watercourses and waterbodies and a 50-foot setback for septic and sump tanks from watercourses and waterbodies (here, the Pacific Ocean), but allowed the dispersal field in this case to be setback 75 feet instead and the septic tank to be setback 46 feet instead, and the septic system is 350 feet from Easkoot Creek, where that system was located as far landward as possible and inland of the house. The septic system would be located on a raised

⁵ One of the appeals also contends that the CEQA analysis used for the SBCWD permit is stale and deficient because it is from 2019 and focused primarily on the proposed septic system instead of the overall residence, and as it didn't consider the January 2023 storms or the recent sea level rise studies conducted for Stinson Beach. However, contentions regarding CEQA compliance are not valid appeal contentions because per the Coastal Act, appeal contentions are limited to questions of LCP consistency and Coastal Act access and recreation consistency.

bed (which underlies the system below grade) surrounded by a short (3 to 6-inch tall) retaining wall intended to increase separation from seasonal high groundwater and potential wave runup and has been designed to accommodate the lowest wastewater design daily flow rate tier of 150 gallons per day. While the SBCWD approval was issued in 2020 and was valid at the time the Applicant resubmitted the CDP application for the proposed development in 2021, following two years of review of the CDP in question, the approval expired on July 18, 2023. However, the County's approval requires that the Applicant get reauthorization for the septic system through SBCWD, and there is no evidence to suggest that SBCWD would not do so. Thus, the project is conditioned for the required approval, and is consistent with the LCP requirement on this sign-off point.

At the same time, and more broadly, there are concerns about water quality problems associated with septic systems, which is not unique to this site in Stinson Beach. In fact, the Greater Farallones National Marine Sanctuary (GFNMS) commented on the project and noted concern regarding the proximity of the proposed septic system to sanctuary and ocean waters, and the potential for the impact of spilling/seeping sewage from the underground septic tank into sanctuary waters. To address such concerns as much as possible if residential development is approved, and according to SBCWD, the system was designed to avoid such impacts, including through the use of raised bed dispersal fields, an intermittent sand filter pretreatment unit, and the use of watertight tanks.⁶ In other words, although septic systems are not ideal in areas such as this due to their location near to sensitive water bodies and recreational areas, and although such concerns themselves could support denial of projects, the outcome here is allowable in a takings approval (see also takings finding and conclusion to this section below).

In terms of the septic system's retaining wall, although the County indicates that it is not intended to arrest shoreline erosion, bluff erosion, and/or coastal retreat, and thus would not act as a shoreline protection device, such conclusions differ from the wall's identified purpose in that regard. In fact, one of the identified purposes for the wall is to protect the septic system from potential wave runup, meaning it will function as a shoreline protection device. It is thus inconsistent with the LCP's coastal hazards policies that prohibit such devices in this case,⁷ which would suggest denial is appropriate if the subject armoring could not be eliminated. Again, in a takings approval (see also takings finding and conclusion to this section below), such inconsistency can be allowed if it is limited as much as possible. Here, SBCWD notes that this component is a key element in the resource protective features of the septic system, including given the system was allowed to be located closer to the ocean than is typically required. Further, and critically, the County required the Applicant to record a deed restriction prohibiting future shoreline armoring, and further requiring the removal of threatened structures on the site in the future as opposed to armoring them. With the residential development sited

⁶ In addition, SBCWD implements water tightness tests on systems within its jurisdiction to assure no leakage occurs.

⁷ One of the appeals also contends that the retaining wall poses a risk to fish or wildlife as demonstrated by the aforementioned GFNMS letter but does not further explain this allegation. If the appeal means risks from water quality changes, then that concern is covered by the above explanation. If the appeal means risks for other reasons, there is no evidence in the record to support this allegation.

closer to the ocean than the septic system, it is fair to presume that the house will be so threatened before the septic system, and thus removal of all development would be triggered, including the septic system and retaining wall.

Lastly, in terms of geotechnical requirements, the LCP requires that applicants provide a geologic hazards evaluation with CDP applications, describing potential hazards and options for mitigating those hazards. Here, the Applicant provided a “Coastal Engineering Analysis and Geotechnical Feasibility Study” (prepared by Noble Consultants, Inc. in 2016), and rereview of that study and further analysis/recommendations (by Noble from 2020), as well as a “Limited Preliminary Geotechnical Feasibility Study” (prepared by Murray Engineers Inc.) from 2021. These reports evaluate erosion, flood, and wave uprush hazards onsite, looking at the impact of estimated sea level rise on the proposed residence and septic system over a 50-year timeframe. Although the 2021 report does recommend a further design-level geotechnical investigation, it appears that the reports that were completed satisfy the LCP’s requirements for supporting reports of this nature.

As to the necessary response to coastal hazards, the 2021 report identifies that the development should be designed in accordance with current earthquake standards and design parameters, recommends relatively rigid shallow foundations as well as ground improvement or alternatively a deep foundation extending below liquefiable materials, notes that the owner must be willing to accept inherent risk of tsunamis and seiches given the site’s location, and states that the site may be susceptible to impact from sea level rise, storm damage, and associated swell events, and the County’s CDP incorporates these recommendations as requirements in the permit record. However, there is no evidence to demonstrate that the proposed development would not need shoreline protection in the future, and there is no estimated setback to meet LCP coastal hazard setback requirements (i.e., from the Coastal Act and the LCP that incorporates Coastal Act requirements, development in hazardous areas must be designed to be safe from coastal hazards). It is reasonably inferred from the 2021 report, however, that the site cannot be developed consistent with required coastal hazard setbacks, which represents another LCP inconsistency, that again can only be addressed in the takings context. In that exercise, the County conditioned the CDP to account for all the recommendations of the 2021 report, to prohibit shoreline armoring, to require the Applicant to assume risks and waive liability associated with the development on the site, and to require removal when threatened by coastal hazards. Put another way, the County’s actions require this Applicant to internalize and assume all risks for development at this site in light of the coastal hazards risks that it faces, and the public – and the beach – will not be forced to absorb burdens, especially from shoreline armoring, in relation to this approval.

In conclusion, the County-approved project is clearly inconsistent with LCP provisions prohibiting development in the 100-year floodplain, prohibiting shoreline armoring in this case, prohibiting development in required coastal hazard setback areas, and could potentially be inconsistent in terms of the potential for adverse impacts from the septic system. In addition, such inconsistencies cannot be cured by conditions of approval, which would suggest that the CDP be denied. However, at the same time the County determined that a denial for these reasons could lead to a takings and that approval of a

residential project modified to limit coastal resource impacts and LCP inconsistencies as much as possible was allowed by the LCP and appropriate in this case (see takings finding for additional discussion). Toward that end, the County worked with the Applicant to reduce the size and scope of the proposed development by about half, to locate it about 20 feet further inland, to prohibit any future shoreline armoring, to require future removal in the face of coastal hazards problems, and to ensure that the Applicant assumes all risks for developing at this site in spite of the known coastal hazard risks. Thus, although the project does not avoid floodplains, is not set back far enough to address coastal hazards, and includes armoring, the armoring serves a critical water quality function and can't be removed, and the County has done what it can to minimize coastal hazard concerns in a takings approval context. In short, the County approved a reduced scale project, based on site-specific technical and other analyses, intended to avoid a takings, and that appears appropriate in this case. Put another way, although there are clearly LCP coastal hazard issues associated with the approved development, including as the Appellants allege, the LCP also allows for approval of this type to avoid a takings, and in this case these issues do not rise to the level of a substantial issue. In fact, if the Commission were to find substantial issue and take jurisdiction over the CDP application here, it would be faced with the same issues and would likely end up with a similar type of approval.

3. Public Access

Applicable Coastal Act and LCP Provisions

Maximizing public recreational access opportunities is a fundamental objective of the Act, which also protects against impacts to existing public access. 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.*

Further, Coastal Act Section 30240(b) protects parks and recreation areas, such as the adjacent beach, while Section 30252 speaks to more broadly protecting and enhancing public access as it relates to circulation, stating:

30240(b). *Development in areas adjacent to environmentally sensitive habitat areas and 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 habitat and recreation areas.*

30252. *The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.*

The LCP echoes those Coastal Act provisions, and includes references specifically to Stinson Beach, which is a prime visitor destination. The LCP states:

C-PA-15 Impacts of New Development on Public Use of Coastal Accessways. *Site and design new development so as to avoid, if feasible, and, if unavoidable, to minimize impacts to users of public coastal access and recreation areas. Measures to mitigate impacts to users of public coastal access and recreation areas shall be implemented prior to or concurrent with construction of the approved development.*

C-PA-22 Protection Against Encroachments on Public Coastal Accessways and Offers to Dedicate Easements. *Seek assistance from the Coastal Commission or other entities as appropriate in order to enforce the terms of public access easements and/or offers to dedicate easements that have been blocked by private development.*

C-SB-6 R-2 Zoning. ...*Site and design development so as to minimize septic tank problems and the cumulative impacts of such development on public access.*

Analysis

The site is located immediately adjacent to Stinson Beach, a very popular visitor-serving recreational beach area for nearby residents and people from both the Bay Area and further inland. Most people access Stinson Beach by parking in one of three public parking lots located between Highway 1 and the beach, and via pedestrian access pathways from those lots. As laid out above, a project like this one in such close association to a highly used visitor-serving amenity like Stinson Beach, should not only protect existing access, but should also maximize public recreational access opportunities. Here, one of the appeals contends that public access impacts were not properly evaluated, and that the development adversely affects public access because the coastal hazards on the site were not properly addressed, the shoreline protection device for the septic system was improperly allowed, and the geotechnical risks were identified but not mitigated.

In this case, several things should be noted. First, as previously discussed, the reduced development scheme approved by the County assures the proposed development is set back by as much as feasible from the sandy beach area in a takings context, and such development would be sited in the area where the site topography transitions to a more level area inland of the beach. As a result, its siting protects existing beach areas as much as possible with a takings.

Second, as opposed to allowing a future reliance on armoring to protect the home in the face of hazards, future shoreline armoring is prohibited, and removal is required instead. Thus, such a provision allows for the sandy beach to migrate naturally as it normally would, helping to protect beach resources in this context as much as possible in an approval.

Third, and as voluntarily proposed by the Applicant and conditioned by the County, the Applicant is required to offer to dedicate a 40-foot wide (along the beach) by 80-foot long (perpendicular to the beach) public access easement across the most seaward portion of the property (see **Exhibit 3**), which helps to perfect public access rights to this 3,200 square-foot beach area.⁸ In addition, to the allegation that the septic system retaining wall requires the type of access and shoreline armoring mitigation that is familiar to the Commission, the wall is actually quite small, and its impacts would be expected to have little to no impact on erosion rates or sand dynamics given its low profile and, further, is located inland of the home which will be impacted by these forces first. In any case, any such remnant impacts are appropriately accounted for by the value provided by the required public access easement.

⁸ Bracketing that this area appears to have been used by the public as public beach for many years, and a prescriptive right of access may already have formed. That said, such prescriptive right can only be established by the courts, and thus there remains value in establishing a public access easement without a court case as is part of the County's approval.

Fourth, this project will not affect public access to the beach otherwise inasmuch as it will not alter established patterns of beach access via Calle Del Onda or via nearby public parking lots (the closest of which is located four blocks south of the site).

Thus, for the reasons above, the County's approval does not raise a substantial Coastal Act or LCP consistency issue related to public access.

4. Takings

Applicable LCP Provisions

Similar to the United States and California Constitutions, and the Coastal Act, the LCP does not allow for a takings of private property without just compensation. The LCP also provides a fairly detailed framework for evaluating such potential takings, and ultimately allows for approval of development that might be LCP inconsistent if necessary to avoid such takings, provided such approval provides for the least environmentally damaging development feasible in that context. The LCP states:

IP Policy Section 22.70.180 Potential Takings Evaluation. *If the application of the policies, standards or provisions of the Local Coastal Program to proposed development would potentially constitute a taking of private property, then a development that is not consistent with the LCP may be allowed on the property to avoid a taking, provided such development is as consistent as possible with all applicable policies and is the minimum amount of development necessary to avoid a taking as determined through a takings evaluation, including an evaluation of the materials required to be provided by the applicant as set forth below. ...*

A. Filing.... *(1) The date the applicant purchased or otherwise acquired the properties, and from whom; (2) The purchase price paid by the applicant for the properties; (3) The fair market value of the properties at the time the applicant acquired them, describing the basis upon which the fair market value is derived, including any appraisals done at the time; (4) The general plan, zoning or similar land use designations applicable to the properties at the time the applicant acquired them, as well as any changes to these designations that occurred after acquisition; (5) Any development restrictions or other restrictions on use, other than government regulatory restrictions described in subsection (4) above, that applied to the properties at the time the applicant acquired them, or which have been imposed after acquisition; (6) Any change in the size of the properties since the time the applicant acquired them, including a discussion of the nature of the change, the circumstances and the relevant dates; (7) A discussion of whether the applicant has sold or leased a portion of, or interest in, the properties since the time of purchase...; (8) Any title reports, litigation guarantees or similar documents in connection with all or a portion of the properties of which the applicant is aware; (9) Any offers to buy all or a portion of the properties which the applicant solicited or received...; (10) The applicant's costs associated with the ownership of the properties...; (11) ...any income generated by the use of all or a portion of the properties...; (12) Any additional information...*

B. Evaluation. *To evaluate whether application of the LCP would potentially*

result in a taking, an applicant shall provide information about coastal resources present on the properties and/or affected by the application sufficient to determine whether all of the properties, or which specific area of the properties, is subject to the restriction on development, so that the scope and nature of development that could be allowed on any portions of the properties that are not subject to the restriction can be determined. Based upon this analysis, the least environmentally damaging feasible alternative shall be identified. Impacts to coastal resources that cannot be avoided through the implementation of siting and design alternatives shall be mitigated to the maximum extent feasible, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to mitigate impacts on-site. Mitigation shall not substitute for implementation of the feasible project alternative that would avoid LCP inconsistencies, including adverse coastal resource impacts.

C. Supplemental Findings for Approval of Coastal Development Permit. ...

(1) Based on the information provided by the applicant, as well as any other relevant evidence, there is no potential development consistent with the LCP policies, standards and provisions that would avoid a taking of the applicant's property; (2) The use proposed by the applicant is consistent with the applicable zoning; (3) The use and project design, siting, and size are the minimum necessary to avoid a taking; (4) The project is the least environmentally damaging alternative and is consistent with all provisions of the certified LCP other than the provisions for which the exception(s) is (are) necessary to avoid a taking; (5) The development will not result in a public nuisance. If it would be a public nuisance, the development shall be denied.

Analysis

The Appellants allege that the County's takings analysis was cursory, lacked supporting evidence, and was overall fundamentally flawed, including because it did not support a finding that the approved development was the minimum necessary or least environmentally damaging, and including because it did not consider any alternatives to the proposed project. In addition, one of the appeals specifically contends there was no showing of the Applicant's reasonable investment-backed expectation, alleging that the applicant for the septic permit was different than the Applicant, and that the Applicant only had a contingent offer to purchase the property at that time, and further alleging that there was no attempt to value alternative outcomes with development outside of the flood zones, outside of ESHA, within the original building footprint, or as a resource dependent use, and because the LCP requirements alone do not constitute a taking.⁹

However, it is clear from the County's record that the County cited several facts, including the Applicant's acquisition history for the site (i.e., originally a partial

⁹ One appeal also contends that the County can't determine that the approved project was the least environmentally damaging alternative as a full CEQA analysis has not been conducted. However, not only did the County undertake CEQA analysis, but contentions regarding the County's compliance with CEQA are not valid appeal contentions because appeal contentions, per the Coastal Act, are limited to questions of LCP consistency and Coastal Act public access and recreation consistency.

inheritance in 1979, and then a buyout of other co-owners in 1990 and 2003),¹⁰ LCP requirements at the time the Applicant acquired the property, fair market value of the property at that time (estimated to be \$16,000 for the one-eighth share in 1979), and the history of proposals and associated County and Coastal Commission staff feedback on various attempts to develop the property. Bracketing the above-detailed LCP issues, the County-approved project provides for a modestly sized home on a vacant lot that previously was occupied by a home until 1985 (and that was destroyed by a fire at that time) that is zoned for residential use. While these facts need to be tempered by the LCP requirements applicable to the site that were applicable when the Applicant acquired it,¹¹ they are facts that support a conclusion that denial could constitute a takings. Further, the approved project was significantly reduced from the original proposal to account for the least amount of development that would give this Applicant an economic use commensurate with the Applicant's reasonable investment-backed expectation to develop here. Thus, the County, including through its LCP-derived authority to conduct such an analysis, concluded that the Applicant had a reasonable investment-backed expectation to build a home on the site. Although the Applicant acquired his initial partial interest in the property through inheritance, he increased his interest and investment in the property at various points in time and has further invested in the property through payment of both property taxes and development-related costs (the latter of which, at least, must be countenanced and understood as part of the reasonableness test). Although some of these costs could be dismissed as not reasonable in light of the LCP requirements applicable here, they too are facts that support the conclusion that denial could constitute a takings.

Thus, and based on that evidence, the County's conclusion that denial of a CDP for the proposed project based upon LCP inconsistencies could constitute a takings without just compensation is not inappropriate. In fact, there is no project that could occur at this site outside of ESHA or outside of the floodplain (see *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014). Under the rubric of a *Penn Central* regulatory takings analysis (which evaluates the nature of the government action, whether the government's action denies an owner's reasonable investment-backed expectations, and the diminution in value to the property caused by the government action), the County appears to have correctly determined that denial may have led to a viable takings claim. In brief, the County determined that there is no feasible location on the site that is not encumbered by flood zone limitations, coastal hazards, and presence of and proximity to coastal dunes and their associated buffer area; that the project has

¹⁰ The Applicant and 7 other entities acquired the property through inheritance. Subsequently, the Applicant bought out an additional one-eighth interest in 1990 for an estimated value of \$35,000, resulting in the Applicant holding a 25% interest in the property, and in 1997, the Applicant's wife quitclaimed her interest in the property to him. In 1997, the Applicant transferred 25% interest into the Brian Johnson trust. In 2003, the Applicant purchased an additional 25% interest from Yvette Trost for an estimated value of \$65,000. The Applicant holds a 50% interest in the property today.

¹¹ Note, too, that the LCP provisions in place at that time, while similar to those identified herein, were not all the same because the County substantially updated their LCP, that update was certified, and ultimately became effective in 2019. While not dispositive, this fact means that the LCP requirements actually changed as they applied to this site from before to after 2019 due to the update, some in fairly meaningful ways as they affect this site (e.g., updated and more detailed prescriptions for dune ESHA protections, specific takings evaluation requirements, etc.).

been reduced in size and scope from prior iterations of same; that any development anywhere on the site would be inconsistent with relevant LCP provisions; that the house itself would meet all height, yard setbacks, coverage and FAR requirements; that there is evidence that the Applicant had a reasonable basis to conclude that some residential development on the site would be allowable; and thus that denial of a reduced-scale project such as this could result in a potential takings.

For all of these reasons, the Commission finds that in this case the County's reliance on a takings analysis to approve the development does not raise a substantial issue of LCP consistency.

5. Substantial Issue Conclusion

When considering a project that has been appealed to it, the Commission must first determine whether the local government's decision on the project raises a substantial issue of LCP or Coastal Act public access policy conformity, such that the Commission should assert jurisdiction over the CDP application 'de novo' (i.e., completely reviewing the project for LCP and Coastal Act consistency) for such development. At this stage, the Commission has the discretion to find that the project does or does not raise a substantial issue of LCP, or Coastal Act public access, conformance. Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a significant issue: the degree of factual and legal support for the County's decision; the extent and scope of the development as approved or denied by the County; the significance of the coastal resources affected by the decision; the precedential value of the County's decision for future interpretations of its LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance. The Commission may, but need not, assign a particular weight to a factor, and may make a substantial issue determination for other reasons as well. In this case, the five factors, considered together, support a conclusion that the County's approval of a CDP for the proposed project does not raise a substantial issue of LCP conformance.

In terms of the degree of factual and legal support for the County's decision, the County reviewed a recent real estate appraisal for the property, 2018 deed of trust, tax records, and other materials provided by the Applicant in order to assess whether denying development of the property could result in a potential taking of private property without just compensation. In addition, the County also considered the findings and recommendations of both a biological site assessment particular to the ESHA resources onsite as well as engineering/geotechnical feasibility studies prepared for the project, and used that information to craft its approval, including incorporating several measures to address habitat and hazard concerns via conditions of approval. To be clear, the County identified resource impacts associated with the proposed project that would be inconsistent with the LCP and sought to minimize such impacts while avoiding a takings in its approval. In other words, the County conducted a proper analysis to assess coastal resources present and worked with the Applicant to minimize impacts to coastal resources by as much as possible through reductions in size and scope of the design as well as required conditions of approval to account for those coastal resource impacts. The result is a house of similar in size and setback to those nearby while avoiding LCP

inconsistencies as much as possible in a takings context. The first factor does not weigh in favor of a finding of substantial issue.

With respect to extent and scope of the County-approved development and the significance of affected coastal resources, while the resultant approved project appears to be the minimum necessary to avoid a taking, the significance of the coastal resources impacted by that development should not be minimized. In particular, dune ESHA is severely constrained along the California coast, and it is constantly under threat by development, such as this. Here, this is a good example where a development project leads to a loss of dune ESHA. Yes, the County has required mitigation for such impact, but it is both emblematic and troubling that such resource is still being lost to development at this stage in the Coastal Management Program. In sum, while the extent and scope are relatively small, the coastal resources impacted by the project are undeniably significant. So, while the second factor suggests no substantial issue, it is tempered by the fact that the third factor weighs more towards substantial issue than not.

With regard to the fourth factor (i.e., the potential to set an adverse precedent for future interpretations of the LCP), it should first be noted that any one case, like this one, is decided on its specific facts and its specific merits and is not entirely dispositive on how the Commission decides on a subsequent item. At the same time, there is always the potential that the County (and/or potential future applicants) might see the County's action here as precedential. In fact, the Appellant contends that this CDP is the first in Marin County to use the takings provision as the basis for its approval (it is not; see for example the Groneman/Sibley SFD approved under a takings just last year), that the approval is based on a flawed and cursory takings evaluation (it is not; see preceding discussions), and that it would set a precedent for Stinson Beach development and/or any site constrained by the presence of ESHA. The reality, however, is that it is not this decision that is setting any precedence, rather it is simply implementing the LCP in the ways it is structured on this point, including to implement Federal and State Constitutions and the Coastal Act as it relates to potential takings of private property without just compensation. To suggest that this decision is now somehow a 'cookie cutter' that others can simply apply is to misunderstand the case-specific nature of CDP decisions in general and takings cases specifically. The fourth factor does not weigh in favor of a substantial issue finding.

Finally, as to the fifth factor, the County-approved project does indeed raise issues of regional and statewide significance associated with dune ESHA and development in an area that is subject to coastal hazard risks, and how best to address such development while also protecting coastal resources, including beaches and ESHA. The fifth factor weighs towards finding substantial issue.

So, while the resources involved when taken together could argue for a substantial issue finding, the fact that the County appropriately protected them through its conditions of approval and the reductions in size and scope of the project along with increased setbacks supports a finding of no substantial issue.

In sum, while some of the five factors do not necessarily suggest a no substantial issue conclusion, taken together they do point towards a finding of no substantial issue. Ultimately, because it appears that the LCP's takings override is applicable and appropriately applied in this case, it is unlikely that a Commission finding of substantial issue, and a subsequent Commission *de novo* review of the project, would result in a significantly different outcome to the County's decision from a coastal resource perspective. With that in mind it is also important to note that while the five factors listed in Section 13115(c) of the Commission regulations are important and used frequently by the Commission, they are not an exhaustive list and the Commission is not "limited" to using those factors. On the contrary, and as stated above, the Commission may use the five factors – and any weighting between them that it deems appropriate – but also may make a substantial issue determination for other reasons as well. In this situation, particularly given the takings context and the fact that the County worked with the Applicant to reduce the size and scope of the proposed development by about half, to locate it about 20 feet further inland, to prohibit armoring (and to instead require Applicant assumption of risks and future removal if threatened by coastal hazards), and to require mitigation for project impacts in the form of dune restoration and a lateral public access easement on the seaward/beach side of the property, and especially when the Commission's review would most likely lead to a similar type of approval, the record suggests that the correct determination is no substantial issue.

As such and for the reasons stated above, the Commission finds that Appeal Number A-2-MAR-23-0048 does not present a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act, and the Commission declines to take jurisdiction over the CDP application for this project.

3. APPENDICES

A. Substantive File Documents¹²

- Marin County CDP File P3049

B. Staff Contacts with Agencies and Groups

- Marin County Community Development Agency

¹² These documents are available for review from the Commission's North Central Coast District office.