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Th12a

Prepared June 12, 2024, for June 13, 2024 Hearing

To: Commissioners and Interested Persons
From: Stephanie Rexing, North Central Coast District Manager
Isobel Cooper, Coastal Planner
Subject: **STAFF REPORT ADDENDUM for Th12a**
Application Number A-2-SMC-11-041-EDD (Hodge)

In the time since the staff report for this item was published (on May 23, 2024), the Commission has received multiple communications from the Applicants' representative, Peter Prows, including a letter dated May 23, 2024 and an email dated June 7, 2024. In these communications, Mr. Prows raises a number of concerns with the amendment application review process and the staff recommendation, and he has characterized the weakening amendment appeal for the Applicants' proposed detached ADU as a housing issue. While staff recognizes the critical need for housing in the coastal zone, and in fact is very supportive of housing projects that comply with Coastal Act, LCP and coastal development permit (CDP) requirements, the issue being considered in the case of the Applicants' amendment application is exclusively concerned with habitat protection and compliance with prior CDP conditions, not housing. Furthermore, Mr. Prows' communications refer to both a proposed detached ADU, which is the subject of the Applicants' amendment application and analyzed in the staff report, as well as a proposed attached ADU that his clients might instead pursue. Staff have informed the Applicants and Mr. Prows that a proposed attached ADU at the Applicants' property would also require submittal of a CDP amendment application to the Commission, and that it would also raise the same weakening amendment problems as does the proposed detached ADU (because essentially everything outside of the house footprint is a deed restricted habitat protection area required to be restored, and even an attached ADU would encroach on this area). In any event, no such attached ADU application has been submitted to the Commission, and such a scenario is not discussed further herein.

Mr. Prows' communications assert that the Commission's original 2013 CDP determination was incorrectly based on the assumption that the grading, vegetation removal, and fill that destroyed riparian and wetland habitats at the Applicants' property was unpermitted; that the Commission has applied the incorrect legal standard and procedures to the amendment application; that the Commission has not complied with the requirements of the Permit Streamlining Act; that staff's request to the Applicants to confirm that the 2013 CDP was exercised prior to its expiration is "First Amendment

retaliation”; that all violations detailed in the staff report have been addressed; and that the Executive Director has not responded to his requests to meet. The primary purpose of this addendum is to respond to such assertions and to add a ‘response to comments’ section of the staff report. This addendum also addresses a typo on page 4 of the report, where the word “wrong” is mistakenly highlighted in yellow, and in footnote 15 where a County staff report is mistakenly dated as 2020 instead of 2010. Please note that this addendum does not modify the base staff recommendation, which continues to be a recommendation that the Commission concur with the Executive Director’s determination to reject the CDP amendment application, as was required by the Commission’s regulations.

The following changes are made to the staff report published on May 23, 2024 (where text in underline format denotes text that would be added, and text shown in ~~strikeout~~ format denotes text that would be deleted):

1. Delete footnote 3 on page 3 of the staff report and renumber all subsequent footnotes accordingly:

~~³Based on information currently available to staff, it appears that the CDP actually expired before it was exercised, which, if accurate, would mean that the residence and all related development at this site is unpermitted, and that there is no unexpired CDP to even amend. The Commission’s enforcement unit is investigating the matter.~~

2. Remove yellow highlight from the word “wrong” near the bottom of page 4 of the staff report.

3. Correct the year listed in footnote 15 on page 13 of the staff report from 2020 to 2010:

¹⁵ Per a ~~2020~~ 2010 supplemental staff report produced by County Planning staff, County Parks and Recreation Department staff confirmed that the Applicants’ property and an adjacent parcel were used for staging during construction activities for the Mirada Surf trail project, but that the agreement to use the site for staging was made between Mr. Hodge and the project contractor unbeknownst to, and unauthorized by, County staff.

4. Add a “Response to Comments” Section

Staff modifies the staff recommendation to add the following response to comments section just prior to the report’s “Conclusion” section on page 16 (as new subsection G, thus renumbering the staff report’s “Conclusion” section as section H) as follows:

G. Response to Comments

In the time since the staff report for this item was published (on May 23, 2024), the Commission has received multiple communications from the Applicants’ representative, Peter Prows, including a letter dated May 23, 2024 and an email dated June 7, 2024. Mr. Prows’ communications assert that Commission’s original 2013 CDP determination was incorrectly based on the assumption that the grading, vegetation removal, and fill that destroyed riparian and wetland habitats at the Applicants’ property was unpermitted; that the Commission has applied the incorrect legal standard and procedures to the amendment application; that the Commission has not complied with the requirements of the Permit Streamlining Act; that Commission staff’s request to the

Applicants to confirm that the 2013 CDP was exercised prior to its expiration is “First Amendment retaliation”; that all violations detailed in the staff report have been addressed; and that the Executive Director has not responded to his requests to meet. The following provides responses to the Applicants’ allegations.

Legal Status of Wetland Fill

The Applicants’ representative again asserts that the grading, stockpiling, vegetation removal, and fill that resulted in the destruction of riparian and wetland areas at the Applicants’ property was properly permitted under a 2005 County-issued CDP for the Mirada Surf trail project. As detailed in this report, that 2005 County CDP file acknowledged the presence of wetland areas in and around the trail extension project site and included a series of measures to prevent any potential impacts to them. In fact, that trail project was not even located on the Applicants’ property, and the CDP did not authorize development on the Applicants’ property at all, let alone habitat destruction. In addition, the County staff report and supporting materials for that trail CDP specify that the trail project would not result in any direct impacts to any habitat areas. Thus, the Commission was correct in its assertion that the grading, vegetation removal and fill which resulted in habitat destruction was unpermitted, and was thus also correct in applying the pre-violation baseline as the legally established baseline for considering the Applicants’ proposed house at that time.

Legal Standard for Processing and Analyzing CDP Amendment Applications

Mr. Prows asserts as follows: that the Commission has incorrectly applied Title 14 California Code of Regulations (CCR) Section 13166(a), arguing that that regulation is not found in San Mateo County’s LCP; that CDP amendment applications should instead be evaluated against the LCP’s CDP amendment standards; that, by this logic, the Permit Streamlining Act (PSA) applies to the current application; that the Commission has not complied with any such PSA timing requirements, including the 30-day deadline to evaluate the completeness of an application; and that the CDP amendment application should be deemed complete for these reasons. These assertions are all incorrect. The Commission’s regulations explicitly provide the requisite procedures for evaluating amendments to Commission-issued CDPs, and that legal standard in the first case is 14 CCR Section 13166. Thus, the Commission is correct in applying Section 13166(a) to the amendment application, the Executive Director is correct in properly rejecting the CDP amendment application (as is required by 14 CCR Section 13166 in this case), and because that application was rejected, there is no valid application to which the PSA might apply.

In this case, the Applicants appear to suggest that because the CDP application was originally approved by the County, and then appealed to the Commission, with the Commission eventually approving a CDP, that this somehow suggests that the County’s regulations for amendments would apply. However, that is not correct. Once the Commission takes jurisdiction over the CDP application on appeal, as it did in finding the County’s original CDP action raised a substantial issue, it then reviews that CDP application de novo, and the Commission action takes the place of and completely nullifies the local government’s CDP. The standard of review in such a case is whether

“the proposed development is in conformity with the certified local coastal program”.¹ In other words, the substantive standard of review for that application is whether the proposed development conforms with the LCP. However, there is nothing in the Coastal Act or the Commission’s regulations that would suggest that the Commission’s de novo CDP is subsequently subject to the *procedures* in the LCP. In fact, 14 CCR Section 13166(c) states that the standard of review for an amendment to a CDP is whether the development, as amended, conforms with Chapter 3 "or with a certified local coastal program if applicable," which makes clear that the regulations are intended to also apply post-LCP certification, rather than having the LCP's procedural provisions govern. Put another way, the substantive standard of review for development in proposed in CDP and CDP amendment applications in areas with certified LCPs is the LCP, but when the Commission reviews the proposed development de novo, the LCP does not take the place of the Commission’s regulations, including the specific provisions related to amendments to Commission CDPs.

What’s more, beyond the Commission’s clear regulations, it does not make logical sense that procedural components of an LCP would apply to amending the Commission’s own CDP. Different LCPs can have different procedural, noticing, and filing requirements; different deadlines; and different decision making bodies – none of which would make sense to apply to the Commission’s CDP actions, and would perhaps result in dozens of different procedures for amendments to Commission CDPs. In this case, the Commission is the correct entity to process the CDP amendment application, as the Applicants are seeking to place a detached ADU in an area that was required to be restored and is encumbered by a Commission-imposed deed restriction. Therefore, the Commission’s own CDP amendment regulations apply. Here, the Applicants submitted an amendment application pursuant to the Commission’s regulations and the Executive Director determined that the proposed amendment was a weakening amendment, as explained in the preceding findings.

CDP Expiration, Exercise, and Concerns of Retaliation by Commission Staff

In a May 16, 2024 letter to Mr. Prows, Commission staff requested confirmation that the 2013 CDP was exercised by the Applicants prior to its expiration on December 11, 2015. This request was made because staff, in its exercise of due diligence in evaluating the Applicants’ various claims in relation to their amendment application, became aware that it appeared that construction of the subject residence had not commenced until after the CDP’s expiration date. Absent any other development taking place under the CDP prior to that expiration, the CDP would have expired, and then the house would be unpermitted. In fact, at the time that the staff report was published, Commission staff were only aware that the County had issued a building permit for the Applicants’ single-family home in 2016, several months after the CDP’s December 2015 expiration date. In Mr. Prows’ May 23, 2024 letter, he provided satisfactory evidence that the 2013 CDP was exercised prior to its expiration date,² and thus staff concurred

¹ See *Kaczorowski v. Mendocino County Board of Supervisors* (2001) 88 Cal.App.4th 564, 569, and California Public Resources Code Section 30604(b).

² Specifically, Mr. Prows submitted evidence of soil borings in the vicinity of the house footprint undertaken by the Applicants prior to CDP expiration. While such borings were not required by the Commission’s CDP approval, nor were they evaluated or discussed as part of the Commission’s review of

with Mr. Prows that the 2013 CDP was properly exercised, and the original footnote asserting that the CDP may not be vested (originally on page 3 of the this report) was removed via a staff report addendum.

However, in providing such information, Mr. Prows also alleged that Commission staff asking for such evidence that the CDP was exercised amounts to improper retaliation against the Applicants for applying for a CDP amendment in the first place. As part of that claim, Mr. Prows asserted that the Commission is attempting to cover for an error in its original 2013 CDP, and that the request for such information, as well as the Commission's claims of existing violations at the property (also discussed further below) are retaliatory in nature. The Applicants also claim that they have "made clear" their intentions to produce a film publicizing Commission staff's supposed mistakes in processing the original CDP, implying that the Commission is retaliating against them for doing so. None of these allegations are true.

With respect to staff's request for information regarding whether the CDP had been properly exercised, this is nothing more than a proper request for such information when confronted with evidence that would suggest that the CDP actually expired and that the house itself was not permitted, and part of staff's responsibilities to implement the Coastal Act and its permitting requirements. Staff is now convinced that the CDP was actually exercised prior to expiration, which fortunately avoids significant complications that would have arisen had the CDP expired. To suggest that the request for information regarding when the CDP was exercised was somehow meant to be punitive and 'retaliatory' is simply unfounded.

Similarly, allegations of retaliation related to identification of violations at the Applicants' property are without justification. First of all, such violations are not being addressed in the action before the Commission today, and the recommendation by staff is not in any way based on the existence of the violations; rather it is based on the existence and analysis of the CDP and its terms and conditions, as well as Coastal Act/LCP requirements that are directly and specifically applicable to the proposal at hand.

However, since the issue of the violations was raised by the Applicants, and assertions have been made with regard to the fact that such information was discovered by Commission staff and questions were raised regarding the genesis of additional information that has come to light, we will briefly address the issue here. Specifically, staff's evaluation of the Applicants' amendment application necessitated taking a close look at the underlying CDP as well as the Applicants' compliance with it. That is a very normal part of CDP amendment application review, and it was no different here. In looking into such CDP compliance questions it became apparent that there appeared to be a significant lack of compliance with and/or violations of multiple CDP terms and conditions, as well as potential development without Coastal Act authorization, including all of the following without Coastal Act authorization: a fenced in yard area filled with

the CDP application, and while the Commission had no prior knowledge that such borings took place until being informed by Mr. Prows in his May 23, 2024 letter, such borings constitute development reasonably inferred to be a normal part of building a house, and can be considered sufficient evidence to determine that activity exercised the CDP before it expired.

ornamental plants and what appear to be concrete patios within the restricted habitat restoration area; conversion of the garage to living space; additional vegetation clearance within the restricted habitat restoration area; failure to adhere to the required habitat restoration plan; and failure to comply with the required landscape screening plan (which required the house to be screened from public views as seen from the nearby public trail and from Highway 1, but the house is actually quite visible in such views).³ These were all discovered during analysis of the CDP amendment application since, prior to that time, staff had not evaluated the full extent to which the CDP conditions had been complied with, nor did staff have any reason to have done so.

In general, CDPs are issued based on the agreement of the applicants to comply with the included terms and conditions, and staff presumes that parties will comply with the terms and conditions of their CDPs as required. As the *Feduniak* case made clear, the Commission has no “statutory duty to inspect all properties for compliance with conditions after a permit has been issued, let alone a duty to do so on an ongoing basis for as long as the permit is applicable.”⁴ In fact, “given the practical considerations involved in inspecting property and enforcing easement and permit conditions and given budgetary limitations on, and inherently discretionary nature of, allocation of administrative resources for those purposes”,⁵ staff simply cannot know of every violation at all times. This is precisely what occurred in this instance, where staff were unaware of almost all of these potential violations until the Applicants applied for the CDP amendment, and resources were allocated to reviewing that amendment, and staff discovered the potential violations. It is quite common that staff discovers violations while doing a CDP or CDP amendment application review, and one only need look at past Commission agendas to see as much. Again, these issues and any potential violations of the Coastal Act are not before the Commission today and are not the basis for staff’s recommendation. In fact, any action based on these potential violations will be considered separately, and they are not the legal basis for this proceeding. It is not retaliatory for an agency to perform its duties and enforce its own laws. Mr. Prows and the Applicants are inventing a narrative of retaliation that simply does not exist.

Finally, as to claims of retaliation because the Applicants are apparently making a film about the difficulties of developing in the coastal zone, Commission staff were not aware of the Applicants’ intention to make any film prior to Mr. Prows stating as much in his May 23, 2024 letter. As such, Commission staff actions had nothing to do with any

³ As stated above, these matters have been referred to the Commission’s enforcement division for further action. On this point it is noted that Mr. Prows asserts in his recent correspondence that all such violations have been addressed, suggesting that a meeting with Commission enforcement staff on August 29, 2023 was sufficient to do so in this case. It was not. Mr. Prows seems to suggest that since enforcement staff has not formally required anything of the Applicants to date to resolve these violations, then the violations must be considered resolved. The reality is that Commission enforcement staff have a large case load of violations up and down the state with which to deal, and a violator cannot presume that a lack of formal enforcement staff communication means that the violations have been resolved. They have not. Commission staff have not received any evidence to suggest that these violations have been addressed (as is readily apparent by recent photographs of the home and property – see Exhibit 2). All violations detailed in this report remain unresolved and the violation case remains open.

⁴ See *Feduniak v. California Coastal Commn.*, 148 Cal.App.4th 1346, 1363.

⁵ *Id.* at 1364.

such film – nor could they because staff did not know it existed. Since hearing of the film, Commission staff bear no ill will for a movie they've never seen nor know anything about beyond a few brief statements by Mr. Prows. In sum, the Applicants 'retaliation' allegations are simply baseless.

Communications with the Executive Director

Mr. Prows claims that the Executive Director has not responded to his requests to meet. While this may be true, it is also true that the Executive Director is often directly contacted by applicants and others asking for her to meet, and she must triage such inputs on a daily basis, and the Executive Director often delegates detailed case work to her staff. In fact, the Executive Director is extremely busy looking after the whole of the state's coastal zone, with responsibilities that overburden her ability to be involved at a micro level in each case, and she generally allocates day-to-day responsibility for addressing CDP issues like this to her staff, where that staff are assigned to and responsible for working with applicants in cases like this. Of course, if she is needed, whether in her estimation or in the estimation of staff working on any particular item, then she can allocate the time to become more directly involved, such as in meeting with applicants. Here, this is actually a fairly straightforward case, and although staff have kept the Executive Director apprised as it has developed, and she has made the various decisions on it that are hers alone to make, staff did not believe that there was – or is – a need for the Executive Director to become involved in the way requested by the Applicants. However, that is not to say that Commission staff has not met and worked directly with these Applicants on a regular basis, because they have. In fact, Commission staff have been responsive and in regular communication with the Applicants and Mr. Prows ever since the CDP amendment application was submitted in December 2023.