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Staff: Isobel Cooper - SF  
Staff Report: 5/23/2024  
Hearing Date: 6/13/2024

## STAFF REPORT WEAKENING AMENDMENT APPEAL

- Application Number:** A-2-SMC-11-041-A1-EDD
- Applicants:** David and Hi-Jin Hodge
- Project Location:** “U”-shaped quarter-acre parcel primarily made up of wetland and riparian habitats located immediately seaward of Highway 1, between Magellan Avenue and the County’s Mirada Surf open space recreational area, and adjacent to an unnamed stream and the Mirada Surf public recreational trail, in the unincorporated Miramar area of San Mateo County (APN 048-016-010).
- CDP-Approved Project:** Construction of a 2,081 square-foot single-family residence with an integral 2-car garage on a 10,802 square-foot parcel, with essentially everything outside of the residence footprint required to be restored as wetland/riparian habitat (to partially offset unpermitted wetland/riparian destruction on the site that preceded the CDP application) also capable of screening the approved residence from public views (e.g., from Highway 1 and the adjacent Mirada Surf public recreational trail), and with all such required habitat restoration area deed restricted against any future development other than habitat, landscaping, stormwater and erosion control related development. The LCP required denial because most of the site constituted protected wetland/riparian habitat, where LCP requirements would preclude development, but the Commission approved the residence in such habitat to avoid a constitutional takings, where the house was conditioned as stated above, and essentially the remainder of the site was required to be restored and protected as open space and habitat.

**Proposed Amendment:** Construct a new 795 square-foot and one-story/23-foot-tall detached accessory dwelling unit (ADU) between the residence and Highway 1 in the required wetland/riparian habitat restoration and deed restricted area.

**ED's Determination:** The Executive Director determined that the proposed amendment would lessen and avoid the intended effect of the original CDP terms and conditions, particularly by placing additional residential development in a deed restricted and required to be restored habitat area (often referred to as a "weakening" amendment).

**Applicants' Appeal:** The Applicants dispute the Executive Director's weakening amendment determination, and appeal to the Commission to overturn it.

**Staff Recommendation:** Concur with the Executive Director's Determination

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### SUMMARY OF STAFF RECOMMENDATION

In 2013, CDP A-2-SMC-11-041 authorized David and Hi-Jin Hodge (the Applicants for both that project and the now proposed amendment) to develop a 2,081 square foot single-family residence, inclusive of an integrated 2-car garage, on Magellan Avenue in the unincorporated community of Miramar in San Mateo County. The site borders an unnamed stream on its upcoast side adjacent to the County's Mirada Surf open space recreational area and is mostly made up of riparian and wetland habitats. In its 2013 CDP determination, the Commission found that unpermitted grading, vegetation removal, and fill prior to consideration of the application for the residence had resulted in the destruction of riparian and wetland areas on the Applicants' parcel and an adjacent parcel (APN 048-016-010 and APN 048-016-020, respectively). As such, the Commission evaluated the proposed project based on site conditions that existed prior to the unpermitted activities (i.e., the legally established baseline for the site), and found that the proposed residence would be sited within a wetland and in LCP-required wetland and riparian buffers. Because the whole site was either wetland, riparian, or LCP-required wetland/riparian buffer for CDP consideration purposes, no amount of conditions could be applied to make the project LCP consistent, thus requiring its denial.

However, even though the Applicants had purchased the roughly quarter-acre parcel for only \$20,000 (i.e., much less than the cost of residentially developable property in the area) and there were strong arguments that they didn't have a reasonable investment-backed expectation to develop a residence on it, there was some concern by the Commission that a CDP denial could lead to an unconstitutional taking of private property if challenged in court. To avoid such potential outcome, the Commission approved a single-family residence sized and scaled to avoid a taking (i.e., the 2,081 square-foot residence), required establishment and restoration of an open space restricted area over the rest of the site<sup>1</sup> (and additional compensatory habitat restoration

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<sup>1</sup> Other than a 20-foot wide driveway apron and a roughly 30-foot long by 5-foot deep strip of land next to the driveway between the seaward most portion of the residence and the Magellan Avenue right-of-way

mitigation offsite as well), and required such vegetated area to screen the residence from Highway 1 and Mirada Surf trail public views. Importantly, the Commission's takings approval only allowed the amount of development necessary to avoid a takings, and constituted (or put another way, 'used up') the entire allowed development potential of the site, where the Commission required essentially everything outside of the house footprint to be restored, left alone, and deed restricted as open space for habitat purposes.<sup>2</sup> The Applicants accepted the terms and conditions of the 2013 CDP, including accepting that the development envelope so identified was the limit of allowed development, and that they were not allowed future development outside of this area, and ultimately the single-family residence was constructed at the subject site in 2016.<sup>3</sup>

The Applicants have now applied to amend the CDP to allow for construction of a detached ADU outside of the allowed development envelope and within the habitat restoration and deed restricted open space area between the now developed residence and Highway 1. Pursuant to the Commission's regulations, CDP amendment applications such as this must meet a critical first test before they can be accepted for processing. Specifically, the Executive Director is required to reject such applications if they would lessen or avoid the intended effect of the Commission's CDP action (often referred to as a "weakening amendment"). Specifically, California Code of Regulations (CCR) Section 13166(a) states in applicable part as follows:

*The executive director **shall reject** an application for an amendment to an approved permit if he or she determines that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit unless the applicant presents newly discovered material information, which the applicant could not, with reasonable diligence, have discovered and produced before the permit was granted. (emphasis added)*

In this case, and because the proposed amendment would lead to additional development that would extend outside the original 2013 CDP's maximum allowed building envelope, and into the required habitat restoration and deed restricted open space area portion of the parcel where such residential development is prohibited by the CDP, staff notified the Applicants that the Executive Director had rejected the amendment application as just such a "weakening amendment" because the Applicants were applying for development in an area which is deed restricted and required to be restored to ESHA where the CDP prohibited development. The Applicants then appealed that Executive Director determination to the Commission (as allowed by CCR Section 13166(a)(1)). To be clear, there is no debate that the proposed amendment

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(or about 300 square feet in a narrow 'strip' adjacent to the road), where neither restoration nor future development restrictions were imposed in such Magellan Avenue setback space nearest the road.

<sup>2</sup> Development in the Open Space Restricted Area is prohibited, with the exception of habitat restoration and landscaping allowed pursuant to Special Conditions 2 and 3, and stormwater runoff and erosion control measures allowed pursuant to Special Condition 5 of the original 2013 CDP.

<sup>3</sup> Based 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.

would “avoid the intended effect” of the CDP. Rather, here the Applicants are instead arguing that they are ‘presenting newly discovered material information which could not, with reasonable diligence, have been discovered and produced before the Commission approved the CDP.’ Staff does not agree that the Applicants have met that requisite test and are recommending that the Commission uphold the Executive Director’s determination.

Specifically, the Applicants suggest that a County-issued CDP (that authorized the Mirada Surf public access trail adjacent to, but not on, the Applicants’ parcel in 2005) constitutes newly discovered material information that they could not have discovered and produced before the 2013 CDP was granted. The Applicants further assert that the 2005 County CDP actually permitted the grading, vegetation removal, and fill that had destroyed the wetland area on the subject property (which now underlies the residential footprint at the site) as part of that trail project and prior to Commission consideration of the original 2013 CDP, and therefore that the Commission’s approval incorrectly identified the area as wetland/riparian habitat as part of the legally established baseline at that time, and also incorrectly limited future development on the remainder of the site outside of the development envelope. However, not only could the Applicants have discovered and produced these materials by applying reasonable diligence prior to the Commission’s 2013 CDP determination,<sup>4</sup> but the Commission was, in fact, aware of the trail construction and associated habitat destruction activities that occurred at the time, including as it was discussed in the Commission’s findings, and in fact was one of the bases for determining the legally established, pre-unpermitted activity, baseline condition for the Applicants’ parcel. Put another way, the information the Applicants cite to is neither newly discovered information nor is it information that could not have been timely produced prior to the 2013 CDP approval hearing (and, in fact, such information was not unknown to the Commission at that time). For these reasons alone, the Applicants’ challenge fails the requisite tests for accepting a CDP amendment application in this case.

Furthermore, even if the Applicants’ information somehow met that ‘newly discovered information’ submittal threshold, which it does not, the information is not material to the issues at hand. The Applicants are simply wrong in their assertion that the 2005 County CDP somehow authorized the grading, vegetation removal, and fill that destroyed the wetland area on the subject property prior to the Commission’s original 2013 action. In fact, as was previously identified in the Commission’s adopted findings for the original 2013 CDP, neither the County nor the Applicants considered such habitat destruction to

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<sup>4</sup> Including because part of the Applicants’ assertions are that they were the ones that gave permission for the grading, vegetation removal, and fill that destroyed habitat on their property to take place during construction of the trail extension, suggesting some knowledge of that CDP before the Commission’s original 2013 action, and because the Applicants actually applied to the County for a CDP for after-the-fact recognition of those same habitat destruction activities before the Commission’s original 2013 action, suggesting that they not only knew about that 2005 County CDP, but they also acknowledged (at least at that time) that that County CDP did not cover the activities in question, and that such activities were unpermitted, whereas they now essentially assert in this appeal that they had no knowledge of these things prior to the Commission’s 2013 action.

have been permitted when the Commission took its 2013 action.<sup>5</sup> Now, however, the Applicants point to the fact that two of the plan sheets for that 2005 County CDP inconsistently referenced the wetland area on the Applicants' parcel (which was not the site of that trail development, but rather on an adjacent property where the 2005 County CDP had not authorized any development), which they conclude means that that 2005 County CDP authorized the vegetation removal and wetland fill, and thus that the baseline should have been that no wetland (and related requirements) was present. However, neither any alleged contractor activities for an unrelated site, nor a plan sheet description of that unrelated site (i.e., the Applicants' parcel in the case of that 2005 County CDP that applied to other property, and not this one) on a single construction plan sheet somehow 'reach back' to the CDP and make such activities authorized, nor establish that no such habitat existed at the site before the unpermitted activities. The County – the entity that approved that 2005 CDP, and that was responsible for its LCP consistency and implementation – concurs. In sum, even if the 2005 County CDP met the required 'newly discovered information' threshold, which it does not, that CDP did not authorize the grading, vegetation removal, and fill of wetlands on the Applicants' parcel that preceded the Commission's 2013 CDP action as alleged by the Applicants, and the information presented by the Applicants is not actually even material to the questions at issue.<sup>6</sup>

In short, the Applicants' amendment application does not present any newly discovered material information that could not have been discovered with reasonable diligence at the time that the Commission approved the 2013 CDP, and, as proposed, the CDP amendment directly contravenes and attempts to vacate the Commission's required sensitive habitat protections. It is because of these protections and associated mitigations identified, including the required habitat restoration and establishment of the deed restricted open space area, that the Commission was able to approve the development of the single-family residence in order to avoid a constitutional taking in the first place.<sup>7</sup>

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<sup>5</sup> In fact, at the time of the original 2013 CDP approval for the house, the Applicants had applied for and received an after-the-fact CDP from the County for the unpermitted fill of the wetland (that CDP was denied on appeal by the Commission at the same time the house CDP was approved), evidencing that at that time that neither the County nor the Applicants believed that the fill in question was permitted.

<sup>6</sup> Even if the 2005 County CDP met the required 'newly discovered material information' threshold, and even if it authorized the habitat destruction on the Applicants' parcel and no wetlands were deemed to exist in the legally established baseline, none of which is true, the Applicants' development envelope would still have been constrained by required riparian setbacks (50 feet under the LCP), and these same setbacks would apply to areas of the property now proposed for an ADU. Put another way, even if everything the Applicants assert were somehow true, it would not alter the fact that the property is still constrained by LCP habitat protection requirements.

<sup>7</sup> It is also noted that the site is the subject of numerous outstanding Coastal Act violations, including the prior habitat destruction that preceded the CDP approval in 2013, more recent vegetation clearance in the required habitat restoration and deed restricted open space area, and lack of compliance with and/or violations of multiple CDP terms and conditions (including a fenced in yard area filled with ornamental plants and what appear to be concrete patios in the required habitat restoration and deed restricted open space area that were not approved) and extends into wetland areas that weren't authorized; the garage was apparently converted to living space when that was not authorized; there has apparently been

For all of these reasons, staff recommends that the Commission concur with the Executive Director's rejection determination, and the motion to implement this recommendation is found on **page 8** below.

Finally, in addition to the proposed amendment here, the Applicants have also indicated that they may propose a different development on the site, whereby in place of the now proposed detached ADU, they would instead propose to extend the house inland towards Highway 1 and into the required habitat restoration area. Staff notes that such an application would raise all of the same issues as this current application, including proposing development in an area that was required to be restored and protected as wetland where such development is currently prohibited by the original 2013 CDP. Staff notes in advance that an amendment application like that would be considered a weakening amendment that would also be required to be rejected by the Commission's Executive Director. Staff strongly recommends that these Applicants' cease from pursuing any such development outside of the footprint that was allowed by the Commission, a footprint that was only allowed in an LCP-protected habitat area in order to avoid a potential taking if the Commission had denied the original CDP as directed by the LCP.

Put another way, the Applicants have received the benefits of that 2013 CDP as applies to this habitat and public view constrained parcel, and they must also accept the burdens that are attached to that CDP as well. Staff expects the Applicants to abide by the terms and conditions of the CDP, including in order to offset the adverse impacts of that development on a site that was determined to be all habitat and where development was only allowed to avoid a takings. In doing so, staff hopes the Applicant can work towards remedying any violations on site and continue to comply with the other terms of the CDP.

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additional and unauthorized vegetation clearance within the habitat restoration area and deed restricted open space area; failure to adhere to the required restoration plan; and failure to comply with the 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). The matter has been referred to the Commission's enforcement division to consider options for future action to address these violations.

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**EXHIBITS**

- Exhibit 1 – Project Location Map
- Exhibit 2 – Project Area Photos
- Exhibit 3 – Open Space Restricted Area
- Exhibit 4 – Applicant and California Coastal Commission Communications
- Exhibit 5 – Proposed CDP Amendment Plans

## 1. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **uphold** the Executive Director's determination that the CDP amendment application be rejected. To implement this recommendation, staff recommends a **NO** vote on the following motion. Failure of this motion will result in rejection of the CDP amendment application, and the terms and conditions of CPD A-2-SMC-11-041 will remain unchanged. Passage of this motion will result in the Commission overturning the Executive Director's determination, and the amendment application will be accepted for processing. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:*** *I move that the Commission **overturn** the Executive Director's decision to reject Coastal Development Permit Amendment Application Number A-2-SMC-11-041-A1, and I recommend a **no** vote.*

***Resolution to Concur with the Executive Director's Determination:*** *The Commission hereby concurs with the Executive Director's determination to reject Coastal Development Permit Amendment Application Number A-2-SMC-11-041-A1 on the grounds that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit and that there is no newly discovered material information which, in the exercise of reasonable diligence, could not have been discovered and produced before the permit was granted.*

## 2. FINDINGS AND DECLARATIONS

### A. CDP A-2-SMC-11-041 Background

The Applicants' property is a 10,802 square foot, U-shaped parcel located just seaward of Highway 1 along Magellan Avenue in the unincorporated Miramar area of the County (APN 048-016-010). The upcoast side of the Applicants' parcel abuts the County's 'Mirada Surf' open space recreational area and an unnamed perennial creek, whose dense willow riparian corridor extends onto the Applicants' property. The seaward side of the parcel is adjacent to the County's Mirada Surf trail and a smaller County parcel (located in the middle of the 'U'; APN 048-016-020) developed with a small public restroom facility. The inland side of the Applicants' parcel extends to the Highway 1 right-of-way. See **Exhibit 1** for location map and **Exhibit 2** for project area photos.

In 2011, San Mateo County approved a CDP authorizing the development of a single-family residence on the Applicants' property (CDP PLN2008-00380), and a separate after-the-fact CDP authorizing unpermitted grading and vegetation clearance that had destroyed wetland and riparian habitats (that spanned both the Applicants' property and the County's property within the "U") after-the-fact (CDP PLN2009-00358). Both CDP decisions were appealed to the Commission, with the Appellants raising questions of LCP consistency with respect to sensitive habitat and visual resource impacts, variances, and lot legality. Ultimately, after finding substantial issues and taking jurisdiction over the two CDP applications, the Commission in 2013 denied the after-the-fact habitat destruction CDP (CDP A-2-SMC-11-040) but approved the CDP for the Applicants' single-family residence (CDP A-2-SMC-11-041).



In approving CDP A-2-SMC-11-041 in 2013, the Commission determined that not only had the Applicants allowed the grading, vegetation clearance, and fill on their property in 2008 and 2009 that resulted in wetland and riparian habitat destruction, but that it was also unpermitted.<sup>8</sup> Because such destruction occurred without any CDP, the Commission reviewed the proposed project based on the boundaries of the wetland and riparian habitat which existed on the subject site prior to the unpermitted activities (i.e., the legally established baseline for the site). Through that evaluation, the Commission determined that the proposed single-family residence would be sited within a wetland, and within LCP-required wetland and riparian buffers. Because the whole site was either wetland, riparian, or LCP-required wetland/riparian buffer (and within an LCP-protected scenic corridor associated with adjacent Highway 1) for CDP consideration purposes, no amount of conditions could be applied to make the project LCP consistent, thus requiring its denial. However, because any development on the property would result in some form of LCP inconsistency, and even though the Applicants had purchased the roughly quarter-acre parcel for only \$20,000 (i.e., much less than the cost of residentially developable property in the area) and there were strong arguments that they didn't have a reasonable investment-backed expectation to develop a residence on it, there was some concern that such denial could lead to an unconstitutional taking of private property if the Commission were challenged in court. Thus, the Commission ultimately approved a single-family residence sized and scaled to avoid a taking and required restoration of and a conservation easement over essentially the rest of the site.<sup>9</sup>

In doing so, the Commission found that, in this particular case, there were no other uses/development at the property could provide the Applicants with an economically viable use that would also avoid development within sensitive habitats or scenic corridors. In particular, when viewing the evidence that (1) permanently restricting use of the property to resource dependent uses could potentially eliminate the economic value of the property; (2) residential use of a small portion of the property would provide an economic use; and (3) a court could determine that an applicant could have had a reasonable investment-backed expectation that a residential use of some form would be allowed on the property, the Commission concluded that a court might determine that CDP denial of a residential project due to its LCP inconsistencies constituted a taking. As such, the Commission approved a single-family residence on the property to avoid the potential for such a taking. Having reached that conclusion, the Commission also found that the approved residential development must still comply with the requirements of the LCP as much as possible in a takings approval of this type. Thus, the Commission approved a single-family residence sized and scaled to avoid a taking, required restoration of and a conservation easement over essentially the rest of the site, and required landscaping that would screen the development from Highway 1 and

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<sup>8</sup> Including as evidenced by the County CDP on appeal to the Commission designed to authorize such activities after-the-fact that was before the Commission at the same time, and which the Commission ultimately denied.

<sup>9</sup> Other than a 20-foot wide driveway apron and a roughly 30-foot long by 5-foot deep strip of land next to the driveway between the seaward most portion of the residence and the Magellan Avenue right-of-way (or about 300 square feet in a narrow 'strip' adjacent to the road), where neither restoration nor future development restrictions were imposed in such Magellan Avenue setback space nearest the road.

Mirada Surf trail public views. Importantly, the Commission's takings approval only allowed the amount of development necessary to avoid a takings, and constituted (or put another way, 'used up') the entire allowed development potential of the site, where essentially everything outside of the house footprint was deed restricted as open space area and required to be restored to habitat (see **Exhibit 3**). The Applicants accepted the terms and conditions of the CDP, including accepting that the development envelope was the limit of allowed development.

After the Applicants submitted materials necessary to satisfy the CDP's seven prior-to-issuance conditions, the Commission issued the CDP on October 7, 2015, and the Applicant constructed the single-family residence at the site in 2016.<sup>10</sup> Subsequently, in early 2022, Commission staff were informed by County staff that the County had received an application to construct an ADU within the required habitat restoration and deed restricted open space area on the Applicants' property. At that time, Commission staff informed the Applicants and the County that any such addition at the site would require the Applicants to apply for an amendment to the Commission's CDP, that it appeared that such an application would be a weakening amendment that would need to be rejected (per CCR Section 13166), and that they should reconsider such a potential amendment, including to save all parties time and resources for an amendment that the Commission could not approve.

County staff at that time also noted that it appeared that additional unpermitted vegetation removal had recently occurred at the site, which prompted Commission staff to look into the state of condition compliance at the site more broadly. Ultimately Commission staff determined that in fact there were numerous additional Coastal Act violations at the site associated with a lack of compliance with and/or violations of multiple CDP terms and conditions including, but not limited to: a fenced in yard area filled with ornamental plants and what appear to be concrete patios in the required habitat restoration and deed restricted area that were not approved; the garage was apparently converted to living space when that was not authorized; there has apparently been additional and unauthorized vegetation clearance within the habitat restoration and deed restricted open space areas; failure to adhere to the required restoration plan; and failure to comply with the 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). Thus, the site is the subject of numerous outstanding Coastal Act violations related to the prior unpermitted development that preceded the CDP approval in 2013, more recent vegetation clearance in the deed restricted habitat area, and lack of compliance with and/or violations of multiple CDP terms and conditions, all as is described further in the Violations section below.

## **B. Proposed Amendment**

The Applicants propose to amend CDP A-2-SMC-11-041 to allow the construction of an

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<sup>10</sup> Based on information currently available, 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.

795 square-foot and one-story/23-foot tall accessory dwelling unit (ADU) in the conditioned habitat restoration and open-space deed restricted area between the existing residence and Highway 1. To mitigate for habitat impacts associated with such an ADU, the Applicants also propose to “create and enhance wetlands” both on their parcel (APN 048-016-010) and on the County’s adjacent restroom parcel (APN 048-016-020) (see **Exhibit 4 and Exhibit 5**).

### **C. CDP Amendment Criteria**

Pursuant to CCR Section 13166(a), CDP amendment applications that would lessen or avoid the intended effect of the Commission’s CDP action are required to be rejected by the Commission’s Executive Director, unless the applicant presents newly discovered material information that could not, with reasonable diligence, have been discovered and produced before the permit was approved. Specifically, CCR Section 13166(a) states in applicable part:

*The executive director **shall reject** an application for an amendment to an approved permit if he or she determines that the proposed amendment would lessen or avoid the intended effect of an approved or conditionally approved permit unless the applicant presents newly discovered material information, which the applicant could not, with reasonable diligence, have discovered and produced before the permit was granted. (emphasis added)*

Thus, applications that amend Commission CDPs must meet a critical first test before they can be accepted for processing. Specifically, the Executive Director is required to evaluate such applications, and to reject such applications if they would lessen or avoid the intended effect of the Commission’s CDP action (sometimes referred to as a “weakening amendment”). Section 13166(a) also allows applicants to appeal such an Executive Director’s determination to the Commission. If the Commission agrees with the Executive Director, then the amendment application is rejected. If the Commission overturns the Executive Director’s determination, then the amendment application is accepted for processing.

### **D. Executive Director’s Determination**

Pursuant to the requirements of CCR Section 13166(a), and upon receipt of the Applicants’ CDP amendment application, the Executive Director determined that such application constituted a weakening amendment per CCR 13166(a) because the Applicants’ proposal would undo the Commission’s required restoration and protection of sensitive habitat in a deed restricted open space area within which future development – aside from approved habitat restoration and landscaping activities, and stormwater runoff and erosion control measures – was prohibited by the Commission’s CDP (see **Exhibit 4**).

The Applicants did not argue those facts, but rather suggested that they had newly discovered material information that would allow the application to be accepted for processing pursuant to CCR Section 13166(a). Specifically, the Applicants provided a copy of a 2005 County CDP that provided for the construction of the paved version of the Mirada Surf trail that extends from Magellan Avenue just seaward of this site to Highway 1 where it intersects Coronado Street upcoast (including a bridge over the

unnamed stream adjacent to the Applicant's property),<sup>11</sup> and suggested that this CDP constituted newly discovered material information which was not reasonably discoverable at the time of the Commission's determination. Specifically, the Applicants assert that the 2005 County CDP authorized grading that filled the wetland area on their parcel, and therefore the Commission's identified legally established baseline for its 2013 CDP review, including related to wetland habitat, was incorrect. Rather, the Applicants assert that because the destruction of the wetland was actually permitted by this 2005 County CDP, the legally established baseline was that no wetland existed on this site, and thus that constraint to development was incorrectly applied by the Commission.<sup>12</sup> The Executive Director informed the Applicants at that time that she disagrees with all such assertions.

First, although the construction that it authorized was discussed in the Commission's 2013 CDP approval, the 2005 County CDP itself was not explicitly referenced. That said, the 2005 County CDP itself, and the information contained therein, is not "new". Not only could these materials have been discovered with reasonable diligence at the time of the Commission's CDP hearing,<sup>13</sup> but the 2005 County CDP had been reported to the Commission (as part of the normal CDP post-LCP certification process), and the actual file was located in both the County's and the Commission's permit files. In fact, the Applicants themselves admittedly provided authorization to project contractors to use their property as a staging area for the Mirada Surf trail project,<sup>14</sup> which resulted in the destruction of riparian and wetland areas on the Applicants' parcel and an adjacent parcel (APN 048-016-010 and APN 048-016-020, respectively). The Applicants then sought an after-the-fact (ATF) CDP from the County (PLN2009-00368) to legalize the land clearing and wetland fill on both parcels. The Mirada Surf trail 2005 County CDP, and the biological study prepared in support of said CDP, are referenced in permitting and appeal materials related to Applicants' after-the-fact CDP application. Put another way, the Applicants appear to have been quite aware of the 2005 County CDP, including as they pursued an ATF CDP to legalize work associated with it that was – at least at that time – acknowledged by the Applicants to have been unpermitted, and their ATF materials include references to the 2005 County CDP. In short, for these reasons,

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<sup>11</sup> County CDP PLN2005-00078. To be clear, that 2005 County CDP is different from the two 2011 County CDPs that were appealed, and that ultimately resulted in the Commission CDP at issue now.

<sup>12</sup> The Applicants also claim that the trail construction pursuant to the 2005 County CDP altered the hydrology at their parcel in such a way as to create a "drainage problem" at the location that the Commission identified as illegal wetland fill in its 2013 CDP, and that this area could be part of their wetland mitigation efforts if the ADU was permitted. However, this area was not identified as having any sort of 'drainage problem' in the Commission's 2013 CDP, and in fact it delineated (as determined by the Commission's Ecologist at time, Dr. John Dixon) as a ruderal and non-native grassland area due to the illegal grading and vegetation removal that had destroyed it. It is not clear how the Applicants' 'drainage problem' and mitigation suggestions in this regard have any bearing on the weakening amendment question and are not further discussed herein.

<sup>13</sup> While the Applicants claim that they only became aware of the 2005 County CDP in 2022 after pursuing a Public Records Act request from the County, this does not mean that this information could not have been discovered and produced by applying reasonable diligence prior to the Commission's 2013 CDP determination.

<sup>14</sup> See David Hodge email to such contractors dated September 11, 2008.

and as a threshold matter, the 2005 County CDP does not constitute any type of new information that the Applicants could not have discovered and produced with reasonable diligence before the CDP was approved, and thus the Executive Director (and the Commission) are required to reject this amendment application on that basis alone.

Second, even if the 2005 County CDP met that discovery threshold, which it does not, that CDP does not present any material information pertinent to the amendment in question. Specifically, and contrary to the Applicants' assertions, that 2005 County CDP did not actually authorize the grading, vegetation removal, and fill of wetlands on the Applicants' parcel. Instead, the 2005 County CDP file, including the staff report to the San Mateo County Planning Commission that approved the CDP, acknowledged the presence of these adjacent sensitive habitat areas, and included a series of measures to prevent any potential impacts to them. There is nothing in that CDP that authorizes the wetland destruction in the way now argued by the Applicants, let alone on a parcel that was not the subject of the 2005 County CDP. The County – the entity that approved that CDP, and that was responsible for its LCP consistency and implementation – concurs. Despite these clear facts, the Applicants continue to suggest that that CDP did in fact authorize such wetland/riparian habitat destruction. Specifically, the Applicants point to the County's construction plans for the trail project where one plan sheet identifies the wetland at the subject site and a different plan sheet does not. Whether the wetland area on the Applicants' parcel was identified on all of the construction plans is simply immaterial to the question at hand, including because that 2005 County CDP didn't authorize any development on the Applicants' property in the first place, and if one sheet omitted the wetland characterization of this nearby but not to be developed property, it is not logical to suggest that somehow changed the 2005 County CDP as well. Furthermore, the question of whether the activities which led to the land clearing and wetland fill at the subject site were authorized under the 2005 County CDP were clearly addressed in the course of the local permitting and appeals process for the Applicants' after-the-fact CDP application to address such illegal activities at the subject site (County CDP PLN2009-00358).<sup>15</sup> In sum, even if the 2005 County CDP met the required discovery threshold, which it does not, that CDP did not authorize the grading and fill of wetlands/habitat on the Applicants' parcel, and the information presented is not actually even material to the questions at issue.

Third, as for the Applicants' assertion that the County was allowed to benefit from the unpermitted wetland fill when it built the restroom on the County's adjacent property in 2014, and presumably that that means that the Applicants should be allowed to so benefit too, that is inaccurate. While it appears to be true that the County permitted the construction of a public restroom on APN 048-016-020 atop a portion of the filled wetland (per County CDP PLN2010-00356), it also appears true that the issue was

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<sup>15</sup> Per a 2020 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.

identified at the time,<sup>16</sup> and the County approved the restroom regardless. That County decision was not appealed to the Coastal Commission and was not challenged in court, and the time to appeal or challenge it has long since passed. Conversely, the wetland fill on the Applicants' property was well understood to be a violation by all parties – including the Applicants – at the time they were pursuing their residential project, including because it was the subject of the Applicants' request for such wetland fill to be approved after-the-fact, which the Commission ultimately denied. Thus, the status of the wetland on the County's restroom property is immaterial to the issues being considered in the subject amendment to this permit. In other words, whether the County CDP for the public restroom properly recognized the wetland fill as unpermitted and analyzed the restroom project with that perspective in mind does not change the fact that the wetland fill authorized by the Applicants was, in fact, unpermitted, and was evaluated by the Commission with that perspective in mind.

Fourth, even if the 2005 County CDP met the required discovery threshold, and even if it authorized the grading and fill of wetlands on the Applicants' parcel and no wetlands were deemed to exist in the legally established baseline, none of which is true, the Applicants' development envelope at the time of the original 2013 CDP action would still have been constrained by required riparian setbacks (50 feet from the limit of riparian vegetation for perennial streams under the LCP), and these same setbacks would apply to areas of the property now proposed for an ADU. Put another way, even if everything the Applicants assert were somehow true, it would not alter the fact that the property was (and is) still constrained by LCP habitat protection requirements.

Finally, as it was discussed in the Commission's adopted findings, the single-family residence is inconsistent with the sensitive resources and visual resource policies of the County's LCP. Typically, such LCP inconsistencies would require denial of the project. In this case, to avoid a taking of the Applicants' property, the Commission through its 2013 action approved a single-family residence of a size and location on the subject that would minimize impacts to sensitive coastal resources while also allowing for a reasonable economic use of the property. The Commission approved the Hodges' residence with a 1,414 square foot footprint (and 2,081 square feet all told with a partial second story) and required mitigation measures to minimize significant adverse impacts to sensitive habitats and visual resources while providing for a reasonable use of the property. The Commission's 2013 CDP approval only allowed the amount of development necessary to avoid a takings, and the limited footprint of the residence was approved on the condition that nearly everything outside of the approved footprint was required to be restored to habitat and restricted as open space. The Applicants' proposed detached ADU extends significantly beyond the approved 1,414 development footprint found by the Commission to be the minimum necessary to avoid a takings while maximizing LCP consistency.

In short, the Applicants' amendment application did not present any newly discovered information that could not have been discovered with reasonable diligence at the time

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<sup>16</sup> In any case, a staff report prepared by County Planning staff for CDP PLN2010-00356 notes that County parcel 048-016-020 was cleared "by the adjacent landowner" without the benefit of a permit.

that the CDP was first approved in 2013, and, even if it met that threshold, the information provided does not change the basic facts underlying the Commission's decision in any material way. As proposed, the CDP amendment directly contravenes and attempts to vacate the Commission's required sensitive habitat protections associated with the Commission's original CDP approval. It is because of these protections and required mitigations, including the establishment of the open space deed restricted area and required restoration area, that the Commission was able to approve the development of the single-family residence in order to avoid a potential constitutional taking in the first place. To propose to undermine those habitat protections is the epitome of a weakening amendment under CCR Section 13166, requiring rejection of the proposed CDP amendment.

### **E. Applicants' Appeal of Executive Director's Determination**

As allowed by CCR Section 13166, the Applicants appealed the Executive Director's determination in early 2023 (in a letter dated February 3, 2023; see **Exhibit 4**), again suggesting that the 2005 County CDP shows that the Commission's 2013 CDP determination was based on the wrong legally established baseline, as described above. The Executive Director continues to believe that the proposed CDP amendment is a weakening amendment, for all the reasons discussed above, and was properly rejected as required by the Commission's regulations.

Thus, the question before the Commission is whether to concur with the Executive Director's determination (and thus reject the amendment application) or whether to overturn the Executive Director's determination (and thus accept the amendment application for processing). For the same reasons as discussed above, the Commission concurs with the Executive Director and rejects the Applicants' CDP amendment application as required by the provisions of CCR Section 13166.

### **F. Violation**

Violations of the Coastal Act and the San Mateo County LCP exist at the subject site including, but not limited to: (1), unpermitted grading, vegetation clearance, and soil stockpiling that occurred in 2008 and 2009; (2) more recent vegetation clearance in the deed restricted open space area; and (3) unpermitted development at the site associated with a lack of compliance with and/or violations of multiple CDP terms and conditions (including a fenced in yard area filled with ornamental plants and what appear to be concrete patios in the required habitat restoration and deed restricted open space area that were not approved) and extends into wetland areas that weren't authorized; the garage was apparently converted to living space when that was not authorized; there has apparently been additional and unauthorized vegetation clearance within the deed restricted open space and habitat restoration area; failure to adhere to the required restoration plan; and failure to comply with the 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).<sup>17</sup>

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<sup>17</sup> As described above, based on information currently available, 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.

Although development has taken place without CDP authorization and actions and/or inactions have occurred in violation of past CDP authorization prior to the Applicants' appeal of the Executive Director's determination to reject the CDP amendment application, the Commission's consideration of this appeal has been based solely on measuring consistency of the proposed amendment project against the applicable provisions of the California Code of Regulations. Commission review and action on this appeal does not constitute a waiver of any legal action with regard to the alleged violations (or any other violations), nor does it constitute an implied statement of the Commission's position regarding the legality of any development undertaken on the site without a CDP, or any other development. The Commission's concurrence with, or rejection of, the Executive Director's original determination on the amendment application will not result in resolution of the above violations.

### **G. Conclusion**

It is clear that CDP A-2-SMC-11-041 explicitly required the Applicants to restore essentially the entire parcel outside of the building footprint, and further required them to keep the area free from development, all in an effort to avoid, and where unavoidable to mitigate, coastal resource impacts associated with development of the single-family residence within sensitive habitat on the basis of a takings approval under the CDP. It is also clear that the Applicants have not presented any new information that could not have been discovered with reasonable diligence before the CDP was approved. Finally, even if the information provided by the Applicants met that new information threshold, such information does not change the basic facts underlying the Commission's decision in any material way. The Commission concurs with the Executive Director's determination, the Applicants' appeal is denied, and the amendment application is rejected.

The Applicants have exercised the CDP and received the benefit of the approved CDP via the construction of the residence at the subject property, and the Commission expects the Applicants to abide by the terms and conditions of CDP, including in order to offset the adverse impacts of that development on a site that was determined to be all habitat and where development was only allowed to avoid a takings.

As it is, the Applicants are out of compliance with the base CDP, as they were made aware when the NOV was sent on July 13, 2023. Should the Applicants continue to wish to explore an amendment to the CDP that does not weaken the original coastal resource protection and intent of the base CDP, then the Applicants are free to do so.

Finally, in addition to the proposed amendment here, the Applicants have also indicated that they may propose a different development on the site, whereby in place of the now proposed detached ADU, they would instead propose to extend the house inland towards Highway 1 and into the required habitat restoration area. The Commission notes that such an application would raise all of the same issues as this current application, including proposing development in an area that was required to be restored and protected as wetland where such development is currently prohibited by the original CDP, and notes in advance that an amendment application like that would be considered a weakening amendment that would also be required to be rejected by the Commission's Executive Director. The Commission strongly recommends that these



Applicants' cease pursuing any such development outside of the footprint that was allowed by the Commission, a footprint that was only allowed in an LCP-protected habitat area in order to avoid a potential taking if the Commission had denied the original CDP as directed by the LCP.

Put another way, the Applicants have received the benefits of that 2013 CDP as applies to this habitat- and public view-constrained parcel, and they must also accept the burdens that are attached to that CDP as well. The Commission expects the Applicants to not only resolve all violations at the site, but to also abide by the terms and conditions of the CDP, including in order to offset the adverse impacts of that development on a site that was determined to be all habitat and where development was only allowed to avoid a takings.

### 3. APPENDICES

#### **A. Appendix A – Substantive File Documents<sup>18</sup>**

- Files for Appeal/CDP Application Numbers A-2-SMC-11-040 and A-2-SMC-11-041

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

- San Mateo County Planning Department

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<sup>18</sup> These documents are available for review in the Commission's North Central Coast District office.