

INTRODUCTION

This is one of eight (8) related appeals from San Luis Obispo County's approval of accessory dwelling units (ADU) in the community of Los Osos by Los Osos Sustainability Group (LOSG), on whose behalf these appeals are filed. LOSG urges the Coastal Commission to grant these appeals and to direct San Luis Obispo County not to approve any more ADUs or any other type of new development that uses water or sewer services in Los Osos until and unless the Coastal Commission (Commission) has approved the Los Osos Community Plan (LOCP) thereby setting buildout limits that reflect the availability of water supplies and sewer services. In the course of its review of the LOCP, which the County has yet to submit to the Commission for review, the Commission will be able to ensure that future development will not jeopardize the resources needed to meet the needs of current development, and valuable coastal resources including Ecologically Sensitive Habitats (ESHA) are preserved.

When the Coastal Commission considered and eventually approved the Los Osos Wastewater Project (LOWWP) in 2010, it recognized the complex problems that affect the continued viability of the groundwater basin on which the residents of Los Osos currently and forever must rely. In this regard, a Commission staff report explained:

potential buildout under the LCP is significantly constrained, including due to public service constraints, habitat, and rural/agricultural protection. Thus, it is not clear at the current time that buildout of that degree is possible, nor whether it could be found consistent with the LCP. The County has committed to rectifying buildout issues through an LCP amendment following the LOWWP. Specifically the proposed project includes condition 86, which states: *(Consistent with condition of approval #34 from CDP A-3-SLO-03-113). To prevent wastewater treatment system from inducing growth*

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that cannot be safely sustained by available water supplies, the sewer authority is prohibited from providing service to existing undeveloped parcels within the service area, unless and until the Estero Area Plan is amended to incorporate a sustainable buildout target that indicates that there is water available to support such development without impacts to wetlands and habitats.

The LCP addressed these concerns by including policies that prohibit residential and commercial development unless the availability of water supply and sewer service is established. In recognition of these constraints (as well those caused by the prevalence of ESHA throughout the area), the Coastal Development Permit (CDP) that the Commission issued in connection with the LOWWP in 2010 (CDP A-3-SLO-09-055/069) explicitly prohibits additional residential and commercial development reliant on the LOWWP until the County establishes appropriate limits on growth based on the basin's true carrying capacity based on "conclusive evidence" of an adequate water supply, adequate sewer treatment capacity, and ESHA protection.

Condition of Approval No. 6 specifically provides:

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

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Condition 6 has not been satisfied because the County has yet to submit the LOCP for consideration to the Commission, and the LOCP thus has not been vetted or approved by the Commission.

Moreover, the recently approved LOCP does not present “conclusive evidence” of an adequate water supply and fails to adequately analyze the myriad of complex factors that affect the reliability of Los Osos water supplies. As more thoroughly explained in LOSG’s detailed comments to the County, the LOCP and EIR are woefully inadequate because both documents simply assume that the implementation of the mitigation measures identified in the Los Osos Basin Plan will eventually reverse sea water intrusion that continues to threaten the long-term viability of the water supplies. This conclusion is not supported by the monitoring reports and other data. Sea water intrusion and nitrite contamination continue to threaten the viability of the Los Osos groundwater basin casting doubt on the availability of water supplies for the current residents, let alone support any new development.

To make matters worse, the County recently adopted a Growth Management Ordinance (GMO) that does not set any limits on the number of ADUs and other “exempt” housing the County may approve in Los Osos. Accordingly, the County’s practice of approving ADUs without appropriate consideration of water supply and sewer limitations raises the specter of rampant ADU development in Los Osos as an end-run around the limits on development set by the Coastal Development Permit the Coastal Commission issued in connection with the Los Osos Wastewater Project (LOWWP). By approving coastal ADUs without any consideration of the individual or cumulative impact on water supplies, the County would set a dangerous precedent by creating the expectation that a coastal ADU is simply available for the asking, regardless of impacts on the water basin, unsustainable water

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supplies, impacts habitat, the size of the ADU, whether it is consistent with the character of the area, or the total number of applications.

LOSG's appeal of the eight ADUs should be granted because, as explained in detail in our attached appeal forms, the County's approval process ignores the Coastal Act, the LCP and the County's own Coastal Zone Land Use Ordinance (CZLUO), which clearly require the County to consider the availability of water before approving any ADUs. ADUs are subject to San Luis Obispo County Code §23.08.169 - Secondary Dwelling Units - which prohibits Secondary Dwelling Units in the South Bay, because it is understood that secondary dwelling units are "incompatible with existing development, or the density increase resulting from secondary units pursuant to this section would create adverse cumulative effects on essential community services and natural features. Such services and features include but are not limited to water supplies, storm drainage facilities, roadway traffic capacities, and soils with "limited suitability for septic system sewage disposal or subject to erosion" (i.e., outside of the wastewater service area). The Code provides an exception under certain circumstances, providing that the County "may" allow an ADU within a Residential Single-Family land use category, for example where "the site area is 12,000 square feet or larger and the site is served by community water and sewer; ..." These provisions make it clear that the County must consider the ADUs' potential impact on water supplies and sewer services, which in turn means that County may not consider the ADUs consistency with §23.08.169 on a ministerial basis. The discretionary nature of the County's process for approving ADUs in the South Bay means the County was required to conduct environmental review as required by the California Environmental Quality Act (CEQA). Protecting Our Water & Env'tl. Res. v. Cty. of Stanislaus, (2020) 10 Cal. 5th 479, 501

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“when an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not *categorically* classify the issuance of permits as ministerial.”)

Pursuant to §23.08.169, the County could not lawfully approve these ADUs on a ministerial basis, without any consideration as to whether these ADUs would result individually or cumulatively in significant impacts on water supplies, sewer or ESHA.

LOSG anticipates that the County will claim its approval of these ADUs was consistent with the State regulation of ADUs, in particular, the provisions of Government Code §65852.2, which generally govern the processing of ADU applications by cities and counties. It appears that the County believes the provisions of §65852.2 trump and supersede the provisions of the County’s Local Coastal Plan, including but not limited to the provision of the County Code §23.08.169. The County’s position is wrong as a matter of law because the County’s position is specifically inconsistent with Government Code §65852.2(l), according to which, §65852.2 cannot be construed to “supersede or in any way alter or lessen the effect of or application of the California Coastal Act of 1976 ...” It is important to note that the LCP embodies and effectuates the policies and concerns of the Coastal Act and the County’s authority to issue Coastal Development Permits (CDPs) in accordance with the LCP, which is delegated by the Commission. Charles A. Pratt Constr. Co. v. California Coastal Com. (2008)162 Cal. App. 4th 1068, 1075. The County has no authority to issue ADUs in contravention of the LCP, including §23.08.169 and LCP policies that are intended to protect and preserve the Los Osos water supplies, sewer capacity and ESHA.

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The LOSG also anticipates that the County will claim that approval of these ADUs will not have an adverse impact on water supplies and will ensure an adequate water supply for the new development, current development, and ESHA because the ADUs are subject to a Title 19, 2:1 retrofit ordinance. The County has even claimed on occasion that new development subject to this requirement provides a “net benefit” to the water supply. These claims are not unavailing because compliance with Title 19 does not guarantee conformity with the Coastal Act policies reflected in the LCP and CZLUO provisions designed to ensure orderly and sustainable coastal development for the following reasons:

- a. The Title 19 retrofit requirement does not establish that the Groundwater Basin is sustainable and an adequate water supply exists for the current population, added population, and ESHA. The most recent Basin metrics and monitoring show seawater intrusion is continuing to move inland and threaten supply wells in the Basin and the true sustainable/safe yield of the Basin has not been established.
- b. The Title 19 requirement uses conservation potential at twice the rate of a program for current residents because approved new development uses half, and possibly more, of the offset (also see E below). The Commission itself has in the past recognized that any remaining conservation potential in the Basin is needed and must be used to promote a sustainable Basin to meet the current needs and ESHA.
- c. The Title 19 program competes with the Special Condition 5 conservation program of the LOWWP CDP, which requires the County to spend \$5 million to “help Basin residents to reduce potable water use as much as possible” including with enforceable mechanisms as needed.

If any additional conservation potential exists (as evidenced by use of

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the Title 19 program) it ought to be realized by the County through expenditure of the portion of the \$5 million that remains unspent (based on Annual Monitoring Reports prepared for the Basin Management Committee).

- d. Although the Title 19 Ordinance has a provision for verifying the effectiveness of the program, the provision has not been used and there has been no follow-up review or study, to our knowledge, to confirm actual long-term reductions in water use from the program.
- e. The retrofit formula for the program assumes ADUs use half the water of single-family homes, so it does not offset the water use of many ADUs (e.g., larger ADUs and ADUs on properties) that may well use more than the assumed amount. Further, water use has gone up in 2020 due to COVID 19.

We incorporate by reference our letter to the Commission dated October 1, 2020, with attachments, which include various cited documents and letters submitted to the SLO County Planning and Building Department between August 25, 2015 and August 11, 2020. We also include by reference our letter to the SLO Board of Supervisors dated December 15, 2020.

Appeal of local CDP decision

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1. Appellant information¹

Name: _____

Mailing address: _____

Phone number: _____

Email address: _____

How did you participate in the local CDP application and decision-making process?

Did not participate Submitted comment Testified at hearing Other

Describe: _____

If you did *not* participate in the local CDP application and decision-making process, please identify why you should be allowed to appeal anyway (e.g., if you did not participate because you were not properly noticed).

Describe: _____

Please identify how you exhausted all LCP CDP appeal processes or otherwise identify why you should be allowed to appeal (e.g., if the local government did not follow proper CDP notice and hearing procedures, or it charges a fee for local appellate CDP processes).

Describe: _____

¹ If there are multiple appellants, each appellant must provide their own contact and participation information. Please attach additional sheets as necessary.

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2. Local CDP decision being appealed²

Local government name: _____

Local government approval body: _____

Local government CDP application number: _____

Local government CDP decision: CDP approval CDP denial³

Date of local government CDP decision: _____

Please identify the location and description of the development that was approved or denied by the local government.

Describe: _____

² Attach additional sheets as necessary to fully describe the local government CDP decision, including a description of the development that was the subject of the CDP application and decision.

³ Very few local CDP denials are appealable, and those that are also require submittal of an appeal fee. Please see the [appeal information sheet](#) for more information.

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3. Identification of interested persons

On a separate page, please provide the names and contact information (i.e., mailing and email addresses) of all persons whom you know to be interested in the local CDP decision and/or the approved or denied development (e.g., the applicant, other persons who participated in the local CDP application and decision making process, etc.), and check this box to acknowledge that you have done so.

Interested persons identified and provided on a separate attached sheet

4. Grounds for this appeal⁴

For appeals of a CDP approval, grounds for appeal are limited to allegations that the approved development does not conform to the LCP or to Coastal Act public access provisions. For appeals of a CDP denial, grounds for appeal are limited to allegations that the development conforms to the LCP and to Coastal Act public access provisions. Please clearly identify the ways in which the development meets or doesn't meet, as applicable, the LCP and Coastal Act provisions, with citations to specific provisions as much as possible. Appellants are encouraged to be concise, and to arrange their appeals by topic area and by individual policies.

Describe: _____

⁴ Attach additional sheets as necessary to fully describe the grounds for appeal.

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5. Appellant certifications

I attest that to the best of my knowledge, all information and facts in this appeal are correct and complete.

Print name _____

Patrick McGibney

Signature

Date of Signature _____

5. Representative authorization⁶

While not required, you may identify others to represent you in the appeal process. If you do, they must have the power to bind you in all matters concerning the appeal. To do so, please complete the representative authorization form below and check this box to acknowledge that you have done so.

I have authorized a representative, and I have provided authorization for them on the representative authorization form attached.

⁵ If there are multiple appellants, each appellant must provide their own certification. Please attach additional sheets as necessary.

⁶ If there are multiple appellants, each appellant must provide their own representative authorization form to identify others who represent them. Please attach additional sheets as necessary.

LOCATION AND DESCRIPTION OF THE DEVELOPMENT

The project is located at street address 1196 6th St, Los Osos, CA 93402, assessor's parcel number 06079-038-041-008. The 6,250 square foot lot has an existing two-story 1,029 square foot primary dwelling with a garage below.

The project would add a detached 800 square foot two-bedroom accessory dwelling unit (ADU) and two on-site parking spaces. The project would use Los Osos Community Services District water service and the Los Osos Sewer. The project may not make final connections until phase two of the Los Osos Sewer is open. The applicant will be required to provide will-serve letters.

The permit application was received by the San Luis Obispo County Planning and Building Department, the agency that grants development permits for unincorporated areas including Los Osos, on July 21, 2020. The project was approved ministerially by County staff pursuant to California Government Code section 65852.2(l) and County of San Luis Obispo Code section 23.08.169(d).

The County submitted a notice of final action for the project on December 16, 2020. The included findings state that the project is consistent with the County's Local Coastal Plan (LCP). However, the ADU Compliance Review Form states that the project is not consistent with the LCP due to the size of the lot, but that the various provisions of California Government Code section 65852.2 limiting restrictions on ADU size based on the size of the overall lot are controlling.

GROUNDS FOR THIS APPEAL

I. Coastal Development Permits (CDP) for Accessory Dwelling Units (ADU) must conform with the San Luis Obispo County Local Coastal Program (LCP) Implementation Plan ADU provision.

The County of San Luis Obispo (County) appears to believe that the provisions of California Government Code section 65852.2, including subsection (a)(4) which states that “an accessory dwelling unit ordinance that fails to meet the requirements of this subdivision . . . shall be null and void and that agency shall . . . apply the standards established in this subdivision . . . until the agency adopts an ordinance that complies,” supersede the ADU provisions in its LCP. This is incorrect as a matter of law. The currently certified provisions of the County’s LCP—including Coastal Zone Land Use Ordinance 23.08.169, last amended in 2018—must be applied to all ADU permit applications within the County’s Coastal Zone.

A. California Government Code section 65852.2 does not supersede currently certified provisions of the San Luis Obispo County LCP.

“Nothing in this section shall be construed to supersede or in any way alter or lessen the effect of the California Coastal Act . . . except that the local government shall not be required to hold public hearings” for ADU permits. Cal Gov’t Code § 65852.2 (l). The inclusion of the public hearing provision in this subsection is significant because of its limiting effect. “It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes.” In re Jennings (2004) 34 Cal.4th 254, *citing* People v. Norwood (1972) 26 Cal. App. 3d 148. No other provision of the State ADU law besides those related to

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public hearings, including the prohibition on lot size limits, may supersede, alter, or lessen the effect of the Coastal Act.

The County's LCP is not indefinitely excused from noncompliance with the State ADU law, but neither is it rendered void as to ADUs in the meantime. Consistent with § 65852.2 (l), in an April 2020 Guidance Memo¹ to the planning directors of coastal cities and counties, Coastal Commission executive director John Ainsworth advised that despite a spate of recent updates to the state law, "existing ADU provisions contained in certified LCPs are not superseded by Government Code section 65852.2 and continue to apply to CDP applications for ADUs until an LCP amendment is adopted."

B. San Luis Obispo County Code Title 23 Implements the San Luis Obispo County LCP and is a provision of the County's LCP.

Title 23 of the San Luis Obispo County Code implements the San Luis Obispo County LCP and was adopted pursuant to the authority vested in the County by the Coastal Act. San Luis Obispo County (SLOC) Code §§ 23.01.010 (a) and 23.01.020; Cal Pub Resources Code § 30500 (a) ("Each local government lying, in whole or in part, within the coastal zone shall prepare a local coastal program for that portion of the coastal zone within its jurisdiction"). The development review processes described in Title 23—including section 23.08.169 – Secondary Dwelling Units—are conducted under authority explicitly delegated to the County by the Coastal Act. Cal Pub Resources Code § 30519 (following certification of an LCP, the Coastal Commission authority for development review is delegated to the local

¹

<https://documents.coastal.ca.gov/assets/rflg/California%20Coastal%20Commission%20ADU%20Memo%20dated%20042120.pdf>, accessed 1/12/2021.

GROUNDS FOR THIS APPEAL

government implementing the LCP). See Schneider v. California Coastal Com. (2006) 140 Cal.App.4th 1339, 1344-1345.

The fact that the County’s LCP Implementation Plan is codified as Title 23 of the County Code and termed “Coastal Zone Land Use Ordinance” does not alter its character as a certified provision of the County LCP and not solely a local ordinance. “Under the Coastal Act's legislative scheme, however, the LCP and the development permits issued by local agencies pursuant to the Coastal Act are not solely a matter of local law, but embody state policy.” Charles A. Pratt Constr. Co. v. California Coastal Com. (2008) 162 Cal. App. 4th 1068, 1075.

II. San Luis Obispo County CDP PMTR2020-01207 does not conform with the San Luis Obispo County LCP

The County’s LCP does not permit any ADU to be developed on a lot of this size, in this location.

A. ADUs are not allowed within the South Bay Urban Area where the CDP site is located unless certain provisions (not here met) are satisfied.

Secondary Dwelling Units, also known as ADUs, are excluded from areas of the County’s Coastal Zone where the associated “density increases . . . would create adverse cumulative effects on essential community services.” SLOC Code § 23.08.169 (c) (1). These limits are consistent with the State ADU law, which allows a local agency to “designate areas . . . where accessory dwelling units may be permitted . . . based on the adequacy of water and sewer services . . .” Cal Govt Code § 65852.2 (a)(1)(A).

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One such area of exclusion is South Bay, Los Osos “as defined by the Land Use Element, Estero area plan.” SLOC Code § 23.08.169 (c)(1)(i). The Estero area plan² describes the South Bay urban area as the western end of Los Osos Valley, bounded by Los Osos Creek on the east, Montana de Oro on the west, Morro Bay on the north, and Irish Hills on the South. As explained in the introduction to this Appeal, the severely limited groundwater supply and sewage capacity of the Los Osos area are well documented and currently under debate in the context of the Los Osos Community Plan, which was recently approved by the County but has not yet been submitted to the Coastal Commission.

Detached ADUs **may** only be allowed³ in the South Bay urban area where the site of the CDP is at least:

- 12,000 square feet and served by community water and sewer;
- One acre (net) and served by community water and on-site sewage; or
- 2.5 acres (net) and served by on-site water and sewage.

Ibid. ADUs attached to or incorporated within a primary residence are not mentioned in the exception to the exclusion so it appears they are disallowed entirely within the South Bay urban area.

The site of the CDP that is the subject of this appeal is a 6,250 square foot lot within the South Bay urban area. Therefore, no detached ADU is allowed because it does not meet the 12,000 square foot minimum.

²

<https://www.slocounty.ca.gov/Departments/Planning-Building/Forms-Documents/Plans-and-Elements/Area-Plans/Coastal-Zone.aspx>, accessed 1/12/2021.

³ Note that the language of this subsection does not guarantee that an ADU will be granted a ministerial permit even if the lot size is sufficient; the ADU “may” be permitted, indicating that a discretionary decision must be made. SLOC Code §23.08.169 (c)(1)(i).

Law Office of Babak Naficy

Coastal Commission Appeal of SLO County CDP PMTR2020-00883

Additional Sheet 4 of 4 | Attached to Appeal Form Page 4

IDENTIFICATION OF INTERESTED PERSONS

1. Applicant

Marc Kimbell
1196 6th Street
Los Osos, CA 93402

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
 SAN FRANCISCO, CA 94105-2219
 VOICE (415) 904-5200
 FAX (415) 904-5400

**DISCLOSURE OF REPRESENTATIVES**

If you intend to have anyone communicate on your behalf to the California Coastal Commission, individual Commissioners, and/or Commission staff regarding your coastal development permit (CDP) application (including if your project has been appealed to the Commission from a local government decision) or your appeal, then you are required to identify the name and contact information for all such persons prior to any such communication occurring (see Public Resources Code, Section 30319). The law provides that failure to comply with this disclosure requirement prior to the time that a communication occurs is a misdemeanor that is punishable by a fine or imprisonment and may lead to denial of an application or rejection of an appeal.

To meet this important disclosure requirement, please list below all representatives who will communicate on your behalf or on the behalf of your business and submit the list to the appropriate Commission office. This list could include a wide variety of people such as attorneys, architects, biologists, engineers, etc. If you identify more than one such representative, please identify a lead representative for ease of coordination and communication. You must submit an updated list anytime your list of representatives changes. You must submit the disclosure list before any communication by your representative to the Commission or staff occurs.

Your Name _____

CDP Application or Appeal Number _____

Lead Representative

Name _____

Title _____

Street Address. _____

City _____

State, Zip _____

Email Address _____

Daytime Phone _____

Your Signature Patrick McGibney _____

Date of Signature 1/13/21 _____

Additional Representatives (as necessary)

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Name _____
Title _____
Street Address. _____
City _____
State, Zip _____
Email Address _____
Daytime Phone _____

Your Signature Patrick McGibney

Date of Signature 1/13/21