The Sierra Club v. California Coastal Commission, BS 160383	Decision on petition for writ of mandate: denied

Petitioner The Sierra Club ("Sierra Club") seeks a writ of mandate to compel Respondent California Coastal Commission ("Commission") to aside its approval of a Coastal Development Permit ("CDP") for a project involving the development of five residences on a 156-acre parcel of land in the Santa Monica Mountains.

The court has read and considered the moving papers, oppositions,[1] and reply, heard oral argument, and renders the following decision.

A. Statement of the Case

Petitioner Sierra Club commenced this proceeding on January 21, 2016. The verified Petition alleges in pertinent part as follows.

On December 10, 2015, the Commission approved CDPs for a large project consisting of five single-family homes, an access road, a water line, and other infrastructure on a 151-acre site in the Santa Monica Mountains ("Project"). The Project, as approved, would be built on five lots in a contiguous grouping ("Project Site"). The Project Site contains large areas of critical habitat designated as environmentally sensitive habitat area ("ESHA") by the County of Los Angeles ("County").

The challenged Project Approvals are the Commission's approvals of the six applications for CDPs, which together form the approval of the Project. The applications were submitted by Real Parties-in-Interest Mulryan Properties LLLP, Morleigh Properties LLLP, Vera Properties LLLP, Lunch Properties LLLP, Ronan Properties LLLP, and Ed West Coast Properties, LLLP (collectively, "Applicants"). The six applications form a single Project because they share common infrastructure, such as a single access road and water line, and the applicants have coordinated their participation in the CDP application process.

The County adopted a new Local Coastal Program for the Santa Monica Mountains ("LCP") in August 2014. The LCP governs land use approvals in the portion of the Santa Monica Mountains coastal zone that lies within the County's unincorporated area. The area regulated by the LCP includes the Project Site.

The Applicants originally submitted applications to the Commission in 2007 and 2008 for a development on the Project Site. Those applications were withdrawn and re-submitted before the Commission denied them in 2011. In August 2011, Mulryan Properties LLLP, Lunch Properties LLLP, Vera Properties LLLP, and Ronan Properties, LLLP each filed a lawsuit against the Commission claiming that the denials were unconstitutional takings ("Applicant Lawsuits"). In March 2013, the Applicants and the Commission entered into a settlement to remand the Mulryan, Lunch, Vera, and Ronan applications to the Commission, and for Morleigh to submit a new application, and to allow the Applicants to propose a more clustered development scheme for the Commission's consideration.

The Applicants re-submitted their applications, which were modified to conform to the

[1] Respondent Commission and Real Parties-in-Interest filed separate opposition briefs.

LCP. The applications were considered at the Commission's May 2015 hearing, but the hearing was continued. The Commission made a final decision approving the CDP for the Project on December 10, 2015.

The Commission's Approval of the Project was based on the Staff Report, which serves as the Project's environmental impact report ("EIR") under CEQA, as well as documentation of the Project's purported consistency with the Coastal Act and the LCP. The Staff Report consists of the Staff Report dated November 24, 2015 for the December 10, 2015 Commission hearing and the Staff Addendum issued December 9, 2015.

The Commission prejudicially abused its discretion by approving the Project, despite its inconsistency with the Coastal Act, on the ground that denial of a CDP would constitute a taking. The Project includes development in HI and H2 habitat, significantly disrupts sensitive habitat values, and is a use that does not depend on those resources. The mitigation measures required by the Commission are inadequate.

The Commission also prejudicially abused its discretion because the Staff Report failed to analyze important categories of potentially significant adverse effects of the Project: air quality impacts, greenhouse gas emissions, noise, population and housing, public services, or transportation and traffic impacts. The Staff report also did not comply with CEQA substantive requirements, such as failing to evaluate alternatives, failing to consult with other agencies that may have jurisdiction, and failing to provide sufficient standards for mitigation measures.

B. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or a writ of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of a "determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA]." Public Resources ("Pub. Res.") Code §21168. This is generally referred to as an "adjudicatory" or "quasi-judicial" decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is appropriate in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Where an agency is exercising a quasi-legislative function, it is properly viewed as a petition for traditional mandamus. Id. at 567; Pub. Res. Code §21168.5.

At issue is Petitioner Sierra Club's Coastal Act and CEQA challenge to the Coastal Commission's issuance of a CDP for the Project. The Commission acts in a quasi-judicial capacity when acting on a CDP application. *See, e.g.*, Pacifica Corp. v. City of Camarillo, (1983) 149 Cal.App.3d 168, 177 ("[T]he courts have uniformly held that the coastal permit process is adjudicatory".) This procedural setting, where an administrative hearing was required, is governed by administrative mandamus. In determining whether to grant a petition in a CEQA case, the court decides whether there was a prejudicial abuse of discretion. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or

decision is not supported by substantial evidence. Western States, *supra*, 9 Cal.4th at 568; Pub. Res. Code §21168.5.

CCP section 1094.5 does not in its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. That issue was left to the courts. In cases other than those requiring the court to exercise its independent judgment, the substantial evidence test applies. CCP §1094.5(c). Land use decisions do not typically involve vested rights requiring independent review. *See* PMI Mortgage Insurance Co. v. City of Pacific Grove, (1981) 128 Cal.App.3d 724, 729. A requirement of a permit for a developer, public or private, does not infringe on the fundamental vested rights of adjoining property owners. Bakman v. Dept. of Transportation, (1979) 99 Cal.App.3d 665, 689-90. The "substantial evidence" standard governs such review, and "substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n. 28.

Petitioner Sierra Club expressly disavows any claim that the record lacks substantial evidence on a particular issue. Reply at 1. Instead, Petitioner asserts that that the Commission failed to consider a single home option for purposes of Coastal Act analysis and that the Commission's CEQA document completely fails to address certain issues required by law. Reply at 1-3. A reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, ("Vineyard") (2007) 40 Cal.4th 412, 435. Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects, are subject to a less deferential standard than challenges to an agency's substantive factual conclusions. Id. at 435. In reviewing these claims, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements'." Id.

Whether the agency abused its discretion must be answered with reference to the administrative record. This standard requires deference to the agency's factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights Improvement Assn. v. Regents of University of California, ("Laurel Heights") (1988) 47 Cal.3d 376, 393, 409. Argument, speculation, and unsubstantiated opinion or narrative will not suffice.[2] Guidelines §15384(a), (b).

C. Coastal Act

The Coastal Act of 1976 (Pub. Res. Code[3] §30000 *et seq.*,) (the "Coastal Act" or the "Act") is the legislative continuation of the coastal protection efforts commenced when the People passed

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[2]As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines") contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

[3] All further statutory references are to the Public Resources Code unless otherwise stated.

Proposition 20, the 1972 initiative that created the Coastal Commission. *See* Ibarra v. California Coastal Comm., ("Ibarra") (1986) 182 Cal.App.3d 687, 693. One of the primary purposes of the Coastal Act is the avoidance of deleterious consequences of development on coastal resources. Pacific Legal Foundation v. California Coastal Comm., (1982) 33 Cal.3d 158, 163. The Supreme Court described the Coastal Act as a comprehensive scheme to govern land use planning for the entire coastal zone of California. Yost v. Thomas, (1984) 36 Cal.3d 561, 565. The Act must be liberally construed to accomplish its purposes and objectives. §30009.

The Coastal lAct's goals are binding on both the Commission and local government and include: (1) maximizing, expanding and maintaining public access (§§ 30210-14); (2) expanding and protecting public recreation opportunities (§§ 30220-24); 3) protecting and enhancing marine resources including biotic life (§§ 30230-37); and (4) protecting and enhancing land resources (§§ 30240-44). The supremacy of these statewide policies over local, parochial concerns is a primary purpose of the Coastal Act, and the Commission is therefore given the ultimate authority under the Act and its interpretation. Pratt Construction Co. v. California Coastal Comm., (2008) 162 Cal.App.4th 1068, 1075-76.

The heart of the Coastal Act is the requirement that a person must obtain a CDP prior to undertaking development within the coastal zone. §30106. Before it can approve a project, the Commission must make the finding that the project, as conditioned, is consistent with the applicable Chapter 3 policies of the Coastal Act and the applicable requirements of CEQA. §§ 21080.5, 30604(a); 14 Cal. Code Regs. 13096(a). Based on the evidence, the Commission may grant, deny or otherwise condition the CDP based on applicable Coastal Act policies. *See* LT-WR, L.L.C. v. California Coastal Com., (2007) 152 Cal.App.4th 770, 794-95.

Because local areas within the coastal zone may have unique issues not amenable to centralized administration, the Coastal Act "encourage[s] state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development" in the coastal zone. §30001.5; Ibarra, *supra*, 182 Cal.App.3d at 694-96. To that end, the Act requires that "each local government lying, in whole or in part, within the coastal zone" prepare a local coastal program ("LCP"). §30500(a). A local government must prepare its LCP in consultation with the Commission and with full public participation. §§ 30500(a), (c), 30503; McAllister v. California Coastal Comm., (2009) 169 Cal.App.4th 912, 930, 953.

The Act defines a LCP as:

> "[A] local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coast resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of this division [the Coastal Act] at the local level." §30108.6.

Thus, the LCP consists of a land use plan ("LUP")[4] and the implementing actions of zoning

[4]The LUP is defined in section 30108.5 as: "[T]he relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions."

ordinances, district maps, and other implementing actions ("LIP"). Yost v. Thomas, *supra*, 36 Cal.3d at 571-72. These may be prepared together or sequentially, and may be prepared separately for separate geographical areas or "segments" of a local coastal zone. §30511. The LCP provides a comprehensive plan for development within the coastal zone with a focus on preserving and enhancing the overall quality of the coastal zone environment as well as expanding and enhancing public access. Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553, 571.

D. CEQA

The purpose of CEQA (Pub. Res. Code §21000 *et seq.*,), is to maintain a quality environment for the people of California both now and in the future. §21000(a). "[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." Save Our Peninsula Committee v. Monterey County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259.

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. §21002. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." §21000(g).

The EIR is the "heart" of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights Improvement Association v. Regents of University of California, ("Laurel Heights II") (1994) 6 Cal.4th 1112, 1123. An EIR describes the project[5] and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions." No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. Using the EIR's objective analyses, agencies "shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do so. §21002.1.

CEQA is intended to be used in conjunction with discretionary powers granted to public agencies by other laws. Guidelines §15040. CEQA permits a state agency with a regulatory

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[5]A "project" is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. §21065.

program to be exempt from the requirement for preparing an EIR, negative declaration, or initial study if the Secretary for Resources certifies that the agency's program meets the criteria set forth in section 21080.5. Environmental Protection Information Center, Inc. v. Johnson, ("Environmental Protection") (1985) 170 Cal.App.3d 604, 620, 610. Agencies certified under section 21080.5 must adopt a "functional equivalent" of the EIR or negative declaration process. Certified regulatory programs are exempt only from Chapters 3 and 4 of the Public Resources Code (concerning EIRs) and section 21167 (statute of limitations), and remain subject to the other provisions of CEQA. Sierra Club v. State Board of Forestry, ("State Board of Forestry") (1994) 7 Cal.4th 1215, 1231; Guidelines §15250. The agency "must comply with all of CEQA's other requirements. Mountain Lion Foundation v. Fish & Game Commission, ("Mountain Lion") (1997) 16 Cal.4th 105, 114 (section 21080.5 establishes a limited CEQA exemption).

A certified regulatory agency must prepare an environmental document that includes a description of the proposed activity, identifies a project's adverse environmental impacts, and mitigates those effects through adoption of feasible alternatives or mitigation measures that may substantially lessen significant adverse impacts. §21080.5(d)(2)(A); Citizens for Non-Toxic Pest Control v. Department of Food and Agriculture, ("Citizens for Non-Toxic Pest Control,") (1986) 187 Cal.App.3d 1575, 1586; Guidelines §15252.[6] The procedure must allow for review and comment by the public and other agencies and must include a detailed response to all significant environmental issues raised by commentators. §21080.5(d)(2)(C), (D); Schoen v. California Dept. of Forestry and Fire Protection, ("Schoen") (1997) 58 Cal.App.4th 556, 565.

The Secretary for Resources has determined that the Commission's regulatory program of granting CDPs and certifying LCPs qualifies for certification under section 21080.5. Guidelines §15251(c), (f). The Commission's certified regulatory program is an extension of its Coastal Act mandate to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." §30001.5(a). The Commission's staff report for such projects serves as a "functional equivalent" of an EIR.

E. Statement of Facts[7]

1. First Applications

On November 22, 2005, each Applicant purchased one of the six Sweetwater Mesa lots. AR 34780. At the time, the 1986 LUP was in effect and the six parcels were designated with an M2 land-use designation, where "very low-intensity residential development" is allowed at a maximum density of one dwelling unit per 20 acres. Pet. RJN, Ex. 1, p. 59. The Applicants submitted applications for CDPs for five single family residential projects in 2007 and 2008. AR 34593-94. The Commission staff deemed the applications incomplete, and Applicants appealed that determination to the Commission. AR 34594.

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[6]The Commission's regulations also require it to make specific findings with regard to a development's consistency with CEQA and the Coastal Act. 14 CCR §§ 13356, 13057, and 13096.

[7] Petitioner Sierra Club asks the court to judicially notice (1) the County's Malibu 1986 LUP ("1986 LUP") (Ex. 1), (2) the County's LUP that is part of the LCP (Ex. 2), (3) the County's LIP that is part of the LCP (Ex. 3), and (4) the Applicants petition in LASC BS133269 (Ex. 4). The requests are granted. Evid. Code §§ 452(c), (d).

On May 7, 2008, the Commission heard the Applicants' appeal. AR 34594. The Commission concluded that three of the five disputed items were necessary for staff analysis of the development proposals. AR 34594.

2. The Reapplications

In June 2010, the Applicants again applied for CDPs for a five-house Project. The Commission staff recommended denial of the applications because the proposed Project was inconsistent with the Coastal Act and the 1986 LUP in effect at the time. AR 33798-800.

a. Staff Report

The Staff Report for the June 16, 2011 hearing ("2011 Staff Report") analyzed the coastal resource impacts of the applications based mostly on the Coastal Act itself, not the 1986 LUP. In recommending denial, Commission staff found that the Project Site and the surrounding area, with the exception of the approximately three-acre mesa area on the Mulryan and Lunch parcels, the jeep trail leading up to it, and the northernmost 1,200-foot section of the water line alignment within an existing roadway, were ESHAs. AR 33843. The construction of the residences would be inconsistent with the Coastal Act's policies because construction of the residences would require both the complete removal of ESHA from the home development areas and from fuel modification (removal of combustible vegetation)[8] for fire protection around the homes. AR 33846. The access road, the waterline, and the deposit of excess excavated material adjacent to the access road would all be located in ESHA and the construction would violate the Coastal Act and the 1986 LUP because of their effects on ESHA. AR 33847-48. Because each element of the proposed Project would result in significant disruption of habitat values and was not a use dependent on those sensitive habitat resources, application of section 30240 by itself would require denial of the applications. AR 33849.

As for visual impact, "the proposed residences, access road, fill, and lot line adjustment would not serve to protect public views, minimize landform alteration, or be compatible with the character of the surrounding area," and were inconsistent with section 30251 and 1986 LUP visual resources policies. AR 33903.

With respect to cumulative impacts, the Commission staff did not consider the project sites to be located within, contiguous with, or in close proximity to an existing developed area to avoid inducing further development. AR 33867.

The Commission staff concluded: "[T]he proposed project is significantly out of conformance with the Coastal Act because the project site is located in the middle of significant ESHA habitat and much of the project would traverse a highly visible, undisturbed area of the Santa Monica Mountains, where the expanse of natural landscape and vegetation defines the appearance and much of the overall character of the area. As a result, the proposed project must be denied in its present form." AR 33868.

The 2011 Staff Report turned to a takings analysis, and concluded that denial of the CDPs would not constitute a taking under California or federal law. AR 33868-902. The Commission staff based this conclusion in part on the determination that the five applications should be

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[8] Fuel modification constitutes development under the Coastal Act. §30106 (defining "development" to include "removal or harvesting of major vegetation").

considered together as a single Project due to the unity of ownership for the purpose of the takings analysis. AR 33880-92. The Project was designed and controlled solely by David Evans ("Evans"). AR 33871. The Applicants were all business entities with the same authorized agents, the Applicants acted in concert in submitting the applications, and they were acting in a single venture for profit. AR 33882-90. Evans further had a close familial or business relationship with the principals of all the other Applicants. AR 33884-85. The 2011 Staff Report noted that, while it did not have all relevant ownership information, that fact was due to an unwillingness by the Applicants to provide information. AR 33893.

The Commission in the past has looked beyond the surface transactions where ostensibly separate ownership is actually more complicated. AR 33895. The 2011 Staff Report concluded that there was substantial evidence of unity of ownership for at least three parcels, and the Commission should treat the relevant area for a takings analysis as something less than the five separate parcels presented by the Applicants. AR 33895. The 2011 Staff Report concluded that denial of the Project would not deprive the Applicants of all economically viable use of their property under Lucas v. South Carolina Coastal Council, ("Lucas") (1992) 505 U.S. 1003, 1012 because the development could occur with fewer than five houses and the development could occur on a smaller scale. AR 33896. The 2011 Staff Report also noted that the Coastal Act restrictions were in effect at the time the parcels were purchased and the Applicants could not have had a reasonable expectation that they would be entitled to the proposed Project. AR 33897. Therefore, takings law did not require approval of a single family residence on each of the existing legal lots. AR 33902.

b. Denial with Guidance

On June 16, 2011, Real Party Morleigh withdrew its CDP application and the Commission denied the other CDP applications. AR 34557.

The Commission described its decision as "Denial with Guidance," giving the Applicants guidance on how the Project could be revised. AR 33902. The Commission found that the Project was inconsistent with the Coastal Act provisions regarding ESHAs and public views. AR 33902-93. The Commission also stated that it has not made a final decision about the use of the Project Site and has not indicated that no development is possible. AR 33902. Takings law did not require approval of a single family residence on each of the existing legal lots. A small project may be approvable, but the Commission could not determine the exact size of permissible development based on the existing record. There also was considerable variation in where a single house could be located. AR 33902.

The Commission made express findings regarding the feasibility of alternatives. AR 33902-03. There are no potential development sites on the properties that could completely avoid impacts to ESHA or visual resources. AR 33903. However, there were "potential design, siting, clustering and water supply alternatives that could significantly reduce the existing proposal's inconsistencies with the ESHA and visual resources." AR 33903. The Commission discussed a variety of alternatives that could bring the development into consistency with the Coastal Act. AR 33903-06. These alternatives included a reduction in the number of residences to "somewhat less than five" and down to two or three (AR 33903), siting alternatives including moving one residence closer to the proposed access road (AR 33904), and clustering alternatives including alternative lot configurations (AR 33905-06).

3. The Litigation

On August 12, 2011, Real Parties Mulryan, Lunch, Vera, and Ronan filed separate Petitions for Writ of Mandate challenging the Commission's taking analysis. AR 20770. The lawsuits were consolidated in October 2011. AR 34557.

In March 2013, the Applicants entered into a settlement agreement with the Commission to remand the Mulryan, Lunch, Vera, and Ronan applications to the Commission and to allow Morleigh to submit a new application. AR 20770-82, 34557. The court stayed the lawsuit and remanded the matter to the Commission in order to allow the Applicants to submit revised applications. AR 20789-94, 34598.

4. The Revised Project

The Applicants submitted applications for a revised Project in April 2014. AR 19090-93. The revised applications were deemed complete in August 2014. AR 34598.

On October 8, 2014, the Commission certified the County's LCP, which covers an area including the Project Site. AR 34557. The LCP consists of the LUP, which functions as a general plan, and the LIP, which updates the County Code and includes zoning. Pet. RJN Exs. 2-3.

The Project was originally scheduled to be considered on October 8, 2014. AR 34598. On October 7, 2014, the Serra Canyon Property Owners Association submitted a comment stating that none of the homeowners on Sweetwater Mesa Road had received notice of the October 8, 2014 hearing. AR 19969-79. The hearing to consider the Project was continued due to this noticing deficiency. AR 34598. The Applicants took advantage of the continuance to modify their proposals to make them compatible with the newly certified LCP. AR 34598.

5. The Revised Project Description

a. Residences

The proposed Mulryan residence is an 18-foot high three level home with a basement. AR 34553. The home is a 9,572 square feet, with an attached 1,184 square foot garage, and a 399 square foot non-habitable space. Id. The development proposal includes a swimming pool, septic system, 300 liter water line extension, an access road extension, and a Fire Department hammerhead turnaround. Id.

The Morleigh Residence is an 18-foot high three-level home. AR 34554. The home is 7,812 square feet, with an attached 2,422 square foot garage and a 668 square foot non-habitable space. Id. The development proposal includes a swimming pool, septic system, a water line extension, a shared access road extension, and a Fire Department hammerhead turnaround. Id.

The Vera Residence is an 18-foot high, stepped, three-level home. AR 34554. The home is 9,454 square feet, with an attached 982 square foot garage and a 196 square foot non-habitable space. Id. The development proposal includes a swimming pool, septic system, a water line extension, a shared access road extension, a Fire Department hammerhead turnaround, a Fire Department access turnout, and a high berm with a ten foot barrier fence as a rock stabilization device. Id.

The Lunch Residence is an 18-foot high two-level home. AR 34554-55. The home is 9,555 square feet, with an attached 639 square foot garage and a 121 square foot non-habitable space. Id. The development proposal includes a swimming pool, septic system, a water line

extension, a shared access road extension, and a Fire Department hammerhead turnaround. Id.

The Ronan Residence is an 18-foot high, stepped, three-level home. AR 34554. The home is 8,357 square feet, with an attached 2,139 square foot garage and a 693 square foot non-habitable space. Id. The development proposal includes a swimming pool, septic system, a water line extension, a shared access road extension, a Fire Department hammerhead turnaround, and a six-foot high barrier fence, rock fall stabilization device. Id.

b. Lot Line Adjustment

The Project includes a lot-line adjustment to adjust the boundaries for the lots for the five residences, as well as the boundaries of a sixth parcel owned by E.D. West Coast Properties. AR 34555-56. The purpose of this lot-line adjustment is to allow the five houses to be located in proximity to one another and reduce the Project's development footprint. AR 34555.

c. Shared Access Road

The Project requires a shared access road, 2,180 feet in length, 20 feet wide, to connect to a yet-to-be approved road segment in the City of Malibu ("Malibu") that will in turn connect to the existing Sweetwater Mesa road and require 25,520 cubic yards of grading. AR 34586. The access road will require 168 reinforced concrete caissons with an average diameter of 50 inches and an average depth of approximately 56 feet. AR 34590-91. Four retaining walls, a total of 610 feet in length, are required for the road. Id. Two "stabilization devices" consisting of 10-foot high wire mesh barriers installed behind four-foot high vegetated berms -- one 315 feet long and the other 190 feet in length -- will protect the road and the Ronan residence from rock falls. AR 34591.

d. Water Line

The shared water line will be eight inches in diameter and extend 7,000 feet from Costa del Sol Road to the Project Site. AR 34586, 34591. The northernmost 1,200 feet would be constructed by trenching under the Costa del Sol Road right-of-way. The middle 4,510 foot portion would be installed utilizing horizontal directional drilling, and the final 1,310-foot segment would be constructed by trenching under the Project's access road. AR 34591.

e. Conservation

As part of the Project, Applicants agreed to dedicate of 137 acres of the Project Site to the Mountains Recreations and Conservation Authority and grant a trail easement over another portion of the Project Site. AR 34586.

6. Public Comment

The National Park Service ("NPS") submitted a written comment stating that the Project continued to present significant biological and visual impacts. AR 25282. NPS pointed out that the required fuel modification zone around the Lunch and Ronan Residences would directly impact H1 habitat. AR 25283. The placement of the residences would impact the ridgeline view from several trails around the Project Site. AR 25283. The placement of homes on a ridgeline that has burned at least six times between 1942 and 2010 made it highly probable that the homes would be exposed to wildland fire in the near future. AR 25284.

Petitioner Sierra Club submitted a written comment stating that the Project continued to

violate the Coastal Act and the LCP. AR 25304. The Sierra Club commented the grading for the Project would be massive, and not consistent with the LCP's requirement to minimize grading. There was no discussion of a haul route. AR 25304. The Sierra Club also noted that the Project would have un-mitigated impacts on the public view. AR 25304. The comment complained that the 7800 foot water line extension does not comply with the LIP. AR 25305. The comment also stated that the cumulative impacts of the Project were not properly analyzed. AR 25305. Finally, the Sierra Club stated that the Commission staff report serves as an EIR and must comply with CEQA's informational requirements, yet failed to do so and failed to define the Project to include the access road. AR 25306.

On May 6, 2015, Steven and Helen Clarke submitted a written comment that the Project would increase traffic in an already congested traffic area. AR 25324.

On May 7, 2015, Palomba Weingarten submitted a written comment stating that the Project would increase traffic density, construction truck traffic would affect air quality and create excessive noise, impair access for fire and safety, and impact water resources in the area. AR 25326-27.

The Malibu Coalition for Slow Growth and Malibu Township Council submitted a written comment discussing the lack of cumulative impact analysis in the staff report, specifically with respect to the proposed use of Sweetwater Mesa Road for ingress and egress to the Project. AR 25216. The comment also discussed the proposed water line extension, which would enable several other parcels to be developed. AR 25217-18. The comment also addressed the Project's view impacts, the risk of wildfire in the Project Site, and the failure to analyze impacts of the haul route. AR 25218-20.

Save Open Space submitted a written comment stating that the staff report failed to include an updated geological map showing that the Project Site is located in a landslide area. AR 25257. The comment complained that the staff report did not include a map of all H1 and H2 habitat areas that would be disturbed by the Project. AR 25258. The commenter noted that the water line extension would be growth-inducing, and this impact was not studied. AR 25258. A local archeologist found several cultural artifacts on the Project Site, requiring an archeological significance study. The proposed grading also was excessive. AR 25258.

The Save Open Space comment further asserted that the Project created cumulative hazards of landslides, fires, and storm water flows. AR 25255-59. It encouraged the Commission to limit the Project to only one residence, as that would not constitute a taking, and would be the environmentally superior option. AR 25263. The staff report also failed to completely analyze the impacts of the Project on the ridgeline view, and did not provide simulation pictures of the views from various national park view sites. AR 25265-66. This impact also would be mitigated if the Project were limited to only a single residence. AR 25266.

Applicants' counsel submitted a written comment on November 6, 2015 listing the estimated construction costs to build the Project. AR 29431-32. In order to comply with the Commission's requests, the residences had been located on the most expensive areas of the property to develop and cluster. AR 29431. An appraisal shows that the construction cost for these five residences is $78 million, and the property as developed would be valued at $79 million and. AR 29431. If the Project were reduced from five residences to four, the cost to construct the properties would exceed the value of the development. AR 29431. Counsel asserted that the point at which the cost to construct exceeds the resulting value is the difference between a use that is

economically viable and one that is not under Lucas. AR 29431.

7. The May 2015 Hearing

The Commission staff scheduled the modified Project applications for hearing on May 14, 2015. AR 34598. At the hearing, the Commission requested additional analysis and continued the hearing to December 10, 2015. AR 28499.

8. The December 2015 Hearing

a. The 2015 Staff Report

Commission staff prepared a Staff Report for the December 10, 2015 meeting ("2015 Staff Report"). AR 34552-701. The 2015 Staff Report recommended approval of the reconfigured Project. AR 34557.

The Project involves residential development within H2 habitat, which the LCP generally requires to be avoided. Such development is permitted (1) if it is infeasible to avoid these impacts and still provide a reasonable economic use of the property (a takings standard) and (2) the location and design of the development minimizes impacts to H2 habitat. AR 34636. Similarly, some portions of the development would be within the 100-foot buffer and 100-foot quiet zone required for H1 habitat. AR 34636. Location within the 100-foot H1 buffer is inconsistent with LCP protections unless (1) the impacts are necessary to avoid a taking, (2) there is no feasible alternative, and (3) the impacts are mitigated to the maximum extent feasible. AR 34636.

Additionally, none of the five proposed residences would be directly in H1 habitat. However, each house would require fuel modification, which is itself development, directly within H1. AR 34636. The LCP prohibits such development without exception. AR 34636. Any approval would conflict with the LCP and would require denial of a CDP unless it would constitute a taking under section 30010 of the Coastal Act. AR 34636.

The 2015 Staff Report contained a new takings analysis based on the LCP, which integrates takings principles into its policies. AR 34636-37. The 2015 Staff Report adopted the reasoning of the 2011 Staff Report in finding that the parcels had a unity of interest. AR 34638. This conclusion was only strengthened by the fact that the Applicants had acted as a unit in the litigation and negotiations with the Commission regarding the Project. AR 34638.

The 2015 Staff Report analyzed the standard for a taking, and concluded that under a Lucas standard of ensuring that the agency is not depriving the property owner of all of the economically viable use of the parcels, the denial of CPDs would not be a taking. AR 34639. The staff was not persuaded by Applicants' argument that five residences were necessary to avoid a taking because the cost of construction would outweigh the value of the improved parcels for any lesser number of residences. AR 34639-40. The case law cited by Applicants concerned investment property, not the "dream homes" at issue for Applicants. AR 34640. The property retained significant value to the Applicants independent of the comparison of development costs to market value. AR 34640. Moreover, the high cost of developing the property is inherent in its remoteness and landslide risk, not due to any government regulation. AR 34640. Finally, while the property would cost tens of millions to develop, it also would indisputably be worth tens of millions of dollars. It is not correct, therefore, that the development of fewer than five residences would have no economically viable use. AR 34640.

The 2015 Staff Report applied another high court takins case, Penn Central Transportation

Co. v. City of New York, ("Penn Central") (1978) 438 U.S. 104, to the situation where the government proposes some restrictions on the use of a property, but is not denying all economic use of the property. AR 34631. Penn Central requires an assessment of the owner's reasonable investment-backed expectations for the property, the nature of the government action, and the economic impact of the action. The first factor – reasonable investment expectation – is by far the most important. AR 34641. When the Applicants purchased their properties, the 1986 LUP was in effect. All six properties sit on ESHA, and the Applicants could not have had an expectation to build more than six homes, one on each parcel. AR 34641. Nor can one simply add up the number of parcels to determine a reasonable investment expectation. The property site is extremely steep, prone to wildfires, contain a visually prominent ridgeline, and has several geologically unstable areas. AR 34642. In addition, the Commission previously decided that the relevant area for a takings analysis was something less than the five separate parcels presented. AR 34642.

After the lawsuit and settlement, the Applicants have revised the Project to reduce grading by 33%, as well as to reduce biological resources and visual impacts. AR 34642. The revised Project clusters the five proposed homes, which takes advantage of overlapping fire clearance zones and sites them in the southern portion of the property closer to nearby development. AR 34642. It also minimizes new roadway construction, concentrating development in a relatively flat 13-acre area. AR 34642-43. This concentrated development is an environmentally superior alternative because it avoids large-scale disturbances in the northern half of the site, and the ESHA impacts from the five homes are roughly comparable to three homes with non-overlapping fire clearance zones. AR 34643. The critical factor for protecting coastal resources is the development's footprint and location; the number of houses is less important than restricting the houses to a clustered pattern within the mesa area. AR 34643.

It is infeasible to avoid all impacts to H2 habitat and still provide an economic use for the property. It also is infeasible to keep all development out of the 100-foot buffer and 100-foot quiet zone for H1 habitat. AR 34643. Allowing some development is consistent with LUP and LIP policies. However, those policies require that impacts to H2 habitat be minimized, that there is no feasible alternative, and that impacts to H1 habitat be avoided to the maximum extent possible. AR 34643. The Commission staff considered one Project alternative where the five residences were even more tightly clustered, but that alternative would remove four H1 rock outcrops in conflict with the LCP. AR 34644. As H1 habitat is the highest priority, the proposed Project is the better alternative. AR 34644.

The 2015 Staff Report concluded that the proposed development on the mesa area would not interfere with the reasonable investment-backed expectations of the Applicants, as it is the only part of the property which could reasonably support development. AR 34644. As for the nature and extent of development that should be permitted, the five clustered houses were a reasonable approach given (1) Applicants' entitlement to multiple economically viable uses (the number of which is not precisely known), (2) the Project's long history and redesign to avoid ESHA to the north, (3) the small difference in biological impacts resulting from five versus three houses, (4) the permanent protection of 137 out of 151 acres of open space, (5) the overall reasonableness of the proposed development within a large property, and (6) the proposal is a settlement of litigation involving uncertainty. AR 34644-45. The 2015 Staff Report concluded that there is no viable alternative use for the property other than residential. AR 34645.

b. Public Comment

NPS submitted a written comment on December 8, 2015. AR 35187-91. NPS concluded that the revised Project presents significant biological and visual impacts and requested that the Commission further investigate an alternative configuration for the houses that located the houses in the southern area of the overall site. AR 35189. Although this location would impact to H1 rock formations, it would significantly reduce overall impacts. AR 35189.

Save Open Space submitted a written comment on December 7, 2015. AR 35199-203. This comment argued that the 2015 Staff Report failed to address the cumulative impact of the five residences on the landslide area. AR 35200. The comment also complained that the Staff Report did not address any alternative of fewer than five houses. AR 35200. The comment further argued that the Applicants could recoup their investment-backed expectations simply by selling the undeveloped property. AR 35202.

The Malibu Coalition for Slow Growth and Malibu Township Council submitted a written comment stating that the 2015 Staff Report failed to include a reduced pad or structure size in its alternatives analysis. A reduced pad and structure would significantly reduce visual impacts and impacts to H1 and H2 habitat. AR 35220. The comment also stated that the 2015 Staff Report served as the equivalent of an EIR, and must fulfill CEQA informational requirements. AR 35221. The 2015 Staff Report did not examine and account for the adverse impacts of the entire Project, including impacts of the road segment within Malibu, traffic, grading, and public access. AR 35221-22.

c. The Addendum

On December 9, 2015, the Commission issued an Addendum addressing the public comments and revising portions of the 2015 Staff Report. AR 35105-15. In the Addendum, the Commission stated that removal of the two northerly houses would eliminate H2 habitat impacts without creating additional H1 habitat impact. The Commission did not agree with the Applicants that a restriction to only three houses would be a taking. Nonetheless, the Commission was willing to allow the construction of five houses within the specified developable area to resolve the dispute because the five houses would be limited to the 13-acre area that drives the Applicants' reasonable investment-backed expectations. AR 35108. Construction of the additional two houses had only marginal additional impact, and would resolve the dispute between the Applicants and the Commission regarding the potential taking. AR 35108.

d. The Commission Approval

At the December 10, 2015 hearing, Commissioner Ainsworth stated that the clustered alternative was the Project configuration that staff had advocated from the beginning. AR 33751. It was not reasonable to impose an even tighter configuration, which could be the equivalent of a five-unit condo on 150 acres. AR 33751. The proposed configuration recognized the six legal parcels and the attendant property rights in those parcels, while still protecting resources. AR 33752.

The Commission unanimously approved all of the applications that made up the Project. AR 33790-92.

On December 16, 2015, the Commission notified the Office of the Secretary for Natural Resources of its decision to approve the Project. AR 33235. The notice stated that the Commission

had determined that the Project as approved would not have significant effects on the environment, environmental analysis documents were prepared for the Project pursuant to Section 21080.5 and Guidelines Section 15252, and mitigation measures were in some cases made conditions of approval. AR 33235.

F. Analysis

Petitioner Sierra Club asserts that the Commission abused its discretion in approving the Project because (1) the Commission improperly determined that any greater restrictions on the Project would constitute a taking, (2) the Commission's approval of the Project was inconsistent with visual resource, water line, and cumulative impact policies, and (3) the 2015 Staff Report is inadequate because it does not provide all of analysis required by CEQA.

1. Absent Application of Takings Principles Incorporated in the LCP, the Project Would Violate the LCP's Protection of H1 and H2 Habitat

The Coastal Act provides for heightened protection of ESHAs, defined as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. §30107.5. ESHAs "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. §30240(a). Development in areas adjacent to EHSAs shall be sited and designed to prevent impacts which would significant degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas. §30240(b). Thus, the Coastal Act places strict limits on the uses which may occur in an ESHA and carefully controls the manner in which uses around the ESHA are developed. Bolsa Chica Land Trust v. Superior Court, (1999) 71 Cal.App.4th 493, 506-08. *See also* Feduniak v. California Coastal Commission, (2007) 148 Cal.App.4th 1346, 1376.

The LCP has been certified, necessarily implements the Coastal Act policies, and governs issuance of CDPs for the Project. §30604(b). The LCP's "Guiding Principle" is that "[r]esource protection has priority over development." Pet. RJN Ex. 2, p. 020. LUP Policy CO-33 defines "Sensitive Environmental Resource Areas" ("SERAs"), which is the LCP's roughly equivalent term for ESHA, as areas containing habitats of the highest biological significance, rarity, and sensitivity. SERAs are divided into two habitat categories —HI habitat and H2 habitat —that are subject to strict land use protections and regulations. Pet. RJN Ex. 2, pp. 031-032 (CO-33).

The LUP prohibits non-resource dependent development in H1 habitat areas with inapplicable exceptions. Pet. RJN Ex. 2, p. 034 (Policy CO-41). *See also* 2014 LIP, Pet. RJN Ex. 3, pp. 124-34, (Los Angeles County Code ("LACC") §22.44.1890(C)). In addition to prohibiting non-resource dependent development in H1 habitat, the LUP requires a 100-foot native vegetation buffer around H1 habitat in which development is prohibited. Pet. RJN, Ex. 2, p. 037 (Policy CO-55). An additional 100-foot "quiet zone" is required where feasible. Pet. RJN Ex. 2, p. 037 (Policy CO-57). As for H2 habitat, the LUP requires that "[n]ew development shall avoid H-2 Habitat...where feasible, to protect these sensitive environmental resources from disruption of habitat values." Pet. RJN, Ex. 2, p. 034 (Policy CO-43). Thus, the LCP prohibits development in H1 habitat and restricts development in H2 habitat. Protection of H1 and H2 habitat shall have priority over other developmental standards. Pet. RJN, Ex. 2, p. 039 (Policy CO-66). These LUP

policies are mirrored in the LIP. Pet. RJN, Ex. 3, pp. 125-29 (LACC section 22.44.1890(D).

The Project Site contains H1 habitat in the form of grasslands with purple needlegrass and rocky outcrops as well as H2 habitat of mixed chaparral. AR 34628. The Project's residences will not themselves be constructed in H1 habitat, but the Los Angeles County Fire Department ("LACFD") requires 200-foot fuel modification zones around each residence. All native vegetation must be removed from Zone A, the 20-foot wide zone immediately adjacent to the buildings. AR 34647. Most native vegetation must be removed or widely spaced in Zone B, which extends 100 feet outward from Zone A. AR 34647. In Zone C, which extends outward another 100 feet from Zone B, native vegetation must be thinned or widely spaced, and particular high-fuel plant species must be removed. AR 34647.

Thus, fuel modification affects H1 and H2 habitat within 220 feet of the residences. Approximately .46 of an acre of fuel modification will be located in H1 habitat. AR 34631.[9] The steep and rocky topography of the sites will reduce the H1 habitat impact because relatively little vegetation would be removed, but still "there are several areas where neither the 100-foot H1 buffer nor the 100-foot H1 Quiet Zone can be provided between structures and H1 habitat areas. AR 24632. The revised Project also "will impact significant areas of H2 habitat" containing chaparral habitat. AR 34634.

The Commission noted that the LCP permits a reduced H1 buffer and/or quiet zone only where six certain criteria are satisfied, one of which is the takings issue: to avoid interfering with the investment-backed expectations of the applicants. AR 34632. Specifically, new development may invade the H1 habitat buffer if it is the minimum necessary to provide a reasonable economic use and there is no feasible alternative, as long as impacts to H1 habitat are avoided to the maximum extent feasible. *See* Pet. RJN, Ex. 2, p. 037 (Policy CO-56). New development may invade the H1 habitat quiet zone if it is the minimum necessary to provide a reasonable economic use and there is no feasible alternative, as long as impacts to H1 habitat and buffer are avoided to the maximum extent feasible. *See* Pet. RJN, Ex. 2, p. 038 (Policy CO-57).

The Commission found that the required fuel modification for the proposed residences may be allowed within the H1 habitat buffer and quiet zone because the Project will meet the six criteria required by LUP Policies CO-56 and CO-57. AR 34633-34. In making this finding, the Commission noted that LIP sections 22.44.1910 and 22.44.1890 require clustered development and building sites limited to 10,000 square feet within H2 habitat areas. AR 34632. Each of the five proposed residences meets this standard. LIP sections 22.44.1910 and 22.44.1920 also require preservation in perpetuity of the remaining habitat areas through an open space easement, and the Project conforms to this requirement. AR 34632-33. Given the topography and the location of H1 habitat, there are no other feasible building sites on the properties that can avoid H1 buffer or quiet zone. AR 34633. Reducing the footprint of the proposed residences would increase the H1 buffer, but would significantly impact public view of the ridgeline. AR 34633. A reduction of the

[9] Exhibit 23 to the 2011 Staff Report (AR 35102) shows how the Project affects H1 habitat. Several areas of H1 Purple Needlegrass are in fuel modification Zone C for the two northernmost houses (Ronan and Lunch), as are some H1 Rock Outcrops and H2 Habitat with H1 Rock Outcrops. A Rock Outcrop is in Zone B for the Morleigh Residence (the property in the middle). Several areas of H1 Rock Outcrops are in Zones B and C for the Vera Residence (the furthest south).

footprint while maintaining the 18-foot above grade height for visual issues would allow for an increase in buffer or quiet zone width, but the footprint reduction would have to be more than 50% to provide a buffer from H1 outcrop habitat and still would not provide the full buffer or quiet zone. AR 34633. Finally, the proposed residences are sited and designed to prevent H1 habitat impacts to the extent feasible, given the need to protect visual resources as well as geologic hazard constraints. AR 34633. Moreover, all feasible mitigation measures have been provided. AR 34633.

As for H2 habitat, the Commission noted that the LUP requires that new development shall avoid H2 habitat where feasible. Fuel modification around the proposed residences and the proposed waterline will impact significant areas of H2 habitat. AR 34634. The proposed development is clustered, the majority of the sites will remain open space, and each of the five proposed buildings meets the 10,000 square foot standard. AR 34634. The Commission concluded that, given the topography, location of H1 habitat, geological hazards, ridgeline, and steep slopes, there are no other feasible alternative building sites that can avoid removal of H2 habitat. AR 34634.

2. <u>The Takings Analysis</u>

Public Resources Code section 30010 states that "[t]he Legislature hereby finds and declares that [the Coastal Act] is not intended, and shall not be construed as authorizing the commission... to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor." §30010. *See also* Pet. RJN Ex. 2, p. 037 (Policies CO-56, CO-57) and Ex. 3, p. 131 (LACC 22.44.1910).

Petitioner Sierra Club notes that, pursuant to the settlement of their initial lawsuit, the Applicants submitted revised applications to cluster the houses and reduce the amount of development in H1 and H2 habitat. But the revised Project would still develop in those protected habitats. The 2011 Staff Report, after a lengthy legal analysis (AR 33868-33902), concluded that a denial of the Project would not be a taking. According to Petitioner, the 2015 Staff Report recommended approval of the revised Project because it changed its position on whether a denial of the Project would constitute a taking and therefore trigger section 30010's requirement that a CDP must be issued when denying the permit would be a taking. Under the pressure of the lawsuit, the 2015 Staff Report wrongly reversed this position even though none of the facts on which it was based had changed. Pet. Op. Br. at 10.

Sierra Club further notes that the required fuel modification for the proposed residences will impact significant areas of H1 habitat. AR 34634. Several areas of H1 Purple Needlegrass are in a fuel modification zone. AR 35102. The Project also will impact significant areas of H2 habitat. AR 34634. The Project will cause visual blight because it will be built into a Significant Ridgeline and the Lunch, Vera, and Ronan residences violate the 50-foot vertical setback required by LIP section 22.44.20140(B)(3). AR 34557, 34663. And the majority of the proposed water line extension will not be located under an existing road right of way as required by LIP section 22.44.1340(D). AR 34875. Pet. Op. Br. at 11-13.

As such, Sierra Club contends that the Project does not comply with the Coastal Act or the LCP. The 2015 Staff Report nonetheless approved the Project because it determined that to do otherwise would constitute a taking. AR 34636. Petitioner argues that this determination was

erroneous because the Project is larger than the minimum project the Commission could approve to avoid a taking. Pet. Op. Br. at 14.

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation." Similarly, Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation... has first been paid to, or into court for, the owner."

In Pennsylvania Coal Co. v. Mahon, (1922) 260 U.S. 393, the Supreme Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs. The Court stated that "while property may be regulated to a certain extent, if a regulation goes too far it will be recognized as a taking." Id. at 415.

The United States Supreme Court has subsequently identified two circumstances under which a regulatory taking may occur. In Lucas, *supra*, 505 U.S. at 1003, the Court stated that a regulation that denied all economically viable use of a property was a taking regardless of the public interest involved in the regulation. Id. at 1014. This category is extremely narrow, and applies only in the extraordinary circumstance when no productive or economically beneficial use of land is permitted, or when the property has been rendered valueless. Id. at 1016-17.

The second circumstance under which a regulatory taking may occur is under the three-part, ad hoc test in Penn Central, *supra*, 438 U.S. at 124. This test requires an examination into the character of the government action, its economic impact, and its interference with distinct, investment-backed expectations. Id. at 134. Even when a property does not lose all economic value following regulation, the regulation may still be considered a taking under the Penn Central factors. Palaazzolo v. Rhode Island, (2001) 533 U.S. 606, 632 (remanding case for consideration under Penn Central even though it did not satisfy the Lucas test).

As a threshold matter before the takings issue can be analyzed, it is necessary to define the property interest against which any taking claim would be measured. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, (2002) 535 U.S. 302, 327. When a landowner owns or controls multiple, adjacent, or contiguous parcels related to the proposed development, courts will analyze whether the lots and the proposed development are sufficiently related such that the lots should be aggregated and treated as a single parcel for purposes of the takings analysis. Forest Properties, Inc. v. U.S., (Fed. Cir. 1999) 177 F.3d 1360, 1365. In determining whether lots should be aggregated, courts look to factors such as the unity of ownership, the degree of contiguity among the lots, the dates of acquisition, and the extent to which the area has been treated as a single unit. District Intown Properties, Ltd. v. District of Columbia, (D.C. Cir. 1999) 198 F.3d 874, 879-80; Ciampitti v. United States, (Cl. Ct. 1991) 22 Cl. Ct 310, 318.

Petitioner Sierra Club asserts that the 2015 Staff Report omits the 2011 Staff Report's conclusion that allowing a single residence to be built on the Project Site would be sufficient to avoid a taking. Pet. Op. Br. at 15. The 2011 Staff Report concluded that the appropriate unit of analysis for takings purposes was "something less than the five separate parcels presented by the applicants." AR 33895. Sierra Club contends that the 2015 Staff Report contains no analysis of what level of development would constitute a "reasonable economic use of the property." Pet. Op. Br. at 15. The entire Project site should be considered as a single unit because they have unity of ownership, are physically adjacent, were all acquired on the same date, and have been treated as a single unit. Pet. Op. Br. at 17.

There is no dispute that the Applicants are a single unit for purposes of a takings analysis. The 2015 Staff Report explains that the Applicants had continued to function as a unit through the litigation and CDP application process, and had abandoned any pretense of operating separately. AR 34638. The Commission stated that it was adopting the analysis and conclusion of unity of interest from the 2011 Staff Report. AR 34638. Neither Real Parties nor the Commission contend that the Commission did not find a unity of interest, or that the parcels should not be treated as a single unit.

While the Applicants' property should be treated as a single unit, this does not mean that only a single residence should be built on five separate lots. The owner of multiple lots generally has a property right to build on all of them. The Commission found that the Applicants had legal lots and a reasonable expectation to develop them, although not to the extent originally proposed. AR 34641. When the Applicants purchased the Property in 2005, the property was covered with ESHA and the Coastal Act, coupled with the applicable zoning allowing only low density residential development, would prevent a property purchaser from having a reasonable expectation that the Property could be developed with five residences. The Commission also historically had allowed the construction of only a single house on similar large parcels under section 30010. AR 34641. The issue is whether it would be a taking to deprive the owner of this right.

The Commission determined that the denial of the Project would not function as a categorical taking under Lucas because it would not deprive the Applicants of all viable economic value. AR 34640. The Commission always was willing to permit some residential development, and the property retained significant value independent of development costs. Id. However, the Commission also determined that denial of CDPs for the Project would be a taking under Penn Central. The Applicants had a reasonable investment-backed expectation that they would be permitted to develop the "developable" portions of the Project Site. AR 34642-43. This developable portion was the 13-acre mesa area where the Commission had directed Applicants to cluster the houses in the revised Project. AR 34643. The Commission determined that the number of houses within that area was less important than the restriction of development to the developable area. Id.

Petitioner Sierra Club argues that the Commission improperly applied the Penn Central factors because the only reasonable investment-backed expectation the Applicants could have had was to develop a single house on the Project Site. Based on the presence of H1 and H2 habitat and Coastal Act and zoning requirements, a reasonable buyer would conclude that he or she would receive only a CDP for a single home on the 156-acre property, or else would hold and sell the property in a few years. Pet. Op. Br. at 17-18.

As Real Parties point out, there is evidence in the record to support the Commission's determination that permits for fewer than five houses would not be economically viable. Real Parties Opp. at 8-9.

First, Applicants submitted evidence as part of the application process that any reduction in the number of homes built as part of the Project would cause the cost to construct to exceed the value of the property. AR 29431, 29456, 29514. The, same economic analysis was performed for two sets of five home alternatives -- one with average house footprints of approximately 9,300 square feet and another with smaller house footprints averaging approximately 5,300 square feet. AR 29514. The appraisals and construction cost estimates showed that clustering the residences and reducing their square footage would not be economically viable options because the resulting

value of the Project would be considerably less than the cost of development. AR 29514. While the Commission did not consider this evidence sufficient to establish a categorical Lucas taking, it is relevant for an ad hoc Penn Central analysis.

Second, the Applicants' reasonable investment-backed expectation to develop the "developable portion of the site" is not dependent on the number of residences. The Commission found that the critical factor for protecting coastal resources is the development's footprint and location, with the number of houses being less important than restricting the houses to a clustered pattern within the mesa area. AR 34643. The Commission noted that the revised Project performs this task because it clusters the five homes, takes advantage of overlapping fire clearance zones, sites the residences in the southern portion of the property closer to nearby development, concentrates development in a relatively flat 13-acre mesa area, and minimizes new roadway construction. The revised Project is environmentally superior because it avoids large-scale disturbances in the northern half of the site and the H1 and H2 habitat impacts from the five homes are roughly comparable to three homes with non-overlapping fire clearance zones. AR 34643.[10] Thus, the Applicants could reasonably expect to develop as many residences as the flat mesa area would permit. *See* AR 34644.

Thus, the Commission did consider the investment-backed expectation from fewer than the Project's five residences. Petitioner places too much reliance on the Commission's June 2011 decision in which the Commission found that denial of the prior configuration of the residences would not result in a taking because the Applicants had neither a reasonable, nor investment-backed expectation that they could develop the property as then proposed. AR 33900. While the Commission did say that allowing only a single home might be sufficient to avoid a taking, it also concluded that it had insufficient information to make that determination.

In the June 2001 decision, the Commission gave the Applicants guidance on potential alternatives that could be approved, including a reduction in the number of residences to "somewhat less than five," design alternatives, siting alternatives and clustering alternatives. AR 33903-906. The Applicants followed this guidance in submitting a revised Project that still included five homes, but clustered and designed them as recommended. The revised Project reduces the disturbed area by 43% and increased the open space by 44%. AR 29670. The Commission noted that the Applicants contended that the removal of the northerly two houses would constitute a taking, and exercised its discretion to accept the marginal additional impacts of five houses to resolve the dispute and avoid a possible taking. AR 35108, 34645. The Commission was entitled to exercise its discretion in this fashion.

The record shows that the Commission did consider the takings impact of requiring fewer than five residences. The record also contains substantial evidence that limiting Applicants to an economically unfeasible single home development would defeat their reasonable investment-backed expectations. Sierra Club has produced no evidence to support its claim that a single residence would be economically feasible.

Petitioner Sierra Club argues that a Project denial would have had little impact on the economic value of the Project Site. Pet. Op. Br. at 18. However, the Commission found that other

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[10] The Commission considered an alternative of a "super cluster" of residences, which was not feasible because it would result in the loss of four H1 rocky outcrop habitats and not meet LACFD access and grade requirements. aR 34634-35.

allowable uses for the Project Site were not feasible and would not provide Applicants with an economic return on their investment. AR 34645. Sierra Club does not provide any evidence to support its claim that a single house would be a reasonable economic use of the Project Site. To the contrary, as discussed *ante*, there is substantial evidence that fewer than five homes would not be financially feasible.

Sierra Club argues that the character of the government action supports a finding that denying the Project would not be a taking. Pet. Op. Br. at 18. The Commission's denial would promote policies protecting the preservation of H1 and H2 habitat and scenic resources, which is an exercise of police power. However, as the Commission stated in the 2015 Staff Report, there is no financially feasible alternative that would not affect H1 and H2 habitat. AR 34644. In Lucas, the Supreme Court stated that even a valid regulation under the state's police power may constitute a taking if other factors are met. 505 U.S. at 1026. The Commission's exercise of police power is not by itself a sufficient reason to find that the denial of the Project would not be a taking.

Sierra Club has not demonstrated that the Commission's takings analysis was an abuse of discretion. The Commission made the necessary findings to support a limitation of coastal resource policies to allow a constitutionally reasonable economic use. McAllister v. California Coastal Commission, (2008) 169 Cal.App.4th 912, 939.

3. Consistency with LCP Policies for Visual Resources, Water Line, and Cumulative Impacts

a. Visual Resources

The Project will be built on an almost undeveloped ridgeline extending upward 2.18 miles from a narrow coastal terrace to the backbone crest of the Santa Monica Mountain Range. AR 34662. The ridgeline has been designated in the LUP as a Significant Ridgeline (AR 34557), and is a prominent landscape feature visible from several significant public vantages along Pacific Coast Highway. AR 34662-63. The Project's 2,180 foot access road will be visible from public viewing areas. AR 34666. The road will require several long retaining walls and a fire department turnaround 6,400 square feet in size, all of which add to its visual impact. AR 34666.

"The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas ... shall be subordinate to the character of its setting." §30251.

The LCP incorporates this section 30251 requirement in its policies. One of the LCP's policies is to "Protect public views of designated Scenic Elements and Significant Ridgelines" (Pet. RJN Ex. 2, p. 058 (CO-127)), and the LIP requires that "the highest point of a structure shall be located at least 50 vertical feet and 50 horizontal feet from a Significant Ridgeline." Pet. RJN Ex. 3, p. 160. All proposed residences would be located off and at least 50 horizontal feet from the ridgeline. Portions of the Lunch, Vera, and Ronan residences would be within the 50 foot vertical setback. AR 34663.

The 2015 Staff Report overcame these LIP requirements by granting a variance. The LCP allows for a variance where structures on a parcel cannot meet the visual resource protection policies and (1) because of special circumstances, strict application of the policy would deprive

the property of privileges enjoyed by other properties; (2) the adjustment would not constitute a grant of special privilege; (3) strict application of zoning regulations would result in unnecessary hardships; (4) the adjustment will not be materially detrimental to the public health, or the use and enjoyment of other property in the vicinity; and (5) the granting of the variance will not be materially detrimental to coastal resources. Pet. RJN Ex. 3, p. 44.

The 2015 Staff Report analyzed these five factors and concludes that a variance is warranted. The Report concluded that the Project Site is extremely constrained by topographic, geologic, and H1 and H2 habitat factors, all of which create exceptional circumstances. AR 34644. The residences could not be relocated without practical difficulties or unnecessary hardship. Any other location would have impacted ESHA, or would have resulted in relocation of the residences to areas with unstable geography. AR 34664-65. A variance would not grant special privilege because the five proposed residences are clustered and less than the maximum permitted square footage. AR 34666. There is no feasible alternative where the development would not be visible by the public. AR 34666. To minimize view impacts, the Project approval conditions require the Applicants to construct the road's retaining walls with similarly colored stone and provide plants to screen the road from view. AR 34666. The Report concluded that locating residences within the 50-foot vertical setback from the ridge will not be materially detrimental to coastal resources because this location "minimizes impacts to coastal resources." AR 34665.

Petitioner Sierra Club argues that the Commission abused its discretion in granting a variance. Petitioner asserts that the grant of a variance will result in huge visual impacts in the Coastal Zone that are prohibited by section 30251 and the LCP. Pet. Op. Br. at 13. This argument is inadequate. It is undisputed that the variance will result in visual impacts because that is what a variance does -- it permits development that would otherwise violate a zoning requirement. Sierra Club has not pointed to any evidence showing that the variance -- as opposed to the existence of visual impacts -- is unwarranted. Sierra Club also does not address the view mitigation of retaining walls and plants to screen the road.

The Commission did not abuse its discretion in granting a variance for the vertical setback requirement.

b. Water Line

LIP section 22.44.1340(D) requires: "The proposed extension of water, sewer, or utility infrastructure to serve new development shall be located within legally existing roadways and road rights-of-way in a manner that avoids adverse impacts to coastal resources to the maximum extent feasible." Pet. RJN Ex. 3, p. 70.

Petitioner notes that most of the 7000 foot water line would not be located within road rights-of-way. AR 34875 (Ex. 11). The northernmost 1,200 feet would be located within the Costa Del Sol Way. AR 34591. The 4,510 foot middle segment would be drilled below non-road land and the southernmost 1,310 foot segment would be installed under the Project's proposed access road, not an existing right-of-way. AR 34591. According to Petitioner, the Project's water line violates the LCP because it is not located within a legally existing roadway. By permitting construction of the Project's water line under circumstances prohibited by the LIP, the Commission abused its discretion. Pet. Op. Br. at 13-14.

The Commission found the water line to be consistent with the LIP because the method of constructing the line will consist of trenching within a paved road and using horizontal directional

drilling for that portion of the water line not under an existing road. AR 35114. The Commission found the use of a water line extension to be superior to the use of water wells and tanks. Id. The water line is also underground, does not impact H1 and H2 habitat, would not require fuel modification, and will not induce growth because its use is limited to the properties at issue. AR 34657, 35109-10.

The Commission did not abuse its discretion in approving the water line, as it properly determined whether the water line extension avoided adverse impacts to the extent feasible. Petitioner does not contend that construction of the northernmost 1,200 feet of water line below the existing Costa Del Sol Way violates LIP section 22.44.1340(D). Nor does construction of the 4,510 foot middle segment below non-road land or construction of the southernmost 1,310 foot segment under the Project's proposed access road. LIP section 22.44.1340(D) requires that the water line be located within legally existing roadways and road rights-of-way. While the proposed access road does not yet exist, this fact is not dispositive. The purpose of section 22.44.1340(D) is to avoid adverse impacts to coastal resources to the maximum extent feasible, and construction of the southern portion of the water line under the access road that will be built as part of the Project does just that. Similarly, nothing in section 22.44.1340(D) prevents construction of the middle segment underground. Again, the point is to preserve coastal resources and underground construction of the water line protects H1 and H2 habitat. AR 35109.

The Commission did not abuse its discretion in finding the water line consistent with the LIP.

c. Cumulative Impacts

"New residential, commercial, or industrial development shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources...." §30250; Pet. RJN Ex. 2, p. 104 (2014 LUP Policy LU-1).

Petitioner contends that the Project's cumulative impacts violate LUP Policy LU-1 because the Project is not adjacent to existing development. Pet. Op. Br. at 14. Although the Project is not in close proximity to existing developed areas, the Commission correctly argues that LUP Policy LU-1 also allows development in an area not in close proximity to existing development where it will not have significant adverse effects. Comm. Opp. at 22. The 2015 Staff Report concluded that the LCP requires new development to be clustered and that land divisions minimize impacts to habitat and visual resources. AR 34656. The Project complies with this and other LCP requirements. The Project has been mitigated so that it will not have significant individual or cumulative adverse effects on coastal resources.

The Commission did not abuse its discretion in finding the Project's location of the five clustered residences would not have significant adverse individual or cumulative effects on coastal resources and, as such, is consistent with LUP Policy LU-1.

4. CEQA

Petitioner Sierra Club argues that the 2015 Staff Report was inadequate because it did not analyze all of the potential environmental impacts required by CEQA. Pet. Op. Br. at 22. The Commission is the only agency approving the Project and must analyze its environmental effects.

Pet. Op. Br. at 20-21. Yet, the 2015 Staff Report did not analyze Biological Resources, Greenhouse Gas Emissions, Transportation/Traffic, Utilities/Service Systems, Air Quality, Noise, or Recreation. Pet. Op. Br. at 22. These areas are required under Appendix G to the CEQA Guidelines and common sense shows that the Project may have significant impacts on these subjects. Id. The 2015 Staff Report also fails to determine the effects of the Malibu's extension of Sweetwater Mesa Road to connect with the Project's access road, which is improper piecemealing. Pet. Op. Br. at 23.

a. Failure to Exhaust

Real Parties assert that Sierra Club failed to exhaust these issues because no party raised them during the public comment period. Real Parties Opp. at 11. In making this argument, Real Parties claim that Sierra Club cannot rely on public comments made for the Project denied in June 2011, or for the revised Project for the May 2015 meeting, because those comments were not a response to the 2015 Staff Report presented for the Commission's December 2015 approval. Real Parties Opp. at 13. As the 2015 Staff Report superseded all previous versions, all commenters should have resubmitted their comments prior to the December 2015 meeting. Real Parties Opp. at 13.

Real Parties rely on California Native Plant Society v. City of Rancho Cordova, ("California Native Plant Society") (2009) 172 Cal.App.4th 603, in which the court held that public comments to an earlier EIR could not be relied upon to exhaust objections to the current EIR. Id. at 630. In that case, the earlier EIR was a community plan EIR that had been incorporated by reference into the project EIR that was the subject of the case. Id. The court found that the comments in the prior separate proceeding did not satisfy the exhaustion doctrine for the proceeding at issue. Id.

In any action for proceeding alleging non-compliance with CEQA, the alleged grounds for non-compliance must have been presented to the public agency during the administrative process. Pub. Res. Code §21177(a). This administrative exhaustion requirement is jurisdictional. Abelleira v. District Court of Appeal, (1941) 17 Cal.2d 280, 292-93. The grounds may be presented to the public agency by any person, who need not be the person seeking judicial review. Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 267-68. The exhaustion doctrine applies equally to both the evidence and law that a petitioner uses as the basis for a CEQA challenge in court. Barthelemy v. Chino Basin Municipal Water District, (1995) 38 Cal.App.4th 1609, 1620-21.

The issues must be presented to the public agency with as much specificity as possible. Coalition for Student Action v. City of Fullerton, (1984) 153 Cal.App.3d 1194, 1197. Petitioners cannot rely on "generalized environmental comments" to satisfy the exhaustion doctrine. Id. However, the necessary level of specificity is less than that required to preserve an issue for appeal in a judicial proceeding, especially when the residents are not represented by counsel during the administrative proceedings. Citizens Association for Sensible Development of Bishop Area v. County of Inyo, (1985) 172 Cal.App.3d 151, 163.

While the court accepts that Sierra Club cannot rely on public comments to the version of the Project denied in 2011, California Native Plant Society does not prevent Sierra Club from relying on comments to the revised Project applications submitted in April 2014 and addressed by the Commission in May and December 2015. It is the Project application, not the staff report, to

which the public comment is made. Because the Commission was considering the same applications at all of these meetings, the public comments for those hearings can qualify for exhaustion. *See* Reply at 11.

Real Parties specifically argue that the issues of greenhouse gas emissions and air quality were not sufficiently exhausted because any comments related to those issues were too general and do not constitute substantial evidence supporting a fair argument that would require environmental review on those issues. Opp. at 14-15.

Real Parties misunderstand the point of Sierra Club's argument. Sierra Club is not asserting that there is a fair argument that there were actual impacts to air quality or greenhouse gas emissions such that an EIR is required. The Commission's staff report is the functional equivalent of an EIR. Sierra Club is arguing that the Commission failed to properly include a greenhouse gas emissions and air quality analysis in its CEQA document. This is an issue of a failure to proceed in the manner required by law through some evaluation of these potential impacts. *See* Reply at 6-9. Sierra Club points to several comments that state that the staff reports serve the same purpose as an EIR, and must fulfill the same information requirements as CEQA. AR 25306, 25484-85, 35221. Climate change, noise, and air quality were specifically mentioned as issues that should be analyzed. Reply at 9.

This is sufficient to place the Commission on notice that Sierra Club and other commenters believed that the Commission had an obligation to prepare a staff report that served the same purpose as an EIR by addressing noise, greenhouse gas emissions, and air quality issues. Sierra Club did not fail to exhaust its administrative remedies.

b. Required Information and Analysis

The Secretary for Resources has determined that the Commission's regulatory program of granting CDPs qualifies for certification under section 21080.5. Guidelines §15251(c). The Commission's certified regulatory program is an extension of its Coastal Act mandate to "[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." §30001.5(a). As a certified regulatory program, the Commission is exempt only from Chapters 3 and 4 of the Public Resources Code (concerning EIRs) and section 21167 (statute of limitations), and remain subject to the other provisions of CEQA. State Board of Forestry, *supra*, 7 Cal.4th at 1231; Guidelines §15250. The agency "must comply with all of CEQA's other requirements." Mountain Lion, *supra*, 16 Cal.4th at 114 (section 21080.5 establishes a limited CEQA exemption).

A certified regulatory agency must prepare an environmental document that includes a description of the proposed activity and mitigates the project's effects through adoption of feasible alternatives or mitigation measures that may substantially lessen significant adverse impacts. §21080.5(d)(2), (3); Guidelines §15252(b); Citizens for Non-Toxic Pest Control, *supra*, 187 Cal.App.3d at 1586.[11] The procedure must allow for review and comment by the public and other agencies and must include a response to all significant environmental issues raised by commentators. §21080.5(d)(2)(C), (D); Schoen, *supra*, 58 Cal.App.4th at 566.

[11]The Commission's regulations also require it to make specific findings with regard to a development's consistency with CEQA and the Coastal Act. 14 CCR §§ 13356, 13057, and 13096.

The Commission's staff report serves as a functional equivalent of an EIR. The 2015 Staff Report is the only CEQA document for the Project, and it does not contain a full analysis of the environmental impacts of the Project. *See* Comm. Opp. at 23-25. The 2015 Staff Report analyzed only the coastal issues relevant to the Project, and did not analyze Appendix G environmental impacts such as Biological Resources, Greenhouse Gases, Traffic, Utilities/Service Systems, Air Quality, Noise, and Recreation. AR 34614-53. *See* Pet. Op. Br. at 22.[12] The Report also did not discuss whether any feasible mitigations or alternatives for significant environmental impacts on these subjects. Pet. Op. Br. at 23.

The Commission does not dispute that the 2015 Staff Report does not contain an assessment of all the environmental impacts required for an EIR. The Commission argues that a certified regulatory agency is required to prepare an environmental document analyzing issues outside its regulatory authority only where it acts first as lead agency, and the Guidelines do not require the Commission to act as lead agency. For the Project, the Commission was only required to comply with its certified regulatory program, including the Coastal Act and the Commission's regulations, and not act as a lead agency. Comm. Opp. at 24.

The Commission relies on Ross v. California Coastal Commission, ("Ross") (2011) 199 Cal.App.4th 900. In Ross, the appellate court considered the development into four lots of a 2.08 beachfront parcel in Malibu. The developer applied for entitlements that included a CDP and a LCP amendment to permit a new zoning district allowing for narrower lots than otherwise required. Id. at 909. Malibu conditionally approved the CDP and LIP amendment conditioned on the Commission's certification. Id. at 910. The Commission subsequently approved the LCP amendment with modifications. Id. at 917. As pertinent, the appellate court reviewed the trial court's decision that (1) the Commission necessarily was the CEQA lead agency for the LCP amendment because it could not take effect without the Commission's certification, and (2) the Commission was required to comply with CEQA's environmental impact analysis requirements. Id. at 919-20.

The Ross court generally noted that, as a certified regulatory program, the Commission was exempted from CEQA's requirements to prepare "initial studies, negative declarations and environmental impact reports....[T]he agency must prepare paperwork that acts as a substitute document for the normal environmental review papers...." Id. at 930. With respect to the LCP amendment, the court noted that Malibu was exempted under Guidelines section 15265 from preparing an EIR and the burden of CEQA compliance was shifted to the Commission. Id. at 940. But the Commission also was exempted from preparing an EIR and needed only comply with the environmental documentation required by section 21080.5(d)(2) and (3), requirements which were synthesized by the California Supreme Court in Sierra Club v. State Board of Forestry, (1994) 7 Cal.4th 1215, 1230 (document functioning as EIR equivalent must include description of the project, its alternatives, and mitigation measures to minimize significant adverse impacts, as well as be available for review and comment by other agencies and the public). As a result, the court

[12] Real Parties argue that the 2015 Staff Report adequately analyzed Biological Resources, but Petitioner contends that the Report only assessed ESHA and not wildlife. Real Parties Opp. at 16. Pet. Op. Br. at 23. Real Parties also point out that the Report requires a hiking trail and significant open space, as well as water line and fire protection. Real Parties Opp. at 16. But the Report contains no assessment of recreation and utility/service system impacts, if any.

concluded that no EIR was required from the Commission and it was not required to act as lead agency. Id. at 940.[13]

The import of Ross is that the Commission necessarily complies with CEQA when its staff report meets Coastal Act requirements. *See also* Californians for Alternatives to Toxics v. Department of Pesticide Regulation, (2006) 136 Cal.App.4th 1049, 1068 (pesticide registration program meant that department's "compliance with the applicable rules and regulations constitutes CEQA compliance"). The Commission's staff report is the functional equivalent of, but not congruent with, an EIR. There are environmental assessment subjects that may be required for an EIR that would not be included in the Commission's staff report on coastal resource impacts. For example, greenhouse gas emissions, traffic impacts, air quality, and noise are potential impacts listed in Appendix G for preparation of a CEQA document that are not commonly addressed in Commission staff reports. This difference does not affect the adequacy of the Commission's staff report under CEQA. The Legislature and the Secretary for Resources have determined that Commission approval through a Coastal Act-compliant staff report adequately protects the environment, even if each potential environmental impact that would be addressed in an EIR has not been considered. Indeed, there would be no purpose to the functional equivalency exception if the Commission were required to consider every substantive element required for an EIR.

Petitioner Sierra Club argues, both in its brief and at hearing, that the Commission cannot fail to address these environmental impacts because section 21080.5(d)(2)(A) requires it to adopt feasible alternatives or mitigation measures that may substantially lessen significant environmental adverse impacts. Petitioner questions how there can be a basis for the mitigations imposed by the 2015 Staff Report without the foundation of an analysis of environmental impacts? Pet. Op. Br. at 23. The court agrees with Sierra Club's premise that a mitigation cannot be considered without knowing what is being mitigated. Nor can an alternative be considered without knowing what significant impact it may lessen. The answer to Sierra Club's question lies in the fact that the Commission is only required by section 21080.5(d)(2)(A) to address feasible mitigations and alternatives for impacts on coastal resources; it is not required to consider mitigations/alternatives for impacts from, *e.g.,* air emissions, traffic and noise impacts.

Petitioner argues that the Commission must act as lead agency because no other agency bears responsibility for approval of the Project. Pet. Op. Br. at 21. *Cf.* §20167 (defining "lead agency" as the public agency with principal responsibility for approving a project). Counsel for the Commission and Real Parties admitted at hearing that the County has no permitting authority and Malibu is responsible only for approving the extension of the Sweetwater Mesa Road, with no

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[13] The Commission also relies on Guidelines section 15253, which governs the situation in which an agency must act as responsible agency and use an environmental analysis document prepared by a certified agency in granting approval for the same project. Comm. Opp. at 24. The second agency must act as responsible agency if, *inter alia*, the certified agency is the first to grant a discretionary approval for the project. *See* City of Morgan Hill v. Bay Area Air Quality Management District, (2004) 118 Cal.App.4th 861, 874-75 (citing Guidelines §15253(a)-(b)(1)). The certified agency is not required to act as lead agency, however. Guidelines §15253(c). If certified agency's actions do not meet the criteria of Guidelines section 15253(b), then the other agency must become a lead agency and prepare CEQA documentation. Remy, Thomas, Moose, and Manley, Guide to CEQA: California Environmental Quality Act, (1th ed. 2007) p. 177.

authority over the Project itself. *See* AR 34577. Therefore, only the Commission has any approval authority for the Project. But this fact does not mean that the Commission must act as lead agency under CEQA. The situation is no different than Ross, where neither Malibu nor the Commission was required to act as lead agency for the LCP amendment. The Commission cannot be compelled to act as lead agency under Guidelines section 15253(c). The Legislature has determined that the Commission's compliance with the Coastal Act is sufficient for environmental protection.[14]

The Commission did not violate CEQA by failing to consider all potential environmental effects of the Project.

G. Conclusion

The petition for writ of mandate is denied. Sierra Club has not demonstrated that the Commission's takings analysis was an abuse of discretion. The Commission did not abuse its discretion in granting a variance for the vertical setback requirement, in finding the water line consistent with the LIP, and in finding the Project's location of the five clustered residences is consistent with LUP Policy LU-1.

Under CEQA, the Commission cannot be compelled to serve as lead agency for the Project. The 2015 Staff Report complied with Coastal Act requirements and was the functional equivalent of an EIR. As such, the Report was not required to analyze all potential environmental impacts of the Project.

Real Parties' counsel is ordered to prepare a proposed judgment, serve it on opposing counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for June 1, 2017 at 9:30 a.m.

Dated: April 21, 2017

Superior Court Judge

[14] For the same reason, Petitioner's argument is not well taken that the 2015 Staff Report improperly piecemealed the environmental analysis by not addressing a foreseeable construction of a road segment to connect the Project's access road to Sweetwater Mesa Road in Malibu. *See* Pet. Op. Br. at 23-24. The Commission is only required to address the Project's coastal resource issues and their mitigation and alternatives; it need not consider the reasonably foreseeable environmental consequences of a CDP application to Malibu for construction of the road segment.