

**SANTA BARBARA COUNTY
BOARD AGENDA LETTER**



Clerk of the Board of Supervisors
105 E. Anapamu Street, Suite 407
Santa Barbara, CA 93101
(805) 568-2240

Agenda Number:
Prepared on: February 07, 2002
Department Name: Planning & Development
Department No.: 053
Agenda Date: February 19, 2002
Placement: Departmental
Estimate Time: N/A
Continued Item: NO
If Yes, date from: F:\GROUP\Dev_Rev\WP\TM_TPM\14300s\14375\bos21902.doc

TO: Board of Supervisors

FROM: Rita Bright
Secretary to the Planning Commission

STAFF CONTACT: Patricia Miller, Supervising Planner (568-2054)
David Swenk, Planner III, Development Review North (934-6266)

SUBJECT: **Appeal of the Denial of the Dunn Vesting Tentative Parcel Map (TPM 14,375)
01APL-00000-00025**

Recommendation(s):

That the Board of Supervisors deny the appeal of Pat Yokum, agent for applicant Steve Dunn, and deny TPM 14,375 based upon the project's inconsistency with the Coastal Plan and Comprehensive Plan and the inability to make the required findings.

Your Board's motion should include the following:

1. Adopt the required findings for the project specified in Attachment A of the Planning Commission Action Letter dated September 27, 2001 (Board Letter Exhibit 1), including CEQA findings; and
2. Deny Tentative Parcel Map TPM 14,375.

Refer back to staff if the Board of Supervisors takes other than the recommended action.

Alignment with Board Strategic Plan:

The recommendations are primarily aligned with actions required by law or routine business necessity.

Executive Summary and Discussion:

This application (TPM 14,375) is a request to subdivide 6.05 acres into 2 parcels of 3.025 acres each. The property is located at 2777 Padaro Lane in the Summerland area of the First Supervisorial District (APN 005-260-013). On September 26, 2001, the Planning Commission considered TPM 14,375 and consistent with staff's recommendation, adopted the required findings and denied the project. The denial was based on the project's potential impacts to onsite wetlands which are considered environmentally sensitive habitat (ESH) areas, lack of adequate wastewater disposal, and the Commission's inability to make the requisite statutory findings for the approval of the project.

Background Information

The subject parcel is one of four lots created by Parcel Map 13,698 which was recorded in October 1986. At the time of processing of this earlier parcel map, the presence of wetland resources was not recognized. Therefore, no wetland delineation was performed in creating the subject lot and these resources were not addressed. Two building envelopes were designated and recorded on the subject lot. These envelopes were located on either side of an earthquake fault which bisects the property and were intended to give the owner some flexibility as to where structural development could occur. The designation of these envelopes was not intended to enable or facilitate further subdivision of the property.

The applicant claims, but has no vested right to the desired lot split. The Subdivision Map Act and the County's implementing land use regulations require that a subdivision be consistent with the policies and development standards of the General Plan, which in this case includes the Local Coastal Plan. Gov. Code §66474; *Associated Home Builders, Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633. The mere fact that the project site is in a zone that may be lawfully subdivided, does not diminish the County's power to determine that a particular subdivision is not suitable for that location. *See Wesley Investment Company v. County of Alameda* (1984) 151 Cal.App.3d 672, 678. In other words, the fact that there may be sufficient acreage to subdivide under quantifiable acreage standards does not excuse the project from complying with the General Plan and implementing zoning policies of the Local Coastal Plan. Moreover, it has long been the rule in this state that no vested right may accrue until an owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government. *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 791. In *Avco*, the California Supreme Court held that neither the existence of particular zoning nor work undertaken pursuant to government subdivision and permit approvals preparatory to construction of buildings can form the basis of a vested right. Here, the applicant has no subdivision approval, much less a building permit upon which to claim a vested right. Nor does he have the ability to compel the exercise of discretion that your Board has with respect to determining whether the proposed subdivision project satisfies applicable coastal resource protection policies and development standards.

Basis for Appeal

The applicant contends that the Planning Commission decision was not in accordance with Article II of Chapter 35 of the County Code (Coastal Zoning Ordinance) and the County's Environmental Thresholds and Guidelines Manual (1995). The applicant believes errors and abuse of discretion for the reasons set forth in letters dated August 8, 2001 and September 18, 2001 (submitted with the appeal) occurred. These letters were addressed in detail in the final environmental impact report and at the Planning Commission hearing of September 26, 2001. The major issues are summarized below.

Wetland Issues

Wetlands are regulated at the federal, state, and local level. The following are criteria upon which a wetland designation is based:

1. Hydrophytic Vegetation: These are unique plant life that exist in conditions where the soil is either permanently or seasonally saturated and are predominant in the area.
2. Hydric Soils: This is a soil type that exhibits a saturated state and has developed anaerobic conditions conducive to the development of hydrophytic plants. There are recognized hydric soils but any soil may exhibit hydric tendencies if it is in a saturated state long enough. The major indicators are a mottled appearance and low chroma.
3. Wetland Hydrology: The hydrologic characteristics of areas which effect permanent or periodic inundation. These would be linked to abiotic influences in the terrain such as topography, rechargeability, impermeable soil strata, etc.

The method by which a wetland may have been created is not relevant. Under the U.S. Fish & Wildlife (Cowardin) classification system required by Coastal Commission regulation, the fact that the onsite wetlands are ephemeral or may not be present in drought years does not change their designation if one of the three criteria is met. As recent California court decisions make clear, under the Coastal Act's regulatory scheme, "ESHA's, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection." *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 508. "Simply stated, in determining whether a wetland is protected under the Coastal Act and the LCP, the quality of the wetland is essentially legally irrelevant." *Kirkorowicz v. California Coastal Commission* (2000) 83 Ca. App.4th 980.

00-EIR-04 fully explains the methodologies used to delineate wetlands. The area was surveyed according to accepted protocols used in the 1987 U.S. Army Corps of Engineers Wetland Delineation Manual and conducted by qualified professionals (Rindlaub, 1998; LSA, 1999, and Padre, 2000). The basis of the delineation was evidence of saturation and the presence of soils with mottling and low chroma. Numerous hydrophytic plant species of a number qualifying them as wetland indicators were also identified. The County and the County's EIR consultant (Padre) and the applicant's consultant (LSA) are in agreement regarding the accuracy of these delineations.

The onsite wetlands are located entirely within proposed Parcel 1. These resources exhibited two of the three criteria (hydrophytic vegetation and wetland hydrology) on 0.18 acres and all three criteria (hydrophytic vegetation, hydrophytic soils, and wetland hydrology) on 0.178 acres.

The U.S. Army Corps of Engineers requires the presence of all three criteria for designation as a wetland. In this case, onsite resources meeting the ACE definition of wetland resources include 0.178 acres. However, although meeting the ACE definition, the Corps has chosen not to assert permit jurisdiction because the onsite features are not considered "waters of the United States." The fact that the Corps does not exercise permit jurisdiction over the site is irrelevant to whether the County has jurisdiction under the California Coastal Act and its implementing LCP.

In contrast to the ACE definition of wetlands, the U.S. Fish and Wildlife Service requires only one or more of the above referenced criteria to delineate a wetland (0.18 acres meets this definition). State agencies including the California Department of Fish and Game and the California Coastal Commission define

wetlands based on one or more of the criteria in accordance with the Cowardin definition. Coastal Act Section 30121 defines a wetland as:

“Wetland means lands within the Coastal Zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens. “

To implement and interpret the wetland and related provisions of the Coastal Act, the California Coastal Commission in February 1981 promulgated guidelines, entitled “Statewide Interpretive Guidelines for Wetlands and Other Wet Environmentally Sensitive Habitat Areas.” Pursuant to the Commission’s Guidelines, the Commission utilizes the U.S. Fish & Wildlife classification system to guide the identification of wetlands within the meaning of the Coastal Act. As stated above, the Cowardin classification system defines wetlands as follows:

“...wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. For purposes of classification, wetlands must have one or more of the following three attributes: (1) at least periodically, the land supports predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; (3) the substrate is nonsoil and is saturated with water or covered with shallow water at some time during the growing season of the year. (Commission Guidelines, p. 79.)”

Simply stated, in order to be consistent with the Coastal Act, the County must utilize the U.S. Fish & Wildlife Service classification system (Cowardin) definition of a “wetland” for purposes of implementing land use policies in the coastal zone. See *Kirkorowicz* and *Bolsa Chica*, *supra*.

Section 30107.5 of the California Coastal Act defines an environmentally sensitive habitat area as follows:

“...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.”

A wetland has a specific role in the ecotone in which it persists. The wetlands located on the project site contain wetland indicator plant species that are valuable to wetland ecosystems and would be eradicated if the site is developed. Wildlife known to habituate in wetland areas has historically visited the area. These resources are considered environmentally sensitive habitat (ESH) areas, which are rare and especially valuable due to the massive and continuing loss of wetlands in California. As the Court stated in *Kirkorowicz*, in rejecting a claim that marginal degraded wetlands cannot be designated as an ESHA:

“To the contrary, the Coastal Act by its definition of wetland (§30121) does not distinguish between wetlands according to their quality. Indeed, section 30233 limits development in all wetlands without reference to their quality. This is because of the dramatic loss of over 90 percent of historic wetlands in California and their critical function in the ecosystem.”

Accordingly, Coastal Act Sections 30231, 30233, and 30240 require the protection of wetlands. All of the onsite resources (0.18 acres) would meet the Coastal Act definition of wetlands.

The applicant advances a rigid interpretation of the Coastal Act, arguing that only wetlands that existed in 1972 at the time the Coastal Act originally was enacted are protected by the Act. However, the police power is elastic and the County's certified Coastal Land Use Plan (CLUP) recognizes that the location of wetlands and other ESHAs are dynamic:

While the designations reflected on the land use plan and resource maps represent the best available information, these designations are not definitive and may need modification in the future. The scale of the maps precludes complete accuracy in the mapping of habitat areas and, in some cases, the precise location of habitat areas is not known. **In addition, migration of species or discovery of new habitats would result in the designation of a new area. Therefore, the boundaries of the designation should be updated periodically in order to incorporate new data.** Changes in the overlay designations may be initiated by the County or by the landowners. (Emphasis added.) (CLUP, p. 119, fn. 1.)

The CLUP uses the ESHA overlay designation to address difficulties in precisely identifying habitat areas due to species migration and new data. In explanatory text preceding LCP Policy 9-1, the CLUP explains how the overlay designation serves as a planning tool to trigger further analysis of ESHA locations during the development permit review process:

Due to the limitations of mapping techniques and, in some cases, incomplete information on habitat areas, the following policies shall apply to development on parcels designated as a habitat area on the land use plan and/or resource maps and to development on parcels within 250 feet of a habitat area or projects affecting an environmentally sensitive area. (CLUP, p. 120.)

CLUP Policy 9-1 makes clear that it is only at the development review stage that the precise location of an ESHA is established for purposes of applying the resource protection policies of the County's Coastal Land Use Plan. Policy 9-1 states in its pertinent part:

Prior to the issuance of a development permit, all projects on parcels shown on the land use plan and/or resource maps with a Habitat Area overlay designation or within 250 feet of such designation or projects affecting an environmentally sensitive habitat area shall be found in conformity with the applicable habitat protection policies of the land use plan.

The applicant's appeal also confuses CEQA analysis with the requirements of Coastal Act policy consistency. The applicant asserts that the absence of endangered species or the fact that the wetlands are artificially-occurring make the impact of development on them less than significant. However, as recent court decisions make clear, the Coastal Act requires wetlands to be protected in situ as a matter of law. In

addition, the County Thresholds Manual notes that for purposes of determining a potentially significant effect on wetlands, Santa Barbara County requires that at least one of the above three criteria be met. All of the onsite wetland resources (0.18 acres) meet at least one of the criteria and are considered environmentally sensitive habitat (ESH) under Section 3.9.4 of the Coastal Plan and also under Article II of Chapter 35 of the County Code, Section 35 – 97. These resources are subject to protection in their entirety, including a 100-foot buffer. Specifically, in the coastal area of Santa Barbara County, wetlands are afforded protection under the aforementioned California Coastal Act Sections 30107.5, 30231, 30233, and 30240 as well as Coastal Plan Policies 2-11, 3-14, 3-19, 9-1, 9-9, 9-11, and 9-36.

The applicant also asserts the wetlands do not warrant protection under federal provision for two reasons: 1) the wetlands do not discharge into the waters of the United States so it does not require a 404 permit under U.S. Army Corps of Engineers jurisdiction; and 2) no federally listed species under the Endangered Species Act are located onsite hence the U.S. Fish and Wildlife Service has no jurisdiction. The applicant further asserts, as the wetlands do not meet federal protection jurisdiction, by default, do not warrant protection under state and county regulations. However, the absence of federal jurisdiction does not discharge the applicant from state and county wetland protection requirements. These regulations are independent of federal statute and, if a wetland meets the state law definition, it is required to be afforded the protections of state law.

As currently proposed, future development on proposed Parcel 1 including septic system installation, would result in placement of permanent structures within onsite wetlands and associated 100-foot buffer areas. This would result in potentially significant and unavoidable environmental impacts through direct removal, damage, and/or alteration of the hydrologic regime. Conflicts with adopted plans and policies would also occur, including the above mentioned California Coastal Act Sections 30107.5, 30231, 30233, and 30240 as well as Coastal Plan Policies 2-11, 3-14, 3-19, 9-1, 9-9, 9-11, and 9-36.

Staff also notes that the property, including the wetlands area, has been subject to regular mowing (including during 2001). P&D has notified the applicant on several occasions that such mowing activities within the onsite wetlands are subject to permit review. Although the most recent activities (observed during June 2001) were again conducted without benefit of permit review, P&D is awaiting the outcome of the Board of Supervisors appeal hearing before pursuing the issue of mowing activities further.

Wastewater Disposal Issues

The Regional Water Quality Control Board Basin Plan includes wastewater disposal regulations that serve to protect public health and safety. Properly designed septic systems minimize the potential for human contact with untreated sewage effluent and the potential for groundwater and surface water contamination. According to Basin Plan Prohibition 10, septic effluent disposal fields that would be required for the proposed project must be located a minimum of 100 feet from watercourses and 200 feet from any reservoir or pond. In the particular circumstances of the ephemeral ponds or wetlands on this site, the RWQCB staff has recommended that a 100-foot setback, rather than a 200-foot setback, be applied. Note that this setback is applicable regardless of how these features were created.

Basin Plan prohibitions (policies) 3 and 4 require a vertical setback from groundwater that ranges from 5 to 50 feet depending upon disposal method and soil character. Basin Plan prohibition 5 requires a 10-foot vertical setback from any impervious (impermeable) layer. These prohibitions are found in Section VIII.3.D.i of the RWQCB Basin Plan. Because of the known presence of an impervious layer (i.e. clay layers that allow the wetland to form), it would be difficult to construct a disposal field on the project site that meets these standards. With the required setbacks, the applicant's proposed leach field and expansion area would require more area than is available. As indicated in the EIR, if all the required constraints setbacks are applied, structural development on proposed Parcel 1 would be limited to an area of approximately 3300sf, while septic system installation would be limited to an area of approximately 750 sf. This limited space is inadequate for installation of a septic system and required 100% expansion area. This factor alone renders the proposed system infeasible.

The Basin Plan also prohibits the placement of disposal fields (leach fields or drywells) on slopes in excess of thirty percent and recommends that they be setback from steep slopes by up to 100 feet based upon a formula provided in the regulations. Steep slopes are located adjacent to the building site in the arroyo to the west and at the coastal bluff to the south. In addition, any disposal field would also have to setback from the coastal bluff. This setback would have to account for 75-years of retreat pursuant to Coastal Land Use Plan Policy 3-4 as this system is an integral part of an onsite dwelling. These factors serve to substantially limit the area available for effluent disposal on this property.

At the September 26, 2001 Planning Commission hearing, consultants for the applicant proposed that a septic disposal field (leach field) could be constructed *beneath* the onsite wetland. As pointed out by P&D and EHS staff during the hearing, such a system could not be approved as it would violate established State regulations and could not be assured of functioning.

As indicated above, Regional Water Quality Control Board Prohibition 10 requires that septic disposal fields (leach fields and drywells) be set back 100 or 200 feet from watercourses and bodies of water (such as the onsite wetland). County and RWQCB staff are in agreement that this prohibition establishes an area surrounding water bodies or wetlands in which no septic disposal field is allowed to be placed. Therefore, Environmental Health Services cannot grant a permit for a septic system beneath, or within the setback area of, a wetland. *(Note that the applicant asserted at the 9-26-01 hearing that the setback applied only to the surface of the ground, not to a septic system located below the ground. This concept is without merit as all septic systems are located below the ground surface. Surfacing of septic effluent represents a failed system that must be abandoned and replaced.)*

If the requirement regarding installation of a septic disposal field below a wetland could be ignored, such a system could not be expected to properly function in any case. An important component of leach field operation, evapo-transpiration of effluent, could not occur if the field were somehow installed below the impermeable layer that caused the wetland to form. It would be more likely, however, that the leach field (a gravel filled trench excavated through wetland substrate) would be flooded and septic effluent would contaminate the wetland during winter periods. In addition, the known presence of impermeable clay may not allow such a system to meet County disposal rate standards. The suggestion that a leach field could be located below a wetland is the equivalent of placing a leach field below a lake and cannot be supported.

The placement of a leach field within a wetland has another potential effect: the draining and elimination of the wetland habitat. Depending on size and design, a leach field could serve as a disposal field for the water that would have accumulated in the wetland. This would be contrary to Coastal Land Use Plan and Coastal Act policies that protect such habitat.

Within the boundaries of proposed Parcel 1, a small area may exist that meets all the applicable setback requirements for the use of drywells. The applicant, however, has not provided evidence that an area or subsurface zone exists on this property that meets all of the RWQCB Basin Plan regulations, required coastal bluff setbacks or County Ordinance standards for absorption capacity. Additionally, wastewater collection via any kind of central sewer system is not available in this area. Thus, adequate sewage disposal capacity consistent with Coastal Land Use Plan Policy 2-6 requirements has not been demonstrated.

Summary

Staff recommends denial of the appeal and denial of the project based on the inability to make the required policy consistency and administrative findings as summarized above and set forth in the environmental impact report, the policy consistency analysis in Exhibit 2 of this Board letter, the findings in Exhibit 1 of this Board letter, as well as in the remainder of the administrative record.

Mandates and Service Levels:

The appeal was filed pursuant to Section 35-182.3 of Article II of Chapter 35 of the County Code, which Coastal Act Policy 30231states that the decisions of the Planning Commission may be appealed to the Board Supervisors within 10 days after the Planning Commission's action.

Pursuant to Government Code Sections 65355 and 65090, a notice shall be published in at least one newspaper of general circulation. Mailed notice required to property owners within 300 feet of the project, including the real property owners, project applicant, and agencies expected to provide essential services shall be done at least 10 days prior to the hearing (Government Code Section 65091).

Fiscal and Facilities Impacts:

Pursuant to Board of Supervisors action involving charging fees for appeals in the Coastal Zone, the applicant is responsible for the \$2000 appeal fee. Costs exceeding this amount are absorbed by General Fund revenue.

Special Instructions:

Clerk of the Board shall forward a copy of the Minute Order to Planning & Development, attn: Hearing Support, Cintia Mendoza.

Planning and Development will prepare all final action letters and notify all interested parties of the Board of Supervisors' final action.

Concurrence: County Counsel

ATTACHMENTS:

- Exhibit 1: Planning Commission action letter dated September 27, 2001
 - A. Findings
 - B. Policy Consistency Analysis (including revisions adopted during Planning Commission hearing of September 26, 2001)
- Exhibit 2: Planning Commission Staff Report dated September 18, 2001 (Policy Consistency Analysis Included)
- Exhibit 3: 00-EIR-04 (Board of Supervisors)
- Exhibit 4: Appeal dated October 5, 2001
- Exhibit 5: Comment Letters