



BOARD OF SUPERVISORS  
AGENDA LETTER

Agenda Number:

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

**Department Name:** Planning and  
Development  
**Department No.:** 053  
**For Agenda Of:** July 8, 2014  
**Placement:** Departmental  
**Estimated Tme:** 1.5 hour on 7/8/14  
**Continued Item:** No  
**If Yes, date from:**  
**Vote Required:** Majority

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**TO:** Board of Supervisors  
**FROM:** Department Glenn Russell, Ph.D, Director, Planning and Development  
(805) 568-2085  
Contact Info: Alice McCurdy, Deputy Director, Development Review  
(805) 934-6559  
**SUBJECT:** **Hearing to Consider the Appeal (Case No. 13APL-00000-00029) of the County Planning Commission's Approval of the Beach Club Project (Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054), First Supervisorial District**

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**County Counsel Concurrence**

As to form: Yes

**Auditor-Controller Concurrence**

N/A

**Recommended Actions:**

Consider Case No. 13APL-00000-00029, the Summerland Citizens' Association, Reeve Woolpert, and Tom Evans' Appeal of the County Planning Commission's approval of Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054 for the Beach Club project.

On July 8, 2014, staff recommends that your Board take the following actions:

1. Deny the appeal, Case No. 13APL-00000-00029;
2. Make the required findings for the project, Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054, including CEQA findings, included as Attachment 2;
3. Adopt the Revised Proposed Final Mitigated Negative Declaration 13NGD-00000-00012, included as Attachment 4 and adopt the mitigation monitoring program included as Attachment 3; and
4. Grant de novo approval of Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054, thereby affirming the decision of the Planning Commission, subject to the Revised Conditions of Approval included in Attachment 3.

Alternatively, refer back to staff if the Board takes other than the recommended actions.

The project site is located at 2825 Padaro Lane in the Summerland area, First Supervisorial District. The applications involve AP No. 005-260-018.

**Summary:**

Ana Citrin (Law Office of Mark Chytilo) timely filed an appeal on December 16, 2013 of the Beach Club project approved by the County Planning Commission on December 4, 2013 (Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054). The appeal was filed on behalf of the Summerland Citizens' Association, Reeve Woolpert and Tom Evans. The Beach Club project consists of three main elements: (1) a Tentative Parcel Map to divide 10.25 acres into two lots of 3.02 and 7.23 acres on property zoned 3-E-1; (2) legalization of grading conducted without a permit; legalization of as-built modifications to a previously approved habitat restoration plan; removal of existing legal nonconforming dwellings; removal of a play structure, retaining wall and well located within the riparian setback; capping of significant cultural resources; installation of a new fence; and (3) construction of a new single family residence and associated fencing and landscaping.

**Background:**

A Draft Mitigated Negative Declaration was prepared to evaluate the impacts of the project and was circulated for public review on August 9, 2013. The applicant subsequently revised the project to address comments raised by area residents regarding the adequacy of the MND and impacts of the project. These project changes included relocating the house and both development envelopes to be more than 71 feet from the bluff top and redesigning the house to remove the cantilevered element. The project description was also modified to more clearly state what type of development would be allowed outside of the envelopes and within the riparian setback. Language was added to the MND regarding the utility of placing rock features within the riparian setback to facilitate revegetation and prevent erosion. The MND was also revised to more accurately describe the existing vegetation along Padaro Lane and the limited, filtered blue water public views of the ocean from Padaro Lane.

The Proposed Final MND (MND, as presented to the Planning Commission and included as Attachment E of Attachment 6 of this Board Letter) concluded that the project would result in significant but mitigable impacts in the following issue areas: Aesthetic/Visual Resources, Air Quality, Biological Resources, Cultural Resources, Fire Protection, Geologic Resources, Noise and Water Resources. On December 4, 2013, after hearing substantial testimony, the Planning Commission voted 4-0 (Blough absent) to approve the project and adopt the Revised Final MND as adequate environmental review under CEQA.

On December 16, 2013, the Planning Commission's approval of the project was appealed by Ana Citrin, Law Office of Mark Chytilo, on behalf of the Summerland Citizens' Association, Reeve Woolpert, and Tom Evans. Appeal issues included the project's consistency with ordinance and policies addressing recreation, trails, and visual resources; adequacy of the MND; and the County's practice of legalizing zoning violations. The project was agendaized for the Board of Supervisors hearing of April 1, 2014. However, Planning & Development requested that it be dropped from the agenda in order to have

adequate time to evaluate and address additional information received from the appellants on March 28, 2014. Additional appeal issues presented in the March 28, 2014 letter included the permit status of a gate across Toro Canyon Creek at Padaro Lane, historic public use of the creek corridor for beach access, and interference with alleged public prescriptive rights. As a result of the additional issues raised in the materials submitted on March 28, 2014, sections 1.0, 3.1, 3.3, 4.5 and 4.16 of the Proposed Final MND presented to the Planning Commission were revised (“Revised Proposed Final MND”) including a revised project description in which the gate would be removed prior to issuance of Coastal Development Permit 11CDH-00000-00006. This change was offered by the applicant and is not required to mitigate any environmental impact, nor would it result in an environmental impact. Removal of the gate is also incorporated as a project condition of approval for 11CDH-00000-00006, in order to formalize and clarify elements of its implementation. Revised permit no. 11CDH-00000-00006 and the Revised Proposed Final MND are included as Attachments 3 and 4 of this Board Letter. The item was re-agendized and re-noticed for today’s hearing.

### **Appellant Issues and Staff Responses:**

The appellant submitted a letter (included with Attachment 1 of this Board Letter) with the application appealing the December 4, 2013 Planning Commission approval of Case Nos. 12TPM-00000-00006, 11CDH-00000-00006, and 11CDH-00000-00054. The letter identifies three primary issues as reasons for the appeal. Staff’s responses are presented after a summary of each appeal issue, below.

### **Appellant Issue #1, Policy and Ordinance Consistency**

**Appellant Issue #1.1, Draft Summerland Community Plan Update.** The appellant states that neither the Staff Report nor the MND analyze the project’s consistency with the then-draft Summerland Community Plan update. The applicant contends that such analysis is required by Coastal Zoning Ordinance (CZO) Section 35.169.4.1.e.

### **Staff Response to Issue #1.1, Draft Summerland Community Plan Update:**

CZO Section 35.169.4.1.e states (underline emphasis added):

***Section 35-169.4 Processing.*** (Amended by Ord. 4584, 11/22/05; Ord. 4594, 03/05/2008; Ord. 4595, 03/05/2008)

***1. Coastal Development Permits for development that is not appealable to the Coastal Commission in compliance with Section 35-182 (Appeals) and is not processed in conjunction with a Conditional Use Permit or Development Plan. This Section provides the processing requirements for applications for Coastal Development Permits that are not subject to Section 35-169.4.2 or Section 35-169.4.3 below.***

***e. If a Coastal Development Permit is requested for property subject to a Resolution of the Board of Supervisors initiating a rezoning or amendment to this Article, a Coastal Development Permit shall not be approved or conditionally approved while the proceedings are pending on such rezoning or amendment unless the proposed uses or structures conform to both the existing zoning and existing provisions of this Article and the rezoning or amendment initiated by the Board of Supervisors, or unless a Preliminary or Final Development Plan was approved by the County before the adoption of the***

*Board's resolution and the proposed uses or structures are in conformance with the approved Preliminary or Final Development Plan.*

The Board did not initiate by resolution "a rezoning or amendment to this Article" (i.e. the Coastal Zoning Ordinance) for the SCP. Rather, Long Range Planning's 2007-2008 Annual Work Program listed several potential new projects, including "Update Summerland Circulation Element and Design Guidelines." The Annual Work Program did not provide any additional details and did not specifically initiate any rezoning or amendment to the Coastal Zoning Ordinance for Summerland. On June 15, 2007, the BOS adopted a resolution (No. 07-183) adopting the proposed budget for the 2007-2008 fiscal year. The proposed budget included funding for the potential new projects listed LRP's 2007-2008 Annual Work Program, including "Update Summerland Circulation Element and Design Guidelines." The Board adopted and approved the Summerland Community Plan Update on May 6, 2014.

In summary, when the BOS adopted the 2007-2008 budget, they approved the funding and approved P&D to work on the update, but did not initiate a rezone or amendment to the CZO for Summerland. Therefore, the provisions of CZO Section 35.169.4.1.e do not apply. As a result, the proposed project is not required to be consistent with the policies and development standards of the revised and adopted draft Community Plan that is not effective in the Coastal Zone until the Coastal Commission certifies the amendments. Instead, the project must be consistent with the policies and development standards of the effective SCP on the property.

**Appellant Issue #1.2, Policy and Ordinance Compliance.** The appellant also states that the project does not comply with Summerland Community Plan and Local Coastal Plan policies and Coastal Zoning Ordinance requirements regarding (a) Parks, Recreation and Trails, and (b) Visual Resources.

**Appellant Issue #1.2 (a) Parks, Recreation and Trails.** The appellant states that the project is inconsistent with the following ordinance provision and policies pertaining to Parks, Recreation and Trails:

*Summerland Community Plan Policy PRT-S-2. In compliance with applicable legal requirements, all opportunities for public recreational trails within those general corridors adopted by the Board of Supervisors as part of the Parks, Recreation and Trails (PRT) maps of the County Comprehensive Plan (and this Community Plan) shall be protected, preserved and provided for during and upon the approval of any development, subdivision and/or permit requiring any discretionary review or approval.*

*Coastal Zoning Ordinance Section 35-63. Coastal Trails. Easements for trails shown on the Santa Barbara County Comprehensive Plan Parks, Recreation and Trails (non-motorized) maps, shall be required as a condition of project approval for that portion of the trail crossing the lot upon which the project is proposed.*

*Coastal Land Use Plan Policy 7-25<sup>1</sup>. Easements for trails shall be required as a condition of project approval for that portion of the trail crossing the parcel upon which the project is proposed.*

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<sup>1</sup> The appeal letter incorrectly identified this policy language as CLUP Policy 7-26. It is correctly referenced here as Policy 7-25.

### **Staff Response to Issue #1.2 (a), Parks, Recreation and Trails:**

Specifically, the appellant contends that the project site contains a mapped “proposed off road trail” that should, per these policies, be preserved, protected and provided for as a condition of the approval of the proposed project.

Parks, Recreation and Trails Map PRT-2, adopted with the Comprehensive Plan by the Board of Supervisors in 1980, identifies the subject 10-acre property as a “proposed park”. Map PRT-2 also depicts a “proposed off road trail” along the beach located outside of and below the subject parcel (i.e. not along the creek corridor as asserted by the appellant). Coastal Land Use Plan Table 3-5, *Summary of LCP Access and Recreation Proposals*, recommends a “vertical access corridor” in the Carpinteria planning area at Padaro Lane, and a “moderate use recreation area” at Loon Point in the Summerland planning area. Finally, Table 5 of the Land Use Element of the Comprehensive Plan, *Proposed Parks and Joint Use Facilities*, identifies “Site # 3, 11 acres, Loon Point” as an area for walking and beach use; this is consistent with Map PRT-2’s designation of the entire property as a proposed park. Finally, SCP Figure 15, Trail, Open Space and Vista Map, identifies the Toro Creek Corridor as a “possible future trail”.

The “possible future trail” that is identified within the Toro Creek Corridor in Figure 15 of the Summerland Community Plan is not depicted on the PRT-2 map. For this reason, at the time this item was heard by the Planning Commission on December 14, 2013, and when the Board Letter was submitted for the hearing of April 1, 2014, staff did not recognize that there was a PRT-mapped trail located on the property. However, the appellant submitted materials on March 28, 2014 (contained in Attachment 7 of this Board Letter) that clarified that the “possible future trail” in Figure 15 of the Summerland Community Plan represents the PRT map adopted for the Summerland Community Plan Area. Upon review, staff concurs that the project site contains a PRT-mapped “possible future trail” along the Toro Canyon Creek corridor. In addition, the site is identified as a “proposed park” on the PRT-2 map; is identified as a possible “moderate use recreation area” by CLUP Table 3-5; and is identified as a possible “area for walking and beach use” in Land Use Element Table 5. The project site does not contain a “proposed off road trail”, although one is designated along the beach below and separate from the subject parcel.

Clearly, however, the appellant is speaking to the “possible future trail” shown in the SCP Figure 15, not the “off road trail” located along the beach below the property. That being said, since the 1980 adoption of the Comprehensive Plan and 1992 adoption of the Summerland Community Plan, the courts have narrowed the ability of local jurisdictions to exact vertical and horizontal access easements to the beach. An exaction is dependent on an essential nexus, where the condition has a relationship to the impact the project would have on the surrounding community. There must be an essential nexus between burdens imposed by the development and the exaction.

In this case, the creation of one net new lot on private property, consistent with the zoning, is not expected to place an additional burden on the public trail system, and the proposed project is consistent with applicable parks, recreation and trails-related policies of the Comprehensive Plan. Therefore, the Parks Division of the Community Services Department does not request, nor does P&D staff recommend, exaction of a trail.

**Appellant Issue #1.2 (b) Visual Resource Protection.** With regard to Visual Resources, the appellant states that the project is inconsistent with the following three policies:

***CLUP Policy 4-3.** In areas designated as rural on the land use plan maps, the height, scale, and design of structures shall be compatible with the character of the surrounding natural environment, except where technical requirements dictate otherwise. Structures shall be subordinate in appearance to natural landforms; shall be designed to follow the natural contours of the landscape; and shall be sited so as not to intrude into the skyline as seen from public viewing places.*

***Coastal Act Policy 30251.** 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.*

***Summerland Community Plan Policy VIS-S-3.** Public views from Summerland to the ocean and from the Highway to the foothills shall be protected and enhanced. Where practical, private views shall also be protected.*

**Staff Response to Issue #1.2 (b) Visual Resource Protection:**

The appellant states that neither the MND nor the Planning Commission Staff Report reference Policy VIS-S-3. As a result of public comments by the appellant, VIS-S-3 was discussed during the Planning Commission hearing of December 4, 2013. Staff stated that the proposed project would be consistent with this policy for several reasons. From Padaro Lane, filtered blue water views are available to the public through the existing myoporum hedge along the road. Also, the large parcel sizes, large area excluded from future development, and the imposition of development envelopes creates a situation where future construction of two new SFDs would not significantly interrupt the existing, filtered blue water views. The Planning Commission's motion acknowledged the project's consistency with this policy as addressed orally by staff at the hearing. The Commission's determination regarding this policy is reflected in the Action Letter dated January 23, 2014 (Attachment 5 of this Board Letter).

The appellant also states that the project documents rely on a flawed rationale for determining consistency; and that the MND and Staff Report do not disclose that the site is located within a view corridor identified in the Summerland Community Plan, or that it is visible from the railroad.

The SCP, which was adopted in 1992, notes the following as an existing condition: "From the Padaro Lane area, a view corridor exists of the foothills to the north and of the ocean and Loon Point to the south and west" (p. 137, third paragraph). However, no figures or maps in the Summerland Community Plan show the project site as a view corridor. In the 22 years since adoption of the SCP, hedges and other vegetation have grown along the south side of Padaro Lane. Today's public views of the ocean in the vicinity of the project are extremely limited, consisting of heavily filtered blue water views through the mature myoporum hedge at the property line and the eucalyptus trees along the south side of the railroad corridor. This condition is the current setting and was used as the baseline for the environmental and policy analysis.

Of the two permits approved for the lots immediately to the west of the subject parcel, only one was conditioned to preserve a view corridor, and that condition only pertained to the western property line of assessor's parcel number 005-260-012, defining and preserving an existing view corridor at that specific portion of Padaro Lane located west of the proposed project site. No other projects along this portion of Padaro Lane have been required to create or maintain public views to the ocean. Because there is no mapped view corridor over the lot, and because existing public views are heavily filtered by the myoporum hedge, the Planning Commission's approval did not include a condition to maintain or improve the views across the property. Additionally, staff does not recommend such conditions because the project is consistent with SCP policies as discussed below.

The proposed project is, and will continue to be, consistent with all of the applicable policies of the Summerland Community Plan, CLUP Policy 4-3, and Coastal Act Policy 30251. Public views over the lot of blue water from Padaro Lane and the railroad corridor are minimal given the dense vegetative screening consisting of eucalyptus trees and the myoporum hedge along the property line. As a result of the screening, the proposed single-family dwelling associated with permit no. 11CDH-00000-00054 would also only be minimally visible to the public as seen from Padaro Lane and the railroad corridor. As designed, the proposed residence would be less than 16 feet in height. Given this minimal height, the structure would be compatible with the character of the surrounding natural environment, which is a generally level bluff. The single family dwelling would be subordinate in terms of its height, size, and orientation to the landform and has been designed to follow the natural contours of the landscape. The structure has also been sited on the lot to minimize its visibility from public viewing places. The residence has already undergone conceptual design review and must receive final design approval from the South Board of Architectural Review prior to permit issuance. In addition, future review of any new home(s) on the property would be subject to the same permit and design review process as the currently proposed project. Thus, the proposed project is consistent with these policies.

### **Appellant Issue #2, CEQA**

The appellant states that the MND fails to satisfy the requirements of CEQA. The appellant contends (a) that the analysis of the project is legally inadequate because the MND fails to accurately describe the environmental baseline, and (b) that an EIR is required for this project pursuant to the California Environmental Quality Act because there is substantial evidence supporting a fair argument that the project may impact public access and recreation, and visual resources.

**Appellant Issue 2 (a), Failure to Adequately Describe Environmental Baseline.** The appellant states that the MND mischaracterizes the "proposed off road trail" depicted on the Summerland PRT map along the eastern boundary of the property as a "possible future trail", obscuring its relevance related to the above PRT policies. The appellant also contends that the MND does not disclose that the public's use of the creek corridor 15 or 20 years ago may have created a public prescriptive right.

### **Staff Response to Issue #2 (a):**

As discussed above under staff's response to appeal issue #1, the "proposed off road trail" depicted on the Summerland PRT Map PRT-2 is located along the beach below the subject parcel. The Toro Creek corridor is identified in Summerland Community Plan Figure 15, *Trail, Open Space and Vista Map*, as a "possible future trail".

Public prescriptive rights may only be adjudicated by the courts. The County lacks the authority to adjudicate the existence of prescriptive rights for public use of privately owned property and cannot base its permit decision on the existence of potential prescriptive rights in favor of the public. However, if there is current unauthorized, unofficial use of trails, this project does not interfere with that unauthorized use. The MND has been revised to acknowledge the past use of this trail; however because the trail has not received significant use in 15-20 years (see Attachment 7 of this Board Letter), there is no significant impact on any existing trails or recreational facilities. In addition, the project description has been changed to include removal of the gate, thus removing an obstacle to public use of the trail.

The appellant also states that the MND mischaracterizes the adequacy of nearby beach access routes, and that these routes do not provide safe or adequate access to Loon Point and the down-coast beaches east of Loon Point, particularly under high-tide conditions.

The Staff Report and MND accurately identify the locations and status of nearby beach access routes to the east and west of the project site. As discussed in detail on page 11 of this Board Letter, these access points are within the "reasonable distance" referenced in CLUP Policy 7-2. Although the trail from the Loon Point parking lot west of the project site is always open, high tides may reduce the beach such that access to Loon Point may not be possible from the west. Similarly, walking west from Santa Claus Lane, beach access may also be impeded from time to time throughout the year.

The appellant states that the MND does not disclose that the project is within a view corridor recognized in the Summerland Community Plan, and does not make any attempt to characterize the existing view through the hedge from Padaro Lane and other public viewing locations. The appellant further states that the MND does not disclose that the project will be visible from the railroad or provide any photos or visual simulations showing these views.

As described above under appeal issue #1, current public views of the ocean in the vicinity of the project are extremely limited, consisting of heavily filtered blue water views through the mature myoporum hedge at the property line and the eucalyptus trees along the south side of the railroad corridor. This condition is the current setting and was used as the baseline for the environmental and policy analyses. Both the MND and Staff Report state that there are filtered public blue water views from Padaro Lane through the existing hedge. The MND has been revised to indicate that there are also extremely filtered blue water views from the railroad tracks through the eucalyptus windrow and the myoporum hedge. The extremely limited nature of the existing, public blue water views as seen from both Padaro Lane and the railroad tracks to the north is further documented in the Power Point presentation for this Board hearing.

**Appellant Issue 2 (b) EIR Required.** The appellant states that substantial evidence supports a fair argument that the project conflicts with policies adopted for the purpose of avoiding or mitigating environmental effects. The appellant also states that personal observations by area residents also support a fair argument that the project may result in significant impacts to public access and recreation, and visual resources. The appellant concludes that the project requires a focused EIR.

**Staff Response to Issue 2 (b):**

As discussed above, the project is consistent with the visual resource or recreation and trails policies identified by the appellant and listed above. The MND has been revised to recognize the 15 surveys submitted by the appellant on March 28, 2014, testifying to historic public access to the beach via the Toro Canyon Creek corridor. The analysis in the Revised Proposed Final MND concludes that while the testimonies presented discuss historic use, the public has not used the trail significantly over the past 15-20 years and therefore the proposed project would have no impact on public access and recreation. In addition, the revised project description requires removal of the gate, thus removing an obstacle to public use of the trail. As discussed in issue #2 (a), the County lacks the authority to adjudicate the existence of prescriptive rights. As such, the MND is adequate for the purpose of analyzing the current project, and an EIR is not required.

**Appellant Issue #3, Legalization of Zoning Violations.** Permit no. 11CDH-00000-00006 would legalize unpermitted grading and selected as-built deviations from a previously approved habitat restoration plan. It would also require removal of specific structures within the creek corridor and riparian setback, protective capping of a significant cultural resource, and mitigation of impacts to the cultural resource in the form of a comprehensive program of archaeological analysis and reporting. The appellant states that such legalization fails to penalize the applicant for violating the County's CLUP and Coastal Act; encourages similar violations by the same applicant or other property owners; fails to mitigate "for temporal impacts associated with the ongoing zoning violation on the property"; deprives the County of revenue; and encourages landowners to build first and then apply for permits if and when they are caught. The appellant also states that in the Coastal Zone the County has a "pattern and practice of condoning unpermitted development", which has "substantial cumulative adverse effects" and promotes "a culture of unpermitted development activity with only a small fraction of such violations ever being prosecuted as such, and for those, with token or no penalties or sanctions". The appellant concludes that "this approach fails to safeguard the County's sensitive coastal resources or uphold the letter and spirit of the California Coastal Act, LCP and Coastal Zoning Ordinance".

**Staff Response to Issue #3:**

When the County Planning & Development Department (P&D) receives a zoning violation complaint, P&D's administrative practice is to identify methods to abate the violation and, where possible, to identify a permit path to authorize the unpermitted work. This often results in after-the-fact permitting, including mitigation measures or other appropriate conditions of approval. The process may also result in a requirement to remove unpermitted structures or other objects. In this case, a Coastal Development Permit (CDP) application was submitted by the applicant in response to the Zoning Enforcement Violation (ZEV) for unpermitted grading within an archaeological site. The CDP application fees were doubled to the maximum allowable amount of \$2,000. During case processing, P&D also identified deviations from the previously approved restoration plan, including hardscape located within the riparian setback. As part of application processing, the County required that the applicant fund research to assess impacts to significant cultural resources. Based on this work, mitigation measures were developed and incorporated into project conditions of approval. In addition, the county's biologist and the California Coastal Commission worked with the applicant to craft a revised habitat restoration plan that effectively responds to the on-the-ground conditions. These changes included hardscape to aid revegetation and prevent erosion in the loose soils within the riparian setback, and removal of unnecessary structures

within the riparian corridor. Measures such as bonding for and initiation of the archaeological study, removal of structures, and capping of the cultural resource are required to be completed prior to the approval of any other permits on the property, including those for the lot split or new residence. These and additional mitigation measures have been applied to the project as if it was new rather than existing development. The County has no ordinance in place to mitigate the temporal impacts of the violation through assessment of fines.

### **Additional Issues Raised in the March 28, 2014 Letter from the Law Office of Mark Chytilo**

#### **1. Existing Development not Addressed by Project**

The appellant identified a gate located across Toro Canyon Creek immediately south of Padaro Lane (shown in Exhibit 3 of the March 28, 2014 letter included in Attachment 7 of this Board Letter) and questioned its permit status. The appellant states that installation of this gate blocked off the historically used public trail along the creek corridor and interfered with the public's ability to access the coast at this location. The appellant further states that this issue must be addressed before the project may be approved by the Board.

#### **Staff Response**

The gate structure with pillars is located on three separate properties owned by the County of Santa Barbara (Padaro Lane road right-of-way); Cameron Family Trust; and the applicant. The gate and pillars were constructed when the property was owned by Mr. Art Cameron, Sr. sometime between 1986 and 1989. At the time of its construction, a permit for Mr. Cameron to place the gate on his property was not required; therefore, the gate is a legal nonconforming structure and not a zoning violation. However, the gate was constructed partially within the County road right-of-way without a road encroachment permit. Additionally, the gate does not conform to Flood Control requirements because it could catch debris and block creek flows during storm events. The applicant has offered to remove the gate at his own expense. The project description has been revised to require removal of the gate, as reflected in Condition 1 of 11CDH-00000-00006 (see the Revised Conditions of Approval included as Attachment 3 of this Board Letter). The gate pillars will be left in place to avoid disturbance to sensitive resources. Removal of the gate will resolve this appeal issue.

#### **2. Inconsistency with Applicable General and Specific Plans**

The appellant reiterates that the project does not comply with the applicable policies of the Comprehensive Plan, CLUP, and Summerland Community Plan and states that as a result, the Board cannot make findings for approval required by Government Code Section 66474.

Specifically, as stated in appeal issue 1 and discussed above, the appellant contends that the project does not conform to SCP Policy PRT-S-2, CLUP Policy 7-25, and CZO Section 35-63 because it does not incorporate an easement for a trail along Toro Canyon Creek. In this additional appeal issue, the applicant also states that the project does not comply with CLUP Policy 7-1, which requires the following:

***CLUP Policy 7-1:*** *The County shall take all necessary steps to protect and defend the public's constitutionally guaranteed rights of access to and along the shoreline. At a minimum, County actions shall include:*

- a. *Initiating legal action to acquire easements to beaches and access corridors for which prescriptive rights exist consistent with the availability of staff and funds.*
- b. *Accepting offers of dedication which will increase opportunities for public access and recreation consistent with the County's ability to assume liability and maintenance costs.*
- c. *Actively seeking other public or private agencies to accept offers of dedications, having them assume liability and maintenance responsibilities, and allowing such agencies to initiate legal action to pursue beach access.*

The appellant also asserts that the project would interfere with historic public access along Toro Creek, thus providing a nexus and rough proportionality to support exaction of a trail easement.

### **Staff Response**

As discussed in staff's response to appeal issue 1.2 (a) on page 5 of this Board Letter, the policies cited by the appellant predate court rulings that limit the ability of a local agency to exact amenities such as trails absent findings of an essential nexus and rough proportionality. Therefore, the cited policies must be considered in that context. With regard to CLUP Policy 7-1 (a), and as discussed on page 7 of this Board Letter in staff's response to appeal issue #2 (a), the County lacks the authority to adjudicate the existence of prescriptive rights for public use of privately owned property. The 15 testimonial statements provided by the appellant in the March 28 letter to your Board indicate that use of the corridor over the past 15-20 years was minimal. Also as discussed above, the creation of one net new lot on private property, consistent with the zoning, would not place an additional burden on the public trail system or have an impact on any existing trails or recreational facilities. Therefore, the Parks Division of the Community Services Department does not request, nor does P&D staff recommend, exaction of a trail. However, the applicant has offered to remove the gate across the creek that has partially limited unauthorized use of Toro Canyon Creek for beach access, and the project description of 11CDH-00000-00006 has been changed accordingly.

Although not addressed by the appellant, the project is also consistent with CLUP Policy 7-2:

***Coastal Land Use Plan Policy 7-2:*** *For all development between the first public road and the ocean granting of an easement to allow vertical access to the mean high tide line shall be mandatory unless:*

- a. *Another more suitable public access corridor is available or proposed by the land use plan within a reasonable distance of the site measured along the shoreline, or*

- b. *Access at the site would result in unmitigable adverse impacts on areas designated as "Habitat Areas" by the land use plan, or...*

The project's consistency with this policy is discussed in Section 6.2, page 32 of the Planning Commission staff report dated November 15, 2013 (Attachment 6 of this Board Letter). Public beach access currently exists approximately ¼ mile to the west at the Loon Point beach access path; an additional vertical public easement to the beach from Padaro Lane is located approximately 1 mile to the east of Toro Canyon Creek at 3443 Padaro Lane. Although the Montecito Trails Foundation letter (Attachment 7 of this Board Letter) states, "The standing 1987 "Offer To Dedicate" a trail through 3443 Padaro Lane has not been accepted by the County and has languished on the books ever since", this information is incorrect. This easement was originally required as condition #15 of a land division, TPM 13,698. It was also a condition of a subsequent CDP, 86-CDP-130, and an offer to dedicate was accepted by the Board on October 20, 1998. This easement is currently undeveloped. Both easements are located a reasonable distance from the proposed project site and both are more suitable beach access locations than the "possible future trail". The "possible future trail" is located within a riparian corridor that has been thoroughly restored as resolution of a Coastal Commission appeal of a previous project on the lot. It is also immediately adjacent to (and likely within) a significant cultural resource. While trails are a specifically allowed use in ESHA, CLUP Policies 10-1 and 10-2, and SCP Policy HA-S-1, require that impacts to significant cultural resources should be avoided wherever possible. Therefore, a trail in this location is not recommended.

Public Resources Code Section 66474 (g) states that a legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes the findings that that the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. This subsection applies only to easements of record or to easements established by judgment of a court of competent jurisdiction and does not grant authority to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision. In this case, the public has not "acquired" any easements by prescriptive rights or otherwise.

### **3. Historic Public Use and Prescriptive Rights along Toro Creek Trail**

The appellant states that there is substantial evidence of historic public use and prescriptive rights along the Toro Creek corridor. Specifically, the appellant cites the Santa Barbara County Coastal Access Implementation Plan dated March 29, 1991 (Exhibit 8 of the letter dated March 28, 2014), which describes the ancestor parcel as historically having been used for vertical access; notes that this access was recently gated off; and suggests that the County investigate the prescriptive rights (and acquisition of easement) for this access way. The appellant also provided 15 declarations of use of Toro Creek describing the individual responders' use of Toro Creek from the 1960s on (Exhibit 9 of the March 28 letter). Finally, the appellant states that the MND must disclose the existence of substantial evidence of historic public use and prescriptive rights to accurately reflect the environmental setting.

#### **Staff Response**

The MND has been revised to add the following language to the Setting section: "While no public trails or adjudicated prescriptive trail rights exist through or adjacent to the subject property, there is a history

of public access through the project site. This is documented by signed surveys from 15 different members of the public clarifying their historic access through the project site and submitted to the County by the Summerland Citizens Association. However, based on statements from several members of the public and the 15 declarations of use provided by the appellant, the riparian corridor trail has not received significant use in approximately 15-20 years.” The MND accurately reflects the current environmental setting related to recreational use of the parcel and concludes that the project has a less than significant impact. As discussed in issue #2 (a) above, the County lacks the authority to adjudicate the existence of prescriptive rights. At the request of the applicant, the project description has been revised to require removal of the gate where Toro Canyon Creek crosses the northern perimeter of the site.

#### **4. Interference with Public Access and Public Prescriptive Rights along Toro Creek**

The appellant states that the proposed project would intensify the use of a relatively undeveloped area of Summerland’s coast that is identified as a potential park on the County’s PRT-2 map. The appellant contends that because of the applicant’s identity, the occupation of the proposed dwelling would likely result in increased security and less opportunity for the public to access the beach via Toro Canyon Creek. The appellant states that these circumstances provide a nexus and rough proportionality to support a trail exaction. The appellant also states that members of the public do still use the Toro Creek trail today but that access was “substantially obstructed” by placement of the gate.

#### **Staff Response**

The proposed project would create one net new legal lot, remove a legal nonconforming dwelling and accessory structure, and permit one new single family dwelling. Any owner has the ability to exclude the public from private property, and the public does not currently have a “right” to access the trail as alleged by the appellant. Review of the 15 testimonials regarding historic use suggest that there has been little public use of the creek corridor in the past 15-20 years, even though the March 28 letter states that the gate only partially obstructed access. Further, the identity of an applicant is not a consideration in how individual permits are processed by the County. Regardless, as stated previously, the creation of one net new lot on private property, consistent with the zoning, would not place an additional burden on the public trail system. Therefore, the Parks Division of the Community Services Department does not request, nor does P&D staff recommend, exaction of a trail.

#### **5. EIR Required Under CEQA’s Fair Argument Test**

The appellant states that substantial evidence supports a fair argument that the Project may significantly impact public access and recreation based on alleged conflicts with County public access, recreation, and visual resources policies. The appellant also states that the MND is legally inadequate based on defects in the environmental setting/baseline with respect to the park designation and view corridor, and recognition of historic public use and prescriptive rights.

#### **Staff Response**

The appellant’s statements regarding conflicts with public access, recreation, and visual resource policies are addressed above in the staff response to Appellant Issues 1 and 2. Additionally, the MND prepared for this project has been revised to expand the discussion of recreational and visual issues and to

acknowledge receipt of the testimonials from the 15 members of the public (Attachment 4 of this Board Letter). A fair argument has not been made related to the alleged visual impacts of the project. Additionally, because the trail has not received significant public use in approximately 15-20 years and because the project will not obstruct the trail, a fair argument that the project may have a significant impact on recreation has not been raised under CEQA, and the MND is adequate for the project.

### **Additional Public Comments**

Public comments in support of the appeal were received on March 28, 2014 from the Montecito Trails Foundation and the Santa Barbara County Trails Council (Attachments 9 and 10 of this Board Letter). Comments against the appeal were received after April 1, 2014 from the Carpinteria Summerland Fire Department, and Native Americans Patrick Tumamait and Gilbert Unzueta (Attachments 11a, 11b, and 11c of this Board Letter).

The letters from the Montecito Trails Foundation and the Santa Barbara County Trails Council urge the County to exact a trail easement along Toro Canyon Creek. The Carpinteria Summerland Fire Department is concerned with any increase in pedestrian traffic in the creek area, which, because of environmental concerns, cannot be kept free of dense vegetation. Native American representatives oppose a public trail because of the presence of extremely sensitive cultural resources in this location.

### **Fiscal and Facilities Impacts:**

Budgeted: Yes

No appeal fees are required for appeals of projects that may be appealed to the California Coastal Commission. The estimated staff cost to process the appeal is approximately \$14,932 (80 planner hours). This work is funded in the Planning and Development Permitting Budget Program on page D-168 of the adopted 2013-2015 fiscal year budget.

### **Special Instructions:**

The Clerk of the Board shall publish a legal notice at least 10 days prior to the hearing on July 8, 2014. The notice shall appear in the Santa Barbara News-Press. The Clerk of the Board shall fulfill noticing requirements. Mailing labels for the mailed notice are attached. A minute order of the hearing and copy of the notice and proof of publication shall be returned to Planning and Development, attention David Villalobos.

### **Attachments:**

1. Appeal Packet 13APL-00000-00029, dated December 16, 2013
2. Board of Supervisors Findings of Approval
3. Revised Conditions of Approval
4. Revised Proposed Final MND
5. Planning Commission Action Letter for December 4, 2013 hearing, revised January 23, 2014
6. Planning Commission Staff Report dated November 15, 2013, including Environmental Document
7. Letter to the Board of Supervisors from the Law Office of Marc Chytilo dated March 28, 2014

8. Exhibit - Marc Chytilo and Reeve Woolpert to the Board of Supervisors
9. Letter to Salud Carbajal from the Montecito Trails Foundation dated March 28, 2014
10. Letter to Steve Lavagnino from the Santa Barbara County Trails Council dated March 31, 2014
11. Public Comments submitted after April 1, 2014
  - a. Letter to Joyce Gerber from the Carpinteria Summerland Fire Department dated April 8, 2014
  - b. Letter to Salud Carbajal from Patrick Tumamait dated April 30, 2014
  - c. E-mail from Gilbert Unzueta to Ginger Andersen (to the attention of Supervisor Carbajal) dated May 23, 2014

**Authored by:** Joyce Gerber, Planning and Development Department, (805) 934-6265