No. S284378

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SHEAR DEVELOPMENT CO., LLC,

Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION,

Defendant and Respondent.

Court of Appeal of the State of California
Second Appellate District, Division Six, Case No. B319895

Superior Court of California
County of San Luis Obispo
The Honorable Rita Federman
Civil Case No. 20CV-0431

APPELLANT'S OPENING BRIEF

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Issues Presented

1. What judicial standard of review applies to a decision by the California Coastal Commission asserting appellate jurisdiction under Public Resources Code Section 30603(a)?
2. Whether courts must defer to the local government author of a local coastal program (LCP) when the Commission and local government offer conflicting interpretations of the LCP.

Introduction

Shear Development Company, LLC (Shear) has been working for nearly two decades to build seven modest single-family homes on lots zoned for that use in an area surrounded by similar homes in San Luis Obispo County. The County approved the construction of all seven homes under its 1988 Local Coastal Program (LCP), the set of land use rules it authored to govern development in its coastal zone; four were finished a decade ago. The last three, whose permit is the subject of this case, remain undeveloped because the Commission appealed the County's approval to itself and rejected the project. The heart of this case is whether the Commission unlawfully expanded its appellate authority under the Coastal Act and LCP to take control of the matter. The Commission's grounds for asserting jurisdiction

violate the terms of the LCP as they have been consistently interpreted by the LCP's author, the County. The dispute represents a recurring conflict between local governments like San Luis Obispo County and the Commission over limits imposed on the state agency's jurisdiction where local governments issue permits under a certified LCP.

The Court of Appeal upheld the Commission's jurisdiction based on Pub. Res. Code § 30603(a)(3), which allows appeals of projects "that are located in a sensitive coastal resource area" (SCRA). Pub. Res. Code § 30603(a)(3).[1] This was an error, made possible because the court effectively applied the wrong standard of review to the question of the Commission's jurisdiction and deferred to the Commission's interpretation of the County's LCP.

While the Court of Appeal claimed to approach the question of the Commission's jurisdiction under an independent judgment standard of review, it applied a concept of "sensitive coastal resource area" (SCRA) that is unmoored from either the Coastal Act or LCP's legal standard for defining SCRAs. Instead, the

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[1] *Shear Development Co., LLC v. California Coastal Commission*, No. B319895, 2024 WL 700176 (Cal. Ct. App. Feb. 21, 2024) (Op.), *reh'g denied* (Mar. 19, 2024). Citations to the Opinion are to the Westlaw cite.

court concluded that "substantial evidence" supported the Commission's finding that Shear's proposed development is in an area allegedly containing sensitive resources protected by the LCP. Op. at *4 (stating that "substantial evidence support[s] the Commission's findings that the project is located in [a sensitive coastal resource area] and that the development permit is therefore appealable."). The Court thus substituted "substantial evidence" review of a quintessentially legal question for its own independent judgment.

The Court of Appeal's conclusion ratifies a troubling trend by the Commission to unilaterally expand its jurisdiction beyond the boundaries of the Coastal Act by failing to respect the Act's intended primacy of certified LCPs in coastal development. Coastal property owners like Shear must be able to rely on the explicit provisions of certified LCPs when seeking to develop their land. Coastal cities and counties, too, must have certainty that their certified LCPs will be enforced as written. By reversing the decision below, this Court would preserve the Coastal Act's vision of local decision-making balanced by *limited* Commission oversight.

Background: Regulatory Framework

The Coastal Act and Local Coastal Programs

The Coastal Act was enacted in 1976 to enhance and protect the state's coastal resources. It aims to balance the values achieved through coastal development with conserving and protecting marine and coastal habitats and other natural resources. To regulate development, the Act establishes a process for conforming local land use decisions to state policy while maintaining primary permitting authority with local governments.

Local governments prepare a Local Coastal Program (LCP) for the portion of the coastal zone under its jurisdiction, which they submit to the Coastal Commission for certification. Pub. Res. Code § 30500(a). "The precise content of each local coastal program shall be determined by the local government" in consultation with the Commission and the public. *Id.* § 30500(c). The local government is the sole author of its LCP. *Yost v. Thomas*, 36 Cal. 3d 561, 572 (1984) ("[T]he Commission ... does not create or originate any land use rules and regulations. It can approve or disapprove [the LCP], but it cannot itself draft any part of the coastal plan."). An LCP that meets the requirements

of Chapter 3 of the Coastal Act must be certified by the Commission, and once certified, "the Commission's role in the permit process for coastal development [is] to hear appeals from decisions by [the local government] to grant or deny permits." *Sec. Nat'l Guar. v. Cal. Coastal Comm'n*, 159 Cal. App. 4th 402, 421 (2008).

As relevant to this case, the Commission may exercise its appellate jurisdiction over locally approved projects only when the County's approval is allegedly inconsistent with its certified LCP or the Coastal Act's "public access" policies. Pub. Res. Code §§ 30603(a)(1), (b)(1). A mere policy disagreement does not give the Commission authority to review a locally approved project.

When a local decision raises a "substantial issue" concerning the project's conformance with the LCP or the Act's "public access" policies, the Commission may assume appeal jurisdiction and review the project *de novo*. Cal. Code Regs. tit. 14, § 13321. "[A] coastal development permit shall be issued" when the project conforms to the LCP. Pub. Res. Code § 30604(b).

In summary, the Coastal Act establishes state policies for coastal development; it mandates local governments to create a local coastal program for land use permitting that conforms to

state policies; it empowers the Commission to determine whether those plans conform—requiring it to certify them when they do—and then it delegates permitting decisions to the local government operating under the certified LCP. Finally, the Coastal Act places limited appellate review authority in the hands of the Commission only for certain kinds of projects and only in circumstances involving local decisions alleged to have violated the terms of the LCP or the Coastal Act's public access policies.

Once certified, the Commission has "no power either to make the amendments [to an LCP] itself or to compel the local government to make them." *Sec. Nat'l Guar.*, 159 Cal. App. 4th at 421. Only the local government can amend its LCP. Pub. Res. Code § 30514(a). The Commission can only "submit . . . recommendations of corrective actions that should be taken[,]" as well as "recommended amendments" to the LCP. *Id.* § 30519.5(a); *see also City of Malibu v. Cal. Coastal Comm'n*, 206 Cal. App. 4th 549, 563 (2012) (If the Commission "determines that a certified LCP is not being carried out in conformity with . . . the Coastal Act . . . [it's] power is limited to recommending amendments to

the local government's LCP . . . [or] recommend[ing] legislative action.")

San Luis Obispo County's LCP

The County began implementing its LCP in 1988, following the Commission's certification of the LCP as consistent with the Coastal Act. *Schneider v. Cal. Coastal Comm'n*, 140 Cal. App. 4th 1339, 1348 (2006) (discussing history of County's LCP). Since then, the County has been the day-to-day administrator of its LCP. *Id.*; Administrative Record (AR) 1962–63. The LCP consists of several related land use plans, each of which governs a particular geographic area of the County, as well as implementing zoning regulations embodied in a Coastal Zone Land Use Ordinance (CZLUO).

Consistent with the Coastal Act, the LCP strictly limits the Commission's appeal authority over locally approved projects. In relevant part, the implementing regulations state that projects are appealable if they are in a "Sensitive Coastal Resource Area" (SCRA), among which are areas "mapped and designated as Environmentally Sensitive Habitats (ESHA) in the Local Coastal Plan." San Luis Obispo County Code § 23.01.043(c)(3)(i). The

Commission's appeal jurisdiction "[d]oes not include resource areas determined by the County to be Unmapped ESHA." *Id.*[2]

The LCP also makes appealable projects "not listed in Coastal Table O, Part I of the [County's] Land Use Element as a Principal Permitted (P) Use" in the project site's "Land Use Category" or zone. San Luis Obispo County Code § 23.01.043(c)(4). Coastal Table O lists fourteen (14) Land Use Categories, ranging from "Agriculture" to "Residential Single-Family" to "Retail" to "Open Space." *See, e.g.*, AR 1865. The table identifies multiple Principal Permitted Uses in every category, signified by the letter "P." AR 1865–71. The "Residential Single-Family" category, for example, designates "Single Family Dwelling," "Coastal Accessways," and "Passive Recreation" as Principal Permitted Uses. AR 1866, 1868.

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[2] ESHA is defined by the CZLUO as "a type of [s]ensitive [r]esource . . . which could easily [be] disturbed or degraded by . . . development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats *and are mapped as Land Use Element combining designations* [in the LCP]." County Code § 23.11.030 (emphasis added). Unmapped ESHA are the same types of resources that the County may determine at the time of a coastal development application but "may not be mapped as Land Use Element combining designations." *Id.*

Since the LCP's adoption over 35 years ago, the County has interpreted section 23.01.043(c)(4) of its LCP to mean that approval of a Principal Permitted Use designated with a "P" in Table O is not appealable, even if there are other "Principal Permitted Uses" for the relevant zone. AR 1950 (County discussing "past practice" of interpreting the LCP as denying appeal jurisdiction where the project is a principal permitted use). Until 2005, this was also the Commission's interpretation; that year, the Commission first took the position that *all* projects in the County are appealable because the County's LCP does not list one Principal Permitted Use per zone. This change in interpretation resulted in litigation when a property owner challenged the Commission's assertion of jurisdiction over his project using that argument.

The matter was resolved when the San Luis Obispo Superior Court upheld the County's interpretation and rejected the Commission's jurisdiction, entering judgment for the owner; that judgment was not appealed. *See* Appellant's Am. Supp. Mot. for Jud.Notice (Am. Supp. MJN), Ex. 6 (*Crowther v. Cal. Coastal Comm'n*, No. CV 050453 (San Luis Obispo Superior Ct.), Statement of Decision at 2) ("[T]hose land uses designated as 'P'

and/or 'SP' in Table O of the County of San Luis Obispo's Land Use Element Local Coastal Plan . . . are 'principal permitted uses' within the meaning [of] Public Resources Code 30603(a)(4) . . . and are not appealable to Respondent [Commission]."). The record indicates that the Coastal Commission submitted to *Crowther* until another about-face in 2019 when Shear's project was approved. AR 1949–50 ("[O]ur agency has determined that our appeal jurisdiction, specifically as it relates to principally permitted uses within coastal counties, may require more projects to be considered appealable than previously understood.").

Factual and Procedural Background

In 2003, Shear purchased eight residential lots in the unincorporated town of Los Osos, San Luis Obispo County, intending to build single-family homes. AR 927. The lots are "zoned Residential single family, which allows for one residence per legal parcel." AR 536, 1868. Single-family homes are the predominant use of property around the lots. AR 83, 1943–44; 1953–54. Because Shear's lots are in Los Osos, their development is governed, in relevant part, by the LCP's Estero Area Plan (EAP), its associated combining-designations map (mapping

where different coastal resources exist in the area), and the CZLUO.

A. The Initial County and Commission Approvals

In 2004, the County approved a Coastal Development Permit (CDP) authorizing Shear to build one single-family home on each of the eight lots in the subdivision. AR 191. Because Los Osos lacked a community sewer, the County approved construction in two phases: four homes to be built in Phase 1 using individual onsite septic systems, with the remaining four to be built and connected to a planned community sewer in Phase II. *Id.*

The Commission appealed the County's 2004 CDP approval to itself. AR 191.[3] It approved the first four Phase 1 homes but denied Phase 2, instructing Shear to return to the County for an additional CDP after the sewer was completed. AR 536. The

[3] The Commission appealed the permits on the erroneous grounds that Shear's property was between the ocean and the first public road. The record contains no evidence as to why the Commission's jurisdiction was not challenged at that time, but the Commission did not assert that basis for appeal before the trial court or on appeal in this case, and Shear disputes that the property is located between the ocean and first public road. *See* Resp. Cross-Appellant Br. at 25 (noting that the Commission does not assert this as a basis for jurisdiction in this appeal).

Commission acknowledged that Shear had already "substantially developed" the entire eight-lot subdivision with significant "grading, retaining walls, underground utilities, roads, and landscaping." AR 1369, 927 ¶ 3. This included the installation of certified building pads, water and sewer mains, sewer laterals, and gas infrastructure. AR 927.

B. Phases 1 & 2 of the Project

Shear built single-family homes on the first four lots consistent with its CDP and awaited sewer construction to pursue Phase 2. By 2007, Shear had installed water meters on all eight lots, AR 695, 927, which have been served since with an "unrestricted supply of water." AR 927. Shear has continuously maintained active water use for landscaping. *Id.*

In 2009, the Commission approved a CDP for the County to construct the Los Osos Wastewater Project (LOWWP). AR 1513. The approval came with various conditions, including Special Condition 6:

> Wastewater service to ***undeveloped properties*** within the service area shall be prohibited unless and until the Estero Area Plan is amended to identify appropriate and sustainable buildout limits, and any appropriate mechanisms to stay within such limits, based on conclusive evidence indicating that adequate water is available to support development

> of such properties without adverse impacts to ground and surface waters, including wetlands and all related habitats.

AR 1612 (emphasis added).

The LOWWP was completed by 2016, AR 1937, after which Shear applied to the County for a CDP to build the Phase 2 homes. AR 66. It later modified its application, reducing the request from four to three homes. *See* AR 997, 1953. The County granted a CDP in 2019, AR 486, and the Commission again appealed the approval to itself. AR 521. The Commission cited two grounds to justify its jurisdiction.

First, the Commission argued that the project is in a Sensitive Resources Area (SRA), specifically that the project was "designated and mapped by the LCP as ESHA." (Mapped ESHA). AR 643; *see also* AR 544, 537 (same). Mapped ESHA appears *only* in combining designations maps the County keeps on file. Notably, the Commission could produce no official LCP map designating the site as an ESHA or SRA. Instead, all the Commission could muster was a "figure" in the LCP's EAP, which is not an official ESHA map and doesn't mention, let alone designate, either ESHA or SRA. AR 643 (citing "Figure 6-3" of the EAP). The figure only describes the location of certain dune

sands, but it does not indicate any intent to officially designate those sands as SRA or ESHA.

Second, the Commission noted that "the LCP does not designate one single principally permitted use within the residential single-family zoning district," and concluded, "thus all uses within the district are appealable." AR 537. The Commission charged ahead with this interpretation of the LCP despite its rejection by the San Luis Obispo Superior Court in the *Crowther* case noted above, Am. Supp. MJN, Ex. 6, and its conflict with the County's consistent interpretation of section 23.01.043(c)(4) for the prior three decades. *See* AR 1949–50 (describing consistent policy about principal permitted uses). The Commission assumed appeal jurisdiction, triggering *de novo* project review. The Commission staff report alleged that the project raised a substantial issue of conformity with the LCP's ESHA policies and lacked access to water and wastewater. AR 532–33. At the subsequent *de novo* hearing in July 2020, Shear urged the Commission to dismiss the appeal as improvidently granted and allow the County's approval to stand. Shear also argued, in the alternative, that the Commission should grant a CDP for the single-family homes, as approved by the County, given the

project's conformity with the LCP. AR 1936. At the close of the hearing, and without deliberation, the Commission voted to deny the CDP. AR 1975.

C. Shear Challenges the CDP Denial

Superior Court Proceedings

In August 2020, Shear brought an action for writ of mandate in Superior Court, asking that the Commission's CDP denial be set aside because (1) the Commission lacked appeal jurisdiction over the project, and (2) even if the Commission had jurisdiction, the Commission's findings did not support project denial.[4] AA004 (Petition). The court denied the Petition on November 15, 2021. AA083.

As in *Crowther*, the trial court rejected the Commission's claim of jurisdiction grounded in the LCP's designation of multiple Principal Permitted Uses in the zoning district. AA095–96. It also found that the Commission lacked substantial evidence for its contention that Shear's project was inconsistent with the LCP's ESHA policies, AA094, or threatened any ESHA. AA096–

[4] In the alternative, Shear alleged that denying development constituted a taking without just compensation. That claim was voluntarily dismissed and is not at issue in this appeal.

97. However, the court upheld the Commission's jurisdiction on the premise that the project is within a sensitive coastal resource area (SCRA) and substantial evidence supporting the Commission's concerns about water and wastewater access. AA096–99.

Shear filed a motion for clarification of the Superior Court's decision. AA101. Although the court determined that the project was within an SCRA, the conclusion seemed contradicted by its finding that it was not within Mapped ESHA. Mapped ESHA is the specific kind of sensitive resource area the Commission asserted as the basis of its jurisdiction, and the County's LCP expressly defines that category alone as an SCRA that triggers Commission jurisdiction. Having recognized that the project site had no ESHA, the court failed to explain what map could possibly give the Commission appellate jurisdiction over the project. The court granted Shear's motion in part and amended its order denying the writ. AA119–20 (Amended Order Denying Petition). Specifically, the court clarified its ruling by citing not a map but Figure 6-3 of the EAP to support its conclusion that the project site was in an SCRA. AA128. The Superior Court entered final judgment on April 25, 2022. AA138.

Court of Appeal Proceedings

Shear appealed the judgment, again arguing that the Commission lacked appeal jurisdiction over the project and that, even if it had jurisdiction, the record did not support project denial. The Commission cross-appealed, asserting that substantial evidence demonstrated that the three lots were in an SCRA and that single-family residential development was not *the* principal permitted use in the applicable zoning area. Resp. Cross-Appellant Br. at 25–26.

As the author of the LCP, the County of San Luis Obispo participated as amicus curiae, arguing that Figure 6-3 did not designate a sensitive resource area and that the project did not contain ESHA triggering the Commission's jurisdiction. It further stated that the LCP's inclusion of multiple Principally Permitted (P) Use categories for particular zones did not give the Commission jurisdiction over the project. The County warned that the Commission's jurisdictional arguments would up-end the LCP and cause hardship and unpredictability for the County and its property owners, as it would mean that all projects in the County's coastal zone would be appealable to the Commission.

See Br. Amicus Curiae of Cnty. of San Luis Obispo, at 12–19 (Aug. 10, 2023) (Cnty. Amicus Br.).

The Court of Appeal affirmed the opinion of the Superior Court, upholding the Commission's determination of jurisdiction over the project. It acknowledged that appealable projects are those within SCRAs, which include land habitats mapped and designated as ESHA in the LCP, and that no official map designated Shear's project location as an ESHA (or any other sensitive resource area). Op. at *3. The court then turned to Chapter 6 of the EAP's discussion of a Los Osos Dune Sands Habitat, referring to the "Figure 6-3" relied on by the trial court. According to the appeals court, that figure was "substantial evidence" that the project is in a sensitive coastal resource area, supporting the Commission's jurisdiction. *Id.* at *4. It thus hinged the Commission's jurisdiction not on its independent judgment as to the *legal* meaning of the LCP or Coastal Act's provisions circumscribing the Commission's jurisdiction over approved projects, but on whether substantial evidence supported the Commission's assertion of authority.

The Court rejected Shear's argument that the LCP does not officially "map and designate" the project location as ESHA (the

only relevant category of sensitive coastal resource area set out by the LCP as triggering Commission jurisdiction). *Id.* Moreover, it did not address any of amicus County's arguments on that issue, nor the County's protest that the referenced "figure" is not an official LCP map designating ESHA or an appealable location under the LCP.

Having upheld the Commission's jurisdiction over the project on those grounds, the court declined to address the Commission's alternative jurisdictional claim that it has authority over all County projects where the LCP designates more than one Principal Permitted Use in a zone. *Id.* at *5.

Shear filed a petition for rehearing, which was denied without opinion in March 2024, and then filed a timely petition to this Court.

Argument

This case exemplifies a pattern of overreach by the California Coastal Commission. It centers on two related issues: (1) whether the courts must use independent judgment in determining the legal meaning of a County's LCP when reviewing the Commission's appeal jurisdiction over projects approved by a local government operating under a certified LCP, or whether a

substantial evidence standard may suffice, and (2) whether courts should defer to the local government author of an LCP when the Commission and local government offer conflicting interpretations of its provisions relevant to the Commission's jurisdiction. The court below could only affirm the Commission's exercise of jurisdiction in this case by using a standard less than independent judgment to interpret the legal meaning of the County's LCP. And where the Commission and County offered conflicting interpretations of key provisions, it deferred to the Commission rather than the County—the drafter and primary implementer of that LCP.

Whether the Commission has jurisdiction over Shear's project was a *legal* question that could only be answered by a thorough and holistic interpretation of the County's LCP, not on "substantial evidence" of its meaning offered by the Commission. A faithful reading precludes the Commission's claim of jurisdiction.

First, the LCP's plain language excludes Shear's urban Los Osos property from the areas it designates as SCRA. The Commission's contrary belief, accepted by the lower courts, is based on an illustration (Figure 6-3) of the area containing

Shear's lots. The LCP itself indicates that the figure is not an authoritative representation of the "mapped and designated ESHA" that triggers appealability to the Commission under the LCP, and it is contradicted by numerous other provisions and *all* the official maps of the LCP. Those maps were created by the County and previously certified by the Commission as consistent with the Coastal Act.

Second, the Commission's interpretation that any zone with multiple "principal permitted uses" is appealable is not only barred by a previous final judgment of the Superior Court but—if implemented—would render jurisdictional limits in the Coastal Act and LCP utterly meaningless, making every permit in the County appealable to the Commission.

This Court should hold that reviewing courts must use independent judgment when determining the Commission's jurisdiction over projects approved by local governments under their LCPs and that deference, if any, is due not to the Commission but to local governments when interpreting purportedly ambiguous LCP provisions. Because the Commission's jurisdiction raises a pure question of law on undisputed facts, the Court should also decide whether the

Commission had jurisdiction over Shear's CDP. Using appropriate standards, it did not.

I. A court must use independent judgment to determine the meaning of the Coastal Act and local ordinances implementing an LCP when reviewing the Commission's claims of jurisdiction

In reviewing the legal question whether the Commission has the authority to take jurisdiction over a project approved by a local government operating under a certified LCP, courts must exercise their independent judgment. *See, e.g.*, *Reddell v. Cal. Coastal Comm'n*, 180 Cal. App. 4th 956, 965 (2009), *as modified on denial of reh'g* (Dec. 29, 2009) ("[W]e exercise our independent judgment in reviewing the Commission's interpretation of the Coastal Act and LCP policies[.]"). Though the court below, in this case, purported to do so, *see* Op. at *3, it did not. Rather, it hinged the Commission's jurisdiction on a single illustration, deeming it "substantial evidence" supporting the Commission's interpretation that the LCP designated Shear's property a "sensitive coastal resource area" sufficient to establish jurisdiction under section 30603(a) of the Coastal Act. Op. at *4.

As demonstrated below in Part II, a faithful reading of the Coastal Act and County LCP confirms that the *only* applicable

definition of SCRA at issue was contained within the County LCP and was limited to a single relevant category: Mapped ESHA. Because Shear's property is not in a location mapped and designated as Mapped ESHA, the County's approval of its project was not appealable.

The County—who drafted and is tasked with the primary implementation of its own LCP—was so concerned by the Commission's enlargement of its authority (and the trial court's affirmance) that it appeared as amicus in the Court of Appeal to explain its own longstanding interpretation of the LCP. But the Court of Appeal ignored the County's view, instead deferring entirely to the Commission's strained interpretation.

This is not the first time courts have engaged in minimal, deferential scrutiny over core questions of LCP interpretation and Commission jurisdiction. This Court should provide instruction in the proper role of the courts when interpreting LCPs and should resolve the unanswered question of whether the local government or Commission is entitled to deference (if any) when they offer conflicting interpretations of a certified LCP.

A. Legal questions of LCP interpretation require independent judgment

When a Court reviews a legal question of LCP interpretation, it must exercise independent judgment. *See, e.g.*, *Reddell*, 180 Cal. App. 4th at 965. Deference to agency interpretation is inappropriate when the relevant provision is plain and unambiguous. *See Lindstrom v. Cal. Coastal Comm'n*, 40 Cal. App. 5th 73, 96 (2019); *see also McAllister v. Cnty. of Monterey*, 147 Cal. App. 4th 253, 921 (2007).

The importance of independent judgment review is especially stark when the legal questions involve core questions of an agency's jurisdictional authority under a governing statute. *See, e.g.*, *Schneider*, 140 Cal. App. 4th at 1344 ("A court does not . . . defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature."). But lower courts vary in how they proceed, even when using the label of independent judgment. *Compare Sec. Nat'l Guar.*, 159 Cal. App. 4th at 402 (focusing on the legal meaning of an LCP's provisions designating protected ESHA, and rejecting the Commission's attempt to classify new ESHA not within the meaning of the LCP); *with Charles A. Pratt Constr. Co.*

v. Cal. Coastal Comm'n, 162 Cal. App. 4th 1068, 1077 (2008), *as modified on denial of reh'g* (June 9, 2008) (looking only for "substantial evidence" to support the Commission's treatment of a property as ESHA). In this case, the court below engaged in a lax application of the independent judgment standard, finding jurisdiction acceptable because "substantial evidence" within the record supported the Commission's interpretation of the LCP. Op. at *4. This move confused a legal question with a factual one.

Specifically, the court below said that Figure 6-3 "constitutes substantial evidence supporting the Commission's findings that the project is located in" an SCRA and that "the development permit is therefore appealable to the Commission." *Id.* Although the Court of Appeal *stated* that it "independently review[ed] the question [of] whether the Commission's exercise of jurisdiction here [was] consistent with the Coastal Act[,]" Op. at *3, its actual reasoning and conclusions reflect a deferential inquiry.

To be sure, there are factual components to the jurisdictional determination—for example, the location of Shear's property as it relates to the land areas designated as SCRA by the LCP *is* a factual question. But—as will be described fully

infra, Part II—the *process of designating* SCRA (such as Mapped ESHA) in the LCP is a legal, not factual, question.

At least three separate questions had to be answered to determine the if the Commission had jurisdiction over Shear's CDP: (1) How does the LCP define Sensitive Coastal Resource Areas for the purposes of the Commission's appellate jurisdiction? (2) What areas are designated by the LCP such that they fall within that definition? (3) Does the subject property fall within one of those areas?

The first and second questions are purely legal questions of LCP interpretation, and the answer is clear: As relevant to Shear's project, SCRAs are defined under the LCP as Mapped ESHA.[5] County Code § 23.01.043(c)(3)(i); *see infra*, Part II. And the LCP designates and maps ESHA with official maps and in Chapter 7 of the EAP. Only after those legal questions are answered may the court apply the available evidence on whether a project is within the Mapped ESHA appearing on official maps (Shear's is not).

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[5] Specifically, the category of "[s]pecial . . . land habitat areas" SCRA asserted as justification to take appeal of Shear's permit. County Code § 23.01.043(c)(3)(i). Other categories of SCRA exist that are not Mapped ESHA, but none are relevant here.

However, the Court of Appeal did not engage in a holistic and harmonizing reading of the LCP and accepted the Commission's interpretation of disputed elements. For example, when the Commission asserted that Shear's site was appealable because it purportedly contained ESHA, both Shear and the County explained that Shear's project was not appealable because it was not within mapped and designated ESHA within official maps or any enumerated location triggering Commission review in Chapter 7 of the LCP's EAP. *See* Resp. Cross-Appellant Br. at 24–26; Cnty. Amicus Br. at 18. When the Commission offered a single illustration in the EAP, Figure 6-3, to support its contention that Shear's site was in an area depicted as containing sensitive resources, both the County as amicus and Shear carefully described the framework of the LCP to show why that illustration did not designate the location of Shear's lots as SCRA. Resp. Cross-Appellant Br. at 27–33; Cnty. Amicus Br. at *12–18.

When the Commission argued that there were internal conflicts in the LCP justifying its interpretation, both the County and Shear offered simple explanations to harmonize and resolve the purportedly conflicting provisions. Instead, the Court of

Appeal accepted the EAP Figure 6-3 for the proposition that the project was located within a sensitive resource area. And it accepted, as a matter of substantial evidence, that the figure further satisfied the meaning of "sensitive coastal resource area" in section 30603(a). Op. at *4. It may have called this "independent judgment" in reviewing the Commission's jurisdictional determination, but it was a deferential "substantial evidence" review in practice.

The court below is not the only one to adopt this inadequate mode of analysis. In *Charles A. Pratt Constr. Co.*, the Second District similarly reviewed a CDP appeal to determine whether the LCP had classified the subject property as ESHA. 162 Cal. App. 4th at 1077. In that case, it was undisputed that the property had been designated as an SRA, but the landowner argued that it did not appear within the ESHA designating maps and was, therefore, not subject to the stricter standards applied to designated ESHA. There, too, the court's description of the LCP failed to engage in meaningful analysis of the LCP as a whole and noted only that a map description identifying "terrestrial habitats" as among "sensitive resource areas that are

also environmentally sensitive habitats." *Id.*[6] Accordingly, the *Pratt* court held that there was "substantial evidence support[ing] the Commission's treatment of a large portion of Pratt's parcel as an ESHA." *Id.*

The First District, by contrast, demonstrated the proper independent judgment review of the Commission's jurisdiction in *Security National Guaranty*, 159 Cal. App. 4th at 402. In that case, a developer applied for and received a CDP from the local government of Sand City under its certified local coastal program. The approval was appealed to the Commission and, "[r]elying on the [LCP's] general policies regarding ESHA[]," alleged that the permit was improperly granted because the project site was in an ESHA. *Id.* at 411. The Court noted that Sand City's LCP, like San Luis Obispo's, protected only designated ESHAs that were mapped, and the developer's project site (like Shear's) was not a mapped and designated ESHA

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[6] To be sure, it may be that the LCP did intend to designate the terrestrial habitat SRA as ESHA, even if the official ESHA maps excluded it. But by failing to consider the entirety of the LCP and its designating mechanisms, the Pratt court was still engaging in something far below independent review. Regardless, it is notable that the Court of Appeal here relied on *far less*, since Figure 6-3 on its face did not purport to identify SRA or ESHA. *See infra*, Part II.

triggering the Commission's jurisdiction. *Id.* at 423. The court made a searching review of the LCP, reading its various provisions in harmony to reach an independent judgment about its meaning. It concluded that "the Coastal Act grants the Commission no power to declare property an ESHA [that is not already designated such by the certified LCP] during a CDP appeal." *Id.* at 407. And because the project site was not in the ESHA designated and mapped by Sand City's LCP, the "Commission imposed additional standards not found in Sand City's LCP," and "exceeded an express limitation on its jurisdiction." *Id* at 422 (citing Pub. Res. Code § 30603(b)(1)).

The minimal scrutiny of a core jurisdictional question—one requiring the careful interpretation of both state law and multiple local ordinances—by the Court of Appeal in this case is inconsistent with this Court's precedent, *see Yamaha Corp. of America v. State Bd. of Equalization*, 19 Cal. 4th 1, 11 n.4 (1998), as well as other courts of appeal. *See Lindstrom*, 40 Cal. App. 5th at 96 (exercising independent judgment without deference when interpreting plain language within an LCP). More fundamentally, it is an abdication of a core function of the courts—the duty "to say what the law is." *Powers v. City of*

Richmond, 10 Cal. 4th 85, 115 (1995) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)). The LCP's mechanism of designating areas within the County as ESHA—or any SCRA—is a question of statutory interpretation that carries substantial legal significance because—among other legal impacts—a designation of ESHA or SCRA can confer appellate jurisdiction to the Commission over an otherwise unappealable permit.

To ensure consistent application of the Coastal Act, this Court should clarify that it is the role of the courts to interpret legal provisions—including LCP-implementing ordinances—and that independent judgment cannot be satisfied by merely reviewing the record for substantial evidence that supports the Commission's proffered interpretation.

B. If any deference is warranted, it should be accorded to the County as the drafter and primary implementer of its LCP

No Court has yet directly addressed whether a local government or the Commission is entitled to deference when they offer conflicting interpretations of a certified LCP. If there is any ambiguity in an LCP, greater weight should be given to the County's interpretation. The County, as the drafter and primary implementer of the LCP, offers a more authoritative and

consistent interpretation that better reflects the Coastal Act's emphasis on delegation of permit decisions to local governments operating under a certified LCP. *See Yamaha,* 19 Cal. 4th at 12 ("A court is more likely to defer to an agency's interpretation of its own regulation . . . since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another."). Indeed, the Coastal Act's respect for local decision-making is so strong that even if the Commission later determines that the local agency is not effectively implementing its program in conformity with Coastal Act policies, the Commission is still not empowered to effect changes to the program on its own. Rather, the Commission may report the local agency's shortcomings to the Legislature and recommend legislative action to ensure the effective implementation of Coastal Act policies within the local jurisdiction. Pub. Res. Code § 30519.5. In other words, the Commission's role is to first certify an LCP, and then to police

local government conformity *with its own certified LCP*, but it is no longer empowered to impose general policies of the Act.[7]

In *Yamaha*, this Court provided several factors to consider when weighing agency interpretations, including: (1) the agency's expertise and technical knowledge, (2) whether the interpretation is long-standing and consistently maintained, (3) whether the interpretation was contemporaneous with legislative enactment of the statute, and (4) indications of potential legislative approval of the interpretation. *Yamaha*, 19 Cal. 4th at 12–13. If deference is due to anyone in interpreting a certified LCP, these factors favor the local government. This case is instructive.

First, a County has greater expertise in interpreting and implementing its own LCP. As *Yamaha* recognizes, an agency's

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[7] The one exception is the Commission's authority to ensure compliance with public access policies of the Act on appeal of a CDP. *See* Pub. Res. Code § 30603(b)(1) ("The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the *public access policies* set forth in this division." (emphasis added)). The fact that the legislature chose to single out these provisions necessarily implies that it intended to exclude all other general Coastal Act policies from Commission consideration on CDP appeals. *Gikas v. Zolin*, 6 Cal. 4th 841, 852 (1993) ("*Expressio unius est exclusio alterius.* The expression of some things in a statute necessarily means the exclusion of other things not expressed.").

interpretation of its own regulation is entitled to more consideration because it "is likely to be intimately familiar with regulations it authored." *Id.* at 12. The County drafted the LCP and is primarily responsible for implementing it. It thus has the most intimate familiarity with the LCP's provisions and practical implications.

Second, in this case, the County's interpretations of the contested provisions are long-standing and consistently maintained, while the Commission offered a novel one. For decades, the County has interpreted its LCP as requiring Mapped ESHA before a project may be deemed a "[s]pecial land habitat area[]" SCRA triggering the Commission's appellate jurisdiction. County Code § 23.01.043(c)(3)(i). Similarly, it has never treated principal permitted uses as appealable simply because the zoning category contained more than one such use. As the County explains, the Commission's contrary interpretations are a serious departure from "decades worth of interpretation" that creates "broad and profound impacts to the County's processing of land use permits within the Coastal Zone." Cnty. Amicus Br. at *18–19, 21. The Commission's competing interpretations appear to be new. There is no evidence it ever previously used Figure 6-3 to

claim jurisdiction over Los Osos properties, and only a single instance in the County—rejected decisively by a superior court judge—where it attempted to assert its "principal permitted use" theory of jurisdiction. Am. Supp. MJN, Ex. 6, Statement of Decision at 2.

Yamaha instructs that long-standing, consistently maintained interpretations deserve greater weight, while "[a] vacillating position . . . is entitled to no deference." 19 Cal. 4th at 13. The County's interpretation in this case is essentially contemporaneous with the LCP's enactment, as it reflects how it has understood and implemented the LCP since its adoption. In general, where a statute is ambiguous, the contemporaneous construction of a statute by its drafter is entitled to "great weight" and should be "respected by the courts" unless clearly erroneous. *City of Monterey v. Carrnshimba*, 215 Cal. App. 4th 1068, 1087 (2013). The Commission's novel interpretation comes decades after the LCP's certification.

Third, there are strong indications of legislative sanction to favor an LCP drafter's interpretation. The Coastal Act emphasizes local decision-making and reliance on local land use planning. *See* Pub. Res. Code § 30004(a) ("To achieve maximum

responsiveness to local conditions, accountability, and public accessibility, it is necessary to rely heavily on local government and local land use planning procedures and enforcement.").

Courts have recognized that "the Coastal Act presents competing values: local planning options and needs versus statewide concerns in the preservation of the unique California coastal zone." *City of Chula Vista v. Superior Ct.*, 133 Cal. App. 3d 472, 496 (1982). And once an LCP is certified, the Coastal Act "emphasizes local control . . . ." *City of Malibu*, 206 Cal. App. 4th at 563. The Coastal Act regulations also recognize that determining whether development is appealable "shall be made by the local government" with reference to the "certified Local Coastal Program." Cal. Code Regs. tit. 14, § 13569(a). When courts accept the Commission's self-serving interpretations of LCPs in conflict with the understanding of the LCP by its local-government author, they undermine this legislatively crafted balance. This Court should hold that when deference is due to an agency's interpretation of a certified LCP, it should be accorded to the local government, not the Commission.

II. A faithful interpretation of the County LCP confirms that Shear's project was not appealable to the Commission

Whether the Commission has jurisdiction to review a local government's coastal permitting decisions hinges on the meaning of the Coastal Act and local ordinances implementing a certified LCP. As discussed above, that meaning and its application to undisputed facts must be resolved by a reviewing court using independent judgment. *See, e.g.*, *Reddell*, 180 Cal. App. 4th at 965 ("[W]e exercise our independent judgment in reviewing the Commission's interpretation of the Coastal Act and LCP policies.").

The Court of Appeal, however, reviewed the County LCP only for "substantial evidence" to support the Commission's contention that it had jurisdiction over Shear's permit. Op. at *4. In essence, the Court started and ended its review with a single question: Is there "substantial evidence" within the LCP's provisions to support the Commission's contention that Shear's property is sensitive enough to warrant protection? This constituted a category error because LCP provisions are not "substantial evidence"—a concept applicable to factual findings, not legal meaning.

It failed to interpret the County's LCP and land use plans holistically to establish the predicate legal framework under which all additional questions must be resolved—primarily, whether the LCP establishes the location of Shear's project as an SCRA triggering the Commission's jurisdiction for appellate review. An engaged analysis of the LCP must conclude that it does not.

The Coastal Act delegates coastal development permit decisions to local governments operating under a Commission-certified LCP and provides jurisdiction to the Commission only to review those decisions in limited, enumerated circumstances. As relevant here, the Commission has review powers over "[d]evelopments approved by the local government . . . that are located in a sensitive coastal resource area," Pub. Res. Code § 30603(a)(3), and development "not designated as the principal permitted use under the [Commission-certified local] zoning ordinance or zoning district map." *Id.* § 30603(a)(4).

The Commission proffered two theories of appellate jurisdiction over Shear's CDP. First, the Commission argued that the project "is located within [SCRA]" that is "mapped" by the County's LCP as ESHA. AR 537, 642. Second, it asserted that it

may take appeal of any project in a zoning district that contains more than one principally permitted use. AR 644.

Both theories are invalid and were adopted by the Court of Appeal only because the court proceeded with the wrong mode of analysis and standard of review. *See supra*, Part I. Further, the Court treated the Coastal Act provisions governing the Commission's appellate jurisdiction as *independent* of the LCP. Op. at *4. They are not. The LCP implements the Coastal Act provisions and precisely defines the scope of the two provisions at issue: (1) SCRA under the LCP is limited to Mapped ESHA; and (2) development is appealable only if it is not designated as a Principal Permitted Use under the LCP, regardless of whether multiple uses are allowed.

A. Commission jurisdiction under the Coastal Act is limited by the precise language and terms contained within the County's certified LCP

This case and the Court of Appeal decision can be confusing because they involve several terms that sound alike or evoke similar concepts. It is vital to keep them separate. First, there is the term "sensitive coastal resource area" (SCRA), which is used in both the Coastal Act, Pub. Res. Code § 30603(a)(3), and the County Code § 23.01.043(c)(3), as a category of development

project locations over which the Commission has review authority. Next, there is "sensitive resource area," (SRA), a term that appears nowhere in the Coastal Act but is used by the County, its LCP, and the lower courts in describing "ecologically important areas, such as wetlands, marshes, sand dunes," etc., *see* Op. at *4, only some of which (but, as discussed below, not including the Shear's lots) are established by Chapter 7 (Planning Area Standards) of the County's EAP and on the LCP's official maps as the kind of SRA further treated as *SCRA* giving rise to the Commission's jurisdiction. Finally, the term Environmentally Sensitive Habitat Area (ESHA) is a category of SRA that may or may not be SCRA triggering the Commission's jurisdiction depending on whether the LCP formally recognizes it. The County's LCP makes "land habitat areas . . . mapped and designated as" ESHA in "official maps" an SCRA appealable to the Commission. County Code § 23.01.043(c)(3)(i); *id.* § 23.07.160.[8]

According to the County and, as discussed below, a fair reading of its LCP, "there is no official County map which

[8] The same section expressly excludes "Unmapped ESHA" as triggering the Commission review authority.

formally designates the subject property as mapped ESHA or within [any] formally mapped or designated Sensitive Coastal Resource Area." *See* Cnty. Amicus Br. at *13.

Throughout its administrative proceeding, the Commission grounded its jurisdiction on the assertion that Shear's development lies within an SCRA, AR 537, 642, and argued the County's EAP "mapped" Shear's property as ESHA. AR 643. On appeal, the Commission changed course: It acknowledged that Shear's property does not fall within any of the official maps designating Mapped ESHA, nor does it appear within any of the official maps designating the County's SRA, and it conceded that the property contained no Unmapped ESHA. Resp. Cross-Appellant Br. at 29. Instead, it relied on an illustration in Chapter 6 of the EAP that showed the property in an area containing sand dunes that the EAP describes as containing (non-jurisdictional) sensitive resources.

This case went wrong because the Commission and the lower courts uprooted the terms SCRA, SRA, or ESHA from their meanings as legal terms within the Coastal Act or LCP. The Coastal Act generally defines SCRA. Pub. Res. Code § 30116. However, the Act delegates the precise designation of SCRA to

certified LCPs. *See* Pub. Res. Code § 30603(b)(1) (limiting appeals concerning sensitive coastal resources to whether a local approval conforms to the standards set forth in a certified LCP). The County's LCP limits SCRA to a subset of SRA mapped and designated as ESHA. County Code § 23.01.043(c)(3)(i). There is no basis in the Coastal Act or LCP to find ESHA or SCRA outside those maps or mapping processes.

The Court of Appeal implied that section 30603(a)(3)'s phrase "sensitive coastal resource areas" could be interpreted independently of the meaning of that term within the LCP. Op. at *4 ("Section 30603 does not limit [the Commission's jurisdiction] to projects located in mapped ESHA but extends it to all projects located in an SCRA."). However, the court did not refer to the Coastal Act's definition of SCRA in section 30116(a), which provides jurisdiction only over sensitive resource areas "mapped and designated in Part 4" of the "California Coastal Zone Conservation Plan prepared and adopted by the California Coastal Zone Conservation Commission and submitted to the Governor and the Legislature on December 1, 1975," section 30102, or another process extending to 1977. Those provisions required a designation and recommendation by the Commission

not later than September 1, 1977. Pub. Res. Code § 30502. That designation would expire not later than two years after designation by the Commission if it were not further designated by statute by the Legislature. Pub. Res. Code § 30502.5; s*ee, e.g.*, *LT-WR, L.L.C. v. Cal. Coastal Comm'n*, 151 Cal. App. 4th 427, 792 (2007), *as modified* (June 21, 2007). However, later amendments entirely removed the Commission's ability to designate sensitive coastal resource areas and vacated all previous designations. *See* Assembly Bill 1610 (1979). There is nothing in the record, nor anything asserted by the Commission, to suggest that Shear's lots were so mapped. *See also* Appellant's Pet. for Reh'g at 15–18.

Because of the amendments removing the Commission's power to designate SCRA, the Commission *must* rely on local governments to create and implement LCPs—which the Commission will review and certify—that concretely establish which project locations may be treated as SCRAs. *See* Pub. Res. Code § 30603(b)(1) (the Commission may find substantial issue with a permit approval as to sensitive coastal resources only if the development does not conform to the standards *set forth in a certified LCP*). Section 30603(a)(3) does not authorize the

Commission to take jurisdiction over projects not designated by an LCP. Similarly, any designation of ESHA in any area under a certified LCP *must* be designated by that LCP. *Sec. Nat'l Guar., Inc.*, 159 Cal. App. 4th at 423 ("By declaring the site an ESHA, the Commission has impermissibly attempted to amend part of Sand City's LCP.").

Because the Commission lacks any legislative power, its role in ensuring that LCPs are sufficient to carry out the SCRA and ESHA policies contained within the Coastal Act is limited to its authority to certify proposed LCPs. Once certified, the Commission *must* treat an LCP as consistent with all policies of the Act,[9] and if it believes that an LCP no longer does so, its only recourse is to recommend amendments to the LCP or legislative action. *City of Malibu*, 206 Cal. App. 4th at 563.

In sum, while the Commission has been given the authority to review locally issued permits for projects in a sensitive coastal resource area, it has no authority to designate property as a

[9] The Commission may may still appeal CDPs to ensure that the local government action was consistent with both the LCP and the public access provisions of the Coastal Act. But it may not ignore or alter any aspects of the LCP on appeal, even if it believes that LCP is no longer sufficient to carry out policies of the Act.

sensitive coastal resource area. And while the Coastal Act has a policy of limiting disturbances in ESHA, the Commission itself may not designate any property as ESHA. *See Sec. Nat'l Guar.*, 159 Cal. App. 4th at 423.

The *only* mechanism by which the Shear property could be designated SCRA is the County LCP. As discussed below, the only type of SCRA at issue here is the designation of "Mapped ESHA." The Commission and the courts below should have applied the text and language of the County LCP using their independent judgment to resolve the legal question of whether the LCP mapped and designated Shear's property as within ESHA. A fair interpretation of the LCP reveals that Shear's property has never been designated ESHA, and therefore does not qualify for appellate jurisdiction.

B. The County's LCP delineates how to identify jurisdictional SCRAs

An LCP comprises a Land Use Plan (LUP), zoning ordinances, zoning district maps, and other implementing actions. Pub. Res. Code §§ 30512, 30513. The Commission reviews each proposed LUP for conformance with the Act. *Id.* § 30512. So long as the LUP meets the requirements of the Act,

the Commission "shall certify" the LUP. *Id.* The Commission must also certify the zoning ordinances, zoning district maps, and other implementing actions. *Id.* § 30513. It may reject them only if they do not conform with, or are inadequate to carry out, the provisions of the certified LUP. *Id.*

In San Luis Obispo County, land use decisions are governed by its Land Use Element and Land Use Ordinance. *See* County of San Luis Obispo Coastal Plan Policies at 1–2 (revised Apr. 2007).[10] The Land Use Ordinance contains standards for development based on the effects of specific land uses. *Id.* The Land Use Element contains the processes by which land use policies and decision-supporting information are updated. *Id.*

The County's LCP is implemented through the Local Coastal Plan Policy Document, the Land Use Element Amendments, and its Commission-certified Land Use Ordinance. *Id.* at 1–3. The LCP Amendments to the Land Use Element are divided over four planning areas: North Coast, Estero, San Luis Bay, and South County. *Id.* Shear's property falls within the EAP

[10] Available at https://www.slocounty.ca.gov/departments/planning-building/forms-documents/plans-and-elements/elements/coastal-plan-policy.

portion of the Land Use Element. AR008. This background is provided to explain that the County's LCP is not a single document but a set of ordinances, policies, and standards that must be integrated when applied to specific projects.

A holistic reading of the LCP precludes the legal conclusion that Shear's lots lie within SCRA, which means the Commission does not have jurisdiction over the project under section 30603. This Court has repeatedly emphasized the importance of "harmonizing" the language contained within statutes. *State Dep't of Pub. Health v. Superior Court*, 60 Cal. 4th 940, 955 (2015). A court should strive to construe statutes in a way that "give[s] force and effect to all of their provisions." *Id.* Significance should be given to "every word, phrase, sentence and part of an act" and courts should avoid making any portion of the statute surplusage. *Fontana Unified Sch. Dist. v. Burman*, 45 Cal. 3d 208, 218 (1988). Further, each portion should be considered within the "context of the statutory framework as a whole . . . ." *Coal. of Concerned Cmtys., Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737 (2004).

After restating nearly verbatim section 30603(a)(1)–(2) of the Coastal Act, the County LCP provisions precisely outline

which County-approved projects are appealable as "located in a Sensitive Coastal Resource Area." As relevant to this case, those projects include those in "[s]pecial marine and land habitat areas, wetlands, lagoons, and estuaries *mapped and designated* as Environmentally Sensitive Habitats (ESHA) in the Local Coastal Plan. *Does not include* resource areas determined by the County to be *Unmapped ESHA*." County Code § 23.01.043(c)(3)(i) (emphases added).

This is the only provision indicated in the proceedings below by the Commission as (or which is, in fact) relevant to its claim of jurisdiction on the grounds of the project being in an SCRA. Its asserted hook for jurisdiction was that Shear's property is a "[s]pecial land habitat area[]" under subsection (i).[11]

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[11] Throughout the Commission's briefing below, however, it repeatedly cited only to the general term SCRA, and ignored entirely the LCP's detailed enumeration of locations deemed SCRA. *See, e.g.*, Resp. Cross-Appellant Br. at 26. Under the Commission's view, while the County's LCP enumerates a detailed list of which properties are to be deemed SCRA, that does not preclude any other property from being treated as SCRA if the Commission believes it fits a more general definition contained elsewhere in the LCP. *Id.* at 27. But that is not the way one ordinarily reads an ordinance or statute and underscores the error in the proceedings below. Rather, the rule is that the specific always controls the general such that a detailed definition of SCRA in the LCP should control over more general

Subsection (i) covers *only* areas that are "mapped and designated as Environmentally Sensitive Habitats (ESHA) in the Local Coastal Plan." Further, it expressly "[d]oes not include areas determined by the County to be Unmapped ESHA." *Id.* § 23.01.043(c)(3)(i).

Separately, the LCP creates what it calls "combining designation" standards. County Code § 23.07. Some but not all locations with combining designations are shown on official maps and made SCRA by the terms of County Code § 23.01.043(c)(3). One combining designation is the Sensitive Resource Area, or SRA). County Code § 23.07.160. ESHA is a sub-category of the SRA combining designation. County Code § 23.07.170; *see also* County Code § 23.11.030 (defining both Mapped and Unmapped ESHA as "[a] type of Sensitive Resource Area"). Mapped ESHA *must* be "mapped as Land Use Element combining designations." County Code § 23.11.030. Unmapped ESHA, on the other hand, "includes but is not limited to" areas that contain features or

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meanings of the term. Moreover, it violates the canon of construction by which the express mention of one thing in a provision excludes others—here, the express description of SCRA as locations within mapped and designated ESHA excludes from the Commission's jurisdiction other areas it may deem sensitive.

natural resources identified by the county as "equivalent" to "mapped other environmental sensitive habitat areas," areas previously known to the County as containing ESHA resources, and areas "commonly known as habitat for species determined to be threatened, endangered, or otherwise needing protection." *Id.*

Under this framework, Mapped ESHA is *strictly limited* to those areas that have been mapped *in the Land Use Element combining designations*. Unmapped ESHA is a more expansive category that encompasses a variety of knowable areas that may contain similar, or even *equivalent* characteristics, but are *not* mapped in the Land Use Element combining designations and is therefore not deemed SCRA for purposes of the Commission's jurisdiction.

As discussed above, SRA and SCRA are *not* synonymous terms within the County LCP. Rather, SRA is merely one category of combining designation (of which ESHA is a subset). County Code § 23.07.160. SCRA, on the other hand, is defined as "those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity, *pursuant to Section 23.01.043(c)(3)* of this title." County Code § 23.11.030 (emphasis added). Read as a whole, only projects

within the latter category of locations are subject to Commission review. The LCP's structure makes it clear that the Commission only has section 30603(c)(3) jurisdiction over a project if it meets the criteria contained within County Code § 23.01.043(c)(3).

In sum, a project is not appealable to the Commission merely because it is designated as SRA (or any other combining designation). Instead, a property *must* fall within the listed categories of SCRA to be appealable to the Commission.

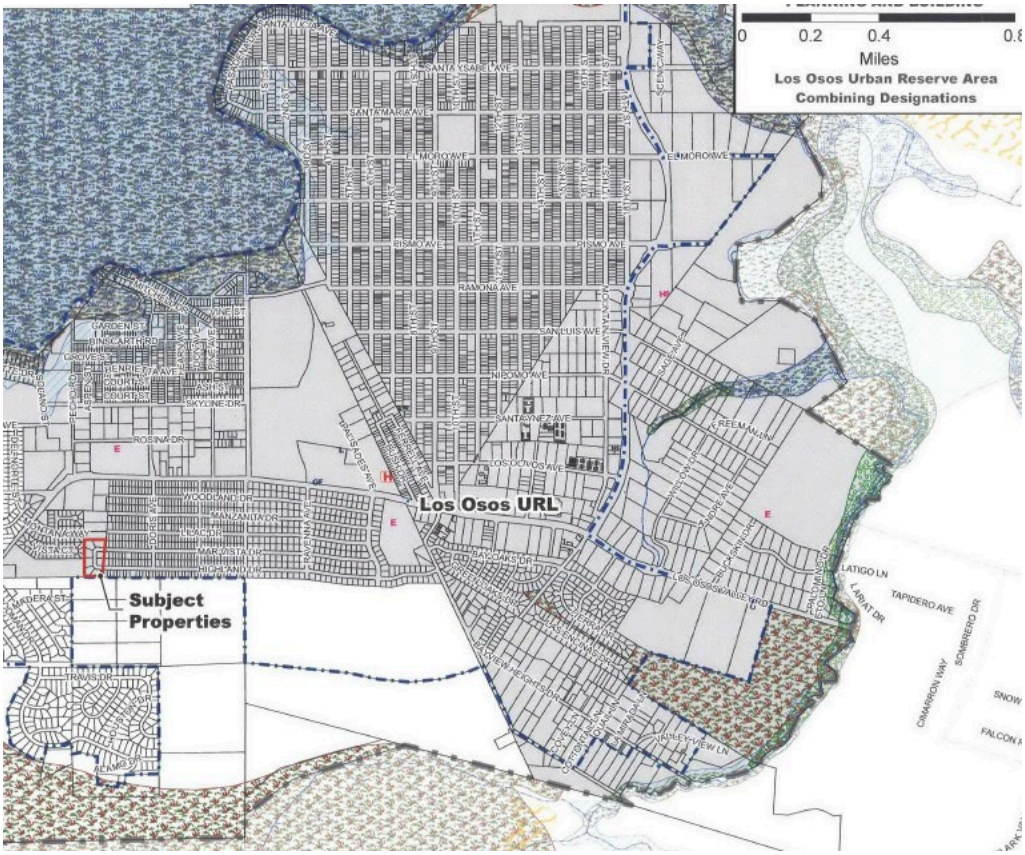
C. Independent judgment applied to this case shows that Shear's Development is not an SCRA because it is not Mapped ESHA under the LCP

Applying the standards of the LCP, Shear's development may be appealed as an SCRA *only if* it is Mapped ESHA (a subset designation within the SRA combining designations). The Commission effectively conceded below that none of the County's official "combining designations" maps show Shear's property as existing within *any* SRA, and that it is not *Mapped* ESHA. Resp. Cross-Appellant Br. at 31–32. This concession was significant because, under the LCP, SRAs and ESHAs are *only* designated on official maps. The County Code states: "The Sensitive Resource Area combining designation is applied by the Official Maps (Part III) of the Land Use Element to identify areas with

special environmental qualities, or areas containing unique or endangered vegetation or habitat resources." County Code § 23.07.160. Similarly, the EAP confirms that SRAs are "shown on the combining designation maps at the end of Chapter 7 and on the official maps, Part III of the Land Use Element, on file in the County Department of Planning and Building." Appellant's Mot. for Jud. Notice (MJN), Ex. 2, EAP at 6-4. Critically, the EAP confirms that *some* ecologically sensitive features that are not designated in the Part III of the Land Use Element "are considered SRAs." MJN, Ex. 2, EAP at 6-6. However, it limits those designations to "[a]reas . . . that are listed in Chapter 7, Section III of this plan . . . ." *Id.* By logical extension, areas—even areas identified with "ecologically sensitive features"—that are *not* listed in Chapter 7, section III of the EAP are also *not* intended to designate those areas as SRAs.

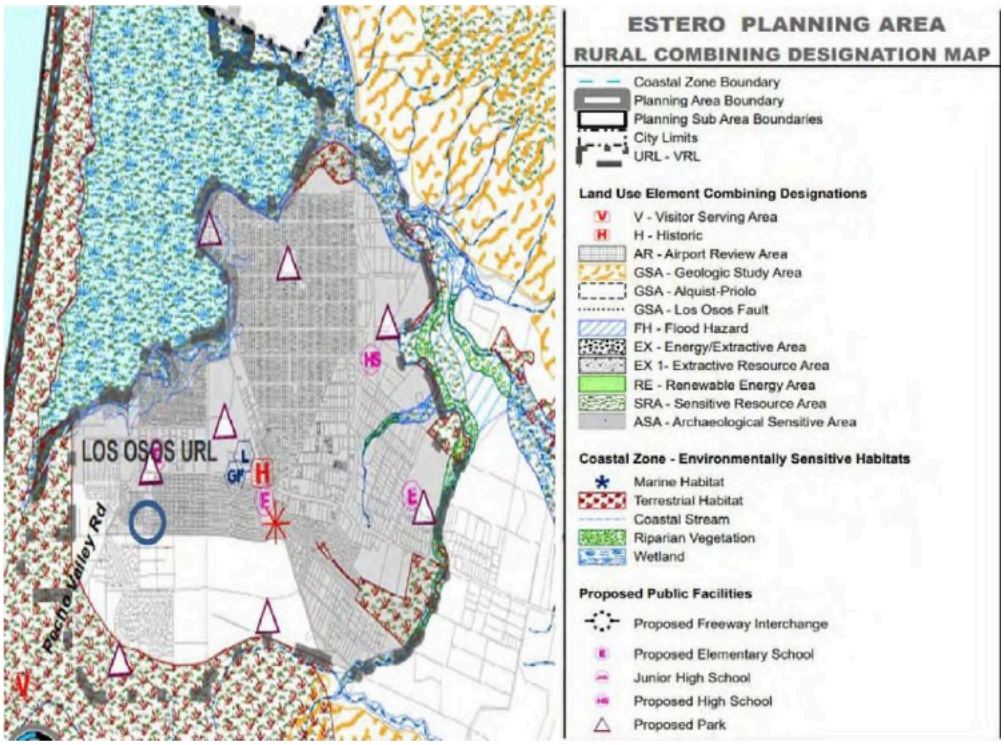
The two relevant "combining designation" maps for the area that include Shear's project site depict the site as neither an SRA nor ESHA. AR 685, 822. The "Los Osos Urban Reserve Area—Combining Designations" map is the governing map for Shear's property. The legend provides color-coded symbols for the location of both ESHA (the first 5 symbols) and SRAs (the second-

to-the-last symbol). That map shows that Shear's project site is not mapped as an SRA or ESHA:



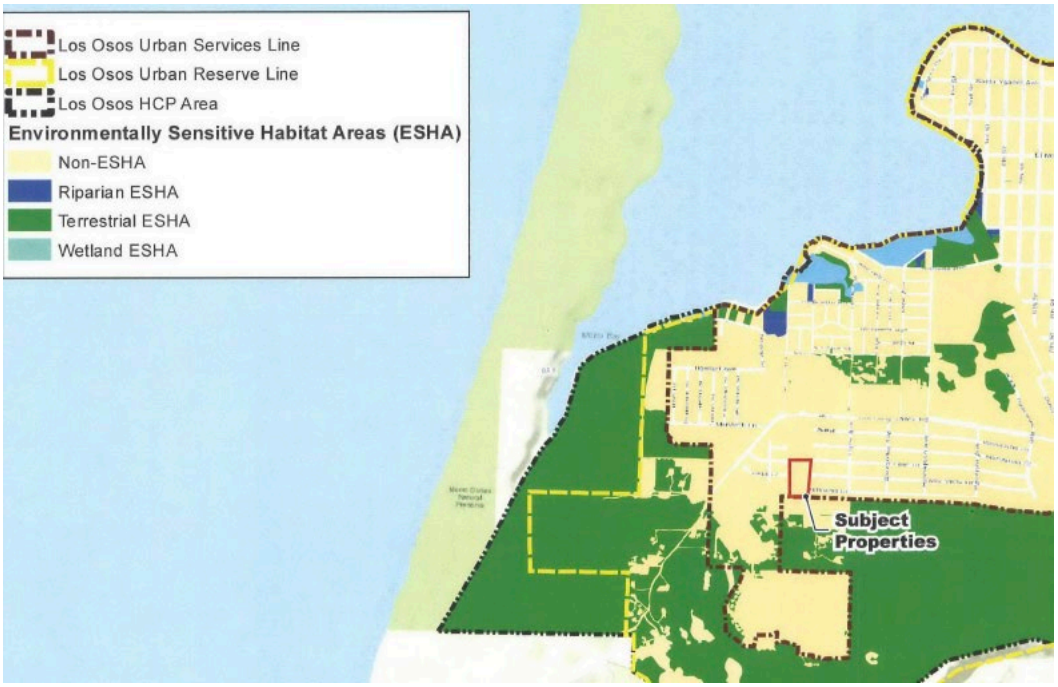
AR 685.

Though concerned with the area outside the Los Osos Urban Reserve Area, the "Estero Planning Area—Rural Combining Designation Map" similarly does not map Shear's site as an SRA or ESHA. That map is reproduced below, with the project site circled in blue. Again, the legend provides color-coded symbols for ESHA and SRAs.



AR 685.

Given the absence of any official map designating Shear's property as an SRA or ESHA, the Commission lacked any basis in section 23.01.43(c)(3)(i) for asserting jurisdiction over the project. Furthermore, in its 2019 Draft Environmental Impact Report for the Los Osos Community Plan Update, the County published a map showing that Shear's property and the area around it are expressly "Non-ESHA."



AR 689.

Unable to produce an official map designating Shear's property as an ESHA, the Commission relied on Figure 6-3 in Chapter 6 of the EAP to support its assertion of jurisdiction. The Commission argues that this figure "maps" Shear's property as part of the Los Osos Dune Sands Habitat SRA. This argument fails for several reasons.

i. Figure 6-3 is not contained within the official designating maps

The San Luis Obispo County LCP establishes a clear and specific process for designating SRAs and ESHAs. This process relies on official maps, not illustrative figures within plan documents. Again, the County Code explicitly states: "The

Sensitive Resource Area combining designation is applied by the Official Maps (Part III) of the Land Use Element . . . .” County Code § 23.07.160.

This provision unambiguously establishes that SRAs and ESHAs are designated by official maps, not figures or illustrations within other planning documents. The EAP, a component of the LCP within which Figure 6-3 resides, also reiterates this requirement: “The following combining designations [which includes SRAs] are shown on the combining designation maps at the end of Chapter 7 and on the official maps, Part III of the Land Use Element, on file in the County Department of Planning and Building.” MJN, Ex. 2, EAP at 6-4. Figure 6-3, on which the Commission relied, does not meet these criteria. It is not contained within the official maps at the end of Chapter 7 of the EAP nor is it part of the official maps in Part III of the Land Use Element. Instead, Figure 6-3 appears within the body of the EAP as an illustrative figure.

ii. Figure 6-3 does not “Map” any SRA or ESHA

The EAP itself confirms that Figure 6-3 is nothing more than a graphic representation of a federal agency’s soil survey. MJN, Ex. 2, EAP at 6-9. The figure is captioned “Los Osos Dune

Sands"—not "Los Osos Dune Sands SRA" or "Los Osos Dune Sands ESHA." Depicting the location of dune sands is not the same as conferring a legal status on the land underlain by those soils for property development purposes.

Moreover, Figure 6-3 only partially depicts the location of dune sands officially designated as the Los Osos Dune Sands Habitat SRA *elsewhere in the EAP*. MJN, Ex. 2, EAP at 6-9. For example, the figure does not show any of the dune sands in "Cayucos and Vicinity," for which the "Los Osos Dune Sands Habitat SRA" designation was created in the first place. *Id.* It is improbable that Figure 6-3 could be intended to be a "map" of the Los Osos Dune Sands Habitat SRA while simultaneously failing to depict the very community for which that SRA was created.

The EAP explicitly notes in its discussion of the Los Osos Dune Sands Habitat SRA that the outlines of areas that contain Los Osos "sandy soils," and ends: "[t]he areas underlain by these sands *outside of Los Osos* are included in the Sensitive Resource Area combining designation and are also an Environmentally Sensitive Habitat . . . ." *Id.* (emphasis added). This section cannot apply to Shear's property because it is within the excluded Los Osos area. But even if it did apply, the provision wouldn't alter

the conclusion that Shear's property is *outside* the Los Osos Dune Sands Habitat SRA. This is because Chapter 7, section III, specifically enumerates some areas considered SRAs even if not officially mapped as such. *Id.*, EAP at 7-5. The Los Osos Dune Sands are not included in these areas. *Id.*; AR 685, 822 (the official maps covering the area of Shear's property also show no SRAs there).

Finally, in Chapter 7, the EAP describes the Los Osos Dune Sands SRA, and notes that "Chapter 6 of this plan further discusses the public interests served by these SRA designations and *generally describes the geographic areas in which they apply*." MJN, Ex. 2, EAP at 7-21. In other words, while Chapter 6 of the EAP generally describes the dune sands and their environmental significance, Chapter 7 is where specific locations among the generally described sensitive areas are legally designated as SRA. *See* Cnty. Amicus Br. at *14–16 (Chapter 6 "generally describe[s] the . . . resources of the area" but "*does not* formally designate any areas as SRA[s]" and "Chapter 7 takes the information and recommendations in Chapter 6 . . . and implements them into real and precise land use regulation.").

Statutes, including land use ordinances, must be interpreted as a whole to harmonize all the enactment's various parts and give meaning to "every word, phrase, sentence and part" of the statute. *Fontana Unified Sch. Dist.*, 45 Cal. 3d at 218. The most coherent and complete interpretation of the County LCP is that Figure 6-3, as an illustrative figure within the plan document, is not intended to override or supersede other language within the LCP that *requires* official maps to designate SRA and ESHA. The Commission's attempt to transform Figure 6-3 into an official combining designation creates impossible tension within the County LCP by supplanting entirely the language and structure of the official designating mechanisms of the LCP.

Finally, and to underscore the point, even if the LCP *could* be fairly read to designate Shear's property as an SRA, it would be insufficient to confer appellate jurisdiction to the Commission *unless* that SRA was *also* mapped ESHA. *See* County Code § 23.01.043(c)(3)(i).[12]

[12] Although it is true that some additional categories of SRA may be considered SCRA under other subsections of County Code section 23.01.043(c)(3), none are applicable to Shear's property.

D. The LCP's designation of more than one "principal permitted use" in each coastal zone does not give the Commission jurisdiction over every permit

Although the Court of Appeal found it unnecessary to address it, the Commission justified its jurisdiction on a second, independent statutory basis. The Coastal Act allows the Commission to take appeal of any development "that is not designated as the principal permitted use under the zoning ordinance or zoning district map [of an LCP]." Pub. Res. Code § 30603(a)(4).

Under the Commission's theory of that provision, any zoning category that "does not designate one single principally permitted use" opens up "all uses within [the] district" to Commission appeal. AR 537. Although neither court below accepted the Commission's arguments on the principal permitted use issue, the position must still be addressed. If not resolved, the prospect of Commission jurisdiction will loom over every permit issued in Los Osos—if not much of the California coast.

The Commission's view of section 30603(a)(4) and its application to this case is wrong for several reasons. First, the Commission's interpretation was precluded by prior litigation.

Second, even if the Commission's interpretation was not precluded, it is contrary to the plain language of the County's LCP, which was certified *by the Commission* as consistent with the Coastal Act and sufficient to carry out its provisions. Third, the interpretation is contrary to common sense and the longstanding practice of the Commission and County.

The Commission's interpretation fails due to Issue Preclusion

The Commission is precluded by prior litigation from asserting its interpretation of section 30603(a)(4). The Commission advanced this interpretation when taking an appeal over a San Luis Obispo County permit decision nearly two decades ago. The landowners challenged their jurisdiction, and, in 2006, San Luis Obispo County Superior Court Judge Tangeman ruled in favor of the petitioners, holding that the Commission's "principal permitted use" argument was incorrect. The Court held that "those land uses designated as 'P' and/or 'SP' in Table O of the County of San Luis Obispo's Land Use Element Local Coastal Plan (hereinafter LCP) are 'principal permitted uses' within the meaning [of] Public Resources Code 30603(a)(4) . . . and are not appealable to Respondent [Commission]." Am.

Supp. MJN, Ex. 6, Statement of Decision at 2. As Judge Tangeman explained:

> "[T]he Court rejects Respondent's contention that there can be only one principal permitted use within any zoning designation or classification in an LCP. . . . [T]he County's LCP, at section 23.01.043(c)(4), states that appealable development includes '[a]ny approved development not listed in the Coastal Table O, Part I of the Land Use Element as a Principal Permitted (P) Use.' In addition, under the County's LCP most, if not all, of the zoning classifications/designations contain multiple 'principal permitted uses.' Thus, adoption of Respondent's position would contravene the purpose of Local Coastal Plans, since virtually every developmental approval would be appealable, thereby defeating the transfer of final approval authority to local jurisdictions following adoption (and certification) of Local Coastal Plans. See Public Resources Code § 30603; see also 14 CCR § 13569."

Id.

The Commission did not appeal *Crowther,* and the Superior Court's judgment became final and binding against the Commission.

> Issue preclusion prohibits relitigating of issues argued and decided in a previous case," and "applies (1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party."

DKN Holdings LLC v. Faerber, 61 Cal. 4th 813, 824–25 (2015).

The *Crowther* decision satisfies these factors: The identical

"principal permitted use" issue presented by the Commission here was litigated by the Commission and necessarily decided by Judge Tangeman in *Crowther*. The Commission, therefore, is bound by the determination made in *Crowther*—that a County-approved project that is one of the zoning district's principal permitted uses is not appealable merely because the district has multiple principal permitted uses.

The Commission's interpretation fails by the logic of section 30603(a)(4)

Even if the Commission's interpretation was not precluded by prior litigation, it is nonetheless prohibited from relying on the general language of section 30603(a)(4) in an area with a certified LCP containing specific implementing language as to that provision. The LCP clarifies that a County-approved project is appealable if it is "not listed in Coastal Table O, Part I of the [County's] Land Use Element as a Principal Permitted (P) Use" in the project site's "Land Use Category" or zoning district. County Code § 23.01.043(c)(4). In certifying the LCP in 1988, the Commission agreed to that limitation, which applies the general "principal permitted use" concept found in section 30603(a)(4) to the County's specific approach to zoning. The County decided to

identify more than one principal permitted use within each zoning district, and both the County and the Commission agreed that the County could make the final decision on permitting a principal permitted use without it being appealed to the Coastal Commission.

The Commission interpretation fails common sense and long-standing practice

Third, even if the Commission could override the LCP's multiple uses on the grounds of the article "the" in section 30603(a)(4), its interpretation is contrary to the structure of the Coastal Act and longstanding Commission and County practice. There is no evidence that the Legislature intended to limit every coastal jurisdiction to only one principal permitted use for each zoning district on the pain of having locally approved projects made appealable to the Commission. Nor does that make sense as a matter of the common use of language. To be a "principal" ordinarily just means that something is first in order of importance. One might say that San Diego, Los Angeles, and San Francisco are the "principal" cities along the West Coast of California, or everyone occupying the office of Vice President of a

large corporation is a "principal administrator of the CEO's vision.

Below, the Commission provided no legislative history or other context for the purported substitution of the article "the" for "a" as the modifier of "principal permitted use," so it's impossible to say with any degree of certainty what the Legislature intended by the substitution. However, one thing is for certain: The Legislature could not have intended for the exception of appealability to become the rule in any coastal jurisdiction with a certified LCP, such as San Luis Obispo County. *City of Malibu*, 206 Cal. App. 4th at 555 ("Except for *limited* rights of appeal to the Coastal Commission, a coastal development permit must be obtained from the local government after the Coastal Commission has certified a local coastal program, or LCP." (citing Pub. Res. Code § 30600(d)) (emphasis added)). A certified LCP that permits appeal of every locally approved permit does not implement a limited right of appeal. The Court should construe the "principal permitted use" provision "to avoid this absurd result" and instead "apply reason, practicality, and common sense to make the words of the statute workable and reasonable." *People v. Avila*, 212 Cal.

App. 4th 819, 828 (2013) (internal citations and quotation marks omitted).

Further, this appears to be a relatively new interpretation of section 30603. Though the provision has been in force for over four and a half decades, no published opinion accepts the Commission's "principal permitted use" argument.[13] At best, the Commission provided two instances—one in Marin County from 2003, and one in San Luis Obispo County from 2005—in which it had advanced the same theory. As discussed above, the attempt from San Luis Obispo was challenged and rejected by the Superior Court. And when the Commission staffer informed the

[13] The case of *DeCicco v. California Coastal Commission* is instructive. 199 Cal. App. 4th 947 (2011). In that case, the landowners owned four contiguous lots in San Luis Obispo County. *Id.* at 949. The landowners sought to both subdivide the parcels into five parcels, and construct four townhouses and a motel. *Id.* Although the Court of Appeal upheld the Commission's appellate jurisdiction, it did so based only on the need for subdivision approval. *Id.* at 951. The court noted that, had the landowners needed only "a permit to construct a principal permitted use," the permit would not be appealable. *Id.* There—as here—the zoning allowed for more than one principal permitted use: both residential multifamily and commercial retail. *Id.* at 949. There is nothing within the opinion to suggest that the Commission advanced the argument that multiple principal permitted uses conferred appellate jurisdiction.

County of the Commission's "principal permitted use" interpretation, he presented it as something new:

> "[O]ur agency has determined that our appeal jurisdiction, specifically as it relates to principally permitted uses within coastal counties, may require more projects to be considered appealable than previously understood. This interpretation of appealability may impact projects beyond the current [project]."

AR 1949–50.

The longstanding practice of both the County and the Commission has been the opposite of the Commission's proffered interpretation of both the LCP and Coastal Act.

Conclusion

Shear respectfully requests this Court to hold that when determining the Coastal Commission's jurisdiction under Pub. Res. Code Section 30603, courts must proceed with independent judgment, giving deference (if any) to the local government drafter of a certified LCP in resolving ambiguous provisions. Applying those rules to the undisputed facts in this case, the Court should further hold that the Commission did not have

jurisdiction over the locally-approved CDP in this case and set aside the Commission's appeal.

DATED: September 10, 2024.

Respectfully submitted,

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Certificate of Compliance

The text of this brief consists of 12,885 words according to the word count feature of the computer program used to prepare this brief.

DATED: September 10, 2024 /s/ Jeremy Talcott
JEREMY TALCOTT

Declaration of Service

I, Tawnda Dyer, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to this action. My business address is 555 Capitol Mall, Suite 1290, Sacramento, California 95814.

On September 10, 2024, I caused a true copy of Appellant's Opening Brief to be electronically delivered via Truefiling upon the following:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 10, 2024, at Roseville, California.

TAWNDA DYER