

**CALIFORNIA COASTAL COMMISSION**

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March 15, 2024

Mendocino County

MAR 15 2024

Planning & Building Services

Liam Crowley, Planner  
Mendocino County Planning and Building Services  
120 West Fir Street  
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SUBJECT: Comments on County Coastal Development Permit (CDP) Application No. CDP\_2023-0009 (De Alba), 33389 Pacific Way, Fort Bragg (APN 017-320-51).

Dear Liam,

Thank you for providing our office with a copy of the staff report and hearing notice for the subject project, which our office received on February 29, 2024. We understand that the applicant is proposing new development on an approximately three (3)-acre bluff top parcel that is currently developed with two (2) water wells, two (2) sheds, a cabin, deck and driveway. According to the staff report, the applicant is proposing all of the following: (1) construct a new 1,802-square-foot single family residence with 836-square-foot attached garage; (2) construct 547<sup>1</sup> square feet of new decking; (3) construct 606 square feet of additional concrete walkways and patio; (4) destroy one existing well and connect the second existing well to the residence through trenching; (5) installation of roof-mounted solar panels and associated trenching; (6) extend existing driveway and develop new parking area; (7) install septic system; (8) convert existing cabin to an accessory dwelling unit (ADU); and (9) develop a 1,700-square-foot dog area and private walking path from the western end of the proposed residence through Pacific reedgrass meadows to connect to a nearby public access trail (Belinda Point Trail).

As discussed further below, the staff report indicates that County staff recommend conditional approval of the development as proposed, even though all development is proposed to be sited within Environmentally Sensitive Habitat Areas (ESHAs) and/or minimum required ESHA buffers, inconsistent with the requirements of the Mendocino County certified LCP. Pursuant to Coastal Act Section 30603(a), any CDP granted by the County for the development project at the subject site would be appealable to the Coastal Commission, including because the subject parcel is located: (1) between the sea and the first public road paralleling the sea; (2) within 100 feet of a wetland or stream; and (3) within 300 feet of the top of the seaward face of a coastal bluff.

Commission staff offer the following comments for your consideration at this time.

### **1. Protection of Biological Resources**

The County staff report indicates that the subject property is designated and zoned Rural Residential and consists partially of non-prime agricultural land (as depicted on the LCP Land Capabilities and Natural Hazards map). Habitat features mapped on the

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<sup>1</sup> The applicant's submittal dated February 28, 2023 proposes 297 square feet of decking.

site include six Sensitive Natural Communities recognized as ESHA, including Northern Bishop Pine Forest, Pacific reedgrass meadows, Salmonberry- Wax Myrtle Scrub wetland, and Twinberry Scrub wetland. According to the application materials and County staff report, the proposed project would directly impact and eliminate approximately 1,550 square feet of Bishop pine forest and 1,640 square feet of Pacific reedgrass meadow.

A. Allowable Uses in ESHAs and ESHA Buffers

The Mendocino County Local Coastal Program (LCP) policies including LUP Policies 3.1-4, 3.1-7, and 3.1-13, and CZC Section 20.496.020 identify a very limited range of specific uses permitted in wetland and other ESHAs, and residential use is not listed in the LCP as an allowable use within ESHAs.

Wetlands, riparian areas, and rare species habitats and communities, and all other ESHA are also subject to the ESHA buffer requirements of LUP Policy 3.1-7 and CZC Section 20.496.020. LUP Policy 3.1-7 and CZC Section 20.496.020(A)(1) allow for development to be permitted within a buffer area if the development is for a use that is the same as those uses permitted in the adjacent environmentally sensitive habitat area, and if the development complies with specified standards as described in subsections (1)-(3) of LUP Policy 3.1-7 and 4(a)-(k) of Section 20.496.020(A). CZC Section 20.532.100(A)(1)(a) requires that ESHA resources affected by development not be significantly degraded by the proposed development. Justifications for development in ESHA as the “least environmentally harmful alternative” should only be applied to those uses that are *allowable* within ESHA or ESHA buffer.

According to these policies, a buffer area of a minimum of 100 feet shall be established adjacent to all ESHAs, unless an applicant can demonstrate, after consultations and agreement with the California Department of Fish and Wildlife (CDFW) that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The policies state that in that event, *the buffer shall not be less than 50 feet in width.*

Additionally, even though Mendocino County now has in place a certified LCP that allows development of ADUs and JADUs (effectively certified November 9, 2021, ten months after the applicant acquired the property), Mendocino County Coastal Zoning Code (CZC) section 20.458.045 (“Coastal Resource Protections”) disallows development of ADUs and JADUs within 100 feet of the boundary of an ESHA “unless contained entirely within a legally-authorized existing or approved residential structure that will not be repaired or improved to the extent that it constitutes a replacement structure under section 13252 of Title 14, California Administrative Code.” CZC section 20.458.045 further specifies:

All new development associated with an ADU (well, water storage, septic improvements, parking and driveways, vegetation removal for fire safety, etc.) must also be located more than 100 feet from the boundary of an Environmentally Sensitive Habitat Area. An exception to these requirements may be authorized through the administrative coastal development permit process in

circumstances where the development is consistent with the standards established in Chapter 20.496.

Mendocino County Coastal Zoning Code (CZC) Section 20.532.095(A)(1) requires the County to make findings that demonstrate each project is consistent with all provisions of the certified local coastal program. The proposed residential development and related improvements are not in any way dependent on the ESHAs at the site, but would occur within ESHA and ESHA buffer areas that are required to be established around the Sensitive Natural Community ESHAs. Therefore, as residential uses are not listed in the LCP as allowable uses within ESHA or ESHA buffers, and the Coastal Act only allows resource dependent uses within ESHA and ESHA buffers, the proposed development is inconsistent with the use limitations of the certified LCP, including its references to 30240, and including LUP Policy 3.1-7 and CZC Sections 20.496.020(A)(1) and 20.496.020(A)(4).

The County's findings and supporting application materials acknowledge that the conversion of the existing cabin to an ADU would be sited within ESHA and minimum ESHA buffers, inconsistent with the requirements of the certified LCP. The staff report also correctly acknowledges the inconsistency of the proposed new residential development with the biological resource protection policies of the certified LCP, stating in part the following:

The Project would involve the direct modification of two identified ESHA through grading, trenching, vegetation removal, soil removal, and other construction activities. Therefore, it is possible that these ESHA may be significantly degraded by the proposed development. In this situation, MCC Section 20.496.015(E) mandates that the development be denied.

Therefore, the proposed project should be modified to ensure that any development would occur outside of ESHA and the required minimum ESHA buffers.

#### B. Takings Analysis

The County staff report and supporting documentation includes a takings analysis and concludes that staff has determined that the project must be approved to avoid a possible taking of private property for public use. The County's determination appears premature and unsupported by findings of fact for the following reasons.

1. It does not appear that the staff report cites to relevant facts that support the finding that the applicant has a reasonable expectation to build a house and garage of the size and scale as currently proposed. Five unrelated recent nearby developments are presented in the staff report as comparable developments, however four of the examples demonstrate avoidance of developing within ESHA and adherence to the minimum required ESHA buffer setbacks. Only one example authorized development to avoid the potential for a regulatory taking, but allowed for less development than on the subject property, and on a previously undeveloped parcel. Finally, the staff report did not demonstrate why the applicant did not reasonably expect to build an alternative development proposal consisting of an addition to the cabin in similar proportion as that which

the County permitted at 33401 Pacific Way; this previous development may be a more appropriate comparable development to establish the reasonableness of the applicant's investment backed expectation and better protect ESHA.

2. The County has not established a basis under which the applicant would have expected to develop a property constrained by sensitive habitats. When the applicant purchased the property in 2021, there was ample evidence that development of a single-family residence on the parcel might not be possible due to botanical constraints. The Northern Bishop Pine forest and pacific reedgrass meadows Sensitive Natural Communities have been recognized as rare statewide since 1995<sup>2</sup> and several actions have been undertaken by the county to regulate development based on the existence of these and other ESHAs for more than ten years, including as evidenced by the surrounding parcel analyses included in the staff report and supporting documents.
3. Despite the existing entitlement on the subject property, the staff report presumes that there was a reasonable expectation to build a single family residence within a defined building envelope without acknowledging that feasible alternatives exist to adjust or even relocate the building envelope. A building envelope was approved as part of a subdivision in 1991 (CDP 1-91-60), and later moved through an amendment in 1994 (CDP Amendment 1-91-60-A). The location of the building envelope was moved as part of an amendment after "newly discovered material information" had been presented demonstrating that relocating the building envelope would not impact geologic or botanical resources recognized in 1994.

The property has since changed ownership and circumstances of the site have changed in the thirty years since the building envelope was last modified. The application materials demonstrate other changed circumstances necessitating an adjustment of expectations and project design to accommodate a septic system: Attachment G (Carl Rittiman and Associates SER Proposal Abstract) states in part "A disposal system was identified for the parcel as part of the subdivision process and the system was sized to accommodate a total of three bedrooms, as per subdivision requirements. The approved leachfield cannot be used as it is located in a road easement that was developed after the leachfield approval."

Thus, the applicant has proposed to site a septic system outside of the proposed building envelope to accommodate site constraints and could similarly apply to adjust the building envelope to enable siting development in a manner that could more feasibly accommodate ESHA constraints.

4. The County staff report does not demonstrate that approving the proposed project is the minimum necessary to avoid a regulatory taking. As indicated further below, it appears that feasible alternatives exist that could avoid and/or lessen development impacts within ESHAs and ESHA buffers.

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<sup>2</sup> Sawyer, J. O., and T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society, Sacramento, CA.

C. Alternatives Analysis

The County staff report does not provide an analysis of feasible alternatives and instead states on Page CPA-10 “An alternative location would either have a similar impact on ESHA or not be sufficient to serve the proposed development.” Even if the County determines that development must be approved to avoid a regulatory takings, as part of the analysis of impacts to ESHAs, either the county or the Commission on appeal must at minimum evaluate whether the size, location, and design of the home and ancillary developments are the least environmentally damaging alternative, as compared to the other alternatives (such as but not limited to a smaller house design and the “no project” alternative).

Therefore, the applicant should propose, and the County should address in its findings alternative designs that would be less environmentally damaging. Alternatives that should be considered include, but should not be limited to: (1) redeveloping the existing structure, (2) alternative house sizes, including an alternative house size that is no larger than the average house size of similarly-constrained property in the surrounding neighborhood, (3) alternative designs that minimize the footprint of the house (and any proposed J/ADU) on the ground by utilizing the same footprint as the existing cabin and adding an upper story or stories, and (4) alternative floor plans that minimize encroachment into ESHA and ESHA buffer areas.

D. Mitigation Measures

After identifying the least environmentally damaging feasible alternative, if the alternatives analysis demonstrates there are no feasible alternatives that do not encroach into ESHA and ESHA buffer areas, the County should demonstrate how the proposed development implements *all* feasible mitigation measures consistent with LCP requirements that include but are not limited to CZC Sections 20.496.020(A)(4) and 20.532.100(A)(1). In addition to implementing the mitigation measures recommended by CDFW, additional mitigation measures should include but are not limited to requiring as a condition of approval the recordation of a deed restriction that adequately prohibits all development in the ESHA buffer area on the property except for the following types of development: a) removal of non-native vegetation; b) the planting of native vegetation, or c) vegetation clearance if required by CalFire.

Since rodenticides are sometimes used to prevent rats, moles, voles, gophers, and other similar small animals from eating newly planted saplings, and many rodenticides have been found to pose significant primary and secondary risks to non-target wildlife present in urban and urban/wildland areas, we also recommend the County require that the use of any rodenticides on the property shall be prohibited, to minimize potential significant adverse impact of rodenticide use to other environmentally sensitive wildlife species.

E. CEQA Compliance

Commission staff is also concerned about the adequacy of the County’s compliance with the California Environmental Quality Act (CEQA). As indicated in the staff report, County staff is proposing that the Coastal Permit Administrator adopt a mitigated



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negative declaration (MND) for the proposed development. As you know, MNDs are reserved for discretionary approvals where a project's significant adverse impacts have been identified but mitigation measures are incorporated into the project to make those impacts less than significant. The staff report explicitly acknowledges in Finding 1. on page 11 that "all requisite findings pursuant to MCC Section 20.532.100(A) cannot be made because the Project may result in substantial degradation of ESHA." Given the disallowed impacts on ESHA identified in the staff report by allowing a non-resource dependent use in ESHA and the buffer, the fact that the development cannot be found consistent with ESHA policies, alone, should be considered an unavoidable significant adverse impact on ESHA that requires a statement of overriding considerations which is only possible through preparation of an environmental impact report (EIR) under CEQA. Furthermore, the staff report states, on page 12, that "there is no feasible less environmentally damaging alternative to the Project" yet a word search in the staff report for "alternative" reveals that the County did not actually evaluate any alternative designs, siting or consider renovation and an addition as a possible path to avoid ESHA impacts. Therefore, the Commission recommends that either the County prepare an EIR to adequately address the ESHA impacts or pursue an alternative project that avoids the significant adverse impacts on ESHA if it chooses to continue the path of adopting an MND for the Project.

## **2. LCP Requirements for Nonconforming Uses and Structures**

The supporting application materials included with the staff report describe the cabin as a legally non-conforming structure. Therefore, the County's findings should address how any use and/or modification of the existing cabin conforms with the requirements of CZC Chapter 20.204 ("Nonconforming Uses and Structures").

Thank you again for the opportunity to provide comments. Should you have any questions, please contact me at [Tamara.Gedik@coastal.ca.gov](mailto:Tamara.Gedik@coastal.ca.gov).

Sincerely,



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Supervising Analyst

Cc: Wynn Coastal Planning  
CA Department of Fish and Wildlife