

CALIFORNIA COASTAL COMMISSION
NORTH COAST AREA
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February 21, 1997

TO: Commissioners and Interested Persons

FROM: Peter Douglas, Executive Director
Steve Scholl, District Director
Jo Ginsberg, Coastal Planner

RE: **Mendocino County LCP Amendment No. 1-96 (Major): Site B,
Mendocino Coast Properties, Appeal**

APPEAL DESCRIPTION: Appeal by Mendocino County of the Executive Director's determination that the County's submittal for LCP Amendment 1-96 (Major), Site B, is not properly submitted because it does not contain materials sufficient for a complete review by the Commission.

The proposed LCP Amendment seeks to change the land use classification and rezone from Open Space (OS) to Rural Residential-5 acre minimum, Planned Development (RR-5:PD) for a 6.35-acre parcel located west of Highway One in the Irish Beach subdivision south of Elk in Mendocino County.

SUBSTANTIVE FILE DOCUMENTS: California Coastal Act of 1976 as of January 1997; California Code of Regulations, Title 14, Division 5.5; Mendocino County staff report for General Plan Amendment and Rezone for #GP 12-93/#R 12-93; Appendix X, Preliminary Geotechnical Evaluation of Lot 28, Unit 1, Irish Beach Development, dated January 23, 1989, prepared by Earth Science Consultants; Geotechnical Evaluation on Bluff Retreat Rate for Lot 28, Unit 1, Navarro Way, Irish Beach Development, dated February 23, 1995, prepared by Earth Science Consultants.

PROCEDURAL NOTE: Pursuant to Section 13553 of the California Code of Regulations, any disagreement between the executive director and the local government or governing authority as to information requirements of an LCP amendment submittal may be resolved by the Commission. The filing of an LCP amendment submittal is the threshold step in the California Coastal Commission's review process. Once a submittal is filed complete it is scheduled for a hearing before the Commission.

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SUMMARY OF STAFF RECOMMENDATION:

The primary area of concern regarding this LCP amendment submittal is the sufficiency of the information provided that addresses (1) geologic and fire hazards, and (2) public access. Staff believes the County has not provided adequate information in these areas for the Commission to determine if the proposed change in the land use and zoning designation is consistent with the Coastal Act chapters 3 and 6, and for staff to be able to make a recommendation to the Commission as to whether the subject site is suitable for residential development.

Staff recommends that the Commission concur in the Executive Director's decision and direct staff not to file as complete Mendocino County LCP Amendment No. 1-96 (Major): Site B, because the filing of an incomplete submittal would not be consistent with Coastal Act Section 30510(b) and Section 13552 of Title 14 of the California Code of Regulations.

STAFF RECOMMENDATION:

The staff recommends that the Commission concur in the Executive Director's decision. The staff recommends a NO vote on the following motion.

MOTION:

I move that the Commission direct the Executive Director to consider Mendocino County LCP Amendment No. 1-96 (Major): Site B as properly submitted.

To pass the motion, a majority of the Commissioners is required. Approval of the motion that the County's LCP amendment is not properly submitted.

FINDINGS

A. Background.

1. Proposed LCP Amendment

The County submittal for Site B seeks to change the land use classification and rezone from Open Space (OS) to Rural Residential-5 acre minimum, Planned Development (RR-5:PD) for an undeveloped 6.35-acre parcel located west of Highway One in the Irish Beach subdivision south of Elk in Mendocino County.

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The Open Space land use designation is described in the LUP as follows:

Intent: The Open Space classification is intended to be applied to lands not suited for development or to lands most valuable in their undeveloped natural state. Factors limiting the development potential of land would include such constraints as unstable soils, high fire hazard, remote location, poor access, scenic qualities, and susceptibility to flooding. Valuable natural areas could include rare and endangered species and habitat, riparian vegetation zones, or wild and scenic rivers.

Zoning Code Section 20.340.010 describes Open Space as:

Land designated to remain in its natural condition or open agricultural use with no structures, except structures normally associated with park or open space use, or other development which is zoned Open Space.

Zoning Code Section 20.308.095(K) defines "Principal Permitted Use" as:

The primary use as designated in the Coastal Element and this Division for each land use classification.

The principally permitted uses on a parcel designated Open Space would not allow any structures. Conditional uses (needs a conditional use permit from the County in addition to a coastal development permit) include employee caretaker housing and other structures normally associated with park or open space use.

The proposed Rural Residential-5 designation would allow as a principally permitted use one single-family residence on the subject site.

2. Initial Submittal

In May of 1996, the County of Mendocino submitted to the Commission an LCP amendment request consisting of two parts. Because the submittal for Site A (Flanagan) was complete, while the submittal for Site B (Mendocino Coast Properties) was not complete, Commission staff separated the submittal into two parts: (1) Mendocino County LCP Amendment No. 1-96 (Major): Site A, Flanagan, which was approved as submitted by the Commission on July 10, 1996, and (2) Mendocino County LCP Amendment No. 1-96 (Major): Site B, Mendocino Coast Properties, which is the subject of this appeal.

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3. Site Description

The subject site is located about four miles north of Manchester, 600 feet west of Highway One. It is an undeveloped parcel of 6.35 acres, located on the face of an approximately 150-foot-high coastal bluff. It is a unique parcel within the subdivision in that it is the only parcel among the hundreds of other parcels in Irish Beach where a home site is proposed to be situated on the steep bluff face. There is a relatively level bench area approximately 80 feet to 100 feet in width that has been targeted as the future building site (see Exhibit No. 2). This designated future building site is located about 125 feet down the bluff face. There are steep slopes both above and below this relatively flat area, and, according to County staff, there has been some recent slumping and landsliding upslope of the building site. What was once apparently a driveway is now heavily overgrown and has eroded into a fairly narrow path of approximately 700 feet in length and 9-12 feet in width that County staff estimates to have been constructed in the 1960's. This path leads down the steep bluff face to the building site, then continues for a short distance down the cliff, where it drops off into space above the ocean where the ground has eroded away.

B. LCP Amendment Filing Requirements.

Section 13552 of Title 14 of the California Code of Regulations describes the contents of an LCP or LRDP amendment submittal, and states that the amendment submittal shall include:

(a) A summary of the measure taken to provide the public and affected agencies and districts maximum opportunity to participate in the LCP or LRDP amendment process, pursuant to Section 13515 and Public Resources Code Section 30503; a listing of members of the public, organizations, and agencies appearing at any hearing or contacted for comment on the LCP or LRDP amendment; and copies or summaries of significant comments received and of the local government or governing authority's response to the comments.

(b) All policies, plans, standards, objectives, diagrams, drawings, maps, photographs, and supplementary data, related to the amendment in sufficient detail to allow review for conformity with the requirements of the Coastal Act. Written documents should be readily reproducible. An amendment to a land use plan or LRDP shall include, where applicable, a readily identifiable public access component as set forth in Section 13512.

(c) A discussion of the amendment's relationship to and effect on the other sections of the certified LCP or LRDP.

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(d) An analysis that meets the requirements of Section 13511 or an approved alternative pursuant to Section 13514 and that demonstrates conformity with the requirements of Chapter 6 of the Coastal Act.

(e) Any environmental review documents, pursuant to CEQA, required for all or any portion of the amendment to the LCP or LRDP.

(f) An indication of the zoning measures that will be used to carry out the amendment to the land use plan (unless submitted at the same time as the amendment to the land use plan).

Pursuant to these regulations, the Application for Local Coastal Program Amendment includes a list of submittal requirements (see Exhibit No. 6). Included on this list are the following relevant requirements:

(5) If the amendment affects an area between the sea and the first public road paralleling the sea, an analysis must be made on the effect of that amendment on the certified public access component.

(6) If the amendment involves a change in density or public service provision, an analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the change, and how the change can be found consistent with the policies of Chapter 3 and 6 of the California Coastal Act.

(7) The Secretary for Resources has determined that LCP amendments fall within the statutory exemption of LCPs from EIR preparation. However, the Commission's review of LCP amendments must comply with the standards of CEQA. Therefore, an amendment request must be accompanied by sufficient information to enable the Commission to prepare an environmental analysis which satisfies the requirements of CEQA.

Section 13553 of the California Code of Regulations states that any disagreement between the Executive Director and the local government or governing authority as to information requirements of an LCP amendment submittal may be resolved by the Commission. The Executive Director has determined that Mendocino County LCP Amendment 1-96 (Major): Site B is not properly submitted because the County did not provide information necessary for evaluation of the proposed amendment and its consistency with the Coastal Act.

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C. Correspondence

On 6 June 1996, Commission staff sent a letter to County staff (see Exhibit No. 7) indicating that the County's submittal for Site B was incomplete. Commission staff stated that since the amendment involves a change in density (a change in the land use and zoning classification from Open Space to Rural Residential), the applicant must submit an analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the change, and how the change can be found consistent with the policies of Chapter 3 and 6 of the Coastal Act. While the County Board of Supervisors approved the project, it provided no written findings to support this approval, and no separate analysis as to why the project is consistent with the policies of Chapter 3 and 6 of the Coastal Act. Commission staff requested, in particular, an analysis of how the project is consistent with the geologic hazards policy found in Coastal Act Section 30253. In addition, since the County Board of Supervisors approved the proposed change based on their County Counsel's opinion that to deny the change would constitute a "takings," Commission staff further requested clarification as to the Board's findings on the takings issue (see Exhibit No. 8).

County staff responded by sending a letter dated 28 June 1996 and a copy of a memorandum from County Counsel to County Planning staff dated 21 June 1996 explaining his position on the "takings" issue (see Exhibit No. 8).

Commission staff sent a letter dated 31 July 1996 to County staff (see Exhibit No. 9) indicating that while the County had submitted a legal memorandum from County Counsel analyzing whether denying the owner's request to rezone the property from open space would constitute a taking, County staff did not include in the response an analysis of how the proposed change is consistent with the Coastal Act, particularly regarding geologic and fire hazards and public access. The geotechnical investigation prepared by Earth Science Consultants in 1995 (see Exhibit No. 12) indicates that a building setback of 75 feet from the top of the bluff would be necessary to avoid geologic hazards. However, at least a portion of the existing driveway appears to be within the recommended 75-foot setback area delineated by the geologist. Commission staff requested information regarding the stability of the driveway with regard to geologic hazards, as no analysis is included discussing the safety of the access road, the effects of bluff retreat on the road, and what impacts to the slope would result from any grading and road widening necessary to improve the driveway such that it could serve a residence consistent with the road standards and fire safety standards imposed by County Public Works and the California Department of Forestry (CDF). Commission staff further requested information on the minimum road standards required by both Public Works and CDF to serve a residence at the site, since without this information staff cannot evaluate how much road improvement, grading, etc. will be

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necessary to construct a roadway that meets County and State fire safety standards, and if it is feasible to construct such a road down the bluff face at the site.

The record submitted with the proposed LCP amendment also included specific references to the existence of potential public prescriptive rights that may have developed across the subject property. Commission staff requested an analysis of how the proposed LCP amendment would impact any potential prescriptive rights which may exist, including (1) evidence the site was ever posted with no trespassing signs, and, if so, where, when, for how long, and with what specific language; (2) evidence a notice was ever recorded with the County to prevent prescriptive rights from accruing; (3) evidence the site was ever fenced or gated to prevent public use, and, if so, where, when, for how long, and in what manner; (4) evidence of the existence and use of trails; and (5) evidence that residents were permitted to come on the property.

Commission staff did not request a full prescriptive rights analysis. What staff requested was merely information regarding any possible defenses to prescriptive rights which could prevent prescriptive rights from accruing. This information would be readily available to the property owner and the County and would help the Commission assess how significant the prescriptive rights issue may be.

County staff did not submit the requested information. In a letter dated 13 December 1996 (see Exhibit No. 10), County staff indicated that he believed the County had previously submitted much of the requested information, that the project does not represent a density increase and therefore does not warrant submittal of some of the requested information, and that the level of analysis requested by Commission staff is more appropriate at the development stage. County staff requested that Commission staff carry the application forward to the Coastal Commission for a decision, or, if Commission staff does not concur with the County's position that the application was complete, that Commission staff bring the matter before the Commission for a hearing.

The Executive Director has determined that Mendocino County LCP Amendment No. 1-96 (Major): Site B is not properly submitted because the County did not provide information necessary for evaluation of the proposed amendment and its consistency with the Coastal Act. The Executive Director is thus bringing the matter before the Commission.

D. Information Lacking in Submittal.

1. An analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the proposed change in land use and zoning designation. This information is required by 14 CCR 13552(b) and 13511.

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2. An analysis of how the proposed change can be found consistent with the policies of Chapter 3 and 6 of the Coastal Act, particularly regarding geologic and fire hazards and public access. This information is required by 14 CCR 13552(b).
3. Information regarding the stability of the driveway with regard to geologic hazards, and an analysis discussing the safety of the access road, the effects of bluff retreat on the road, and what impacts to the slope would result from any grading and road widening necessary to improve the driveway such that it could serve a residence consistent with the road standards and fire safety standards imposed by County Public Works and the California Department of Forestry (CDF). This information is required to evaluate the proposed amendment's consistency with Coastal Act Sections 30253 and 30235.
4. Information on the minimum road standards required by both Public Works and CDF to serve a residence at the site so that Commission staff can evaluate how much road improvement, grading, etc. will be necessary to construct a roadway that meets County and State fire safety standards, and if it is feasible to construct such a road down the bluff face at the site. This information is required to evaluate the proposed amendment's consistency with Coastal Act Section 30253.
5. An analysis of how the proposed LCP amendment would impact any potential prescriptive rights which may exist, including (1) evidence the site was ever posted with no trespassing signs, and, if so, where, when, for how long, and with what specific language; (2) evidence a notice was ever recorded with the County to prevent prescriptive rights from accruing; (3) evidence the site was ever fenced or gated to prevent public use, and, if so, where, when, for how long, and in what manner; (4) evidence of the existence and use of trails; and (5) evidence that residents were permitted to come on the property. This information is required to determine whether potential issues of the amendment's consistency with Coastal Act Section 30211 exist.

E. Areas of Deficiency of Submittal.

1. Geologic and Fire Hazards

The proposed LCP amendment request seeks to change the land use and zoning designations of the subject parcel from Open Space to Rural Residential-5, thereby allowing one residence as a principally permitted use, which is the primary use allowed for a land use classification.

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The particular setting of the proposed project makes effective implementation of the geologic hazard policies especially important. As noted in the Site Description above (Section A.3), the subject site is a unique parcel in that it is entirely located on the steep bluff face below the row of parcels on Navarro Way (see Exhibit No. 2 and 3). There is one potential building site, a relatively flat area that may or may not be a natural topographic feature. This designated future building site is about 125 feet below the top of the cliff, with steep slopes both above and below it. To access this site, there is an overgrown and degraded driveway graded about 35 years ago, which is now little more than a steep, narrow path that traverses the precipitous bluff face to reach the building site; this driveway will most likely require substantial improvement, possibly even including a revetment or retaining wall, to provide safe egress and ingress to the site. It is also possible that fire safety standards imposed by County Public Works and/or the California Department of Forestry and Fire Safety (CDF) will require road widening to allow for fire protection vehicles, including a turnaround.

As the subject site is located on what appears to be the bluff face of a fairly steep ocean bluff, it gives rise to a major concern about geologic hazards such as landsliding, erosion, and bluff retreat. There is some discrepancy between what the preparers of the preliminary geotechnical evaluation believe and what the Planning staff as well as Coastal Commission staff (including the Commission engineer, who conducted a site visit in August of 1996) believe regarding the location of the bluff edge, which complicates the situation.

According to Earth Science Consultants, the bluff edge is located seaward of the relatively flat area proposed as a building site, about 30 feet above the ocean (see Exhibit No. 11). On the other hand, Commission staff, including the Commission engineer, having visited the site several times and reviewed the Commission regulations on the subject, have documented that the entire property appears to be a bluff face, with the top of the bluff being located upslope (east) of the site, about 150 feet above the ocean.

The Commission's engineer points out that Title 14 of the California Code of Regulations Section 13577(h)(2) defines the termini of the bluff line, or edge along the seaward face, "as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland face of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations." In addition, 14 CCR 13577(h)(2) states that, "In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge."

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The Commission engineer indicates that using this definition for bluff edge makes it very difficult to find that the small flat feature (proposed building site) is landward of the top of the bluff (see Exhibit No. 2). She states that even if the feature is a natural bench, it is reasonable to see it as a steplike feature where the "landward edge of the topmost riser shall be taken to be the cliff edge." She also indicates that it does not appear that this bench feature is repeated in other areas; the flat bench seems to be far seaward of the natural bluff edge that can be found in most of the immediate area (see Exhibit No. 2).

During her site visit, the Coastal Commission's engineer noted evidence of recent surficial failures and small slumps along the eastern boundary of the path that provides access to the proposed building site. She also noted that this relatively flat portion of the site may not be a natural topographic feature, but, rather, part of a large ancient slope which might have been leveled some time in the past. Earth Science Consultants has indicated that this flat portion is probably a natural feature. In any case, it is the only likely future building site, and safe access to the site will need to be provided, using an existing path down the bluff face.

Although specifically requested, the County has not provided information regarding what minimum road standards would be imposed by Public Works. The County also has not provided any information regarding the safety of the access road, the effects of bluff retreat on the road, and what impacts to the slope would result from any grading and road widening necessary to improve the driveway such that it could serve a residence consistent with the road standards and fire safety standards imposed by Public Works and CDF.

The Coastal Act is the standard of review that the Commission uses when evaluating an LCP amendment. Commission staff looked at the relevant policies of the Coastal Act to see if enough information had been provided by the County to conclude whether the proposed change in land use and zoning designation was appropriate and consistent with the Coastal Act and with the LCP.

Section 30253 of the Coastal Act states in relevant part:

New development shall:

- (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
- (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or

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in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Coastal Act Section 30235 states in relevant part:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply...
(Emphasis added)

The proposed change would allow a single-family residence to be built on the subject site and would likely require substantial road improvement on the bluff face. Commission staff requested but did not receive from the County information indicating why the proposed change is consistent with this Coastal Act policy, and the County has not submitted information regarding future road improvements that would most likely be necessary to access the site. What the County submitted was a staff report recommending denial of the proposed change, with findings supporting this recommendation. These findings demonstrate how the proposed LCP amendment is not consistent with the policies of the certified LCP. When the Board of Supervisors approved the project, no findings were made to support this approval that demonstrate how the proposed change is consistent with the LCP, or with the policies of the Coastal Act. The Commission staff therefore cannot evaluate whether the proposed change would result in allowing development that would not minimize risks to life and property, would not assure stability and structural integrity, and might create or contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area, inconsistent with Coastal Act Section 30253.

In addition, since the County has not submitted information regarding what road improvements would be necessary to provide safe access to the site, the Commission cannot determine if any such road improvements would necessitate the construction of a cliff retaining wall or revetment to support the bluff. The Commission has always interpreted Section 30235 to mean that such devices as revetments and cliff retaining walls are not allowed when they are proposed to protect new development, only to protect existing development. If the geologic evaluation of the road access that staff is requesting were to indicate that a safe adequate accessway to the home site could be developed only with the addition of a cliff retaining wall or revetment, development of the site for residential use would be inconsistent with Coastal Act Sections 30235 and 30253; thus, the proposed amendment itself, to allow a single-family

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residence as the principally permitted use, would be inconsistent with the Coastal Act.

Commission staff concludes that it is lacking the essential information necessary for the Commission to determine if the proposed LCP amendment is consistent with the policies of the Coastal Act.

The information requested by staff is also important given that the LCP contains additional policies and regulations that prohibit development on bluff faces, discourage development within setback areas, and prohibit the construction of revetments except to support existing development.

2. Public Access.

Coastal Act Section 30211 states that:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

The County submitted information that referred to the existence of potential prescriptive rights that may have developed across the property at the time the Irish Beach Improvement Club leased the property from the owner, Mendocino Coast Properties (County staff report for #GP 12-93/#R 12-93 dated 2/1/96). The Commission requested an analysis of how the proposed LCP amendment would impact any potential prescriptive rights which may exist. The Commission requested that the analysis specifically include (1) evidence the site was ever posted with no trespassing signs, and, if so, where, when, for how long, and with what specific language; (2) evidence a notice was ever recorded with the County to prevent prescriptive rights from accruing; (3) evidence the site was ever fenced or gated to prevent public use, and, if so, where, when, for how long, and in what manner; (4) evidence of the existence and use of trails; and (5) evidence that residents were permitted to come on the property.

Commission staff did not request a full prescriptive rights analysis. What staff requested was merely information regarding any possible defenses to prescriptive rights which could prevent prescriptive rights from accruing. This information would be readily available to the property owner and the County and would help the Commission assess how significant the prescriptive rights issue may be.

The County did not submit this information to the Commission; Commission staff is therefore unable to determine if future development that would be allowed

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if the proposed change is approved would interfere with the public's right of access to the sea where acquired through use, inconsistent with Coastal Act Section 30211.

F. Conclusion.

The proposed LCP amendment seeks to change the land use classification and rezone the subject parcel from Open Space to Rural Residential-5; if approved, this change would allow for one residence on the site as a principally permitted use. Commission staff must evaluate whether this change would be consistent with the policies of the Coastal Act.

As part of its LCP amendment submittal, the Mendocino County is required to submit, pursuant to Section 13552 of Title 14 of the California Code of Regulations all information related to the amendment "in sufficient detail to allow review for conformity with the requirements of the Coastal Act."

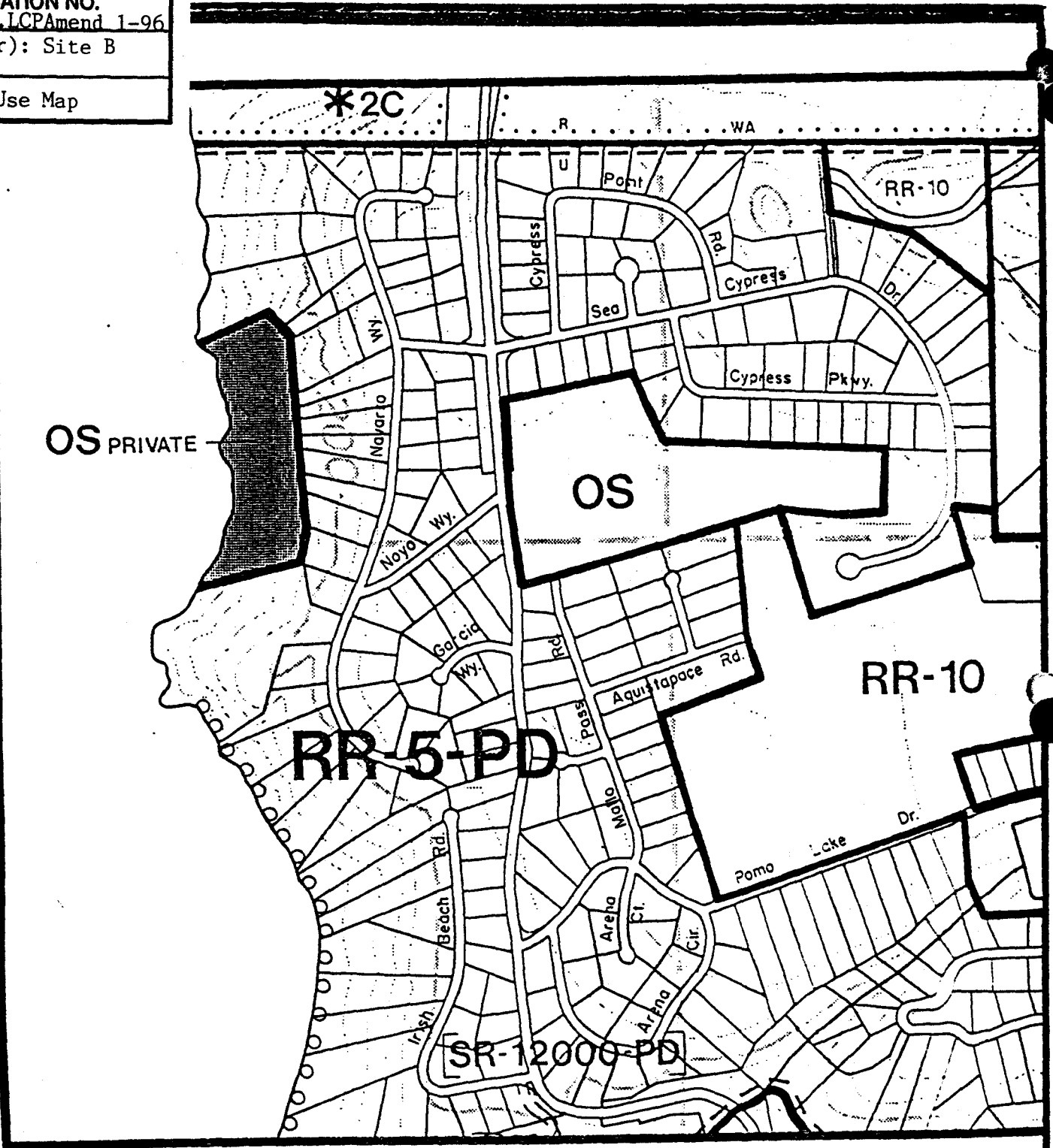
Commission staff asked for information on which to base their evaluation; the County did not submit the requested information. What the County submitted was a staff report recommending denial of the proposed change, with findings supporting this recommendation. These findings demonstrate how the proposed LCP amendment is not consistent with the policies of the certified LCP. When the Board of Supervisors approved the project, no findings were made to support this approval that demonstrate how the proposed change is consistent with the LCP, or with the policies of the Coastal Act (see Exhibit No. 5). Commission staff requested this information, but it was not provided. The information currently in staff's possession regarding geologic and fire hazards and public access is not adequate for staff to determine if the proposed change is consistent with the Coastal Act.

The County indicated that such information as Commission staff requested would be generated at such time as specific development is proposed. Commission staff believes it is appropriate and, in fact, necessary, to evaluate that information now; otherwise there is not sufficient information to determine whether a land use classification allowing no structures as a principally permitted use should be changed to a land use classification where a single-family residence is a principally permitted use. The Commission does not want to create an expectation that the property owner can develop a residence on the site by approving the LCP amendment only to find that after the necessary geologic information is provided, the site is unsafe for residential development.

EXHIBIT NO. 3

APPLICATION NO.
Men. Co. LCP Amend 1-96
(Major): Site B

Land Use Map



Site - Change from OS to RR-5-PD & DL

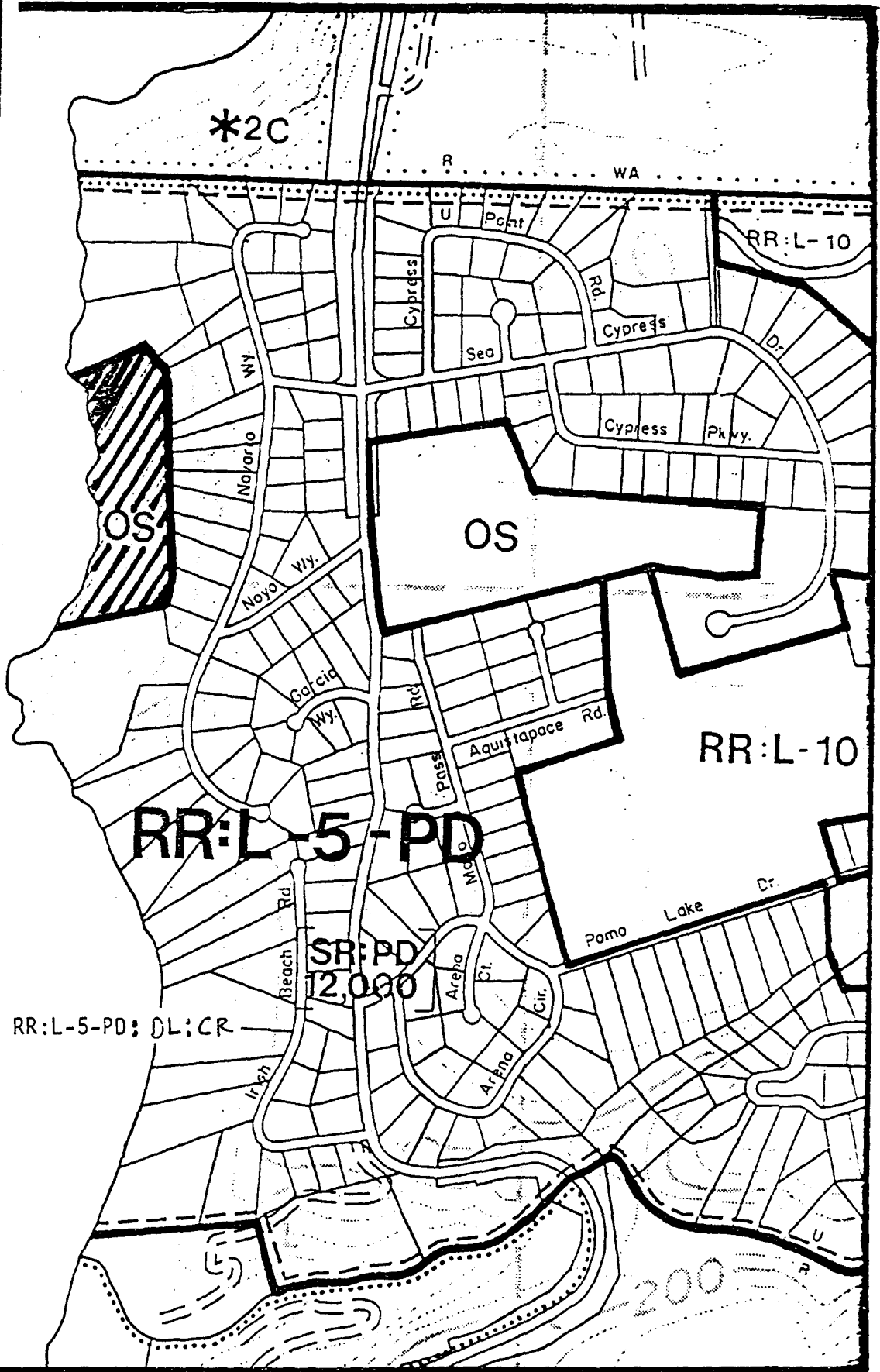
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|-----------------------------------|--------------------------------------|-------------------------|
| CASE NUMBER: #GP 12-93/R 12-93 | OWNER: MENDOCINO COAST PROPERTIES | AGENT: JAMES BARRETT |
| A/P NUMBER: B-6 | 132-020-19 | EXHIBIT A |
| LAND USE | | NORTH |


EXHIBIT NO. 4

APPLICATION NO.
Men. Co. LCP Amend 1-96

(Major): Site B

Zoning Map



 Change from OS to RR:L-5-PD; DL:CR

CASE NUMBER:
#GP 12-93/R 12-93

OWNER:
MENDOCINO COAST PROPERTIES

AGENT:
JAMES BARRETT

B-7

A/P NUMBER:
132-020-19

EXHIBIT B

ZONING



NORTH

| | |
|--------------------------------|------------------------|
| EXHIBIT NO. | 5 |
| APPLICATION NO. | Men. Co. LCP Amendment |
| | 1-96 (Major): Site B |
| Mendocino County Board Minutes | |

MENDOCINO COUNTY BOARD OF SUPERVISORS

March 11, 1996

8. #GP 12-93 R 12-93 MENDOCINO COAST PROPERTIES (OWNER) - J.R. BARRETT ASSOCIATES (AGENT)

LOCATION: 4 +- mi N of Manchester, 600 +- ft W of State Route 1, bounded by the Pacific Ocean and Irish Beach subdivision Unit 1; APN 132-020-19. REQUEST: Change the Coastal Plan land use designation and rezone from Open Space (OS) to Rural Residential - 5 ac minimum, Planned Development (RR-5-PD) and RR-5:PD, respectively.

Planner Gary Pedroni presented the staff report and briefly reviewed the action taken by the Planning Commission on February 15, 1996.

County Counsel H. Peter Klein made comments on the issue of whether or not leaving the property zoned as Open Space constituted a taking.

Jim Barrett, Agent, spoke in favor of the rezone and made comments on the Earth Science Consultants preliminary geotechnical evaluations. Bill Moores, owner, gave a presentation dealing with the history of the subject property. Gordon Moores, owner, spoke in favor of the rezone.

THE PUBLIC HEARING WAS OPENED and the following spoke on this item: John Birk spoke in opposition to the rezoning and referenced a letter received from Marv Satuloff regarding geological studies. THE PUBLIC HEARING WAS CLOSED.

Discussion ensued relative to adding a Development Limitation to the rezoning. Supervisor Peterson stated specific concerns as to this parcel and directed staff to make modifications to the current Resolution on this project.

Motion by Supervisor Peterson, seconded by Supervisor Sugawara that the Board of Supervisors hereby ADOPTS.....

RESOLUTION NO. 96-044

RESOLUTION OF THE MENDOCINO COUNTY BOARD OF SUPERVISORS OF INTENT TO AMEND THE LOCAL COASTAL PROGRAM FOR MENDOCINO COUNTY (GP 12-93 / R 12-93 - MENDOCINO COAST PROPERTIES

tentatively approving #GP 12-93/#R 12-93 for inclusion in the 1995-B South of Navarro Watershed Group of General Plan Amendments finding that the project is consistent with the Coastal Plan and will not have any significant negative impacts upon the environment.

error in Minutes. requested a minute correction

~~Condition of Rezoning: This entitlement does not become effective or operative and no work shall be commenced under this entitlement until the California Department of Fish and Game filing fees required or authorized by Section 711.4 of the Fish and Game Code are submitted to the Mendocino County Department of Planning and Building services. Said fee of \$25.00 shall be submitted to the Department of Planning and Building Services by March 15, 1996, unless the project is appealed, made payable to the Mendocino County Clerk. Failure to pay this fee by the specified deadline shall result in the entitlement automatically becoming null and void.~~

BY ORDER OF THE CHAIR the vote on the motion with regards to this item is continued until 1:30 p.m. so that staff has an opportunity to amend the Resolution to reflect Supervisor Peterson's concerns.

The above motion made by Supervisor Peterson, seconded by Supervisor Sugawara, was carried on the following roll call vote (4-1) with Supervisor Pinches dissenting.

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| EXHIBIT NO. | 5 |
| APPLICATION NO. | Men.Co.LCP Amendment 1-96 (Major): Site B |
| Mendocino County Board Minutes | |

4. MINUTES (Continued)

Upon motion by Supervisor Peterson, seconded by Supervisor Sugawara, and carried, IT IS ORDERED that the minutes of March 11, 1996, are further corrected on page 413 as follows: GP 12-93 R 12-93 Mendocino Coast Properties, Owner) - J.R. Barrett Associates (Agent) - delete paragraph entitled Condition of Rezoning.

THERE BEING NOTHING FURTHER TO COME BEFORE THE BOARD, THE MEETING ADJOURNED AT 2:30 P.M.

LIZ HENRY, Chair

ATTEST: JOYCE A. BEARD
Clerk of the Board

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| EXHIBIT NO. 5 |
| APPLICATION NO. Men.Co.LCP Amendment |
| 1-96 (Major): Site I |
| Mendocino County Board Minutes |

CALIFORNIA COASTAL COMMISSION

14TH COAST AREA
MONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
(415) 904-5260



_____ DISTRICT

_____ AREA OFFICE

APPLICATION FOR LOCAL COASTAL PROGRAM AMENDMENT

I. JURISDICTION _____

SEGMENT _____

UNCERTIFIED AREA _____

II. TYPE OF AMENDMENT SUBMITTAL (check one)

LUP _____
ZONING/IMPLEMENTATION PROGRAM _____
LCP (Land Use & Zoning) _____

III. LCP STATUS

Yes/No, Date

LUP CERTIFIED _____
ZONING CERTIFIED _____
AREA OF DEFERRED CERTIFICATION _____
STATUS OF COMMISSION ACTION _____
ON SUGGESTED MODIFICATIONS _____
PRIOR COMMISSION ACTION ON THIS SUBMITTAL _____

IV. SUMMARY OF AMENDMENT PROPOSAL

- 1)
- 2)
- 3)
- 4) etc.

Attach documentation as needed and as outlined in Submittal Requirements.

V. COMMISSION OFFICE USE ONLY:

Amendment # _____
Date Received _____
Date Filed _____
Comm. Hearing Agenda _____
Commission Action: A _____, AWM _____, D _____

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| EXHIBIT NO. 6 |
| APPLICATION NO. Men.Co. LCP Amend. 1-96 (Major): Site B |
| LCP Amendment Application |

K1: 4/88

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| EXHIBIT NO. 6 |
| APPLICATION NO. Men.Co. LCP Amend. |
| 1-96 (Major): Site B |
| LCP Amendment Application |

VI. SUBMITTAL REQUIREMENTS

Coastal Commission Administrative Regulations (14 Cal. Admin. Code Sec. 13551 & 13552) require that all LUP-LCP Amendment submittals must consist of:

- (1) A resolution adopted and dated by the Board of Supervisors or City Council after a public hearing (P.R.C. Section 30510(a)):
 - Indicating that the local government intends to carry out the LCP in a manner fully consistent with the California Coastal Act.
 - Indicating when it will take effect (automatically upon Commission approval or requiring formal local action after Commission approval).
- (2) A clear, reproducible copy of adopted amendment(s).
 - If additional text, an indication of where it fits into the previously certified document (e.g., insert as p. 20a between pp. 20 and 21) as policy # _____.
 - If revision to certified text, submit either with strikeouts and underlines or with indication of what policies, paragraph(s) or page(s) it replaces.
 - If map change, submit a new (replacement) map or submit a supplemental map with indication that previously adopted map is to be superseded by the supplement for the specific geographic area indicated (13552(b), (c)).
- (3) Discussion of the amendment's relationship to and effect on other sections of the previously certified LCP, including the access component. If the amendment to a certified LCP involves a land use plan (LUP) change only, an indication of which certified zoning provision(s) carries it out. If the amendment involves a zoning change only, an indication of which certified land use plan provision(s) it carries out (13552(c) and (f)).
- (4) If the amendment is to the land use plan only (there is no certified Implementation Plan), an indication of the zoning measures that will be submitted to carry out the amendment.
- (5) If the amendment affects on area between the sea and the first public road paralleling the sea, an analysis must be made on the effect of that amendment on the certified public access component.
- (6) If the amendment involves a change in density or public service provision, an analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the change, and how the change can be found consistent with the policies of Chapter 3 and 6 of the California Coastal Act.

- (7) The Secretary for Resources has determined that LCP amendments fall within the statutory exemption of LCPs from EIR preparation. However, the Commission's review of LCP amendments must comply with the standards of CEQA. Therefore, an amendment request must be accompanied by sufficient information to enable the Commission to prepare an environmental analysis which satisfies the requirements of CEQA.
- (8) A summary of the measures taken to ensure public and agency participation.
- Include list of hearing dates, sample notice, mailing list.
 - Comments received from hearing participants (written and verbal) and names and addresses.
 - Any response to comments by the local government.
- (9) All staff reports and other information addressing the LUP amendment request's consistency with the Coastal Act, and/or the adequacy of the implementation program, as amended, to conform with and to carry out the certified LUP. (P.R.C. Sections 30512 and 30513)
- (10) Where required pursuant to Section 30241.5 of the Coastal Act, a determination of the viability of existing agricultural uses, including the economic feasibility of the conversion of the agricultural land to other uses.

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| EXHIBIT NO. | 6 |
| APPLICATION NO. | n.Co. LCP Amend. |
| | 1-96(Major): Site B |
| LCP Amendment Application | |

CALIFORNIA COASTAL COMMISSION

NORTH COAST AREA

45 FREMONT, SUITE 2000

SAN FRANCISCO, CA 94105-2219

(415) 904-5260

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| EXHIBIT NO. 7 |
| APPLICATION NO. Men. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Correspondence |

6 June 1996

Gary Pedroni
 County of Mendocino
 Department of Planning and Building Services
 Courthouse
 Ukiah, CA 95482

RE: Mendocino County LCP Amendment No. 1-96 (Major)

Dear Gary:

We have reviewed the County's submittal of the above-referenced LCP Amendment and find the submittal to be incomplete regarding Site B, Mendocino Coast Properties, GP 12-93/R 12-93, as described below.

In our Application for Local Coastal Program Amendment form, No. (6) of the Submittal Requirements requires that "If the amendment involves a change in density or public service provision," the applicant must submit "an analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the change, and how the change can be found consistent with the policies of Chapter 3 and 6 of the California Coastal Act." The submitted staff reports provide this information for Part A of the amendment. However, regarding Site B, the staff report submitted recommends denial of the proposed change of density, and does an analysis of why the proposed change is not consistent with the policies of the County's LCP pertaining to geologic hazards. While the Planning Commission recommended denial of the project to the Board of Supervisors, the Board approved the project, but provided no findings to support this approval, and no separate analysis as to why the project is consistent with the policies of Chapter 3 and 6 of the Coastal Act has been provided with the LCP amendment application. Therefore the submittal is thus incomplete. Please submit an analysis of why the part of the amendment involving Site B is consistent with the policies of Chapter 3 and 6 of the Coastal Act. Among the particular Coastal Act policies that should be addressed is the geologic hazards policy found in Section 30253 of the Coastal Act.

Further, Exhibit No. 3 includes a detailed legal opinion by Frank Zotter, Jr., Deputy County Counsel regarding the "takings" issue, and concludes that the County's denial of the requested land use designation change from OS to RR-5:PD would not constitute a "takings." However, the Board apparently approved the proposed change based on the opinion that to deny the change would constitute a takings. No analysis or findings to this effect have been included with the County's submittal. Please clarify what the Board found with regard to the takings issues and why.

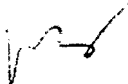
GARY PEDRONI

Page Two

Commission staff finds the submittal for Site A, Flanagan, GP 13-95/R 15-95 to be complete, although we note that County staff, in its findings for approval of the proposed change, does an analysis as to why the change is consistent with the County's LCP, when the basis for approval of a change to the LUP must be its consistency with the policies of the Coastal Act. For future LCP Amendments, please keep this in mind. In any case, since the submittal for Site A is complete, we will process that portion of the LCP Amendment separately, and intend to schedule it for the July 1996 Commission meeting, with a recommendation of approval. We will schedule the Site B portion at some future date, once the submittal is complete.

If you have any questions, please don't hesitate to call. Thank you.

Sincerely,



JO GINSBERG
Coastal Planner

cc: Ray Hall
Alan Falleri

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| EXHIBIT NO. | 7 |
| APPLICATION NO. | Gen. Co. LCP Amendment 1-96 (Major): Site B |
| Correspondence | |

RAYMOND HALL
DIRECTOR



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JUL 01 1996

TELEPHONE
707-463-4281

FAX #
707-463-5709

CALIFORNIA
COASTAL COMMISSION

**COUNTY OF MENDOCINO
DEPARTMENT OF PLANNING AND BUILDING SERVICES**

MAILING ADDRESS: COURTHOUSE
UKIAH, CALIFORNIA 95482

June 28, 1996

Jo Ginsberg, Coastal Planner
California Coastal Commission, North Coast Area
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

RE: Mendocino County LCP Amendment No. 1-96 (Major)
Site B, Mendocino Coast Properties, #GP 12-93/#R 12-93

Dear Jo:

In your letter to our office dated June 6, 1996, you requested additional information pertaining to Site B, Mendocino Coast Properties.

Attached you will find a memorandum from H. Peter Klein, County Counsel, dated June 21, 1996, which explains the legal basis for the County Board of Supervisors action with respect to this project. Should you require additional information in order to make this portion of the submittal complete, please let me know.

I have also enclosed a mailing list that may have been omitted in our original submittal. Should you have any questions, please contact me directly.

Sincerely,

Gary Pedroni, Planner II

cc: Ray Hall, Director
Alan Falleri, Chief Planner
#GP 12-93/#R 12-93

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| EXHIBIT NO. | 8 |
| APPLICATION NO. | Men.Co.LCP Amendment |
| | 1-96 (Major): Site B |
| | Correspondence |

MENDOCINO COUNTY

MEMORANDUM

TO: H. Peter Klein, County Counsel

DATE: 6/14/96

FROM: Gary Pedroni, Planner II

SUBJECT: General Plan Amendment #GP 12-93/#R 12-93; (Moores), #95-553

In order to continue the planning review of this amendment at the State level, the Coastal Commission staff has requested that the County submit a written legal opinion which relates to the Board of Supervisors decision relative to this case.

On March 11, 1996, the Board of Supervisors adopted Resolution No. 96-044, tentatively approving #GP 12-93/#R 12-93. Their action was based primarily upon your verbal opinion pertaining to the issue of "takings". Your opinion differed from the written opinion of Frank Zotter (#95-553).

Both the County Planning Commission and planning staff recommended project denial based upon numerous issues such as anticipated negative environmental impacts, inconsistencies with the Local Coastal Plan, etc. In taking their action on March 11, 1996, the Board did not attempt to justify their action with findings which explain how their approval is consistent with the Coastal Act. Instead, they considered the takings issue to be the primary concern.

Coastal Commission planning staff intends to delay review of this case until the legal basis relative to "takings" is fully explained as this issue appears to be "driving" the case.

In summary, please provide our office with the requested opinion as soon as possible. We will then forward the information to the Coastal Commission staff and request that they proceed with processing this application.

cc: Ray Hall
Alan Falleri
#GP 12-93 - Mendocino Coast Properties

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| EXHIBIT NO. | 8 |
| APPLICATION NO. | Moore Co. LCP Amendment 1-96 (Major): Site B |
| Correspondence | |

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| EXHIBIT NO. 8 |
| APPLICATION NO. Men. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Correspondence |

MENDOCINO COUNTY MEMORANDUM

TO: GARY PEDRONI, Planner II, Planning & Bldg. Serv. June 21, 1996

FROM: H. PETER KLEIN, County Counsel *PK*

RE: GP AMENDMENT #GP 12-93/#R 12-93; #96-523

We reply to your memo dated June 14, 1996 relative to the above. You have indicated that Coastal Commission staff intend to delay review of this case until the legal basis relative to "takings" is explained.

ISSUE:

Does the refusal to grant the owner's request to rezone property from OS constitute a taking?

ANSWER:

See below.

LEGAL RESEARCH AND ANALYSIS:

My analysis of the "taking issue" is limited to the scope of Frank Zotter's opinion and the facts presented to the Board of Supervisors.

1. Voluntary OS designation is irrelevant.

The argument was made that an earlier consent to an Open Space designation, fixes the use of that property as Open Space despite the owner's subsequent objection. I believe this argument would only be valid if it can be shown that the Open Space designation was part of a "quid-pro-quo" in obtaining an earlier agency approval for development, such as the imposition of an Open Space easement as a condition of a development permit (assuming *Nollan* requirements are met).

In the Moores' application, there was no evidence that the property owner received a development right in exchange for the Open Space designation. The fact that the property owner received a tax break for keeping the land in Open Space is irrelevant to this issue because his inducement for placing the property into Open Space did not confer a bargained for development right. The tax

break received by the property owner exists only so long as the property in Open Space, during that time the public also benefited from that designation.

In essence, what the Moores did by placing the property in an Open Space designation was exercise of a private property owner's right to effectively create an "open space easement" similar to those contained in Chapter 6.5 and Chapter 6.6 of the Government Code (Government Code §§ 51050 through 51097) and in exchange the owner received a tax break during the duration of the "easement." Open Space Easements under these Chapters are not imposed upon a landowner but are created by a voluntary act of the landowner and the County and exist so long as the County and landowner agree the easement is to remain in effect.

2. Taking v. Non-Taking.

Having a "legitimate state interest" in designating some parcels Open Space does not necessarily insulate a public agency from being liable for damages. For example, a public agency may have a legitimate interest in providing parks for its inhabitants but that doesn't allow them to take private property for those purposes without compensation. To require the Moores property to remain in an Open Space zone, without the owners' consent, for the "legitimate state interest" of "providing aesthetic enhancement to surrounding property, providing a haven for wildlife, affording relief from the monotony and sprawl of development, acting as a buffer between developed property and wildlands" has the effect of inversely condemning his property as a park triggering the need to pay compensation. Clearly, as long as a private property owner consents to Open Space zoning, without public agency compulsion, there is no taking and no liability for a taking.

In the *First English* case, on remand to determine whether the county ordinance (which was a safety measure to prohibit development on flood prone flatland along a creek in a mountain canyon) amounted to an unconstitutional taking, the court held that the ordinance did not deny all use of the property and substantially advanced the state's interest in public safety by lessening the likelihood of death and injury during flooding. *First English Evangelical Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353.

In *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, the court held that when a regulation denies an owner all economically beneficial or productive use of his or her land, the agency is categorically required to pay compensation without reference to the public purpose behind the regulation. Nonetheless, the court held that compensation is excused if the regulation is justified by background principles of state nuisance or property law, i.e., no

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| EXHIBIT NO. 8 |
| APPLICATION NO. Men.Co.LCP Amendment |
| 1-96 (major): Site B |
| Correspondence |

compensation is necessary if the use would have been prohibited by law principles of nuisance or property law at the time the property was purchased.

The *Lucas* court provided guidelines to assist courts in the application of its rule that compensation is not required if the uses prohibited are also prohibited under nuisance law or were part of the owner's title or estate. Among the factors to be analyzed are: "the degree of harm to public lands and resources, or adjacent private property, posed by claimant's activities, the social values of the claimant's activities and their suitability to the locality in question and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike." 120 L.Ed.2d at 822. The fact that a particular use has long been engaged in and that other similarly situated landowners are permitted to continue the use denied to the claimant are also relevant factors because they imply the lack of any common-law prohibition. The court also acknowledged that changed circumstances or new knowledge can justify the prohibition of uses that were previously permissible. This is especially important in matters relating to rapidly developing scientific research.

It should be noted that the regulation in *Lucas* was a statute imposing setback requirements which had the effect of preventing Lucas from erecting any permanent habitable structure on the lots. At the time he acquired the lots, there was no legal restraint on the right to build. Both the lower courts and the supreme court assumed that the lots were rendered valueless by the regulation. The *Lucas* court did not rule on the issue of when a property becomes valueless because of state imposed restrictions, this issue will have to await future decisions. CEB California Zoning Practice (1996) pp. 58-81.

First English and *Lucas* lead to the conclusion that the only justifiable restriction prohibiting a single family dwelling on the Moores' property would be the finding that a health and safety problem akin to a common law public nuisance prevents development of that type. Therefore, development limitations such as those based on geotechnical considerations would be valid even to the degree of preventing the building of a residence provided the hazard can only be addressed in that manner and to that degree. It was my understanding that even after application of all health and safety development limitation factors, it would probably still result in a parcel which could accommodate a residence. Board Resolution No. 96-044 requires development constraints to be examined prior to the granting of any permits for future development.

Continued imposition of the Open Space zone in the face of owner opposition for the reasons enumerated in opinion #95-553 and referenced above

(aesthetics, wildlife haven, development buffer) do not fit within the common law nuisance concept of *Lucas*. Additionally, the Open Space designation was not applied to the property prior to acquisition by Moores, and similarly situated owners in Irish Beach are permitted to continue a use denied to the Moores (a single family dwelling). Given these factors, I believe continuation of the Open Space designation on this parcel would, in all probability, constitute an unlawful taking of private property and potentially subject the governmental entity imposing this condition to the payment of damages.

HPK/dl

cc: Honorable Board of Supervisors
Clerk of the Board
County Administrative Officer
Frank Zotter, Jr., Chief Deputy County Counsel

File: Planning

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| EXHIBIT NO. 8 |
| APPLICATION NO. Gen. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Correspondence |

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JUL 21 1995

July 20, 1995
PLANNING & BUILDING SERVICES
MENDOCINO CO. 95622

MENDOCINO COUNTY MEMORANDUM

TO: Gary Pedroni, Planning & Building Services
FROM: Frank Zotter, Jr., Deputy County Counsel JZ
RE: Takings, Coastal Access Issues, and Project Conditions related to General Plan Amendment Application #GP 12-93/#R 12-93 (William Moores); #95-553

You have asked for an opinion regarding the following factual background and question:

William Moores is seeking a general plan amendment to change the land use classification and a rezoning of Lot 1, Unit 1 of the Irish Beach subdivision. The project, if approved, would change the land use classification from Open Space to Rural Residential 5-acre minimum, Planned Development, so that a house could be constructed on the site. The property was originally zoned R-3, Multifamily Residential, in 1965 at the time that the subdivision creating the parcel was originally processed.

At some time in the late 1960s or early 1970s, Mendocino Coast Properties (the nominal owner of the parcel) leased the parcel to a local private nonprofit group known as the Irish Beach Improvement Club (IBIC), which was interested in acquiring the lot in order to build a stairway to the beach lying to the north of the subject parcel. The IBIC, with the cooperation of the landowner, successfully accomplished the rezoning of the property to its current Open Space designation, which also lessened the tax burden on the parcel. The IBIC, however, never constructed the staircase because of concerns about potential premises liability.¹ According to the applicant, the IBIC gave up its lease with Mendocino Coast Properties in 1989.

Planning staff currently does not know how often this parcel may have been used by the public during the time that the IBIC leased the land. As mentioned, the IBIC considered a staircase trail to the beach using this parcel. There are more than twenty coastal plan policies which emphasize the need to establish, develop, and maintain public beach access. Coastal Act § 30212, subdivision (a) states in part that public access "shall be provided in new development projects" Because a house could be developed where legally one cannot currently be built, this General Plan Development would fall under that section.

Local Coastal Plan policy 4.11-3 relates specifically to Irish Beach. The policy refers to a potential trail adjoining the southern boundary of the Irish Beach subdivision, immediately north of Irish Gulch. This policy reads as follows:

¹The foregoing information was included in the Moores' application material and has not been verified with the IBIC.

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| EXHIBIT NO. 8 |
| APPLICATION NO. Men. CO. LCP Amendment |
| 1-96 (Major): Site B |
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Access shall be provided in accord with offer to dedicate right of pedestrian access over road to the beach and the developer's agreement to improve and dedicate a 10-car parking lot as required by Appeal No. 51-78. Caltrans shall be requested to provide a parking area within their easement east of Highway 1 at Irish Beach. Unless access and parking have been secured in accordance with this policy, an offer to dedicate pedestrian access to the beach, consistent with Policy 3.6-5, shall be required as a condition of development at Irish Beach. Parking shall be obtained either as provided in Policy 3.6-5, through acquisition, or through agreement with Caltrans.

To staff's knowledge, this access and parking east of Highway 1 have not been secured and developed at this time, and therefore, should this project move forward, it may be appropriate to seek an alternative beach access as stated in this policy.

County Planning staff obtained a copy of Appeal No. 51-78 from the Coastal Commission staff. This case involved the Coastal Commission's approval of the construction of two single family residences in Unit 7 of Irish Beach, located east of Highway 1. The appeal was made by the Sierra Club, and centered on the issue of public access to the beach. The file was not complete, however, because some exhibits were missing. A preliminary review seems to indicate that, as a condition of approval for the construction of two single family homes in Unit 7, public access to the beach and "along the beachfront" would be provided. The condition refers to potential lease agreements between IBIC and Mendocino Coast Properties.

QUESTION NO. 1:

Would a County denial of the applicant's request to change the property's land use designation from OS to RR-5:PD result in a "taking" of the property?

ANSWER NO. 1:

No.

ANALYSIS:

In order to respond to this question, and to the questions related to access issues that follow, we will refer to prior opinions nos. 93-379 (addressed to Linda Ruffing), 94-153 (Dutton), and 94-173 (Garrison), the latter two addressed to Gary Berrigan. These opinions, we believe, address many of the foundational legal principles on which we will base the answer to these questions; setting forth those principles at length here would be duplicative. We attach copies for reference, and will quote from those opinions where necessary.

As you can see from opinion 93-379, the three most important decisions with respect to whether a government action constitutes a taking are *First Lutheran Church v. County of*

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| EXHIBIT NO. 8 |
| APPLICATION NO. Men. Co. LCP Amendment 1-96 (MaJOR): Site B |
| Correspondence |

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Los Angeles, 482 U.S. 304, 96 L.Ed.2d 250 (1987) (*First Lutheran I*); *Nollan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677; and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L.Ed.2d 798 (1992). *Nollan* is primarily relevant to the access questions, while *First Lutheran I* and *Lucas* are of primary importance in answering this question.²

First English I is significant only because it mandates that, once it has *already* been determined that a taking has occurred, the government must pay financial compensation. *Lucas* involved the rare situation in which the state courts had already concluded that all economic value of the property had been destroyed. Anything short of a "*Lucas* wipeout," however, will not require compensation be paid to the owner. Furthermore, if the property cannot be developed because the project would amount to a nuisance, there is still no compensation due the owner. See, quotation from *Lucas* at 821-822, on p. 4 of opinion #94-153.

In this situation there are two independent reasons why the county's failure to change the land use classification/rezone the property would not be a taking. First, the property still has economic value, notwithstanding the OS designation. Second, and perhaps most significantly, the current zoning was enacted with the consent—even the cooperation—of the property owner.

With respect to the first issue, under *Lucas* a taking occurs when the landowner can demonstrate that 1) the application of general zoning laws to his property do not substantially advance a legitimate state interest; or 2) the laws deprive him of substantially all economically viable use of his land. In *Lucas*, as noted in our earlier opinions, the Supreme Court simply assumed that the South Carolina courts had already found that the state's prohibition on building on barrier islands had deprived him of all economically viable uses. It did not independently set forth a standard for use in deciding when such a "wipeout" has occurred.

The OS zoning in this case does not trigger either of these requirements for a "taking." First, there is a legitimate state interest in designating some parcels of land as open space. Property left in its natural state provides aesthetic enhancement to surrounding property, provides a haven for wildlife, affords relief from the monotony and sprawl of development, and acts as a buffer between developed property and wildlands. Its presence in an area like Irish Beach can also enhance the monetary value of surrounding developed parcels because open space increases the beauty and desirability of those parcels that are developed.

As to the "deprivation of all economically viable use," the only evidence of this is

²*Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed.2d 304 (1994), decided since our three opinions were the *Nollan* decision, and adds little of substance that is relevant here.

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| EXHIBIT NO. 8 |
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Mr. Moores' assertion that the covenants, conditions and restrictions (CC&Rs) of the Irish Beach subdivision preclude any use of this parcel except as a residence. While this may be the case, that restriction is imposed upon the property by the CC&Rs—which are essentially private agreements—not by the OS zoning. The issue, however, is whether the *County regulation* deprives the owner of all economically viable use, not whether that regulation in combination with contractual obligations (over which the County has no control) does so.

In *Long Beach Equities v. County of Ventura* (1991) 231 Cal.App.3d 1016, the Court of Appeal discussed the meaning of "economically viable use." Quoting from an earlier case, the court said:

"The meaning of [economically viable use] is elusive, but the general rule is that 'the existence of permissible uses determines whether a development restriction denies a property holder of economically viable use of his property.'" [Citation omitted.][¶] The denial of the highest and best use does not constitute unconstitutional taking of the property. [Citation omitted.] Even when there is a very substantial diminution in the value of land, there is no taking.

Long Beach Equities, supra, 231 Cal.App.3d at 1036.

Long Beach Equities concludes by pointing out that "the burden of proof is on the applicant, who faces an uphill battle." *Lucas* itself concurs, noting in a footnote that, ". . . in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full Takings law is full of these "all-or-nothing" situations." *Lucas, supra*, 120 L.Ed.2d at 815, n. 8, emphasis in original.

Ordinarily, therefore, the possibility of recreational uses would preclude a finding that the property's zoning—even as open space—amounts to a taking. That was the result, ironically enough, when *First Lutheran I* came back before the California Court of Appeal to determine whether the Church actually had suffered a compensable loss. In *First Lutheran Church v. County of Los Angeles* (1989) 210 Cal.App.3d 1353 (*First Lutheran II*), the Court of Appeal concluded that the County of Los Angeles owed the Church nothing. First, the County's interim ordinance (which banned construction on the Church's property for two years) was not a taking because the Church could continue to use the property for recreation (an historic use of the property) while the County studied the risk of future floods. Second, whatever uses *were* denied was not compensable because the property posed a demonstrated public safety hazard.

If Mendocino Coast Properties finds that the CC&Rs prevent all use of the property, even for recreational use, then its remedy is to seek an amendment of those agreements to permit recreational use on parcels that are designated as open space, following the procedure spelled out in the CC&Rs. The restriction on alternative uses is, we reiterate, the consequence of *private agreements*, not the County's OS zoning.

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| EXHIBIT NO. | 8 |
| APPLICATION NO. | |
| Men. Co. LCP Amendment | |
| 1-96 (Major): Site B | |
| Correspondence | |

A second reason to find that there would be no taking is that, according to your recitation of the facts, the rezoning approximately 25 years ago was accomplished *with the owner's consent*, in part to reap the benefit of tax savings. One consequence of the holding in *First Lutheran I*, after all, is that if the OS zoning is a taking now, it has also been one ever since the rezoning to OS a generation ago. The holding in that case covers temporary, as well as permanent, takings.

Because the property owner consented to this change, however, he is not in a position to complain about that change; there is a maxim of jurisprudence that states, "He who consents to an act is not wronged by it." Civil Code § 3515. It would be ironic if Mendocino Coast Properties has derived tax benefits over the years from its voluntary rezoning, only to now to challenge the County for acquiescing in that rezoning that the owner requested.

QUESTION NO. 2:

With respect to public access, is it possible that while IBIC leased the property that "prescriptive rights" for public access across the property were developed?

ANSWER NO. 2:

Yes, although determining whether such rights exist would require a fairly extensive investigation that would also hinge on the intent of the landowner. It would also require a lawsuit to enforce those rights against the property owner if the owner will not recognize them by granting or acceding to access conditions under this permit.

ANALYSIS:

This question is answered by the discussion in opinions 94-153 and 94-173. As you can see from those opinions, especially 94-153, there is always the possibility that the use of property by non-owners would have created an implied dedication of the property. As we advised Mr. Berrigan last year, whether an implied dedication exists is largely a factual question, and not a legal question per se. The existence of trails and the testimony of people who claim to have used the property without restriction by the owner would tend to establish an implied dedication.

On the other hand, as we stated at pages 5-6 of #94-153, "Evidence that the residents of the park were permitted to come on the property might also raise the inference that the owner of the park and/or its residents were individually given licenses by the owner . . . which is a different kind of permission to pass, . . . revocable at will. This is similar to Civil Code § 1008 (which prevents business parking lots from becoming public access after five years), and would rebut the possibility of public access." Mr. Moores makes just such a claim in his letter of June 22, 1995 addressed to you (*See*, comment (1) on page 1 of his iragraph). Obviously, the conflicting evidence will have to be sorted out as

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I recommended to Mr. Berrigan last year.

QUESTION NO. 3:

May the County rely on LCP Policy 4.11-3 in order to require public access on Moores' property in association with this application, if the application is ultimately approved and allows construction of only one single-family residence?

ANSWER NO. 3:

The County could impose a public access requirement either to protect public views that might be blocked by the project, or otherwise if a nexus can be established.

ANALYSIS:

The answer to this question is essentially the same as that set forth in opinion no. 94-173. *Nollan* would prohibit an access condition that did not have a nexus between the "harm" that the project would create and the mitigation that an access condition would provide. On the other hand, if there *were* a nexus between an environmental impact and the mitigation (for example, if the access condition protected pre-existing public views or to mitigate the loss of that view, or to use access conditions that already exist under an implied dedication) then such an access condition would be lawful).

It is not entirely clear whether Coastal Plan policies themselves can justify imposition of access conditions over the objection of a landowner. On the one hand, if someone purchased property since those policies went into effect, there is an argument that the pre-existing policy was a "burden" on the land at the time of the purchase, and that the owner bought the property "subject to" the access condition. The County would not be "taking" anything; the owner simply did not acquire the property free of the access conditions—just as people who buy an historic building know (or should know) at the time of purchase that they own the building subject to the community's interest in historic preservation.

A countervailing argument is that *Nollan* places a special requirement on conditions that require outright dedication of land, or dedication of an easement. These are "physical takings"—the landowner is actually being forced to give up some of their real property. By contrast, the County would have more flexibility in imposing so-called "regulatory takings," such as deciding to limit where on the property the owner could build or how big a house he can build. Coastal Plan policies that do not meet the nexus test of *Nollan* would therefore be invalid. Given that *Nollan* dealt with the California Coastal Act itself, we believe that the most prudent approach would be to analyze each condition for a nexus before imposing it—Coastal Plan policies or not.

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QUESTION NO. 4:

Does the determination made in consideration of Coastal Commission Appeal #51-78 indicate that a trail was promised as a condition of past development of two single family residences in Unit 7?

ANSWER NO. 4:

As with opinion no. 93-379, we think that the conditions imposed on past applications are relevant to this application only to provide general guidance. Therefore, in line with our response to Question No. 3 above, the conditions to be imposed on this development, especially in light of *Nollan*, should be determined outside the scope of the strict requirements of the Coastal Plan policies.

ANALYSIS:

As just noted in response to Question No. 3, where physical takings are involved, the cautious approach would be to analyze the possible dedication requirements mainly under the *Nollan* criteria, and not by strictly following the policies. Otherwise, you run the risk of imposing a condition that (as in *Nollan* itself) may comply with the access policies but not meet the nexus test and be invalid.

Furthermore, as in opinion 93-379, the fact that, in similar applications in the past, the Coastal Commission may have imposed access requirements is not decisive here. Coastal Commission Appeal #51-78 was, of course, decided many years before *Nollan*, and Coastal Plan policy access requirements at that time were presumptively valid. After *Nollan*, these cases (even though cited in Policy 4.11-3) at best provide general guidance about when the access policies may be legitimate. In opinion no. 93-379, you will note, we concluded that a condition of the 1981 development on that subject parcel could not be enforced, even though it would have been a valid condition in 1993 if the application had been finalized in 1981.

Even if the trail was "promised" as a condition of the 1978 application, if it was never constructed, the lapse of time and the intervening change in the law requires that we reconsider that condition now. Such a trail would have to meet the nexus test, and it would not do so if the trail was a condition imposed as the result of a development permit granted as to a completely different parcel. Under the reasoning of *Nollan*, we do not believe that this trail, even if required in 1978, would be a legitimate condition today. Thus, a trail could only be imposed as a consequence of granting this application, according to the nexus test, and not because of the 1978 requirement.

FZ/dl

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| EXHIBIT NO. 8 |
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| 1-96 (Major): Site B |
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CALIFORNIA COASTAL COMMISSION

NORTH COAST AREA

EUREKA, SUITE 2000

SAN FRANCISCO, CA 94105-2219

(415) 904-5260



31 July 1996

Gary Pedroni
 County of Mendocino
 Department of Planning and Building Services
 501 Low Gap Road, Room 1440
 Ukiah, CA 95482

RE: Mendocino County LCP Amendment No. 1-96 (Major): Site B, Mendocino Coast Properties

Dear Gary:

We are writing regarding the County's submittal of LCP Amendment No. 1-96 (Major). In our letter of 6 June 1996 I indicated that the County's submittal for Site A, Flanagan, GP 13-95/R 15-95, was complete, but the submittal for Site B, Mendocino Coast Properties, GP 12-93/R 12-93, was not complete. We therefore separated the two portions for separate processing, scheduled Site A for a Commission hearing, and requested additional information necessary before the application for Site B could be considered complete.

The proposed LCP amendment for Site B would change the land use classification from Open Space to Rural Residential-5 acre minimum, Planned Development, so that a house could be constructed on the site. In our 6 June letter, we noted that our Application for Local Coastal Program Amendment requires that, if the amendment involves a change in density or public service provision, the applicant must submit an analysis of potentially significant adverse cumulative impacts on coastal resources and access, due to the change, and how the change can be found consistent with the policies of Chapter 3 of the Coastal Act. This information is also specifically identified in the information requirements for LCP Amendments delineated in Section 13552 of the Commission's regulations. In addition, since the Board of Supervisors appears to have approved the proposed amendment based on the opinion that to deny the change would constitute a takings, we requested clarification as to what the Board found with regard to the takings issue and why.

In your response to our letter, dated 28 June 1996, you attached a legal memorandum from Peter Klein analyzing whether the owner's request to rezone the property from open space would constitute a taking. However, you did not include in your response an analysis of how the proposed change is consistent with the Coastal Act. Our two main areas of concern regarding Coastal Act

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GARY PEDRONI
Page Two

consistency are geologic hazards and public access. The Board of Supervisors did not provide information regarding why they believe the proposed change in density is consistent with the policies of the Coastal Act pertaining to geologic and fire hazards. In particular, we are interested in obtaining information regarding the stability of the driveway with regard to geologic hazards. The geologic survey and addendum prepared by Earth Science Consultants indicate that a building setback of 75 feet from the top of the bluff would be necessary to avoid geologic hazards. However, no analysis is included discussing the safety of the access road, the effects of bluff retreat on the road, and what impacts to the slope would result from any grading and road widening necessary to improve the driveway such that it could serve a residence consistent with the road standards and fire safety standards imposed by Public Works and CDF. Please provide such an analysis, and include copies of any available geotechnical reports that may have been prepared for the site in the past by geotechnical experts.

Furthermore, we need to know what are the minimum road standards required by both Public Works and CDF to serve a residence at the site. Without this information, we cannot evaluate how much road improvement, grading, etc. will be necessary to construct a road that meets County and State fire safety standards, and if it is feasible to construct such a road down the bluff face at the site.

Regarding public access, the record submitted with the proposed LCP Amendment includes specific references to the existence of potential prescriptive rights that may have developed across the property during the time the Irish Beach Improvement Club leased the property. Consequently, please provide an analysis of how the proposed LCP Amendment would impact any potential prescriptive rights which may exist. This analysis should specifically include (1) evidence the site was ever posted with no trespassing signs, and, if so, where, when, for how long, and with what specific language; (2) evidence a notice was ever recorded with the County to prevent prescriptive rights from accruing; (3) evidence the site was ever fenced or gated to prevent public use, and, if so, where, when, for how long, and in what manner; (4) evidence of the existence and use of trails; and (5) evidence that residents were permitted to come on to the property.

If you have any questions, please do not hesitate to call. Thanks.

Sincerely,



JO GINSBERG
Coastal Planner

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| EXHIBIT NO. | 9 |
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EXHIBIT NO. 10

APPLICATION NO.
Men. Co. LCP Amendment

1-96 (Major): Site B

Correspondence



TELEPHONE
707-463-4281

FAX #
707-463-5709

COUNTY OF MENDOCINO
DEPARTMENT OF PLANNING AND BUILDING SERVICES

501 LOW GAP ROAD, ROOM 1440
UKIAH, CALIFORNIA 95482

December 13, 1996

Jo Ginsberg
California Coastal Commission, North Coast Area
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

RECEIVED
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CALIFORNIA
COASTAL COMMISSION

RE: Mendocino County LCP Amendment No. 1-96 (Major): Site B, Mendocino Coast Properties, #GP 12-93/ R 12-93; Supplemental Information

Dear Jo:

Our office has completed a review and analysis of your letter dated July 31, 1996. You raised several issues in your letter concerning that portion of the County's submittal pertaining to LCP Amendment No. 1-96, Site B.

For reasons as discussed below, we request that you carry this application forward to the Coastal Commission for a decision regarding project approval or denial. If you do not concur with our position that the submittal regarding this case is complete, then please except this correspondence as a "letter of appeal" regarding the issue of project completeness and schedule this item for the soonest available Coastal Commission hearing.

The rationale which we feel qualifies this submittal as complete is summarized below. The order which the issues are addressed roughly corresponds to the order of issues as they appear in your letter of July 31, 1996. In addition, we believe that much of the information that you have requested is included in the 168 page project submittal which you received several months ago.

1. County Board of Supervisor's Findings - On June 28, 1996, I mailed you a copy of a legal opinion from our County Counsel regarding this project. As is explained in Mendocino County Counsel's opinion #96-523 (Klein, 6/21/96), the Board's overriding concern with respect to project approval centered upon the "takings issue" and its' relevance to this case. Our Counsel's opinion and direction to the Board was that "continuation of the Open Space designation on this parcel would, in all probability, constitute an unlawful taking of private property...".

At that point in the public hearing, the Board made a motion for project approval without an in-depth discussion and associated findings related to the proposed density increase and its effect upon coastal resources, access, etc. The County's opinion is that the constitutional issues of this case overwhelm the specific potential environmental concerns at this stage of project development. It is recognized that further analysis of potential environmental impacts may be necessary in association with future development applications such as a coastal development permit.

2. Change in Density/Development - Many of the issues raised by this case are obviously open to significant amounts of interpretation. Most significantly, it can be argued that this project does not represent a "density increase". The current Open Space zoning designation would allow Employee Caretaker Housing upon approval of a use permit. If approved, the proposed RR-5 zoning would allow one (1) single family residence. There would not be the potential for a subdivision. If in fact this project would be considered a 'density increase', the cumulative impact from one (1) dwelling would be negligible.
3. Geologic Hazards/Fire Hazards/Site Access - The County's position is that the level of analysis included in the submittal associated with the access road, bluff retreat, and driveway standards is sufficiently detailed to allow a decision to be made for a Coastal Element amendment. It is recognized that more detailed analysis may be required at a more specific development stage.

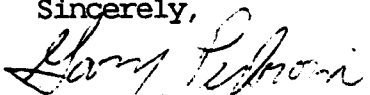
The County's Public Works Department does not have specific driveway standards. The California Department of Forestry refused to make comment pertaining to the driveway and what standards would apply to the driveway should a residence be proposed on this property. It is my understanding that CDF clearance or waiver would be required prior to approval of a building permit for a residence on this site.

4. Public Access - Depending upon the results of the interpretation of whether or not this project represents a density increase as discussed in Item #2 above, the question of prescriptive public access should not be applicable at this stage in the planning process. The Coastal Act states that "development" shall not interfere with the public's right of access. Should this application be approved, it may be necessary to continue with a more thorough analysis of the public access/prescriptive right issue in association with the planning review of a coastal development permit.

Enclosed with this letter is a packet of additional information submitted by the project applicant. This information is intended to supplement the original submittal package and shed additional light upon the issues raised to date. Much of this information was included in the original submittal either in an identical or similar format. However, at the request of the applicant, the information is included here.

In summary, the County's position is that the level of specificity contained in the project submittal is appropriate for this stage of the planning process and is adequate for the Coastal Commission to consider and render a decision regarding project approval or denial. We request that this case be scheduled for Coastal Commission review as soon as possible. Thank you for your consideration. Should you have any questions, please contact our office.

Sincerely,



Gary Pedroni, Planner II

cc: #GP 12-93/R 12-93
William Moores

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| EXHIBIT NO. | 10 |
| APPLICATION NO. | Men.Co.LCP Amendment |
| | 1-96 (Major): Site B |
| Correspondence | |

APPENDIX X

Preliminary Geotechnical Evaluation
January 23, 1989

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| EXHIBIT NO. 11 |
| APPLICATION NO. Men. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Geotechnical Evaluation 1989 |

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SOIL • FOUNDATION AND GEOLOGICAL ENGINEERS

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| EXHIBIT NO. | 11 |
| APPLICATION NO. | Men. Co. LCP Amendment |
| | 1-96 (Major): Site B |
| | Geotechnical Evaluation 1989 |

P. O. BOX 3410/SAN RAFAEL CALIFO

January 23, 1989

Job No. 892188

William Moores
3880 Sleepy Hollow
Santa Rosa, CA 95404

RE: Preliminary Geotechnical
Evaluation
Lot 28, Unit 1,
Irish Beach Development
Mendocino County, California

This letter confirms that on August 12, 1988, we performed a brief preliminary visual geotechnical observation at the above property.

We understand that it is desired to construct a single family residence within the approximately level apparent natural bench area within the property, as indicated to us by Gordon Moores.

The approximately level bench area appears to be a natural topographical feature and possibly a remnant of a previous marine terrace. The level bench area appears to be about 80 feet to 100 feet in width. Upslope from the bench area, we observed a steeply sloping hillside area that appears to be about 125 feet in height, at a degree of inclination of about 1 1/4:1, and then at the upper portion the slope appears to become more gentle, with a degree of inclination of about 3:1. The steep hill above the house site location appeared to be brush covered at the time of our observation. Downslope from the bench area, we observed another steeply sloping apparent natural hillside area, with a degree of inclination of about 1 1/4:1, and then a very steep bluff area that appears to be on the order of about 30 feet, and then the beach and ocean area.

Based upon our preliminary geotechnical evaluation, it is our preliminary opinion that it would be feasible to construct a

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Lot 28, Unit 1 - Irish Beach

Page 2 - January 23, 1989

single family residence within the level bench area from the conceptual geotechnical engineering standpoint, provided certain restrictions and limitations were considered.

We recommend that the proposed residence be located approximately in the central portion of the level bench area so as to be relatively well away from the steeper slope area upslope, and also relatively well away from the steeper slope area below. It is possible that a slough-catchment wall, designed for a relatively high lateral earth pressure, could be required between the proposed house and the steeper slope area above, with such a slough wall probably being on the order of about 4 feet to 6 feet in height.

If it is decided to proceed with the proposed residential development of Lot 28, then we should perform a more detailed geotechnical observation and subsurface investigation, including representative exploration test pits in the proposed house building area so as to confirm our preliminary conclusions.

We trust this correspondence supplies the information you require.

Yours very truly,
EARTH SCIENCE CONSULTANTS



Jay A. Nelson
Principal Geotechnical Engineer
Civil Engineer - 19738, expires 9/30/89
Geotechnical Engineer 630

2 copies submitted

2 cc: Mendocino Coast Properties at Irish Beach
Star Route
Manchester, CA 95459
Attention: Gordon Moores

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| EXHIBIT NO. | 11 |
| APPLICATION NO. | Men.Co.LCP Amendment |
| | 1-96 (Major): Site B |
| Geotechnical Evaluation | 1989 |

EARTH SCIENCE CONSULTANTS
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P. O. BOX 3410/SAN RAFAEL/CALIFORNIA 94912-3410/ (415) 383-0935

February 23, 1995

Job No. 952188

William Moores
3880 Sleepy Hollow
Santa Rosa, CA 95404

RE: Bluff Retreat Rate
Lot 28 - Unit 1, Navarro Way
Irish Beach Development
Mendocino County, California

INTRODUCTION

This correspondence provides our opinion with respect to the bluff retreat rate at the above site. Our work was performed in response to the letter dated February 6, 1995, from the County of Mendocino, Department of Planning and Building Services, by Planner Gary Pedroni, and a supplemental telephone conference with him on February 22, 1995, as well as our extended telephone conferences with William Moores of February 10 and 19, 1995.

Our scope of work was to determine the maximum bluff retreat rate based upon information currently available to us, consisting of aerial photos of various ages of the area as well as copies of older topographical maps in our files. No new site work or subsurface investigation was within our scope of work at the present time. However, prior to the issuance of a building permit, a more complete geotechnical study including subsurface investigation will be necessary.

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| EXHIBIT NO. | 12 |
| APPLICATION NO. | Men.Co.LCP Amendment |
| | 1-96 (Major): Site B |
| | Geotechnical Evaluation 1995 |

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BACKGROUND

Observation of the original Irish Beach subdivision topographical map blueprint from the early 1960's indicates that Lot 28 was subdivided at that time. We understand that about 15 or 20 years ago, the developers of the Irish Beach subdivision apparently gave the lot to the Irish Beach homeowners association, who some years ago returned the lot to the developers as they did not want to bear legal responsibility for the lot. It is now our understanding that Mendocino Coast Properties desires to construct a single family residence within Lot 28, of which the house site location and design have not been determined pending certain processing and approval by the County of Mendocino.

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| EXHIBIT NO. 12 |
| APPLICATION NO. Gen. Co. LCP Amendment |
| 1-96 (Major): Site B |
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| EXHIBIT NO. 12 |
| APPLICATION NO. Men. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Geotechnical Evaluation 1995 |

BLUFF RETREAT RATE

Our scope of work was to estimate the maximum possible apparent bluff retreat rate using information available in our files. The items that we reviewed in our current study of the bluff retreat rate included the following:

- a. Our preliminary geotechnical evaluation correspondence of January 23, 1989, which is attached as Appendix X, as well as the field notes that we took during that brief preliminary visual reconnaissance.
- b. A 1956 aerial photo obtained from the U.S. Geological Survey, Photo #7-22-561F-88GS-CBW.
- c. A 1967 aerial photo taken by Pacific Aerial Surveys on February 21, 1967, Photo #AV-784-11-01.
- d. 1987 aerial photos obtained from the U.S. Geological Survey taken on June 22, 1987, Photo #NAPP 513-164 and 165.
- e. An early 1960's blueprint-topographical map of the original Irish Beach subdivision, at the scale of 1 inch = 200 feet, as provided to us by the developer about 15 years ago.
- f. A portion of a fairly detailed topographical map made from a aerial photo as commissioned by the developer about 20 years ago, at the scale of 1 inch = 200 feet.
- g. A portion of a topographical map made of the actual topographical bench-greater pad area created about 20 years ago, at a scale of 1 inch = 20 feet.
- h. The Geology and Geomorphic Map of the Mallo Pass Creek 7.5 Minute Quadrangle, as prepared by the California Division of Mines and Geology in 1984.

After careful observation of the various aerial photos and topographical maps as indicated above, it is our opinion that the maximum local rate of bluff regression is equal to or less than 1 foot or 0.3 meters per year, with a max 75 year retreat rate equal to or less than 75 feet or 22.9 meters.

While we were observing the various aerial photos, it was not always possible to determine the exact top-of-bluff location due to the vegetated nature of the hillside area downslope from the pad area. When we perform our more detailed geotechnical investigation including current field measurements of the width of the building pad area compared with the older topographical maps and surveys, we believe the actual measured-recorded rate of bluff regression will be significantly less than the 1 foot per year.

However, in our analysis, we interpreted the aerial photos from the most conservative and prudent standpoint, and where there was some uncertainty due to the vegetation as to the exact location of the bluff top, we used the more prudent and conservative interpretation. It should be realized that even under high magnification, subtle topographical features that are vegetated are difficult to precisely determine.

At the present time, for preliminary planning purposes, we would recommend that the 75-foot or 22.9 meter setback from the top of the bluff be used. As the approximately level pad area in the proposed building area varies from about 110 to 120 feet in width, there still is sufficient room for a house, although it may be relatively narrow. A moderate setback should also be kept between the base of the steeper upslope area, and a slough-catchment wall will likely be required as indicated in our preliminary evaluation correspondence of January 23, 1989.

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| EXHIBIT NO. | 12 |
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Lot 28, Irish Beach

Page 5 - February 23, 1995

To provide for a conservative and prudent foundation system, we recommend that the proposed new structure be placed upon deeper and well-reinforced drilled pier and grade beam foundations, with the pier holes extending to a minimum depth of 15 to 20 feet and/or well into the underlying bedrock formation.

There appears to be sufficient room for a leachfield dispersal system. However, this will have to be confirmed by field percolation tests in accordance with the requirements of the Environmental Quality-Health Department prior to any building design.

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| EXHIBIT NO. 12 |
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| 1-96 (Major): Site B |
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Lot 28, Irish Beach

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Access Driveway - It should be realized that the access driveway to the Lot 28 pad area was initially constructed about 30 years ago. The 1967 aerial photo clearly shows the existence of the access driveway at that time. Also, the topographical map at the scale of 1 inch = 200 feet, made about 20 years ago, clearly shows the continuing existence and presence of the access driveway. However, apparently as the result of many years of no vehicle access or use while the lot was in the ownership of the homeowners association, the access driveway has become relatively well-overgrown with brush and is frequently not distinguishable in the 1987 aerial photo.

Because the access driveway was originally constructed about 30 years ago, we anticipate that no new access driveway grading will be necessary other than removing the brush from the driveway surface, and probably providing some periodic drainage, and some deferred maintenance where local erosion and/or sloughing has occurred.

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| EXHIBIT NO. 12 |
| APPLICATION NO. Men. Co. LCP Amendment |
| 1-96 (Major): Site B |
| Geotechnical Evaluation 1995 |

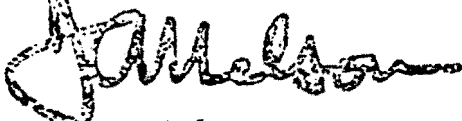
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Future Geotechnical Consultation and Investigation - Prior to the precise locating of the new house and prior to the preliminary design of the proposed house, we should perform a more detailed and complete geotechnical investigation, including subsurface investigation. At that time, we will determine a more precise rate of bluff regression that will likely be considerably less than the 1 foot per year as indicated in this correspondence. During the past 20 years, we have performed about 15 geotechnical lot investigations for bluff side lots in the Irish Beach subdivision, and have found the bluff retreat rate to be considerably less than 1 foot per year. Our more complete and detailed field geotechnical investigation also will have to be based upon some preliminary indication from the developer as to the approximate desired location of the proposed house.

It should be realized that this current correspondence is issued only upon the condition that we will be retained at a later time to perform additional and subsurface investigation and consultation so as to more fully define and confirm the general and preliminary opinions and conclusions as provided in this correspondence.

We trust this correspondence supplies the information required. Please call if you have further questions.

Yours very truly,
EARTH SCIENCE CONSULTANTS



Jay A. Nelson
Principal Geotechnical Engineer
Civil Engineer - 19738, expires 9/30/97
Geotechnical Engineer 630



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| EXHIBIT NO. | 12 |
| APPLICATION NO. | Men.Co.LCP Amendment |
| | 1-96 (Major): Site B |
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Attachment: Appendix X - Preliminary Geotechnical Evaluation,
January 23, 1989

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