

CALIFORNIA COASTAL COMMISSION

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Th 13c

Addendum

June 4, 2008

To: Commissioners and Interested Persons

From: California Coastal Commission
San Diego Staff

Subject: Addendum to **Item 13c**, Coastal Commission Permit Application
#A-6-NOC-07-130 (Key/McCullough/Ames), for the Commission
Meeting of June 12, 2008

Subsequent to distribution of the staff report for the above-referenced agenda item, staff has identified a need to make certain corrections/additions to the report. Therefore, staff recommends the following changes be made to the above-referenced staff report:

1. On Page 3 of the referenced staff report, Special Condition #2 (specifically the introductory paragraph and subsection #2b), requiring revised landscaping, shall be modified as follows:

2. Revised Final Landscaping Plan. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit for the review and written approval of the Executive Director, a revised final landscaping plan developed in consultation with the California Department of Fish and Game and approved by the City of San Diego. Said plan shall be in substantial conformance with the plans approved by the City of San Diego (prepared by Foothill Associates and submitted as City's Exhibit "A"), but shall be revised to include the following:

[...]

b. All landscaping shall be drought-tolerant, ~~and native or~~ and non-invasive plant species, except that use of drought-tolerant, non-invasive ornamental species is allowed as a small garden component. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized.

2. On Pages 7 and 8 of the staff report, Special Condition #8 shall be modified as follows:

8. Future Development Restriction

A. This permit is only for the development described in coastal development permit No. A-6-NOC-07-130. Except as provided in Public Resources Code section 30610 and applicable regulations, any future development as defined in PRC section 30106, including, but not limited to, a change in the density or intensity of use land, shall require an amendment to Permit No. A-6-NOC-07-130 from the California Coastal Commission ~~or shall require an additional coastal development permit from the California Coastal Commission or from the applicable certified local government.~~

3. On Page 17 of the staff report, the following two paragraphs shall be added at the top of the page:

In addition, the applicants' biology report was reviewed by the Commission's staff ecologist, Dr. John Dixon, who determined the CSS and SMC on the subject site adjacent to the MHPA are environmentally sensitive habitat area (ESHA). While the term "ESHA" is not defined in the City's LCP, it is used in policies found in the North City Land Use Plan. On pages 73 and 74 of this plan, there are policies adopting, nearly verbatim, Section 30240 of the Coastal Act. In the absence of a specific definition of ESHA in the LUP, but where this phrase is used in the LUP, it is appropriate to interpret the phrase consistent with how it is used in the Coastal Act. The Commission's staff biologist has determined that the CSS on this property adjacent to the MHPA is ESHA because it is rare, but also because it performs the function of providing habitat to the coastal California gnatcatcher, an avian species listed as "threatened" by the Federal government. As noted above, the gnatcatcher has been identified on the subject site within the CSS adjacent to the MHPA. SMC's rarity alone makes it ESHA. Moreover, both vegetation types are easily disturbed by human activities.

As the CSS and SMC on site adjacent to the MHPA are environmentally sensitive habitat areas, the policies contained in the North City LUP require that these areas be protected against significant disruption and only uses dependent on and compatible with such resources should be allowed within these areas. See North City Land Use Plan page 73. In addition, new development "should be sited and designed to prevent impacts which would significantly degrade" the CSS and SMC on-site adjacent to the MHPA. Id. at 74. These LCP policies therefore require that any new development be compatible with the CSS and SMC located on site adjacent to the MHPA, and that it be designed to prevent impacts that would significantly degrade these resources.

4. On Page 18 of the staff report, the second complete paragraph shall be modified as follows:

The City of San Diego created its Multiple Species Conservation Plan (MSCP) in the mid-90's, in response to the state's Natural Communities Conservation Plan (NCCP) legislation. Based on the MSCP requirement to preserve the best habitats, along with connecting habitats to provide corridors for wildlife movement, the City created the Multi-Habitat ~~Planning~~ Preserve Area (MHPA). However, the MSCP/MHPA was never incorporated into the City's LCP, although it is referenced in the newer certified LUPs of the City, and in portions of the certified IP as well. Because the program itself is not certified as part of the LCP, it is not a legal standard of review for CDPs. Since most City-issued CDPs are associated with other local discretionary permits, however, the MSCP provisions are typically relied upon by the City for most City actions.

5. On Page 19 of the staff report, the first complete paragraph shall be modified as follows:

The applicants claim that despite the protective policies of the City's LUP, Section 143.0141(h) of the City's implementing plan should be interpreted to allow unlimited impacts to sensitive biological resources, as long as those resources are located outside of the MHPA. This broad interpretation of 143.0141(h) that would allow complete elimination of all sensitive biological resources outside of the MHPA is not supported by the policies in the LUP or other sections of the LDC. For example, Section 143.0140(b) of the LDC provides that the allowable development area for subdivisions is based on the existing lot to be subdivided, and Section 143.0140(c) of the ESL regulations of the LDC requires that no building lot shall be created if future reasonable development of that lot would require encroachment into environmentally sensitive lands beyond that allowed for development of the unsubdivided premises. This is exactly the situation presented here, where the applicants could develop their single lot with no impacts to sensitive resources. Thus, this provision of the ESL prevents subdivision of this property unless such subdivision would not result in encroachment into environmentally sensitive lands. If one were to accept the applicants' interpretation of 143.0141(h), it would essentially eliminate Section 143.0140(c) of the ESL, as there are no circumstances under which it could apply. Moreover, Section 143.0141(h) is located in the City's LDC, which is intended to implement the policies of the certified LUP. The applicants' interpretation of this provision would eliminate protection of sensitive biological resources outside of the MHPA. This not only does not implement the many LUP policies cited above, but it directly contradicts those policies. Instead, Section 143.0141(h) is more reasonably interpreted, in light of the LUP policies and other ESL policies, to mean that encroachment into sensitive biological resources outside the MHPA is not prohibited, as it would be if it were treated as environmentally sensitive habitat areas are in the Coastal Act, but that encroachment is still subject to other applicable policies of the LUP and ESL that require minimization of that encroachment.

6. At the top of Page 20 of the staff report, the following three paragraphs shall be added as follows:

The applicants' attorney has written several letters to the Commission claiming that a recent case, *Security National Guaranty, Inc. v. California Coastal Commission* (January 25, 2008) 159 Cal.App.4th 402 ("SNG"), precludes the Commission from finding that the subject property includes ESHA and that the proposed development, as approved by the City, is not consistent with the terms of the LCP. The applicants' attorney claims that if the Commission adopted the findings laid out in the staff report, it would be "re-writing" the LCP, inconsistent with SNG. Factually, however, the current application bears little resemblance to the situation presented in SNG, where the relevant LUP specifically stated that there was no ESHA on the subject property. Under those circumstances, the court found that the Commission could not find, contrary to the express terms of the LCP, that there was in fact ESHA on the subject property. *Id.* at 423. That is not the situation presented here.

Subsequent to the decision in SNG, another court of appeals decision, which the applicants' attorney failed mentioned in any of his letters, found that the Commission properly exercised its jurisdiction when it determined that there was ESHA on property that was the subject of an appeal. *Charles A. Pratt Construction Co., Inc. v. California Coastal Commission*, (May 8, 2008) 162 Cal.App.4th 1068, 76 Cal.Rptr.3d 466 at 472 ("*Pratt*"). In this decision, the court discussed the SNG opinion and found that it simply stands for the proposition that the Commission cannot determine on appeal that a property contained ESHA when such a determination "contradicted the terms of a certified LCP." *Id.*

Similar to the situation presented in *Pratt*, the City's LCP contains a provision that requires the City, or the Commission on appeal, to determine the location of environmentally sensitive lands on a project-specific basis based on the best information available at the time the application is considered. See Section 143.0113 of the LDC. Therefore, under the provisions of this LCP, the Commission must determine, based on the best information available today, whether sensitive biological resources exist on the subject property, and if it finds such resources, it applies the relevant policies of the certified LCP.

7. On Page 24 of the staff report, Finding #7 shall be modified as follows:

7. Local Coastal Planning. The City of San Diego has a fully certified LCP, and has issued a coastal development permit (CDP) based on consistency with the LCP. The City's permit was appealed, and the Commission found, on February 7, 2008, that a substantial issue has been raised. Therefore, the City's CDP is null and void, although other local permits approved in conjunction with the CDP remain effective. A new CDP from the Coastal Commission is approved herein, using the certified LCP as the legal standard of review. Special Condition #8 advises that, since this is a Coastal Commission-issued CDP, any future additions or modifications to the site will require a Coastal Commission-issued amendment to this permit, again using the

certified LCP as the standard of review. With the conditions attached hereto, the Commission finds that approval of this development will not prejudice the City's ability to continue implementation of the certified LCP throughout its coastal zone.

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June 3, 2008

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Received

JUN 04 2008

California Coastal Commission
San Diego Coast District

Re: Appeal No. A-6-NOC-07-130 (Key, McCullough & Ames)

Dear Chair Kruer and Members of the Commission:

This firm, along with Katie Wilson and Susan McCabe, represents the Applicants in the above appeal. The Applicants propose a simple lot split and two single-family residences on the inland side of Racetrack View Drive in the City of San Diego – the last development on Racetrack View Drive and in the original subdivision approved by the Commission which anticipated the lot split.

The principal flaw in the Staff Recommendation is that it asks the Commission to effectively rewrite the LCP, which the California courts recently declared the Commission may not do. (*Security National Guaranty, Inc. v. California Coastal Com.* (January 25, 2008) 159 Cal.App.4th 402, 422-423.) The Applicants contend:

1. The Commission lacks appeal jurisdiction over this Project – the Project lies inland of the “first public road paralleling the sea.”
2. Assuming the Commission had appeal jurisdiction, the Project complies with the “Environmentally Sensitive Lands” requirements of the certified LCP – “Outside the MHPA, encroachment into sensitive biological resources is **not** limited” (Land Development Code Section 143.0141(h).)
3. The Staff Recommendation, if adopted, would constitute a de facto denial and result in a “taking” of the Applicants’ property.

Attachment 1 to this letter includes two motions that we ask the Commission to consider. The first motion would determine that the Commission lacks appeal jurisdiction. Alternatively, the second motion would delete Special Condition Nos. 1 (Revised Final TPM/Building Plans) and 7 (Open Space and Conservation Easement), and find that the Project, as conditioned, is in conformity with the certified LCP and the public access and recreation policies of the Coastal Act.

**APPLICANTS’ RESPONSE TO
STAFF RECOMMENDATION**

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**THE BASIC PROBLEM – CONTRARY TO THE RECENT DECISION IN
SECURITY NATIONAL GUARANTY V. COASTAL COMMISSION, THE
STAFF RECOMMENDATION WOULD REWRITE THE LCP.**

The City's certified LCP specifically defines the Commission's appeal jurisdiction by post-certification maps; they show the subject property to be outside the appealable area. The LCP also specifically permits the development of environmentally sensitive lands ("ESL") outside of the City's Multi-Habitat Planning Area (MHPA); it requires only mitigation, which the City properly required for this Project. Those requirements cannot be ignored or contradicted on appeal. Yet, that is exactly what the Staff Recommendation would do.

Shortly after the Commission found "substantial issue" on the subject appeal, the Court of Appeal decided the *Security National Guaranty* ("SNG") case. There, the certified Sand City LCP identified and mapped locations that were ESHAs. No ESHAs were mapped on SNG's property. The City approved SNG's application for a CDP. On appeal, the Commission found that the entire project site was an ESHA and denied the project. The Court of Appeal held that "by declaring SNG's site an ESHA, the Commission exceeded its statutory authority, improperly assumed powers reserved to local government, and contradicted the terms of the certified LCP." (*SNG, supra*, 159 Cal.App.4th at 422.) As germane to the appeal here, the Court of Appeal explained:

"First, the Commission's action clearly exceeded an express limitation on its jurisdiction in permit appeals. The Coastal Act limits the grounds for such an appeal to an allegation that the development does not conform to the standards set forth in the certified LCP. [Citation.] In denying SNG's permit (at least in part) based on its unlawful ESHA designation, the Commission imposed additional standards not found in Sand City's LCP. SNG was entitled to have its development proposal judged by the standards of the certified LCP in effect at the time of its application. [Citation.]

"Second, the Commission has purported to exercise powers that the Legislature has expressly allocated to local government, which has decreed that LCP's may be amended "by the appropriate local government." [Citation.] By declaring the site an ESHA, the Commission has impermissibly attempted to amend part of Sand City's LCP. [Citation.]

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“Third, the Commission’s ESHA designation actually contradicts the terms of the certified LCP itself. The Commission’s staff concluded that SNG’s site was ESHA on the basis of general LCP policies regarding ESHA protection. But that conclusion cannot be reconciled with the specific findings in section 4.2.4. of Sand City’s certified LUP that there were *no* ESHA’s in the area west of Highway 1, where SNG’s site is located . . . The Commission’s ESHA designation simply cannot be squared with the plain terms of Sand City’s LCP.”

(*SNG, supra*, 159 Cal.App.4th at 422-423 (emphasis in original; citations omitted); see also *Morro Bay Mini-Storage, Inc. v. California Coastal Com.* (2001) San Luis Obispo County Sup. Ct. Case No. CV00-0578 [LCP mapped ESHAs which did not include applicant’s property; Commission, on appeal, acted in excess of its jurisdiction in designating site as ESHA based on its assessment of resources existing “on the ground”].)

THE COMMISSION LACKS APPEAL JURISDICTION

As a basic proposition, every administrative agency has jurisdiction to determine its jurisdiction in the first instance. (*U.S. v. Superior Court* (1941) 19 Cal.2d 184, 195.) The issue may be addressed at any time, including here where the Commission initially found the appeal to raise a substantial issue. (*See e.g., Buckley v. California Coastal Commission* (1998) 68 Cal.App.4th 178, 190.)

The Approved Post-Cert Maps Govern the Commission’s Appeal Jurisdiction

The subject property is located on Racetrack View Drive. The Post-Certification Maps referenced in the City’s certified LCP show the property to be inland of the “first public road” and beyond the Commission’s appeal jurisdiction. (*See* Attachment 2.)

On December 6, 2007, after approving the Project, the City incorrectly issued a Notice of Final Action indicating that the Project was appealable. Recognizing the mistake, on April 2, 2008, the City issued a corrected Notice of Final Action, explaining in a letter to Staff:

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“The project is within Non-Appealable Area 1, as shown on Map Drawing No. C-730.1. When the California Coastal Commission certified the City of San Diego Local Coastal Program Amendment #1-98B, it included the Land Development Code and Land Development Manual. The Land Development Code defines the appealable area as ‘The *appealable area* is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal.’” (See Attachment 3 – the City’s letter is not attached to the Staff Report.)

The City is absolutely correct: The City’s Post-Cert Map, expressly incorporated in the certified LCP, shows the subject property to be located outside of the “first public road,” which is Racetrack View Drive.

Section 13576(a) of the Commission’s Regulations provides:

“In conjunction with final Local Coastal Program certification . . . the Commission *shall*, after public hearing, adopt a map or maps of the coastal zone of the affected jurisdiction that portrays the areas where the Commission retains permit authority . . . These maps shall be drawn based on the criteria for permit and appeal boundary determinations, set forth in Section 13577 below, and will serve as the official maps of the Commission’s permit and appeal jurisdiction.” (Emphasis added.)

Consistent with the mandatory mapping requirement of Section 13576, the City prepared a comprehensive set of Post-Cert Maps for its LCP. As indicated, Map Drawing No. C-730.1 provides that Racetrack View Drive is the “first public road,” and therefore the Project is located *outside* of the Commission’s appeal jurisdiction. In December 1997, the City adopted the Land Development Code and the Post-Cert Maps by Ordinance No. 0-18451. Thereafter, it submitted to the Commission an LCP amendment, No. 1-98B, which included a comprehensive Land Development Code and Land Development Manual to replace the zoning and other implementing actions previously certified by the Commission. In February 1999, following a public hearing, the Commission certified the LCP amendment.

Section 113.0103 of the certified Land Development Code defines “appealable area” as:

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“The area, as defined by California Public Resources Code section 30603, within the coastal zone that constitutes the appeal jurisdiction of the Coastal Commission. This area includes lands between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no beach, whichever is the greater distance, or within 100 feet of any wetland, estuary, or stream, or within 100 feet of the top of the seaward face of any coastal bluff. **The appealable area is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal.**”¹ (Attachment 4; emphasis added.)

Thus, the certified Post-Cert Maps show the subject property to be outside of the Commission’s appeal jurisdiction. For six years following certification of the Land Development Code, the City consistently approved projects landward of Racetrack View Drive and issued Notices of Final Action specifying that the developments approved are “non-appealable.” Commission Staff never objected:

Racetrack View Drive –	6-NOC-97-042
	6-NOC-97-043
Recuerdo Drive –	6-NOC-98-173
Lozana Road –	6-NOC-97-154
Mango Drive –	6-NOC-98-166
	6-NOC-00-306
Minorca Cove –	6-NOC-02-143

It was not until approximately 2005 that Commission Staff first advised City Staff of its contrary view. Thereafter, until this appeal, the City simply acquiesced, contrary to its certified LCP, and issued subsequent Notices of Final Action indicating that the

¹ Section 126.0702(b) further addresses “Permits Issued by the Coastal Commission,” and again defines Commission permit jurisdiction and deferred certification by the same maps:

“A Coastal Development Permit or exemption for all coastal development on a project site located completely within the Coastal Commission Permit Jurisdiction or in the Deferred Certification Area must be obtained from the Coastal Commission. **The Coastal Commission Permit Jurisdiction and the Deferred Certification Area are shown on Map No. C-730.1 on file in the Planning and Development Review Department, the San Diego office of the Coastal Commission, and in the office of the City Clerk as Document No. 00-17067-1.**” (Emphasis added.)

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developments approved were appealable. (Racetrack View Drive – 6-NOC-04-106; Recuerdo Drive – 6-NOC-05-274, 6-NOC-05-030; Lozana Road – 6-NOC-06-010.) But, as the Court in *SNG* held, the Commission cannot simply by fiat change the provisions of an LCP once certified, and that includes the Post-Cert Maps.

Despite the plain language of Section 113.0103 of the certified Land Development Code, Staff argues the maps have never been certified and are just “drafts.” It is, however, readily apparent that the maps are not merely “drafts.” They are not stamped “draft.” Section 113.0103 does not refer to them as “drafts.” Instead, the maps were specifically and unqualifiedly included in Section 113.0103 and approved when the Commission certified the Land Development Code as follows: “The appealable area is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1.”

Staff added the last clause of Section 113.0103 – “however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal” – as a Suggested Modification at the time the Commission approved Land Development Code. (See Attachment No. 5.) Staff now suggests that this language supports its view that the map was only a “draft.” Staff, however, misreads the language. **There would have been no reason to “update” the map if it were only a “draft.”** In fact, the added language did nothing more than conform the appeal provision to the Commission’s regulations, which provide a process for modifying the boundaries of an already adopted map. Section 13576(a) of the Commission’s regulations provides:

“The Commission, in consultation with the local government, shall update these maps from time to time, where changes occur in the conditions on which the adopted maps were based, or where it can be shown that the location of the mapped boundary does not accurately reflect the intended boundary criteria. Revisions of the adopted maps shall be based on precise boundary determinations made using the criteria set forth in Section 13577. The revised maps shall be filed with the affected jurisdiction within 30 days of adoption by the Commission.”

The Commission here has not followed the process outlined in its own regulations noted above. There has been no revised map relating to the subject property adopted or filed with the City, nor has there been a map revision or update as provided for in the LCP. The Commission should find that it lacks appeal jurisdiction here.

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**Even if There Were No Adopted Post-Cert Map, Racetrack View Drive is the
“First Public Road Paralleling the Sea”**

Even assuming *arguendo* that the Post-Cert Maps had not been included in the Land Development Code and certified by the Commission, it is abundantly clear that Racetrack View Drive is the “first public road paralleling the sea,” defining the limit of Commission appeal jurisdiction. Section 13011 of the Commission’s regulations defines the “first public road paralleling the sea” as being (a) lawfully open to uninterrupted public use and suitable for such use; (b) publicly maintained; (c) an improved, all-weather road open to motor vehicle traffic in at least one direction; and (d) not subject to any restrictions on use by the public. It also must:

“ . . . in fact connect with other public roads providing a continuous access system, and generally parallel[] and follow[] the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.” (Reg. Section 13011(e).)

Racetrack View Drive satisfies all of the requirements of Section 13011.

Past Commission decisions explain that Via de la Valle is the first public east-west road *north* of the San Dieguito Lagoon, and that I-5 is the first public north-south road *east* of the Lagoon. (6-04-49 [22nd District Agricultural Association]; 6-02-020 [same].) The first public east-west road *south* of, and parallel to, the Lagoon is Racetrack View Drive. Racetrack View Drive not only frames the Lagoon but also overlooks the Lagoon, provides direct views of the Lagoon and ample adjacent street parking for the public, and is directly inland of a publicly accessible trail along the south side of the Lagoon, which has a signed and improved public access trailhead on the north side of Racetrack View Drive directly across from the subject property. It is the *only* road that logically qualifies as the first public road paralleling the sea.

There can be only one “first public road paralleling the sea” in this area. Staff argues Racetrack View Drive does not qualify because it ends in a cul-de-sac. However, it is the combination of, and connection with, I-5, Via de la Valle, Jimmy Durante Boulevard, San Dieguito Road **and** Racetrack View Drive that provide an obvious and continuous access system around the Lagoon. (See Google Earth photo, Attachment 6.) Staff’s choice of roads does not remotely accomplish that.

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Exhibit 11 to the Staff Report reflects for the first time Staff's suggested "first public road." Because the flat one-dimensional Thomas Guide map is unrevealing, we have attached a Google Earth photo (Attachment 7) to demonstrate that Staff's suggested route makes no sense and does not meet the requirements of Section 13011. Staff's road system is well south of, and between ½ mile and one mile from, the Lagoon. Unlike Racetrack View Drive, which frames the Lagoon, Staff's road system courses through a residential subdivision, and is accessed far from the Lagoon -- from the Freeway and Del Mar Heights Road at one end and by Camino Del Mar at the other. It has absolutely *no* connection (physical, visual or otherwise) to the Lagoon, and in fact is one major canyon removed from the Lagoon and Racetrack View Drive. There is no rational basis for designating this *inland* road as the "first public roadway paralleling the sea." **For anyone familiar with this location, no reasonable person would take this circuitous and certainly "non-parallel" route through the residential subdivision for any purpose connected with the Lagoon or, as the regulation requires, to provide a "continuous access system."**

In short, the Commission lacks appeal jurisdiction over the Project and the appeal should be dismissed. Under *SNG*, the Commission may not revise the appeal boundary to include the subject property. In conformance with the Commission's regulations, Racetrack View Drive is the first public road paralleling the sea, and the subject property is inland of the appeal boundary.

THE PROJECT CONFORMS WITH THE "ENVIRONMENTALLY SENSITIVE LANDS" REQUIREMENTS OF THE CERTIFIED LCP

Even assuming that the Commission had appeal jurisdiction, the Staff's ESHA determination, which encompasses the vast majority of the property, directly contradicts the certified LCP and ignores the key provision of the certified Land Development Code, which specifies that in the area proposed for development, "encroachment into sensitive biological resources **is not limited.**" (Certified Land Development Code § 143.0141; emphasis added.) Staff's approach in this particular instance is not permitted under the *SNG* case.

The Staff Recommendation recites the applicable policies of both the North City Land Use Plan component of the City's certified LCP and the certified Torrey Pines Community Plan. For example, the North City Land Use Plan provides:

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Page 73- “Environmentally sensitive habitat areas *should* be protected against any significant disruption of habitat values, and only those uses dependent on and compatible with such resources *should* be allowed within such areas.”

Page 74 – “Development *should* be sited and designed to prevent impacts which would significantly degrade environmentally sensitive habitat areas.”

The Torrey Pines Community Plan additionally provides on Page 29:

1. “Land uses adjacent to environmentally sensitive habitats shall not negatively impact those areas.”
2. “Development impacts to rare, threatened, endangered, or candidate species shall be minimized or eliminated.”
3. “No filling, clearing, grubbing, or other disturbance of biologically sensitive habitats shall be permitted without approved mitigation plans.”

These land use policies are, in turn, specifically implemented by the Environmentally Sensitive Lands (ESL) Regulations of the City’s certified Implementation Plan. Two provisions are key here (*see* Attachment 8):

Section 143.0140 – “General Development Regulations for all Environmentally Sensitive Lands”

“Development that proposes encroachment into environmentally sensitive lands or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations:

- “(c) No building lot shall be created that provides such a small development area that future reasonable development of the lot will require additional encroachment into environmentally sensitive lands beyond the maximum allowable development area of the original, unsubdivided premises. If additional development area is proposed for a lot that would exceed the maximum allowable development area of the original, unsubdivided premises, a deviation is accordance with Section

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143.0150 is required, regardless of the lot size and the existing development area of the individual lot.”

Section 143.0141 – “Development Regulations for Sensitive Biological Resources”

“Development that proposes encroachment into sensitive biological resources or that does not qualify for an exemption pursuant to Section 143.0110(c) **is subject to the following regulations** and the Biology Guidelines in the Land Development Manual.

“ . . .

“(h) Outside the MHPA, encroachment into sensitive biological resources is not limited, except as set forth in Section 143.0141(b) and (g) [pertaining to wetland, their buffers and designated open space].” (Emphasis added.)

“(i) All development occurring in sensitive biological resources is subject to a site-specific impact analysis conducted by the City Manager, in accordance with the Biology Guidelines in the Land Development Manual. The impact analysis shall evaluate impacts to sensitive biological resources and CEQA sensitive species. **The analysis shall determine the corresponding mitigation, where appropriate, and the requirement for protection and management. Mitigation may include any of the following, as appropriate to the nature and extent of the impact.**

(1) Acquisition or dedication of another site that can serve to mitigate the project impacts with limited right of entry for habitat management, as necessary, if the site is not dedicated. This site must have long-term viability and the biological values must be equal or greater than the impacted site.

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- (2) Preservation or dedication of on-site sensitive biological resources, creation of new habitat, or enhancement of existing degraded habitat, with limited right of entry for habitat management, as necessary, if the site is not dedicated. The site must have long-term viability and the biological values must be equal to or greater than the impacted site.
- (3) In circumstances where the area of impact is small, monetary payment of compensation into a fund in lieu of other forms of mitigation. The City shall use the fund to acquire, maintain and administer habitat areas pursuant to City Council Resolution No. R-275129, adopted February 12, 1990. Where appropriate, the City Manager is authorized to enter into agreements with public agencies or private non-profit conservancies or foundations to administer the funds and acquire or maintain habitat preservation areas.” (Bold added.)

As applicable here, Section 143.0141 of the certified Land Development Code addresses the maximum allowable development area of the property. The Project does not encroach into environmentally sensitive lands beyond that maximum allowed development area. Importantly, there is also *no* encroachment into the City’s Multi-Habitat Planning Area (MHPA). The MHPA encompasses the steep slope portions of the subject property, and borders the site on the south, east, and across Racetrack View Drive to the north. It is undisputed that the development proposed is located *outside* of the MHPA. Accordingly, under the certified LCP, the development proposed “is not limited,” and certainly not limited in the manner suggested by the Staff Report.

Significantly, the Staff Report seeks to fashion a new and different standard based upon what Staff, not the LCP, believes should now be the applicable siting criteria. The Staff Report states (at p. 13): “The Coastal Commission has not interpreted the resource protection policies of the [Coastal] Act or certified LCPs to allow all impacts at any cost to sensitive resources.” The *SNG* case, however, forecloses that type of rewrite of the LCP. It is irrelevant here how the Commission may have interpreted the Coastal Act’s resource protection policies in other contexts or other LCPs. What

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counts is what this LCP states, and it states unambiguously that “[o]utside the MHPA, encroachment into sensitive biological resources is not limited.” (§143.0141(h).)

The Staff Report states that the determination of allowable development area “should” be based on application of all governing LUP policies and the ESL regulations to accommodate a reasonable use while recognizing any resource constraints. (Staff Recommendation, p. 13.) There is no such provision in the certified LCP. Instead, the Staff Report goes further to state that to conform to the applicable LUP policies, the allowable development area “should” not encroach into environmentally sensitive lands if it is possible to avoid such impacts. (*Id.*) Again, there is no such provision in the LCP. Instead, the LCP draws a clear distinction between ESL in the MHPA (essentially, the steep slope areas) and areas outside the MHPA that may contain sensitive biological resources. Under *SNG*, the appeal cannot provide a basis for rewriting the certified LCP. In the words of *SNG*, to do so would exceed the Commission’s statutory authority, improperly assume powers reserved to local government, and contradict the terms of the certified LCP. (*SNG*, *supra*, 159 Cal.App.4th at 422.)

The Staff Report argues that if one were to read Section 143.0141(h) as we do and as its unqualified language states, that interpretation would essentially eliminate Section 143.0140(c), above, as there are no circumstances under which it could apply. Staff misreads Section 143.0140(c), which has no application here. That section provides that no building lot may be created that provides such a small development area that “future” reasonable development of the lot will require additional encroachment into ESL beyond the “maximum allowable development area of the original, unsubdivided premises.” That is the not the case. The “maximum allowable development area of the original, unsubdivided premises” is the area where the Applicants now propose to develop the houses. No development is proposed beyond that.

There are three additional reasons why Section 143.0141(h) must be read and applied as the City did in approving this Project. First, the Section specifically states that “Outside the MHPA, encroachment into sensitive biological resources is not limited . . .” Staff would rewrite this LCP provision to read: “Outside the MHPA, encroachment into sensitive biological resources is limited.” That is not permitted.

Second, the Section expressly states the exceptions where encroachment into ESL would be limited: “. . . except as set forth in Section 143.0141(b) and (g) [pertaining to wetland, their buffers and designated open space].” Neither exception applies here.

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“Under the familiar rule of construction, *expressio unius est exclusio alterius*, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed.” (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.) In other words, the LCP set the exceptions. Staff cannot now carve out another one and effectively neuter the provision.

Third, the quoted language above demonstrates that where development occurs “in” sensitive biological resources, mitigation is required – exactly what the City required here. With Staff’s interpretation, to require a development to avoid ESL altogether – the Staff Recommendation here -- would actually render the development exempt altogether from the CDP requirement. (LDC Section 143.0110(b)(4); *see* Attachment 9.) At the very least, it would mean that no mitigation could be required, and worse still it would impermissibly eliminate Section 143.0141(i) and its mitigation requirements.

Finally, despite the express and acknowledged reference to the MHPA in the certified LCP, the Staff Report attempts to cast some doubt on the value of that designation. The fact is, it is the defining criteria in the certified LCP. Further, Staff’s suggestion now, years after certification, that the Multi-Habitat Preserve Area identified in the City’s Multiple Species Conservation Program (MSCP) may have been based not on biology but solely on cooperation of the property owner at the time the City put together the MHPA. This is not only irrelevant, but it is unsupported. It would be hard to believe that Staff recommended certification of the LCP with Section 141.0141(h) on that basis. Rather, as the City explained in the Executive Summary to its MSCP (December 1997), submitted to the Commission in connection with the LCPA for the Land Development Code:

“The purpose of establishing the MHPA is to protect and enhance natural areas essential to the continued survival and health of wildlife (plant and animal) species that are threatened by the ongoing urbanization in this region . . . The MHPA, which contains both publicly and privately owned land, **consists of core area of high biological value** and corridors that connect these core areas. Approximately 90% of the land in the city’s MHPA will be preserved for biological purposes.” (Executive Summary, MSCP, p. 1 – *see* Attachment 10; emphasis added.)

Regardless, for this property, in particular, the MHPA – the steep slope and sensitive resource protected portion of the site – lies within the Crest Canyon Reserve area.

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The part of the property sought to be developed is *outside* the MHPA, and under *SNG*, the express terms of the LCP govern and cannot be changed in connection with this appeal.

In sum, Section 143.0141(h) requires that the City must evaluate development occurring in sensitive biological resources in an impact analysis and require mitigation. The Applicants prepared an impact analysis for this Project, and consistent with its obligation under Section 143.0141(h), the City required both an in-lieu and on-site preservation for the CSS, non-native grasslands, and Southern Maritime Chaparral impacted. That is precisely what the certified LCP requires, and the Staff Recommendation can neither ignore the LCP nor rewrite its provisions.

THE STAFF RECOMMENDATION IS A DE FACTO DENIAL; REWRITING THE CERTIFIED LCP AND GROSSLY LIMITING THE HOUSE SIZE WOULD RESULT IN A "TAKING"

Although the Staff Report purports to recommend approval of the lot split and two houses, it is in fact a recommendation for denial. In rewriting the LCP, the Staff Recommendation would preclude the ability to site either of the houses approved by the City. The result is a taking.

The Constraints Map (Attachment 11 and Exhibit 9 to the Staff Report) shows the "ESHA," as Staff now views it, the previously dedicated open space easement, the two fuel modification zones required by the City, and the required property setback. It also shows the existing SDG&E power line and easement which bifurcates the property, and cannot be relocated. The remaining unconstrained development area for each lot would be tiny, irregular in size and shape, and unusable as a practical matter. (Compare Attachment 11 with Attachment 12, the City approved project).

Staff strikingly offer no evidentiary support or expertise for its assertion that the Applicants could build a single-family home "complex" without the subdivision, two smaller single-story houses, or two small two-story houses, or "perhaps many more" alternatives, and avoid all impacts to CSS and SMC. These are fanciful alternatives.

Staff's revision of the LCP would effectively limit the size of the "complex" to two 750 square foot buildings, split by the power line and easement; or, one 750 square foot residence on each lot; or two houses, each essentially 1,500 square feet (a two-story stacked box with 750 square feet on each story). The effort to designate new

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ESHA on the property not recognized under the LCP would significantly impact the Applicants' economic use of the property and would interfere with their reasonable investment-backed expectations developed at the time they acquired the property. Adoption of Staff's recommendation would constitute a multi-million dollar taking under California law. (*See Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Reehard v. Lee County* (11th Cir. 1992) 968 F.2d 1131, 1136.)

The Applicants paid \$1,550,000 for the subject property – approximately \$842,385 per acre. Since that time, the Applicants have incurred approximately \$468,000 in carrying costs and other costs as part of the entitlement process. Under the circumstances, no reasonable builder could afford to construct a house on the portion of the property remaining after application of the Staff Recommendation.

It was entirely reasonable under the circumstances existing at the time of their purchase in 2004 that the Applicants could expect to build two homes within the building envelope evaluated for the creation of Lot 4. In 1978, the Commission approved the original four-lot subdivision of 38.8 acres, which included this property. Although not stated in the current Staff Report, the Commission's approval provided that the future division of Parcels 3 and 4 (the subject property) would be limited "to one, 2-way split on each lot." In 1988, the Commission approved CDP Application No. 6-88-364, which approved the re-subdivision of the four lots created. This permit required recordation of an open space deed restriction on the steep slopes with native vegetation occurring along the southern portion of the four lots, including Parcel 4. The Staff Report for the 1988 permit also discussed the future subdivision of Parcels 3 and 4 as follows:

"When the applicant applies for a coastal development permit for the future subdivision of Parcels 3 and 4, it will be necessary that a grading report, as detailed as the one prepared for Parcels 1 and 2 be submitted by the applicant. This will allow the reviewing power to approve only those parcels which have adequate stable building areas, and require no encroachments into the developed open space." (CDP Application No. 6-88-364, p. 7.)

In connection with this Project, the Applicants submitted the required detailed geology report, which demonstrates that proposed lots are grossly stable. The Staff Report for this application (at p. 9) correctly explains that in 1988, "the Commission and its staff were only protecting ESHA if it occurred on steep slopes." Indeed, as discussed above, that approach was in fact captured in the certified LCP, and for this

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property it is, in essence, the portion of the site within the MHPA and the existing open space/deed restricted area. Parcel 3, the adjacent parcel, already has been split, includes an existing 3,255 square foot residence, and includes a graded area as well for a second residence. Other homes in the immediate vicinity range in size from 3,000 to 5,000 square feet.

The Applicants had no reason to believe at the time of acquisition that the Commission might impose an approximately 1,500 square foot size limit on homes outside of the MHPA. Neither CSS nor SMC now or were ever are designated as ESHA in the LCP. The Commission had not previously prohibited development outside the MHPA and open space deed restricted area, but rather expressly noted the future lot split. The Applicants had no reason to believe that CSS and MSS, coupled with the required fuel modification zones, would comprise most of the usable portions of the property and effectively render the entire lot unbuildable.

For these reasons, approval of the Project, as approved by the City, is necessary to avoid a taking. The unsanctioned departure from the certified LCP and the unreasonable size of the development envelope that would then remain compels forsaking the Staff Recommendation and approving the Project.

CONCLUSION

For all the foregoing reasons, the Applicants respectfully ask that the Commission determine that it lacks appeal jurisdiction over the Project, or, in the alternative, that the Commission delete Special Conditions Nos. 1 and 7. The Applicant's suggested motions are set forth on Attachment 1.

Very truly yours,


Steven H. Kaufmann

cc w/attachments: Ms. Ellen Lirley, CCC - SD
Mr. Lee McEachern, CCC - SD
Mr. Kelly G. Broughton, Dir. of Dev. Services, City of SD
Ms. Leslie Goosens, Dev. Project Manager, City of SD
Ms. Katie Wilson
Mr. Rick Valles Key
Mr. Monte McCullough
Mr. Brett Ames

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APPLICANTS' SUGGESTED MOTIONS

The Applicants recommend that the Commission adopt either of the following motions:

MOTION: I move that the Commission find that it lacks jurisdiction over this appeal under Public Resources Code section 30603.

The Applicants recommend a YES vote on the motion and that the Commission instruct Staff to prepare revised findings to support the determination that it does not have jurisdiction. If the Commission finds that it does lack jurisdiction over this appeal, the local action will become final and effective. The motion passes by an affirmative vote by a majority of the Commissioners present.

* * *

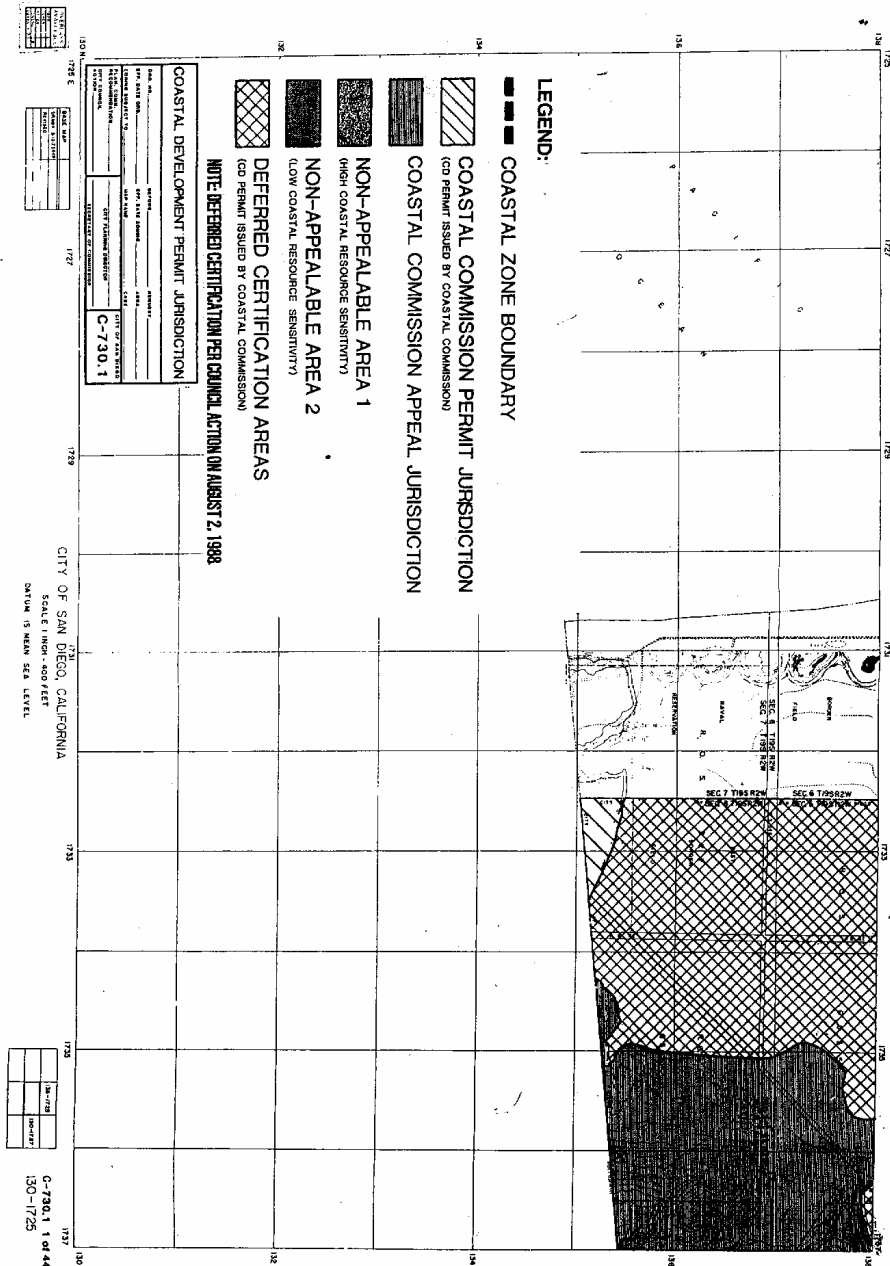
ALTERNATIVE MOTION: I move that the Commission approve Application No. A-6-NOC-07-130 pursuant to the staff recommendation.

AMENDING MOTION: I move that the Commission delete Special Condition No. 1 (Revised Final TPM/Building Plans) and Special Condition No. 7 (Open Space and Conservation Easement).

If the Commission determines that it has appeal jurisdiction over the Project, the Applicants recommend a YES vote on this alternative motion and the amending motion to delete the two related Special Conditions, Nos. 1 and 7, and further that the Commission instruct Staff to prepare revised findings to support the approval of a coastal development permit for the Project, as so conditioned. The motion passes by affirmative vote of a majority of the Commissioners present.

ATTACHMENT 1

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THE CITY OF SAN DIEGO

April 2, 2008

Ms. Ellen Lirley
San Diego Coast District Office
California Coastal Commission
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

Subj: Racetrack View Drive, Commission Appeal No. A-6-NOC-07-130

Dear Ellen:

This letter is to inform you that the December 6, 2007 Notice of Final Action for the Racetrack View Drive project incorrectly indicated that the project was appealable to the Coastal Commission. A corrected Notice of Final Action is attached.

The project is within Non-Appealable Area 1, as shown on Map Drawing No. C-730.1. When the California Coastal Commission certified the City of San Diego Local Coastal Program Amendment #1-98B, it included the Land Development Code and Land Development Manual. The Land Development Code defines the appealable area as "The *appealable area* is shown on Map Drawing No. C-730, on file in the office of the City Clerk as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal." To my knowledge, there have been no updates to this map showing the Racetrack View Drive project being located within the appealable area.

Therefore, the City of San Diego believes it is acting within its authority as the final decision-maker to issue the Coastal Development Permit approved by the Planning Commission on December 6, 2007. The City of San Diego has issued other Coastal Development Permits in this non-appealable area as well. I apologize for any inconvenience this may have caused the State Coastal Commission or the applicant.

Sincerely,

A handwritten signature in cursive script that reads "Leslie Goossens".

Leslie Goossens
Development Project Manager

cc: Rick Valles Key
Monty McCullough
Brett Ames
Katie Wilson



Development Services

1222 First Avenue, MS S01 • San Diego, CA 92101-4155
Tel (619) 445-5460

ATTACHMENT 3

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San Diego Municipal Code
(4-2008)

Chapter 11: Land Development Procedures

Advertising display sign means a *sign* where the *sign copy* does not pertain to the use of the property, a product sold, or the sale or lease of the property on which the *sign* is displayed and which does not identify the place of business as purveyor of the merchandise or services advertised on the *sign*. Such *signs* include vehicle-mounted *signs* and *billboards*.

Affiliate means business entities, organizations, or individuals who either directly or indirectly (1) control one another or have the power to control one another or (2) are controlled by a third party or are subject to control by a third party. *Affiliates* include chief executive officers and members of boards of directors or their equivalents.

Affordable housing cost shall mean (1) for ownership housing, a housing payment which includes loan principal, loan interest, property taxes, property and mortgage insurance, and homeowners association dues which allows a household with a gross income at not more than one hundred percent (100%) of the area median income to purchase a home and (2) for rental or cooperative housing, a housing payment including a reasonable allowance for utilities, which does not exceed thirty percent (30%) of not more than fifty percent (50%) of the area median income for *very low income* households and thirty percent (30%) of not more than eighty percent (80%) of the area median income for *low income* households.

Alley means a public way that is no wider than 25 feet that is dedicated as a secondary means of access to an *abutting property*.

Amended map means a map as set forth in the *Subdivision Map Act*, Section 66469 through 66472.1, that is used to correct errors or to amend an existing final map or *parcel map*.

Antenna means a device or system used for the transmission or reception of radio frequency signals for wireless communications. It may include an Omni-directional (whip), directional (panel), dish, or GPS *antenna*. It does not include the support structure.

Appealable area means the area, as defined by California Public Resources Code Section 30603, within the coastal zone that constitutes the appeal jurisdiction of the Coastal Commission. This area includes lands between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance; or within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff. The *appealable area* is shown on Map Drawing No. C-730, on file in the office of the City Clerk as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal jurisdiction.

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STATE OF CALIFORNIA - THE RESOURCES AGENCY

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
3111 CAMINO DEL RIO NORTH, SUITE 200
SAN DIEGO, CA 92108-1725
(619) 521-8038

PETE WILSON, Governor



Date: January 14, 1999

TO: COMMISSIONERS AND INTERESTED PERSONS

FROM: DEBORAH LEE, SOUTH COAST DEPUTY DIRECTOR
SHERILYN SARB, DISTRICT MANAGER, SAN DIEGO AREA OFFICE
COASTAL PROGRAM ANALYSTS, SAN DIEGO AREA OFFICE

SUBJECT: STAFF RECOMMENDATION ON CITY OF SAN DIEGO MAJOR LCP AMENDMENT
#1-98B (LAND DEVELOPMENT CODE) (For Public Hearing and possible Commission
Action at the Meeting of February 3 - 5, 1999)

SYNOPSIS

SUMMARY OF AMENDMENT REQUEST

The portion of the City of San Diego LCP amendment submittal which is the subject of this report includes the Land Development Code and support documents. The Land Development Code (LDC) is a complete rewrite of all the City development regulations contained in the Municipal Code. The LDC and support documents would replace or amend City zoning ordinances and implementing actions which have been previously certified by the Commission as part of the certified City of San Diego Local Coastal Program (LCP). The LDC has been developed as part of a multi-year public planning process and is also principally designed to implement the Multiple Species Conservation Program (MSCP) within the entire City of San Diego. The entire Land Development Code has not been submitted by the City for incorporation into the LCP.

The City Council also directed the submittal of the following support documents which will be in a document entitled the Land Development Manual. The guidelines have been submitted for certification by the Commission as consistent with the Coastal Act and include the following: Coastal Bluffs and Beaches Guidelines; Steep Hillside Guidelines; Biology Guidelines; Landscape Standards; and, Historical Guidelines.

On December 24, 1997, the City of San Diego submitted the subject amendment package. However, the amendment request was not formally filed until May 8, 1998. At the Commission's July 1998 hearings, a time extension of up to one year was granted for the amendment package. The amendment submittal and a preliminary staff recommendation were presented to the Commission in October, 1998. The public hearing was opened and testimony was taken from the City and interested members of the public. The Commission then continued the matter to the February, 1999 hearing with the intent that all parties would work together to try and narrow the areas of disagreement. Since the October 1998 meeting, Commission staff has met on many occasions with City staff and the public, and a number of issues have been resolved. The following staff report, while addressing the full amendment submittal, will focus primarily on the remaining unresolved issues.

SUMMARY OF STAFF RECOMMENDATION

Major Issues

ATTACHMENT 5

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CITY OF SAN DIEGO LCPA #1-98B
LAND DEVELOPMENT CODE
January 14, 1999

(d) Notice Address

(3) A notice mailed to a tenant address shall be addressed "~~Resident~~" "Tenant".

8. Section 112.0306, Notice for Coastal Development Permits, shall be revised to read:

All notices for a coastal development permit shall include a statement that the development is within the coastal zone, the date of filing of the application and the number assigned to the application. When a coastal development permit is to be considered under Process Two or at a public hearing, the City Manager shall mail a Notice of Future Decision or Notice of Public Hearing to the California Coastal Commission and all persons requesting notice on Coastal Development Permits. This notice shall be provided in addition to the other notices required by this division. Notices for appealable Coastal Development Permits shall include provisions for appeals to the California Coastal Commission.

Chapter 11/Article 2/Division 5: Decision Process

9. Section 112.0503(b), Process Two, shall be revised to read:

(b) Decision Process. The designated staff person may approve, conditionally approve, or deny the application without a public hearing. The decision shall be made no less than 11 *business* days after the date on which the Notice of Future Decision is mailed to allow for a sufficient time for public comment. A public comment period of sufficient time to allow for the submission of comments by mail will be held prior to the local decision. This 11 *business* days minimum time frame for a staff decision will be extended by a period not to exceed an additional 20 *business* days to allow time for a recommendation by a recognized community planning group, if requested by the group's chair, or the chair's designee [...]

Chapter 11/Article 3/Division 1: Definitions

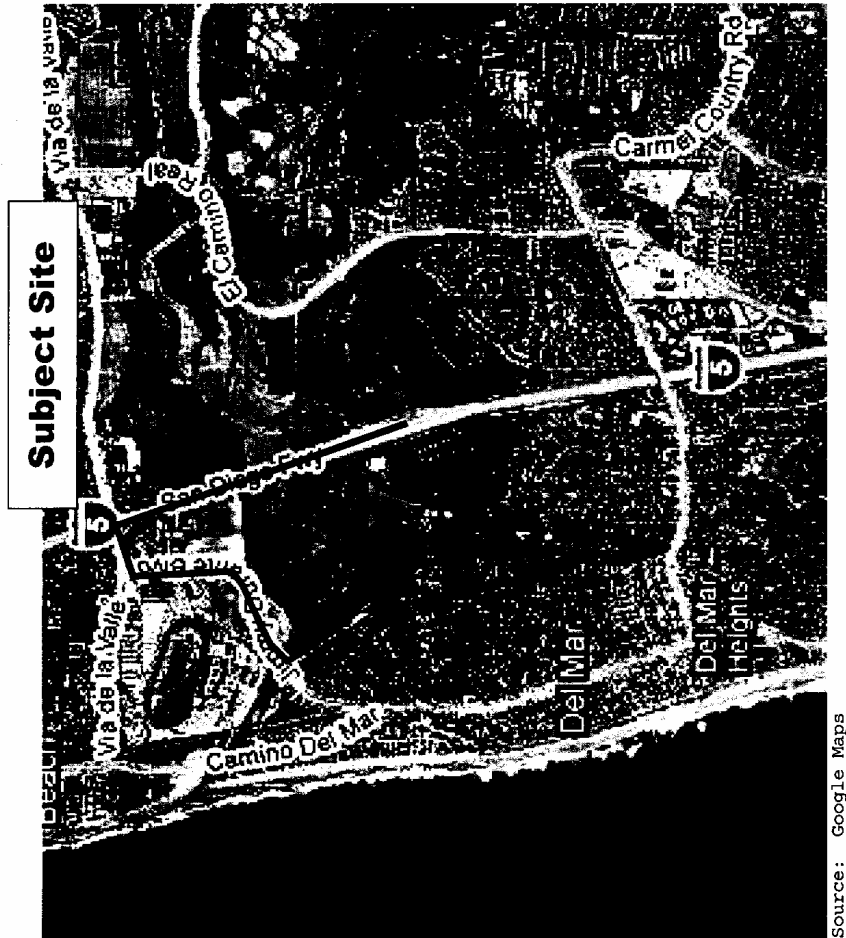
10. Section 113.0103, Definitions, shall be revised to read:

Appealable Area means the area, as defined by California Public Resources Code Section 30603, within the coastal zone that constitutes the appeal jurisdiction of the Coastal Commission. After certification of the local coastal program any developments approved This area includes lands between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance; any development approved or within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff. may be appealed to the Coastal Commission. The appealable area is shown on Map Drawing No C-730, on file in the office of the City Clerk as Document No. 00-17087-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal jurisdiction.

Channelization means the filling or substantial alteration of the floodplain and any artificial flood control works designed and constructed to contain all of a specified flood event.

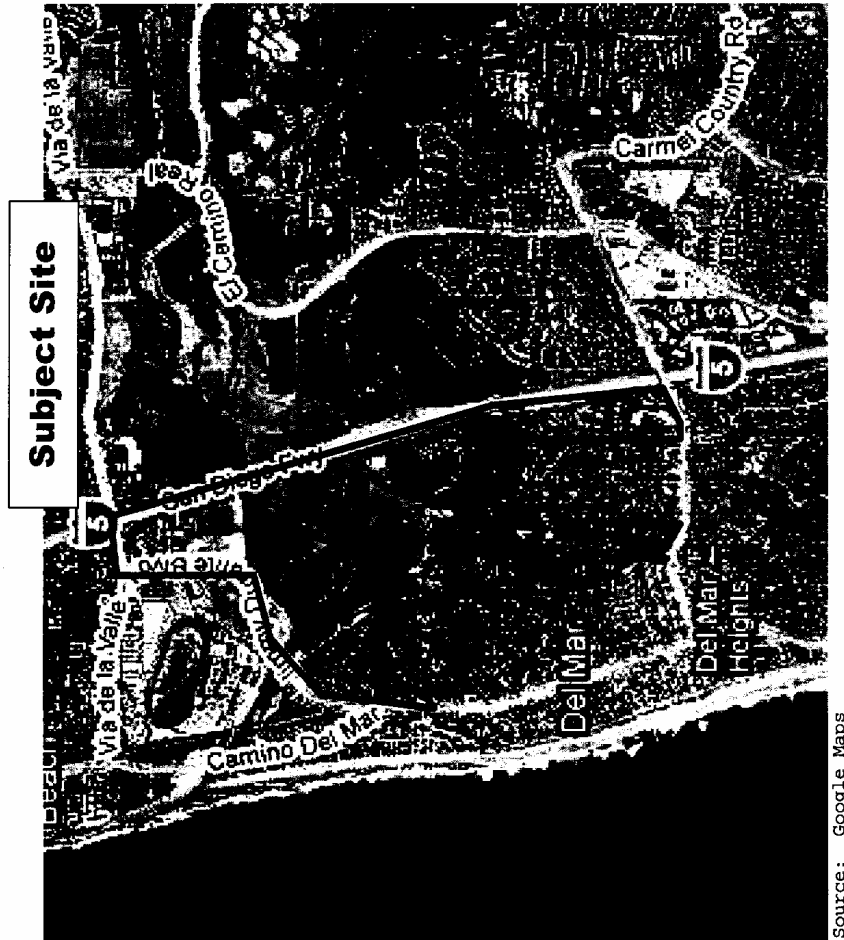
Coastal bluff means an escarpment or steep face of rock, decomposed rock, sediment, or soil resulting from erosion, faulting, or folding, or excavation of the land mass that has a vertical relief of 10 feet or more and is in the coastal zone. It may be flat, curved, or steplike.

Coastal bluff edge means the seaward-most upper termination of the top of a coastal bluff where the downward gradient of the land surface begins to increase more or less continuously until it



ATTACHMENT 6

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ATTACHMENT 7

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§143.0140 General Development Regulations for all Environmentally Sensitive Lands

Development that proposes *encroachment* into *environmentally sensitive lands* or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations.

- (a) *Environmentally sensitive lands* that are outside of the allowable development area on a *premises* shall be left in a natural state and used only for those passive activities allowed as a condition of permit approval. The landowner may elect to offer to dedicate in fee the undeveloped remainder portion of the *premises* to the City to relieve the land owner of management and liability obligations associated with that portion of the *premises*. Otherwise, the passive activities allowed on the undeveloped remainder of the *premises* and any other conditions of the permit shall be incorporated into a covenant of easement that shall be recorded against title to the property, in accordance with procedures set forth in Section 143.0152.
- (b) The allowable development area for all proposed *subdivisions* is based on the existing *lot* or *premises* to be subdivided. If no *development* is proposed on any newly created *lot*, the future development area of the *lot* shall be indicated on the required *grading* plan and included in the maximum allowable development area calculation for the *subdivision*.
- (c) No building *lot* shall be created that provides such a small development area that future reasonable *development* of the *lot* will require additional *encroachment* into *environmentally sensitive lands* beyond the maximum allowable development area of the original, unsubdivided *premises*. If additional development area is proposed for a *lot* that would exceed the maximum allowable development area of the original, unsubdivided *premises*, a deviation in accordance with Section 143.0150 is required, regardless of the *lot* size and the existing development area of the individual *lot*.

San Diego Municipal Code
(4-2008)

Chapter 14: General Regulations

- (d) No temporary disturbance or storage of material or equipment is permitted in *environmentally sensitive lands*, unless the disturbance or storage occurs within an area approved for *development* by a Site Development Permit or unless it can be demonstrated that the disturbance or storage will not alter the landform or cause permanent habitat loss and the land will be revegetated and restored in accordance with the Biology Guidelines in the Land Development Manual.

(Added 12-9-1997 by O-18451 N.S.; effective 1-1-2000.)

(Amended 11-28-2005 by O-19444 N.S.; effective 2-9-2006.)

EDITORS NOTE: The Land Development Manual includes:

Coastal Bluffs and Beaches Guidelines

Biology Guidelines

Historical Resources Guidelines

Submittal Requirements for Deviations within the Coastal Overlay Zone

See RR-292248 for the Coastal Bluffs and Beaches Guidelines of the Land Development Code; RR-292249 for the Biology Guidelines of the Land Development Code; RR-292250 for the Historical Resources Guidelines of the Land Development Code; RR-292251 for the Submittal Requirements for Deviations within the Coastal Overlay Zone of the Land Development Code.

§143.0141 Development Regulations for Sensitive Biological Resources

Development that proposes *encroachment* into *sensitive biological resources* or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations and the Biology Guidelines in the Land Development Manual.

- (a) State and federal law precludes adverse impacts to *wetlands* or listed non-covered species habitat. The *applicant* shall confer with the U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service and/or California Department of Fish and Game before any public hearing for the *development* proposal. The applicant shall solicit input from the Resource Agencies on impact avoidance, minimization, mitigation and buffer requirements, including the need for upland transitional habitat. The applicant shall, to the maximum extent feasible, incorporate the Resource Agencies' recommendations prior to the first public hearing. *Grading or construction permits* shall not be issued for any project that impacts *wetlands* or Listed non-covered species habitat until all necessary federal and state permits have been obtained.

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- (b) Outside and inside the *MHPA*, impacts to *wetlands*, including vernal pools in naturally occurring complexes, shall be avoided. A *wetland buffer* shall be maintained around all *wetlands* as appropriate to protect the functions and values of the *wetland*. In the Coastal Overlay Zone the applicant shall provide a minimum 100-foot buffer, unless a lesser or greater buffer is warranted as determined through the process described in 143.0141(a). Mitigation for impacts associated with a deviation shall achieve the goal of no-net-loss and retain in-kind functions and values.
- (c) Inside the *MHPA*, *development* shall avoid impacts to narrow endemic species. Outside the *MHPA*, measures for protection of narrow endemic species shall be required such as management enhancement, restoration and/or transplantation. A list of narrow endemic species is included in the Biology Guidelines in the Land Development Manual.
- (d) Inside the *MHPA*, *development* is permitted only if necessary to achieve the allowable development area in accordance with the regulations set forth in the OR-1-2 zone, pursuant to Section 131.0250(b), unless exempted from the development area regulations pursuant to Section 143.0111.
- (e) Inside and adjacent to the *MHPA*, all *development* proposals shall be consistent with the City of San Diego *MSCP Subarea Plan*.
- (f) Inside the *MHPA*, any change of an agricultural use to a non-agricultural use is subject to the development area regulations of Section 143.0141(d). Existing agricultural operations that exceed the allowable development area may remain as agricultural use only and do not count as part of the allowable development area.
- (g) Outside the *MHPA*, *development* of lands that are designated as open space in the applicable *land use plan* and zoned OR-1-1 is permitted only if necessary to achieve the allowable development area, in accordance with Section 131.0250(a).
- (h) Outside the *MHPA*, *encroachment* into *sensitive biological resources* is not limited, except as set forth in Section 143.0141(b) and (g).
- (i) All *development* occurring in *sensitive biological resources* is subject to a site-specific impact analysis conducted by the City Manager, in accordance with the Biology Guidelines in the Land Development Manual. The impact analysis shall evaluate impacts to *sensitive biological resources* and CEQA sensitive species. The analysis shall determine the corresponding mitigation, where appropriate, and the requirements for protection and management. Mitigation may include any of the following, as appropriate to the nature and extent of the impact.

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- (1) Acquisition or *dedication* of another site that can serve to mitigate the project impacts, with limited right of entry for habitat management, as necessary, if the site is not dedicated. This site must have long-term viability and the biological values must be equal to or greater than the impacted site.
- (2) Preservation or *dedication* of on-site *sensitive biological resources*, creation of new habitat, or enhancement of existing degraded habitat, with limited right of entry for habitat management, as necessary, if the site is not dedicated. The site must have long-term viability and the biological values must be equal to or greater than the impacted site.
- (3) In circumstances where the area of impact is small, monetary payment of compensation into a fund in lieu of other forms of mitigation. The City shall use the fund to acquire, maintain and administer habitat areas pursuant to City Council Resolution No. R-275129, adopted February 12, 1990. Where appropriate, the City Manager is authorized to enter into agreements with public agencies or private non-profit conservancies or foundations to administer the funds and acquire or maintain habitat preservation areas.
- (j) *Grading* during wildlife breeding seasons shall be consistent with the requirements of the City of San Diego *MSCP Subarea Plan*.
- (k) *Sensitive biological resources* that are outside of the allowable development area on a *premises*, or are acquired as off-site mitigation as a condition of permit issuance, are to be left in a natural state and used only for those passive activities allowed as a condition of permit approval. If the land is not dedicated in fee to the City, identification of permissible passive activities and any other conditions of the permit shall be incorporated into a covenant of easement that shall be recorded against title to the property, in accordance with procedures set forth in Section 143.0152. The U.S. Fish and Wildlife Service and the California Department of Fish and Game are to be named as third party beneficiaries to any covenant of easement recorded pursuant to this section.

(Added 12-9-1997 by O-18451 N.S.; amended 10-18-1999 by O-18691 N.S.; effective 1-1-2000.)

EDITORS NOTE: The Land Development Manual includes:
Coastal Bluffs and Beaches Guidelines
Biology Guidelines
Historical Resources Guidelines

§143.0110 When Environmentally Sensitive Lands Regulations Apply

This division applies to all proposed *development* when *environmentally sensitive lands* are present on the *premises*.

- (a) Where any portion of the *premises* contains any of the following *environmentally sensitive lands*, this division shall apply to the entire *premises*, unless otherwise provided in this division:
 - (1) *Sensitive biological resources*;
 - (2) *Steep hillsides*;
 - (3) *Coastal beaches* (including V zones);
 - (4) *Sensitive coastal bluffs*; and
 - (5) *Special Flood Hazard Areas* (except V zones).
- (b) Table 143-01A identifies the appropriate development regulations, the required decision process, and the permitted uses applicable to various types of *development* proposals that propose to encroach into *environmentally sensitive lands* or that do not qualify for an exemption pursuant to Section 143.0110(c).
 - (1) A Neighborhood Development Permit or Site Development Permit is required for all types of *development* proposals listed, in accordance with the indicated decision process. If *coastal development* is proposed in the Coastal Overlay Zone, a Coastal Development Permit is required in accordance with Section 126.0702.
 - (2) All types of *development* proposals are subject to Section 143.0140.
 - (3) Any *development* proposal that proposes to encroach into more than one type of *environmentally sensitive lands* is subject to all of the development regulations sections for each type of *environmentally sensitive lands* present. The applicable decision process is the higher process number indicated.
 - (4) Any *development* proposal on a site containing *environmentally sensitive lands* may be exempt from the permit requirements of this division if no *encroachment* into the *environmentally sensitive lands* is proposed and the *development* complies with Section 143.0110(c). Within the Coastal Overlay Zone, a Coastal Development Permit is required for all *coastal development* and the regulations of this division shall apply.
 - (5) Limited exceptions to the applicable development regulations for specific types of *development* are listed in Section 143.0111.

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City of San Diego
Local Coastal Program Amendment

Executive Summary
Multiple Species Conservation Program

December 1997

Description of Multiple Species Conservation Program (MSCP)

The City of San Diego's MSCP Subarea Plan was prepared in conjunction with the United States Fish and Wildlife Service, the California Department of Fish and Game and affected property owners to meet the requirements of the California Natural Communities Conservation Planning Act of 1992. The Subarea Plan implements the City's portion of the larger MSCP open space preserve (also known as the Multi-Habitat Planning Area MHPA) which encompasses land in the City and County of San Diego and in several smaller municipalities.

The purpose of establishing the MHPA is to protect and enhance natural areas essential to the continued survival and health of wildlife (plant and animal) species that are threatened by the ongoing urbanization in this region. The concept of the MSCP is that it will be possible for the wildlife agencies (state and federal) to permit development to proceed on other lands because they will have confidence that a sufficient system of protected open space will continue to exist within the region to ensure that endangered and threatened habitats and species will survive and thrive in the future.

The MHPA, which contains both publicly and privately owned land, consists of core areas of high biological value and corridors that connect these core areas. Approximately 90% of the land in the City's MHPA will be preserved for biological purposes.

On April 7, 1997, following an extensive public input and hearing process, the San Diego City Council adopted the City's MSCP Subarea Plan and amendments to the Progress Guide and General Plan and several community plans to implement the MSCP. The plan amendments included revisions to the Open Space and Natural Resource sections of the Progress Guide and General Plan. Open space within the City was placed into two categories: 1.) Multi Species Conservation Open Space and 2.) Other Community Open Space. The primary purpose of Multi Species Conservation Open Space is preservation of biological areas of regional significance. By contrast, Other Community Open Space has several important values including buffering and defining urban areas. Some of these areas also have locally significant biological values.

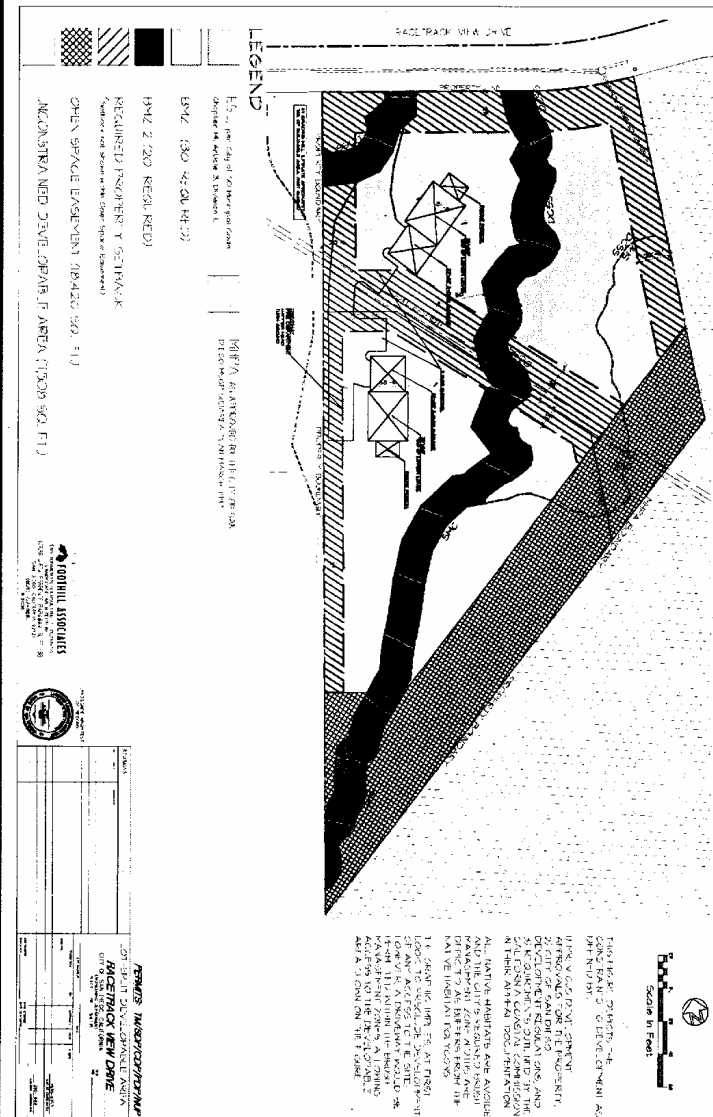
The North City Future Urbanizing Area Framework Plan and the Carmel Valley, Rancho Penasquitos, Otay Mesa, and East Elliott Community Plans were also amended. These amendments expanded the areas designated for open space in these communities and in some instances added language regarding the importance of protecting natural areas of regional biological significance. The Tijuana River Valley Plan was rescinded because with the City's adoption of the MSCP Plan, urban development is no longer

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ATTACHMENT 10

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Special Condition No. 1



CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
7575 METROPOLITAN DRIVE, SUITE 103
SAN DIEGO, CA 92108-4421
(619) 767-2370



Th 13c

Staff: Ellen Lirley-SD
Staff Report: May 22, 2008
Hearing Date: June 11-13, 2008

STAFF REPORT AND RECOMMENDATION ON APPEAL

Application No.: A-6-NOC-07-130

Applicant: Rick Vales Key/Monty McCullough/
Brett Ames Agent: Katie Wilson

Description: Subdivision of vacant 1.84-acre parcel into two 0.92-acre lots and construction of a 5,430 sq.ft. single-family residence, with attached 1,120 sq.ft. garage and 570 sq.ft. guest house above garage on Parcel 1, and a 5,000 sq.ft. single-family residence with attached 960 sq.ft. garage on Parcel 2.

Site: 2835 Racetrack View Drive, North City (Torrey Pines Community), San Diego, San Diego County. APN: 300-160-59

Substantive File Documents: City File; Biological Resources Technical Report, dated May, 2007; Report of Preliminary Geotechnical Investigation, dated November 8, 2005, and including April, 2007 Addendum; Mitigated Negative Declaration

STAFF NOTES:

Summary of Staff's Preliminary Recommendation: The Commission found, on February 7, 2008, that substantial issue exists regarding the grounds upon which this appeal was filed. As approved by the City of San Diego, this development would have significant impacts on both coastal sage scrub (CSS) and southern maritime chaparral (SMC) located adjacent to the MHPA, that would be inconsistent with the applicable land use plans (LUPs) and the certified Implementation Plan (IP) regarding protection of environmentally sensitive lands

This project was originally scheduled for DE NOVO hearing in April, but the applicants submitted written comments the day before the hearing that necessitated a staff response. The applicants claimed that the project is not appealable, stating that the site is not between the first public road and the sea, along with a contention that the special conditions do not allow reasonable use of the site. Thus, the item was postponed.

The main issues here are to demonstrate that the project is appealable and determine what reasonable use on an existing legal lot is. Generally, a single house on a single legal lot provides reasonable use of a site. There is nothing in the City's LCP, or the Coastal Act for that matter, that would require the City to approve a subdivision that results in sensitive biological resource impacts. The subject site is a vacant legal lot, and approval

of a modestly-sized single home would achieve reasonable use of the site. Such a home can be sited on the subject property without impacts to sensitive biological resources adjacent to the MHPA, either from the home or from required fuel management.

In this particular case, staff recommends approval of the coastal development permit, including the proposed subdivision, with special conditions requiring a significant redesign by re-siting of the proposed homes, and associated fuel management, outside of sensitive areas. This recommendation is possible only because the non-constrained (by sensitive biological resources adjacent to the MHPA) portion of the site is large enough to accommodate two reasonably-sized homes without impacts. Therefore, some of the recommended special conditions address the necessary revisions to existing plans, such as the Tentative Parcel Map (TMP), architectural plans, landscaping plan, etc., along with exterior color treatments to minimize visual impacts. Two of the conditions require recorded restrictions to incorporate all permit conditions and to protect on the site sensitive biological resources, and another advises that no additional development can occur on the property without further review, in the form of an amendment to this coastal development permit or separate new coastal development permit, from the Coastal Commission or appropriate local government. The final condition upholds all conditions of the City approvals based on non-Coastal Act requirements.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve Coastal Development Permit No. A-6-NOC-07-130 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE THE PERMIT:

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the certified local coastal program and the public access and recreation policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. Revised Final TPM/Building Plans. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and written approval, final, full-size plans, approved by the City of San Diego, that include the following:

- A revised tentative parcel map eliminating resource impacts and identifying open space to be preserved in perpetuity pursuant to Special Condition #7.
- A revised site plan, including all required fuel management areas, overlain on a vegetation map.
- Revised floor plans and elevations of the proposed homes.

Revised plans shall eliminate all encroachments into the upland native plant communities of coastal sage scrub and southern maritime chaparral located adjacent to the MHPA. Encroachments into non-native grasslands and a small isolated patch of disturbed coastal sage scrub (not adjacent to the MHPA) located in the northwestern corner of the site adjacent to Racetrack View Drive are allowed.

The permittee shall undertake the development in accordance with the approved final plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

2. Revised Final Landscaping Plan. **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit for the review and written approval of the Executive Director, a revised final landscaping plan developed in consultation with the California Department of Fish and Game and approved by the City of San Diego. Said plan shall be in substantial conformance with the plans approved by the City of San Diego (City's Exhibit "A"), but shall be revised to include the following:

- a. A plan showing the type, size, and location of all landscape species to be retained, removed and planted on site and shall include, at a minimum, 4 trees (minimum 24-inch box or 5-foot trunk height minimum) or 4 similarly sized non-invasive plant species to be located adjacent to the northern/northeastern side of the proposed residence(s) in a manner that will maximize screening of the structure and/or upon

maturity will exceed the roofline of the residence so as to break up the façade of the structure from views from San Dieguito Lagoon and Interstate 5.

b. All landscaping shall be drought-tolerant and native or non-invasive plant species, except that use of drought-tolerant, non-invasive ornamental species is allowed as a small garden component. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized.

c. The applicant shall provide a written commitment that all required plantings shall be maintained in good growing condition, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with applicable landscape screening requirements.

d. Rodenticides containing any anticoagulant compounds (including, but not limited to, Warfarin, Brodifacoum, Bromadiolone or Diphacinone) shall not be used.

e. Five years from the date of issuance of the coastal development permit, the applicant shall submit for review and written approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, which certifies the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicant, or successors in interest, shall submit a revised or supplemental landscape plan for the review and written approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

The permittee shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Commission-approved amendment to the permit unless the Executive Director determines that no such amendment is legally required.

3. Exterior Treatment. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for the review and written approval of the Executive Director, a color board or other indication of the exterior

materials and color scheme to be utilized in the construction of the proposed residential addition. This document shall comply with the following requirement:

- a. The color of the proposed residence(s) and roof permitted herein, along with any proposed fences or walls, shall be restricted to colors compatible with the surrounding environment (earth tones) including shades of green, brown, and gray, with no white or light shades and no bright tones except as minor accents.
- b. All proposed external windows on the east and north sides of the residence(s) visible from Interstate 5 or the San Dieguito Lagoon shall be comprised of non-glare glass. No clear glass windscreens, clear glass railings around decks, or clear glass in perimeter or fire walls shall be installed on the site.

The permittee shall undertake the development in accordance with the approved color board. Any proposed changes to the approved color board shall be reported to the Executive Director. No changes to the color board shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

4. Grading/Erosion Control. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit to the Executive Director for review and written approval, final grading and erosion control plans that have been approved by the City of San Diego. The plans approved shall contain written notes or graphic depictions demonstrating that all permanent and temporary erosion control measures will be developed and installed prior to or concurrent with any on-site grading activities and include, at a minimum, the following measures:

- a. Placement of a silt fence around the project anywhere there is the potential for runoff. Check dams, sand bags, straw bales and gravel bags shall be installed as required in the City's grading ordinance. Hydroseeding, energy dissipation and a stabilized construction entrance shall be implemented as required. All disturbed areas shall be revegetated after grading.
- b. The site shall be secured daily after grading with geotextiles, mats and fiber rolls; only as much grading as can be secured daily shall be permitted. Concrete, solid waste, sanitary waste and hazardous waste management BMP's shall be used. In addition, all on-site temporary and permanent runoff and erosion control devices shall be installed and in place prior to commencement of construction to minimize soil loss from the construction site.
- c. If grading is to occur during the rainy season (October 1st to April 1st) of any year, the applicant shall submit to the Executive Director for review and written approval, a program for monitoring the condition of erosion control devices and the effectiveness of the erosion control program. The monitoring program shall include, at a minimum, monthly reports beginning November 1st of any year continuing to April 1st, which shall be submitted to the Executive Director for

review and written approval at the end of each month. The reports shall be completed by a licensed engineer and shall describe the status of grading operations and the condition of erosion control devices. Maintenance of temporary erosion control measures is the responsibility of the applicant, including replacement of any devices altered or dislodged by storms. Desilting basin maintenance, including removal of accumulated silt, shall occur prior to the onset of the rainy season and on an as-needed basis throughout the season.

d. Landscaping shall be installed on all cut and fill slopes prior to October 1st with temporary or permanent (in the case of finished slopes) erosion control methods. Said planting shall be accomplished under the supervision of a licensed landscape architect, shall provide adequate coverage within 90 days, and shall utilize vegetation of species compatible with surrounding native vegetation, subject to Executive Director approval.

The permittee shall undertake development in accordance with the approved grading and erosion control plans. Any proposed changes to the approved grading and erosion control plans or grading schedule shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

5. Final Drainage Plan. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and written approval, a final drainage and runoff control plan in substantial conformance with plans approved by the City of San Diego (City's Exhibit "A"), documenting, graphically and through notes on the plan, that runoff from the roof(s), driveway(s) and other impervious surfaces will be directed through vegetation into the street storm drain system.

The permittee shall undertake the development in accordance with the approved plans. Any proposed changes to the approved plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

6. Deed Restriction. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description and graphic depiction of the entire parcel or parcels governed by this

permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

7. Open Space and Conservation Easement

A. No development, as defined in section 30106 of the Coastal Act shall occur in the on-site coastal sage scrub or southern maritime chaparral vegetation adjacent to the MHPA, as shown in Exhibit #8 except for:

1. maintenance of the existing utility easement that crosses the site in a general southeast to northwest direction;
2. maintenance of that portion of the existing desilting basin located in the northeast portion of the site, and extending into the adjacent MHPA lands;

AND

3. installation of minor drainage pipes.

B. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT

PERMIT, the applicant shall execute and record a document in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private association approved by the Executive Director an open space and conservation easement for the purpose of habitat conservation. Such easement shall be located over all coastal sage scrub and southern maritime chaparral vegetation, as shown in Exhibit #8. The recorded document shall include graphic depictions and legal descriptions of both the applicant's entire parcel and the easement area. The recorded document shall also reflect that development in the easement area is restricted as set forth in this permit condition.

C. The offer shall be recorded free of prior liens and encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of the State of California, binding all successors and assignees, and shall be irrevocable for a period of 21 years, such period running from the date of recording.

8. Future Development Restriction

A. This permit is only for the development described in coastal development permit No. A-6-NOC-07-130. Except as provided in Public Resources Code section 30610 and applicable regulations, any future development as defined in PRC section 30106, including, but not limited to, a change in the density or intensity of use land, shall require an amendment to Permit No. A-6-NOC-07-130

from the California Coastal Commission or shall require an additional coastal development permit from the California Coastal Commission or from the applicable certified local government.

9. Other Special Conditions from City of San Diego. Except as provided by this coastal development permit, this permit has no effect on conditions imposed by the City of San Diego pursuant to an authority other than the Coastal Act.

IV. Findings and Declarations.

The Commission finds and declares as follows:

1. Detailed Project Description/History. The proposed development involves the subdivision of a vacant 1.84 acre site into two .92 acre lots. Also proposed is the construction of a 5,430 sq. ft. single-family residence with attached 1,120 sq. ft. garage and 570 sq. ft. guest house above part of the garage on proposed Parcel 1, and a 5,000 sq. ft. single-family residence with attached 960 sq. ft. garage on proposed Parcel 2. Except for the guesthouse above the garage, both houses are one story in height. The house on proposed Parcel 1 will attain a maximum height of 29.2 feet at the guesthouse, with most of the other rooflines at 21 feet. The highest point of the house on proposed Parcel 2 is 29.6 feet at the chimney, with varying lower rooflines for the remainder of the house. The project site is located along the southern slopes of the San Dieguito River Valley, on the south side of Racetrack View Drive (2835) in the City of San Diego (Torrey Pines Community), adjacent to portions of the Crest Canyon Open Space.

The subject site has been addressed by the Commission on at least four separate occasions, including February 7, 2008, when Substantial Issue was found regarding the City's permit for the subject development. Going back to the first action on the site, in August, 1978, the Commission approved a four-lot subdivision (CDP #F6210) on a 38.8-acre vacant parcel that included this property, and dedication of 5 acres north of San Dieguito Drive (later renamed Racetrack View Drive for that portion east of the City of Del Mar). Then, in 1988, the Commission approved two permits for the site: CDP #6-88-92 and #6-88-364. CDP #6-88-92 proposed re-subdivision of the four lots created in F6210 into the current lot configuration, plus construction of a home on Parcel 1. The applicant was already processing building permits for two homes (the other on Parcel 2), when it was discovered that there had been landslides on the site. This required extensive excavation and recompaction of the soils, and some adjustment to the building footprint. The applicant returned to the Commission that same year with CDP application #6-88-364. This incorporated all the elements of CDP #6-88-92, along with the additional grading and site adjustments required to address the landslides, and the home on Parcel 2; the Commission approved that permit and the applicant abandoned CDP #6-88-92. The subject site is Parcel 4 of the 1988 subdivision.

CDP #6-88-364 required recordation of open space deed restrictions on the steep slopes with native vegetation along the southern portions of all four lots. In 1988, native vegetation was only considered sensitive if it occurred on steep slopes, so the open space

restrictions did not apply to the Coastal Sage Scrub (CSS) and Southern Maritime Chaparral (SMC) on the majority, flatter portion of the site. This deed restriction contains the language “unless approved by the Coastal Commission or its successor in interest,” such that the subject permit approval is consistent with the existing recorded documents.

The 1988 permit also discussed the potential for future subdivision of Parcels 3 and 4, which are significantly larger than Parcels 1 and 2 of the 1988 subdivision. Apparently, the City was conducting discretionary review at that time for subdivisions on Parcels 3 and 4, such that they were expected to be submitted for Commission review in the near future. Since the Commission, and its staff, were only protecting sensitive biological resources if they occurred on steep slopes in 1988, any on-site habitat outside the open space deed restriction area was not considered to be an issue. In any case, the potential subdivisions of Lots 3 and 4 did not occur at that time. Lot 3 was subsequently subdivided and there is now one home built and another under construction on that site.

The subject site is located generally within the multi-community area of the North City LCP segment, and more specifically, within the Torrey Pines community of that segment. Thus, planning policies from both certified documents (North City LCP Land Use Plan & Torrey Pines Community Plan) apply to the proposed development. The North City LUP is a certified document dating back to the early 1980's. It specifically addressed the four communities (University, Torrey Pines, Mira Mesa, and North City West) that were identified within its boundaries at that time. Several additional North City communities have split off or otherwise been created within this same geographical area and some have since been renamed. That original document included mostly general planning policies addressing the broad range of resources within the LCP segment. The document is still in use, but, if more detailed individual LUPs for each subarea have been certified, they generally take precedence.

This site is within the Torrey Pines Community of North City, and a Torrey Pines Community Plan/LCP Land Use Plan was effectively certified in April, 1996. That document includes the following statement, on Page 19:

The North City Local Coastal Program – Land Use Plan as amended remains in full force and effect. However, should any policies contained in this document conflict with the previously adopted LCP Land Use Plan, this document shall take precedence.

As the citation indicates, both the original North City Land Use Plan (LUP) and the more recent Torrey Pines Community Plan apply to the subject site. The North City LUP covers the entire geographic area of North City, with the individual community plans each addressing only one subset of North City. The original document contained more general policies, many taken verbatim from Chapter 3 of the Coastal Act, whereas the individual plans contain more specific policies applicable to each separate community. Within the Torrey Pines community, the Torrey Pines Community Plan takes precedence over the North City LCP Land Use Plan only if there are conflicts between the two

documents. The Commission does not identify any conflicts between the resource protection policies within the North City LUP and those in the Torrey Pines Community Plan.

2. Appealability of the Proposed Development. The applicable portions of Section 30603 of the Coastal Act describe appealable area in this way:

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance. ...

...(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

In addition, Section 30115 of the Coastal Act defines “sea,” in part, as:

“Sea” means the Pacific Ocean and all harbors, bays, channels, estuaries, salt marshes, sloughs, and other areas subject to tidal action through any connection with the Pacific Ocean, excluding nonestuarine rivers, streams, tributaries, creeks, and flood control and drainage channels. ...

Finally, Section 13011 of Division 5.5 of the California Code of Regulations defines the “first public road paralleling the sea” in the following way:

The “first public road paralleling the sea” means that road nearest to the sea, as defined in Section 30115 of the Public Resources Code, which:

- (a) Is lawfully open to uninterrupted public use and is suitable for such use;
- (b) Is publicly maintained;
- (c) Is an improved, all-weather road open to motor vehicle traffic in at least one direction;
- (d) Is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and
- (e) Does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and

wetlands cause the waters of the sea to extend landward of the generally continuous coastline.

On December 13, 2007, the Coastal Commission's San Diego office received a Notice of Final Action (NOFA) from the City of San Diego, for a project at 2835 Racetrack View Drive. The NOFA identified this as an appealable coastal development permit, and we sent the Notification of Appeal Period to the City and the applicants on December 14, 2008. Only after appeals were filed on December 28, 2007, and after the Commission found Substantial Issue on February 7, 2008, did the City reverse its position and send a "corrected" NOFA stating that the project was not appealable. Both the original NOFA, as stated previously, and the City's staff report, identified the permit as appealable.

Around 2004-2005, while investigating a potential violation in the larger subdivision to the east of the project site, the Commission staff realized that this area was not being correctly identified as appealable, even though it was clearly between the first public road and the sea. This error had gone unnoticed by City and Commission staffs alike for several years. Since that time, when the Commission staff brought this situation to the notice of several City staffers, the City's NOFAs have identified projects in this general area as appealable, although this is the first development that has actually generated an appeal.

The applicants' attorney asserts that the project is not appealable because the project site is not identified as appealable on the City's draft post-certification maps, that Racetrack View Drive is the first public road and, because the project is on the "inland" side of the road, the project site is not between the first public road and the sea.

To begin with, the draft post-certification maps delineating permit and appeals jurisdiction have never been finalized or adopted by the Commission. While it is true that the City did submit a set of draft post-certification maps for review by Commission staff, numerous errors were identified on those maps by Commission staff. Many attempts have occurred, both by Commission staff and by the City, to arrive at a set of maps ready for certification, including ongoing efforts at this time.

As the applicants note, the City's Land Development Code refers to the appealable areas within the City and states: "[t]he appealable area is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1; however this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal." (emphasis added). The map referenced here is only a draft, with many geographic areas unresolved, such as the subject area, and it has never been presented to or adopted by the Commission, due to these numerous errors. Even if the map had been fully certified, the LCP language explicitly recognizes that the map may not include all lands that are within the appeals area. Clearly that is the case here, where the subject site is not included within the appealable area of the draft, uncertified map, but it is located between the first public road and the sea, as discussed below.

Contrary to the applicants' contention, and what the City's proposed draft post-certification maps may represent, Racetrack View Drive is not the "first public road paralleling the sea," since it ends in a cul-de-sac west of Interstate 5 (I-5). Although Racetrack View Drive appears to meet the first four criteria in the California Code of Regulations citation (a-d, above), it does not meet the criteria identified in part (e). Because Racetrack View Drive ends in a cul-de-sac, it is not a public road that connects to a continuous access system. Thus, there is no public road, as defined in the Commission's regulations, between the subject site and the lagoon, therefore the development is located between the first public road and the sea, and is appealable. The "first public road" designation is not a fixed location, as the addition of new public through streets, vacation of old ones, and changes in resources and tidal prism can require adjustments from time to time. Exhibit #11 demonstrates the most conservative location for the first public road through this area.

The applicants have also questioned whether tidal action extends as far inland as the subject property. The City of San Diego has erroneously identified Camino del Mar as the first public road. There are extensive salt marshes and channels east of Camino del Mar, however, which shows that tidal influence extends at a minimum beyond Camino del Mar, which is why the City's designation of this road as the first public road is incorrect. As explained above, Racetrack View Drive does not meet the criteria for the first public road; therefore, regardless of whether tidal action extends as far east as the subject site, there is still no public road between the project and the salt marshes and channels that exist east of Camino del Mar. In fact, the next through public road east of Camino del Mar is I-5; thus, everything west of I-5 in this river valley is between the first public road and the sea. In reality, tidal action exists far east of I-5, both historically and as currently being enhanced by the San Dieguito River Valley Restoration Plan. Before the restoration activities began, some salt marsh was found as far east as Horsepark, and the movement of tides can be seen in the river channel that far east. A 2003 study conducted by scientists associated with the lagoon restoration demonstrated tidal action both east and west of Interstate 5.

In summary, the subject site is between the first continuous public road and the sea. In addition, tidal action extends to, and well eastward of, the subject site. Therefore, the Commission finds the site appealable as described in the previous Coastal Act and California Code of Regulations citations.

3. Biological Resources. The City's Land Development Code (LDC) defines sensitive biological resources as follows:

Section 113.0103 Definitions

[...]

Sensitive biological resources means upland and/or wetlands areas that meet any one of the following criteria:

- (a) Lands that have been included in the City of San Diego Multiple Species Conservation Program Preserve;
- (b) Wetlands;
- (c) Lands outside the MHPA that contain Tier I Habitats, Tier II Habitats, Tiers IIIA Habitats, or Tier IIIB Habitats;
- (d) Lands supporting species or subspecies listed as rare, endangered, or threatened under Section 670.2 or 670.5, Title 14, California Code of Regulation, or the Federal Endangered Species Act, Title 50, Code of Federal Regulations, Section 17.11 or 17.12, or candidate species under the California Code of Regulations;
- (e) Lands containing habitats with Narrow Endemic Species as listed in the Biology Guidelines in the Land Development manual;
- (f) Lands containing habitats of covered species as listed in the Biology Guidelines in the Land Development Manual. “

The North City Land Use Plan component of the City’s certified LCP contains provisions for protection of sensitive habitat areas, as follows:

Page 17 - Item 19. Determine existing land use designations relative to resource protection in environmentally sensitive areas and adjacent buffer areas.

Page 17 - first goal: To preserve and enhance the unique natural environment.

Page 63 - 7th bullet: Sites within the San Dieguito Lagoon Restoration Plan [1979 plan addressing only areas west of I-5] area which are privately owned should either be purchased by the Federal or State government, or be allowed to develop privately in a manner which is environmentally and financially supportive of the goals and recommendations of the enhancement plan. ...

Page 68 - last paragraph: Another important natural area is Crest Canyon. It extends north from Del Mar Heights Road to San Dieguito Lagoon and includes about 130 acres of native coastal chaparral, a Torrey Pine grove, and sandstone cliffs. Crest Canyon has been acquired by the City and surrounding property owners for open space. This designation precludes future development and virtually assures this beautiful canyon of remaining in a natural state. *[It should be noted that the subject site is not located within the main canyon of the Crest Canyon Open Space, but is at the mouth of the next canyon to the east which is also within the same mapped open space area.]*

Page 73 - Environmentally sensitive habitat areas should be protected against any significant disruption of habitat values, and only those uses dependent on and compatible with such resources should be allowed within such areas...

Page 74 - Development should be sited and designed to prevent impacts which would significantly degrade environmentally sensitive habitat areas.

Page 84 - New development should first be located adjacent to developed areas able to accommodate it, and where it will not have significant adverse effects on coastal resources.

The following citations addressing biological resources are from the certified Torrey Pines Community Plan:

Page 5, Key Policies:

1. All development adjacent to open space areas shall be designed to reduce visual and development impacts.
3. Residential development shall reflect the diversity of existing homes in the community, and shall be in compliance with all development regulations.

Page 9, the following were identified as issues to the community:

Development and construction impacts to environmentally sensitive areas, including sedimentation, erosion, visual impacts, and encroachment.

The lack of protection of environmentally sensitive resources

Page 26, the following goals:

1. Ensure long term sustainability of the unique ecosystems in the Torrey Pines Community, including all soil, water, air, and biological components which interact to form healthy functioning ecosystems.
2. Conserve, restore, and enhance plant communities and wildlife habitat, especially habitat for rare, threatened, and endangered species.

Page 29, the following policies:

1. Land uses adjacent to environmentally sensitive habitats shall not negatively impact those areas.
2. Development impacts to rare, threatened, endangered, or candidate species shall be minimized or eliminated.
3. No filling, clearing, grubbing, or other disturbance of biologically sensitive habitats shall be permitted without approved mitigation plans.

Page 31, policies for San Dieguito Lagoon and River Valley:

4. Development adjacent to the lagoon should be designed to avoid sedimentation, erosion or other potential impacts which degrade the quality of the

water resources, and should preserve existing public views. The following measures to reduce grading impacts should be utilized where appropriate: minimize grading during the rainy season, install sediment basins and/or energy dissipating structures, and ensure revegetation and stabilization of slopes before the onset of the rainy season. To reduce visual impacts, development should be low-profile and screened from view by landscaped buffers.

6. Protect, preserve and enhance the variety of natural features within the San Dieguito River Valley including the floodplain, the open waters of the lagoon and river, wetlands, marshlands and uplands.

Page 119, under Local Coastal Program Policies/Visual Resources policies:

5. Landscaping of properties adjacent to open space areas shall not use invasive plant species. Landscaping adjacent to these areas should use plant species naturally occurring in that area.

6. New residential development shall be compatible with the existing neighborhood, and designed to blend into adjacent natural open space areas. Only low-profile dwellings designed to fit with the natural terrain and not be visually prominent from the canyon floor shall be allowed. For development located in visually prominent areas adjacent to [open] space areas, building colors and materials shall be limited to earth tones and colors subordinate to the surrounding natural environment which minimize the development's contrast with the surrounding hillsides and open space areas.

In addition, because the subject site contains identified sensitive biological resources, the development is subject to the development provisions for sensitive biological resources contained in the Environmentally Sensitive Lands (ESL) Regulations of the City's certified Implementation Plan. The purpose of the ESL Regulations is to protect and preserve environmentally sensitive lands within the City and the viability of the species supported by those lands. Applicable provisions include the following:

143.0140 General Development Regulations for all Environmentally Sensitive Lands

Development that proposes encroachment into environmentally sensitive lands or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations:

[...]

(c) No building lot shall be created that provides such a small development area that future reasonable development of the lot will require additional encroachment into environmentally sensitive lands beyond the maximum allowable development area of the original, undivided premises. If additional

development area is proposed for a lot that would exceed the maximum allowable development area of the original, unsubdivided premises, a deviation in accordance with Section 143.0150 is required, regardless of the lot size and the existing development area of the individual lot.

143.0141 Development Regulations for Sensitive Biological Resources

Development that proposes encroachment into sensitive biological resources or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations and the Biology Guidelines in the Land Development Manual.

[...]

- (h) Outside the MHPA, encroachment into sensitive biological resources is not limited, except as set forth in Section 143.0141(b)* and (g)*.

* The two exceptions referred to in the above citation are wetlands and their buffers, and designated open space.

The subject site contains essentially three vegetation communities: disturbed non-native grassland (.92 acres), coastal sage scrub (.38 acres) and southern maritime chaparral (.53 acres). Included within these native habitat areas is the Del Mar Mesa Sand Aster (which is considered sensitive by the California Native Plant Society). In addition, the California Gnatcatcher has been observed on the site in the coastal sage scrub habitat located adjacent to the MHPA. The project site is not within the City's Multi-Habitat Planning Area (MHPA), but the MHPA borders the site on the south, east and across Racetrack View Drive to the north and contains the same vegetation communities that are found on the site.

The proposed project will result in direct impacts to both coastal sage scrub (CSS) and southern maritime chaparral (SMC). Habitat impacts will result from the actual development (homes, driveways, landscaping) and necessary fuel management for fire safety. Impacts include removal of .35 acres of CSS and .19 acres of SMC. Approximately 500 Del Mar Mesa Sand Aster individuals were found scattered over the site; some will be impacted, but the biology report did not identify how many. Proposed mitigation for upland habitat impacts is through a combination of on-site preservation of the remaining on-site habitat (through a conservation easement) and payment into the City's Habitat Acquisition Fund; mitigation for the loss of Del Mar Mesa Sand Asters was considered to be included in these measures.

The SMC is defined as a Tier I habitat area and the CSS is Tier II, thus these habitat areas are both sensitive biological resources, as defined in the LDC. In addition, the site contains sensitive biological resources due to the presence on-site of Del Mar Sand Aster individuals and gnatcatchers, both of which are covered species listed in the Biology Guidelines in the Land Development Code.

As proposed, and approved by the City of San Diego, the project will result in adverse impacts to these sensitive biological resources in the form of direct impacts to CSS (.35 acres) and SMC(.19 acres), that are otherwise avoidable. The property is large enough that several alternatives to the proposed design are possible. These will be discussed in detail in a subsequent finding. The applicant disagrees that all impacts to sensitive resources on the property could be avoided. This is based on the fact that the City considers the non-native grasslands to be environmentally sensitive and requiring mitigation, and no development can occur on either the existing lot or with the proposed subdivision without impacting those non-native grasslands. The applicant also argues that because the site is not located within the MHPA, the applicant is allowed to develop the entire site, even for a single home, impacting all vegetation, so long as mitigation is performed.

The Coastal Commission has not interpreted the resource protection policies of the Act or certified LCPs to allow all impacts at any cost to sensitive resources. The numerous policies cited above in both the North City Land Use Plan and the Torrey Pines Community Plan are designed to protect sensitive biological resources and to minimize the impact of new development on these resources. In addition, Section 143.0140 of the ESL regulations states that allowable development area is based on an existing lot or premises. The determination of the allowable development area should be based on application of all applicable LUP policies and, in this case, the ESL regulations to accommodate reasonable use recognizing any resource constraints.

The policies of the Torrey Pines Community Plan require that land uses adjacent to environmentally sensitive habitats must not negatively impact those areas and that impacts to rare or threatened species must be minimized or eliminated. (See page 29). Whenever sensitive resources are present, therefore, impacts to those resources must always be avoided if possible, then potentially minimized and mitigated depending on the circumstances. Policies that provide for preventing or minimizing impacts should be considered in a manner that is most protective of the resource if impacts may be allowed at all. Therefore, in this particular case, to conform to the applicable LUP policies, the allowable development area should not encroach into environmentally sensitive lands if it is possible to avoid such impacts. Where impacts are unavoidable, they should be minimized.

It must be recognized that this property has no right or entitlement to a subdivision. As an existing, subdivided legal lot it is entitled only to reasonable use of that one lot, which is generally interpreted to mean one modest single-family residence. The City was under no obligation to approve a subdivision when the resulting project had impacts to sensitive biological resources adjacent to the MHPA. Neither was the City required to approve the specific, large homes that were proposed, when other projects could avoid impacts to sensitive biological resources adjacent to the MHPA. It is only because the site is large enough to accommodate two homes without impacts to sensitive biological resources adjacent to the MHPA that the Commission can find subdivision of the property into two lots to be consistent with the certified LCP, and particularly with the certified LUP documents that apply to the site, when the ESL regulations are intended to implement

those policies. As noted above, in a previous CDP action on the site, it was acknowledged that future subdivision of the site may occur. However, no approval of such occurred. The reason the potential future subdivision was mentioned in prior staff reports was simply to put the applicants on notice that when and if such a proposal occurs, a report addressing geotechnical issues needed to be submitted. Thus, the applicants' claim of entitlement is not accurate.

Regarding the resources on this particular site, the City's Land Development Code does not consider the three vegetation types on the site, southern maritime chaparral (Tier I), coastal sage scrub (Tier II) and non-native grasslands (Tier III), as being equal in value, nor do they require the same level of mitigation. Although the Commission acknowledges that non-native grasslands do perform many of the same functions as native grasslands, they would not typically be considered as important a resource to protect as are the other identified habitats on the site, unless they supported rare or listed species. Therefore, impacts to these habitat areas are less significant than impacts to the Tier I and Tier II habitats also present on the site.

The City of San Diego created its Multiple Species Conservation Plan (MSCP) in the mid-90's, in response to the state's Natural Communities Conservation Plan (NCCP) legislation. Based on the MSCP requirement to preserve the best habitats, along with connecting habitats to provide corridors for wildlife movement, the City created the Multi-Habitat Preserve Area (MHPA). However, the MSCP/MHPA was never incorporated into the City's LCP, although it is referenced in the newer certified LUPs of the City, and in portions of the certified IP as well. Because the program itself is not certified as part of the LCP, it is not a legal standard of review for CDPs. Since most City-issued CDPs are associated with other local discretionary permits, however, the MSCP provisions are typically relied upon by the City for most City actions.

It should also be noted that while the subject site is not located within the mapped MHPA, the MHPA is currently composed of mostly public lands. Private lands were only included in the MHPA when the property owner was willing to allow that designation. Otherwise, the MHPA boundaries simply exclude the private properties, regardless of the resources on the private sites. In this particular case, the MHPA follows the property boundary on the east and south of the subject site exactly, as well as across Racetrack View Drive to the north. The same sensitive biological resources that occur on the subject site are located on the adjacent MHPA lands. Thus, the fact that the on-site sensitive biological resources adjacent to the MHPA (as determined by the Commission's ecologist) is not included in the MHPA appears to be based not on ground truthing the resources but on the large-scale aerials used by the City to map the conceptual boundaries of the MHPA. On its face, this would not appear consistent with the intent of the NCCP program overall, nor with the City's ongoing practice of doing site-specific mapping when a project is proposed and then adjusting the MHPA boundaries accordingly.

The City's MHPA mapping has thus resulted in the City applying a lower standard of review for those on-site sensitive biological resources adjacent to the MHPA, even though they extend beyond the site and are really part of the overall sensitive biological

resources of the MHPA that surrounds, or is adjacent to, the site on the north, east and south. Moreover, the MSCP was never certified as part of the City's LCP, and the standard of review here is solely the provisions of the certified LCP, thus any MSCP policies related to development outside of the MHPA that are not also adopted in some fashion into the LCP are not relevant to the Commission's determination of whether this project is consistent with the certified LCP. Both the SMC (Tier I) and the CSS (Tier II) are considered very environmentally sensitive lands pursuant to the LCP's categorization, and in this case, with several non-impactive alternatives available, the relevant policies of the certified LUP require that these resources adjacent to the MHPA should not be disturbed.

The applicants claim that despite the protective policies of the City's LUP, Section 143.0141(h) of the City's implementing plan should be interpreted to allow unlimited impacts to sensitive biological resources, as long as those resources are located outside of the MHPA. This broad interpretation of 143.0141(h) that would allow complete elimination of all sensitive biological resources outside of the MHPA is not supported by the policies in the LUP or other sections of the LDC. For example, Section 143.0140 of the LDC requires that no building lot shall be created if future reasonable development of that lot would require encroachment into environmentally sensitive lands beyond that allowed for development of the unsubdivided premises. This is exactly the situation presented here, where the applicants could develop their single lot with no impacts to sensitive resources. Thus, this provision of the ESL prevents subdivision of this property unless such subdivision would not result in encroachment into environmentally sensitive lands. If one were to accept the applicants' interpretation of 143.0141(h), it would essentially eliminate Section 143.0140(c) of the ESL, as there are no circumstances under which it could apply. Moreover, Section 143.0141(h) is located in the City's LDC, which is intended to implement the policies of the certified LUP. The applicants' interpretation of this provision would eliminate protection of sensitive biological resources outside of the MHPA. This not only does not implement the many LUP policies cited above, but it directly contradicts those policies. Instead, Section 143.0141(h) is more reasonably interpreted, in light of the LUP policies and other ESL policies, to mean that encroachment into sensitive biological resources outside the MHPA is not prohibited, as it would be if it were treated as environmentally sensitive habitat areas are in the Coastal Act, but that encroachment is still subject to other applicable policies of the LUP and ESL that require minimization of that encroachment.

The applicants also claim that the SMC and CSS on the site should not be considered biologically sensitive habitats because they are not identified on a "Biologically Sensitive Habitats" map for the Torrey Pines Community Plan. The Torrey Pines Community Plan is clear, however, that the determination of what constitutes environmentally sensitive lands will be made on a project-specific basis based on the best information available at the time of the that determination. See Section 143.0113 of the LDC. Thus, under the requirements of the LDC, the City and the Commission on appeal must evaluate the sensitivity of the habitat on the subject property prior to issuance of a CDP.

In summary, the proposed development is clearly inconsistent with the various resource protection policies of the North City LCP Land Use Plan and the Torrey Pines Community Plan that have been cited above. Where there is any potential for interpreting the LUP and IP differently, the LUP is the controlling document, such that the IP must be interpreted in a manner most consistent with LUP policies. All relevant LUP policies must be considered before allowing any impacts to sensitive resources. In addition, the proposed development is inconsistent with the LDC regarding new subdivisions. Therefore, Special Condition #1 requires a revision to the site plan that eliminates all impacts to CSS and SMC adjacent to the MHPA, whether for buildings, pavement, landscaping, or fuel management. Special Conditions #2-5 require revision to the rest of the plan package (landscaping, color board, erosion control and drainage plans) to be consistent with the redesign required in Special Condition #1.

Implementation of two of the special conditions (Special Condition #6 and Special Condition #7) involve the processing and recordation of a deed restriction and an offer to dedicate an easement. The purpose of the deed restriction required in Special Condition #6 is to record all conditions of approval, therefore reminding the current property owner of his or her duties with respect to the use and upkeep of the site, and notifying any and all future owners of the property that there are restrictions that run with the land and continue to be applicable. Special Condition #7 requires the permittees to record an offer to dedicate the open space area of their site for permanent preservation. Since this open space portion of the subject site is contiguous with MHPA lands, it is likely the City may accept the offer and potentially add the area to the MHPA. Only as conditioned, can the Commission find the proposed development consistent with the entire certified LCP, that is, with all applicable LUP policies considered, and the IP provisions interpreted in the manner most consistent with those controlling LUP policies.

4. Potential Project Alternatives. As noted above, the subject site is an existing undeveloped legal lot. Approximately one-half of the subject site (.92 acres) contains non-sensitive vegetation (disturbed non-native grasslands). Currently, there is adequate development area on the existing premises to be developed with a single-family home and avoid all impacts to on-site sensitive habitats (CSS and SMC) adjacent to the MHPA from the development itself and necessary brush management. In other words, it is the subdivision of the existing legal lot into two lots, creating development expectations over a significantly greater portion of the property, that results in direct impacts to environmentally sensitive lands; the property owner can develop the existing lot and achieve economic use of the site without impacts to sensitive biological resources. Thus, no subdivision need occur to accommodate reasonable development of the subject property.

However, the Commission is not prohibiting a subdivision of this property through this action, if the applicant revises the project to avoid sensitive biological resources adjacent to the MHPA. As stated previously, it would appear there are several viable project alternatives. First, the applicant could build a single home complex on the existing property without a subdivision. Recognizing the constraint of the utility easement that crosses the property and prohibits buildings within it, the applicant could achieve equal or

greater floor area in a single home at the northern end of the site, and construct a detached garage, guest house, or other outbuildings south of the utility easement.

Second, the applicants could have the desired subdivision, and construct two smaller single-story homes on the two resulting legal lots. This would provide homeowners a greater outdoor area, and still preserve all on-site sensitive biological resources adjacent to the MHPA. Third, two, 2-story homes could be built. This would allow the subdivision, plus allow the applicant to construct homes of equal square footage to those proposed, while cutting the project footprint in half, thus preserving all on-site sensitive biological resources. The applicants are currently proposing one single-story home, and one mostly single-story but with a second floor over the garage; both proposed homes are roughly 29 feet in height (where a maximum of 30 feet is allowed). However, many good-sized two-story homes are built within the City of San Diego within that same height limit. Since complete two-story homes would have more bulk, if not more height, than the single-story homes proposed, this alternative could result in view impacts. These can be resolved through appropriate design, landscaping, building colors, and siting.

The applicants have submitted their interpretation of what could be built on two lots if all sensitive biological resources adjacent to the MHPA are completely avoided. This drawing is attached as Exhibit #9. The applicants have determined that two-story homes would not be acceptable to the community, and, because of the utility easement, would not be desirable for purchase, and believe that reasonable use of the site cannot be attained without impacts to sensitive biological resources adjacent to the MHPA since the developable areas are too small for homes compatible with surrounding development. The Commission notes two problems with the applicants' submitted drawings and conclusions. First, the applicants chose to place little boxes in the middle of each developable area, rather than spreading out and using ALL the developable area, which would provide both larger homes and also more architecturally-interesting structures. Since there are no sensitive biological resources within them, the total 50-foot brush management areas provide plenty of space for project grading, driveway access, yards, patios, pools, etc. It is only the homes themselves that are limited to the developable areas shown in white on the exhibit.

Second, the applicants have identified a biological constraint that wasn't addressed as such in prior Commission staff reports, namely, a small, isolated area of disturbed coastal sage scrub in the northwest corner of the site. This area is surrounded on the east and south by non-native grasslands, on the west by an existing developed residential lot, and on the north by Racetrack View Drive. Thus, it is separated and not adjacent to the MHPA. In addition, no gnatcatchers were identified in this area. Because of the small size and isolation of the vegetation, the Commission finds this area of vegetation would not rise to the level of protected sensitive biological resources, and was not so identified by the Commission's staff ecologist. As approved by the City, that small bit of vegetation would be mostly eliminated by proposed driveway improvements. The determination that that area is not a sensitive biological resource would remove any need for brush management zones in that part of the site. Thus, although the northern building

area is significantly more constrained on the applicants' interpretation sketch, that entire corner of the site could then be added to the available development area for the northern house.

Any of these alternatives, and perhaps many more as well, could be designed to avoid all impacts to southern maritime chaparral and coastal sage scrub adjacent to the MHPA from either the residences or the required fuel management zones. Although City regulations would still require mitigation for impacts to non-native grasslands, the applicants' mitigation burden would be greatly decreased by not having to mitigate for huge losses to CSS and SMC. Since a variety of alternatives would be environmentally preferable to the proposed project, the Commission finds the proposed project inconsistent with the certified LCP, and can only approve the development as conditioned to require avoidance of impacts on sensitive biological resources adjacent to the MHPA.

5. Visual Resources. The certified North City LUP contains provisions for protection of visual resources within the Coastal Zone. Applicable provisions include the following:

Page 17 - Item 21. Protect the visual integrity of future development on the slopes above San Dieguito Lagoon, at the Interstate 5-Carmel Valley Road intersection, and in the Sorrento Valley industrial area.

Page 89 - Protect scenic and visual qualities of coastal areas as a public resource.

Page 89 - Development should be designed to protect public views to and along the ocean and scenic coastal areas ...

In addition, several of the earlier citations for biological resources reference visual resources as well. The project site is highly visible from both Interstate 5 (southbound) and other public areas within the San Dieguito River Valley west of Interstate 5. Current construction of a major restoration project in the river valley includes a new public trail system. Thus, the proposed development will be visible to an even larger number of people in the future.

The proposed residential structures conform to required building heights, setbacks and other lot development standards. However, as discussed in the previous section, the proposed homes impact sensitive biological resources, and, as such, are required to be revised. However, Special Condition #2 is required to assure the screening of the proposed structures through on-site landscaping, and Special Condition #3 addresses appropriate exterior color treatments, to reduce the visibility of the proposed structures from off-site public vantage points. The first of these conditions includes that additional screening trees may be required if the 2-story option is chosen, even though, at 29+ feet, the currently-proposed 1-story homes attain as great a height as 2-story homes would typically. Thus, even if the applicant switches to 2-story homes, they will not be significantly more prominent in the identified view sheds than the proposed 1-story

residences. Thus, the Commission finds that, with the attached special conditions, the project can be found consistent with the certified LCP.

6. Public Access. The following public access Chapter 3 policies are most applicable to the proposed development and state, in part:

Section 30210

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

- (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
- (2) adequate access exists nearby, or,
- (3) agriculture would be adversely affected. ...

The site is located between the sea (San Dieguito Lagoon) and the first public road, which is I-5 in this location. Racetrack View Drive ends in a cul-de-sac within a larger subdivision east of the subject property. The San Dieguito Lagoon open space system begins just north of Racetrack View Drive, with native uplands just north of the road sloping down to wetlands moving north towards the San Dieguito River. The river valley is undergoing a massive restoration project, which is about halfway complete at this time. The restoration project includes a public trail system; however, it is located mostly along the northern side of the wetlands and uplands, with a smaller overlook loop trail in the upland area on the south side of the valley, but east of I-5.

The ocean itself, and the municipal beaches in the City of Del Mar, are more than a mile west of the subject site. The main east-west beach access routes are Via de la Valle and Del Mar Heights Road, located north and south of the site, respectively. Racetrack View Drive is strictly a two-way residential street within the City of San Diego. Its western terminus is at Jimmy Durante Drive, which primarily accesses various areas of the Fairgrounds. Thus, Jimmy Durante is used by the public for access to recreational events at the Fairgrounds, and also as a means of connecting to other access points to the Del Mar beaches.

To summarize, the proposed project is on a tucked-away site on the south side of the San Dieguito open space, separated from it by Racetrack View Drive. Except for residents living further east on this street (less than thirty houses), this street is not used as a beach access route. The beach itself is over a mile to the west, and there will be no water contact activities within the lagoon. Therefore, the Commission finds the proposed development, as conditioned, consistent with the cited public access Coastal Act policies.

7. Local Coastal Planning. The City of San Diego has a fully certified LCP, and has issued a coastal development permit (CDP) based on consistency with the LCP. The City's permit was appealed, and the Commission found, on February 7, 2008, that a substantial issue has been raised. Therefore, the City's CDP is null and void, although other local permits approved in conjunction with the CDP remain effective. A new CDP from the Coastal Commission is approved herein, using the certified LCP as the legal standard of review. With the conditions attached hereto, the Commission finds that approval of this development will not prejudice the City's ability to continue implementation of the certified LCP throughout its coastal zone.

8. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project has been conditioned in order to be found consistent with the City of San Diego's certified LCP. Mitigation measures, including conditions addressing project redesign will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned, is the least environmentally-damaging feasible alternative and is consistent with the requirements of the Coastal Act to conform to CEQA.

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development

shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

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1 VI. WHEREAS, coastal development permit No. 6-88-364
 2 was subject to the terms and conditions including but not limited
 3 to the following conditions:

4
 5
 6 Applicant's Assumption of Risk. Prior to the issuance of the
 7 coastal development permit, the applicant as landowner shall
 8 execute and record a deed restriction, in a form and content
 9 acceptable to the Executive Director, which shall provide: A- that
 10 the applicant understands that the site may be subject to extra-
 11 ordinary hazard from landslide potential, and the applicant
 12 assumes liability from such hazards; and B- that the applicant
 13 unconditionally waives any claim of liability on the part of the
 14 Commission and agrees to indemnify and hold harmless the Commission
 15 and its advisors relative to the Commission's approval of the project
 16 for any damage due to natural hazards. The document shall run with
 17 the land, binding all successors and assigns, and shall be recorded
 18 free of prior liens.

19 VII. WHEREAS, the Commission found that but for the
 20 imposition of the above conditions the proposed development could
 21 not be found consistent with the provisions of the California
 22 Coastal Act of 1976 and that a permit could therefore not have
 23 been granted; and

24 VIII. WHEREAS, it is intended that this Deed Restriction
 25 is irrevocable and shall constitute enforceable restrictions; and

26 IX. WHEREAS, Owner has elected to comply with the
 27 conditions imposed by Permit No. 6-88-364 so as to enable
 Owner to undertake the development authorized by the permit.

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1 NOW, THEREFORE, in consideration of the granting of Permit
2 No. 6-88-344 to the Owner by the California Coastal Commission,
3 the Owner hereby irrevocably covenants with the California Coastal
4 Commission that there be and hereby is created the following
5 restrictions on the use and enjoyment of said subject property, to
6 be attached to and become a part of the deed to the property. The
7 undersigned Owner, for himself/herself and for his/her heirs,
8 assigns, and successors in interest, covenants and agrees that:
9 the site may be subject to extraordinary hazard from landslide potential,
10 and assumes the liability from such hazards; and agrees to unconditionally
11 waive any claim of liability on the part of the Coastal Commission and
12 agrees to indemnify and hold harmless the Commission and its advisors
13 relative to the Commission's approval of the project for any damage due to
14 natural hazards.
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23
24 If any provision of these restrictions is held to be invalid
25 or for any reason becomes unenforceable, no other provision shall
26 be thereby affected or impaired.
27

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1 Said deed restriction shall remain in full force and effect
 2 during the period that said permit, or any modification or
 3 amendment thereof, remains effective, and during the period that
 4 the development authorized by said permit or any modification of
 5 said development, remains in existence in or upon any part of, and
 6 thereby confers benefit upon, the subject property described
 7 herein, and to that extent, said deed restriction is hereby deemed
 8 and agreed by Owner to be a covenant running with the land, and
 9 shall bind Owner and all his/her assigns or successors in interest.

10
 11 Owner agrees to record this Deed Restriction in the
 12 Recorder's office for the County of San Diego as
 13 soon as possible after the date of execution.

14
 15 DATED: February 16, 1999

16
 17 SIGNED: *Cameron Noesteghi*

18
 19 Cameron Noesteghi

20
 21 PRINT OR TYPE NAME OF ABOVE

22
 23 SIGNED: _____

24
 25
 26 PRINT OR TYPE NAME OF ABOVE

27 (NOTARY ACKNOWLEDGMENT ON NEXT PAGE)

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 of 10/20/08
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1 **NOTE TO NOTARY PUBLIC:** If you are notarizing the signatures of
 2 persons signing on behalf of a corporation, partnership, trust,
 3 etc., please use the correct notary jurat (acknowledgment) as
 4 explained in your Notary Public Law Book.

5
 6 State of California, County of San Diego, ss
 7 On this 16th day of February, in the
 8 year 1989, before me Melanie M. Adams, a
 9 Notary Public, personally appeared Cameron Moshaghil
 10 personally known to me (or proved to me on the basis of
 11 satisfactory evidence) to be the person whose name is subscribed
 12 to this instrument, and acknowledged that he/she executed it.



Melanie M. Adams
 NOTARY PUBLIC IN AND FOR SAID
 COUNTY AND STATE

13
 14
 15
 16
 17
 18 State of California, County of _____, ss
 19 On this _____ day of _____, in the
 20 year _____, before me _____, a
 21 Notary Public, personally appeared _____
 22 personally known to me (or proved to me on the basis of
 23 satisfactory evidence) to be the person whose name is subscribed
 24 to this instrument, and acknowledged that he/she executed it.

25
 26
 27
 NOTARY PUBLIC IN AND FOR SAID
 COUNTY AND STATE

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1 This is to certify that the deed restriction set forth above
 2 is hereby acknowledged by the undersigned officer on behalf of the
 3 California Coastal Commission pursuant to authority conferred by
 4 the California Coastal Commission when it granted Coastal
 5 Development Permit No. 5-28-364 on November 17, 1988
 6 and the California Coastal Commission consents to recordation
 7 thereof by its duly authorized officer.

8 Dated: March 15, 1989

John Bowers
 John Bowers, Staff Counsel
 California Coastal Commission

12 STATE OF California
 13 COUNTY OF San Francisco

14 On March 15, 1989, before me, Deborah L. Rowe,
 15 Notary Public, personally appeared John Bowers,
 16 personally known to me to be (or proved to me on the basis of
 17 satisfactory evidence) to be the person who executed this
 18 instrument as the Staff Counsel and authorized
 19 representative of the California Coastal Commission and
 20 acknowledged to me that the California Coastal Commission executed
 21 it.



Deborah L. Rowe
 NOTARY PUBLIC IN AND FOR
 SAID STATE AND COUNTY

COMMIT PAPER
 STATE OF CALIFORNIA
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ATTACHMENT C

COASTAL COMMISSION STAFF REPORT
DATED OCTOBER 31, 1988

STATE OF CALIFORNIA--THE RESOURCES AGENCY
CALIFORNIA COASTAL COMMISSION
 SAN DIEGO COAST DISTRICT
 1000 CAMINO DEL BOS SOUTH, SUITE 100
 SAN DIEGO, CA 92108-3500
 (619) 297-9740

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EXHIBIT "A" A125

Filed: August 1, 1988
 48th Day: Waived
 180th Day: January 29, 1989
 Staff: EL-50
 Staff Report: October 31, 1988
 Hearing Date: November 15-18, 1988

**REGULAR CALENDAR
 STAFF REPORT AND PRELIMINARY RECOMMENDATION**

Application No.: 6 88-364

Applicant: Cameron Moshtagh

Agent: Concepts West

Description: Resubdivision of four parcels into four new parcels (Parcel 1 - 1.24 acres; Parcel 2 - 1.86 acres; Parcel 3 - 1.84 acres; Parcel 4 - 1.84 acres); also, demolition of existing house and accessory structures and construction of two, two-story, single family residences and associated grading and lot stabilization on two adjacent, vacant parcels (Parcels 1 and 2); project includes approximately 15,000 cu.yds. of cut and fill grading.

Parcel 1

Lot Area	53,046 sq. ft.
Building Coverage	2,904 sq. ft. (5%)
Pavement Coverage	3,000 sq. ft. (6%)
Landscape Coverage	2,000 sq. ft. (4%)
Unimproved Area	45,942 sq. ft. (85%)

Parcel 2

Lot Area	55,016 sq. ft.
Building Coverage	4,687 sq. ft. (9%)
Pavement Coverage	3,000 sq. ft. (5%)
Landscape Coverage	2,000 sq. ft. (4%)
Unimproved Area	45,329 sq. ft. (82%)

Parking Spaces

3 (each)

Zoning

R-1-40,000

Plan Designation

Torrey Pines/Residential

Ht abv fin grade

30 feet

Site:

South side of Racetrack View Drive, approximately 880 feet east of San Dieguito Drive, North City, San Diego, San Diego County.
 APN 900-160-5467

Summary of Staff's Preliminary Recommendation:

Staff is recommending approval with special conditions requiring submittal of a detailed grading schedule and erosion control plans, reclamation of an open space dead restriction, abandonment of Coastal Development Permit #6-88-52 (and amendment) and revegetation of areas disturbed by grading.

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Substantive File Documents: Certified North City Land Use Plan and City of San Diego LCP Implementing Ordinances
CCC Files #6210; #6-88-92 and amendment

PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

I. Approval with Conditions.

The Commission hereby **GRANTS** a permit for the proposed development, subject to the conditions below, on the grounds that the development will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Standard Conditions.

See attached page.

III. Special Conditions.

The permit is subject to the following conditions:

1. Grading and Erosion Control. Prior to the issuance of the coastal development permit, the applicant shall submit final grading plans which shall incorporate the following:

A. From November 15 to March 31 of each year, grading may only occur in increments as determined by the City Engineer and in conformance with Section 62.0417.1 of the Land Development Ordinance of the City of San Diego, as certified by the Commission in January, 1988. Prior to commencement of any grading activity, the permittee shall submit a grading schedule to the Executive Director. Any variation from the schedule shall be promptly reported to the Executive Director.

B. All permanent runoff and erosion control devices shall be developed and installed prior to or concurrent with any on-site grading activities.

C. All areas disturbed, but not completed, during the construction season, including graded pads, shall be stabilized in advance of the rainy season. The use of temporary erosion control measures, such as silt interceptor ditches, sandbagging, filtered inlets, debris basins, and silt traps shall be utilized in conjunction with plantings to minimize soil loss from the construction site.

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2. Open Space Deed Restriction. Prior to the issuance of the coastal development permit, the applicant shall record a restriction against the subject property, from of all prior liens and encumbrances, except for tax liens, and binding on the permittee's successors in interest and any subsequent purchasers of any portion of the real property. The restriction shall prohibit any alteration of landform, removal of vegetation or the erection of structures of any type in the area shown on the attached exhibit #1 without the written approval of the California Coastal Commission or successor in interest. The recording document shall include legal descriptions of both the applicant's entire parcel(s) and the restricted area, and shall be in a form and content acceptable to the Executive Director. Evidence of recordation of such restriction shall be subject to the review and written approval of the Executive Director.
3. Abandonment of Prior Permit. Prior to the issuance of the coastal development permit, the applicant shall commit in writing that, upon issuance of said permit, all development rights approved under Coastal Development Permit #6-02-92, as amended, shall be abandoned. No grading, demolition or construction may occur in reliance on that prior permit, which is herein superseded by the subject permit. The written agreement shall be submitted to, reviewed and approved in writing by the Executive Director.
4. Building Materials. Prior to the issuance of the coastal development permit, the applicant shall submit for the review and approval in writing of the Executive Director a color board or other indication of the exterior materials and color scheme to be utilized in the construction of the exterior residence. Earth tones designed to minimize the project's contrast with the surrounding hillsides and lagoon shall be utilized.
5. Applicant's Assumption of Risk. Prior to the issuance of the coastal development permit, the applicant as landowner shall execute and record a deed restriction, in a form and content acceptable to the Executive Director, which shall provide: (a) that the applicant understands that the site may be subject to extraordinary hazard from landslide potential, and the applicant assumes the liability from such hazards; and (b) that the applicant unconditionally waives any claim of liability on the part of the Commission and agrees to indemnify and hold harmless the Commission and its advisors relative to the Commission's approval of the project for any damage due to natural hazards. The document shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens.
6. Revegetation Plan. Prior to the issuance of the coastal development permit, the applicant shall submit a detailed revegetation plan indicating the type, size, extent and location of all plant materials, any proposed irrigation system and other landscape features to revegetate that portion of parcels 1 and 2 that is disturbed by the remedial grading and buttress fill. Brought tolerant native plants shall be utilized to the maximum extent feasible to re-establish the area consistent with the adjacent naturally vegetated hillsides (open space area). Said plan shall be submitted to, reviewed by and approved in writing by the Executive Director.

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Page 4IV. Findings and Declarations.

The Commission finds and declares as follows:

1. Detailed Project Description. The applicant is proposing resubdivision of four existing parcels into four new parcels of somewhat different dimensions. The resulting parcels will be: Parcel #1 - 1.24 acres; Parcel #2 - 1.26 acres; Parcel #3 - 1.04 acres; Parcel #4 - 1.84 acres. In addition, a single-family residence on Parcel 1 will be removed and new, two-story, single-family residences will be constructed on Parcels 1 and 2. The new home on Parcel 1 will be located in the same area as the existing house. The access driveway for both residences will cut across portions of both parcels, in an area that has seen previous disturbance during the construction of Racetrack View Drive.

The submitted geology report identifies two old landslides on the site and recommends that the landslide area should be excavated and recompact prior to preparation of building pads and house construction. The landslide area extends over portions of both Parcels #1 and #2, and includes areas of naturally vegetated slopes on both parcels as well as less steep or previously disturbed areas. Proposed remedial grading includes excavation and recompaction of that portion of the landslide area underlying the proposed building pads, and will result in higher elevations (close to ten feet higher in one cross-section) for the building pads.

2. Site History. The proposed subdivision, demolition and residential construction will be located on a site which has been the subject of several previous permit actions by the Commission. The original subdivision (Coastal Development Permit No. F6210) was approved on August 16, 1978, when the California Coastal Commission, on appeal, issued a permit for a four-lot subdivision (Replacement Map #77-149). Either that tentative map was revised before recordation, without further Coastal Commission review, or it was never recorded. In any case, some years later the City approved TM 03-0821, a four-lot subdivision of different configuration than that approved by the Commission in 1978. Final Map #14043 was recorded without Coastal Commission review or approval.

In April 1988, the Commission approved a resubdivision (Coastal Development Permit No. 6-88-02) which altered the previous lot lines, but did not result in the creation of any additional parcels. In that action, which also included the demolition and reconstruction of a residence on Parcel 1, the Commission required that an open space deed restriction be applied to the portions of the site where disturbance was not allowed because of steep slopes or sensitive vegetation. The required deed restriction has not yet been recorded.

In July 1988, the Commission approved an amendment to the April 1988 permit which allowed additional grading on Lots 1 and 2 to stabilize a landslide area. The amendment also included the creation of a building pad on Lot 2. The approved amendment was subject to grading and erosion control conditions, including a limitation on the time of grading, and the applicant was required

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to execute an "assumption of risk" deed restriction. The deed restriction has not yet been recorded.

The subject application was submitted on July 29, 1988, and was for the construction of a single family residence on Lot 2 using the previously approved grading (6-88-92-A). Subsequent to that submission, the final geological report was issued, indicating that a slight increase in the proposed grading would be required, resulting in two small encroachments into what had been approved as open space, although the deed restriction has not yet been recorded. The applicant also proposed slightly altering the location of the proposed residence on Parcel 2, to accommodate future plans for a boundary adjustment.

In an attempt to organize the various permit actions, both past and on-going, the applicant postponed action on the subject application and submitted new site and grading plans for Parcels 1 and 2 and the final geology report. To avoid further amendments to Coastal Development Permit #6-88-92, and fragmented approvals where the grading for Lot 2 was on one permit and the residence proposed on another, it was suggested that all items be consolidated into a single approval and the prior permit and amendment be abandoned. The applicant agreed and modified the subject application accordingly. Therefore, the subject application now includes all items listed in Coastal Development Permit #6-88-92 (resubdivision of four lots, demolition of one home, construction of one home and remedial grading) plus the single family residence first proposed in this application. Special Condition #3 calls for the abandonment of the prior permit and amendment, once the current proposal has been approved and the permit issued.

3. Geologic Hazards/Remedial Grading. Section 30253 of the Coastal Act addresses development in hazardous areas and states, in 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 in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

When the subject four lots were originally created in 1976, and again earlier this year when the revised lot configuration was approved by the Coastal Commission, it was not known that a geologic hazard existed on the site. Soil testing which occurred during the subsequent development of building plans revealed the presence of two old landslides on portions of Parcels 1 and 2. The applicant's geotechnical consultant, Geocor, has prepared a detailed report, outlining the current site conditions and making specific recommendations to alleviate the landslide hazard.

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It is the stated opinion of Geocon that a major portion of Parcels 1 and 2 must be excavated, recompact and supported by buttress fill prior to any construction activities occurring on the site. The geologist's maintain that alternatives, such as retaining walls or the resting of the homes, have been considered and found to be equally or more damaging to the environment, while providing a less stable building site. This is due to the presence of an existing buttress fill area of steep slope along Racetrack View Drive, which prevents the homes from being sited nearer the road, and the steep, naturally vegetated condition of the hillsides to the south. Much of the vegetation and portions of the hillsides themselves would have to be removed to properly engineer a retaining wall along the rear of the proposed building sites.

For these reasons, Geocon recommends their preferred treatment, which will excavate and recompact the site, then further stabilize the hillsides with the buttress fill. It is this fill that raises the building pads, minimally in some places, but by as much as ten feet in isolated spots on the site. In addition, the buttress fill will encroach in two areas into the portion of the site previously identified for protection by an open space deed restriction. On Parcel 1, the encroachment into naturally vegetated steep slopes amounts to slightly less than 2% of the total steep slope area on-site, and, on Parcel 2, to slightly more than 1%.

The certified North City Land Use Plan and the City's LCP Implementing Ordinances, specifically the Hillside Review (HR) ordinance, contain provisions allowing some encroachment into naturally vegetated steep slope areas when it is deemed necessary to obtain reasonable use of the site. A sliding scale would allow encroachments of up to 10% on each of the subject parcels, if such were found unavoidable under a discretionary action such as this permit review. In this particular case, the geology report has documented the necessity for remedial site stabilization, and the proposed encroachments are well within the allowed ratio, being 2% and 1% on Parcels 1 and 2 respectively. Therefore, the Commission finds the proposed grading and buttress fill consistent with Section 30263 of the Act, and the Hillside Review Ordinance, since this action will best reduce the landslide hazard on the site.

Due to the inherent risk of any development on this site resulting from the existence of the previous landslides, and the Commission's mandate to minimize risks (Section 30263), the standard waiver of liability condition has been attached. By this means, the applicant is notified of the risks and the Commission is relieved of liability in permitting the development of this site. Pursuant to Section 13166(e)(1) of the Commission's administrative regulations, an application may be filed to remove Special Condition #5 from this permit if the applicant presents newly discovered material information regarding the existence of any hazardous condition which was the basis for the condition, if they could not with reasonable diligence have discovered and produced such information before the permit was granted.

It should be noted at this time that the applicant is currently processing lot splits on Parcels 3 and 4 with the City of San Diego. The original permit review (Coastal Development Permit #F0210) contained a provision that Parcels

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1 and 2 could not be further subdivided and Parcels 3 and 4 could not be subdivided more than a single lot split each, potentially creating a maximum of six total building sites on the applicant's property. Had the landslide history of Parcels 1 and 2 been known at the time the original subdivision was proposed, it is likely the Commission's action would have resulted in fewer parcels, or parcels of different configuration. The rezoning permitted in Coastal Development Permit 6-88-92 and again in this action did not appreciably alter the buildability of any of the four existing parcels. When the applicant applies for a coastal development permit for the further subdivision of Parcels 3 and 4, it will be necessary that a geology report, as detailed as the one prepared for parcels 1 and 2, be submitted with the application. This will allow the reviewing power to approve only those parcels which have adequate, stable building area, and require no encroachments into the designated open space.

4. Visual and Environmental Resource Impacts. Sections 30240 and 30251 of the Coastal Act provide for the protection of scenic coastal areas, the preservation/protection of environmentally sensitive habitats, and for the compatibility of new and existing development. This site is located on the south side of San Dieguito Lagoon, and is highly visible from I-5, Jimmy Durante Boulevard and the Fairgrounds itself. Other than the existing house on Parcel 1, there is no development in the immediate area. To the east, there is a larger subdivision, basically complete and partially occupied, which is separated from the subject property by the surrounding topography. To the west, there is a scattering of older homes back in the canyons and on the lower hillsides, but these too are visually separated from the subject site.

The site is on the south side of Race Track View Drive, with lagoon uplands, under the ownership of the California Department of Fish and Game, on the northern side of the road. That parcel had been placed in permanent open space at the time of the original 1978 subdivision. There are some flatter portions of the subject site near the road, with the land rising gradually, then more steeply, towards the south. Most of the site is covered by native vegetation, with the only disturbed areas being near the road and where the existing house is located. Much of the terrain is at or exceeding 25% gradient, and the entire site is within the City of San Diego's Hillside Review (HR) Overlay Zone. Steep slopes on the property are designated as sensitive slopes within the HR policies, except for those on Parcel 1; this exception may be due to the fact that there are already structural improvements on the site. In any event, Special Condition #2 provides that all naturally-vegetated steep slopes not disturbed by the remedial grading and buttress fill activities shall be retained as permanent open space.

The southerly portion of the site (i.e., the area subject to open space restrictions) is heavily vegetated with native chaparral plant materials, as are the slopes farther to the south. Portions of the southern slopes belong to the applicant and the remainder are part of the Crest Canyon Open Space acquired by the City of San Diego a couple years ago. These vegetated slopes will form a fairly uniform background for the residences. The project site is visible across the lagoon from the north and the addition of the residences

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will result in increased visibility, especially if the exterior color of the residences is lighter than the vegetated background. In addition, the remedial grading necessary for site stabilization will raise the pad elevations above the existing grade, further increasing site visibility. Therefore, Special Condition #4 has been attached to require Executive Director review of the proposed color/architectural treatments in order to assure the future residences will not adversely affect the scenic qualities of the area. Additionally, Special Condition #6 requires that all areas disturbed by grading adjacent to the open space area be revegetated with species compatible with the adjacent natural vegetation.

The proximity of development to the lagoon and the impacts of development have been addressed and mitigated, both previously and within this permit action. As described in previous paragraphs, the lagoon uplands to the north and the majority of the hillsides to the south are now in public ownership. To protect downstream resources, as required in Sections 30231 and 30240 of the Coastal Act, Special Condition #1 establishes strict grading and erosion controls. The open space deed restriction, the grading and erosion control measures and the applicant's assumption of risk for the previously-approved grading operation are repeated in this action, since the deed restrictions have not yet been recorded, and that prior permit will become null and void upon issuance of the subject permit. Therefore, the Commission finds that the proposed development, as conditioned, is consistent with Sections 30231, 30240 and 30251 of the Act, and with the scenic and resource protection policies of the City's certified LCP as well.

5. Local Coastal Planning. Section 30604 (a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. Such a finding can be made for the subject proposal.

The project site is zoned R-1-40,000 and designated for residential development at a density not to exceed one dwelling unit for every 40,000 sq. ft. Each of the parcels in the subject subdivision meets that requirement, as all the parcels exceed an acre in size. The previous findings have shown that the proposed project, with the attached special conditions, can be found consistent with all applicable policies of Chapter 3 of the Coastal Act and that substantial adverse impacts on coastal resources will not result. The proposed project, as conditioned, is also consistent with applicable policies and implementing ordinances of the City of San Diego's North City Land Use Plan and Local Coastal Program. Approval of the project, as conditioned, will not result in any prejudice to the City's ability to implement their fully-certified local Coastal Program.

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6-88-364
Page 9STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All development must occur in strict compliance with the proposal as set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

(8364N)

Description: San Diego, CA Document-Year No-78 1000

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6-88-364



Site

EXHIBIT NO. 1
APPLICATION NO. 6-88-364
Vicinity Map

1

Description: San Diego Co. Document

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6-88-31

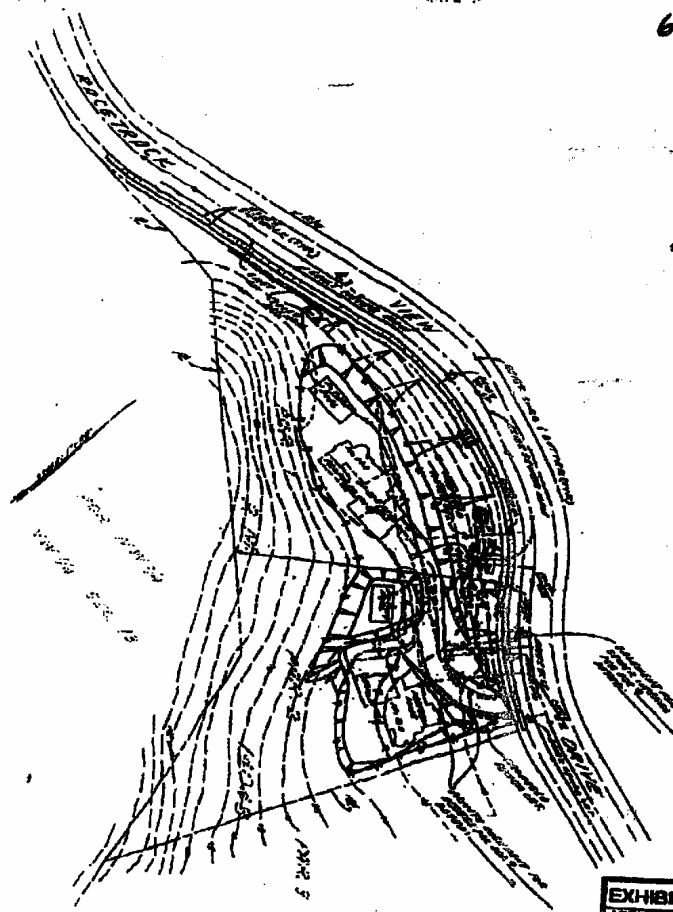


EXHIBIT NO. 2
APPLICATION NO. 6-88-31
Grading Plan
Plan 1 of 2

1

Description: San Diego, CA Document-Year.DocID 1989.186403 Date: 12-15-08

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01-15-2008

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36

Open Space is
Unshaded Area

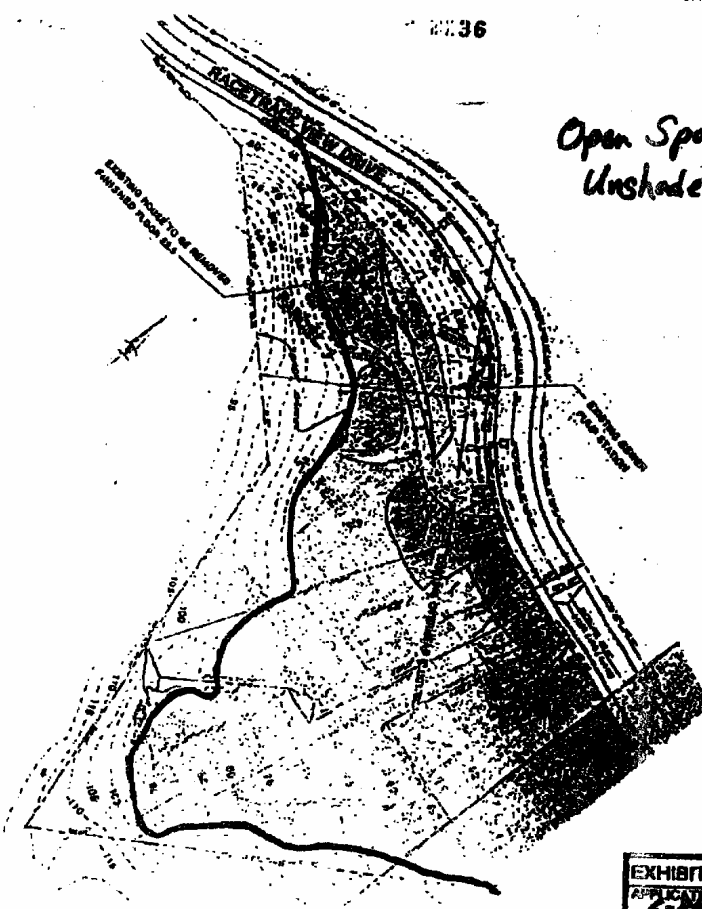


EXHIBIT NO.	3
APPLICATION NO.	2-07-364
Open Space	
City of Alameda, California	

ALAMEDA COUNTY RECORDS & CLERK

1



THE CITY OF SAN DIEGO

January 10, 2008

Ms. Ellen Lirley
San Diego Coast District Office
California Coastal Commission
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108-4421

Subj: Racetrack View Drive, Commission Appeal No. A-6-NOC-07-130

Dear Ellen:

This letter is in response to your January 2, 2008 Commission Notification of Appeal for the project referenced above. Per your request, I am enclosing the relevant documents and materials used in the City of San Diego's consideration of the Tentative Map, Site Development, Planned Development and Coastal Development Permit.

The November 8, 2005 Report of Preliminary Geotechnical Investigation and a November 10, 2006 Addendum was forwarded to you by the applicant. I understand that you already have the Biological Resources Technical Report. We also have a Stormwater Management Plan, Preliminary Drainage Report, and a Cultural Resources Survey in the project file. Per our phone conversation, you did not need copies of these at this time. There were no interested persons at the public hearing, nor did any person express an interest in the decision in writing to the Planning Commission or city staff.

As we discussed, the appeal language refers to language in the North City Land Use Plan. The applicable policy document for land use and design guidelines for this area is the Torrey Pines Community Plan. Appendix E of the Community Plan includes recommendations from the Local Coastal Program Policies. The Visual Resources section, on pages 118-9, recommends that: "new residential development shall be compatible with the existing neighborhood, and designed to blend into adjacent natural open space areas." Moreover, the plan also recommends: "Building colors and materials shall be limited to earth tones and colors subordinate to the surrounding natural environment which minimize the development's contrast with the surrounding hillsides and open space areas".

Staff's analysis, including field visits, of the proposed two new residences, found that the materials and colors proposed for the construction, combined with the proposed new landscaping, would create two new residences that will blend into the existing surroundings once the required landscaping matures. As seen on the aerial photograph in the Report to the Planning Commission (attachment 1), the location of the proposed



Development Services

1222 First Avenue, MS 501 • San Diego, CA 92101-4155
Tel (619) 446-5460

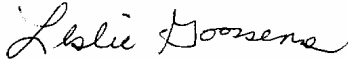
EXHIBIT NO. 5
APPLICATION NO.
A-6-NOC-07-130
Letter from City
<i>2 pages</i>
California Coastal Commission

Ms. Ellen Lirley
January 10, 2008
Page 2

new residences is west of a series of existing homes. Attachment 5 to the Report to the Planning Commission shows that the existing homes to the east of the subject parcel are virtually invisible from a public vantage point. The proposed two new homes would be of similar development to the existing homes to the east. Further, the Torrey Pines Community Plan does not map preservation of view corridors from public vantage points. Staff has confirmed that the view of these homes from I-5 southbound is minimal. The existing mature torrey pines, palms and stone pines more than adequately buffer the existing homes from public view. The proposed new landscaping would create a similar appearance for the new residences as is the case with the existing homes and landscaping. The development proposal is not located within a direct view to the coast or open space and is located adjacent to a hill. The only view of these homes is essentially southbound towards the hill and towards the coast. The location of the proposed two residences is below Crest Canyon and would not adversely affect the view to the canyon.

I hope you find this information helpful. If there is anything else you need, please let me know.

Sincerely,



Leslie Goossens
Development Project Manager

Enclosures:

1. General Application
2. Ownership Disclosure Statement
3. Notice of Public Hearing
4. Certification of Publication for Public Hearing
5. Torrey Pines Community Planning Board Recommendation
6. Report to the Planning Commission, November 29, 2007
7. Racetrack View Drive Exterior Specifications
8. Plans
9. Environmental Resolution with Mitigation, Monitoring a Reporting Program (MMRP) Conditions
10. July 25, 2007 Email from Shawna Anderson of the San Dieguito River Park JPA

cc (without enclosures):

Rick Valles Key
Monty McCullough
Brett Ames
Katie Wilson

Received

JAN 14 2008

California Planning Commission
Planning Commission

FILE COPY

From: Katie Wilson [mailto:katiw@mun.com]
Sent: Thursday, January 31, 2008 11:27 AM
To: sblank@kandsranch.com
Subject: Racetrack View Dr. Appeal (Item th8b on next week's Coastal Comm. Agenda)

Good morning, Commissioner Blank.

I am very interested in an opportunity to speak with you before next week's Coastal Commission hearing regarding an appeal of a project that was approved by the City of San Diego and appealed by the Commission. I have attached the agenda report to this email. Included within the report is our letter responding to the issues raised in the appeal (beginning on page 48 of the report). The issues and our response are as follows:

The project is for a lot split of a 1.84 acre vacant parcel into two .92 acre parcels and construction of two single family homes (one on each lot). The main focus of the appeal is a section of the San Diego Land Development Code that states that no new lot shall be created that results in more encroachment into environmentally sensitive habitat than would be allowed if the lot were left unsubdivided. However, what was ignored was the statement related to ESHA in the Land Development Code that clearly states that development of single family homes have NO LIMIT ON ENCROACHMENT so long as very specific mitigation measures are in place (basically payment into a Habitat Acquisition Fund and/or mitigation on-site --- of which we are doing both). Thus, the City of San Diego Planning Commission and Planning staff correctly found that there is no encroachment beyond what would be allowed without the lot being split.


It is important to note that the Coastal Commission issued the original Coastal Development Permit that created the 1.84 acre parcel and the CDP identified its potential for a further lot split into two lots and did not impose any restrictions whatsoever. The adjacent parcel to the west was also 1.84 acres and was split approximately 5 years ago into two .92 acre parcels with the mitigation of ESHA impacts through the exact same methods we are using (on site preservation and payment into a Habitat Acquisition Fund, as mandated by the San Diego Land Development Code). The City's files show that the Coastal Commission was notified of the approval of that project, but apparently there was a decision made (rightfully so) NOT to appeal that project. Yet, here we are five years later with the exact same Land Development Code and exact same Community Land Use Plan and our identical project is appealed.

Lastly, the appeal incorrectly cited the wrong Community Land Use Plan. Staff identified the applicable plan as the North City LUP, when actually the appropriate plan is the Torrey Pines Community Plan. The North City Plan was the leading document for this area until the Torrey Pines Community Plan was adopted and it clearly states in the Torrey Pines LUP that any conflicts between the two documents shall mean that the Torrey Pines Plan is the guiding document (basically trumps the North City Plan). Thus, in our response to the appeal we address the applicable provisions in the Torrey Pines LUP and our counter arguments showing how our project complies completely. We were unanimously supported by the Torrey Pines Community Planning Group when the project was presented to them for consideration.

Commissioner Ben Hueso is anticipated to make the motion that NO SUBSTANTIAL ISSUE exists and he is considering a YES vote on that motion. We are hoping that you will follow suit and would love to discuss the issues in more detail with you to support our position.

Please feel free to contact me at (858)776-2577 at your convenience, including evenings and weekends. I appreciate your time.

Katie Wilson

EXHIBIT NO. 6
APPLICATION NO.
A-6-NOC-07-130
Applicant's E-mail
 California Coastal Commission

RECORDING REQUESTED BY
CITY OF SAN DIEGO
DEVELOPMENT SERVICES
PERMIT INTAKE, MAIL STATION 501

WHEN RECORDED MAIL TO
PROJECT MANAGEMENT
PERMIT CLERK
MAIL STATION 501

SPACE ABOVE THIS LINE FOR RECORDER'S USE

JOB ORDER NUMBER: 42-6263

COASTAL DEVELOPMENT PERMIT NO. 325414
SITE DEVELOPMENT PERMIT NO. 326387
PLANNED DEVELOPMENT PERMIT NO. 438751
NEIGHBORHOOD USE PERMIT NO. 438758
RACETRACK VIEW DRIVE [MMRP]
PLANNING COMMISSION

This Coastal Development Permit No. 325414, Site Development Permit No. 326387, Planned Development Permit No. 438751, and Neighborhood Use Permit No. 438758 is granted by the Planning Commission of the City of San Diego to RUSSELL V. VALLES KEY, BRETT E. AMES, AND MONTY E. McCULLOUGH, Tenants in Common, Owner/Permittee, pursuant to San Diego Municipal Code [SDMC] section 126.0701, 126.0501, 126.0601, 126.0201. The 1.84 acre site is located at 2835 Racetrack View Drive in the RS-1-1 Zone, Coastal Overlay Zone (appealable), and Coastal Height Limit Overlay Zone of the Torrey Pines Community Plan. The project site is legally described as Parcel 4 of Parcel Map 14043.

Subject to the terms and conditions set forth in this Permit, permission is granted to Owner/Permittee to subdivide a 1.84 acre site into two (2) 0.92 acre parcels and develop the property with two (2) single-family homes and a guest quarters, described and identified by size, dimension, quantity, type, and location on the approved exhibits [Exhibit "A"] dated December 6, 2007, on file in the Development Services Department.

The project shall include:

- a. Construction on Parcel 1 of a 5,430 sq. ft. single family dwelling, 1,130 square foot garage, and 570 sq. ft. guest quarters, including grading, landscaping and associated site improvements;
- b. Construction on Parcel 2 of a 5,000 square foot single family dwelling and a 960 square foot garage, including grading, landscaping and associated site improvements;

EXHIBIT NO. 7
APPLICATION NO. A-6-NOC-07-130
City's CDP
<i>10 pages</i> California Coastal Commission

PLANNING COMMISSION RESOLUTION NO. -PC-xxxx
TENTATIVE MAP NO. 326386
RACETRACK VIEW DRIVE - PROJECT NO. 99387

WHEREAS, RUSSELL V. VALLES KEY, BRETT E. AMES, AND MONTY E. McCULLOUGH, Applicant/Subdivider, and BRUCE A. ROBERTSON OF REC CONSULTANTS, INC., Engineer, submitted an application with the City of San Diego for a Tentative Map, No. 326386, for the subdivision of a 1.84 acre parcel into two .92 acre parcels. The project site is located at 2835 Racetrack View Drive and is described as Parcel 4 of Parcel Map 14043 within the Torrey Pines Community Plan; and

WHEREAS, the Map proposes the subdivision of a 1.84 acre site into two .92 acre parcels; and

WHEREAS, Mitigated Negative Declaration No. 99387 has been prepared for the project in accordance with State of California Environmental Quality Act (CEQA) guidelines which addresses potential impacts to biology, Multiple Habitat Planning Area, and archaeology. A Mitigation, Monitoring and Reporting Program would be implemented with this project to reduce the impacts to a level below significance; and

WHEREAS, the project complies with the requirements of a preliminary soils and/or geological reconnaissance report pursuant to the Subdivision Map Act and Section 144.0220 of the Municipal Code of the City of San Diego; and

WHEREAS, on December 6, 2007, the Planning Commission of the City of San Diego considered Tentative Map No. 326386, and pursuant to Section 125.0440 of the Municipal Code of the City of San Diego and Subdivision Map Act Section 66428, received for its consideration written and oral presentations, evidence having been submitted, and heard testimony from all interested parties at the public hearing, and the Planning Commission having fully considered the matter and being fully advised concerning the same; NOW, THEREFORE,

BE IT RESOLVED by the Planning Commission of the City of San Diego, that it adopts the following findings with respect to Tentative Map No. 326386:

1. The proposed subdivision and its design or improvement are consistent with the policies, goals, and objectives of the applicable land use plan (Land Development Code Section 125.0440.a and State Map Action Sections 66473.5, 66474(a), and 66474(b)).
2. The proposed subdivision complies with the applicable zoning and development regulations of the Land Development Code (Land Development Code Section 125.0440.b).

- c. Deviations to minimum street frontage for Parcel 2, allowing no street frontage along Racetrack View Drive where 100 feet is required by the RS-1-1 Zone;
- d. Landscaping/Brush Management (planting, irrigation and landscape related improvements);
- e. Off-street parking; and
- f. Accessory improvements determined by the Development Services Department to be consistent with the land use and development standards in effect for this site per the adopted community plan, California Environmental Quality Act Guidelines, public and private improvement requirements of the City Engineer, the underlying zone(s), conditions of this Permit, and any other applicable regulations of the SDMC in effect for this site.

STANDARD REQUIREMENTS:

1. This permit must be utilized within thirty-six (36) months after the date on which all rights of appeal have expired. Failure to utilize and maintain utilization of this permit as described in the SDMC will automatically void the permit unless an Extension of Time has been granted. Any such Extension of Time must meet all SDMC requirements and applicable guidelines in affect at the time the extension is considered by the appropriate decision maker.
2. This Coastal Development Permit shall become effective on the eleventh working day following receipt by the California Coastal Commission of the Notice of Final Action, or following all appeals.
3. No permit for the construction, occupancy or operation of any facility or improvement described herein shall be granted, nor shall any activity authorized by this Permit be conducted on the premises until:
 - a. The Owner/Permittee signs and returns the Permit to the Development Services Department; and
 - b. The Permit is recorded in the Office of the San Diego County Recorder.
4. Unless this Permit has been revoked by the City of San Diego the property included by reference within this Permit shall be used only for the purposes and under the terms and conditions set forth in this Permit unless otherwise authorized by the Development Services Department.
5. This Permit is a covenant running with the subject property and shall be binding upon the Owner/Permittee and any successor or successors, and the interests of any successor shall be subject to each and every condition set out in this Permit and all referenced documents.

6. The continued use of this Permit shall be subject to the regulations of this and any other applicable governmental agency.

7. Issuance of this Permit by the City of San Diego does not authorize the Owner/Permittee for this permit to violate any Federal, State or City laws, ordinances, regulations or policies including, but not limited to, the Endangered Species Act of 1973 [ESA] and any amendments thereto (16 U.S.C. § 1531 et seq.).

8. In accordance with authorization granted to the City of San Diego from the United States Fish and Wildlife Service [USFWS] pursuant to Section 10(a) of the ESA and by the California Department of Fish and Game [CDFG] pursuant to Fish and Game Code section 2835 as part of the Multiple Species Conservation Program [MSCP], the City of San Diego through the issuance of this Permit hereby confers upon Owner/Permittee the status of Third Party Beneficiary as provided for in Section 17 of the City of San Diego Implementing Agreement [IA], executed on July 16, 1997, and on file in the Office of the City Clerk as Document No. OO-18394. Third Party Beneficiary status is conferred upon Owner/Permittee by the City: (1) to grant Owner/Permittee the legal standing and legal right to utilize the take authorizations granted to the City pursuant to the MSCP within the context of those limitations imposed under this Permit and the IA, and (2) to assure Owner/Permittee that no existing mitigation obligation imposed by the City of San Diego pursuant to this Permit shall be altered in the future by the City of San Diego, USFWS, or CDFG, except in the limited circumstances described in Sections 9.6 and 9.7 of the IA. If mitigation lands are identified but not yet dedicated or preserved in perpetuity, maintenance and continued recognition of Third Party Beneficiary status by the City is contingent upon Owner/Permittee maintaining the biological values of any and all lands committed for mitigation pursuant to this Permit and of full satisfaction by Owner/Permittee of mitigation obligations required by this Permit, as described in accordance with Section 17.1D of the IA.

9. The Owner/Permittee shall secure all necessary building permits. The Owner/Permittee is informed that to secure these permits, substantial modifications to the building and site improvements to comply with applicable building, fire, mechanical and plumbing codes and State law requiring access for disabled people may be required.

10. Construction plans shall be in substantial conformity to Exhibit "A." No changes, modifications or alterations shall be made unless appropriate application(s) or amendment(s) to this Permit have been granted.

11. All of the conditions contained in this Permit have been considered and have been determined to be necessary in order to make the findings required for this Permit. It is the intent of the City that the holder of this Permit is required to comply with each and every condition in order to be afforded the special rights which the holder of the Permit is entitled as a result of obtaining this Permit.

In the event that any condition of this Permit, on a legal challenge by the Owner/Permittee of this Permit, is found or held by a court of competent jurisdiction to be invalid, unenforceable,

or unreasonable, this Permit shall be void. However, in such an event, the Owner/Permittee shall have the right, by paying applicable processing fees, to bring a request for a new permit without the "invalid" condition(s) back to the discretionary body which approved the Permit for a determination by that body as to whether all of the findings necessary for the issuance of the proposed permit can still be made in the absence of the "invalid" condition(s). Such hearing shall be a hearing de novo and the discretionary body shall have the absolute right to approve, disapprove, or modify the proposed permit and the condition(s) contained therein.

12. The applicant shall defend, indemnify, and hold harmless the City, its agents, officers, and employees from any and all claims, actions, proceedings, damages, judgments, or costs, including attorney's fees, against the City or its agents, officers, or employees, including, but not limited to, any to any action to attack, set aside, void, challenge, or annul this development approval and any environmental document or decision. The City will promptly notify applicant of any claim, action, or proceeding and, if the City should fail to cooperate fully in the defense, the applicant shall not thereafter be responsible to defend, indemnify, and hold harmless the City or its agents, officers, and employees. The City may elect to conduct its own defense, participate in its own defense, or obtain independent legal counsel in defense of any claim related to this indemnification. In the event of such election, applicant shall pay all of the costs related thereto, including without limitation reasonable attorney's fees and costs. In the event of a disagreement between the City and applicant regarding litigation issues, the City shall have the authority to control the litigation and make litigation related decisions, including, but not limited to, settlement or other disposition of the matter. However, the applicant shall not be required to pay or perform any settlement unless such settlement is approved by applicant.

ENVIRONMENTAL/MITIGATION REQUIREMENTS:

13. Mitigation requirements are tied to the environmental document, specifically the Mitigation, Monitoring, and Reporting Program (MMRP). These MMRP conditions are incorporated into the permit by reference or authorization for the project

14. The mitigation measures specified in the Mitigation Monitoring and Reporting Program, and outlined in Mitigated Negative Declaration No. 99387, shall be noted on the construction plans and specifications under the heading ENVIRONMENTAL/MITIGATION REQUIREMENTS.

15. The Owner/Permittee shall comply with the Mitigation, Monitoring, and Reporting Program (MMRP) as specified in Mitigated Negative Declaration No. 99387, satisfactory to the Development Services Department and the City Engineer. Prior to issuance of the first grading permit, all conditions of the MMRP shall be adhered to, to the satisfaction of the City Engineer. All mitigation measures as specifically outlined in the MMRP shall be implemented for the following issue areas:

- Historical Resources (Archaeology)
- Paleontology
- MHPA Land Use Adjacency
- Biological Resources

16. Prior to issuance of any construction permit, the Owner/Permittee shall pay the Long Term Monitoring Fee in accordance with the Development Services Fee Schedule to cover the City's costs associated with implementation of permit compliance monitoring.

AFFORDABLE HOUSING REQUIREMENTS:

17. Prior to the issuance of the first residential building permit, the applicant shall comply with the affordable housing requirements of the City's Inclusionary Housing Ordinance (Chapter 14, Article 2, Division 13) of the Land Development Code, which requires that the project provide 10 percent of the units as affordable or pay an in lieu fee.

LANDSCAPE REQUIREMENTS:

18. Prior to issuance of any engineering permits for grading, construction documents for the revegetation and hydroseeding of all disturbed land shall be submitted in accordance with the Landscape Standards and to the satisfaction of the Development Services Department. All plans shall be in substantial conformance to this permit (including Environmental conditions) and Exhibit 'A,' on file in the Office of the Development Services Department.

19. Prior to issuance of any engineering permits for right-of-way improvements, complete landscape construction documents for right-of-way improvements shall be submitted to the Development Services Department for approval. Improvement plans shall take into account a 40 sq-ft area around each tree which is unencumbered by utilities. Driveways, utilities, drains, water and sewer laterals shall be designed so as not to prohibit the placement of street trees.

20. Prior to issuance of any construction permits for structures (including shell), complete landscape and irrigation construction documents consistent with the Landscape Standards shall be submitted to the Development Services Department for approval. The construction documents shall be in substantial conformance with Exhibit 'A,' Landscape Development Plan, on file in the Office of the Development Services Department. Construction plans shall take into account a 40 sq-ft area around each tree which is unencumbered by hardscape and utilities as set forth under LDC 142.0403(b)5.

21. Prior to final inspection, it shall be the responsibility of the Permittee or subsequent Owner to install all required landscape and obtain all required landscape inspections. A "No Fee" Street Tree Permit shall be obtained for the installation, establishment, and on-going maintenance of all street trees.

22. All required landscape shall be maintained in a disease, weed and litter free condition at all times. Severe pruning or "topping" of trees is not permitted unless specifically noted in this Permit.

23. The Permittee or subsequent owner shall be responsible for the maintenance of all landscape improvements in the right-of-way consistent with the Landscape Standards unless long-term maintenance of said landscaping will be the responsibility of a Landscape Maintenance

District or other approved entity. In this case, a Landscape Maintenance Agreement shall be submitted for review by a Landscape Planner.

24. If any required landscape (including existing or new plantings, hardscape, landscape features, etc.) indicated on the approved construction document plans is damaged or removed during demolition or construction, it shall be repaired and/or replaced in kind and equivalent size per the approved documents to the satisfaction of the Development Services Department within 30 days of damage or final inspection.

BRUSH MANAGEMENT PROGRAM REQUIREMENTS:

25. Prior to issuance of any engineering permits for grading, landscape construction documents required for the engineering permit shall be submitted showing the brush management zones on the property in substantial conformance with Exhibit 'A'.

26. Prior to issuance of any building permits, a complete set of brush management construction documents shall be submitted for approval to the Development Services Department. The construction documents shall be in substantial Conformance with Exhibit 'A' and shall comply with the Uniform Fire Code, SDMC 55.0101, the Landscape Standards, and the Land Development Code Section 142.0412.

27. The Brush Management Program shall consist of two zones consistent with the Brush Management regulations of the Land Development Code section 142.0412 as follows:

- a. Lot 1 shall have a minimum 41-ft Zone One between the existing structure and eastern property line, with 0-ft Zone Two;
- b. Lot 2 shall have a minimum 37-ft Zone One with 20-ft Zone Two;
- c. Brush Management along the south side of the structure on Lot 2 shall observe an expanded 44-ft Zone One and 20-ft Zone Two.

28. All new constructions within 300 feet of the boundary between Brush Management Zone One and Brush Management Zone Two shall comply with building standards and policy per 2001 California Building Code, San Diego Municipal Code Chapter 14, Art. 5, Div. 5 and Chapter 14, Art. 2, Div. 4.

29. Within Zone One, combustible accessory structures (including, but not limited to decks, trellises, gazebos, etc.) are not permitted, while non-combustible accessory structures may be approved within the designated Zone One area subject to Fire Marshall and the Development Services Departments approval.

30. The following note shall be provided on the Brush Management Construction Documents: 'It shall be the responsibility of the Permittee to schedule a pre-construction meeting on site with the contractor and the development Services Department to discuss and outline the implementation of the Brush Management Program.'

31. In Zones One and Two, plant material shall be selected to visually blend with the existing hillside vegetation. No invasive plant material shall be permitted as jointly determined by the Landscape Section and the Environmental Analysis Section.

32. Prior to Final Inspection and Framing Inspection for any building, the approved Brush Management Program shall be implemented.

33. The Brush Management Program shall be maintained at all times in accordance with the City of San Diego's Landscape Standards.

PLANNING/DESIGN REQUIREMENTS:

34. No fewer than 6 off-street parking spaces (4 spaces on Parcel 1 and 2 spaces on Parcel 2) shall be maintained on the property at all times in the approximate locations shown on the approved Exhibits "A," on file in the Office of the Development Services Department. Parking spaces shall comply at all times with requirements of the Land Development Code and shall not be converted for any other use unless otherwise authorized by the Development Services Department.

35. A topographical survey conforming to the provisions of the SDMC may be required if it is determined, during construction, that there may be a conflict between the building(s) under construction and a condition of this Permit or a regulation of the underlying zone. The cost of any such survey shall be borne by the Owner/Permittee.

36. The Owner/Permittee shall post a copy of the approved discretionary permit or Tentative Map in the sales office for consideration by each prospective buyer.

37. All private outdoor lighting shall be shaded and adjusted to fall on the same premises where such lights are located and in accordance with the applicable regulations in the SDMC.

WASTEWATER REQUIREMENTS:

38. No trees or shrubs exceeding three feet in height at maturity shall be installed within ten feet of any sewer laterals.

39. Proposed private underground sewer facilities located within a single lot shall be designed to meet the requirements of the California Uniform Plumbing Code and shall be reviewed as part of the building permit plan check.

40. All onsite sewer facilities shall be private.

41. The developer shall design and construct all proposed public sewer facilities to the most current edition of the City of San Diego's Sewer Design Guide.

WATER REQUIREMENTS:

42. Prior to the issuance of any certificates of occupancy, public water facilities necessary to serve the development, including services, shall be complete and operational in a manner satisfactory to the Water Department Director and the City Engineer.

INFORMATION ONLY:

- Any party on whom fees, dedications, reservations, or other exactions have been imposed as conditions of approval of this development permit, may protest the imposition within ninety days of the approval of this development permit by filing a written protest with the City Clerk pursuant to California Government Code §66020.
- This development may be subject to impact fees at the time of construction permit issuance

APPROVED by the Planning Commission of the City of San Diego on December 6, 2007 by Resolution No. PC-xxxx.

Permit Type/PTS Approval No.: CDP 325414
SDP 326387
PDP 438751
NUP 438758

Date of Approval: December 6, 2007

AUTHENTICATED BY THE DEVELOPMENT SERVICES DEPARTMENT

LESLIE GOOSSENS
Development Project Manager

**NOTE: Notary acknowledgment
must be attached per Civil Code
section 1180 et seq.**

**The undersigned Owner/Permittee, by execution hereof, agrees to each and every condition of
this Permit and promises to perform each and every obligation of Owner/Permittee hereunder.**

Owner/Permittees:

By _____
RUSSELL V. VALLES KEY

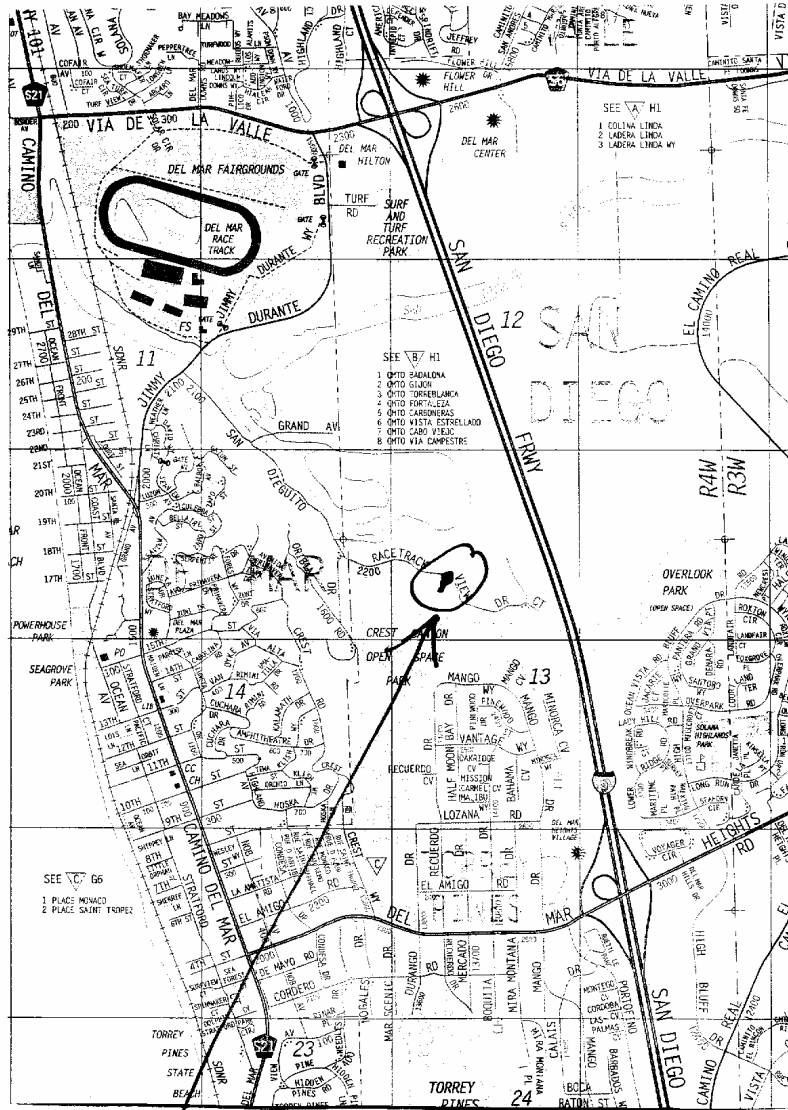
By _____
BRETT E. AMES

By _____
MONTY E. McCULLOUGH


**NOTE: Notary acknowledgments
must be attached per Civil Code
section 1180 et seq.**

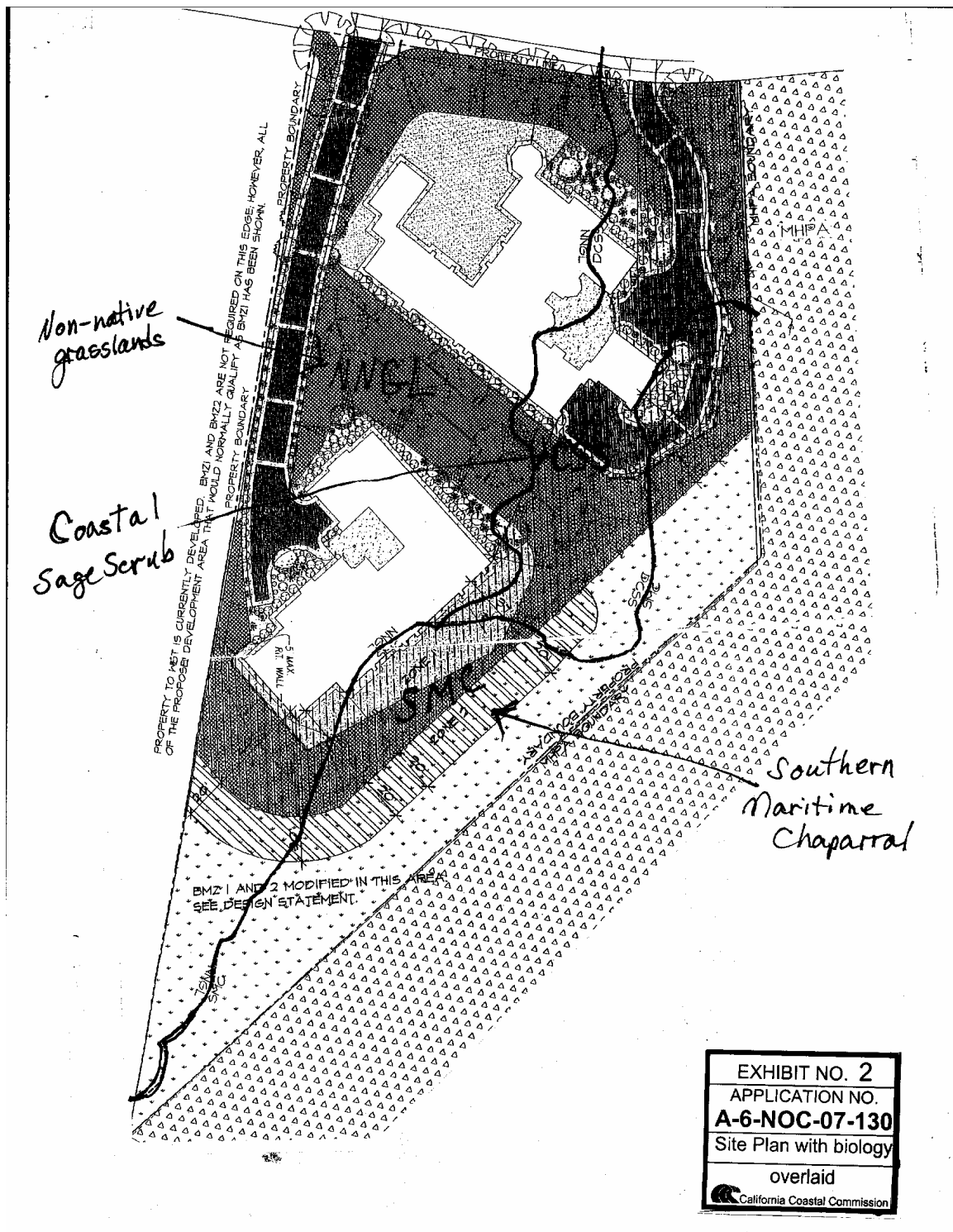


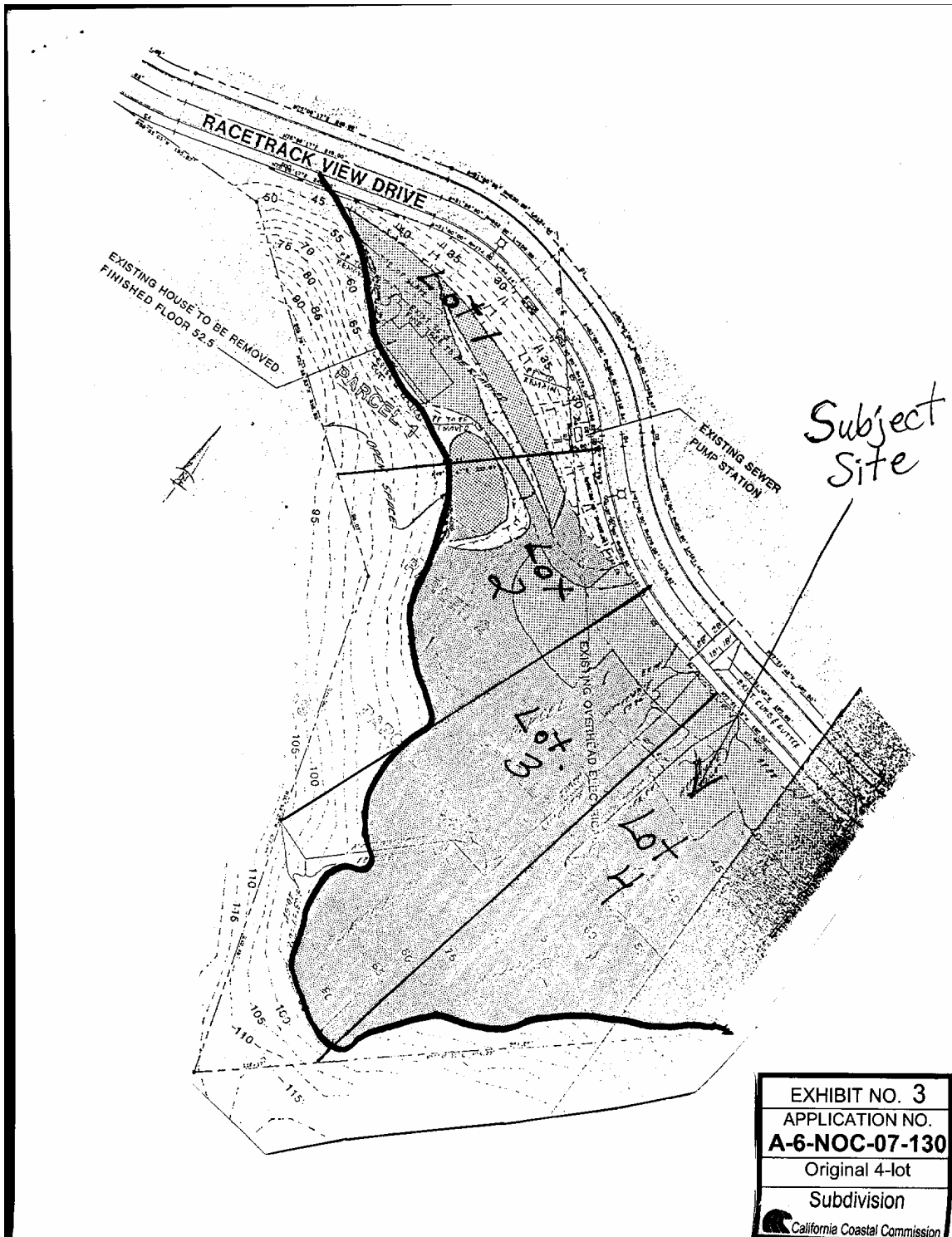
A-6-NOC-07-130



Site

EXHIBIT NO. 1
APPLICATION NO.
A-6-NOC-07-130
Location Map
 California Coastal Commission





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January 14, 2008

Ms. Ellen Lirley and Mr. Lee McEachern
California Coastal Commission
San Diego Area
7575 Metropolitan Drive, Suite 103
San Diego, CA 92108

Subject: Appeal No. A-6-NOC-07-130

Dear Ms. Lirley and Mr. McEachern:

We are pleased to submit our response to Appeal No. A-6-NOC-07-130 for your consideration.

Project Background

The proposed development involves the subdivision of a vacant 1.84-acre site into two .92-acre lots with proposed construction of single-family residences on each lot. The project site is located along the northern extent of Crest Canyon on the south side of Racetrack View Drive in the Torrey Pines Community in the City of San Diego.

The proposed project will result in direct impacts to coastal sage scrub (CSS) and southern maritime chaparral (SMC), as well as disturbed non-native grassland. The habitat impacts that will result from the development of the homes and necessary brush management include 0.35-acres of CSS, 0.19-acres of SMC, and 0.84-acres of non-native grassland. Mitigation for habitat impacts is through a combination of on-site preservation of the remaining on-site habitat through a conservation easement and payment into the City's Habitat Acquisition Fund.

Previous Coastal Development Permit for Subject Property

On August 16, 1978 Coastal Development Permit No. A-209-78, also referenced as Coastal Development Permit #F6210, (hereinafter "Permit", attached as Attachment A) was issued for the subject property. The Permit was issued as part of the approval for a four-lot subdivision of which this property is Parcel 4. The Permit states as follows (emphasis added for relevance):

"NOW, THEREFORE, in consideration of the granting of Permit No. A-209-78 to the Owner by the California Coastal Commission, the Owner

Received

JAN 15 2008

San Diego County Registrar

EXHIBIT NO. 4
APPLICATION NO.
A-6-NOC-07-130
Applicant's Response
41 Pages
California Coastal Commission

hereby irrevocably covenants with the California Coastal Commission that there be and hereby is granted the following restrictions on the use and enjoyment of the Property, to be attached to and become a part of the deeds to the Property. The undersigned Owner, for itself and for its heirs, assigns, and successors in interest, covenants and agrees that:

1. There shall be no further subdivision of Parcel 1 and Parcel 2 of the Property.
2. **Future subdivision of Parcel 3 and Parcel 4 of Property shall be limited to no more than one two-way split of each lot."**

Subsequent to the issuance of Permit No. A-209-78/#F6210, CDP No. 6-88-364 was issued on February 16, 1988 and amended the previous Permit in order to address a development application for Parcel 1 and Parcel 2 (Attachment B). At that time, the future subdivision of Parcel 3 and Parcel 4 was again addressed. In the Staff Report prepared on October 31, 1988 (Attachment C), it is stated as follows:

"When the applicant applies for a coastal development permit for the further subdivisions of Parcels 3 and 4, it will be necessary that a geology report, as detailed as the one prepared for Parcels 1 and 2, be submitted with the application. This will allow reviewing power to approve only those parcels which have adequate, stable building area, and require no encroachments into the designated open space."

The past approvals by the Coastal Commission clearly anticipated that Parcel 4 would be split to create two lots and a deed restriction was placed upon the property as such. Further, in compliance with CDP No. 6-88-364 our application with the City of San Diego included a detailed geological report with an addendum, a copy of which you have been provided. This report identifies that there is adequate stable building area for the two parcels to be created. Likewise, in conformance with CDP No. 6-88-364 there are no encroachments into the designated open space proposed for this project.

Precedence Established by Previous Coastal Development Permit Granted for Adjacent Property

On September 20, 2001 Tentative Map, Coastal Development Permit, Site Development Permit, and a Planned Development Permit No. 40-014 was approved by the City of San Diego Planning Commission for the lot directly adjacent to the subject property to the west (identified as Parcel 3 in CDP Nos. A-209-78/#F6210 and 6-88-364). The granting of the Permit was not appealed by the California Coastal Commission.

The property involved was also a 1.84-acre parcel subdivided into two .92-acre parcels. Similarly, the proposed development had impacts to CSS, SMC, and non-native grasslands. Each of these impacts was mitigated to below a level of significance using the same methods identified for this project (through a combination of on-site preservation and payment into the HAF). To ensure that the site development would avoid significant environmental impacts, a Mitigation Monitoring and Reporting Program was also required.

There are no substantial differences between the previously approved project for which a CDP was issued and the proposed project under Appeal that would justify the denial of the Coastal Development Permit.

Issue of Appeal – Conformance with Torrey Pines Community Plan

Attachment A to Appeal No. A-6-NOC-07-130 incorrectly applies provisions for the protection of sensitive habitats included in the North City Land Use Plan component of the City's certified LCP. The property is actually subject to the Torrey Pines Community Plan component of the City's certified LCP. Page 17 of the Torrey Pines Community Plan states:

"The North City Local Coastal Program Land Use Plan (LCP) was adopted by the San Diego City Council in March 1981, revised in May 1985, and revised again in March 1987. The LCP, as amended, remains in full force and effect. **However, should any policies contained in this document conflict with the previously adopted LCP Land Use Plan, this document [the Torrey Pines Community Plan] shall take precedence.**" (Emphasis added)

The Torrey Pines Community Land Use Plan identifies the following Key Policies that are applicable to this project:

1. All development adjacent to open space areas shall be designed to reduce visual and development impacts.
3. Residential development shall reflect the diversity of existing homes in the community, and shall be in compliance with all development regulations.

Key Policy #1 clearly states that development adjacent to open space areas shall be designed to reduce the impacts of development. It does not state that there should emphatically be NO impacts caused by development. As will be demonstrated later in this document, the proposed single family homes fully comply with Key Policy #3.

Further, Page 27 of the Torrey Pines Community Plan outlines the following policies:

1. Land uses adjacent to environmentally sensitive habitats shall not negatively impact those areas.
2. Development impacts to rare, threatened, endangered, or candidate species shall be minimized or eliminated.
3. No filling, clearing, grubbing, or other disturbance of biologically sensitive habitats shall be permitted without approved mitigation plans.

There is no such statement in the Torrey Pines Community Plan that there can be no impact – only no negative impact. Policy #2 and Policy #3 above contemplate that impacts to environmentally sensitive habitat can be mitigated to a level below the threshold of significance. The language here clearly implies that impacts can be made so long as they are mitigated appropriately with an approved mitigation plan. A site specific Mitigation Monitoring and Reporting Plan has been approved for this project and the environmental impacts were adequately addressed within the requirements of this document, of which you have a copy. After implementation, no adverse impacts to environmentally sensitive lands will occur. All of the impacts are reduced to below a level of significance through a combination of preservation measures and payment into the Habitat Acquisition Fund (HAF).

- o Mitigation for the impact to 0.35-acres of CSS is broken up into 0.337-acres being mitigated through payment into the HAF at a 1:1 ratio. The remaining 0.013-acres of impact will be preserved on-site at the appropriate 1.5:1 ratio, resulting in 0.02-acres to be preserved.
- o Mitigation for the impacts to 0.84-acres of non-native grasslands would be broken up into 0.79-acres being mitigated through payment into the HAF at a 0.5:1 ratio resulting in a payment equal to the value of 0.395-acres. The remaining 0.05-acres would be mitigated through on-site preservation at a 1:1 ratio resulting in 0.05-acres being preserved.
- o Mitigation for the impacts to 0.19-acres of SMC would be broken up into a payment into the HAF for 0.05-acres at a 1:1 ratio with the remaining 0.14-acres to be mitigated on-site at a 2:1 ratio for a total of 0.28-acres preserved.

The recommendations and development criteria of the LCP have been incorporated into the individual elements of the Torrey Pines Community Plan. Due to the standard of review established in the Coastal Act of 1976, an LCP Land Use Plan must contain a great deal of specificity to direct the formulation of suitable implementing ordinances. Therefore, more specific and detailed

supplemental coastal development policies not contained within the main body of this Plan are found in Appendix E of the document.

In regard to development in areas of sensitive vegetation, Appendix E states as follows (page 117):

"In addition, to the extent applicable, all new development within the coastal zone shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the statewide Natural Communities Conservation Planning (NCCP) Program, and shall comply with the City of San Diego MSCP Interim Habitat Loss Permit Process, or shall obtain an incidental take permit under Section 4d, Section 7 or Section 10a of the Endangered Species Act related to the California Gnatcatcher. Compliance with these goals and requirements shall be implemented in consultation with the United States Fish and Wildlife Service and California Department of Fish and Game."

The proposed project fully complies with these requirements.

Issue of Appeal – City of San Diego Environmentally Sensitive Lands Regulations

The Environmentally Sensitive Lands Regulations are contained in the City's Land Development Code. Section 143.0110(b) identifies the appropriate development regulations, the required decision process, and the permitted uses applicable to various types of development proposals that propose to encroach into environmentally sensitive lands. The pertinent section of the table is copied below:

		Wetlands (Not Applicable)	Sensitive Bio Resources Other than Wetlands (Applicable)
2 Single dwelling units on lots or multiple lots totaling more than 15,000 square feet	R	143.0141(a)(b)	143.0141
	P	SDP Process Tree	SDP Process Tree
	L	143.0130(d)(c)	--

Section 143.0140 identifies the General Development Regulations for all Environmentally Sensitive Lands and states that development that proposes encroachment into environmentally sensitive lands is subject to the following regulation:

Section 143.0140(b) – The allowable development area for all proposed subdivisions is based on the existing lot or premises to be subdivided. If no development is proposed on any newly created lot, the future

development area of the lot shall be indicated on the required grading plan and included in the maximum allowable development area calculation for the subdivision.

In this application, development is proposed on the newly created lots and is thus indicated on the plans, in compliance with this section.

The Appeal cites the following section of the Land Development Code Environmentally Sensitive Lands Regulations:

Section 143.0140(c) - No building lot shall be created that provides such a small development area that future reasonable development of the lot will require additional encroachment into environmentally sensitive lands beyond the maximum allowable development area of the original, unsubdivided premises. If additional development area is proposed for a lot that would exceed the maximum allowable development area of the original, unsubdivided premises, a deviation in accordance with Section 143.0150 is required, regardless of the lot size and the existing development area of the individual lot.

Section 143.0141 of the Development Regulations for Sensitive Biological Resources addresses the maximum allowable development area of the property. The proposed subdivision is in compliance with this section, which states (emphasis added for relevancy where appropriate):

"Development that proposes encroachment into sensitive biological resources or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations and the Biology Guidelines in the Land Development Manual.

(h) Outside the MHPA, encroachment into sensitive biological resources is not limited, except as set forth in Section 143.0141(b) [wetlands, not applicable] and (g) [land designated as open space, not applicable].

(i) All development occurring in sensitive biological resources is subject to a site-specific impact analysis conducted by the City Manager, in accordance with the Biology Guidelines in the Land Development Manual. The impact analysis shall evaluate impacts to sensitive biological resources and CEQA sensitive species. The analysis shall determine the corresponding mitigation, where appropriate, and the requirements for protection and management. Mitigation may include any of the following, as appropriate to the nature and extent of the impact.

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- (1) Acquisition or dedication of another site that can serve to mitigate the project impacts, with limited right of entry for habitat management, as necessary, if the site is not dedicated. This site must have long-term viability and the biological values must be equal to or greater than the impacted site.
 - (2) Preservation or dedication of on-site sensitive biological resources, creation of new habitat, or enhancement of existing degraded habitat, with limited right of entry for habitat management, as necessary, if the site is not dedicated. The site must have long-term viability and the biological values must be equal to or greater than the impacted site.
 - (3) In circumstances where the area of impact is small, monetary payment of compensation into a fund in lieu of other forms of mitigation. The City shall use the fund to acquire, maintain and administer habitat areas pursuant to City Council Resolution No. R-275129, adopted February 12, 1990. Where appropriate, the City Manager is authorized to enter into agreements with public agencies or private non-profit conservancies or foundations to administer the funds and acquire or maintain habitat preservation areas.
- (j) Grading during wildlife breeding seasons shall be consistent with the requirements of the City of San Diego MSCP Subarea Plan.
 - (k) Sensitive biological resources that are outside of the allowable development area on a premises, or are acquired as off-site mitigation as a condition of permit issuance, are to be left in a natural state and used only for those passive activities allowed as a condition of permit approval."

These all address the maximum allowable development area of the existing lot. Having complied with each of the above requirements, the proposed subdivision does not result in an encroachment beyond the maximum allowable development area of the unsubdivided property.

Issue of Appeal – Finding of No Adverse Impact

The Appeal indicates that the City did not specifically state in its findings that the project will not adversely affect environmentally sensitive lands. The language in the pertinent finding (reproduced below) clearly acknowledges the impact and

states that the Mitigation Monitoring and Reporting Program to be implemented will reduce the impacts to a level below significance. Clearly, this is a finding of no adverse impact.

"The proposed project site contains environmentally sensitive lands in the form of biological resources and steep hillsides. The proposed project, to subdivide a 1.84 acre site into to .92 acre parcels and develop the property with two single-family homes and a guest quarters has been reviewed in accordance with the California Environmental Quality Act (CEQA) and a Mitigated Negative Declaration was prepared which addresses potential impacts to Historical Resources (Archaeology), Paleontology, Biological Resources, and the Multiple Habitat Planning Area. A Mitigation Monitoring and Reporting Program would be implemented with this project to reduce the impacts to below a level of significance."

Further, in the discussion contained in the Appeal it is stated that there is adequate development area on the existing premises that could be developed with a single-family home and avoid all impacts to on-site sensitive habitats from the development and necessary brush management. This is not an accurate assessment. It is not possible to develop anything that would be considered an economically viable project on the parcel without impacting habitat since the City's guidelines consider even non-native grassland to have habitat value. It is impossible to develop the property in a manner such as to avoid all impacts.

Issue of Appeal – MHPA Adjacency

The Appeal accurately states that the subject site is located outside of the mapped MHPA boundary. The appropriateness of the mapped MHPA boundaries is not relevant to this project. The boundaries are mapped and recorded and the project has been designed in accordance with the regulations applicable to properties located outside the MHPA boundaries.

Issue of Appeal – Protection of Visual Resources

Again, the Appeal incorrectly applies the North City Land Use Plan document to this project. The primary applicable Land Use Plan is the Torrey Pines Community Plan. Related to protection of visual resources, the Torrey Pines Community Plan states as follows:

Page 31 – Addressing development adjacent to Crest Canyon as follows:

"Design of dwelling units adjacent to State Reserve Extension and Crest Canyon shall stress a blending of architecture with the natural terrain. Architectural shapes, bulk, materials, and landscaping should be carefully chosen to respect the physical constraints of the land."

Site planning and design features were incorporated to be sensitive to the natural resources surrounding the property and to be compatible with the existing developed neighborhood.

Single story structures were designed to facilitate the blending of the architecture with the natural terrain and the proposed building colors and materials are earth tones and colors that are subordinate to the natural environment to minimize the visual impacts.

Page 36 – Addressing implementation of the Torrey Pines Community Plan as follows:

"The specific proposals and design guidelines for development adjacent to environmentally sensitive areas currently can only be implemented through the discretionary review process."

The project required the discretionary review by the City of San Diego Planning Commission. The project was considered and unanimously approved by the Planning Commission on December 6, 2007.

Page 66 of the Torrey Pines Community Plan establishes the Residential Development Design Guidelines:

"New residential development within the Torrey Pines community should continue to incorporate a wide variety of architectural styles, colors and building materials. New residential development should also be designed to encourage compatibility in bulk and scale between existing and new residential development. All new residential development shall conform to citywide underlying zoning and Coastal Zone requirements. The Torrey Pines Community Planning Group should review all development requiring discretionary approval by the City."

On September 14, 2005 the project was presented to the Torrey Pines Community Planning Group who unanimously recommended approval of the project as designed.

Appendix E (page 118) discusses Visual Resources as follows:

"5. Landscaping of properties adjacent to open space areas shall not use invasive plant species. Landscaping adjacent to these areas should use plant species naturally occurring in that area.

6. New residential development shall be compatible with the existing neighborhood, and designed to blend into adjacent natural open space areas. Only low-profile dwellings designed to fit with the natural terrain and not be visually prominent from the canyon floor shall be allowed. For development located in visually prominent areas adjacent to space areas, building colors and materials shall be limited to earth tones and colors subordinate to the surrounding natural environment, which minimize the development's contrast with the surrounding hillsides and open space areas.

12. New residential, commercial, and industrial development shall provide landscape buffers to screen views of the buildings from designated scenic roadways."

As stated earlier, site planning and design features were incorporated to be sensitive to the natural resources surrounding the property and to be compatible with the existing developed neighborhood. Single story structures (with one small two story element on one of the homes) were designed to facilitate the blending of the architecture with the natural terrain and the proposed building colors and materials are earth tones and colors that are subordinate to the natural environment to minimize the visual impacts.

In regard to landscaping, the landscaping plans were designed in compliance with the City's guidelines. The Landscape Plans propose plant palettes consisting primarily of plant species native to the immediate project area. While a few non-native species are used, none of them are invasive. Contrary to the claims made in the Appeal, the landscaping is designed to create buffers to screen views of the buildings from designated scenic roadways, including through the planting of street trees. Furthermore, the use of a primarily native planting scheme provides the best possible opportunity to match the overall colors and textures of the surrounding natural areas.

In response to these issues raised in the appeal, the City's Long Range Planning staff made the following comments (in an email dated January 8, 2008 from Leslie Goossens, Development Project Manager, City of San Diego Development Services Department to Katie Wilson):

"[S]taff's analysis, including field visits, of the proposed two new residences, found that the materials and colors proposed for the construction, combined with the proposed new landscaping, would create two new residences that will blend

into the existing surroundings once the required landscaping matures...According to staff in the City's Long Range Planning Division, the proposed two new homes would be of similar development to the existing homes to the east. Further, the Torrey Pines Community Plan does not map preservation of view corridors from public vantage points. Staff can confirm that the view of these homes from I-5 southbound is minimal. The existing mature Torrey pines, palms and stone pines more than adequately buffer the existing homes from public view. The proposed new landscaping would create a similar appearance for the new residences, as is the case with the existing homes and landscaping. The development proposal is not located within a direct view to the coast or open space and is located adjacent to a hill. The only view of these homes is essentially southbound towards the hill and towards the coast. The location of the proposed two residences is below Crest Canyon and would not adversely affect the view to the canyon."

Lastly, the Appeal incorrectly states that the City failed to address exterior color treatments to reduce the visibility of the proposed structures from off-site public vantage points. The City required the submittal of a materials and color board to ensure that the project incorporated earth tones and colors subordinate to the natural environment in order to minimize the visual impacts. Color renderings of the two single family homes were also provided.

Conclusion

With this rebuttal to the issues raised in the Appeal, we would like to conclude with the following observations and statements for the Coastal Commission's consideration:

- 1) The existing lot was apparently approved for future development in general by the Coastal Commission when they approved the initial creation of the parcel, as is evidenced by the language referencing the future splitting of this parcel in the approved Coastal Development Permit Nos. A-209-78 (#F6210) and 6-88-364 and again with the approval of CDP No. 40-014 for an identical lot-split on the adjacent property (referred to as Parcel 3 in the previously approved CDP's) in September of 2001.
- 2) It is not possible to develop anything on the parcel without impacting habitat since the City's guidelines consider even non-native grassland to have habitat value. We are unable to avoid all impacts even without subdividing the property.
- 3) All impacts are being mitigated to less than significant by mitigation methods approved by the City and in conformance with the Torrey Pines Community Plan and the City's land development regulations.

- 4) Given the City's brush management regulations, it would not be possible to develop any single family home on the lot without having at least SOME impact to CSS or SMC.
- 5) Some of the CSS being impacted is fairly degraded in its value. The CSS that is present is a relatively small patch unconnected with larger expanses of CSS, though it is directly connected to the adjacent SMC. The SMC that is on site is classified as such primarily because of its geographic position near the coast, as opposed to its actual species composition. None of the ceanothus, manzanita, and oak species indicators of SMC are present.
- 6) There is not even a remote possibility that any further development will happen next to these parcels, since it is surrounded by MHPA.
- 7) If the Coastal Commission is interpreting the City's regulations to require that no impacts occur even if mitigated to below a level of significance then that essentially means the property cannot be developed; but if the requirement is that the design is done in a manner that provides an economically viable project and still preserves the most valuable habitat, then the project as approved by the City of San Diego under the regulations contained in the Land Development Code is reasonable and should be granted the Coastal Development Permit.

Based upon all of the information provided above, we believe that the merits of the Appeal are such that it should be withdrawn, or at the very least, there should be a finding of No Substantial Issues. We appreciate your consideration of the issues as addressed in this letter and look forward to discussing them with you and with members of the Commission in more detail. If you have any questions, please do not hesitate to contact me at (858) 776-2577.

Sincerely,



Katie P. Wilson

Cc Chairman Pat Kruer, California Coastal Commission
Commissioner Sara Wan, California Coastal Commission
Commissioner Ben Hueso, San Diego Coast Rep., California Coastal Commission

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ATTACHMENT A

CDP NO. A-209-78

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 Return to: PERMITS, SAN SD-288
 Box 6 San Diego, CA 92108

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PLAN FILE NO.: T.M. 77-149

SITE ADDRESS: 1585 San Diego Drive

DECLARATION OF COVENANTS
 FOR
 PUBLIC IMPROVEMENTS

FILE/PAY NO. 90-207896
 2008 12-15
 APPROVED REQUEST OF
City Records
 JUN 1 5 59 PM '08
 OFFICIAL RECORDS
 SAN DIEGO COUNTY, CALIF.
 PERMITS & LICENSE
 DIVISION

\$3.00

WHEREAS, Cameron Moshtaghi
 is/(are) the owner(s) of the following described property (legal):

LOT: SLACK MAP:
 SUNDIV. a portion of the SW 1/4 of the SW 1/4 of Section 13, T18S, R24E, S20E.

WHEREAS, the owner(s) seeks a change affecting said property to wit: Obtain a Building Permit pursuant to Municipal Code Section 52.0207 which change will cause additional burdens on the City of San Diego; and

WHEREAS, The City of San Diego is empowered to prevent said change, or to deny or withhold its consent to the proposed change, as the case may be, until the owner(s) provides such public improvements as will alleviate such burdens; and

WHEREAS, the installation by owner(s) of Public Improvements described below is a reasonable condition to the granting of authority for said change by the City of San Diego; and

WHEREAS, in lieu of the immediate installation and dedication of said Public Improvements, it is the desire and intention of the owner(s) to impose upon the property described above these covenants for future improvements for the benefit of the City of San Diego; NOW, THEREFORE,

The owner(s) hereby declares that all the property described above is held and shall be held, conveyed, hypothecated or encumbered, leased, rented, used, occupied and improved subject to the following covenants, which shall run with the land and shall be binding on all parties having or acquiring any right, title, or interest in the described lands or any part thereof.

No protest shall be made by the owner(s) to any proceedings for the installation or acquisition of sidewalks on San Diego Drive

under any special assessment proceedings, whether conducted pursuant to the Improvement Act of 1911 or the Municipal Improvement Act of 1915, or any other applicable state or local law, and whether processed by the City of San Diego or any other governmental entity having jurisdiction in the matter and for the purposes of determining property owner(s) support for such same.

Cameron Moshtaghi

(PRINT NAME)

STATE OF CALIFORNIA

COUNTY OF San Diego

June 23, 1980

before me, the undersigned a Notary Public in and for said State, personally appeared *Cameron Moshtaghi*

known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Witness my hand and official seal.
 Wendy A. Warrick
 WENDY A. WARRICK
 (Name Printed or Stamped)



RECORDED

THIS ONLY!

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RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO: 0: 1050

83-232958

CALIFORNIA COASTAL COMMISSION
631 HOWARD STREET, FOURTH FLOOR
SAN FRANCISCO, CA 94105
ATTN: Legal Department

RECORDED
OFFICE OF THE CLERK
OF SAN DIEGO COUNTY
JUL -8 AM 11:26

VEERAL
COUNTY RECORDER

DEED RESTRICTIONS

I. WHEREAS, Eibetique, Inc., a California corporation (hereinafter "Owner"), is the record owner of the real property located approximately 2,300 feet west of Interstate 5, at the southeast end of San Diego Drive, in the County of San Diego described in attached Exhibit "A", hereby incorporated by reference (hereinafter "Property"); and

II. WHEREAS, the California Coastal Commission is acting on behalf of the people of the State of California; and

III. WHEREAS, pursuant to the California Coastal Act of 1976, Willard A. Rigley, Presidio Development Company, applied to the California Coastal Commission for a Coastal Development Permit for the development of the property; and

IV. WHEREAS, Coastal Development Permit A-209-78 was granted on August 16, 1978, by the California Coastal Commission; and

V. WHEREAS, pursuant to the California Coastal Act of 1976, Willard A. Rigley, Presidio Development Co., assigned Coastal Development Permit A-209-78 to Owner; and

VI. WHEREAS, Coastal Development Permit A-209-78 was subject to terms and conditions including but not limited to the following conditions:

Prior to recordation of the final map, the applicant shall record the following restrictions to run with the land free of prior encumbrances, except for tax liens, and in a manner approved by the Executive Director:

a. Number of Lots. The permit issued for the revised, four-lot division, provided, however, that future division of the property shall be limited to a total of six lots by means of a Covenant Not to Divide Parcels 1 and 2 and similar covenants to limit future divisions of Parcels 3 and 4 to one, 2-way split on each lot.

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VII. WHEREAS, the Property is a parcel located in the Coastal Zone; and
 VIII. WHEREAS, the Commission found that but for the imposition of the
 above condition the proposed development could not be found consistent with
 the provisions of the California Coastal Act of 1976 and that a permit could
 therefore not have been granted; and

IX. WHEREAS, it is intended that this Deed Restriction is irrevocable
 and shall constitute enforceable restrictions; and

NOW, THEREFORE, in consideration of the granting of Permit No.
 209-78 to the Owner by the California Coastal Commission, the Owner hereby
 irrevocably covenants with the California Coastal Commission that there be
 and hereby is created the following restrictions on the use and enjoyment
 of the Property, to be attached to and become a part of the deeds to the
 Property. The undersigned Owner, for itself and for its heirs, assigns,
 and successors in interest, covenants and agrees that:

1. There shall be no further subdivision of Parcel 1 and
 Parcel 2 of the Property.

2. Future subdivision of Parcels 3 and 4 of Property shall be
 limited to no more than one two-way split of each lot.

Said Deed Restrictions shall remain in full force and effect during
 the period that said permit or any modification or amendment thereof remains
 effective and during the period that the development authorized by said
 permit or any modification or amendment of said development remains in
 existence in or upon any part of and thereby confers benefits upon the
 Property and to the extent said Deed Restrictions are hereby deemed and
 agreed by Owner to be covenants running with the land and shall bind the
 Owner and all his assigns or successors in interest.

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Owner agrees to record this Dead Restriction in the Recorder's office
for the County of SAN DIEGO as soon as possible after
the date of its execution.

DATED: MAY 20 1983

OWNER

MEHRDAD MOSHTAGHI PRESIDENT
TYPE OR PRINT NAME OF ABOVE

OWNER

TYPE OR PRINT NAME OF ABOVE

NOTE TO MOTARY PUBLIC: If you are notarizing the signatures of persons
--- partnership, trust, etc., please use

STATE OF CALIFORNIA }
COUNTY OF SAN DIEGO }

1053

On MAY 20 1983, before me, the undersigned, a Notary
Public for said State, personally appeared MEHRDAD MOSHTAGHI (PRESIDENT)
personally known to me or proved to me on the basis of satisfactory
evidence to be the person who executed the within instrument as the
ZIBATIQUE. President, and
personally known to me or proved to me on the basis of satisfactory evidence
to be the person who executed the within instrument as the PRESIDENT
Secretary of the Corporation that executed the within instrument and
acknowledged to me that such corporation executed the within instrument
and that the same was done in accordance with the laws or a resolution of its board of directors.
by hand and official seal.

SIGNATURE

Ruth S. Jahn

83-
7
232958

951 5873510

MuniFancial

07:09:27 a.m.

01-15-2008

19 / 42

1052

1 Owner agrees to record this Deed Restriction in the Recorder's office
2 for the County of SAN DIEGO as soon as possible after
3 the date of its execution.

4 DATED: MAY 20, 1983

OWNER

MEHREZAD MOSHTAGHI President
TYPE OR PRINT NAME OF ABOVE

OWNER

TYPE OR PRINT NAME OF ABOVE

12 NOTE TO NOTARY PUBLIC: If you are notarizing the signatures of persons
13 signing on behalf of a corporation, partnership, trust, etc., please use
14 the correct notary jurat (acknowledgment) as explained in your Notary
15 Public Law Book.

16 State of California, County of SAN DIEGO, ss
17 On this 20 day of MAY 1983, in the year 1983

18 before me RUTH L. FABER a Notary Public, personally
19 appeared MEHREZAD MOSHTAGHI President

20 personally known to me (or proved to me on the basis of satisfactory (INDICATE
21 evidence) to be the person whose name is subscribed to this instrument, and
22 acknowledged that he/she executed it.

24 Ruth L. Faber
25 NOTARY PUBLIC IN AND FOR SAID COUNTY AND
26 STATE



83-
232958
7

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01-15-2008

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1054

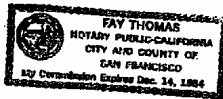
1 This is to certify that the deed restriction set forth above is hereby
 2 acknowledged by the undersigned officer on behalf of the California Coastal
 3 Commission pursuant to authority conferred by the California Coastal
 4 Commission when it granted Coastal Development Permit No. 209-78
 5 on 8-16-78 and the California Coastal Commission consents to
 6 recordation thereof by its duly authorized officer.

7 Dated: May 12, 1983

Nelson D. Brown
 Legal Counsel
 California Coastal Commission

8 STATE OF California
 9 COUNTY OF San Francisco ss

10 On May 12, 1983, before me Ray Thomas
 11 a Notary Public, personally appeared Nelson D. Brown, personally known to
 12 me to be (or proved to me on the basis of satisfactory evidence) to be the
 13 person who executed this instrument as the Legal Counsel
 14 and authorized representative of the California Coastal Commission and
 15 acknowledged to me that the California Coastal Commission executed it.



9515873510

MuniFancial

07:09:48 a.m.

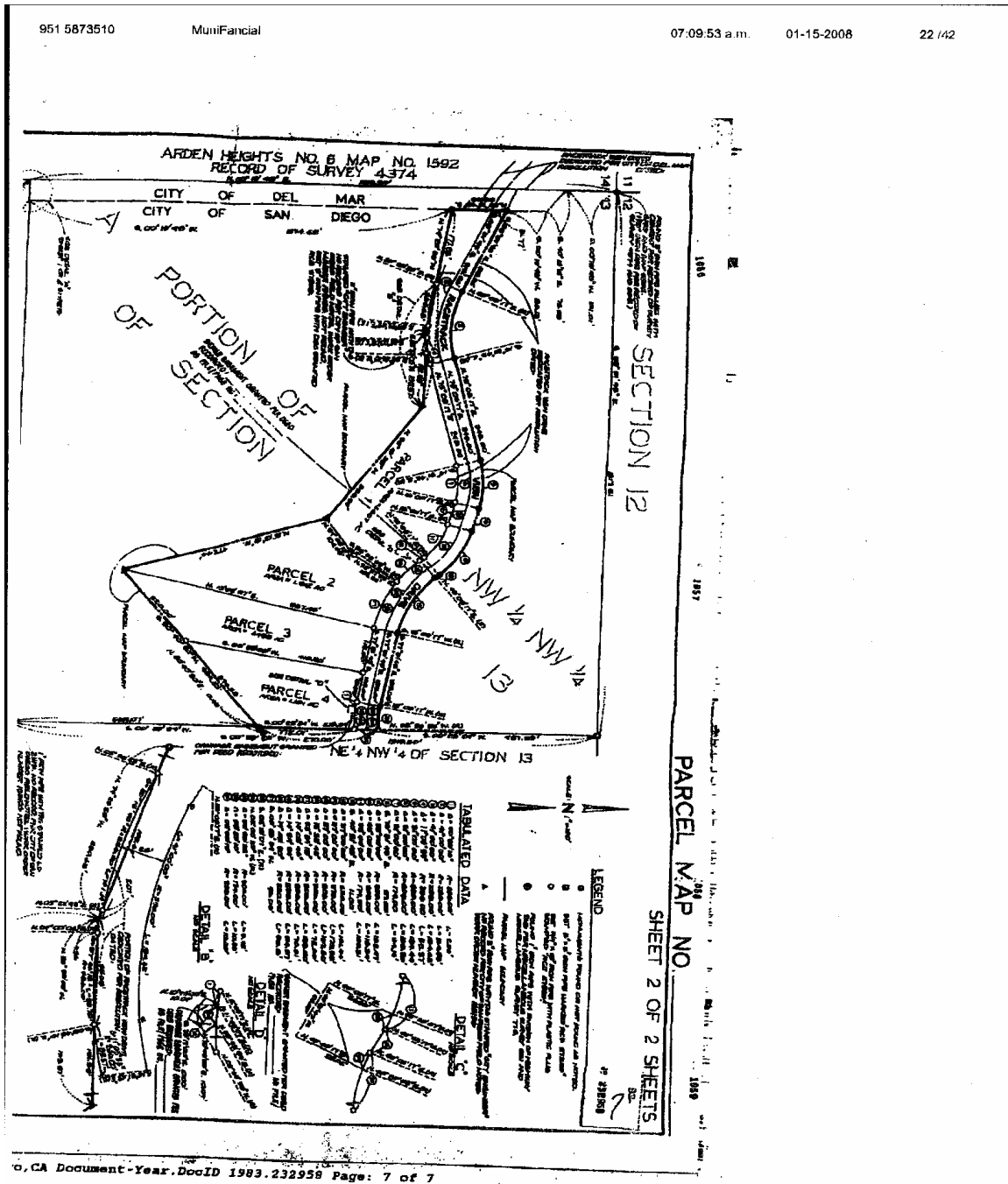
01-15-2008

21 / 42

1055

EXHIBIT A

Property in the City of San Diego, County of San Diego,
State of California, referred to as Parcels 1 through 4
on the Parcel Map attached hereto as Exhibit "B".



951 5873510

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07:10:11 a.m.

01-15-2008

23 /42

ATTACHMENT B

CDP NO. 6-88-364

951 5873510

MuniFancial

07:10:15 a.m.

01-15-2008

24 / 42

RECORDED
GATEWAY IN REQUESTED BY
RECORDING REQUEST BY AND RETURN TO:
STATE OF CALIFORNIA
CALIFORNIA COASTAL COMMISSION
611 HOWARD STREET, FOURTH FLOOR
SAN FRANCISCO, CALIFORNIA 94105

2110

APR 10 2008 10:56 AM

DEED RESTRICTION

I. WHEREAS, CORPORATE MEMBERSHIP

hereinafter referred to as Owner(s), is the record owner of the
following real property:

PARCEL 1 AND 2, OF PARCEL MAP NO. 14843, IN THE CITY SAN DIEGO, COUNTY
OF SAN DIEGO, STATE OF CALIFORNIA, FILED IN THE OFFICE OF THE COUNTY
RECORDS OF SAN DIEGO COUNTY, NOVEMBER 22, 1985, AS FILE NO. RE-443947 OF
OFFICIAL RECORDS.

hereinafter referred to as the subject property; and

II. WHEREAS, the California Coastal Commission is
acting on behalf of the People of the State of California; and

III. WHEREAS, the subject property is located within the
coastal zone as defined in Section 30103 of the California Public
Resources Code (hereinafter referred to as the California Coastal
Act); and

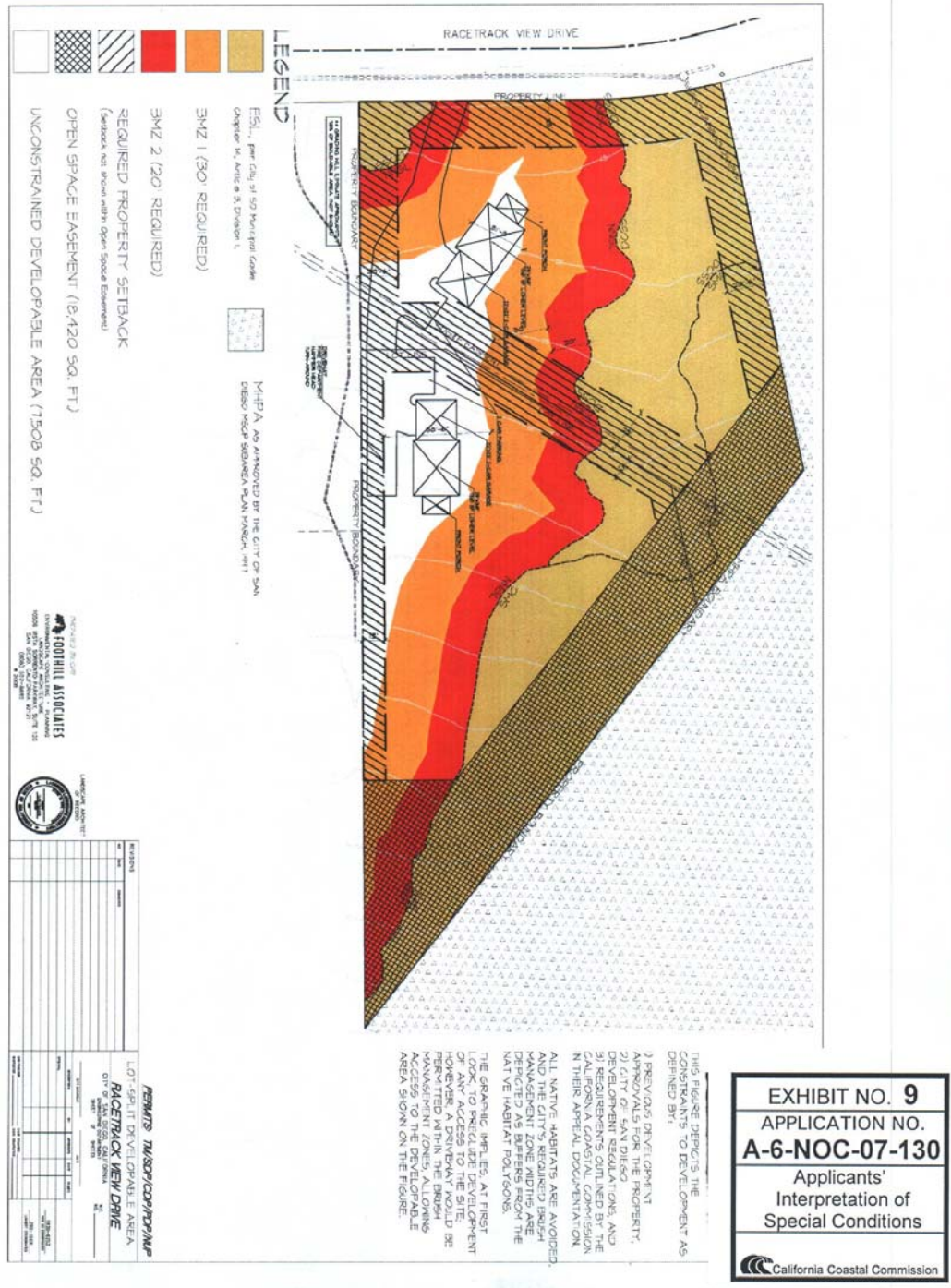
IV. WHEREAS, pursuant to the California Coastal Act of
1976, the Owner applied to the California Coastal Commission for a
coastal development permit for the development on the subject
property described above; and

V. WHEREAS, coastal development permit No. 6-88-364
was granted on November 17, 1988 by the California
Coastal Commission in accordance with the provision of the Staff
Recommendation and Findings, attached hereto as Exhibit "A" and
herein incorporated by reference; and

COPIES
11/15/88
11/15/88

RE-20
AR-16
MS-1

RECORDED
ON 04/10/08
09 APR 10 PM 3:56
VERA L. LYLE
COUNTY RECORDER



IRM RICHARDS | WATSON | GERSHON
SC ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101
 Telephone 213.626.8484 Facsimile 213.626.0078

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GLENN R. WATSON
 (RETIRED)

HARRY L. GERSHON
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 ROCHELLE BROWNE
 WILLIAM B. RUDELL
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 CAROL W. LYNCH
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 KEVIN G. ENNIS
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 B. TILDEN KIM
 SASKIA T. ASAMURA
 KAYSER O. SUME
 PETER M. THORSON
 JAMES L. MARKMAN
 CRAIG A. STEELE
 T. PETER PIERCE
 TERENCE R. BOGA
 LISA BOND
 JANET E. COLESON
 ROXANNE M. DIAZ
 JIM G. GRAYSON
 ROY A. CLARKE
 WILLIAM P. CURLEY III
 MICHAEL F. YOSHIBA
 REGINA N. DANNER
 PAULA GUTIERREZ BAEZA
 TERESA HO-VUHO
 BRUCE W. GALLOWAY
 DIANA K. CHUANG
 PATRICK K. BOBKO
 BILLY D. DUNSMORE
 AMY GREYSON
 DEBORAH R. HAKMAN
 D. CRAIG FOX
 ALEXANDER ASBE
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 LOLLY A. ENRIQUEZ
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 G. INDER KHALSA
 GINETTA L. GIOVINCO
 TRISHA ORTIZ
 CANDICE K. LEE
 DAVID G. ALDERSON
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SAN FRANCISCO OFFICE
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ORANGE COUNTY OFFICE
 TELEPHONE 714.990.0901

May 13, 2008

VIA ELECTRONIC MAIL AND HAND DELIVERY

Ms. Ellen Lirley
 Mr. Lee McEachern
 California Coastal Commission
 San Diego Area
 7575 Metropolitan Drive, Suite 103
 San Diego, CA 92108

Re: Appeal No. A-6-NOC-07-130 (Key, McCullough & Ames)

Dear Ms. Lirley and Mr. McEachern:

This firm, along with Susan McCabe and Katie Wilson, represents the Applicants in the above appeal. This letter supplements the letter to you from Ms. Wilson, dated January 10, 2008. We request that both letters be attached to the Staff Report ultimately prepared for this matter.

This letter responds to the Staff Recommendation prepared for the April 2008 meeting. In brief, the Applicants object to Special Condition Nos. 1 (Revised Final TPM/Building Plans) and 7 (Open Space and Conservation Easement). There are fundamental problems with the Staff Recommendation. While the City of San Diego carefully applied the provisions of the certified LCP, the current Staff Recommendation ignores the key provisions and effectively would rewrite the LCP, which the California courts recently have declared the Commission may not do. (*Security National Guaranty, Inc. v. California Coastal Com.* (January 25, 2008) 159 Cal.App.4th 402, 422-423; see also *Morro Bay Mini-Storage, Inc. v. California Coastal Com.* (2001) San Luis Obispo Sup. Ct. Case No. CV00-0578.)

As discussed below, the Applicants join with the City of San Diego in contending that the Commission lacks appeal jurisdiction over this Project. Even assuming the Commission has appeal jurisdiction, the Project complies with the "Environmentally Sensitive Lands" requirements of the certified LCP. Finally, the current Staff Recommendation, if adopted, would result in a "taking" of the Applicants' property. At the very least, the Staff Recommendation should delete Special Condition Nos. 1 and 7.

EXHIBIT NO. 10
APPLICATION NO.
A-6-NOC-07-130
Applicants' Response
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The Recent Decision in *Security National Guaranty* Should Govern the Staff Recommendation for the Project

The City's certified LCP defines the Commission's appeal jurisdiction by post-certification maps; they show the subject property to be outside the appealable area. The LCP also specifically permits the development of environmentally sensitive lands ("ESL") outside of the City's Multi-Habitat Planning Area (MHPA); it requires only mitigation, which the City properly required for this Project. Those requirements cannot be ignored or contradicted on appeal.

The recent Court of Appeal decision in *Security National Guaranty* ("*SNG*"), *supra*, decided earlier this year, is directly on point. There, the certified Sand City LCP identified and mapped locations that were ESHAs. No ESHAs were mapped on SNG's property. The City approved SNG's application for a CDP. On appeal, the Commission found that the entire project site was an ESHA and denied the project. The Court of Appeal held that "by declaring SNG's site an ESHA, the Commission exceeded its statutory authority, improperly assumed powers reserved to local government, and contradicted the terms of the certified LCP." (*SNG, supra*, 159 Cal.App.4th at 422.) As germane to the appeal here, the Court of Appeal explained:

"First, the Commission's action clearly exceeded an express limitation on its jurisdiction in permit appeals. The Coastal Act limits the grounds for such an appeal to an allegation that the development does not conform to the standards set forth in the certified LCP. [Citation.] In denying SNG's permit (at least in part) based on its unlawful ESHA designation, the Commission imposed additional standards not found in Sand City's LCP. SNG was entitled to have its development proposal judged by the standards of the certified LCP in effect at the time of its application. [Citation.]

"Second, the Commission has purported to exercise powers that the Legislature has expressly allocated to local government, which has decreed that LCP's may be amended "by the appropriate local government." [Citation.] By declaring the site an ESHA, the Commission has impermissibly attempted to amend part of Sand City's LCP. [Citation.]

"Third, the Commission's ESHA designation actually contradicts the terms of the certified LCP itself. The Commission's staff concluded that SNG's site was ESHA on the basis of general LCP policies regarding ESHA protection.

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But that conclusion cannot be reconciled with the specific findings in section 4.2.4. of Sand City's certified LUP that there were *no* ESHA's in the area west of Highway 1, where SNG's site is located . . . The Commission's ESHA designation simply cannot be squared with the plain terms of Sand City's LCP."

(*SNG, supra*, 159 Cal.App.4th at 422-423 (emphasis in original; citations omitted); see also *Morro Bay Mini-Storage, Inc., supra* [LCP mapped ESHAs which did not include applicant's property; Commission, on appeal, acted in excess of its jurisdiction in designating site as ESHA based on its assessment of resources existing "on the ground"].)

The Commission Lacks Appeal Jurisdiction

The subject property is located on Racetrack View Drive. The Post-Certification Maps referenced in the City's certified LCP show the property to be inland of the "first public road" and beyond the Commission's appeal jurisdiction.

On December 6, 2007, after approving the Project, the City incorrectly issued a Notice of Final Action indicating that the Project was appealable. Recognizing the mistake, on April 2, 2008, the City issued a corrected Notice of Final Action, explaining in a letter to Staff:

"The project is within Non-Appealable Area 1, as shown on Map Drawing No. C-730.1. When the California Coastal Commission certified the City of San Diego Local Coastal Program Amendment #1-98B, it included the Land Development Code and Land Development Manual. The Land Development Code defines the appealable area as 'The *appealable area* is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal.'"

The City is correct: The City's Post-Cert Map, incorporated in the certified LCP, shows the subject property to be located outside of the "first public road," which is Racetrack View Drive.

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Section 13576(a) of the Commission's Regulations provides:

"In conjunction with final Local Coastal Program certification . . . the Commission *shall*, after public hearing, adopt a map or maps of the coastal zone of the affected jurisdiction that portrays the areas where the Commission retains permit authority . . . These maps shall be drawn based on the criteria for permit and appeal boundary determinations, set forth in Section 13577 below, and will serve as the official maps of the Commission's permit and appeal jurisdiction." (Emphasis added.)

Consistent with the mandatory mapping requirement of Section 13576, the City prepared a comprehensive set of Post-Cert Maps for its LCP. As indicated, Map Drawing No. C-730.1 provides that Racetrack View Drive is the "first public road," and therefore outside of the Commission's appeal jurisdiction. In December 1997, the City adopted the Land Development Code and the Post-Cert Maps by Ordinance No. 0-18451. Thereafter, it submitted to the Commission an LCP amendment, No. 1-98B, which included a comprehensive Land Development Code and Land Development Manual to replace the zoning and other implementing actions previously certified by the Commission. Following a public hearing, the Commission certified the LCP amendment.

Section 113.0103 of the certified Land Development Code defines "appealable area" as:

"[t]he area, as defined by California Public Resources Code section 30603, within the coastal zone that constitutes the appeal jurisdiction of the Coastal Commission. This area includes lands between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no beach, whichever is the greater distance, or within 100 feet of any wetland, estuary, or stream, or within 100 feet of the top of the seaward face of any coastal bluff. **The appealable area is shown on Map Drawing No. C-730, on file in the office of the City Clerk, as Document No. 00-17067-1; however, this map may be updated as appropriate and may not include all lands involving post-LCP certification appeal.**" (Emphasis added.)

Section 126.0702(b) further addresses "Permits Issued by the Coastal Commission," and states:

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“A Coastal Development Permit or exemption for all coastal development on a project site located completely within the Coastal Commission Permit Jurisdiction or in the Deferred Certification Area must be obtained from the Coastal Commission. The Coastal Commission Permit Jurisdiction and the Deferred Certification Area are shown on Map No. C-730.1 on file in the Planning and Development Review Department, the San Diego office of the Coastal Commission, and in the office of the City Clerk as Document No. 00-17067-1.” (Emphasis added.)

Thus, the certified Post-Cert Maps show the subject property to be outside of the Commission’s appeal jurisdiction. Indeed, for the six years following certification of the Land Development Code, the City consistently approved projects in the vicinity of subject property, landward of Racetrack View Drive, and issued Notices of Final Action specifying that the developments approved are “non-appealable.” Commission Staff never objected:

Racetrack View Drive –	6-NOC-97-042
	6-NOC-97-043
Recuerdo Drive –	6-NOC-98-173
Lozana Road –	6-NOC-97-154
Mango Drive –	6-NOC-98-166
	6-NOC-00-306
Minorca Cove –	6-NOC-02-143

It was not until approximately 2004 that Commission Staff advised City Staff of its contrary view. Thereafter, until now, City Staff simply acquiesced, contrary to its certified LCP, and issued subsequent Notices of Final Action indicating that the developments approved were appealable. (Racetrack View Drive – 6-NOC-04-106; Recuerdo Drive – 6-NOC-05-274, 6-NOC-05-030; Lozana Road – 6-NOC-06-010.) As the Court of Appeal decision in *SVG* held, however, the Commission cannot simply by fiat change the provisions of an LCP once certified, and that includes the Post-Cert Maps.

There is a process for modifying the boundaries of a map. Section 13576(a) of the Commission’s regulations provides:

“The Commission, in consultation with the local government, shall update these maps from time to time, where changes occur in the conditions on which

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the adopted maps were based, or where it can be shown that the location of the mapped boundary does not accurately reflect the intended boundary criteria. Revisions of the adopted maps shall be based on precise boundary determinations made using the criteria set forth in Section 13577. The revised maps shall be filed with the affected jurisdiction within 30 days of adoption by the Commission.”

The Commission here has not followed the process outlined in its own regulations noted above. There has been no revised map relating to the subject property adopted or filed with the City, nor has there been a map revision or update as provided for in the LCP.

Finally, even assuming *arguendo* that the post-certification maps had not been included in the Land Development Code and certified by the Commission, it is still clear that Racetrack View Drive is the “first public road paralleling the sea,” defining the limit of Commission appeal jurisdiction. Section 13011 of the Commission’s regulations defines the “first public road paralleling the sea” as being (a) lawfully open to uninterrupted public use and suitable for such use; (b) publicly maintained; (c) an improved, all-weather road open to motor vehicle traffic in at least one direction; and (d) not subject to any restrictions on use by the public. It also must:

“ . . . in fact connect with other public roads providing a continuous access system, and generally parallel[] and follow[] the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.”

Racetrack View Drive satisfies all of the requirements of Section 13011.

Past Commission decisions explain that Via de la Valle is the first public east-west road *north* of the San Dieguito Lagoon, and that I-5 is the first public north-south road *east* of the Lagoon. (6-04-49 [22nd District Agricultural Association]; 6-02-020 [same].) As to the first public east-west road *south* of the Lagoon, one decision erroneously states, without explanation, that a road several miles south, Mango Way, is the first public road in this area. (F7453-A2 [Stephenson].) Unlike Racetrack View Drive, however, which connects with Jimmy Durante Boulevard, Via de la Valle, and I-5 – thus framing the Lagoon and providing a continuous access system, Mango Way is well south of the Lagoon, is in a disjunct subdivision, is accessed by

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Del Mar Heights Road, and has *no* connection (physical, visual or otherwise) to the Lagoon. Indeed, there is no rational basis for designating this *inland* road as the “first public roadway paralleling the sea.” By contrast, Racetrack View Drive not only frames the Lagoon but it is the first public east-west roadway immediately south of the Lagoon. It overlooks the Lagoon and provides direct views of the Lagoon, ample parking for the public, and is directly inland of a publicly accessible trail along the south side of the Lagoon. (*See* F7453-A2 [Stephenson].) It is the *only* road that logically qualifies as the first public road paralleling the sea.

Accordingly, despite the Commission’s finding of “substantial issue,” on closer scrutiny the Commission lacks appeal jurisdiction over the Project, and the appeal should be dismissed. Under *SNG*, the Commission may not revise the appeal boundary to include the subject property. In conformance with the Commission’s regulations, Racetrack View Drive is the first public road paralleling the sea, and the subject property is inland of the appeal boundary.

**The Project Conforms With the “Environmentally Sensitive Lands”
Requirements of the Certified LCP**

Even assuming that the Commission had appeal jurisdiction, the Staff’s ESHA determination, which encompasses the vast majority of the property, directly contradicts the certified LCP and ignores the key provision of the certified Land Development Code, which specifies that in the area proposed for development, “encroachment into sensitive biological resources **is not limited.**” (Certified Land Development Code § 143.0141; emphasis added.) Staff’s approach in this particular instance is not permitted under the *SNG* case.

The Staff Recommendation and Ms. Wilson’s January 14, 2008 letter recite the applicable policies of both the North City Land Use Plan component of the City’s certified LCP and the certified Torrey Pines Community Plan. For example, the North City Land Use Plan provides:

Page 73- “Environmentally sensitive habitat areas *should* be protected against any significant disruption of habitat values, and only those uses dependent on and compatible with such resources *should* be allowed within such areas.”

Page 74 – “Development *should* be sited and designed to prevent impacts which would significantly degrade environmentally sensitive habitat areas.”

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The Torrey Pines Community Plan additionally provides on Page 29:

1. “Land uses adjacent to environmentally sensitive habitats shall not negatively impact those areas.”
2. “Development impacts to rare, threatened, endangered, or candidate species shall be minimized or eliminated.”
3. “No filling, clearing, grubbing, or other disturbance of biologically sensitive habitats shall be permitted without approved mitigation plans.”

These land use policies are, in turn, specifically implemented by the Environmentally Sensitive Lands (ESL) Regulations of the City’s certified Implementation Plan. Two provisions are key here:

Section 143.0140 – “General Development Regulations for all Environmentally Sensitive Lands”

“Development that proposes encroachment into environmentally sensitive lands or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations:

- (c) No building lot shall be created that provides such a small development area that future reasonable development of the lot will require additional encroachment into environmentally sensitive lands beyond the maximum allowable development area of the original, unsubdivided premises. If additional development area is proposed for a lot that would exceed the maximum allowable development area of the original, subdivided premises, a deviation in accordance with Section 143.0150 is required, regardless of the lot size and the existing development area of the individual lot.”

Section 143.0141 – “Development Regulations for Sensitive Biological Resources”

Development that proposes encroachment into sensitive biological resources or that does not qualify for an exemption pursuant to

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Section 143.0110(c) is **subject to the following regulations** and the Biology Guidelines in the Land Development Manual.

(h) Outside the MHPA, encroachment into sensitive biological resources is not limited, except as set forth in Section 143.0141(b) and (g) [pertaining to wetland, their buffers and designated open space].” (Emphasis added.)

A. “Outside the MHPA, Encroachment into Sensitive Biological Resources is not Limited” – Land Development Code Section 143.0141(h).

As applicable here, Section 143.0141 of the certified Land Development Code addresses the maximum allowable development area of the property. The Project does not encroach into environmentally sensitive lands beyond that maximum allowed development area. Importantly, there is also *no* encroachment into the City’s Multi-Habitat Planning Area (MHPA). The MHPA encompasses the steep slope portions of the subject property, and borders the site on the south, east, and across Racetrack View Drive to the north. It is undisputed that the development proposed is located *outside* of the MHPA. Accordingly, under the certified LCP, the development proposed “is not limited,” and certainly not limited in the manner suggested by the Staff Report.

Significantly, the Staff Report quotes but then ignores Section 143.0141. Instead, it seeks to fashion a new and different standard based upon what Staff, not the LCP, believes should be the applicable siting criteria. The Staff Report states: “The Coastal Commission has not interpreted the resource protection policies of the [Coastal] Act or certified LCPs to allow all impacts at any cost to sensitive resources.” (Staff Report, p. 13.) The *SNG* case, however, forecloses that type of rewrite of the LCP. It is irrelevant here how the Commission may have interpreted the Coastal Act’s resource protection policies in other contexts or other LCPs. What counts is what this LCP states, and it states unambiguously that “[o]utside the MHPA, encroachment into sensitive biological resources is not limited.” (§143.0141(h).)

The Staff Report states that the determination of allowable development area “should” be based on application of all governing LUP policies and the ESL regulations to accommodate a reasonable use while recognizing any resource constraints. (Staff Recommendation, p. 13.) There is no such provision in the certified LCP. Instead, the Staff Report goes further to state that to conform to the

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applicable LUP policies, the allowable development area “should” not encroach into environmentally sensitive lands if it is possible to avoid such impacts. (*Id.*) Again, there is no such provision in the LCP. Instead, the LCP draws a clear distinction between ESL in the MHPA (essentially, the steep slope areas) and areas outside the MHPA that may contain sensitive biological resources. Under *SNG*, the appeal cannot provide a basis for rewriting the certified LCP. In the words of *SNG*, to do so would exceed the Commission’s statutory authority, improperly assume powers reserved to local government, and contradict the terms of the certified LCP. (*SNG*, *supra*, 159 Cal.App.4th at 422.)

Despite the express and acknowledged reference to the MHPA in the certified LCP, the Staff Report attempts to cast some doubt on the value of that designation. The fact is, it is the defining criteria in the certified LCP. Further, Staff’s suggestion now, years after certification, that the Multi-Habitat Preserve Area identified in the City’s Multiple Species Conservation Program (MSCP) may have been based not on biology but solely on cooperation of the property owner at the time the City put together the MHPA. This is not only irrelevant, but it is unsupported. It would be hard to believe that Staff recommended certification of the LCP with Section 141.0141(h) on that basis. Rather, as the City explained in the Executive Summary to its MSCP (December 1997), submitted to the Commission in connection with the LCPA for the Land Development Code:

“The purpose of establishing the MHPA is to protect and enhance natural areas essential to the continued survival and health of wildlife (plant and animal) species that are threatened by the ongoing urbanization in this region . . . The MHPA, which contains both publicly and privately owned land, **consists of core area of high biological value** and corridors that connect these core areas. Approximately 90% of the land in the city’s MHPA will be preserved for biological purposes.” (Executive Summary, MSCP, p. 1; emphasis added.)

Regardless, for this property, in particular, the MHPA – the steep slope and sensitive resource protected portion of the site – lies within the Torrey Pines Reserve. The part of the property sought to be developed is *outside* the MHPA, and under *SNG*, the express terms of the LCP govern and cannot be changed in connection with this appeal.

B. Biologically Sensitive Habitats Map in the Certified LCP (Appendix F) – Excludes CSS and SMC on the Subject Property.

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The certified Torrey Pines Community Plan also has specifically identified in the LCP the “Biologically Sensitive Habitats (North)” which encompass the subject property. (See TPCP, p. 125, Appendix F.) The “Biologically Sensitive Habitats” map identified “Grasslands” on this property, but did not identify CSS or SMC, the species that concern Staff. Moreover, the Staff Report notes the presence of non-native grasslands on the property, but explains that “impacts to that habitat are not considered impacts to ESHA” (Staff Report, p. 14.)

While the certified LCP has identified other areas within the Torrey Pines Community Plan that Staff may now consider to be ESHA, here, in particular, this LCP has specifically not identified ESHA on the subject property. While the portion of the property outside of the MHPA constitutes environmentally sensitive lands, the Commission has previously explained that “the term environmentally sensitive lands is **not** the same as environmentally sensitive habitat areas or ESHA addressed in Section 30240 of the Coastal Act.” (City of San Diego Major Amendment No. 3-03B [Crescent Heights], p. 19; emphasis added.) Thus, as in *SNG*, Staff’s attempted ESHA designation “simply cannot be squared with the plain terms of [the] . . . City’s certified LUP. (See *SNG*, 159 Cal.App.4th at 123.)

C. Conclusion.

In sum, Section 143.0141(h) requires that the City must evaluate development occurring in sensitive biological resources in an impact analysis and require mitigation. The Applicants prepared an impact analysis for this Project, and consistent with its obligation under Section 143.0141(h), the City required both an in-lieu and on-site preservation for the CSS, non-native grasslands, and Southern Maritime Chaparral impacted. That is precisely what the certified LCP requires, and the Staff Recommendation can neither ignore the LCP nor rewrite its provisions.

Rewriting the Certified LCP and Grossly Limiting the House Size Would Result in a Taking

In rewriting the LCP, the Staff Recommendation would preclude the ability to site either of the houses approved by the City. The result is a taking. The Constraints Map, attached as an Exhibit, shows the “ESHA,” as Staff now views it, the open space easement, the two fuel modification zones required by the City, and the required property setback. It also shows the existing SDG&E power line and

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easement which bifurcates the property, and cannot be relocated. The remaining unconstrained development area for each lot would be irregular in size and shape and unusable as a practical matter. Limiting the size of each house to essentially 1,500 square feet (a two-story stacked box with 750 square feet on each story) and designating new ESHA on the property would significantly impact the Applicants' economic use of the property and would interfere with their reasonable investment-backed expectations developed at the time they acquired the property. Adoption of Staff's recommendation would therefore constitute a multi-million dollar taking under California law. (*See Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Reehard v. Lee County* (11th Cir. 1992) 968 F.2d 1131, 1136.)

The Applicants paid \$1,550,000 for the subject property – approximately \$842,385 per acre. Since that time, the Applicants have incurred approximately \$468,000 in carrying costs and other costs as part of the entitlement process. Under the circumstances, no reasonable builder could afford to construct a house on the portion of the property remaining after application of the Staff Recommendation.

It was entirely reasonable under the circumstances existing at the time of their purchase in 2004 that the Applicants could expect to build two homes within the building envelope evaluated for the creation of Lot 4. In 1978, the Commission approved the original four-lot subdivision of 38.8 acres, which included this property. Although not stated in the current Staff Report, the Commission's approval provided that the future division of Parcels 3 and 4 (the subject property) would be limited "to one, 2-way split on each lot." In 1988, the Commission approved CDP Application No. 6-88-364, which approved the re-subdivision of the four lots created. This permit required recordation of an open space deed restriction on the steep slopes with native vegetation occurring along the southern portion of the four lots, including Parcel 4. The Staff Report for the 1988 permit also discussed the future subdivision of Parcels 3 and 4 as follows:

"When the applicant applies for a coastal development permit for the future subdivision of Parcels 3 and 4, it will be necessary that a grading report, as detailed as the one prepared for Parcels 1 and 2 be submitted by the applicant. This will allow the reviewing power to approve only those parcels which have adequate stable building areas, and require no encroachments into the developed open space." (CDP Application No. 6-88-364, p. 7.)

In connection with this Project, the Applicants submitted the required detailed geology report, which demonstrates that proposed lots are grossly stable. The Staff

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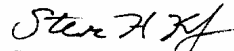
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Report for this application (at p. 9) correctly explains that in 1988, "the Commission and its staff were only protecting ESHA if it occurred on steep slopes." Indeed, as discussed above, that approach was in fact captured in the certified LCP, and for this property it is, in essence, the portion of the site within the MHPA and the existing open space/deed restricted area. Parcel 3, the adjacent parcel, already includes an existing 3,255 square foot residence, and other homes in the immediate vicinity range in size from 3,000 to 5,000 square feet.

The Applicants had no reason to believe at the time of acquisition that the Commission might impose an approximately 1,500 square foot size limit on homes outside of the MHPA. Neither CSS nor SMC now or were ever are designated as ESHA in the LCP. The Commission had not previously prohibited development outside the MHPA and open space deed restricted area, but rather expressly noted the future lot split. The Applicants had no reason to believe that CSS and MSS, coupled with the required fuel modification zones, would comprise most of the usable portions of the property and effectively render the entire lot unbuildable.

For these reasons, approval of the Project, as approved by the City, is necessary to avoid a taking. The unsanctioned departure from the certified LCP and the unreasonable size of the development envelope that would then remain compels forsaking the Staff Recommendation and approving the Project.

Very truly yours,


Steven H. Kaufmann

cc (w/attach.):

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