

## CALIFORNIA COASTAL COMMISSION

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# F 16b

Filed:	November 6, 2007
49 <sup>th</sup> Day:	December 25, 2007
Hearing Opened:	December 14, 2007
Staff:	Melissa B. Kraemer
Staff Report:	March 27, 2009
Hearing Date:	April 10, 2009

STAFF REPORT: APPEAL  
DE NOVO HEARING

APPEAL NO.:	<b>A-1-MEN-07-047</b>
APPLICANTS:	<b>William &amp; Marcia McConnell</b>
LOCAL GOVERNMENT:	County of Mendocino
DECISION:	Approval with Conditions
PROJECT LOCATION:	In the Irish Beach Subdivision, approximately four miles north of the town of Manchester, on the south side of Navarro Way (CR 553), approximately 250 feet southwest of its intersection with State Highway 1, on a west-facing slope near the ocean, at 14820 Navarro Way (APN 132-020-05).
PROJECT DESCRIPTION (as approved by the County):	Construction of a 1,336-square-foot single-story single family residence with a maximum average height of 20 feet above finished grade; 327 square feet of decks; 85 square feet of covered porch; a 305-square-foot detached garage with a maximum average height of 13 feet above finished grade; 1,200 square feet of concrete driveway; installation of an underground propane tank, 24-square-foot trash enclosure, and an on-site septic system; and connection to utilities and community water.
PROJECT DESCRIPTION (as amended <i>de novo</i> ):	Construction of a 1,203-square-foot single story single family residence with a 344-square-foot attached garage at a maximum average height of approximately 15 feet above mean natural grade; 272 square feet of exterior decks; 48 square feet of covered porches; 451 square feet of concrete

driveway; an on-site septic system; an above-ground propane tank within a fenced enclosure; and connections to utilities and community water.

APPELLANTS:

Commissioners Pat Kruer & Sara J. Wan

SUBSTANTIVE FILE  
DOCUMENTS:

(1) Mendocino County CDP No. 76-2006;  
(2) Mendocino County Local Coastal Program;  
(3) *Geotechnical Investigation and Geologic Reconnaissance/Planned McConnell Residence/14820 Navarro Way/Irish Beach, Manchester, Mendocino County, California/12132.1*, dated December 9, 2008, by BACE Geotechnical, Santa Rosa, CA;  
(4) *Botanical Survey: McConnell Project*, dated May 2006, and *Addendum to Botanical Survey, William McConnell – APN 132-020-05 (April 2006)*, dated June 2007, by BioConsultant LLC, Santa Rosa, CA; and  
(5) *Point Arena Mountain Beaver Survey: McConnell Project (April, 2006)* by BioConsultant LLC, Santa Rosa, CA.

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**SUMMARY OF STAFF RECOMMENDATION DE NOVO:**  
**APPROVAL WITH CONDITIONS**

Staff recommends that the Commission approve with conditions the coastal development permit for the proposed project. Staff believes that as conditioned, the development, as amended for purposes of the Commission's *de novo* hearing, will include measures to mitigate all significant adverse impacts to environmentally sensitive habitat areas (ESHA) and geologic hazards to the greatest extent feasible consistent with the Mendocino County LCP and the public access policies of the Coastal Act while providing for a reasonable economic use of the property that will preclude an unconstitutional taking of private property for public use consistent with the requirements of Section 30010 of the Coastal Act.

The proposed residential development is located in the Irish Beach Subdivision, approximately four miles north of the town of Manchester, on the south side of Navarro Way (CR 553), approximately 250 feet southwest of its intersection with State Highway 1, on a west-facing slope near the ocean, at 14820 Navarro Way (see Exhibit Nos. 1, 2, and 3).

The subject property, which is approximately 0.48-acre in size, is located on a west-facing marine terrace and extends down a coastal bluff, but it is not the most westward lot on the bluff; there is a neighboring lot designated as Open Space under separate ownership located on the bluff between the subject lot and the ocean (see Exhibit No. 4). The subject parcel is approximately 100 feet wide (north to south) and 300 feet long (from Navarro Way westward), and extends to within 300 feet of the ocean.

The subject parcel is located within an existing residential neighborhood, the Irish Beach subdivision, along an otherwise rural stretch of the southern Mendocino coastline. The subject parcel is located on the urban side of the urban/rural boundary and is planned and zoned for residential use (see Exhibit No. 4). The subject site is not located within an area designated as “highly scenic” in the County’s certified LCP (see Exhibit No. 4). However, views of the ocean and Point Arena lighthouse are afforded through the site from Navarro Way, a public street.

A habitat assessment and survey conducted on the property by BioConsultant LLC in April 2006 for the Point Arena mountain beaver (PAMB) reports “good to excellent quality” habitat with an estimated 200+ active PAMB burrows throughout the coastal scrub habitat on the parcel. Inactive burrows also were observed in the disturbed, eastern portion of the parcel, where mowing and shrub removal reportedly occurred in late 2005 or early 2006, altering the habitat from coastal scrub to nonnative grassland. Point Arena mountain beaver (*Aplodontia rufa nigra*) is a federally-listed endangered species protected under the Endangered Species Act of 1973. The species is also listed as a California Species of Concern by the California Department of Fish and Game (CNDDDB *RareFind* 3.1.1), and its habitat meets the definition of “environmentally sensitive” (ESHA) under the County’s certified LCP (see Finding IV-G below). Although the Point Arena mountain beaver bears some resemblance to a beaver, the animal is actually a type of terrestrial rodent (see Finding IV-G below for more details).

Because PAMB burrows were observed throughout much of the subject property and there was a likelihood of “incidental take” of PAMB as a result of future development of the parcel, BioConsultant LLC initiated technical assistance from the U.S. Fish and Wildlife Service (FWS) in April of 2006 (prior to the applicants’ ownership of the property). The FWS determined that with appropriate protective measures, the development would not be likely to result in incidental take of PAMB. Recommended protective measures included designating and protecting in perpetuity the currently suitable and occupied habitat on the parcel. Thus, the applicants established, in cooperation with FWS, a conservation easement and deed restriction over the approximately western half of the property, which prohibits certain activities within the FWS-designated PAMB habitat on the parcel, including vegetation alteration or removal, ground disturbance, and rodent control (see Exhibit No. 10). However, as discussed below, the FWS conservation easement and deed restriction does not extend over all of the PAMB ESHA on the property.

For the purposes of *de novo* review by the Commission, the applicants submitted a revised project description and revised plans (Exhibit Nos. 5, 6, and 7) that make changes to the development originally approved by the County. The project revisions were designed to address concerns raised in the appeal that the project (1) did not include sufficient buffer between the development and the PAMB ESHA on the property, (2) raised geologic concerns, and (3) did not keep grading to an absolute minimum.

The proposed project as revised for the Commission’s *de novo* review involves construction of a 1,203-square-foot single family residence (versus 1,336 square feet as approved by the County) with a 344-square-foot attached (versus 305-square-foot detached) garage at a maximum average height of approximately 15 feet (versus 20 feet) above finished grade; 272 square feet of exterior

decks (versus 327 square feet); 48 square feet of covered porches (versus 85 square feet); 451 square feet of concrete driveway (versus 1,200 square feet); an on-site septic system; an above-ground (versus underground) propane tank within a fenced enclosure; and connections to utilities and community water. The basic layout of the development has changed, in that the home has been shifted approximately 35 feet eastward, closer to the road and top of bluff, just downslope from the on-site septic system, which is located on the eastern end of the lot adjacent to Navarro Way.

With regard to the ESHA buffer, the revisions to the project for the purposes of *de novo* review by the Commission were designed to ensure that at least a 50-foot buffer would be established between all new proposed development and the PAMB habitat located in the conservation easement and deed restriction area (established in cooperation with the U.S. Fish & Wildlife Service in 2006, at the time that the applicant purchased the property – see Exhibit No. 10) on the western side of the parcel. The County-approved project was located only 5-15 feet from the deed-restricted PAMB habitat.

Although the house will be 50 feet back from the deed-restricted area required by the FWS for its “no take” determination of the project’s effects on PAMB, at least a portion of the proposed development still would be located within an area that provided habitat for PAMB until unpermitted clearing of vegetation occurred a few years ago (prior to the applicant’s owning the property). This area that was disturbed without authorization is considered ESHA under the certified LCP and the Coastal Act. Approximately half of the proposed house would be located within PAMB ESHA (modified suitable PAMB habitat), and the remainder of the proposed development (including a portion of the house, the driveway, septic fields, etc.) would be located within the ESHA buffer (i.e., less than 50 feet from modified suitable PAMB habitat).

With regard to the geologic concerns, the applicant’s geologist submitted a quantitative slope stability analysis for purposes of *de novo* review by the Commission (Exhibit No. 8). The slope stability analysis, which was prepared by the applicant’s consultant BACE Geotechnical, dated December 9, 2008, recommends a geologic setback of 30 feet from an old landslide headscarp to provide the appropriate factor of safety to guard against bluff retreat hazards (see Exhibit Nos. 8 and 9). The analysis also offers numerous recommendations on site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls and site drainage. The Commission’s geologist concurs with the recommendation for the siting of the home and the design recommendations. However, the analysis does not recommend a bluff edge setback, since the analysis acknowledges, and the Commission’s geologist agrees, that the entire subject property, including the proposed building area, is located seaward of the bluff edge, on the uppermost, broadly rounded, gently-sloping bluff face. In contrast, the geologic report that was the basis for the County’s approval of the original project asserted that the building site (as approved by the County) was located landward of the bluff edge, approximately 350 feet east of the recommended geologic setback line. See Finding IV-F below for a more in depth geologic discussion.

With regard to grading issues, the project as revised for purposes of *de novo* review reduces the total amount of necessary grading by approximately 30 cubic yards, from approximately 205 cubic yards of maximum cut for the house, garage, and driveway (as approved by the County) to

a proposed 175 cubic yards (145 cubic yards for the house and garage construction and 30 cubic yards for driveway construction). Proposed grading has been reduced by locating the house and garage further eastward on the property, closer to the road, thereby shortening the driveway significantly from 1,200 square feet to the currently proposed 450 square feet, and by utilizing for the proposed building site the more gently sloping terrain at the east end of the property while still maintaining the necessary setbacks from the on-site septic system, which, due to soil properties and constraints, cannot be located elsewhere on the parcel (Exhibit No. 7).

Staff believes that the proposed project is inconsistent with the geologic hazard policies of the LCP, specifically with LUP Policy 3.4-10 and CZC 20.500.020(B)(4), which prohibit development on bluff faces. As staff cannot make findings for approval consistent with these LCP policies, these policies require that the proposed project be denied.

Additionally, staff believes that because the majority of the proposed 1,203-square-foot single family residence would be located within PAMB ESHA (modified suitable PAMB habitat), the proposed development would significantly degrade the PAMB ESHA (further than its already been degraded). Thus, staff believes that findings for project approval cannot be made consistent with LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1), and these policies mandate that the project be denied.

Moreover, because (1) the proposed development would be located less than 50 feet from delineated PAMB ESHA inconsistent with LUP Policy 3.1-7 and CZC Section 20.496.020(A), and (2) the proposed residential development would significantly degrade the PAMB habitat (at a minimum the modified suitable PAMB habitat), staff believes that findings for approval cannot be made consistent with LUP Policy 3.1-7 and CZC Sections 20.496.015 and 20.532.100(A)(1), and these policies mandate that the project be denied.

However, in this case, as discussed at length below in Findings IV-H and IV-I, staff has determined that the Commission must allow a reasonable residential development on the subject property to avoid an unconstitutional taking of the applicant's property without payment of just compensation and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010. Staff interprets Section 30010, together with the *Lucas* decision, to mean that if an applicant demonstrates that Commission denial of the project would deprive his or her property of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act or LCP provision would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, unless the proposed project would constitute a public nuisance under state law, the applicable provisions of the certified LCP cannot be read to deny all economically beneficial or productive use of land because these sections of the certified LCP cannot be interpreted to require the Commission to act in an unconstitutional manner. Staff believes that in this particular case, none of the other allowable principally permitted or conditionally permitted uses at the subject property would avoid the geologic hazards of building on a bluff face, avoid development within and immediately adjacent to environmentally sensitive Point Arena mountain beaver habitat (PAMB ESHA), be feasible, and provide the property with an economically viable use.

Though applicants are entitled under Coastal Act Section 30010 to an assurance that the Commission will not act in such a way as to take their property, this section does not authorize the Commission to completely avoid application of the policies and standards of the certified LCP. Instead, the Commission is only directed to avoid construing these applicable policies in a way that would take private property for public use. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the LCP. Therefore, in this situation, the development must still comply to the greatest extent possible with LUP Policies 3.1-2 and 3.4-10 and CZC Sections 20.496.015, 20.500.020(B)(4), and 20.532.100(A)(1) by requiring measures to mitigate geologic hazards and adverse environmental effects on environmentally sensitive Point Arena mountain beaver habitat.

Therefore, staff recommends Special Condition Nos. 1 through 7 to minimize and mitigate geologic hazards to the greatest extent feasible, as is required by LUP Policy 3.4-10 and CZC Section 20.500.020(B)(4), and Special Condition Nos. 4 through 10 to minimize and mitigate the adverse environmental effects and avoid significant degradation of the PAMB ESHA, as required by LUP Policy 3.1-2 and CZC Section 20.532.100:

- Special Condition No. 1 would require, in part, that prior to permit issuance, a geotechnical engineer approve all final plans and ensure that all geologic setback, site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls, and site drainage recommendations included in the BACE Geotechnical report prepared for the site dated December 9, 2008 (Exhibit No. 8) have been incorporated into final plans;
- Special Condition No. 2 would prohibit the construction of shoreline protective devices on the parcel, require that the landowner provide a geotechnical investigation and remove the permitted single-family residence, garage, decking, porches, driveway, septic system, propane tank, and water and utility connections if bluff retreat reaches the point where the permitted development is threatened, and require that the landowners accept sole responsibility for the removal of any structural debris resulting from landslides, slope failures, or erosion of the site;
- Special Condition No. 3 would require the landowner to assume the risks of extraordinary erosion and geologic hazards of the property and waive any claim of liability on the part of the Commission;
- Special Condition No. 4 would require that the applicant record and execute a deed restriction approved by the Executive Director against the property that imposes the special conditions of this permit as covenants, conditions, and restrictions on the use and enjoyment of the property;
- Special Condition No. 5 would require a coastal development permit or a permit amendment for all additions and improvements to the residence on the subject parcel that might otherwise be exempt from coastal permit requirements;
- Special Condition No. 6 would restrict the use of all areas of the lot west of the proposed building area, as generally depicted on Exhibit No. 16, to open space where all development would be prohibited except for the removal of non-native vegetation; installation of erosion control measures and drainage improvements installed pursuant to

Special Condition No. 1; planting of drought-tolerant native vegetation and habitat restoration pursuant to Special Condition No. 8; and installation of a protective fence installed pursuant to Special Condition No. 9;

- Special Condition No. 7 would impose landscaping restrictions on the parcel, including (a) drought-tolerant vegetation only shall be maintained within the geologic setback area/open space area west of the approved building envelope as shown on Exhibit No. 16 to minimize the need for irrigation and the potential for geologic hazards; (b) only native and/or non-invasive plant species of local genetic stock be planted at the site; and (c) no rodenticides of any kind be utilized on the property;
- Special Condition No. 8 would require that the applicant submit a final landscaping and habitat restoration plan for the property demonstrating, in part, that the portion of the open space deed-restricted area established pursuant to Special Condition No. 6 shall be planted with vegetation beneficial to Point Arena mountain beaver habitat;
- Special Condition No. 9 would requires that, prior to permit issuance, the applicant submit for the review and approval of the Executive Director, a final buffer fencing plan, which provides for a fence to be erected to separate the new development and activities associated with residential living from the PAMB ESHA; and
- Special Condition No. 10 would restrict the timing of construction so that no development authorized by the permit would occur during the PAMB breeding season period of December 15 through June 30.

Staff believes that as conditioned, the project would include measures to mitigate all significant adverse environmental effects and geologic hazards to the greatest extent possible consistent with LUP Section 3.4-10 and CZC Section 20.500.020(B)(4) while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use. Additionally, staff believes that as conditioned, the project would include measures to mitigate all significant adverse environmental effects on environmentally sensitive Point Arena mountain beaver habitat to the greatest extent feasible consistent with the requirements of LUP Policy 3.1-7 and CZC Section 20.532.100, which require that permitted development within an ESHA be sited and designed to prevent impacts which would significantly degrade such areas while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

Furthermore, this particular project involving a bluff-face parcel with significant Point Arena mountain beaver environmentally sensitive habitat is unique and unusual and contains conditions specific to this project. Staff believes that approval of this project would not establish a precedent for the Commission or Mendocino County to approve development on bluff faces for other projects.

**The motion to Adopt the staff recommendation of approval with conditions is on page 10.**

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## **STAFF NOTES:**

### **1. Procedure**

On December 14, 2007, the Commission found that the appeal of the County of Mendocino's approval of a local coastal development permit for a single family residence raised a substantial issue with respect to the grounds on which the appeal had been filed, pursuant to Section 13115 of the Title 14 of the California Code of Regulations. As a result, the County's approval is no longer effective, and the Commission must consider the application *de novo*. The Commission may approve, approve with conditions (including conditions different than those imposed by the County), or deny the application. Since the proposed project is within an area for which the Commission has certified a Local Coastal Program (LCP) and is located between the first public road and the sea, the applicable standard of review for the Commission to consider is whether the development is consistent with the Mendocino County certified LCP and the public access policies of the Coastal Act. Testimony may be taken from all interested persons at the *de novo* hearing.

### **2. Submittal of Additional Information by the Applicant**

For the purposes of *de novo* review by the Commission, the applicant has provided Commission staff with supplemental information consisting of the following:

- (a) A quantitative slope stability analysis for determining bluff stability, prepared by BACE Geotechnical dated December 9, 2008 (Exhibit No. 8);
- (b) A delineation and description of the area on the eastern end of the parcel that constituted the extent of the Point Arena Mountain Beaver (PAMB) habitat prior to modification of the habitat through past unpermitted vegetation removal, prepared by BioConsultant LLC dated January 17, 2008 (Exhibit No. 12);
- (c) Information regarding the applicant's acquisition of the property to allow the Commission to evaluate whether a denial of the project would result in a "takings" inconsistent with Section 30010 of the Coastal Act;
- (d) A link to the Irish Beach CC&Rs describing guidelines and restrictions that affect the subject property imposed by the Irish Beach Subdivision (<http://www.ibiclub.com/downloaddocs/ibccr14.htm>);
- (e) An evaluation of the suitability of the soils for a septic system at the alternative leach field location suggested by the County, prepared by DMC Consulting Services dated March 14, 2008, demonstrating that the alternative location would not be suitable to meet County standards (Exhibit No. 13); and
- (f) A letter from the Irish Beach Water District, dated November 7, 2007, demonstrating that the District has the capacity and willingness to serve the development.

The supplemental information addresses issues raised by the appeal and provides additional information that was not a part of the record when the County originally acted to approve the coastal development permit.

### **3. Amended Project Description Submitted by Applicant for *de novo* Review**



For the purposes of *de novo* review by the Commission, the applicant submitted a revised project description and revised plans dated January 17, 2009 that make changes to the proposed residential development as originally approved by the County. The project revisions were designed to address concerns raised in the appeal that the project (1) did not include sufficient buffer between the development and the Point Arena Mountain Beaver ESHA on the property, (2) raised geologic concerns, and (3) did not keep grading to an absolute minimum.

The proposed project as revised for the Commission's *de novo* review involves construction of a 1,203-square-foot single story single family residence (versus 1,336 square feet as approved by the County) with a 344-square-foot attached (versus 305-square-foot detached) garage at a maximum average height of approximately 15 feet (versus 20 feet) above mean natural grade; 272 square feet of exterior decks (versus 327 square feet); 48 square feet of covered porches (versus 85 square feet); 451 square feet of concrete driveway (versus 1,200 square feet); an on-site septic system; an above-ground (versus underground) propane tank within a fenced enclosure; and connections to utilities and community water (see Exhibit Nos. 5 and 6).

With regard to the ESHA buffer, the revisions to the project for the purposes of *de novo* review by the Commission were designed to ensure that at least a 50-foot buffer would be established between all new proposed development and Point Arena Mountain Beaver (PAMB) habitat located within a deed-restricted conservation easement (established in cooperation with the U.S. Fish & Wildlife Service) on the western side of the parcel. The County approved project was located only 5-15 feet from the deed-restricted PAMB habitat.

With regard to the geologic concerns, the applicant's geologist submitted a quantitative slope stability analysis for purposes of *de novo* review by the Commission (Exhibit No. 8). No slope stability analysis had been available as a basis for the County's approval of the original project. The geologic hazard policies of the LCP require, in part, that new development minimize the risk of geologic hazard, assure structural integrity and stability, and neither create nor contribute significantly to erosion, geologic instability or destruction of the site or surrounding areas nor in any way require the construction of protective devices that would substantially alter natural landforms along the bluff. The LCP policies also require that development be set back a sufficient distance from the bluff edge to ensure its safety from bluff erosion and cliff retreat during its economic life span (75 years). The slope stability analysis, which was prepared for the purposes of the Commission's *de novo* review by the applicant's consultant BACE Geotechnical, dated December 9, 2008, recommends a geologic setback of 30 feet from an old landslide headscarp in order to provide the appropriate factor of safety to guard against bluff retreat hazards (see Exhibit Nos. 8 and 9). The analysis also offers numerous recommendations on site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls, and site drainage. The analysis does not recommend a bluff edge setback, since the analysis acknowledges that the entire subject property, including the proposed building area, is located seaward of the bluff edge, on the uppermost, broadly rounded, gently-sloping bluff face. In contrast, the geologic report that was the basis for the County's approval of the original project asserted that the building site (as approved by the County) was located landward of the bluff edge, approximately 350 feet east of the recommended geologic setback line.

With regard to grading issues, the project as revised for purposes of *de novo* review reduces the total amount of necessary grading by approximately 30 cubic yards, from approximately 205 cubic yards of maximum cut for the house, garage, and driveway (as approved by the County) to a proposed 175 cubic yards (145 cubic yards for the house and garage construction and 30 cubic yards for driveway construction). Proposed grading has been reduced by locating the house and garage further eastward on the property closer to the road, thereby shortening the driveway significantly from 1,200 square feet to the currently proposed 450 square feet and by utilizing for the proposed building site the more gently sloping terrain at the east end of the property while still maintaining the necessary setbacks from the on-site septic system, which, due to soil properties and constraints, cannot be located elsewhere on the parcel (see Exhibit Nos. 7 and 13).

The amended project description and supporting information address issues raised by the appeal, where applicable, and provide additional information concerning the amended project proposal that was not a part of the record when the County originally acted to approve the coastal development permit.

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**I. MOTION, STAFF RECOMMENDATION DE NOVO, & RESOLUTION:**

**Motion:**

*I move that the Commission approve Coastal Development Permit No. A-1-MEN-07-047 subject to conditions.*

**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 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 Mendocino County LCP. 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 Appendix A.**

**III. SPECIAL CONDITIONS:**

**1. Minimization of Geologic Hazards**

- A. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047**, the applicant shall submit for the review and approval of the Executive Director evidence that (1) a geotechnical engineer has reviewed the anchoring systems and anticipated seismic loading of the proposed buildings and that any recommendations for appropriate restraint systems have been incorporated into the final project design, (2) a geotechnical engineer has approved all final design, construction, foundation, grading, and drainage plans, (3) all geologic setback, site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls, and site drainage recommendations included in the BACE Geotechnical report prepared for the site dated December 9, 2008 (Exhibit No. 8) have been incorporated into final plans, and (4) a licensed engineering geologist, or a registered civil engineer with soil analysis expertise, has been retained to supervise the foundation construction and earthwork to ensure that the geologic hazard mitigation measures and recommendations included in the BACE Geotechnical report prepared for the site dated December 9, 2008 (Exhibit No. 8) are properly incorporated into the development.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**2. No Future Bluff or Shoreline Protective Device**

- A. By acceptance of this permit, the applicant agrees, on behalf of himself and all successors and assigns, that no bluff or shoreline protective device(s) shall ever be constructed to protect the new single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections authorized pursuant to Coastal Development Permit No. A-1-MEN-07-047, in the event that the single-family residence, garage, decking, porches, driveway, septic system, propane tank, and/or water and utility connections are threatened with damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, ground subsidence, or other natural hazards in the future. By acceptance of this permit, the applicant hereby waives, on behalf of himself and all successors and assigns, any rights to construct such devices to protect the single-family residence, garage, decking, porches, driveway, septic system, propane tank, and water and utility connections that may exist under Public Resources Code Section 30235 or under Mendocino County Land Use Plan Policy No. 3.4-12, and Mendocino County Coastal Zoning Code Section 20.500.020(E)(1).
- B. By acceptance of this Permit, the applicant further agrees, on behalf of himself and all successors and assigns, that the landowner shall remove the single-family residence, garage, decking, porches, driveway, septic system, propane tank, and water and utility connections authorized by this permit if any government agency has ordered that the structures are not to be occupied due to any of the hazards identified above. In the event that portions of the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections fall to the beach before they are

removed, the landowner shall remove all recoverable debris associated with the development from the beach and ocean and lawfully dispose of the material in an approved disposal site. Such removal shall require a coastal development permit.

- C. In the event the edge of the bluff recedes to within 10 feet of the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections but no government agency has ordered that the structures not be occupied, a geotechnical investigation shall be prepared by a licensed geologist or civil engineer with coastal experience retained by the applicant, that addresses whether any portions of the structures are threatened by waves, erosion, storm conditions, or other natural hazards. The report shall identify all those immediate or potential future measures that could stabilize the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections without shore or bluff protection, including but not limited to, removal or relocation of portions of the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections. The report shall be submitted to the Executive Director and the appropriate local government official. If the geotechnical report concludes that the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections is unsafe for use, the permittee shall, within 90 days of submitting the report, apply for a coastal development permit amendment to remedy the hazard which shall include removal of the threatened portion of the single-family residence, garage, decking, porches, driveway, septic system, propane tank, or water and utility connections.

### **3. Assumption of Risk, Waiver of Liability and Indemnity**

By acceptance of this permit, the applicant acknowledges and agrees: (i) that the site may be subject to hazards from landslide, bluff retreat, erosion, subsidence, and earth movement; (ii) to assume the risks to the applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

### **4. Deed Restriction**

**PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047**, the applicant shall submit for the review and approval of the Executive Director, 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 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.

**5. Future Development Restrictions**

This permit is only for the development described in Coastal Development Permit No. A-1-MEN-07-047. Any future improvements to the single-family residence or other approved development will require a permit amendment or a new coastal development permit.

**6. Open Space Restriction**

A. No development, as defined in Section 30106 of the Coastal Act, shall occur west of the approved building envelope as shown on Exhibit No. 16 except for:

(1) Removal of nonnative vegetation; installation of erosion control measures installed pursuant to Special Condition No. 1; installation of drainage improvements installed pursuant to Special Condition No. 1; planting of drought-tolerant native vegetation and habitat restoration pursuant to Special Condition No. 8; and installation of a protective fence installed pursuant to Special Condition No. 9.

(2) The following development, if approved by the Coastal Commission as an amendment to this coastal development permit: vegetation removal for fire-safe compliance purposes and restoration activities undertaken in cooperation with the U.S. Fish and Wildlife Service.

B. **PRIOR TO ISSUANCE OF THE “NOTICE OF INTENT TO ISSUE COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047” (NOI)**, the applicant shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, as generally described above and shown on Exhibit No. 16 attached to this staff report.

**7. Landscaping Restrictions**

A. Drought-tolerant native vegetation only shall be maintained within the open space area west of the approved building envelope as shown on Exhibit No. 16 to minimize the need for irrigation and the potential for geologic hazards.

B. 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 a “noxious weed” by the governments of the State of California or the United States shall be utilized within the property that is the subject of CDP No. A-1-MEN-07-047.

- C. No rodenticides of any kind shall be utilized within the property that is the subject of CDP No. A-1-MEN-07-047.

**8. Landscaping and Habitat Restoration Plan**

- A. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047**, the applicant shall submit for the review and approval of the Executive Director a plan for (1) restoring and enhancing the Point Arena mountain beaver ESHA habitat located landward of the U.S. Fish and Wildlife Service conservation easement and deed-restricted area to the maximum extent feasible to screen the new development from the Point Arena mountain beaver occupied habitat and (2) any other residential landscaping to be used on the property. The plan shall be prepared by a qualified botanist or licensed landscape architect.

(1) The plan shall demonstrate that

- i. Landscaping specifications shall conform to all provisions specified in Special Condition Nos. 7, 9, and 10 of CDP No. A-1-MEN-07-047.
- ii. Only those plants that are drought tolerant and native to “northern coastal scrub” habitats of Mendocino County shall be used;
- iii. The portion of the open space deed-restricted area established pursuant to Special Condition No. 6 shall be planted with vegetation beneficial to Point Arena mountain beaver habitat. The planting plan shall be developed in consultation with the U.S. Fish and Wildlife Service;
- iv. No existing vegetation located west of the approved building footprint within the open space deed-restricted area established pursuant to Special Condition No. 6 shall be altered or removed, except for removal of nonnative vegetation pursuant to this condition and Special Condition No. 6 and vegetation removal for fire-safe compliance purposes if approved by the Commission as an amendment;
- v. Planting within the open space deed-restricted area established pursuant to Special Condition No. 6 shall be completed within 60 days after completion of construction and prior to the onset of the rainy season; and
- vi. All proposed plantings shall be obtained from local genetic stocks within Mendocino County. If documentation is provided to the Executive Director that demonstrates that native vegetation from local genetic stock is not available, native vegetation obtained from genetic stock outside the local area, but from within the adjacent region of the floristic province, may be used. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or by the State of California shall be planted or allowed to naturalize or persist on the parcel. No plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be utilized within the property;

- vii. No rodenticides of any kind shall be utilized within the property that is the subject of CDP No. A-1-MEN-07-047; and
- viii. Existing piles of yard trimmings that have been dumped within the ESHA area shall be removed and disposed of at an authorized disposal location.

(2) The plan shall include, at a minimum, the following components:

- i. A final landscape site plan depicting the species, size, and location of all plant materials to be planted on the property, any irrigation system, delineation of the approved development, and all other landscape features;
- ii. A schedule for the planting of the landscaping; and
- iii. A plan for disposal of the existing piles of yard trimmings.

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

## **9. Final Buffer Fencing Plan**

A. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047**, the applicant shall submit for the review and approval of the Executive Director a plan for fencing the habitat buffer open space area surrounding the Point Arena mountain beaver ESHA on the property as required by Special Condition No. 6. The buffer fencing plan shall separate the new development and activities associated with residential living from the ESHA.

(1) The plan shall demonstrate that

- i. The fence shall be a minimum of 36 inches tall and constructed of rock, wood, or other durable material;
- ii. The fence shall extend north and south of the western edge of the approved house and deck to the north and south property lines to protect the Point Arena mountain beaver ESHA and to ensure consistency with geologic setback requirements pursuant to Special Condition No. 1; and
- iii. The fence shall be installed prior to occupancy of the residence.

(2) The plan shall include, at a minimum, the following components:

- i. A site plan showing the location of the fence relative to property lines, the open space area, the geologic setback line, the Point Arena mountain beaver ESHA, the conservation easement and deed-restricted Point Arena mountain beaver habitat area developed in consultation with the U.S. Fish and Wildlife Service, and other features of the site;
- ii. A detailed illustration showing the fence design and height;
- iii. A list of fence materials;

- iv. A schedule for installation of the fence; and
  - v. A plan for maintaining the buffer fence over the life of the project to ensure that it will have the intended benefit of protecting the sensitive Point Arena mountain beaver habitats adjacent to the project site.
- B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

#### **10. Timing of Construction**

To avoid adverse impacts to Point Arena mountain beaver (PAMB) environmentally sensitive habitat on the parcel to the maximum extent feasible, no development authorized by CDP No. A-1-MEN-07-047 shall occur during the PAMB breeding season period of December 15 through June 30. Additionally, no ground-disturbing activities shall occur between the rainy season period of October 31 and April 1 to minimize the potential for soil disturbance during the rainy season.

#### **11. Design Restrictions**

- A. All exterior siding and roofing of the proposed structure shall be composed only of the colors proposed in the application or darker earth-tone colors. The current owner or any future owner shall not repaint or stain the house or other approved structures with products that will lighten the color of the house or other approved structures without an amendment to this permit. In addition, all exterior materials, including roofs and windows, shall be non-reflective to minimize glare; and
- B. All exterior lights, including any lights attached to the outside of the buildings, shall be the minimum necessary for the safe ingress and egress of the structures, and shall be low-wattage, non-reflective, shielded, and have a directional cast downward such that no light will shine beyond the boundaries of the subject parcel.

#### **12. Mendocino County Encroachment Permit**

**PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-07-047**, the applicant shall submit for the review and approval of the Executive Director a copy of an Encroachment Permit issued by Mendocino County Department of Transportation for the construction of the proposed driveway, or evidence that no permit is required. The applicant shall inform the Executive Director of any changes to the project required by the County. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

#### **13. Conditions Imposed By Local Government**

This action has no effect on conditions imposed by a local government pursuant to an authority other than the Coastal Act.



#### **IV. FINDINGS & DECLARATIONS**

The Commission hereby finds and declares as follows:

##### **A. Incorporation of Substantial Issue Findings**

The Commission hereby incorporates by reference the Substantial Issue Findings contained in the Commission staff report dated November 30, 2007.

##### **B. Project History**

On June 28, 2007, the Mendocino County Coastal Permit Administrator (CPA) denied Coastal Development Permit (CDP) No. 76-2006 for development of a single-story single family residence, decks, covered porch, detached garage, concrete driveway, underground propane tank, trash enclosure, on-site septic system, and connection to utilities and community water on the subject property. On July 3, 2007, the applicants appealed the CPA's denial to the Mendocino County Board of Supervisors. On October 2, 2007, the Board conditionally approved CDP No. 76-2006 for construction of the project (see Exhibit No. 14).

The development, as approved by the County, involved construction of a 1,336-square-foot single-story single family residence with a maximum average height of 20 feet above finished grade; 327 square feet of decks; 85 square feet of covered porch; a 305-square-foot detached garage with a maximum average height of 13 feet above finished grade; 1,200 square feet of concrete driveway; installation of an underground propane tank, 24-square-foot trash enclosure, and an on-site septic system; and connection to utilities and community water.

The project site is located in the Irish Beach Subdivision, approximately four miles north of the town of Manchester, on the west side of Navarro Way, approximately 250 feet southwest of its intersection with State Highway 1, on a west-facing slope near the ocean, at 14820 Navarro Way (APN 132-020-05) (see Exhibit Nos. 1, 2, and 3).

The approved County permit imposed nine special conditions, four of which pertain to the appeal's three main contentions (see below): (1) County Special Condition No. 1 required that, prior to issuance of the building permit, a landscape plan be submitted for approval by the Coastal Permit Administrator (CPA) in compliance with the Point Arena Mountain Beaver (PAMB) deed restriction (a deed-restricted conservation easement was established over the PAMB habitat on the western half of the property in an agreement with the U.S. Fish and Wildlife Service in 2006), which prohibits alteration or removal of existing vegetation. Special Condition No. 1 also required planting of local native grasses and shrubs for erosion control purposes (in compliance with the recommendations of the consulting engineer); (2) County Special Condition No. 2 required that, prior to permit issuance, the applicants execute and record a deed restriction, which, among other things, prohibited the construction of a bluff or shoreline protective device to protect the approved structures in the event that they are subject to damage or other erosional hazards in the future; (3) County Special Condition No. 3 required that, prior to permit issuance, a grading plan approved by a California licensed architect or engineer be

submitted for approval by the CPA, which clarifies the total amounts and locations of proposed cut and fill, requires adherence to the Erosion Control Plan development by the consulting engineer, and restricts ground disturbing activities to the dry season period of July 1 through October 31; and (4) County Special Condition No. 5 designated the PAMB habitat on the western half of the parcel as ESHA, required its protection from development and disturbance in perpetuity, and restricted development, other than that approved by the County, within the 50-foot buffer area surrounding the designated PAMB habitat. Special Condition No. 5 further restricted ground-disturbing activities during the PAMB breeding season (December 15 through June 30); encouraged exclusion of domestic pets from the designated PAMB habitat area; required, prior to issuance of the building permit, erection of a temporary barrier between the PAMB habitat area and the remainder of the parcel; and required erection of a permanent fence at least 36 inches tall within 6 months after initiation of construction activities, which is to be inspected for condition compliance prior to final clearance of the building permit.

On November 6, 2007, an appeal of the County's approval of the project was filed by Commissioners Krueer and Wan (Exhibit No. 15). The appeal was filed with the Commission in a timely manner, within 10 working days of receipt by the Commission of the County's Notice of Final Action on October 23, 2007 (Exhibit No. 14). On December 14, 2007, the Commission opened the hearing on the appeal and found that a Substantial Issue had been raised with regard to the consistency of the project as approved and the applicable policies of the LCP concerning (1) environmentally sensitive habitat areas (ESHA), (2) geologic hazards, and (3) grading, erosion, and runoff:

- First, the Commission found that the project, as approved by the County, raised a substantial issue of conformance with the ESHA protection provisions of the certified LCP because (a) the approved development would be constructed adjacent to (within 5 to 15 feet of) endangered species ESHA (PAMB habitat) without maintaining a minimum 50-foot buffer as required by the LCP, (b) the County did not consider feasible alternative sites or configurations for the development that would avoid locating development within the ESHA buffer, and (c) the County did not demonstrate that the approved development complies with any guidelines and management practices established by the Department of Fish and Game for the protection of the endangered PAMB.
- Second, the Commission found that the project, as approved by the County, raised a substantial issue of conformance with the geologic hazard provisions of the certified LCP that (a) require that approved building sites assure safety from bluff erosion and cliff retreat for the economic lifespan of the approved development and (b) prohibit development on bluff faces.
- Third, the Commission found that the project, as approved by the County, raised a substantial issue of conformance with the grading, erosion, and runoff provisions of the certified LCP, which require that development be planned to fit the topography, soils, geology, hydrology, and other conditions existing on the site so that grading is kept to an absolute minimum.

The Commission continued the *de novo* portion of the appeal hearing so that the applicant could provide additional information relating to the substantial issue. The applicant has provided Commission staff with supplemental information consisting of the following:

- (a) A quantitative slope stability analysis for determining bluff stability, prepared by BACE Geotechnical dated December 9, 2008 (Exhibit No. 8);
- (b) A delineation and description of the area on the eastern end of the parcel that constituted the extent of the Point Arena Mountain Beaver (PAMB) habitat prior to modification of the habitat through past unpermitted vegetation removal, prepared by BioConsultant LLC dated January 17, 2008 (Exhibit No. 12);
- (c) Information regarding the applicant's acquisition of the property to allow the Commission to evaluate whether a denial of the project would result in a "takings" inconsistent with Section 30010 of the Coastal Act;
- (d) A link to the Irish Beach CC&Rs describing guidelines and restrictions that affect the subject property imposed by the Irish Beach Subdivision (<http://www.ibiclub.com/downloaddocs/ibccr14.htm>);
- (e) An evaluation of the suitability of the soils for a septic system at the alternative leach field location suggested by the County, prepared by DMC Consulting Services dated March 14, 2008, demonstrating that the alternative location would not be suitable to meet County standards (Exhibit No. 13); and
- (f) A letter from the Irish Beach Water District, dated November 7, 2007, demonstrating that the District has the capacity and willingness to serve the development.

The supplemental information addresses issues raised by the appeal and provides additional information that was not a part of the record when the County originally acted to approve the coastal development permit. For purposes of the Commission's *de novo* review, the applicant has also submitted a revised project description and revised plans (Exhibit Nos. 5 and 6) designed to address the issues raised on appeal, which are discussed below in the Project Description Finding.

### **C. Site Description/Environmental Setting**

The subject property, which is approximately 0.48-acre in size, is located on a west-facing marine terrace and extends down a coastal bluff, but it is not the most westward lot on the bluff; there is a neighboring lot designated as Open Space under separate ownership located halfway up the bluff between the subject lot and the ocean (see Exhibit Nos. 1, 2, 3, and 4). The subject parcel is approximately 100 feet wide (north to south) and 300 feet long (from Navarro Way westward), and extends to within 300 feet of the ocean.

Elevations across the subject parcel range from approximately 120 feet above mean sea level at the western end to approximately 300 feet above mean sea level at the eastern end near Navarro Way. According to the applicants' botanical consultant (BioConsultant LLC), the entire lot is sloped westward, with slopes ranging from 8 degrees [~14 percent] on the upper terrace to 40 degrees [~84 percent] on the steep ocean bluff. Slopes within the County-approved project footprint range from 22.5 to 41.5 percent (averaging 33 percent), according to measurements in the local record taken on a site visit by County planning staff. Slopes within the proposed project footprint are more gentle (approximately 17 percent).

The vegetation communities on the property include Nonnative Grassland (type #42.000.00 per CDFG 2003) on the eastern, upper-most, more gently sloping portion of the parcel, and Coastal Scrub (type #32.000.00 per CDFG 2003) on the progressively steeper slopes (BioConsultant LLC May 2006 botanical survey report and June 2007 addendum to the botanical survey). The botanical surveys revealed no rare plant species or community types present on the property. The nonnative grassland community is dominated by exotic (and in some cases invasive) species such as velvet grass (*Holcus lanatus*), soft chess (*Bromus hordeaceus*), ripgut brome (*B. diandrus*), rattlesnake grass (*Briza maxima*), wild radish (*Raphanus sativus*), and others. The coastal scrub community is dominated by native species such as thimbleberry (*Rubus parviflorus*), Pacific bramble (*R. ursinus*), coyote brush (*Baccharis pilularis*), cow parsnip (*Heracleum lanatum*), poison-oak (*Toxicodendron diversilobum*), Henderson's angelica (*Angelica hendersonii*), and others. According to botanical reports prepared by BioConsultant LLC dated May 2006 and June 2007, disturbance (mowing and shrub removal) that occurred without the benefit of a coastal development permit at some point after October 2005 and before April 2006 (based on aerial photo and survey history) modified the eastern, upper-most portion of the parcel, altering the vegetation on this upper section from coastal scrub with scattered grassy openings to nonnative grassland with scattered coastal scrub remnants.

A habitat assessment and survey conducted on the property by BioConsultant LLC in April 2006 for the Point Arena mountain beaver (PAMB) reports "good to excellent quality" habitat with an estimated 200+ active PAMB burrows throughout the coastal scrub habitat on the parcel. Inactive burrows also were observed in the disturbed, eastern portion of the parcel, where mowing and shrub removal reportedly occurred in late 2005 or early 2006, altering the habitat from coastal scrub to nonnative grassland. Point Arena mountain beaver (*Aplodontia rufa nigra*) is a federally-listed endangered species protected under the Endangered Species Act of 1973. The species is also listed as a California Species of Concern by the California Department of Fish and Game (CNDDDB *RareFind* 3.1.1), and its habitat meets the definition of "environmentally sensitive" (ESHA) under the County's certified LCP (see Finding IV-G below). Although the Point Arena mountain beaver bears some resemblance to a beaver, the animal is actually a type of terrestrial rodent (see Finding IV-G below for more details).

Because PAMB burrows were observed throughout much of the subject property and there was a likelihood of "incidental take" of PAMB as a result of future development of the parcel, BioConsultant LLC initiated technical assistance from the U.S. Fish and Wildlife Service (FWS) in April of 2006 (prior to the applicants' ownership of the property). The FWS determined that with appropriate protective measures, the development would not be likely to result in incidental take of PAMB. Recommended protective measures included designating and protecting in perpetuity the currently suitable and occupied habitat on the parcel. Thus, the applicants established, in cooperation with FWS, a conservation easement and deed restriction over the approximately western half of the property, which prohibits certain activities within the FWS-designated PAMB habitat on the parcel, including vegetation alteration or removal, ground disturbance, and rodent control (see Exhibit No. 10). The easement/deed restriction also requires that a barrier at least 18-inches tall and constructed of rock, wood, or other durable material be established between the designated habitat area and the remainder of the parcel to prevent domestic pets and other disturbance from impacting the PAMB habitat. The FWS also recommended both trimming of a single cypress tree near the eastern boundary of the designated

habitat area to enhance PAMB habitat and restriction of construction during the PAMB breeding season (December 15 to June 30).

In July of 2008, some vegetation removal and soil excavation occurred within the PAMB deed-restricted habitat during a geologic investigation by the applicant's geologist. The FWS was notified of the disturbance and consequently, on September 24, 2008, rescinded its "no take" determination for the proposed project (Exhibit No. 11). The FWS recommended that the applicant develop and implement, with FWS assistance, a restoration plan for the portion of the deed-restricted habitat disturbed by the geologic investigation, and determined that a new determination of "no take" for the project could be made "at some point in the future" once the FWS determines that "all other aspects of the proposed project remain unchanged" and it is determined "there is a reasonable certainty that the proposed restoration will be effective." The applicant's consultant, BioConsultant LLC, submitted a restoration plan for the disturbed PAMB habitat dated October 2008 (Exhibit No. 11) that has been reviewed and approved by the FWS (John Hunter, FWS, pers. comm., March 18, 2009). Mr. Hunter of the Arcata branch of the FWS informed Commission staff that he has recently been on site monitoring the disturbed habitat, which appears to be successfully recolonizing with native coastal scrub vegetation. Mr. Hunter anticipates being able to issue a new determination of no take for the project within the next six months to one year (approximately).

As discussed in more detail in Finding IV-G below, the FWS-deed-restricted PAMB habitat does not necessarily represent the full extent of environmentally sensitive PAMB habitat on the parcel. An additional approximately 6,000-square-foot area located immediately adjacent to (east of) the deed-restricted habitat area supported active mountain beaver burrows as recently as four to seven years ago, until it was converted from coastal scrub habitat to nonnative grassland habitat without the benefit of a coastal development permit for the major vegetation removal that occurred. This vegetation removal was cited by the applicant's consultant in the 2006 PAMB survey report conducted on the property. It is unknown exactly when or by whom the vegetation removal was conducted, but, as discussed at length in Finding IV-G below, this modified suitable PAMB habitat area meets the definition of ESHA under the Mendocino County certified Local Coastal Program (LCP).

The subject parcel is located within an existing residential neighborhood, the Irish Beach subdivision, along an otherwise rural stretch of the southern Mendocino coastline. The subject parcel is located on the urban side of the urban/rural boundary (see Exhibit No. 4). The subject parcel is planned in the certified Land Use Plan as Rural Residential with a minimum parcel size of 5 acres and a Planned Unit Development Combining District (RR-5-PD). The parcel is zoned Suburban Residential with a minimum lot area of 12,000 square feet, a maximum dwelling density of one single family dwelling per 12,000 square feet, and a Planned Unit Development Combining District (SR-12,000-PD).

The proposed building site for the residence is in line with existing residences to the immediate north and south of the parcel (see Exhibit Nos. 3 and 5). According to assessor's records, the residence to the immediate south (APN 132-020-06) has been in existence since 1972, predating the effective dates of both the Coastal Initiative and the Coastal Act. The residence to the immediate north (APN 132-020-04) was approved by the Coastal Commission in 1991 (see CDP

No. 1-91-55). The project was approved with a 50-foot geologic setback requirement; at that time the bluff edge on that particular property was determined to be approximately 176 feet west of Navarro Way.

The subject site is not located within an area designated as “highly scenic” in the County’s certified LCP (see Exhibit No. 4). However, views of the ocean and Point Arena lighthouse are afforded through the site from Navarro Way, a public street.

#### **D. Project Description**

The development as originally proposed and approved by the County involved construction of a 1,336-square-foot single-story single family residence with a maximum average height of 20 feet above finished grade; 327 square feet of decks; 85 square feet of covered porch; a 305-square-foot detached garage with a maximum average height of 13 feet above finished grade; 1,200 square feet of concrete driveway; installation of an underground propane tank, 24-square-foot trash enclosure, and an on-site septic system; and connection to utilities and community water (see details in Exhibit No. 14). The approved building site for the residence was located on the most westward portion of the parcel outside of the deed-restricted PAMB habitat area, approximately 15 feet from the ESHA. This portion of the parcel is steep, with maximum slopes exceeding 40 percent. A steep driveway, 125 in length, which included a 3-foot retaining wall on its east side, was approved to provide access to the detached garage located just east of the residence. The approved site for the septic leach field was located on the flattest portion of the parcel, near the road. The approved site for the septic tanks was located 5 feet from the ESHA, on the west side of the residence.

For the purposes of *de novo* review by the Commission, the applicants submitted a revised project description and revised plans (Exhibit Nos. 5, 6, and 7) that make changes to the development originally approved by the County. The project revisions were designed to address concerns raised in the appeal that the project (1) did not include sufficient buffer between the development and the Point Arena mountain beaver ESHA on the property, (2) raised geologic concerns, and (3) did not keep grading to an absolute minimum.

The proposed project as revised for the Commission’s *de novo* review involves construction of a 1,203-square-foot single family residence (versus 1,336 square feet as approved by the County) with a 344-square-foot attached (versus 305-square-foot detached) garage at a maximum average height of approximately 15 feet (versus 20 feet) above finished grade; 272 square feet of exterior decks (versus 327 square feet); 48 square feet of covered porches (versus 85 square feet); 451 square feet of concrete driveway (versus 1,200 square feet); an on-site septic system; an above-ground (versus underground) propane tank within a fenced enclosure; and connections to utilities and community water. The basic layout of the development has changed, in that the home has been shifted approximately 35 feet eastward, closer to the road and top of bluff, just downslope from the on-site septic system, which is located on the eastern end of the lot adjacent to Navarro Way.

With regard to the ESHA buffer, the revisions to the project for the purposes of *de novo* review by the Commission were designed to ensure that at least a 50-foot buffer would be established

between all new proposed development and the Point Arena mountain beaver (PAMB) habitat located in the conservation easement and deed restriction area (established in cooperation with the U.S. Fish & Wildlife Service) on the western side of the parcel. The County-approved project was located only 5-15 feet from the designated PAMB habitat.

Although the house will be 50 feet back from the deed-restricted area required by the FWS for its “no take” determination of the project’s effects on PAMB, at least a portion of the proposed development still would be located within an area that provided habitat for PAMB until unpermitted clearing of vegetation occurred a few years ago. This area that was disturbed without authorization is considered ESHA under the certified LCP and the Coastal Act. Approximately half of the proposed house would be located within PAMB ESHA (modified suitable PAMB habitat), and the remainder of the proposed development (including a portion of the house, the driveway, septic fields, etc.) would be located within the ESHA buffer (i.e., less than 50 feet from modified suitable PAMB habitat).

With regard to the geologic concerns, the applicant’s geologist submitted a quantitative slope stability analysis for purposes of *de novo* review by the Commission (Exhibit No. 8). No slope stability analysis had been available as a basis for the County’s approval of the original project (though a geologic report had been prepared prior to the County’s approval of the project by Paoli Engineering & Surveying dated September 24, 2007). The geologic hazard policies of the LCP require, in part, that new development minimize the risk of geologic hazard, assure structural integrity and stability, and neither create nor contribute significantly to erosion, geologic instability or destruction of the site or surrounding areas nor in any way require the construction of protective devices that would substantially alter natural landforms along the bluff. The LCP policies also require that development be set back a sufficient distance from the bluff edge to ensure its safety from bluff erosion and cliff retreat during its economic lifespan (75 years). The slope stability analysis, which was prepared by the applicant’s consultant BACE Geotechnical, dated December 9, 2008, recommends a geologic setback of 30 feet from an old landslide headscarp to provide the appropriate factor of safety to guard against bluff retreat hazards (see Exhibit Nos. 8 and 9). The analysis also offers numerous recommendations on site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls and site drainage. The analysis does not recommend a bluff edge setback, since the analysis acknowledges that the entire subject property, including the proposed building area, is located seaward of the bluff edge, on the uppermost, broadly rounded, gently-sloping bluff face. In contrast, the geologic report that was the basis for the County’s approval of the original project asserted that the building site (as approved by the County) was located landward of the bluff edge, approximately 350 feet east of the recommended geologic setback line. See Finding IV-F below for a more in depth geologic discussion.

With regard to grading issues, the project as revised for purposes of *de novo* review reduces the total amount of necessary grading by approximately 30 cubic yards, from approximately 205 cubic yards of maximum cut for the house, garage, and driveway (as approved by the County) to a proposed 175 cubic yards (145 cubic yards for the house and garage construction and 30 cubic yards for driveway construction). Proposed grading has been reduced by locating the house and garage further eastward on the property, closer to the road, thereby shortening the driveway significantly from 1,200 square feet to the currently proposed 450 square feet, and by utilizing

for the proposed building site the more gently sloping terrain at the east end of the property while still maintaining the necessary setbacks from the on-site septic system, which, due to soil properties and constraints, cannot be located elsewhere on the parcel (Exhibit No. 7).

The proposed exterior materials and finishes of the new residence would include a weathered-copper-colored standing seam metal roof, slate-colored fiber cement shingle siding, “Tuscany brown” aluminum clad wood windows, fiber cement board window and door trim, copper flashings, gutters, and downspouts, and painted aluminum or black vinyl rubber/plastic appliance and plumbing vents (see Exhibit No. 6).

## **E. Locating New Development**

### Summary of Applicable LCP Provisions:

LUP Policy 3.9-1 of the Mendocino County Land Use Plan (LUP) states that new development shall be located within or near existing developed areas able to accommodate it or in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. The intent of this policy is to channel development toward more urbanized areas where services are provided and potential impacts to resources are minimized.

LUP Policy 3.8-1 states that Highway 1 capacity, availability of water and sewage disposal, and other known planning factors shall be considered when considering applications for development.

### Project Consistency with Applicable LCP Provisions:

The subject parcel is located within an existing residential neighborhood, the Irish Beach Subdivision, on the urban side of the urban/rural boundary (Exhibit No. 4). The subject parcel is planned in the certified Land Use Plan as Rural Residential with a minimum parcel size of 5 acres and a Planned Unit Development Combining District (RR-5-PD). The parcel is zoned Suburban Residential with a minimum lot area of 12,000 square feet, a maximum dwelling density of one single family dwelling per 12,000 square feet, and a Planned Unit Development Combining District (SR-12,000-PD).

Water service will be provided to the single family residential development by the Irish Beach Water District. Sewer service will be provided by an on-site septic system that has been reviewed and approved by the County Division of Environmental Health.

As the Irish Beach subdivision already was in existence prior to certification of the LCP, the significant cumulative adverse impacts on traffic capacity of Highway 1 from the proposed new residence was taken into account at the time the LCP was certified. Therefore, the proposed single family residence would not result in significant adverse impacts to the traffic capacity of Highway 1, consistent with the applicable provisions of LUP Policy 3.8-1.

As discussed below, the proposed development has been conditioned to include mitigation measures, which will minimize all significant adverse environmental impacts. Therefore, the



Commission finds that as conditioned, the proposed development is consistent with LUP Policies 3.9-1 and 3.8-1 because (1) the development is located within an existing developed area, (2) there are adequate services to serve the proposed development, and (3) the development will not significantly contribute to adverse cumulative impacts on highway capacity, or, as discussed in the Findings below, on geologic hazards, environmentally sensitive habitats, scenic values, public access, or other coastal resources.

## **F. Geologic Hazards**

### **Summary of Applicable LCP Provisions:**

Mendocino County Land Use Plan (LUP) Policy 3.4-1 states the following (emphasis added):

*The County shall review all applications for Coastal Development permits to determine threats from and impacts on geologic hazards arising from seismic events, tsunami runup, landslides, beach erosion, expansive soils and subsidence and shall require appropriate mitigation measures to minimize such threats. In areas of known or potential geologic hazards, such as shoreline and bluff top lots and areas delineated on the hazards maps the County shall require a geologic investigation and report, prior to development, to be prepared by a licensed engineering geologist or registered civil engineer with expertise in soils analysis to determine if mitigation measures could stabilize the site. Where mitigation measures are determined to be necessary, by the geologist, or registered civil engineer the County shall require that the foundation construction and earthwork be supervised and certified by a licensed engineering geologist, or a registered civil engineer with soil analysis expertise to ensure that the mitigation measures are properly incorporated into the development.*

LUP Policy 3.4-7 states, in applicable part, the following (emphasis added):

*The County shall require that new structures be set back a sufficient distance from the edges of bluffs to ensure their safety from bluff erosion and cliff retreat during their economic life spans (75 years). Setbacks shall be of sufficient distance to eliminate the need for shoreline protective works. Adequate setback distances will be determined from information derived from the required geologic investigation and from the following setback formula:*

$$\text{Setback (meters)} = \text{Structure life (years)} \times \text{Retreat rate (meters/year)}$$

*The retreat rate shall be determined from historical observation (e.g., aerial photographs) and/or from a complete geotechnical investigation.*

...

LUP Policy 3.4-8 states the following:

*Property owners should maintain drought-tolerant vegetation within the required blufftop setback. The County shall permit grading necessary to establish proper drainage or to install landscaping and minor improvements in the blufftop setback.*

LUP Policy 3.4-9 states the following:

*Any development landward of the blufftop setback shall be constructed so as to ensure that surface and subsurface drainage does not contribute to the erosion of the bluff face or to the instability of the bluff itself.*

LUP Policy 3.4-10 states the following (emphasis added):

*No development shall be permitted on the bluff face because of the fragility of this environment and the potential for resultant increase in bluff and beach erosion due to poorly-sited development. However, where they would substantially further the public welfare, developments such as staircase accessways to beaches or pipelines to serve coastal-dependent industry may be allowed as conditional uses, following a full environmental, geologic and engineering review and upon the determinations that no feasible less environmentally damaging alternative is available and that feasible mitigation measures have been provided to minimize all adverse environmental effects.*

LUP Policy 3.4-12 states the following (emphasis added):

*Seawalls, breakwaters, revetments, groins, harbor channels and other structures altering natural shoreline processes or retaining walls shall not be permitted unless judged necessary for the protection of existing development or public beaches or coastal dependent uses. Allowed developments shall be processed as conditional uses, following full environmental geologic and engineering review. This review shall include site-specific information pertaining to seasonal storms, tidal surges, tsunami runups, littoral drift, sand accretion and beach and bluff face erosion. In each case, a determination shall be made that no feasible less environmentally damaging alternative is available and that the structure has been designed to eliminate or mitigate adverse impacts upon local shoreline sand supply and to minimize other adverse environmental effects. The design and construction of allowed protective structures shall respect natural landforms, shall provide for lateral beach access, and shall minimize visual impacts through all available means.*

Mendocino County Coastal Zoning Code (CZC) Section 20.500.010 states the following (emphasis added):

*(A) The purpose of this section is to insure that development in Mendocino County's Coastal Zone shall:*

*(1) Minimize risk to life and property in areas of high geologic, flood and fire hazard;*

*(2) Assure structural integrity and stability; and*

*(3) Neither create nor contribute significantly to erosion, geologic instability or destruction of the site or surrounding areas, nor in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.* (Ord. No. 3785 (part), adopted 1991)

CZC Section 20.500.015 states the following:

*(A) Determination of Hazard Areas.*

*(1) Preliminary Investigation. The Coastal Permit Administrator shall review all applications for Coastal Development Permits to determine threats from and impacts on geologic hazards.*

*(2) Geologic Investigation and Report. In areas of known or potential geologic hazards such as shoreline and blufftop lots and areas delineated on the hazard maps, a geologic investigation and report, prior to development approval, shall be required. The report shall be prepared by a licensed engineering geologist or registered civil engineer pursuant to the site investigation requirements in Chapter 20.532.*

*(B) Mitigation Required. Where mitigation measures are determined to be necessary, the foundation, construction and earthwork shall be supervised and certified by a licensed*

*engineering geologist or a registered civil engineer with soil analysis expertise who shall certify that the required mitigation measures are incorporated into the development. (Ord. No. 3785 (part), adopted 1991)*

CZC Section 20.500.020 states, in applicable part, the following (emphasis added):

...

*(B) Bluffs.*

*(1) New structures shall be setback a sufficient distance from the edges of bluffs to ensure their safety from bluff erosion and cliff retreat during their economic life spans (seventy-five (75) years). New development shall be setback from the edge of bluffs a distance determined from information derived from the required geologic investigation and the setback formula as follows:*

$$\text{Setback (meters)} = \text{structure life (75 years)} \times \text{retreat rate (meters/year)}$$

*Note: The retreat rate shall be determined from historical observation (aerial photos) and/or from a complete geotechnical investigation.*

*(2) Drought tolerant vegetation shall be required within the blufftop setback.*

*(3) Construction landward of the setback shall not contribute to erosion of the bluff face or to instability of the bluff.*

*(4) No new development shall be allowed on the bluff face except such developments that would substantially further the public welfare including staircase accessways to beaches and pipelines to serve coastal-dependent industry. These developments shall only be allowed as conditional uses, following a full environmental, geologic and engineering review and upon a finding that no feasible, less environmentally damaging alternative is available. Mitigation measures shall be required to minimize all adverse environmental effects.*

...

*(E) Erosion.*

*(1) Seawalls, breakwaters, revetments, groins, harbor channels and other structures altering natural shoreline processes or retaining walls shall not be permitted unless judged necessary for the protection of existing development, public beaches or coastal dependent uses. Environmental geologic and engineering review shall include site-specific information pertaining to seasonal storms, tidal surges, tsunami runups, littoral drift, sand accretion and beach and bluff face erosion. In each case, a determination shall be made that no feasible less environmentally damaging alternative is available and that the structure has been designed to eliminate or mitigate adverse impacts upon local shoreline sand supply and to minimize other significant adverse environmental effects.*

Project Consistency with Applicable LCP Provisions:

As summarized above, CZC Section 20.500.015(A) requires all applications for coastal development permits in areas of known or potential geologic hazards such as shoreline and bluff-top lots be reviewed to ensure that new development will be safe from bluff erosion and cliff retreat. To this end, LUP Policy 3.4-7 and CZC Sections 20.500.010(A)(3) and 20.500.020(E) direct the approving authority to assure that new development is sited and designed to provide adequate setbacks from geologically hazardous areas, and that restrictions of land uses be applied

as necessary to ensure that the construction of seawalls or other shoreline protective structures will not be needed “in any way” over the full 75-year economic lifespan of the development. A sole exception to this prohibition on the construction of shoreline protective devices is provided in CZC Section 20.500.020(E) for protecting existing development, public beaches, and coastal-dependent uses. LUP Policy 3.4-8 and CZC Section 20.500.020(B)(2) require property owners to maintain drought-tolerant vegetation within the required bluff top setback area to minimize the need for watering, which could accelerate bluff-top erosion. Similarly, LUP Policy 3.4-9 and CZC Section 20.500.020(B)(3) require development landward of the bluff-top setback to be constructed so as to ensure that surface and subsurface drainage does not contribute to the erosion of the bluff face or the instability of the bluff itself. Finally, CZC Section 20.500.010 requires that all development in the County coastal zone minimize risk to life and property in areas of high geologic hazard, assure structural integrity and stability, and neither create nor contribute significantly to erosion or engender the need for protective devices that would alter natural landforms along bluffs and cliffs.

**(1) Safety from Bluff Erosion and Retreat During Economic Lifespan of Proposed Development**

As discussed above in Finding IV-C, the subject property, which is approximately one half-acre in size, is located on a gently-sloping marine terrace, at an elevation range of 120-300 feet. The entire lot is sloped westward, with slopes ranging from approximately 14 percent on the upper terrace to over 84 percent on the steep ocean bluff. Slopes within the County-approved project footprint range from 22.5 to 41.5 percent (averaging 33 percent), according to measurements in the local record taken on a site visit by County planning staff. Slopes within the proposed project footprint are more gentle (approximately 17 percent).

According to the geologic investigation prepared by the applicant’s consultant (BACE Geotechnical, Exhibit No. 8), the subject property is underlain by Franciscan Complex bedrock. The terrace was formed during the Pleistocene Epoch, when periods of glaciation caused sea level fluctuations, which created a series of steps, or terraces, cut into the coastal bedrock by wave erosion. Shallow marine sediments (Pleistocene terrace deposits) were deposited on the wave-cut, bedrock platforms while they were submerged beneath the ocean during interglacial sea-level high stands. Some of these marine deposits have been locally eroded as the terraces began to emerge from the ocean due to uplift associated with the San Andreas Fault Zone during the middle and late Pleistocene. The active San Andreas Fault (North Coast segment) is located offshore, approximately 1.4 miles southwest of the site. Future large magnitude earthquakes originating on this or other nearby faults are expected to cause strong ground shaking at the site.

The proposed project as revised for the Commission’s *de novo* review involves construction of a 1,203-square-foot single family residence with a 344-square-foot attached garage at a maximum average height of approximately 15 feet above mean natural grade; 272 square feet of exterior decks; 48 square feet of covered porches; 451 square feet of concrete driveway; an on-site septic system; an above-ground propane tank within a fenced enclosure; and connections to utilities and community water.

In previous actions on coastal development permits and appeals, the Commission has interpreted Section 30253 of the Coastal Act, LUP Policy 3.4-7, and CZC Section 20.500.010(A) to require that coastal development be sited a sufficient distance landward of coastal bluffs that it will neither be endangered by erosion nor lead to the construction of protective coastal armoring during the assumed economic life of the development. LUP Policy 3.4-7 indicates the economic life of a structure to be 75 years. A setback adequate to protect development over the economic life of a development must account both for the expected bluff retreat during that time period and the existing slope stability. Long-term bluff retreat is measured by examining historic data, including vertical aerial photographs and any surveys conducted that identified the bluff edge, and estimating changes in this rate that may be associated with continuing or accelerating sea level rise. Slope stability is a measure of the resistance of a slope to landsliding, and can be assessed by a quantitative slope stability analysis.

For purposes of *de novo* review by the Commission, the applicant's geologist, BACE geotechnical, submitted a quantitative slope stability analysis (dated December 9, 2008) (Exhibit No. 8). The slope stability analysis states the following, in part, with regard to actively eroding soils in the project vicinity:

"...Erosion of surface soils and loose rock is occurring at varying rates all along the steep slopes below the Irish Beach subdivision...[T]he entire bluff face below Navarro Way is a debris slide slope, a geomorphic feature characterized by steep, partially vegetated slopes that have been sculpted by numerous debris slide events. Individual slide areas are periodically re-activated on the bluff face...

The aerial photographs show that some noticeable erosion has occurred since 1963 along the toe of the bluff below the site, on the western face of the dormant slide block. Our site reconnaissance and quantitative review of aerial photographs indicated an average bluff retreat (erosion) rate along the western face of the slide block is about 3 inches per year...At this average rate, the bluff toe block could erode back approximately 18.75 feet over the next 75 years...

...Periodic slides on the steep bluff face below the property (above the bluff-toe block) will, over time, create steep scarps and intervening, less steep areas, as the slope approaches its angle of repose (the maximum slope or angle at which loose material remains stable). This process could eventually lead to instability at the uppermost part of the bluffs, along Navarro Way, due to oversteepening. However, such dramatic reshaping of the bluff face is likely to occur over geologic time, rather than within the economic life span of the planned structures...[p. 10]

The quantitative slope stability analysis has been reviewed by the Commission's geologist, Mark Johnsson. The analysis indicates, and Dr. Johnsson agrees, that the bluff is stable within the proposed building area (as shown on the site plan, Exhibit No. 5, and on the geologic figures contained in Exhibit No. 9). Additionally, the analysis finds the potential for fault rupture and tsunami/storm wave inundation hazards at the site to be low. The analysis further finds that, although the site will be subject to strong ground shaking during future, nearby, large magnitude earthquakes (e.g., originating on the active San Andreas Fault), wood-frame structures founded in supporting materials and designed in accordance with current building codes generally are well-suited to resist the effects of ground shaking. The analysis recommends that all proposed

development be located at least 30 feet back from the old landslide headscarp on the property in order to provide the appropriate factor of safety to guard against bluff retreat hazards (see Exhibit Nos. 8 and 9). The analysis also offers numerous recommendations on site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls and site drainage to ensure that the project minimizes risk to life and property, assures structural integrity and stability, and neither creates nor contributes significantly to erosion or engenders the need for protective devices that would alter natural landforms along the bluff.

As revised for purposes of the Commission's *de novo* review, the development will be located at least 30 feet from the old landslide headscarp on the property to provide the appropriate factor of safety to guard against bluff retreat hazards as recommended by the geologic report. The report further recommends that the structure be supported by cast-in-place concrete drilled piers embedded in the competent bedrock beneath the weak soils and weathered bedrock mantling the site. The Commission finds that such a foundation system and minimum 30-foot setback from the old landslide headscarp proposed by the applicant is appropriate mitigation for stability hazards associated with the site and are sufficient to protect the new development from bluff retreat hazards over its expected economic life consistent with the requirements of CZC Section 20.500.010(A)(1) that development minimize risk to life and property in areas of high geologic hazard, consistent with the policies and standards of the certified LCP. Adherence to these requirements is required by Special Condition No. 1.

**(2) Proposed Development Located on Bluff Face**

Although the subject property does not comprise the most western lot on the bluff (there is a neighboring lot designated as Open Space under separate ownership located on the bluff between the subject lot and the ocean, as seen in Exhibit No. 4), according to the determinations made by both the Commission's geologist, the applicant's geologist, and County planning staff in the local record, the entire subject parcel is located on a bluff face, seaward of the bluff edge. According to the Commission's geologist, and to County planning staff in its findings for denial of the project prior to its appeal to and subsequent approval by the County Board of Supervisors, the bluff edge on the subject property is located approximately at the position of Navarro Way near the eastern property boundary.

The certified LCP does not include a definition of "bluff edge." The Commission's geologist, Mark Johnsson, determined the bluff edge location at the site based on the definition of bluff edge found in Section 13577(h) of the Commission's regulations, which states the following, in applicable part (emphasis added):

- (h) *Coastal Bluffs. Measure 300 feet both landward and seaward from the bluff line or edge. Coastal bluff shall mean:*
  - (1) *those bluffs, the toe of which is not or was historically (generally within the last 200 years) subject to marine erosion; and*
  - (2) *those bluffs, the toe of which is not now or was not historically subject to marine erosion, but the toe of which lies within an area otherwise identified in Public Resources Code Section 30603(a)(1) or (a)(2).*

*Bluff line or edge shall be defined as the upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge. The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations.*

Dr. Johnson concluded that because the coastal bluff at the subject site is broadly rounded near the top and levels off very nearly at the location of Navarro Way, applying the definition of Section 13577(h), the entire lot is on the bluff face.

The quantitative slope stability analysis prepared by the applicant's consultant (Exhibit No. 8) acknowledges that the entire subject property, including the proposed building area, is located seaward of the bluff edge, on the uppermost, broadly rounded, gently-sloping bluff face. The analysis states that "The upper bluff edge along Navarro Way has not changed at all since Navarro Way was constructed between 1963 and 1972..."

As summarized above, LUP Policy 3.4-10 and CZC 20.500.020(B)(4) prohibit development on bluff faces except for developments that "would substantially further the public welfare" such as staircase accessways or pipelines to serve coastal-dependent industry. Thus, because the proposed development (consisting of a single family residence, garage, decking, porches, on-site septic system, propane tank, and water and utility connections) would occur on a bluff face but is not a development that "would substantially further the public welfare," the Commission finds that the proposed development is inconsistent with the provisions of LUP Policy 3.4-10 and CZC 20.500.020(B)(4). As findings for approval cannot be made consistent with these LCP policies, the Commission finds that these policies require that the proposed project be denied. However, in this case, as discussed at length below in Findings IV-H and IV-I, the Commission has determined that it must allow a reasonable residential development on the subject property to avoid an unconstitutional taking of the applicant's property without payment of just compensation.

#### **G. Environmentally Sensitive Habitat Areas (ESHA)**

##### **Summary of Applicable LCP Provisions:**

Mendocino County Land Use Plan (LUP) Policy 3.1-2 states the following (emphasis added):

*Development proposals in environmentally sensitive habitat areas such as wetlands, riparian zones on streams or sensitive plant or wildlife habitats (all exclusive of buffer zones) including, but not limited to those shown on the Land Use Maps, shall be subject to special review to determine the current extent of the sensitive resource. Where representatives of the County Planning Department, the California Department of Fish and Game, the California Coastal Commission, and the applicant are uncertain about the extent of sensitive habitat on any parcel such disagreements shall be investigated by an on-site inspection by the landowner and/or*

agents, County Planning Department staff member, a representative of California Department of Fish and Game, a representative of the California Coastal Commission. The on-site inspection shall be coordinated by the County Planning Department and will take place within 3 weeks, weather and site conditions permitting, of the receipt of a written request from the landowner/agent for clarification of sensitive habitat areas.

*If all of the members of this group agree that the boundaries of the resource in question should be adjusted following the site inspection, such development should be approved only if specific findings are made which are based upon substantial evidence that the resource as identified will not be significantly degraded by the proposed development. If such findings cannot be made, the development shall be denied. Criteria used for determining the extent of wetlands and other wet environmentally sensitive habitat areas are found in Appendix 8 and shall be used when determining the extent of wetlands.*

LUP Policy 3.1-7 states the following (emphasis added):

*A buffer area shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide for a sufficient area to protect the environmentally sensitive habitat from significant degradation resulting from future developments. The width of the buffer area shall be a minimum of 100 feet, unless an applicant can demonstrate, after consultation and agreement with the California Department of Fish and Game, and County Planning Staff, that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the environmentally sensitive habitat areas and shall not be less than 50 feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent environmentally sensitive habitat area and must comply at a minimum with each of the following standards:*

- 1. It shall be sited and designed to prevent impacts which would significantly degrade such areas;*
- 2. It shall be compatible with the continuance of such habitat areas by maintaining their functional capacity and their ability to be self-sustaining and to maintain natural species diversity; and*
- 3. Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel. Mitigation measures, such as planting riparian vegetation, shall be required to replace the protective values of the buffer area on the parcel, at a minimum ratio of 1:1, which are lost as a result of development under this solution.*

LUP Policy 3.1-18 states the following (emphasis added):

*Public access to sensitive wildlife habitats such as rookeries or haulout areas shall be regulated, to insure that public access will not significantly adversely affect the sensitive resources being protected.*

*Development within buffer areas recommended by the California Department of Fish and Game to protect rare or endangered wildlife species and their nesting or breeding areas shall meet guidelines and management practices established by the Department of Fish and Game, and must be consistent with other applicable policies of this plan.*



CZC Section 20.496.015 states, in applicable part, the following (emphasis added):

**(A) Determining Extent of ESHA.** *The Coastal Permit Administrator shall review, with the assistance of land use maps, all permit applications for coastal developments to determine whether the project has the potential to impact an ESHA. A project has the potential to impact an ESHA if:*

...

(2) The development is proposed to be located within an ESHA, according to an on-site investigation, or documented resource information; ...

(3) The development is proposed to be located within one hundred (100) feet of an environmentally sensitive habitat and/or has potential to negatively impact the long-term maintenance of the habitat, as determined through the project review.

...

**(D) Development Approval.** *Such development shall only be approved if the following occurs:*

(1) *All members of the site inspection team agree to the boundaries of the sensitive resource area; and*

(2) Findings are made by the approving authority that the resource will not be significantly degraded by the development as set forth in Section 20.532.100(A)(1).

**(E) Denial of Development.** *If findings cannot be made pursuant to Section 20.532.100(A)(1), the development shall be denied.*

CZC Section 20.532.100 states, in applicable part, the following (emphasis added):

*In addition to required findings, the approving authority may approve or conditionally approve an application for a permit or variance within the Coastal Zone only if the following findings, as applicable, are made:*

**(A) Resource Protection Impact Findings.**

**(1) Development in Environmentally Sensitive Habitat Areas.** *No development shall be allowed in an ESHA unless the following findings are made:*

(a) The resource as identified will not be significantly degraded by the proposed development.

(b) There is no feasible less environmentally damaging alternative.

(c) All feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted.

...

Section 20.496.020 of the CZC states, in applicable part, the following (emphasis added):

**(A) Buffer areas.** *A buffer shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide for a sufficient area to protect the environmentally sensitive habitat from degradation resulting from future developments and shall be compatible with the continuance of such habitat areas.*

**(1) Width.** *The width of the buffer area shall be a minimum of one hundred (100) feet, unless an applicant can demonstrate, after consultation with the California Department of Fish and Game, and County Planning staff, that one hundred feet is not necessary to*

*protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the Environmentally Sensitive Habitat Areas and shall not be less than fifty (50) feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent Environmentally Sensitive Habitat Area.*

*Standards for determining the appropriate width of the buffer area are as follows:*

- (a) *Biological Significance of Adjacent Lands...*  
...
- (b) *Sensitivity of Species to Disturbance...*  
...
- (c) *Susceptibility of Parcel to Erosion...*  
...
- (d) *Use of Natural Topographic Features to Locate Development...*  
...
- (e) *Use of Existing Cultural Features to Locate Buffer Zones...*  
...
- (f) *Lot Configuration and Location of Existing Development...*  
...
- (g) *Type and Scale of Development Proposed...*  
...

**(2) Configuration...**

**(3) Land Division....**

**(4) Permitted Development.** Development permitted within the buffer area shall comply at a minimum with the following standards:

- (a) *Development shall be compatible with the continuance of the adjacent habitat area by maintaining the functional capacity, their ability to be self-sustaining and maintain natural species diversity.*
- (b) *Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel.*
- (c) *Development shall be sited and designed to prevent impacts which would degrade adjacent habitat areas. The determination of the best site shall include consideration of drainage, access, soil type, vegetation, hydrological characteristics, elevation, topography, and distance from natural stream channels. The term "best site" shall be defined as the site having the least impact on the maintenance of the biological and physical integrity of the buffer strip or critical habitat protection area and on the maintenance of the hydrologic capacity of these areas to pass a one hundred (100) year flood without increased damage to the coastal zone natural environment or human systems.*
- (d) *Development shall be compatible with the continuance of such habitat areas by maintaining their functional capacity and their ability to be self-sustaining and to maintain natural species diversity.*

(e) Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel. Mitigation measures, such as planting riparian vegetation, shall be required to replace the protective values of the buffer area on the parcel, at a minimum ratio of 1:1, which are lost as a result of development under this solution.

(f) Development shall minimize the following: impervious surfaces, removal of vegetation, amount of bare soil, noise, dust, artificial light, nutrient runoff, air pollution, and human intrusion into the wetland and minimize alteration of natural landforms.

(g) Where riparian vegetation is lost due to development, such vegetation shall be replaced at a minimum ratio of one to one (1:1) to restore the protective values of the buffer area.

(h) Aboveground structures shall allow peak surface water flows from a one hundred (100) year flood to pass with no significant impediment.

(i) Hydraulic capacity, subsurface flow patterns, biological diversity, and/or biological or hydrological processes, either terrestrial or aquatic, shall be protected.

(j) Priority for drainage conveyance from a development site shall be through the natural stream environment zones, if any exist, in the development area. In the drainage system design report or development plan, the capacity of natural stream environment zones to convey runoff from the completed development shall be evaluated and integrated with the drainage system whenever possible. No structure shall interrupt the flow of groundwater within a buffer strip. Foundations shall be situated with the long axis of interrupted impermeable vertical surfaces oriented parallel to the groundwater flow direction. Piers may be allowed on a case by case basis.

(k) If findings are made that the effects of developing an ESHA buffer area may result in significant adverse impacts to the ESHA, mitigation measures will be required as a condition of project approval. Noise barriers, buffer areas in permanent open space, land dedication for erosion control, and wetland restoration, including off-site drainage improvements, may be required as mitigation measures for developments adjacent to environmentally sensitive habitats.

#### Project Consistency with Applicable LCP Provisions:

(1) **Background on the Identification of the Presence, Extent, and Impacts of the Proposed Development on Point Arena Mountain Beaver ESHA**

Point Arena mountain beaver (*Aplodontia rufa nigra*) is a federally-listed endangered species protected under the Endangered Species Act of 1973. The species is also listed as a California Species of Concern by the California Department of Fish and Game (CNDDDB *RareFind* 3.1.1), and its habitat meets the definition of “environmentally sensitive” (ESHA) under the County’s certified LCP (CZC Section 20.496.010), as the habitat is that of a rare and endangered animal.

According to information from the U.S. Fish & Wildlife Service website (<http://www.fws.gov/arcata/es/mammals/mtnbeaver/mtnbeaver.html>), mountain beavers are the only extant member of

the family Aplodontidae and are considered the most primitive living rodents. They average about one foot in length and 2 to 4 pounds in weight. Mountain beavers are not closely related to true beavers (*Castor* spp.), which are semi-aquatic. The Point Arena mountain beaver is one of seven subspecies of mountain beaver and is only found within a disjunct, 24-square-mile area in western Mendocino County. Mountain beavers are semi-fossorial, spending much of their time in underground burrow systems, but surface above ground to forage on vegetation. Studies suggest that the most important factors in habitat use are a cool thermal regime, adequate soil drainage and softness, abundant food supply, and a high percent cover of lush herbaceous and small-diameter woody plants. Point Arena mountain beavers are found in a variety of habitat types including mesic coastal scrub, northern dune scrub, the edges of coniferous forest, and riparian plant communities. Mountain beavers are strictly herbivorous and are known to eat many plants toxic to other animals, including bracken fern (*Pteridium aquilinum*), sword fern (*Polystichum munitum*), stinging nettle (*Urtica dioica*), thistle (*Cirsium* spp.), and larkspur (*Delphinium* spp.). Probable or known foods of the Point Arena mountain beaver include ice plant (*Carpobrotus* or *Mesembryanthemum* spp.), sword fern, cow parsnip (*Heracleum lanatum*), wild radish (*Raphanus* spp.), angelica (*Angelica* spp.), Douglas iris (*Iris douglasiana*), miner's lettuce (*Claytonia perfoliata*), and many others. The primary reasons for the decline in Point Arena mountain beavers is habitat loss and fragmentation, primarily due to construction of recreational facilities, urban development, conversion to agricultural use (farming and livestock grazing), and construction of transportation and utility corridors. Cattle and sheep can also alter vegetation and crush mountain beaver burrows. Rodent control activities, domestic pets, invasive plants, and vegetation fires are among the other threats to the Point Arena mountain beaver. Mountain beavers have highly developed tactile senses, suggesting susceptibility to disturbance from loud noises or ground vibration during the breeding season.

As discussed above in Finding IV-C, a habitat assessment and survey conducted on the property by the applicant's consultant, BioConsultant LLC, in April 2006 (prior to the applicants owning the property) for the Point Arena mountain beaver (PAMB) reports "good to excellent quality" habitat with an estimated 200+ active PAMB burrows throughout the coastal scrub habitat on the parcel (which at that time covered approximately entire western half of the parcel). Inactive burrows also were observed in the disturbed, eastern portion of the parcel, where mowing and shrub removal reportedly occurred in late 2005 or early 2006 (prior to the applicants owning the property), altering the habitat from "coastal scrub" to "nonnative grassland."

Because PAMB burrows were observed throughout much of the subject property and there was likelihood of "incidental take" of PAMB as a result of future residential development of the parcel, BioConsultant LLC initiated technical assistance from the U.S. Fish and Wildlife Service (FWS) in April of 2006 (prior to the applicants' ownership of the property). The FWS determined (in a letter response dated June 7, 2006) that with appropriate protective measures, the development (as approved by the County) would not be likely to result in incidental take of PAMB. The FWS recommended protective measures, including designating and protecting in perpetuity the currently (at that time) suitable and occupied habitat on the parcel (which at that time comprised the existing coastal scrub habitat covering the approximately entire western half of the lot). Thus, the applicants established, in cooperation with FWS, a conservation easement and deed restriction over the approximately western half of the property, which prohibits certain activities within the designated PAMB habitat on the parcel, including vegetation alteration or

removal, ground disturbance, and rodent control (see Exhibit No. 10). FWS also recommended that a barrier at least 18-inches tall and constructed of rock, wood, or other durable material be established between the designated habitat area and the remainder of the parcel to prevent domestic pets and other disturbance from impacting the PAMB habitat. Furthermore, the FWS recommended restricting construction during the PAMB breeding season (December 15 to June 30). The conservation easement and deed restriction was recorded on the same date that the ownership of the property was transferred to the applicants, on June 15, 2006.

The area that was deed-restricted as PAMB habitat by agreement with FWS does not represent all of the PAMB ESHA habitat pursuant to the LCP and the Coastal Act. As discussed further below, the entire subject parcel, except for a 45-foot-wide band of grassy habitat along the eastern edge of the parcel adjacent to Navarro Way (see Figure 1 within Exhibit No. 12), constitutes PAMB ESHA as defined by CZC Section 20.496.010. The local record indicates that some clearing of vegetation that may have affected PAMB habitat was performed without permits some time between October of 2005 and April of 2006. The applicant does not know who conducted the clearing, and the previous owner of the property has stated that he did not conduct any vegetation clearing on the property. It is believed that the clearing may have been initiated at the request of the local fire department for fuel abatement purposes.

The LCP defines “development” according to the definition found in Section 30106 of the Coastal Act, which includes “...*the removal or harvesting of major vegetation other than for agricultural purpose...*” (LUP glossary page G-2 and CZC Section 20.308.035). The CZC (Section 20.308.080) further defines “major vegetation removal” as including any vegetation removal that “*may result in a significant impact*” as determined by the County Planning and Building Services Director. One of the listed criteria for determining whether or not the impact may be deemed “significant” is if the vegetation removal “*is located within or adjacent to an environmentally sensitive habitat*” [CZC Section 20.308.080(C)(3)(c)]. Thus, any vegetation that was removed on the parcel for fuel abatement purposes or other reasons occurred at a minimum adjacent to PAMB ESHA, and perhaps within PAMB ESHA itself, and was undertaken without the benefit of any necessary coastal development permit authorization.

For the purposes of *de novo* review by the Commission, the applicant’s consultant, BioConsultant LLC, prepared a delineation and description of the area on the eastern end of the parcel (including the proposed building footprint), which is now “nonnative grassland” habitat but which constituted the extent of the PAMB habitat (coastal scrub habitat) prior to modification of the habitat through past unpermitted vegetation (mostly shrub) removal (Exhibit No. 12). The report, dated January 17, 2008, evaluated the amount and quality of the altered habitat on the parcel prior to April 2006 (when the consultant initially conducted the PAMB survey on the property) through, in part, an examination of a series of photographs spanning 30 years. The evaluation found, in part, the following:

“...significant and ongoing habitat alterations have occurred at the Irish Beach Subdivision for several decades. Close examination of the subject parcel over time confirms that considerably more coastal scrub habitat was present in the past. It is apparent that a significant number of shrubs in the eastern section of the parcel were removed sometime between 2002 and 2005...”

The report concludes that an approximately 6,000-square-foot area on the eastern end of the parcel (see Figure 1 within Exhibit No. 12), a portion of which is currently proposed for development under this permit application, constitutes “modified suitable PAMB habitat” which, the biological evaluation concludes, was actively used by PAMB individuals as recently as 2002-2005, prior to the shrub removal (habitat conversion) that occurred within that area during that time period (without the benefit of a coastal development permit), as evidenced by an inactive PAMB burrow located within the area during PAMB surveys conducted by BioConsultant LLC in 2006 (see Figure 1 within Exhibit No. 12).

Therefore, because removal of the PAMB habitat was never legally authorized, the Commission finds that the entire subject parcel, except for a 45-foot-wide band of grassy habitat along the eastern edge of the parcel adjacent to Navarro Way (see Figure 1 within Exhibit No. 12), constitutes PAMB ESHA as defined by CZC Section 20.496.010.

**(2) Proposed Development Located Within Rare Species ESHA**

As approximately all but a 45-foot-wide strip of “nonnative grassland” habitat along the eastern property boundary constitutes PAMB habitat, an environmentally sensitive habitat area (ESHA) as defined by CZC Section 20.496.010, any proposed development sited west of the delineated ESHA boundary would be located within ESHA (including both coastal scrub habitat that supports active PAMB burrows and modified suitable PAMB habitat that has been converted to nonnative grassland). CZC Section 20.496.015 states that a project has the potential to impact an ESHA if development is proposed to be located within the ESHA. CZC Section 20.496.015(D) further restricts development in an ESHA to only those instances where: (1) agreement as to the extent of the ESHA has been reached among the members of the site inspection party; and (2) findings are made by the approving authority that the resource will not be significantly degraded by the development as set forth in Section 20.532.100(A)(1). That section further indicates that no development shall be allowed in an ESHA unless: (a) the resource will not be significantly degraded by proposed development, (b) no feasible, environmentally less damaging alternative exists; and (c) all feasible mitigation measures capable of reducing or eliminating project-related impacts have been adopted. In addition, CZC Section 20.496.015(E) states that if findings cannot be made pursuant to Section 20.532.100(A)(1), the development shall be denied.

The proposed project involves construction of a single family residence, garage, driveway, on-site septic system, and other associated minor development in the eastern portion of the approximately 300-foot-long by 100-foot wide, 0.5-acre parcel. The majority of the proposed 1,203-square-foot single family residence would be located within PAMB ESHA (i.e., modified suitable PAMB habitat), and the rest of the house and the proposed driveway and septic fields, which would be located east of the proposed residence, would be located adjacent to the delineated ESHA (within ESHA buffer). See Exhibit No. 5 and Figure 1 within Exhibit No. 12.

Although the modified suitable PAMB habitat in which the residence is proposed to be constructed has already been significantly degraded through unpermitted vegetation removal activities, construction of the residence would further degrade the PAMB habitat, as mountain beavers require coastal scrub vegetation for foraging, breeding, and protective cover, and house construction obviously would necessitate additional significant vegetation removal and site

grading within and around the building footprint for construction access. In addition, to comply with fire-safe regulations, the vegetation within at least 30 feet of defensible space around the perimeter of the house would need to be cleared or mowed. U.S. Fish and Wildlife (FWS) standards for “no-take” of PAMB individuals prohibit (1) noise disturbance (including chain saws and weed-eaters) within 100 feet of active burrows during the breeding season (which is December 15 to June 30); (2) ground vibration disturbance (including soil excavation and air compressors) within 100 feet of active burrows during the breeding season and not within 50 feet during the remainder of the year; and (3) habitat modification and removal of PAMB habitat (including mowing, grazing, plowing, cultivation of nonnative vegetation, herbicide application, paving, and road construction) within 400 feet of active burrows.

The proposed location of the single family residence is the only location on the parcel suitable for building that both ensures safety from geologic hazards (as discussed in Finding IV-F above) and maintains the required 20-foot septic field setback as required by the County Division of Environmental Health. As part of the Commission’s *de novo* review, the applicant was asked to evaluate the suitability of soils for a septic system at an alternative leach field location located further westward on the property to allow for siting the proposed residence at the far eastern end of the property (adjacent to Navarro Way). The applicant submitted evidence, prepared by DMC Consulting Services dated March 14, 2008 and reviewed by County Environmental Health, demonstrating that an alternative leach field location would not be suitable to meet County standards (Exhibit No. 13). Thus, the only feasible location for an on-site septic system is on the eastern end of the property as proposed, adjacent to Navarro Way, which necessitates locating the proposed residence westward of the septic fields a minimum distance of 20 feet and thus within the delineated PAMB ESHA (i.e., modified suitable PAMB habitat).

Therefore, the Commission finds that because the proposed development would significantly degrade the PAMB ESHA (further than its already been degraded), findings for approval cannot be made consistent with LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1), and these policies mandate that the project be denied.

**(2) Proposed Development Located Within ESHA Buffer**

As cited above, LUP Policy 3.1-7 and CZC Section 20.496 contain specific requirements for the establishment of a buffer area between development and an adjacent ESHA to protect ESHA from disturbances associated with proposed development. The width of the buffer area is required to be a minimum of 100 feet, unless an applicant can demonstrate, after consultation with the California Department of Fish and Game and County Planning staff, that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area is required to be measured from the outside edge of the ESHA and shall not be less than 50 feet in width. Development permitted within a buffer area is required to be generally the same as those uses permitted in the adjacent environmentally sensitive habitat area and must comply within the standards set forth in CZC Section 20.496.020(A)(4)(a)-(k).

Although the proposed development is located at least 50 feet from the deed-restricted PAMB habitat discussed above (see Exhibit Nos. 5 and 10), the proposed development is located

partially within (i.e., a portion of the proposed house footprint) “modified suitable PAMB habitat” in which major vegetation removal (habitat conversion) occurred within the last four to seven years without the benefit of a coastal development permit (see Figure 1 of Exhibit No. 12). Therefore, the Commission finds that development is proposed both within PAMB ESHA itself (i.e., within modified suitable PAMB habitat) and within the minimum 50-foot-wide ESHA buffer.

LUP Policy 3.1-7 and CZC Section 20.496.020 require development permitted within a buffer area to be generally the same as those uses permitted in the adjacent ESHA, and shall be (1) sited and designed to prevent impacts which would significantly degrade such areas, (2) compatible with the continuance of the habitat, and (3) allowed only if no other feasible site is available on the parcel and mitigation is provided to replace any particular value of the buffer lost by the development. The LCP is silent with regard to the specific kinds of development that are allowed within rare species ESHA (and therefore the types of development allowed within the ESHA buffer). However, CZC 20.532.100(A)(1) states that no development shall be allowed within an ESHA unless (a) the resource will not be significantly degraded by the proposed development, (b) there is no feasible less environmentally damaging alternative, and (c) all feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted. Therefore, because LUP Policy 3.1-7 and CZC Section 20.496.020 require development permitted within a buffer area to be generally the same as those uses permitted in the adjacent ESHA, the only types of development allowed within rare species ESHA buffer include those that meet these three criteria.

As discussed above, although the modified suitable PAMB habitat already has been significantly degraded through past unpermitted vegetation removal activities, the proposed development, which would involve significant vegetation clearing and site grading within the building footprint, which includes PAMB ESHA and adjacent buffer, would further degrade the PAMB ESHA (modified suitable PAMB habitat). Due to the fact that all but an approximately 45-foot-wide band of grassy habitat on the eastern end of the parcel has been delineated as PAMB ESHA, it is not possible to develop the parcel without locating development within ESHA buffer (i.e., less than 50 feet from ESHA). In this case, an on-site septic system, driveway, and portion of the single family residence are proposed to be located within ESHA buffer. These developments will require complete site grading and vegetation removal within 50-100 feet of active burrows (in the deed-restricted occupied PAMB habitat in the western half of the parcel) and habitat modification and removal of PAMB habitat within 400 feet of active burrows, which is inconsistent with FWS standards for “no take” of PAMB individuals.

Therefore, because (1) the proposed development would be located less than 50 feet from delineated PAMB ESHA inconsistent with LUP Policy 3.1-7 and CZC Section 20.496.020(A), and (2) the proposed residential development would significantly degrade the PAMB habitat (at a minimum the modified suitable PAMB habitat), the Commission finds that findings for approval cannot be made consistent with LUP Policy 3.1-7 and CZC Sections 20.496.015 and 20.532.100(A)(1), and these policies mandate that the project be denied. However, as discussed below, the Commission has determined that it must allow a reasonable residential development on the subject property to avoid an unconstitutional taking of the applicant’s property without payment of just compensation.



## **H. Need to Allow a Reasonable Residential Development to Avoid an Unconstitutional Taking of Property**

As discussed above, the proposed development is inconsistent with: (1) LUP Policy 3.4-10 and CZC 20.500.020(B)(4) regarding development on bluff faces; (2) LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1) regarding development within rare species ESHA; and (3) LUP Policy 3.1-7 and CZC Section 20.496.020(A) regarding development within ESHA buffer. Therefore, the LCP requires that the project be denied. However, when the Commission considers denial of a project, a question may arise as to whether the denial results in an unconstitutional “taking” of the applicant’s property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project with the assurance that its actions are consistent with Section 30010. If the Commission concludes that its action would constitute a taking, then application of Section 30010 would overcome the presumption of denial. In this latter situation, the Commission will propose modifications to the development to minimize its Coastal Act inconsistencies while still allowing some reasonable amount of development.<sup>1</sup>

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010, its denial of the project would constitute a taking. As discussed further below, the Commission finds that to avoid a takings in compliance with Section 30010, the Commission determines it will allow a reasonable residential development on the subject property.

### **(1) General Takings Principles**

The Fifth Amendment of the United States Constitution provides that private property shall not “*be taken for public use, without just compensation.*”<sup>2</sup> Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

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<sup>1</sup> For example, in CDP A-1-MEN-03-029 (Claiborne and Schmitt), the Commission in 2004 approved residential development on a site that was entirely ESHA, even though it was not resource-dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

<sup>2</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* [(1922) 260 U.S. 393]. Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories [see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523]. First, there are the cases in which government authorizes a physical occupation of property [see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419]. Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation [e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18]. The Commission's actions here would be evaluated under the standards for a regulatory taking.

In its recent takings cases, the Court has identified two circumstances in which a regulatory taking might occur. The first is the "categorical" formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a "case specific" inquiry into the public interest involved (*Id.* at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted" or the "relatively rare situations where the government has deprived a landowner of all economically beneficial uses" or rendered it "valueless" [*Id.* at pp. 1016-1017 (emphasis in original)] (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 (regulatory takings occur only under "extreme circumstances")).<sup>3</sup>

The second circumstance in which a regulatory taking might occur is under the three-part, *ad hoc* test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations [*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005]. In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur [see *id.* (rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*)].

(2) **Before a Landowner May Establish a Taking, Government Must Have Made a Final Determination Concerning the Use to Which the Property May Be Put**

Before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, however, it must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property [e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348]. Premature adjudication of a takings claim is highly disfavored, and the Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of

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<sup>3</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

permitted development before adjudicating the constitutionality of the regulations that purport to limit it” (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, and as discussed further below, although the LCP instructs the Commission to deny the proposed development that would be constructed on a bluff face and within and immediately adjacent to environmentally sensitive Point Arena mountain beaver habitat (PAMB ESHA), the Commission’s denial would preclude the applicant from applying for some other economic use on the site. As discussed further, the subject property, APN 132-020-05, is planned and zoned for residential use, and to deny the applicant residential use of the parcel would leave no other economic use of the property. In these circumstances, the applicant could successfully argue that the Commission has made a final and authoritative decision about the use of the subject property. Therefore, the applicant could successfully argue that the Commission’s denial is a taking because a taking claim is “ripe.”

**(3) Determination of Unit of Property Against Which Takings Claim Will be Measured**

As a threshold matter, before a taking claim can be analyzed, it is necessary to define the parcel of property against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. The issue is complicated in cases where the landowner owns or controls adjacent or contiguous parcels that are related to the proposed development. In these circumstances, courts will analyze whether the lots are sufficiently related so that they can be aggregated as a single parcel for takings purposes. In determining whether lots should be aggregated, courts have looked to a number of factors such as unity of ownership, the degree of contiguity, the dates of acquisition, and the extent to which the parcel has been treated as a single unit [*e.g., District Intown Properties, Ltd. v. District of Columbia* (D.C.Cir.1999) 198 F.3d 874, 879-880 (nine individual lots treated as single parcel for takings purposes); *Ciampitti v. United States* (Cl.Ct. 1991) 22 Cl.Ct. 310, 318].

In this case, the applicant owns the subject vacant parcel proposed to be developed with a single-family residence (APN 132-020-05), but does not own any adjacent parcels. The applicant purchased APN 132-020-05 for \$475,000 with a closing date of June 15, 2006. On the same day, a Grant Deed was recorded in Volume 2006, page 11795 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to the applicant. Based upon an examination of copies of this document and related entries within the current property tax rolls of the County of Mendocino’s Assessor’s Office, the adjoining parcels are owned by others. The adjoining parcel to the north (APN 132-020-04) is owned by Joe Kelada. The adjoining parcel to the south (APN 132-020-06) is owned by Malcolm and Irmela Barlow. The adjoining parcel to the west (APN 132-020-19) is owned by Mendocino Coast Properties. To the east, the applicant’s property adjoins Navarro Way. The two parcels on the east side of Navarro Way across from the applicant’s property are APN 132-020-11 (owned by Darryl and Bonita Datwyler) and APN 132-020-12 (owned by Anne Marie Fernandez).

Therefore, the evidence establishes that the Commission should treat APN 132-020-05 as a single parcel for the purpose of determining whether a taking occurred.

**(4) The Commission Will Allow a Reasonable Residential Development on the Subject Property to Avoid a Takings in Compliance with Section 30010 of the Coastal Act**

**(a) Categorical Taking**

Section 30010 of the Coastal Act provides that the Coastal Act shall not be construed as authorizing the Commission to exercise its power to grant or deny a permit in a manner which will take private property for public use. Application of Section 30010 may overcome the presumption of denial in some instances. The subject of what government action results in a “taking” was addressed by the U.S. Supreme Court in *Lucas v. South Carolina Coastal Council* (1992).

In *Lucas*, the Court held that where a permit applicant has demonstrated that he or she has a sufficient real property interest in the property to allow the proposed project, and that project denial would deprive his or her property of all economically viable use, then denial of the project by a regulatory agency might result in a taking of the property for public use, unless the proposed project would constitute a nuisance under State law.

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if an applicant demonstrates that Commission denial of the project would deprive his or her property of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act or LCP provision would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, unless the proposed project would constitute a public nuisance under state law, the applicable provisions of the certified LCP cannot be read to deny all economically beneficial or productive use of land because these sections of the certified LCP cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property owner of some economically viable use.

Section 20.384.010 of the CZC sets forth the principal permitted use types in the SR district, which include (1) single-family residential, (2) vacation home rental, and (3) passive recreation. Additionally, the section sets forth the conditional permitted use types in the SR district, which include various residential (two-family, multifamily, boardinghouse, and mobile home park), commercial (cottage industries), and civic use types (government administrative services, on-site alternative energy facilities, cemetery services, community recreation, day care facilities/small schools, educational facilities, fire and police protection services, group care, fraternal and civic assembly lodges, major impact services and utilities, minor impact utilities, and religious assembly).

The Commission finds that in this particular case, none of the other allowable principally permitted or conditionally permitted uses at the subject property would avoid the geologic hazards of building on a bluff face, avoid development within and immediately adjacent to environmentally sensitive Point Arena mountain beaver habitat (PAMB ESHA), be feasible, and provide the property with an economically viable use. Making use of the subject property as a vacation home rental, cottage industry, or any of the conditionally permitted residential or

commercial use types would still require building a home or other structure on the property on the bluff face in a manner inconsistent with LUP Policy 3.4-10 and CZC Section 20.500.020(B)(4), and within and immediately adjacent to PAMB ESHA inconsistent with LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1). The same is true for most of the conditionally permitted civic use types. Regarding the other conditionally permitted civic use types, there are provisions in LUP Policy 3.4-10 and CZC Section 20.500.020(B)(4) allowing for certain development to occur on bluff faces if such development “*would substantially further the public welfare,*” such as staircase accessways to beaches and pipelines to serve coastal-dependent industry, “*following a full environmental, geologic and engineering review and upon the determinations that no feasible less environmentally damaging alternative is available and that feasible mitigation measures have been provided to minimize all adverse environmental effects.*” Some of the conditional permitted civic use types would arguably be uses that would substantially further the public welfare. However, the half-acre property is too small to be of value for a use that “*would substantially further the public welfare,*” especially given the limited part of the lot (less than a quarter acre in size) where development can be located safe from bluff retreat and other geologic hazards, as discussed above. Additionally, such civic uses would still require development within and adjacent to PAMB ESHA in a manner inconsistent with LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1). Furthermore, the property is located within an established residentially-developed area (with residences on both sides) where there is little impetus for public agencies to purchase the lot. The applicant indicates that no public agency has indicated any interest in purchasing the lot.

Regarding “passive recreation” which is a principally permitted use type that wouldn’t necessarily require building a home or other structure on the bluff face and within and immediately adjacent to PAMB ESHA in a manner inconsistent with the LCP, the passive recreation use type is defined in CZC Section 20.340.015 as follows:

*Leisure activities that do not require permits pursuant to this Division nor constitute “development” as defined in Section 20.308.035(D), and that involve only minor supplementary equipment. Examples include sight seeing, hiking, scuba diving, swimming, sunbathing, jogging, surfing, fishing, bird watching, picnicking, bicycling, horseback riding, boating, photography, nature study, and painting.*

However, none of these kinds of leisure activities afford the property owners an inherent economically viable use. Commercial recreational uses that incorporate the leisure activities included in the definition of passive recreation activities such as renting bicycles from the property, leading nature study tours on the property for a fee, or conducting photography lessons for a fee at the site come under the separate use type of “Active Recreation” as defined in CZC Section 20.340.020 and thus would not be permitted on the subject property. The passive recreation use also does not include setting aside lands for parks or open space preserves. These kinds of uses come under the separate use type of “Open Space” as defined in CZC Section 20.340.010. Even if the open space use type were allowed on the property, which it is not, the applicant attests that no public agency has indicated any interest in purchasing the property for natural resource conservation or other resource-compatible public uses. The property is likely too small to be of value as a habitat preserve. Additionally, the property is located within an established residentially developed area with several large state and regional parks and other

conservation areas nearby that contain and preserve coastal bluff habitats (e.g., Manchester State Park). Thus, there is little impetus for such public agencies to purchase the lot.

Therefore, the Commission finds that it is reasonable to conclude that denial of the proposed residential use would deprive the applicant of all economically viable use. Therefore, whether or not denial of the permit would constitute a taking under the *ad hoc* inquiry required by *Penn Central* and discussed below, the Commission finds it necessary to approve some residential use of the property to avoid a categorical *Lucas*-type taking.

**(b) Taking Under Penn Central**

Although the Commission has already determined it is necessary to approve some residential use to avoid a categorical taking under *Lucas*, a court may also consider whether the permit decision would constitute a taking under the *ad hoc* inquiry stated in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-125. This *ad hoc* inquiry generally requires an examination into factors such as the sufficiency of the applicant's property interest, the regulation's economic impact, and the regulation's interference with reasonable, investment-backed expectations.

**Sufficiency of Interest.** In the subject case, the applicant purchased APN 132-020-05 for \$475,000 with a closing date of June 15, 2006. On the same day, a Grant Deed was recorded in Volume 2006, page 11795 of the Official Records, Mendocino County Recorders Office, effectively transferring and vesting fee-simple ownership to the applicant. Based upon an examination of copies of this document and related entries within the current property tax rolls of the County of Mendocino's Assessor's Office, the Commission concludes that the applicant has demonstrated that they have sufficient real property interest in the subject parcel to allow pursuit of the proposed project.

**Reasonable Investment-Backed Expectations.** In this case, the applicant's proposal to construct a residence on APN 132-020-05 may have been an investment-backed expectation, but not necessarily a reasonable expectation. To determine whether the applicant had an investment-backed expectation to construct a house on APN 132-020-05, it is necessary to assess what the applicant invested when he purchased that lot.

The applicant purchased APN 132-020-05, an approximately half-acre parcel, for a single purchase price of \$475,000. A review of comparable properties in the southern Mendocino County coastal area that sold around the same time as the applicant's purchase of the subject property indicate sale prices of \$285,000 for a 0.40-acre parcel, \$525,000 for a 0.50-acre parcel, \$643,200 for a 0.88-acre parcel, and \$750,000 for a 0.5-acre parcel. These comparable parcels are similarly designated (in the certified Land Use Plan) for rural residential use.

To determine whether an expectation to develop a property as proposed is reasonable, one must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the applicant's proposed use, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

When the applicant purchased the property, there was no indication that development of a single-family residence on the parcel would not be possible due to geologic constraints. At the time that the applicant was attempting to purchase the property, there were numerous existing homes on the west side of Navarro Way (*i.e.*, seaward of the “bluff edge,” as discussed in Finding IV-F above), including homes on the adjacent parcels to the north and south of the subject parcel. According to assessor’s records, the residence to the immediate south (APN 132-020-06) has been in existence since 1972, predating the Coastal Act. The residence to the immediate north (APN 132-020-04) was approved by the Coastal Commission in 1991 (see CDP No. 1-91-55). That project was approved with a 50-foot geologic setback requirement; at that time the bluff edge on that particular property was determined to be approximately 176 feet west of Navarro Way. Consequently, the applicant may have had an *investment-backed* expectation that he had purchased a lot that could be developed consistent with the geologic hazard policies of the certified LCP, and his investment reflected that the future development of a residential use could be accommodated on APN 132-020-05. Given that numerous homes were in existence on the west side of Navarro Way at the time of the property purchase, including homes immediately to the north and south of the subject lot, and given that the property was planned and zoned for residential use, viewed objectively, a reasonable person would thus have had a reasonable expectation that APN 132-020-05 could be developed as a residential parcel.

However, when the applicant purchased the property, there were indications that development of a single-family residence on the parcel would not be possible due to environmentally sensitive Point Arena mountain beaver habitat concerns. As discussed above, prior to purchasing the lot in 2006, the applicant had consulted with FWS about impacts of the proposed development on the Point Arena mountain beaver and agreed to grant a conservation easement and deed restriction to the FWS for protection of the species. These consultations and negotiations with FWS gave the applicant actual and constructive notice that the habitat of a rare and endangered species exists on the property. The LCP and its policies requiring the protection of environmentally sensitive habitat areas, including the habitats of rare and endangered animal species, had been effectively certified in 1993, many years prior to the applicant’s purchase of the subject property. Therefore, when the applicant purchased the property, the applicant could have determined that the development of a single-family residence on the parcel would be problematic, as the LCP policies preclude development within ESHA that would significantly degrade the habitat, and the LCP requires a minimum ESHA buffer of at least 50 feet. Therefore, a reasonable person would not have had a reasonable expectation that APN 132-020-05 could be developed with a residence consistent with the certified LCP ESHA protection policies.

Therefore, although the applicant may have had an investment-backed expectation, the applicant did not have a reasonable expectation that the subject property could be developed with a residence, as is currently proposed.

**Economic Impact.** In this case, the evidence demonstrates that the Commission’s action would have substantial impact on the value of the subject property.

As noted previously, the subject property is on the urban side of the urban/rural boundary and is planned and zoned (respectively) for Rural Residential (RR)/Suburban Residential (SR) use in

the County's LCP (see Exhibit No. 4). According to the LCP, the SR district is intended to be applied adjacent to existing developed communities on the urban side of the urban/rural boundary, or in areas suited for future residential growth. Section 20.384.010 of the CZC sets forth the principal permitted use types in the SR district, which include single-family residential, vacation home rental, and passive recreation, and the conditionally permitted use types in the SR district, which include various residential (two-family, multifamily, boardinghouse, and mobile home park), commercial (cottage industries), and civic use types (government administrative services, on-site alternative energy facilities, cemetery services, community recreation, day care facilities/small schools, educational facilities, fire and police protection services, group care, fraternal and civic assembly lodges, major impact services and utilities, minor impact utilities, and religious assembly).

The Commission finds that in this particular case, none of the other allowable uses at the subject property would avoid the geologic hazards of building on a bluff face, avoid development within and immediately adjacent to PAMB ESHA, be feasible, and provide the owners an economic return on their investment. As discussed above, making use of the subject property as a vacation home rental or various of the other conditionally permitted residential, commercial, and civic uses would still require building a structure on the property on the bluff face in a manner inconsistent with LUP Policy 3.4-10 and CZC Section 20.500.020(B)(4) and within and adjacent to ESHA inconsistent with LUP Policy 3.1-2 and CZC Sections 20.496.015 and 20.532.100(A)(1). Furthermore, as discussed above, none of the kinds of leisure activities (pursuant to CZC Section 20.340.015) afford the property owners an inherent economic use. Commercial recreational uses that incorporate the leisure activities included in the definition of passive recreation activities such as renting bicycles from the property, leading nature study tours on the property for a fee, or conducting photography lessons for a fee at the site come under the separate use type of "Active Recreation" as defined in CZC Section 20.340.020 and thus would not be permitted on the subject property. The passive recreation use also does not include setting aside lands for parks or opens space preserves. These kinds of uses come under the separate use type of "Open Space" as defined in CZC Section 20.340.010. Even if the open space use type were allowed on the property, which it is not, the applicant attests that no public agency has indicated any interest in purchasing the property for natural resource conservation or other resource-compatible public uses. The half-acre property is likely too small to be of value as a habitat preserve. Additionally, the property is located within an established residentially developed area with several large state and regional parks and other conservation areas nearby that contain and preserve coastal bluff habitats (e.g., Manchester State Park). Thus, there is little impetus for such public agencies to purchase the lot.

In these circumstances, it is reasonable to conclude that the denial of the proposed residential use would have a substantial economic impact on the value of the subject property. To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit allows for the construction of a residential development to provide a reasonable economic use of the subject property. This determination is based on the Commission's finding in this staff report that whether or not APN 132-020-05 was purchased with the reasonable expectation of residential use, the proposed development is commensurate with the investment-backed expectations for the property, and that none of the uses otherwise allowable under the certified LCP would provide an economic use.



(5) **A Taking Cannot Be Avoided Because the Project Could Not Be Prohibited Under Background Principles of State Property Law**

Finally, *Lucas* provides that a regulatory action does not constitute a taking if the restrictions inhere in the title of the affected property; that is, “background principles” of state real property law would have permitted government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036). These background principles include a State’s traditional public nuisance doctrine or real property interests that preclude the proposed use, such as restrictive easements. Here, the proposed project would not constitute a public nuisance, so as to preclude a finding that the Commission’s denial of the project would constitute a taking.

California Civil Code Section 3479 defines a nuisance as follows:

*Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.*

California Civil Code Section 3480 defines a public nuisance as follows:

*A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.*

There is no evidence that construction of a residence on the subject property would create a nuisance under California law. The site is located in a rural/suburban residential area where the proposed single-family residential development would be compatible with surrounding land uses. Additionally, water service will be provided to the single family residential development by the Irish Beach Water District, and sewer service will be provided by an on-site septic system that has been reviewed and approved by the County Division of Environmental Health. This ensures that the proposed new residence would not create public health problems in the area. Furthermore, the proposed use is residential, rather than, for example, industrial, which might create noise or odors or otherwise create a public nuisance.

Therefore, the Commission finds the proposed project would not constitute a public nuisance that would preclude a finding that the regulatory action constitutes the taking of private property without just compensation.

**Conclusion**

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit allows for the construction of a residential development to provide a reasonable economic use of the subject property. This determination is based on the Commission’s finding in this staff report that whether or not APN 132-020-05 was purchased with the reasonable expectation of residential use, the proposed development is commensurate with the investment-backed expectations for the property, and that none of the uses otherwise allowable under the certified LCP would provide an economic use.

For all of the above reasons, the Commission determines it will allow a reasonable residential development on the subject property to avoid an unconstitutional takings consistent with Coastal Act Section 30010.

**I. Maximizing LCP Conformity while Avoiding Takings**

Though applicants are entitled under Coastal Act Section 30010 to an assurance that the Commission will not act in such a way as to take their property, this section does not authorize the Commission to completely avoid application of the policies and standards of the certified LCP, including LUP Policies 3.1-2 and 3.4-10 and CZC Sections 20.496.015, 20.500.020(B)(4), and 20.532.100(A)(1). Instead, the Commission is only directed to avoid construing these applicable policies in a way that would take private property for public use. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the LCP. Therefore, in this situation, the Commission must still comply with LUP Policies 3.1-2 and 3.4-10 and CZC Sections 20.496.015, 20.500.020(B)(4), and 20.532.100(A)(1) by requiring measures to mitigate geologic hazards and adverse environmental effects on environmentally sensitive Point Arena mountain beaver habitat.

**(1) Mitigation Measures to Minimize Geologic Hazards**

To minimize and mitigate geologic hazards to the greatest extent feasible, as is required by LUP Policy 3.4-10 and CZC Section 20.500.020(B)(4), the Commission attaches Special Condition Nos. 1 through 7:

To ensure that the development conforms to the recommendations listed in the geologic report, the Commission attaches Special Condition No. 1. This condition requires that prior to permit issuance, a geotechnical engineer shall approve all final design, construction, foundation, grading and drainage plans, and shall review the anchoring systems and anticipated seismic loading of the proposed buildings and provide recommendations, as necessary, for appropriate restraint systems, as recommended by the geologic report. Moreover, the condition requires that all geologic setback, site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls, and site drainage recommendations included in the BACE Geotechnical report prepared for the site dated December 9, 2008 (Exhibit No. 8) have been incorporated into final plans. The condition further requires that the foundation construction and earthwork be supervised and certified by a licensed engineering geologist, or a registered civil engineer with soil analysis expertise, to ensure that the geologic hazard mitigation measures are properly incorporated into the development. The Commission finds that only as conditioned to ensure that the mitigation measures are properly incorporated into the development can the project be found consistent with LUP Policies 3.4-1 and 3.4-7 and CZC Section 20.500.010(A).

Although the slope stability analysis concludes that "...the site is geologically and geotechnically suitable for the proposed residence..." (p. 8), the applicant is nonetheless proposing to construct a new single family residence on a high uplifted marine terrace bluff that is actively eroding. Thus, as the slope stability analysis demonstrates, notwithstanding the relative degree of insulation of the proposed project in its proposed location from geologic hazards, the subject site is nonetheless located in an area of high geologic hazard. New development can only be found

consistent with the above-referenced LCP provisions if the risks to life and property from the geologic hazards are minimized and if a protective device will not be needed in the future. As stated above, the slope stability analysis demonstrates that if the new development is set back at least 30 feet from the old landslide headscarp on the property, it will be safe from erosion and will not require any devices to protect it during its useful economic life.

Although a comprehensive geotechnical evaluation is a necessary and useful tool that the Commission relies on to determine if proposed development is permissible at all on any given bluff top site, the Commission finds that a geotechnical evaluation alone is not a guarantee that a development will be safe from bluff retreat. It has been the experience of the Commission that in some instances, even when a thorough professional geotechnical analysis of a site has concluded that a proposed development will be safe from bluff retreat hazards, unexpected bluff retreat episodes that threaten development during the life of the structure sometimes still do occur. Examples of this situation include the following:

- The Kavich Home at 176 Roundhouse Creek Road in the Big Lagoon Area north of Trinidad (Humboldt County). In 1989, the Commission approved the construction of a new house on a vacant bluff top parcel (CDP No. 1-87-230). Based on the geotechnical report prepared for the project it was estimated that bluff retreat would jeopardize the approved structure in about 40 to 50 years. In 1999 the owners applied for a coastal development permit to move the approved house from the bluff-top parcel to a landward parcel, because the house was threatened by 40 to 60 feet of unexpected bluff retreat that occurred during a 1998 El Niño storm event. The Executive Director issued a CDP waiver (1-99-066-W) to authorize moving the house in September of 1999.
- The Denver/Canter home at 164/172 Neptune Avenue in Encinitas (San Diego County). In 1984, the Commission approved construction of a new house on a vacant bluff-top lot (CDP No. 6-84-461) based on a positive geotechnical report. In 1993, the owners applied for a seawall to protect the home (CDP Application No. 6-93-135). The Commission denied the request. In 1996 (CDP Application No. 6-96-138) and again in 1997 (CDP Application No. 6-97-90), the owners again applied for a seawall to protect the home. The Commission denied the requests. In 1998, the owners again requested a seawall (CDP Application No. 6-98-39) and submitted a geotechnical report that documented the extent of the threat to the home. The Commission approved the request on November 5, 1998.
- The Arnold project at 3820 Vista Blanca in San Clemente (Orange County). Coastal development permit (CDP No. 5-88-177) for a bluff-top project required protection from bluff-top erosion, despite geotechnical information submitted with the permit application that suggested no such protection would be required if the project conformed to 25-foot bluff top setback. An emergency coastal development permit (CDP No. 5-93-254-G) later was issued to authorize bluff-top protective works.

The Commission emphasizes that the above examples are not intended to be absolute indicators of bluff erosion on the subject parcel, as coastal geology can vary significantly from location to location. However, these examples do illustrate that site-specific geotechnical evaluations cannot always accurately account for the spatial and temporal variability associated with coastal

processes and therefore cannot always absolutely predict bluff erosion rates. Collectively, these examples have helped the Commission form its opinion on the vagaries of geotechnical evaluations with regard to predicting bluff erosion rates.

Although the project has been evaluated and designed in a manner to minimize the risk of geologic hazards, and although the Commission is requiring with Special Condition No. 1 that the applicant adhere to all recommended specifications to minimize potential geologic hazards (including recommendations on geologic setback, site grading, foundation support, seismic design criteria, concrete slab floor support, retaining walls and site drainage), some risk of geologic hazard still remains. This risk is reflected in the slope stability analysis report (Exhibit No. 8), which references various "limitations" of the analysis, such as:

"...The samples taken and tested, and the observations made, are considered to be representative of the site; however, soil and geologic conditions may vary significantly between test borings and across the site..." [p. 17]; and

"...Changes in the condition of a site can occur with the passage of time, whether they are due to natural events or to human activities on this, or adjacent sites. In addition, changes in applicable or appropriate codes and standards may occur, whether they result from legislation or the broadening of knowledge..." [p. 18]

This language in the report itself is indicative of the underlying uncertainties of this and any geotechnical evaluation and supports the notion that no guarantees can be made regarding the safety of the proposed development with respect to bluff retreat. Geologic hazards are episodic, and bluffs that may seem stable now may not be so in the future.

Therefore, the Commission finds that the subject lot is an inherently hazardous piece of property, that the bluff face is clearly eroding in some areas, and that the proposed new development will be subject to geologic hazard and could potentially someday require a bluff or shoreline protective device, inconsistent with LUP Policy 3.4-7 and CZC Sections 20.500.010 and 20.500.020(B). The Commission thus finds that the proposed development could not be approved as being consistent with LUP Policy 3.4-7 and CZC Section 20.500.010 and 20.500.020(B) if projected bluff retreat would affect the proposed development and necessitate construction of a seawall to protect it.

The slope stability analysis prepared by the applicant's geologist indicates that the risks of geologic hazard are minimized if the new development is set back at least 30 feet or more from the old landslide headscarp on the property as proposed (Exhibit Nos. 8 and 9). However, given that the risk cannot be completely eliminated and the geologic report cannot assure that shoreline protection will never be needed to protect the carport, the Commission finds that the proposed development is consistent with the certified LCP only if it is conditioned to provide that shoreline protection will not be constructed. Thus, the Commission further finds that (1) due to the inherently hazardous nature of this lot, (2) the fact that no geology report can conclude with any degree of certainty that a geologic hazard does not exist, (3) the fact that the approved development and its maintenance may cause future problems that were not anticipated, and (4) because new development shall not engender the need for shoreline protective devices, it is

necessary to attach Special Condition No. 2 to ensure that no future shoreline protective device will be constructed.

Special Condition No. 2 prohibits the construction of shoreline protective devices on the parcel, requires that the landowner provide a geotechnical investigation and remove the permitted single-family residence, garage, decking, porches, driveway, septic system, propane tank, and water and utility connections if bluff retreat reaches the point where the permitted development is threatened, and requires that the landowners accept sole responsibility for the removal of any structural debris resulting from landslides, slope failures, or erosion of the site. These requirements are necessary for compliance with CZC Section 20.500.010, which states that new development shall minimize risk to life and property in areas of high geologic hazard, assure structural integrity and stability, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding areas, nor in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. The Commission finds that the proposed development could not be approved as being consistent with CZC Section 20.500.010 if projected bluff retreat would affect the proposed development and necessitate construction of a seawall to protect it.

Special Condition No. 3 requires the landowner to assume the risks of extraordinary erosion and geologic hazards of the property and waive any claim of liability on the part of the Commission. Given that the applicant has chosen to implement the project despite these risks, the applicant must assume the risks. In this way, the applicant is notified that the Commission is not liable for damage as a result of approving the permit for development. The condition also requires the applicant to indemnify the Commission in the event that third parties bring an action against the Commission as a result of the failure of the development to withstand hazards. In addition, as discussed below, the requirement of Special Condition No. 4 that a deed restriction be recorded, will ensure that future owners of the property will be informed of the risks, the Commission's immunity from liability, and the indemnity afforded the Commission.

In addition, as noted above, some risks of an unforeseen natural disaster, such as massive slope failure, erosion, etc., could result in destruction or partial destruction of the single family residence or other development approved by the Commission. Furthermore, the development itself and its maintenance may cause future problems that were not anticipated. When such an event takes place, public funds are often sought for the clean-up of structural debris that winds up on the beach or on an adjacent property. As a precaution, in case such an unexpected event occurs on the subject property, Special Condition No. 2(B) requires the landowner to accept sole responsibility for the removal of any structural debris resulting from landslides, slope failures, or erosion on the site, and agree to remove the single-family residence, garage, and other permitted development should the bluff retreat reach the point where a government agency has ordered that the structures not be occupied.

The Commission finds that Special Condition No. 4 is required to provide notice of potential hazards of the property and help eliminate false expectations on the part of potential buyers of the property, lending institutions, and insurance agencies that the property is safe for an indefinite period of time and for further development indefinitely into the future, or that a protective device could be constructed to protect the approved development. The condition

requires that the applicant record and execute a deed restriction approved by the Executive Director against the property that imposes the special conditions of this permit as covenants, conditions, and restrictions on the use and enjoyment of the property.

As conditioned, the proposed development will not contribute significantly to the creation of any geologic hazards and will not have adverse impacts on slope stability or cause erosion. However, the Commission notes that future minor incidental development normally associated with single family residences such as additions to the residence, construction of outbuildings, decks and patios, or installation of additional landscaped areas could be sited and designed in a manner that could compromise geologic stability, leading to significant adverse impacts to the site and surrounding area. Many of these kinds of development are normally exempt from the need to obtain a coastal development permit under Section 30610(a) of the Coastal Act. Thus, unless the Commission specifies in advance, the Commission would not normally be able to review such development to ensure that geologic hazards are avoided.

The Commission further notes that Section 30610(a) of the Coastal Act and Section 20.532 of the County's Coastal Zoning Code specifically exempt certain additions to existing single family residential structures from coastal development permit requirements. Pursuant to this exemption, once a house has been constructed, certain additions and accessory buildings that the applicant might propose in the future are normally exempt from the need for a permit or permit amendment.

To avoid such impacts to coastal resources and geologic hazards from the development of otherwise exempt additions to existing homes, Section 30610(a) requires the Commission to specify by regulation those classes of development that involve a risk of adverse environmental effects and require that a permit be obtained for such improvements. Pursuant to Section 30610(a) of the Coastal Act, the Commission adopted Section 13250 of Title 14 of the California Code of regulations. Section 13250(b)(6) specifically authorizes the Commission to require a permit for additions to existing single-family residences that could involve a risk of adverse environmental effect by indicating in the development permit issued for the original structure that any future improvements would require a development permit. As noted above, siting and development of certain additions or improvements to the approved residence could involve a risk of initiating significant adverse geologic hazards. Therefore, in accordance with provisions of Section 13250(b)(6) of Title 14 of the California Code of Regulations, the Commission attaches Special Condition No. 5, which requires a coastal development permit or a permit amendment for all additions and improvements to the residence on the subject parcel that might otherwise be exempt from coastal permit requirements. This condition will allow future development to be reviewed by the Commission to ensure that future improvements will not be sited or designed in a manner that would result in significant adverse geologic consequences. As discussed above, Special Condition No. 4 also requires that the applicant record and execute a deed restriction approved by the Executive Director against the property that imposes the special conditions of this permit as covenants, conditions, and restrictions on the use and enjoyment of the property. Special Condition No. 4 also will help assure that future owners are aware of these CDP requirements applicable to all future development.

The Commission thus finds that the proposed development, as conditioned, is consistent with the policies of the certified LCP regarding geologic hazards, including LUP Policies 3.4-1, 3.4-7, 3.4-12 and CZC Sections 20.500.010, 20.015.015, and 20.500.020, since the development as conditioned will not contribute significantly to the creation of any geologic hazards, will not have adverse impacts on the stability of the coastal bluff or on erosion, and will not require the construction of shoreline protective works. Only as conditioned is the proposed development consistent with these LCP policies on geologic hazards.

The slope stability analysis prepared by the applicant's consultant recommends a geologic setback of 30 feet between the proposed development and the old landslide headscarp on the property (see Exhibit Nos. 8 and 9). The report also recommends this setback for all future property improvements, including leach fields. Because the proposed building area (as shown on Exhibit Nos. 5 and 9) is located precisely 30 feet from the geologic setback line (old landslide headscarp), the Commission finds that the only way it is possible to mitigate geologic hazards associated with the site to the maximum extent feasible is to restrict to open space all areas of the subject property west of the proposed building area as shown on Exhibit No. 16. Therefore, the Commission attaches Special Condition No. 6, which restricts the use of all areas of the lot west of the proposed building area, as generally depicted on Exhibit No. 16, to open space. The area of the property unaffected by the restrictions becomes a building envelope within which the authorized 1,203-square-foot single family residence, 344-square-foot attached garage, 272 square feet of exterior decks, 48 square feet of covered porches, 451 square feet of concrete driveway, on-site septic system, propane tank within a fenced enclosure, and connections to utilities and community water must be located. Special Condition No. 6 prohibits all development in the affected area (open space area) except for the removal of non-native vegetation; installation of erosion control measures installed pursuant to Special Condition No. 1 (see above); installation of drainage improvements installed pursuant to Special Condition No. 1; planting of drought-tolerant native vegetation pursuant to Special Condition No. 8 (see below); and installation of a protective fence installed pursuant to Special Condition No. 9 (see below). Furthermore, as discussed above, Special Condition No. 4 requires the applicants to record a deed restriction that imposes the special conditions of the permit as covenants, conditions, and restrictions on the use of the property to ensure that both the applicants and future purchasers of the property are notified of the prohibitions on development within the open space area established by Special Condition No. 6.

The referenced slope stability analysis states that "Irrigation near the old slide area (i.e., the geologic setback line discussed above) should be kept to a minimum. Saturation of these weak soils, or excess seepage along their base, could cause sloughing and re-activation of the slide plane. Care should be taken to avoid concentrated surface flow of runoff along the bluff face." (p. 17). As discussed above, Special Condition No. 1 requires that prior to permit issuance, a geotechnical engineer shall approve all final plans, including drainage plans, and provide recommendations as necessary for appropriate site development to minimize geologic hazards. Because of the need to minimize the potential for soil saturation in the geologic setback area between the proposed building site and the old landslide headscarp, and because LUP Policy 3.4-8 and CZC Section 20.500.020(B)(2) require property owners to maintain drought-tolerant vegetation within the required bluff-top setback, the Commission attaches Special Condition No. 7. This condition requires, in part, that drought-tolerant vegetation only shall be maintained

within the geologic setback area/open space area west of the approved building envelope as shown on Exhibit No. 16 to minimize the need for irrigation and the potential for geologic hazards.

As conditioned to require that the property west of the building envelope be restricted to open space, that drought tolerant vegetation be maintained within the geologic setback area west of the approved building envelope, and other specific mitigation measures to further minimize geologic hazards as discussed above, the Commission finds that the project will include measures to mitigate all significant adverse environmental effects and geologic hazards to the greatest extent possible consistent with LUP Section 3.4-10 and CZC Section 20.500.020(B)(4) while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

Furthermore, this particular project involving a bluff-face parcel with significant Point Arena mountain beaver environmentally sensitive habitat is unique and unusual and contains conditions specific to this project. Approval of this project would not establish a precedent for the Commission or Mendocino County to approve development on bluff faces for other projects.

**(2) Mitigation Measures to Minimize Adverse Environmental Effects on ESHA**

LUP Policy 3.1-2 states in applicable part that “...development shall be approved only if specific findings are made which are based upon substantial evidence that the resources [ESHA] as identified will not be significantly degraded by the proposed development.” CZC Section 20.532.100 states in applicable part that “...No development shall be allowed in an ESHA unless the following findings are made: (a) the resources as identified will not be significantly degraded...(b) there is no feasible less environmentally damaging alternative, and (c) all feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted.” To minimize and mitigate the adverse environmental effects and avoid significant degradation of the PAMB ESHA as required by the policies, the Commission attaches Special Condition Nos. 4, 5, 6, 7, 8, 9, and 10.

The proposed development has been sited to prevent significant adverse impacts that would significantly degrade PAMB ESHA, and specifically to occupied (active) PAMB habitat on the western half of the parcel in the conservation easement/deed-restricted area, to the maximum extent feasible. The development has been sited as far east on the property (i.e., as far away from the deed-restricted, occupied PAMB habitat within the coastal scrub vegetation on the western half of the parcel) as possible while still maintaining the mandatory 20-foot septic field setback (the septic fields are located as far eastward on the property as possible, which is the only suitable site on the lot where they can be developed in compliance with County Division of Environmental Health standards). As proposed, all proposed development is located at least 50 feet from the conservation easement/deed-restricted PAMB habitat (i.e., the occupied PAMB habitat), at least 30 feet from the old landslide headscarp as recommended by the applicant’s geologist (see Finding IV-F above), and at least 20 feet from the septic leach field areas. Additionally, as discussed above, Special Condition No. 1 requires that all final grading and drainage plans, among others, be reviewed and approved by a geotechnical engineer for conformance with all recommendations in the December 9, 2008 BACE Geotechnical report,



which will help ensure that the project will (1) maintain the physical integrity of the buffer strip, (2) minimize the alteration of natural landforms, and (3) protect hydrological processes.

As discussed above, Special Condition No. 5 requires a coastal development permit or a permit amendment for all additions and improvements to the residence on the subject parcel that might otherwise be exempt from coastal permit requirements. This condition will allow future development to be reviewed by the Commission to ensure that future improvements will not be sited or designed in a manner that would result in significant adverse environmental effects on PAMB ESHA. Also as discussed above, Special Condition No. 4 requires that the applicant record and execute a deed restriction approved by the Executive Director against the property that imposes the special conditions of this permit as covenants, conditions, and restrictions on the use and enjoyment of the property and that will help assure that future owners are aware of these CDP requirements applicable to all future development.

Special Condition No. 6, discussed above, restricts the use of all areas west of the proposed building area, as generally depicted on Exhibit No. 16, to open space. The area of the property unaffected by the restrictions becomes a building envelope within which the authorized 1,203-square-foot single family residence, 344-square-foot attached garage, 272 square feet of exterior decks, 48 square feet of covered porches, 451 square feet of concrete driveway, on-site septic system, propane tank within a fenced enclosure, and connections to utilities and community water must be located. Special Condition No. 6 prohibits all development in the open space area except for the removal of non-native vegetation; installation of erosion control measures and drainage improvements installed pursuant to Special Condition No. 1; planting of drought-tolerant native vegetation and habitat restoration pursuant to Special Condition No. 8 (see below); and installation of a protective fence installed pursuant to Special Condition No. 9 (see below). In addition, vegetation removal for fire-safe compliance purposes and restoration activities undertaken in cooperation with the U.S. Fish and Wildlife Service may be proposed if approved by the Commission as an amendment to the permit. Again, Special Condition No. 4 requires the applicants to record a deed restriction that imposes the special conditions of the permit as covenants, conditions, and restrictions on the use of the property to ensure that both the applicants and future purchasers of the property are notified of the prohibitions on development within the open space area established by Special Condition No. 6.

To enhance and restore the PAMB habitat on the property and prevent the development from degrading the habitat to the maximum extent feasible, the Commission attaches Special Condition No. 8, which requires that the applicant submit, prior to permit issuance for the review and approval of the Executive Director, a final landscaping and habitat restoration plan for the property. The plan shall demonstrate that (a) landscaping specifications shall conform to all provisions specified in Special Condition No. 7, 9, and 10 described above; (b) only those plants that are drought-tolerant and native to "northern coastal scrub" habitats of Mendocino County shall be used; (c) the portion of the open space deed-restricted area established pursuant to Special Condition No. 6 shall be planted with vegetation beneficial to Point Arena mountain beaver habitat; (d) no existing vegetation located west of the approved building footprint within the open space deed-restricted area established pursuant to Special Condition No. 6 shall be altered or removed, except for removal of nonnative vegetation pursuant to Special Condition No. 6; (e) planting within the open space deed-restricted area established pursuant to Special

Condition No. 6 shall be completed within 60 days after completion of construction and prior to the onset of the rainy season; (f) all proposed plantings shall be obtained from local genetic stocks within Mendocino County; and (g) no rodenticides of any kind shall be used on the property.

Additionally, the Commission finds that although a large portion of the subject parcel is vegetated with existing non-native invasive plant species, the PAMB ESHA could be adversely affected by the development if additional non-native, invasive plant species were introduced from landscaping at the site. Introduced invasive exotic plant species could spread into the coastal scrub habitat that contains active PAMB burrows and displace native vegetation that the mountain beavers depend on for food and cover. The applicant is not proposing any landscaping as part of the proposed project. However, to ensure that the ESHA is not adversely impacted by any future landscaping of the site, the Commission attaches Special Condition No. 7-B that requires only native and/or non-invasive plant species of local genetic stock be planted at the site.

Moreover, to help in the establishment of vegetation, rodenticides are sometimes used to prevent rats, moles, voles, gophers, and other similar small animals from eating the newly planted saplings. The U.S. Fish and Wildlife Service has identified “rodent control activities” as a threat to the endangered Point Arena mountain beavers. Additionally, certain rodenticides, particularly those utilizing blood anticoagulant compounds such as brodifacoum, bromadiolone and diphacinone, have been found to pose significant primary and secondary risks to non-target wildlife present in urban and urban/wildland areas. As the target species are preyed upon by raptors or other environmentally sensitive predators and scavengers, these compounds can bioaccumulate in the animals that have consumed the rodents to concentrations toxic to the ingesting non-target species. Therefore, to minimize this potential significant adverse impact to Point Arena mountain beavers and other environmentally sensitive wildlife species, the Commission attaches Special Condition No. 7-C prohibiting the use of any rodenticides on the property governed by CDP No. A-1-MEN-07-047.

The U.S. Fish and Wildlife Service recommends that the applicant erect a protective fence, at least 18 inches tall and constructed of rock, wood, or other durable material, between the deed-restricted conservation easement on the western half of the property over the occupied PAMB habitat (established in cooperation with the FWS) and the remainder of the parcel to prevent domestic pets and other disturbance from impacting the PAMB habitat. The conservation easement and deed restriction established in cooperation with the FWS protects only the existing coastal scrub habitat on the parcel where active mountain beaver burrows were located. As discussed above, the Commission finds that PAMB ESHA actually covers an additional approximately 6,000-square-foot area of the parcel where suitable PAMB habitat existed as recently as four to seven years ago, until unpermitted vegetation removal converted the suitable coastal scrub habitat to nonnative grassland habitat unsuitable to support the mountain beavers. Thus, the Commission finds that the protective fence should be located further eastward on the property to protect not just the occupied PAMB habitat, but also the remainder of the ESHA to minimize noise disturbance and other activities which could adversely affect the mountain beavers. Additionally, as the geologic investigation recommends that the development not be sited closer than 30 feet from the old landslide headscarp, the Commission finds that the

protective fencing should be located 30 feet landward of the old landslide headscarp (geologic setback line) to minimize geologic hazards. To ensure that protective fencing is erected in a way that both protects occupied PAMB habitat and minimizes geologic hazards, the Commission attaches Special Condition No. 9. This condition requires that, prior to permit issuance, the applicant submit for the review and approval of the Executive Director, a final buffer fencing plan, which provides for a fence to be erected to separate the new development and activities associated with residential living from the ESHA. The plan shall demonstrate that the fence shall be (1) a minimum of 36 inches tall (rather than 18-inches tall, as recommended by the FWS, to increase the likelihood that pets and other disturbance will be effectively separated from the sensitive habitat) and constructed of rock, wood, or other durable material, (2) established to extend north and south of the western edge of the approved house and deck to the north and south property lines to protect the PAMB ESHA and to ensure consistency with geologic setback requirements pursuant to Special Condition No. 1; and (3) installed prior to occupancy of the residence.

Finally, as recommended by FWS to avoid adverse impacts to mountain beavers on the parcel, Special Condition No. 10 restricts the timing of construction so that no development authorized by CDP No. A-1-MEN-07-047 shall occur during the PAMB breeding season period of December 15 through June 30. The condition also restricts ground-disturbing activities between the rainy season period of October 31 and April 1 to minimize the potential for soil disturbance during the rainy season.

In conclusion, although the proposed development is not an allowable use within the PAMB ESHA or within the area immediately adjoining the ESHA, the Commission finds that as discussed in detail above, the project will include measures to mitigate all significant adverse environmental effects on environmentally sensitive Point Arena mountain beaver habitat to the greatest extent feasible consistent with the requirements of LUP Policy 3.1-7 and CZC Section 20.532.100, which require that permitted development within an ESHA be sited and designed to prevent impacts which would significantly degrade such areas while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

Furthermore, this particular project involving a bluff face parcel and significant environmentally sensitive Point Arena mountain beaver habitat is unique and unusual and has been approved with conditions that are specific to the project. Approval of the project would not establish a precedent for the Commission or Mendocino County to approve development with PAMB ESHA for other parcels.

## **J. Visual Resources**

### **Summary of Applicable LCP Provisions:**

Land Use Plan (LUP) Policy 3.5-1 states in applicable part (emphasis added):

*The scenic and visual qualities of Mendocino County coastal areas shall be considered and protected as a protected resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and where feasible, to restore and enhance visual quality in visually degraded areas. New*

*development in highly scenic areas designated by the County of Mendocino Coastal Element shall be subordinate to the character of its setting.*

LUP Policy 3.5-15 states in applicable part (emphasis added):

*Installation of satellite receiving dishes shall require a coastal permit. In highly scenic areas, dishes shall be located so as to minimize visual impacts. Security lighting and floodlighting for occasional and/or emergency use shall be permitted in all areas. Minor additions to existing nightlighting for safety purposes shall be exempt from a coastal permit. In any event no lights shall be installed so that they distract motorists and they shall be shielded so that they do not shine or glare beyond the limits of the parcel wherever possible.*

Project Consistency with Applicable LCP Provisions:

The visual resources protection policies of the LCP require, among other things, that new development be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, and to be visually compatible with the character of surrounding areas. The subject property is not located in a designated “highly scenic area” (Exhibit No. 4). However, views to the ocean and Point Arena lighthouse are afforded across the property from Navarro Way, which is a public street.

The project will not adversely affect coastal views as required by LUP Policy 3.5-1. Although the house will block some blue water views from Navarro Way, public views still will be available around the sides of the house (there will be an approximately 25-foot separation between the proposed residence and the existing houses on the adjoining lots, which will allow for blue water views between the houses) (see Exhibit No. 5). Additionally, the vertical elevation of the roof ridge above natural grade as seen from the street has been designed to be low enough to allow visual sight lines over the roof to the horizon line of the ocean beyond from someone walking on Navarro Way.

The proposed development has been sited and designed in a manner that will be visually compatible with the surrounding development. The proposed single family residence will have a maximum average height of 15 feet above finished grade, well within the 35-foot the height limit established for the Suburban Residential zoning district and no taller than the neighboring houses. In addition, the proposed one-bedroom, one-story, 1,203-square-foot house with an attached one car garage and an approximately 30-foot-long driveway is consistent with the size and bulk of other surrounding residential development and will not be out of scale with its surroundings. The proposed exterior materials and finishes of the new residence are proposed to include a weathered-copper-colored standing seam metal roof, slate-colored fiber cement shingle siding, “Tuscany brown” aluminum clad wood windows, fiber cement board window and door trim, copper flashings, gutters, and downspouts, and painted aluminum or black vinyl rubber/plastic appliance and plumbing vents (see Exhibit No. 6). These proposed exterior colors are earth-tones that will blend well with the surrounding natural landscape.

The Commission finds that if the applicant or future owner(s) of the property choose to change the materials or colors of the residence to brighter, non-earth-tone colors or materials, the development may no longer be visually compatible with the character of the surrounding area and may become increasingly visible from public vantage points. To ensure that the exterior

building materials and colors used in the construction of the development are compatible with natural-appearing earth-tone colors that blend with their surroundings as proposed, the Commission attaches Special Condition No. 11(A), which requires that all exterior siding and roofing be composed of the colors proposed in the application or darker earth-tone colors only. The condition requires that the current owner or any future owner not repaint or stain the house or other approved structures with products that will lighten the color of the house or other approved structures without a permit amendment. In addition, all exterior materials, including roofs and windows, are required to be non-reflective to minimize glare. Additionally, Special Condition No. 11(B) requires that exterior lights be shielded and positioned in a manner that will not allow glare beyond the limits of the parcel. These requirements will ensure that the proposed residence in this location will be visually compatible with the character of the surrounding area.

Finally, the proposed development minimizes grading and the alteration of natural landforms, as required by LUP Policy 3.5-1. Under the proposed grading plan (Exhibit No. 7), the amount of necessary grading has been reduced from 205 cubic yards (as originally approved by the County) to 175 cubic yards (145 cubic yards for the proposed house and garage construction and 30 cubic yards for the proposed driveway construction). Proposed grading has been reduced by locating the house and garage further eastward on the property closer to the road, thereby shortening the driveway significantly from 1,200 square feet to the currently proposed 450 square feet, and by utilizing for the proposed building site the more gently sloping terrain at the east end of the property while still maintaining the necessary setbacks from the on-site septic system, which, due to soil properties and constraints, cannot be located elsewhere on the parcel (Exhibit No. 13).

Therefore, the Commission finds that as conditioned, the proposed project is consistent with LUP Policies 3.5-1 and 3.5-15, as the development will (1) not adversely affect coastal views from public areas, (2) be visually compatible with the character of surrounding areas, (3) minimize alteration of natural landforms, and (4) ensure that exterior lighting is minimized and installed so as not to shine or glare beyond the limits of the parcel.

#### **K. Public Access**

##### Summary of Applicable LCP Provisions:

Projects located between the first public road and the sea and within the coastal development permit jurisdiction of a local government are subject to the coastal access policies of both the Coastal Act and the certified LCP. Coastal Act Sections 30210, 30211, and 30212 require the provision of maximum public access opportunities, with limited exceptions. Section 30210 states that maximum access and recreational opportunities shall be provided consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse. Section 30211 states that development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. Section 30212 states that public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, adequate access exists nearby, or agriculture would be adversely affected.

In its application of the above policies, the Commission is limited by the need to show that any denial of a permit application based on this section or any decision to grant a permit subject to special conditions requiring public access is necessary to avoid or offset a project's adverse impact on existing or potential access.

Project Consistency with Applicable LCP Provisions:

Although the proposed development is located between the first public road and the sea, the project will not adversely affect public access. There are no trails that provide shoreline access within the vicinity of the project that will be affected by the proposed project. Furthermore, the proposed project will not create any new demand for public access or otherwise create any additional burdens on public access.

Therefore, the Commission finds that the proposed project does not have any significant adverse effect on public access, and that the project as proposed without new public access is consistent with the requirements of Coastal Act Sections 30210, 30211, 30212, and 30214 and the public access policies of the County's certified LCP.

**L. Alleged Violation**

Although certain development has allegedly taken place at the project site without the benefit of a coastal development permit (including "major vegetation removal" across the approximately eastern half of the property), consideration of the application by the Commission has been based solely upon the proposed project's conformance with the Mendocino County certified Local Coastal Program and the Chapter 3 public access policies of the Coastal Act. Approval of this permit does not constitute a waiver of any legal action with regard to the alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal development permit.

**M. California Environmental Quality Act**

Mendocino County is the lead agency for the purposes of CEQA review. The County determined that the proposed project is categorically exempt (Class 3) from CEQA requirements.

Section 13096 of the Commission's administrative regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the application, as modified by any conditions of approval, to be consistent with any applicable requirement 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 the proposed development may have on the environment.

The Commission incorporates its findings on conformity with Coastal Act policies at this point as if set forth in full. These findings address and respond to all public comments regarding potential significant adverse environmental effects of the project that were received prior to preparation of the staff report. As discussed herein, in the findings addressing the consistency of the proposed project with the certified Mendocino County LCP, the proposed project has been

conditioned to be found consistent with the certified Mendocino County LCP and Section 30010 of the Coastal Act. All feasible mitigation measures, which will minimize all significant adverse environmental impacts have been required. As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, which would substantially lessen any significant adverse impact that the activity may have on the environment. Therefore, the Commission finds that the proposed project can be found to be consistent with the requirements of the Coastal Act to conform to CEQA.

Click on the link below to go to the exhibits.

**EXHIBITS:**

1. Regional Location Map
2. Topographic Map
3. Aerial Photograph
4. Subject parcel within the Irish Beach subdivision as shown on certified LUP Map No. 22
5. Proposed Site Plan
6. Proposed Floor Plan & Elevations
7. Proposed Preliminary Grading Plan
8. Geotechnical Investigation by BACE Geotechnical dated December 9, 2008 (excerpt)
9. Recommended Geologic Setback (Plates 2 & 3 from BACE Geotechnical 12/9/08 report)
10. Conservation Easement & Deed Restriction Recorded Under Agreement Between Applicant & the U.S. Fish & Wildlife Service
11. U.S. FWS Letter & Restoration Plan for 2008 Impacts to Deed-Restricted PAMB Habitat
12. Delineation & Description of Modified PAMB ESHA
13. Evaluation of Soil Suitability for Septic System at Alternative Leach Field Location
14. Notice of Final Local Action & County Staff Report
15. Appeal
16. Area Subject to Open Space Restrictions Pursuant to Special Condition No. 6

## **APPENDIX A**

### **STANDARD CONDITIONS:**

**1. Notice of Receipt & Acknowledgement**

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 of interpretation of any condition will be resolved by the Executive Director of 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 & 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.