

CALIFORNIA COASTAL COMMISSION

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F7a

MEMORANDUM

Date: November 18, 2010

To: Commissioners and Interested Parties

From: Peter Douglas, Executive Director
Robert S. Merrill, District Manager – North Coast District

Subject: **Addendum to Commission Meeting for Friday, November 19, 2010
North Coast District Item F7a, Appeal No. A-1-MEN-09-023 (Wernette)**

This addendum to the staff report for Appeal No. A-1-MEN-09-023 mailed on November 4, 2010 presents: (I) revisions to the Staff Summary, (II) revisions to the recommended findings, (III) a revised Exhibit, (IV) copies of the new correspondence received since publication of the staff report, and (V) responses to comments made in correspondence received since publication of the November 4, 2010 staff report.

Staff continues to recommend approval of the permit with conditions as recommended in the November 4, 2010 staff report.

Text to be deleted is shown in ~~bold strikethrough~~, text to be added appears in **bold underline**

I. Revisions to Summary of Staff Recommendation

Revise the paragraph in the Summary of the Staff Recommendation that begins at the end of Page 4 and continues on to the top of page 5 as follows:

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 approval allows for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence that: (1) permanently restricting use of the property to resource dependent uses could potentially ~~eliminate~~ **significantly diminish** the economic value of the property; (2) residential use of a small

portion of the property would provide an economic use; and (3) an applicant would have had a reasonable investment-backed expectation that a fully mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the inconsistency of this use with LCP Policies and LCP Zoning would constitute a taking. Therefore, the staff recommended that the Commission find that the County LCP in this case does not preclude non resource-dependent development within ESHA and ESHA buffer.

REASON FOR CHANGES: Since publication of the staff recommendation, evidence has been submitted to the Commission that the neighbors of the subject property inquired in the past about purchasing the property (See Attachments B and C). The published staff recommendation indicates that denial of residential use of the subject property could be considered as a categorical Lucas-type of taking of private property, as no feasible economic use of the property that is consistent with LCP policies has been identified and denial would have a substantial economic impact on the value of the property. The fact that an inquiry was submitted in writing suggests that the property may have value to someone and thus denial of the project does not necessarily render the property valueless. Therefore, as the subject property may retain some value, the staff believes that denial of the project would not necessarily result in a categorical Lucas-type taking. However, staff continues to believe that denial of residential use on the property could be considered a takings under the Penn Central test, and continues to recommend approval to avoid a takings.

II. Revisions to Findings

A. Beginning On Page 84, revise the section of the ESHA findings (Finding 5) titled, “(D) 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 (i) Categorical Taking, as follows:

(i) 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

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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 residential (multifamily, boardinghouse, and mobile home parks); commercial (cottage industries); and civic use types (on-site alternative energy facilities, community recreation, day care and small school facilities, educational facilities, fire and police protection services, group care, lodge, fraternal and civic assembly, 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 development within environmentally sensitive coastal bluff morning-glory habitat, 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, commercial, or civic use types would still require building a home or other structure within coastal bluff morning-glory ESHA and ESHA buffer inconsistent with LUP Policies 3.1-2 and 3.1-7, and CZC Sections 20.496.015, 20.496.020, and 20.532.100(A)(1). Furthermore, the property is located within an established residentially-developed area (with single-family residential developments on the adjacent lots to the south and east) and where there is no impetus for public agencies to purchase the lot for recreational, open space, or other uses.

Regarding “passive recreation” which is a principally permitted use type that wouldn’t necessarily require building a home or other structure within coastal

bluff morning-glory 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 "Active Recreation" is not a conditionally permitted use of the subject parcel.

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 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., Gualala Point County Park, Schooner Gulch State Beach), and does not afford access to any beach, park, or other recreation area. Thus, there is no impetus for such public agencies to purchase the lot.

Although, none of the principally permitted or conditionally permitted uses at the subject property would avoid development within environmentally sensitive coastal bluff morning-glory habitat, be feasible, and provide the property with an economically viable use, denial of the application would not necessarily render the property "valueless." Appellant Duane Hines indicates in correspondence received by the Commission on November 10 (See Attachment B) that the adjacent neighbor previously made an offer to purchase the property which was refused. After the correspondence from Mr. Hines was received by the Commission, the applicant submitted correspondence that included as attachments, (1) a copy of a letter to the applicant from Mr. Hines dated March 11, 2006 indicating that if the applicant was interested, the adjacent neighbors would be willing to propose an offer to purchase the property, and (2) a return letter from the applicant acknowledging receipt of the March 11, 2006 letter from Mr. Hines (See Attachment C). The applicant indicates in his recent correspondence to the Commission that the applicant was not interested in selling the property at that time. It is important to note that no actual offer to purchase the property was made and no specific purchase price was proposed. Mr. Hines

only inquired as to whether the applicant would be interested in considering such an offer. It is unknown (a) exactly what value to attach to the subject property if it was to be used by the adjacent neighbor as an extension of the neighbor's property and as a buffer from other adjacent properties, (b) whether fair market value would have been offered, and (c) whether the person making the inquiry would have the same interest in the property if the Commission denied the permit. Nonetheless, the fact that an inquiry was submitted in writing suggests that the property may have value to someone and thus denial of the project does not necessarily render the property valueless. Therefore, as the subject property may retain some value, the Commission finds that denial of the project does not necessarily result in a categorical Lucas-type taking.

~~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.~~

REASON FOR CHANGES: Since publication of the staff recommendation, evidence has been submitted to the Commission that the neighbors of the subject property inquired in the past about purchasing the property (See Attachments B and C). The published staff recommendation indicates that denial of residential use of the subject property could be considered as a categorical Lucas-type of taking of private property, as no feasible economic use of the property that is consistent with LCP policies has been identified and denial would have a substantial economic impact on the value of the property. The fact that an inquiry was submitted in writing suggests that the property may have value to someone and thus denial of the project does not necessarily render the property valueless. Therefore, as the subject property may retain some value, the staff believes that denial of the project would not necessarily result in a categorical Lucas-type taking. However, staff continues to believe that denial of residential use on the property could be considered a takings under the Penn Central test, and continues to recommend approval to avoid a takings.

- B. **Beginning On Page 86, revise the section of the ESHA findings (Finding 5) titled, “(D) 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 (ii) Taking Under Penn Central as follows:**

(ii) **Taking Under Penn Central**

~~Although~~ **Even though** the Commission has already determined it is **not** 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 145-161-27 for \$160,000 with a closing date of September 11, 1997. On September 11, 1997, a Grant Deed was recorded as Instrument 15154, Book 2443, page 367 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to the applicant. Upon review of these documents, 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 may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence; however it could be argued that a reasonable person would not have had a reasonable expectation to build a house and garage of the size and scale as that proposed, given the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3.

To determine whether the applicant had an investment-backed expectation to construct a house on APN 145-161-27, it is necessary to assess what the applicants invested when they purchased that lot. 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.

The applicant purchased APN 145-161-27, an approximately 0.72-acre parcel, for a single purchase price of \$160,000. For the purposes of *de novo* review by the Commission, the applicant submitted a Property Interest Summary on April 18, 2020 (Exhibit 32). The applicant indicates the fair market value of the property interest for APN 145-161-27 at the time it was acquired was estimated to be

\$189,000 based on comparisons with other properties for sale in the Gualala area. No independent appraisal was conducted.

When the applicant purchased the property in 1997, there was no indication that development of a single-family residence on the parcel would not be possible due to botanical constraints. The coastal bluff morning-glory had only recently become listed by the California Native Plant Society and neither the county nor the Commission had regulated development based on the existence of the rare California plant. At the time that the applicant was attempting to purchase the property, the property was zoned for residential use and there were numerous existing homes on bluff top parcels in the North Gualala subdivision, including homes on the adjacent lots to the south and east of the subject parcel. In addition to other developments in the subdivision approved by the County following certification of their LCP in 1992, the adjacent residence to the south (APN 145-161-07) was approved by the Coastal Commission in 1974, with a subsequent modification approved June 23, 1975 (see CDP No. NCR-75-CC-438). The 0.3-acre parcel, which is now owned by appellant Duane Hines, consisted of approved development that included 3,000 square feet of land coverage (including pavement and decks) for a two-story single-family residence, plus installation of a septic tank and leach field. Consequently, the applicants may have had a reasonable *investment-backed* expectation that they had purchased a lot that could be developed consistent with the ESHA policies of the certified LCP, and their investment reflected that the future development of a residential use could be accommodated on APN 145-161-27. Given that: (1) numerous homes were in existence in the North Gualala subdivision at the time of the property purchase, including homes on the adjacent lots to the south and east of the subject parcel; (2) the property was planned and zoned for residential use; and (3) there was no indication at the time of purchase that development of a single family residence on the parcel would not be possible due to botanical constraints, viewed objectively, a reasonable person would thus have had a reasonable expectation that APN 145-161-27 could be developed as a residential parcel.

To assess whether the applicant had a reasonable expectation to build the proposed two-story house at the building footprint size of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade), and 2,100 square feet total of combined driveway, parking area, and emergency vehicle turnaround with a pervious concrete surface, the Commission reviewed the total house ground cover square footage and garage ground cover square footage of other developed residential lots within the immediate area surrounding the subject parcel as shown on Sheet 1 of the 86-parcel North Gualala Subdivision No. 3 (Exhibits 4 and 31).

The applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a house and garage

of the size and scale as that proposed (approximately 1,200 square feet combined ground cover footprint for house and garage, which is smaller than houses proposed in earlier applications at the subject site), given the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3.

On June 24, 2010, the applicant submitted to the Commission for *de novo* review an excel spreadsheet provided by the Mendocino County Assessor's Office that contains the parcel data for 31 developed residential parcels in the North Gualala Subdivision No. 3. Commission staff reviewed the parcel data, and analyzed data with information available from current and historic aerial imagery from the Coastal Records Project¹, and parcel data from County records accessed through RealQuest² online subscription services. In addition, Commission staff reviewed the permit history for the parcels. At the request of Commission staff, the applicant submitted additional information provided by the County regarding permit status for 11 of the parcels.

Upon review of all information, staff modified the list of 31 parcels provided by the applicant to exclude: (1) those parcels that supported commercial, non-residential uses (2 parcels); (2) those parcels that were developed after the applicant purchased the subject parcel (4 parcels), since developments after the time of purchase would not have affected the applicant's investment-backed expectations; (3) those parcels developed prior to implementation of the California Coastal Act (5 parcels); and (4) those parcels for which permit information could not be located (4 parcels). The latter two categories were excluded as developments that could not be reasonably expected to be replicated because they occurred without evidence of an approved permit issued by the Commission or by the County as part of a certified local coastal program.

House ground-cover was determined to be the total ground footprint of the house, rather than the total overall square footage of the house. For example, parcel 145-161-32 (Row 30, Exhibit 31), a 0.80-acre bluff-top parcel, has a ground cover square footage of 1,596, but a total square footage of 1,992 because it is a two-story structure. Total ground cover square footages of the 16 surrounding homes evaluated in the North Gualala Subdivision No. 3 range from 714 square feet on a 0.31-acre parcel (APN 145-163-01; Row 38, Exhibit 31) up to 2,274 square feet on a 0.25-acre parcel (APN 145-161-04; Row 19, Exhibit 31), with an average house ground cover square footage of 1,257 square feet. Garage ground cover square footages ranged from 308 square feet (APN 145-163-02; Row 39, Exhibit 31) to 929 square feet (APN 145-163-04), with an average of 470 square feet. The resulting total average ground cover footprint for a house and garage therefore is 1,727 square feet. Parcel sizes of the 16 surrounding homes evaluated in the North Gualala Subdivision No. 3 range from 0.25 acre to 1.56 acres, with an average parcel size of 0.39 acre. While the applicant's parcel is approximately 0.72 acre in

¹ Copyright (C) 2002-2010 Kenneth & Gabrielle Adelman, California Coastal Records Project, www.Californiacoastline.org

² CoreLogic Realquest subscription services for current parcel data accessed at www.RealQuest.com

size, only approximately 0.48 acre is physically feasible to build upon, as the remainder of the lot drops off steeply down to the Pacific Ocean below.

Therefore, The the applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence. Given that the average combined ground cover footprint for a garage and house is 1,727 square feet on an average parcel size of 0.39 acre, it could be argued that a reasonable person would have had a reasonable expectation to build a house and garage of the size and scale as that proposed (approximately 1,200 square feet combined ground cover footprint for house and garage, which is smaller than houses proposed in earlier applications at the subject site), given the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3.

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 planned and zoned for Suburban Residential (SR) use in the County's LCP. 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 (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 residential (multifamily, boardinghouse, and mobile home parks); commercial (cottage industries); and civic use types (on-site alternative energy facilities, community recreation, day care and small school facilities, educational facilities, fire and police protection services, group care, lodge, fraternal and civic assembly, 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 development within environmentally sensitive coastal bluff morning-glory habitat, be feasible, and provide the property with an economically viable use. 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 within coastal bluff morning-glory 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 “Active Recreation” is not a conditionally permitted use of the subject parcel. 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 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., Gualala Point County Park, Schooner Gulch State Beach), and does not afford access to any beach, park, or other recreation area. Thus, there is no impetus for such public agencies to purchase the lot for recreational, open space, or other uses.

~~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.~~

As noted above, a written inquiry regarding purchase of the property was received by the applicant in 2006. The inquiry did not constitute an actual purchase offer, and no specific purchase price was proposed. It is unknown (a) exactly what value to attach to the subject property if it was to be used by the adjacent neighbor as an extension of the neighbor’s property and as a buffer from adjacent properties; (b) whether fair market value would have been offered; and (c) whether the person making the inquiry would have the same interest in the property if the Commission denied the permit application. However, the fact that an inquiry was submitted in writing suggests that the property may have residential value to others. Therefore, even though no development of the site has been identified for a use that would avoid development within environmentally sensitive coastal bluff morning-glory habitat and still be feasible, denial of the project would not necessarily substantially diminish the value of the subject property as someone may be interested in purchasing the property.

As noted above, the ad hoc test identified in Penn Central for determining whether a regulatory taking might occur requires examination of three factors. These three factors include (a) an examination into the character of the government action, (b) its economic impact, (c) and its interference with reasonable, investment backed expectations. Whether or not a Commission denial would substantially diminish the value of the property, the Commission still has to consider the other two factors under the ad hoc test identified in Penn Central. As discussed above, the available evidence indicates that the applicant had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a house and garage of the size and scale as that proposed (approximately 1,200 square feet combined ground cover footprint for house and garage, which is

smaller than houses proposed in earlier applications at the subject site), given the established nature of North Gualala Subdivision No. 3, the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3, and the fact that there was no indication at the time of purchase that development of a single family residence would not be possible due to botanical constraints. Therefore, given that the reasonable investment backed expectation factor of Penn Central strongly weighs in favor of a finding that denial of this project constitutes a taking and as discussed below, the proposed project would not constitute a public nuisance under State law, the Commission finds that it is necessary to approve some residential use of the property to avoid a taking under the ad hoc inquiry required by Penn Central.

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, though not necessarily the exact residence proposed by the applicants, to provide a reasonable economic use of the subject property. ~~This determination is based on the Commission's finding in this staff report that residential 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.~~

REASON FOR CHANGES: Two kinds of revisions are made to this finding. First the finding has been revised to provide more details about the analysis conducted by staff of development in the surrounding area that lead to the conclusion that the applicant had a reasonable expectation to be able to build the proposed house with a footprint or ground coverage size of 1,200 square feet. The additional finding language details how the average combined ground cover footprint for residential development (house and garage) in the surrounding area approved under the Coastal Act or LCP at the time the applicant purchased the subject property is 1,727 square feet, which is larger than the 1,200-square-foot ground coverage proposed by the applicant. Second, the finding has been revised to reflect that even though an inquiry has been made in the past about possible purchase of the property by the applicant's neighbors, denial of the project could still be considered a takings under the ad hoc Penn Central test. The available evidence indicates that the applicant had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a house and garage of the size and scale as that proposed (approximately 1,200 square feet combined ground cover footprint for house and garage, which is smaller than houses proposed in earlier applications at the subject site), given the established nature of North Gualala Subdivision No. 3, the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3, and the fact that there was no indication at the time of purchase that development of a single family

residence would not be possible due to botanical constraints. Therefore, given that the reasonable investment backed expectation factor of Penn Central strongly weighs in favor of a finding that denial of this project constitutes a taking, staff believes that it is necessary to approve some residential use of the property to avoid a taking under the ad hoc inquiry required by Penn Central.

C. Corrections to Typographical Errors.

There are several typographical errors in the findings. These errors, and any other typographical errors in the report will be corrected in the Adopted Findings prepared after Commission action on the application. The typographical errors include (1) references throughout the document to approval by the County Planning Commission rather than by the Coastal Permit Administrator, and (2) references on pages 83 and 87 to the date of a property interest statement submitted by the applicant as being 2020 rather than 2010.

III. Revised Exhibits

A. Exhibit No. 31, “House Size Comparisons,” is replaced by a revised Exhibit No. 31 attached as Attachment A.

REASON FOR CHANGES TO EXHIBIT: Exhibit No. 31 contains house size, ground coverage, and parcel data for other developed residential lots within the immediate area surrounding the subject parcel useful for assessing whether the applicant had a reasonable expectation when the applicant purchased the property to build the proposed residence with the ground coverage proposed. Staff has modified Exhibit No. 31 to exclude data for those lots within the immediate area that were developed prior to implementation of the Coastal Act and those parcels for which permit information could not be located. Data for these lots were excluded as development that could not be reasonable expected to be replicated by the applicant because they occurred without evidence of an approved permit issued by the Commission or by the County under the development limitations imposed by the Coastal Act or the certified LCP.

IV. Additional Correspondence and Disclosures of Ex Parte Communications.

Since publication of the staff report, the Commission has received additional correspondence from Duane Hines, one of the appellants, as well as a response to the Hines letter from Frank Wernette, the applicant’s agent. These letters are attached as

Attachments B and C, respectively. In addition, Commissioners have submitted completed forms disclosing Ex Parte communications they have had with persons commenting on the project. Those Ex Parte disclosure forms are attached as Attachments D and E.

V. Responses to Comments Received

Since publication of the staff recommendation on November 4, 2010, the Commission received a letter from Appellant Duane Hines on November 10, 2010. Responses to comments made in the letter not addressed above in changes to the staff recommended findings are included below:

Comment No. 1: Changes to Project. At various points in the letter, comments are made suggesting that the project before the Commission is not the project that was appealed to the Commission.

Response: The applicant has not made changes to the project description since the Local Notice of Final Action was received by the Commission on May 7, 2009. As discussed in the staff report, however, two previous local applications for residential development on the subject parcel were reviewed and denied by the County before the current project was approved. The current project differs from the earlier denied projects, primarily in that the footprint has changed to accommodate a uniform 40 foot-geologic bluff setback. The previous project designs encroached closer to the bluff edge and did not provide for the uniform 40-foot bluff setback recommended in the updated geologic reports. Thus, the earlier design alternatives are not feasible alternatives as they do not minimize geologic hazards, ensure the project will not contribute to geologic hazards, and do not conform to certified LCP geologic hazard policies.

Comment No. 2: Site Drainage Will Lead to Soil Instability. The commentator opines that the drainage system that distributes water underneath the house will lead to soil instability.

Response: As discussed on pages 105-106 of the staff report, the applicant proposes to utilize a perforated pipe drainage system to capture and evenly distribute stormwater and roof runoff across the surface of developed areas underneath the slightly elevated structure before runoff ultimately drains south and west along the parcel. The design includes a pervious concrete driveway and parking area, and a perforated pipe grid system under the residential structure to distribute surface water runoff, with roof runoff tied into the pipe grid to ensure that drainage would not be hindered by the development. The drainage design is intended to mimic current conditions whereby rainfall evenly infiltrates across the parcel surface and ultimately drains south across the surface. The surface water distribution system is not buried within the soil with the intent to cause all of the collected runoff to infiltrate into the

ground. Rather, the perforated pipe grid system is placed within a layer of gravel placed on top of the existing ground surface to allow the collected to runoff to runoff laterally through the gravel across the parcel surface and partially infiltrate as runoff currently does on the vacant parcel. The Commission's staff geologist concurs with the drainage plan and indicates the plan and the proposed project will not lead to stability issues at the site or adjacent to it.

Comment No. 3: Additional ESHA: The commentator notes that botanical surveys indicate that the numbers of rare plant specimens on the site and adjoining areas have increased over time:

Response: The recommended findings (see pages 69-80 of staff report) also note how more individual rare plant specimens have been observed on the property over time and conclude that all portions of the subject parcel with the exception of the areas dominated by pampas grass or other non-native vegetation constitute coastal bluff morning-glory and /or other rare plant environmentally sensitive habitat. The findings also conclude that an approximately 369-square-foot portion of the driveway/parking area and an approximately 104-square-foot-portion of the footprint of the home are within the rare plant ESHA and that the project is inconsistent with ESHA buffer policies of the LCP. However, to preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, the staff recommendation allows for the construction of a residential development.

Comment No. 4: Development Inconsistent with LCP Required Floor Area Ratios: The commentator indicates that the proposed development is inconsistent with the established floor area ratio requirements of the Gualala Town Plan.

Response: The Gualala Town Plan is incorporated into the certified Mendocino County LUP, and the certified Coastal Zoning Code (CZC) contains standards particular to the Gualala Town Plan area. Although the Gualala Town Plan and the CZC do require that development in certain land use classifications and zoning districts in Gualala such as the Gualala Village Mixed Use and Gualala Highway Mixed Use land use classification not exceed certain floor area ratio requirements, no such floor area ratio requirements are imposed in the Suburban Residential land use classifications and zones. CZC Section 20.385.045 does impose a maximum lot coverage standard for the Suburban Residential zoning district of fifty (50) percent. The proposed development meets this standard as the development covers only approximately 11% of the project parcel.

EXHIBIT 31.
North Gualala Subdivision No.3
House Size Comparisons

	A	B	D	E	H	J	K	L	M	N	O	P	Q	R
1	Used in Home Size Comparison Analysis? (Y/N)	APN	NAME	Address	Before (B) or After (A) 1997 parcel buy?	Bluff Parcel ?	2-Story	LOT SIZE (Acres)	LOT SIZE (sf)	TOTAL HOUSE SIZE (sf)	House Ground Cvg (sf)	Garage (sf)	House G.C. + Garage (sf)	Notes
2	N/A	145-161-27	Proposed Wemette Home (applicant)	38454 Robinson Reef Drive		Y	Y	0.72	31,500	1,950	850	350	1,200	
3	N	145-161-11	Harnell	No Address	N/A			0.28	12,196					No address, no improvements
4	N	145-161-16	Vaskelis	No Address	N/A			0.33	14,374					No address, no improvements
5	N	145-161-25	Shinn	38190 Old Coast Highway	N/A			0.72	31,363					No improvements
6	N	145-161-30	Shinn	No Address	N/A			0.12	5,227					No address, no improvements
7	N	145-161-33	Brown	38600 Robinson Reef Drive	N/A	Y		1.02	44,431					No improvements
8	N	145-161-34	Hopkins	No Address	N/A			0.35	15,246					No address, no improvements
9	N	145-162-1	Clement	38411 Robinson Reef Drive	N/A	N	N	0.26	11,325	1,248	1,248	0	1,248	Non-residential structure (restaurant) No address, no improvements
10	N	145-162-12	Green	No Address	N/A			0.31	13,503					No address, no improvements
11	N	145-162-15	Francisco	47020 Westward Ho	N/A	N		0.27	11,761				0	No improvements
12	N	145-162-2	Hines	No Address	N/A			0.27	11,761					No address, no improvements
13	N	145-162-3	Rosensteel	38431 Windward Ct.	N/A	N		0.26	11,325				0	No improvements
14	N	145-162-4	Coast Construction Co.	38460 So. Hwy 1	N/A	N		0.28	12,196	2,520	2,520	0	2,520	Non-residential structure No address, no improvements
15	N	145-162-5	Balter	No Address	N/A			0.30	13,068					No address, no improvements
16	N	145-162-9	Ford	38461 Robinson Reef Drive	N/A	N		0.25	10,890				0	No improvements
17	N	145-163-5	Talamini	No Address	N/A			0.25	10,890					No address, no improvements
18	N	145-165-1	Hopkins	No Address	N/A			0.27	11,761					No address, no improvements
19	Y	145-161-04	Bobba	38430 Robinson Reef Drive	B	Y	N	0.25	10,890	2,274	2,274	529	2,803	
20	N	145-161-05	Schnieders	38440 Robinson Reef Drive	B	Y	N	0.25	10,890	1,152	1,152	560	1,712	Pre-Coastal Act
21	N	145-161-06	Hines (formerly Turnlund appellant)	38450 Robinson Reef Drive	B	Y	N	0.27	11,761	1,480	1,480	528	2,008	Pre-Coastal Act
22	Y	145-161-07	Hines (appellant)	38460 Robinson Reef Drive	B	Y	Y	0.30	13,068	2,465	1,616	768	2,384	
23	N	145-161-09	Wemette	38480 Robinson Reef Drive	B	Y	N	0.28	12,196	1,500	1,248	288	1,536	Pre-Coastal Act
24	Y	145-161-12	Wolk	38520 Robinson Reef Drive	B	Y	N	0.26	11,325	1,476	1,345	576	1,921	* Includes basement of 131 sf
25	N	145-161-13	Shumway	38540 Robinson Reef Drive	B	Y	N	0.26	11,325	1,411	1,528	318	1,846	Pre-Coastal Act
26	N	145-161-14	Hawkins	38550 Robinson Reef Drive	B	Y	Y	0.26	11,325	1,678	1,194	550	1,744	Permit info N/A
27	N	145-161-15	Hickey	38560 Robinson Reef Drive	B	Y	N	0.28	12,196	1,420	1,420	501	1,921	Permit info N/A
28	Y	145-161-17	Vaskelis	38600 Robinson Reef Drive	B	Y	Y	0.35	15,246	2,082	1,086	504	1,590	
29	Y	145-161-31	Brown	38570 Coral Ct	B	Y	N	1.56	67,953	2,076	1,507	378	1,885	* Includes basement of 569 sf
30	Y	145-161-32	Brown	38614 Coral Ct	B	Y	Y	0.80	34,848	1,992	1,596	512	2,108	
31	Y	145-162-11	Trost	38481 Robinson Reef Drive	R	N	Y	0.28	12,196	1,102	798	441	1,239	

**EXHIBIT 31.
North Gualala Subdivision No.3
House Size Comparisons**

	A	B	D	E	H	J	K	L	M	N	O	P	Q	R
1	Used in Home Size Comparison Analysis? (Y/N)	APN	NAME	Address	Before (B) or After (A) 1997 parcel buy?	Bluff Parcel ?	2-Story	LOT SIZE (Acres)	LOT SIZE (sf)	TOTAL HOUSE SIZE (sf)	House Ground Cvg (sf)	Garage (sf)	House G.C. + Garage (sf)	Notes
32	Y	145-162-13	Jarvis	47060 Westward Ho	B	N	N	0.25	10,890	1,176	1,176	528	1,704	
33	Y	145-162-14	Helms	47040 Westward Ho	B	N	N	0.26	11,325	1,418	1,418	480	1,898	
34	N	145-162-16	Miller	47000 Westward Ho	B	N	N	0.25	10,890	1,520	1,520	576	2,096	Pre-Coastal Act
35	Y	145-162-6	Oreno	38447 Windward Ct.	B	N	N	0.26	11,325	952	952	0	952	
36	N	145-162-7	Simons	38451 Windward Ct.	B	N	N	0.32	13,939	980	980	0	980	Permit info N/A
37	N	145-162-8	Ford	38457 Robinson Reef Drive	B	N	Y	0.26	11,325	1,853	664	564	1,228	Permit info N/A
38	Y	145-163-1	Jones	38575 Robinson Reef Drive	B	N	Y	0.31	13,503	1,888	714	460	1,174	
39	Y	145-163-2	Grossman	38551 Robinson Reef Drive	B	N	N	0.27	11,761	1,538	1,230	308	1,538	
40	Y	145-163-3	McDonald (1600)	38525 Robinson Reef Drive	B	N	Y	0.26	11,325	1,608	984	0	984	
41	Y	145-163-4	Talamini	38501 Robinson Reef Drive	B	N	Y	0.26	11,325	1,975	1,012	929	1,941	
42	Y	145-165-21	Carroll	47045 Westward Ho	B	N	N	0.28	12,196	1,360	1,360	440	1,800	
43	Y	145-161-02	Shinn	38410 Robinson Reef Drive	A (B=1040 s.f.)	Y	N	0.29	12,632	1,501	1,501	672	2,173	Studio over Garage- 448 sf; Deck 160 sf. Structure was expanded in 2002, but pre-1997 size was 1,040, which was used in the analysis
44	N	145-161-03	Fischer	38420 Robinson Reef Drive	A	Y	Y	0.25	10,890	1,840	1,450	528	1,978	
45	N	145-161-08	Stein	38470 Robinson Reef Drive	A	Y	N	0.32	13,939	1,368	1,368	484	1,852	
46	N	145-161-10	Giusso	38490 Robinson Reef Drive	A	Y	Y	0.25	10,890	2,280	1,480	576	2,056	
47	N	145-162-10	Healy	38471 Robinson Reef Drive	A	N	Y	0.30	13,068	1,925	1,412	364	1,776	
48	Average Parcel Size ¹ :								0.39	Avg. House G.C.+ Garage ²			1,727	
49														
50														
51														
52	Total Parcels Used in Analysis: 16										Average total house sizes in subdivision ³ :		1,651	
53											Average house ground cover sizes in subdivision ⁴ :		1,257	
54											Average garage sizes in subdivision ⁵ :		470	
55											Average house g.c. plus average garage g.c. ⁶ :		1,727	
56	Notes:													
57	(1) Average size calculated using the average lot size, in acres, of all developed parcels used in the analysis.													
58	(2) Calculated by adding area of house ground cover (g.c.) and garage for each parcel, then using the average of this total amount for all developed parcels used in the analysis.													
59	(3) Calculated using average of total house sizes from Column L, for developed parcels (includes 2nd story or split level in some instances).													
60	(4) Calculated using average of house ground cover sizes from Column O (excludes consideration of 2nd story or split level that does not affect ground footprint).													
61	(5) Calculated using average garage size for those parcels with garages.													
62	(6) Calculated by adding cell Q53 (average house ground cover size) and Q54 (average garage size) to achieve building footprint consistent with surrounding development (Commission Recommended size for proposed project)													

Duane M. Hines
415 Coloma St.
Sausalito, CA 94965

California Coastal Commission
North Coast District Office
710 E. St., Suite 200
Eureka, CA 95501-1865
Attn: Tamara L Gedik

RECEIVED
NOV 10 2010
CALIFORNIA
COASTAL COMMISSION

Dear Tamara;

Thank you for forwarding the recent correspondence regarding the Wernette project.

I have received the documents and would like to offer some comments and observations for your consideration in the staff report:

Alternative Drainage approaches for A-1-MEN-09-023

The footprint drawing of the proposed house placement is from an earlier design, there have been two others since the one shown. This is not the footprint as appealed.

The option of A and B apparently has been eliminated and the approach presented in the appealed project was not considered. The proposal was to provide concrete paving in the front yard setback, that would allow drainage through the paving and feed a leach line system located under the house. It has been our contention that this is contrary to the geotechnical engineer's recommendations.

Updated Geological Report

This report is based on a previous site plan (building location) and does not show the proposed building site as appealed.

Page 13 (site drainage) does not address the Paoli leech field design, but does state that the "surface drainage systems should not be connected to subsurface drainage systems".

We believe that the water saturation of the soil under the foundation will lead to soil instability. This has not been clearly discussed.

Page 9 (site preparation and grading) The stripping, scarafing, filling and compaction of the soil will take place in an ESHS containing 40-50 endangered plant species.

ATTACHMENT B
(1 of 20)

This is an area where bulkheads are to designed to cut through the center of the ESHA and will require removing a substantial portion of the hillside (ESHA).

Property interest information 4-18-10

The item 9 response is not correct. The adjacent property owners did offer, in writing to purchase the Wernette parcel. That offer was rejected.

Botanical Considerations

Over time the ESHA'S have increased in size and quantity of specimens on the subject property. Until recently, there was never a study completed on the adjacent properties. When completed, the study showed numerous rare plant specimens within 50' of the subject property. These must be taken into consideration now.

All of the bulkhead cuts are in ESHA'S and will require removing approximately 50% of the ESHA.

Floor Area Ratio

Mr. Wernette's letter of June 24, 2010 includes a house size comparison schedule for the surrounding area. This comparison is not valid.

The Wernette parcel has a gross area of 31,000 Sq.Ft. but approximately 60% of the lot is in the Pacific Ocean. The remaining land surface, after allowance for erosion setbacks, front yard setbacks and ESHA'S leaves a net buildable area on the lot of 30x40. The proposed house would carry a floor area ratio of 2:1 (2 parts house to 1 part land). The surrounding houses are 1:3 floor area ratio.

County of Mendocino Coastal Element section 4.14

The Gualala Town Plan w establishes floor area ratios which should be respected. This project exceeds the allowed ratio.

Reasonable expectations of landowner

Mr. Wernette had the opportunity to do his due diligence prior to the purchase of the property. The adjacent neighbor had made an offer to purchase the property which was refused. There have been 10-15 public hearings on this project over the span of 13 years at several community levels. There must be a good reason for this.

Mr. Wernette has long known that this property is problematical, yet he has not taken the opportunity to recover financially through a sale of the property.

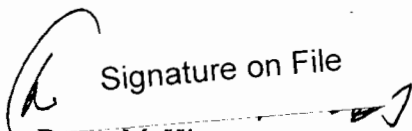
Taking

It should be noted that the site plan under appeal was moved from its previous location which was not on an ESHA and had available unrestricted building area. The contention that the site under appeal has no alternative location is untrue. **A taking is not required.** There is a serious question that Mr. Wernette had a reasonable expectation that this parcel could be developed.

It is likely that something could be constructed on the parcel, but it should not be to the scale of surrounding properties since the lot will not support a large house.

Thank you for your consideration of the above, I trust it may be of help in the preparation of the upcoming staff report.

Sincerely,


Signature on File
Duane M. Hines

Enclosed:

1. Figure G-1
2. Photograph
3. Previous design
4. Proposed building footprint

Duane M. Hines
 415 Coloma Street
 Sausalito, California 94965

April 22, 2009

331-3656

County of Mendocino
 Department of Planning and Building Services
 790 South Franklin Street
 Fort Bragg, CA 95437

ATTN: Coastal Permit Administrator

RE: CDP #51-2008

Dear Mr. Lynch:

This letter is to address the staff report and letter comments (January 29, 2009) by Mr. Frank Wernette regarding CDP #51-2008.

Drainage Plan

The proposed pervious concrete paving and leech line dispersal system is questionable from the standpoint that it is unrealistic to think that such a system will not eventually fill with sediment and cease working. The proposed mitigation of vacuuming and pressure-washing the concrete every three months is ridiculous, unenforceable and would only extend the time before the sediment fills the porosity of the concrete. When that happens, sooner or later, the water flow from the hill will be forced, by the house, to travel to the southern end of the lot and create a serious erosion problem. Ironically, that flow would erode Dr. Wernette's own parcel to the south side of Mr. and Mrs. Hines' house!

It should be noted that the placement of a pipe grid to disperse water from the previous concrete drive will have to be 4' to 5' below the ground level

County of Mendocino

April 22, 2009

Page 2

and house floor. Grade beams, crossing pipes, and gravel will extend that far under the grade. This will require a substantial cut below the grade.

The collection of water utilizing this system will substantially increase the water retention of the soil. Mr. Glomb's letter of April 9, 1999 under Recommendations states: "In no case should focused surface runoff flow over the sea cliff and drainage should not be allowed to pond on the site."

The drainage grid is a concentration of ponded water under the house.

Mr. Glomb's letter of June 5, 1992 recommends: "Surface and sub-surface drainage systems (including roof drains) should be installed to intercept surface runoff at the site and ground water flow along the base of fill to reduce saturation and erosion of the bluff top soils and rock. Drains should outlet so as to not cause sea cliff erosion."

Mr. Glomb's letter of August 13, 2002 contains similar recommendations.

On November 6, 2008, the GMAC recommended:

Drainage:

The Council believes the drainage plan needs to be fully reviewed and include a comprehensive study of the water flow and debris on the pervious driveway and parking area as well as the grid of perforated pipe underneath the house over multiple storm events (and throughout the rainy season) to insure that the proposed system will be able to process the runoff load during similar periods.

The expert comments above leave serious doubt about the drainage system operation and effect on the stability of the soil below the foundation when saturated. Over time the accumulated groundwater would encourage an avalanche effect as water travels to the sloped rock subsurface encouraging slippage.

There is a question as to where the water flow through the pervious driveway goes. Is there a grid system proposed in order that the flow can

County of Mendocino
April 22, 2009
Page 3

reach the under house grid? It appears that the pervious concrete is directly on the soil and that the underlying soil will not absorb the water at the rate it comes through the pervious concrete.

We believe that these concerns should be resolved through a complete design that would preclude a potential major failure of the hillside as a result of water saturation.

It is interesting that the findings on page seven of Mr. Wernette's letter find that the plants in the southern area of the parcel are ESHAs but the ones to the north are not!

ESHA

It is our contention that the existence of endangered plants is the basis to declare the area an ESHA. Arguments that the plants are not important, or that they are growing in the area, do not change that the plants exist there and have been there for years. That above, is the basis to declare a 100' and 50' buffer area.

The proposed structure encroaches 30' into the 50' buffer. It is unrealistic to think that construction activity would take place in the remaining 20' regardless of declared mitigation measures.

The argument that there is no other feasible location on the parcel is not valid because even after the revised setback measurement (40'), the area representing the last proposal is available. The area shown on Fig. B-5 Construction Zone would measure 40' x 38'.

Construction in that area would preclude the requirement to encroach upon the 50' ESHA to the north.

The proposed structure would encroach on the ESHA leaving approximately 1200 sq. ft. of unrestricted ground space unused -- a bonus for the applicant and an invasion of the ESHA.

County of Mendocino

April 22, 2009

Page 4

Conclusion:

There should be considerably more development and description of the details of the drainage system and an evaluation of the design by an independent soils engineer to determine the effect upon the bluff stability.

There is no justification to move the house footprint to a place on the parcel that violates the 50' ESHA law when there is another feasible location to build elsewhere on the parcel. There is a 38' x 40' area free of restraints which is sufficient to build a small residence. That is all the parcel will allow after all setbacks, etc. are considered.

There is enough area to build, therefore no taking is required.

An applicant's desire for a larger house is not justification to encroach on an ESHA, particularly when there are other alternatives.

We believe the County should decide in favor of the environmental laws rather than accommodating a larger house for an individual applicant.

Thank you for your consideration of this matter.

Signature on File



Duane Hines

415-298-3565

THE WERNETTE PROJECT
GUALALA, CALIFORNIA

Figure 4. Previous Proposed Building Footprint and Updated Plant Locations



**Julie A. Verran,
P.O. Box 382, Gualala, CA 95445-0382
Phone and Fax (707) 884-3740
Office: East Side Tower, Anchor Bay Village**

Mr. and Mrs. D. Hines
627 Marina Blvd.
San Francisco, CA 94123

July 15, 2010

Dear Mr. and Mrs. Hines,

On July 12-15, at your request, I conducted a focused survey of the un-mowed, down-slope portions of your two residential properties on Robinson Reef Drive in Gualala, Mendocino County, for *Calystegia purpurata* ssp. *saxicola*, Coastal Bluff Morning Glory [Photo P7170237].

The plant communities present are Coastal Bluff Shrub and Coastal Scrub. Both are in very good shape for a ruderal site, with strong specimens of diverse native plants, in spite of the presence of several invasive, non-native plants.

The Coastal Bluff Morning Glory was found occurring abundantly on your property. All the plants observed were the rare subspecies. This plant is listed as 1B, meaning rare in California and not occurring in other states. It is currently in bloom throughout its local range.

Your two properties on Robinson Reef Drive comprise the richest site for this plant that I have seen, while observing it in bloom on scattered sites from Bodega Head to Navarro Bluffs. One significant role of the Coastal Bluff Morning Glory is supporting native bees, which are significant pollinators and at risk [Photo P7150184]. This and subsequent photos will follow by mail.

Using binoculars and a 60-power spotting scope, I observed the Coastal Bluff Morning Glory in bloom on the property below yours which is proposed for a residence, across the old railroad grade from concentrations of the plant on your properties. These may have been one population until the railroad was graded and built ca. 1860. [Photo P7150179]

The re-vegetation of the railroad grade since 1972 can be seen on the California Coastal Records Project website, www.californiacoastline.org, by entering the 2009 image number, 200904572 on the home page, and clicking on "Time Comparison." The site will show a range of photos for each year's series. The best images for this site are: 2005 image, 200504147; 2002 image, 12090; 1993 image, 199300159008 near bottom of image; 1987 image, 8716025; 1979 image, 7917031; 1972 image, 72100228.

The first botanist to list Coastal Bluff Morning Glory on a Gualala permit survey was Jon Thompson, former Manager of the USDA Forest Service plant nursery at Magalia. He found it growing primarily within the coastal scrub on a property northwest of yours, and he advised local CNPS members to look for it in similar brushy sites.

I am familiar with the plant. It occurs on my property located about a quarter-mile south of yours, which I manage for the morning glory. I presented an original poster on the plant at the

2.

California Native Plant Society Conservation Conference in Sacramento in January, 2009, showing three ways to distinguish the rare subspecies from the common one.

My special project for a 2008 Natural History Certificate from College of the Redwoods Mendocino Coast was a study of the range of the plant and the other native plants with which it occurs. Earlier, I took botany classes at UC Berkeley and Santa Rosa JC. In 2006, I took a two-day CNPS workshop at UC Davis Bodega Bay Marine Lab, for a certificate in Protocols for Botanical Surveys; and was able to see the rare subspecies blooming in the coastal bluff area where it was first collected by Miss Alice Eastwood ca. 1900.

In 2003, Dr. Richard K. Brummitt, the British botanist who first separated the genus *Calystegia* from the genus *Convolvulus* visited my property with four prominent California botanists. He collected many stems with varying leaf characteristics and later told his hosts they were all the rare subspecies, despite their variations in leaf shape. These specimens formed part of the basis for his new treatment of *Calystegia* for the Jepson Manual of the Higher Plants of California. In his new treatment, rounded leaf form is no longer diagnostic, but is included in the generic description. Further discussion of the two subspecies will follow, with references.

On your southern property, to facilitate photography, orange surveyor's tape was tied to a taller plant near each appearance of the fragile-stemmed Coastal Bluff Morning Glory. The plant may have multiple stems to an individual. Each flag was placed near two or three stems visible in the upper layer of the brushy vegetation. More stems may be present within the taller portions of the brush. [P7160199]

Eighty tape flags were placed, located in two distinct patches with a stand of taller, dense brush in between them, where the Coastal Bluff Morning Glory may also occur, twining beneath the woody plants. There are an estimated 200 stems of the plant in the un-mowed portion of your southern property, and more in the mowed portion. The position of the main concentration of Coastal Bluff Morning Glory near your deck was delineated as you requested on a copy the applicant's map of the site.

The northwestern property you own is more impacted by invasive weeds and spreading horticultural plants, but it is still a rich site for Coastal Bluff Morning Glory, which occurs in the mowed area and also in a stand of blooming *Kniphofia uvaria*, Red-hot Poker. Here survey flags were placed marking the appearance of the Coastal Bluff Morning Glory at the edge of the mowed area. To show up next to the *Kniphofia* blooms, six-foot wooden stakes wrapped with blue survey tape mark groups of Coastal Bluff Morning Glory stems within the *Kniphofia* clumps. [Photo P160193]

Survey flags and taped stakes line up with each other, and some also line up with the Marin County firm's white survey flags on the far side of the old RR grade on the ocean front property [Photo P7170205]. There appears to be a significant rare plant ESHA which has persisted on these three properties across time and space. [Photo P7150176]. There is a boundary marker in the *Kniphofia* near the larger concentration of Coastal Bluff Morning Glory on your property. This was used as a basis for an ESHA delineation you requested. If the applicant's ESHA 50-foot

3.

circles were included on this map, they would overlap.

A licensed Wildlife Biologist familiar with local conditions should evaluate all these properties for special-status animals. In the bluff scrub which faces northwest-north grow numerous healthy plants of several native species in the carrot family [Photo P7150184]. Such slopes are classic habitat for the Federal Endangered Species, *Aplodontia rufa nigra*, Point Arena Mountain Beaver, which is anecdotally present in the area, and which historically extended its range to Point Reyes.

The application includes a letter stating that no such determination need be made because the area is outside the known range of the animal. In my opinion, this view is incorrect, since it does not give animals a chance to extend their range, as they well may do in response to climate change, fires, and other factors. Current thinking is that rare species which are holding their own or expanding their range have priority for preservation and mitigation.

Food plants for two endangered butterflies occur near your properties and may be present: *Viola adunca*, Early Blue Violet, is the food plant of the Behrens Silverspot Butterfly. *Lotus formosissimus*, Harlequin Lotus, is the food plant of the Lotis Blue Butterfly. [Photos of those plants blooming elsewhere are available.]

When a two-box load of Ice Plant was removed for photographic purposes from the cinder block wall that marks the property line [Photo P7150178] on the southeast side of the proposed access drive, two native side-band snails, with their shells sealed for the summer, fell out. The genus is probably *Helminthoglypta*, some members of which are listed as rare. A snail expert would be needed to identify them to the required level. In the meantime, avoid treading in the brush or using snail poison. Remove by hand and destroy French snails from newly-purchased potted plants. A provisional snail ESHA is delineated using the cinder block corner as reference point.

The summer portion of a full botanical survey of your two properties may be carried out next week. The other two bloom periods are spring and fall. Ideally, all should be done.

Yours sincerely

Signature on File



Julie A. Verran

The Wernette Project in Gualala, CA

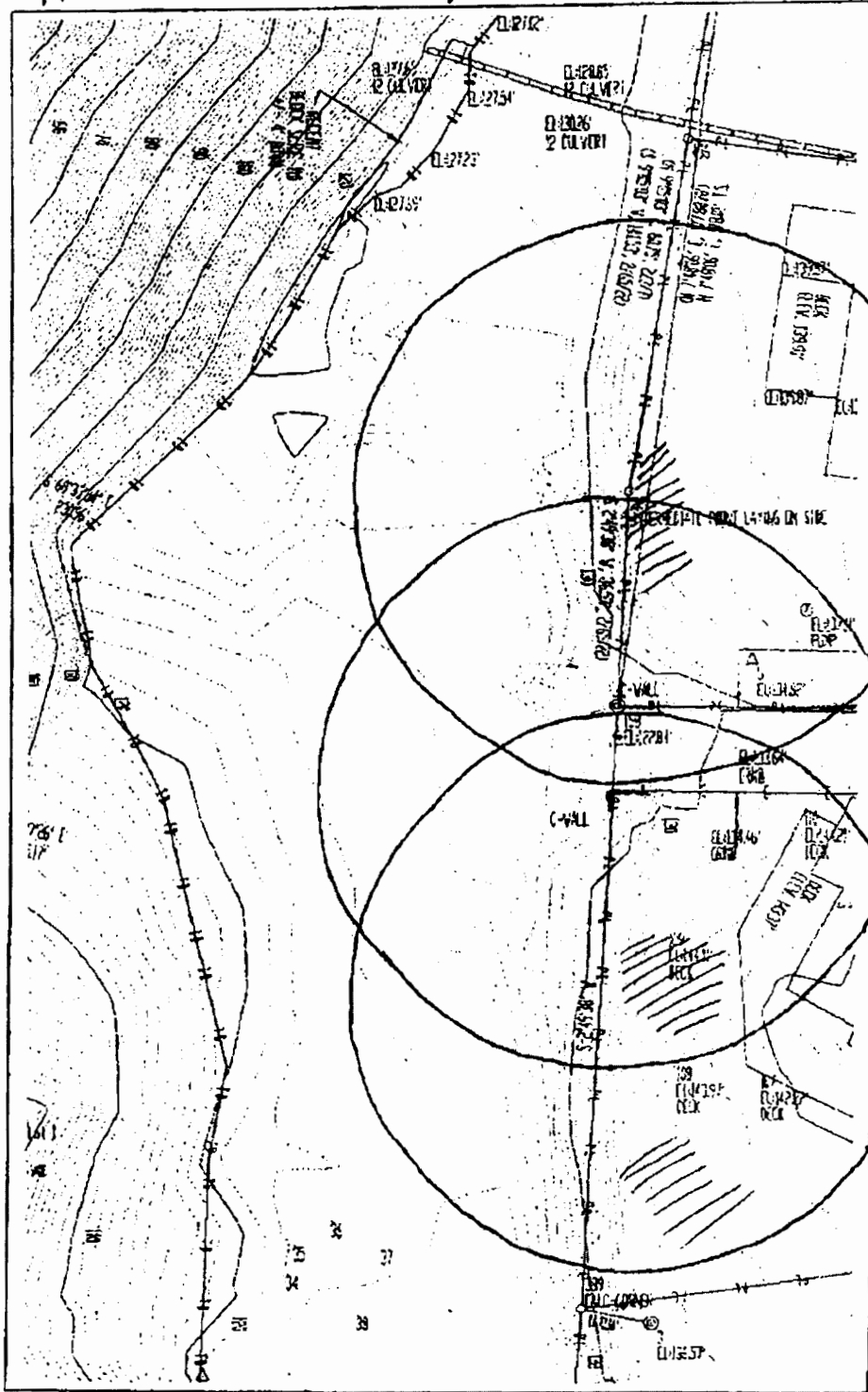
SECTION D: Site Topography

PLANT: *Calystegia purpurata* ssp. *saxicola* (CAPUS); SNAIL: *Herminthoglypta* sp. ?

THE WERNETTE PROJECT
GUALALA, CALIFORNIA
Figure D-2 Topographic Map - 2

Suggested ESHA delineated by J.A. Verran; Submitted by D.D. Hines

July, 2010



Proposed berms cut for bulkhead

Duane M. Hines

415 Coloma Street
Sausalito, CA 94965

July 19, 2010

Robert Merrill
California Coastal Commission
710 E Street, Suite 200
PO Box 4908
Eureka, CA 95501-1885

Re: Wernette Appeal

Dear Mr. Merrill:

Enclosed, you will find a detailed Botanical study with plant species maps for our properties adjacent to the Wernette parcel.

Through the history of this case all botanical studies have been conducted by WRA consultants under commission by the Wernettes. None of these studies were conducted on the adjacent properties.

We have now completed a Botanical study on our parcels and have discovered 80-90 listed species of the type found on the Wernette reports. The attached botanical map shows numerous locations where the required ESHA circles for the plants located on the Hines' property extend onto the Wernette property and in some cases they overlap others previously descended by the WRA survey on the Wernette parcel. All plants have been located by stakes.

By this letter, we request that our study be evaluated by the Coastal Commission staff and that your botanical expert consider the habitat without consideration of property lines. Photographs will be provided under separate cover.

We believe that all parcels combined create a substantial ESHA.

Thank you for your consideration.

Duane M. Hines

Julie A. Verran,
P.O. Box 382, Gualala, CA 95448-0382
Phone and Fax (707) 884-3740
Office: East Side Tower, Anchor Bay Village

Mr. and Mrs. D. Hines
627 Marina Blvd.
San Francisco, CA 94123

July 15, 2010

Dear Mr. and Mrs. Hines,

On July 12-15, at your request, I conducted a focused survey of the un-mowed, down-slope portions of your two residential properties on Robinson Reef Drive in Gualala, Mendocino County, for *Calyptegia purpurata* ssp. *saxicola*, Coastal Bluff Morning Glory [Photo P7170237].

The plant communities present are Coastal Bluff Shrub and Coastal Scrub. Both are in very good shape for a ruderal site, with strong specimens of diverse native plants, in spite of the presence of several invasive, non-native plants.

The Coastal Bluff Morning Glory was found occurring abundantly on your property. All the plants observed were the rare subspecies. This plant is listed as 1B, meaning rare in California and not occurring in other states. It is currently in bloom throughout its local range.

Your two properties on Robinson Reef Drive comprise the richest site for this plant that I have seen, while observing it in bloom on scattered sites from Bodega Head to Navarro Bluffs. One significant role of the Coastal Bluff Morning Glory is supporting native bees, which are significant pollinators and at risk [Photo P7150184]. This and subsequent photos will follow by mail.

Using binoculars and a 60-power spotting scope, I observed the Coastal Bluff Morning Glory in bloom on the property below yours which is proposed for a residence, across the old railroad grade from concentrations of the plant on your properties. These may have been one population until the railroad was graded and built ca. 1860. [Photo P7150179]

The re-vegetation of the railroad grade since 1972 can be seen on the California Coastal Records Project website, www.californiacoastline.org, by entering the 2009 image number, 200904572 on the home page, and clicking on "Time Comparison." The site will show a range of photos for each year's series. The best images for this site are: 2005 image, 200504147; 2002 image, 12090; 1993 image, 199300159008 near bottom of image; 1987 image, 8716025; 1979 image, 7917031; 1972 image, 72100228.

The first botanist to list Coastal Bluff Morning Glory on a Gualala permit survey was Jon Thompson, former Manager of the USDA Forest Service plant nursery at Magalia. He found it growing primarily within the coastal scrub on a property northwest of yours, and he advised local CNPS members to look for it in similar brushy sites.

I am familiar with the plant. It occurs on my property located about a quarter-mile south of yours, which I manage for the morning glory. I presented an original poster on the plant at the

2.

California Native Plant Society Conservation Conference in Sacramento in January, 2009, showing three ways to distinguish the rare subspecies from the common one.

My special project for a 2008 Natural History Certificate from College of the Redwoods Mendocino Coast was a study of the range of the plant and the other native plants with which it occurs. Earlier, I took botany classes at UC Berkeley and Santa Rosa JC. In 2006, I took a two-day CNPS workshop at UC Davis Bodega Bay Marine Lab, for a certificate in Protocols for Botanical Surveys; and was able to see the rare subspecies blooming in the coastal bluff area where it was first collected by Miss Alice Eastwood ca. 1900.

In 2003, Dr. Richard K. Brummitt, the British botanist who first separated the genus *Calyptegia* from the genus *Convolvulus* visited my property with four prominent California botanists. He collected many stems with varying leaf characteristics and later told his hosts they were all the rare subspecies, despite their variations in leaf shape. These specimens formed part of the basis for his new treatment of *Calyptegia* for the Jepson Manual of the Higher Plants of California. In his new treatment, rounded leaf form is no longer diagnostic, but is included in the generic description. Further discussion of the two subspecies will follow, with references.

On your southern property, to facilitate photography, orange surveyor's tape was tied to a taller plant near each appearance of the fragile-stemmed Coastal Bluff Morning Glory. The plant may have multiple stems to an individual. Each flag was placed near two or three stems visible in the upper layer of the brushy vegetation. More stems may be present within the taller portions of the brush. [P7160199]

Eighty tape flags were placed, located in two distinct patches with a stand of taller, dense brush in between them, where the Coastal Bluff Morning Glory may also occur, twining beneath the woody plants. There are an estimated 200 stems of the plant in the un-mowed portion of your southern property, and more in the mowed portion. The position of the main concentration of Coastal Bluff Morning Glory near your deck was delineated as you requested on a copy the applicant's map of the site.

The northwestern property you own is more impacted by invasive weeds and spreading horticultural plants, but it is still a rich site for Coastal Bluff Morning Glory, which occurs in the mowed area and also in a stand of blooming *Kniphofia uvaria*, Red-hot Poker. Here survey flags were placed marking the appearance of the Coastal Bluff Morning Glory at the edge of the mowed area. To show up next to the *Kniphofia* blooms, six-foot wooden stakes wrapped with blue survey tape mark groups of Coastal Bluff Morning Glory stems within the *Kniphofia* clumps. [Photo P160193]

Survey flags and taped stakes line up with each other, and some also line up with the Marin County firm's white survey flags on the far side of the old RR grade on the ocean front property [Photo P7170205]. There appears to be a significant rare plant ESHA which has persisted on these three properties across time and space. [Photo P7150176]. There is a boundary marker in the *Kniphofia* near the larger concentration of Coastal Bluff Morning Glory on your property. This was used as a basis for an ESHA delineation you requested. If the applicant's ESHA 50-foot

3.

circles were included on this map, they would overlap.

A licensed Wildlife Biologist familiar with local conditions should evaluate all these properties for special-status animals. In the bluff scrub which faces northwest-north grow numerous healthy plants of several native species in the carrot family (Photo P7150184). Such slopes are classic habitat for the Federal Endangered Species, *Aplodontia rufa nigra*, Point Arena Mountain Beaver, which is anecdotally present in the area, and which historically extended its range to Point Reyes.

The application includes a letter stating that no such determination need be made because the area is outside the known range of the animal. In my opinion, this view is incorrect, since it does not give animals a chance to extend their range, as they well may do in response to climate change, fires, and other factors. Current thinking is that rare species which are holding their own or expanding their range have priority for preservation and mitigation.

Food plants for two endangered butterflies occur near your properties and may be present: *Viola adunca*, Early Blue Violet, is the food plant of the Behrens Silverspot Butterfly. *Lotus formosissimus*, Harlequin Lotus, is the food plant of the Lotus Blue Butterfly. (Photos of those plants blooming elsewhere are available.)

When a two-box load of Ice Plant was removed for photographic purposes from the cinder block wall that marks the property line (Photo P7150178) on the southeast side of the proposed access drive, two native side-band snails, with their shells sealed for the summer, fell out. The genus is probably *Helminthoglypta*, some members of which are listed as rare. A snail expert would be needed to identify them to the required level. In the meantime, avoid treading in the brush or using snail poison. Remove by hand and destroy French snails from newly-purchased potted plants. A provisional snail ESHA is delineated using the cinder block corner as reference point.

The summer portion of a full botanical survey of your two properties may be carried out next week. The other two bloom periods are spring and fall. Ideally, all should be done.

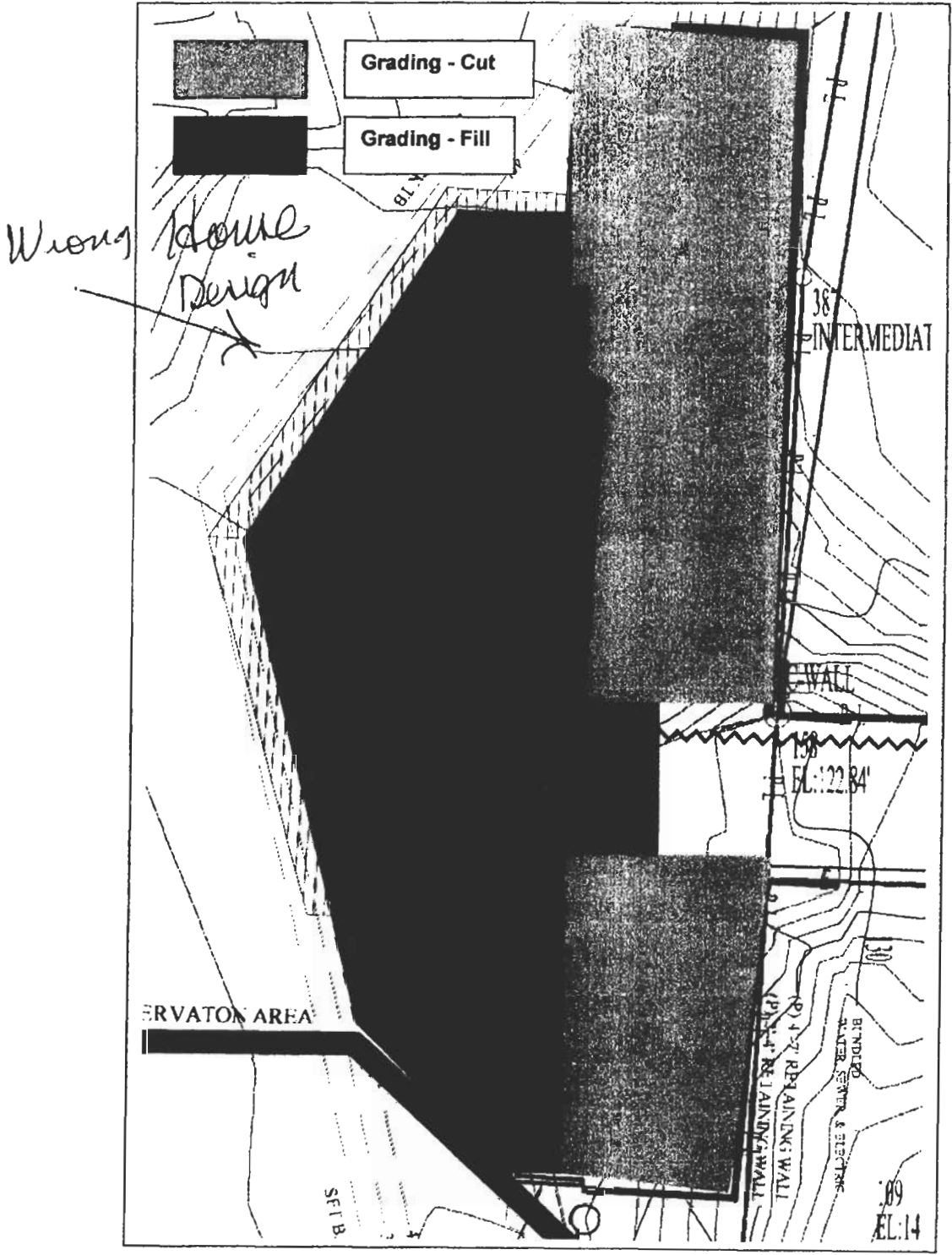
Yours sincerely,

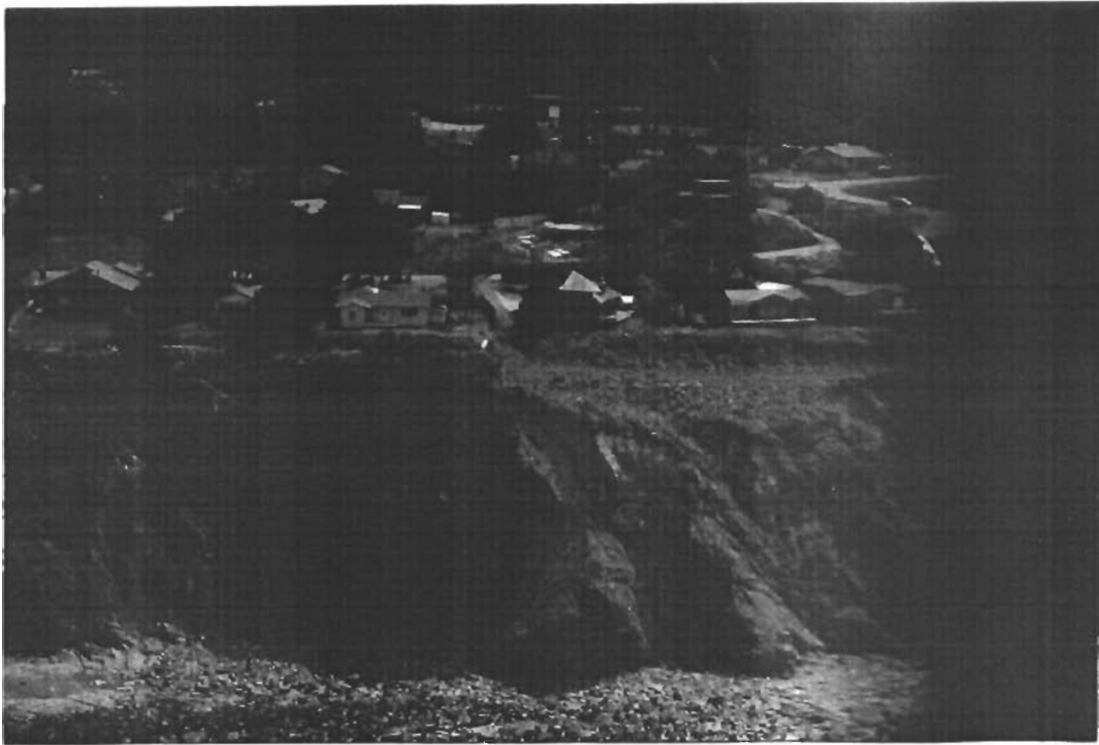
Signature on File

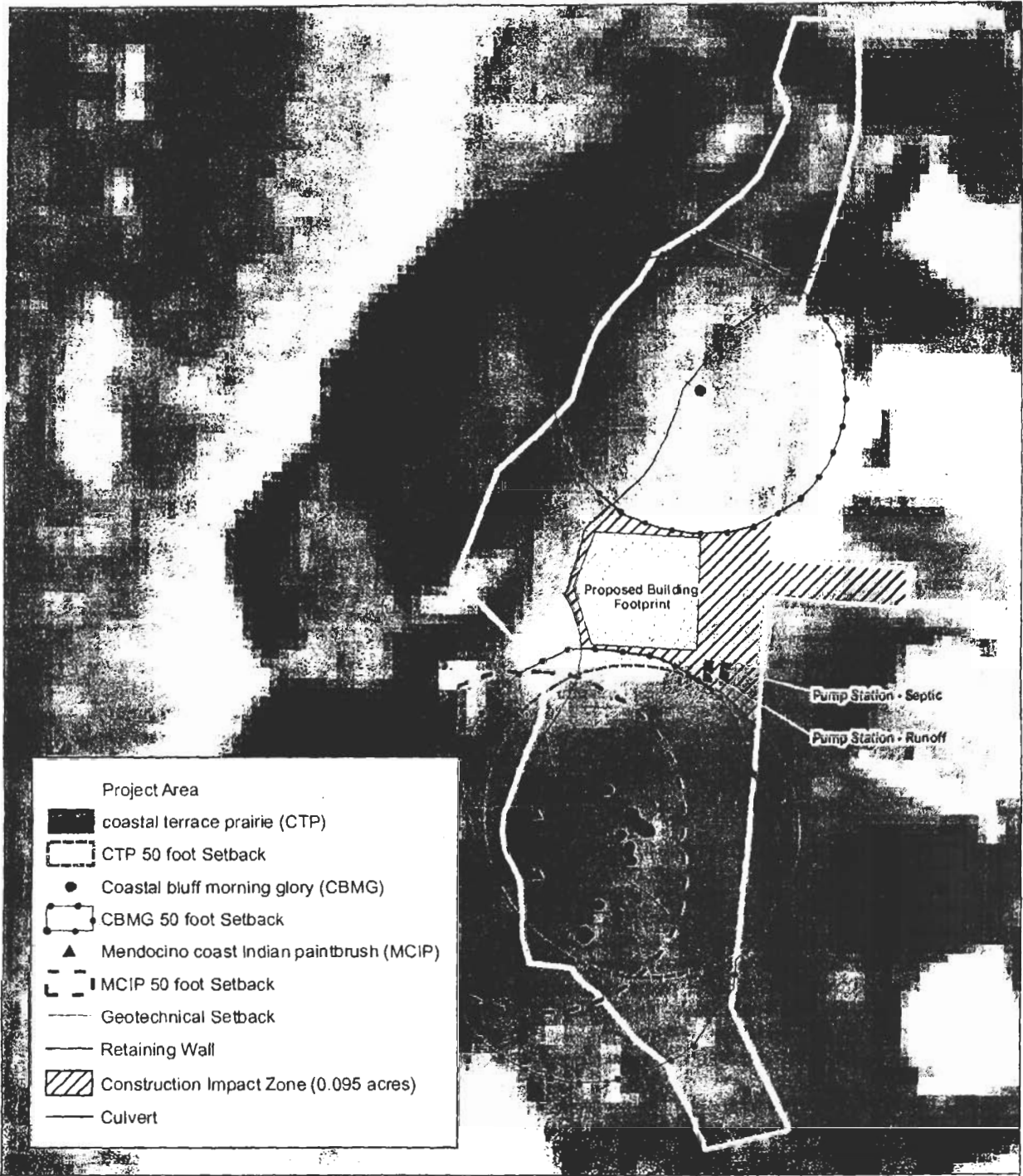
Julie A. Verran



THE WERNETTE PROJECT
GUALALA, CALIFORNIA
Figure G-1 Grading Plan Detail







Bob Merrill

From: Wernette, Frank [F.Wernette@TRITOO.COM]
Sent: Wednesday, November 17, 2010 10:25 AM
To: Bob Merrill; Tamara Gedik; Linda Thomas
Subject: Additional Correspondence Files - Appeal A-1-MEN-09-023- Wernette Project
Attachments: Hines Letter 3-16-06 and Response.pdf

Bob and Tamara:

This is in follow-up to Duane Hines' letter received by the Commission on November 10, 2010. In that letter, Mr. Hines stated that the adjacent property owners did offer, in writing, to purchase the Wernette parcel but that this offer was rejected.

We scoured our files again regarding this issue and found two related pieces of correspondence. They are attached for your reference.

The first document is Mr. Hines' letter dated March 16, 2006. In that letter, he asked if my dad and Jerri were interested in receiving a purchase offer. Since, at the time, they were not George Wernette sent the second document in response dated March 29, 2006.

George and Jerri Wernette have not received a specific, verbal or written monetary offer to buy all or a portion of the subject parcel.

Let me know if you have any additional questions.

Thanks

Frank

ATTACHMENT C
(1 of 3)

Duane M. Hines
415 Coloma Street
Sausalito, California 94965
415-331-5515

March 16, 2006

George and Jeri Wernette
1039 Mountain Air Court
Reno, NV 89511

Dear George and Jeri,

In an effort to resolve the extended approval controversy on your lot, the adjacent property owners would be willing to make an offer to purchase the property.

If this approach would be of interest to you, please let me know and we will propose a formal offer for your consideration.

Thank you for your consideration.

Sincerely yours,

Signature on File

Duane M. Hines

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2 of 3

George J. Wernette
1039 Mountain Air Court
Reno Nevada 89511

March 29, 2006

Mr. Duane M. Hines
415 Coloma Street
Sausalito CA 94965

Dear Duane,

I have received your letter dated March 16, 2006.

Sincerely,

George J. Wernette

3 of 3

F 7a.

**FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATION**

Date and time of communication:
(For messages sent to a Commissioner by mail or facsimile or received as a telephone or other message, date time of receipt should be indicated.)

November 12, 2010, 10:45am

Location of communication:
(For communications sent by mail or facsimile, or received as a telephone or other message, indicate the means of transmission.)

Commissioner Neely's Eureka Office

Person(s) initiating communication:

Maggy Herbelin, Local ORCA Representative

Person(s) receiving communication:

Commissioner Bonnie Neely

Name or description of project:

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CALIFORNIA
COASTAL COMMISSION

F7a. Appeal No. A-1-MEN-09-23 (Wernette, Mendocino Co.) Appeal by Duane M. Hines & Richard & Judith Turnlund from decision of County of Mendocino granting permit with conditions to George & Jerri Wernette for construction of 2-story single-family home with 1,950(+/-) sq. feet of living space and 350(+/-) sq.ft. attached garage and installation of sewage pump tank and connection of off-site septic disposal services, connection of community water, installation of driveway, retaining walls, LPG tank, generator, on-site drainage infrastructure, and connection of utilities, at 38454 Robinson Reef Drive, Gualala, Mendocino County. (TG-B)

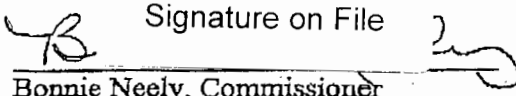
Detailed substantive description of content of communication:

(If communication included written material, attach a copy of the complete text of the written material.)

Our colleagues in ORCA on behalf of the Environmental Commons

Oppose staff recommendation to approve with conditions; urge denial. The proposed house is too large for the parcel, and there are too many unresolved issues.

Signature on File



Bonnie Neely, Commissioner

Date: November 12, 2010

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceedings and provide the Executive Director with a copy of any written material that was part of the communication.

Coastal Commission Fax: 415 904-5400

ATTACHMENT D

**FORM FOR DISCLOSURE OF
EX-PARTE COMMUNICATIONS**

Name or description of the project: Agenda Item F.12.a.

Appeal No. A-5-LOB-10-15 (2H Properties, Long Beach)

Time/Date of communication: Friday, November 12, 2010

Location of communication: 7727 Herschel Avenue, La Jolla, CA

Person(s) initiating communication: David Grubb, for El Dorado Audubon and Los Cerritos Wetlands Trust

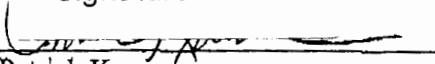
Person(s) receiving communication: Patrick Krueger

Type of communication: Meeting

1. The Los Cerritos Wetlands Land Trust supports the restoration requirements of the staff report with a special emphasis on providing enough soil for the listed native plants to take root. For certain plants, six inches of soil is not enough. We believe that, based on sound scientific fact, a requirement for deeper soil should be made explicit in the final decision.
2. The landowner graded the 9.38-acre parcel without permits from any entity for any kind of development. And despite numerous requests from local citizens, he refused to cease his activity or show any permits (because he didn't have any) until the damage had been done and the land had been scraped bare and almost leveled.
3. The land owner should be required to return the property to a condition similar to the way it was pre-March, 2009, so that the fragile species that depend on that habitat can be supported.
4. Contact Elizabeth Lambe, Executive Director, Los Cerritos Wetlands Trust, with any questions or for more information at: 714-357-8576

Date: 11/12/10

Signature on File


Patrick Krueger

**ATTACHMENT E
(1 of 2)**

**FORM FOR DISCLOSURE OF
EX-PARTE COMMUNICATIONS**

Name or description of the project: Agenda Item F.7.a.

Appeal No. A-1-MEN-09-23 (Wernette, Mendocino Co.)

Time/Date of communication: Friday, November 12, 2010

Location of communication: 7727 Herschel Avenue, La Jolla, CA

Person(s) initiating communication: David Grubb, for Environmental Commons

Person(s) receiving communication: Patrick Krueer

Type of communication: Meeting

Oppose the staff recommendation to approve with conditions, urge denial.

- 1) Proposed development is on a remnant parcel that was formerly a railroad ROW. Significant stretches of the old ROW immediately north and south of this parcel have eroded into the sea.
- 2) Water will drain from the adjacent subdivision down the proposed driveway and be retained on the lot in a gravel field below the proposed residence. The increased saturation and overburden will decrease the stability of this bluff top parcel, a condition that has not been adequately addressed by the applicant.
- 3) Proposed development will result in substantial take of wetlands and a rare coastal bluff morning glories plant community. It is uncertain if development can be relocated to avoid such take, both long term and during construction.
- 4) There are significant questions as to whether or not the applicant has a reasonable financial backed expectation to develop the parcel. Access to the parcel is via an easement through a subdivision, but the parcel is not part of that subdivision. Reasonable financial backed expectations to develop should be based on development of similar parcels in the area and not on existing development in the adjacent subdivision.
- 5) There is an outstanding offer to purchase the parcel as is, therefore denying the project outright does not eliminate the economic value of the property.

Date: 11/12/10

Signature on File

Patrick Krueer

2 of 2

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NOV 15 2010

CALIFORNIA
COASTAL COMMISSION

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE
710 E STREET • SUITE 200
EUREKA, CA 95501-1865
VOICE (707) 445-7833
FACSIMILE (707) 445-7877



F7a

Filed: May 19, 2009
49th Day: Waived
Staff: Tamara L. Gedik
Staff Report: November 4, 2010
Hearing Date: November 19, 2010
Commission Action:

STAFF REPORT: APPEAL

SUBSTANTIAL ISSUE & DE NOVO

APPEAL NUMBER: **A-1-MEN-09-023**

APPLICANTS: George and Jerri Wernette

AGENTS: Frank Wernette; Alan Block

LOCAL GOVERNMENT: County of Mendocino

DECISION: Approval with Conditions

PROJECT LOCATION: Approximately ½-mile north of Gualala, in the North Gualala Subdivision No. 3, on a bluff top lot 150 feet west of Robinson Reef Drive (CR 527), and approximately 400 feet north of its intersection with Westward Ho (CR 529), at 38454 Robinson Reef Drive, Gualala (APN 145-161-27).

PROJECT DESCRIPTION
(as approved by the County): Construct a two-story single-family residence with approximately 1,950 square feet of living space and an approximately 350-square-foot attached garage. Install sewage pump tank and sewage holding tank, and connect to off-site septic disposal services, connect to community water, install driveway, retaining walls, liquefied propane gas (LPG) tank, generator, on-site drainage infrastructure, and connect to utilities. The project includes

encroachment into rare plant ESHA buffer and incorporates a rare plant management plan.

PROJECT DESCRIPTION
(as amended *de novo*):

The project description remains the same as the project approved by the County, with the exception of a slightly modified construction zone and planting plan (to accommodate additional sensitive plants observed in 2010); see Exhibit 37.

LAND USE DESIGNATION: Rural Residential, 5 acre minimum (RR-5) [with alternate density of Suburban Residential 40,000 Square Foot Minimum (SR-40,000)]

ZONING DISTRICT Rural Residential, 5 acre minimum lot size (RR:L-5) [with alternate zoning of suburban residential (SR L-40,000)]

APPELLANTS: (1) Duane Hines and (2) Richard and Judith Turnlund

SUBSTANTIVE FILE DOCUMENTS: 1) Mendocino County CDP No. 51-2008; and 2) Mendocino County Local Coastal Program

SUMMARY OF STAFF RECOMMENDATIONS:

1. Summary of Staff Recommendation: Substantial Issue

The staff recommends that the Commission, after public hearing, determine that a SUBSTANTIAL ISSUE exists with respect to the grounds on which the appeal has been filed, and that the Commission hold a *de novo* hearing, because the appellants have raised a substantial issue with the local government's action and its consistency with the certified Local Coastal Program (LCP).

On April 23, 2009, the Mendocino County Planning Commission approved Coastal Development Use Permit No. CDP 51-2008. The project as approved by the County consists of: (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) installation of a sewage pump tank, sewage holding tank and back-up generator, with connection to off-site septic disposal services,

connection to community water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid system underneath the home); and (5) use of a portion of the property as a temporary construction staging area. The project as approved by the County includes encroachment into rare plant ESHA buffer and incorporates a rare plant management plan. The approved development occurs on a bluff top lot 150 feet west of Robinson Reef Drive (CR 527), and approximately 400 feet north of its intersection with Westward Ho (CR 529), at 38454 Robinson Reef Drive, Gualala (APN 145-161-27) (Exhibit Nos. 1 and 2).

Two separate appeals of the County's decision to grant the permit with conditions were filed within 10 working days of receipt by the Commission of the County's Notice of Final Action. The appeals were filed by (1) Duane Hines; and (2) Richard and Judith Turnlund.

The appeals allege the approval of CDP 51-2008 by Mendocino County is inconsistent with the policies and standards of the certified Local Coastal Program (LCP) including, but not limited to, policies and standards regarding development within and adjacent to environmentally sensitive habitat areas (ESHA); geologic hazard policies to assure structural stability and integrity of structures without contributing to geologic instability; and grading, erosion, and runoff policies.

Environmentally Sensitive Habitat Areas

The Commission finds that the appeals raise a substantial issue of conformance of the project as approved with the ESHA protection provisions of the certified LCP including, but not limited to, the LUP's references to Section 30240 of the Coastal Act, and including LUP Policy 3.1-7, CZC Section 20.496.020, CZC Section 20. 532.100(A)(1), and CZC Section 20. 532.100(A)(1), because (1) the County failed to identify the full extent of the rare plant ESHA; (2) the approved development does not provide a buffer between the development and rare plant ESHA and ESHA buffers are not allowed to be reduced to less than 50 feet; and (3) only resource dependent uses are allowed in a rare plant ESHA and a residential development is not an allowed use within rare plant ESHA.

Geologic Hazards

The Commission finds that the appeals raise a substantial issue of conformance of the project as approved with the geologic hazard provisions including but not limited to LUP Policies 3.4-1 and 3.4-7 and Coastal Zoning Code Sections 20.500.020, because the geotechnical investigations performed by the time of County approval did not include a quantitative slope stability analysis, and the degree of factual support for the local government's determination that (a) the approved project site will be stable over the life of the project, and (b) threats to the development from geologic hazards have been minimized and mitigated is very low.

The motion to adopt the staff recommendation of Substantial Issue is found on page 10.

2. 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

revised for purposes of the Commission's *de novo* hearing would be consistent with the Mendocino County LCP and the public access policies of the Coastal Act.

The proposed project consists of: (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) installation of a sewage pump tank, sewage holding tank and back-up generator, with connection to off-site septic disposal services, connection to community water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid system underneath the home); and (5) use of a portion of the property as a temporary construction staging area.

ESHAs

All portions of the subject parcel- with exception to the areas dominated by pampas grass or non-native vegetation as mapped in Figure 2 of the 2008 WRA report- constitute coastal bluff morning-glory and/or other rare plant habitat, an environmentally sensitive habitat area (ESHA) as defined by CZC Section 20.496.010. Most of the development is located in areas of non-native vegetation that are not part of the ESHA. However, an approximately 369-square-foot portion of the driveway/parking area and an approximately 104-square-foot-portion of the footprint of the home are within the rare plant ESHA. In addition, the proposed development is also located within ESHA buffer. Therefore, because (1) the proposed residential use is not a use that would be allowed in the adjacent rare plant ESHA, (2) the proposed development would be located less than 50 feet from ESHA inconsistent with LUP Policy 3.1-7 and CZC Section 20.496.020(A), (3) the proposed residential development would significantly degrade the coastal bluff morning-glory habitat, and (4) all feasible mitigation measures capable of reducing or eliminating project-related impacts have been not adopted, findings for approval cannot be made. 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.

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 approval allows for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence that: (1) permanently restricting use of the property to resource dependent uses could potentially eliminate the economic value of the property; (2) residential use of a small portion of the property

would provide an economic use; and (3) an applicant would have had a reasonable investment-backed expectation that a fully mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the inconsistency of this use with LCP Policies and LCP Zoning would constitute a taking. Therefore, the staff recommended that the Commission find that the County LCP in this case does not preclude non resource-dependent development within ESHA and ESHA buffer.

Having reached this conclusion, however, the LCP only instructs the Commission to construe the resource protection policies of the Mendocino County LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on this appeal. Thus, the Commission must still comply with the requirements of the LCP by avoiding, to the maximum extent feasible, the significant disruption of habitat values at the site. To achieve consistency with the LCP's ESHA policies in light of constitutional takings issues, the project must be the most feasible, least environmentally damaging alternative, and must adopt all feasible mitigation measures capable of reducing or eliminating project impacts to best avoid the significant disruption to sensitive habitat that would accompany any development of this property.

Although locating the house in its currently proposed location in the center of the parcel mostly within a nonnative vegetation area that is not ESHA and closest to the existing driveway easement minimizes degradation of the ESHA, direct adverse impacts to rare plant ESHA and ESHA buffer from the proposed development are not avoidable. Therefore, the project as conditioned will include measures outlined in Special Condition No. 9 to mitigate all significant adverse environmental effects on environmentally sensitive rare plant habitat and its buffers 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.

Special Condition No. 7 establishes a building envelope encompassing a building site at the currently proposed location set sufficiently back from the bluff edge to ensure an adequate bluff setback to avoid geologic hazards, as discussed below. The authorized single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, generator, water and utility connections must all be located within the building envelope. The approximately 5,762-square-foot building envelope (that includes the driveway easement) is the minimum size necessary to accommodate these portions of the approved development at the maximum sizes specified as discussed below. A temporary construction staging area is authorized outside the building envelope in an area that is not ESHA because of the dominance of invasive plants, pursuant to Special Condition No. 9. The special condition requires this area to be restored to native habitat and excluded for future use following construction activities. Special Condition No. 7 restricts the use of all areas outside of the approved building envelope to open space. Special Condition No. 7 prohibits all

development in the open space area except for removal of non-native vegetation; the planting of native vegetation pursuant to Special Condition No. 9; installation of erosion control measures pursuant to Special Condition No. 6A(2); and erection of temporary protective fencing pursuant to Special Condition No. 8A; and use of the particular area prepared as a staging area for that purpose during construction pursuant to Special Condition No. 9.

Special Condition No. 2 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. 7.

The Commission finds that limiting development activities to within the designated building envelope as described above ensures the proposed development is the feasible, least environmentally damaging alternative consistent with CZC Section 20.532.100(A)(1)(b).

Special Condition No. 8 requires in part that: (a) temporary construction exclusion fencing be installed and maintained during construction to protect the ESHA, (b) Contractors shall be informed of the presence of rare plants on the site and the importance of avoiding disturbance to areas outside of the authorized building envelope, especially with regard to erosion and runoff from the building site; (c) onsite native vegetation be maintained to the maximum extent possible during construction activities; and (d) Any disturbed areas shall be replanted or seeded immediately with low-growing herbaceous native species following completion of construction of the residential structure and driveway, in a manner that conforms to the planting limitations of Special Condition Nos. 9(F) and 9(G).

In addition, Special Condition No. 3 requires that any future additions to the residences that might otherwise be exempt from permit requirements will require an amendment to the permit to enable the Commission to review such future development proposals to ensure that such development does not encroach into ESHA areas.

Geologic Hazards

With regard to geologic hazard concerns, Mark Johnsson, Ph.D., the Commission's staff geologist, has reviewed geotechnical reports and supplements prepared by Mr. Glomb in 2002 (Exhibit 23), 2008 (Exhibit 24), and 2009 (Exhibits 25 and 26) for the proposed project, and met with Mr. Glomb in addition to registered Geotechnical Engineer Don Poindexter, Commission staff, and the applicant's agent Frank Wernette at the site on January 7, 2010. Dr. Johnsson concurs with the recommended 40-foot geologic setback recommended by the applicants' geologists.

Because the current proposed project avoids concentrating and directing runoff over the seacliff by using a pervious concrete system and perforated pipe system to capture and evenly distribute runoff across the site, the Commission finds the project as conditioned is consistent with LUP Policy 3.4-9, which requires that any development landward of

the bluff top 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. Special Condition 4A requires that design and construction plans including foundations, grading, retaining walls, and drainage plans, shall be consistent with the recommendations contained in the Updated Geotechnical and Engineering Geologic Investigation Report dated September 12, 2009 and prepared by Jim Glomb Geotechnical and Environmental Consulting, Inc. Special Condition 4B further requires the applicant to develop the project in accordance with the approved plans.

The applicant proposes to use pervious concrete material for the driveway and parking areas in an effort to further minimize surface runoff and ensure that surface and subsurface drainage does not contribute to the erosion of the bluff face or to the instability of the bluff itself. In addition to Special Condition 4 that requires the project design to follow the recommendations in the geologic report, Special Condition 6B(3) requires the applicant to submit a permeable pavement maintenance plan with provisions that include but are not limited to requirements for installation by a certified pervious concrete contractor; regularly scheduled maintenance; performance testing; and documentation. Lastly, Special Condition 8O prohibits the staging or storing of any pore-clogging materials, including but not limited to soil, mulch, and yard waste, on any pervious surfaces during construction activities.

Based upon the geologic report and supplemental documents prepared by the applicants' geologist, the Commission finds that the risks of geologic hazard are minimized if development is sited and designed according to the setback and construction recommendations and conditions of this permit. However, given that the risk cannot be eliminated and the geologic report cannot assure that shoreline protection will never be needed to protect the residence, the Commission finds that the proposed development is consistent with the Mendocino County LCP only if it is conditioned to provide that shoreline protection will not be constructed. Thus, the Commission further finds that due to the inherently hazardous nature of this lot, the fact that no geology report can conclude with certainty that a geologic hazard does not exist, the fact that the approved development and its maintenance may cause future problems that were not anticipated, and because new development shall not engender the need for shoreline protective devices, it is necessary to attach Special Condition No. 5 to ensure that no future shoreline protective device will be constructed to protect the proposed new development.

Special Condition No. 5 prohibits the construction of shoreline protective devices on the parcel to protect the proposed single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections and/or other development approved by Permit No. A-1-MEN-09-023 and requires that the landowner provide a geotechnical investigation and remove the proposed improvements associated with the development approved by Permit No. A-1-MEN-09-023 if bluff retreat reaches the point where this 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(A), which states that new development shall minimize risk to life and property in areas of high geologic, flood, and fire 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(A) if projected bluff retreat would affect the proposed development and necessitate construction of a seawall to protect it.

Special Condition No. 5 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 applicants have chosen to implement the project despite these risks, the applicants must assume the risks. In this way, the applicants are notified that the Commission is not liable for damage as a result of approving the permit for development. The condition also requires the applicants 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, Special Condition No. 2 requires the applicants to record a deed restriction to impose the special conditions of the permit as covenants, conditions and restrictions on the use and enjoyment of the property. This special condition is required, in part, to ensure that the development is consistent with the Coastal Act and 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 and will ensure that future owners of the property will be informed of the Commission's immunity from liability, and the indemnity afforded the Commission.

Stormwater Runoff

With regards to water quality, a September 2009 geologic report specified erosion control/drainage measures that include proper collection and disposal of surface water runoff, including grading the site to direct drainage away from buildings, sidewalks, and driveways; directing roof runoff into downspouts and gutters that discharge away from the foundations and disperse into pre-existing sheet flow areas to prevent concentrated flows; connecting surface drainage systems to sub-surface drainage systems; and directing drain outlets such that they do not cause sea cliff erosion. The report also states "Energy dissipators [sic], such as riprapped stilling basins, may be required to reduce erosion where drains, subdrains or culverts discharge into natural, unlined drainage ways." Staff concurs with the analyses and recommendations.

Runoff originating from the development site that is allowed to drain off the site could contain entrained sediment and other pollutants that would contribute to degradation of the quality of coastal waters, including downstream marine waters. Sedimentation impacts from runoff would be of the greatest concern during and immediately after construction. Therefore, in addition to the Special Conditions described above for

maintenance of the permeable concrete driveway, and consistent with CZC Section 20.492.020(B), the Commission includes within attached Special Condition No. 6B(2) a requirement that the applicants minimize erosion and sedimentation impacts from the proposed construction of the residence. Special Condition No. 6A(2) requires that the applicants submit for the review and approval of the Executive Director revised site plans that include erosion and runoff control measures that would specify that: (1) rice straw bales be installed to contain runoff from construction and demolition areas; (2) on-site vegetation be maintained to the maximum extent possible during construction; (3) any disturbed areas be replanted with noninvasive native plants obtained from local seed stock immediately following project completion and covered with jute netting, coir logs, and rice straw; (4) washing-out of concrete delivery vehicles, disposal of solid waste, or release of any hazardous materials on the parcel be prohibited; (5) erosion rates shall not exceed existing conditions; (6) Adjoining property shall be protected from excavation and filling operations and potential soil erosion; and (7) An onsite spill prevention and response program that utilizes Best Management Practices be implemented.

In addition, all disturbed soil areas must be reseeded and covered with native vegetation to control erosion, pursuant to Special Condition 6(B)(2)(a)(iii) and that conforms with the planting limitations of Special Condition Nos. 8(K) and 8(L).

In addition, best management practices outlined in Special Condition No. 8 require that during construction: (1) rice straw or weed-free hay bales be installed to contain runoff from construction and demolition areas; (2) best management practices be effective at controlling sediment and surface runoff during the rainy season; (3) excess excavated material and/or debris shall be removed from the project site and disposed of at a disposal site outside the coastal zone; (4) on-site stockpiles of construction debris shall be covered and contained at all times to prevent polluted water runoff; and (5) no soil, mulch, yard debris, or other pore-clogging materials shall be stored or staged atop the pervious concrete (or other permeable pavement) areas, including the driveway, parking, and turnaround areas, at any time.

The Commission finds that as conditioned, the proposed development is consistent with CZC Sections 20.492.015 and 20.492.020 because erosion and sedimentation will be controlled and minimized by (1) maintaining on-site vegetation to the maximum extent possible; (2) replanting or seeding any disturbed areas with native vegetation following project completion; (3) using hay bales to control runoff during construction, and (4) directing runoff from the completed development in a manner that would provide for infiltration into the ground. Furthermore, the Commission finds that the proposed development as conditioned to require these measures to control sedimentation from storm water runoff from the site is consistent with the provisions of LUP Policy 3.1-25 requiring that the biological productivity of coastal waters be sustained. Moreover, the Commission finds that the proposed development is consistent with CZC Section 20.492.025(E) because, as conditioned, runoff from the roofs will be directed into the perforated pipe grid system and evenly distributed across the site, and the driveway will be paved with pervious material and maintained to facilitate infiltration of runoff and minimize erosion and sedimentation from stormwater runoff.

Visual Resources

The subject property is a bluff-top parcel that is not located in a designated “highly scenic area and with the exception of views from Robinson’s Reef Drive, which accesses the subdivision from Highway One, it is not visible from public vantage points. The view of the ocean from Robinson’s Reef Drive is limited to a fleeting glimpse down the access easement between the two existing houses. The horizon of the ocean will still appear visible from the street upon completion of the proposed development.

To ensure the project’s conformance with provisions in the certified LCP regarding lighting restrictions, staff recommends Special Condition No. 11 that requires all exterior lights to be the minimum necessary for the safe ingress, egress, and use of the structures, and shall be low-wattage, non-reflective, shielded, and have a directional cast downward such that no light will be directed to shine beyond the boundaries of the subject parcel.

Lastly, staff recommends Special Condition No. 2 that requires the applicants to record a deed restriction detailing the specific development authorized under the permit, identifying all applicable special conditions attached to the permit, and providing notice to future owners of the terms and limitations placed on the use of the property.

Staff recommends that the Commission find that the development as conditioned is consistent with the certified Mendocino County LCP and the public access policies of the Coastal Act, while providing the applicant with a reasonable economic use of their property to avoid an unconstitutional taking of private property for public use.

Therefore, as conditioned, staff recommends that the Commission find that the project is consistent with the certified Mendocino County LCP.

The Motion to adopt the Staff Recommendation of Approval with Conditions is found on page 11.

I. STAFF RECOMMENDATION, MOTION AND RESOLUTION ON SUBSTANTIAL ISSUE

Pursuant to Section 30603(b) of the Coastal Act and as discussed below, the staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

Motion:

I move that the Commission determine that Appeal No. A-1-MEN-09-023 raises No Substantial Issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

Staff Recommendation:

Staff recommends a **NO** vote. Following the staff recommendation will result in the Commission conducting a de novo review of the application, and adoption of the

following resolution and findings. Passage of this motion, via a yes vote, will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

Resolution to Find Substantial Issue:

The Commission hereby finds that Appeal No. A-1-MEN-09-023 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the proposed project with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

II. MOTION, STAFF RECOMMENDATION *DE NOVO*, AND RESOLUTION

The staff recommends that the Commission adopt the following resolution:

Motion:

I move that the Commission approve Coastal Development Permit No. A-1-MEN-09-023, subject to conditions, pursuant to the staff recommendation.

Staff Recommendation of Approval:

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

Resolution to Approve 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.

PART ONE – SUBSTANTIAL ISSUE

STAFF NOTES:

1. Appeal Process

After certification of Local Coastal Programs (LCPs), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Section 30603 states that an action taken by a local government on a coastal development permit application may be appealed to the Commission for certain kinds of developments, including developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, or within three hundred feet of the inland extent of any beach, or of the mean high tide line of the sea where there is no beach, or within one hundred feet of any wetland or stream, or within three hundred feet of the top of the seaward face of any coastal bluff, or those located in a sensitive coastal resource area.

Furthermore, developments approved by counties may be appealed if they are not designated the “principal permitted use” under the certified LCP. Finally, developments which constitute major public works or major energy facilities may be appealed, whether approved or denied by the city or county. The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program and, if the development is located between the first public road and the sea, the public access policies set forth in the Coastal Act.

The subject development is appealable to the Commission pursuant to Coastal Act Section 30603(a)(1) & (2) because it is located between the first public road paralleling the sea, and is within 300 feet of the top of the seaward face of a coastal bluff.

The decision of the Planning Commission was not appealed at the local level to the County Board of Supervisors. The County then issued a Notice of Final Action, which was received at the Commission’s North Coast District Office on May 7, 2009 (Exhibit No. 11). Section 13573 of the Commission’s regulations allows for appeals of local approvals to be made directly to the Commission without first having exhausted all local appeals when, as here, the local jurisdiction charges an appeal fee for the filing and processing of local appeals. Two appeals were filed with the Commission’s North Coast District Office on May 19, 2009 from Duane Hines, and Richard and Judith Turnlund (Exhibit No. 12). The appeals were filed in a timely manner, within 10 working days of receipt by the Commission of the County's Notice of Final Action.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue is raised by the appeal. Since the staff is recommending substantial issue, and unless three Commissioners object, it is presumed that the appeal raises a substantial issue and the Commission may proceed to the *de novo* review.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised.

The only persons qualified to testify before the Commission on the substantial issue question are the applicant, the appellant and other persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing.

Unless it is determined that there is no substantial issue, the Commission would continue with a full public hearing on the merits of the project. If the Commission were to conduct a *de novo* hearing on the appeal, the applicable test for the Commission to consider would be whether the development is in conformity with the certified Local Coastal Program.

2. Filing of Appeals

Two separate appeals of the County's decision to grant the permit with conditions were filed in a timely manner with the Commission within 10 working days of receipt by the Commission of the County's Notice of Final Action (Exhibit No. 11) on May 7, 2009. The appeals were filed by (1) Duane Hines; and (2) Richard and Judith Turnlund (Exhibit No. 12).

3. 49-Day Waiver

Pursuant to Section 30621 of the Coastal Act, an appeal hearing must be set within 49 days from the date an appeal of a locally issued coastal development permit is filed. On May 27, 2010, prior to the 49th day after the filing of the appeal, the applicants requested a postponement and submitted a signed 49-Day Waiver waiving the applicants' right to have a hearing set within 49 days from the date the appeal had been filed.

III. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Appellants Contentions:

The Commission received two appeals of the County of Mendocino's decision to conditionally approve the development. The appeals were received by (A) Duane Hines and (B) Richard and Judith Turnlund. The project as approved by the County consists of: (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) Installation of a sewage pump tank and back-up generator, with connection to off-site septic disposal services, connection to community

water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid system underneath the home); and (5) use of a portion of the property as a temporary construction staging area. The project as approved by the County includes encroachment into rare plant ESHA buffer and incorporates a rare plant management plan. The appellants' contentions are summarized below, and the full text of the contentions is included as Exhibit No. 12.

Appellant A: Duane Hines, claims that the approved project is inconsistent with (1) the environmentally sensitive habitat area (ESHA) protection provisions; (2) geologic hazard provisions; and (3) runoff standards; and (4) the development criteria for special communities and neighborhoods as outlined in the Mendocino County certified Local Coastal Program (LCP).

Appellant B: Richard and Judith Turnlund, reiterate concerns (1)-(4) described by Appellant A, and additionally claim that the approved project is inconsistent with fire safety provisions of the Mendocino County certified Local Coastal Program (LCP). They further note that previous efforts of the applicant to build a house on the allegedly unsuitable lot were denied by local government.

1. Protection of Environmentally Sensitive Habitat Areas

Both appeals raise a contention involving inconsistency of the approved project with the County's LCP policies regarding protection of environmentally sensitive habitat areas, namely the rare plant coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*). Both appeals raise issue with regards to the County's determination that a portion of the site with coastal bluff morning-glory plants is not ESHA. While a portion of the site was designated ESHA with 50-foot buffers for the presence of rare plants and sensitive plant communities, the approved development is located within 20 feet of coastal bluff morning-glory plants that the County did not recognize as occurring within ESHA. Pursuant to LUP 3.1-7, ESHA buffers are not allowed to be reduced to less than 50 feet. Appellant B further alleges that the number of plants in the area not designated as ESHA has doubled from earlier reports and concludes this demonstrates the site as a viable location for coastal bluff morning-glory and ESHA designation, which renders the approved development inconsistent with LCP policies regarding development within an ESHA. Both appellants allege that given this and other site constraints, the size and location of the house are not the least environmentally damaging feasible alternative.

2. Geologic Hazards

Both appellants further contend that the approved project is inconsistent with geologic hazards policies of the LCP that require that stability and structural integrity be assured, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area, or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. The appeals contend that the project as approved threatens the geologic stability of the

site and the surrounding area, and express concern that landslides have removed portions of lots directly north and south of the subject parcel.

Appellant B further notes recent slippage on the northern part of the parcel (see photos Exhibit 12), and expresses concern that the building site in the new proposal is 30 feet closer to the eroding area than the site in the previous applications. Appellant B expresses concern that the addition of ground disturbance and weight near the cliff, with wave erosion at the cliff base and drainage runoff down the cliff face may increase the risk of slides and the magnitude of slippage.

The approved development includes 40-foot bluff setbacks, and the County staff report notes this is an increase from previous applications for the site. The County staff report indicates the increased setback follows the consultant's recommendations after additional geologic work with reconnaissance of the bluff face subsequent to the recent slippage. Appellant A alleges an independent geotechnical review should be made that includes core samples and other evaluations that take into consideration surface drainage and saturation issues.

3. Grading, Erosion, and Runoff

Both appellants raise concerns because the approved runoff design routes the surface drainage under the building, and contend this will substantially increase the water retention of the soil, inconsistent with the consulting geologists' recommendations and with LCP policies that require provisions be made to infiltrate and/or safely conduct surface water to storm drains or suitable watercourses and to prevent surface runoff from damaging faces of cut and fill slopes. The County staff report describes the design as including a pervious concrete driveway and parking area, and a perforated pipe grid system under the residential structure to distribute surface water runoff, with roof runoff tied into the pipe grid to ensure that drainage would not be hindered by the development (Exhibit 29).

The appellants raise concerns that the pervious pavement will eventually fill with sediment, especially if not adequately maintained, and cause system failure, thereby increasing stormwater runoff and risks of erosion. Appellant A alleges that if the pervious pavement failed, the water flow from upslope would travel down to the southern end of the parcel and erode the Applicant and Appellant's parcel, inconsistent with LCP grading standards that require adjoining property to be protected from excavation and filling operations and potential soil erosion.

Appellant A further alleges that the placement of a pipe grid to disperse water from the pervious concrete driveway will require placement 4-5 feet below the ground level and house floor. The appellant alleges this will require a substantial cut below the grade, which would be inconsistent with grading standards of the LCP that 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.

4. Development

Both appellants allege that the approved house is too large for the size of the parcel and aforementioned constraints.

5. Fire Hazard Development Standards

Appellant B further claims that the approved project is inconsistent with the fire safety provisions of the certified LCP because the applicants obtained waivers to seven sections of the Uniform Fire Code and State Fire Code, including a less-than-standard 14-foot-wide driveway easement that accesses the parcel. This appellant alleges that the fire department is voluntary and thus cannot respond quickly to fires. In addition, they note a fire burned down the Old Milano Hotel, within ¼ mile and within sight of the proposed building (under the same volunteer fire department's jurisdiction) a few years ago.

B. Local Government Action

On September 5, 2008, George and Jerri Wernette submitted Coastal Development Permit Application CDP 51-2008 to the Mendocino County Planning and Building Services Department for a coastal development permit. This application sought authorization to construct a two-story single-family residence on a coastal blufftop parcel, with approximately 1,950 square feet of living space; approximately 350-square-foot attached garage; and approximately 2,100 square feet of driveway and parking area. It also included proposals to install a sewage pump tank and connect to off-site septic disposal services; connect to community water; install retaining walls, liquefied propane gas (LPG) tank, generator, and on-site drainage infrastructure; and connect to utilities.

On April 23, 2009, the Mendocino County Planning Commission approved with four special conditions Coastal Development Use Permit No. CDP 51-2008. The County approval included Special Condition Number 1 requiring that the residence be constructed in accordance with the setback, foundation, and drainage recommendations of the geotechnical investigation prepared by Mr. Glomb. Special Condition No. 2 required execution and recordation of a deed restriction that limits liability, future bluff protective devices, risk and responsibility, and transfers responsibility to future owners of the parcel. Special Condition No. 3 provided mitigation measures for a reduced 50-foot buffer between development and ESHA delineated on the southern portion of the parcel. Lastly, Special Condition No. 4 required the applicant to submit copies of "will serve" letters from the North Gualala Water Company and Gualala Community Services District prior to issuance of the building permit. The decision of the County Planning Commission was not appealed at the local level to the County Board of Supervisors.

The County then issued a Notice of Final Action, which was received at the Commission's North Coast District Office on May 7, 2009 (Exhibit No. 11). Section 13573 of the Commission's regulations allows for appeals of local approvals to be made directly to the Commission without first having exhausted all local appeals when, as here, the local jurisdiction charges an appeal fee for the filing and processing of local appeals.

Two separate appeals of the County's decision to grant the permit with conditions were filed in a timely manner with the Commission. The appeals were filed by (1) Duane Hines; and (2) Richard and Judith Turnlund.

C. Project History

The County previously reviewed two other applications submitted by the applicant for development on the subject parcel, which were denied by the local government.

A summary of the previously proposed projects and reasons for denial are presented below; details about the related projects and issues are documented in the County staff report included as Exhibit 11.

1. CDP #57-98

In 1998, application CDP 57-98 (Wernette) was submitted to the County for construction of a two-story, 2,552-square-foot single family residence with an attached 486-square-foot garage, with maximum height of 27 feet. The development included construction of a 3-foot-tall, 40-foot-long retaining wall at the driveway edge; paving the driveway access to the residence; connection to Gualala water and sewer systems; and installation of a drainage collection tank and pump to connect to an existing culvert discharging over the coastal bluff edge near the north property line. The project was approved by the county's coastal permit administrator.

An appeal to the County Board of Supervisors was submitted by Duane Hines. The appeal raised issues regarding lot legality; impacts to wetlands; drainage issues including drainage onto wetlands; inconsistencies with Uniform Fire Code requirements; and inadequate final drainage plans. Wetlands issues were raised in relation to a 500-square-foot wetland feature that was identified and delineated by the consultant Wetlands Research Associates in 2000. The proposed development was located immediately adjacent to the wetland feature, and mitigation in the form of payment towards restoration of a wetland nearly 60 miles away had been proposed. The County Board of Supervisors denied the project, finding that the wetland resource as identified would be significantly degraded by the proposed development; and all feasible mitigation measures capable of reducing or eliminating project impacts had not been adopted.

2. CDP #96-2002

Application CDP 96-2002 (Wernette) was submitted for construction of a two-story, 2,632-square-foot single family residence with an attached 448-square-foot garage (for a total of 3,080 square feet), and a maximum average height of 28 feet above grade. Associated development included a paved driveway; a retaining wall; connection to community water and sewage systems; installation of a drainage collection tank and pump; installation of liquefied propane gas (LPG) tank; and a sewage pump tank.

On April 24, 2008, the Coastal Permit Administrator denied without prejudice the request for approval of CDP 96-2002 finding that: (1) The project did not conform to the Local Coastal Plan in that adequate utilities, drainage, and other facilities could not be provided

without conflicts with LCP policies; and (2) The project did not provide adequate clarity to assure feasibility without further study.

3. CC #20-2008

In addition to applications for development, the applicant applied for a Certificate of Compliance to demonstrate lot legality to ensure that the issue of legality would not be raised in the future. The County was in the process of finalizing the issuance of the Certificate at the time of the County hearing for the current project; the County issued the Certificate as a ministerial act on April 27, 2009.

D. Site and Project Description

The proposed project site is located approximately ½ mile north of downtown Gualala, on a bluff top lot, 150 feet west of Robinson Reef Drive (CR 527), and approximately 400 feet north of its intersection with Westward Ho (CR 529), at 38454 Robinson Reef Drive, Gualala. The parcel is located within the 87-parcel subdivision known as North Gualala Subdivision No. 3. The site is located on an approximately 0.72-acre parcel that is accessed by a 14-foot-wide driveway easement located between two residences- the Hines parcel to the south, and the former Turnlund parcel to the north (now also owned by Mr. Hines).

The subject property is designated in the Coastal Land Use Plan and zoned in the Coastal Zoning Ordinance as Rural Residential – 5-acre minimum parcel size (RR-5), with an alternate zoning and land use designation of suburban residential, 40,000 Square-Foot Minimum (SR L-40,000). The proposed single family residence is a form of land use consistent with the Suburban Residential land use classification and zoning district.

The proposed development is not located within a designated highly scenic area. The site is located within the special neighborhood designation of the Gualala area and is subject to the development criteria as described in CZC Section 20.504.020. A glimpse of ocean view is afforded through the lot from the street in front of the parcel, and the ocean horizon is visible from the street above the roofline of the surrounding residential developments (Exhibit 5).

According to an archaeological report dated October 28, 2000 and prepared for the subject parcel, the property occurs on the former alignment of the Gualala Mill Railroad that transported lumber from an old mill along the Gualala River approximately two miles to the south to a cable-ship loading facility at Bourne’s Landing, approximately 1-1/2 miles to the north, and that was built in the late 1800’s. The subject parcel represents only a remnant of the railroad grade that is isolated due to bluff retreat and modern development to the north and south. The parcel is part of a marine terrace located down slope of surrounding development. The parcel consists of a relatively flat “pad” that measures approximately 60 feet wide and 350 feet long (0.48 acre total), with residential developments abutting the length of the parcel to the east, and a steep seacliff to the west, with the remainder of the lot dropping off steeply to the Pacific Ocean below. Several +/- 50 to 75-foot high bedrock sea stacks exist in the tidal zone below the subject property.

Drainage

At Robinson Reef Drive, an existing 12-inch culvert captures stormwater for the surrounding development from a drainage ditch across the street from the subject parcel. The culvert crosses the road westward, continues underneath the adjacent eastern residence, and bisects the extreme northern portion of the subject property before discharging from the outlet perched on the bluff face. The culvert was installed as part of the subdivision that was developed circa 1964, and the responsibility to maintain the culvert within the county road right of way belongs to Mendocino County Department of Transportation. The end of the culvert was replaced with a plastic culvert in 1998 after the existing metal culvert had corroded in several areas near the outlet, resulting in water pouring through the sides of the pipe and eroding the edges of the subject and adjacent properties and causing slippage to occur. Previous applications for development of the subject parcel proposed to direct site drainage into this existing culvert. However, the current project as approved by the County presents an alternative consisting of a perforated pipe grid system underneath the house designed to collect surface and roof runoff and distribute water evenly across the ground surface in a way that mimics a rainfall event on the surface, with excess water following natural topography to sheet off the surface (Exhibit 29).

Two drop inlets are located at the top of the driveway easement, and the drop inlets currently discharge flows onto the surface of the subject parcel near the base of the easement. As described by the applicant's agent, during storms water from the drop inlets commingles with surface flows down the easement. That storm water first saturates the soil and then moves laterally southwest and south toward the bluff edge as either surface or subsurface flows. As part of the approved development, the outfalls from the drop inlets would be connected to a subsurface manifold and pipe running under the pervious concrete driveway to the drainage grid header at the east edge of the perforated pipe grid system. A letter submitted by the consulting geologist to Appellant A, Duane Hines, and dated April 30, 2009 (Exhibit 25), and the geologic report dated September 12, 2009 (Exhibit 26) further explain the proposed drainage system.

Habitat

The southern portion of the parcel includes intact Coastal Terrace Prairie plant community, along with areas of encroachment of Coastal Scrub plant community. The Coastal Terrace Prairie community type is itself recognized as a sensitive plant community by California Department of Fish and Game (CDFG), and is recognized as ESHA by the Coastal Commission. Additional special-status species present on the parcel include what is presumed to be Mendocino coast Indian paintbrush (*Castilleja mendocinensis*) near the bluff edges on the southern portion of the parcel (access is unsafe for positive identification), and coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) on both the northern and southern portions of the property. Mendocino coast Indian paintbrush and coastal bluff morning-glory both have a California Rare Plant

Rank (CRPR¹) of 1B.2, a designation assigned to plants considered rare, threatened, or endangered in California and elsewhere. In California, both species are considered to be “distributed in a limited number of occurrences” (CNPS 2003) and fairly threatened in California with a moderate degree/immediacy of threat.

The consulting biologists Wetland Research Associates (WRA) have conducted several biological investigations and surveys on the subject parcel dating back to 2000. In a December 2000 report entitled “Delineation of Potential Jurisdictional Wetlands Under Section 404 of the Clean Water Act and California Coastal Act,” WRA identified and delineated a 500-square-foot wetland feature adjacent to the proposed development site. Subsequent reports, including the April 23, 2010 Supplemental Biological Report (Exhibit 16) and the May 28, 2010 memo submitted by WRA (Exhibit 18) describe the site as no longer exhibiting wetland features due to changes in vegetation composition, lack of hydric soils, and lack of evidence of wetland hydrology. Consideration of wetland features is addressed further in Finding 5, “Environmentally Sensitive Habitat Areas” of the Findings for *de novo* review, beginning on Page 20.

An August 2008 report entitled “Biological Report of Compliance for a Mendocino County Coastal Development Permit” (Exhibit 14) identifies locations of the Coastal Terrace Prairie plant community and locations of sensitive plants. The report describes some morning-glory plants as exhibiting characteristics of both the rare and common subspecies of morning-glory², and some specimens exhibiting characteristics of the common subspecies. The report additionally describes two plants occurring near the northern portion of the parcel. The report includes a diagram illustrating 50-foot ESHA buffers around all rare plants and rare plant communities, and indicates that the proposed development occurs within 20 feet of the two plants occurring in the northern portion of the property. In a letter dated February 23, 2009 (Exhibit 15) submitted to Mendocino County Project Coordinator Teresa Spade, WRA Senior Vice President Tim DeGraff discusses habitat variations between the northern and southern portions of the parcel, and concludes the following:

In summary, the two isolated coastal bluff morning glory locations are in atypical habitat that may be unsuitable for sustaining these plants, and is not likely to support natural recruitment of new individuals. The immediate vicinity of the plants is dominated by shady habitat, large shrubs and trees, and adjacent habitats are also dominated by invasive species such as pampas grass, iceplant, and annual grasses. As the trees and shrubs continue to grow and invasions expand, this may prove to be unsuitable habitat for the plants, whether development occurs in the vicinity of these morning glory plants or not. It is our opinion that these two isolated coastal bluff morning glory plants do not meet the definition of an ESHA,

¹ Formerly recognized as the California Native Plant Society (CNPS) list, the new designation of CRPR reflects in its name the cooperative statewide process of plant status review and ranking, but in no way changes the content or format of the listing system.

² Another closely-related species of morning-glory known as climbing morning-glory (*Calystegia purpurata* ssp. *purpurata*) commonly occurs in similar habitats and is not considered sensitive; according to Hickman (1993), intergradation is common between *Calystegia* species.

as the supporting habitat is not rare or sensitive, and is not likely to sustain the existing plants or population in the long-term.

A subsequent report dated April 23, 2010 (Exhibit 16) was submitted after the County approved the project. In the report, which was intended to update 2008 survey data, Mr. DeGraff indicated that non-floristically-appropriate surveys conducted in March and April 2010 identified increases to all coastal bluff morning-glory occurrences on the parcel. The report states the following:

Thirteen coastal bluff morning glory and potential hybrids, and four plants appearing to be the common subspecies were observed on the Wernette parcel during 2008 surveys. Two of the thirteen coastal bluff morning glory plants were located within 50 feet of the proposed project at the north end of the parcel. In 2010 WRA biologists observed approximately 63 coastal bluff morning glory and potential hybrids, and 11 plants appearing to be the common subspecies. Approximately 28 coastal bluff morning glory and potential hybrids, or 44 percent, were observed within 50 feet of the proposed project.

Dominant species within the southern portion of the parcel include pacific reedgrass (*Calamagrostis nutkaensis*), tufted hairgrass (*Deschampsia cespitosa* ssp. *holciformis*), silver lupine (*Lupinus albifrons* var. *albifrons*), coast angelica (*Angelica hendersonii*), coyote brush (*Baccharis pilularis*), and Point Reyes ceanothus (*Ceanothus gloriosus*), a watch-list³ species. Some encroachment of invasive non-native species is also present, such as pampas grass (*Cortaderia jubata*), French broom (*Genista monspessulana*), and cotoneaster (*Cotoneaster* sp.). California blackberry (*Rubus ursinus*) occurs sporadically throughout the parcel.

The central and northern portions of the property consist predominantly of coastal scrub habitat, with coyote brush, pacific reedgrass, cow parsnip (*Heracleum lanatum*), and Douglas' iris (*Iris douglasiana*) prevalent. A large patch of nonnative grasses occurs near the center of the parcel, and consists primarily of rattlesnake grass (*Briza maxima*) in addition to velvet grass (*Holcus lanatus*) and sweet vernal grass (*Anthoxanthum odoratum*). Much of the nonnative grassland appears to occur in an area mapped as man-made fill on a geologic map prepared by the consulting geologist dated April 1999.

A cluster of wind-pruned trees occurs toward the northern portion of the parcel, and includes Douglas-fir (*Pseudotsuga menziesii*), coffeeberry (*Rhamnus californica*), and California wax myrtle (*Myrica californica*). The base of the driveway easement and the cutbanks along the eastern property line are heavily colonized by the invasive ornamental iceplant (*Carpobrotus edulis*), in addition to a mix of ornamental redhot poker (*Kniphofia uvaria*) and coastal scrub plants such as California blackberry, coast angelica, and pacific reedgrass.

³ The California Rare Plant Rank (CRPR) system assigns a "watch list" designation to plants that are of limited distribution or infrequent throughout a broader area in California, and whose vulnerability or susceptibility to threat appears low at this time. While these plants are not considered "rare" from a statewide perspective, they are uncommon enough that their status should be monitored regularly.

E. Substantial Issue Analysis

Section 30603(b)(1) of the Coastal Act states:

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

The contentions raised in the appeals present potentially valid grounds for appeal in that they allege the project's inconsistency with policies of the certified LCP.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., Title 14, section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure, section 1094.5.

In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that the appeals raise a substantial issue of conformance of the project as approved by the County with the policies of the certified LCP.

1. Allegations Raising A Substantial Issue

a. Protection of Environmentally Sensitive Areas

Both appeals contend that the approved project is inconsistent with the environmentally sensitive habitat area (ESHA) protection provisions of the Mendocino County certified

Local Coastal Program (LCP), namely as it concerns the rare plant coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*). Both appeals raise issue with regards to the County's determination that a portion of the site with coastal bluff morning-glory plants is not ESHA. While a portion of the site was designated ESHA with 50-foot buffers for the presence of rare plants and sensitive plant communities, the approved development is located within 20 feet of coastal bluff morning-glory plants that the County did not recognize as part of ESHA. ESHA buffers are not allowed to be reduced to less than 50 feet. Appellant B further alleges that the number of plants in the area not designated as ESHA has doubled from earlier reports and concludes this demonstrates the site as a viable location for coastal bluff morning-glory and ESHA designation, which renders the approved development inconsistent with LCP policies regarding development within an ESHA.

Discussion:

Coastal Bluff Morning-Glory is ESHA

The Commission has found, in past decisions on permit appeals that coastal bluff morning-glory and its habitat constitute an environmentally sensitive habitat area (ESHA). These past decisions include, but are not limited to decisions on two appeals of projects approved in the Gualala area in 2003 (A-MEN-03-029) and 2010 (A-1-MEN-05-037), both for single-family residences.

ESHA, as defined in Section 30107.5 of the Coastal Act, Section 3.1 of the certified Mendocino County LUP, and CZC Section 20.308.040(F) is "...*any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities*" (see pages 57-62 of this report for the full text of the LCP ESHA policies cited herein). Thus, Coastal Act Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F) set up a two part test for determining an ESHA. The first part is determining whether an area includes plants or animals or their habitats that are either: (a) rare; or (b) especially valuable because of their special nature or role in an ecosystem. If so, then the second part asks whether such plants, animals, or habitats could be easily disturbed or degraded by human activities. If so, then the area where such plants, animals, or habitats are located is deemed ESHA by Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F).

The first test for determining ESHA under Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F) is whether an **area** including plants or animals or their habitats **is either (a) rare, or (b) especially valuable because of its special nature or role in an ecosystem.**

Coastal bluff morning glory (*Calystegia purpurata* ssp. *saxicola*) is a perennial herb in the Convolvulaceae family that usually grows on coastal dunes, scrub, and bluffs in Marin, Sonoma, and Mendocino Counties (CNPS 2003). It has no federal or state threatened or endangered status, but it has a California Rare Plant Rank (CRPR) of 1B.2 (plants considered rare, threatened, or endangered in California and elsewhere).

Normally, impacts to the plants on CRPR List 1B.2 are considered significant by the California Department of Fish and Game (CDFG) under the California Environmental Quality Act (CEQA). In addition to the California Rare Plant rank 1B.2 that designates coastal bluff morning-glory as rare, threatened or endangered in California and elsewhere, it also has a CNDDDB state/global ranking of G4T2/S2.2 that further recognizes the status of coastal bluff morning-glory as imperiled and vulnerable to extirpation from the nation or state/province⁴. Because of its relative rarity at the state level, the area containing coastal bluff morning glory meets the rarity test for designation as ESHA under the above cited Coastal Act and LCP policies.

The second test for determining ESHA under Coastal Act Section 30107.5 (Section 3.1 of the certified LUP) is **whether the habitat could be easily disturbed or degraded by human activities and developments**. The coastal bluff morning-glory plants occurring on the property could be easily disturbed or degraded by human activities and developments such as those that would be necessary to develop the proposed house, including grading, paving, building construction, foot trampling, etc. Therefore, coastal bluff morning-glory plants occurring on all portions of the approved project site meet the second test for determining ESHA under Section 30107.5 of the Coastal Act, LUP Section 3.1, and CZC Section 20.308.040(F).

The consulting biologists Wetland Research Associates have conducted several biological investigations and surveys on the subject parcel dating back to 2000. An August 2008 report entitled “Biological Report of Compliance for a Mendocino County Coastal Development Permit” (Exhibit 14) identifies locations of the Coastal Terrace Prairie plant community and locations of sensitive plants. The report describes some morning-glory plants as exhibiting characteristics of both the rare and common subspecies of morning-glory⁵, and some specimens exhibiting characteristics of the common subspecies. The August 2008 report additionally describes two plants occurring near the northern portion of the parcel. The report includes a diagram illustrating 50-foot ESHA buffers around all rare plants and rare plant communities, and indicates that the proposed development occurs within 20 feet of the two plants occurring in the northern portion of the property. In a letter dated February 23, 2009 (Exhibit 15) submitted to Mendocino County Project Coordinator Teresa Spade, WRA Senior Vice President Tim DeGraff discusses habitat variations between the northern and southern portions of the parcel, and concludes the following:

⁴ In this case, the California Heritage (CNDDDB) ranking of G4T2/S2.2 describes the global rank (G rank) of the entire distribution for the species *Calystegia* as apparently secure and uncommon but not rare. Subspecies receive a T-rank attached to the G-rank. With the subspecies, the G-rank reflects the condition of the entire species, whereas the T-rank reflects the global situation of just the subspecies or variety. The T-rank for *Calystegia purpurata* ssp. *saxicola* indicates this subspecies is imperiled, and at high risk of extinction due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors. The state rank (S rank) for coastal bluff morning-glory is imperiled in California because of rarity due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors making it very vulnerable to extirpation from the nation or state/province.

⁵ Another closely-related species of morning-glory known as climbing morning-glory (*Calystegia purpurata* ssp. *purpurata*) commonly occurs in similar habitats and is not considered sensitive; according to Hickman (1993), intergradation is common between *Calystegia* species.

In summary, the two isolated coastal bluff morning glory locations are in atypical habitat that may be unsuitable for sustaining these plants, and is not likely to support natural recruitment of new individuals. The immediate vicinity of the plants is dominated by shady habitat, large shrubs and trees, and adjacent habitats are also dominated by invasive species such as pampas grass, iceplant, and annual grasses. As the trees and shrubs continue to grow and invasions expand, this may prove to be unsuitable habitat for the plants, whether development occurs in the vicinity of these morning glory plants or not. It is our opinion that these two isolated coastal bluff morning glory plants do not meet the definition of an ESHA, as the supporting habitat is not rare or sensitive, and is not likely to sustain the existing plants or population in the long-term.

In its analysis of ESHA on the northern portion of the parcel, the County staff report states the following:

The northern portion of the parcel contains a small, shaded, protected area where two individual coastal bluff morning glory plants were observed. Mr. DeGraff notes in his February 23, 2009 letter that the area is not typical habitat for these two individuals, is not likely to support additional rare plants, and is not likely a sustainable, long-term habitat area (page 3). Mr. DeGraff also notes in his letter that coastal bluff morning glory is known to thrive locally in areas disturbed by mowing (page 2). For these reasons the two individuals in the northern portion of the parcel do not meet the second part of the ESHA definition, and staff finds that the northern area does not warrant ESHA protective status.

This decision was made in consultation with Rick Macedo of the Department of Fish and Game, who met with planning staff on February 25, 2009 to review the project information including the project file, biological report, and February 23, 2009 letter from Tim DeGraff. Planning staff and Rick Macedo discussed the case over a conference call with Tim DeGraff, and all parties stated that they were in agreement that the northern parcel area containing the two coastal bluff morning glory individuals did not constitute an ESHA.

Commission staff contacted Rick Macedo at DFG via telephone on September 16, 2010 to inquire about the County's findings. Mr. Macedo requested it be clarified that he did not intend to make a determination whether an area was ESHA, but rather whether and how to mitigate for areas where development may encroach into sensitive plant habitat. Mr. Macedo indicated the last time he had visited the site was December 13, 2007. Upon request, Mr. Macedo provided an email to Commission staff dated January 23, 2008 (Exhibit 21) that was submitted to the County as part of the previous application No. CDP 96-2002, in which Mr. Macedo states "Based on our December 13, 2007 site visit, a cursory review of proposed mitigation measures outlined in the January 24, 2008 staff report and the understanding that the project occurs outside a 50-foot setback to all ESHAs, I have no further comments regarding the project's potential impacts on sensitive species and communities. The proposed 50-foot setback should adequately protect the identified sensitive resources."

The County's dismissal of the northern portion of the parcel as ESHA in its approval raises a substantial issue of conformity of the approved development with certified LUP sections 3.1 and CZC Section 20.308.040(F) because it fails to recognize in its findings that whether coastal bluff-morning glory can tolerate and/or "thrive" from disturbance by mowing, does not address other forms of disturbance that can negatively affect coastal bluff morning-glory. The second part of the test for ESHA evaluates **whether the habitat could be easily disturbed or degraded by human activities and developments**. The coastal bluff morning-glory plants and habitat occurring on the property could be easily disturbed or degraded by human activities and developments such as those that would be necessary to develop the proposed house, including grading, paving, building construction, foot trampling, etc. Such development activities could additionally degrade coastal bluff morning-glory habitat by disturbing the soil and native plant community such that it facilitates encroachment by invasive exotic species. This can be evidenced by the lack of rare plant occurrences within the area mapped by WRA as "nonnative vegetation" that is dominated by nonnative grasses, which generally correlates with an area of man-made fill from railroad construction mapped by the consulting geologist in 1999.

The County further noted in its report:

As we learn more about ecology, our determinations of ESHA become more appropriate. At the present time, we are transitioning towards plant community, or appropriate habitat based protection, as opposed to drawing circles around individual species. Donna Shorrock, a California Native Plant Society (CNPS) vegetation ecologist notes:

...a plant community is an association of species that interact in a shared, physical environment. As such, the response of vegetation to environmental changes can serve as an indicator of the overall health of the ecosystem and the species contained within it. It is also within vegetation, or plant communities, that one can measure biological diversity. This typically includes the number of different native species, the variety of different habitats, the variety of interactions between species, and the range of genetic variation among individuals within a species. When conservation efforts look only at individual species, none of these other elements are preserved (CNPS Bulletin 2008).

While the County acknowledges the importance of plant community- and habitat-based protection, its determination that two plants within a portion of the larger plant community – and more importantly, the greater habitat occupied by the plants – were not ESHA, fails to recognize the greater components at the site that support not only coastal bluff morning-glory, but other sensitive species and plant communities. The County findings reference WRA's determination that the location of the two plants is not typical habitat because it is shaded by trees and is surrounded by encroaching invasive species. The mere presence of the plant at this location demonstrates that suitable habitat exists. Commission staff has observed this site and noted that while a non-native grassland does occur nearby, the northern area occupied by coastal bluff morning-glory plants is surrounded by native coastal scrub species (typical habitat for coastal bluff morning-

glory) that include pacific reedgrass, California blackberry, coast angelica, bracken fern (*Pteridium aquilinum*), and Douglas-fir that is wind-pruned such that it does not significantly shade the site. In fact, the number of coastal-bluff morning-glory plants in the vicinity of the location of the two coastal-bluff morning-glory plants increased to well over 25 plants in the year following the filing of the appeal, demonstrating further the dynamics of the plant community and the premise for designating the northern area, in addition to the southern portion of the parcel, as ESHA. In a subsequent report intended to update 2008 survey data and dated April 23, 2010 (Exhibit 16), Mr. DeGraff indicated that non-floristically-appropriate surveys conducted in March and April 2010 identified increases to all coastal bluff morning-glory occurrences on the parcel. The report states the following:

Thirteen coastal bluff morning glory and potential hybrids, and four plants appearing to be the common subspecies were observed on the Wernette parcel during 2008 surveys. Two of the thirteen coastal bluff morning glory plants were located within 50 feet of the proposed project at the north end of the parcel. In 2010 WRA biologists observed approximately 63 coastal bluff morning glory and potential hybrids, and 11 plants appearing to be the common subspecies. Approximately 28 coastal bluff morning glory and potential hybrids, or 44 percent, were observed within 50 feet of the proposed project.

Prior to review of the biological reports, Commission staff visited the subject parcel on May 13, 2010, when coastal bluff morning-glory plants were in bloom. Staff examined various coastal bluff morning-glory occurrences on the site, including the location where two plants were initially documented. Staff reexamined the site on August 25, 2010 after reviewing biological reports dating back to 2000, and including the most recent report dated April 23, 2010. Commission staff used a Trimble GeoXM 2005 geographic positioning system (GPS) unit to collect data on plant occurrences in the area where two plants were originally identified. On the day of inspection, staff counted 48 individuals occurring in the vicinity of the two plants previously identified by WRA. Plants were counted by following vegetation to the soil surface; where several inches separated individual or clusters of stems, the plant was counted as a unique individual. Using geographic information system (GIS) software and after obtaining data files from the consultant, staff overlaid findings from the August 25, 2010 site visit with the occurrence data and proposed project site mapped by WRA. According to the GIS analysis, the 48 individuals observed by staff occur within 50 feet of the project area, with some plants occurring as close as 6 feet from the edge of the proposed development.

It is unclear why there is a discrepancy in numbers of plants observed. On August 24, 2010, Commission staff contacted WRA via email to ask what methodology was used to count morning-glory plants, since the methodology was not stated in any of the survey reports reviewed. On August 26, 2010, WRA Botanist/Wetlands Biologist Jennifer Mathers responded that "As the subject species is a vine, occasionally it may be difficult to determine if several branches in an area belong to the same individual plant. However, since the updated survey in 2010 was performed early in the growing season for this species, branches had not yet extended to significant lengths. Therefore plants were

compact enough to isolate and count individuals with a fair amount of accuracy. Generally clusters of stems were counted as a single plant, and this could usually be verified by viewing the origin of the stems.”

Accordingly, the Commission finds that the appeals of the County’s approval raise a substantial issue of conformity of the approved development with the ESHA provisions of the certified LCP because the degree of factual and legal support for the County’s action is low, given that the findings used to dismiss ESHA do not adequately evaluate or represent habitat conditions and threats to rare species in relation to the proposed development.

Development Within Rare Plant ESHA

As a result of the County’s determination of non-ESHA, the County approved development to occur within 20 feet of rare coastal bluff morning-glory occurrences identified in 2008 (and within 6 feet of plants identified in 2010), inconsistent with LCP provisions including CZC Section 20.496.020, which requires a 50-foot minimum buffer width for development.

LUP Policy 3.1-7 and CZC Section 20.496.020 (A)(1) allow for development to be permitted within a buffer area if the development is for a use that is the same as those uses permitted in the adjacent environmentally sensitive habitat area, and if the development complies with specified standards as described in subsections (1)-(3) of LUP Policy 3.1-7 and 4(a)-(k) of Section 20.496.020. CZC Section 20.532.100(A)(1)(a) requires that ESHA resources affected by development will not be significantly degraded by the proposed development. The LCP policies identify specific uses permitted in wetland and riparian ESHAs, but do not specifically identify what uses are allowed within rare plant ESHA, and by extension, within the rare plant buffer.

Coastal Act Section 30240(a) states that environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, only uses dependent on those resources shall be allowed within those areas. Although Section 30240 of the Coastal Act is not listed in the section of the certified Land Use Plan entitled, “Coastal Element Policies: Habitats and Natural Resources,” which contains LUP Policy 3.1-7 and other LUP policies governing the protection of ESHA, Section 30240 is listed and referred to in the narrative for the section of the Land Use Plan containing the other LUP policies governing the protection of ESHA.

Although local governments are responsible for drafting the precise content of their LCPs, the Coastal Act requires that LCPs must, at a minimum, conform to and not conflict with the resource management standards and policies of the Coastal Act. It can be presumed that the County was aware that the Coastal Act established the minimum standards and policies for local coastal programs and knew, that in drafting its local coastal program, it was constrained to incorporate the development restrictions of Section 30240(a) of the Coastal Act, including the restriction that only uses dependent on those resources shall be allowed in those areas. It can also be assumed that in certifying the Mendocino County LCP, the Commission understood and found that the LCP conformed

to (i.e. incorporated) the minimum policies and standards of the Coastal Act, including the development restrictions of Section 30240(a).

As noted above, the narrative for the section of the Land Use Plan containing LUP policies governing the protection of ESHA includes Section 30240. In addition, the narrative contains statements that acknowledge the protections afforded by Section 30240 and the County's commitment to incorporate those protections into the LCP, including the following statements:

- “The Coastal Act mandates the preservation of significant natural resources and habitats;”
- “Throughout all policies pertaining to Habitats and Natural Resources shall run the continuous theme that natural habitat areas constitute significant public resources which shall be protected not only for the wildlife which inhabits those areas but for the enjoyment of present and future populations of the State of California;”
- This Local Coastal Plan represents the commitment of the County of Mendocino to provide continuing protection and enhancement of its coastal resources

The LCP policies do not expressly authorize non-resource dependent uses nor any other uses within rare plant ESHA. The fact that the LCP policies do not specifically state what uses are allowed within rare plant ESHA does not mean the policy is intended to relax the restriction of Section 30240(a) of the Coastal Act that limits uses in habitat areas to those dependent on habitat resources. An LCP policy that allowed non-resource dependent uses in rare plant ESHA would be inconsistent with and directly conflict with Section 30240(a). Moreover, the provisions in the LCP concerning permissible development in habitat areas are not incompatible with the restrictions in Section 30240(a). These provisions refer generally to maintaining minimum buffers between development and ESHA, which is not inconsistent with restricting development within rare plant ESHA to resource dependent uses. Therefore, the Commission finds that the Mendocino County LCP policies governing rare plant habitat areas restrict development to resource dependent uses that do not significantly disrupt habitat values.

The protection of ESHA in the coastal zone is an issue of statewide concern addressed by Section 30240 of the Coastal Act. In addition, as noted above, the degree of factual and legal support for the County's action is low, given that the findings used to dismiss ESHA do not adequately evaluate or represent habitat conditions and threats to rare species in relation to the proposed development. The approved residential development is not in any way dependent on the rare plants or plant communities at the site. Therefore, as a residential development is not listed in the LCP as an allowable use within rare plant ESHA and the Coastal Act only allows resource dependent uses within an ESHA, the appeals raise a substantial issue as to whether the approved development conforms with the use and buffer limitations of the certified LCP, including its references to 30240, and including LUP Policy 3.1-7 and CZC Section 20.496.020(A)(4).

Conclusion

Therefore, because (1) the County failed to identify rare plant ESHA; (2) the approved development does not provide a buffer between the development and rare plant ESHA and ESHA buffers are not allowed to be reduced to less than 50 feet; and (3) only resource dependent uses are allowed in a rare plant ESHA and a residential development is not an allowed use within rare plant ESHA, the Commission finds that the appeals raise a substantial issue of conformance of the project as approved with the ESHA protection provisions of the certified LCP including, but not limited to, the LUP's references to Section 30240 of the Coastal Act, and including LUP Policy 3.1, and CZC Sections 20.308.040(F) and 20.496.020.

b. Geologic Hazards

Both appellants further contend that the approved project is inconsistent with geologic hazards policies of the LCP that require that stability and structural integrity be assured, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area, or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. The appeals contend that the project as approved threatens the geologic stability of the site and the surrounding area, and express concern that landslides have removed portions of lots directly north and south of the subject parcel.

Appellant B further notes recent slippage on the northern part of the parcel (see photos Exhibit 12), and expresses concern that the building site in the new proposal is 30 feet closer to the eroding area than the site in the previous applications. Appellant B expresses concern that the addition of ground disturbance and weight near the cliff, with wave erosion at the cliff base and drainage runoff down the cliff face may increase the risk of slides and the magnitude of slippage.

The approved development includes 40-foot bluff setbacks, and the County staff report notes this is an increase from previous applications for the site. The County staff report indicates the increased setback follows the consultant's recommendations after additional geologic work with reconnaissance of the bluff face subsequent to the recent slippage. Appellant A alleges an independent geotechnical review should be made that includes core samples and other evaluations that take into consideration surface drainage and saturation issues.

Discussion:

The parcel is located on a coastal bluff top property and is part of a marine terrace located down slope of surrounding development. The parcel consists of a relatively flat "pad" area 120-130 feet above sea level, with a 10 to 12-foot high +/-1:1 (horizontal:vertical) cut slope on the east site margin and a steep seacliff on the west site margin. The pad measures approximately 60 feet wide and 350 feet long (0.48 acre total), with residential developments abutting the length of the parcel to the east, with the remainder of the lot dropping off steeply to the Pacific Ocean below. Several +/-50 to 75-foot high bedrock sea stacks exist in the tidal zone below the subject property.

LUP Policy 3.4-7 and Coastal Zoning Code Section 20.500.020 require that a site for new development remain stable for the development's expected economic life, which is defined as 75 years (see pages 98-102 of this report for the full text of the LCP Geologic Hazard policies cited herein). Policy 3.4-1 and Coastal Zoning Code Section 20.500.020 require mitigation measures to minimize threats to the development from geologic hazards arising from landslides, seismic events, beach erosion and other geologic events. 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.

Geological consultant Jim Glomb and Civil Engineer David Paoli have conducted several geologic investigations on the subject parcel dating back to 1992. The County staff report highlights several of these including "Engineering Geologic Investigation" on June 5, 1992; "Geologic & Soils Investigation" prepared by David Paoli, Civil Engineer, on August 13, 1997 and revised on August 20, 1998; an "Updated Engineering Geologic Investigation" prepared by Jim Glomb on April 9, 1999; and a "Final Engineering Geologic Investigation Report" prepared by Jim Glomb on August 13, 2002.

In addition, Mr. Glomb prepared and submitted to the County on July 15, 2008 a document titled "Supplemental Foundation Recommendations for the Proposed Wernette Project" to provide additional information requested for the evaluation of the proposed project. The document indicates that loose soils and unengineered fill materials overlay stable sandstone bedrock by a depth of two to seven feet at the building site. The letter outlines a detailed recommendation for supporting the structure on steel reinforced piers embedded a minimum of ten feet in the bedrock.

The Mendocino County LCP requires that a bluff setback for new structures be determined by multiplying the structure life (~75 years) by the retreat rate of the bluff, which shall be determined from historical observation and/or a complete geotechnical investigation (Policy 3.4-4 of the LUP). The proposed bluff setback for the residence is 40 feet. According to the local record, the setback was previously proposed at 35.5 feet in association with CDP 96-2002. The County noted that although the information in the 2002 geotechnical report by Jim Glomb is still relevant for the project, the updated setback takes into consideration a recent slip-out that occurred north of the proposed residence. The County noted that Mr. Glomb and his assistant rappelled the bluff face, observing and noting key features of the topography in their recent assessment, and that the revised setback assures the required 75-year lifespan of the proposed structure based on recent information regarding the site. The County approval included Special Condition Number 1 requiring that the residence be constructed in accordance with the setback, foundation, and drainage recommendations of Mr. Glomb.

Long-term bluff retreat is measured by examining historic data including vertical aerial photographs and any surveys conducted that identified the bluff edge. Slope stability, on the other hand, is a measure of the resistance of a slope to land sliding, and is assessed by a *quantitative slope stability analysis*. In such an analysis, the forces resisting a potential landslide are first determined. These are essentially the strength of the rocks or soils making up the bluff. Next, the forces driving a potential landslide are determined. These

forces are the weight of the rocks as projected along a potential slide surface. The resisting forces are divided by the driving forces to determine the “factor of safety.” The Commission generally defines “stable” with respect to slope stability as a minimum factor of safety of 1.5 against landsliding. The process involves determining a setback from the bluff edge where a factor of safety of 1.5 is achieved.

LUP Policy 3.4-1 states:

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.

Although several geologic analyses have been conducted over time on the subject parcel, no quantitative slope stability analysis had been conducted before the County approved the project. Therefore, it was unknown at the time of County approval where on the bluff top a 1.5 factor of safety is attained, and what parts of the bluff top will have a 1.5 factor of safety at the end of 75 years of bluff retreat. In addition, it is unclear from the County’s findings whether the steel-reinforced pier foundation design can ensure stability over the life of the project.

Conclusion:

Therefore, based on the geotechnical investigations available at the time of County approval, the degree of legal and factual support for the local government’s decision that (a) the approved project site will be stable over the life of the project, and (b) that threats to the development from geologic hazards have been minimized and mitigated, is low. Therefore, the Commission finds that the project as approved raises a substantial issue of conformance with the provisions of LUP Policies 3.4-1 and 3.4-7 and Coastal Zoning Code Sections 20.500.020.

CONCLUSION OF PART ONE: SUBSTANTIAL ISSUE

The Commission finds that for the reasons stated above, the appeals raise a substantial issue with respect to the conformance of the project as approved by the County with the policies of the certified LCP regarding the protection of ESHAs and minimization of geologic hazards.

PART TWO—*DE NOVO* ACTION ON APPEAL

STAFF NOTES:

1. Procedure

If the Commission finds that a locally approved coastal development permit raises a Substantial Issue with respect to the policies of the certified LCP and/or the public access policies of the Coastal Act, the local government's approval no longer governs, and the Commission must consider the merits of the project. The Commission may approve, approve with conditions (including conditions different than those imposed by the County), or deny the application. Testimony may be taken from all interested persons during the *de novo* hearing.

2. Standard of Review

The Coastal Commission effectively certified the County of Mendocino's LCP in 1992. Pursuant to Section 30603(b) of the Coastal Act, after effective certification of an LCP, the standard of review for all coastal permits and permit amendments for development located between the first public road and the sea is the standards of the certified LCP and the public access and recreation policies of the Coastal Act.

3. 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) Updated Geotechnical and Engineering Geologic Investigation Report with supplemental geotechnical analyses for determining bluff stability and quantitative slope stability analysis data, dated September 12, 2009 (Exhibit No. 26);
- (b) Drainage overview and Alternative Drainage Approaches analysis submitted September 21, 2009 (Exhibit No. 28);
- (c) Drainage cross-section detail submitted September 19, 2010 (Exhibit No. 29);
- (d) Property interest and lot legality analysis information (Exhibit 32), including Chain of Title documentation;
- (e) Updated biological report dated April 23, 2010 (Exhibit No. 16);
- (f) Updated construction zone map submitted September 6, 2010 to reflect new rare plant occurrence near southern portion of proposed development (Exhibit No. 37);
- (g) Memo from WRA dated May 28, 2010 containing 2010 wetland investigation data and notes (Exhibit No. 18);
- (h) Responses to appellants' and citizen's concerns dated August 19, 2010 and September 9, 2010 (Exhibit No. 13);

- (i) Parcel development data for surrounding residential homes in North Gualala Subdivision No. 3, prepared June 2010 by Mendocino County Assessor (Exhibit 31);
- (j) Copies of geologic and engineering documents prepared for the subject parcel dating back to 1992; and
- (k) Copies of cultural and natural resource analysis documents prepared for the subject parcel dating back to 2000

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.

IV. **STANDARD CONDITIONS:** See Attachment A.

V. **SPECIAL CONDITIONS:**

1. **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 wildfire and erosion; (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.

2. **Deed Restriction**

PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-09-023, 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.

3. Future Development

This permit is only for the development described in coastal development permit No. A-1-MEN-09-023. Any future improvements or changes to the single-family residence or other approved structures shall require an amendment to Permit No. A-1-MEN-09-023 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

4. Conformance of the Design and Construction Plans to the Geotechnical Investigation Report

A. All final design and construction plans including foundations, grading, retaining walls, and drainage plans, shall be consistent with the recommendations contained in the Updated Geotechnical and Engineering Geologic Investigation Report dated September 12, 2009 and prepared by Jim Glomb Geotechnical and Environmental Consulting, Inc. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-09-023**, the applicant shall submit, for the Executive Director's review and approval, evidence that a licensed professional (Certified Engineering Geologist or Geotechnical Engineer) has reviewed and approved all final design, construction, foundation, grading and drainage plans and has certified that each of those plans is consistent with the Commission-specified bluff setback and all of the recommendations specified in the above-referenced geotechnical reports approved by the California Coastal Commission for 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.

5. No Future Bluff or Shoreline Protective Device

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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments authorized pursuant to Coastal Development Permit No. A-1-MEN-

09-023, in the event that the single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments 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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments 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).

By acceptance of this Permit, the applicant further agrees, on behalf of himself and all successors and assigns, that the landowner shall remove the new single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments 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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments 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.

In the event the edge of the bluff recedes to within 10 feet of the single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments 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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments without shore or bluff protection, including but not limited to, removal or relocation of portions of the single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments. 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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments are 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, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections, and/or other related developments.

6. Revised Plans

- A. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-09-023**, the applicant shall submit final revised plans to the Executive Director for review and approval.
- B. The revised plans shall include a site plan, Erosion and Drainage Runoff Control Plan, Permeable Pavement Maintenance Plan, and landscaping plan, and shall be in substantial conformance with the plans submitted by Frank Wernette, dated August 25, 2010 and April 26, 2010, and September 18, 2010 with exception to the following changes to the project:
- 1) Site Plan Revisions
 - a. The plans shall depict the main residence with a minimum setback of 37.5 feet from the bluff edge, and with the combined building footprint of the residence and attached garage no greater than 1,200 square feet, with pervious driveway, parking area, and emergency vehicle turnaround area not to exceed 2,100 square feet located within the designated 5,762-square-foot building envelope (that includes the driveway easement) shown in Exhibit No. 9 of the staff report and outside of the open space area as required pursuant to Special Condition No. 7.
 - b. The site plan shall depict the final configuration of the 5,762-square-foot building envelope (that includes the driveway easement) shown in Exhibit No. 9 of the staff report and the open space area as shown in Exhibit No. 10.
 - c. The site plan shall depict runoff and drainage conveyance systems that are consistent with the provisions of the erosion and runoff control plan required below.
 - 2) Erosion and Drainage Runoff Control Plan
 - a. The final runoff control plans shall at a minimum include the following provisions:

- i. Soil grading activities shall be restricted to the dry-season between April 15 and October 14;
 - ii. A physical barrier consisting of silt fencing and/or bales of straw placed end-to-end shall be installed downslope of any construction areas. The bales shall be composed of weed-free rice straw, and shall be maintained in place throughout the construction period;
 - iii. Native vegetation at the site shall be maintained to the maximum extent possible. Soil excavated or imported for the house, driveway, septic construction/installation, or for other purposes, shall not be stockpiled onsite, except within the footprint of the proposed house, garage, driveway, and adjacent areas to the west of the driveway. Any disturbed areas shall be replanted with low-growing herbaceous vegetation that conforms with the planting limitations of Special Condition Nos. 8(K) and 8(L), immediately following project completion, and covered by jute netting, coir logs, and/or rice straw;
 - iv. The washing-out of concrete delivery vehicles, disposal of solid waste, or release of any hazardous materials on the parcel shall be prohibited, and any accidental spill of such materials shall be promptly cleaned up and restored;
 - v. The erosion rate shall not exceed the natural or existing level before development;
 - vi. Adjoining property shall be protected from excavation and filling operations and potential soil erosion;
 - vii. An on-site spill prevention and control response program, consisting of BMPs for the storage of clean-up materials, training, designation of responsible individuals, and reporting protocols to the appropriate public and emergency services agencies in the event of a spill, shall be implemented at the project to capture and clean-up any accidental releases of oil, grease, fuels, lubricants, or other hazardous materials from entering any ESHA.
- 3) Permeable Pavement Maintenance Plan
- a. A permeable pavement maintenance plan shall be submitted that at a minimum includes the following provisions:
 - i. The pervious concrete driveway (or other permeable pavement material) shall be installed by a contractor possessing certification through the National Ready Mixed Concrete Association (NRMCA), Pervious Concrete Contractor certification program at the minimum “installer”

- level;
- ii. The pervious concrete driveway (or other permeable pavement material) shall be maintained throughout the life of the project, including but not limited to a minimum periodic annual vacuum sweeping in the late summer and early spring, and pressure washing as needed, and consistent with maintenance measures identified in the “Pervious Concrete Owners Manual and Maintenance Outline” included as Exhibit 30;
 - iii. **Testing-** Infiltration Rate testing shall be completed twice annually, in October and again in May, following project completion. Testing methods shall be conducted in accordance with those presented in the “Procedure for Determining Need for Maintenance of Pervious Concrete Via Infiltration Rate” available at www.concreteresources.net. If the calculated Infiltration Rate is greater than the Maintenance Rate by a safety factor of three or greater for each of three continuous years, testing shall be completed every third year thereafter, for the life of the development. Infiltration Rate test results shall be reported in writing to the Executive Director of the Coastal Commission by November 15th and June 15th of each year for the October and May testing respectively;
 - iv. **Special Maintenance-** If after the first three years of infiltration rate testing or at any time thereafter the Executive Director determines that the required measures are not successful at maintaining the performance of the pervious concrete driveway (or other permeable pavement material) consistent with the testing specifications described in Special Condition 6B(3)(iii) above, the applicant shall submit an amendment to the coastal development permit proposing additional maintenance measures to ensure all performance criteria are satisfied consistent with the terms and conditions of this permit. Additional special maintenance measures may include, but are not limited to, subscription to a maintenance program through local street sweeping companies, repairs to permeable material, and increased frequency of general maintenance;
 - v. **Maintenance Log-** The applicant shall maintain a log documenting all testing dates, observations, and maintenance activities. The log shall be available for inspection upon request by either the County of Mendocino Building Department or the Executive Director of the

- Coastal Commission; and
- vi. **Prohibitions**- At no time shall a seal coat be applied to the pervious concrete driveway, turnaround area, or parking areas.
- 4) Landscape Plan
- a. The landscaping plan shall demonstrate that:
 - i. 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 employed or allowed to naturalize or persist at the site of the proposed development. 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;
 - ii. Plants used for landscaping shall be locally native species naturally occurring in coastal habitats (such as *Myrica californica*, *Ceanothus thrysiflorus*, *Garrya elliptica*, *Holodiscus discolor*, *Vaccinium parvifolium*, *V. ovatum*, and *Arctostaphylos uva-ursi*, among others). 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;
 - iii. No landscaping shall be installed outside of the building envelope generally shown in Exhibit No. 9 of the staff report except as required herein; and
 - iv. Rodenticides containing any anticoagulant compounds, including but not limited to, Bromadiolone, Brodifacoum, or Diphacinone, shall not be used.
 - b. The plan shall include, at a minimum, the following components:
 - v. A map showing the type, size, and location of all plant materials that will be retained or installed on the developed site, any proposed irrigation system, delineation of the approved building envelope for structures, driveways, and landscaped areas, topography of the developed site, and all other landscape features, and
 - vi. Appropriately worded landscaping plan notes, declaring that:
 - (1) “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 employed or allowed to naturalize or persist at the site of the proposed development. 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;" and

- (2) "All areas located outside of the approved building site envelope are considered rare plant habitat and shall not be landscaped except as required by this permit;" and
- (3) "No herbicides shall be stored, mixed, or used on the subject parcel and no rodenticides containing any anticoagulant compounds, including but not limited to, Bromadiolone, Brodifacoum, or Diphacinone, shall be used"

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

7. Open Space Restrictions

A. No development, as defined in Section 30106 of the Coastal Act, shall occur in the open space area generally depicted on Exhibit No. 10, which includes all designated areas of the subject parcel outside of the approved building envelope for the authorized 2,300-square foot combined residence and attached garage (1,200-square-foot total ground cover footprint) and 2,100-square-foot pervious driveway, except for:

- 1) Removal of non-native vegetation; installation of erosion control measures pursuant to Special Condition No. 6A(2); erection of temporary protective fencing pursuant to Special Condition No. 8A; use of the particular area prepared as a staging area for that purpose during construction pursuant to Special Condition No. 9 and as shown in Exhibit 37 that shall be restored to native habitat and excluded for future use following construction activities; and
- 2) The following development, if approved by the Coastal Commission as an amendment to this coastal development permit: vegetation clearance if required by the California Department of Forestry and Fire Protection (CDF) to meet fire safety standards; planting of native vegetation to improve the habitat value, and removal of debris and unauthorized structures.

- B. **PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOTICE OF INTENT TO ISSUE COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-09-023**, 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. 10 attached to this staff report.

8. **Best Management Practices and Construction Responsibilities**

The permittee shall comply with the following construction-related requirements:

- A. Prior to the commencement of any construction activities, the construction zone shall be delineated by a land surveyor and fenced with temporary cyclone fencing to protect coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) habitat occurring outside the construction area. The temporary/construction fencing shall be maintained in place until the authorized development is completed. No construction related activities, including but not limited to grading, staging or stockpiling of materials, or other ground disturbance shall be allowed to encroach into the areas protected by the temporary exclusion/construction fencing;
- B. Prior to the commencement of any construction activities, all special status plants will be flagged by a qualified biologist;
- C. Contractors shall be informed of the presence of rare plants on the site and the importance of avoiding disturbance to areas outside of the authorized building envelope, especially with regard to erosion and runoff from the building site;
- D. Any fueling and maintenance of construction equipment shall occur within upland areas outside of environmentally sensitive habitat areas or within designated staging areas;
- E. Any and all excess excavated material and/or debris resulting from construction activities shall be removed from the project site within 10 days of project completion and disposed of at a disposal site outside the coastal zone or placed within the coastal zone pursuant to a valid coastal development permit;
- F. Rice straw bales, weed-free hay bales, coir rolls, and/or silt fencing structures shall be installed prior to and maintained throughout the construction period to contain runoff from construction areas, trap entrained sediment and other pollutants, and prevent discharge of sediment and pollutants downslope toward the ocean;
- G. To avoid impacts to special status birds or bats during the breeding season, any construction activities that occur between November 1 and August 31 and that involve substantial ground disturbance (including but not limited

to grading, foundation pier installation, and septic tank installation) shall adhere to the requirements of Special Condition 10, "Final Nesting Bird Protection Program;"

- H. All best management practices employed shall be effective during the rainy season (October 15 through April 14) if construction occurs during that time of year;
- I. All earth-moving activities shall be conducted during the period of May 15 through November 15; any earth-moving activity conducted between October 16 and November 15 shall additionally be subject to the following conditions:
 - 1) All work shall cease upon the onset of precipitation at the project site and shall not recommence until the predicted chance of rain is less than 50 percent for the Gualala segment of the National Weather Service's forecast for Northwestern California;
 - 2) The work site(s) shall be winterized between work cessation periods by installing stormwater runoff and erosion control barriers around the perimeter of the construction site to prevent the entrainment of sediment into coastal waters; and
 - 3) Adequate stocks of stormwater runoff and erosion control barrier materials shall be kept onsite and made available for immediate use.
- J. If rainfall is forecast during the time construction activities are being performed, any exposed soil areas shall be promptly mulched or covered with plastic sheeting and secured with sand bagging or other appropriate materials before the onset of precipitation;
- K. On-site native vegetation shall be maintained to the maximum extent possible during construction activities;
- L. Any disturbed areas shall be replanted or seeded immediately with low-growing herbaceous native species following completion of construction of the residential structure and driveway, in a manner that conforms to the planting limitations of Special Condition Nos. 9(F) and 9(G);
- M. Rodenticides containing any anticoagulant compounds, including but not limited to, Bromadiolone, Brodifacoum, or Diphacinone, shall not be used;
- N. All on-site stockpiles of construction debris shall be covered and contained at all times to prevent polluted water runoff; and
- O. No soil, mulch, yard debris, or other pore-clogging materials shall be stored or staged atop the pervious concrete (or other permeable pavement) areas, including the driveway, parking, and turnaround areas, at any time.

9. Protection of Sensitive Plant Habitat

The permittee shall comply with the following requirements to protect and mitigate impacts to sensitive plant habitat:

- A. Comply with the temporary exclusion/construction fencing requirements of Special Condition No. 8(A);
- B. Permanent exclusionary fencing shall be installed along the boundary of the conservation area and separating the conservation area from the driveway/parking area. Fencing shall consist of low (approximately 3 feet) post and cable, split-rail, or similar symbolic fencing that does not interfere with the visual surroundings. Only foot traffic shall be allowed within the conservation area beyond the fence, and should be limited to visits for restoration, monitoring, and maintenance by the property owner, monitoring biologist, or designated maintenance personnel, as described in Section 4.1 of the August 2008 WRA Biological Report;
- C. Invasive plants, including but not limited to French broom (*Genista monspessulana*), pampas grass (*Cortaderia jubata*), iceplant (*Carpobrotus edulis*), velvet grass (*Holcus lanatus*), sweet vernal grass (*Anthoxanthum odoratum*), and rattlesnake grass (*Briza maxima*) (in addition to other species listed in Section 4.3.2 of the Resource Protection Plan contained within the August 2008 WRA Biological Report), shall be removed by hand and/or with the use of hand tools, from all areas within and outside of ESHAs on the relatively flat portions of the parcel at the top of the bluff (including sloped driveway);
- D. Long-term site maintenance shall include hand-pulling annual grasses and other weeds from the conservation area;
- E. Areas of invasive plant removal should be replanted immediately with locally native coastal scrub and coastal prairie species according to the guidelines outlined in Section 4.3.3 of the August 2008 WRA report and pursuant to Special Condition 9(G);
- F. 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 employed or allowed to naturalize or persist at the site of the proposed development. 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;
- G. For all areas of coastal bluff morning-glory habitat outside the building envelope approved in this coastal development permit, 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;

- H. No clearing or removal of trees or vegetation shall occur, other than authorized clearing of trees or vegetation as described in Special Condition 7(A) and 9(C);
- I. Initial removal of invasive plants and replanting of exposed areas shall occur no later than within 90 days of completion of exterior residential construction activities (e.g., foundation, drainage, retaining walls, framing, roofing, siding, etc.);
- J. The results of removing invasive plant species and replanting exposed areas with locally native plants shall be monitored, including photo points, by a qualified biologist, with submittal of reports to the Executive Director and copied to DFG within 120 days of completion of exterior construction activities and annually thereafter by December 31 of each year for five successive years. The reports shall include
 - 1) Description of enhancement work performed on the parcel over the previous year;
 - 2) The current status (numbers and condition) of special status and other rare plants and communities, as well as any observed threats to these plants or to native habitats;
 - 3) An evaluation of whether the special status plant populations in the Conservation Area remain stable (with a minimum of 80% of the number of each species maintained) compared to conditions observed prior to the start of construction;
 - 4) An evaluation of the survival rate of new locally native plantings in exposed areas relative to a minimum target of 80% survival;
 - 5) Documentation of any new invasions of exotic species and plans for their removal or control, as necessary;
 - 6) Photos from designated photo stations.
- K. A final report should be submitted to the Executive Director and copied to DFG after the five years of monitoring that: (1) documents whether all protective measures outlined in the Conditions of Approval have been met; (2) discusses the success or failure of mitigation measures applied on the site; and (3) includes recommendations for mitigation if Conditions have not been met;
- L. If after five years it is determined that the population of coastal bluff morning-glory has not achieved 80% survival and the areas that have been replanted with locally native plants have not achieved 80% survival, the applicant shall submit an amendment to the coastal development permit proposing additional mitigation to ensure all performance criteria are satisfied consistent with the terms and conditions of this permit. Such

additional mitigation may include fencing; rare plant seed collection (with donation to Rancho Santa Ana Botanic Garden along with current fees for preservation and processing of seed), propagation and replacement planting; additional irrigation; weeding; invasive exotic eradication; maintenance; or any other practice to achieve these requirements, and further monitoring and reporting for an additional five years after additional mitigation efforts; and

- M. No herbicides shall be stored, mixed, or used on the subject parcel and no rodenticides containing any anticoagulant compounds, including but not limited to, Bromadiolone, Brodifacoum, or Diphacinone, shall be used.

10. Final Nesting Bird Protection Program

- A. **PRIOR TO COMMENCEMENT OF ANY CONSTRUCTION OPERATIONS AFTER NOVEMBER 1, 2010**, the permittee shall submit, for the review and approval of the Executive Director, a final Nesting Bird Protection Program, prepared by a qualified biologist, for conducting seasonal surveys for bird nesting and roosting habitat and protecting such habitat from project impacts. The protection program shall, at a minimum, include the following:

- 1) Provisions for surveying for the presence of active nesting and/or roosting habitat, by a qualified biologist, during construction activities proposed to occur between November 1 and August 31 and that involve substantial ground disturbance (including but not limited to grading, foundation pier installation, and septic tank installation) during the length of the development authorized by this permit;
 - 2) Provisions for avoiding any bird nesting and/or roosting trees located in areas of potential impact; and
 - 3) Provisions for submission of the surveys of nesting and roosting habitat required above for the review and approval of the Executive Director prior to the commencement of that season's construction work that includes a map that locates any sensitive habitat (including nesting and/or roosting trees) identified by the survey, and a narrative that describes sensitive avoidance measures proposed;
- B. The permittee shall undertake development in accordance with the approved final nesting bird protection program and the approved season surveys. Any proposed changes to the approved final nesting bird protection program and the approved season surveys shall be reported to the Executive Director. No changes to the approved final nesting bird protection program and the approved season surveys shall occur without an amendment to Coastal Development Permit No. A-1-MEN-09-023, unless the Executive Director determines that no amendment is legally required.

11. Design Restrictions

- A. 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 and seaward of the bluff edge.

12. Area of Archaeological Significance

- A. If an area of cultural deposits is discovered during the course of the project all construction shall cease and shall not recommence except as provided in subsection (B) hereof; and a qualified cultural resource specialist shall analyze the significance of the find.
- B. A permittee seeking to recommence construction following discovery of the cultural deposits shall submit a supplementary archaeological plan for the review and approval of the Executive Director.
- 1) If the Executive Director approves the Supplementary Archaeological Plan and determines that the Supplementary Archaeological Plan's recommended changes to the proposed development or mitigation measures are *de minimis* in nature and scope, construction may recommence after this determination is made by the Executive Director.
 - 2) If the Executive Director approves the Supplementary Archaeological Plan but determines that the changes therein are not *de minimis*, construction may not recommence until after an amendment to this permit is approved by the Commission.

13. Mendocino County Encroachment Permit

PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-09-023, 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.

14. 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.

III. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares the following:

1. Incorporation of Substantial Issue Findings

The Commission hereby incorporates by reference the Substantial Issue Findings above into its findings on the *de novo* review of the project.

2. Site Description

The proposed project site is located approximately ½ mile north of downtown Gualala, on a bluff top lot, 150 feet west of Robinson Reef Drive (CR 527), and approximately 400 feet north of its intersection with Westward Ho (CR 529) that connects to Highway One, at 38454 Robinson Reef Drive, Gualala. The parcel is located within the primarily residential, 87-parcel subdivision known as North Gualala Subdivision No. 3. A few of the parcels within the subdivision support commercial uses, particularly those parcels adjacent to Highway One. The site is located on an approximately 0.72-acre parcel that is accessed by a 14-foot-wide driveway easement located between two residences- the Hines parcel to the south, and the former Turnlund parcel to the north (now also owned by Mr. Hines).

The subject property is designated in the Coastal Land Use Plan and zoned in the Coastal Zoning Ordinance as Rural Residential – 5-acre minimum parcel size (RR-5), with an alternate zoning and land use designation of suburban residential, 40,000 Square-Foot Minimum (SR L-40,000). The County applies the SR zoning designation to the site. The proposed single family residence is a form of land use consistent with the Suburban Residential land use classification and zoning district.

The proposed development is not located within a designated highly scenic area. The site is located within the special neighborhood designation of the Gualala area and is subject to the development criteria as described in CZC Section 20.504.020. A glimpse of ocean view is afforded through the lot from the street in front of the parcel, and the ocean horizon is visible from the street above the roofline of the surrounding residential developments (Exhibit 5).

According to an archaeological report dated October 28, 2000 and prepared for the subject parcel, the property occurs on the former alignment of the Gualala Mill Railroad that transported lumber from an old mill along the Gualala River approximately two miles to the south to a cable-ship loading facility at Bourne's Landing, approximately 1-1/2 miles to the north, and that was built in the late 1800's. The subject parcel represents only a remnant of the railroad grade that is isolated due to bluff retreat and modern development to the north and south. The parcel is part of a marine terrace located down slope of surrounding development. The parcel consists of a relatively flat "pad" that measures approximately 60 feet wide and 350 feet long (0.48 acre total), with residential developments abutting the length of the parcel to the east, and a steep seacliff to the west, with the remainder of the lot dropping off steeply to the Pacific Ocean below. Several +/- 50 to 75-foot high bedrock sea stacks exist in the tidal zone below the subject property.

Drainage

At Robinson Reef Drive, an existing 12-inch culvert captures stormwater for the surrounding development from a drainage ditch across the street from the subject parcel. The culvert crosses the road westward, continues underneath the adjacent eastern residence, and bisects the extreme northern portion of the subject property before discharging from the outlet perched on the bluff face. The culvert was installed as part of the subdivision that was developed circa 1964, and the responsibility to maintain the culvert within the county road right of way belongs to Mendocino County Department of Transportation. The end of the culvert was replaced with a plastic culvert in 1998 after the existing metal culvert had corroded in several areas near the outlet, resulting in water pouring through the sides of the pipe and eroding the edges of the subject and adjacent properties and causing slippage to occur. Previous applications for development of the subject parcel proposed to direct site drainage into this existing culvert. However, the current project as now proposed by the applicant presents an alternative consisting of collecting surface and roof runoff in a perforated pipe grid system underneath the house and distributing the water evenly across the ground surface in a way that mimics a rainfall event on the surface, with excess water following natural topography to sheet southward off the surface (Exhibit 29).

Two drop inlets are located at the top of the driveway easement, and the drop inlets currently discharge flows onto the surface of the subject parcel near the base of the easement. As described by the applicant's agent, during storms water from the drop inlets commingles with surface flows down the easement. That storm water first saturates the soil and then moves laterally southwest and south toward the bluff edge as either surface or subsurface flows. As part of the proposed development, the outfalls from the drop inlets would be connected to a subsurface manifold and pipe running under the pervious concrete driveway to the drainage grid header at the east edge of the perforated pipe grid system. A letter submitted by the consulting geologist to Appellant A, Duane Hines, and dated April 30, 2009 (Exhibit 25), and the geologic report dated September 12, 2009 (Exhibit 26) further explain the proposed drainage system.

Habitat

The southern portion of the parcel includes intact Coastal Terrace Prairie plant community, along with areas of encroachment of Coastal Scrub plant community. The Coastal Terrace Prairie community type is itself recognized as a sensitive plant community by California Department of Fish and Game (CDFG), and is recognized as ESHA by the Coastal Commission. Additional special-status species present on the parcel include what is presumed to be Mendocino coast Indian paintbrush (*Castilleja mendocinensis*) near the bluff edges on the southern portion of the parcel (access is unsafe for positive identification), and coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) on both the northern and southern portions of the property. Mendocino coast Indian paintbrush and coastal bluff morning-glory both have a California Rare Plant

Rank (CRPR⁶) of 1B.2, a designation assigned to plants considered rare, threatened, or endangered in California and elsewhere. In California, both species are considered to be “distributed in a limited number of occurrences” (CNPS 2003) and fairly threatened in California with a moderate degree/immediacy of threat.

The consulting biologists Wetland Research Associates (WRA) have conducted several biological investigations and surveys on the subject parcel dating back to 2000. In a December 2000 report entitled “Delineation of Potential Jurisdictional Wetlands Under Section 404 of the Clean Water Act and California Coastal Act,” WRA identified and delineated a 500-square-foot wetland feature adjacent to the proposed development site. Subsequent reports, including the April 23, 2010 Supplemental Biological Report (Exhibit 16) and the May 28, 2010 memo submitted by WRA (Exhibit 18) describe the site as no longer exhibiting wetland features due to changes in vegetation composition, lack of hydric soils, and lack of evidence of wetland hydrology. Consideration of wetland features is addressed further in Finding 5, “Environmentally Sensitive Habitat Areas” of the Findings for *de novo* review, beginning on Page 57.

An August 2008 report entitled “Biological Report of Compliance for a Mendocino County Coastal Development Permit” (Exhibit 14) identifies locations of the Coastal Terrace Prairie plant community and locations of sensitive plants. The report describes some morning-glory plants as exhibiting characteristics of both the rare and common subspecies of morning-glory⁷, and some specimens exhibiting characteristics of the common subspecies. The report additionally describes two plants occurring near the northern portion of the parcel. The report includes a diagram illustrating 50-foot ESHA buffers around all rare plants and rare plant communities, and indicates that the proposed development occurs within 20 feet of the two plants occurring in the northern portion of the property. In a letter dated February 23, 2009 (Exhibit 15) submitted to Mendocino County Project Coordinator Teresa Spade, WRA Senior Vice President Tim DeGraff discusses habitat variations between the northern and southern portions of the parcel, and concludes the following:

In summary, the two isolated coastal bluff morning glory locations are in atypical habitat that may be unsuitable for sustaining these plants, and is not likely to support natural recruitment of new individuals. The immediate vicinity of the plants is dominated by shady habitat, large shrubs and trees, and adjacent habitats are also dominated by invasive species such as pampas grass, iceplant, and annual grasses. As the trees and shrubs continue to grow and invasions expand, this may prove to be unsuitable habitat for the plants, whether development occurs in the vicinity of these morning glory plants or not. It is our opinion that these two isolated coastal bluff morning glory plants do not meet the definition of an ESHA,

⁶ Formerly recognized as the California Native Plant Society (CNPS) list, the new designation of CRPR reflects in its name the cooperative statewide process of plant status review and ranking, but in no way changes the content or format of the listing system.

⁷ Another closely-related species of morning-glory known as climbing morning-glory (*Calystegia purpurata* ssp. *purpurata*) commonly occurs in similar habitats and is not considered sensitive; according to Hickman (1993), intergradation is common between *Calystegia* species.

as the supporting habitat is not rare or sensitive, and is not likely to sustain the existing plants or population in the long-term.

A subsequent report dated April 23, 2010 (Exhibit 16) was submitted after the County approved the project. In the report, which was intended to update 2008 survey data, Mr. DeGraff indicated that non-floristically-appropriate surveys conducted in March and April 2010 identified increases to all coastal bluff morning-glory occurrences on the parcel. The report states the following:

Thirteen coastal bluff morning glory and potential hybrids, and four plants appearing to be the common subspecies were observed on the Wernette parcel during 2008 surveys. Two of the thirteen coastal bluff morning glory plants were located within 50 feet of the proposed project at the north end of the parcel. In 2010 WRA biologists observed approximately 63 coastal bluff morning glory and potential hybrids, and 11 plants appearing to be the common subspecies. Approximately 28 coastal bluff morning glory and potential hybrids, or 44 percent, were observed within 50 feet of the proposed project.

Dominant species within the southern portion of the parcel include pacific reedgrass (*Calamagrostis nutkaensis*), tufted hairgrass (*Deschampsia cespitosa* ssp. *holciformis*), silver lupine (*Lupinus albifrons* var. *albifrons*), coast angelica (*Angelica hendersonii*), coyote brush (*Baccharis pilularis*), and Point Reyes ceanothus (*Ceanothus gloriosus*), a watch-list⁸ species. Some encroachment of invasive non-native species is also present, such as pampas grass (*Cortaderia jubata*), French broom (*Genista monspessulana*), and cotoneaster (*Cotoneaster* sp.). California blackberry (*Rubus ursinus*) occurs sporadically throughout the parcel.

The central and northern portions of the property consist predominantly of coastal scrub habitat, with coyote brush, pacific reedgrass, cow parsnip (*Heracleum lanatum*), and Douglas' iris (*Iris douglasiana*) prevalent. A large patch of nonnative grasses occurs near the center of the parcel, and consists primarily of rattlesnake grass (*Briza maxima*) in addition to velvet grass (*Holcus lanatus*) and sweet vernal grass (*Anthoxanthum odoratum*). Much of the nonnative grassland appears to occur in an area mapped as man-made fill on a geologic map prepared by the consulting geologist dated April 1999.

A cluster of wind-pruned trees occurs toward the northern portion of the parcel, and includes Douglas-fir (*Pseudotsuga menziesii*), coffeeberry (*Rhamnus californica*), and California wax myrtle (*Myrica californica*). The base of the driveway easement and the cutbanks along the eastern property line are heavily colonized by the invasive ornamental iceplant (*Carpobrotus edulis*), in addition to a mix of ornamental redhot poker (*Kniphofia uvaria*) and coastal scrub plants such as California blackberry, coast angelica, and pacific reedgrass.

⁸ The California Rare Plant Rank (CRPR) system assigns a "watch list" designation to plants that are of limited distribution or infrequent throughout a broader area in California, and whose vulnerability or susceptibility to threat appears low at this time. While these plants are not considered "rare" from a statewide perspective, they are uncommon enough that their status should be monitored regularly.

The project is located outside of the known range of the federally-listed Point Arena mountain beaver (PAMB). A letter dated August 12, 2008 (Exhibit 22) was submitted by Biologist Matt Richmond indicating that the proposed development did not pose any threat to PAMB or potential habitat. The letter also indicated that Mr. Richmond contacted John Hunter with the U.S. Fish and Wildlife Service (FWS) office in Arcata to verify that a request for technical assistance from FWS was not necessary.

The proposed project occurs within the range of the federally endangered Behren's silverspot butterfly (*Speyeria zerene behrensii*) and Lotis Blue butterfly (*Lycaiedes idas lotis*). In a November 7, 2005 letter, Entomological Services, Ltd. President Richard Arnold, P.h.D. indicated that neither of the species is likely to occur on the Wernette parcel due to lack of suitable habitat conditions on the Wernette parcel and in the vicinity. The report states, "Although one potential food plant for the Lotis Blue occurs at the property, the absence of favored wetland habitats, such as seeps, bogs, or wet meadows greatly reduces the likelihood of the butterfly occurring there. Historically the Lotis Blue butterfly has been associated with the aforementioned wetland habitats rather than with coastal bluff scrub vegetation." The letter further describes that a violet (*Viola sp.*) was observed at the property and was presumed to be the species that serves as a host plant for Behren's silverspot butterfly (*Viola adunca*), but that the coastal scrub and wooded conditions are not favored by the Behren's silverspot, which prefers coastal terrace prairie conditions. Although in his letter Dr. Arnold noted an absence of coastal terrace prairie conditions at the site, which conflicts with site characterizations described by WRA, Dr. Arnold further concludes that, "Also, the extensive residential and commercial development of Robinson Reef Point and surrounding areas substantially reduces the likelihood that either of these butterflies would live nearby." In a letter dated May 6, 2006 (Exhibit 20), FWS indicated it concurred with the findings of the November 7, 2005 document.

The subject parcel is constrained for development due to rare plants and geotechnical issues associated with the coastal bluff edge. The rare CRPR List 1B plant, coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) occurs in several locations on the parcel. As discussed in the Environmentally Sensitive Habitat Area (ESHA) Finding below, the coastal bluff morning-glory habitat is considered to be ESHA.

3. Project Description

The proposed project consists of: (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) installation of a sewage pump tank, sewage holding tank and back-up generator, with connection to off-site septic disposal services, connection to community water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid

system underneath the home); and (5) use of a portion of the property as a temporary construction staging area.

The applicant has modified the proposed project design from the previous applications denied by the County in response to concerns that include drainage design and house size. The current proposed project is smaller in overall size (2,300 square feet total), height (25 feet), and building ground cover (1,200 square feet) than previous applications. In response to concerns expressed about drainage capabilities, the current project now proposes to direct runoff through a perforated pipe grid system to evenly distribute runoff, and includes a proposal to use pervious concrete for the paved parking and driveway surfaces to further accommodate stormwater runoff. This modified design also eliminates the need for a holding tank and pump for water runoff, and eliminates discharge through the culvert that outlets onto the bluff edge.

Two drop inlets are located at the top of the driveway easement, and the drop inlets currently discharge flows onto the surface of the subject parcel near the base of the easement. As described by the applicant's agent, stormwater from the drop inlets commingles with surface flows down the easement. That storm water first saturates the soil and then moves laterally southwest and south toward the bluff edge as either surface or subsurface flows. As part of the proposed development, the outfalls from the drop inlets would be connected to a subsurface manifold and pipe running under the pervious concrete driveway to the drainage grid header at the east edge of the perforated pipe grid system. A letter submitted by the consulting geologist to Appellant A, Duane Hines, and dated April 30, 2009 (Exhibit 25), and the geologic report dated September 12, 2009 (Exhibit 26) further explain the proposed drainage system.

The applicant proposes to use drilled, cast-in-place, reinforced concrete piers as the major component of the foundation support design. All exterior and interior piers will be structurally tied together with reinforced concrete grade beams and tie beams so that they act as a rigid unit. The concrete pier foundation design follows the recommendations and specifications described in the July 15, 2008 letter prepared by Jim Glomb entitled "Supplemental Foundation Recommendations for the Proposed Wernette Project" (Exhibit 24), and in the September 12, 2009 geologic report (Exhibit 26). The slab thickness for the home will range from approximately 4 inches to 12 inches, and will be reinforced with ¼-inch rebar and include a vapor barrier. The applicant proposes to utilize a perforated pipe drainage system to capture and evenly distribute stormwater and roof runoff across the surface of developed areas before runoff ultimately drains south and west along the parcel. The design includes a pervious concrete driveway and parking area, and a perforated pipe grid system under the residential structure to distribute surface water runoff, with roof runoff tied into the pipe grid to ensure that drainage would not be hindered by the development.

The applicant has provided a grading and drainage plan, which is included herein as Exhibit 8. The plan features retaining walls along the east side of the proposed development area (between existing development and the proposed driveway/parking area), which range in height from approximately ten feet along the north side, to two to four feet along the south side to secure the slopes on the east side of the parcel. The

retaining walls would incorporate drainage features that would allow water draining from neighboring properties to continue draining westward, so that the current hydrology would not be significantly impacted by the walls. For the purposes of *de novo* review, the applicant submitted a cross-sectional diagram to illustrate the drainage system in relation to site topography and building elevations (Exhibit 29).

Electrical, telephone, and drinking water services will be installed in the driveway easement, which will subsequently be resurfaced to provide correct cross section slope. Drop inlets will be re-installed to direct drainage to the grid of perforated pipe.

Although the configuration of the construction zone boundary has been modified to exclude two additional coastal-bluff morning-glory plants observed on the parcel during 2010 surveys, the project description has not been amended by the applicant since it was currently proposed.

The development includes improvements to the ingress and egress on to Robinson Reef Drive. Mendocino County Department of Transportation (DOT) has recommended that prior to commencement of construction activities, the applicant obtain an encroachment permit and improve the sight distance at the existing driveway to a minimum distance of 165 feet (visibility is currently partially obstructed by a tall hedge growing within the County right-of-way). The DOT also requires a standard driveway approach onto Robinson Reef drive be constructed prior to final occupancy.

The exterior materials and finishes of the new residence as proposed include Hardi Plank (or equivalent) siding in an "Alpine Frost" color (James Hardie Color JH50-10 or equivalent), with Hardi Cedarmill (or equivalent) fascia and trim in a "Monterey Taupe" color (James Hardie Color JH40-20 or equivalent). Proposed window trim and window door trim consists of Milgard Fiberglass and vinyl/fiberglass, respectively, both in the previously-described "Monterey Taupe" color. The roofing material is proposed as grey or equivalent "Timberline" 30-year composition shingle, and decks and ramps are proposed to be constructed of pressure-treated sunboard in a "natural" color. Five exterior lights as depicted in the lighting plan submitted by the applicant will be installed using shielded downcast fixtures from Kichler or equivalent.

As described above, the parcel supports sensitive plant communities and habitat that include coastal terrace prairie, Mendocino coast Indian paintbrush, and coastal bluff morning-glory. Based upon 2010 surveys described in the April 23, 2010 report submitted by WRA, approximately 28 plants occur within 50 feet of the proposed project site. Two plants located in 2010 at the southern junction between the property line and driveway easement are likely to be directly impacted as a result of the proposed development.

The August 2008 Biological Report of Compliance submitted by WRA (Exhibit 14) discussed potential indirect impacts resulting from development within 20 feet of coastal bluff morning-glory plants in the northern portion of the property; construction activities occurring within the 100-foot ESHA buffer; loss of some coastal scrub habitat; and disturbance that may increase erosion or presence of invasive species. The report includes mitigation measures to reduce impacts to a less than significant level, and includes a

resource protection plan with specifications for invasives removal, fencing, minor replanting, and monitoring.

Mitigation measures proposed in the August 2008 report by the consulting botanist and included in the project proposal submitted by the applicant to the County are paraphrased below. Mitigation measures included but were not limited to the following:

1. Maintenance of conditions outside the construction zone similar to that which occurred on the site prior to project disturbance, and limit allowable activities onsite;
2. Recordation of a deed restriction;
3. Establishment of a fenced, excluded Conservation Area on the southern portion of the parcel where restoration and monitoring will be conducted pursuant to the resource protection plan;
4. Limitation on acceptable plants for landscaping and restoration areas;
5. Use of temporary exclusionary fencing, silt fence, and other erosion control measures during construction activities;
6. Flagging of plants and education of contractors on the presence and location of rare plants;
7. Use of best management practices; and
8. Requirements for special status bird and bat surveys for construction activities conducted between November 1 and August 31.

4. Planning and Locating New Development

LCP Policies

LUP Policy 3.9-1 of the Mendocino County Land Use Plan states its intent to apply the requirement of Coastal Act Section 30250(a). To this end, LUP Policy 3.9-1 requires 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.

Discussion:

The subject parcel is located within an existing residential neighborhood and is designated in the Coastal Land Use Plan and zoned in the Coastal Zoning Ordinance as Rural Residential – 5-acre minimum parcel size (RR-5), with an alternate zoning and land use designation of suburban residential, 40,000 Square-Foot Minimum (SR L-40,000). The project as approved by the County applied the SR zoning designation. The proposed

single family residence is a form of land use consistent with the Suburban Residential land use designation and zoning district. The Coastal Zoning Code (CZC) allows single-family residential development as a principal permitted use in the SR zoning district but does not allow for more than one residential unit per parcel in this location.

The proposed single-family residential development is compatible with the Suburban Residential zoning district and is designated as a principal permitted use in the Mendocino County Coastal Zoning Code (CZC). The approved structure would have a maximum height of approximately 25' above average finished grade. The maximum allowable height pursuant to the CZC is 28 feet because the property is not located in a designated highly scenic area (HSA). The development would not exceed the maximum allowable lot coverage (20%), and complies with the minimum building setback requirements for the district (20 feet in the front and rear, 6 feet on the side yards), and the corridor preservation setback along Robinson Reef Drive.

The subject parcel is located within the 87-parcel subdivision known as North Gualala Subdivision No. 3. Because the subdivision had already been developed prior to certification of the LCP, the significant cumulative adverse impacts on traffic capacity of Highway One from the residential use of the subject property were taken into account at the time the LCP was certified. Therefore, as conditioned, the proposed development would not result in adverse impacts to the traffic capacity of Highway One consistent with the applicable provisions of LUP Policy 3.8-1.

The site is located in an area mapped as Critical Water Resources (CWR). The development will be served by a municipal water system supplied by the North Gualala Water Company. The proposed development will connect to the Gualala Community Sewer District (GCSD) community sewage system, and includes at the project site the underground installation of a 5-foot-high by 6-foot-wide by 13-foot-long, 1,500-gallon sewage holding tank system with integrated pump. Placement and size specifications of the sewage holding tank follow recommendations by GCSD and include a traffic slab cover to support emergency vehicle turnaround atop the buried tank. The proposed design also includes installation of a 500-gallon liquefied propane gas (LPG) tank to provide heat and fuel for an enclosed low-decibel level back-up generator to support the sewage pump during power outages.

As discussed below, the proposed development has been conditioned to include mitigation measures, which will minimize all significant adverse environmental impacts consistent with the limitations of Section 30010 of the Coastal Act. 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 on the site to serve the proposed development, and (3) the development will not contribute to adverse cumulative impacts on highway capacity, scenic values, water quality, or other coastal resources.

5. Environmentally Sensitive Habitat Areas (ESHA)

Summary of Applicable LCP and Coastal Act Provisions:

Environmentally Sensitive Habitat Areas (ESHA) are defined in Section 3.1 of the Mendocino County Land Use Plan (LUP) as follows:

Any areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Coastal Zoning Code (CZC) Section 20.496.010 “*Environmentally Sensitive Habitat and other Resource Areas—Purpose*” states the following (emphasis added):

...Environmentally Sensitive Habitat Areas (ESHA's) include: anadromous fish streams, sand dunes, rookeries and marine mammal haul-out areas, wetlands, riparian areas, areas of pygmy vegetation which contain species of rare or endangered plants and habitats of rare and endangered plants and animals.

Wetlands are defined in Section 3.1 of the Mendocino County Land Use Plan (LUP) as follows:

Wetlands. *Lands which may be covered periodically or permanently with shallow water, including saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens. Wetlands are extremely fertile and productive environments. Tidal flushing from the ocean and/or nutrient-rich freshwater runoff mix to form a delicate balance responsible for their productivity. They function as nurseries for many aquatic species and serve as feeding and nesting areas for waterfowl, shorebirds and wading birds, as well as a few rare and endangered species.*

The edge or upland limit of wetlands is designated by the California Coastal Commission guidelines on wetlands as: (a) the boundary between land with predominantly hydrophytic (adapted to wet conditions) cover and land with predominantly mesophytic (adapted to average conditions) or xerophytic (adapted to dry conditions) cover; (b) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or, in the case of wetlands without vegetation or soils; (c) the boundary between land that is flooded or saturated at some time during years of normal precipitation and land that is not. Areas with drained hydric soils that are no longer capable of supporting hydrophytes (species adapted to wet conditions) are not considered wetlands.

Wetlands are defined in Section 13577 of the Commission Regulations as follows:

Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where

vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.

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...

...

(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 and Determination of the Presence, Extent, and Impacts of the Proposed Development on Wetlands ESHA**

(A) Prior WRA Biological Reports

The consulting biologists Wetland Research Associates (WRA) have conducted several biological investigations and surveys on the subject parcel dating back to 2000. In a December 2000 report entitled “Delineation of Potential Jurisdictional Wetlands Under Section 404 of the Clean Water Act and California Coastal Act” (Exhibit 17), WRA identified and delineated a 500-square-foot “potential jurisdictional wetland” feature adjacent to the proposed development site. The feature was identified following a site visit on October 20, 2000, during which saturated soil conditions were observed at the site.

The most specific definition of LCP and Coastal Act wetlands is found in Section 13577 of the California Code of Regulations, which defines wetland⁹ as “...land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent...” Therefore, in order to qualify as a wetland in the Coastal Zone, land must be at least periodically inundated or saturated for sufficient duration to result in a predominance of hydrophytes or a predominance of hydric soils. There is no specific periodicity or duration of inundation or saturation required. The primacy of hydrology is implicit in the definition, but is presumed adequate if either hydrophytic cover or hydric soils are predominant. However, neither the definitions of hydrophytes or hydric soils nor field methods for their identification are provided in California law. In practice, delineators primarily rely on the definitions and technical guidelines developed by the Army

⁹ The definition in the Regulations was adapted from Cowardin, L.M., V. Carter, F.C. Golet, and E.T. LaRue. 1979. *Classification of wetlands and deepwater habitats of the United States*. Office of Biological Services, U.S. Fish and Wildlife Service, Washington, D.C. The definitions of upland limits are identical to those of the Service.

Corps of Engineers.¹⁰ Several other technical publications also provide useful guidance.¹¹

The WRA 2000 report included data forms and characterizations of vegetation, hydrology, and soil that satisfied Coastal Commission jurisdictional wetland indicator criteria. The 2000 report describes the feature as follows:

The potential jurisdictional area had wetland plants, including two OBL¹² plants (giant horsetail and hedge) and a FACW¹³ plant (California blackberry), as well as low-chroma matrix hydric soils and positive wetland hydrology indicators. Water sources for the potential jurisdictional wetland include direct precipitation and runoff from upslope areas to the north, as well as from the driveway and slope immediately to the east. The potential jurisdictional wetland is a level depression that holds water for extended periods. Overflow flows into the ditch running along the eastern boundary of the Study Area, and subsequently off the cliff at the southern boundary of the site.

The 2000 report described hydrology in the feature area as follows:

The potential jurisdictional wetland area met the primary hydrologic indicator by the presence of saturated soil. The soils were saturated at the driest time of the year, when little appreciable rainfall had occurred for several months. In addition, this area had positive secondary hydrologic indicators of oxidized rhizospheres and a FAC-neutral test. Water ponds in the level area adjacent to and south of the driveway during winter and spring months as indicated by positive hydrology indicators. This may be due to a compacted layer of clay loam which prevents water from infiltrating. Upland sampling areas were very dry, mostly sloped, well drained, and lacked indicators of wetland hydrology.

Previous applications for development on the subject site included off-site mitigation measures for encroachment within the ESHA wetland buffer. For example, the development proposed as part of CDP#57-98 was located immediately adjacent to the wetland feature, and mitigation in the form of payment towards restoration of a wetland nearly 60 miles away had been proposed. The County Board of Supervisors denied the project, finding that the wetland resource as identified would be significantly degraded by the proposed development; and all feasible mitigation measures capable of reducing or eliminating project impacts had not been adopted.

¹⁰ Environmental Laboratory. 1987. *Corps of Engineers wetlands delineation manual*. Technical Report Y-87-1, U.S. Army Engineer Waterways Experiment Stations, Vicksburg, Mississippi.

¹¹ Federal Interagency Committee for Wetland Delineation. 1989. *Federal manual for identifying and delineating jurisdictional wetlands*. Cooperative technical publication. U.S. Army Corps of Engineers, U.S. Environmental Protection Agency, U.S. Fish and Wildlife Service, and USDA Soil Conservation Service, Washington, D.C.; National Research Council. 1995. *Wetlands: Characteristics and boundaries*. National Academy Press, Washington, D.C.; Tiner, R.W. 1999. *Wetland indicators. A guide to wetland identification, delineation, classification, and mapping*. Lewis Publishers, N.Y.

¹² **OBL** = Obligate Wetland. Designation per U.S.F.W.S. list of plants that occur in wetlands (Reed 1988), assigned to plants that occur in wetlands under natural conditions at an estimated probability > 99%

¹³ **FACW** = Facultative Wetland. Designation per U.S.F.W.S. list of plants that occur in wetlands (Reed 1988), assigned to plants that usually occur in wetlands (estimated probability 67%-99%), but are occasionally found in non-wetlands

Subsequent reports submitted by WRA describe the site as no longer exhibiting wetland features due to changes in vegetation composition, lack of hydric soils, and lack of evidence of wetland hydrology. A July 2004 report entitled “Special Status Plant Species Survey and Wetland Evaluation” indicates that work conducted at the site by WRA in April 2002 documented a change in plant species composition in the wetland area such that the potential jurisdictional wetland feature was no longer dominated by hydrophytic plants. The changes in vegetation composition described in the July 2004 report are not documented in a subsequent report prepared by WRA after the April 2002 inspection and dated August 2002. The August 2002 report in the local record does not include data forms. Regardless of the discrepancies, the July 2004 report indicates that further evaluation of the feature was conducted on September 30, 2003 and in May 2004. The report states the following:

During the September 30, 2003 site visit, two vegetation transects were conducted within the potential wetland area in order to determine if the plant community meets the definition of a hydrophytic community. An area has hydrophytic vegetation when, under normal circumstances more than 50 percent of the composition of the dominant species from all strata are obligate (OBL), facultative wetland (FACW), and/or facultative (FAC) species. Dominant species are the most abundant plant species that immediately exceed 50 percent of the total dominance measure, plus any additional species comprising 20 percent or more of the total dominance measure. All dominants are treated equally in determining the presence of hydrophytic vegetation (i.e., 50/20 rule) (Environmental Laboratory 1987; Federal Interagency Committee for Wetland Delineation 1989).

Upon review of the transect data and application of the 50/20¹⁴ rule, two plant species were determined to be dominant (iceplant and California blackberry). Based upon the vegetation transect data, more than 50 percent of the dominant species are not OBL, FACW, or FAC (Appendix C). As a result, the area does not contain a hydrophytic community.

The reports describe the absence of hydric soils due to a lack of low-chroma¹⁵ soils in combination with a lack of sufficient quantity of redoximorphic features. The July 2004 report described methodology for inspecting soils for hydric characteristics as follows:

Several test pits were dug within the potential wetland area during the September 2003 and May 2004 site visits. During both visits, evidence of hydric soil indicators was not observed. Hydric mineral soils that are saturated for substantial periods of the growing season, but are unsaturated for some time, commonly develop mottles (concentrated areas of a common mineral). Soils that

¹⁴ The 50/20 rule indicates that all vegetation be ranked in descending order by percent cover for each stratum and cumulatively totaled. Species that cumulatively total 50%, plus any additional species that comprise 20% or more of the cover for each stratum are considered dominants.

¹⁵ Chroma refers to color “strength,” as referenced in Munsell soil color charts used for wetland delineations.

have brightly colored mottles and a low chroma matrix are indicative of a fluctuating water table. Hydric mineral soils usually have one of the following color features in the horizon immediately below the A horizon: (1) matrix chroma of two or less in mottled soils, or (2) matrix chroma of one or less in unmottled soils (Environmental Laboratory 1987, Federal Interagency Committee for Wetland Delineation 1989). These criteria have been accepted by CCC for determination of hydric soils.

Presence of hydrologic indicators in the form of saturated soil conditions was described in the December 2000 WRA report. The June 2004 WRA states an assumption was made in the previous report that the saturated conditions observed in October 2000 were normal circumstances and states “However, an early season rain storm occurred along the Mendocino coast on October 9 and 10, 2000 and this storm was not acknowledged in the December 2000 report. Additionally, irrigation runoff [sic] from upslope may have, at least partially, contributed to the observed saturated soil conditions during the October 2000 site visit.” The May 28, 2010 memo (Exhibit 18) additionally notes the following:

During the initial delineation in 2000 on the property, a small potential wetland was identified due to the presence of horsetail (*Equisetum telmateia*) and hedge nettle (*Stachys ajugoides*) and saturated soils in a flat area near the base of the driveway. At that time, two sample points were located in areas with the above listed obligate wetland species, and two upland sample points were located in slightly sloped areas lacking these indicator species. The 2000 delineation occurred approximately a week after an inch of rain fell, and the report describes a ditch to the south that drained the potential wetland. The ditch is no longer visible and the area has been invaded by upland species including iceplant (*Carpobrotus edulis*), coyote brush (*Baccharis pilularis*), and cow parsnip (*Heracleum lanatum*).

The County staff report for the current project did not discuss the current status of the wetland evaluation. The local record for previous applications at the subject site, in addition to letters submitted to the Commission by citizens (Exhibit 13), demonstrate there has been suspicion by members of the public in the past regarding the change in described site conditions over the years. In CDP#96-2002, WRA provided direct responses to some of the concerns expressed, and these are available as part of the County’s local record. The applicant has submitted copies of ACOE jurisdictional determination¹⁶ as evidence of satisfying federal requirements related to potential wetlands at the site.

(B) Commission Staff Review

Commission staff possessing 14 years of botanical experience and nine years experience delineating wetlands within and outside the California coastal zone conducted a site inspection on August 23, 2010. The weather was sunny and breezy and ambient temperature was approximately 75° F; no precipitation had

¹⁶ ACOE jurisdictional determination is a separate, federal jurisdiction related to filling of potential wetlands and not related to the state Coastal Commission wetlands jurisdiction standards

occurred in over 2 weeks. Staff dug sample pits at the flagged locations previously sampled by consultants and used Data Point labels consistent with those mapped in the April 23, 2010 Supplemental Biological Report (Exhibit 16). Staff evaluated potential wetland conditions in accordance with the currently applicable U.S. Army Corps of Engineers (ACOE) 1987 Wetland Delineation Manual¹⁷ and 2008 ACOE Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region¹⁸, and used a Trimble GeoXM 2005 GPS unit to collect data on sampling point locations.

Staff reviewed data forms submitted by WRA after the August 23, 2010 site visit and compared results. At WRA point P1, staff observed the same composition of species as WRA. Although the vegetative cover observed by staff was slightly different than that observed by WRA (15% cover of horsetail and 5% cover of iceplant as dominants compared to less than 1%, and 1% respectively as noted by WRA), the ultimate conclusion that the site lacked predominantly hydrophytic vegetation was the same due to the presence of the other dominant species (coyote brush and iceplant). This was particularly evident when taken in consideration with the lack of hydric soils and the lack of wetland hydrology indicators. Staff observed a soil matrix of 10YR 2/1.5, and only a few (1%), minor (1mm) potentially redoximorphic features which in combination affirmed a lack of hydric soils. No oxidized rhizospheres¹⁹ or other primary hydrologic indicators were observed at this sample location.

Similarly, at WRA point P2, species composition was the same, and although percentage of vegetative cover was different (possibly due to differing sample dates and increased growth of certain species later in the season); staff determined an absence of predominantly hydrophytic vegetation, consistent with WRA's determination. Soils observed at this old fill site (historic railroad grade) were sandy loam to sandy clay loam in texture, with gravels mixed throughout the matrix. Although soils were low in chroma (10YR 2/1), as per the ACOE 2008 Supplement the absence of redoximorphic features or other hydric soil indicators affirms the absence of hydric soil characteristics at this site. Lastly, no wetland hydrology indicators were observed at this site, and therefore staff concludes the site meets upland conditions.

In addition to reviewing current conditions, staff also obtained rainfall data as reported in the local newspaper the Independent Coast Observer (ICO) for the date of the initial WRA inspection on October 20, 2000. The ICO rain gauge is

¹⁷ Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual, Technical Report Y-87-1. Department of the Army Waterways Experiment Station, Corps of Engineers, Vicksburg, Miss.

¹⁸ U.S. Army Corps of Engineers. 2008. Interim Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region. Final Technical Report ERDC/EL TR-08-13 April 2008. U.S. Army Engineer Research and Development Center Environmental Laboratory. Vicksburg, MS.

¹⁹ Oxidized rhizospheres in the upper twelve inches suggests that soils likely fluctuate between wet and dry for significant periods of time.

located behind their office located less than ¼ mile from the subject parcel, and within the same subdivision (North Gualala Subdivision No. 3). Rainfall data for the week October 4 through October 10 was recorded as 0.78 inch, with no rainfall recorded October 11 through October 17. Therefore, after reviewing current conditions on the parcel during a site visit on August 23, 2010, and reviewing previously documented conditions, staff concurs with WRA's determination that no wetland conditions meeting the definitions of wetlands contained in Section 3.1 of the LUP and Section 13577 of the Commission's regulations currently occur onsite.

(2) **Background on the Identification of the Presence, Extent, and Impacts of the Proposed Development on Rare Plant ESHA**

(A) Rare Plant Habitat is ESHA

The rare CRPR list 1B plant, coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) occurs in several locations on the parcel. Coastal bluff morning-glory is a perennial herbaceous plant in the Convolvulaceae family that is endemic to California and occurs in coastal dunes, scrub, and bluff habitats in Mendocino, Marin, and Sonoma counties (CNPS 2003). Coastal bluff morning-glory does not have state or federal listing status, but it is on List 1B.2 of the California Rare Plant Rank (CRPR) system, a designation assigned to plants considered rare, threatened, or endangered in California and elsewhere. In California, it is considered to be "distributed in a limited number of occurrences" (CNPS 2003) and fairly threatened in California with a moderate degree/immediacy of threat.

The Commission has found, in past decisions on permit appeals that coastal bluff morning-glory and its habitat constitute an environmentally sensitive habitat area (ESHA). These past decisions include, but are not limited to decisions on two appeals of projects approved in the Gualala area in 2003 (A-MEN-03-029) and 2010 (A-1-MEN-05-037), both for single-family residences.

As described above, the southern portion of the parcel includes intact Coastal Terrace Prairie plant community, along with areas of encroachment of Coastal Scrub plant community. The Coastal Terrace Prairie community type is itself recognized as a sensitive plant community by California Department of Fish and Game (CDFG), and is recognized as ESHA by the Coastal Commission. Additionally, what is presumed to be the special-status species Mendocino coast Indian paintbrush (*Castilleja mendocinensis*) occurs near the bluff edges on the southern portion of the parcel (access is unsafe for positive identification). Like coastal bluff morning-glory, Mendocino coast Indian paintbrush has a California

Rare Plant Rank (CRPR²⁰) of 1B.2, a designation assigned to plants considered rare, threatened, or endangered in California and elsewhere.

ESHA, as defined in Section 30107.5 of the Coastal Act, Section 3.1 of the certified Mendocino County LUP, and CZC Section 20.308.040(F) is “...*any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities.*” Thus, Coastal Act Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F) set up a two part test for determining an ESHA. The first part is determining whether an area includes plants or animals or their habitats that are either: (a) rare; or (b) especially valuable because of their special nature or role in an ecosystem. If so, then the second part asks whether such plants, animals, or habitats could be easily disturbed or degraded by human activities. If so, then the area where such plants, animals, or habitats are located is deemed ESHA by Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F).

The first test for determining ESHA under Section 30107.5, LUP Section 3.1, and CZC Section 20.308.040(F) is whether an **area** including plants or animals or their habitats **is either (a) rare, or (b) especially valuable because of its special nature or role in an ecosystem.** As discussed above, Mendocino coast Indian paintbrush and coastal bluff morning-glory occur on the subject property. The species are included on lists of rare, threatened, and endangered species by the California Native Plant Society²¹ and the Department of Fish and Game.²² Both species have a CRPR listing of 1B.2. Coastal bluff morning-glory additionally has a CNDDDB state/global ranking of G4T2/S2.2²³, and Mendocino coast Indian paintbrush has a CNDDDB state/global ranking of G2/S2.2²⁴. Because of their relative rarity at the state level, coastal bluff morning-glory and Mendocino coast

²⁰ Formerly recognized as the California Native Plant Society (CNPS) list, the new designation of CRPR reflects in its name the cooperative statewide process of plant status review and ranking, but in no way changes the content or format of the listing system.

²¹ California Native Plant Society (CNPS). 2009. *Inventory of Rare and Endangered Plants* (online edition, v7-09d). California Native Plant Society. Sacramento, CA. Accessed from <http://www.cnps.org/inventory>.

²² California Department of Fish and Game, Natural Diversity Database (NDDDB). April 2010. *Special Vascular Plants, Bryophytes, and Lichens List*. Quarterly publication. 71 pp.

²³ In this case, the California Heritage (CNDDDB) ranking of G4T2/S2.2 describes the global rank (G rank) of the entire distribution for the species *Calystegia* as apparently secure and uncommon but not rare. Subspecies receive a T-rank attached to the G-rank. With the subspecies, the G-rank reflects the condition of the entire species, whereas the T-rank reflects the global situation of just the subspecies or variety. The T-rank for *Calystegia purpurata* ssp. *saxicola* indicates this subspecies is imperiled, and at high risk of extinction due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors. The state rank (S rank) for coastal bluff morning-glory is imperiled in California because of rarity due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors making it very vulnerable to extirpation from the nation or state/province.

²⁴ The California Heritage (CNDDDB) ranking of G2/S2.2 describes the global rank (G rank) of the entire distribution of *Castilleja mendocinensis* as imperiled and at high risk of extinction due to very restricted range, very few populations (often 20 or fewer), steep declines, or other factors. The state rank is the same as that described in footnote 23.

Indian paintbrush habitats meet the rarity test for designation as ESHA under the above cited Coastal Act and LCP policies.

As described above, The Coastal Terrace Prairie community type is itself recognized as a sensitive plant community by California Department of Fish and Game (CDFG), is designated as rare in the CDFG Natural Diversity Database, and is recognized as ESHA by the Coastal Commission.

The second test for determining ESHA under Coastal Act Section 30107.5 (Section 3.1 of the certified LUP) is **whether the habitat could be easily disturbed or degraded by human activities and developments**. Rare plant habitat occurring on the property could be easily disturbed or degraded by human activities and developments such as those that would be necessary to develop the proposed house, including grading, paving, building construction, foot trampling, etc. Such development activities could additionally degrade rare plant habitat by disturbing the soil and native plant community such that it facilitates encroachment by invasive exotic species. This is evidenced by the lack of rare plant occurrences within the area mapped by WRA as “nonnative vegetation” that is dominated by nonnative grasses, which generally correlates with an area of man-made fill from railroad construction mapped by the consulting geologist originally in 1999 and again in the most recent geologic report from September 2009. Therefore, the rare plant habitat occurring on the approved project site meet the second test for determining ESHA under Section 30107.5 of the Coastal Act, LUP Section 3.1, and CZC Section 20.308.040(F).

(B) Biological Assessments Background and Mitigation Measures

As noted above, the consulting biologists Wetland Research Associates (WRA) have conducted several biological investigations and surveys on the subject parcel dating back to 2000. Their reports document that the parcel supports sensitive plant communities and habitat that include coastal terrace prairie, Mendocino coast Indian paintbrush, and coastal bluff morning-glory. Based upon 2010 surveys described in the April 23, 2010 report submitted by WRA (Exhibit 16), approximately 28 coastal bluff morning-glory plants occur within 50 feet of the proposed project site, including the two plants previously described on the northern portion of the parcel. Another two plants located in 2010 at the southern junction between the property line and driveway easement are likely to be directly impacted as a result of the proposed development.

The April 23, 2010 report describes observed plants and methodology for identification as follows:

Similar to previous surveys of this species, all morning glory plants were identified as the special status subspecies *C. purpurata* ssp. *saxicola*, the common subspecies *C. purpurata* ssp. *purpurata*, and potential hybrids. All plants observed were re-identified based on features observed in 2010, regardless of how they were labeled in 2008.

The determination of subspecies was based on the treatments and keys in the Jepson Manual (Hickman 1993) and the 2nd edition (not yet published but available online). There has been no substantial revision to the key in the 2nd edition as it relates to *Calystegia purpurata* and subspecies. Since it was early in the growing season, no flowers were present on this species. Many plants were only a few inches tall with only the beginning growth of trailing or climbing stems. As is standard practice among consulting botanists in this region, subspecies determination was based on leaf shape as described in both editions of the Jepson Manual. Plants exhibiting intermediate characteristics or diagnostic leaf shapes of both subspecies were labeled as potential hybrids. Similar to previous reports by WRA, it is recommended that potential hybrids be conservatively treated as the special status subspecies for project planning purposes.

At the request of Appellant Duane Hines, a local citizen familiar with coastal bluff morning-glory plants conducted a focused survey for these plants on July 12-15, 2010 on the appellant's two adjoining parcels and used binoculars and a 60-power spotting scope to observe conditions on the subject parcel. The citizen noted in a letter to the appellant dated July 15, 2010 (Exhibit 13) her experience and familiarity with coastal bluff morning-glory, including its presence on the property where she resides ¼-mile south of the appellant's parcel. The citizen, Ms. Julie Verran, notes additionally that in 2003 British botanist Dr. Richard K. Brummitt visited her site with other botanists to verify identification of plants as the sensitive subspecies. Dr. Brummitt authored the taxonomic keys and described the rare and common subspecies of coastal bluff morning-glory in the 1993 Jepson Manual²⁵ and the revised Jepson online version²⁶, which are the botanical standards for taxonomic nomenclature in California. In her letter to Mr. Hines, Ms. Verran states "The Coastal Bluff Morning Glory was found occurring abundantly on your property. All the plants observed were the rare subspecies." While the letter does not indicate the number of *plants* observed per se, Ms. Verran notes "There are an estimated 200 stems of the plant in the un-mowed portion of your southern property, and more in the mowed portion. The position of the main concentration of Coastal Bluff Morning Glory near your deck was delineated as you requested on a copy the [sic] applicant's map of the site." The differing identifications of morning-glory specimens by these resource professionals is discussed further in subsection (3) below.

The August 2008 WRA report entitled "Biological Report of Compliance for a Mendocino County Coastal Development Permit" (Exhibit 14) identifies locations of the Coastal Terrace Prairie plant community and locations of sensitive plants. The August 2008 report additionally describes two plants occurring near the northern portion of the parcel. The report includes a diagram illustrating 50-foot

²⁵ Hickman, James C., Ed. 1993. The Jepson Manual: Higher Plants of California. University of California Press, Berkeley, CA.

²⁶ University of California Regents. 2008. Jepson Flora Project: Jepson Online Interchange for California Floristics. Accessed online at <http://ucjeps.berkeley.edu/interchange.html>

ESHA buffers around all rare plants and rare plant communities, and indicates that the proposed development occurs within 20 feet of the two plants occurring in the northern portion of the property. In a letter dated February 23, 2009 (Exhibit 15) submitted to Mendocino County Project Coordinator Teresa Spade, WRA Senior Vice President Tim DeGraff discusses habitat variations between the northern and southern portions of the parcel, and concludes the following:

In summary, the two isolated coastal bluff morning glory locations are in atypical habitat that may be unsuitable for sustaining these plants, and is not likely to support natural recruitment of new individuals. The immediate vicinity of the plants is dominated by shady habitat, large shrubs and trees, and adjacent habitats are also dominated by invasive species such as pampas grass, iceplant, and annual grasses. As the trees and shrubs continue to grow and invasions expand, this may prove to be unsuitable habitat for the plants, whether development occurs in the vicinity of these morning glory plants or not. It is our opinion that these two isolated coastal bluff morning glory plants do not meet the definition of an ESHA, as the supporting habitat is not rare or sensitive, and is not likely to sustain the existing plants or population in the long-term.

The Commission rejects WRA's determination that the location of the two plants is not typical habitat because it is shaded by trees and is surrounded by encroaching invasive species. The mere presence of the plant at this location demonstrates that suitable habitat exists. Commission staff has observed this site and noted that while a non-native grassland does occur nearby, the northern area occupied by coastal bluff morning-glory plants is surrounded by native coastal scrub species (typical habitat for coastal bluff morning-glory) that include pacific reedgrass, California blackberry, coast angelica, bracken fern (*Pteridium aquilinum*), and Douglas-fir that is wind-pruned such that it does not significantly shade the site. In fact, as described below, the number of coastal-bluff morning-glory plants in the vicinity of where the subject two coastal-bluff morning-glory plants occur increased to well over 25 plants in the year following the filing of the appeal, demonstrating further the dynamics of the plant community and the premise for designating the northern area, in addition to the southern portion of the parcel, as ESHA.

In a subsequent report intended to update 2008 survey data and dated April 23, 2010 (Exhibit 16), Mr. DeGraff indicated that non-floristically-appropriate surveys conducted in March and April 2010 identified increases to all coastal bluff morning-glory occurrences on the parcel. The report states the following:

Thirteen coastal bluff morning glory and potential hybrids, and four plants appearing to be the common subspecies were observed on the Wernette parcel during 2008 surveys. Two of the thirteen coastal bluff morning glory plants were located within 50 feet of the proposed project at the north end of the parcel. In 2010 WRA biologists observed approximately 63 coastal bluff morning glory and potential hybrids, and 11 plants appearing to be the common subspecies. Approximately 28 coastal bluff morning glory and potential hybrids, or 44 percent, were observed within 50 feet of the proposed project.

Prior to review of the biological reports, Commission staff visited the subject parcel on May 13, 2010, when coastal bluff morning-glory plants were in bloom. Staff examined various coastal bluff morning-glory occurrences on the site, including the location where two plants were initially documented. Staff reexamined the site on August 25, 2010 after reviewing biological reports dating back to 2000, and including the most recent report dated April 23, 2010. Commission staff used a Trimble GeoXM 2005 geographic positioning system (GPS) unit to collect data on plant occurrences in the area where two plants were originally identified. On the day of inspection, staff counted 48 individuals occurring in the vicinity of the two plants previously identified by WRA. Plants were counted by following vegetation to the soil surface; where several inches separated individual or clusters of stems, the plant was counted as a unique individual. Using geographic information system (GIS) software and after obtaining data files from the consultant, staff overlaid findings from the August 25, 2010 site visit with the occurrence data and proposed project site mapped by WRA. According to the GIS analysis, the 48 individuals observed by staff occur within 50 feet of the project area, with some plants occurring as close as 6 feet from the edge of the proposed development (Exhibit X).

It is unclear why there is a discrepancy in numbers of plants observed. On August 24, 2010, Commission staff contacted WRA via email to ask what methodology was used to count morning-glory plants, since the methodology was not stated in any of the survey reports reviewed. On August 26, 2010, WRA Botanist/Wetlands Biologist Jennifer Mathers responded that “As the subject species is a vine, occasionally it may be difficult to determine if several branches in an area belong to the same individual plant. However, since the updated survey in 2010 was performed early in the growing season for this species, branches had not yet extended to significant lengths. Therefore plants were compact enough to isolate and count individuals with a fair amount of accuracy. Generally clusters of stems were counted as a single plant, and this could usually be verified by viewing the origin of the stems.”

Identification of coastal bluff morning-glory

The August 2008 WRA report describes some morning-glory plants as exhibiting either the rare, common, or hybrid subspecies characteristics of *Calystegia purpurata*²⁷. The report states the following:

The subspecies are differentiated primarily by leaf shape, which can be highly variable. Specimens with at least a few leaves matching taxonomic descriptions of the rare subspecies (rounded with overlapping lobes), including all potential hybrids, were mapped as ESHAs in this report to ensure that the most protective and suitable ESHA buffers and mitigation measures were applied to the Study Area.

²⁷ Another closely-related species of morning-glory known as climbing morning-glory (*Calystegia purpurata* ssp. *purpurata*) commonly occurs in similar habitats and is not considered sensitive; according to Hickman (1993), intergradation is common between *Calystegia* species.

Specimens were considered to be non-ESHAs if all leaves matched taxonomic descriptions of the common subspecies (acute tip and spreading lobes). Additional specimens that were clearly identified as the common subspecies were found along Robinson Reef Drive near the entrance to the Study Area. This close proximity indicates that hybridization between the subspecies is one potential explanation for specimens with a variety of leaf shapes.

In the April 23, 2010 WRA report, which was intended to update 2008 survey data (Exhibit 16), Mr. DeGraff indicated that non-floristically-appropriate surveys conducted in March and April 2010 identified increases to common, rare, and “potential hybrid” morning-glory occurrences on the parcel. The report states the following:

Thirteen coastal bluff morning glory and potential hybrids, and four plants appearing to be the common subspecies were observed on the Wernette parcel during 2008 surveys. Two of the thirteen coastal bluff morning glory plants were located within 50 feet of the proposed project at the north end of the parcel. In 2010 WRA biologists observed approximately 63 coastal bluff morning glory and potential hybrids, and 11 plants appearing to be the common subspecies. Approximately 28 coastal bluff morning glory and potential hybrids, or 44 percent, were observed within 50 feet of the proposed project.

While WRA recommends “potential hybrids” should be afforded the same protections as the rare subspecies, plants identified as the common form (*Calystegia purpurata* ssp. *purpurata*) are not afforded protection in WRA’s recommendations.

On August 26, 2010, Commission staff visited the Humboldt State University Herbarium to examine morning-glory plant specimens. Because all specimens in the inventory were those of the common form, staff subsequently accessed the Consortium of California Herbaria²⁸ to review photographed herbarium specimens of the rare coastal bluff morning-glory. Herbarium specimens of common morning-glory appeared substantially more robust and with more distinct leaf morphology than the herbarium specimen of the rare coastal bluff morning-glory, and appeared to contrast with specimens observed on the subject parcel that included those observed near the entrance to the subject property.

Based upon data submitted by WRA (Exhibit 16), plants determined to be the “hybrid” form were observed within 2 feet of the common subspecies, and within 6 feet of the rare subspecies. WRA documented rare and common subspecies as occurring with 13 feet of each other. As noted by staff Ecologist John Dixon, P.h.D., the likelihood of pure rare, pure common, and hybrid subspecies all occurring within 13 feet of each other and still retaining the pure traits of the subspecies is highly questionable from an ecological perspective, because genetic swarming would create hybrids and backcrosses to pure forms of the plants. Many

²⁸ Consortium of California Herbaria accessed online September 2010 at <http://ucjeps.berkeley.edu/consortium/>

plant species demonstrate “phenotypic plasticity”- that is, “the ability of an individual organism to alter its physiology/morphology in response to changes in environmental conditions²⁹.” Variations in light, disturbance, nutrients, and other factors can affect morphological and physiological variations in a number of plant species and subspecies, and it is more likely here that variations in leaf morphology observed amongst individual plants and in some cases even on a singular plant are due to phenotypic plasticity within *Calystegia purpurata* ssp. *saxicola*. Such variation in leaf morphology within such a small site (0.48 acre of relatively flat marine terrace) does not provide adequate evidence that some observed forms may be hybrids or subspecies, and the lack of demonstrated certainty by the consulting biologists (as evidenced by the description as “potential hybrids”) warrants treatment as the rare form unless genetic testing can be conducted to prove the identity otherwise. Ultimately, whether or not hybrid and common plants share the same habitat conditions as the rare coastal bluff morning-glory plants ignores the fact that coastal bluff morning-glory *does* occur throughout portions of the parcel, and therefore the habitat that supports and is capable of supporting coastal bluff morning-glory habitat is recognized as ESHA, as described above.

Conclusion on Extent of ESHA

Therefore, in the absence of clear genetic analysis or other definitive evidence demonstrating a positive distinction between alleged rare, common, and hybrid forms on the subject parcel, the Commission finds that all habitat capable of supporting coastal bluff morning-glory plants on the subject parcel be treated as ESHA. Using this approach, all portions of the subject parcel, with exception to the areas dominated by pampas grass or non-native vegetation as mapped in Figure 2 of the 2008 WRA report, are deemed ESHA for the purposes of further analysis because these areas all contain rare plants and/or the habitats that support, or are capable of supporting coastal bluff morning-glory, Mendocino coast Indian paintbrush, and/or the Coastal Terrace Prairie plant community.

An August 2008 report entitled “Biological Report of Compliance for a Mendocino County Coastal Development Permit” submitted by WRA (Exhibit 14) discussed potential indirect impacts resulting from development within 20 feet of coastal bluff morning-glory plants in the northern portion of the property; construction activities occurring within the 100-foot ESHA buffer; loss of some coastal scrub habitat; and disturbance that may increase erosion or presence of invasive species. The report includes mitigation measures to reduce impacts to a less than significant level, and includes a resource protection plan with specifications for invasives removal, fencing, minor replanting, and monitoring.

Mitigation measures proposed in the August 2008 report by the consulting botanist and included in the project proposal submitted by the applicant to the

²⁹ Schlichting, Carl D. 1986. "The evolution of phenotypic plasticity in plants." Annual Review of Ecology & Systematics 17, 667-693. Academic Search Complete, EBSCOhost (accessed September 14, 2010).

County are paraphrased below. Mitigation measures included but were not limited to the following:

1. Maintenance of conditions outside the construction zone similar to that which occurred on the site prior to project disturbance, and limit allowable activities onsite;
2. Recordation of a deed restriction;
3. Establishment of a fenced, excluded Conservation Area on the southern portion of the parcel where restoration and monitoring will be conducted pursuant to the resource protection plan;
4. Limitation on acceptable plants for landscaping and restoration areas;
5. Use of temporary exclusionary fencing, silt fence, and other erosion control measures during construction activities;
6. Flagging of plants and education of contractors on the presence and location of rare plants;
7. Use of best management practices; and
8. Requirements for special status bird and bat surveys for construction activities conducted between November 1 and August 31.

According to the local record and telephone correspondence between Commission staff and DFG Environmental Scientist Rick Macedo, DFG staff have not visited the site since December 13, 2007. Upon request, Mr. Macedo provided an email to Commission staff dated January 23, 2008 (Exhibit 21) that was submitted to the County as part of the previous application No. CDP 96-2002, in which Mr. Macedo states "Based on our December 13, 2007 site visit, a cursory review of proposed mitigation measures outlined in the January 24, 2008 staff report and the understanding that the project occurs outside a 50-foot setback to all ESHAs, I have no further comments regarding the project's potential impacts on sensitive species and communities. The proposed 50-foot setback should adequately protect the identified sensitive resources." The previous correspondence from DFG does not reflect the presence of coastal bluff morning-glory plants that occur within the 50-foot ESHA buffer.

(3) Proposed Development Located Within Rare Plant ESHA

The proposed project involves (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) Installation of a sewage pump tank and back-up generator, with connection to off-site septic disposal services, connection

to community water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid system underneath the home); and (5) use of a portion of the property as a temporary construction staging area. The project includes encroachment into rare plant ESHA buffer designated on the southern portion of the parcel and incorporates a rare plant management plan.

All portions of the subject parcel- with exception to the areas dominated by pampas grass or non-native vegetation as mapped in Figure 2 of the 2008 WRA report- constitute coastal bluff morning-glory and/or other rare plant habitat, an environmentally sensitive habitat area (ESHA) as defined by CZC Section 20.496.010. Most of the development is located in areas of non-native vegetation that are not part of the ESHA. However, an approximately 369-square-foot portion of the driveway/parking area and an approximately 104-square-foot-portion of the footprint of the home are within the rare plant ESHA.

LUP Policy 3.1-7 and CZC Section 20.496.020 (A)(1) allow for development to be permitted within a buffer area if the development is for a use that is the same as those uses permitted in the adjacent environmentally sensitive habitat area, and if the development complies with specified standards as described in subsections (1)-(3) of LUP Policy 3.1-7 and 4(a)-(k) of Section 20.496.020. CZC Section 20.532.100(A)(1)(a) requires that ESHA resources affected by development will not be significantly degraded by the proposed development. The LCP policies identify specific uses permitted in wetland and riparian ESHAs, but do not specifically identify what uses are allowed within rare plant ESHA, and by extension, within the rare plant buffer.

Coastal Act Section 30240(a) states that environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, only uses dependent on those resources shall be allowed within those areas. Although Section 30240 of the Coastal Act is not listed in the section of the certified Land Use Plan entitled, "Coastal Element Policies: Habitats and Natural Resources," which contains LUP Policy 3.1-7 and other LUP policies governing the protection of ESHA, Section 30240 is listed and referred to in the narrative for the section of the Land Use Plan containing the other LUP policies governing the protection of ESHA.

Although local governments are responsible for drafting the precise content of their LCPs, the Coastal Act requires that LCPs must, at a minimum, conform to and not conflict with the resource management standards and policies of the Coastal Act. It can be presumed that the County was aware that the Coastal Act established the minimum standards and policies for local coastal programs and knew, that in drafting its local coastal program, it was constrained to incorporate the development restrictions of Section 30240(a) of the Coastal Act, including the restriction that only uses dependent on those resources shall be allowed in those areas. It can also be assumed that in certifying the Mendocino County LCP, the

Commission understood and found that the LCP conformed to (i.e. incorporated) the minimum policies and standards of the Coastal Act, including the development restrictions of Section 30240(a).

As noted above, the narrative for the section of the Land Use Plan containing LUP policies governing the protection of ESHA includes Section 30240. In addition, the narrative contains statements that acknowledge the protections afforded by Section 30240 and the County's commitment to incorporate those protections into the LCP, including the following statements:

- “The Coastal Act mandates the preservation of significant natural resources and habitats;”
- “Throughout all policies pertaining to Habitats and Natural Resources shall run the continuous theme that natural habitat areas constitute significant public resources which shall be protected not only for the wildlife which inhabits those areas but for the enjoyment of present and future populations of the State of California;”
- This Local Coastal Plan represents the commitment of the County of Mendocino to provide continuing protection and enhancement of its coastal resources

The LCP policies do not expressly authorize non-resource dependent uses nor any other uses within rare plant ESHA. The fact that the LCP policies do not specifically state what uses are allowed within rare plant ESHA does not mean the policy is intended to relax the restriction of Section 30240(a) of the Coastal Act that limits uses in habitat areas to those dependent on habitat resources. An LCP policy that allowed non-resource dependent uses in rare plant ESHA would be inconsistent with and directly conflict with Section 30240(a). Moreover, the provisions in the LCP concerning permissible development in habitat areas are not incompatible with the restrictions in Section 30240(a). These provisions refer generally to maintaining minimum buffers between development and ESHA, which is not inconsistent with restricting development within rare plant ESHA to resource dependent uses. Therefore, the Commission finds that the Mendocino County LCP policies governing rare plant habitat areas restrict development to resource dependent uses that do not significantly disrupt habitat values.

The protection of ESHA in the coastal zone is an issue of statewide concern addressed by Section 30240 of the Coastal Act. The proposed residential use is not in any way dependent on the rare plant habitat at the site. Therefore, as a residential use is not listed in the LCP as an allowable use within rare plant ESHA and the Coastal Act only allows resource dependent uses within an ESHA, the proposed development is inconsistent with the use limitations of the certified LCP, including its references to 30240, and including LUP Policy 3.1-7 and CZC Section 20.496.020(A)(4), and these policies mandate that the project be denied. However, as discussed below, the Commission has determined that it must allow

a reasonable development on the subject property to avoid an unconstitutional taking of the applicant's property without payment of just compensation.

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 applicant has modified the proposed project design from the previous applications denied by the County in response to concerns that include drainage design and house size. The current proposed project is smaller in overall size (2,300 square feet total), height (25 feet), and building ground cover (1,200 square feet) than previous applications. In response to concerns expressed about drainage capabilities, the current project now proposes to direct runoff through a perforated pipe grid system to evenly distribute runoff, and includes a proposal to use pervious concrete for the paved parking and driveway surfaces to further accommodate stormwater runoff. This modified design also eliminates the need for a holding tank and pump for water runoff, and eliminates discharge through the culvert that outlets onto the bluff edge.

The applicant has sited the house in a location that minimizes direct impacts to coastal bluff morning-glory plants by concentrating development where non-native species currently prevail, while also accommodating other site constraints that include geologic, building, and property line setbacks. Although the proposed modifications included in the current project design reduce impacts from those of previous applications, direct impacts to approximately three morning-glory plants and a portion of coastal bluff morning-glory habitat will occur. In addition, all feasible mitigation measures capable of reducing or eliminating project-related impacts have not been adopted, because only the southern portion of the property has been delineated as a conservation area designed to protect and enhance coastal bluff morning-glory habitat.

Therefore, the Commission finds that because the proposed development would significantly degrade the coastal bluff morning-glory ESHA, and because not all feasible mitigation measures capable of reducing or eliminating project-related impacts have been adopted, 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. 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.

(4) **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).

The proposed development is located partially within coastal bluff morning-glory ESHA itself 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. As discussed above, 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, the proposed residential use is not in any way dependent on the rare plant habitat at the site. Therefore, as discussed above, as a residential use is not listed in the LCP as an allowable use within rare plant ESHA and the Coastal Act only allows resource dependent uses within an ESHA, the proposed development is inconsistent with the use limitations of the certified LCP, including its references to 30240, and including LUP Policy 3.1-7 and CZC Section 20.496.020(A)(4). 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 all portions of the subject parcel- with exception to the areas dominated by pampas grass or non-native vegetation as mapped in Figure 2 of the 2008 WRA report- constitutes coastal bluff morning-glory 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, a single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, generator, water and utility connections are proposed to be located within ESHA buffer. These developments will require site grading (estimated by the applicant at approximately 175 cubic yards of cut and 85 cubic yards of fill).

Therefore, because (1) the proposed residential use is not a use that would be allowed in the adjacent rare plant ESHA, (2) the proposed development would be located less than 50 feet from ESHA inconsistent with LUP Policy 3.1-7 and CZC Section 20.496.020(A), (3) the proposed residential development would significantly degrade the coastal bluff morning-glory habitat, and (4) all feasible mitigation measures capable of reducing or eliminating project-related impacts have been not adopted, the Commission finds that findings for approval cannot be made consistent with LUP Policy 3.1-7 and CZC Sections 20.496.015 regarding development within ESHA buffer, 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.

(5) **Need to Allow a Reasonable Residential Development to Avoid an Unconstitutional Taking of Property**

As discussed above, the proposed development is inconsistent with (1) Coastal Act Section 30240; LUP Policies 3.1-2 and 3.1-7; and CZC Sections 20.496.015, 20.496.020(A)(4), and 20.532.100(A)(1) regarding development within rare species ESHA, and (2) LUP Policy 3.1-7 and CZC Section 20.496.020(A) regarding development within an 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 determines 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.³⁰

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.

(A) 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.*”³¹ 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.”

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 whereby 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

³⁰ 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).

³¹ 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).

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”)).³²

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*)].

(B) 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 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 within environmentally sensitive coastal bluff morning-glory habitat and its buffer area, 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 145-1610-27, 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

³² 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).

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."

(C) **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].

For the purposes of *de novo* review by the Commission, the applicant submitted a Property Interest Summary on April 18, 2020 (Exhibit 32). In this case, the applicant owns the subject vacant parcel proposed to be developed with a single-family residence (APN 145-161-27). The subject parcel was acquired from Sanford L. Binker on September 11, 1997 for \$160,000 and includes a 14-foot-wide non-exclusive easement for utilities, ingress, and egress. On September 11, 1997, a Grant Deed was recorded as Instrument 15154, Book 2443, page 367 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to applicants George J. Wernette and Jerri Wernette, husband and wife. In addition, the applicant purchased an adjacent parcel with an existing single-family residence (APN 145-161-09); this parcel was acquired from Carl Anderson on September 7, 2001 for \$500,000. Although the parcels are "adjacent" in that they share a common property corner to the southeast (the most recently acquired parcel is cater-cornered to the subject parcel- see Exhibit 4), the lots have been previously owned by separate owners, were not conveyed at the same time, and therefore have not been treated as one contiguous unit over time.

Based upon an examination of copies of these documents and related entries within the current property tax rolls of the County of Mendocino's Assessor's Office, the adjoining parcels (other than APN 145-161-09 described above) are separately owned. Two adjoining parcels to the east (APNs 145-161-07 and 145-161-06) are currently owned by appellant Duane Hines (APN 145-161-06 was

formerly owned by appellant Joseph Turnlund). The adjoining parcel to the southeast (APN 145-161-08) is owned by William and Janice Stein. The adjoining parcel to the south (APN 145-161-31) is owned by Kenneth and Marian Brown. Another adjoining parcel to the northeast (APN 145-161-05) is owned by Wilhelm and Barbara Schneiders. The adjoining northeast corner parcel that is cater-cornered (APN 145-161-04) is owned by Claude and Matilda Bobba. The undeveloped adjoining parcel to the north (APN 145-161-25) is owned by Annette Daroczi.

Across the street (Robinson Reef Drive), the nearest parcels to the east (APNs 145-162-08 and undeveloped parcel 145-162-09) are owned by Jon and Vikki Ford; and Francis and Loretta Healy own APN 145-162-10, also across the street. To the west, the applicant's property adjoins the Pacific Ocean.

Therefore, the evidence establishes that the Commission should treat APN 145-161-27 as a single parcel for the purpose of determining whether a taking occurred.

(D) 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

(i) 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 residential (multifamily, boardinghouse, and mobile home parks); commercial (cottage industries); and civic use types (on-site alternative energy facilities, community recreation, day care and small school facilities, educational facilities, fire and police protection services, group care, lodge, fraternal and civic assembly, 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 development within environmentally sensitive coastal bluff morning-glory habitat, 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, commercial, or civic use types would still require building a home or other structure within coastal bluff morning-glory ESHA and ESHA buffer inconsistent with LUP Policies 3.1-2 and 3.1-7, and CZC Sections 20.496.015, 20.496.020, and 20.532.100(A)(1). Furthermore, the property is located within an established residentially-developed area (with single-family residential developments on the adjacent lots to the south and east) and where there is no impetus for public agencies to purchase the lot for recreational, open space, or other uses.

Regarding “passive recreation” which is a principally permitted use type that wouldn’t necessarily require building a home or other structure within coastal bluff morning-glory 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 “Active Recreation” is not a conditionally permitted use of the subject parcel.

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 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., Gualala Point County Park, Schooner Gulch State Beach), and does not afford access to any beach, park, or other recreation area. Thus, there is no 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.

(ii) 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 145-161-27 for \$160,000 with a closing date of September 11, 1997. On September 11, 1997, a Grant Deed was recorded as Instrument 15154, Book 2443, page 367 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to the applicant. Upon review of these documents, 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 may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a residence; however it could be argued that a reasonable person would not have had a reasonable expectation to build a house and garage of the size and scale as that proposed, given the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3.

To determine whether the applicant had an investment-backed expectation to construct a house on APN 145-161-27, it is necessary to assess what the applicants invested when they purchased that lot. 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.

The applicant purchased APN 145-161-27, an approximately 0.72-acre parcel, for a single purchase price of \$160,000. For the purposes of *de novo* review by the Commission, the applicant submitted a Property Interest Summary on April 18, 2020 (Exhibit 32). The applicant indicates the fair market value of the property interest for APN 145-161-27 at the time it was acquired was estimated to be \$189,000 based on comparisons with other properties for sale in the Gualala area. No independent appraisal was conducted.

When the applicant purchased the property in 1997, there was no indication that development of a single-family residence on the parcel would not be possible due to botanical constraints. The coastal bluff morning-glory had only recently become listed by the California Native Plant Society and neither the county nor the Commission had regulated development based on the existence of the rare California plant. At the time that the applicant was attempting to purchase the property, the property was zoned for residential use and there were numerous existing homes on bluff top parcels in the North Gualala subdivision, including homes on the adjacent lots to the south and east of the subject parcel. In addition to other developments in the subdivision approved by the County following certification of their LCP in 1992, the adjacent residence to the south (APN 145-161-07) was approved by the Coastal Commission in 1974, with a subsequent modification approved June 23, 1975 (see CDP No. NCR-75-CC-438). The 0.3-acre parcel, which is now owned by appellant Duane Hines, consisted of approved development that included 3,000 square feet of land coverage (including pavement and decks) for a two-story single-family residence, plus installation of a septic tank and leach field. Consequently, the applicants may have had a reasonable *investment-backed* expectation that they had purchased a lot that could be developed consistent with the ESHA policies of the certified LCP, and their investment reflected that the future development of a residential use could be accommodated on APN 145-161-27. Given that: (1) numerous homes were in existence in the North Gualala subdivision at the time of the property purchase, including homes on the adjacent lots to the south and east of the subject parcel; (2) the property was planned and zoned for residential use; and (3) there was no indication at the time of purchase that development of a single family residence on the parcel would not be possible due to botanical constraints, viewed objectively, a reasonable person would thus have had a reasonable expectation that APN 145-161-27 could be developed as a residential parcel.

To assess whether the applicant had a reasonable expectation to build the proposed two-story house at the building footprint size of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade), and 2,100 square feet total of combined driveway, parking area, and emergency vehicle turnaround with a pervious concrete surface, the Commission reviewed the total house ground cover square footage and garage ground cover square footage of other developed residential lots within the immediate area surrounding the subject parcel as shown on Sheet 1 of the 86-parcel North Gualala Subdivision No. 3 (Exhibits 4 and 31).

The applicant may have had an investment-backed expectation and a reasonable expectation that the subject property could be developed with a house and garage of the size and scale as that proposed (approximately 1,200 square feet combined ground cover footprint for house and garage, which is smaller than houses proposed in earlier applications at the subject site), given the average and largest sizes of surrounding homes in the North Gualala Subdivision No. 3.

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 planned and zoned for Suburban Residential (SR) use in the County's LCP. 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 (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 residential (multifamily, boardinghouse, and mobile home parks); commercial (cottage industries); and civic use types (on-site alternative energy facilities, community recreation, day care and small school facilities, educational facilities, fire and police protection services, group care, lodge, fraternal and civic assembly, 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 development within environmentally sensitive coastal bluff morning-glory habitat, be feasible, and provide the property with an economically viable use. 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 within coastal bluff morning-glory 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 “Active Recreation” is not a conditionally permitted use of the subject parcel. 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 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., Gualala Point County Park, Schooner Gulch State Beach), and does not afford access to any beach, park, or other recreation area. Thus, there is no impetus for such public agencies to purchase the lot for recreational, open space, or other uses.

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, though not necessarily the exact residence proposed by the applicants, to provide a reasonable economic use of the subject property. This determination is based on the Commission’s finding in this staff report that residential 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.

(E) **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 North Gualala Water Company, and sewer service will be provided by the Gualala Community Sewer District (GCSD) community sewage system (with an underground sewage holding tank system with integrated pump located on-site) septic system that has been reviewed and approved by the Gualala Community Services District. The provision of these services 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 approval allows for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence that: (1) permanently restricting use of the property to resource dependent uses could potentially eliminate the economic value of the property; (2) residential use of a small portion of the property would provide an economic use; and (3) an applicant would have had a reasonable investment-backed expectation that a fully mitigated residential use would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a residential use, based on the inconsistency of this use with LCP Policies and LCP Zoning would constitute a taking. Therefore, the Commission determines that the County LCP in this case does not preclude non resource-dependent development within ESHA and ESHA buffer.

Having reached this conclusion, however, the Commission also finds that the LCP only instructs the Commission to construe the resource protection policies of the

Mendocino County LCP in a manner that will avoid a taking of property. It does not authorize the Commission to otherwise suspend the operation of or ignore these policies in acting on this appeal. Thus, the Commission must still comply with the requirements of the LCP by avoiding, to the maximum extent feasible, the significant disruption of habitat values at the site. To achieve consistency with the LCP's ESHA policies in light of constitutional takings issues, the project must be the most feasible, least environmentally damaging alternative, and must adopt all feasible mitigation measures capable of reducing or eliminating project impacts to best avoid the significant disruption to sensitive habitat that would accompany any development of this property.

1. 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 Policy 3.1-2 and CZC Sections 20.496.015 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 CZC Sections 20.496.015 and 20.532.100(A)(1) by requiring measures to mitigate adverse environmental effects on environmentally sensitive coastal bluff morning-glory habitat.

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 coastal bluff morning-glory ESHA as required by the policies, the Commission attaches Special Condition Nos. 3, 6, 7, 8, 9, and 10.

The project as currently proposed includes (1) construction on a bluff-top parcel of a two-story single-family residence on a building footprint of approximately 1,200 square feet, with approximately 1,950 square feet of total living space that includes a 350-square-foot attached garage (for a total of 2,300 square feet), 150 square feet of decking upstairs, and a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade); (2) installation of a new

driveway, parking area, and emergency vehicle turnaround (2,100 square feet total) with a pervious concrete surface; (3) Installation of a sewage pump tank and back-up generator, with connection to off-site septic disposal services, connection to community water, installation of liquefied propane gas (LPG) tank, and under-driveway connection to utilities; (4) installation of retaining walls, and on-site drainage infrastructure (consisting of a perforated pipe grid system underneath the home); and (5) use of a portion of the property as a temporary construction staging area.

The project includes encroachment into rare plant ESHA and ESHA buffer. To ensure development within coastal bluff morning-glory habitat is the least environmentally damaging feasible alternative consistent with CZC Section 20.532.100(A)(1)(b), the Commission considered the condition of habitat throughout the project area. Commission staff visited the site on May 13, 2010, when coastal bluff morning-glory plants were in bloom, and again on August 23, 2010 to evaluate habitat conditions including consideration of potential wetlands on site. The southern portion of the parcel consists of relatively intact native coastal terrace prairie (a sensitive plant community) and native coastal scrub vegetation. Some encroachment of invasive non-native species is also present, such as pampas grass (*Cortaderia jubata*), French broom (*Genista monspessulana*), and cotoneaster (*Cotoneaster sp.*).

The central and northern portions of the property consist predominantly of coastal scrub habitat, with coyote brush, pacific reedgrass, cow parsnip (*Heracleum lanatum*), and Douglas' iris (*Iris douglasiana*) prevalent. A large patch of nonnative grasses occurs near the center of the parcel, and consists primarily of rattlesnake grass (*Briza maxima*) in addition to velvet grass (*Holcus lanatus*) and sweet vernal grass (*Anthoxanthum odoratum*). The proposed building footprint centers on this area and extends beyond into surrounding scrub habitat that, as described above, constitutes coastal bluff morning-glory ESHA.

A cluster of wind-pruned trees occurs toward the northern portion of the parcel, and includes Douglas-fir (*Pseudotsuga menziesii*), coffeeberry (*Rhamnus californica*), and California wax myrtle (*Myrica californica*). Coastal bluff morning-glory plants are also present in this northern portion of the parcel. The base of the driveway easement and the cutbanks along the eastern property line are heavily colonized by the invasive ornamental iceplant (*Carpobrotus edulis*), in addition to a mix of ornamental redhot poker (*Kniphofia uvaria*) and coastal scrub plants such as California blackberry, coast angelica, and pacific reedgrass.

The Commission finds that locating the house in its currently proposed location in the center of the parcel mostly within a nonnative vegetation area that is not ESHA and closest to the existing driveway easement minimizes degradation of the ESHA. Coastal bluff morning-glory plants have not been observed in areas dominated by invasive plants on the site. With exception to these areas, which have been mapped by WRA (Exhibit 16), the entire site currently supports coastal bluff morning-glory habitat. Areas currently dominated by invasive plants have

the capacity to be rehabilitated to support coastal native plant communities (coastal scrub and coastal terrace prairie) and ultimately coastal bluff morning-glory habitat through removal of invasive plants and some replanting with locally native coastal species. Because the proposed project directly impacts coastal bluff morning-glory ESHA and encroaches within the minimum allowable ESHA buffer, the Commission attaches Special Condition No. 9 that includes, but is not limited to requirements for invasive plant removal, replanting with locally native genetic stock, and a 5-year monitoring and reporting program to evaluate mitigation success, with additional requirements if mitigation is unsuccessful at the end of the 5-year period. Additionally, Special Condition 9I requires that initial removal of invasive plants and replanting of exposed areas shall occur no later than within 90 days of completion of exterior residential construction activities. By restoring invasive-dominated areas and the temporary construction staging area to ESHA, habitat quality on the entire parcel will be retained.

In addition, the Commission attaches Special Condition No. 7 which establishes a building envelope encompassing a building site at the currently proposed location set sufficiently back from the bluff edge to ensure an adequate bluff setback to avoid geologic hazards, as discussed in Finding 2 below. The authorized single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, generator, water and utility connections must all be located within the building envelope. The approximately 5,762-square-foot building envelope (that includes the driveway easement) is the minimum size necessary to accommodate these portions of the approved development at the maximum sizes specified in Special Condition No. 6, as discussed below. A temporary construction staging area is authorized outside the building envelope in an area that is not ESHA because of the dominance of invasive plants, pursuant to Special Condition No. 7. The special condition requires this area to be restored to native habitat and excluded for future use following construction activities. Special Condition No. 7 restricts the use of all areas outside of the approved building envelope as generally depicted on Exhibit No. 10, to open space. Special Condition No. 7 prohibits all development in the open space area except for removal of non-native vegetation; the planting of native vegetation pursuant to Special Condition No. 9; installation of erosion control measures pursuant to Special Condition No. 6B(2); and erection of temporary protective fencing pursuant to Special Condition No. 8A; and use of the particular area prepared as a staging area for that purpose during construction pursuant to Special Condition No. 7. In addition, vegetation removal for fire-safe compliance purposes, utility maintenance development, additional planting of vegetation for habitat restoration purposes, and debris removal may be proposed if approved by the Commission as an amendment to the permit. As discussed above, Special Condition No. 2 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. 7.

Furthermore, the Commission attaches Special Condition No. 6B(1) to submit revised plans that depict the final configuration of the 5,762-square-foot building envelope (that includes the driveway easement) shown in Exhibit No. 9 of the staff report and the open space area as shown in Exhibit No. 10. In addition, Special Condition No. 6B(1) specifies the combined building footprint of the residence and attached garage no greater than 1,200 square feet (as currently proposed), with pervious driveway, parking area, and emergency vehicle turnaround area not to exceed 2,100 square feet (as currently proposed) located within the designated 5,762-square-foot building envelope (that includes the driveway easement) shown in Exhibit No. 9 of the staff report and outside of the open space area as required pursuant to Special Condition No. 7. The Commission finds that limiting development activities to within the designated building envelope as described above ensures the proposed development is the feasible, least environmentally damaging alternative consistent with CZC Section 20.532.100(A)(1)(b).

To ensure the proposed development implements all feasible mitigation measures capable of reducing or eliminating project related impacts consistent with CZC Section 20.532.100(A)(1)(c), the Commission attaches Special Conditions 9 and 10, which include some mitigation measures proposed in the August 2008 WRA report. The August 2008 Biological Report of Compliance submitted by WRA (Exhibit 14) includes mitigation measures to reduce impacts to a less than significant level, and includes a resource protection plan with specifications for invasives removal, fencing, minor replanting, and monitoring.

Mitigation measures proposed in the August 2008 report by the consulting botanist and included in the project proposal submitted by the applicant to the County are paraphrased below. Mitigation measures included but were not limited to the following:

1. Maintenance of conditions outside the construction zone similar to that which occurred on the site prior to project disturbance, and limit allowable activities onsite;
2. Recordation of a deed restriction;
3. Establishment of a fenced, excluded Conservation Area on the southern portion of the parcel where restoration and monitoring will be conducted pursuant to the resource protection plan;
4. Limitation on acceptable plants for landscaping and restoration areas;
5. Use of temporary exclusionary fencing, silt fence, and other erosion control measures during construction activities;
6. Flagging of plants and education of contractors on the presence and location of rare plants;

7. Use of best management practices; and
8. Requirements for special status bird and bat surveys for construction activities conducted between November 1 and August 31.

As discussed above, Special Condition No. 3 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 coastal bluff morning-glory ESHA. Also as discussed above, Special Condition No. 2 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.

To enhance coastal bluff morning-glory habitat on the property and prevent the development from degrading the habitat to the maximum extent feasible, the Commission attaches Special Condition No. 6B(4), which requires that the applicant submit, prior to permit issuance for the review and approval of the Executive Director, a final landscaping plan for the property. The plan shall demonstrate that (a) No plant species listed as problematic and/or invasive shall be employed or allowed to naturalize or persist at the site of development; (b) No landscaping shall be installed outside of the approved building envelope; (c) All areas located outside of the approved building site envelope are considered rare plant habitat and shall not be landscaped except as required by this permit; (d) No herbicides shall be stored, mixed, or used on the subject parcel; (e) Plants used for landscaping shall be locally native species naturally occurring in coastal habitats; and (f) all proposed plantings shall be obtained from local genetic stocks within Mendocino County.

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. 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 bio-accumulate in the animals that have consumed the rodents to concentrations toxic to the ingesting non-target species. Similarly, herbicides are often used as a means to remove or control the growth of nonnative weeds. Herbicides can have a deleterious effect on sensitive coastal bluff morning-glory plants, habitat, and/or pollinators of coastal bluff morning-glory. The proposed development will occur within coastal bluff morning-glory ESHA and adjacent to other rare plant habitat. Therefore, to minimize potential

significant adverse impact of rodenticide use to other environmentally sensitive wildlife species, and to minimize potential significant adverse impacts of herbicide use on rare plants, their habitat, and other organisms that may benefit rare plants, their habitat, and other organisms, the Commission attaches Special Condition Nos. 6B(4) (landscape plan), 8M (best management practices) and 9M (protection of sensitive habitat) prohibiting the use of any rodenticides or herbicides on the property governed by CDP No. A-1-MEN-09-023.

Special Condition 8A requires installation of temporary fencing of the construction zone prior to the commencement of any construction activities to protect coastal bluff morning-glory habitat occurring outside the construction area. The temporary/construction fencing shall be maintained in place until the authorized development is completed. Special Condition 9B additionally requires that permanent exclusionary fencing be installed along the boundary of the conservation area and separating the conservation area from the driveway/parking area. Fencing shall consist of low (approximately 3 feet) post and cable, split-rail, or similar symbolic fencing that does not interfere with the visual surroundings, and access of the fenced area is limited to activities described in Special Condition 9B.

Lastly, Special Condition 10 requires submittal of a final Nesting Bird Protection Program, prepared by a qualified biologist, for conducting seasonal surveys for bird nesting and roosting habitat and protecting such habitat from project impacts that may occur during construction activities occurring between November 1 and August 31 and that involve substantial ground disturbance (including but not limited to grading, foundation pier installation, and septic tank installation). This condition reflects mitigation recommendations documented in the 2008 WRA biological report.

The mitigation measures described above are consistent with the recommendations from the August 2008 WRA report, and combined with other requirements of Special Condition No. 9, ensure that all feasible mitigation measures capable of reducing or eliminating project related impacts consistent with CZC Section 20.532.100(A)(1)(c) have been adopted.

The Commission has required similar mitigation measures in past decisions on permit appeals where coastal bluff morning-glory ESHA would be impacted as a result of development of a single-family residence, and where the residence was approved to avoid an unconstitutional taking of private property for public use. In a recent decision on appeal of a project approved in the Gualala area in 2010 (A-1-MEN-05-037) for a single-family residence, the Commission included mitigation measures to transplant coastal bluff morning-glory plants from areas of direct impacts to sites devoid of invasive species prior to ground disturbing activities. Additionally, in A-1-MEN-05-037, the Commission required a qualified biologist to collect seed from coastal bluff morning-glory plants at the subject parcel prior to plant salvaging, transplantation, or any other ground-disturbing activities, and submit them to the Rancho Santa Ana Botanic Garden

(RSABG) as part of their permanent conservation seed banking program. The Commission found these salvaging and transplanting measures necessary because that project as described would directly impact 340-405 coastal bluff morning-glory plants. In contrast, the proposed development on the subject parcel may result in direct impacts to two plants located at the southern junction between the property line and driveway easement. Given the lack of documented success with transplanting coastal bluff morning-glory as discussed in A-1-MEN-05-037, and due to the small number of potentially impacted plants (2), the Commission finds that additional mitigation measures of seed collection and transplanting plants are unnecessary because mitigation measures outlined in Special Condition 9 sufficiently mitigate potential impacts to a less than significant level in this case.

In conclusion, although the proposed development is not an allowable use within the coastal bluff morning-glory ESHA or within ESHA buffer, the Commission finds that as discussed in detail above, the project will include measures to mitigate all significant adverse environmental effects on environmentally sensitive coastal bluff morning-glory 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 contains significant environmentally sensitive coastal bluff morning-glory habitat that 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 coastal bluff morning-glory ESHA for other parcels.

2. Geologic Hazards

a. LCP Policies and Standards

LUP Policy 3.4-1 states:

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:

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.

All grading specifications and techniques will follow the recommendations cited in the Uniform Building Code or the engineering geologists report.

LUP Policy 3.4-8 states:

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:

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)

Section 20.500.015 of the Coastal Zoning Code states:

(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)*

Sec. 20.500.020, “Geologic Hazards - Siting and Land Use Restrictions,” states in applicable part (emphasis added):

(A) Faults.

(1) Residential, commercial and industrial structures shall be sited a minimum of fifty (50) feet from a potentially, currently or historically active fault. Greater setbacks shall be required if warranted by geologic conditions.

(2) Water, sewer, electrical and other transmission and distribution lines which cross fault lines shall be subject to additional standards for safety including emergency shutoff valves, liners, trenches and the like. Specific safety measures shall be prescribed by a licensed engineering geologist or a registered civil engineer.

(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.

(D) Landslides.

(1) New development shall avoid, where feasible, existing and prehistoric landslides. Development in areas where landslides cannot be avoided shall also provide for stabilization measures such as retaining walls, drainage improvements and the like. These measures shall only be allowed following a full environmental, geologic and engineering review pursuant to Chapter 20.532 and upon a finding that no feasible, less environmentally damaging alternative is available.

(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.

b. Discussion

Background

Coastal Zoning Code (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 a 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.

As described above, the proposed project involves constructing a new single-family residence, decking, an attached garage with a driveway, and a retaining wall on a bluff top parcel. The parcel is part of a marine terrace located down slope of surrounding development. The 0.72-acre parcel consists of a relatively flat “pad” area 120-130 feet above sea level, with a 10 to 12-foot high +/-1:1 (horizontal:vertical) cut slope on the east site margin and a steep seacliff on the west site margin. The pad measures approximately 60 feet wide and 350 feet long (0.48 acre total), with residential developments abutting the length of the parcel to the east, and with the remainder of the lot dropping off steeply to the Pacific Ocean below. Several +/-50 to 75-foot high bedrock sea stacks exist in the tidal zone below the subject property.

LUP Policy 3.4-7 and Coastal Zoning Code Section 20.500.020 require that a site for new development remain stable for the development’s expected economic life, which is defined as 75 years. Policy 3.4-1 and Coastal Zoning Code Section 20.500.020 require mitigation measures to minimize threats to the development from geologic hazards arising from landslides, seismic events, beach erosion and other geologic events. 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.

Document History

Jim Glomb, a geological consultant and Certified Engineering Geologist, and Civil Engineer David Paoli have conducted several geologic investigations on the subject parcel dating back to 1992. The County staff report highlights several of these including “Engineering Geologic Investigation” on June 5, 1992; “Geologic & Soils Investigation” prepared by David Paoli on August 13, 1997 and revised on August 20, 1998; an “Updated Engineering Geologic Investigation” prepared by Jim Glomb on April 9, 1999; and a “Final Engineering Geologic Investigation Report” prepared by Jim Glomb on August 13, 2002.

In addition, Mr. Glomb prepared and submitted to the County on July 15, 2008 a document titled “Supplemental Foundation Recommendations for the Proposed Wernette Project” to provide additional information requested for the evaluation of the proposed project. The document indicates that loose soils and unengineered fill materials overlay stable sandstone bedrock to a depth of two to seven feet at

the building site. The letter outlines a detailed recommendation for supporting the structure on steel reinforced piers embedded a minimum of ten feet in the bedrock.

Mr. Glomb also submitted a letter dated April 30, 2009 (Exhibit 25) to appellant Duane Hines entitled "Supplemental Geotechnical Review, Proposed Site Drainage System and Septic Tank, CDP #51-2008 Wernette, APN 145-161-27, 38454 Robinson Reef Drive, Gualala, California." The letter describes how the proposed drainage system will simulate preconstruction drainage conditions and prevent ponding within or adjacent to the building and parking areas.

For the purposes of *de novo* review, Mr. Glomb submitted a report to the Coastal Commission dated September 12, 2009 and entitled "Updated Geotechnical and Engineering Geologic Investigation Report" (Exhibit 26). The details of this report are discussed below.

Geologic Hazards Analysis

LUP Policy 3.4-7 and Coastal Zoning Code Section 20.500.020 require that a site for new development remain stable for its expected economic life, which is defined as 75 years. Policy 3.4-1 and Coastal Zoning Code Section 20.500.020 require mitigation measures to minimize threats to the development from geologic hazards arising from landslides, seismic events, beach erosion and other geologic events. 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.

The Mendocino County LCP requires that a bluff setback for new structures be determined by multiplying the structure life (~75 years) by the retreat rate of the bluff, which shall be determined from historical observation and/or a complete geotechnical investigation (Policy 3.4-4 of the LUP). The proposed bluff setback for the residence is 40 feet.

In addition, the structure must remain stable throughout its 75 year economic life. Stability is usually defined as a factor of safety against landsliding of 1.5, so the distance from the bluff edge necessary to achieve a factor of safety of 1.5 normally must be added to the setback stipulated above. In the present case, this is not necessary because the structure is to be founded on piers imbedded in stable bedrock. Stability will thus be assured through deepened foundations rather than through setback.

Long-term bluff retreat is measured by examining historic data including vertical aerial photographs and any surveys conducted that identified the bluff edge. Slope stability, on the other hand, is a measure of the resistance of a slope to land sliding, and is assessed by a *quantitative slope stability analysis*. In such an analysis, the forces resisting a potential landslide are first determined. These are essentially the strength of the rocks or soils making up the bluff. Next, the forces driving a potential landslide are determined. These forces are the weight of the

rocks as projected along a potential slide surface. The resisting forces are divided by the driving forces to determine the “factor of safety.” The process involves determining a setback from the bluff edge where a factor of safety of 1.5 is achieved. The Commission generally defines “stable” with respect to slope stability as a minimum factor of safety of 1.5 against landsliding.

It was unknown at the time of County approval where on the bluff top a 1.5 factor of safety is attained, and what parts of the bluff top would have a 1.5 factor of safety at the end of 75 years of bluff retreat. In addition, although several geologic analyses had been conducted over time on the subject parcel, no quantitative slope stability analysis had been conducted before the County approved the project. For the purposes of *de novo* review by the Commission and to address information deficiencies raised by the appeals, Jim Glomb submitted supplemental analyses of the project site that included a geologic map with sampling and evaluation points along with a quantitative slope stability analysis and corresponding data, dated September 12, 2009. In this report, entitled “Updated Geotechnical and Engineering Geologic Investigation Report” (Exhibit 26), Mr. Glomb concludes the following regarding the proposed construction of a single-family residence at the site:

1. From an engineering geologic viewpoint it is considered feasible to construct a single-family residence at the site. The building footprint is shown on plate 1. Based on our site reconnaissance efforts, subsurface explorations, literature review and analyses, we conclude that the seacliff at the subject property is retreating eastward at an average rate of 0.5 foot or less per year. A construction setback line 37.5 feet from the top of the seacliff, based on a 75-year structure life and a conservative retreat rate of 0.5 feet per year, respectively, is shown on the Geologic Map, Plate 1. Therefore, it is our professional opinion that the footprint, which is proposed to be no closer than 40 feet to the top of seacliff, will not be affected by seacliff retreat over a design life of 75 years.
2. As discussed above, slope stability analyses resulted in safety factors against instability, for the given conditions and assumptions that meet the specified minimum requirements. Therefore, it is our conclusion that the existing slope is adequately stable, for both static and earthquake loading, in its present condition.
3. Factors favorable to future sea cliff stability adjacent to the proposed building are: avoiding concentrated surface drainage directed over the seacliff; protection of the bluff from wave action by prominent bedrock sea stacks; and a relatively stable bedrock condition within the sea cliff.
4. The pier foundations that are planned for the residence may have a stabilizing effect on sea cliff stability.

5. Seismic forces from a nearby maximum credible earthquake in the future may accelerate sea cliff retreat. Therefore, the weathered terrace sands and the weathered, fractured bedrock on the outer portion of the cliff face could fail during such an event. However, based on our stability analyses, we conclude that the potential for earthquake-induced cliff retreat to the tentative building footprint is very low over the expected life of the project.

This September 2009 geologic report prepared for the Commission's *de novo* review of the project discusses use of stereo pairs of old aerial photographs to identify landslide and seacliff retreat history at the subject parcel. The report identifies portions of the parcel where shallow landslides have occurred along the top of the sea cliff since 1961, causing about 20 feet of retreat in areas with the most friable terrace deposits and surficial bedrock; this retreat rate calculates to approximately 0.41 foot per year (20 feet divided by 49 years). In areas with less friable sandstone bedrock, Mr. Glomb estimates about 10 to 15 feet of retreat has occurred since 1961. Mr. Glomb noted that "seaward and adjacent to the proposed building envelope is the top of an old fill slope, which is also the top of seacliff that has retreated about 2 feet or less over about 13 years. The estimated retreat rate for this feature is calculated to be 0.15 feet or less per year." The seacliff retreat rate of 0.5 foot or less per year that Mr. Glomb estimated for the entire site therefore utilizes the highest and most conservative of retreat rates observed for features on the parcel. The September 2009 report also describes a recent small landslide on the north limit of the property at the outlet to a storm drain, and attributes this landslide to uncontrolled storm drainage.

Mark Johnsson, Ph.D., the Commission's staff geologist, has reviewed geotechnical reports and supplements prepared by Mr. Glomb in 2002 (Exhibit 23), 2008 (Exhibit 24), and 2009 (Exhibits 25 and 26) for the proposed project, and met with Mr. Glomb in addition to registered Geotechnical Engineer Don Poindexter, Commission staff, and the applicant's agent Frank Wernette at the site on January 7, 2010. Dr. Johnsson had previously visited the site on October 20, 2000 to review a previously-proposed project for the subject parcel. In a memo to Coastal Commission staff dated September 27, 2010 (Exhibit 27), Dr. Johnsson concurs with the recommended 40-foot geologic setback recommended by the applicants' geologists and states the following:

An aerial photograph analysis presented in reference (1) indicates a long-term bluff retreat rate of 0.5 feet per year or less, roughly consistent with the rate measured at other sites in the Gualala area underlain by similar bedrock. Assuming a 75-year economic life, bluff retreat of about 37 feet may be expected over the life of the structure. The 40-foot setback recommended in reference (4) should thus assure stability of the building envelope.

The September 2009 geologic report submitted by the applicant's geologist includes recommendations for various design features of the proposed residence,

including but not limited to foundation drilled pier criteria, retaining walls, site drainage, and maintenance. The applicant proposes to utilize a perforated pipe drainage system to capture and evenly distribute stormwater and roof runoff across the surface of developed areas before runoff ultimately drains south and west along the parcel. The design includes a pervious concrete driveway and parking area, and a perforated pipe grid system under the residential structure to distribute surface water runoff, with roof runoff tied into the pipe grid to ensure that drainage would not be hindered by the development. The applicant has provided a grading and drainage plan, which is included herein as Exhibit 8. The plan features retaining walls along the east side of the proposed development area (between existing development and the proposed driveway/parking area), which range in height from approximately ten feet along the north side, to two to four feet along the south side. The retaining walls would incorporate drainage features that would allow water draining from neighboring properties to continue draining westward, so that the current hydrology would not be significantly impacted by the walls. For the purposes of *de novo* review, the applicant submitted a cross-sectional diagram to illustrate the drainage system in relation to site topography and building elevations (Exhibit 29).

Roof runoff would be tied into the pipe grid, to ensure that drainage would not be hindered by the development. As proposed by the applicant, the floor slab of the residence would be protected by an impermeable rubber sheet material, followed by a layer of drain rock or sand, a layer of fill, and then the perforated pipe grid. The proposed drilled pier /grade beam foundation would not be detrimentally impacted by the presence of water, so long as the bottoms of the pier foundations are dry prior to the placement of reinforcement and concrete, as recommended by Mr. Glomb in his July 15, 2008 supplemental recommendations letter.”

The drainage design is intended to mimic current conditions whereby rainfall evenly infiltrates across the parcel surface and ultimately drains south across the surface. In the September 2009 geologic report, Mr. Glomb states the following:

Simulating the preconstruction drainage conditions in our opinion will not increase geologic instability of the site. Currently, surface flows down the easement and flows exiting the drop inlet structure result in concentrated drainage flowing south and southwest causing increased gully erosion and focused saturation of the top of [sic] seacliff. In summary, the proposed project’s drainage plan will change the distribution of runoff and reduce the concentration of drainage, reducing seacliff erosion. The drainage system will also be designed to disallow ponding within the building footprint or adjacent to the building and parking areas.

Previously submitted project applications proposed to direct all runoff into the existing 12-inch culvert that empties onto the seacliff; this outlet is the location of the recent small landslide that was attributed to this outlet source. Because the current proposed project avoids concentrating and directing runoff over the seacliff by using a pervious concrete system and perforated pipe system to capture

and evenly distribute runoff across the site, the Commission finds the project as conditioned is consistent with LUP Policy 3.4-9, which requires that any development landward of the bluff top 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. Special Condition 4A requires that design and construction plans including foundations, grading, retaining walls, and drainage plans, shall be consistent with the recommendations contained in the Updated Geotechnical and Engineering Geologic Investigation Report dated September 12, 2009 and prepared by Jim Glomb Geotechnical and Environmental Consulting, Inc. Special Condition 4B further requires the applicant to develop the project in accordance with the approved plans.

The applicant proposes to use pervious concrete material for the driveway and parking areas in an effort to further minimize surface runoff and ensure that surface and subsurface drainage does not contribute to the erosion of the bluff face or to the instability of the bluff itself. In the September 2009 report Mr. Glomb provides recommendations to maintain the permeable concrete to preserve its design porosity. In addition to Special Condition 4 that requires the project design to follow the recommendations in the geologic report, Special Condition 6B(3) requires the applicant to submit a permeable pavement maintenance plan with provisions that include but are not limited to requirements for installation by a certified pervious concrete contractor; regularly scheduled maintenance; performance testing; and documentation. Lastly, Special Condition 8O prohibits the staging or storing of any pore-clogging materials, including but not limited to soil, mulch, and yard waste, on any pervious surfaces during construction activities.

Dr. Johnsson concurs with the evaluation methodology, recommendations, and conclusions for slope stability, seacliff retreat rates, recommended bluff setbacks, foundation design, and site drainage presented by Mr. Glomb in the subject reports. In his September 27, 2010 memo (Exhibit 26), Dr. Johnsson notes the following:

Concentrated drainage beneath a 12 inch storm drain at the northern end of the property has lead to erosion of the seacliff offsite and at the northern margin of the property. Although ideally this situation should be corrected, it should not affect the proposed building envelope. Nevertheless, because of the poorly consolidated fills, drainage is a serious issue at the site. Currently, much of the site drains to the south via sheetflow. In order to minimize impermeable surface area that might concentrate flow, the drainage plan developed in reference (3) calls for the use of permeable concrete in the driveway and parking area. Although it must be regularly maintained, permeable concrete (and a gravel subbase) should allow for infiltration of rainwater, reducing runoff-induced erosion and having water quality benefits as well. Further, drainage from the roof will be captured and discharged into a layer of gravel beneath the house through perforated pipes. The

saturation of soils near foundation elements will not cause structural concerns because the house will be founded on piles penetrating at least ten feet into the dense bedrock of the Anchor Bay Member (Reference 2).

In my opinion, the proposed location, foundation, and drainage plans assure that the proposed development will be stable for its economic life and will not lead to stability issues at the site or adjacent to it.

The applicants are proposing to construct development that would be located on a high uplifted marine terrace bluff top that is actively eroding. Consequently, the development would be located in an area of high geologic hazard. However, new development can only be found consistent with LUP Policy 3.4-7, and CZC Section 20.500.010(A) 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. The applicants have submitted information from a registered engineering geologist which states that the site is geotechnically suitable for the planned residential construction.

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 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 (Permit 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 Nino storm event. The Executive Director issued a waiver of coastal development permit (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 (Permit 6-84-461) based on a positive geotechnical report. In 1993, the owners applied for a seawall to protect the home (Permit Application 6-93-135). The Commission denied the request. In 1996 (Permit Application 6-96-138), and again in 1997 (Permit Application 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 (Permit Application 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 (Permit # 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 (Permit #5-93-254-G) was later issued to authorize bluff top protective works.

The Commission emphasizes that the examples above 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. 4 that the applicant adhere to all recommended specifications to minimize potential geologic hazards, some risk of geologic hazard still remains. This risk is reflected in the September 12, 2009 geotechnical report submitted by Jim Glomb Geotechnical and Environmental Consulting, Inc., which references various “limitations” of the analysis. This geotechnical report states that the services consist of professional opinions and conclusions developed by a certified engineering geologist and a professional engineer in accordance with generally-accepted engineering geologic and geotechnical engineering principles and practices. The report further states, “...*We provide no other warranty, either expressed or implied.*” 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 bluffs are clearly eroding, 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, CZC Section 20.500.010(A), and CZC Section 20.500.020(B). The Commission finds that the proposed development could not be approved as being consistent with LUP Policy 3.4-7, CZC Section 20.500.010(A), and CZC Section 20.500.020(B) if projected bluff retreat would

affect the proposed development and necessitate construction of a seawall to protect it.

Based upon the geologic report and supplemental documents prepared by the applicants' geologist, the Commission finds that the risks of geologic hazard are minimized if development is sited and designed according to the setback and construction recommendations and conditions of this permit. However, given that the risk cannot be eliminated and the geologic report cannot assure that shoreline protection will never be needed to protect the residence, the Commission finds that the proposed development is consistent with the Mendocino County LCP only if it is conditioned to provide that shoreline protection will not be constructed. Thus, the Commission further finds that due to the inherently hazardous nature of this lot, the fact that no geology report can conclude with certainty that a geologic hazard does not exist, the fact that the approved development and its maintenance may cause future problems that were not anticipated, and because new development shall not engender the need for shoreline protective devices, it is necessary to attach Special Condition No. 5 to ensure that no future shoreline protective device will be constructed to protect the proposed new development.

Special Condition No. 5 prohibits the construction of shoreline protective devices on the parcel to protect the proposed single-family residence, driveway, decking, garage, sewage pump tank, propane tank, retaining walls east of the residence, on-site drainage infrastructure, water and utility connections and/or other development approved by Permit No. A-1-MEN-09-023 and requires that the landowner provide a geotechnical investigation and remove the proposed improvements associated with the development approved by Permit No. A-1-MEN-09-023 if bluff retreat reaches the point where this 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(A), which states that new development shall minimize risk to life and property in areas of high geologic, flood, and fire 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(A) if projected bluff retreat would affect the proposed development and necessitate construction of a seawall to protect it.

Special Condition No. 5 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 applicants have chosen to implement the project despite these risks, the applicants must assume the risks.

In this way, the applicants are notified that the Commission is not liable for damage as a result of approving the permit for development. The condition also requires the applicants 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, Special Condition No. 2 requires the applicants to record a deed restriction to impose the special conditions of the permit as covenants, conditions and restrictions on the use and enjoyment of the property. This special condition is required, in part, to ensure that the development is consistent with the Coastal Act and 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 and will ensure that future owners of the property will be informed of the Commission's immunity from liability, and the indemnity afforded the Commission.

As noted above, some risks of an unforeseen natural disaster, such as an unexpected landslide, massive slope failure, erosion, etc. could result in destruction or partial destruction of the house or other development approved by the Commission. In addition, 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. 5 also 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 residential development should the bluff retreat reach the point where a government agency has ordered that these facilities not be used.

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 Chapter 20.532 of the County's Coastal Zoning Code 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.

However, Section 30610(a) requires the Commission to specify by regulation those classes of development which 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 specifically authorizes the Commission to require a permit for additions to existing single-family residences that could involve a risk of adverse environmental effect. Section 13250(b)(1) indicates that improvements to a single-family structure in an area within 50 feet of the edge of a coastal bluff involve a risk of adverse environmental effect and therefore are not exempt. The proposed residence on the subject property will be within 50 feet of a coastal bluff. Therefore, pursuant to Section 13250(b)(1) of the Commission's regulations, Special Condition No. 3 expressly requires all future improvements to the approved development to obtain a coastal development permit so the County and the Commission would have the ability to review all future development on the site to ensure that future improvements will not be sited or designed in a manner that would result in an adverse environmental impact. As discussed above, Special Condition No. 2 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. 2 will also help assure that future owners are aware of these CDP requirements applicable to all future development.

c. Conclusion

The Commission thus finds that the proposed development, as conditioned, is consistent with the policies of the LCP regarding geologic hazards, including LUP Policy 3.4-7, and CZC Sections 20.500.010(A), 20.500.015, and 20.500.020 since the development as conditioned (1) will not contribute significantly to the creation of any geologic hazards, (2) will not have adverse impacts on the stability of the coastal bluff or on erosion, and (3) will not require the construction of shoreline protective works. Only as conditioned is the proposed development consistent with the LCP.

3. Stormwater Runoff

LCP Provisions

LUP Policy 3.1-25 states:

The Mendocino Coast is an area containing many types of marine resources of statewide significance. Marine resources shall be maintained, enhanced and, where feasible, restored; areas and species of special biologic or economic

significance shall be given special protection; and the biologic productivity of coastal waters shall be sustained.

CZC Section 20.492.015 sets erosion control standards and states in part:

(A) *The erosion rate shall not exceed the natural or existing level before development.*

(B) *Existing vegetation shall be maintained on the construction site to the maximum extent feasible.* *Trees shall be protected from damage by proper grading techniques.*

(C) *Areas of disturbed soil shall be reseeded and covered with vegetation as soon as possible after disturbance,* *but no less than one hundred (100) percent coverage in ninety (90) days after seeding; mulches may be used to cover ground areas temporarily. In environmentally sensitive habitat areas, the revegetation shall be achieved with native vegetation...*

(D) *Mechanical or vegetative techniques to control erosion may be used where possible or necessary* *providing that they are fully discussed in the approved development plan.*

(E) *To control erosion, development shall not be allowed on slopes over thirty (30) percent unless adequate evidence from a registered civil engineer or recognized authority is given that no increase in erosion will occur... [emphases added]*

CZC Section 20.492.020 sets sedimentation standards and states in part:

A. *Sediment basins (e.g., debris basins, desilting basins, or silt traps) shall be installed in conjunction with initial grading operations and maintained through the development/construction process to remove sediment from runoff wastes that may drain from land undergoing development to environmentally sensitive areas.*

B. *To prevent sedimentation of off-site areas, vegetation shall be maintained to the maximum extent possible on the development site. Where necessarily removed during construction, native vegetation shall be replanted to help control sedimentation.*

C. *Temporary mechanical means of controlling sedimentation, such as hay baling or temporary berms around the site, may be used as part of an overall grading plan, subject to the approval of the Coastal Permit Administrator.*

D. *Design of sedimentation control devices shall be coordinated with runoff control structure to provide the most protection. [emphasis added.]*

CZC Section 20.492.025 sets runoff standards and states in applicable part:

(A) Water flows in excess of natural flows resulting from project development shall be mitigated...

(C) The acceptability of alternative methods of storm water retention shall be based on appropriate engineering studies. Control methods to regulate the rate of storm water discharge that may be acceptable include retention of water on level surfaces, the use of grass areas, underground storage, and oversized storm drains with restricted outlets or energy dissipators [sic].

(D) Retention facilities and drainage structures shall, where possible, use natural topography and natural vegetation. In other situations, planted trees and vegetation such as shrubs and permanent ground cover shall be maintained by the owner.

(E) Provisions shall be made to infiltrate and/or safely conduct surface water to storm drains or suitable watercourses and to prevent surface runoff from damaging faces of cut and fill slopes... [emphasis added]

Discussion

Storm water runoff from new residential development can adversely affect the biological productivity of coastal waters by degrading water quality. LUP Policy 3.1-25 requires the protection of the biological productivity of coastal waters. Additionally, Sections 20.492.015 and 20.492.020 of the Mendocino County Coastal Zoning Code set forth erosion control and sedimentation standards to minimize erosion and sedimentation of environmentally sensitive areas and off-site areas. Specifically, Sections 20.492.015 and 20.492.020(B) require that the maximum amount of vegetation existing on the development site shall be maintained to prevent sedimentation of off-site areas, and where vegetation is necessarily removed during construction, native vegetation shall be replanted afterwards to help control sedimentation. Furthermore, CZC Section 20.492.025 requires that provisions shall be made to infiltrate and/or safely conduct surface water to prevent runoff from damaging cut and fill slopes.

As discussed above, the subject parcel is located on a coastal bluff top and is planned and zoned for suburban residential development. At Robinson Reef Drive, an existing 12-inch culvert captures stormwater from a 3.2-acre watershed. The culvert crosses the road westward, and bisects the extreme northern portion of the subject property before discharging from the outlet perched on the bluff face. The culvert was installed as part of the subdivision that was developed circa 1964, and the responsibility to maintain the culvert within the county road right of way belongs to Mendocino County Department of Transportation. The end of the culvert was replaced with a plastic culvert in 1998 after the existing metal culvert had corroded in several areas near the outlet, resulting in water pouring through the sides of the pipe and eroding the edges of the subject and adjacent properties and causing erosion. Previous applications for development of the subject parcel

proposed to direct site drainage into this existing culvert. However, the current proposed project presents an alternative consisting of a perforated pipe grid system underneath the house designed to collect surface and roof runoff and distribute water evenly across the ground surface in a way that mimics a rainfall event on the surface, with excess water following natural topography as sheetflow (Exhibit 29).

Two drop inlets are located at the top of the driveway easement, and the drop inlets currently discharge onto the surface of the subject parcel near the base of the driveway easement. As described by the applicant's agent, stormwater from the drop inlets commingles with water that flows down the easement. That storm water first saturates the soil and then moves laterally southwest and south toward the bluff edge as either surface or subsurface flows. As part of the proposed development, the discharge from the drop inlets would be connected to a subsurface manifold and pipe running under the pervious concrete driveway to the drainage grid header at the east edge of the perforated pipe grid system. A letter submitted by the consulting geologist to Appellant A, Duane Hines, and dated April 30, 2009 (Exhibit 25), and the geologic report dated September 12, 2009 (Exhibit 26) further explain the proposed drainage system.

The applicant describes in their submitted grading plan the use of engineered retaining walls to secure the slopes on the east side of the parcel in a manner that will allow the parking area, turnaround, and driveway to be constructed within the 20-foot-wide building setback. The local record states the following:

The applicant has provided a grading and drainage plan. The plan features retaining walls along the east side of the proposed development area. As shown in [the applicant's plan (Exhibit 29)], these retaining walls would range in height from approximately ten feet along the north side, to two to four feet along the south side. The retaining walls would incorporate drainage features that would allow water draining from neighboring properties to continue draining westward, so that the current hydrology would not be significantly impacted by the walls. The applicant also proposes pervious concrete paving and a perforated pipe grid system under the residential structure, and the roof runoff would be tied into the pipe grid, to ensure that drainage would not be hindered by the development... The floor slab of the residence will be protected by an impermeable rubber sheet material, followed by a layer of drain rock or sand, a layer of fill, and then the perforated pipe grid.

The applicant proposes to use pervious concrete material for the driveway and parking areas in an effort to further minimize surface runoff and ensure that surface and subsurface drainage does not contribute to the erosion of the bluff face or to the instability of the bluff itself. As described by the Pacific Southwest

Concrete Alliance,³³ pervious concrete is a structural concrete pavement with a large volume (15 to 35 percent) of interconnected voids. Like conventional concrete, it's made from a mixture of cement, coarse aggregates, and water. However, it contains little or no sand, which results in a porous open-cell structure that water passes through readily.

When pervious concrete is used for paving, it can take in stormwater at a rapid rate of 3 to 5 gallons per minute per square foot of surface area, which exceeds the flow rate needed to prevent runoff in most rain events. The rainwater may be stored in a 3/4" drain rock layer (recharge bed of several inches thick) underneath the pavement or allowed to percolate into the underlying soil. Because the pavement itself acts as a retention area, it helps to prevent much of the polluted runoff that normally occurs with impervious pavements. The filtration process also helps to purify the water. Aerobic bacteria present in the voids of the concrete, recharge bed, and soil break down harmful pollutants and chemicals as the water percolates through the open cells of the pavement.

According to the applicant's agent, the proposed project, with the use of pervious concrete for the paved areas, will result in runoff flow of approximately 0.04 cubic feet per second (cfs) from the structure (approximately 1,150 square feet) and 0.09 cfs from the easement driveway and drop inlets (approximately 2,500 square feet) being collected and distributed in a grid of perforated pipe under the house or dispersed through the pervious concrete east of the proposed house.

In their appeal of the local government action, the appellants raised concerns that the pervious pavement would eventually fill with sediment, especially if not adequately maintained, and cause system failure, thereby increasing stormwater runoff and risks of erosion. Appellant A alleged that if the pervious pavement failed, water flow from upslope would travel to the southern end of the parcel and erode the Applicant and Appellant's parcels, inconsistent with LCP grading standards that require adjoining property to be protected from excavation and filling operations and potential soil erosion.

According to the Pacific Southwest Concrete Alliance,²¹ it is unlikely that a pervious surface will become totally clogged, due to the very high void content in a properly installed product. They indicate that reducing erosion and sediment runoff onto the pavement through good design can eliminate most problems, and they recommend an annual maintenance schedule that uses a vacuum sweep truck or pressure washer can assure long-term permeability. The Portland Cement Association³⁴ provides the following information about pervious concrete:

33Pacific Southwest Concrete Alliance. Accessed October 2010 at http://www.concreteresources.net/categories/1BA5F416-E9DF-9526-7D1B84E23E360385/introduction_to_pervious_concrete.htm

³⁴ Tennis, Paul, D.; Leming, Michael, L.; and Akers, David, J., Pervious Concrete Pavements, EB302.02, Portland Cement Association, Skokie, Illinois, and National Ready Mixed Concrete Association, Silver Spring, Maryland, USA, 2004, 36 pages.

The majority of pervious concrete pavements function well with little or no maintenance. Maintenance of pervious concrete pavement consists primarily of prevention of clogging of the void structure. In preparing the site prior to construction, drainage of surrounding landscaping should be designed to prevent flow of materials onto pavement surfaces. Soil, rock, leaves, and other debris may infiltrate the voids and hinder the flow of water, decreasing the utility of the pavement. Landscaping materials such as mulch, sand, and topsoil should not be loaded on pervious concrete, even temporarily. Vacuuming annually or more often may be necessary to remove debris from the surface of the pavements. Other cleaning options may include power blowing and pressure washing.

In a September 27, 2010 memo submitted to Coastal Commission staff (Exhibit 27), staff geologist Dr. Mark Johnsson states "...because of the poorly consolidated fills, drainage is a serious issue at the site. Currently, much of the site drains to the south via sheetflow. In order to minimize impermeable surface area that might concentrate flow, the drainage plan developed in reference (3) calls for the use of permeable concrete in the driveway and parking area. Although it must be regularly maintained, permeable concrete (and a gravel subbase) should allow for infiltration of rainwater, reducing runoff-induced erosion and having water quality benefits as well." The applicant has submitted a document entitled "Procedure for Determining Need for Maintenance of Pervious Concrete Via Infiltration Rate" obtained from the Pacific Southwest Concrete Alliance website³⁵. A "Pervious Concrete Owners Manual and Maintenance Outline" is included as Exhibit 30.

In the September 2009 geologic report Mr. Glomb provides recommendations to maintain the permeable concrete to preserve its design porosity. In addition to Special Condition 4 that requires the project design to follow the recommendations in the geologic report, Special Condition 6B(3) requires the applicant to submit a permeable pavement maintenance plan with provisions that include but are not limited to requirements for installation by a certified pervious concrete contractor in order to ensure a properly installed product; regularly scheduled maintenance; performance testing; and documentation. Lastly, Special Condition 8O prohibits the staging or storing of any pore-clogging materials, including but not limited to soil, mulch, and yard waste, on any pervious surfaces during construction activities. Therefore, as conditioned, the Commission finds the proposed development is consistent with CZC Section 20.492.025, which requires that provisions shall be made to infiltrate and/or safely conduct surface water to prevent runoff from damaging cut and fill slopes.

According to the September 2009 geologic report, no evidence of the groundwater table, seeps or springs was observed at the site during the investigation, and no seepage was observed. Additionally, no free water was encountered in the test

³⁵[http://www.concreteresources.net/images/graphics/Test Method for Determination of Infiltration Capacity of Pervious Concrete.doc](http://www.concreteresources.net/images/graphics/Test_Method_for_Determination_of_Infiltration_Capacity_of_Pervious_Concrete.doc)

trenches, which were excavated using a backhoe to a depth ranging from 4 to 9 feet. The report specified erosion control/drainage measures that include proper collection and disposal of surface water runoff, including grading the site to direct drainage away from buildings, sidewalks, and driveways; directing roof runoff into downspouts and gutters that discharge away from the foundations and disperse into pre-existing sheet flow areas to prevent concentrated flows; connecting surface drainage systems to sub-surface drainage systems; and directing drain outlets such that they do not cause sea cliff erosion. The report also states “Energy dissipators [sic], such as riprapped stilling basins, may be required to reduce erosion where drains, subdrains or culverts discharge into natural, unlined drainage ways.” Staff concurs with the analyses and recommendations.

Runoff originating from the development site that is allowed to drain off the site could contain entrained sediment and other pollutants that would contribute to degradation of the quality of coastal waters, including downstream marine waters. Sedimentation impacts from runoff would be of the greatest concern during and immediately after construction.

Consistent with CZC Section 20.492.020(B), the Commission includes within attached Special Condition No. 6B(2) a requirement that the applicants minimize erosion and sedimentation impacts from the proposed construction of the residence. Special Condition No. 6B(2) requires that the applicants submit for the review and approval of the Executive Director revised site plans that include erosion and runoff control measures that would specify that: (1) rice straw bales be installed to contain runoff from construction and demolition areas; (2) on-site vegetation be maintained to the maximum extent possible during construction; (3) any disturbed areas be replanted with noninvasive native plants obtained from local seed stock immediately following project completion and covered with jute netting, coir logs, and rice straw; (4) washing-out of concrete delivery vehicles, disposal of solid waste, or release of any hazardous materials on the parcel be prohibited; (5) erosion rates shall not exceed existing conditions; (6) Adjoining property shall be protected from excavation and filling operations and potential soil erosion; and (7) An onsite spill prevention and response program that utilizes Best Management Practices be implemented.

In addition, all disturbed soil areas must be reseeded and covered with native vegetation to control erosion, pursuant to Special Condition 6(B)(2)(a)(iii) and that conforms with the planting limitations of Special Condition Nos. 8(K) and 8(L).

In addition, best management practices outlined in Special Condition No. 8 require that during construction: (1) rice straw or weed-free hay bales be installed to contain runoff from construction and demolition areas; (2) best management practices be effective at controlling sediment and surface runoff during the rainy season; (3) excess excavated material and/or debris shall be removed from the project site and disposed of at a disposal site outside the coastal zone; (4) on-site

stockpiles of construction debris shall be covered and contained at all times to prevent polluted water runoff; and (5) no soil, mulch, yard debris, or other pore-clogging materials shall be stored or staged atop the pervious concrete (or other permeable pavement) areas, including the driveway, parking, and turnaround areas, at any time.

The Commission finds that as conditioned, the proposed development is consistent with CZC Sections 20.492.015 and 20.492.020 because erosion and sedimentation will be controlled and minimized by (1) maintaining on-site vegetation to the maximum extent possible; (2) replanting or seeding any disturbed areas with native vegetation following project completion; (3) using hay bales to control runoff during construction, and (4) directing runoff from the completed development in a manner that would provide for infiltration into the ground. Furthermore, the Commission finds that the proposed development as conditioned to require these measures to control sedimentation from storm water runoff from the site is consistent with the provisions of LUP Policy 3.1-25 requiring that the biological productivity of coastal waters be sustained. Moreover, the Commission finds that the proposed development is consistent with CZC Section 20.492.025(E) because, as conditioned, runoff from the roofs will be directed into the perforated pipe grid system and evenly distributed across the site, and the driveway will be paved with pervious material and maintained to facilitate infiltration of runoff and minimize erosion and sedimentation from stormwater runoff.

4. **Fire Hazards**

Summary of Applicable LCP Provisions:

Land Use Plan (LUP) Policy 3.4-13 states the following (emphasis added):

All new development shall meet the requirements for fire protection and fire prevention as recommended by responsible fire agencies.

Mendocino County Coastal Zoning Code (CZC) Section CZC 20.500.025, “Fire Hazard- Development Standards” states the following (emphasis added):

(A) Fire hazard areas shall be identified using the California Department of Forestry’s Fire Hazard Severity Classification System which classifies hazards into three categories: moderate, high or extreme hazard.

(B) Land Use Restrictions.

(1) All new development shall be sited taking into consideration the fire hazard severity of the site, the type of development and the risk added by the development to the fire hazard risk. Where feasible, areas of extreme high risk should be avoided for development except agricultural and open space uses. (Ord. No. 3785 (part), adopted 1991)

Discussion

As described in the local record, the proposed development is located in an area with a “Moderate” fire hazard according to the CalFire hazard severity rating system. This is the lowest rating (least hazardous) assigned to any site.

In their appeal of the local government action, concerns relating to fire safety had been raised by the appellants. Appellant B had expressed concerns because the applicants obtained waivers to seven sections of the Uniform Fire Code and State Fire Code, including a less-than-standard 14-foot-wide driveway easement that accesses the parcel. This appellant alleged that the fire department is voluntary and thus cannot respond quickly to fires. In addition, they noted in their appeal of the local government action that a fire burned down the Old Milano Hotel, within ¼ mile and within sight of the proposed building (under the same volunteer fire department’s jurisdiction) a few years ago. The South Coast Fire Protection District is the local fire district responsible for structural fire protection in Gualala. The applicant has stated in the local record the following: “There are significant constraints associated with the location and configuration of the parcel and the limited size of the allowable building envelope after easement width, property setbacks, bluff setbacks, and other limiting factors are taken into consideration. The easement driveway leading to the project site is approximately 150 feet long and 14 feet wide with a grade of approximately 14 percent.” In a letter dated July 9, 2008 and submitted to Chief Leighton Nelson of the South Coast Fire Protection District (Exhibit 35), the applicant’s agent (Frank Wernette) requested waivers to seven sections of the fire code relating to roadway grades; roadway surfaces; roadway turnarounds; access routing around the building; minimum 20-foot-wide access road; dead-ends and turnaround requirements; and hydrant installation. In a letter dated July 28, 2008 (Exhibit 35), Chief Nelsen documented the granting of the requested waivers. Chief Nelsen has also reviewed the project site in the past as part of previous project applications at the site. The County staff references a comment by Chief Nelsen in which he states “...Our trucks would have no problem fighting a fire at this location; we have additional water and we carry enough hose to reach the closest fire hydrant to this location.” Appellant B has expressed concern that “...the Uniform Fire Code and State Fire Code...provisions are in place to prevent of [sic] fires from spreading.” In a letter dated December 12, 2005 (Exhibit 35), which was submitted by the applicant’s agent and referenced in the local record, Chief Nelson provides clarification to fire safety code requirements by saying “In regards to the allegations by Mr. Hines about the Wernette property...The Uniform Fire Code in most areas, state, [such provisions are necessary] ‘when required by [the Fire] Chief.’ Again, after reviewing said project I believe the South Coast Volunteer Fire Department can effectively and efficiently fight a fire on this property and protect adjacent properties.”

In response to concerns voiced during the public comment period, the applicant provided the County with a review of documents and issues pertaining to fire

safety concerns (Exhibit 35). The applicant additionally submitted a supplemental letter to the County dated January 29, 2009, indicating that a new fire hydrant has been recently installed even closer to the proposed residence site than the closest existing fire hydrant. The new hydrant is approximately 700 feet from the project site, whereas the previously closest fire hydrant was 1,200 feet away. Because the proposed development has been sited to take into consideration the fire hazard severity of the site in relation to the type of development, and has met the requirements for fire protection and fire prevention as recommended by responsible fire agencies, the proposed development is consistent with the applicable fire hazard policies of the LCP, including but not limited to LUP 3.4-13 and CZC 20.500.025.

5. 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.

Mendocino County Coastal Zoning Code (CZC) Section 20.504.020, “Special Communities and Neighborhoods” states in applicable part the following (emphasis added):

(B) The communities and service centers, designated as CRV or CFV, of Westport, Caspar, Albion, Elk and Manchester, and the additional areas of Little River, Anchor Bay and Gualala, as described below, shall have special protection as set forth in Section 20.504.020(C):...

(3) Gualala: The Sonoma County Line on the south to Big Gulch on the north including all commercial and industrially zoned parcels on the east side of Highway 1 and all parcels west of Highway 1.

(C) Development Criteria.

- (1) The scale of new development (building height and bulk) shall be within the scope and character of existing development in the surrounding neighborhood.*
- (2) New development shall be sited such that public coastal views are protected.*
- (3) The location and scale of a proposed structure will not have an adverse effect on nearby historic structures greater than an alternative design providing the same floor area. Historic structure, as used in this subsection, means any structure where the construction date has been identified, its history has been substantiated, and only minor alterations have been made in character with the original architecture.*
- (4) Building materials and exterior colors shall be compatible with those of existing structures.*

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. Regarding visual compatibility with the character of the surrounding area, Section 20.504.020(C) specifically requires that the building height and bulk of new development be within the scope and character of existing development in the surrounding neighborhood and that building materials and exterior colors shall be compatible with those of existing structures.

The subject property is a bluff-top parcel that is not located in a designated “highly scenic area” (Exhibit No. 2), and with the exception of views from Robinson’s Reef Drive, which accesses the subdivision from Highway One, it is not visible from public vantage points. The view of the ocean from Robinson’s Reef Drive is limited to a fleeting glimpse down the access easement between the two existing houses. The horizon of the ocean will still appear visible from the street upon completion of the proposed development (Exhibit 5).

The proposed single family residence will have a maximum height of +/- 25 feet (with average height of +/- 21 feet above finished grade), consistent with the 28-foot height limit established for the Suburban Residential zoning district and no taller than the neighboring houses. In addition, at a total size of 2,300 square feet (that includes a 350-square-foot garage within the 1,200-square-foot total ground cover building footprint) the proposed two-story single-family residence is consistent with the size and bulk of other surrounding residential development and will not be out of scale with its surroundings. According to Mendocino County Assessor records, a single-story house on the immediately adjacent parcel to the north is 1,480 square feet total (plus a 528-square-foot garage for a 2,008-square-foot total ground cover building footprint), and the immediately adjacent

parcel to the south is a two-story, 2,465-square-foot house (plus a 768-square-foot garage within a 2,384-square-foot total ground cover building footprint). Other similarly-sized two-story homes occur across the street and throughout the subdivision (Exhibit 6).

The exterior materials and finishes of the new residence as proposed include Hardi Plank (or equivalent) siding in an “Alpine Frost” color (James Hardie Color JH50-10 or equivalent), with Hardi Cedarmill (or equivalent) fascia and trim in a “Monterey Taupe” color (James Hardie Color JH40-20 or equivalent). Proposed window trim and window door trim consists of Milgard Fiberglass and vinyl/fiberglass, respectively, both in the previously-described “Monterey Taupe” color. The roofing material is proposed as grey or equivalent “Timberline” 30-year composition shingle, and decks and ramps are proposed to be constructed of pressure-treated sunboard in a “natural” color. Five exterior lights as depicted in the lighting plan submitted by the applicant will be installed using shielded downcast fixtures from Kichler or equivalent. These proposed materials and exterior colors are within the scope and character of existing development, and are compatible with the surrounding structures. For example, the two houses to the north (including the adjacent parcel) and two houses across the street have similar materials and light exterior colors to those proposed on the subject parcel.

The Commission finds that the proposed colors and materials of the roof, siding and trim are compatible with those of existing structures, and that the two-story structure is consistent with the character of existing development within the surrounding neighborhood. To ensure that lighting will not shine or glare beyond the limits of the parcel wherever possible, the Commission attaches Special Condition No. 11, which requires that exterior lights be shielded and positioned in a manner that will not allow glare beyond the limits of the parcel or seaward of the bluff edge. This requirement will also help 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. The applicant has prepared a grading and drainage plan (Exhibit 8) that describes the target elevation of the garage, driveway, parking area, and turnaround area as being approximately 126.5 feet, with a target elevation for the building foundation floor of 127 feet. The September 2009 Geologic Map prepared by Jim Glomb shows the current elevation in the area of proposed development ranging from 125 to 127 feet. The local record describes grading related to the proposed project as follows:

The project would require approximately 175 cubic yards of cut and 85 cubic yards of fill on a bluff lot within 100 feet of Environmentally Sensitive Habitat Areas. The maximum height of the cut slope would be approximately ten feet, and the maximum height of the fill slope would be approximately three feet. Approximately 90 cubic yards of exported

material would go to the Hay Industrial Park in Point Arena, or another approved site.

This relatively small grading amount is primarily for preparing the building footprint for the proposed structures, driveway, and parking areas. Thus, the development as conditioned will minimize the alteration of natural landforms consistent with LUP Policy 3.5-1.

Therefore, the Commission finds that as conditioned, the proposed project is consistent with LUP Policies 3.5-1 and 3.5-15 and CZC Section 20.504.020(C), as the development will (1) not adversely affect coastal views from public vantage points; (2) be visually compatible with the character of surrounding areas as the height and bulk of the new residence will be within the scope and character of the existing residences in the neighborhood and the building materials and colors will be compatible with those of existing structures; (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.

6. Archaeological Resources

Coastal Act Section 30244 provides for protection of archaeological and paleontological resources and requires reasonable mitigation where development would adversely impact such resources.

According to the Archaeological Survey report dated October 28, 2000 and prepared by Registered Professional Archaeologist Thad Van Bueren, the only resource discovered on the project site was part of the railroad grade for the former Gualala Mill Railroad, which is shown on U.S. Government Land Office plats between 1868 and 1882, and on the Official Map of Mendocino County published in 1905. The resource was discovered during field pedestrian surveys that included transects spaced no farther than 5 meters apart and a trowel used every 5 meters to expose the ground underneath heavy grass cover.

Mr. Van Bueren described the railroad as a short line track that ran from the Gualala Mill just north of the mouth of the Gualala River, and northwest along the coastal bluff about two miles to the Gualala Mill landing (later known variously as Bourne's or Bowen's Landing). The railroad was described³⁶ as "wide gauge; 5'8", nearly a foot wider than the standard. This was done to accommodate a team of two horses abreast to pull the cars." In 1874 a steam donkey engine provided locomotion, then in 1880 an engine was used.

Mr. Van Bueren notes that the portion of the railroad grade in the project area represents what is now an isolated segment of the short line route that contains only the grade itself. Mr. Van Bueren concludes the resource discovered on the subject parcel fails to qualify as a historical resource because it lacks continuity

³⁶ Holmes and Lawson 1996, in Van Bueren 2000

due to surrounding bluff retreat and modern development, and does not possess any qualities that could convey its historical importance.

Mr. Van Bueren indicates no other resources were located on the subject parcel, and notes that findings are based on surface inspection and modest subsurface probing. He recommends that in the unlikely event archaeological remains come to light during construction activities, that all work should be temporarily suspended until a qualified professional archaeologist can examine the finds and provide recommendations on its treatment.

To ensure protection of any cultural resources that may be discovered at the site during construction of the proposed project, and to implement the recommendation of the archaeologist, the Commission attaches Special Condition No. 12. This condition requires that if an area of cultural deposits is discovered during the course of the project, all construction must cease, and a qualified cultural resource specialist must analyze the significance of the find. To recommence construction following discovery of cultural deposits, the applicant is required to submit a supplementary archaeological plan for the review and approval of the Executive Director to determine whether the changes are *de minimis* in nature and scope, or whether an amendment to this permit is required.

Therefore, the Commission finds that the proposed project, as conditioned, is consistent with Coastal Act Section 30244, as the development will not adversely impact archaeological resources.

7. Public Access

Summary of Applicable Coastal Act and 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 Coastal Act and 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 for the public 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.

8. California Environmental Quality Act

Mendocino County is the lead agency for the purposes of CEQA review. On April 23, 2009, the County coastal permit administrator determined that the proposed project was categorically exempt from CEQA pursuant to Class 3(a)(d)(e), consistent with the findings of the County staff report.

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.

EXHIBITS:

1. Regional Location
2. Vicinity Map
3. Proposed Site Plan, Floor Plans, and Elevations
4. Parcel Map
5. Visual Simulations of Proposed Development
6. Coastal Records Project Aerial Image of North Gualala Subdivision No. 3
7. Natural Communities and Special Status Species
8. Grading and Drainage Plan
9. Conditionally-approved Building Envelope
10. Area Subject to Open Space Restrictions Pursuant to Special Condition No.7 6
11. Notice of Final Local Action & County Staff Report
12. Appeal
13. Correspondence following Appeal
14. August 2008 Biological Report of Compliance With Mitigation and Resource Protection Plan
15. February 23, 2009 WRA letter re: coastal bluff morning-glory ESHA
16. April 23, 2010 Supplemental Biological Report and Cover Letter
17. December 2000 wetland delineation report
18. May 28, 2010 wetland memo and data forms
19. November 7, 2005 Habitat Assessment for Lotis Blue and Behrens Silverspot Butterflies
20. U.S. Fish & Wildlife Service Comment Letter on Butterfly Habitat
21. DFG comments on proposed botanical mitigation measures
22. August 12, 2008 Point Arena Mountain Beaver letter
23. August 13, 2002 Final Engineering Geologic Investigation report
24. July 15, 2008 Supplemental Foundation Recommendations for the Proposed Wernette Project
25. April 30, 2009 Supplemental Geotechnical Review Proposed Site Drainage System and Septic Tank
26. Excerpts from September 12, 2009 Updated Geotechnical and Engineering Geologic Investigation Report
27. September 27, 2010 Geotechnical Review Memorandum
28. Drainage Overview and Alternatives Analysis
29. Drainage and Retaining Wall Details
30. Pervious Concrete Owners Manual and Maintenance Outline
31. North Gualala Subdivision No. 3 Home Size Comparisons
32. April 18, 2010 Property Interest Information Summary
33. April 21, 2010 lot legality analysis
34. Mendocino County Department of Transportation Recommendations
35. Fire Code Waiver Documents
36. Habitat Types in Relation to Proposed Development
37. Construction Zone

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.