

CALIFORNIA COASTAL COMMISSION

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W15a

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Staff:	Tamara L. Gedik
Staff Report:	April 1, 2010
Hearing Date:	May 12, 2010
Commission Action:	

STAFF REPORT: APPEAL**DE NOVO**

APPEAL NUMBER:	A-1-MEN-05-037
APPLICANTS:	Bobbie Piety and Yves Panelli
LOCAL GOVERNMENT:	County of Mendocino
DECISION:	Approval with Conditions
PROJECT LOCATION:	Approximately two miles north of Gualala, in the Smugglers Cove Subdivision, on the south side of Pirates Drive (CR 562), 300 feet west of its intersection with Highway One at 47021 Pirates Drive, Mendocino County (APN 144-290-01).

PROJECT DESCRIPTION

(1) Construction of an approximately 2,275-square-foot single-story single-family residence with an approximately 719-square-foot attached garage for a total of approximately 2,994 square feet and a maximum average height of 18'6" above natural grade; (2) Installation of a new driveway and encroachment onto Pirates Drive and a septic disposal system and connection to the North Gualala Water Company. The project includes

impacts to rare plant populations and incorporates a rare plant management plan.

LAND USE DESIGNATION: Rural Residential (RR)

ZONING DISTRICT Rural Residential (RR)

APPELLANT: Ann Zollinger

SUBSTANTIVE FILE 1) Mendocino County CDP No. 08-03; and
DOCUMENTS: 2) Mendocino County Local Coastal Program

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

Staff recommends that the Commission approve with conditions the coastal development permit for the proposed project. Staff believes that as conditioned, the development as amended for purposes of the Commission's *de novo* hearing would be consistent with the Mendocino County LCP and the public access policies of the Coastal Act.

The proposed project includes the construction of an approximately 2,275-square-foot single-story, single-family residence with an approximately 719-square-foot attached garage for a total of approximately 2,944 square feet and a maximum average height of 18'6" above natural grade. A new, approximately 1,000 square-foot driveway and encroachment onto Pirates Drive would also be installed, as well as an on-site septic disposal system and a connection to the North Gualala Water Company (Exhibit 3). Both the primary and replacement leachfields are planned for installation when the septic is installed. The proposed project has not been amended by the applicant since it was approved by the county.

The primary issues raised by the proposed project are the project's consistency with the environmentally sensitive habitat area policies, the geologic hazard policies, and the visual resource policies of the LCP. The subject 0.61-acre property contains significant rare plant habitat and is a bluff top parcel.

The entire buildable portion of the parcel is coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) ESHA and plants are distributed throughout the parcel. The proposed development is not an allowable use within the coastal bluff morning-glory ESHA or within the buffer area immediately adjoining the ESHA, and is inconsistent with 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). However, staff believes a residence must be approved to avoid an unconstitutional taking of private property for public use.

Staff believes that direct adverse impacts to coastal bluff morning-glory plants and ESHA from the proposed development are not avoidable. Therefore, the project as conditioned

will include measures outlined in Special Condition No. 8 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. Measures included in Special Condition No. 8 include: (a) no invasive plants be planted on the property and all existing invasive plants be removed from all areas of the parcel, (b) a qualified biologist shall collect seed from coastal bluff morning-glory plants and submit to Rancho Santa Ana Botanic Garden for storage, along with applicable fees, prior to ground disturbing activities; (c) transplant coastal bluff morning-glory plants from areas described in Special Condition Nos. 8D and 8E following seed collection and prior to ground-disturbing activities; (d) conduct seasonal high-weed mowing to keep weeds and brush from invading the rare plant habitat, and (e) prohibit use, mixing, or storing of herbicides onsite.

Special Condition 5A is designed to ensure that the feasible, least environmentally damaging alternative is adopted. By requiring a reduction in the combined building footprint of the residence and attached garage from the proposed 2,944 square feet to no greater than 1,636 square feet (consistent with the average size of surrounding residential development in the Smuggler's Cove subdivision), plus a deck not to exceed 50 square feet, and a gravel-surfaced or other pervious driveway not to exceed 1,000 square feet, and located within the designated 1,805-square-foot building envelope shown in Exhibit No. 8, Special Condition 5A ensures the feasible, least environmentally-damaging alternative is adopted, consistent with CZC Section 20.532.100(A)(1)(b).

To ensure the protection of the ESHA on the site, staff further recommends that the Commission impose Special Condition Nos. 6 and 7. Special Condition No. 6 establishes a building envelope encompassing a building site at the southern end of the parcel set sufficiently back from the bluff edge to ensure an adequate bluff setback to avoid geologic hazards, as discussed in Finding 7 below. The authorized single-family residence, garage, deck, and driveway must all be located within the building envelope. The approximately 1,805-square-foot building envelope is the minimum size necessary to accommodate these portions of the approved development at the maximum sizes specified in Special Condition No. 5, as discussed below. The panhandle of the building envelope is designed to accommodate the driveway to the house extending from Pirates Drive. Special Condition No. 6, restricts the use of all areas outside of the approved building envelope as generally depicted on Exhibit No. 9, to open space. Special Condition No. 6 prohibits all development in the open space area except for installation of the on-site septic system, connections to utilities and community water, installation of the propane tank, the removal of non-native vegetation; installation of erosion control measures and drainage improvements installed pursuant to Special Condition No. 5; planting of drought-tolerant native vegetation and habitat restoration pursuant to Special Condition No. 5 (see below); and installation of a protective fence installed pursuant to Special Condition No. 8 (see below). 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. Special Condition No. 1 requires the applicants to record a deed restriction that imposes the special conditions of the permit as covenants, conditions, and restrictions on the use of the property to ensure that both the applicants and future purchasers of the property are notified of the prohibitions on development within the open space area established by Special Condition No. 6.

Special Condition No. 7 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. 8(M) and 8(N).

In addition, Special Condition No. 5B 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.

With regard to geologic hazard concerns, BACE's methodology acknowledges an inability to access the upper bluff edge at the Piety parcel to accurately measure bluff retreat rates, and uses aerial photography due to tree and brush cover. The September 14, 2005 letter describes an extrapolation from the 3.5 inches per year observed for the headlands down to an anticipated retreat rate of one inch per year for the Piety parcel. While the method describes general inferences made that led to the extrapolation, including less exposure to direct wave action than the headlands, no direct measurements or mathematical formula is provided to justify the chosen corollary, suggesting that the BACE-determined bluff retreat rate of approximately one inch per year is arbitrary. The only direct retreat measurements provided for the site are the 3.5 inches per year observed at the western point of the headlands. Although the BACE report is likely correct in indicating that the Piety bluff is currently subjected to less direct wave attack in its somewhat protected location in the cove than that incurred by the bluff on the point of the headlands, no evidence has been submitted suggesting that the retreat rate at the Piety bluff is less than a third of the retreat rate at the point of the headlands, as inferred by BACE. Staff also notes that sea level rise will exacerbate the frequency and intensity of wave energy received at shoreline sites, and will significantly increase direct wave action and the related retreat rate of the bluffs below the Piety parcel.

As a result of the more recent sea level rise data not considered in the BACE report, which suggests that the bluff at the applicants' parcel will be subject to much greater wave attack than it is currently; and, due to the apparently arbitrary method used to extrapolate bluff retreat rates from the headlands site to the Piety parcel, staff rejects the

extrapolation and finds using the bluff retreat rate that was actually calculated for the bluffs near the Piety site of approximately 3.5 inches per year for the headlands to be more appropriate for the Piety parcel. Therefore, staff believes application of a one inch retreat rate with a “safety factor of two” is inadequate, and recommends Special Condition No. 5 to require the final construction plans for the development adhere to a bluff setback of 21.9 feet (3.5 inches per year multiplied by 75 years). The condition requires that development be constructed consistent with the final construction plans. With staff’s modification to the proposed setback, staff believes the minimum setbacks between the bluff edges and the new development proposed by the applicants are sufficient to protect the new development from bluff retreat for a 75-year design life consistent with LUP Policy 3.4-7 and CZC Section 20.500.020(B).

Therefore, staff-recommended conditions would increase the setback of the proposed development from the bluff edge from 12.5 feet to 21.9 feet to provide an additional factor of safety to guard against bluff retreat hazards and likely increased risks from sea level rise. Staff also recommends that the Commission impose Special Condition Nos. 2, 3, and 4. These recommended conditions would require (1) conformance of the design and construction plans to the geotechnical report (with exception to changes in bluff setback discussed in Special Condition No. 5A(1)); (2) no future bluff or shoreline protective device, and (3) assumption of risk, waiver of liability and indemnity.

With regards to water quality, a geotechnical report dated August 29, 2003 and submitted by BACE specified erosion control/drainage measures that include directing drainage, including roof and site drainage, to the inland side of the house and conveying drain water to a ditch along side Pirates Drive. The report also noted the option of directing some runoff into the nearby ravine (Glennen Gulch). However, following inspection of Glennen Gulch from the subject parcel during site visits by Commission staff, staff believes that directing runoff from the proposed development to Glennen Gulch would likely facilitate erosion of the steep bluff face in that portion of the property, and may encroach onto adjacent property ownership prior to reaching the gulch. Therefore, staff recommends Special Condition 5(A)(2)(a)(v) that requires runoff from the driveway and rooftops to be collected and conveyed to the northeastern side of the driveway and structures, and discharged in a non-erosive manner via a pipe placed alongside the driveway that drains to the roadside ditch along Pirates Drive. In addition, staff recommends all disturbed soil areas should be reseeded and covered with native vegetation to control erosion, pursuant to Special Condition 5(A)(2)(a)(iii) and that conforms with the planting limitations of Special Condition Nos. 8(M) and 8(N).

To ensure the protection of water quality, staff is recommending Special Condition No. 7, requiring implementation of standard Best Management Practices (BMPs) during construction to control the erosion of exposed soils and minimize sedimentation of coastal waters during construction. Additionally, consistent with CZC Section 20.492.020(B), the Commission includes within attached Special Condition No. 5A(2) a requirement that the applicants minimize erosion and sedimentation impacts from the proposed construction of the residence. Special Condition No. 5A(2) requires submittal of an erosion and runoff control plan. The erosion control plan should specify that: (1)

hay 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; and (5) Runoff from the driveway and rooftops shall be collected and conveyed to the northeastern side of the driveway and structures, and discharged in a non-erosive manner via a pipe placed alongside the driveway that drains to the roadside ditch along Pirates Drive, where it may infiltrate into the ground and undergo bio-filtration prior to entry into any drainage course or waterway. Consistent with CZC Section 20.492.025(E), Special Condition No. 5A(1)(d) requires that the applicants surface the proposed driveway with gravel or other impervious material to facilitate infiltration into the ground of greater amounts of runoff from the driveway.

To ensure the project's conformance with provisions in the certified LCP regarding lighting restrictions, staff recommends Special Condition No. 10B 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. Staff also recommends Special Condition No. 10A, which requires that all exterior siding and roofing be composed of the colors proposed in the application or darker earth-tone colors only. The condition requires that the current owner or any future owner not repaint or stain the house or other approved structures with products that will lighten the color of the house or other approved structures without a permit amendment. In addition, all exterior materials, including roofs and windows, are required to be non-reflective to minimize glare. Finally, Special Condition 11 requires retention of a stand of approximately six trees located on the southeast side of the residence (shown on the site plan in Exhibit 3) throughout the life of the project, because these trees help screen the view from Cook's Beach of the proposed development.

Lastly, staff recommends Special Condition No. 1 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.

The Motion to adopt the Staff Recommendation of Approval is found on page 8.

STAFF NOTES

1. 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.

2. Procedure

On September 12, 2005, the Coastal Commission found that the appeal of the County of Mendocino's approval of CDP No. 08-03 for the subject development raised a substantial issue with respect to the grounds on which the appeal had been filed, pursuant to Section 30625 of the Coastal Act and Section 13115 of Title 14 of the California Code of Regulations. As a result, the County's approval is no longer effective, and the Commission must consider the project *de novo*. 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 at the *de novo* hearing.

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) Clarification on habitat for Behren's silverspot butterfly in response to U.S. Fish and Wildlife Service File Number 8-14-2005-2791.1, and clarification on vegetation community types submitted by Thomas Reid Associates dated November 19, 2005 (Exhibit No. 19);
- (b) Letter responding to October 21, 2005 Commission staff information requests, submitted by Bobbie Piety dated April 13, 2009 (Exhibit No. 12);
- (c) Supplemental geotechnical analyses for determining bluff stability, prepared by BACE Geotechnical dated September 14, 2005 (Exhibit No. 22);
- (d) Supplemental quantitative slope stability analysis data, prepared by BACE Geotechnical dated February 15, 2006 (Exhibit No. 22);
- (e) A copy of the amended Smuggler's Cove CC&Rs describing guidelines and restrictions that affect the subject property imposed by the Smuggler's Cove Subdivision (Exhibit No. 24); and
- (f) Digital version of photo simulation of proposed project to assess consistency with visual resource policies, submitted by Bobbie Piety on June 17, 2009 (Exhibit No. 5).

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.

I. 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-05-037, 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.

II. STANDARD CONDITIONS: See Appendix A.

III. SPECIAL CONDITIONS:

1. Deed Restriction

PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-05-037, 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.

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

- A. All final design and construction plans including foundations, grading, and drainage plans, shall be consistent with the recommendations, excluding the recommendation for bluff setback (discussed in Special Condition 5 below), contained in the Geotechnical Investigation report dated August 29, 2003 as modified and supplemented by the Geotechnical Investigation reports dated July 21, 2005, September 14, 2005, and February 15, 2006 prepared by BACE Geotechnical. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-05-037**, 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, excluding the recommendation in the geotechnical report for bluff setback (discussed in Special Condition 5 below).
- 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.

3. No Future Bluff or Shoreline Protective Device

By acceptance of this permit, the applicant agrees, on behalf of herself 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, septic system, propane tank, water and utility connections, and/or other related developments authorized pursuant to Coastal Development Permit No. A-1-MEN-05-037, in the event that the single-family residence, driveway, decking, garage, septic system, propane tank, 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 herself and all successors and assigns, any rights to construct such devices to protect the single-family residence, driveway, decking, garage, septic system, propane tank, 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 herself and all successors and assigns, that the landowner shall remove the new single-family residence, driveway, decking, garage, septic system, propane tank, 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, septic system, propane tank, 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, septic system, propane tank, 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, septic system, propane tank, 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, septic system, propane tank, 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, septic system, propane tank, 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, septic system, propane tank, water and utility connections, and/or other related developments.

4. Assumption of Risk, Waiver of Liability and Indemnity

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

5. Revised Plans

A. **PRIOR TO ISSUANCE OF COASTAL DEVELOPMENT PERMIT NO. A-1-MEN-05-037**, the applicant shall submit final revised plans to the Executive Director for review and approval. The revised plans shall include a site plan, floor plan, building elevation views (two sheets), Erosion and Drainage Runoff Control Plan, and landscaping plan, and shall provide for the following changes to the project:

1) Site Plan Revisions

- a. The plans shall depict the main residence with a minimum setback of 21.9 feet from the bluff edge, and with the combined building footprint of the residence and attached garage no greater than 1,636 square feet, with the deck not to exceed 50 square feet, and a gravel-surfaced or other pervious driveway not to exceed 1,000 square feet located within the designated 1,805-square-foot building envelope shown in Exhibit No. 8 of the staff report and outside of the open space area as required pursuant to Special Condition No. 6.
- b. The plans shall depict the location of the propane tank with a footing no greater than 25 square feet, sited in accordance with Mendocino County Planning and Building Department regulations.
- c. The plans shall depict the approved septic tank sited in accordance with Mendocino County Department of Public Health – Division of Environmental Health regulations.
- d. The plans shall depict the driveway at the minimum width required by the County and by the California Department of Forestry and Fire Protection, and surfaced with gravel or another pervious material.
- e. 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 plans shall include an erosion and Runoff Control Plan that incorporates design elements and/or Best Management Practices (BMPs) which will serve to minimize the volume and velocity of stormwater runoff leaving the developed site, and to capture sediment and other pollutants contained in stormwater runoff from the development, by facilitating on-site infiltration and trapping of sediment generated from construction. The drainage plan shall include a site map showing drainage features relating to the structure footprint (including roof and sidewalk runoff from house and garage), driveway, decking, and any other physical structures associated with development. The drainage plan shall also include calculations for the volume of runoff that is expected and the details of the drainage features to be constructed. The drainage plan shall be reviewed by BACE Geotechnical Inc. for conformance with their recommendations. 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 east 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(M) and 8(N), 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; and
 - v. Runoff from the driveway and rooftops shall be collected and conveyed to the northeastern side of the driveway and structures, and discharged in a non-erosive manner via a pipe placed alongside the driveway that drains to the

roadside ditch along Pirates Drive. Where gutters and downspouts are used, splash block velocity reducers shall be incorporated, to prevent scour and erosion at the outlet.

3) 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. No landscaping shall be installed outside of the building envelope generally shown in Exhibit No. 8 of the staff report except as required herein;

b. The plan shall include, at a minimum, the following components:

- i. 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
- ii. 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."

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.

6. 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. 9, which includes all areas of the subject parcel outside of the approved building envelope for the authorized 1,636-square foot combined residence and attached garage, 50-square-foot deck, and 1,000-square-foot pervious driveway, except for:
1. Installation of the authorized onsite sewage disposal system, generally shown in Exhibit No. 7 attached to the staff report; propane tank, community water services and public utility hook-ups; transplanting of sensitive plants pursuant to Special Condition No. 8; high weed mowing pursuant to Special Condition No. 8(L); removal of non-native vegetation; installation of erosion control measures pursuant to Special Condition No. 5A(2); erection of temporary protective fencing pursuant to Special Condition No. 7A; and
 2. The following development, if approved by the Coastal Commission as an amendment to this coastal development permit: maintenance of the authorized onsite sewage disposal system and utility lines; vegetation clearance 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-05-037**, 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. 9 attached to this staff report.

7. 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 as described in the April 2005 Management Plan for Coastal Bluff Morning-Glory prepared by TRA, 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 shall be allowed to encroach into the areas protected by the temporary exclusion/construction fencing;

- 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. Any and all excess excavated material resulting from construction activities shall be removed and disposed of at a disposal site outside the coastal zone or placed within the coastal zone pursuant to a valid coastal development permit;
- D. Straw 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;
- E. 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;
- F. On-site native vegetation shall be maintained to the maximum extent possible during construction activities;
- G. 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. 8(M) and 8(N);
- H. Rodenticides containing any anticoagulant compounds, including but not limited to, Bromadiolone, Brodifacoum, or Diphacinone, shall not be used; and
- I. All on-site stockpiles of construction debris shall be covered and contained at all times to prevent polluted water runoff.

8. Protection of Sensitive Plant Habitat

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

- A. Comply with the temporary exclusion/construction fencing requirements of Special Condition No. 7(A).
- B. Invasive plants, including French broom (*Genista monspessulana*), Italian thistle (*Carduus pycnocephala*), and wild radish (*Raphanus sativus*) shall be removed by hand and/or with the use of hand tools, from all areas within the flat, buildable portion of the parcel;
- C. Prior to the commencement of any construction or other ground-disturbing activities and at the floristically appropriate time of year, a qualified biologist shall:
 - 1. Collect coastal bluff morning-glory seed from plants on the site in a manner consistent with Rancho Santa Ana Botanic Garden Guidelines (Exhibit 26), including but not limited to a minimum of 2,500 seeds per

population from 35-50 individuals randomly sampled throughout the population's distribution;

2. Submit seed to Rancho Santa Ana Botanic Garden (RSABG) following the Collection and Documentation Guidelines included as Exhibit 26, along with a contribution of the greater of \$3,000.00 or current fee schedule amount for permanent conservation of the seed collection, plus the greater of \$240.00 or current fee schedule amount for seed processing. A seed storage program other than RSABG may be used upon the approval of the Executive Director if the applicant submits justification for the review and approval of the Executive Director prior to seed collection and submittal;
 3. The permittee shall submit chain of custody evidence that seed has been submitted to RSABG (or other approved entity) and processed by submitting to the Executive Director a copy of the report and copy of payment receipt provided by RSABG;
- D. Prior to the commencement of any construction or other ground-disturbing activities and after seed-collection efforts, a qualified biologist shall salvage and transplant onsite coastal bluff morning-glory plants from all areas where permanent impacts to coastal bluff morning-glory are anticipated from the house site, garage site, and driveway, plants shall be to a location devoid of invasive species and not currently occupied by coastal bluff morning-glory plants, within the front portion of the property to ensure long-term maintenance. Salvaging and transplantation shall be done consistent with methods outlined in the April 2005 management plan prepared by TRA;
- E. Prior to any construction or disturbance for the septic system and leach field installation and after seed collection efforts:
1. The trenching locations for the septic leach field should be marked, and all coastal bluff morning-glory plants within the leach field trenching area should be identified for removal by a qualified biologist.
 2. Prior to trenching/construction, the coastal bluff morning-glory should be carefully removed with hand tools by a qualified biologist.
 3. Slabs of topsoil (4-6" deep) may be removed along with the plants from the trenching locations only, consistent with communication between biologist Patrick Kobernus and soils engineer Carl Rittiman (April 2005) and as outlined in the April 2005 management plan prepared by TRA. If the septic plan deviates from the septic permit application 23733 filed in 2004, coordination with the soils engineer and County Department of Environmental Health must occur prior to removal of topsoil within the septic area.
 4. Any proposed changes to the septic plan and/or proposed transplanting efforts shall be reported to the Executive Director. No changes to the

- approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required;
5. For all other areas within the septic leach field, soil shall be left in place pursuant to DEH septic requirements, and coastal bluff morning-glory plants should be carefully removed by hand and placed in pots.
 6. The removed plants and soil should be carefully set aside in a designated protected location during the leach field trenching and construction and watered consistent with the April 2005 TRA management plan measures.
 7. When septic installation work is completed, a qualified biologist shall replant the slabs of topsoil and coastal bluff morning-glory plants into the septic leach field trenches and into the new designated location for the plants on the property.
- F. Transplanted plants shall be tagged with numbered metal tags pinned into the ground at the base of the plant;
- G. Site maintenance shall include hand-pulling annual grasses and other weeds from disturbed areas for the first three years of the project;
- H. The results of transplanting coastal bluff morning-glory plants shall be monitored with photo points for five successive years, with submittal of reports to the Executive Director and copied to DFG one year after installation and annually thereafter by December 31 of each year for five successive years. This report shall include
1. The survival, percent cover, and height of both tree and shrub species following site construction activities;
 2. The number of coastal bluff morning-glory plants transplanted from the house, garage, driveway, and septic areas, an overview of the revegetation effort, and the method used to measure transplantation success; and
 3. Photos from designated photo stations.
- I. To ensure a successful transplantation effort, all transplants shall have a minimum of 80% survival at the end of 5 years, with notification to the Executive Director and copied to DFG for further evaluation if monitoring reveals less than 300 plants present any year over the five-year monitoring period.
- J. A final report should be submitted to the Executive Director and copied to DFG after the five years of monitoring that discusses the success or failure of mitigation measures applied on the site;
- K. If after five years it is determined that the population has 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, propagation and replacement planting of seeds

- deposited at RSABG, watering, weeding, invasive exotic eradication, additional seed collection (with donation to Rancho Santa Ana Botanic Garden along with current fees for preservation and processing of seed), maintenance or any other practice to achieve these requirements, and further monitoring and reporting for an additional five years after additional mitigation efforts.
- L. Conduct seasonal high-weed mowing (mower height no less than eight inches) in the designated open space areas to keep weeds and brush from invading the coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) habitat located in that area. Care should be exercised to mow around and above the height of the prostrate coastal bluff morning-glory
 - M. 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.
 - N. 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.
 - O. No herbicides shall be stored, mixed, or used, on the subject parcel.

9. Future Development Restrictions

This permit is only for the development described in Coastal Development Permit No. A-1-MEN-05-037. Any future improvements to the single-family residence or other approved structures will require a permit amendment or a new coastal development permit.

10. Design Restrictions

- A. All exterior siding and roofing of the proposed structure shall be composed only of the colors proposed in this coastal development permit or darker earth-tone colors. The current owner or any future owner shall not repaint or stain the house or other approved structures with products that will lighten the color of the house or other approved structures without an amendment to this permit. In addition, to minimize glare no reflective glass, exterior finishings, or roofing materials are authorized by this permit. The proposed copper roof which will oxidize to a bluish green-gray hue is allowed.
- B. All exterior lights, including any lights attached to the outside of the buildings, shall be the minimum necessary for the safe ingress and egress of the structures, and shall be low-wattage, non-reflective, shielded, and have a directional cast

downward such that no light will shine beyond the boundaries of the subject parcel.

11. Maintenance of Existing Screening Trees

The stand of approximately six trees located on the southeast side of the residence (shown on the site plan in Exhibit 3) shall be maintained in good condition throughout the life of the project. If any of these existing trees die, become decadent, rotten, or weakened by decay or disease and must be removed for any reason, they shall be replaced in approximately the same location at a 1:1 ratio, no later than May 1st of the next spring season, and replaced in-kind or with another native species common to the coastal Mendocino County area that will grow to a similar or greater height. 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.

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-05-037, 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.

IV. 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 contained in the Commission staff report dated September 1, 2005.

2. Site Description

The subject parcel is located in the Smuggler's Cove Subdivision on the west side of Highway One, two miles north of Gualala. The subdivision occupies a point of land that extends outward from the coastal terrace. There are eighteen parcels in the subdivision, ranging in size from approximately ½ to ¼ acre. Only two or three remain undeveloped: the subject parcel, the adjacent parcel to the southwest, and possibly a third parcel adjacent to Highway One. The subject parcel is approximately ½-acre in size. The buildable area is on the north and central portions of the parcel, within a flat grassland area that is approximately ¼-acre in size. The remainder of the lot drops off steeply to the southeast towards Glennen Gulch, down to the beach and the Pacific Ocean below. A private pathway to Cooks Beach for the use of subdivision residents runs from Pirates Drive along the southwest side of the property, then down the bluff face along the south-southwest side of the property. The cut into the bluff for the path was cut in approximately 12 feet or more in vertical height.

The subject parcel is not located within a designated highly scenic area, and no ocean views are afforded through the lot from the street in front of the parcel. Six Bishop pine trees growing on the bluff edge and face provide some visual screening of part of the subject parcel from Cook's Beach below.

Near the bluff, dominant species include nonnatives such as French broom (*Genista monspessulana*) and wild radish (*Raphanus sativus*), with a native component of scrub shrub habitat near the bluff edge that includes Bishop pine (*Pinus muricata*), grand fir (*Abies grandis*), Douglas-fir (*Pseudotsuga menziesii*), and coffeeberry (*Rhamnus californica*). This habitat transitions into the flat portion of the lot, where nonnative grasses such as velvet grass (*Holcus lanatus*), sweet vernal grass (*Anthoxanthum odoratum*), and rattlesnake grass (*Briza maxima*) dominate. Other species interspersed through this area include wild radish, French broom, Italian thistle (*Carduus pycnocephala*), and natives such as

Douglas iris (*Iris douglasiana*), coyote bush (*Baccharis pilularis*), and beach strawberry (*Fragaria chiloensis*).

Other vegetation on the lot includes a thin bank of riparian vegetation along Glennen Gulch near the southern boundary of the lot, which includes red alder (*Alnus rubra*) and willow (*Salix spp.*) in the canopy and subcanopy, respectively, with a ground layer dominated by herbaceous species common near stream channels including coltsfoot (*Petasites frigidus*), thimbleberry (*Rubus parviflorus*), and lady fern (*Athyrium filix-femina*). The project provides the 100-foot LCP required ESHA buffer from this riparian plant community.

The proposed project occurs within the range of the federally endangered Behren's silverspot butterfly (*Speyeria zerene behrensii*). On September 9, 2005 the Commission received a letter from U.S. Fish and Wildlife Service (FWS) requesting information on whether suitable habitat for the butterfly was present onsite, and requesting evaluation of the project's potential effects on the endangered butterfly if habitat was present. Plant Ecologist Tom Mahony of Albion Environmental, Inc. submitted a letter to the Commission dated November 8, 2005 indicating that he did not observe the primary host plant for Behren's silverspot, known as early blue violet (*Viola adunca*), onsite during his sensitive plant survey and ESHA assessment on June 11, 2003.

In a November 19, 2005 letter submitted to the Commission, Patrick Kobernus of Thomas Reid Associates noted that habitat potential and reintroduction opportunities at the subject site were extremely low for Behren's silverspot butterfly. Mr. Kobernus attributed the lack of suitable habitat to the large distance of the project site from the only known location of Behren's silverspot butterfly (an extant location on private land in Point Arena); the isolated nature of the project site within an existing residential community surrounded by dense coniferous forest on the east and the Pacific ocean on the west; and the small size of the lot compared to habitat needs of *Speyeria* butterfly species (either large grassland habitat areas on the order of tens to several hundred acres, or a minimum of smaller grassland areas connected by grassland corridors). Commission staff contacted FWS Plant Ecologist David Imper on February 24, 2010 to verify that the additional information regarding no suitable habitat satisfied their concerns, and he responded in the affirmative.

The subject parcel is constrained for development due to rare plants and geotechnical issues associated with the coastal bluff edge. The rare CNPS Class 1B plant, coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) is widely distributed throughout the lot. 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 includes the construction of an approximately 2,275-square-foot single-story, single-family residence with an approximately 719-square-foot attached garage for a total of approximately 2,944 square feet and a maximum average height of 18'6" above natural grade. A new, approximately 1,000 square-foot driveway and encroachment onto Pirates Drive would also be installed, as well as an on-site septic disposal system and a water supply connection to the North Gualala Water Company (Exhibit 3), and installation of a propane tank. Both the primary and replacement leachfields are planned for installation when the septic is installed. The proposed project has not been amended by the applicant since it was approved by the county.

The proposed single-family residential development is compatible with the Rural 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 18'6" 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). However, Item 9 of the Restrictions and Covenants ("CC&Rs") of the Smuggler's Cove Subdivision (Exhibit 24) specify a maximum building height above ground level not to exceed 16 feet at the highest corner of the house location, with the exception of chimneys. The development would not exceed the maximum allowable lot coverage (20%), complies with the minimum setback requirements for the district (20 feet in the front and rear, 6 feet on the side yards) and the corridor preservation setback from Pirates Drive.

The proposed project will include construction of a new encroachment onto Pirates Drive to satisfy requirements of Mendocino County Department of Transportation. Pursuant to their recommendations, the proposed encroachment will be asphalt/concrete overlay to match the public street but the remainder will be of a material consistent with the rest of the driveway.

At the request of Commission staff, the applicant submitted their choice of colors for use on the proposed residence. The applicant's preference is to use a dark brown color (True Value 1T-45, Color 3221 "Dutch Chocolate (D)") for the stucco siding on the south and southeast walls of the house that are visible from Cook's Beach, and a lighter, taupe-like color (True Value 1T-45, Color 3223 "Cityscape (P)") on the north and northwest walls of the house. The applicant prefers to use trim colors on the house if permissible and proposes a dark green trim (True Value 5T-26, Color 3586 "Camouflage (N)") for the south and southeast sides visible from Cook's Beach, and a lighter, pastel green color (True Value 5T-26, Color 3588 "Ceska (P)") for north and northeast trim. According to the local record, the proposed residence would have copper roof panels installed that are anticipated to quickly develop a patina in the sea salt air.

The project proposes to site the residence approximately 12½ feet from the bluff edge. While the CC&Rs require all structures to be placed no more than 70 feet from the front property line fronting Pirate's Drive, the applicant indicates support was received by a majority of subdivision owners (pursuant to CC&Rs Item 6) to locate the house beyond the 70 feet restriction (closer to the bluff) to afford the applicant an ocean view from the proposed residence. The applicant obtained a mix of written and verbal support at the time of home purchase (November 2001), and obtained notarized signatures of 9 owners in late 2005 and early 2006 following the project appeal.

According to the June 2004 botanist report prepared by Tom Mahony at Albion Environmental and entitled "Analysis of Coastal Bluff Morning-Glory (*Calystegia purpurata* ssp. *saxicola*) Population" (Exhibit 14), and as discussed in the Environmentally Sensitive Habitat Area (ESHA) Findings and Takings Analysis Findings below, the proposed project will impact approximately 340-405 coastal bluff morning-glory plants, which includes 110-130 individuals that the botanist believes will be impacted only temporarily during installation of the septic leachfield. In September 2004, Thomas Reid Associates (TRA) submitted a mitigation plan prepared by Patrick Kobernus with his recommended mitigation measures to compensate for the loss of the plant due to the proposed project, including seed collection, delivery to a nursery for propagation, replanting, maintenance, and monitoring. A management plan was submitted by Mr. Kobernus of TRA in April 2005 to provide a more comprehensive plan that incorporates recommended mitigation measures following consultation and site visits with DFG staff, and information compiled in earlier reports prepared by Albion Environmental and TRA. Mitigation measures proposed in the April 2005 report by the consulting botanist include the following:

1. Delineation of construction area by a land surveyor and installation of temporary cyclone fencing to exclude non-construction areas from impacts;
2. Salvaging and transplantation of coastal bluff morning-glory plants from house site, driveway, and septic areas;
3. Site maintenance by hand-pulling weeds and mowing three times per year for the first three years of the project, exercising care to mow around and above the height of the prostrate coastal bluff morning-glory;
4. Tagging transplanted plants using numbered metal tags and monitoring with photo points for five successive years, with submittal of reports to DFG and the County of Mendocino one year after installation and annually thereafter for five successive years;
5. Success criteria of plant numbers within the range of 500 +/-200 plants over the five-year monitoring period, with notification to DFG for further evaluation if monitoring reveals less than 300 plants present.

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 planned and zoned in the Land Use Plan and Coastal Zoning Code as Rural Residential (RR). The Coastal Zoning Code (CZC) allows single-family residential development as a principal permitted use in the RR zoning district but does not allow for more than one residential unit per parcel in this location.

Because the Smuggler's Cove 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 was 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 development will be served by a municipal water system supplied by the North Gualala Water Company. The proposed development includes installation of a septic system sized to support a two-bedroom residence. Both the primary and replacement (secondary) leachfields will be installed at the onset, using a pressurized Highline leachfield system.

The Mendocino County Department of Environmental Health (DEH) approved the adequacy of the proposed septic system. County staff informed the applicant and project biologist to communicate with the septic designer and DEH to ensure their proposed mitigation measures would conform to septic specifications for retention of soil in leach field areas, or resubmit a modified plan to DEH. The project biologist subsequently satisfied this measure.

The proposed development satisfies the mandatory 25-foot setback of the septic tank from the bluff edge, and mandatory 50-foot setback of the leachfield from the bluff edge, pursuant to Table 4-1 "Minimum Setback Distances" of the North

Coast Regional Water Quality Control Board Water Plan (“Basin Plan”) requirements (including footnote 4 specifying increased distances for shallow soil or groundwater depths to leaching trenches).

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 Provisions:

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

Development proposals in environmentally sensitive habitat areas such as wetlands, riparian zones on streams or sensitive plant or wildlife habitats (all exclusive of buffer zones) including, but not limited to those shown on the Land Use Maps, shall be subject to special review to determine the current extent of the sensitive resource. Where representatives of the County Planning Department, the California Department of Fish and Game, the California Coastal Commission, and the applicant are uncertain about the extent of sensitive habitat on any parcel such disagreements shall be investigated by an on-site inspection by the landowner and/or agents, County Planning Department staff member, a representative of California Department of Fish and Game, a representative of the California Coastal Commission. The on-site inspection shall be coordinated by the County Planning Department and will take place within 3 weeks, weather and site conditions permitting, of the receipt of a written request from the landowner/agent for clarification of sensitive habitat areas.

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

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

A buffer area shall be established adjacent to all environmentally sensitive habitat areas. The purpose of this buffer area shall be to provide for a sufficient area to protect the environmentally sensitive habitat from significant degradation resulting from future developments. The width of the buffer area shall be a minimum of 100 feet, unless an applicant can demonstrate, after consultation and agreement with the California

Department of Fish and Game, and County Planning Staff, that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the environmentally sensitive habitat areas and shall not be less than 50 feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent environmentally sensitive habitat area and must comply at a minimum with each of the following standards:

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

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

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

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

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

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

...

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

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

...

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

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

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

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

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

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

(A) Resource Protection Impact Findings.

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

- (a) The resource as identified will not be significantly degraded by the proposed development.
- (b) There is no feasible less environmentally damaging alternative.
- (c) All feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted.

...

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

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

(1) Width. The width of the buffer area shall be a minimum of one hundred (100) feet, unless an applicant can demonstrate, after consultation with the California Department of Fish and Game, and County Planning staff, that one hundred feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development. The buffer area shall be measured from the outside edge of the Environmentally Sensitive Habitat Areas and shall not be less than fifty (50) feet in width. New land division shall not be allowed which will create new parcels entirely within a buffer area. Developments permitted within a buffer area shall generally be the same as those uses permitted in the adjacent Environmentally Sensitive Habitat Area.

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

- (a) Biological Significance of Adjacent Lands...
...
- (b) Sensitivity of Species to Disturbance...
...
- (c) Susceptibility of Parcel to Erosion...
...
- (d) Use of Natural Topographic Features to Locate Development...

- ...
(e) *Use of Existing Cultural Features to Locate Buffer Zones...*
- ...
(f) *Lot Configuration and Location of Existing Development...*
- ...
(g) *Type and Scale of Development Proposed...*
- ...

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

- (a) *Development shall be compatible with the continuance of the adjacent habitat area by maintaining the functional capacity, their ability to be self-sustaining and maintain natural species diversity.*
- (b) *Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel.*
- (c) *Development shall be sited and designed to prevent impacts which would degrade adjacent habitat areas. The determination of the best site shall include consideration of drainage, access, soil type, vegetation, hydrological characteristics, elevation, topography, and distance from natural stream channels. The term “best site” shall be defined as the site having the least impact on the maintenance of the biological and physical integrity of the buffer strip or critical habitat protection area and on the maintenance of the hydrologic capacity of these areas to pass a one hundred (100) year flood without increased damage to the coastal zone natural environment or human systems.*
- (d) *Development shall be compatible with the continuance of such habitat areas by maintaining their functional capacity and their ability to be self-sustaining and to maintain natural species diversity.*
- (e) *Structures will be allowed within the buffer area only if there is no other feasible site available on the parcel.* *Mitigation measures, such as planting riparian vegetation, shall be required to replace the protective values of the buffer area on the parcel, at a minimum ratio of 1:1, which are lost as a result of development under this solution.*
- (f) *Development shall minimize the following: impervious surfaces, removal of vegetation, amount of bare soil, noise, dust, artificial light, nutrient runoff, air pollution, and human intrusion into the wetland and minimize alteration of natural landforms.*
- (g) *Where riparian vegetation is lost due to development, such vegetation shall be replaced at a minimum ratio of one to one (1:1) to restore the protective values of the buffer area.*
- (h) *Aboveground structures shall allow peak surface water flows from a one hundred (100) year flood to pass with no significant impediment.*
- (i) *Hydraulic capacity, subsurface flow patterns, biological diversity, and/or biological or hydrological processes, either terrestrial or aquatic, shall be protected.*

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

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

Project Consistency with Applicable LCP Provisions:

(1) **Background on the Identification of the Presence, Extent, and Impacts of the Proposed Development on Coastal bluff morning-glory ESHA**

(A) Coastal bluff morning-glory is ESHA

The rare CNPS Class 1B.2 plant, coastal bluff morning-glory (*Calystegia purpurata* ssp. *saxicola*) is widely distributed throughout the lot. 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 Native Plant Society (CNPS), 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.

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, coastal bluff morning-glory occurs on the subject property. The species is included on lists of rare, threatened, and endangered species by the California Native Plant Society¹ and the Department of Fish and Game.² The species has a CNPS listing of 1B.2 and a CNDDDB state/global ranking of G4T2/S2.2³. Because of its relative rarity at the state level, 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 large concentrations of 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, the large concentrations of coastal bluff morning-glory 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 2003-2005 and Their Recommended Mitigation Measures

As described in Finding IV-2, the applicant's consultant Albion Environmental Inc. conducted an ESHA assessment and delineation on June 11, 2003 with results submitted in August 2003 in a report entitled "Environmentally Sensitive Habitat Area Assessment Under the California Coastal Act and Mendocino County Local

¹ 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>.

² California Department of Fish and Game, Natural Diversity Database (NDDDB). April 2010. *Special Vascular Plants, Bryophytes, and Lichens List*. Quarterly publication. 71 pp.

³ 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.

Coastal Program.” To verify the identification of morning-glory specimens⁴ observed at the subject parcel, the consultant assessed distinguishing characteristics of plants onsite, then compared specimens from the subject parcel to voucher specimens in the Jepson Herbarium at U.C. Berkeley, and submitted digital photographs of parcel specimens to *Calystegia* expert Dr. Richard Brummitt of the Royal Botanical Garden, all of which confirmed the identification of specimens as the rare *Calystegia purpurata* ssp. *saxicola*.

The initial August 2003 report (Exhibit 13) describes the presence of approximately 265 coastal bluff morning-glory individuals scattered throughout the subject parcel, with greatest concentrations located in the central and western portions of the terrace. The botanist estimated, depending on the exact final location of the house and driveway, that the house and driveway would “permanently” impact approximately 50 to 90 individuals of coastal bluff morning-glory, and “temporarily” impact portions of the population as a result of septic tank leachfield installation.

The 2003 report suggests mitigating impacts by: (1) transplanting plants that would be “permanently” impacted by the proposed house and driveway, to non-impacted areas of the parcel with transplanting methodology developed in conjunction with California Department of Fish and Game (DFG); and (2) avoiding the large concentration of individuals (100 to 125 plants) located adjacent to the beach access trail along the western edge of the subject parcel. The report describes plants occurring in the area of proposed septic installation as being subjected to “temporary” impacts that can be mitigated using avoidance where feasible during leachfield trenching operations; and excavation of 8 to 12 inches of topsoil with a sod-cutting device where avoidance is not feasible during trenching operations, then replacing sod pieces after trenching is complete.

On April 13, 2004, DFG staff Tracie (Hughes) Nelson and Liam Davis visited the subject parcel with Planner Rick Miller of the Mendocino County Planning Department and reviewed the August 2003 report onsite. On April 15, 2004, DFG submitted an email to the consultant requiring a map of plant locations, abundance, and distribution numbers, and feasible avoidance considerations to site the proposed development to lessen impact.

Subsequently, Plant Ecologist Tom Mahony of Albion Environmental conducted a field survey on May 11, 2004 and submitted a report in June 2004 entitled “Analysis of Coastal Bluff Morning-Glory (*Calystegia purpurata* ssp. *saxicola*) Population.” The subsequent survey noted the presence of 495 coastal bluff morning-glory plants, with approximately 100 plants clustered under and around a Bishop pine tree adjacent to the pathway easement along the southwest side of the parcel. Mr. Mahony noted “The change in absolute plant numbers is likely

⁴ 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.

primarily due to increased visibility of coastal bluff morning-glories (e.g., more plants in bloom, reduced overstory vegetation cover, transect location), as well as vagaries of counting dense concentrations of individual plants.”

The June 2004 analysis considered two options for the proposed house, in which one was the applicant’s preferred alternative locating the house near the bluff and the driveway and leachfield near the road; and “Alternative 2” that located the house near the road with a resulting shorter driveway, and placing the leachfield near the bluff. According to the June 2004 report, the analysis was conducted by utilizing a September 16, 2003 site plan prepared by Tammy Renz (it was noted this site plan differed from that used in the 2003 Albion Environmental Inc. report which used a site plan dated May 2002 that located the house closer to the bluff). The proposed house and driveway locations were drawn onto an orthophoto using measurements based on both the site plan and the orthophoto and were described as thus being considered only a close approximation.

The analysis noted that because no site plan exists for Alternative 2, only general impact determinations could be made for that alternative. It also noted assumptions that were made in assessing temporary impacts, including an assumption that septic leachfield installation could take place during fall or winter dormancy, and that native topsoil can be stockpiled and backfilled into leachfield trenches. The June 2004 analysis also noted that impacts analysis assumed complete avoidance of the approximately 100 plants clustered under and around a Bishop pine tree adjacent to the pathway easement along the southwest side of the parcel. As a result of this analysis, the botanist concluded that using the September 16, 2003 plan, the preferred Alternative 1 would result in permanent impacts to approximately 230 to 270 individuals due to the house and driveway, plus “temporary” impacts to 110-135 individuals during septic leachfield installation. Alternative 2, the botanist concludes, would result in permanent impacts of approximately 139 individuals from the house and driveway, and “temporary” impacts to between 230 and 256 individuals during septic leachfield installation.

In September 2004, Thomas Reid Associates (TRA) submitted a mitigation plan (Exhibit 15) prepared by Patrick Kobernus with his recommended mitigation measures to compensate for the loss of the plant due to the proposed project, including seed collection, delivery to a nursery for propagation, replanting, maintenance, and monitoring. It was noted that these mitigation measures would apply equally to either Alternative 1 or Alternative 2 as described in the June 2004 Albion Environmental report.

The September 2004 mitigation report prepared by Mr. Kobernus recommends protecting a portion of the existing plant colonies on site through deed restriction, and replanting disturbed areas with plants grown from seed collected on site. The 2004 mitigation plan also discusses that CNPS (1989) recommends “transplantation should only be used as a last recourse in conserving rare plants” and “opposes the use of transplanting as the primary method of conserving rare

plant species (CNPS, 1998).” It references a discussion with Gene Cooley at DFG that notes “In many circumstances transplantation is not an effective method for protecting rare plant species.”

On November 17, 2004, DFG commented that it had reviewed the September 2004 mitigation strategy and recommended acceptance of the mitigation measures proposed in the September 2004 report. Additionally, DFG recommended Alternative 2 for the proposed project because it would create the least amount of permanent disturbance to coastal bluff morning-glory plants. The local record indicates however that the applicant has steadfastly and adamantly refused consideration of Alternative 2, because the ocean view can only be seen from the house if the house is sited closer to the bluff (Alternative 1), and the applicant states this is the only reason they purchased the property at the price they paid.

The local record states that:

Staff expressed the opinion that the project would need to be modified to impact the least number of individual plant species in order for the required findings for development in an ESHA to be made. Meanwhile, the applicant questioned staff’s goal of protecting individual number of rare plants and instead wanted staff to look at the project from a rare plant management perspective, putting aside the more mathematical approach to saving individual plants. To that end, the applicant secured the services of Mr. Patrick Kobernus with Thomas Reid Associates to develop a comprehensive management plan for the coastal bluff morning-glory.

Mr. Kobernus of TRA submitted a final management plan in April 2005 (Exhibit 16) “to provide a comprehensive management plan for protecting and enhancing the population of coastal bluff morning-glory.” The report notes that it “incorporates recommended mitigation measures by DFG staff and information compiled in earlier reports prepared by Albion Environmental and Thomas Reid Associates.” The April 2005 management plan contrasts with the September 2004 mitigation plan (both by the same author), because it recommends transplantation, not seed collection as recommended in September 2004. In an email to the Commission dated April 13, 2010, Mr. Kobernus explains: “The management plan focuses on using transplanting on site instead. Based on the high density of the *Calystegia* [sic] in the areas outside of the proposed development and leach field, we thought that these areas could be augmented with transplants, rather than needing to collect seed and grow plants off site to replant in those areas. Also, the management plan focuses on long term maintenance, which we felt was the more important component to insure the long term viability of the species on site.”

Mitigation measures proposed in the April 2005 report by the consulting botanist include the following:

1. Delineation of construction area by a land surveyor and installation of temporary cyclone fencing to exclude non-construction areas from impacts;
2. Salvaging and transplantation of coastal bluff morning-glory plants from house site, driveway, and septic areas;
3. Site maintenance by hand-pulling weeds and mowing three times per year for the first three years of the project, exercising care to mow around and above the height of the prostrate coastal bluff morning-glory;
4. Tagging transplanted plants using numbered metal tags and monitoring with photo points for five successive years, with submittal of reports to DFG and the County of Mendocino one year after installation and annually thereafter for five successive years;
5. Success criteria of plant numbers within the range of 500 +/-200 plants over the five-year monitoring period, with notification to DFG for further evaluation if monitoring reveals less than 300 plants present.

DFG submitted additional mitigation measures following review of the subsequent April 2005 management plan. In email correspondence dated April 25, 2005 and May 4, 2005, DFG Environmental Scientist Corinne Gray recommended the following additional mitigation measures be included as part of the conditions of approval:

1. A final report should be submitted to DFG after the five years of monitoring that discusses the success or failure of mitigation measures applied on the site;
2. To ensure a successful revegetation effort, all plantings shall have a minimum of 80% survival at the end of 5 years.
 - 2.1. If these survival requirements are not met, the landowner is responsible for replacement planting, additional watering, weeding, invasive exotic eradication, or any other practice, to achieve these requirements. Replacement plants shall be monitored with the same survival and growth requirements for five years after planting.
3. An annual status report shall be submitted to DFG by December 31 of each year.
 - 3.1. This report shall include the survival, percent cover, and height of both tree and shrub species.
 - 3.2. The number of plants replaced, an overview of the revegetation effort, and the method used to assess these parameters shall also be included.
 - 3.3. Photos from designated photo stations shall be included.

4. If after five years it is determined that the population has not achieved 80% survival, additional mitigation and monitoring will be imposed upon the project including fencing, seed collection (donation to Rancho Santa Ana Botanic Garden along with \$2500 for preservation of seed), propagation and replanting, maintenance, and further monitoring and reporting.

In the septic area, the April 2005 management plan proposed the following transplanting methods:

Prior to any construction or disturbance, the trenching locations for the septic leach field should be marked, and all plants within the trenching area, driveway, and home site should be identified for removal. Prior to trenching/construction, the coastal bluff morning-glory should be carefully removed with hand tools. Slabs of topsoil (4-6" deep) may be removed along with the plants from the trenching locations only (personal communication, Carl Rittiman, County of Mendocino Soils Engineer). For all other areas within the septic leach field, soil will need to be left in place and plants should be carefully removed by hand and placed in pots. The plants and soil should then be carefully set aside in a designated protected location during the leach field trenching and construction.

(2) Proposed Development Located Within Rare Species ESHA

The proposed project involves construction of a single family residence, garage, driveway, on-site septic system sized to support a 2-bedroom residence, and deck in the flat, buildable portion that is approximately 130 feet long and 80 feet wide (nearly ¼ acre) of the approximately ½-acre parcel.

In a letter to the applicant dated February 25, 2005, Mr. Kobernus of TRA describes that both "sides" of the property (bluff side versus street side, in terms of siting development) provide habitat for coastal bluff morning-glory. As approximately all but the steep bluff face constitutes coastal bluff morning-glory habitat, an environmentally sensitive habitat area (ESHA) as defined by CZC Section 20.496.010, any proposed development would be located within 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.

Regardless of whether Alternative 1 (applicant preferred house location near the bluff) or Alternative 2 (house location near the street) was selected, either option results in the development of the single family residence and related developments within ESHA. As part of the Commission's *de novo* review, the applicant was asked to submit an analysis of the presence of feasible environmentally damaging alternative designs or locations.

The applicant submitted a letter to the Commission dated April 13, 2009. The applicant's response to evaluation of alternatives between the back (northwest),

middle, and front (southeast) portions of the parcel indicates the "...Middle Alternative, with the house sited in between...was immediately dismissed as it adversely impacts both the greatest number of *Calystegia* [sic] specimens and the greatest amount of their habitat, and would require a split leach field, if possible at all." The applicant's response additionally notes "...Further, the soils report stated a 50' setback from the bluff is required for the septic leach field."

Upon review of the soils information and specifications for septic and leach field installation prepared by certified professional soil scientist Carl Rittiman and submitted to the applicant on October 24, 2003, it appears that installation of a septic tank could occur no closer than 25 feet from the bluff edge. In an email dated April 19, 2010 from Mr. Rittiman, he explained "The code indicates that a 50 foot setback is required between a leachfield and a sharp change in slope or bluff given the soil and groundwater conditions at the site. There often is some ambiguity as to where the sharp change is [sic] slope begins or what constitutes a bluff but that is the code." In a telephone discussion with Mr. Rittiman on April 19, 2010, Mr. Rittiman further indicated a required 50-foot setback of the leachfield from the bluff edge, pursuant to Table 4-1 "Minimum Setback Distances" of the North Coast Regional Water Quality Control Board Water Plan ("Basin Plan") requirements (including footnote 4 specifying increased distances for shallow soil or groundwater depths to leaching trenches).

The applicant provided a sketch of the house and driveway footprint in relation to plant impacts for Alternative 1 and Alternative 2 in her April 13, 2009 letter (Exhibit 12). The location of the septic system was not included in the sketches, and therefore a site plan for the proposed septic is provided from the local record as Exhibit 7.

The applicant did not provide a redesign of the structure with a reduced footprint, as requested in (3) above, stating:

Any home could be designed to be smaller, the proposed home notwithstanding. But, one might ask how far does this go?...If our proposed design is excessive for whatever reason, perhaps you can stipulate what the Commission believes is reasonable and attempts will be made to work within that boundary. But, I would like to add that we went through many design changes to fit within existing constraints...

The applicant did provide some information on square footage and related ground disturbance as requested in (3)(b) above, noting a change in habitat available for coastal bluff morning-glory based upon the area of scrub habitat that could eventually outcompete coastal bluff morning-glory. In a letter submitted to the applicant dated February 25, 2005, Mr. Kobernus of TRA noted "it is likely that the backside of the property is more susceptible to habitat loss from brush succession due to the greater abundance of scrub and trees near the *Calystegia* [sic] in this area. However, these same species would ultimately overwhelm the

entire property over time without some management to control their expansion.” He further states “Landowner participation in protection of this species will not only require protecting the area through a deed restriction or other mechanism, but also require providing on-going management (stewardship) to the property to maintain the coastal prairie vegetation and minimize weed competition.”

As Mr. Kobernus highlights, there is a need for on-going maintenance of coastal bluff morning-glory regardless of where the house is sited. Therefore, the Commission evaluated the siting of the structure based upon feasibility of location in relation to constraints, and extent of impacts within existing habitat. The applicant notes that of the roughly 10,400 square feet of level buildable lot, Alternative 1 occupies approximately 3000 square feet for the house and garage, and approximately 1000 square feet of driveway, or 4000 square feet total...” whereas Alternative 2 “takes 3000 square feet for the house, 360 square feet for the shorter driveway...”. Neither analysis includes the footprint of the proposed deck or septic system, but upon examination of the septic site plan, it appears an area of disturbance of approximately 3000-3500 square feet will occur for the septic system. Upon examination of the house site plan, it appears the deck will occupy approximately 50 square feet. Thus, both alternatives would require disturbance of the coastal bluff morning-glory habitat.

Therefore, the Commission finds that because the proposed development would significantly degrade the coastal bluff morning-glory ESHA, 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.

(3) 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).

CZC 20.532.100(A)(1) states that no development shall be allowed within an ESHA unless (a) the resource will not be significantly degraded by the proposed development, (b) there is no feasible less environmentally damaging alternative, and (c) all feasible mitigation measures capable of reducing or eliminating project related impacts have been adopted. Therefore, because LUP Policy 3.1-7 and CZC Section 20.496.020 require development permitted within a buffer area to be generally the same as those uses permitted in the adjacent ESHA, the only types of development allowed within rare species ESHA buffer include those that meet these three criteria.

Due to the fact that all but the steep bluff face 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, an on-site septic system, driveway, deck, and single family residence are proposed to be located within ESHA buffer. These developments will require site grading (estimated by the applicant at no more than 50 cubic yards according to the local record).

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), and (3) the proposed residential development would significantly degrade the coastal bluff morning-glory habitat, the Commission finds that findings for approval cannot be made consistent with LUP Policy 3.1-7 and CZC Sections 20.496.015 and 20.532.100(A)(1) 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.

(4) 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 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.⁵

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.

⁵ 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).

(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.*”⁶ 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 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”)).⁷

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*

⁶ 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).

⁷ 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).

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, 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 144-290-01, is planned and zoned for residential use, and to deny the applicant residential use of the parcel would leave no other economic use of the property. In these circumstances, the applicant could successfully argue that the Commission has made a final and authoritative decision about the use of the subject property. Therefore, the applicant could successfully argue that the Commission’s denial is a taking because a taking claim is “ripe.”

(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].

In this case, the applicant owns the subject vacant parcel proposed to be developed with a single-family residence (APN 144-290-01), but does not own any adjacent parcels. The applicant purchased APN 144-290-01 for \$305,000 with a closing date of April 23, 2002. On April 18, 2002, a Grant Deed was recorded in Volume 2002, page 09256 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to applicant Bobbie Piety.

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, a trust transfer deed was submitted on January 30, 2004 and subsequently recorded on March 3, 2004 that modified Ms. Piety's status from unmarried woman to married woman, and transferred the property to coastal development permit co-applicants Yves Panelli and Bobbie Piety as Co-Trustees of the Panelli/Piety 2004 Living Trust. Upon further examination of these documents and the above-described related entries, the adjoining parcels are owned by others. The adjoining parcel to the north (APN 144-290-18) is currently owned by Clifford D. Castle and Joanne B. Borovoy (formerly owned by appellant Ann Zollinger). The undeveloped adjoining parcel to the south (APN 144-290-02) is owned by James and Ellen Church. Across the street (Pirates Drive), the nearest parcel to the northwest (APN 144-290-16) is owned by Scott and Carrie Rawles. To the east, the applicant's property adjoins Cook's Beach.

Therefore, the evidence establishes that the Commission should treat APN 144-290-01 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 20.376.010 of the CZC sets forth the principal permitted use types in the RR district, which include (1) single-family residential, (2) vacation home rental, (3) light agriculture, (4) row and field crops, (5) tree crops, and (6) passive recreation. Additionally, the section sets forth the conditional permitted use types in the RR district, which include residential (mobile home park); commercial (cottage industries); civic use types (on-site and off-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); agricultural use types (limited forest production and processing, commercial woodlots forest production and processing, horticulture, and limited packing and processing); open space use types (active recreation); extractive use types (mining and processing); and natural resource use types (fish and wildlife habitat management, and watershed management).

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 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). The same is true for

most of the conditionally permitted civic use types. Furthermore, the property is located within an established residentially-developed area (with a residence on the adjacent lot to the north) where there is little impetus for public agencies to purchase the lot, and where CC&Rs restrict use types for structures to the exclusive purpose of a “dwelling house or appurtenances thereto.”

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. Although “Active Recreation” is a conditionally permitted use, the Smuggler’s Cove subdivision is a small residential development with one narrow access street that forks into two cul de sacs. Therefore, commercial development of a business is likely not feasible.

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). An easement to Cook’s Beach already occurs on a portion of the applicant’s parcel to provide beach access to subdivision residents, and a recently-dedicated trail to Cook’s Beach (Bonham Trail) has been created for the public via an easement on another nearby parcel (APN 144-170-03). Thus, there is little impetus for such public agencies to purchase the lot.

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

the Commission finds it necessary to approve some residential use of the property to avoid a categorical *Lucas*-type taking.

(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 144-290-01 for \$305,000 with a closing date of April 23, 2002. On April 18, 2002, a Grant Deed was recorded in Volume 2002, page 09256 of the Official Records, Mendocino County Records Office, effectively transferring and vesting fee-simple ownership to the applicant. Based upon an examination of copies of these documents and related entries within the current property tax rolls of the County of Mendocino's Assessor's Office, a trust transfer deed was submitted on January 30, 2004 and subsequently recorded on March 3, 2004 that modified Ms. Piety's status from unmarried woman to married woman, and transferred the property to coastal development permit co-applicants Yves Panelli and Bobbie Piety as Co-Trustees of the Panelli/Piety 2004 Living Trust. 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 Smuggler's Cove subdivision.

To determine whether the applicant had an investment-backed expectation to construct a house on APN 144-290-01, it is necessary to assess what the applicant invested when she 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 144-290-01, an approximately half-acre parcel, for a single purchase price of \$305,000. The applicant submitted a review of comparable properties in the planned community The Sea Ranch (located approximately 8 miles south of the subject parcel in the Sonoma County coastal area) that sold around the same time as the applicant's purchase of the subject property. The provided comparables indicate sale prices of \$319,000 for a 0.45-acre parcel, \$342,000 for a 0.38-acre parcel, \$312,000 for a 0.21-acre parcel (plus commons), \$317,000 for a .53-acre parcel (plus commons), \$331,000 for a 0.20-acre parcel, \$306,000 for a .38-acre parcel, and \$314,000 for a 0.27-acre parcel. These comparable parcels are similarly designated (in the certified Sonoma County Land Use Plan) for rural residential use.

When the applicant purchased the property in 2002, 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 Smuggler's Cove subdivision, including a home on the adjacent parcel to the north of the subject parcel. The residence that is located two parcels to the south (APN 144-290-03) was approved by the Coastal Commission in 1992 (see CDP No. 1-92-06), and parcel APN 144-290-05, located on the southwest bluff top, was approved by the Commission in 1991 (see CDP No. 1-90-311). Consequently, the applicant may have had a reasonable *investment-backed* expectation that she had purchased a lot that could be developed consistent with the ESHA policies of the certified LCP, and her investment reflected that the future development of a residential use could be accommodated on APN 144-290-01. Given that numerous homes were in existence in the Smuggler's Cove subdivision at the time of the property purchase, including a home immediately to the north of the subject lot, and given that the property was planned and zoned for residential use, viewed objectively, a reasonable person would thus have had a reasonable expectation that APN 144-290-01 could be developed as a residential parcel.

To assess whether the applicant had a reasonable expectation to build the proposed house at the size of 2,275 square feet, with an approximately 719-square-foot attached garage for a total of approximately 2,944 square feet, plus 1,000 square foot driveway, the Commission reviewed the total house ground cover square footage and garage ground cover square footage of the 15 other developed residential lots within the Smuggler's Cove subdivision (Exhibit 6 and 23). 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 144-290-03, a 0.32-acre bluff-top parcel, has a ground cover square footage of 1,350, but a total square footage of 1,698 due to a split-level upper story. Total ground cover square footages in the Smuggler's Cove subdivision ranged from

850 square feet on a 0.29-acre parcel (APN 144-290-13) and 1,440 square feet on a 0.46-acre parcel (APN 144-290-18⁸), up to 1,840 square feet on a 0.34-acre parcel (APN 144-290-05), with an average house ground cover square footage of 1,297 square feet. Garage ground cover square footages ranged from 180 square feet (APNs 144-290-17 and 144-290-10) to 480 square feet (APNs 144-290-15 and 144-290-16), with an average of 339 square feet. While the applicant's parcel is approximately 0.5 acre in size, only approximately 0.25 acre is physically feasible to build upon, as the remainder of the lot drops off steeply to the southeast towards Glennen Gulch, down to the beach and the Pacific Ocean below.

Therefore, 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 Smuggler's Cove subdivision.

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 Rural Residential (RR) use in the County's LCP. According to the LCP, the RR district is intended to encourage local small scale food production (farming) in areas which are not well suited for large scale commercial agriculture, defined by present or potential use, location, mini-climate, slope, exposure, etc. Section 20.376.010 of the CZC sets forth the principal permitted use types in the RR district, which include (1) single-family residential, (2) vacation home rental, (3) light agriculture, (4) row and field crops, (5) tree crops, and (6) passive recreation. Additionally, the section sets forth the conditional permitted use types in the RR district, which include residential (mobile home park); commercial (cottage industries); civic use types (on-site and off-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); agricultural use types (limited forest production and processing, commercial woodlots forest production and processing, horticulture, and limited packing and processing); open space use types (active recreation); extractive use types (mining and processing); and natural resource use types (fish and wildlife habitat management, and watershed management).

⁸ A building permit was issued in 2002 for a 2,789 square-foot remodel, but no coastal development permit appears on record with the County, and the County indicates an unexplained violation is noted on the file. Therefore, the house design that was permitted and present at the time of the applicant's purchase of the adjacent property was used in consideration of what the applicant would have seen and expected to be able to build at the time of land purchase.

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 owners an economic return on their investment. As discussed above, making use of the subject property as a vacation home rental or various of the other conditionally permitted residential, commercial, and civic uses would still require building a structure on the property 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. Although “active recreation” is a conditionally permitted use, the Smugglers Cove Subdivision is a small residential development with one narrow access street that forks into two cul de sacs, likely rendering commercial development infeasible. 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). An easement to Cook’s Beach already occurs on a portion of the applicant’s parcel to provide beach access to subdivision residents, and a recently-dedicated trail to Cook’s Beach (Bonham Trail) has been created for the public via an easement on another nearby parcel (APN 144-170-03). Thus, there is little impetus for such public agencies to purchase the lot.

In these circumstances, it is reasonable to conclude that the denial of the proposed residential use would have a substantial economic impact on the value of the subject property. To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this permit allows for the construction of a residential development, 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 an on-site septic system that has been reviewed and approved by the County Division of Environmental Health. This ensures that the proposed new residence would not create public health problems in the area. Furthermore, the proposed use is residential, rather than, for example, industrial, which might create noise or odors or otherwise create a public nuisance.

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

Conclusion

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section

30010, this permit 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 and ESHA.

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 reduced in scope from that proposed, and redesigned as necessary to best avoid the significant disruption to sensitive habitat that would accompany any development of this property.

6. 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. 5, 6, 7, 8, and 9.

The project as currently proposed includes the construction of an approximately 2,275-square-foot single-story, single-family residence with an approximately 719-square-foot attached garage for a total of approximately 2,944 square feet and a maximum average height of 18’6” above natural grade. A new, approximately 1,000 square-foot driveway and encroachment onto Pirates Drive would also be installed, as well as an on-site septic disposal system, a propane gas tank, and a water supply connection to the North Gualala Water Company. As discussed in Finding 7 “Geologic Hazards” below, Special Condition No. 5 includes requirements to submit revised plans that site the house a minimum of 21.9 feet from the bluff edge.

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 March 2, 2010 and met the applicant and project botanist Patrick Kobernus onsite. While a native component of scrub shrub habitat occurs near the bluff edge (within the bluff setback area) with native species that include Bishop pine (*Pinus muricata*), grand fir (*Abies grandis*), Douglas-fir (*Pseudotsuga menziesii*), and coffeeberry (*Rhamnus californica*), Commission staff observed a less intact assemblage of native vegetation along the buildable portion of the lot closest to the bluff edge on the southeastern portion of the parcel, where a prevalence of the invasive exotic French broom (*Genista monspessulana*) along the bluff face appeared to be a perpetual seed source for the establishment of many young invasive plants. In the middle and northeastern portions of the lot, wild radish (*Raphanus sativus*) is prevalent, along with nonnative grasses such as velvet grass (*Holcus lanatus*), sweet vernal grass (*Anthoxanthum odoratum*), and rattlesnake grass (*Briza maxima*). Other species interspersed through this area include French broom, Italian thistle (*Carduus pycnocephala*), and natives such as Douglas iris (*Iris douglasiana*), coyote bush (*Baccharis pilularis*), and beach strawberry (*Fragaria chiloensis*).

Although nonnative grasses are also present on the northwestern portion of the property, this area appears to contain a more intact, less disturbed composition of native species that include Douglas iris and beach strawberry, without the prevalence of the invasive wild radish, Italian thistle, or French broom. Because the entire site supports coastal bluff morning-glory habitat, and because this northwestern portion (fronting Pirate’s Drive) is more intact, the Commission

finds that locating the house at the south end of the property towards the bluff minimizes site degradation. Therefore, the Commission attaches Special Condition No. 6 which establishes a building envelope encompassing a building site at the southern end of the parcel set sufficiently back from the bluff edge to ensure an adequate bluff setback to avoid geologic hazards, as discussed in Finding 7 below. The authorized single-family residence, garage, deck, and driveway must all be located within the building envelope. The approximately 1,805-square-foot building envelope is the minimum size necessary to accommodate these portions of the approved development at the maximum sizes specified in Special Condition No. 5, as discussed below. The panhandle of the building envelope is designed to accommodate the driveway to the house extending from Pirates Drive. Special Condition No. 6 restricts the use of all areas outside of the approved building envelope as generally depicted on Exhibit No. 8, to open space. Special Condition No. 6 prohibits all development in the open space area except for installation of the on-site septic system, connections to utilities and community water, installation of the propane tank, the removal of non-native vegetation; installation of erosion control measures and drainage improvements installed pursuant to Special Condition No. 5; planting of drought-tolerant native vegetation and habitat restoration pursuant to Special Condition No. 5 (see below); and installation of a protective fence installed pursuant to Special Condition No. 8 (see below). 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. 1 requires the applicants to record a deed restriction that imposes the special conditions of the permit as covenants, conditions, and restrictions on the use of the property to ensure that both the applicants and future purchasers of the property are notified of the prohibitions on development within the open space area established by Special Condition No. 6.

Furthermore, the Commission attaches Special Condition No. 5A(1) to submit revised plans with a reduced building footprint size not to exceed 1,636 square feet, including garage and house structures. This results in a reduction of 1,358 square feet from the currently proposed house and garage that total 2,994 square feet. This not-to-exceed total square footage was determined by reviewing the total ground cover square footage of house and garage structures for the 15 other developed lots within the Smuggler's Cove subdivision (Exhibits 6 and 23), as described above. The value 1,636 square feet reflects the average house ground area of 1,297 square feet, plus the average total garage ground cover area of 339 square feet, for a total of 1,636 square feet. In addition, Special Condition No. 6A(1) specifies the driveway shall not exceed 1,000 square feet (the currently proposed size) and decks shall not exceed 50 square feet (the approximate current proposed size). Therefore, the total reduced building footprint for structures, including house, garage, driveway, decks, and any accessory structures (excepting septic and leachfield), shall not exceed 2,686 square feet. The Commission

determined a combined total square footage limitation for the house and garage to afford the applicant the flexibility to decide how to reduce the overall footprint of the proposed development while ensuring 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 Condition 8, which includes mitigation measures proposed in both the September 2004 and April 2005 reports prepared by TRA. The September 2004 mitigation report prepared by Mr. Kobernus at TRA recommends replanting disturbed areas with plants grown from seed collected on site. The 2004 mitigation plan also discusses that CNPS (1989) recommends that “transplantation should only be used as a last recourse in conserving rare plants” and “opposes the use of transplanting as the primary method of conserving rare plant species (CNPS, 1998).” It references a discussion with Gene Cooley at DFG that notes “In many circumstances transplantation is not an effective method for protecting rare plant species.” On November 17, 2004, DFG commented that it had reviewed the September 2004 mitigation strategy and recommended acceptance of the mitigation measures proposed in the September 2004 report. The April 2005 management plan contrasts with the September 2004 mitigation plan (both by the same author), because it recommends transplantation, not seed collection as recommended in September 2004. In an email to the Commission dated April 13, 2010, Mr. Kobernus explains: “The management plan focuses on using transplanting on site instead. Based on the high density of the *Calystegia* [sic] in the areas outside of the proposed development and leach field, we thought that these areas could be augmented with transplants, rather than needing to collect seed and grow plants off site to replant in those areas. Also, the management plan focuses on long term maintenance, which we felt was the more important component to insure the long term viability of the species on site.”

Therefore, to minimize permanent impacts to coastal bluff morning-glory plants, the Commission attaches Special Condition 8D to require coastal bluff morning-glory plants be salvaged from the house site, garage site, and driveway prior to ground-disturbing activities and transplanted to sites devoid of invasive species within the front portion of the property (fronting Pirate’s Drive). Additionally, the Commission attaches Special Condition 8E to require coastal bluff morning-glory plants be salvaged from the septic area prior to ground-disturbing activities, set aside and watered until septic installation is completed, then replanted in the septic area following ground-disturbing activities.

The Commission further finds that, given the documented uncertainty of success with transplanting sensitive species, and the lack of documented success with transplanting coastal bluff morning-glory, there is an inherent risk in depending only upon this approach to restore impacted plant populations. The Commission

further finds that although seed collection has been suggested by DFG as an alternative if transplanting efforts are unsuccessful, collection of seeds after an unsuccessful mitigation would mean a smaller sample size from which to collect seeds, with greater limitations on successful collection and future propagation.

Therefore, Special Condition 8C requires 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. According to their website at <http://www.rsabg.org/collections/256>, “through a Memorandum of Understanding with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, the Garden is authorized and regularly utilized as the principle repository for germplasm collections of rare, threatened, and endangered California native plant species.” This mitigation measure is consistent with recommendations from the September 2004 report, and combined with other requirements of Special Condition No. 8, ensures 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.

As discussed above, Special Condition No. 9 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. 1 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. 5A(3), 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) only those plants that are drought-tolerant and native to “northern coastal scrub” habitats of Mendocino County shall be used in the open space area; (f) planting within the

open space deed-restricted area established pursuant to Special Condition No. 6 shall be completed within 60 days after completion of construction and prior to the onset of the rainy season; and (g) all proposed plantings shall be obtained from local genetic stocks within Mendocino County.

Additionally, the Commission finds that although a large portion of the subject parcel is vegetated with existing non-native invasive plant species, the coastal bluff morning-glory ESHA could be adversely affected by the development if additional non-native, invasive plant species were introduced from landscaping at the site. The applicant is not proposing any landscaping as part of the proposed project. However, to ensure that the ESHA is not adversely impacted by any future landscaping of the site, the Commission attaches Special Condition No. 8M that requires only non-invasive plant species be planted at the site.

Moreover, to help in the establishment of vegetation, rodenticides are sometimes used to prevent rats, moles, voles, gophers, and other similar small animals from eating the newly planted saplings. 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. Therefore, to minimize this potential significant adverse impact to other environmentally sensitive wildlife species, the Commission attaches Special Condition No. 7H prohibiting the use of any rodenticides on the property governed by CDP No. A-1-MEN-05-037.

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. Because the proposed development will occur within coastal bluff morning-glory ESHA, and to minimize this potential significant adverse impact to coastal bluff morning-glory and other organisms that may benefit coastal bluff morning-glory plants, the Commission attaches Special Condition No. 8O prohibiting the use of any herbicides on the property governed by CDP No. A-1-MEN-05-037.

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

Additionally, as discussed below, Special Condition No. 2 requires that all final grading and drainage plans, among others, be reviewed and approved by a geotechnical engineer for conformance with all recommendations (except bluff setbacks, as discussed below) in the August 29, 2003 BACE Geotechnical report, which will help ensure that the project will minimize the alteration of natural landforms and protect hydrological processes.

7. Geologic Hazards

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.

Discussion:

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 Coastal Zoning Code (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, and an attached garage with a driveway, on a bluff top parcel.

The project site is located on a small headland, on a coastal bluff overlooking a cove to the south containing Cooks Beach. The headland is a remnant of a gently sloping marine terrace that extends from an approximate elevation of 70 feet up to 120 feet above sea level. The subject property is situated on a gently sloping portion of the marine terrace, near the edge of a 75-foot-high bluff. The proposed project would be set back 12½ feet from the bluff edge. The steep-sided Glennen Gulch ravine is located east of the property. There is a sand, gravel and cobble beach (Cooks Beach) at the bluff toe. A pathway to Cooks Beach runs from Pirates Drive along the southwest side of the property, then down the bluff face along the south-southwest side of the property. The path was cut into the bluff approximately 12 feet or more in vertical height.

BACE Geotechnical Inc. conducted the geotechnical investigation for the project, and produced a report dated August 29, 2003. BACE observed no landslides at the site except for some relatively minor sloughing on the outer bluff face. In addition, no evidence of faulting was observed on the subject parcel by BACE and none of the published references that BACE reviewed showed faults on or trending towards the property. The geotechnical report stated that the active San Andreas Fault is located within the canyon of Little North Fork of the Gualala River approximately 2 ½ miles to the northeast.

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). BACE concluded that the site is geotechnically suitable for the proposed project. According to BACE, the bluff appeared to be relatively stable and is protected by the beach from most wave action. BACE estimated that the bluff is eroding at the relatively low average rate of about one inch per year. Therefore, over a period of 75 years (the economic lifespan of a house), BACE estimated that the bluff would erode back approximately 6¼ feet. They then doubled this number as an additional precaution, to reach a bluff setback of 12½ feet. The applicants designed the proposed house and deck footprint 12½ feet back from the bluff accordingly.

Prior to the geotechnical investigation by BACE, the site was visited and evaluated by two other geologists, one (Jim Glomb) hired by a neighbor, and one hired by the applicant (Thomas E. Cochrane). The Cochrane report was deemed inadequate by the County because the County LCP requires California licensed engineering geologist or a registered civil engineer with soil analysis expertise and, although Cochrane is a California Registered Geologist, he does not hold either of the other licenses. The Glomb report was not commissioned by or submitted by the applicant for their project and hence was not used by the County in its evaluation of the approved project. Nevertheless, the Gualala Municipal

Advisory Council (GMAC) voted unanimously to recommend denial of the approved project partly over concerns over conflicting geologic reports on the stability of the bluff where the approved house would be located.

These other geological reports were submitted to the Commission by the County as part of the local record. Jim Glomb conducted a “surficial geotechnical reconnaissance of the site and surrounding areas” in April 2003, and observed that “exposures in the face of the seacliff display areas of highly fractured rock, downslope creep, incipient slumping and rockfall. A small landslide measuring about 30 feet across and estimated to be 3 feet deep is exposed on the lower portion of the slope...notable off-site features include an actively failing massive landslide at the south end of Cooks beach...”(Glomb 2003).

Thomas Cochrane visited the site in 2002 and 2003, and examined the bluff edge for faulting, potential landslide material, and water seepage. He remarked that the region is highly fractured and faulted, but the subject lot bluff face is “remarkably stable.” The faults were considered to be old features with no apparent recent movement, and none appeared to directly affect the subject lot, and that no faults or sea caves would preclude the building from being close to the bluff edge on the subject lot (Cochrane 2002). In a March 1, 2003 addendum to the initial report, Cochrane stated: “Two small adjustment faults adjacent to your lot are noticeable on the bluff edge of the two lots just west of your lot. Some erosion is attacking these two highly fractured zones, but should not greatly affect your property” (Cochrane 2003).

BACE re-evaluated the site in 2005 in response to the local appeal to the Board of Supervisors by the appellant. BACE responded to the issues brought up in the Glomb 2003 report. Among several other comments, BACE stated “The rock is moderately to occasionally fractured, however, there is little to no evidence of downslope creep, incipient slumping, or rockfall (there is no debris or boulders at the bluff toe)...as shown in Field Photograph A, we could see no evidence of a ‘small landslide measuring about 30-feet across...’ (Olsborg 2005). In response, the appellant submitted a letter to the Commission on August 11, 2005, stating that BACE’s comments regarding the non-existence of the landslide is inaccurate because the photograph of the area he refers to is not the same area, and that BACE never addressed the “severe erosion” under the trees that is shown as sloping on his topographical map.

Based on the three reports, as well as the letters and addendums going back and forth debating the issues described above, there appeared to be a reasonable amount of uncertainty whether landslides, faulting, and erosion exist on or in the vicinity of the subject site. 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.

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.

Because none of the geologists involved with the approved project conducted a quantitative slope stability analysis, it was unknown where on the bluff top a 1.5 factor of safety is attained, nor what parts of the bluff top would have a 1.5 factor of safety at the end of 75 years of bluff retreat. On September 15, 2005, the Commission determined that the appeal of the project as approved by the county raised 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 at the appeal hearing, because the conflicting geologic reports conducted for the subject site and its environs raised a fair argument to consider that the proposed development may have stability problems.

For purposes of de novo review by the Commission and to address information deficiencies raised by the appeal, BACE submitted supplemental analyses of the project site, including a slope stability analysis, dated September 14, 2005, and supplemental slope stability analysis data, submitted February 15, 2006. Specifically, the September 14, 2005 letter responds to issues relating to landslides, severe erosion, faulting, slope stability analysis, aerial photograph analysis, and sea level rise. Mark Johnsson, the Commission’s staff geologist, has reviewed the geotechnical reports and supplements prepared for the proposed project, and met with the applicant’s geologist Erik Olsberg of BACE Geotechnical, Inc. at the site on October 4, 2005.

The September 14, 2005 BACE letter dismisses concerns raised by the appellant regarding landslides that may threaten the Piety parcel by indicating no landslides are specifically present on the subject parcel. The letter states “This landslide, if it exists, must then be on the Zollinger property. Therefore, it does not appear to be a threat to the Piety property. The landslide at the south end of Cook’s beach is on a different bluff approximately 600 feet from the Piety property. The Bergman landslide was evaluated by the undersigned for Mr. Bergman in May, 2000. Neither of these landslides are of concern to the Piety property.”

BACE addressed concerns raised by the appellant regarding “severe erosion” under the trees as shown on the BACE 2003 topographical map, noting this feature was not mentioned in previous BACE documents because it was considered to be a minor, localized feature of little or no significance. The September 14, 2005 BACE letter explains “the ‘severe erosion’ is on the upper portion of the near-vertical cut bank for the beach trail on the Piety property. The weak soils on the upper portion of the cut have eroded back, as expected, except where the masses of shallow tree roots are holding the surficial soils in place. Where this has happened, the weak soils beneath the root mass have eroded away, leaving an overhang of approximately 12 to 18 inches. The rocks in the lower portion of the trail cut have remained intact.”

The September 14, 2005 BACE letter recognizes faults described by Thomas E. Cochrane in a report and addendum dated January 4, 2002 and March 1, 2003, respectively, by referencing their visibility in photographs submitted as A and B, Plate 2 in the BACE letter dated July 21, 2005, and noting these two faults occur west of the Piety property, off-site.

The September 14, 2005 letter provides further methodology for the slope stability analysis that BACE conducted. However, the Commission noted in a letter submitted to Bobbie Piety on October 11, 2005 that the BACE September 14, 2005 geotechnical report made use of assigned soil strength parameters that were unsupported by actual data. The Commission specified the missing data components it required, and on February 15, 2006, BACE submitted the requested supplemental slope stability analysis data, including review of a Cross Section Exhibit of the Piety bluff, dated October 25, 2005 and prepared by Phelps & Associates Land Surveyors; re-evaluation of soil and rock parameters from BACE’s original analysis, using additional geotechnical data from other investigations along the Mendocino Coast with similar geologic conditions; and inclusion of boring logs and laboratory data. BACE concludes in the 2006 document “Our supplemental analyses have confirmed our initial findings. The stability analysis shows that the bluff is not threatened by imminent failure, although continuing erosion will occur. Therefore, our recommended bluff setback remains unchanged at 12½ feet.”

In the September 14, 2005 letter, BACE documented methods used for evaluating and determining bluff retreat. The letter describes use of enlargements from negatives of 1963, 1981, and 2000 aerial photographs, with use of field measurements between the centerline of Highway One and the westerly roof line of the Zollinger residence, with subsequent measurements of the two features on aerial photographs. There does not appear to be further evaluation of bluff retreat from aerial photographs beyond 2000. In terms of assessing bluff retreat rate, the letter provides the following methodology:

Due to the tree and brush cover on the upper bluff at the Piety property, no direct measurement to the bluff edge could be made. However, for comparative purposes, measurements were made

from the Highway One centerline to a point on the bluff edge at the headlands, as shown on Plates 3 through 5. These measurements indicate a retreat rate of approximately 3.5 inches per year for the headlands. However, the headlands are subject to constant wave action, whereas the Piety property is only infrequently subject to ocean waves. Therefore, we determined the retreat rate at the Piety property to be much less, at approximately one inch per year, to which we applied a safety factor⁹ of two, for a setback of 12½ feet.

BACE's methodology acknowledges an inability to access the upper bluff edge at the Piety parcel to accurately measure bluff retreat rates, due to tree and brush cover. The September 14, 2005 letter describes an extrapolation from the 3.5 inches per year observed for the headlands down to an anticipated retreat rate of one inch per year for the Piety parcel. While the method describes general inferences made that led to the extrapolation, including less exposure to direct wave action than the headlands, no direct measurements or mathematical formula is provided to justify the chosen corollary, suggesting that the BACE-determined bluff retreat rate of approximately one inch per year is arbitrary. The only direct retreat measurements provided for the site are the 3.5 inches per year observed at the western point of the headlands. Although the BACE report is likely correct in indicating that the Piety bluff is currently subjected to less direct wave attack in its somewhat protected location in the cove than that incurred by the bluff on the point of the headlands, no evidence has been submitted suggesting that the retreat rate at the Piety bluff is less than a third of the retreat rate at the point of the headlands, as inferred by BACE. The Commission also notes that sea level rise will exacerbate the frequency and intensity of wave energy received at shoreline sites, and will significantly increase direct wave action and the related retreat rate of the bluffs below the Piety parcel.

The September 14, 2005 BACE letter addresses the potential for increased erosion as sea level rises due to climate change by stating "Sea level rise appears probable, however, the projected rise (1.6 feet over the next century, or 1.2 feet in the next 75 years) will be a gradual process, with the ocean rising slowly over the years. Since the lower bluffs are comprised of relatively hard rock, and the property is at the back of a broad beach, a gradual rise in sea level should have little effect upon present erosion rates."

The Commission notes that the 2005 BACE report was written before important new projections of sea level rise have been published.

⁹ The term "factor of safety" as used above in terms of assessing bluff retreat rate is not the same as the minimum factor of safety of 1.5 against landsliding used in the quantitative slope stability analyses. Rather, when used above to assess bluff retreat rate, it references a multiplier applied to the predicted bluff retreat over the life of the development. This multiplier provides a buffer to account for uncertainty in the analyses, potential accelerating in the bluff retreat rate due to sea level rise, and space for remedial measures, should they become necessary.

Most climate models now project that the historic trends for sea level rise, or even a 50% increase over historic trends, will be at the very low end of possible future sea level rise by 2100. Satellite observations of global sea level have shown sea level changes since 1993 to be almost twice as large as the changes observed by tide gauge records over the past century. Recent observations from the polar regions show rapid loss of some large ice sheets and increases in the discharge of glacial melt. The 2007 Fourth Assessment Report by the Intergovernmental Panel on Climate Change (IPCC) notes that sea level could rise by 7 to 23 inches from 1990 to 2100, provided there is no accelerated loss of ice from Greenland and West Antarctica.¹⁰ Sea level rise could be even higher if there is a rapid loss of ice in these two key regions.

The IPCC's findings were based on a 2007 report prepared by Dr. Stefan Rahmstorf of the Potsdam Institute for Climate Impact Research (hereinafter "Rahmstorf Report"). This report has become the central reference point for much of recent sea level rise planning. The Rahmstorf Report projects that by 2100, sea level could be between 20 to 55 inches higher than 1990 levels. The Rahmstorf Report developed a quasi-empirical relationship between historic temperature and sea level change. Using the temperature changes projected for the various IPCC scenarios, and assuming that the historic relationship between temperature and sea level would continue into the future, he projected that by 2100 sea level could be between 20 inches and 55 inches (0.5 to 1.4 meters) higher than the 1990 levels (for a rate of 0.18 to 0.5 inches/year). These projections for future sea level rise anticipate that the increase in sea level from 1990 to 2050 will be from about 8 inches to 17 inches (for a rate of 0.13 to 0.28 inches/year); from 1990 to 2075, the increase in sea level would be from about 13 inches to 31 inches (for a rate of 0.15 to 0.36 inches/year) and that the most rapid change in sea level will occur toward the end of the 21st century. Most recent sea level rise projections show the same trend as the projections by Rahmstorf — that as the time period increases the rate of rise increases and that the second half of the 21st century can be expected to have a more rapid rise in sea level than the first half.

Several recent studies have projected future sea level to rise as much as 4.6 feet from 1990 to 2100. For example, in California, the Independent Science Board (ISB) for the Delta Vision Plan has used the Rahmstorf Report projections in recommending that for projects in the San Francisco Delta, a rise of 0.8 to 1.3 feet by 2050 and 1.7 to 4.6 feet by 2100 be used for planning purposes.¹¹ This report also recommends that major projects use the higher values to be conservative, and that some projects might even consider sea level projections beyond the year 2100

¹⁰ The IPCC is a scientific intergovernmental body established by the World Meteorological Organization (WMO) and the United Nations Environmental Programme to provide the decision-makers and others interested in climate change with an objective source of information about climate change; <http://www.ipcc.ch/ipccreports/assessments-reports.htm>

¹¹ Independent Science Board, 2007. Sea Level Rise and Delta Planning, Letter Report from Jeffrey Mount to Michael Healey, September 6, 2007, CALFED Bay-Delta Program: http://deltavision.ca.gov/BlueRibbonTaskForce/Sept2007/Handouts/Item_9.pdf

time period. The ISB also recommends “developing a system that can not only withstand a design sea level rise, but also minimizes damages and loss of life for low-probability events or unforeseen circumstances that exceed design standards. Finally the board recommends the specific incorporation of the potential for higher-than-expected sea level rise rates into long term infrastructure planning and design.”

The Rahmstorf Report was also used in the California Climate Action Team's Climate Change Scenarios for estimating the likely changes range for sea level rise by 2100.¹² Another recent draft report, prepared by Philip Williams and Associates and the Pacific Institute for the Ocean Protection Council, the California Energy Commission's Public Interest Energy Research (PIER) Climate Change Research Program, and other agencies also identifies impacts from rising sea level, especially as relate to areas vulnerable to future coastal erosion and flooding.¹³ This report used the Rahmstorf Report as the basis to examine the flooding consequences of both a 40-inch and a 55-inch centurial rise in sea level, and the erosion consequences of a 55-inch rise in sea level.

On November 14, 2008, Governor Schwarzenegger issued Executive Order S-13-08, directing various state agencies to undertake various studies and assessments toward developing strategies and promulgating development review guidelines for addressing the effects of sea level rise and other climate change impacts along the California coastline.¹⁴ Consistent with the executive order, at its June 4, 2009 meeting the governing board of the Coastal Conservancy adopted interim sea level rise rates: (a) 16 inches (40 cm) by 2050; and (b) 55 inches (140 cm) by 2100 for use in reviewing the vulnerability of projects it funds. These rates are based on the PEIR climate scenarios. These criteria will be utilized until the study being conducted by the National Academy of Sciences regarding sea level rise, requested by a consortium of state resource and coastal management agencies pursuant to the executive order, is completed.

Concurrently, in the Netherlands, where flooding and rising sea level have been national concerns for many years, the Dutch Cabinet-appointed Deltacommissie has recommended that all flood protection projects consider a regional sea level rise (including local subsidence) of 2.1 to 4.2 ft by 2100 and of 6.6 to 13 ft. by

¹² Cayan et al. 2009. Draft Paper: Climate Change Scenarios and Sea Level Estimates for the California 2008 Climate Change Scenarios Assessment; CEC-500-2009-014-D, 62 pages; <http://www.energy.ca.gov/2009publications/CEC-500-2009-014/CEC-500-2009-014-D.PDF>

¹³ Heberger, et al. 2009. Draft Paper: The Impacts of Sea Level Rise on the California Coast; California Climate Change Center, California Energy Commission; CEC-500-2009-024-D, March 2009, 99 pages; http://www.pacinst.org/reports/sea_level_rise/index.htm

¹⁴ Office of the Governor of the State of California, 2008. Executive Order S-13-08; <http://gov.ca.gov/index.php?/print-version/executive-order/11036/>

2200.¹⁵ Again, the Rahmstorf Report was used by the Delta Committee as a basis in developing their findings and recommendations.

Based on these projections, a two to three foot rise in level rise over 100 years could be assumed to represent the minimum rate of change for design purposes. However, projections of sea level rise are in flux and sea level rise could actually rise many times that amount.

As a result of the more recent sea level rise data not considered in the BACE report, which suggests that the bluff at the applicants' parcel will be subject to much greater wave attack than it is currently; and, due to the apparently arbitrary method used to extrapolate bluff retreat rates from the headlands site to the Piety parcel, the Commission rejects the extrapolation and finds using the bluff retreat rate that was actually calculated for the bluffs near the Piety site of approximately 3.5 inches per year for the headlands to be more appropriate for the Piety parcel. Therefore, the Commission finds the application of a one inch retreat rate with a "safety factor of two" is inadequate, and includes Special Condition No. 5A(1) to require the final construction plans for the development adhere to a bluff setback of 21.9 feet (3.5 inches per year multiplied by 75 years). The condition requires that development be constructed consistent with the final construction plans. With staff's modification to the proposed setback, the Commission finds the minimum setbacks between the bluff edges and the new development proposed by the applicants are sufficient to protect the new development from bluff retreat for a 75-year design life consistent with LUP Policy 3.4-7 and CZC Section 20.500.020(B).

The geotechnical report also sets forth certain construction-related recommendations regarding site grading, foundation support, seismic design, concrete slabs-on-grade, utility trenches, erosion control, and site drainage. The recommendations are found in Section 6 of the geotechnical report dated August 29, 2003, which is reproduced and included as part of Exhibit No. 21 of the Commission staff report. Staff concurs with the analyses and recommendations.

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.

¹⁵ Delta Committee of the Kingdom of the Netherlands, 2008. Working Together with Water: A Living Land Builds for its Future, Findings of the Deltacommissie, 2nd Ed. November 2008; <http://www.deltacommissie.com/en/advies>

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. 2 that the applicant adhere to all recommended specifications to minimize potential geologic hazards (excluding the recommendations on geologic setback as the Commission believes a larger 21.9-foot setback is warranted for the reasons discussed above), some risk of geologic hazard still remains. This risk is reflected in the August 29, 2003 BACE geotechnical report, which references various “limitations” of the analysis. The BACE geotechnical report states that the geotechnical investigation and review of the proposed development was performed in accordance with the usual and current standards of the profession, as they relate to this and similar localities. The report further states, “...*No other warranty, expressed or implied, is provided as to the conclusions and professional advice presented in this report...*” 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. 3 to ensure that no future shoreline protective device will be constructed to protect the proposed new development.

Special Condition No. 3 prohibits the construction of shoreline protective devices on the parcel to protect the proposed single-family residence, decking, or garage approved by Permit No. A-1-MEN-05-037 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-05-037 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. 3 requires the landowner to assume the risks of extraordinary erosion and geologic hazards of the property and waive any claim of liability on the part of the Commission. Given that the 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. 1 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. 3 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 existing residence on the subject property is within 50 feet of a coastal bluff. Therefore, pursuant to Section 13250(b)(1) of the Commission's regulations, Special Condition No. 9 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. 1 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. 1 will also help assure that future owners are aware of these CDP requirements applicable to all future development.

The Commission thus finds that the proposed development, as conditioned, is consistent with the policies of the 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.

8. **Visual Resources**

Summary of Applicable LCP Provisions:

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

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

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

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

Project Consistency with Applicable LCP Provisions:

The visual resources protection policies of the LCP require, among other things, that new development be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, and to be visually compatible with the character of surrounding areas. The subject property is not located in a designated “highly scenic area” (Exhibit No. 2). However, the development in its proposed location is visible from the publicly-accessible Cook’s Beach, which is located below the bluff and adjacent to the subject parcel. The development in its proposed location is also visible from the

Cook's Beach overlook, a dedicated public viewing area and trail located south of the subject parcel and managed by the Redwood Coast Land Conservancy.

The project will not adversely affect coastal views, as a view of the ocean is not available from Pirate's Drive through the subject parcel. Although the house will be visible from Cook's Beach and the Cook's Beach overlook, other homes within the Smuggler's Cove subdivision are also visible from these vantage points. For example, four existing homes are visible from Cook's Beach, including one light-colored two-story house prominently sited on the bluff (Exhibit 5). In addition, six Bishop pines located near the bluff edge provide visual screening to some portions of the proposed development, as can be seen in the photo simulation provided by the applicant (Exhibit 5).

The proposed single family residence will have a maximum average height of 18'6" above natural grade, well within the 28-foot height limit established for the Rural Residential zoning district and no taller than the neighboring houses. In addition, by reducing the size of the proposed development for a house and garage from 2,994 square feet total to 1,636 square feet total, Special Condition 5A(1) will ensure the proposed development is consistent with the size and bulk of other surrounding residential development and will not be out of scale with its surroundings.

The exterior materials and finishes of the new residence as proposed include copper roof panels, stucco siding in a dark brown color (True Value 1T-45, Color 3221 "Dutch Chocolate (D)") on the south and southeast walls of the house that are visible from Cook's Beach, and a lighter, taupe-like color (True Value 1T-45, Color 3223 "Cityscape (P)") on the north and northwest walls of the house. Proposed trim colors on the house consist of a dark green (True Value 5T-26, Color 3586 "Camouflage (N)") for the south and southeast sides visible from Cook's Beach, and a lighter, pastel green color (True Value 5T-26, Color 3588 "Ceska (P)") for north and northeast trim. These proposed exterior colors are earth-tones that will blend well with the surrounding natural landscape.

The Commission finds that the dark colors of the roof, siding and trim that face the public vantage points at Cook's Beach and the Cook's Beach Overlook will help blend the residence into its surroundings as seen from these vantage points rather than cause the residence to stand out. However, the Commission finds that if the applicant or future owner(s) of the property choose to change the materials or colors of the residence to brighter, non-earth-tone colors or materials, the development may no longer be visually compatible with the character of the surrounding area and may become increasingly visible from public vantage points. To ensure that the exterior building materials and colors used in the construction of the development are compatible with natural-appearing earth-tone colors that blend with their surroundings as proposed, the Commission attaches Special Condition No. 10A, which requires that all exterior siding and roofing be composed of the colors proposed in the application or darker earth-tone colors only. The condition requires that the current owner or any future owner not

repaint or stain the house or other approved structures with products that will lighten the color of the house or other approved structures without a permit amendment. In addition, all exterior materials, including roofs and windows, are required to be non-reflective to minimize glare. Additionally, Special Condition No. 10B requires that exterior lights be shielded and positioned in a manner that will not allow glare beyond the limits of the parcel. These requirements will help ensure that the proposed residence in this location will be visually compatible with the character of the surrounding area.

Finally, Special Condition 11 requires retention of a stand of approximately six trees located on the southeast side of the residence (shown on the site plan in Exhibit 3) throughout the life of the project, because these trees help screen the view from Cook's Beach of the proposed development. The condition requires diseased or damaged trees to be replaced in-kind with genetic stock native to the Mendocino coastline.

Finally, the proposed development minimizes grading and the alteration of natural landforms, as required by LUP Policy 3.5-1. According to the local record, the applicant does not anticipate grading and alteration of the coastal terrace upon which the development will be located to exceed 50 cubic yards. This relatively small grading amount is primarily for excavating foundation footings plus a small amount of grading to prepare a flat even surface for the driveway. 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, as the development will (1) not adversely affect coastal views from public vantage points, (2) be visually compatible with the character of surrounding areas, (3) minimize alteration of natural landforms, and (4) ensure that exterior lighting is minimized and installed so as not to shine or glare beyond the limits of the parcel.

9. 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. 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.

According to BACE, no surface water or evidence of ground water seepage was observed at the site during the investigation. Additionally, no free water was encountered in the test borings. The report specified erosion control/drainage measures that include directing drainage, including roof and site drainage, to the inland side of the house and conveying drain water to a ditch along side Pirates Drive. The report also noted the option of directing some runoff into the nearby ravine (Glennen Gulch). However, following inspection of Glennen Gulch from the subject parcel during site visits by Commission staff, the Commission finds that directing runoff from the proposed development to Glennen Gulch would likely facilitate erosion of the steep bluff face in that portion of the property, and may encroach onto adjacent property ownership prior to reaching the gulch. Therefore, pursuant to Special Condition 5(A)(2)(a)(v), runoff from the driveway and rooftops shall be collected and conveyed to the northeastern side of the driveway and structures, and discharged in a non-erosive manner via a pipe placed alongside the driveway that drains to the roadside ditch along Pirates Drive. In addition, all disturbed soil areas should be reseeded and covered with native vegetation to control erosion, pursuant to Special Condition 5(A)(2)(a)(iii) and that conforms with the planting limitations of Special Condition Nos. 8(M) and 8(N).

As discussed above, the subject parcel is located on a coastal bluff top and is planned and zoned for rural residential development. Runoff from Smuggler's Cove Subdivision parcels flows southerly and westerly into drainage ditching along the access easement and county road (Pirates Drive) then enters into a catch basin that appears to eventually discharge onto the beach between Bourns Landing and Cook's Beach below. Runoff originating from the development site that is allowed to drain off the site, whether ultimately to the beach via the Pirates Drive drainage ditch or via Glennen Gulch located below and southeast of the parcel, would 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. 5A(2) a requirement that the applicants minimize erosion and sedimentation impacts from the proposed construction of the residence. Special Condition No. 5A(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) hay 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; and (5) Runoff from the driveway and rooftops shall be collected and conveyed to the northeastern side of the driveway and structures, and discharged in a non-erosive manner via a pipe placed alongside the driveway that drains to the roadside ditch along Pirates Drive, where it may infiltrate into the ground and undergo bio-filtration prior to entry into any drainage course or waterway.

In addition, best management practices outlined in Special Condition Nos. 7D, 7E, 7G, and 7I require that during construction: (1) 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) on-site vegetation be maintained to the maximum extent possible during construction; (4) 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; and (5) on-site stockpiles of construction debris shall be covered and contained at all times to prevent polluted water runoff. Consistent with CZC Section 20.492.025(E), Special Condition No. 5A(1)(d) requires that the applicants surface the proposed driveway with gravel or other impervious material to facilitate infiltration into the ground of greater amounts of runoff from the driveway.

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 vegetated areas and the driveway will be paved with pervious material to facilitate infiltration of runoff and minimize erosion and sedimentation from stormwater runoff.

10. 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 December 7, 2003 and prepared by Registered Professional Archaeologist Thad Van Bueren, the coastal area around the project site was part of the traditional territory of the Central Pomo indigenous peoples. Their territory extended from the Russian River Valley between Ukiah and Cloverdale to the Pacific Ocean, encompassing coastal lands from the Navarro River south to Gualala.

Seven prior archaeological studies have been conducted within a one mile radius of the subject parcel, but these sites covered less than 10 percent of the surrounding terrain, which, according to Mr. Van Bueren, indicates little is known about the archaeological sensitivity of the immediate vicinity. A prehistoric shell mound thought to be the ethnographic Pomo village of Ka'mli (CA-MEN-2234) is situated less than 0.2 mile from the subject parcel. Mr. Van Bueren's map research of the subject parcel and vicinity indicates that Bowen's (Bourn's) Landing, a lumber milling and shipping location, was located immediately south of the project area and was abandoned by 1908. There is no evidence to suggest prior historic occupation or features at the subject parcel, resulting in the conclusion by Mr. Van Bueren that the project area has a high archaeological sensitivity for prehistoric resources and low sensitivity for historical resources.

No evidence of archaeological resources was observed during Mr. Van Bueren's intensive archaeological field survey of the subject parcel, during which transects were spaced no farther than 5 meters apart and a shovel was used to expose soil every 2 meters or closer. Mr. Van Bueren notes that findings are based on surface

inspection and modest subsurface probing, and recommends that in the unlikely event archaeological remains come to light during construction activities, that all work should be halted until a professional archaeologist can examine the finds.

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.

11. Public Access

Summary of Applicable LCP Provisions:

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

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

Project Consistency with Applicable LCP Provisions:

Although the proposed development is located between the first public road and the sea, the project will not adversely affect public access. There are no trails that

provide shoreline access for the public within the vicinity of the project that will be affected by the proposed project. An existing private easement that provides the subdivision residents access to Cooks Beach extends from Pirates Drive along the southwest side of the property, then down the bluff face along the south-southwest side of the property. However, this private access easement will not be affected by the development, and will continue to allow for whatever access use it currently provides. Furthermore, the proposed project will not create any new demand for public access or otherwise create any additional burdens on public access.

The Commission notes that a recently-dedicated trail to Cook's Beach (Bonham Trail) and public access overlook on the bluff above Cook's Beach has been created for the public via an easement on another nearby parcel (APN 144-170-03), located few hundred yards to the south off of County Road No. 526. The access dedications were provided as part of a boundary line adjustment project approved by the Commission in 2001 under CDP No. A-1-MEN-00-051(Bonham). The access trails and overlook have been improved and recently opened by the Redwood Coast Land Conservancy.

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.

12. California Environmental Quality Act

Mendocino County is the lead agency for the purposes of CEQA review. The County determined that the proposed project could be adequately mitigated through the conditions of approval so that no significant adverse environmental impacts would result from the proposed project, and therefore adopted a Negative Declaration for the proposed project.

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 Maps
5. Visual Simulations of Proposed Development
6. Coastal Records Project Aerial Image of Smuggler's Cove Subdivision
7. Septic Site Plan
8. Conditionally-approved Building Envelope
9. Area Subject to Open Space Restrictions Pursuant to Special Condition No. 6
10. Notice of Final Local Action & County Staff Report
11. Appeal
12. Correspondence following Substantial Issue Hearing
13. August 2003 Biological Assessment
14. June 2004 Analysis of Coastal Bluff Morning-Glory Habitat
15. September 2004 Botanical Mitigation Plan
16. April 2005 Botanical Management Plan
17. U.S. Fish & Wildlife Service Comment Letter on Butterfly Habitat
18. November 8, 2005 Initial Butterfly Habitat Letter
19. November 19, 2005 Behrens Silverspot Butterfly Habitat Assessment
20. DFG comments on proposed botanical mitigation measures
21. August 29, 2003 BACE geotechnical report
22. Excerpts from Geotechnical Reports
23. Smuggler's Cove Home Size Comparisons
24. Smuggler's Cove Subdivision CC&Rs
25. Botanic Garden Seed Storage Fee Schedule
26. Botanic Garden Conditions and Collection and Documentation Guidelines

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.