

**CALIFORNIA COASTAL COMMISSION**

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
VOICE (415) 904-5200  
FAX (415) 904-5400  
TDD (415) 597-5885



# Th11b

Staff: L.Kellner-SF  
Staff Report: 11/01/2012  
Hearing Date: 11/15/2012

## STAFF REPORT: REGULAR CALENDAR

**Application Number:** 2-06-017

**Applicants:** Daniel Altman and Avi Atid

**Project Location:** At 20105 and 20125 Highway 1 along and over Tomales Bay in the unincorporated Marshall area of Marin County (APNs 106-020-38 and 106-020-39).

**Project Description:** Reconstruction of the historic Marshall Tavern into an approximately 5,880 square-foot, 5-unit bed-and-breakfast (with an additional manager's unit) with a reconfigured 8-space gravel parking lot. The proposed project also includes expanded pilings and a reconstructed retaining wall, as well as related site work.

**Staff Recommendation:** Approval with conditions.

---

## SUMMARY OF STAFF RECOMMENDATION

Daniel Altman and Avi Atid (the Applicants) propose to reconstruct the historic Marshall Tavern building, which is located on the eastern shore of Tomales Bay in the town of Marshall in Marin County at 20105 and 20125 Highway 1 (APN 106-020-38 and 106-020-39). The proposed project includes converting the existing structure into an approximately 5,880 square-foot, 5-unit bed-and-breakfast (with an additional manager's unit, for a total of 6 units) and reconstructing an 8-space gravel parking lot on the south side of the tavern building. The proposed development includes: 1) partial demolition, replacement, repair and reinforcement of the existing structure; 2) repair and expansion of existing concrete pilings and one retaining wall; 3) installation of additional windows on the west (bay) side of the structure; 4) installation of skylights on the west-facing, one-story portion of the structure; 5) interior reconstruction; 6) construction of new exterior decks on the lower and upper floors of the west (bay) side of the structure; 7) installation of roof-mounted solar panels on the south-facing portions of the roof; 8) demolition of an existing, deteriorated accessory building; and 9) clean-up and maintenance of the site.

The Marshall Tavern was originally constructed in the 19th century and extends over Tomales Bay itself, supported on raised pilings. It is located in the unincorporated town of Marshall, along a stretch of coast where Highway 1 is immediately adjacent to the shoreline and where numerous residential and commercial structures have also been constructed out over the bay on raised pilings. The Tavern has been vacant since 1990 and was condemned by the Marin County in 1992. The proposed project would be a historically accurate reconstruction designed to restore the building to its previous appearance within which a small bed-and-breakfast would be established.

In general, the proposed project represents a high Coastal Act priority visitor-serving use that should provide new visitor opportunities along a particularly picturesque part of the Marin County shoreline in Tomales Bay where such facilities can enhance the public's ability to enjoy the area. As a site that is located out and over the water, it provides a particularly unique setting for such a small-scale overnight facility. At the same time, however, these same unique site attributes associated with the project raise numerous Coastal Act issues. In particular, the expanded pilings represent a form of wetland fill not allowed for this type of use, and they result in marine resource impacts; the site is land that is encumbered by a public trust easement and public recreational access to the site is not protected nor maximized; the project will modify and increase massing in a significant public view out toward and over Tomales Bay; and the site is subject to shoreline flooding and other hazards, including requiring shoreline altering retaining walls and piers to provide protection from such hazards. As a result, the project cannot be found consistent with the Coastal Act, and in particular Coastal Act Sections 30233 and 30253, and 30211, 30212, and 30213. However, consistent with the mandate of Coastal Act section 30010, and since any economic use of the subject property would necessitate fill of Tomales Bay, staff recommends approval of the bed-and-breakfast in order to provide for a reasonable use of the property that will avoid an unconstitutional taking of private property for public use.

At the same time, in order to comply with the otherwise applicable requirements of the Chapter 3 policies of the Coastal Act, staff recommends special conditions necessary to mitigate all significant adverse environmental effects in and adjacent to Tomales Bay to the greatest extent feasible. Such conditions are necessary to find the proposed development consistent with the otherwise applicable policies of the Coastal Act, including the public access and recreation policies, and recognize that although the applicant owns title to the subject tidelands, such tidelands are protected by a public trust easement.

Thus the modified approvable project requires public access be provided along the portion of the property bordering Highway 1, a public recreational pier to be constructed over existing pilings and integrated into the project, for other pilings to be removed from the Bay, for retaining walls and all other work to be constructed in way so as to minimize marine resource and shoreline impacts, for visual impediments to be removed, and for other related mitigations to protect coastal resources.

As conditioned, staff believes that the project is a visitor-serving and public recreational amenity that will maximize public access and water-oriented recreational opportunities in a unique setting, and appropriately respond to the unique circumstances of this case. Thus, staff recommends that the Commission approve the coastal development permit subject to the recommended conditions. The motion is found on page 4 below.

## TABLE OF CONTENTS

<b>I. MOTION AND RESOLUTION</b>	4
<b>II. STANDARD CONDITIONS</b>	5
<b>III. SPECIAL CONDITIONS</b>	5
<b>IV. FINDINGS AND DECLARATIONS</b>	16
A. PROJECT DESCRIPTION	17
B. PROJECT LOCATION	17
C. DEVELOPMENT HISTORY	18
D. CDP REQUIREMENT	18
E. FILL OF COASTAL WATERS	19
F. HAZARDS	21
G. PUBLIC ACCESS AND RECREATION	23
H. COMMISSION DETERMINATION	26
I. PUBLIC ACCESS AND RECREATION	34
J. HAZARDS	38
K. VISUAL RESOURCES AND COMMUNITY CHARACTER	42
L. MARINE RESOURCES	44
M. OTHER AGENCY APPROVALS	46
N. OTHER	46
O. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)	46

### APPENDICES

[Appendix A – Substantive File Documents](#)

### EXHIBITS

Exhibit 1 – Project Location

Exhibit 2 – Site Photos

Exhibit 3 – Proposed Project Plans

Exhibit 4 – Required Public Access Improvements

## I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** coastal development permit application number 2-06-017 subject to the conditions set forth in the staff recommendation, and I recommend a yes vote.*

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

Resolution:

*The Commission hereby approves coastal development permit number 2-6-017 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

## III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Revised Project Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit two full-size sets of Revised Project Plans to the Executive Director for review and approval. The Revised Project Plans shall be in substantial conformance with the plans submitted to the Coastal Commission (dated received in the Commission's North Central Coast District Office on August 10, 2010 and titled Marshall Tavern House: Proposed Remodeling) except that they shall be revised and supplemented to comply with the following requirements:
  - a. **Historical Standards.** All development shall be consistent with the Secretary of Interior Standards for rehabilitation and reconstruction, and shall clearly specify all measures to be taken to achieve such standards, including the use of salvaged materials.
  - b. **Public Recreational Pier.** A public recreational pier shall be provided in the area of the remaining Marshall Hotel/shed (to be removed) pilings (and using the pilings for support) in a way that seamlessly integrates the pier into the project and the shoreline, and that best facilitates public recreational access, including both viewing access and access to the water through gangway and floating dock, or equivalent (e.g., for small scale boat launch,

etc.). See Exhibit 4. The pier decking and above decking elements shall be constructed out of wood that is sensitive to the natural setting and that holds up in a marine environment (e.g., Ipe), or wood-like product if approved by the Executive Director.

- c. **Structural Stability.** Supplemental plans shall be provided that clearly identify all measures to be taken to ensure that the foundation pilings necessary for the approved bed-and-breakfast structure and the public recreational pier are adequate to provide necessary support and structural stability in light of coastal hazards, including flooding and tsunami runup risks, and these plans shall include, at a minimum, evidence, in the form of a geotechnical report prepared by a California-licensed Engineering Geologist and/or Geotechnical Engineer, that pilings shall be cast or driven into competent bedrock to a sufficient depth that they will not be subject to settlement due to liquefaction during a major earthquake. The design-basis earthquake shall be a major earthquake on the San Andreas Fault consistent with the Uniform California Earthquake Rupture Forecast, Version 2 (or later, if available at the time of submittal), with ground shaking parameters consistent with the California Building Code. Liquefaction potential shall be evaluated consistent with California Geological Survey Special Publication 117.
- d. **Public Lateral Access.** Continuous lateral public access a minimum of five feet in width shall be provided extending from southwest to northeast between the adjacent properties and along Highway 1 starting from Highway 1/adjacent property to the Tomales Bay side of the parking area, then along the shoreline edge of the parking area, then back to Highway 1 (and the area between the Highway and the approved bed-and-breakfast structure) at the approved bed-and-breakfast structure, then along the area between the Highway and the approved bed-and-breakfast structure, and then to the edge of the adjacent northeast property, including the area between the public recreational pier (described above) and the adjacent property and Highway 1. See Exhibit 4. The public lateral access area shall provide a clear path of travel and shall be clearly demarked as such.
- e. **Retaining Wall Concrete Surfacing.** All concrete surfaces shall be faced with a sculpted concrete surface that mimics natural shoreline landforms in the vicinity (in terms of integral mottled color, texture, and undulation to the maximum extent feasible), and that seamlessly blends with adjacent shoreline landforms. Any protruding concrete elements (e.g., corners, edges, etc.) shall be contoured in a non-linear manner designed to evoke natural shoreline undulations. The color, texture, and undulations of all concrete surfaces shall be maintained throughout the life of the structure. PRIOR TO COMMENCEMENT OF CONCRETE SURFACING, the Permittee shall submit to the Executive Director for review and approval the qualifications of the contractor who will perform the concrete work, including photos of similar completed projects. Concrete work shall not commence until the Executive Director has approved of the finish concrete contractor.
- f. **Drainage.** All project area drainage shall be filtered and treated (by CDS units equipped with media that can treat expected pollutants, or equivalent) prior to discharge to Tomales Bay. All drainage and related elements within the sculpted concrete and any related energy dissipation measures shall be camouflaged (e.g., randomly spaced, hidden with

overhanging or otherwise protruding sculpted concrete, etc.) so as to be hidden from view and/or inconspicuous as seen from the area inland of the retaining walls and/or from the public recreational pier.

- g. **Railings.** All project area railings: shall be minimized to the degree feasible (including using landscape areas to avoid the need for railings where feasible); shall be sited and designed to maximize through views (e.g., limiting the width of posts and rails, use of cable rails, etc.); shall be made out of materials appropriate to the historic and shoreline context that blend with the natural materials of the approved project (e.g., wood); and shall utilize the same design theme throughout the project area.
- h. **Landscaping.** All non-native invasive plants (e.g., iceplant) currently present in the shoreline area shall be removed and no such species shall be allowed to persist in these areas; all new plants shall be native (to the Marshall area) plant species that are tolerant of salt air and salt spray and appropriate for enhancing Tomales Bay shoreline resource values; all new plants at the edge of the retaining walls shall be species capable of trailing vegetation that can extend down over the top of the retaining walls; and all new plants shall be maintained in good growing conditions, and any such plants shall be maintained at a height that ensures that views along the shoreline are not blocked or otherwise adversely impacted. Regular monitoring and provisions for remedial action (such as replanting as necessary) shall be provided for to ensure landscaping success.
- i. **Signs.** Sign details showing the location, materials, design, and text of all project signs shall be provided. The signs shall be sited and designed so as to provide clear information without impacting public views and site character. Signs shall be made out of materials appropriate to the historic and shoreline context.
- j. **Piling Removal.** All pilings that are not used for the approved bed-and-breakfast structure or for the public recreational pier shall be removed.
- k. **Fence Removal.** The fence fronting the site along Highway 1 shall be removed to open up through views.
- l. **Debris Removal.** All debris and/or abandoned materials/development that are not part of the approved project and that are located along the shoreline and/or the intertidal area shall be removed.
- m. **Property Lines.** All property lines, including as adjusted by Special Condition 6, for the subject property and all adjacent properties, including the Highway 1 right-of-way, shall be clearly and accurately identified.
- n. **Bat Survey.** A protocol-level bat survey shall be conducted prior to construction to determine use of the site by bats and to recommend measures appropriate to protect bats.
- o. **Solar Panels.** All solar panels shall be sited and designed to integrate seamlessly into the roof in such a way as to appear a coherent part of the roof structure and sheathing (e.g., materials and shapes that mimic roof materials and roof surfaces; elevation above roof surface limited as much as possible; etc.) and to minimize glare as much as possible

(including through the use of anti-glare coatings, etc.). Solar panels that cannot so integrate, including in light of the historic rehabilitation and reconstruction requirements, are prohibited.

- p. **Utilities Underground.** All utilities shall be installed underground.

All requirements above and all requirements of the approved Revised Project Plans shall be enforceable components of this coastal development permit. The Permittee shall undertake development in accordance with the approved Revised Project Plans.

2. **Construction Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit two copies of a Construction Plan to the Executive Director for review and approval. The Construction Plan shall, at a minimum, include the following:

- a. **Construction Areas.** The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall be minimized to the maximum extent feasible in order to have the least impact on public access and Tomales Bay resources, including by using inland areas for staging and storing construction equipment and materials as feasible. Construction (including but not limited to construction activities, and materials and/or equipment storage) is prohibited outside of the defined construction, staging, and storage areas.
- b. **Construction Methods and Timing.** The plan shall specify the construction methods to be used, including all methods to be used to keep the construction areas separated from Tomales Bay and public recreational use areas (including using unobtrusive fencing (or equivalent measures) to delineate construction areas). All work shall take place during daylight hours and lighting Tomales Bay is prohibited.
- c. **Property Owner Consent.** The plan shall be submitted with evidence indicating that the owners of any properties on which construction activities are to take place, including properties to be crossed in accessing the site, consent to such use of their properties.
- d. **General BMPs.** The plan shall identify the type and location of all erosion control/water quality best management practices that will be implemented during construction to protect coastal water quality, including the following: (a) silt fences, straw wattles, or equivalent apparatus, shall be installed at the perimeter of the construction site to prevent construction-related runoff and/or sediment from discharging to Tomales Bay or to areas that would eventually transport such discharge to the Bay; (b) equipment washing, refueling, and/or servicing shall take place at least 50 feet from the Tomales Bay; (c) all construction equipment shall be inspected and maintained at an off-site location to prevent leaks and spills of hazardous materials at the project site; (d) the construction site shall maintain good construction housekeeping controls and procedures (e.g., clean up all leaks, drips, and other spills immediately; keep materials covered and out of the rain (including covering exposed piles of soil and wastes); dispose of all wastes properly, place trash receptacles on site for that purpose, and cover open trash receptacles during

wet weather; remove all construction debris from the site); and (e) all erosion and sediment controls shall be in place prior to the commencement of construction as well as at the end of each work day.

- e. **Material Containment BMPs.** Particular care shall be exercised to prevent foreign materials (e.g., construction scraps, wood preservatives, other chemicals, etc.) from entering Tomales Bay. Where wood preservatives must be applied to cut-wood surfaces, the materials, whenever feasible, shall be treated at an onshore location to preclude the possibility of spills into the Bay. A containment boom shall be placed around all active portions of the construction site where wood scraps or other floatable debris could enter the Bay. Also, for any work on or beneath fixed decks, heavy-duty mesh containment netting shall be maintained below all work areas where construction discards or other materials could fall into the Bay. The containment boom and net shall be cleared daily or as often as necessary to prevent accumulation of debris. Contractors shall insure that work crews are carefully briefed on the importance of observing the appropriate precautions and reporting any accidental spills. Construction contracts shall contain appropriate penalty provisions, sufficient to offset the cost of retrieving or cleaning up improperly contained foreign materials.
- f. **Concrete Work BMPs.** If pile installation or any other portion of the proposed project requires the pouring of concrete in, adjacent to, or over the water, one of the following methods shall be employed to prevent uncured concrete from entering Tomales Bay:
  - (1) Complete dewatering of the pour site, within a caisson or other barrier. The site shall remain dewatered until the concrete is sufficiently cured to prevent any significant increase in the pH of adjacent waters; or
  - (2) The tremie method, which involves placement of the form in water, inserting a plastic pipe down to the bottom of the form and pumping concrete into the form so that the water is displaced towards the top of the form. If this method is selected, the displaced waters shall be pumped off and collected in a holding tank. The collected waters shall then be tested for pH, in accordance with California Department of Fish and Game regulations. If the pH is greater than 8.5, the water will be neutralized with sulfuric acid until the pH is between 8.5 and 6.5. This pH-balanced water can then be returned to the Bay. However, any solids that settle out during the pH balancing process shall not be discharged to the marine environment.
- g. **Construction Site Documents.** The plan shall provide that copies of the signed coastal development permit and the approved Construction Plan be maintained in a conspicuous location at the construction job site at all times, and that such copies are available for public review on request. All persons involved with the construction shall be briefed on the content and meaning of the coastal development permit and the approved Construction Plan, and the public review requirements applicable to them, prior to commencement of construction.
- h. **Construction Coordinator.** The plan shall provide that a construction coordinator be designated to be contacted during construction should questions arise regarding the

construction (in case of both regular inquiries and emergencies), and that their contact information (i.e., address, phone numbers, etc.) including, at a minimum, a telephone number that will be made available 24 hours a day for the duration of construction, is conspicuously posted at the job site where such contact information is readily visible from public viewing areas, along with indication that the construction coordinator should be contacted in the case of questions regarding the construction (in case of both regular inquiries and emergencies). The construction coordinator shall record the name, phone number, and nature of all complaints received regarding the construction, and shall investigate complaints and take remedial action, if necessary, within 24 hours of receipt of the complaint or inquiry.

- i. **Restoration.** All Tomales Bay and/or shoreline areas impacted by construction activities shall be restored to their pre-construction condition or better within three days of completion of construction.
- j. **Notification.** The Permittee shall notify planning staff of the Coastal Commission's North Central Coast District Office at least 3 working days in advance of commencement of construction, and immediately upon completion of construction.

Minor adjustments to the above construction requirements may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources. All requirements above and all requirements of the approved Construction Plan shall be enforceable components of this coastal development permit. The Permittee shall undertake construction in accordance with the approved Construction Plan.

3. **Public Access Management Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit two copies of a public access management plan (Public Access Plan) to the Executive Director for review and approval. The Public Access Plan shall clearly describe the manner in which general public access associated with the approved project is to be provided and managed, with the objective of maximizing public access to the public access areas associated with the approved project (including all lateral accessways and the public recreational pier) and all related areas and public access amenities (i.e., bench seating, etc.) described in this special condition. The Public Access Plan shall be substantially in conformance with the Revised Project Plans (see Special Condition 1), and shall at a minimum include the following:

- a. **Clear Depiction of Public Access Areas and Amenities.** All public access areas and amenities, including all of the areas and amenities described above, shall be clearly identified as such on the Public Access Plan (including with hatching and closed polygons so that it is clear what areas are available for public access use).
- b. **Public Recreational Pier.** All parameters for use of the public recreational pier shall be clearly identified. The public recreational pier shall be publicly available for general public pedestrian access, transient boat use (and not as a long-term residential or live-aboard docking area), small boat launching, fishing, and general viewing use, and shall be clearly integrated into the overall development (including integrating boat use with

overall operations of the bed-and-breakfast ). At least two benches as well as trash and recycling receptacles, bicycle stands, and related access amenities shall be provided. Small-scale commercial activities (e.g., kayak rental, coffee kiosk, etc.) are allowable subject to Executive Director review and approval where they provide reasonable and low-cost public visitor-serving goods and services, and where they are sited and designed to avoid impacting public access and public views. All access amenities, commercial visitor-serving operations, and all necessary pier railings and related development shall be designed to maximize through views and minimize visual intrusion to the maximum extent possible; shall include materials appropriate to the historic and shoreline context that blend with the natural materials of the approved project (e.g., wood); and shall utilize the same design theme throughout the project area.

- c. **Public Lateral Access.** All parameters for use of the public lateral access area shall be clearly identified. The public lateral access area shall be publicly available for general public pedestrian access and general viewing use, and shall be clearly integrated into the overall development.
- d. **Public Access Signs/Materials.** The plan shall identify all signs and any other project elements that will be used to facilitate, manage, and provide public access to the approved project, including identification of all public education/interpretation features that will be provided on the site (educational displays, interpretive signage, etc.). Sign details showing the location, materials, design, and text of all public access signs shall be provided. The signs shall be designed so as to provide clear information without impacting public views and site character. At a minimum, public access directional signs shall be placed at both ends of the lateral access area across the site, at the entrance to the public recreational pier, and at the front of the approved bed-and-breakfast structure; all where their informative utility is maximized. The public recreational pier shall be conspicuously signed and available for public use. At least one public access interpretive sign shall be provided in the public recreational pier area. Public access signage shall include the California Coastal Trail and California Coastal Commission emblems and recognition of the Coastal Commission's role in providing public access.
- e. **No Public Access Disruption.** Development and uses within the public access areas that disrupt and/or degrade public access (including areas set aside for private uses, barriers to public access (furniture, planters, temporary structures, private use signs, fences, barriers, ropes, etc.) shall be prohibited. The public use areas shall be maintained consistent with the approved Public Access Plan and in a manner that maximizes public use and enjoyment.
- f. **Public Access Use Hours.** All public access areas and amenities shall be available to the general public free of charge during at least daylight hours (i.e., one hour before sunrise to one hour after sunset), and during at least all non-daylight hours when the commercial components of the approved project are open.
- g. **Public Access Required Prior to Occupancy.** The public access components of the project shall be constructed and available for public use prior to occupancy of the approved bed-and-breakfast and all related development.

- h. **Public Access Areas and Amenities Maintained.** The public access components of the project shall be maintained in their approved state in perpetuity.

All requirements above and all requirements of the approved Public Access Plan shall be enforceable components of this coastal development permit. The Permittee shall undertake development in accordance with the approved Public Access Plan, which shall govern all general public access to the site pursuant to this coastal development permit.

- 4. **Public Access Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit documentation to the Executive Director for review and approval demonstrating that the Permittee has executed and recorded a deed restriction, in a form and content acceptable to the Executive Director, restricting use and enjoyment of APNs 106-020-38 and 106-020-039 in perpetuity and providing public access as described below:

- a. **Public Access Areas.** The recorded document shall reflect that the Permittee shall provide public recreational access consistent with the terms and conditions of this coastal development permit in the following locations (as generally shown on Exhibit 4):

- (1) **Public Recreational Pier consistent with the requirements of Special Conditions 1b and 3b.** The public recreational pier shall be available for use by the general public for: (i) public pedestrian access; (ii) public viewing; (iii) transient boat use; (iv) small boat launching; and (v) fishing.

- (2) **Lateral Public Access consistent with the requirements of Special Conditions 1d and 3c.** The accessway shall be available for use by the general public for: (i) public pedestrian access; and (ii) public viewing.

- b. **Prohibited Development.** No development, as defined in Section 30106 of the Coastal Act, shall occur within any of the public access deed restricted areas as generally described and depicted in Exhibit 4 of the staff report and the approved Public Access Management Plan required pursuant to Special Condition 3 of the permit, except development authorized by this coastal development permit. The public access areas shall be maintained consistent with the approved Public Access Plan and in a manner that maximizes public use and enjoyment.

- c. **Amendment.** Any future development not authorized by this permit that is proposed to be located either in whole or in part within the area described in the recorded deed restriction shall require a Commission amendment, approved pursuant to the provisions of 14 CCR §13166, to this permit. This requirement shall be reflected in the provisions of the deed restriction.

- d. **Recorded Document.** The document required pursuant to this special condition shall be recorded free of all prior liens and encumbrances that the Executive Director determines may affect the interest being conveyed. The recorded document shall include a legal description of the subject property as adjusted by Special Condition 6, and a metes and bounds legal descriptions and corresponding graphic depictions of the public access areas restricted by this condition, prepared by a licensed surveyor, drawn to scale, and

approved by the Executive Director of the Commission.

5. **Tsunami Safety Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit two copies of a Tsunami Safety Plan to the Executive Director for review and approval. The Tsunami Safety Plan shall clearly describe the manner in which hazards associated with tsunamis will be addressed, including demonstrating that:
  - (a) the existence of the threat of tsunamis from both distant and local sources will be adequately communicated to all guests;
  - (b) information will be made available regarding personal safety measures to be undertaken in the event of a potential tsunami event in the area;
  - (c) efforts will be provided to assist physically less mobile guests in seeking evacuation from the site during a potential tsunami event; and
  - (d) staff have been adequately trained to carry out the safety plan. The Tsunami Safety Plan shall be substantially in conformance with the Revised Project Plans (see Special Condition 1), and shall at a minimum include the following:
    - a. **Marin County Coordination.** The plan shall be prepared in cooperation with the Marin County Office of Emergency Services, and shall be in general conformance with any area-wide tsunami safety plan that has been prepared for this section of the coast.
    - b. **Tsunami Information.** The plan shall detail the posting of placards, flyers, or other materials at conspicuous locations within each room, provided in an appropriate variety of languages and formats (e.g., embossed braille, tape recordings, etc.), explaining tsunami risks, the need for evacuation if strong earthquake motion is felt or alarms are sounded, and the location of evacuation routes.
    - c. **Tsunami Evacuation Assistance.** The plan shall detail the efforts to be undertaken by staff to assist the evacuation of physically less mobile persons during a tsunami event.
    - d. **Staff Training.** The plan shall detail the instruction to be provided to all employees to assure that the Tsunami Safety Plan is effectively implemented.

All requirements above and all requirements of the approved Tsunami Safety Plan shall be enforceable components of this coastal development permit. The Permittee shall manage tsunami risk in accordance with the approved Tsunami Safety Plan.

6. **Lot Combination of APNs 106-020-38 and 106-020-39.** By acceptance of this coastal development permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns that: (1) all portions of the parcels known as APNs 106-020-38 and 106-020-39 shall be recombined and unified, and shall henceforth be considered and treated as a single parcel of land for all purposes, including but not limited to sale, conveyance, lease, development, taxation or encumbrance; and (2) the single parcel created thereby shall not be divided, and none of the parcels existing at the time of this permit approval shall be alienated from each other or from any portion of the combined and unified parcel hereby created.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall execute and record a deed restriction against the property described above, in a form acceptable to the Executive Director, reflecting the restrictions set forth above. The deed

restriction shall include a legal description and graphic depiction of the two parcels being recombined and unified. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens, including tax liens, and encumbrances that the Executive Director determines may affect the enforceability of the restriction.

7. **Coastal Hazards Risk.** By acceptance of this coastal development permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns:
  - a. **Coastal Hazards.** That the site is subject to coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, storms, tsunamis, tidal scour, coastal flooding, and the interaction of same;
  - b. **Assume Risks.** To assume the risks to the Permittee and the property that is the subject of this permit of injury and damage from such coastal hazards in connection with this permitted development;
  - c. **Waive Liability.** To unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such coastal hazards;
  - d. **Indemnification.** To indemnify and hold harmless the Coastal 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 coastal hazards; and
  - e. **Property Owner Responsible.** That any adverse effects to property caused by the permitted project shall be fully the responsibility of the property owner.
8. **Coastal Hazards Response.** By acceptance of this coastal development permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns, that:
  - a. **Coastal Hazards.** That the site is subject to coastal hazards including but not limited to episodic and long-term shoreline retreat and coastal erosion, high seas, ocean waves, storms, tsunamis, tidal scour, coastal flooding, and the interaction of same;
  - b. **Permit Intent.** The intent of this permit is to allow for the approved project to be constructed and used consistent with the terms and conditions of this permit for only as long as it remains safe for occupancy and use without additional substantive measures beyond ordinary repair and/or maintenance to protect it from coastal hazards;
  - c. **Additional Measures Prohibited.** No additional protective structures, including but not limited to additional or augmented piers (including additional pier elevation) or retaining walls, shall be constructed to protect the development approved by this permit in the event that the development is threatened with damage or destruction from coastal hazards;

- d. **Section 30235 Waiver.** Any rights to construct such protective structures that may exist under Public Resources Code Section 30235 are waived; and
  - e. **Removal.** If an appropriate government agency has ordered that the development or portions of the development approved by this permit are not to be occupied due to any of the coastal hazards identified above, and such safety concerns cannot be abated by ordinary repair and/or maintenance, then the Permittee shall remove such development or portions of such development. Prior to removal, the Permittee shall submit two copies of a Removal Plan to the Executive Director for review and approval. The Removal Plan shall clearly describe the manner in which such development is to be removed and the affected area restored so as to best protect coastal resources, including Tomales Bay.
9. **Public Rights.** By acceptance of this coastal development permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns, that the Coastal Commission's approval of this permit shall not constitute a waiver of any public rights that may exist on the property, and that the Permittee shall not use this permit as evidence of a waiver of any public rights that may exist on the property.
10. **Visitor-Serving Overnight Units.** By acceptance of this coastal development permit, the Permittee acknowledges and agrees, on behalf of itself and all successors and assigns, that:
- a. **Length of Stay Provisions.** All five visitor-serving overnight units shall be open and available to the general public. Rooms shall not be rented to any individual, family, or group for more than 29 days per year or for more than 14 days between Memorial Day and Labor Day.
  - b. **Conversion Prohibited.** The conversion of any of the five visitor-serving overnight units to limited use overnight visitor accommodation units (e.g., timeshare, fractional ownership, etc.) or to full-time occupancy condominium units or to any other units with use arrangements that differ from the approved project shall be prohibited.
11. **Other Agency Approval.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit to the Executive Director written evidence that all necessary permits, permissions, leases, approvals, and/or authorizations for the approved project have been granted by: (1) Marin County; (2) the California State Lands Commission; (3) the California Department of Transportation; and (4) the U.S. Army Corps of Engineers. If any of these agencies require changes to the approved project, such changes shall be reported to the Executive Director. The Executive Director can approve minor changes that are deemed reasonable and necessary and do not adversely impact coastal resources. All other changes shall require an amendment to this coastal development permit.
12. **Liability for Costs and Attorney Fees.** The Permittee shall reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys fees (including but not limited to such costs/fees that are: (1) charged by the Office of the Attorney General; and (2) required by a court that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of

this permit, the interpretation and/or enforcement of permit conditions, or any other matter related to this permit. The Permittee shall reimburse the Coastal Commission within 60 days of being informed by the Executive Director of the amount of such costs/fees. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.

- 13. Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Permittee shall submit to the Executive Director for review and approval documentation demonstrating that the Permittee has executed and recorded against the property governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the special conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property. The deed restriction shall include a legal description and site plan of the property 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 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 property.

#### **IV. FINDINGS AND DECLARATIONS**

##### **A. PROJECT DESCRIPTION**

Daniel Altman and Avi Atid (the Applicants) propose to reconstruct the historic Marshall Tavern building, which is located on the eastern shore of Tomales Bay in the town of Marshall in Marin County at 20105 and 20125 Highway 1 (APNs 106-020-38 and 106-020-39). The proposed project straddles both APNs and includes reconstructing and converting the existing structure into an approximately 5,880 square-foot, 5-unit bed-and-breakfast (with an additional manager's unit, for a total of 6 units) and reconstructing an 8-space gravel parking lot on the south side of the tavern building. The proposed development includes: 1) partial demolition, replacement, repair and reinforcement of the existing structure; 2) repair and expansion of existing concrete pilings and one retaining wall; 3) installation of additional windows on the west (bay) side of the structure; 4) installation of skylights on the west-facing, one-story portion of the structure; 5) interior reconstruction; 6) construction of new exterior decks on the lower and upper floors of the west (bay) side of the structure; 7) installation of roof-mounted solar panels on the south-facing portions of the roof; 8) demolition of an existing, deteriorated accessory building; and 9) clean-up and maintenance of the site.

The project also includes the repair of an existing retaining wall. As outlined in the engineering report submitted by the Applicant, one of the existing retaining walls underneath the Marshall Tavern and adjacent to the proposed parking lot requires a significant level of repair and replacement. This wall, located along the eastern edge of the former tavern structure and extending to the south, ranges in height from approximately ten to eleven feet near the tavern structure to approximately six or seven feet in height further from the tavern structure, and serves to protect the parking area, as well as the road behind it. The retaining wall does not have

footings or buttresses and consists of concrete on the upper portion and a stone wall on the lower portion. The wall is proposed for extensive remedial work and reconstruction. The proposed development includes covering the existing wall with gunnite from the bottom to the top. The new gunnite wall is proposed to have tie-backs and a footing.

The proposed project also includes repair and expansion of the existing pilings underneath the former tavern structure. No additional pilings are proposed. Two pilings are proposed for complete replacement, with no expansion, and seven pilings are proposed for repair and expansion, resulting in 44 square-feet of additional fill in the bay.

Finally, the proposed project includes the addition of a lateral accessway through the parking lot and across the landward side of the Marshall Tavern structure.

## **B. PROJECT LOCATION**

The project site is located along the eastern shore of Tomales Bay in the town of Marshall in Marin County at 20105 and 20125 Highway 1 (APNs 106-020-38 and 106-020-39) (see Vicinity Map in Exhibit 1). The site is zoned “Coastal, Village Commercial Residential” (C-VCR) and the Countywide Plan Designation is “Coastal Residential/Commercial” (C-RS). The former Marshall Tavern is located on APN 106-020-039 (approximately 1.09 acres made up almost exclusively Tomales Bay area) which lies adjacent to the site of the former Marshall Hotel (on APN 106-020-038; approximately 1.01 acres of mostly the Bay). The former Marshall Hotel burned down in 1971. Pilings and portions of a floor remain in place in bay waters but there is no standing hotel structure. In total, the project area is about two acres and the majority overlays the tidal waters of Tomales Bay. The project area is bounded by the J. Shields & Sons Coal and Feed building to the north, Tomales Bay to the west, State Highway 1 to the east and an undeveloped parcel owned by the State Lands Commission to the south. Nearby land uses include commercial and single-family residential use. A vacant, vegetated piece of land separates the northern parcel of the project site (APN 106-020-38) and the J. Shields & Sons Coal and Feed building further to the north. The open parcel owned by the State of California (APN 106-020-32) to the south of project parcel APN 106-020-39 consists of a parking area between Highway 1 and Tomales Bay and a retaining wall on the shoreline of the bay. On the eastern side of Highway 1 directly across from the property are several structures, with tall vegetation growing between the structures and the highway.

The property is currently occupied with the vacant building of the former Marshall Tavern, foundation piers and timber floor trusses where the former Marshall Hotel was located, and a small accessory building on the northern side of the property. The Marshall Tavern building has remained more or less in its current form since 1910 and has been vacant since 1990. The Marshall Tavern building was condemned by the Marin County in 1992.

Although the property is located on bay tidelands, it was the subject of a tideland sale and is owned in fee by the Applicants, from the edge of the road right-of-way over the tidally influenced mudflats to the mean low tide. However, when the State sold fee title to this property, it retained a public trust easement in the property. Therefore, the project site is imbued with a public trust easement, which protects the land for public trust uses, such as public access and recreation and boating.

The Coastal Commission retains permitting jurisdiction over both current and historic tidelands, including the property that is the subject of this permit application. As a result, the standard of review for the proposed project is the Coastal Act, although the certified Marin County LCP can provide non-binding guidance.

### **C. DEVELOPMENT HISTORY**

The Marshall Tavern was built in the 19th century, well prior to the enactment of the coastal permitting procedures of Proposition 20 (the Coastal Initiative) in 1972 and 1976's Coastal Act. As a result, the original structure was not subject to Proposition 20, Coastal Act, or LCP requirements. Previous CDPs covering the site have addressed lot-line adjustments, utility upgrades and replacements, and wastewater improvements, including the repair/replacement of septic tanks and the installation of a collection pipe and community leachfield treatment system. In recent history, the structures have been vacant. The tavern building, which is proposed for redevelopment, has been vacant since 1990 and was shortly thereafter condemned by Marin County for being weatherworn and unstable.

Both the Marshall Hotel and the Marshall Tavern were built prior to construction of the railroad along Tomales Bay. The hotel, built by the Marshall Brothers in 1870 and called the Bay View Hotel, functioned as a retreat and resting place for fishermen, hunters and sportsman. The tavern, built by the Marshall Brothers in 1873, originally served as a soda shop and hardware store. An addition to the north was added around 1910, giving the building the form it has today.

Although they have been modified over the years, the tavern building has basically retained its historic appearance and importance to the community. According to the Cultural Resources Inventory and Historic Structures Evaluation completed by Archaeological Resource Service (ARS) and submitted by the Applicants,<sup>1</sup> the tavern appears to meet two of the California Register of Historic Places criteria for listing as a significant historic resource. If renovated and rehabilitated to its historic appearance, the structure could qualify as a contributor to a local historic district, and could even stand on its own as significant historic structure at the local level.

### **D. CDP REQUIREMENT**

#### **Applicable policies**

The Coastal Act defines development broadly, as follows:

*Section 30106. "Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including*

---

<sup>1</sup> Cultural Resources Inventory and Historic Structures Evaluation. Sally Evans and Cassandra Chattan. Archaeological Resource Service (ARS). August 11, 2008.

*any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).*

Section 30610 of the Coastal Act requires a coastal development permit for all development activity, except in cases where an exemption applies. Section 30610 states:

*30610. Notwithstanding any other provision of this division, no coastal development permit shall be required pursuant to this chapter for the following types of development and in the following areas: ... (d) Repair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter.*

Section 13252(b) of the Commission's regulations distinguishes replacement of a structure from repair and maintenance. It states:

*(b) Unless destroyed by natural disaster, the replacement of 50 percent or more of a single family residence, seawall, revetment, bluff retaining wall, breakwater, groin or any other structure is not repair and maintenance under section 30610(d) but instead constitutes a replacement structure requiring a coastal development permit.*

### **Analysis**

The proposed project constitutes new development requiring a permit for several reasons. First, the existing structure was previously used as a Tavern, and was condemned by the County and has been vacant for over twenty years, and therefore, the proposed reconstruction and conversion to a bed-and-breakfast constitutes a change in use of the land, which constitutes development under the Coastal Act. Second, the project includes a physical expansion of the building (through the addition of cantilevered decks), expansion of seven of the concrete pilings, resulting in 44 square feet of new fill, and expansion of the retaining wall through the addition of gunnite over the entirety of its surface. Finally, the interior of the building is almost entirely bare, lacking walls, ceilings and flooring, etc. (see photos in Exhibit 2) and will be entirely replaced. In addition, much of the exterior will be replaced, including deteriorated siding and installation of new windows (see condition of exterior building in Exhibit 2). Therefore, the proposed project involves both expansion of existing development and entails replacing more than 50 percent of the structure, meaning that the project constitutes a 'replacement structure', pursuant to Section 30610(d) of the Coastal Act and Section 13252(b) of the Commission's regulations. For these reasons, the proposed project is considered new development and must be evaluated in its entirety for consistency with all applicable Coastal Act policies.

### **E. FILL OF COASTAL WATERS**

Coastal Act Section 30233 only allows for fill of open coastal waters and estuaries for specific uses, such as expanded boating facilities and for the placement of structural pilings for public recreational piers that provide public access and recreational opportunities. Further, the Coastal

Act only allows such activities where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects. Section 30233(a) of the Coastal Act states, in part:

*The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*

- (1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- (2) Maintaining existing, or restoring previously dredged depths on existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- (3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- (4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- (5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- (6) Restoration purposes.*
- (7) Nature study, aquaculture, or similar resource dependent activities.*

Although not the standard of review, the Marin County LCP Unit II states the following regarding diking, filling, and dredging:

- 1. General policy. Diking, filling, and dredging of coastal areas can have significant adverse impacts on water quality, marine habitats and organisms, and scenic features. The County of Marin intends to strictly limit the purposes for which these potentially damaging activities can occur in the coastal zone, in accordance with Section 30233 of the Coastal Act. For the purposes of the LCP, open coastal waters, wetlands, and other water bodies to which these policies apply shall be defined according to the criteria established by the U.S. Fish and Wildlife Service for marine and estuarine systems. "Fill" shall be defined as "...earth or any other substance or material, including pilings placed for the purpose of erecting structures thereon, placed in a submerged area," as given in Section 30108.2 of the Coastal Act.*

The proposed project would add new fill to the bay tidelands in two ways. First, it includes the expansion of seven of the existing piers, resulting in the addition of 44 square-feet of new fill. And second, it includes the expansion of the retaining wall through the addition of a layer of gunnite across the entire surface of the wall, resulting in approximately 50 square-feet of new fill. Coastal Act Section 30233(a) restricts the Coastal Commission from authorizing a project that includes fill of open coastal waters unless it meets three tests. The first test requires that the proposed activity must fit into one of seven categories of uses enumerated in Coastal Act Section

30233(a). The second test requires that there be no feasible less environmentally damaging alternative. The third test mandates that feasible mitigation measures be provided to minimize the project's adverse environmental effects. In this case, the proposed project fails to meet the first test because the proposed project includes new fill for the purpose of developing a bed-and-breakfast. A bed-and-breakfast facility does not meet any of the seven categories of allowable uses enumerated in Coastal Act Section 30233(a). Therefore, because the proposed project is not an allowable use under Section 30233, the Commission finds that the project is inconsistent with the Coastal Act. As findings for approval cannot be made consistent with this policy, Coastal Act Section 30233 mandates that the project be denied.

## **F. HAZARDS**

### **Applicable Policies**

Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and to avoid the need for landform altering protective measures in the future. Section 30253 provides, in applicable part:

*Section 30253. New development shall do all of the following:*

- (1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

### **Analysis**

The proposed project is located adjacent to and over the Tomales Bay, in a zone of geologic and flood hazards, including hazards from sea level rise and tsunamis. As stated previously, the reconstruction, redevelopment, and change in use of the tavern building is considered new development and therefore, it must comply with all applicable Coastal Act requirements, including Section 30253. As further described below, the project as proposed is inconsistent with Coastal Act policies concerning the potential exposure of persons and property to significant geologic hazards during the economic life of the project because it would not assure the stability and structural integrity of the proposed development or avoid and minimize impacts from coastal flooding, including flooding due to sea level rise in the future.

Sea level has been rising slightly for many years. Recent satellite measurements have detected global sea level rise from 1993 to the present of 3 mm/yr or a significant increase above the historic trend observed from tide gauges. Recent observations of sea level along parts of the California coast have shown some anomalous trends, however; there is a growing body of evidence that there has been a slight increase in global temperature and that an accelerated rate of sea level rise can be expected to accompany this increase in temperature. Sea level rise is expected to increase significantly throughout the 21st century and some coastal experts have indicated that sea level rise of 3 to 5.5 feet or more could occur by the year 2100. Mean water level affects shoreline erosion in several ways and an increase in the average sea level will exacerbate all these conditions.

On the California coast the effect of a rise in sea level will be the landward migration of the intersection of the ocean with the shore. On a relatively flat beach, with a slope of 40:1, a simple geometric model of the coast indicates that every centimeter of sea level rise will result in a 40 centimeter landward movement of the ocean/beach interface. For fixed structures on the shoreline, an increase in sea level will increase the inundation of the structure. More of the structure will be inundated or underwater than is inundated now, and the portions of the structure that are now underwater part of the time will be underwater more frequently.

Accompanying this rise in sea level will be an increase in wave heights and wave energy. Along much of the California coast, the bottom depth controls the nearshore wave heights, with bigger waves occurring in deeper water. Since wave energy increases with the square of the wave height, a small increase in wave height can cause a significant increase in wave energy and wave damage. Combined with the physical increase in water elevation, a small rise in sea level can expose previously protected back shore development to increased wave action, and those areas that are already exposed to wave action will be exposed more frequently, with higher wave forces. Structures that are adequate for current storm conditions may not provide as much protection in the future.

The Pacific Institute SLR inundation maps for the California coast show areas that are at risk from current coastal flooding in a 100-year storm event, and areas that would be at risk given expected sea level rise by 2100 (55 inches). The map for the area around the project site shows that portions of this stretch of shoreline are in danger from the current 100-year flood event, and that the entire area low-lying area, extending from the shoreline to the highway would be inundated by 2100.

With regard to the specific project site, the Applicant's geotechnical report<sup>2</sup> evaluated the amount of sea level rise that may occur over the next 100 years. The report states the following:

*The State of California Sea-Level Rise Interim Guidance Document was reviewed. The Marshall Tavern is a historical building and little could be done to protect it in a cost effective manner against a significant 100-year sea level rise. The rise of 7 inches which is the estimated average of the several models used in the guidance document for the year 2030 would not significantly impact the foundation of the structure. The estimated sea level rise of 14 inches, the average for the year 2050 would be a concern and anything above that would require significant modifications of the structure.*

Therefore, given these estimates, the structure would be in danger by approximately 2050 (or roughly 38 years after the proposed development). However, although California's Sea Level Rise Guidance Document<sup>3</sup> indicates a range for sea level rise,<sup>4</sup> the Applicant used the average of this range. Therefore, the Applicant's estimates are only the average, and thus given current guidance, the structure may be in danger even sooner. Further, the National Academy of

---

<sup>2</sup> Torikian Associates. Geotechnical Report for Marshall Tavern. February 21, 2012.

<sup>3</sup> State of California Sea-Level Rise Interim Guidance Document. October 2010. Accessed October 12, 2012. Available at: [http://opc.ca.gov/webmaster/ftp/pdf/agenda\\_items/20110311/12.SLR\\_Resolution/SLR-Guidance-Documents/SLR-Guidance-Documents.pdf](http://opc.ca.gov/webmaster/ftp/pdf/agenda_items/20110311/12.SLR_Resolution/SLR-Guidance-Documents/SLR-Guidance-Documents.pdf).

<sup>4</sup> 13-21 centimeters by 2030, 26-43 centimeters by 2050, and 78-176 centimeters by 2100.

Science's most recent projections<sup>5</sup> for California indicate that sea level rise will likely be higher than currently estimated, with a range between 4-30 centimeters by 2030, 12-61 centimeters by 2050, and 42-167 centimeters by 2100. Considering the higher range of these new estimates, the structure could be in danger soon after 2030 (or approximately 18 years after the proposed development). As such, the structure is not designed to assure stability and structural integrity or avoid and minimize hazards over the economic life of the structure (typically assumed to be 50-100 years) because it would not be built to avoid or withstand flooding and wave run-up in the future. In fact, it appears liable to be in danger from such hazards within the next two decades, according to the latest projections. Therefore, the proposed project is inconsistent with Coastal Act Section 30253.

## **G. PUBLIC ACCESS AND RECREATION**

### **Applicable Policies**

Coastal Act Sections 30210 through 30224 require that new development maximize public recreational access, provide visitor-serving recreational facilities, protect oceanfront land for recreational use and development, encourage recreational boating facilities, and in general establish that coastal-dependent, visitor-serving, and public recreational access developments have priority over other types of uses and development. In particular:

***Section 30210:** In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

***Section 30211:** 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(a):** Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects...*

***Section 30213:** Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred. ...*

***Section 30220:** Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

***Section 30221:** Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

---

<sup>5</sup> Sea Level Rise for the Coasts of California, Oregon and Washington: Past, Present, and Future. National Academy of Sciences, National Research Council. 2012. Accessed October 11, 2012. Available at: [http://www.nap.edu/catalog.php?record\\_id=13389#toc](http://www.nap.edu/catalog.php?record_id=13389#toc).

*Section 30223: Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

*Section 30224: Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.*

Finally, the Coastal Act protects special communities that are popular visitor destinations, like Marshall. Coastal Act Section 30253(5) states that:

*Section 30253(5). Where appropriate, protect special communities and neighborhoods, which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

Although not the standard of review, the Marin County LCP states on the issue of public access and tidelands:

*Under a series of statutes adopted after 1850, the Legislature authorized the sale of tidelands by patent. (Sales of submerged lands were not authorized by these statutes.) Valid State patents did not divest the public of its rights in the tidelands, however. The buyer of land received title to the underlying soil of validly patented tidelands but the State retained a public trust easement over the property. For the unpatented tidelands and submerged lands, the State retains complete ownership (fee title).*

*The public trust easements on tidelands traditionally have been defined as easements for the purposes of commerce, navigation, and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreational purposes the navigable waters of the State, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. The courts have recognized that the public uses suitable for tidelands are sufficiently flexible to encompass changing public needs...*

*Based on the public trust doctrine, the tidelands and submerged lands of Tomales Bay are subject to the State's public trust easement. Although many of the tidelands in the Bay were surveyed between 1859 and 1872, and title to the soil was sold to private parties, the public trust easement over such parcels still exists. For some of these parcels, the exact location of tidelands boundaries based on the early surveys has not yet been determined by the State Lands Commission. In addition to administering the trust in Tomales Bay, the State Lands Commission has identified the Bay as an area possessing significant environmental values where only certain types of development are appropriate.*

Furthermore, the Marin County LCP Unit II provides guidance on the issue of public access in the Marshall area. It states:

*Nick's Cove, Marshall Tavern, and Tony's Seafood offer restaurant dining with views of Tomales Bay. ...*

(5) Location: Marshall Tavern to Marshall Boat Works.

*Description: This portion of the shoreline constitutes most of the "town" of Marshall. It is extremely narrow and largely built out with single-family residential dwellings on pilings. The few undeveloped lots, used by the public for parking, viewing, and clamming, serve a very important visual access function by providing a break in the long row of developed lots. The state owns two parcels in this section, AP #106-020-31 and 32.*

*LCP recommendations: Lateral access shall be maintained on AP #106-020-33, 12, and 17, the first of which is owned by Audubon. Vertical access shall be provided on at least one of these parcels. Vertical and lateral access shall be required on AP #106-030-16, 106-040-01, 02, 03, and 06. Shoulder parking on all of the undeveloped parcels in this section shall be maintained.*

The Marin LCP Unit II notes the following on recreation in the area:

*Along Tomales Bay, the most popular activities are clamming, swimming and sunbathing, fishing, recreational boating, and to a lesser extent, hunting and nature study... Bicycling has become common on Highway 1 and other coastal access roads...*

The Marin LCP Unit II outlines criteria used to evaluate potential new public access areas:

*The following criteria, based on the policies of the Coastal Act, have been used to evaluate potential new public access areas in Unit II. These criteria have been balanced with one another and evaluated in light of the particular characteristics of the shoreline in Unit II.*

*Desirability of a site for public access. The desirability of a site for public access includes a consideration of its recreational opportunities, scenic quality, available space, uniqueness and variety, and the ability to walk from the site to adjacent shoreline points of interest. It should be noted that according to the Coastal Act and the state constitution, public access is desirable and necessary because it is established as a basic right.*

*Based on these factors, it seems clear that in much of Unit II, public access to the shoreline is very desirable. The shoreline is unspoiled, highly scenic, and suitable for a wide variety of low-intensity recreational uses such as picnicking, clamming, fishing, viewing, and walking. Although space is limited along Tomales Bay, the shoreline there is easily accessible from nearby public roads and regularly used by the public on an informal basis.*

In sum, the Coastal Act direction (and LCP guidance) applicable to the site clearly requires that development here maximize public recreational access and visitor-serving opportunities. As noted in the LCP, Tomales Bay is an area possessing significant environmental values where only certain types of development are appropriate and the public maintains rights in the tidelands, including public access rights. Given that the project includes development over and into public trust resources of the Bay itself, this direction is only magnified. In other words, the Coastal Act requires that the proposed development maximize public access and recreation and include public recreational/visitor-serving access components that are sited and designed in such a way as to provide maximum public access and water-oriented recreation.

### **Analysis**

The proposed project is located on tidelands seaward of the first through public road and is adjacent to and over Tomales Bay. This property is subject to the State's public trust easement, and therefore, must be protected for public trust allowed uses, such as public recreational piers, visitor-serving facilities and boating facilities. According to the National Park Service, Tomales Bay is the most popular area for kayaking at Point Reyes National Seashore and it is the largest unspoiled coastal embankment on the coast of California. Therefore, the property must be protected for public access and recreational uses, including pursuant to Coastal Act Sections 30220 through 30224. Therefore, maximum public access and recreational opportunities must be protected and provided in order for a project at this location to meet the requirements of the Coastal Act.

The proposed project would place a private, visitor-serving commercial use within tidelands that must also remain available for public access and recreational uses as the tidelands are protected by a public trust easement. Although the project would include a lateral public access trail through the parking lot and along the landward side of the restored Marshall Tavern as proposed, such an access trail would not provide a significant public access benefit because it would not connect to any established lateral access trail, would not provide vertical access to the shore itself for pedestrian, boating, or other uses, and it would not provide a significant offset to the visual and other impacts of the proposed project, including as discussed in more detail below. Therefore, as a whole, the project would interfere with the public's right to access the shoreline and would not maximize public access to the shoreline, in direct conflict with the public access and recreation policies of the Coastal Act. Furthermore, the Coastal Act requires lower cost visitor-serving uses to be provided, where feasible, and the proposed project does not provide any such uses. In this case, and as describe in detail below, such lower cost visitor-serving uses are feasible. Therefore, the proposed project is inconsistent with the public access and recreation policies of the Coastal Act, including Sections 30210, 30211, 30212, 30213 and 30222, and must be denied.

### **H. COMMISSION DETERMINATION**

Although, the proposed project is inconsistent with various Coastal Act policies, including policies related to allowable uses for wetlands fill, hazards avoidance policies, and policies requiring public recreational access to be protected and provided, as discussed below the Commission has determined that it must allow a reasonable development on the subject property in order to comply with Section 30010 of the Coastal Act.

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

As discussed above, the proposed development is inconsistent with the above-referenced policies of the Coastal Act, including Section 30233 limiting development in wetlands and open coastal waters. Therefore, the Coastal Act requires that the project be denied. However, when the Commission denies a project, a question may arise 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.<sup>6</sup>

As discussed further below, the Commission finds that to avoid a takings in compliance with Section 30010, the Commission determines it will allow the development of a bed-and-breakfast that maximizes opportunities for public access to and along the shoreline and water-oriented recreation.

### **General Takings Principles**

The Fifth Amendment of the United States Constitution provides that private property shall not “*be taken for public use, without just compensation.*”<sup>7</sup> Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

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 takings cases, the Supreme 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

<sup>6</sup> For example, in CDP A-1-MEN-03-029 (Claiborne and Schmitt), the Commission in 2004 approved residential development on a site that was entirely ESHA, even though it was not resource-dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

<sup>7</sup> The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.* at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless” (*Id.* at pp. 1016-1017 (emphasis in original)) (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 (regulatory takings occur only under “extreme circumstances”)).<sup>8</sup>

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

#### **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 Coastal Act instructs the Commission to deny the proposed bed-and-breakfast structure as an impermissible use for fill of wetlands and open coastal waters, the Commission’s denial would preclude the applicant an economic use on the site. The subject property, APN 106-020-38 and APN 106-020-39, is located out and over the water, extending over Tomales Bay itself. Permissible 30233 uses are either not allowed by local zoning or would not provide the applicant with an economic use of their property. Therefore, any economic use of the property would require pilings in the coastal waters inconsistent with the provisions of Section 30233 of the Coastal Act. To deny the applicant’s proposed fill of coastal

---

<sup>8</sup> Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

waters would leave no 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."

### **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 applying the factors discussed above the Commission determines that the two APNs in this case should be aggregated as a single unit for takings purposes for the following reasons.

First, the applicant owns both parcels proposed to be developed (APNs 106-020-38 and 106-020-39), the applicant purchased both parcels together for a single purchase price and the parties to the sale did not assign separate values or purchase prices to the two parcels.

Second, these two parcels are contiguous, are subject to the same local land use designation and zoning (Coastal Village Commercial Residential, C-VCR) and are taxed at the same assessor's rate.

Third, the parcels (currently APNs 106-020-38 and 106-020-39) have been held together and managed as a unit. Based on a chain of title commencing in 1941 and predating the creation of the parcel originally containing APN 106-020-38 and 106-020-39, the parcels have followed identical paths, having the exact same owner or proportionate owners and being conveyed from one to the next at the same time except for two periods between 1963 and 1977, one lasting a little over three years, the other lasting under seven years around the time of the 1971 hotel fire. Recommencing in 1977, six years after the hotel fire, the parcels again followed identical paths, having the exact same owner or proportionate owners and being conveyed from one to the next at the same time.

Fourth, as discussed herein, although privately owned, both parcels are subject to a public trust easement. The parcels are thus valued in a manner that reflects the presence of intertidal wetlands on both parcels. The Applicants purchased the property in 2004 for \$510,000. Similarly, the Assessor's office currently values the two parcels, one developed and the other undeveloped at \$565,961.

Lastly, the Applicant has previously treated the two parcels as a single unit and the parcels are and have been the subject of a single development scheme. The subject application proposes development of a bed-and-breakfast and parking on the southern parcel and demolition of a structure on the northern parcel. An earlier iteration of the Applicant's proposal, in 2008, consisted of the redevelopment of the tavern and hotel site to facilitate a total of 8 bed-and-breakfast rooms, two manager's apartments and 13 parking spaces. The Tavern would have contained 5 bed-and-breakfast rooms and 1 manager unit and the hotel site would have contained 3 bed-and-breakfast rooms and one manager unit. Also, the applicant's engineer February 14, 2012 engineering report states that the existing seawalls "sustain the shore for both parcels."

Further, the Applicant submitted numerous historical articles characterizing the development on the two parcels as a single unit that was integrally related. These articles evidence that guests routinely used both parcels when they visited the hotel or tavern.

In addition, previous owners of the subject property and permittees proposing work for the subject property have also coordinated prior development schemes on the property. Marin County Environmental Health Services proposed wastewater treatment improvements that included both subject parcels, in CDP 2-07-019. In 1997, the Coastal Commission approved a waiver (1-96-083-W, approved January 9, 1997) which reconfigured the parcel boundaries of the property containing both APNs 106-020-38 and 106-020-39.

Therefore, the evidence establishes that the Commission should treat APNs 106-020-38 and 106-020-39 as a single parcel for the purpose of determining whether a taking occurred. As discussed further below, the Commission's project denial of all development on the property would constitute a taking. However, because both parcels constitute a single unit for purposes of takings analysis, the Commission need only approve one economic use on the two combined parcels rather than one economic use on each of the two parcels.

To ensure that APNs 106-020-38 and 106-020-39 are always considered a single economic unit for purposes of determining whether a taking has occurred, as well as ensure that the two APNs are never placed into divided ownership, the Commission attaches Special Condition 6 requiring that APNs 106-020-38 and 106-020-39 be recombined, unified, and treated as a single parcel of land for all purposes and that APNs 106-020-38 and 106-020-39 never be divided or sold separately. As such, Special Condition 6 will ensure that (1) all portions of the two parcels, APNs 106-020-38 and 106-020-39 will be recombined and unified such that they will be considered and treated as a single parcel of land for all purposes, including but not limited to sale, conveyance, development, taxation or encumbrance, and (2) the created single parcel will not be divided or otherwise alienated from the combined and unified parcel. The condition requires the Applicant to execute and record a deed restriction, free and clear of prior liens, and including a legal description and graphic depiction of the two parcels being recombined and unified, reflecting the restrictions set forth above. The imposition of this condition by the Commission not only ensures that the assessor parcels are never conveyed separately but also that each of the parcels are never the subject of a takings challenge by the current or future owner.

## **The Commission Will Allow Reasonable Development in Order to Comply with Section 30010 of the Coastal Act**

### **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 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 Coastal Act cannot be read to deny all economically beneficial or productive use of land because the Coastal Act 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.

The property is located in the Coastal Village Commercial District. LCP Section 22 57.120 I sets forth the principal permitted use types in the Coastal Village Commercial District (C-VCR) district, which include (1) specified single-family residential development, (2) specified stores, shops and businesses, (3) transit waiting shelters, (4) home occupations, (5) accessory uses, and (6) bed-and-breakfast operations for not more than 3 guest rooms. Additionally, LCP Section 20.57.123 I sets forth the conditional permitted use types in the C-VCR district, which include (1) specified residential development, (2) crop and tree farming, (3) public parks and playgrounds, (4) auto service stations, (5) bars and taverns, (6) building and manufacturing sales and storage, (7) off street parking, (8) restaurants, (9) hotels and motels, (10) places for public assembly, (11) stores and shops, (12) pet clinics and (13) bed-and-breakfasts for four or five rooms.

The Commission finds that in this particular case, none of the other allowable principally permitted or conditionally permitted uses at the subject property would avoid the fill of wetlands. The subject property, APN 106-020-38 and APN 106-020-39, is located out and over the water, extending over Tomales Bay itself. In addition, permissible 30233 uses for wetland fill are either not allowed by local zoning or would not provide the Applicant with an economic use of their property. Therefore, any economic use of the property would require pilings in the coastal waters inconsistent with the provisions of Section 30233 of the Coastal Act. Therefore, development of

an economic use in a manner that avoids impacts to wetland or open coastal waters is not feasible.

Therefore, the Commission finds that it is reasonable to conclude that denial of the proposed bed-and-breakfast 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 visitor-serving use of the property to avoid a categorical *Lucas*-type taking.

### **Taking Under *Penn Central***

Although the Commission has already determined it is necessary to approve some economic 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.

In the subject case, the Applicant purchased APNs 106-020-38 and 106-020-39 for \$510,000 in 2004. On April 2, 2004, a Grant Deed was recorded in the Official Records of the Marin County Recorders Office, effectively transferring and vesting property ownership of APNs 106-020-38 and 106-020-39 to the Applicant.

The Applicant's proposal to construct some type of visitor-serving facility on APNs 106-020-38 and 106-020-39 can be viewed as both a reasonable expectation and an investment-backed expectation. As stated above, the Applicant purchased the property for a single purchase price of \$510,000. In 2009, the Marin County assessor assessed the property at \$565,961. When asked to provide the value of comparable properties in the area, the Applicant did not provide a review of comparable properties in the area instead stating "*Because of the uniqueness of the property, the Tavern and the Hotel, there are no comps, no comparable sales in this category. The market value is the price the buyer paid.*"

Consequently, the Applicant did have an *investment-backed* expectation that he had purchased developable property and his investment reflected that future development could be accommodated on the subject parcel.

In addition, the expectation that the subject property could be developed with a visitor-serving facility would be *reasonable*. To determine whether an expectation 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. At the time the Applicant purchased the property, the property was zoned to allow visitor-serving uses and had historically been developed with a visitor-serving use. In addition, as discussed above, any economic use of the subject property would necessitate fill for pilings to support development above the coastal waters. Historically, other nearby properties had also been developed on pilings in and over the tidelands. Therefore, viewed objectively, a reasonable person could have had a reasonable expectation that the property could be developed with some type of visitor-serving use.

However, the subject tidelands property was originally acquired by patent from the State of California. As such, the buyers of such tidelands receive title to the underlying soil of validly patented tidelands, but the State retains a public trust easement over the property. Public trust easements have been held to include the right to fish, hunt, bathe, swim and to use the tidelands for public recreational purposes. Therefore, even though the Applicant owns the property, the Applicant does not hold the entire title and interest in the tidelands as their estate is subject to the easement and servitude of the public for the purposes of navigation, commerce and fisheries and the public right of access to those navigable waters. Therefore, the public trust doctrine informs the Applicant's reasonable investment-backed expectations and the Applicant may not take actions that would impede public use of the public trust easement.

The Commission concludes that the Applicant has demonstrated sufficient real property interest in the subject parcel to allow pursuit of the proposed project. However, the Commission also finds that because the public trust easement over the property has not been terminated or relinquished by the state, the Applicant has no right to use the former trust property free of trust restrictions. Accordingly, the Applicant does not have an exclusive right to use the tidelands or exclude the public from the tidelands the project occupies. Therefore, any economic use allowed by the Commission must comply with the otherwise applicable policies of the Coastal Act, including the access and recreation policies of the Coastal Act, which require new development to maximize opportunities for public access and water oriented recreation.

### **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 visitor-serving facility to provide a reasonable economic use of the subject property. In view of the evidence that: (1) permanently restricting use of the property to permissible wetland uses could eliminate the economic value of the property; (2) a Coastal Act priority visitor-serving use of the property would provide an economic use; and (3) an applicant would have had a reasonable investment-backed expectation that a fully mitigated visitor-serving use consistent with the public trust servitude retained by the State would be allowed on the property, there is a reasonable possibility that a court might determine that the final denial of a visitor-serving, based on the inconsistency of this use with Section 30233 of the Coastal Act would constitute a taking. Therefore, the Commission determines that the Coastal Act in this case does not preclude developing the property with a visitor-serving use that requires the fill of wetlands and open coastal waters, where such visitor-serving use increases opportunities for public access to the shoreline and water-oriented recreation.

### **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 of the Coastal Act. 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 Coastal Act. Therefore, in this situation, the Commission must still comply with the Coastal Act by requiring measures to mitigate for adverse environmental effects on public access and the filling of wetlands and to ensure that

development adjacent to Tomales Bay is sited and designed to prevent impacts which would degrade these coastal resources.

## **I. PUBLIC ACCESS AND RECREATION**

### **Applicable Policies**

As described previously, the Coastal Act includes strong protections for public access, reserves oceanfront and public trust lands for public recreational uses, and requires low cost visitor accommodations to be provided where feasible, including through Coastal Act Sections 30210, 30211, 30212, 30213 and 30222. In addition, various LCP policies, as stated previously, which can be used as guidance in this case, further describe and protect public access and recreation resources at the project location.

### **Analysis**

Although some development must be approved to avoid an unconstitutional taking of property, such development must still maximize public access and water-oriented recreation consistent with the requirements of the Coastal Act. In this case, as described further below, the project can be modified to incorporate additional public access components that would maximize public access and water-oriented recreation consistent with the Coastal Act.

### **Public Access Alternatives**

As discussed above, the proposed project is inconsistent with the public access policies of the Coastal Act because it does not maximize public access and water oriented recreation consistent with the requirements of the Coastal Act even though the proposed development would be located on land that is protected for public access and recreational uses by a public trust easement. Although the project proposes some lateral access across the site, such access is not significant in nature because it does not connect to an established lateral access way, it is located on the landward side of the proposed structure, and because it does not include any vertical access component. However, in this case, project modifications could result in a project that maximizes public access and provides public access and recreation opportunities, consistent with applicable Coastal Act policies. There are several potential opportunities for incorporating public access and recreation into the proposed project, so that, as a whole, the project would maximize public access and recreation and provide for feasible lower-cost visitor-serving uses, as required by the Coastal Act. These potential opportunities include: 1) continuous lateral access and deck walkway across the bayward portion of the project site (i.e., extending onto the Bay side of the tavern building); 2) reconstruction of the former fishing and boating pier associated with the tavern; or 3) construction of a lateral accessway across the subject property and a public recreational pier on the former hotel site.

With regard to the bay side lateral access way, although this option would address project impacts due to loss of public access to the shoreline and water, it would involve an expansion of the development footprint into the bay, including additional construction and shading over intertidal habitat and the likely addition of new fill in the bay, if such lateral access could not be cantilevered off of the bed-and-breakfast structure. In addition, this alternative does not appropriately recognize the fact that the pilings on the former hotel site already constitute fill in the bay. In a case where there are no such existing, original structures, this alternative might appropriately be considered, including to avoid new fill, but in this case coastal resource impacts at the hotel site (i.e., fill and shading, etc.) exist already.

Another option for incorporating public access and recreation at the site would be to reconstruct the former fishing and boating pier that was located to the south of the bed-and-breakfast structure to provide for public fishing and boating access to the bay. However, again, this does not adequately countenance the existing pilings and flooring and their associated fill and other environmental impacts.

Finally, another option, and the most appropriate in this case, would be to provide for public access on-site through a new lateral accessway integrated with a public recreational pier at the existing hotel site. Such a public recreational pier could utilize the existing hotel piers and flooring, thus limiting new fill in the bay. The public recreational pier could be available to pedestrians and bicyclers who are passing through the area, as well as to boaters for use as a small-craft launching site, to allow boaters to access the bay and its resources, which are especially popular with kayakers. In addition, the site could potentially accommodate a small commercial operation, such as a boat rental facility. If sufficient in size, such a public recreational pier would significantly offset the impacts of the project because it would provide a meaningful public access benefit and therefore, the project, as a whole, could be considered to maximize public access. Therefore, Special Condition 1 requires revised plans that add a public recreational pier to the site, over the former hotel pilings.

The pier would be provided in the area of the remaining Marshall Hotel pilings (and would use these pilings for support) in a way that seamlessly integrates the pier into the project and the shoreline, and that best facilitates public recreational access, including both viewing access and access to the water through gangway and floating dock, or equivalent (e.g., for small scale boat launch, etc.) (see Exhibit 4). The pier would be publicly available for general public pedestrian access, transient boat use (and not as a long-term residential or live-aboard docking area), small boat launching, and general viewing use, and it would include access amenities (i.e., benches, trash and recycling receptacles, bicycle stands, etc.). Small-scale commercial activities (e.g., kayak rental, coffee kiosk, etc.) would be allowed to increase public utility and ensure greatest compatibility with Section 30233. The pier and all related elements would be designed to maximize through views and minimize visual intrusion to include materials appropriate to the historic and shoreline context that blend with the natural materials of the approved project (e.g., wood), and to utilize the same design theme throughout the project area.

The lateral accessway would ensure continuous lateral public access a minimum of five feet in width extending from southwest to northeast between the adjacent properties and along Highway 1. The public lateral access area would provide a clear path of travel to connect the access features of the site and to integrate to up and downcoast areas. Both the pier and the lateral accessway would be managed with the objective of maximizing public access to the public access areas associated with the approved project and all related areas and public access amenities (i.e., bench seating, etc.).

To ensure the required public access is provided and maintained consistent with the Coastal Act, Special Conditions 3 and 4 require a public access management plan and a public access deed restriction to manage and protect the site for maximum public access. This condition applies to both the public recreational pier and to the proposed and required lateral access. The conditions

ensure the required facilities would be provided, maintained, and kept available for general public recreational use in a manner that maximizes their utility and value. In addition, Special Condition 3 requires specificity on signage, interpretation, and use and provision of related access amenities. Specifically, this approval is conditioned to ensure maximum public recreational access benefit in perpetuity, where the primary objective is to maximize public recreational access at the site (including to all site walkways and the public recreational pier) and all related areas and public access amenities, to provide clear and informative signage, and to ensure that the project's public access features are available for general public use during daylight hours (and during all non-daylight hours when the retail components of the approved project are open) 365 days per year (see Special Condition 3).

### **Lower Cost Visitor Facilities**

The proposed bed-and-breakfast does not protect and provide for lower cost visitor-serving recreational facilities over the tidelands, as required by Coastal Section 30213, even though such facilities were historically provided and are feasible. In light of current trends in the marketplace and along the coast, the Commission is increasingly concerned with the challenge of providing lower-cost overnight accommodations consistent with the Coastal Act. Recent findings in support of a Commission decision concerning hotel-condominiums showed that only 7.9% of the overnight accommodations in nine popular coastal counties were considered lower-cost.<sup>9</sup> Although statewide demand for lower-cost accommodations in the coastal zone is difficult to quantify, there is little question that lower cost opportunities (e.g., camping and hostels, etc.) are in high demand, and that there is on-going need to increase lower-cost opportunities along California's coast.<sup>10</sup>

The five proposed overnight units range between 735 and 755 square feet, and each include bay facing decks with prime coastal views of the Tomales Bay. The Applicant has indicated that the room rates will begin at \$175 per night and may be higher, depending upon the season and market conditions. By comparison, many hotel/motels in the Tomales Bay area already demand high-priced rates (including rooms at The Mermaid's House, \$265 - \$345 per night; Nick's Cove and Cottages, \$225 - \$495 per night; and the Holly Tree Inn, starting at \$230 per night). Some accommodations nearby offer lower rates (including rooms at The Motel Inverness, starting at \$99; The Inn on Tomales Bay, \$130 - \$150 per night, The Continental Inn, \$140 per night; and the Abalone Inn, \$110-\$150 per night). In terms of camping and hostel options, average cost data indicates perhaps a better range for what might be considered "lower cost" accommodations. For example, the average cost of a hostel is \$24,<sup>11</sup> and camping rates at nearby parks and campgrounds are available from \$20 to \$40 a night<sup>12,13</sup> The proposed project does not provide

---

<sup>9</sup> See LCPA 1-07, Oceanside; July 2008 hearing.

<sup>10</sup> For example, State Parks estimates that demand for camping has increased 13% between 2000 and 2005, and that nine of the ten most popular campgrounds are along the coast.

<sup>11</sup> Point Reyes Hostel. Reservations. Online. Available at: <http://norcalhostels.org/reyes/>. Accessed October 31, 2012.

<sup>12</sup> National Park Service. Point Reyes National Seashore. Campgrounds. Online. Available at: <http://www.nps.gov/pore/planyourvisit/campgrounds.htm>. Accessed October 31, 2012.

<sup>13</sup> Olema RV Resort and Campground. Rate Information. Online. Available at: <http://www.olemaranch.com/>. Accessed October 31, 2012.

lower cost overnight accommodations, and the project does not otherwise promise to include low-cost overnight accommodations off-site to address the requirements of Coastal Act Section 30213.

In past actions related to proposals for new overnight accommodations that did not provide for lower cost accommodations, the Commission has required up to one-quarter (25%) of proposed rooms be made available at affordable rates.<sup>14</sup> Because the current proposal includes construction of five rooms, application of the 25% methodology means that at least 1 lower cost unit ( $5 \times 0.25 = 1.25$ ) should be provided.

In lieu of providing lower cost overnight accommodations on-site, the requirements of Coastal Act Section 30213 could be met by providing either on-site lower cost visitor-serving amenities or an in-lieu fee for the purpose of funding lower-cost accommodations at an offsite coastal location in the same geographic region. In this case, the project site includes sufficient room to provide lower cost amenities on-site, and as discussed below, it is appropriate to incorporate such amenities into the overall project design, including to incorporate 30233 allowable uses into the overall project so as to better conform the project with that key Coastal Act inconsistency. Accordingly, in order to mitigate for the absence of lower cost visitor accommodation facilities in the proposed development, and to bring the project into conformance with Coastal Act Section 30213, Special Condition 1 requires the construction of a public recreational pier and a public lateral accessway as part of the project for the specific purpose of providing low cost public access and visitor-serving facilities to the site.

In summary, the Applicants are proposing to construct relatively expensive overnight visitor accommodation facilities located in and over tidelands protected by a public trust easement. The Coastal Act protects the public trust access easement area, requires that lower cost visitor and recreational facilities be protected and, where feasible, provided, and requires that oceanfronting sites like this be protected for water-oriented public recreational uses. In this case, the proposed development is not consistent with these requirements. Therefore, in order to bring the project into conformance, the project has been conditioned to require construction of a public recreational pier and a lateral accessway to provide low cost public access and visitor-serving facilities in the area, including water oriented recreational facilities. As conditioned, the project can be found consistent with the lower cost visitor facilities policies of the Coastal Act.

### **Visitor-Serving/Land Use Priorities**

Another issue raised by the rate structure and configuration of the proposed bed-and-breakfast units is the potential for the units to be sold or leased to private individuals and used as quasi-residential units or offered as time-shares. Such potential outcome would diminish the visitor-serving value and utility of such units. If units are individually owned, they are essentially residential investments and constitute a quasi-residential land use with only the possibility of functioning part time as overnight visitor-serving accommodations. In addition, the project does not include a limit on the length of stay or expressly prohibit private ownership of the individual rooms, and does not include adequate safeguards to ensure the units are offered as standard operating overnight units as opposed to something more residentially oriented. Although the

---

<sup>14</sup> See, for example, CDP 3-07-002 (Estero Landing) and CDP 3-07-003 (Front Street Hotel).

Applicant has not expressed intent to sell the individual units, it is possible that it would become necessary depending upon the ability to secure adequate financing for the bed-and-breakfast development or to ensure full occupancy during the off-season. To ensure that the overnight accommodations remain visitor-serving and to ensure Coastal Act consistency in this respect, this approval is conditioned to prohibit private ownership of the hotel units; to limit lengths of stay for any individual, group, or family (i.e., a 29 day limit on the length of stay, including no more than 14 days during the summer peak-season); to require the bed-and-breakfast rooms to always be available for public transient use; and to establish use and rental parameters for operation (see Special Condition 10).

### **Parking**

The estimated parking requirement per the LCP guidance for the proposed bed-and-breakfast development is eight spaces: one for each of the five hotel rooms, one for the live-in manager, and one space for every shift employee.<sup>15</sup> The Applicant has proposed to provide the bed-and-breakfast parking requirement of eight spaces (one ADA compatible). However, the LCP-guidance does not include any parking space requirements specifically attributable to public access use, and in this case, the proposed parking lot, like the bed-and-breakfast structure itself, would be located on land protected by a public trust easement. If additional parking is required for the public access use of the project, as conditioned to include additional public access amenities, such parking demand can be met through use of the informal parking lot located on State Lands south of the property, as well as parallel parking along the Highway 1 corridor, which is currently utilized by the public.

Finally, the project site contains derelict pilings and other rubble, including concrete rubble, that adversely impacts the public's use and enjoyment of the shoreline and water at this location. Therefore, Special Condition 1 requires revised final plans to include removal of unused pilings, abandoned development, and all debris at the project site.

### **Conclusion**

As proposed and conditioned by this permit, the project would expand visitor-serving uses on Tomales Bay with the establishment of five overnight rooms. As conditioned, the proposed project would also maximize public recreational access opportunities by expanding lateral access along the shoreline and vertical public access to the bay itself. Permit conditions refine and secure these public access and visitor-serving elements, and address low-cost accommodation issues. In sum, and only as conditioned, the project represents a public recreational/visitor-serving access project, with components that will be sited and designed in such a way as to provide maximum public access and water-oriented recreation at this important site along Tomales Bay. As such, the project can be found consistent with the Coastal Act policies discussed in this finding.

## **J. HAZARDS**

### **Applicable Policies**

---

<sup>15</sup> Section 22.74 of the Marin County Code is referenced in the Interim Zoning of the Marin LCP Unit II.

As discussed and cited previously, Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and to avoid the need for landform altering protective measures in the future.

## **Analysis**

### **Coastal Flooding**

As described earlier, the proposed project is not designed to avoid and minimize risks from coastal flooding, including from sea level rise, as required by the Coastal Act. However, conditions can be imposed to help reduce these risks. First, the proposed project would not be able to withstand future flooding and wave run-up conditions, including potentially by as soon as 2030. This future risk could be avoided, however, as required by the Coastal Act, through a requirement to remove the proposed structures when they are no longer safe to inhabit. Therefore, Special Condition 8 requires such removal to occur. For purposes of this condition, the structures would be considered unsafe when any government agency has ordered that the structures are not to be occupied due to any of the hazards at the site. As such, although long-term stability cannot be assured, as conditioned, the project would not require additional, more substantial protective measures in the future, because it would be removed when it is in danger, as opposed to being further protected, and therefore, with respect to wave run-up and related coastal hazards, the project, as conditioned, would be consistent with Coastal Act Section 30253.

### **Tsunamis**

The site is also subject to hazards due to tsunami inundation. The CalEMA tsunami inundation maps indicate that the site would be inundated by tsunami flooding. To minimize these risks, the Commission's geologist and engineer recommend that appropriate warning signs be placed at the project site to alert guests to the hazards present and give appropriate instructions for evacuation during strong earthquake events. They further recommend that the Applicant be required to work with the County of Marin to ensure that visitors are aware of any tsunami warning systems (e.g., alert sirens, strong motion alarms) that may be put in place.

To assure that the proposed new development minimizes risks to life and property in areas of high geologic hazard due to tsunami inundation, the Commission attaches Special Condition 5. Special Condition 5 requires that prior to issuance of the coastal development permit, the applicant submit for the review and approval of the Executive Director, a tsunami safety plan. The plan would detail tsunami hazard response materials to be provided to hotel guests including hazard zone maps, evacuation routes, and include a summary of local warning plans by the Marin County Office of Emergency Services.

In addition, Special Condition 1 requires the project to be designed to withstand potential tsunami runup and to set the elevation of the floors where bedrooms are located at a minimum height of one foot above the modeled depth for tsunami run-up at the site, taking into account sea level rise (Special Condition 1). In addition, the development has been conditioned to develop a tsunami safety plan for aiding the evacuation of bed-and-breakfast guests. Thus, as conditioned, the proposed project would be designed so as to minimize risks to life and property from tsunami inundation consistent with the Coastal Act.

### **Liquefaction**

The site is also subject to liquefaction hazards. Liquefaction is a process by which sediments below the water table temporarily lose strength and behave as a viscous liquid rather than a solid reducing the bearing strength of the soil. When liquefaction is accompanied by some form of ground displacement or ground failure it can be destructive to the built environment. Adverse effects of liquefaction to structures can take many forms, including lateral spreading of foundations, uneven building settlement, and increased lateral pressure on retaining walls. Buildings subjected to liquefaction-related damages can shift, tilt, or be displaced off of their foundations.

In this case, the Applicant has agreed to found the entire structure on end-bearing piles set into unweathered bedrock. Such a foundation system would provide protection against damage due to liquefaction of the soils overlying the bedrock, appropriately mitigating and minimizing the liquefaction hazard with respect to the principal structure. Special Condition 1 ensures these proposed measures would be carried out by requiring the Applicant to submit final foundation plans for the review and approval of the Executive Director that include provisions for constructing site structures on end-bearing piles set into unweathered bedrock.

As the development has been conditioned to provide a foundation designed to withstand potential ground settlement and dislocation associated with soil liquefaction, the proposed bed-and-breakfast structure will be located so as to minimize risks to life and property from liquefaction, as required by Section 30253 of the Coastal Act.

### **Shoreline Protection**

As discussed previously, Coastal Act Section 30253 addresses the need to ensure long-term structural integrity, minimize future risk, and to avoid the need for landform altering protective measures in the future. In addition, Coastal Act Section 30235 addresses the use of shoreline protective devices. It states:

*Section 30235. Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.*

Coastal Act Section 30235 acknowledges that seawalls, revetments, cliff retaining walls, groins, seacave infill/plugs and other such structural or “hard” methods designed to forestall erosion also alter natural landforms and natural shoreline processes. Accordingly, with the exception of new coastal-dependent uses, Section 30235 limits the construction of shoreline protective works to those required to protect existing structures or public beaches in danger from erosion. The Coastal Act provides these limitations because shoreline structures can have a variety of negative impacts on coastal resources including adverse affects on sand supply, public access, coastal views, natural landforms, and overall shoreline beach dynamics on and off site, including ultimately resulting in the loss of beach and natural shoreline landforms.

Under Coastal Act Section 30235, shoreline protective structures may be approved if: (1) there is an existing structure; (2) the existing structure is in danger from erosion; (3) shoreline altering

construction is required to protect the existing threatened structure; and (4) the required protection is designed to eliminate or mitigate the adverse impacts on shoreline sand supply. The first three questions relate to whether the proposed armoring is necessary. The fourth question applies to mitigating some of the impacts from armoring.

### **Analysis**

Coastal Act Section 30235 allows for shoreline protection in certain circumstances (if warranted and otherwise consistent with Coastal Act policies) for “existing” structures. One class of “existing structures” refers to those structures in place prior to the effective date of the Coastal Act. Coastal zone development approved and constructed prior to the Coastal Act went into effect was not subject to Section 30253 requirements. Although some local hazard policies may have been in effect prior to the Coastal Act, these pre-Coastal Act structures have not necessarily been built in such a way as to avoid the future need for shoreline protection (in contrast to those evaluated pursuant to Section 30253 and similar LCP policies since).

The proposed project is located along an approximately 1-mile stretch of the Tomales Bay where the highway and residential development are located immediately adjacent to the water. This pattern of development began in the 1800’s, when the railroad was located along the current Highway 1 corridor, and the tavern structure and surrounding residential development were in place well before the Coastal Act was established. The existing residential structures in the area are mostly supported by retaining walls placed at the shoreline underneath the buildings, so that a portion of the buildings are placed on land supported by retaining walls, and the remaining portion is supported by bay pilings. Portions of the highway that are adjacent to lots that do not contain such structures are generally protected by riprap revetments (see site area photos in Exhibit 2).

The proposed project includes reinforcing the existing retaining wall adjacent to the parking lot. The existing retaining wall is made up of both mortared stone and concrete, and would be encased by gunnite and supported with new tie-backs, most likely in the form of helical anchors. Additionally, a footing would be placed to anchor the wall at its bottom at the beach level.<sup>16</sup> Because the proposed repair expands the existing wall (through the addition of a new gunnite surface), and covers more than 50% of the existing structure, it is considered new development for purposes of CDP requirements, and must comply with Section 30235. The retaining wall protects the existing parking area, as well as the slope and highway behind it. As evidenced by the surrounding development and coastal hazards maps, the existing highway is in danger from shoreline erosion and requires protection. In addition, in this case, the repair alternative is the least environmentally damaging because it requires minimal expansion (the wall would be made approximately four inches thicker). Finally, the repaired wall would have minimal impacts on local shoreline sand supply. Given the existing pattern of development, there is little to no sandy beach in this area. In addition, the repaired wall would be located in the intertidal bay mudflat. Further, the wall is vertical and thus the encroachment (consisting of the wall footprint) is minimal. Therefore, although the retaining wall would cause some adverse impacts to beach area and sand supply, as all shoreline protective structures do, the impacts would be minimal in this particular case. Moreover, any adverse sand supply and beach impacts that result from the

---

<sup>16</sup> Letter from Torikian Associates. Geotechnical Engineers for the Marshall Tavern Project. February 12, 2012.

repaired walls would be mitigated by the on-site public access improvements that must be incorporated into the project, as described above.

**Long-Term Stability, Maintenance, and Risk**

Coastal Act Section 30253 requires the project to assure long-term stability and structural integrity, minimize future risk, and avoid additional, more substantial protective measures in the future. For the proposed project, the main Section 30253 concern is assuring long-term stability. This is particularly critical given the dynamic shoreline environment within which the proposed project would be placed. In this case, because assuring long-stability through project design is not possible, as described, the project has been conditioned for removal of the structures when they are no longer safe to inhabit.

In terms of recognizing and assuming the hazard risks for shoreline development, the Commission's experience in evaluating proposed developments in areas subject to hazards has been that development has continued to occur despite periodic episodes of heavy storm damage and other such occurrences. Development in such dynamic environments is susceptible to damage due to such long-term and episodic processes. Past occurrences statewide have resulted in public costs (through low interest loans, grants, subsidies, direct assistance, etc.) in the millions of dollars. As a means of allowing continued development in areas subject to these hazards while avoiding placing the economic burden for damages onto the people of the State of California, applicants are regularly required to acknowledge site hazards and agree to waive any claims of liability on the part of the Commission for allowing the development to proceed. Accordingly, this approval is conditioned for the Applicant to assume all risks for developing at this location (see Special Condition 7).

To ensure that future property owners are properly informed regarding the terms and conditions of this approval, this approval is also conditioned for a deed restriction to be recorded against the property involved in the application (see Special Condition 13). This deed restriction will record the conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the property.

As noted above, some risks of an unforeseen natural disaster could result in destruction or partial destruction of the proposed development. 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 shore or on an adjacent property. As a precaution, in case such an unexpected event occurs on the subject property, the Commission attaches Special Condition 8, which requires the landowner to accept sole responsibility for the removal of any structural debris resulting from coastal hazards that impact the site, and agree to remove the structures should the threat from coastal hazards reach the point where a government agency has ordered that the structure not be occupied.

**K. VISUAL RESOURCES AND COMMUNITY CHARACTER**

**Applicable Policies**

Coastal Act Section 30251 Scenic and visual qualities states:

*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall ... restore and enhance visual quality in visually degraded areas...*

The Marin LCP offers additional guidance on visual and scenic resources:

*...auto travel for sightseeing purposes is the primary activity of up to one-half of all non-county residents on a summer Sunday. For all coastal visitors, the unspoiled character of the Marin coast is a large part of their recreational experience.*

*Placement of New Additions to Historic Buildings*

*The most important façade of any building is generally the frontal façade; this is particularly true when viewing a streetscape. The front elevation, and side elevation on a corner building, should not have additions added that destroy a building's historic character.*

Furthermore, the Marin County LCP Unit II provides guidance on the issue of public access in the Marshall area. It states:

*This portion of the shoreline constitutes most of the "town" of Marshall. It is extremely narrow and largely built out with single-family residential dwellings on pilings. The few undeveloped lots, used by the public for parking, viewing, and clamming, serve a very important visual access function by providing a break in the long row of developed lots.*

**Analysis**

The Marshall Tavern is an important historic structure that adds to the community character of the area. Built by the Marshall Brothers in 1873 prior to the railroad along Tomales Bay, the structure has allowed access over the waters of the Bay for many decades. The tavern originally served as a soda shop and hardware store. Although modified over the years, the structure has basically retained its historic appearance and importance to the community. An addition to the north was added around 1910, giving it the form it has today. Information submitted by the applicants indicates that the tavern appears to meet two of the California Register of Historic Places criteria for listing as a significant historic resource. Furthermore, if renovated and rehabilitated to its historic appearance, the structure could qualify as a contributor to a local historic district and may even stand on its own as significant historic structure at the local level.

The tavern has been in a state of visual degradation for years. While closed, the structure has not been able to provide the community character benefits which it provided historically as an operating facility. In addition, there is now a solid wood fence along the landward edge of the Tavern and hotel site, which partially obstructs views across the site to the shoreline.

The Coastal Act requires new development to protect views to and along the shoreline, be visually compatible with the character of the area, to protect the character of this popular visitor destination, and, where feasible, to restore and enhance visual quality in visually degraded areas. The project site is located along an approximately one-mile stretch of the Tomales Bay that is largely developed between Highway 1 and the bay, and therefore, views in this area are largely blocked by existing development. The Marin County LCP identifies this issue and emphasizes the importance of protecting the views in Marshall that do exist.

On one hand, the proposed restoration of the Marshall Tavern to its historic appearance, and opening it to the public will offer significant visual and community character benefits. However, at the same time, the proposed project does constitute new development for purposes of Coastal Act consistency, and it therefore constitutes placing a two-story structure between Highway 1

and the bay, completely blocking views to the bay from certain vantage points. To help offset this impact, Special Condition 1(k) requires the existing fencing, which did not exist historically, to be removed. In addition, the public recreational pier required above would further offset adverse impacts to coastal views by providing direct views to the bay for the public. Finally, to ensure the proposed restoration will restore the Tavern to its historic appearance, as intended, Special Condition 1(a) requires the restoration to be consistent with the Secretary of Interior Standards for Rehabilitation and Reconstruction. . As conditioned, the project can be found consistent with the visual resource and community character policies of the Coastal Act.

## **L. MARINE RESOURCES**

### **Applicable Policies**

Coastal Act Section 30230 requires that marine resources be maintained, enhanced and restored. New development must not interfere with the biological productivity of coastal waters or the continuance of healthy populations of marine species. Coastal Act Section 30230 states:

*Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231 of the Coastal Act states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Coastal Act Section 30233 requires that development in wetlands shall not adversely impact their functional capacity and shall be permitted when there is no feasible less environmentally damaging alternative and feasible mitigation measures have been applied. Coastal Act Section 30233 states, in relevant part:

*The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects...*

### **Analysis**

The proposed project involves development over the waters, intertidal mudflats, and shoreline of Tomales Bay, which has the potential to adversely impact marine and land resources, including wetlands and water quality. The shallow waters and wetlands of Tomales Bay provide habitat

and food sources for marine flora and fauna, which make use of both the aquatic and terrestrial environments provided in this area of the Bay.

The project is located within and over tidal mudflats of the Tomales Bay. An assessment of the site by Avocet Research Associates (June 16, 2008) concluded that the renovation poses no significant adverse impacts to listed species. Marin County accepted these findings (in their July 1, 2010 Staff Report to the Deputy Zoning Administrator for the Altman/Atid Use Permit, Design Review, and Tidelands Permit), concurring:

*“...the site contains no native vegetation, and...no evidence of any special status species, and... the site did not provide habitat likely to support those species.”*

With respect to Coastal Act policy requirements, marine resources must be protected and restored (Section 30230). New development within the marine environment may be approved for limited uses, provided that the proposed development is the least environmentally damaging alternative and all feasible mitigation measures have been applied to minimize adverse impacts to the marine environment (Section 30233). New development must also be consistent with all other applicable marine resource protection policies. As previously described, the project, as conditioned, is the least environmentally damaging feasible alternative that allows for the restoration of the Marshall Tavern. The proposed project is mostly an in-kind replacement of the existing structures, and therefore new fill will be minimized. In addition, the required public recreational pier will help the project, as conditioned, to maximize consistency with Section 30233 because it is an allowed use for the existing fill in the bay.

Coastal Act Section 30230 also requires the maintenance, enhancement, and, where feasible, the restoration of marine resources. In addition, biological productivity and water quality are protected through Coastal Act Section 30231. Section 30233 allows for development that does not adversely impact the functional capacity of wetlands. Section 30233 also requires that there is no feasible less environmentally damaging alternative and that feasible mitigation measures are applied.

The site is located immediately adjacent to and over the waters of Tomales Bay. The proposed construction activities associated with the development could lead to adverse impacts on wetlands and Tomales Bay resources, including drainage and runoff from the project that could potentially result in adverse impacts on Tomales Bay water quality. In particular, those activities include the demolition and replacement of existing structures, including the buildings, retaining wall, and pilings. The project requires work over and adjacent to intertidal mudflats, which could lead to potential adverse water quality impacts. These impacts to water quality during construction can readily be minimized through the development and implementation of a construction plan that, at a minimum, includes identification of all construction and staging areas, all construction methods and timing, and all construction BMPs (i.e., silt fences, straw wattles, washing/refueling areas, spill containment measures, site cleanup procedures, waste disposal, etc.), including those designed to prevent release of construction-related materials, liquids, soil, and debris into the Bay. Special Condition 2 requires the Applicant to implement specific mitigation measures regarding material containment, installation procedures, construction staging, and debris disposal during all activities which impact the intertidal mudflats. These mitigation measures and construction BMPs include at a minimum, the use of non-reactive piling materials (i.e., concrete, steel, untreated wood, plastic-dipped treated wood,

reinforced recycled plastic, etc.); all concrete work shall be conducted pursuant to Special Condition 2; a flexible skirt shall be used to contain disturbed sediments during installation; heavy-duty netting shall be installed beneath all work areas to collect construction discards and a containment boom must be placed into the Bay to capture all debris that falls into the water; netting and boom shall be cleaned daily or as often as necessary to prevent accumulation of debris; and all wastes shall be disposed of in the appropriate manner. The BMPs identified above are typical requirements for work over and into the Bay, and are adequate to satisfy the requirements of Coastal Act Section 30231 (see Special Condition 2).

To ensure maximum public notification and good construction relations, the CDP and the construction plan must also be kept on site and all persons involved in construction briefed on the content and requirements of them, and a construction coordinator must be designated and be available to answer questions and also investigate complaints and take remediation action if necessary 24 hours per day for the duration of the project (see Special Condition 2).

### **Conclusion**

As conditioned, including as described in the alternatives analysis discussion above, the Commission concludes that there are no feasible less environmentally damaging feasible alternatives to the approved project, and that it appropriately protects coastal waters, water quality, and marine resources as directed by Sections 30230 and 30231 of the Coastal Act. Required conditions include all relevant authorizations; final project plans for the structures, including the building, decks, retaining walls, and pilings, and the landscaping plans; pre and post-construction BMPs; and mitigations for potential impacts and disturbance to the marine environment. With the inclusion of mitigation measures designed to prevent adverse impacts from construction activities, and to protect resources of the marine environment, the project conforms to the marine resource protection requirements of Coastal Act Sections 30230 and 30231.

### **M. OTHER AGENCY APPROVALS**

Special Condition 11 requires the Applicants to provide all relevant authorizations from Caltrans, the Marin County, US Army Corps of Engineers, and State Lands Commission or evidence that permits, authorizations, leases or other approvals from these agencies are not necessary.

### **N. OTHER**

Coastal Act Section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application in the event that the Commission's action is challenged by a party other than the Applicant. Therefore, consistent with Section 30620(c), the Commission imposes Special Condition 12 requiring reimbursement for any costs and attorneys fees that the Commission incurs in connection with the defense of any action brought by a party other than the Applicant challenging the approval or issuance of this permit, the interpretation and/or enforcement of permit conditions, or any other matter related to this permit.

### **O. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be

consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

Marin County served as the lead agency for the project, in its processing of the Altman/Atid Use Permit, Design Review, and Tidelands Permit (Application Number UP-07-12, DR 07-17, and TP 07-13). The County found the project to be categorically exempt from environmental review pursuant to Section 15331 Class 31 of the CEQA Guidelines “because it involves repair and restoration to a historic structure in a manner that is consistent with Secretary of Interior Standards for Treatment of Historic Properties...”<sup>17</sup>

The Coastal Commission’s review and analysis of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. The Commission has reviewed the relevant coastal resource issues with the proposed project, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources. All public comments received to date have been addressed in the findings above. All above findings are incorporated herein in their entirety by reference.

The Commission finds that only as modified and conditioned by this permit will the proposed project avoid significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as conditioned, would have on the environment within the meaning of CEQA. If so conditioned, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

---

<sup>17</sup> Staff Report to the Deputy Zoning Administrator, Altman/Atid Use Permit, Design Review, and Tidelands Permit. Application Number: UP 07-12, DR 07-17, and TP 07-03. APN 106-020-38 and 106-020-39. Planner: Ben Berto. July 1, 2010.

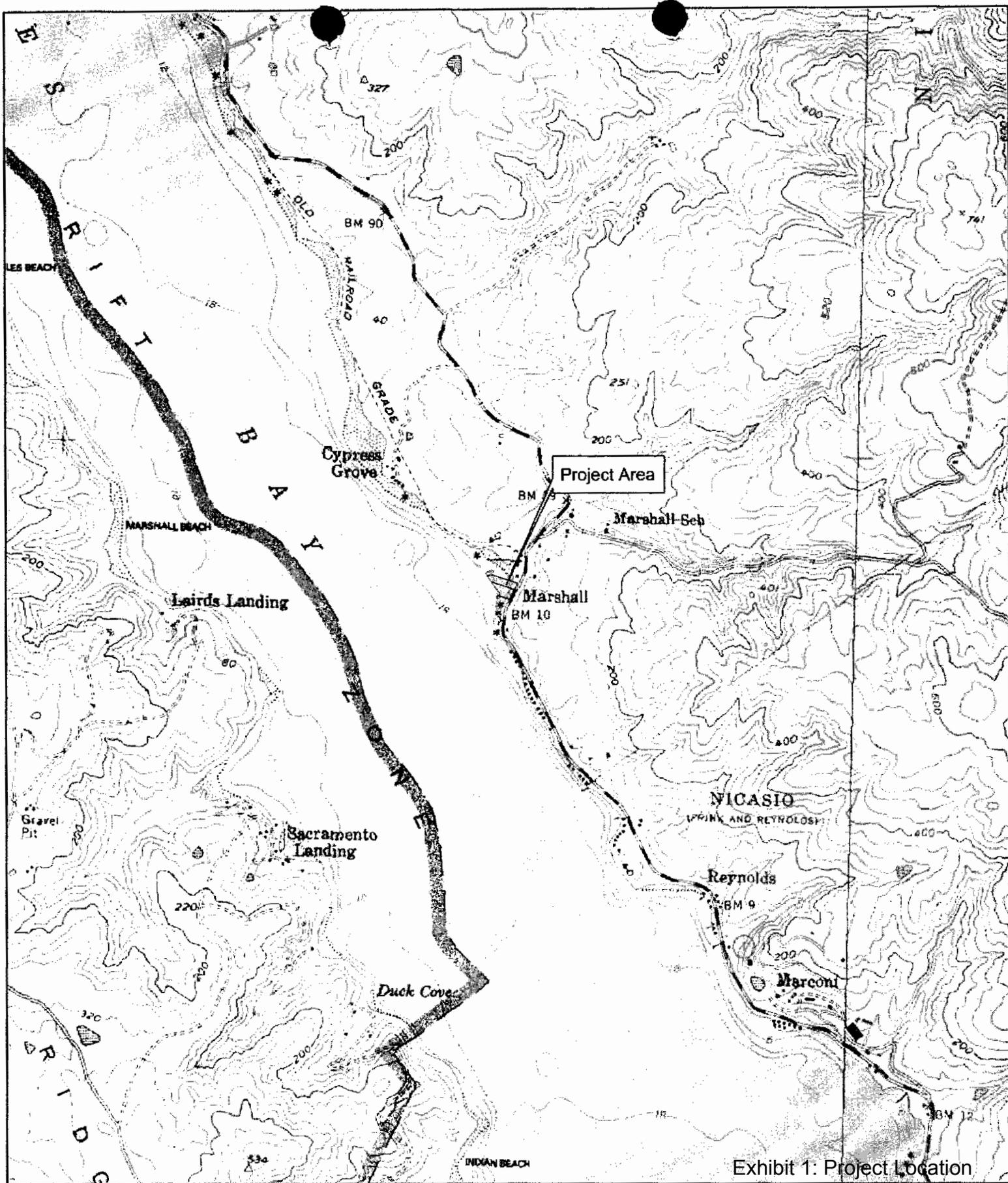


Exhibit 1: Project Location  
2-06-017 (Marshall Tavern)

**ARS 08-033: Marshall Tavern Project**  
**APNs 106-020-038 & -039**  
**Marshall, Marin County, CA**

*USGS 7.5' Tomales Quadrangle Map*



Page 1 of 1  
**Project Location Map**

SRE 6/12/08



Exhibit 2: Site Photos  
2-06-017 (Marshall Tavern)  
Page 1 of 7

SEAFOOD  
FULL BAR  
DANCING  
BAR-B-Q OYSTERS







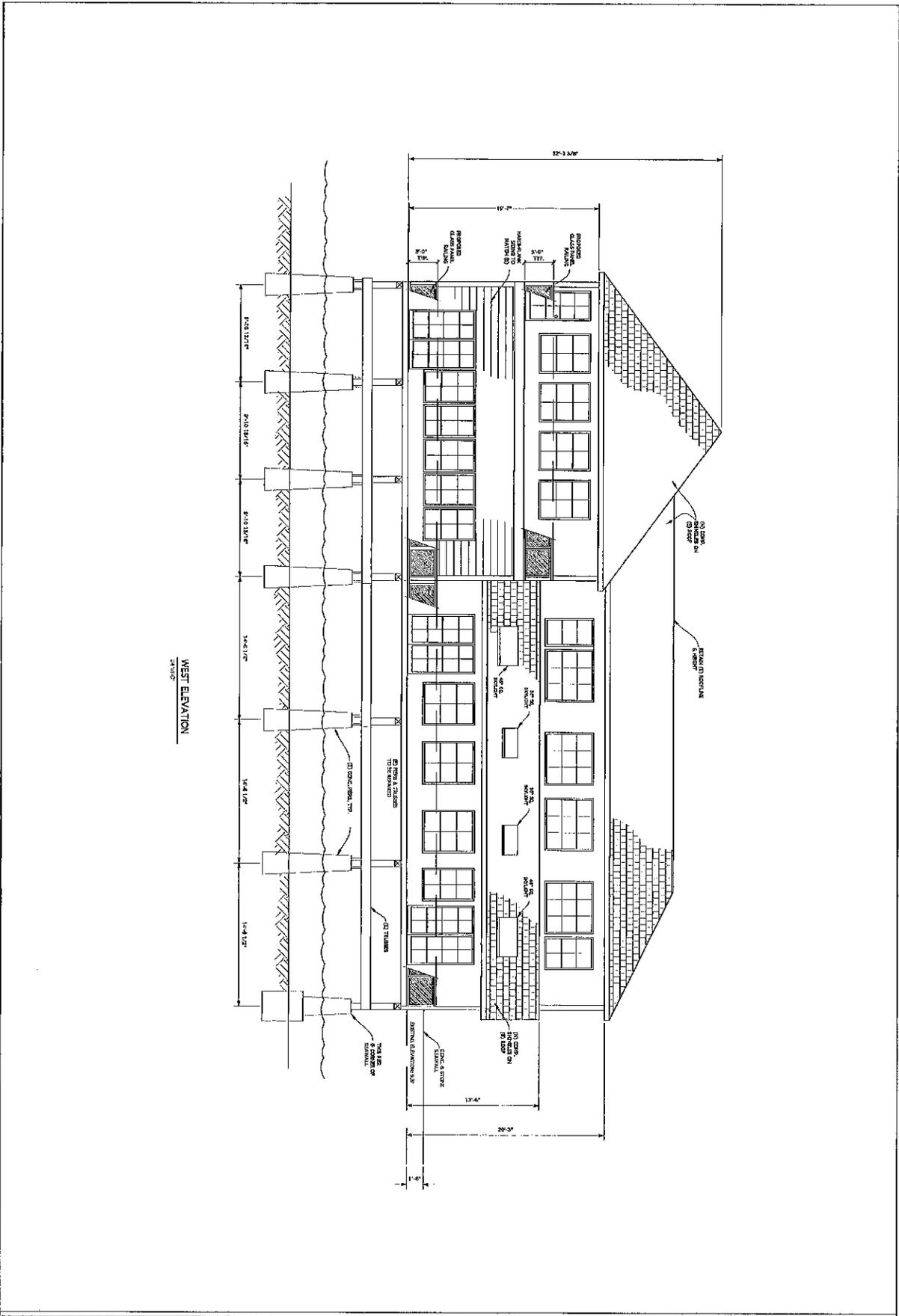




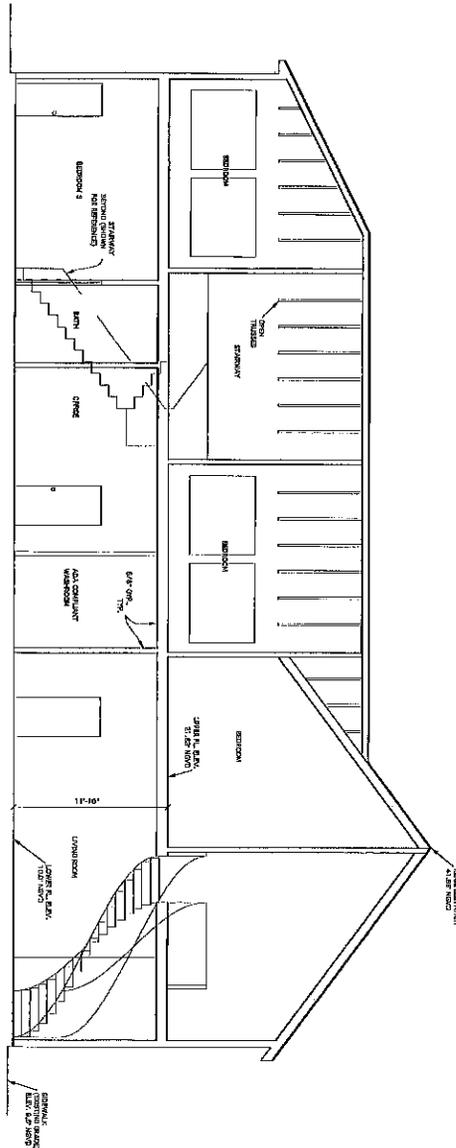








7 SHEET NO.	MARSHALL TAVERN HOUSE: PROPOSED REMODELING (FORMERLY MARSHALL TAVERN) <b>WEST ELEVATION</b> 2010S & 2012S ROUTE 1, MARSHALL, CA	DESIGN: DANIEL ALTMAN (510)-644-4442 OWNERS: DANIEL ALTMAN AVI ATID	PROJECT NO. DATE DRAWN BY CHECKED BY DATE
	SHEET NO. 07 DATE 08.04.17 DRAWN BY DANIEL ALTMAN CHECKED BY AVI ATID DATE 08.04.17	PROJECT NO. 17-001 DATE 08.04.17 DRAWN BY DANIEL ALTMAN CHECKED BY AVI ATID DATE 08.04.17	



SECTION A-A  
1/4"=1'-0"

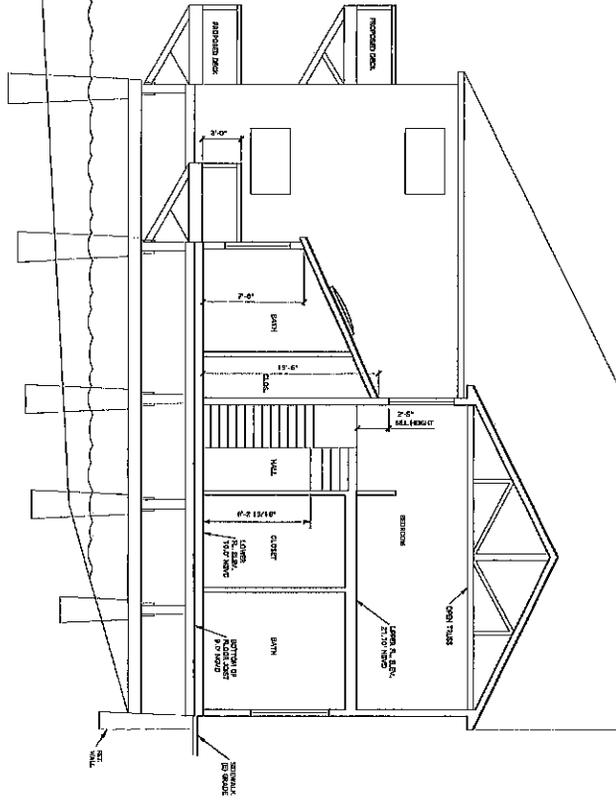
6

DATE: JULY 24, 2018  
 SCALE: AS NOTED  
 DRAWN BY: [Name]  
 CHECKED BY: [Name]

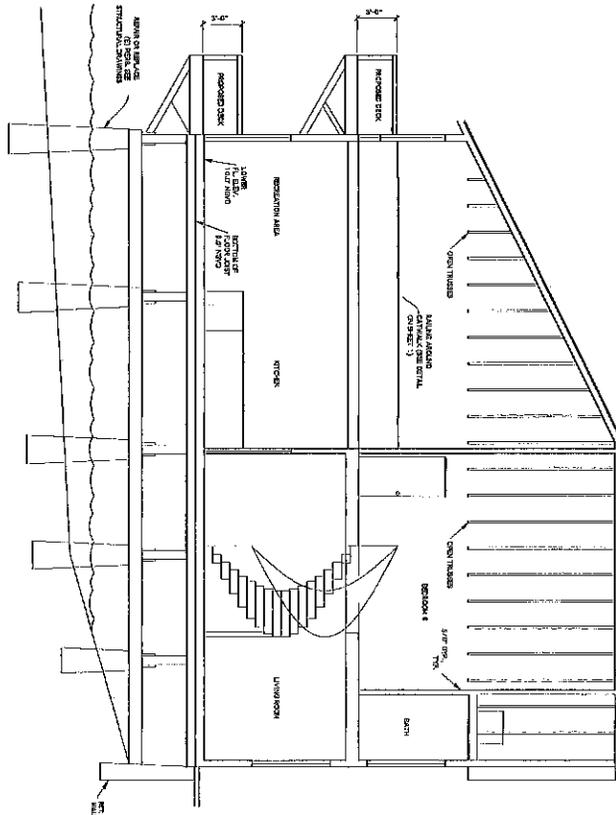
**MARSHALL TAVERN HOUSE: PROPOSED REMODELING**  
**SECTION A-A**  
 20105 & 20125 ROUTE 1, MARSHALL, CA

DESIGN: DANIEL ALTMAN  
 (510)-644-4442  
 OWNERS: DANIEL ALTMAN  
 AVI ATID

DATE	DESCRIPTION
JULY 18, 2018	ISSUE FOR PERMITS
JULY 1, 2018	ISSUE FOR PERMITS
MAY 28, 2017	ISSUE FOR PERMITS
JULY 11, 2016	ISSUE FOR PERMITS
JULY 12, 2016	ISSUE FOR PERMITS
SEP 11, 2016	ISSUE FOR PERMITS



SECTION B-B  
1/2" = 1'-0"



SECTION C-C  
1/2" = 1'-0"

<p>DATE: JULY 24, 2018          SHEET: 206-017          TITLE: MARSHALL TAVERN HOUSE</p>	<p><b>MARSHALL TAVERN HOUSE: PROPOSED REMODELING</b>  <b>SECTION B-B &amp; SECTION C-C</b>          20105 &amp; 20125 ROUTE 1, MARSHALL, CA</p>	<p>DESIGN: DANIEL ALTMAN          (510)-644-4142          OWNERS: DANIEL ALTMAN          AMI ATTD</p>	<p>NO. 10          OF 20</p>	<p>REVISIONS</p> <table border="1"> <tr> <th>NO.</th> <th>DATE</th> <th>DESCRIPTION</th> </tr> <tr> <td>1</td> <td>07/11/18</td> <td>ISSUE FOR PERMITS</td> </tr> <tr> <td>2</td> <td>07/11/18</td> <td>ISSUE FOR PERMITS</td> </tr> <tr> <td>3</td> <td>07/11/18</td> <td>ISSUE FOR PERMITS</td> </tr> </table>	NO.	DATE	DESCRIPTION	1	07/11/18	ISSUE FOR PERMITS	2	07/11/18	ISSUE FOR PERMITS	3	07/11/18	ISSUE FOR PERMITS
NO.	DATE	DESCRIPTION														
1	07/11/18	ISSUE FOR PERMITS														
2	07/11/18	ISSUE FOR PERMITS														
3	07/11/18	ISSUE FOR PERMITS														





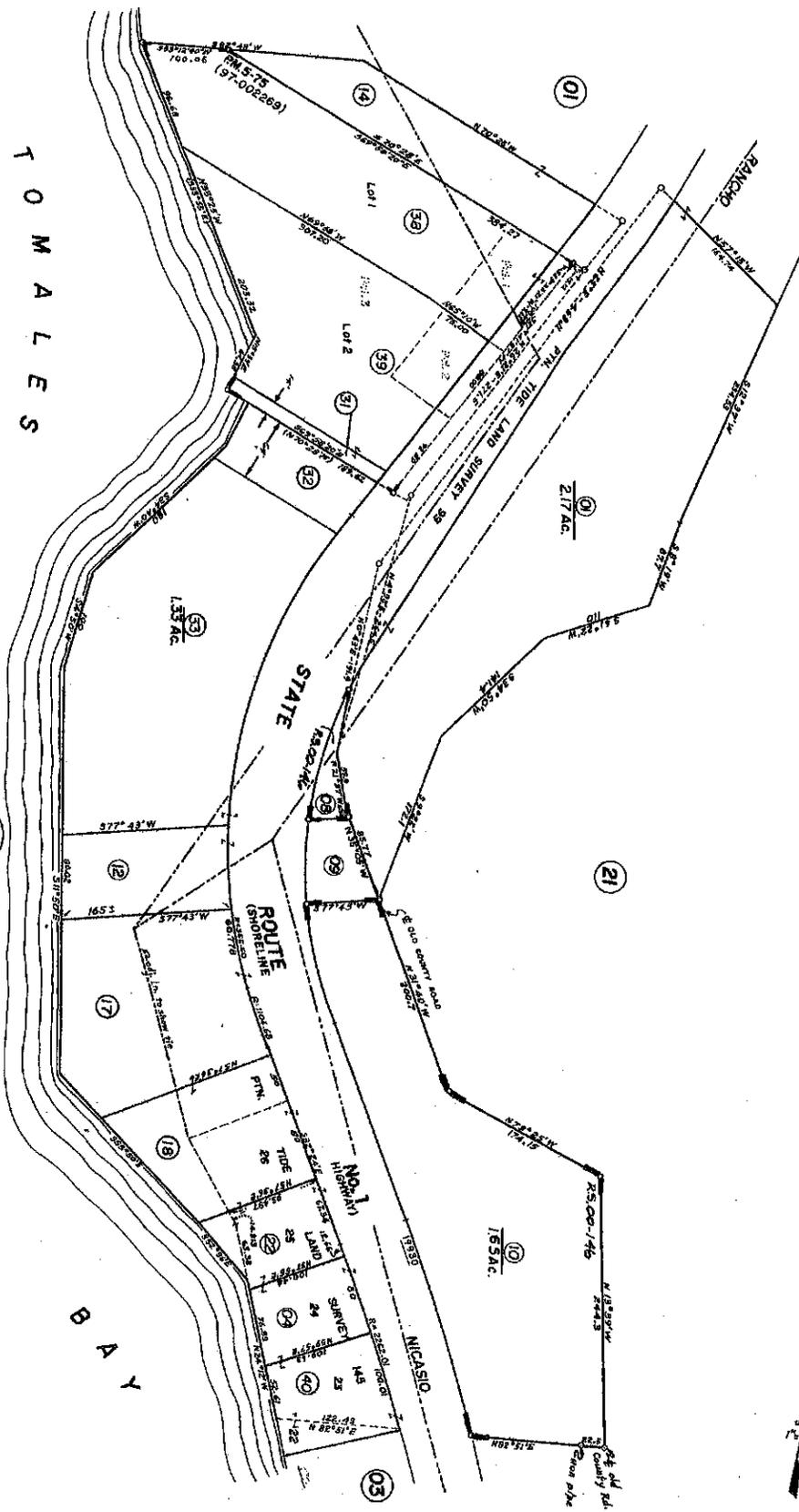




POR. RANCHO NICASIO

Tax Rate Area  
94-004  
94-005

106-02



7-18-01/1  
19-15-98 MS  
2-08-2000 CD

Unrec. Map of Summerfield Sub. of T.L. Survey 145

NOTE - A COMPASS BEARING AND THE NUMBER RIGHT OF WAY LINE  
SHOWN ON THIS MAP, HAS BEEN RECALCULATED TO BE ACCURATE.  
NOTE - Assessor's Block Numbers Shown in Ellipses.  
Assessor's Parcel Numbers Shown in Circles.

TOWN OF MARSHALL  
Assessor's Map Bk. 106-Pg. 02  
County of Marin, Calif.

