

CALIFORNIA COASTAL COMMISSION

CENTRAL COAST AREA OFFICE

FRONT STREET, STE. 300

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HEARING IMPAIRED: (415) 904-5200

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DSL
12/18/96

REVISED FINDINGS

APPLICATION NO.: 3-96-102

APPLICANT: STEPHEN PAGE Agent: John Matthams, Int. Design Group

PROJECT LOCATION: 1450 Sunset Drive, Asilomar Dunes area, City of Pacific Grove, Monterey County, APN 007-021-05

PROJECT DESCRIPTION: Construction of a single-family dwelling, driveway, storm drain system, paved terrace and courtyards, retaining walls; berming and grading of dunes.

- Lot area: 30,232 sq. ft.
- Building coverage: 3,680 sq. ft.
- Pavement coverage: 2,870 sq. ft. (driveway 2,300 sq. ft., patios 570 sq. ft.)
- Grading: 1,391 cu. yds. (983 cu. yds. cut, 408 cu. yds. fill)
- Parking spaces: 2 spaces
- Zoning: Residential (R-1-8-4)
- Plan designation: Low Density Residential, 1-2 units acre
- Project density: 1 unit/30,232 sq. ft.
- Ht abv fin grade: 18 feet max.

PREVAILING COMMISSIONERS ELIGIBLE TO VOTE: Calcagno, Flemming, Staffel

LOCAL APPROVALS RECEIVED: Architectural Approval; CEQA - Final Environmental Impact Report certified 1/6/93.

SUBSTANTIVE FILE DOCUMENTS:

- Page v. City of Pacific Grove, Stipulated Judgement, No. M26049, filed Dec. 2, 1993
- Pacific Grove Local Coastal Program Land Use Plan
- Final EIR, Page Residential Development, EIP Associates, Feb. 1992
- Correspondence from Mary-Margaret O'Connell (Nov. 4, Nov. 12, 1996)
- Correspondence from Stephen Page (Nov. 5, 1996)

STAFF NOTE: The Commission heard this application on November 12, 1996 at the meeting in San Diego. Based on written information from the applicant and on oral testimony at the hearing, the Commission determined that the terms and conditions of the Stipulated Judgement between the Applicant and the City of Pacific Grove, by and large adequately modified the project to meet Coastal Act resource protection standards. The conditions of this agreement were substituted for all of those recommended by staff in the November staff report. These conditions, taken verbatim from the Stipulated Judgement are found on pages 3 through 13 of the Revised Findings for the project. The complete text of the Stipulated Judgement is attached as Exhibit B.

In addition to adopting the city conditions, the Commission also retained a revised portion of Condition 3 originally proposed by staff. This revised condition is found on page 13 of the Revised Findings. Finally, the applicant offered to indemnify the Commission for any damage which may occur to the approved structure as a result of storm waves. The indemnification agreement is attached as Exhibit C.

The project was approved by a six-four vote. Commissioners on the prevailing side were Chairman Calcagno, Flemming, Staffel, Randa, Belgard and Steinberg. Commissioners Randa, Belgard and Steinberg are no longer seated on the Commission, therefore, only Commissioners Calcagno, Flemming and Staffel are eligible to vote on the Revised Findings. A majority of these Commissioners (2) is necessary to approve the Findings. A copy of the transcript of the hearing and relevant supporting materials are included with the proposed Revised Findings. (Exhibits D and E)

I. Staff Recommendation: Staff recommends that the eligible Commissioners adopt the following revised findings and conditions:

II. Standard Conditions.

See Exhibit A (attached).

III. Special Conditions. Text, except for Condition 56, has been taken verbatim from the Stipulated Judgement (Page v. City of Pacific Grove) dated December 12, 1993, re-numbered only for the Commission convenience.

1. The maximum height of the residence shall be 15 feet above grade, with the sole exception of the mezzanine roof which shall not exceed 18 feet above grade. The mezzanine is approximately 12 feet by 12 feet and is shown on Exhibit 2. The 20 foot sightline for the project and all setbacks and other size and siting requirements imposed by Exhibit 1 shall be in effect, except as specifically amended in Paragraph 4 below. Exhibit 2, showing dimensions and location on the lot of the proposed project improvements, including footprint, roof line, lengths, and widths, is incorporated as an illustrative exhibit to this Judgment.
2. Siding and roofing materials for the proposed single family dwelling shall be as specified in Exhibit 3. Qualities and color of the materials shall be substantially identical to the samples lodged with the City on November 9, 1993. The architectural detail relating to the aforesaid materials, as shown on Exhibit 2, shall be deemed to satisfy the Conditions of Approval, Condition No. 3, previously adopted by the City Council.
3. The total covered footprint for the house and garage shall not exceed 3,680 square feet (as generally shown in Exhibit 2), and Conditions of Approval, Condition No. 4, previously adopted by the City Council, is modified accordingly. The covered parking requirement of the City for parking for two vehicles may be satisfied, at Petitioner's request, with the construction of under grade parking to be located as shown on Exhibit 2. The plan for the driveway for the parking area shall contain appropriate measures to screen (by landscaping, by berm, or otherwise) the driveway and garage entrance from public view. The City's Director of Planning shall determine the appropriate method of screening and the sufficiency of such screening prior to the City's issuance of a building permit. The area of underground construction shall not exceed 650 square feet, of which no more than 100 square feet may be devoted to storage space. The entrance to the garage area shall not be more than 20 feet wide. Under no circumstances shall any of the underground area be habitable or converted to habitable uses. Petitioner agrees to hold harmless the City in regard to all costs and claims, if any, arising out of or related to the under grade construction.

NOTE: Exhibit references in these conditions are to those items included in the Stipulated Judgement attached to these Revised Findings as Exhibit B.

III. Special Conditions. (continued)

4. This approval shall be deemed effective on December 1, 1993. This approval shall be valid for two years, said term to commence upon obtaining a coastal development permit for the project from the California Coastal Commission, and Conditions of Approval, Condition No. 13, previously adopted by the City Council, is modified accordingly.
5. All construction and other work on the property shall be in strict compliance with the terms and conditions of approval, including those specified in this Judgment. Any deviation from any term or condition must be approved by the City in advance, and may require City Council approval.
6. The landscape plan required by Resolution No. 6322 for the architectural approval shall be prepared by Petitioner and shall be submitted to the City for approval and approved by the City prior to the building permit being issued. Petitioner and City shall review the plan one year after work is completed, and annually for the next two years in order to assess the success of Petitioner's good faith efforts to restore native vegetation. The landscape plan will be phased or staged so as to plant the dune and the area of ice plant removed for construction, the second stage one year later, and the third stage one year after the second stage. Petitioner and the City shall make a good faith review of the landscaping efforts one year after issuance of the occupancy permit for the residence, and again one year after the first review in order to determine the success of landscaping already in place, and, based thereon, the feasibility and timing of continued revegetation.

Because of the danger of erosion, and in order to maintain stability on the westerly portion of the site, Petitioner is not required as a condition of approval to remove the existing vegetation to the west of the proposed residence. The landscape plan shall require, however, that as to existing vegetation to the west of the residence which is disturbed or damaged during construction or other site work, Petitioner shall restore or replace said vegetation in accordance with the landscaping plan.

9. Upon the granting to Petitioner of a Coastal Development Permit by the California Coastal Commission for the single family residence approved by the City, all causes of action against all respondents and defendants other than City of Pacific Grove shall be dismissed with prejudice. The City shall register with the California Coastal Commission the City's support of the project approved pursuant to this Judgment.
10. The precise dimensions and location on the lot of the proposed project improvements, including footprint, roof line, lengths, and widths, shall be as approved by the council following submittal pursuant to Section III.K. of the resolution.

III. Special Conditions. (continued)

11. The height of the structure shall not exceed 15 feet.
12. Siding and roofing materials shall be wood; the roof shall be shingles. Native stone materials shall also be utilized to assist in blending and harmonizing the structures with the natural elements of the site. Remaining architectural details shall be as approved by the council following submittal pursuant to Section III.K. of the resolution. Provided, that (a) roof lines shall have a slight pitch to harmonize with dune slope and shape, and (b) the design should consist of straight lines to further harmonize the structure with the adjoining dwelling.
13. Total area of the house and garage shall not exceed 2,680 square feet.
14. No structure shall be located westerly of the line labeled "building limit line" as delineated on Exhibit D of Planning Commission Resolution No. 92-32.
15. No structure shall be located easterly of a line parallel to and 245 feet westerly of the west side of Sunset Drive as it abuts the site.
16. All water collected in the gutting system shall be collected and directed, by means subject to approval of the city engineer, to the storm drain system main adjacent to the project site or outfall to the ocean as approved by the Coastal Commission.
17. Connection shall be made to the regional sewer system prior to any approval for occupancy being issued by the community development department.
18. Owner shall secure a coastal development permit from the Coastal Commission prior to issuance of a building permit.
19. Owner shall secure a water permit from the Monterey Peninsula Water Management District prior to issuance of a building permit.
20. A domestic sprinkler system shall be installed, subject to approval of the fire chief.
21. A turn around area shall be provided, to permit head-out exiting onto Sunset Drive. Prior to issuance of the building permit, owner is requested to make a good faith effort to reach agreement with the owner of 1500 Sunset Drive for a shared driveway in order to reduce driveway coverage and contain construction related traffic within a single access route. Driveway design and turn around shall be approved by the site plan review committee.

III. Special Conditions. (continued)

22. Architectural approval shall be valid for one year, said year to commence upon obtaining of a coastal development permit for the project.
23. Construction shall not commence until a copy of this resolution is signed by the owner, acknowledging receipt of the permit and acceptance of its terms and conditions, and is returned to the community development department.
24. All construction and improvement must occur in strict compliance with the proposal as set forth in the application for permit, as modified by this resolution. Any deviation from the approved plans must be reviewed and approved by staff and may require city council approval.
25. These terms and conditions shall be perpetual, and it is the intention of the city council and owner to bind all future owners and successors in interest of the property to the terms and conditions of the resolution, all its attachments, and all documents, plans and other items referenced herein.
26. Owner shall defend and save harmless the City of Pacific Grove against and from any claims, suits, judgments, costs and attorney fees arising out of this approval, or assertions that this approval is invalid, illegal, unconstitutional or otherwise contrary to law.
27. Should any inconsistencies arise in the items listed in these conditions or should any condition of this resolution require interpretation, the Community Development Director shall interpret the requirements of this resolution consistent with the Environmental Impact Report.
28. The boundary fence along the north side of the site shall be retained; when replacement becomes necessary it shall be replaced in kind.
29. Mitigation measures. The footprint, height, and size of the building as initially proposed have been, respectively, lowered and reduced by this council to levels so as to reduce the visual obstruction and interference with public views to a less than significant impact. Further, construction activities and staging areas shall not take place on lands or sensitive habitats adjacent to the project parcel. No dirt or sand shall be removed from sensitive habitats during construction or grading. The area upon which all construction shall take place shall be fenced and all construction equipment and vehicle storage will be confined within the fenced area. No travel or other use of the surrounding area will be permitted.

III. Special Conditions. (continued)

30. Mitigation measures. Incorporated here by reference are the mitigation measures set out at section 4.4-1(f) of the FEIR, with additional reduction of structure (house and garage) to a maximum of 3680 square feet. Further incorporated here by reference is the "suggested additional mitigation measure" set out in section 6.3 related to the blending of sand dune topography with the dwelling. The actual extend of the proposed sand dune screening is similar in concept to the "suggested mitigation measure" and is a variation of the description in section 6.3.
31. Mitigation measures. To the maximum extent possible the existing ground cover that protects the sand dunes shall not be disturbed. If such area is disturbed it shall be replanted immediately or as soon as feasible.

The proposed residential structure shall be supported with deep-seated pier or pole foundation systems. Conventional spread foundations shall not be used because the near-surface sand dunes are too loose to support such foundations, and in order to redensify the soils to bear the weight of the structure, the dunes would have to be graded. This grading action could strip large portions of the existing vegetation from the dunes, which would then exacerbate wind erosion. The drilled pier foundations will disturb less of the ground cover compared to conventional spread foundation. The concrete pier or wood pole foundations shall penetrate all sand dune and terrace deposits and shall be embedded four feet or more into the underlying bedrock. (Piers along the seaward side of the coastline house would be expected to be 12 to 20 feet deep.)

Areas used to store construction materials and house the construction shed shall be restricted and construction vehicle access to driveways or designated pathways shall be limited as much as possible.

32. Mitigation measure. Drilled holes shall be bolstered and supported by shielding three drilled hole sides as required by site conditions.
33. Mitigation measure. Full roof gutters and downspouts shall be placed on all eaves of all structures proposed for development on the site. All roof and driveway runoff as well as surface drainage shall be directed away from building site and into storm drain systems that carry the accumulated water in a closed conduit to the storm sewer system. Alternatively, drainage may also be directed to outfall into the ocean and shall be designed to have no impact upon marine or intertidal biota. Drainage into the ocean shall be designed in conjunction with a coastal biologist and approved by the Coastal Commission. Non-corrosive segmented drain pipe shall be used where coastal erosion may take place. (As the coastline erodes, the segments could be removed easily.)

III. Special Conditions. (continued)

34. Mitigation measure. Foxx, Nielsen and Associates, geotechnical consultants, recommend the use of concrete pier and grade beam foundations and such shall be employed on the project. This construction strategy will prevent major damage to the structures should surficial materials fail. Also incorporated here by reference are the mitigation measures set out above at sections C.1.b. and C.2.b.

All construction, including the infrastructure, shall comply with the most recent edition of the Uniform Building Code Seismic Zone 4 Standards, or local seismic requirements, whichever are most stringent.

35. Mitigation measure. Incorporated here by reference are the mitigation measures set out above at section C.4.b.
36. Mitigation measures. The foundation of the home shall be set back landward of the recommended setback line as indicated on approved architectural plans. The floor system of all living spaces must be elevated or protected from hazardous conditions to a height at least one foot above the 50-year wave runup level. The proposed residence shall comply with recommended elevations for finished floors and the bottom of the horizontal structural elements of the foundations as listed in Table 4.2-1 of the Final EIR.
37. Mitigation measures. Leave natural vegetation intact in all portions of the property, except as required for the normal construction of buildings, utility infrastructure, roadways, driveways, parking, and to comply with fire safety specifications and recommendations.

Do not introduce fill or soil from outside the property. (These could contain seeds of weeds, genista or other undesirable species capable of overrunning the habitat and outcompeting native species.)

One or more new dune restoration sites must be located on the property, preferably in one of the setback areas, and excess sand from grading used to form new dunes. A revegetation or landscaping plan shall be adopted for the restoration sites using only native dune species. (A list of approved plants and possible sources is included in Appendix B of the Final EIR.) The following measures shall be included in the restoration plan:

- (a) Use none of the following invasive non-native species in landscaping: Blue gum (Eucalyptus globulus); Acacias (Acacia spp.); Genista (Cytisus spp.); Pampas grass (Cortaderia spp.); Hottentot fig ice plant (Carpobrotus edulis); Cape weed (Arctotheca calendula); Dune grass (Ammophila arenaria); Pennisetum and all of its species such as fountain grass (Pennisetum setaceum).

III. Special Conditions. (continued)

- (b) Plant only drought tolerant vegetation in the general landscapes. Plants requiring frequent irrigation must be confined to special landscape features or planters near the homes. Topsoil may be imported only for these specific confined and high maintenance areas. In dune habitat or easements, only native dune species shall be used, and no imported soil may be spread.
- (c) All plants used for dune or swale revegetation must be approved by the Director of the Pacific Grove Museum of Natural History or selected from Appendix B. Plants must come from local vegetation (i.e. grown by contract from seeds and/or cuttings collected from the general Asilomar dunes area, rather than from the general commercial trade) to maintain genetic purity in the local native vegetation. Sources which may be able to provide native plants grown by contract are listed in Appendix B. It is suggested that the majority of the plants be grown in Supercells, as these generally adapt to the habitat more quickly than plants of 1-gallon size or larger, and can be produced in larger quantities more economically.
- (d) To monitor the success of the Restoration Plan, a botanist approved by the City of Pacific Grove shall be hired by the applicant/owner to visit the site to oversee or supervise the planting, and thereafter at least once a year for five years to ensure that the restoration or revegetation is succeeding. A report or letter shall be sent to the City following each visit, with a copy sent to the applicant/owner. If deficiencies occur (such as dead plants and shrubs, or presence of pampas grass, weeds or ice plant), the applicant/owner shall replace the dead plants and remove the invasive species. Staff of the City of Pacific Grove, the California Department of Fish and Game, and the U.S. Fish and Wildlife Service, or the Coastal Commission may inspect the property at any time indefinitely and recommend additional studies if the property does not appear to be in compliance with the intent of this mitigation measure.
- (e) The areas containing sensitive habitat/endangered species that remain following construction of the proposed project (including the dune restoration area) shall be dedicated as scenic easements. Site specific populations of Menzies' wallflower (Erysimum menziesii) and Tidestrom's lupine (Lupinus tidestromii) shall be retained.
- (f) Native dune building grasses and forbs shall be retained.
- (g) The owner shall provide sufficient funding to properly manage and maintain the preserved area over time.

III. Special Conditions. (continued)

All ice plant now occurring on the property shall be removed to enhance the habitat according to the following instructions: Ice plant shall be removed by spraying with a non-persistent systemic herbicide such as Roundup, as recommended by a licensed Pest Control Advisor. Ice plant should only be pulled by hand, and not sprayed, within 20 feet of any Tidestrom's lupines, or where significant native vegetation occurs with the ice plant.

All dune restoration shall be accomplished per a landscaping plan prepared by a qualified coastal biologist and implemented under the direction of the coastal biologist as required per LUP provisions 2.3.5.1.e and f. Eradication of ice plant shall be by herbicide only and the dead vegetation shall remain and decay in place. This method will provide erosion protection until the native species become established and a source of nourishment for the new plantings. Dune restoration measures shall be implemented in a manner that avoids increasing erosion by being accomplished in phases or some other method deemed appropriate by the coastal biologist. Snow fencing shall be utilized to control blowing sand until sand is stabilized by restoration planting.

Dune restoration of areas "beyond the approved building site and outdoor living space" and protecting the restored areas shall conform with a written agreement, deed restrictions or conservation easement granted to an appropriate public agency or conservation foundation as contained in LUP section 2.3.5.1.e. Where large areas are involved, such is the case in this proposal, the conservation easement is the instrument required by the City.

The presence of California black legless lizard shall be determined by trapping, combing, or other means deemed appropriate by the coastal biologist within all areas to be disturbed by construction activity immediately prior to grading operations. The determination of the presence of black legless lizard shall be made by a qualified coastal biologist. All individuals of the reptile found during the reconnaissance shall be relocated to suitable habitat.

A detailed grading plan indicating grading proposals in all areas to be disturbed is required to be submitted to the City prior to approval of the Coastal Permit per LUP section 2.3.5.1.d.

38. Mitigation measures. The height of the buildings as initially proposed has been lowered as set out in Exhibit C of this resolution. The overall size of the buildings as initially proposed has been reduced as set out in Exhibit C of this resolution.

III. Special Conditions. (continued)

39. Mitigation measures. All light sources emanating from the project site shall be directed onto the site and/or screened to prevent overflow illumination of adjoining areas. The use of exterior lights shall be kept to a minimum. Exterior spot or flood lighting shall be directional to avoid impacts to marine life and local marine activity. Lighting shall be designed and aimed in such a way that it does not conflict with lighthouse and security operations.
40. Mitigation measures. The project shall incorporate to the maximum extent feasible design standards noted in the scenic resources policy statements outlined in the City of Pacific Grove's LUP (Scenic Resources 2.5.5-1, 2.5.5-4, and 2.5.5-5).

The following mitigation measures shall also be required to ensure that potential aesthetic impacts are lessened to an insignificant level:

1. All uncovered portions of the site shall be maintained in their natural condition, and planted only with native vegetation.
2. The proposed driveway shall be constructed of a material that is similar in color to the surrounding terrain, and located within the site topography, to visually blend into the surroundings to the greatest extent feasible.

The overall height of the proposed structure shall be lowered as noted in subsections E.1.b. and B.1.b., above, and in the body of this resolution.

F. Cultural Resources.

1. Protection of Cultural Remains.
 - a. Potential impact. Construction activities may unearth and damage unidentified cultural remains.
41. Mitigation measures. If archaeological resources or human remains are discovered during construction, all work shall be halted immediately within 50 meters (150 feet) of the find until it can be evaluated. An archaeological consultant shall be retained to evaluate findings in accordance with standard practice and applicable regulations. Date/artifact recovery, if deemed appropriate, would be conducted during the period when construction activities are on hold. If human remains are discovered, an appropriate representative of Native American Indian Groups and the County Coroner would be informed and consulted, as required by State law.

III. Special Conditions. (continued)

42. Mitigation measure. To the extent feasible, construction shall be scheduled during the dry season. An erosion and sediment-transport control plan shall be in place prior to the commencement of earthmoving activities.
43. Mitigation measure. Drainage plans and erosion, sediment and pollution control measures shall be prepared as conditions of approval for development in accordance with LUP policy 2.2.5-2.
44. A landscape plan shall be submitted to the city council at the final design stage, for approval.
45. All utility lines shall be constructed underground, in accord with LUP policy 2.5.5.
46. Because the City of Pacific Grove does not yet have in place ordinances implementing the LUP, the decision whether to require shoreline access easement rests with the coastal commission at such time as it considers an application. Project design could accommodate such easement.
47. The police and fire departments shall review final site plans for the development to ensure adequate access for emergency equipment, and to confirm that all structures are built to meet applicable fire and safety codes.
48. The owner shall be required to obtain a water permit. The proposed project shall be equipped with low flow fixtures and drought tolerant landscaping.
49. All trenches for underground utility lines shall avoid sensitive plant and animal species that are identified in section 4.3 of the Final EIR, and archaeological resources listed in section 4.5 of the Final EIR.
50. The Community Development Director shall develop a master checklist from the findings and conditions of approval related to this project, identifying each mitigation measure together with the person, department or agency responsible for overseeing the implementation of such measures. The master checklist shall be recorded in the office of the County Recorder. The master checklist shall include a fee schedule for payment to City by owner of all costs of preparation of the checklist and monitoring the implementation of the mitigation measures.
51. The owner shall file a written report with the Community Development Director every three (3) months, or more frequently if directed by the Community Development Director, stating the status of implementation of

III. Special Conditions. (continued)

the measures. Once construction is complete, the Community Development Director may establish a less frequent reporting schedule. In the event of sale of the property, subsequent purchasers shall be responsible for all monitoring requirements.

52. The Community Development Director shall review the written reports and determine whether the mitigation measures are being implemented in a proper and timely manner. The Community Development Director may conduct on site inspections to monitor mitigation implementation and to verify the written report.
53. The result of the Community Development Director's review will be provided to the owner in writing. If a measure is not being properly implemented or maintained, the Director and owner shall consult and, if possible, agree to additional actions to be taken to implement the measure. If they are unable to agree, the Director shall impose reasonable action as permitted by law. Such decision of the Community Development Director may be appealed to this council.
54. The Community Development Director shall monitor the implementation of the required mitigation measures and shall report to the city council periodically regarding compliance.
55. Owner shall pay City fees equal to the actual cost of performing required monitoring. Actual costs shall include, without limitation, City personnel costs and consultation fees and costs.
56. Revised Development Plans. PRIOR TO TRANSMITTAL OF THE COASTAL DEVELOPMENT PERMIT, permittee shall submit, for review and approval by the Executive Director, revised project plans which meet the following criteria:
 - a. Total site coverage (building, patios, driveway and turn-around area) not to exceed 6,350 sq. ft.; this limitation on coverage shall not apply to any portion of the shared driveway located on permittee's parcel pursuant to Coastal Development Permit No. 3-94-33 (Miller), nor shall any portion of the driveway located in the 75-ft. minimum front setback area adjacent to Sunset Drive be counted;
 - b. Perimeter of all exterior walls of the residence to be located above the 50-year probability line for storm wave run-up and flooding (elevation 23 ft. above MSL based on existing surveyed ground contours);
 - c. A finished floor elevation of at least 26 feet above mean sea level (MSL).

IV. FINDINGS AND DECLARATIONS.

The Commission finds and declares as follows:

1. Project Description and Standard of Review

The proposed development consists of the construction of a single-family dwelling, driveway, storm drain system, retaining walls, paved terrace and courtyards; and berming and grading of dunes. The subject property is located at 1450 Sunset Drive in the Asilomar Dunes area of the City of Pacific Grove.

The project site comprises a 0.694-acre area ($\pm 30,232$ sq. ft.). This is one of six vacant residential lots on the seaward side of Sunset Drive; see Exhibit F for illustration of existing pattern of residential parcels in the Asilomar Dunes area. Together with a seventh lot, which is developed with an existing residence at 1500 Sunset Drive (Miller/Wilde, pre-1972), this oceanside group of parcels is known as "Rocky Shores." The southernmost five of these parcels have been purchased for management as part of Asilomar State Beach. Therefore, applicant's property is the only remaining vacant privately-owned land on the entire Pacific Grove shoreline.

The project site is located on low dunes adjacent to a cobble beach at the highly scenic northwest projection of the Monterey Peninsula. Immediately to the north is an extensive undeveloped expanse of coastal dunes within the Pt. Pinos Lighthouse Reservation, which is managed by the City of Pacific Grove under lease from the U.S. Coast Guard. The tidepools and the sea to the west of the site are part of the Monterey Bay National Marine Sanctuary. To the south is the previously-described Miller/Wilde parcel, and beyond, Asilomar State Beach.

The City of Pacific Grove has completed the Land Use Plan (LUP) portion of their Local Coastal Program (LCP). This policy document has been certified by the Commission and is referenced in these findings as guidance on a variety of Coastal Act issues. The remaining portion of the City's LCP has not been certified and thus the mandatory standard of review for coastal permits is consistency with Chapter 3 of the Coastal Act.

3. Environmentally Sensitive Habitat Area.

The Coastal Act, in Section 30240, states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

The Coastal Act in Section 30107.5, defines an environmentally sensitive area as "...any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

The site is located within the Asilomar Dunes. Land in public ownership adjacent to the site is considered to be Environmentally Sensitive Habitat, however, the Commission finds that this parcel does not contain Environmentally Sensitive Habitat. Testimony submitted prior to and during the course of the hearing is hereby incorporated by reference as support for this determination. (Transcript pg. 95-96). Please see Exhibit E for the complete text of this supporting documentation.

In order to minimize impacts on the dune environment, however, the Commission has, consistent with the certified Land Use Plan policies relevant to development on this type of landform limited site coverage to 15% of the ±30,232 sq. ft. site and imposed a variety of protective conditions contained in the Stipulated Judgement in order to ensure compliance with Coastal Act requirements (Page v. City of Pacific Grove, No. M26049, dated December 2, 1993.)

The LUP offers the following policies relevant to development proposals in the Asilomar Dunes:

- Structures shall be sited to minimize alteration of natural dune topography. Restoration of disturbed dunes is mandatory as an element in the siting, design and construction of a proposed structure.
- All new development in the Asilomar dunes area shall be controlled as necessary to ensure protection of coastal scenic values and maximum possible preservation of sand dunes and the habitat of rare and endangered plants.
- Where a botanical survey identifies populations of endangered species, all new development shall be sited and designed to cause the least possible disturbance to the endangered plants and their habitat; other stabilizing native dune plants shall also be protected.
- Site coverage proposed for new development (including driveways, accessory buildings and other paved areas) shall be reduced from the maximum coverage allowed in Chapter 3 of this plan (i.e., 15%), and by relevant zoning, to the extent necessary to ensure protection of Menzies' wallflower or Tidestrom's lupine habitat determined to be present on the site. [However, LUP Sec. 3.4.5.2, cited below, exempts that portion of the driveway within the front setback.]

- Require dedication of conservation easement or deed restriction to protect the area of the lot outside the building envelope, with provisions to restore and maintain the natural habitat, restrict fencing that would interfere with public views or wildlife, and require long-term monitoring of the protected area;
- Sidewalks shall not be required as a condition of development permit approval in the Asilomar dunes unless the City makes a finding that sidewalks are necessary for public safety where heavy automobile traffic presents substantial hazards to pedestrians, no reasonable alternative exists and no significant loss of environmentally sensitive habitat would result.
- Require compliance inspections during the construction phase;
- Provide for preparation of a native plant landscaping plan, and limit exotic plant introductions to the area within the building envelope; and,
- Require installation of utilities in a single corridor if possible, avoiding disturbance of the protected habitat area.

2. Maximum aggregate lot coverage for new development shall be 15% of the total lot area. For purposes of calculating lot coverage under this policy, residential buildings, driveways, patios, decks (except decks designed not to interfere with passage of water and light to dune surface below) and any other features which eliminate potential native plant habitat will be counted. However, a driveway area up to 12 feet in width the length of the front setback shall not be considered as coverage if surfaced by a material approved by the Site Plan Review Committee. An additional 5% may be used for immediate outdoor living space, if left in a natural condition, or landscaped so as to avoid impervious surfaces, and need not be included in the conservation easement required by Section 2.3.5.1(e). Buried features, such as septic systems and utility connections which are consistent with the restoration and maintenance of native plant habitats, need not be counted as coverage.

The entire Page site comprises 1.08 acres ($\pm 47,045$ square feet), but is made up of two parcels. Parcel I, where the house will be located, is $\pm 30,232$ square feet in size. Parcel II, which lies seaward of Parcel I is $\pm 16,813$ square feet in size. The proposed development will cover 6350 square feet of the site with buildings and paving. None of this coverage (6,350 sq. ft.) is located within the 75 foot front yard setback area referenced in LUP Policy 3.4.5.2 because access from Sunset Drive to the Page parcel is initially along a driveway shared with the neighbor to the south (Miller). The first ± 125

feet of this driveway is located partly on the Miller property and partly on the Page site (please see Exhibit G, Site Plan). In their review of this project, the City was unaware that the property was made up of two parcels and therefore used the entire site area of 47,045 square feet, as the basis of their calculations regarding compliance with the 15% maximum coverage requirement.

Based on evidence provided at the hearing, the Commission finds that the 15% maximum coverage requirement is met using only the ±30,232 square foot area of Parcel I. (Transcript page 48, lines 12, 13, page 66 line 25, page 67 lines 1-12, page 90, lines 13-19, page 107 lines 13-15, page 109, lines 23-25, page 110 lines 1-4, and page 45 line 25, page 46 lines 1-2).

Commission concerns regarding the potential future development of Parcel II, a rocky area seaward of Parcel I, were resolved based on the applicant's testimony that the parcel was not developable and he intended to donate it to a public agency or other entity. (Transcript page 45, line 21-24, pg. 48 lines 13-19, pg. 67 lines 10-13, pg. 106 lines 23-25, pg. 107 lines 1-8, line 17).

4. Visual Resources.

Section 30251 of the Coastal Act requires that new development in highly scenic areas "such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation..." shall be subordinate to the character of its setting; the Asilomar area is one of those designated in the plan. The Coastal Act further provides that permitted development shall be sited and designed to protect views in such scenic coastal areas; and, in Section 30240(b), requires that development adjacent to parks and recreation areas shall be sited and designed to avoid degradation of those areas.

The City's certified Land Use Plan contains policies which require the following:

- New development on parcels fronting on Sunset Drive must conform to the open space character of the area.
- Design review of all new development is required.
- Minimum building setbacks of seventy-five feet from Sunset Drive shall be maintained. Larger setbacks are encouraged if consistent with habitat protection.
- Residential structures shall be single story in height and shall maintain a low profile complimenting natural dune topography with a maximum structure height of eighteen feet.

- Earthtone color schemes shall be utilized, and other design features incorporated that assist in subordinating the structure to the natural setting.
- Landscape approval shall be required for any project affecting landforms and landscaping. A landscaping plan, which indicates locations and types of proposed plantings, shall be approved by the Architectural Review Board. Planting which would block significant public views shall not be approved.
- Utilities serving new single-family construction in scenic areas shall be placed underground.

The applicant's property is located on the highly scenic seaward side of Sunset Drive, to the north of Asilomar State Beach. While the adjacent pre-1972 residential development has already impaired public views, the overall visual character of the dunes and shoreline still predominates. Therefore, views from these important public use areas along Sunset Drive, the State Beach and the Lighthouse Reservation towards the adjacent dunes and the sea are an issue of concern.

The proposed dwelling will be partially visible from Asilomar State Beach, as are other existing dwellings in the area. The most direct impacts will be on views from the Lighthouse Reservation, immediately to the north, and from the cobble beach below. The house will be articulated in profile, generally not over 15 ft. in height, but having a cupola observatory for an 18 ft. maximum height. In a further effort to protect views, the garage will be placed below the house in a subsurface excavation. Conditions attached to the project by the City also require that all utilities shall be placed underground.

While the proposed residence is positioned on a very exposed shoreline location, the proposed design coupled with the conditions attached to this permit will serve to minimize impacts on public views. Accordingly, as conditioned the project can be found consistent with Section 30251 and 30240(b) of the Coastal Act and LUP visual resource policies.

5. Archaeologic Resources

Section 30244 of the Coastal Act states:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

Land Use Plan Section 2.4 also provides for protection of archaeological resources:

LUP Policy 2.4.5

1. Prior to the issuance of any permit for development or the commencement of any project within the areas designated on Figure 3, the Archaeological Sensitivity Map, the City in cooperation with the State Historic Preservation Office and the Archaeological Regional Research Center, shall:

- a) Inspect the surface of the site and evaluate site records to determine the extent of the known resources.
- b) Require that all sites with potential resources likely to be disturbed by the proposed project be analyzed by a qualified archaeologist with local expertise.
- c) Require that a mitigation plan, adequate to protect the resource and prepared by a qualified archaeologist be submitted for review and, if approved, implemented as part of the project.

The subject site is located in a "sensitive area" according to the LUP Archaeological Sensitivity Map. Several significant archaeological sites have been discovered on the adjacent U.S. Coast Guard property. A "Preliminary Cultural Resources Reconnaissance" was prepared for the site and surrounding parcels by Gary Breschini, Archaeological Consulting, July 24, 1989. The report concludes as follows:

"No cultural remains were noted on [parcel] 007-021-5 ... and development on this parcel should not be delayed or restricted for archaeological reasons. ...

Because the possibility always exists that unidentified cultural resources will be found during construction, we recommend that the following standard language, or the equivalent, be included in any permits issued within the project area:

- o If archaeological resources or human remains are accidentally discovered during construction, work shall be halted within 50 meters (150 feet) of the find until it can be evaluated by a qualified professional archaeologist. If the find is determined to be significant, appropriate mitigation measures shall be formulated and implemented."

As conditioned, to require a monitoring program to protect archaeological resources during construction (and, in event of a subsurface discovery, submittal of a mitigation plan), the proposed development is consistent with Section 30244 of the Coastal Act and approved LUP archaeological resource policies.

6. Shoreline Hazards.

Section 30253 of the Coastal Act states:

New development shall:

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

A geotechnical analysis has been completed for this shoreline site, and is incorporated in the certified EIR as a technical appendix (Geology Report, by Foxx, Nielsen and Associates, July 1990). The report analyzes seismic hazards, coastal erosion rates, wave run-up hazards, and tsunami potential; and, presents recommendations regarding foundations, retaining walls, site drainage and erosion control.

The coastal erosion analysis indicated a bluff erosion rate of up to 0.35 feet per year. Using historical rates of shoreline erosion in the Pt. Pinos area since 1945, a recommended development setback line was established 5 feet landward of the projected bluff edge 50 years in the future. The submitted residence is located entirely landward of this coastal erosion setback line.

Another important design and location issue is storm wave run-up. Because of its exposed location, this extremity of the Monterey Peninsula is subject to episodes of large storm waves and consequent shoreline erosion. When high tides have combined with a strong swell and onshore winds, storm waves have overtopped the coastal bluff at Pt. Pinos and even flooded portions of nearby Ocean View Blvd. As a result, damaging erosion is a chronic problem along the Pacific Grove shoreline; construction on sand dunes adjacent to the shoreline, as proposed by this application, therefore presents a risk that future storm wave episodes will create a demand for shoreline protection works if residential development is allowed at too low an elevation.

The Commission has consistently required new development to be located outside of hazardous areas wherever feasible in order to avoid the need for shoreline protective structures. In this case, the applicant's site offers ample area outside identified hazard areas to construct a home.

The Geology Report analyzes predicted storm wave run-up for applicant's site, and expresses the result in terms of elevation above Mean Sea Level (MSL) for both 50-year and 100-year probability events. The resultant calculated wave run-up elevations are 23 ft. (50-year) and 25 ft. (100-year). All of applicant's deeded Parcel II, and the seaward margin of Parcel I, fall within the storm wave run-up area. Accordingly, the report recommends a finished floor elevation of 26 ft. for the 100-year event, pier-and-beam construction to anchor the building to bedrock, and geotechnical review of final project plans. Since the geology report was prepared, sand spoils from the construction of the shared Page/Miller driveway have been deposited in the area of the building envelope for the new home. This area is now somewhat higher than it was when the project was reviewed in 1994. Written evidence and testimony at the Commission hearing demonstrate that, as conditioned the proposed development will be consistent with PRC 30253. In addition, the applicant has agreed to indemnify the Commission against claims for any damage caused to the home caused by storm waves. (Please see Exhibit C) (Transcript pg. 37 lines 15-25, pg. 38 lines 1-25, page 43 lines 2-9, pg. 46 lines 8-10, page 88 lines 24-25, pg. 89 lines 1-25, page 95 lines 8-16)

Conditions relevant to setbacks and construction techniques ensure compliance with Coastal Act requirements.

7. Public Access.

Applicant's blufftop development site, lies between the first public road -- Sunset Drive -- and the sea. Along the shoreline is a cobble beach which historically provided a lateral access link between the City-managed Lighthouse Reservation and Asilomar State Beach to the south. The portion of the cobble beach above the Mean High Tide Line falls within applicant's Parcel.

Section 30604(c) of the Coastal Act requires that the Commission make specific findings of consistency of such development with the public access and recreation policies of the Coastal Act. Section 30001.5 of the Coastal Act states in part, that one of the basic goals of the state for the coastal zone is to:

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resource conservation principles and constitutionally protected rights of private property owners.

Section 30211 of the Coastal Act states:

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 30210 of the Coastal Act states:

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

Section 30212 of the Coastal Act requires, in part:

- (a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:
 - (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
 - (2) adequate access exists nearby ...

Applicant's project occupies most of the width of his narrow Parcel I, making any future public access route from Sunset Drive to the sea on this parcel infeasible. At present, there is no evidence of such public use (staff observation, air photo analysis). And, there is little need for such additional access route to the shoreline, as excellent public access is available immediately to the north on the Lighthouse Reservation and to the south at several points in Asilomar State Beach. Therefore, this permit has not been conditioned to provide for such "vertical" access to the shoreline.

On the other hand, the proposed project could potentially impair lateral access along the coast. Public use of the cobble beach portion of the parcel, especially at the northern property line, is evident (staff observations, air photo analysis). Eventually, after a course of 50 years at the maximum historic rate of 0.35 feet per year, the physical ability to pass and repass along the beach would be blocked by the presence of the permitted residence (which is proposed for construction at the recommended 50-year erosion setback line).

The certified Pacific Grove LCP Land Use Plan (LUP) policies parallel the above-cited Coastal Act policies. Further, the LUP calls for "a continuous pedestrian coastal trail, the length of the City's coastal zone, seaward of Ocean View Boulevard/Sunset Drive." (LUP Sec. 5.5.1) In the Asilomar Dunes

area, the LUP specifies "dedication of blufftop lateral access easement to an appropriate public agency or private conservation foundation, where private residential use could otherwise impair such access" (LUP Sec. 5.5.4).

As with lateral access on the beach, continued shoreline erosion would eventually leave no room on the blufftop for a lateral access trail. While approval of the residence at the erosion setback line would within the established 50 year period prevent implementation of the LUP's vision of a continuous blufftop trail, the desirable alignment for such a trail would not be presently blocked by the proposed development. Furthermore, no existing blufftop public use is evident. Therefore there is no nexus to require dedication of public access easement.

8. Local Coastal Programs. The Commission can take no action which would prejudice the options available to the City in preparing a Local Coastal Program which conforms with the provisions of Chapter 3 of the Coastal Act (Section 30604 of the Coastal Act). Because this neighborhood contains unique features of scientific, educational, recreational and scenic value, the City in its Local Coastal Program (LCP) will need to assure long-range protection of the undisturbed Asilomar Dunes.

While the northern Asilomar Dunes area was originally included in Monterey County's work program for the Del Monte Forest Area LUP (approved with suggested modifications, September 15, 1983), the area was annexed by the City of Pacific Grove in October, 1980, and therefore is subject to the City's LCP process. Exercising its option under Section 30500(a) of the Coastal Act, the City in 1979 requested the Coastal Commission to prepare its Local Coastal Program. However, the draft LCP was rejected by the City in 1981, and the City began its own coastal planning effort. The City has now submitted its own LCP Land Use Plan (LUP), which the Commission approved with modifications in December, 1988. The City has now revised and adopted the LUP, and is formulating implementing ordinances.

Therefore, as conditioned, the proposed development is consistent with the policies contained in Chapter 3 of the Coastal Act and will not prejudice the ability of the City of Pacific Grove to prepare and implement a complete Local Coastal Program consistent with Coastal Act policies.

9. CEQA. On January 6, 1993, the City of Pacific Grove certified an Environmental Impact Report (EIR), with mitigations, for the proposed development. The City's required mitigation measures and the additional conditions contained in the Stipulated Judgement and attached to this permit, will together offset the impacts of the proposed development, and will provide for conformance with the California Environmental Quality Act.

CALIFORNIA COASTAL COMMISSION

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. Compliance. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the project during its development, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

EXHIBIT NO. A
APPLICATION NO.
PAGE
3-96-102

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Salinas, CA 93902
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DEC 2 1993

DEC 02 1993

ERNEST A. MAGGINI
MONTEREY COUNTY CLERK
DEPUTY

ERNEST A. MAGGINI
MONTEREY COUNTY CLERK
DEPUTY

Laurence P. Horan
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Attorneys for Respondents and Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF MONTEREY

STEPHEN J. L. PAGE,)
)
Petitioner and Plaintiff,)
)
vs.)
)
CITY OF PACIFIC GROVE; THE CITY)
COUNCIL OF THE CITY OF PACIFIC)
GROVE; HON. FLORENCE SHAEFER;)
HON. ROBERT DAVIS; HON. TERRENCE)
ZITO; HON. ELEANOR ROGGE, and)
DOES 1 through 50, inclusive,)
)
Respondents and Defendants.)

No. M 26049

STIPULATED JUDGMENT

EXHIBIT NO. B
APPLICATION NO.
PAGE
P. 3-96-102

The parties having stipulated that judgment in the above-entitled action be entered on the following terms, and good cause

1 appearing therefor, it is hereby ORDERED, ADJUDGED AND DECREED as
2 follows:

3 1. The City of Pacific Grove has approved the application of
4 Stephen Page for architectural approval for construction of a new
5 single family dwelling at 1450 Sunset Drive, Pacific Grove. That
6 approval is upon the terms and conditions stated in Resolution No.
7 6322 of the City Council of the City of Pacific Grove, including
8 the Conditions of Approval and all exhibits to the Resolution,
9 except as specifically modified herein. Resolution No. 6322 is
10 attached as Exhibit 1. Entry of this Judgment constitutes final
11 discretionary design review by the City Council for the
12 application.

13 2. The maximum height of the residence shall be 15 feet
14 above grade, with the sole exception of the mezzanine roof which
15 shall not exceed 18 feet above grade. The mezzanine is
16 approximately 12 feet by 12 feet and is shown on Exhibit 2. The 20
17 foot sightline for the project and all setbacks and other size and
18 siting requirements imposed by Exhibit 1 shall be in effect, except
19 as specifically amended in Paragraph 4 below. Exhibit 2, showing
20 dimensions and location on the lot of the proposed project
21 improvements, including footprint, roof line, lengths, and widths,
22 is incorporated as an illustrative exhibit to this Judgment.

23 3. Siding and roofing materials for the proposed single
24 family dwelling shall be as specified in Exhibit 3. Qualities and
25 color of the materials shall be substantially identical to the
26 samples lodged with the City on November 9, 1993. The
27 architectural detail relating to the aforesaid materials, as shown
28

Mezz. removed

1 on Exhibit 2, shall be deemed to satisfy the Conditions of
2 Approval, Condition No. 3, previously adopted by the City Council.

3 4. The total covered footprint for the house and garage
4 shall not exceed 3,680 square feet (as generally shown in Exhibit
5 2), and Conditions of Approval, Condition No. 4, previously adopted
6 by the City Council, is modified accordingly. The covered parking
7 requirement of the City for parking for two vehicles may be
8 satisfied, at Petitioner's request, with the construction of under
9 grade parking to be located as shown on Exhibit 2. The plan for
10 the driveway for the parking area shall contain appropriate
11 measures to screen (by landscaping, by berm, or otherwise) the
12 driveway and garage entrance from public view. The City's Director
13 of Planning shall determine the appropriate method of screening and
14 the sufficiency of such screening prior to the City's issuance of a
15 building permit. The area of underground construction shall not
16 exceed 650 square feet, of which no more than 100 square feet may
17 be devoted to storage space. The entrance to the garage area shall
18 not be more than 20 feet wide. Under no circumstances shall any of
19 the underground area be habitable or converted to habitable uses.
20 Petitioner agrees to hold harmless the City in regard to all costs
21 and claims, if any, arising out of or related to the under grade
22 construction.

23 5. This approval shall be deemed effective on December 1,
24 1993. This approval shall be valid for two years, said term to
25 commence upon obtaining a coastal development permit for the
26 project from the California Coastal Commission, and Conditions of
27 Approval, Condition No. 13, previously adopted by the City Council,
28 is modified accordingly.

1 6. All construction and other work on the property shall be
2 in strict compliance with the terms and conditions of approval,
3 including those specified in this Judgment. Any deviation from any
4 term or condition must be approved by the City in advance, and may
5 require City Council approval.

6 7. The landscape plan required by Resolution No. 6322 for
7 the architectural approval shall be prepared by Petitioner and
8 shall be submitted to the City for approval and approved by the
9 City prior to the building permit being issued. Petitioner and
10 City shall review the plan one year after work is completed, and
11 annually for the next two years in order to assess the success of
12 Petitioner's good faith efforts to restore native vegetation. The
13 landscape plan will be phased or staged so as to plant the dune and
14 the area of ice plant removed for construction, the second stage
15 one year later, and the third stage one year after the second
16 stage. Petitioner and the City shall make a good faith review of
17 the landscaping efforts one year after issuance of the occupancy
18 permit for the residence, and again one year after the first review
19 in order to determine the success of landscaping already in place,
20 and, based thereon, the feasibility and timing of continued
21 revegetation.

22 Because of the danger of erosion, and in order to maintain
23 stability on the westerly portion of the site, Petitioner is not
24 required as a condition of approval to remove the existing
25 vegetation to the west of the proposed residence. The landscape
26 plan shall require, however, that as to existing vegetation to the
27 west of the residence which is disturbed or damaged during
28

1 construction or other site work, Petitioner shall restore or
2 replace said vegetation in accordance with the landscaping plan.

3 8. Upon the granting to Petitioner of a Coastal Development
4 Permit by the California Coastal Commission for the single family
5 residence approved by the City, all causes of action against all
6 respondents and defendants other than City of Pacific Grove shall
7 be dismissed with prejudice. The City shall register with the
8 California Coastal Commission the City's support of the project
9 approved pursuant to this Judgment.

10 9. Each party shall bear its own costs and attorneys' fees.

11 10. This Superior Court shall retain jurisdiction to enforce
12 the judgment herein.

13 11. The judgment herein may be recorded by either party.

14 Dated: December 2, 1993

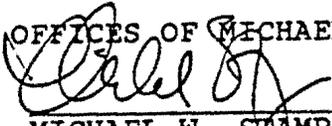
15 **ROBERT O'FARRELL**
16 JUDGE OF THE SUPERIOR COURT

17 APPROVED AS TO FORM:

18 Dated: December 2, 1993

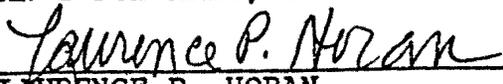
19 GEORGE THACHER
20 CITY ATTORNEY

21 LAW OFFICES OF MICHAEL W. STAMP

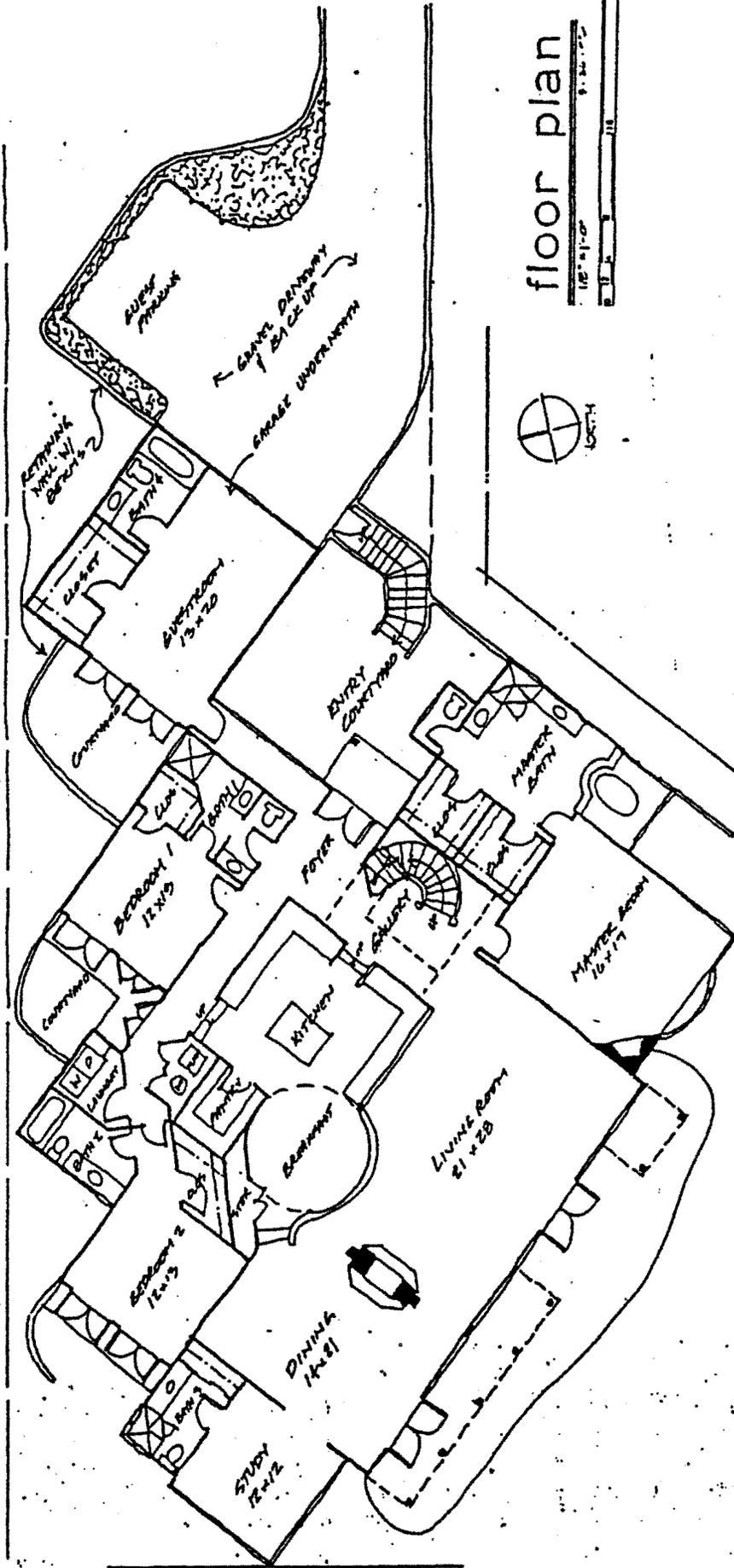
22 By: 
23 MICHAEL W. STAMP
Attorneys for Defendant and
Respondent

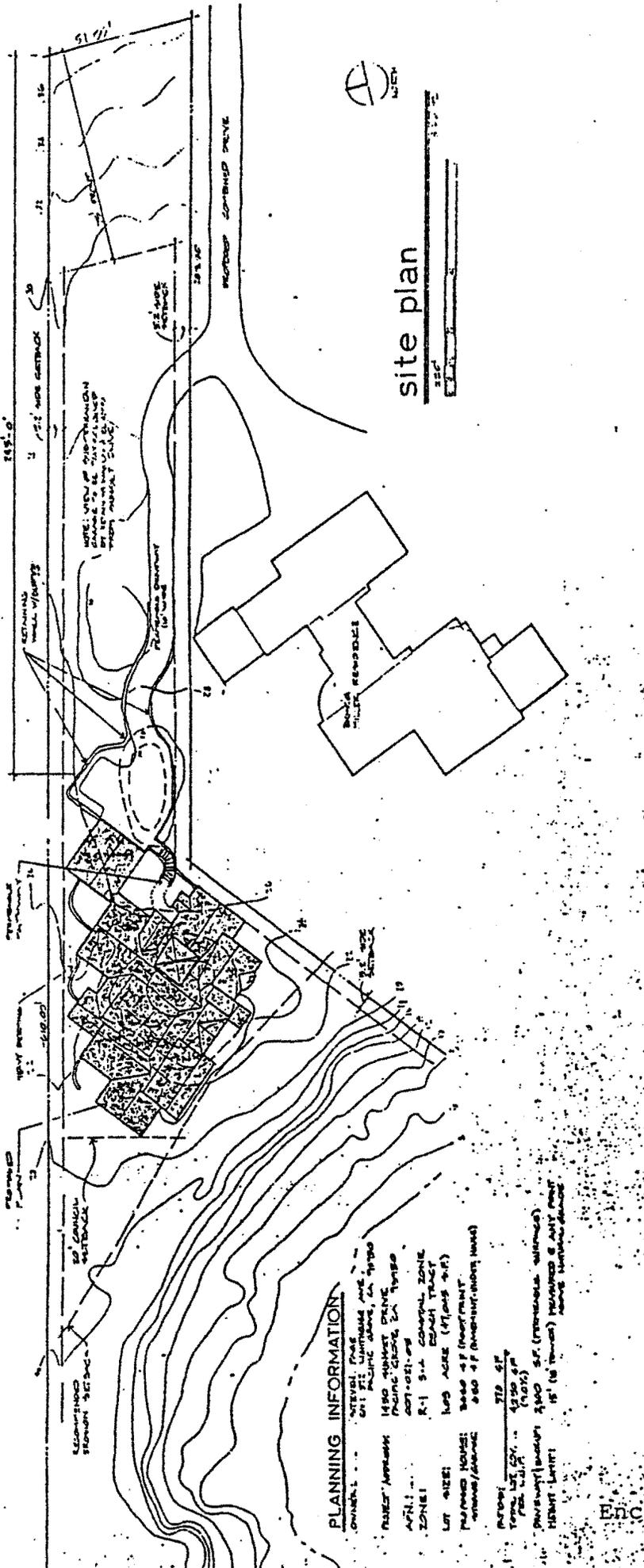
24 Dated: December 2, 1993

25 FINEGAN & CLING
26 HORAN, LLOYD, KARACHALE, DYER,
HORAN & SCHWARTZ, INC.

27 By: 
28 LAURENCE P. HORAN
Attorneys for Petitioner and
Plaintiff

floor plan

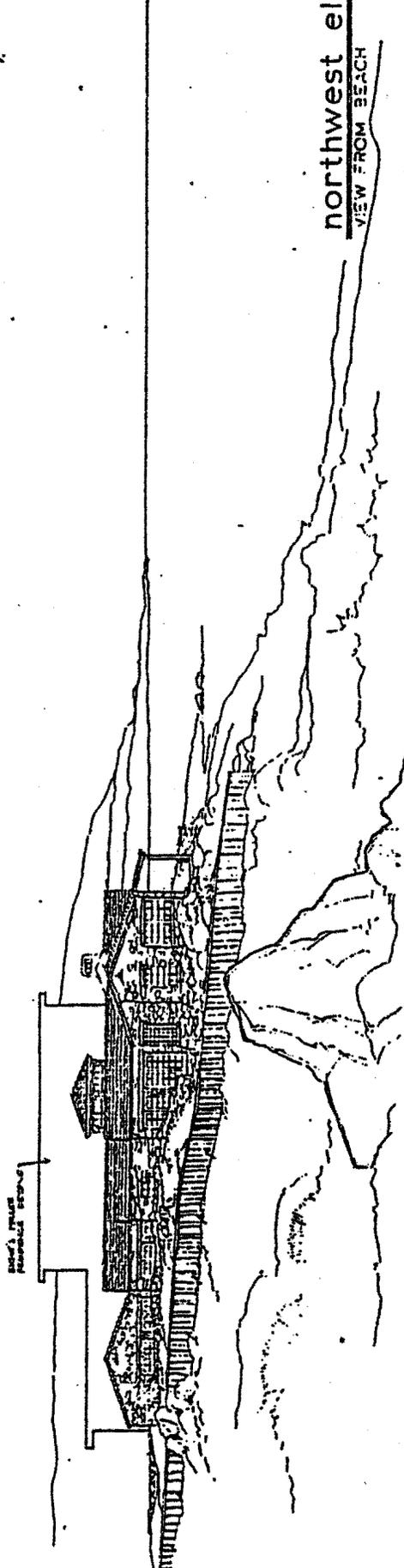




site plan

PLANNING INFORMATION

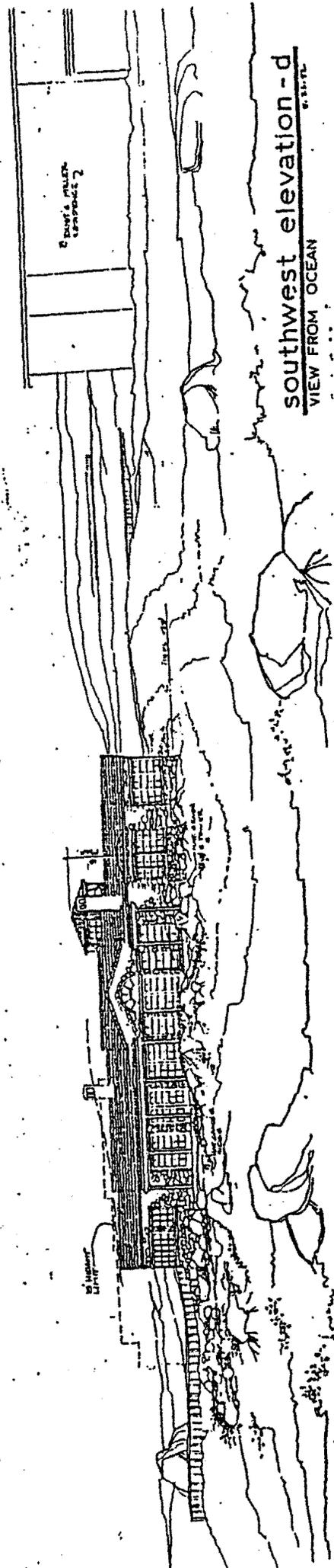
OWNER: ...
 INTEREST: ...
 ADDRESS: 1480 SUMMIT DRIVE
 PLAINFIELD, NJ 07060
 APN: ...
 ZONE: R-1 S.A. CONDOM. ZONE
 LOT SIZE: 1.65 ACRES (71,000 SQ. FT.)
 PROPOSED HOUSE: 3,000 SF (REAR PORCH)
 DRIVEWAY: 15' (MIN.) WIDE
 DIST. FROM: 15' (MIN.) FROM LOT LINE



northwest elevation - a
VIEW FROM BEACH



east elevation - c
VIEW FROM SUNSET DR. 2.24.75



southwest elevation - d
VIEW FROM OCEAN

Page v. City of Pacific Grove, et al.
STIPULATION FOR ENTRY OF JUDGMENT

EXHIBIT 3

MATERIALS:

- Between 70% and 90% Stone Clad walls with balance in sand colored stucco
- Roof used clay tile with barrel shape (grayish rather than orange)
- All metals in copper
- All windows, doors and frames painted

EXHIBIT 1

RESOLUTION NO. 6322

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE (1) CERTIFYING AN ENVIRONMENTAL IMPACT REPORT PREPARED FOR AN ARCHITECTURAL APPROVAL APPLICATION FOR CONSTRUCTION OF A NEW SINGLE FAMILY DWELLING AT 1450 SUNSET DRIVE; (2) DENYING AND APPROVING FOUR APPEALS, AND PARTS THEREOF, FROM AND DEALING WITH PLANNING COMMISSION APPROVAL OF SAID APPLICATION; AND (3) APPROVING SAID APPLICATION, WITH MODIFICATIONS

THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE DOES RESOLVE AS FOLLOWS:

SECTION I. RECITALS.

A. This resolution concerns a decision by the city council regarding four appeals from City of Pacific Grove Planning Commission ("Planning Commission") Resolution No. 92-32.

B. Planning Commission Resolution No. 92-32 dealt with three appeals from City of Pacific Grove Architectural Review Board ("ARB") approval (by ARB Resolution No. 92-01) with modifications, of City of Pacific Grove Architectural Approval Application No. 1349-89 ("application"), said application being a proposal to develop property at 1450 Sunset Drive by constructing thereon a single family dwelling. The applicant/owner is Stephen J.R. Page.

C. The applicant is proposing to construct a one-story, single-family dwelling and garage with adjacent outdoor living areas, and driveway. The project location is the northernmost parcel of property commonly referred to as "Rocky Shores." The site is situated between Sunset Drive and the Pacific Ocean, west of Lighthouse Avenue with views across the site to the Pacific Ocean and Asilomar Beach/Point Joe from Sunset Drive, the Lighthouse Reservation, and the Municipal Golf Course. The parcel fronts onto Sunset Drive for a width of 51.55 feet and extends towards the Pacific Ocean in a 50 foot width that widens at the bluff top area near the shoreline. The dwelling is proposed to be constructed on a wider portion of the site near the bluff top. The total lot size of the project site is 1.08 acres, or 47,045 square feet. The undulating dune topography is part of the Asilomar dune system. A two-story, single-family dwelling is located on the adjacent lot to the south.

D. Pursuant to the requirements of the California Environmental Quality Act ("CEQA"), and state and city CEQA guidelines, a draft environmental impact report ("DEIR") was prepared in connection with the application. Following the required public comment period, responses to comments received were prepared and added to the DEIR.

this council finds that such testimony and documentation does not require further environmental analysis; the mitigation measures suggested in the FEIR are adequately applicable as well to this additional information.

4. The FEIR adequately documents the unique character and nature of the project site and its surroundings. The absence of reference to particular available documentation is not fatal to the project description and analysis, so long as the description and analysis otherwise provide a good faith, reasoned effort at full disclosure, and are adequate to inform of all relevant facts.

5. The FEIR provides a sufficient degree of analysis to enable this council to make a decision which intelligently takes account of the visual impacts. The FEIR contains a lengthy discussion of "visual quality and aesthetics," including photo montages and analysis of city's LUP, an established community standard. Testimony and documentation received during the public hearing process does not require further environmental analysis in the context of modifications or additions to the FEIR.

6. The FEIR adequately discusses sensitive habitats. The FEIR does not conclude that there is no danger to threatened species, but that the proposed mitigation measures will either avoid or reduce to a less than significant level the affects on the habitat.

7. The FEIR does not include a determination of infeasibility vis-a-vis leaving the property undeveloped. The FEIR in fact considers the community value in leaving the property undeveloped, both in its discussion of the parkland and no project alternatives, and in its discussion of certain provisions of the local coastal plan.

8. The FEIR does not discuss potential damage to the Marine Refuge, because it was not identified as a potentially significant effect nor was evidence submitted to support a finding that a potential significant impact might occur. The project's effect on the Refuge would be highly speculative, thus its not being discussed in the FEIR is valid and legal.

9. The FEIR adequately discusses potential tsunami damage and corresponding setback. In support of this finding this council adopts the analysis set out in section 9 (page 7) of the city attorney memorandum.

10. The FEIR adequately discusses the possible effect on tidal ecosystems. In support of this finding this council adopts the analysis set out in section 10 (page 7) of the city attorney memorandum.

11. The FEIR adequately discusses Rocky Shores as habitat for threatened animal species and native dune plants. In support of this finding the council adopts the analysis set out in section 11 (page 7) of the city attorney memorandum.

12. The FEIR prepared for this project is not "generic." It contains a complete and adequate analysis of site specific effects identified as potentially significant. That it was prepared by people who do not live in the city and who may not have

immediate personal concern for the project site does not render it any less adequate. Indeed, preparation by disinterested consultants will, if anything, render the document more objective and neutral.

13. This council finds nothing in the record to indicate that any factual matters contained and represented in the FEIR are not true.

14. The FEIR discusses and analyzes the applicability of many provisions of the land use plan (LUP) of city's local coastal program. This commission finds no evidence in the record that the FEIR has improperly ignored or inadequately considered any provision of the LUP.

15. The FEIR discusses and analyses at length both the visual impact of placing the proposed project adjacent to the only building on Rocky Shores, and the visual impact from viewpoints commonly utilized by hikers, bicyclists and persons on neighboring rocky points.

16. Except as referred to specifically in subsections 1-15, immediately above, no later testimony or documentation has been received requiring this council to direct further analysis of any items challenged on appeal.

B. With regard to the remaining items in the Gourlay and Nolan/Corning appeals, this council makes the following findings:

1. The LUP land use map does not designate the project site as open space; it is designated as low density residential. The LUP (section 3.4.5-4) does provide that it is city's "objective" that the subject site, and others adjacent, be maintained as open space. However, absent findings to accomplish this objective the LUP provides that development applications shall be considered. In this case, consideration of the application is consistent with the land use designation and with the requirement that such application shall be considered. In support of this finding this council also adopts the analysis set out at sections 5 (pages 10-11) of the city attorney memorandum. Further, LUP section 3.4.5-4 is by its terms inapplicable to this application insofar as it provides that funding shall be sought in case of application for a "coastal development permit." The permit at issue is not for a coastal development permit; such application must be made with the California Coastal Commission, as city has yet to complete its local coastal program by adoption of an ordinance to implement the LUP.

2. The project as approved by the planning commission is not out of compliance with LUP provisions protective of archaeological resources. In support of this finding this council adopts the analysis set out at section 3 (page 9) of the city attorney memorandum.

3. The project as approved by the planning commission is not out of compliance with LUP provisions regarding public shoreline access. In support of this finding this council adopts the analysis set out at section 7 (page 11) of the city attorney memorandum.

4. City zoning regulations require that two covered parking spaces (in the form of a garage or carport) be constructed as part of the project at issue, a single family dwelling. Detaching the covered parking from the dwelling provides an opportunity to reduce the mass resulting from construction of a single large building on the site.

5. The monitoring process, i.e., the process to assure compliance with conditions imposed as mitigation measures for environmental protection, is adequate as provided by the planning commission. Requiring weekly monitoring, as suggested by appellant Nolan/Corning, is unnecessary. Quarterly monitoring, given the nature of the project and the mitigation measures, will assure compliance. In addition to quarterly monitoring, monitoring will occur at milestones as part of normal city inspection during construction.

6. Community sentiment for or against this application cannot stand legally as the determining factor in the decision of the council. This council has heard and read considerable comments and material both for and against the application. These comments and submittals have been duly considered in the contexts of the environmental, planning, architectural and/or other issues raised therein. Based on the materials and comments presented, council does not find community sentiment to be overwhelmingly against the application and the project it proposes.

7. Having considered the record regarding the issue of protection of scenic resources this council finds:

(a) This council has visited the site and has observed the potential for obstruction of views from all directions, as demonstrated by the poles and taping in place to simulate the outline of the proposed structure, taking into account the modifications to the project required by the planning commission.

(b) Numerous policies and provisions of the LUP and Coastal Act, and concerns identified by the FEIR process, bear on protection of scenic resources. These items and their application given the evidence in the record are as follows:

(i) LUP Section 2.5.4 sets out city policy that visual quality of scenic areas shall be protected, those areas including the location of the proposed dwelling. Section 2.5.4 requires that such development shall be sited and designed to protect views to and along the ocean and to be visually compatible with the open space character of surrounding areas. Further, land coverage shall be minimized and maximum set backs shall be provided from public-open space areas. Section 2.5.5-1 provides that to the maximum extent feasible new development shall not interfere with public views of the ocean and bay. The City's LUP policies are consistent with the California Coastal Act provisions regarding scenic and visual qualities. (California Public Resources Code, Section 30251)

(ii) Reduction in size and height of the proposed dwelling will lessen interference with the public viewshed. A reduction in square footage (house and garage) to 2500 square feet, a height reduction to 15 feet and siting between a line 245 feet from the eastern boundary and the westerly limit line imposed by the planning

commission, will combine to substantially reduce impact on public viewshed. From each of the viewpoints analyzed in the FEIR (Figure 4.4-1) these reductions and the location will provide a significantly enhanced vista of the bay, ocean and adjacent open space. Additional reductions, while they would further enhance views, are not feasible in that applicant would be deprived of a reasonable living space. At 2500 square feet applicant will be able to construct a dwelling having in excess of 2000 square feet of interior living space. This council notes testimony (Nolan) that homes developed pursuant to coastal development permits on lots of larger and similar size to the site at issue have been limited to sizes comparable to and smaller than 2500 square feet. (Otter Cove, Rocky Point, Yankee Point and Garrapata, for example)

8. Having considered the record regarding the issue of visual impact this council finds:

(a) The site abuts the ocean and consists of rock, sand dunes and vegetation. It is undeveloped. It is the only remaining developable parcel in Pacific Grove abutting the bay or ocean. Immediately south of and adjacent to the site is a lot developed with a large rectangular wood sided and stone two story single family dwelling. The existing dwelling and the site at issue are flanked by public open space in a largely natural state (sand dunes, rocks, ocean front terrain) seaward of Ocean View Boulevard and Sunset Drive.

(b) Numerous policies of the LUP and Coastal Act, city architectural regulations and concerns identified in the FEIR, bear on the issue of visual impact. These items and their application given the evidence in the record are as follows:

(i) LUP Section 2.5.5 provides that residential structures or parcels fronting on Sunset Drive shall compliment the open space character of the area, shall maintain a low profile to compliment the natural dune topography and shall be sited to minimize alteration of the natural dunes. Further, earthtone color schemes shall be utilized, and other design features shall be utilized to subordinate the structure to the natural setting.

(ii) The dwelling as approved by the planning commission would include a stucco finish and tile roof. The three-dimensional model submitted by applicant demonstrates the color and texture of this stucco finish and tile roof. The Mediterranean style shown on the model and approved by the planning commission is not compatible with the natural elements on the site and surrounding sites. The style, texture and color of the planning commission approval dominates and competes with, rather than compliments the gentle, natural dunescape of the area. Wood and stone, utilizing natural earthtone colors and a weathered look, would allow the structure to blend and harmonize with its natural surroundings.

(iii) As this application is for architectural approval, city's architectural review regulations (Chapter 23.73, Pacific Grove Municipal Code) apply to consideration of the application. Those regulations provide, among other things, that all structures shall have simplicity of mass and detail shall either harmonize with adjacent

structures or stand in dignified contrast thereto, and shall have colors appropriate for surrounding environment.

(iv) The complex detail of the proposed structure, as shown on the aforescribed model (and set out at Section 2, Exhibit C of ARB Resolution No. 92-01, adopted by the planning commission) is inappropriate for the simple natural setting of the site; it does not contain the simplicity of detail called for by city's architectural regulations. The wood and stone materials described in (ii), above, provide the simplicity called for by the regulation. Further, the roof lines should have a slight pitch, to harmonize with the gentle shapes and slopes of the dunes.

The architectural style of the planning commission approval is in stark contrast to the large but simple, rectangular, wood sided structure on a site adjacent to the proposed dwelling. Juxtaposing the two would not result in a "dignified contrast," but in a scene which would draw the eye to an unsightly contrast, thereby competing with and detracting from the natural viewscape. Wood and stone, again as described above, would create some harmony with the adjacent structure, leaving nature to predominate the development. To further harmonize the structures, the design should consist of straight lines. The dissimilar is more obtrusive, the similar is more harmonious.

9. Having considered the record regarding the issue of protection of the dunes habitat, this council finds:

(a) According to a report prepared by Bruce Cowan (Appendix B, FEIR) the site is occupied or is potential habitat for a number of "endangered" plant species and at least one "protected" animal species. Tom Moss has identified the site as prime habitat for the black legless lizard. The Asilomar Dunes Habitat Survey (Appendix C - LUP) and others (Yadon) have attested that protected plants have been found on the site.

(b) Numerous policies of the LUP and Coastal Act, and concerns identified in the FEIR, bear on the issue of habitat protection. These items and their application given the evidence in the record are as follows:

(i) Section 2.3.4-1 of the LUP requires the city to protect, maintain and enhance the habitat areas of Menzies' wallflower and Tidestrom's lupine. Section 2.3.5-1 provides, in part, that alteration of natural land forms and dune stabilization by development shall be minimized, and that undeveloped private parcels west of Sunset, which includes the site at issue, should be acquired by a public agency because of their potential for habitat restoration. LUP Section 3.4.4 provides that development in the Asilomar Dunes neighborhood shall be controlled for the maximum possible preservation of sand dunes and habitat of rare and endangered species. Appendix C ("Asilomar Dunes Habitat Survey with Policy Recommendations") of the LUP provides that protection of existing undisturbed habitat should be the highest goal of the planning process. The Coastal Act requires that environmentally sensitive habitat areas be protected against any significant disruption of habitat values. (California Public Resources Code, Section 30240)

(ii) Reduction of the project approved by the planning commission will result in additional dune habitat being left undisturbed and/or subject to restoration mitigation measures set out in Exhibit D of this resolution, in furtherance of the referenced policies.

C. With regard to the items on the Page and Woodward appeals, this council makes the following findings:

1. The planning commission's findings were supported by substantial evidence in the record. The commission viewed the site and considered the visual impairment demonstrated by both the poling/taping on site and by photographic evidence in the FEIR. In light of said evidence the commission determined that, in its judgment, (a) the development did not meet the LUP provision that to the maximum extent feasible new development shall not interfere with public views of the ocean and bay, and (b) the development's impact on visual access to the dunes, ocean and bay had not been mitigated to a less than significant level. The commission's response was to establish an easterly building line and to reduce the dwelling's size. The resolution of the planning commission more fully explains the commission's findings and the evidence in support thereof.

2. The planning commission action did not deprive owner of substantially all economic use of his property. He was granted the ability (subject to obtaining a Coastal Commission coastal development permit) to construct a dwelling (house and garage) of 3500 square feet. According to law, an owners investment-backed expectation is a factor to consider when determining whether all viable economic use has been taken. This expectation must be more than a unilateral expectation or an abstract need; it must be reasonable and consistent with law in effect at the time the expectation is formed. In this case, given the Coastal Act, city's LUP and the considerable environmental concerns attendant with development of the site, owner's reasonable expectations must be influenced by application of the discretionary permit process taking into account applicable lawful restrictions on development of the site.

3. As noted in 1. and 2., immediately above, the planning commission decisions were made following careful consideration of the facts and applicable law and standards. Thus, the decision of the planning commission was not unreasonable, arbitrary or capricious.

4. The planning commission properly upheld the deletion of the proposed mezzanine, their rationale - that it would impede the viewshed, and that it would be incompatible with the balance of the architectural style - was supported by evidence in the record and was reasonable.

SECTION III. DISPOSITION OF APPEALS AND APPLICATION; CONDITIONS.

Based on the forgoing and on the administrative record this council makes the following dispositions of the appeals:

A. The Woodward appeal hereby is denied.

B. The Page appeal hereby is denied.

C. The following items of the Gourlay appeal hereby are denied: (a) all items (1-16) on the section of the appeal entitled "Appeal of the Planning Committee's [sic] Approval of Environmental Impact Report for Application No. 1349-89 - 1450 Sunset Dr.", (b) items 1, 2, 3 and 9 on the section of the appeal entitled "Grounds for Appeal of Project Application 1349-89."

D. The following items of the Nolan/Corning appeal hereby are denied: Items 3, 6, 9e and 9(i) [second i listed under 9. on the itemized appeal].

E. To the extent that modifications to the proposed project (1) to reduce the square footage and height; (2) to restrict the location of the improvements, and (3) to modify the materials, colors and architectural details are hereinafter directed the following items of the Gourlay and Nolan/Corning appeals hereby are granted:

Gourlay: Items 4, 5, 6, 7 and 8 on the section of the appeal entitled "Grounds for Appeal of Project Application 1349-89."

Nolan/Corning: Items 1, 2, 4, 5, 7, 8, 9a, 9b, 9c, 9d, 9f, 9g, 9h, 9i, 9j, 9h (second h), 9j (second j).

F. This council certifies that (a) it has received and considered the information contained in the FEIR, (b) the FEIR is adequate and complete, and has been prepared and processed in compliance with CEQA and state and city guidelines, and (c) pursuant to California Public Resources Code, Section 21082.1(C)(3), the FEIR represents the independent judgment of the city as lead agency for environmental review of the project.

G. Architectural Approval Application No. 1349-89 hereby is approved, subject to conditions set out in Exhibit C, attached hereto and incorporated herein by this reference, and subject to mitigation measures set out in Exhibit D, attached hereto and incorporated herein by this reference.

H. This council finds that the significant environmental effects of the project identified in the FEIR have been either avoided or mitigated to a less than significant level by changes or alterations hereby or incorporated into the project. The specific facts and findings regarding these matters are set out in Exhibit D.

I. It is the intent of this council that the foregoing findings, including the findings, determinations and statements set out in the attachments to this resolution, be considered as an integrated whole whether or not any subdivision of these findings fails to cross-reference or incorporate by reference any other subdivision of these findings; and that any finding requested or permitted to be made by this council with respect to any particular subject shall be deemed made if it appears in any portion of these findings.

J. All conditions of approval and mitigation measures are and shall be conditions and covenants running with the land, and shall be recorded as such in the office of the county recorder.

K. Final design approval by this council shall occur following applicant's submittal of a modified site plan and architectural details consistent with the terms of this resolution.

L. The community development director is directed to file notice of determination with the County Clerk.

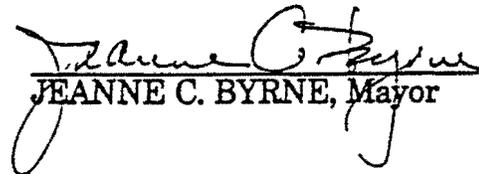
PASSED AND ADOPTED BY THE COUNCIL OF THE CITY OF PACIFIC GROVE this 6th day of January, 1993, by the following vote:

AYES: Davis, Rogge, Schaefer, Zito

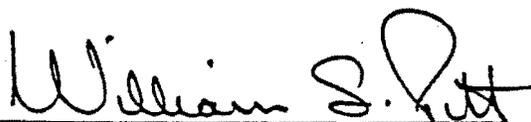
NOES: Byrne, Roberts, Yadon

ABSENT: None

APPROVED:


JEANNE C. BYRNE, Mayor

ATTEST:


WILLIAM S. PITT, City Clerk

APPROVED AS TO FORM:


GEORGE C. THACHER, City Attorney

OCT 13 1992

COMMUNITY DEV. DEPT.

CITY OF PACIFIC GROVE
APPEAL OF PLANNING COMMISSION'S ACTION

SECTION I - PROJECT INFORMATION

Application No.: 1349-89

Applicant: STEPHEN PAGE

Project Address: 1450 SUNSET DRIVE, PACIFIC GROVE, CA

SECTION II - PLANNING COMMISSION ACTION

Date of Planning Commission Action: OCTOBER 1, 1992

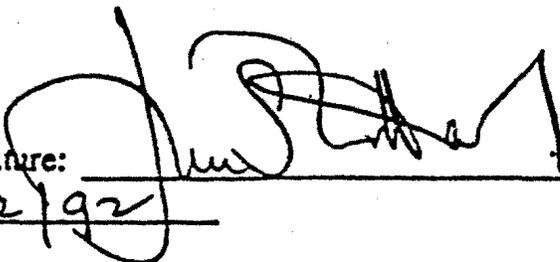
Planning Commission Decision: APPROVED

SECTION III -- APPEAL INFORMATION

Appellant: STEPHEN PAGE/JOHN E. MATTHAMS INTERNATIONAL DESIGN GROUP

Grounds for Appeal - Please explain why you disagree with the Planning Commission's decision. (If necessary, use additional pages)

SEE ATTACHED (2 pages)

Appellant's Signature: 
Date: 10/12/92

Attach appeal fee

ATTACHMENT TO STEPHEN PAGE APPEAL**GROUND'S FOR APPEAL:**

The Applicant, Stephen Page, hereby appeals from those portions of the Planning Commission Resolution No. 92-32 requiring that the total square footage of the house and garage be reduced to 3000 to 3500 square feet, and requiring that the structure be relocated easterly of the line labeled "building limit line" as delineated on Exhibit D attached to said Resolution.

Specifically, Applicant Stephen Page appeals from the following portions of Finding (j) of Section 4 of Resolution No. 92-32 on the grounds that said findings are not supported by substantial evidence in the record and are contrary to applicable law, ordinance, regulation and standards:

- i) The finding that: "As conditioned by the ARB, the project's impact on visual access to the dunes, ocean and bay has not been mitigated to a less than significant level."
- ii) The finding that: "The proposed structure approved by the ARB would significantly impact the viewshed as observed from northerly and northeasterly of the proposed structure, especially from locations on public property (Coast Guard dunes adjacent to the subject site) and on public roads (Ocean View Boulevard northerly from Lighthouse Avenue)."
- iii) The finding that: "It is feasible to reduce the size of the proposed structure and to require that it be pulled back easterly from its ARB-approved location..."
- (iv) The finding that: "In combination, these two changes will substantially increase the public viewshed from the public locations noted hereinabove, and...will (1) reduce the impact on visual access to a less than significant level, and (2) comply with LUP provisions regarding protection of public views of the ocean and bay."

EXHIBIT A-1
(page 3 of 3)

Page Appeal Attachment - Page 2.

"Specifically, the Applicant Stephen Page appeals from Section 9 of Resolution No. 92-32, granting in part the appeals of Gourlay and Nolan/Comring on the grounds that the action reflected in Section 9 (a) is not supported by substantial evidence in the record, (b) is contrary to applicable law, ordinance, regulation and standards, (c) denies the Applicant the right to make economically viable use of his land in accordance with his reasonable investment-backed expectations, and (d) is unreasonable, arbitrary and capricious."

"Specifically, the Applicant Stephen Page appeals from Section 10 of Resolution No. 92-32, requiring that the total square footage of the house and garage shall not exceed 3000 to 3500 square feet, and that the structure as approved by ARB shall be located easterly of the line labeled "building limit line," as delineated on Exhibit D attached to said Resolution, on the Grounds that the action reflected in Section 10 (a) is not supported by substantial evidence in the record, (b) is contrary to applicable law, ordinance, regulation and standards, (c) denies the Applicant the right to make economically viable use of his land in accordance with his reasonable investment-backed expectations, and (d) is unreasonable, arbitrary and capricious."

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OCT - 9 1992

COMMUNITY DEV. DEPT.

CITY OF PACIFIC GROVE
APPEAL OF PLANNING COMMISSION'S ACTION

SECTION I - PROJECT INFORMATION

Application No.: 1349-89

Applicant: STEPHEN PAGE

Project Address: 1450 SUNSET DRIVE, PACIFIC GROVE, CA

SECTION II - PLANNING COMMISSION ACTION

Date of Planning Commission Action: October 1, 1992

Planning Commission Decision: Approved

SECTION III - APPEAL INFORMATION

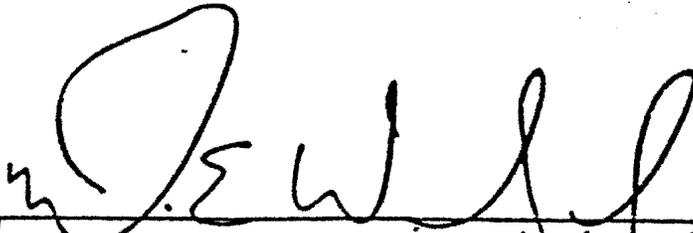
Appellant: MARK E. WOODWARD

Grounds for Appeal - Please explain why you *disagree* with the Planning Commission's decision. (If necessary, use additional pages)

See attached

Appellant's Signature:

Date: 10/9/92



Attach appeal fee \$15.00
RCPT# 01-11242/MARK WOODWARD

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EXHIBIT A-2
(page 2 of 2)

Attachment to Appeal

Grounds for Appeal:

Items of appeal are as follows.

1. Moving the footprint of the house away from the ocean by a further 20'.
2. Reducing the house size to between 3,000 and 3,500 square feet.
3. Reinstate the mezzanine as originally approved by the ARB.

The Reasons for Appeal:

There is no documentation or specific information contained in the LCP, the LUP and City Ordinances that specifically address any of the three items above where it is reasonable that reduction in size, movement of the house and the removal of an architectural feature is consistent with any policies of the City.

EXHIBIT 11-185
(page 1 of 4)

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COMMUNITY DEV. DEPT. CITY OF PACIFIC GROVE
APPEAL OF PLANNING COMMISSION'S ACTION

SECTION I - PROJECT INFORMATION

Application No.: 1349-89
Stephen Page
Applicant: _____
1450 Sunset Drive
Project Address: _____

SECTION II - PLANNING COMMISSION ACTION

Oct. 1 1992
Date of Planning Commission Action: _____
Approved
Planning Commission Decision: _____

SECTION III - APPEAL INFORMATION

Appellant: Walter E. Gourlay
For Friends of Rocky Shores

Grounds for Appeal - Please explain why you *disagree* with the Planning Commission's decision. (If necessary, use additional pages)

(SEE ATTACHED)

Appellant's Signature: _____

Date: Oct 7 1992
Oct.

W. Gourlay

EXHIBIT 17-3
(page 2 of 4)

--GOURLAY

October 7 1992

GROUND'S FOR APPEAL OF PROJECT APPLICATION 1349-89

1. Proposed project is inconsistent with city's Local Coastal Program to maintain Rocky Shores as open space for enjoyment of residents and visitors.

2. In accordance with California Coastal Act and Local Coastal Program, public agencies must be given adequate time to find funding to acquire property.

New Mit

3. Planning Commission erred in not adequately considering "Parkland" alternative and potential means of financing.

4. Project as approved is too massive for location.

5. Architecture and general appearance are not in keeping with character of neighborhood.

6. Style, elements, materials and details of project (Mediterranean style architecture) are incompatible with terrain and natural landscape.

7. Project destroys scenic view. Project is next to only building on Rocky Shores; it would double objectionable visual impact. Planning Commission erred in not adequately considering visual impact on hikers, bicyclists and persons on neighboring rocky points.

mit

8. Environmental effects of project identified in final EIR have not been avoided or mitigated to less than significant level. The Planning Commission did not protect the public interest.

9. Community sentiment is overwhelmingly against this project.

(A SEPARATE BUT RELATED APPEAL OF THE APPROVAL OF THE EIR IS ATTACHED. SEE NEXT PAGE.)

OCTOBER 7 1992

APPEAL OF PLANNING COMMITTEE'S APPROVAL OF ENVIRONMENTAL IMPACT
REPORT FOR APPLICATION NO. 1349-89 -- 1450 SUNSET DRIVE.

APPELLANT: Walter E. Courlay for FRIENDS OF ROCKY SHORES.

GROUNDS FOR APPEAL:

The EIR is deficient in the following respects:

1. The project is in violation of the city's Coastal Land Use Program.
2. The EIR does not adequately examine the "no project" alternative.
3. Project destroys scenic view. Project is next to only building on Rocky Shores; it would double objectionable visual impact. Planning Commission erred in not adequately considering visual impact on hikers, bicyclists and persons on neighboring rocky points.
4. Environmental effects of project identified in final EIR have not been avoided or mitigated to less than significant level. The Planning Commission did not protect the public interest.
5. The EIR does not examine alternative sites for the project.
6. Planning Commission erred in not adequately considering "Parkland" alternative and possible means of financing.
7. The EIR does not supply documents to support its conclusions about the lack of significant biological impact. There is no "good faith" effort to discuss disagreements among experts as to environmental impacts, as required by law.
8. The EIR does not refer to documents available that show the unique nature of the local environment.
9. The EIR does not adequately evaluate the visual impact and destruction of scenic views. The EIR does not refer to community standards when evaluating visual impact.
10. The EIR does not adequately discuss the sensitive habitats involved. It erroneously concludes that there is no danger to threatened species, despite evidence to the contrary supplied by local experts.
11. The EIR arbitrarily states that it is economically unfeasible to leave the property undeveloped, or to use it as parkland. It ignores community values, or the fact that an undisturbed shoreline is a prime economic asset to the city.
12. The EIR does not discuss potential damage to the P.G. Marine Refuge, and ignores documents pertaining to this issue:

EXHIBIT A-3
(page 4 of 4)

-- GOURLAY
October 7 1992

13. The EIR does not adequately discuss danger from tsunamis and provides for insufficient setback from the ocean.
14. The EIR does not discuss the possible effect on tidal ecosystems.
15. The EIR does not deal with the fact that Rocky Shores is the largest contiguous area locally for certain threatened animal species that depend on native dune plants for their existence, some of which plants are found on the property on which the project would be built.
16. This is a generic EIR patched together by people who do not live here and have little sensitivity to, or concern for the unique character of this shoreline.

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OCT 13 1992

(page 19)

COMMUNITY DEV. DEPT.

CITY OF PACIFIC GROVE
APPEAL OF PLANNING COMMISSION'S ACTION

SECTION I - PROJECT INFORMATION

Application No.: 1349 - 89

Applicant: Stephen Page

Project Address: 1450 Sunset Dr.

SECTION II - PLANNING COMMISSION ACTION

Date of Planning Commission Action: Oct. 1, 1992

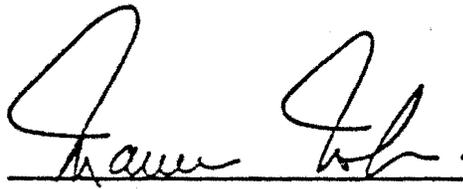
Planning Commission Decision: Approved with modifications

SECTION III - APPEAL INFORMATION

Appellant: Maureen Nolan James Corning

Grounds for Appeal - Please explain why you disagree with the Planning Commission's decision. (If necessary, use additional pages)

(see attached)

Appellant's Signature: 
Date: 10/13/92 Attach appeal fee

City Council
City of Pacific Grove

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COMMUNITY DEV. DEPT.

I am requesting the City Council of Pacific Grove to overturn the resolution approved by the Planning Commission concerning the proposed house to be developed at 1450 Sunset Dr., Pacific Grove.

1. The resolution of the Planning Commission of the City of Pacific Grove did not comply with the Local Coastal Plan (L.U.P.).
2. Project submitted does not comply with LCP intent to Protect environmental sensitive habitats. 2.3 - 2.4 inclusive.
3. Project submitted does not comply with LCP to Protect Archaeological Resources. 2.4 - 2.5 inclusive.
4. Project submitted does not comply with LCP to Protect Scenic Resources 2.5 - 3.0 inclusive.
5. Project submitted does not comply with LCP Coastal Zone Land Use and Development. 3.1 - 3.5.1 inclusive.
6. Project submitted does not comply with LCP Public Shoreline Access. 5.1 - 5.6 inclusive.
7. Project submitted does not comply with the California Coastal Act as submitted in the City of Pacific Grove LCP as Appendix A.

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COMMUNITY DEV. DEPT.

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EXHIBIT IT-451
(page 3 of 4)

8. Project submitted does not comply with the Asilomar Dunes Habitat Survey with Policy Recommendations included in the LCP of the City of Pacific Grove.

9. Project submitted does not conform in architectural elements or style to the Asilomar Dunes Neighborhood.

- a. Mediterrean does not blend with the surrounding dune environment.
- b. Size of the proposed structure is too large for the building pad.
- c. Mass of the structure restricts and negates scenic policies of the LCP.
- d. Roofing materials do not blend with the dune environment rather, the materials dominate the surrounding dune habitat.
- e. Detached garage lends to overall massing, rather than any attempt to blend into the scenic dune environment.
- f. Proposed structure site sits too far west, thus negating scenic policy requirements in the LCP.
- g. Proposed Structure site sits too close to the northern property line, thus inhibiting and negating potential dune habitat areas as required by the specific policies in the LCP.
- h. Exterior materials of earth colored stucco dominate the site and surrounding viewsheds, making a statement house rather than a structure that blends with the environment.
- i. A driveway policy should be included with restrictions on width, and clear drawings of siting on the Page property
- j. Landscaping has not included easements as required by development on the Coast - including dune restoration, timelines, sensitive plant habitats and legless lizard habitats.
- h. outdoor lighting has not been carefully outlined - no outdoor lighting should be lining the driveway as part of decorative effects and all outdoor lighting needs to be carefully defined

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EXHIBIT 11-7
(page 4 of 4)

COMMUNITY DEV. DEPT.

- i. The monitoring process should be on a weekly basis rather than once every three months.
- j. A maximum size for the proposed should not exceed 2500 sq. ft. however a smaller proposed structure should be encouraged.

MAUREEN NOLAN
CITY OF BOSTON

Maureen Nolan

m e m o r a n d u m

August 6, 1992

TO: Members of the Planning Commission

FROM: George C. Thacher, City Attorney

SUBJECT: Appeal of Architectural Review Board Approval of
Architectural Approval Application No. 1349-90 for Property
Located at 1450 Sunset Drive

BACKGROUND: The owner (Stephen J. L. Page) of property at 1450 Sunset Drive has applied for architectural approval of a proposed plan for a single family dwelling on the property. Under applicable city regulations, this approval is the only city entitlement required for development of the site. If architectural approval is obtained here, then Mr. Page must also seek and obtain a coastal development permit from the California Coastal Commission. A coastal development permit is a separate discretionary permit which may be sought at the Commission level only if the property owner has in hand all required local (city) approvals. If architectural approval is not obtained from the city, then Mr. Page will not be in a position to apply to the Commission.

When Mr. Page's application was received, an "initial study" was prepared pursuant to local and state guidelines which implement the California Environmental Quality Act (CEQA). The initial study resulted in a finding that because the proposed project may have a significant effect on the environment, an environmental impact report (EIR) was indicated and would be prepared. A Draft EIR (DEIR) was prepared, comments were received regarding its contents and responses to those comments were included with the DEIR, combining to result in the Final EIR (FEIR) for the project.

With the preparation of the FEIR, the ARB was in a position to consider the proposed project. Their first task was to read, consider and certify the FEIR, following the public hearing required by city regulation. (To assist them I prepared a memorandum, which I attach here, summarizing some CEQA items. Although a number of the same points are covered in the memo you are now reading, please also read the attached for an explanation of required FEIR contents and the certification process.) A project for which an EIR has been prepared may not be approved, in whole or in part, until the EIR is first certified. The ARB did certify the FEIR. You will read on pages 3 and 4 of the attached memorandum a summary of the standard applied to the certification process.

Having certified the FEIR, the ARB turned to the project itself. After a number of hearings the ARB, on a 4-3 vote, decided to approve the proposed project with modifications, conditions and mitigations. The approval - and the certification

of the FEIR -- took the form of a resolution, also attached here. (Note that Exhibit B to the resolution, the site plan and project details, is not attached, but you have been given a copy.) The resolution, as required, addresses and includes certification of the FEIR, mitigation measures (for the most part taking the form of project conditions), and other conditions of approval of the project. Adoption of the resolution by the ARB resulted in project approval, subject to the right of appeal by interested persons.

APPEAL PROCESS: Attached is a copy of Municipal Code Chapter 23.73, the ARB regulations. You will read about appeals from ARB decisions at Section 23.73.080. Three appeals have been taken from the ARB decision on the Page project, all pursuant to Section 23.73.080. Two of the appeals (Gourlay, Nolan/Corning) have also been taken pursuant to Section 23.77.070, dealing with appeals from EIR certifications. In pertinent part, Section 23.77.070 reads: "Any interested person may -- at any time within 10 days following a decision on the project for which the environmental impact report is prepared -- appeal such determination to the body which would hear an appeal of the project. An appeal or call up of the project shall also result in automatic appeal of such determination."

When appeals are filed, they contain statements of objection to the action of body appealed from, thus defining the scope of the appeal. In the matter at hand, two of the appeals call into question the entire approval, including the appropriateness of the FEIR certification. A fair reading of these two appeals, taken in combination, is that appellants argue for no project or for a project significantly smaller, less massive, and/or of different architectural style. So, the appropriate range of actions regarding these appeals would include denial (certifying the FEIR and leaving the ARB approval in place), upholding the appeal by denying the proposed project (FEIR certification would not be required to totally deny the project, but as a practical matter certification would likely have occurred prior to reaching the point of considering the project), and upholding in part and denying in part. The latter action (following FEIR certification) could, for instance, take the form of approval of a smaller, less massive structure, either for environmental reasons or for reasons related to the permitted scope of ARB review, eg., neighborhood compatibility. The two appeals under discussion here do not provide latitude to approve, for instance, a larger, higher and/or more massive project than that approved by ARB.

The third appeal simply requests replacement of the mezzanine which the ARB excluded. Your range of options is limited here to granting (mezzanine returns), denying (mezzanine remains off) or a partial grant/partial deny or some mezzanine structure of a smaller, less intensive nature than that requested by appellant. Of course, the required environmental certification is a necessary element of this appeal as well.

Hearings on appeal in the City of Pacific Grove are "de novo." That is, we hold full hearings rather than rely solely on the written record of the body appealed from. So, the body hearing the appeal hears, reviews, and considers not only materials and the record submitted by the decision making body, but also all comments and materials made and submitted by anyone wishing to speak to the issues on appeal.

Taking into account the limitations imposed by the appeals themselves, discussed above, the planning commission in this case is sitting as if it were the ARB. You are to take into account those matters usually considered by the ARB pursuant

to Chapter 23.73. Treat this as an ARB application, and consider yourselves the ARB.

Occasionally an appeal matter will be returned to the body appealed from, but in this case the ARB fully considered the application, discussed all issues raised and came to a final determination. To return the matter to them for further deliberation at this point would be procedurally and practically inappropriate.

CEQA/EIR ISSUES RAISED ON APPEAL: Both the Gourlay and Nolan/Corning appeals raise issues regarding the adequacy of the FEIR and its compliance with CEQA and the CEQA Guidelines - although the Gourlay appeal does so with far more specificity. Because you must first certify the FEIR if you are to move on to consideration of the project itself, it is appropriate that you first address the points on appeal dealing with CEQA and the FEIR. And I will do so here.

1. The No Project Alternative. CEQA and its Guidelines require that a range of reasonable alternatives to the project, which could feasibly attain the basic objectives of the project, be evaluated, including the no project alternative. (CEQA Guidelines, Section 15126; note that the Guidelines are found at Title 14 of the California Code of Regulations, but for ease of reading references hereafter will be simply to the sections of that title.) Further, if the no project alternative is the superior alternative, the EIR shall identify an environmentally superior alternative among the other alternatives. (Guidelines, Section 15126)

In this case a reading of the FEIR discloses that the no project alternative promises less environmental impact than the proposed project. (Page 6-1, FEIR) While not called out specifically as an alternative, the FEIR, through the evaluation of potentially significant impacts, offers mitigation measures which, as applied to the project application, result in a project alternative which was apparently construed to be environmentally superior to that contained in the application. The consultant determined that because the project was relatively small when compared to most projects requiring an EIR, the scaling down by mitigation was more effective than proposing a series of alternatives. The ARB, by accepting and imposing the suggested mitigation measures, has selected a project which, in their opinion, not only results in development having less than a significant impact, but also is environmentally superior to the project applied for.

The Gourlay appeal contends that the EIR does not adequately examine the no project alternative. Neither CEQA nor the Guidelines have established a categorical imperative regarding either the range of alternatives to be discussed or the depth of required discussion of any particular alternative. Each case must be evaluated on its facts, and must be reviewed in light of CEQA's statutory purposes. (Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553) The key is whether the discussion fosters informed decision making and public participation.

Discussion of the no project alternative in the FEIR at issue points out that as to each of a number of potentially significant effects, this alternative will result in lesser impacts. That is, the analysis is detailed enough to present a valid comparison of potential environmental effects. It is my opinion that you can reasonably determine that the discussion and examination satisfies legal requirements. As noted by the court in Residents Ad Hoc Stadium Com. v. Board of Trustees (1979) 89 Cal.App.3d, the "discussion of alternatives need not be exhaustive, and the requirement as to the discussion of alternatives is subject to a construction of reasonableness. . . ." You can also reasonably conclude, given the state of the record,

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that the discussion of the no project alternative has fostered informed decision making, public participation and debate.

CEQA does not require project denial whenever the no project alternative is deemed environmentally superior. If such were the case, very few projects requiring preparation of an EIR would be approved. CEQA does require, however, that as to identified significant impacts, mitigation measures be adopted to "avoid or substantially lessen" those impacts. (Guidelines, Section 15091)

2. The Alternative Site Discussion. The Gourlay appeal notes that the FEIR does not examine alternative sites for the project. Section 15126 of the Guidelines also suggests that alternative sites be discussed. Such discussion is most appropriate when the proposed project will create unavoidable significant environmental impacts. (Atherton v. Board of Supervisors (1983) 146 Cal.App.3d 346) The decision whether an EIR must consider availability of alternative sites is done on a case by case basis, but courts have provided some guidance.

The leading case on alternative site analysis is Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553. In determining the need to evaluate alternate sites, public and private projects could be distinguished, the court observed, as to relocation feasibility. A public agency, having the power of eminent domain and access to public lands, has a more feasible opportunity to develop on alternative sites. The court also stated that as to private projects, alternative sites may be feasible when, assuming compatible land use designations, the developer owns or controls feasible alternative sites, when the developer has the ability to purchase or lease such properties, when the developer otherwise has access to suitable alternatives, when two or more developers are seeking approval from a local agency for the same type of development at different locations, or when "other circumstances" necessitate such review.

While an individual capable of purchasing the lot at issue in theory is equally capable of purchasing other undeveloped residential properties in the area, the fact is that there are no other ocean front parcels available for private residential development in the city. If, as applicant has stated, it is his desire to develop and live immediately adjacent to the water, it is legitimate to take the position that alternative site analysis is not appropriate. Consider too, as did the court in Citizens of Goleta, that "an EIR is not ordinarily an occasion for the reconsideration or overhaul of fundamental land-use policy." (52 Cal.3d 553, 573) Thus, where a local coastal plan (LCP) - a document which, among other things, "strives to ensure planned, comprehensive development within the coastal zone . . ." (52 Cal.3d 553, 571) - is in place and has analyzed and identified areas available for development, analysis of alternative site becomes less necessary. Alternate site analysis is more appropriate where land use designations are at issue, i.e., when the decision is being made where to allow a particular use. Case-by-case "reconsideration of regional land-use policies, in the context of a project specific EIR, is the very antithesis of the [goal of long-term comprehensive planning]. . ." (52 Cal.3d 553, 573)

3. Adequacy of discussion regarding "biological impact." The Gourlay appeal notes that the EIR does not supply documents to support conclusions about lack of significant biological impact, and that there is no "good faith" effort to discuss disagreements among experts as to such impacts.

Section 15065 of the Guidelines provides, among other things, that an EIR shall be prepared if a project has the potential to substantially reduce the habitat of a

fish or wildlife species. The initial study done for this project noted that the project might ("maybe") have such an effect, thus supporting the preparation of an EIR. It is left to the EIR itself to address this issue and, if possible, to suggest and require mitigation measures.

The DEIR contains summaries of wildlife and vegetation surveys conducted on the site. Although there was little evidence at that time of the presence of endangered species on the site, there was evidence of same on adjacent sites. On the basis of the surveys, the DEIR disclosed an "impact," i.e., that the project "would result in the degradation of dune habitat which is potential habitat for the federally endangered Tidestrom's lupine and California black legless lizard." Consequently, a number of mitigation measures were suggested, and those measures were integrated into the ARB resolution granting project approval.

The EIR appends and discusses a plant survey, and notes and discusses a wildlife survey done by a biologist. Both support the conclusion that the site has clear potential as a habitat, a factor contributing significantly to the mitigation measures required. Neither the surveys nor the EIR suggest that there is a "lack" of "impact," rather that there is an impact and that certain mitigation measures, if implemented, will avoid or reduce that impact. In coming to a decision on the project you have, of course, on the basis of substantial evidence in the record, the ability to impose additional mitigations which you believe better respond to the identified impact. You should independently judge the project and you may modify the approval as warranted.

Section 15151 of the Guidelines provides that disagreement among experts "does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts." Further, this guideline states that the "courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." In its responses to comments the FEIR includes responses to the only information submitted during the EIR preparation process that can be construed as experts in conflict with information contained in the DEIR. The responses (to Fish and Game, State Resources Agency, Office of Planning and Research, Sierra Club) comply with the Guidelines, Section 15088, in that they describe the disposition of the significant issues raised (eg., revisions to project to mitigate impacts or objections), and, it appears, provide good faith, reasoned and supported analysis. The points of disagreement are discussed and disposed of, in my opinion, adequately given the level of analysis required.

4. Documentation regarding unique nature of local environment. It is not clear from the appeal on this issue whether this item is intended to present a legal objection to the adequacy of the FEIR. Of note is that Section 15125 of the Guidelines requires a description of the environmental setting prior to commencement of the project, and a discussion of any inconsistencies between the proposed project and applicable land use plans. In this case the setting is discussed at Section 4 of the DEIR. Further, an impact analysis is contained in that section, describing, explaining and noting appropriate mitigations, with reference to the city's adopted land use plan (LUP) of our LCP.

It appears to me that the environmental setting is adequately described and addressed, and that reference to the many specific environmental concerns and mandates in the LUP point up the uniqueness and sensitiveness of the project site.

Enclosure 6

5. Evaluation of visual impact and destruction of scenic views. The Gourlay appeal here complains of the adequacy of the evaluation and the absence of reference to community standards. On the general adequacy question you are again referred to Section 15151 of the Guidelines, which requires EIR preparation "with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently take account of environmental consequences." Going on, the section notes that an "evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible."

At pages 4.4-1 through 4.4-23 (with attachments, including photo montage) of the DEIR you find a discussion of "visual quality and aesthetics." Among other references in these pages are citations to applicable provisions of the LUP, an established community standard. On the face of the DEIR, it appears that the discussion of the visual impacts is legally adequate. And the responses to comments in the FEIR on this subject are extensive.

6. Evaluation of sensitive habitats. Again, the appeal charges that discussion is inadequate in this area. Again, you are referred to Section 15151 and the analysis contained in the DEIR on this item. Again, it appears to be legally adequate.

On this point, the DEIR concludes not that there is "no danger to threatened species," but that the proposed mitigation measures will either avoid or reduce to a less than significant level the effects on the habitat; the ARB resolution adopts the measures and arrives at the same conclusions.

7. Economic infeasibility of undeveloped property. This objection on appeal argues that a statement of "economic infeasibility" in the EIR is arbitrary and that such a finding ignores community values, or the fact that an undisturbed shoreline is a prime economic municipal asset.

The EIR itself does not make the point on infeasibility, rather that language is found in the ARB resolution by way of explanation for the no project and parkland alternatives not being adopted. The infeasibility noted by the ARB is the likelihood that refusing all development on the site would result in economic exposure (a "takings" claim) for the city. There is little doubt, at the appeal notes, that an undisturbed shoreline begets increased municipal value. But it comes at a corresponding cost to the city.

(On this point, please understand that if on the basis of evidence in the record you determine that there exist unmitigatable significant impacts for which findings of overriding consideration can not be made, the application may be denied. [As noted elsewhere in this memorandum you may also, for legitimate supportable reasons, scale back the project.] If such impacts exist as to any development on the site, and denial of any and all development ultimately occurs, a takings claim would be in order. Development is a privilege, not a right, and a specific development proposal may legitimately be denied if such denial is supported by law and the law as applied to evidence in the record. What is a right, however, is the property owner's right to be compensated -- at fair market value -- in the event an owner is denied economically viable use of his/her property.)

8. Discussion of damage to Marine Refuge. The Gourlay appeal alleges that potential damage to the Marine Refuge is not discussed, and that documents pertaining to this issue have been ignored.

The DEIR does not identify as significant, or insignificant, potential of damage to the Refuge itself. There is some discussion regarding tidal ecosystems (see below), but the Refuge per se is not noted or discussed. This judgment apparently was made with reference to information available at the time of EIR preparation. The comments received on the DEIR did not include specific reference to Marine Refuge impacts, thus the FEIR's responses to comments include nothing specific on the Refuge. Mere speculation is not ordinarily enough to trigger a finding of significant impact; some evidence in support is required.

9. Tsunami damage potential and corresponding setback. The appeal notes that there is inadequate discussion regarding tsunamis, and that insufficient setbacks are provided for such danger.

Tsunamis are discussed at page 4.2-5 of the DEIR, and the decisions regarding tsunami potential in the DEIR are based on a survey done by a geologic and environmental consulting firm. The danger associated with tsunami action is dismissed as minimal. A response to a comment on tsunami action notes that the comment was not specific enough to allow precise response; also, reference was again made to the geologic report to substantiate previous discussion and determinations.

Again, questions of adequacy are dealt with pursuant to the standard noted above, from Section 15151 of the Guidelines.

10. Discussion of effect on tidal ecosystems. The appeal states that the EIR does not discuss the possible effect on tidal ecosystems. In both the DEIR and in responses to comments discussion is found regarding the possibility of surface runoff and pollutants entering adjacent tidelands and intertidal areas. In both instances it is noted that plans for drainage, erosion, sediment and pollution control measures shall be prepared in accordance with LUP policy 2.2.5-2., which provides for reduction in the potential for degradation of tidelands, by specifically requiring such measures as part of any city approval near tidelands.. The ARB resolution includes this requirement.

11. Discussion of Rocky Shores as habitat for threatened animal species and native dune plants. The appeal claims that the EIR does not deal with Rocky Shores as the largest contiguous area for certain threatened animals and plants that depend on native dune plants for their existence, some of which are found on the project property.

First, please note the discussion above regarding the adequacy of habitat discussion.

The dune restoration mitigation requirements are responsive to the recognition that (1) the proposed dwelling will cover and eliminate dune habitat over a certain percentage of the site, and (2) that restoration work constitutes an attempt to re-establish the project site, and consequently at least part of Rocky Shores, as an acceptable habitat for native flora and fauna. If the EIR hadn't dealt with the fact that these dunes are natural hosts to native plants and animals, it surely would have been defective. But it did, recognized the environmental issues, and suggested mitigation accordingly. The ARB resolution included the suggestions.

12. Generic EIR. Finally, the Gourlay EIR holds that the EIR is generic, patched together by people who do not live here, and have no sensitivity to or

concern for the unique character of the affected shoreline. I have no comment here, as this point does not raise any identifiable legal issue.

13. Adequacy of mitigation. Although not mentioned in the Gourlay EIR appeal, in his separate appeal on the project itself Mr Gourlay avers that the environmental effects of the project identified in the FEIR have not been mitigated to less than a significant level, and that, therefore, the ARB did not protect the public interest.

Testing the adequacy of mitigation measures is not a precise science. Section 15091 of the Guidelines requires that as to any identified significant effects, one of three findings must be made: (1) That changes or alterations have been required which avoid or substantially lessen the effect, (2) that another agency has jurisdiction over the mitigations and will or should impose them, or (3) that specific economic, social or other considerations make infeasible the mitigation measures.

"Significant effect on the environment" is defined as follows at Section 15382 of the Guidelines: "... a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic interest ..."

Section 15370 describes the scope of permitted "mitigation" as follows: "(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impacts by repairing, rehabilitating, or restoring the impacted environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments."

As to the identified significant impacts (and as to some of the less than significant impacts) in this case the ARB, in its resolution, has required mitigation measures which it found to reduce the identified effect to less than significant. You should evaluate each impact independently of the ARB's conclusions and you may disagree, based on the evidence in the record, that "substantial lessening" has been accomplished by the measures imposed. If you do, you may impose other, reasonable mitigation measures supported by evidence in the record. You are reminded here that certification of the FEIR does not foreclose your options with respect to additional or different mitigation measures. Section 15121 of the Guidelines points out that an EIR is informational, to inform decision makers and the public regarding the effects of a proposed project. Section 15121 notes that the information in the EIR "does not control" ultimate discretion on the project, thus certification of the document as having been completed in compliance with CEQA does not preclude consideration or imposition of project conditions or reasonable mitigation measures not specifically contained in the EIR.

LCP/LUP ISSUES RAISED ON APPEAL: The Nolan/Corning appeal contains a number of points which focus on alleged non-compliance with the city's land use plan (LUP) of its local coastal program (LCP).

As a preliminary comment, the LUP is an integral part of any local agency's LCP. In the case of Pacific Grove, it has been adopted as part of the general plan. Any development or other activity taking place within the area of this city covered by the LUP shall comply with the requirements of the LUP. It is law just as surely as are the various other land use regulations adopted by the city. If the LUP conflicts with any other land use policy, rule or regulation, the LUP prevails.

1. Untrue facts in ARB resolution; non-compliance with LUP. Nolan/Corning assert that there are untrue facts in the ARB resolution, and that the ARB did not comply with the LUP.

I can not find in the appeal or in submittals any further specification of untrue facts, so no comment is offered.

The assertion that the action of the ARB did not comply with the LUP is dealt with below, as individual LUP provisions are called into question.

2. Non-compliance with LUP provisions regarding environmentally sensitive habitats, LUP Sections 2.3 and 2.4

Nolan/Corning failed to provide specific references to the various subsections in the LUP they claim are violated, making it difficult to identify their precise objections. However, note that in Section 2.3 the DEIR (page 4.1-5), the land use policies having a bearing on the project are 2.3.2 (citing the Coastal Act requirement that sensitive areas be protected against significant disruption, and that only resource dependent uses be allowed in such areas), and 2.3.4-2 (habitat areas of Tidestrom's lupine and Menzies' wallflower be protected, enhanced and maintained).

As to subsection 2.3.2 the DEIR notes that (1) the general area has been determined sensitive, however (2) the LUP land use designation allows for single family development and (3) the site itself does not contain environmentally sensitive habitats as considered by 2.3.2.

As to subsection 2.3.4-2, the DEIR specifies construction methods for the protection of the two named plants on adjacent properties during construction.

As well, the specific policies dealing with development of parcels in the Asilomar Dunes area (found at LUP subsection 2.3.5-1) have been integrated, as appropriate, into the conditions and mitigation measures found in the DEIR and the ARB resolution.

3. Non-compliance with LUP provisions re protection of archaeological resources, LUP Section 2.4.

Again, finding no specific references, precise response is difficult. As required by subsection 2.4.5, an archaeological survey was done (see page 4.5-2, DEIR). Although the survey revealed substantially less archaeological evidence than expected, the DEIR nonetheless requires suspension of construction work in the event of an archaeological find, and recovery work done as appropriate. This is a common mitigation measure where nothing unique is identified, to safeguard against unexpected discoveries during construction.

4. Non-compliance with LUP provisions re protection of scenic resources, LUP Section 2.5. (For ease of reference, Section 2.5 is attached here.)

The objection here is that general and specific policies have not been followed. Please note in a number of these policies the use of language such as "retain the maximum amount of open space possible," minimization of "alteration of natural

dune topography," "compliment the open space character of the area," development "to the maximum extent feasible, shall not interfere with public views," and development to be "sited and designed to protect views . . . to minimize alteration of land forms . . . to be visually compatible [with surrounding open space] . . . and, where feasible, to restore and enhance visual quality. . . ." Note that these policies do not bar all development, but only seek to make development as sensitive as possible.

As to each of these policies reasonable minds will differ as to compliance, and perhaps differ widely. The DEIR, and the ARB in arriving at a decision on the project, considered the application of these policies to the project at hand. Mitigation measures and conditions were imposed (eg., reduction in foot print) in light of these policies. The key here, i.e., what a court may ask when looking at such an approval, is whether the interpretation and decision of the city is in compliance with planning policies, is reasonable, and is supported by the evidence. Those measures and conditions are, in my judgment, within legal bounds.

If, however, it is the reasoned judgment of the planning commission, based on the record before it, that these policies have not been appropriately addressed, and that additional mitigation and conditioning is necessary, the commission may order such additional mitigation.

There are other, less subjective, policies in Section 2.5 which are included in the project approval, eg., 75' setback, earthtone colors, etc. The ARB concluded that each of these has been complied with.

5. Non-compliance with LUP provisions re land use and development, LUP Sections 3.1 through 3.5.

There are several objective policies in subsection 3.1.1 which have been integrated into the project approval either as written or made more restrictive by the ARB, eg., building height, parking.

In their submittal in support of the appeal, Nolan/Corning cite subsection 3.4.2, which in turn notes Coastal Act policy that development in coastal areas shall protect views, minimize land form alteration, be visually compatible, and restore and enhance visual quality. As stated above, these are requirements the implementation of which are subject to interpretation of decision makers. So long as decisions are within reasonable limits and based on the evidence in the record, they will be upheld.

There are also some specific policies at subsection 3.4.5-2, all of which have been acknowledged and integrated into the project approvals.

Nolan/Corning cite subsection 3.4.5-4, focusing on the statement that Rocky Shores should be maintained as open space, and that in the event of an application for development the city shall seek funding to establish permanent open space on the properties. The subsection goes on to say that if after a reasonable time period no funding or other remedy has been found, the application shall be processed under applicable standards. This provision must be read and interpreted in light of time limits placed on public agency handling of development applications. Sections 65920-65960 of the California Government Code -- the so-called Permit Streamlining Act -- provide that for projects which require an EIR, a local agency must make a decision on applications within one year from the date a complete application is received. City's LUP, even though approved and ratified by the California Coastal Commission, does not have the effect of superseding statutory law adopted by the state legislature. Thus, the "reasonable" time delay provision in our LUP must be exercised with due regard for the Permit Streamlining Act. More than a year has now passed since the filing of a complete application for the project at issue here.

(While it is arguable that the city is no longer at risk under the Act because a decision has now been made at the ARB level, the city has an obligation to proceed expeditiously to complete the appeal process.)

6. Non-compliance with LUP provisions re public facilities, Sections 4.0 through 4.2.

Without further explanation from appellant, analysis of this facet of the appeal is not possible. I do note that a quick review of the public facilities provisions of the LUP reveal no policies applicable to the project application which appear to have been violated.

7. Non-compliance with LUP provisions re public shoreline access, Sections 5.1 through 5.6.

Aside from the summary statement in the appeal itself, there is no explanation of this objection. Of note, however, is a finding of "less than significant impact" in the DEIR regarding LUP subsection 5.5.4, which provides for public access in conjunction with development in the area at issue except where it is unsafe or damaging to coastal resources, or where adequate access exists nearby. Despite the finding of less than significant, the ARB did address this matter as an additional mitigation measure in their resolution, to wit, noting that the city does not yet have in place ordinances to require such access, but that the coastal commission should consider such access when it hears the coastal development permit application for the site. (Ordinances are in process, and the Coastal Commission has not objected to our pace in completing them.)

8. Non-compliance with California Coastal Act. Except to the extent that Coastal Act policies underpin the various elements of the LUP cited by Nolan/Corning and discussed above, there is no further explanation of this broad objection.

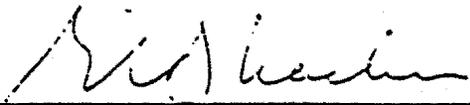
9. Non-compliance with Asilomar Dunes Habitat Survey. Once again, there is no additional argument on this issue. Note, however, that the Survey, appended to the LUP, contains a number of recommendations for handling of development proposed in the Dunes area. Reading the many recommendations, I do not find any that appear to have been avoided or violated during this process.

OTHER ISSUES RAISED ON APPEAL: The Gourlay appeal is in two parts, one regarding the project approval itself and the other dealing with the handling of the CEQA/EIR issues, the latter discussed above. The Gourlay project appeal contains some LUP issues, which have been covered above under discussion of the Nolan/Corning appeal. It also contains an environmental issue, which is discussed at 13. of the CEQA/EIR issues, above.

The balance of the issues on appeal concern project size, materials and details of the structure, architecture, general appearance, massiveness, harmony/conformity with the Asilomar Dunes neighborhood, and the appropriateness of the mezzanine. These issues all fall within the considerable discretion afforded by Chapter 23.73 ("Architectural Review Board"), attached, of the Municipal Code, especially at Sections 23.73.020, .060 and .070.

A final comment. During the course of this appeal, and throughout the ARB process, numerous references have been made to the many size, height, etc., limitations contained in the LUP and other city regulations. Please know that these limitations are maximums, eg., no more than 15% of a site on the Asilomar Dunes may be covered; the city is under no obligation to allow development to stated maximums. Pursuant to your obligations and authority under CEQA (via the FEIR) and under the ARB regulations, you have the ability reasonably to lower, render less massive and otherwise subject any approval to conditions resulting in a structure not built to maximum allowances. (See, for example, Guinnane v. City and County of San Francisco (1989) 209 Cal.App.3d 732., in which the court affirmed a city's ability to deny a building permit application for a dwelling proposed for near maximum limits, where the city had a standard requiring neighborhood compatibility.)

If you have any questions about this memo or anything else regarding the appeal, please call me at 648-3106.


George C. Thacher, City Attorney

Attachment

cc: Tony Lobay
Bob Tiernan
Mayor and Council Members
Walter Gourlay
Maureen Nolan and James Corning
John Matthams
Mark Woodward

EXHIBIT C**CONDITIONS OF APPROVAL FOR ARCHITECTURAL APPROVAL
APPLICATION NO. 1349-89, APPROVED AS MODIFIED BY THE
CITY COUNCIL ON APPEAL**

1. The precise dimensions and location on the lot of the proposed project improvements, including footprint, roof line, lengths, and widths, shall be as approved by the council following submittal pursuant to Section III.K. of the resolution.
2. The height of the structure shall not exceed 15 feet.
3. Siding and roofing materials shall be wood; the roof shall be shingles. Native stone materials shall also be utilized to assist in blending and harmonizing the structures with the natural elements of the site. Remaining architectural details shall be as approved by the council following submittal pursuant to Section III.K. of the resolution. Provided, that (a) roof lines shall have a slight pitch to harmonize with dune slope and shape, and (b) the design should consist of straight lines to further harmonize the structure with the adjoining dwelling.
4. Total area of the house and garage shall not exceed 2500 square feet.
5. No structure shall be located westerly of the line labeled "building limit line" as delineated on Exhibit D of Planning Commission Resolution No. 92-32.
6. No structure shall be located easterly of a line parallel to and 245 feet westerly of the west side of Sunset Drive as it abuts the site.
7. All water collected in the guttering system shall be collected and directed, by means subject to approval of the city engineer, to the storm drain system main adjacent to the project site or outfall to the ocean as approved by the coastal commission.
8. Connection shall be made to the regional sewer system prior to any approval for occupancy being issued by the community development department.
9. Owner shall secure a coastal development permit from the coastal commission prior to issuance of a building permit.
10. Owner shall secure a water permit from the Monterey Peninsula Water Management District prior to issuance of a building permit.

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11. A domestic sprinkler system shall be installed, subject to approval of the fire chief.
12. A turn around area shall be provided, to permit head-out exiting onto Sunset Drive. Prior to issuance of the building permit, owner is requested to make a good faith effort to reach agreement with the owner of 1500 Sunset Drive for a shared driveway in order to reduce driveway coverage and contain construction related traffic within a single access route. Driveway design and turn around shall be approved by the site plan review committee.
13. Architectural approval shall be valid for one year, said year to commence upon obtaining of a coastal development permit for the project.
14. Construction shall not commence until a copy of this resolution is signed by the owner, acknowledging receipt of the permit and acceptance of its terms and conditions, and is returned to the community development department.
15. All construction and improvement must occur in strict compliance with the proposal as set forth in the application for permit, as modified by this resolution. Any deviation from the approved plans must be reviewed and approved by staff and may require city council approval.
16. These terms and conditions shall be perpetual, and it is the intention of the city council and owner to bind all future owners and successors in interest of the property to the terms and conditions of the resolution, all its attachments, and all documents, plans and other items referenced herein.
17. Owner shall defend and save harmless the City of Pacific Grove against and from any claims, suits, judgments, costs and attorney fees arising out of this approval or assertions that this approval is invalid, illegal, unconstitutional or otherwise contrary to law.
18. Should any inconsistencies arise in the items listed in these conditions or should any condition of this resolution require interpretation, the Community Development Director shall interpret the requirements of this resolution consistent with the Environmental Impact Report.
19. The boundary fence along the north side of the site shall be retained; when replacement becomes necessary it shall be replaced in kind.

EXHIBIT D

FINDINGS RELATIVE TO ARCHITECTURAL APPROVAL APPLICATION
NO. 1349-89 AS MODIFIED (APPROVED BY THE CITY COUNCIL ON
APPEAL) PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY
ACT; FINDINGS REGARDING MONITORING OR REPORTING OF
CALIFORNIA ENVIRONMENTAL QUALITY ACT
MITIGATION MEASURES

I. INTRODUCTION**A. Certification and Overview.**

1. These findings are made by the City Council of the City of Pacific Grove pursuant to the California Environmental Quality Act ("CEQA") and State and City Guidelines.
2. The purposes of these findings include (a) acknowledgment of certification of the Final EIR prepared for Architectural Approval Application No. 1349-89 (hereinafter, "project"), (b) description and summary of the potentially significant environmental impacts of the project, (c) description of the mitigation measures suggested by the Final EIR for the project, (d) statement of the city council's findings as to the impacts of the project after adoption or rejection of the mitigation measures. The description of the impacts is in summary form only; the Final EIR describes the impacts in detail, and is incorporated herein by this reference. Certain mitigation measures have been proposed in the Final EIR. These findings adopt such mitigation measures as proposed or as modified. Certain additional mitigation measures, not proposed in the Final EIR as responsive to significant effects, are also adopted in these findings.
3. Although in some cases the mitigation measures may not use the exact wording of the mitigation measures recommended in the Final EIR, in each such instance the adopted mitigation measure is deemed to be identical to or substantially similar to the recommended mitigation measure. Unless specifically stated to the contrary, all such measures are, and are hereby found to be, equally effective in reducing the identified impact to a less than significant level as are the mitigation measures as worded in the Final EIR. In each instance where this council finds that one or more mitigation measures from the Final EIR are adopted, this council means that such measures or their equivalents are adopted.
4. The Final EIR is comprised of those materials described in the recitals in the body of this resolution of which this Exhibit D is an integral part.
5. At Section III.F. of the body of this resolution this city council has certified the Final EIR as required and provided by law. In so certifying, this council recognizes that there may be differences among and between the information and

EXHIBIT D

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opinions offered in the documents and testimony that make up the Final EIR and the administrative record. Experts may disagree and this council must base its decision and these findings on that substantial evidence in the record that it finds most compelling. This council has considered all the opinions submitted to it. Therefore, by these findings, this council ratifies, clarifies and/or modifies the Final EIR as set forth in these findings, and determines that these findings shall control and that the Final EIR shall be deemed certified subject to the determinations reached by this council in these findings which are based on substantial evidence in the administrative record.

6. Unless otherwise indicated, all mitigation measures hereby adopted will avoid or reduce to a less than significant level any significant adverse environmental impacts, and all mitigation measures, themselves, are determined not to result in any potentially significant adverse impacts.

B. The Project. Architectural Approval Application No. 1349-89 is adequately described in the administrative record, in particular in the Final EIR, staff report and in the plan and model submittals made by owner.

C. The Record. The administrative record before this council relating to this project includes those materials described in the recitals of the body of the resolution of which this Exhibit D is a part, and also includes matters of common knowledge, such as City's general plan, zoning regulations and other Federal, State and City policies, laws and regulations.

D. Integration. This council intends that these findings be considered as an integrated whole and, whether or not any subdivision of these findings fails to cross-reference or incorporate by reference any other subdivision of these findings, that any finding required or permitted to be made by this council shall be deemed made if it appears in any portion of this document. All of the text in this findings document constitutes the findings and determinations of this council, whether or not any particular caption, sentence or clause includes a statement to that effect.

II. FINDINGS REGARDING ENVIRONMENTAL IMPACTS AND MITIGATION MEASURES

A. Introduction. The Final EIR discusses the project's environmental setting, potential environmental impacts, and measures and alternatives proposed to mitigate such impacts. The Final EIR includes specific subsections addressing land use and planning, coastal processes and geotechnical issues, vegetation and wildlife, visual quality and aesthetics, cultural resources, and public services and utilities. The organizational format of these findings is intended to follow the organizational format of the Final EIR. Each impact and mitigation measure relative to the project is discussed in the order presented in the Final EIR. Except for those impacts discussed below in subsections B. through G., this council finds that there are no other areas of significant impact. However, at the end of this section II (subsection H.), certain additional mitigation measures -- suggested by the Final EIR to address

EXHIBIT D

non-significant impacts -- are included as well as mitigation measures to assure the most environmentally sensitive project possible.

B. Land Use and Planning.

1. Scenic Resources Policies.

a. Potential Impact. The proposed project would not be entirely consistent with city's LUP scenic resources policies (2.5.2, 2.5.5-1, 2.5.5-4(b) and (c), and 2.5.5-7) in that it would partially obstruct visual access to the ocean and bay, would alter dune topography, would interfere with public views, and would not maximize open space seaward of Sunset Drive.

b. Mitigation measures. The footprint, height, and size of the building as initially proposed have been, respectively, lowered and reduced by this council to levels so as to reduce the visual obstruction and interference with public views to a less than significant impact. Further, construction activities and staging areas shall not take place on lands or sensitive habitats adjacent to the project parcel. No dirt or sand shall be removed from sensitive habitats during construction or grading. The area upon which all construction shall take place shall be fenced and all construction equipment and vehicle storage will be confined within the fenced area. No travel or other use of the surrounding area will be permitted.

2. Environmentally Sensitive Habitats and Scenic Areas Policy.

a. Potential impact. The proposed project would not be entirely consistent with city's LUP environmentally sensitive habitats and scenic areas policy (3.4.4-1 and 3.4.5-2) in that the dunes would be degraded by the project, and, as initially proposed, had a lot coverage of 15%, the maximum allowed.

b. Mitigation measures. Incorporated here by reference are the mitigation measures set out at section 4.4-1(f) of the FEIR, with additional reduction of structure (house and garage) to a maximum of 2500 square feet. Further incorporated here by reference is the "suggested additional mitigation measure" set out in section 6.3 related to the blending of sand dune topography with the dwelling. The actual extent of the proposed sand dune screening is similar in concept to the "suggested mitigation measure" and is a variation of the description in section 6.3.

Project would defeat purpose of dune screening.

C. Coastal Processes and Geotechnical Issues.

1. Construction Activity Disturbances.

a. Potential impact. Portions of the project site disturbed by construction activities could be subject to erosion.

4.4-1(f): Reduce the overall footprint size of the structure (approximately 20%) in combination with a lower roof height and different roof configuration on all or part of the structure.

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b. Mitigation measures. To the maximum extent possible the existing ground cover that protects the sand dunes shall not be disturbed. If such area is disturbed it shall be replanted immediately or as soon as feasible.

The proposed residential structure shall be supported with deep-seated pier or pole foundation systems. Conventional spread foundations shall not be used because the near-surface sand dunes are too loose to support such foundations, and in order to redensify the soils to bear the weight of the structure, the dunes would have to be graded. This grading action could strip large portions of the existing vegetation from the dunes, which would then exacerbate wind erosion. The drilled pier foundations will disturb less of the ground cover compared to conventional spread foundation. The concrete pier or wood pole foundations shall penetrate all sand dune and terrace deposits and shall be embedded four feet or more into the underlying bedrock. (Piers along the seaward side of the coastline house would be expected to be 12 to 20 feet deep.)

Areas used to store construction materials and house the construction shed shall be restricted and construction vehicle access to driveways or designated pathways shall be limited as much as possible.

2. Drilling Holes - Foundation Piers.

a. Potential impact. Loose sands and groundwater pools may make the drilling holes for foundation piers unstable.

b. Mitigation measure. Drilled holes shall be bolstered and supported by shielding three drilled hole sides as required by site conditions.

3. Roof/Driveway Water Erosion.

a. Potential impact. Runoff from roof and driveways could erode sand dunes or marine deposits seaward of the homesite.

b. Mitigation measure. Full roof gutters and downspouts shall be placed on all eaves of all structures proposed for development on the site. All roof and driveway runoff as well as surface drainage shall be directed away from building site and into storm drain systems that carry the accumulated water in a closed conduit to the storm sewer system. Alternatively, drainage may also be directed to outfall into the ocean and shall be designed to have no impact upon marine or intertidal biota. Drainage into the ocean shall be designed in conjunction with a coastal biologist and approved by the coastal commission. Non-corrosive segmented drain pipe shall be used where coastal erosion may take place. (As the coastline erodes, the segments could be removed easily.)

4. Earthquake Damage Potential.

a. Potential impact. Earthquake - induced groundshaking could cause structural damage and safety hazards to building occupants.

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b. Mitigation measure. Foxx, Nielsen and Associates, geotechnical consultants, recommend the use of concrete pier and grade beam foundations and such shall be employed on the project. This construction strategy will prevent major damage to the structures should surficial materials fail. Also incorporated here by reference are the mitigation measures set out above at sections C.1.b. and C.2.b.

All construction, including the infrastructure, shall comply with the most recent edition of the Uniform Building Code Seismic Zone 4 Standards, or local seismic requirements, whichever are most stringent.

5. Landsliding due to Seismic Shaking.

a. Potential impact. Seismic shaking could trigger landsliding or liquefaction of soils on the site.

b. Mitigation measure. Incorporated here by reference are the mitigation measures set out above at section C.4.b.

6. Coastal Bluff Erosion.

a. Potential impact. Proposed structures would be subject to damage from erosion of the coastal bluff and storm wave runup within 50 years.

b. Mitigation measures. The foundation of the home shall be set back landward of the recommended development setback line as indicated on approved architectural plans. The floor system of all living spaces must be elevated or protected from hazardous conditions to a height at least one foot above the 50-year wave runup level. The proposed residence shall comply with recommended elevations for finished floors and the bottom of the horizontal structural elements of the foundations as listed in Table 4.2-1 of the Final EIR.

D. Vegetation and Wildlife.

1. Dune Habitat Degradation.

a. Potential impact. The project will result in the degradation of dune habitat which is potential habitat for the federally endangered Tidestrom's lupine and California black legless lizard.

b. Mitigation measures. Leave natural vegetation intact in all portions of the property, except as required for the normal construction of buildings, utility infrastructure, roadways, driveways, parking, and to comply with fire safety specifications and recommendations.

Do not introduce fill or soil from outside the property. (These could contain seeds of weeds, genista or other undesirable species capable of overrunning the habitat and outcompeting native species.)

One or more new dune restoration sites must be located on the property, preferably in one of the setback areas, and excess sand from grading used to form

EXHIBIT D

new dunes. A revegetation or landscaping plan shall be adopted for the restoration sites using only native dune species. (A list of approved plants and possible sources is included in Appendix B of the Final EIR.) The following measures shall be included in the restoration plan:

(i) Use none of the following invasive non-native species in landscaping: Blue gum (Eucalyptus globulus); Acacias (Acacia spp.); Genista (Cytisus spp.); Pampas grass (Cortaderia spp.); Hottentot fig ice plant (Carpobrotus edulis); Cape weed (Arctotheca calendula); Dune grass (Ammophila arenaria); Pennisetum and all of its species such as fountain grass (Pennisetum setaceum).

(ii) Plant only drought tolerant vegetation in the general landscapes. Plants requiring frequent irrigation must be confined to special landscape features or planters near the homes. Topsoil may be imported only for these specific confined and high maintenance areas. In dune habitat or easements, only native dune species shall be used, and no imported soil may be spread.

(iii) All plants used for dune or swale revegetation must be approved by the Director of the Pacific Grove Museum of Natural History or selected from Appendix B. Plants must come from local vegetation (i.e. grown by contract from seeds and/or cuttings collected from the general Asilomar dunes area, rather than from the general commercial trade) to maintain genetic purity in the local native vegetation. Sources which may be able to provide native plants grown by contract are listed in Appendix B. It is suggested that the majority of the plants be grown in Supercells, as these generally adapt to the habitat more quickly than plants of 1-gallon size or larger, and can be produced in larger quantities more economically.

(iv) To monitor the success of the Restoration Plan, a botanist approved by the City of Pacific Grove shall be hired by the applicant/owner to visit the site to oversee or supervise the planting, and thereafter at least once a year for five years to ensure that the restoration or revegetation is succeeding. A report or letter shall be sent to the City following each visit, with a copy sent to the applicant/owner. If deficiencies occur (such as dead plants and shrubs, or presence of pampas grass, weeds or ice plant), the applicant/owner shall replace the dead plants and remove the invasive species. Staff of the City of Pacific Grove, the California Department of Fish and Game, the U.S. Fish and Wildlife Service, or the Coastal Commission may inspect the property at any time indefinitely and recommend additional studies if the property does not appear to be in compliance with the intent of this mitigation measure.

(v) The areas containing sensitive habitat/endangered species that remain following construction of the proposed project (including the dune restoration area) shall be dedicated as scenic easements. Site specific populations of Menzies' wallflower (Erysimum menziesii) and Tidestrom's lupine (Lupinus tidestromii) shall be retained.

(vi) Native dune building grasses and forbs shall be retained.

EXHIBIT D

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(vii) The owner shall provide sufficient funding to properly manage and maintain the preserved area over time.

All ice plant now occurring on the property shall be removed to enhance the habitat according to the following instructions: Ice plant shall be removed by spraying with a non-persistent systemic herbicide such as Roundup, as recommended by a licensed Pest Control Advisor. Ice plant should only be pulled by hand, and not sprayed, within 20 feet of any Tidestrom's lupines, or where significant native vegetation occurs with the ice plant.

All dune restoration shall be accomplished per a landscaping plan prepared by a qualified coastal biologist and implemented under the direction of the coastal biologist as required per LUP provisions 2.3.5.1.e and f. Eradication of ice plant shall be by herbicide only and the dead vegetation shall remain and decay in place. This method will provide erosion protection until the native species become established and a source of nourishment for the new plantings. Dune restoration measures shall be implemented in a manner that avoids increasing erosion by being accomplished in phases or some other method deemed appropriate by the coastal biologist. Snow fencing shall be utilized to control blowing sand until sand is stabilized by restoration planting.

Dune restoration of areas "beyond the approved building site and outdoor living space" and protecting the restored areas shall conform with a written agreement, deed restrictions or conservation easement granted to an appropriate public agency or conservation foundation as contained in LUP section 2.3.5.1.e. Where large areas are involved, such is the case in this proposal, the conservation easement is the instrument required by the City.

The presence of California black legless lizard shall be determined by trapping, combing, or other means deemed appropriate by the coastal biologist within all areas to be disturbed by construction activity immediately prior to grading operations. The determination of the presence of black legless lizard shall be made by a qualified coastal biologist. All individuals of the reptile found during the reconnaissance shall be relocated to suitable habitat.

A detailed grading plan indicating grading proposals in all areas to be disturbed is required to be submitted to the City prior to approval of the Coastal Permit per LUP section 2.3.5.1.d.

E. Visual Quality and Aesthetics.

1. Change to Aesthetic and Visual Quality.

a. Potential impact. Development of the proposed project would result in a change to the aesthetic environment and visual quality of an area with widely recognized sensitive scenic resources.

b. Mitigation measures. The height of the buildings as initially proposed has been lowered as set out in Exhibit C of this resolution. The overall size of the buildings as initially proposed has been reduced as set out in Exhibit C of this resolution.

15' max.

EXHIBIT D**2. Overnight Illumination.**

a. **Potential impact.** Overflow illumination from the proposed project would have significant impacts of the light and glare characteristics of the surrounding area from dusk to dawn.

b. **Mitigation measures.** All light sources emanating from the project site shall be directed onto the site and/or screened to prevent overflow illumination of adjoining areas. The use of exterior lights shall be kept to a minimum. Exterior spot or flood lighting shall be directional to avoid impacts to marine life and local marine activity. Lighting shall be designed and aimed in such a way that it does not conflict with lighthouse and security operations.

3. Reduction of Open Space and Viewshed Resources.

a. **Potential impact.** The proposed project would reduce open space and viewshed resources west of Sunset Drive, which conflicts with the special objective of the City of Pacific Grove to retain open space on land seaward of Sunset Drive.

b. **Mitigation measures.** The project shall incorporate to the maximum extent feasible design standards noted in the scenic resources policy statements outlined in the City of Pacific Grove's LUP (Scenic Resources 2.5.5-1, 2.5.5-4, and 2.5.5-5).

The following mitigation measures shall also be required to ensure that potential aesthetic impacts are lessened to an insignificant level:

1. All uncovered portions of the site shall be maintained in their natural condition, and planted only with native vegetation.

2. The proposed driveway shall be constructed of a material that is similar in color to the surrounding terrain, and located within the site topography, to visually blend into the surroundings to the greatest extent feasible.

The overall height of the proposed structure shall be lowered as noted in subsections E.1.b. and B.1.b., above, and in the body of this resolution.

F. Cultural Resources.**1. Protection of Cultural Remains.**

a. **Potential impact.** Construction activities may unearth and damage unidentified cultural remains.

b. **Mitigation measures.** If archaeological resources or human remains are discovered during construction, all work shall be halted immediately within 50 meters (150 feet) of the find until it can be evaluated. An archaeological consultant shall be retained to evaluate findings in accordance with standard practice and applicable regulations. Date/artifact recovery, if deemed

EXHIBIT D

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appropriate, would be conducted during the period when construction activities are on hold. If human remains are discovered, an appropriate representative of Native American Indian Groups and the County Coroner would be informed and consulted, as required by State law.

G. Public Services and Utilities.**1. Water Quality.**

a. Potential impact. Excavation and grading activities and sediment from trucks during construction of the project could impact water quality of the adjacent tidelands and the Pacific Ocean.

b. Mitigation measure. To the extent feasible, construction shall be scheduled during the dry season. An erosion and sediment-transport control plan shall be in place prior to the commencement of earthmoving activities.

2. Surface Runoff.

a. Potential impact. The proposed project would add impervious surface area which would increase the amount of surface runoff. The increase in surface runoff would cause more pollutants to enter the storm system and degrade water quality in adjacent tidelands and intertidal areas of the ocean.

b. Mitigation measure. Drainage plans and erosion, sediment and pollution control measures shall be prepared as conditions of approval for development in accordance with LUP policy 2.2.5-2.

H. Additional Mitigation Measures. The following additional mitigation measures, suggested by the Final EIR to address impacts determined to be less than significant, hereby are included as additional mitigation measures for this project.

1. A landscape plan shall be submitted to the city council at the final design stage, for approval.

2. All utility lines shall be constructed underground, in accord with LUP policy 2.5.5.

3. Because the City of Pacific Grove does not yet have in place ordinances implementing the LUP, the decision whether to require shoreline access easement rests with the coastal commission at such time as it considers an application. Project design could accommodate such easement.

4. The police and fire departments shall review final site plans for the development to ensure adequate access for emergency equipment, and to confirm that all structures are built to meet applicable fire and safety codes.

5. The owner shall be required to obtain a water permit. The proposed project shall be equipped with low flow fixtures and drought tolerant landscaping.

6. All trenches for underground utility lines shall avoid sensitive plant and animal species that are identified in section 4.3 of the Final EIR, and archaeological resources listed in section 4.5 of the Final EIR.

I. Discussion of Alternatives. This council makes the following comments and disposition of the project alternatives set out in the Final EIR.

1. No Project Alternative. This alternative would leave the site as undeveloped coastal dune habitat and open space. None of the identified significant or less than significant impacts would occur with this alternative. While, therefore, this would be an environmentally superior alternative, failure of the city to approve reasonable development on a parcel zoned for residential use could result in considerable economic exposure for the city and its taxpayers. This alternative is, therefore, presently infeasible.

2. The Parkland Alternative. This alternative too, would result in none of the identified impacts, and, in fact, could result in preservation and enhancement of the habitat on the site. However, presently neither the city nor any other agency is in a position to purchase the property for public parkland purposes. Thus, this alternative is also presently infeasible.

3. The Reconfigured Project Alternative. In fact, this alternative presents only one change, i.e., construction of a single driveway for use with the proposed project and the adjacent developed lot. Although it is not legally possible for the city to require an adjacent owner to comply with a condition of approval on this project, the mitigation measures previously set out include a non-mandatory suggestion that the owner attempt to arrange a shared driveway agreement with his neighbor. If the owner is able to do so, this project "alternative" will be realized. Otherwise, it is not feasible.

4. The council finds that alternative design of the project has been adequately considered, in that while the EIR only considered one design alternative, the EIR did make substantial modifications to the project through mitigation measures.

III. Findings Regarding Monitoring or Reporting of CEQA Mitigation Measures

Section 21081.6 of the California Public Resources Code requires the City of Pacific Grove to adopt a monitoring or reporting program regarding CEQA mitigation measures in connection with the approval of the project. The following program is adopted in fulfillment of this requirement:

EXHIBIT D

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A. The Community Development Director shall develop a master checklist from the findings and conditions of approval related to this project, identifying each mitigation measure together with the person, department or agency responsible for overseeing the implementation of such measures. The master checklist shall be recorded in the office of the County Recorder. The master checklist shall include a fee schedule for payment to City by owner of all costs of preparation of the checklist and monitoring the implementation of the mitigation measures.

B. The owner shall file a written report with the Community Development Director every three (3) months, or more frequently if directed by the Community Development Director, stating the status of implementation of the measures. Once construction is complete, the Community Development Director may establish a less frequent reporting schedule. In the event of sale of the property, subsequent purchasers shall be responsible for all monitoring requirements.

C. The Community Development Director shall review the written reports and determine whether the mitigation measures are being implemented in a proper and timely manner. The Community Development Director may conduct on site inspections to monitor mitigation implementation and to verify the written report.

D. The result of the Community Development Director's review will be provided to the owner in writing. If a measure is not being properly implemented or maintained, the Director and owner shall consult and, if possible, agree to additional actions to be taken to implement the measure. If they are unable to agree, the Director shall impose reasonable action as permitted by law. Such decision of the Community Development Director may be appealed to this council.

E. The Community Development Director shall monitor the implementation of the required mitigation measures and shall report to the city council periodically regarding compliance.

F. Owner shall pay City fees equal to the actual cost of performing required monitoring. Actual costs shall include, without limitation, City personnel costs and consultation fees and costs.

Page-Wheatcroft & Co., Ltd.

SENIOR LEVEL EXECUTIVE SEARCH & CHANGE MANAGEMENT CONSULTANTS

November 4, 1996

DRAFT

Peter M. Douglas
Executive Director
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

SUBJECT: *Application No. 3-96-102
Stephen J.L. Page, Owner
Property located at 1450 Sunset Drive, Asilomar Dunes area, City of
Pacific Grove, Monterey County, California; APN 007-021-05 (Parcel 1)*

Dear Mr. Douglas:

Letter of Indemnification

I, Stephen J.L. Page, owner of the above-referenced property, hereby indemnify the California Coastal Commission and/or its successors in interest for any and all damage from shoreline erosion, storm wave run-up, tidal flooding, tsunamis, earthquakes, shifting sand dunes and other such hazards.

I understand and acknowledge that the approved development site is located on sand dunes and partially within the predicted storm wave run-up zone, and, therefore, may be subject to extraordinary hazard from coastal erosion and storm wave run-up. I further understand and acknowledge that there is no entitlement to future shoreline protected works to protect against such hazards, and that continued coastal erosion and/or future storm wave event(s) will eventually lead to loss of the permanent residential structure.

I hereby waive any and all future claims of liability against the California Coastal Commission and/or its successors in interest for damages from shoreline erosion, storm wave run-up, tidal flooding, tsunamis, earthquakes, shifting sand dunes and other such hazards.

Yours truly

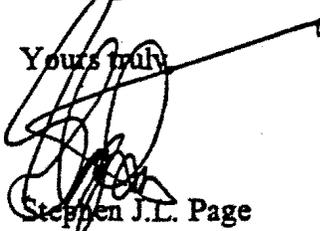

Stephen J.L. Page
Property Owner
1450 Sunset Drive,
Pacific Grove, California 93950

EXHIBIT NO. C

APPLICATION NO.

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COPY

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STATE OF CALIFORNIA
COASTAL COMMISSION

CALIFORNIA
COASTAL COMMISSION
CENTRAL COAST AREA

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STEPHEN PAGE,
SUNSET DRIVE
CITY OF PACIFIC GROVE
MONTEREY COUNTY

Application No. 3-96-102

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday
November 14, 1996
Agenda Item No. 11.d.

Radisson Hotel\Mission Valley
1433 Camino del Rio South
San Diego, California

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COASTAL COMMISSIONERS

Louis Calcagno, Chair
Nancy Flemming, Vice Chair
Rusty Areias
Ray Belgard
Gary Giacomini
Patricia Randa
William Rick
Jacqueline Rynerson, Alternate
Timothy Staffel
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Craig Denisoff, Resources Agency

STAFF

Peter Douglas, Executive Director
Tami Grove, District Director
Lee Otter, District Supervisor of Regulation/Planning
Ralph Faust, Chief Counsel
Jammee Jordan Patterson, Deputy Attorney General

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1 California Coastal Commission
2 November 14, 1996
3 Stephen Page -- Application No. 3-96-102

4 * * * * *

5 CHAIR CALCAGNO: The afternoon session of the
6 California Coastal Commission will come to order.
7 We are ready to proceed with the next item on the
8 agenda.

9 DISTRICT DIRECTOR GROVE: Thank you, Chairman
10 Calcagno.

11 The next item is Item 11.d., which is Application
12 No. 3-96-102, which is an application by Mr. Page for a
13 project in Pacific Grove.

14 Lee Otter, the chief planner from the Central
15 Coast office will making the staff's presentation.

16 CHIEF PLANNER OTTER: Mr. Chairman and
17 Commissioners. This is a do-over. It is the same
18 application, the same project, on the same site, but it is
19 technically a new application, so when I said the same
20 application, I meant it is the same material submitted to us.

21 So, there are four topics that I want to cover in
22 my staff presentation. First, the status of the existing
23 permit, relative to this application; secondly, the community
24 and environmental context; third, the primary issues that we
25 need to consider here; and finally, the staff's recommended

1 conditions and why each is necessary.

2 First, regarding the status of the existing
3 permit, relative to the application, the permit which you
4 granted in 1994 is still in effect, and this was an approval
5 of a single family dwelling, that would be identical to the
6 one that is before us now. So, if a condition compliance
7 were completed, then the applicant would be able to go to the
8 city, draw his building permits, and proceed.

9 Now, if the Commission approves this application
10 that is currently before you, it would replace the present
11 permit -- so, the new one would displace the old.

12 Another part of this context is that there are two
13 lawsuits regarding this property. This material is covered
14 in detail in your staff note No. 2, in your staff report.
15 The two lawsuits we mention there include Mapsted v. Coastal
16 Commission, and then also a little further down is Page v.
17 The City of Pacific Grove, et al, and we are one of the "et
18 al's."

19 On the first lawsuit, I need to make a
20 clarification, or possibly it is a correction to a statement
21 in the staff note here, based on the assertions by Mr.
22 Mapsted, who contacted us yesterday. Mr. Mapsted said that
23 the sentence that reads:

24 "The action of the Commission was thus
25 upheld and the plaintiff did not appeal

1 the trial court decision."

2 He said that is actually not quite true. He said
3 there is no final judgment, and this is the only reason why
4 he has not appealed yet.

5 At the end of my presentation, I will turn the
6 microphone over to the representative of the Attorney
7 General's office, and she will be able to add more detail in
8 these matters.

9 So, to finish my first topic here, there are some
10 changed circumstances here. One is there has been some
11 grading on the property. We determined that the grading was,
12 in fact, legal and legitimate in connection with a different
13 permit that the Commission granted for a shared driveway
14 between Mr. Page's property, and the neighboring property on
15 the south, the Miller property, and that the sand was
16 deposited on the site, pursuant to the terms of that permit,
17 which required that it be left somewhere in the Asilomar
18 Dunes formation. However, in the course of that grading, the
19 edge of the bluff, and the shape of it, was altered somewhat.

20 Another changed circumstance is that the geology
21 report, prepared by applicant's consultant, expired after
22 three years, so we do not have a current and valid geologic
23 report regarding the hazards on the site, particularly the
24 storm wave run up issue.

25 And, finally, another changed circumstance,

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1 compared to last time, is that one of the other vacant
2 parcels in this area has been purchased for permit
3 preservation.

4 The second topic is the community and
5 environmental context, rather than go into the details that
6 we did the last time around, I will recap very quickly here,
7 and that is that this project is located within the city
8 limits of Pacific Grove, but it is also within a particular
9 part of Pacific Grove known as the Asilomar Dunes
10 neighborhood, which was annexed to the city a few years back.
11 This is a roughly 60-acre area, more or less, depending on
12 what you define as the edges of it. And, it has been divided
13 into residential parcels, typically one-half to one-acre in
14 size.

15 It is partly developed, still quite a few vacant
16 parcels here, and we have regularly approved coastal
17 development permits here, usually several per year, in a
18 typical year, subject to a series of conditions that insure
19 that the project conforms to the policies in the city's
20 already certified Land Use Plan. The city has not, however,
21 submitted its zoning to us, so there is not a fully certified
22 LCP yet, and that is why we are still doing coastal permits
23 there.

24 The area inland from Sunset Drive is where all of
25 our other new single family homes on existing vacant parcels

1 were. This is the only situation where we have an existing,
2 vacant, parcel which is zoned for residential development
3 within the entire city, where it lies west of the first
4 public road, or seaward of the first public road, which in
5 this case is Sunset Drive, which you will hear referred to
6 later. So, this is the only parcel like this in the whole
7 city.

8 My third topic is the primary issues that we need
9 to look at here. First and foremost would be the
10 environmentally sensitive dune habitat. Current insights and
11 understandings are that virtually the entire dune formation
12 has to be considered as environmentally sensitive habitat,
13 because from year to year the native dune plants, and
14 wildlife, will utilize the entire dune formation, but in any
15 one particular year they may only use one part of it, and
16 then especially the plant life will spring up on a
17 neighboring dune the next year and so forth. So, the whole
18 area is important to the survival of a variety of species, a
19 number of which are on the state and/or federal endangered
20 list.

21 The staff report goes into quite a bit of detail
22 on this, but suffice it to say that the entire buildable area
23 of the applicant's two parcels, must be considered as
24 environmentally sensitive habitat.

25 Historically, you know, the impacts in the

1 Asilomar Dunes area included sand mining, which has now
2 completed ceased, development from residential and commercial
3 properties, trampling by recreational overuse, which gets
4 over concentrated, and, finally the invasion of exotic pest
5 plants, most particularly the hotentot fig ice plant, as we
6 saw previously in the Marina Dunes Resort project. They have
7 the same problem out in the Asilomar Dunes area.

8 However, the ice plant does get setbacks from time
9 to time. There is a virus that affects it, and also a good
10 frost will give it a good setback, and the native plants will
11 get the upper hand from time to time.

12 So, here we have a situation that is 100 percent
13 environmentally sensitive habitat area. The Coastal Act in
14 Section 3240 would tell us that we can have no significant
15 disruptions in environmentally sensitive habitat areas.

16 What we have to do is reconcile that with the U.S.
17 Constitutional requirements, with respect to the taking
18 issue, and what we recommend is that this needs to be
19 resolved in a way which allows reasonable economic use on
20 this property.

21 And, we further recommend that this needs to be
22 seen as single family residential development, at the size,
23 and in the nature, proposed by the applicant here.

24 So, to summarize that part of the environmentally
25 sensitive habitat issue, but for the taking issue, we would

1 have to recommend denial, but because of that we are
2 recommending approval of a project which covers not more than
3 15 percent of the site, which is the standard that is
4 contained in the Pacific Grove Land Use Plan, which you
5 certified, and also the standard which has been applied to a
6 whole series of, you know, prior developments that we have
7 approved in this neighborhood.

8 The second issue area is scenic resources. There
9 is an exhibit that is being passed around right now, and this
10 will illustrate the views, not only from Sunset Drive, but
11 also from the beach. The beach immediately to the north is
12 owned by the U.S. Coast Guard, administered by the City of
13 Pacific Grove. It provides a nice vantage point over the
14 site. The site is staked in those photos, so you can get an
15 idea of the outline of the house.

16 Probably, the most severe impacts, as far as views
17 go, would be from Sunset Drive, where the house would profile
18 against the ocean. But, you also notice the mitigating
19 circumstance, that there is another existing single family
20 home right next to it. You may hear this one referred to as
21 the Miller residence.

22 Mr. Miller, by the way, informs me that it is now
23 a different color, and therefore this is a good time for me
24 to point out that we have used the same exhibits as we used
25 back in 1994, as well, and that is why the number on this is

1 what it is, rather than the current application.

2 But, for the record, this exhibit does make --
3 except for the color of Mr. Miller's house -- is contemporary
4 representation of the site, and therefore I think we can use
5 it.

6 So, the staff report also contains recommendations
7 on conditions that would provide some further mitigations
8 with respect to scenic resources, and I'll get to those
9 recommendations in a moment.

10 The third issue is the issue of storm wave run up.
11 Of course, the Coastal Act has its policies regarding the
12 avoidance of development in hazardous areas, particularly
13 where the hazard area can be avoided. In this instance, that
14 now expired geology report gave us a storm wave run up
15 prediction that the storm waves would reach up to elevation
16 23 feet for a 50-year look, and the 100-year probability
17 would be that you could experience storm waves that would run
18 up to the elevation of 25 feet. This lead to particular
19 recommendations for where to place the floor level of the
20 house.

21 Our recommendations, originally and currently,
22 both ask that the residence be re-sited so that it is
23 landward of the 50-year storm wave run up mark, and wherever
24 that happens to be, because we don't know where it is going
25 to be on account of the altered topography, and lack of a

1 current geology report.

2 Amongst the primary issues, the final one I need
3 to touch on is the problem of a prejudice to the city's
4 ability to complete its Local Coastal Program in accordance
5 with the Chapter 3 policies of the Act. We run into this
6 particularly if we depart substantially in any way from the
7 city's approach of allowing up to 15 percent development of
8 the site, and arranging for permanent preservation of the
9 remaining 85 percent.

10 Now, the fourth topic that I want to cover before
11 I turn it over to the Attorney General's representative, is
12 we are recommending approval, subject to 13 conditions. That
13 is one less than before. The recommended conditions, and why
14 each is necessary, and is consistent with the Commission's
15 previous actions, is what I need to touch on. Now, I won't
16 hit on all 13 because the need for some of them is pretty
17 self evident, and I am prepared to explain each one of them,
18 if need be, if any Commissioner has a question on it.

19 It is important, however, that I point out that
20 Condition No. 1 incorporates the city's mitigations, and
21 these were arrived at, not through the usual process, but as
22 the result of a settlement of a lawsuit against the city, by
23 the applicant. So, we need to incorporate the city's
24 conditions by reference in order to harmonize our actions
25 with the city's actions, and also to avoid prejudice to the

1 Local Coastal Program.

2 Our conditions, in fact, are completely consistent
3 with the city's conditions that are contained in the
4 stipulated agreement, and so our conditions can be seen as
5 merely updating, and clarifying, and correcting oversights.
6 So, let me detail the nature of those things.

7 I have already mentioned, with respect to
8 recommended Condition No. 2, an updated geology report. We
9 must have that because the old report simply does not apply
10 anymore. It expired after three years, and we have that
11 altered topography. In fact, the altered topography -- and
12 this is an aside -- the altered topography might, in fact, be
13 actually favorable to the applicant, since he piled some
14 extra sand on the edge of the bluff that wasn't there before.

15 The third recommended condition has to do with
16 revised final plans. The word "above" versus "landward" of
17 the storm wave run up mark is quite critical. This was a
18 topic of an amendment request that was before you previously,
19 on the previous permit. The Commission declined to amend the
20 previous permit, so that it would say "above". This would
21 allow the house to be placed on piers over the storm wave run
22 up area. Instead, our recommendation stays the same. That
23 is, the edge of the house has to be in back of wherever that
24 storm wave run up line happens to fall.

25 Also, in the revised final plans, we reiterate the

1 city requirement that the project not exceed 15 percent of
2 the site. We also specify that the shared portion of the
3 driveway doesn't count in the site coverage, and so enough
4 said on that.

5 I need to emphasize that these revised plans are
6 essential to limit impacts on environmentally sensitive
7 habitat area. They are needed to avoid development in
8 hazardous area, and they are needed to harmonize and
9 coordinate with the Land Use Plan policies, and to avoid
10 prejudice to the city's process.

11 Condition No. 4, regarding merger of parcels,
12 actually the applicant was not aware that he had two
13 different legal parcels. We say in the staff note No. 1 that
14 parcel No. 1 where he proposes the residence, is about .7 of
15 an acre, and in reviewing his financial materials that he
16 submitted, we noticed that there was a Parcel 2, which is the
17 balance of the parcel, and is mostly comprised of rocky
18 shoreline and the like.

19 In any event, Parcel No. 2 is not suitable for
20 development, even though we believe it is a separate legal
21 parcel, and the merger is needed in order to preclude any
22 undermining of the city decision in the Land Use Plan, and to
23 make sure we are consistent with policies, especially
24 regarding environmentally sensitive habitat areas.

25 Finally, in the same vein, Conditions Nos. 6, 7,

1 and 8 also address the need to protect environmentally
2 sensitive habitat areas. No. 6, regarding deed restrictions,
3 this is needed to insure that the obligations will run with
4 the land, regardless of changes of ownership. And, it
5 specifically allows for certain structures within the area to
6 be protected consistent with our actions on the Johnny Miller
7 permit last time around, where it was realized that the
8 applicant, or permittee needed to be able to construct
9 boardwalks, or the like, in the dunes area, so the family
10 activities wouldn't, you know, trample and damage the dune
11 habitat.

12 This doesn't preclude the owner from walking
13 anywhere on his property, but it would allow him to have that
14 sort of mitigation structure within the protected area. So,
15 we provided this extra flexibility on the Miller permit, so
16 we think it is appropriate here, as well.

17 The Conditions Nos. 7 and 8 would help preclude
18 invasive exotics -- landscaping that would be inappropriate,
19 plant species which might take over the site and spread onto
20 protected state park lands.

21 And; Condition No. 9 requires a mitigation
22 agreement with the California Department of Fish and Game.
23 This is at their request, and it is needed for coordination
24 with their department.

25 At this point, I would like to point out that

1 included in the correspondence -- and this is for the benefit
2 of the audience -- there was a large response that was sent
3 directly to the Commissioners from the applicant's attorney,
4 and we are prepared to respond to each point that is in that
5 document. We have several extra copies, in case someone
6 hasn't seen that, hasn't gotten their copy.

7 One last housekeeping item, the applicant handed
8 something out to you this morning, and when he asked me what
9 the item number was, I said No. 10.d. I was mistaken. So,
10 if you see an item No. 10.d. that is the same as Item No. 11.
11 d., one and the same, so there shouldn't be any problem
12 there.

13 And, now if I can hand the microphone to Ms.
14 Patterson, that concludes my comments.

15 COMMISSIONER RANDA: I have one question before he
16 is finished.

17 CHAIR CALCAGNO: Commissioner Randa.

18 COMMISSIONER RANDA: Did the Miller property have
19 adjacent properties? did any other property owners that we
20 have approved in the several permits that we approved in the
21 half-acre to one-acre sites in the surrounding area have
22 adjacent parcels in their ownership?

23 CHIEF PLANNER OTTER: You will have to -- excuse
24 me. Through the Chair, you will need to clarify which of the
25 Miller properties you are referring to.

1 COMMISSIONER RANDA: No, I am just saying --

2 CHIEF PLANNER OTTER: Johnny Miller was the
3 applicant for a parcel very close to this site, but on the
4 inland side of Sunset Drive, at our previous meeting. Is
5 that the one you are referring to, Commissioner?

6 COMMISSIONER RANDA: That is one of them, yes.

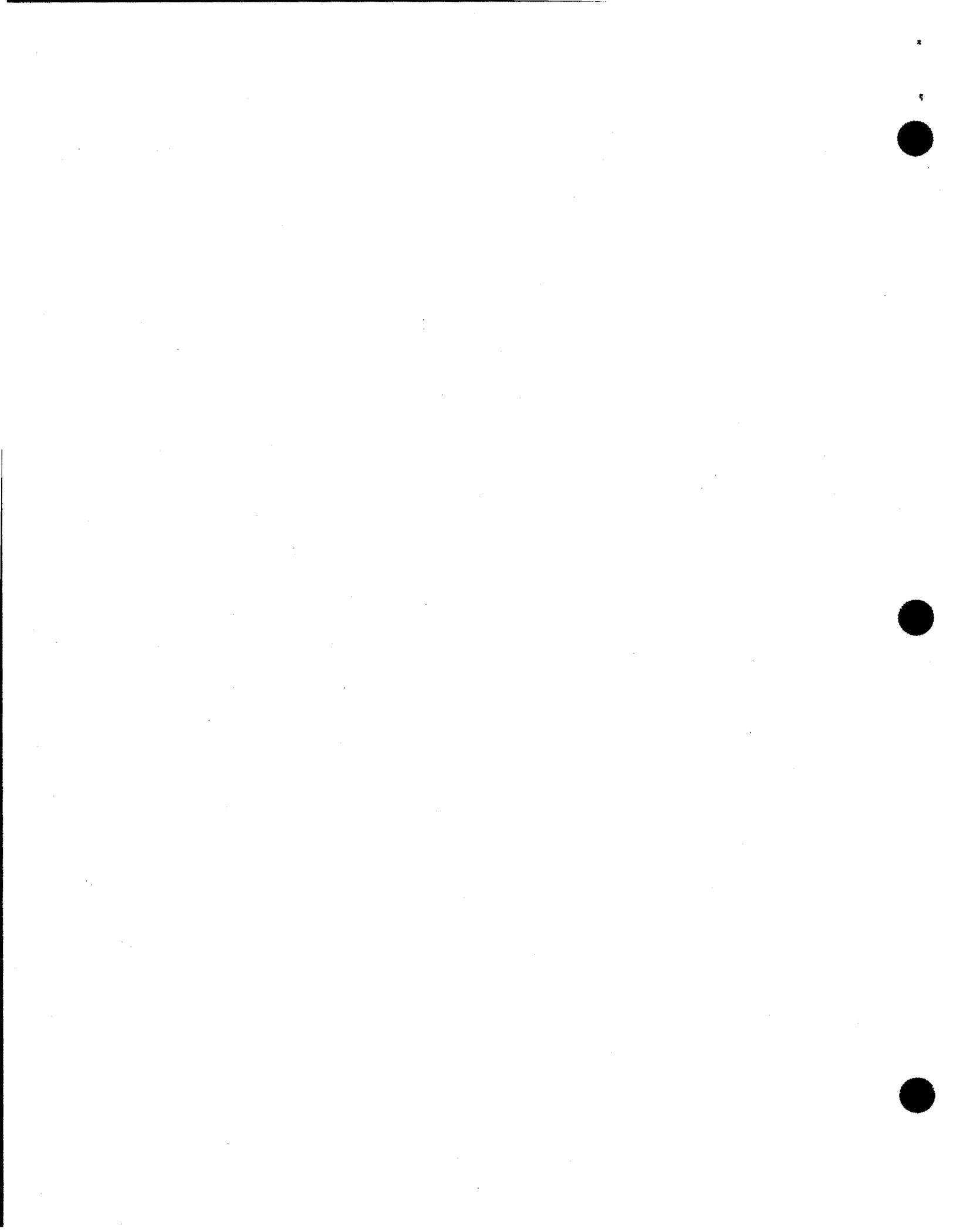
7 You had mentioned that we have approved several
8 sites. It is a residential area that we have recognized, and
9 they are half-acre and one-acre parcels, in a range, and so I
10 was just curious how many of those parcels have adjacent
11 parcels, and did we make any approvals based on merging on
12 those? and if so, which ones?

13 CHIEF PLANNER OTTER: Right, I think I understand
14 the question now.

15 It has to do with the fact that we discovered that
16 this is actually comprised of -- the site is comprised of
17 two, and not one parcel. The answer is the situation only
18 applies to those parcels that are on the immediate shoreline,
19 and therefore it has never come up before in this
20 neighborhood, and so we have never placed any requirement of
21 that sort on a similar project, except on this very project,
22 the last time through.

23 CHAIR CALCAGNO: Any other questions?

24 COMMISSIONER STAFFEL: Mr. Chair, a couple of
25 questions, and really --



1 CHAIR CALCAGNO: Commissioner Staffel.

2 COMMISSIONER STAFFEL: -- you know, I don't know.
3 I look at this item, and I think if we wanted to come to some
4 sort of resolution to this matter, we could probably do it,
5 if we all, both sides kind of look at this logically, both
6 give counsel. And, I see voluminous documents here, and the
7 judgment, and everything.

8 What was the status of the LCP, or the LUP at the
9 time that the judgment was entered? the stipulated judgment?
10 what were the conditions on these properties, pursuant to the
11 Coastal Commission requirements at the time the stipulated
12 judgment was signed and entered into? are they consistent
13 with what is being proposed today?

14 CHIEF PLANNER OTTER: Yes, Commissioner, the
15 conditions are exactly identical today. The Land Use Plan
16 was certified a good number of years back.

17 COMMISSIONER STAFFEL: I think it is important to
18 understand what was the situation at the time, on these
19 parcels, and like-kind parcels, when the parties entered into
20 the stipulated judgment, and whether that was known to the
21 court at the time that this document was signed.

22 CHIEF PLANNER OTTER: Right, and the answer is
23 identical.

24 COMMISSIONER STAFFEL: Okay.

25 CHIEF PLANNER OTTER: Identical conditions as now.

1 COMMISSIONER STAFFEL: And, then the other
2 question comes up, is on this merger requirement, which
3 always kind of makes me a little nervous, the merger of
4 parcels.

5 They are seeking to build one residential unit,
6 correct?

7 CHIEF PLANNER OTTER: That is correct. They are
8 seeking to build only one parcel. They have never made any
9 representations that they were going to build on the parcel
10 which we discovered.

11 COMMISSIONER STAFFEL: Now, the second parcel, I
12 think -- I don't know whether the other site says this --
13 but, the second parcel, if you want to call it that, has
14 environmental conditions on it which makes it -- it can't be
15 built upon. Is that accurate?

16 CHIEF PLANNER OTTER: Well, no. I am concerned
17 that there could be a future effort at building on it, just
18 because it is a legal parcel.

19 COMMISSIONER STAFFEL: I didn't say that.

20 CHIEF PLANNER OTTER: Right, all right.

21 COMMISSIONER STAFFEL: My question is this. I
22 mean, they have sought one residential unit, okay, and there
23 are going to be some facts in dispute as to whether they knew
24 it was two parcels or not. They are probably going to stand
25 up and say, "Gee, we bought two parcels. We knew we bought

1 two parcels, and that was our expectation." I can expect
2 that argument coming from them.

3 But, the second parcel, you know, just by the
4 physical characteristics, can that be built upon?

5 CHIEF PLANNER OTTER: The, a --

6 COMMISSIONER STAFFEL: Because we might be able
7 to, you know, deal with this issue, avoid the merger question
8 completely.

9 CHIEF PLANNER OTTER: Right.

10 Except for the taking issue, the answer is, under
11 the Coastal Act policies, no way, except for the taking
12 issue.

13 And, I want to clarify my previous answer, too, by
14 indicating that when this was before the city, the applicant
15 and the city both treated, this entire property, as a single
16 parcel. It was only after it had come to us, and your own
17 staff, you know, figured out there were actually two parcels
18 there.

19 COMMISSIONER STAFFEL: I understand all of that, I
20 really do.

21 And, it is the merger question that really is kind
22 of bothering me, and having experienced the Morehart
23 litigation in Santa Barbara, it is a concern of mine, and I
24 think, whether we require a merger, or don't, and if the
25 facts that you state are true, with respect to that second

1 parcel, there is a defensible basis not to provide any
2 development on that, anyway. It really becomes kind of a
3 moot issue, I would imagine.

4 They could apply, but if, in fact, there are
5 environmental constraints, pursuant to the Coastal Act, you
6 know, where are we?

7 DEPUTY ATTORNEY GENERAL PATTERSON: If I may take
8 the liberty of stepping in here.

9 Commissioner, there is always the risk that if
10 someone has a separate, legal parcel, they may be entitled to
11 claim that it has got some development potential.

12 COMMISSIONER STAFFEL: Sure, there is always that
13 risk. There is always that risk.

14 DEPUTY ATTORNEY GENERAL PATTERSON: And, that is
15 what staff is attempting to avoid here.

16 And, the city, quite frankly, when it stipulated
17 to that judgment, treated this as if it were one big parcel,
18 and that is all staff is trying to do, is to insure that this
19 permit that the Commission issues complies with what the city
20 had previously approved, and we avoid then the potential of
21 Mr. Page coming back and seeking separate development
22 approvals for that second lot that is most ocean-ward, as I
23 understand it.

24 COMMISSIONER STAFFEL: Well, okay, and I
25 understand all of that. There is always the risk in that,

1 but I think that there are development standards would be in
2 place that would be defensible to preclude development on the
3 second parcel, which would be far more defensible than
4 requiring merger of them, and to get the other side to agree
5 to that statement.

6 I mean, that is my only thought. I think when you
7 start requiring mergers, you start -- well, I have some
8 problems with that.

9 DEPUTY ATTORNEY GENERAL PATTERSON: I have a
10 couple of comments on the litigation --

11 COMMISSIONER STAFFEL: Okay.

12 DEPUTY ATTORNEY GENERAL PATTERSON: -- but, just
13 to follow up on that very briefly.

14 Merger is appropriate for this Commission after
15 the Morehart decision. The Morehart decision expressly
16 recognized that this Commission has the ability to merge
17 parcels when it is appropriate to protect resources, as staff
18 recommends it is here.

19 I would like to point out that there have been
20 three separate lawsuits here. One we have just touched on,
21 and that is the litigation between Mr. Page and the City of
22 Pacific Grove. That resulted in a stipulated judgment, and
23 the approval of the city's permit.

24 Staff is recommended a permit that is
25 substantially in compliance with the city's approval, that

1 was as the result of that stipulated judgment.

2 Previously, the Commission found itself in a
3 awkward position. It was walking a tight rope between
4 balancing coastal resources and private property rights.
5 After the Commission's 1994 decision, the Commission was sued
6 by an opponent to the project, who claimed the Commission
7 didn't protect the coastal resources sufficiently.

8 Sometime much later, the Commission's decision was
9 challenged by the developer, Mr. Page, who claimed his
10 private property rights had been somehow violated.

11 In the first case, Mr. Mapsted's lawsuit, the
12 trial court decision denying the petition for a writ of
13 mandate expressly held:

14 "A review of the administrative record
15 clearly demonstrates that the Commission
16 struggled hard with this issue, and would
17 have preferred that someone come forward
18 to purchase the property; however, under
19 these circumstances, the Commission had no
20 choice but to proceed as they did.

21 "The permit, as conditioned..."

22 -- this is the prior 1994 decision --

23 "...does provide for as minimum disruption
24 as possible and still allows for economically
25 viable use of the property."

1 Incidentally, Mr. Page did not defend his permit
2 in this state court action. Instead, he belatedly filed suit
3 in federal court. That action was dismissed as not being
4 timely filed, and my understanding is that that is now on
5 appeal in the federal court of appeals.

6 Technically, Mr. Mapsted's case -- the trial court
7 decision that I just quoted from -- is not final, as Lee
8 Otter just corrected from the staff report. There was an
9 additional cause of action for injunctive relief, and CEQA,
10 which is still pending. The judge has agreed to rewrite the
11 decision to include a denial of those causes of action under
12 CEQA, but he has not done that yet, and until that is done no
13 final judgment can be entered, and hence no appeal would be
14 able to be filed.

15 But, the trial court did uphold the Commission's
16 decision as a proper balancing of private property rights,
17 versus impacts on coastal resources.

18 CHAIR CALCAGNO: Okay.

19 COMMISSIONER WAN: I have a question of legal
20 staff.

21 CHAIR CALCAGNO: All right, Commissioner Wan.

22 COMMISSIONER WAN: In reading over this letter
23 from the applicant's attorney, there are some statements in
24 here that says that the offer -- that there was an offer of
25 settlement, and that we were never told about this settlement

1 offer.

2 I mean, there is a contention here that apparently
3 the applicant is making that somehow we didn't receive
4 information that was about what was going on. Is that
5 correct?

6 DEPUTY ATTORNEY GENERAL PATTERSON: I know that
7 there had been some generalized discussions. I personally
8 don't know what the nature of them was.

9 It is our office policy to bring to this
10 Commission viable settlement offers. We discuss them with
11 your litigating --

12 CHAIR CALCAGNO: Counsel, before you go any
13 further, the Chair at this point has got a point of order.

14 If, from your standpoint, we basically have a new
15 application before us, the way the Chair is reading it. And,
16 what we are doing now is basically debating past history,
17 instead of addressing the new application.

18 Tell me if I am reading this wrong, and I should
19 proceed with this hearing, or shall we continually debate the
20 old material that is before us?

21 DEPUTY ATTORNEY GENERAL PATTERSON: It is an
22 unusual circumstance, Chairman Calcagno, for this reason.

23 This Commission has previously approved the
24 identical project. The applicant has --

25 CHAIR CALCAGNO: As long as you advise me that

1 what we are doing is right, I have no problem.

2 DEPUTY ATTORNEY GENERAL PATTERSON: The applicant
3 has the right to make a new application, once six months has
4 expired.

5 However, in this case, there was a legal challenge
6 to the Commission's approval by an opponent to the project.
7 This Commission's decision was upheld, and that gives some
8 additional weight, credibility, what have you. I don't know
9 that it arises to the level of res judicata, collateral
10 estoppel, or those legal doctrines that we lawyers tend to
11 rely on, but it certainly has some weight with respect to the
12 arguments that are being made to this Commission about the
13 project that is before you today.

14 A court has looked at it, and found that you
15 balanced in the prior decision properly between protection of
16 coastal resources, and protection of private property rights.
17 We think that has some weight for this Commission to
18 consider. If the Commission chooses to make a different
19 decision, it may do so. It needs to have substantial
20 evidence in the record, in order to make whatever decision it
21 makes today.

22 But, it is important because there is quite a
23 lengthy history here. The litigation has been bandied about
24 by both sides, if you will, the property owner, and with the
25 opponents to the project. And, we felt it was important for

1 this Commission to operate with the fullest amount of
2 information that we can provide you, vis-a-vis the
3 litigation, and then along with your staff report.

4 It is a slightly different situation than we
5 normally find ourselves in.

6 CHAIR CALCAGNO: Okay, thank you.

7 Are there any other questions?

8 [No response.]

9 Okay, at this time, we will open the hearing to
10 the public.

11 Mr. Stephen Page.

12 MS. O'CONNELL: I am not Stephen Page. I am Mary
13 Margaret O'Connell. I am Mr. Page's attorney.

14 Mr. Page and I are going to split the time at the
15 podium today, and I hope you can stand listening to one more
16 person who has a cold, at the microphone.

17 I would like to begin, first, by answering Ms.
18 Wan's question about the communication of the settlement
19 offer. The California Rules of Professional Responsibility
20 require an attorney to immediately notify his client if they
21 have received a settlement offer in writing.

22 I included our settlement offer as an exhibit in
23 the packet that was presented to these Commissioners, that
24 hopefully you received. That is a written settlement offer,
25 dated August 12, that under the rules of professional

1 responsibilities should have been immediately communicated.

2 In addition to that, I have included in my exhibit
3 packet, a transcribed telephone message from the Attorney
4 General's office through Attorney Marjorie Cox, who told me
5 -- as you can see by my exhibit -- that you rejected our
6 offer, and that there was no counter offer.

7 We are very concerned about that, because we think
8 that there have been numerous glitches that rise to
9 Constitutional magnitude, that rise to professional ethics
10 questions, and I think it is very important that you know
11 that.

12 Now, before I get into my few minutes of
13 presentation, I want to point out that you should have
14 received, approximately last Thursday, two packets by
15 overnight mail: a spiral notebook from Mr. Page, sent from
16 Texas; and a packet from me sent from Monterey by overnight
17 mail, that has a letterhead, including a thick packet of
18 documents that went with it. My secretary didn't put tabs on
19 all of them, and I apologize for that, but at least some of
20 you will have documents with tabs.

21 If you didn't receive that, that is a serious
22 concern to me. The only one that I received back in the mail
23 was Mr. Areias' and I flew in early yesterday to drop that
24 off, and one of the assistants in the staff gave it to his
25 alternate, and I surely hope that he received it.

1 The importance of these two packets is very
2 significant. Mr. Page's packet presents the factual history
3 and factual argument behind our opposition to the conditions
4 as suggested. My packet lists a legal argument to the
5 conditions that have been suggested. If you haven't received
6 these, let me know. I'll get angry at the overnight mail
7 people.

8 But, nonetheless, they are important to our
9 presentation, and we spent some significant time dropping
10 everything to prepare these packets because we received the
11 coastal permit suggestions at what I would consider as the
12 eleventh hour. I don't consider it adequate notice, which is
13 an argument that I am putting on the record, verbally.

14 I think it is important to realize that there has
15 been prior litigation in this matter. The first litigation
16 initiated by Mr. Page in state court in Monterey County,
17 against the city and a handful of council members, that
18 resulted in a stipulated judgment. That is a state court
19 speaking about the development of this property. And, I am
20 very concerned that this regulatory agency thinks that it can
21 come in and change some of the terms of that stipulated
22 judgment.

23 And, with due respect to staff's suggestion that
24 they are merely explaining, or expanding, our position is you
25 have no right to do that. There is a state court judgment.

1 Let's not step over on the separation of powers, in this
2 state government, on this property.

3 I am very concerned that many terms of the
4 stipulated judgment have apparently not been understood. We
5 included it in Exhibit 6. And, by the way, for those of you
6 who got the packet that my secretary didn't put the little
7 tabs on the bottom, our exhibit numbers are in the little
8 tags you have seen in court action, Exhibit 1, and it is
9 typed.

10 So, in Exhibit 6, in the lower right-hand corner,
11 starts the section of our packet that has the stipulated
12 judgment. The stipulated judgment is a series of documents.
13 The five-page document that was signed by the judge, signed
14 by my client, and signed by representatives of the city,
15 changes terms in the environmental impact report, clarifies
16 and establishes exactly what the house should look like,
17 changes some terms on the monitoring of the landscape
18 restoration, and for the life of me, I can't figure out why
19 staff doesn't want to go along with the terms of this state
20 court judgment.

21 Staff continues to recite that there should be a
22 five-year monitoring plan, the stipulated judgment says
23 three. Staff continues to recite other issues regarding a
24 blanket conservation easement on the property. In fact, the
25 stipulated judgment, when you read the documents in the order

1 that they are presented, says that the conservation easement
2 should only be on the portion of moved sand, that is moved by
3 the grading for the house, the footprint for the house,
4 wherever that is moved, and placed. That should be the dune
5 restoration -- that -- and that dune restoration gets the
6 conservation easement, not the whole property.

7 A scenic easement is required, if, and only if,
8 after construction -- existing, living, endangered species
9 are identified -- after construction.

10 I would like to tell you how important this is to
11 us by making a due process argument that I didn't actually
12 identify in my written materials. In my presentation to the
13 staff, I asked -- somewhere around page 9 -- that we be given
14 copies of these, the actual language of the proposed deed
15 restrictions. That is a real simple request. That is a due
16 process request. You can't expect us to stand up here at the
17 podium and argue against language we've never seen. And, I
18 don't see how you can vote to approve deed restrictions on
19 language you have never seen.

20 I have watched you folks deliberate. You don't
21 take a pig in a poke. You want to see what something is. It
22 doesn't provide us with adequate due process when we don't
23 see it. We didn't get a copy of those deed restrictions.
24 That is a due process issue.

25 We are very concerned about the special conditions

1 that are being imposed. We are very concerned about deed
2 restrictions.

3 Many of the aspects of the staff's report is a
4 misinterpretation of the stipulated judgment. And, I would
5 ask you to acknowledge our view that that stipulated judgment
6 is in keeping with the LCP of the City of Pacific Grove.
7 Your staff, seated here, has not identified any page of the
8 LCP that has been violated by the stipulated judgment,
9 because there isn't any. And, there is no need to impose
10 extra conditions when the stipulated judgment has made its
11 statement regarding the development of that property.

12 The only goal of the Coastal Commission, at this
13 point, when a public entity has certified its LCP is to make
14 sure that there is no prejudice to it, and believe me if
15 there was prejudice, you would have comments by the staff
16 pointing out what portions of the stipulated judgment
17 violates what page of the LCP, or prejudices it.

18 So, I ask you to really take these issues into
19 consideration, and keep things in perspective. This is a
20 single family residence, on a piece of property that is never
21 going to be developed with anything new, except Mr. Page's
22 house. Different government entities bought the remaining
23 developable lots. That wasn't the case when you reviewed
24 this a couple of years ago -- new and changed significant
25 facts.

1 You don't have to be as concerned that this is the
2 first precedent house in six or seven that are going to be
3 clustered at rocky shores. It won't be. It is the last
4 house.

5 And, I would like to add, as a personal note, very
6 seriously sometimes people look at an attorney and just say,
7 "Oh well, that person is merely saying what they have been
8 paid to say."

9 But, let me tell you something personal, I run
10 that neighborhood every day, and I have run by that potential
11 construction site every day since 1984. I know what that
12 neighborhood is. I know what the view shed is. And, in
13 allowing this person to put his house in, based on the terms
14 of the stipulated judgment, won't obstruct that.

15 Thank you.

16 CHAIR CALCAGNO: Kirstie Wilde.

17 MS. WILDE: Thank you very much. My name is
18 Kirstie Wilde, and I live in the house next door to Mr.
19 Page's property. It looks like a pretty big ugly blue house
20 there, but, now it is a very nice looking natural brown wood
21 house, because we have been working on it quite a lot since
22 these pictures were taken.

23 I would like to just say about one minute's worth
24 of words about extorted charity. Our house was built in
25 1929, therefore no local or state government has been

1 involved in how we have taken care of the dunes on our
2 property. But, we love the coast, as I know all of you do,
3 and as I know Mr. Page does.

4 No one forced us to donate a trail easement to the
5 public, but we did it anyway.

6 No one forced us to donate all development rights
7 on our beach parcel, but we donated those rights anyway.

8 No one forced us to supply water to the Asilomar
9 ecologist when he planted 4000 native plant seedlings next
10 door to us, but when it was clear that they were all going to
11 die for lack of rain, which has happened to many, many, many
12 of the other seedlings they planted, we hauled our hoses over
13 and asked them to please use our water to keep the plants
14 alive, and they did, and the plants are growing very well.

15 No one forced us to share a driveway to minimize
16 the impact of Mr. Page's house next door, but when Mr. Otter
17 and the mayor of Pacific Grove came to us and asked us to
18 please share a driveway, we said, "Of course." It was not
19 forced. It was something we felt was the right thing to do,
20 so we did it.

21 No one forced us to discount the price that we
22 were given for the other lot on the other side, which was
23 bought by the public -- by the government. We discounted it
24 \$65,000 below the appraised value, which was done on the
25 appraisal paid for by the parks department and the City of

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1 Pacific Grove. No one forced us, but we discounted it
2 anyway.

3 My point is this, Mr. Page is a very good man.
4 Mr. Page loves the coast. He will be a steward of this
5 property, without the Coastal Commission or any other
6 government agency looking over his shoulder and deciding what
7 plants he should plant, or whether he should step on the
8 dunes.

9 I would ask you to please approve his permit
10 without the imposition of unreasonable permit conditions.
11 They are unnecessary. They have been taken care of after
12 years of negotiations with the City of Pacific Grove, and
13 truly, they are an insult to a person who will be a good
14 steward of the coast all by themselves.

15 Thank you very much.

16 CHAIR CALCAGNO: Gary Tate.

17 MR. TATE: Mr. Chairman, members of the
18 Commission. Gary Tate, speaking as an individual,
19 representing myself as a private citizen.

20 Staff has talked about some lawsuits in federal
21 court, and Mr. Page has now chosen to not only sue the
22 Coastal Commission, City of Pacific Grove, the park district,
23 and a number of individuals, including myself as an
24 individual, alleging wrong doing, and claiming that I am
25 personally liable for \$1 million. I do take strong exception

1 to that allegation of wrong doing. But, again, I am here
2 speaking, at this time, as an individual exercising my
3 Constitutional rights under the First Amendment to speak on
4 this project. I trust the record is clear on this issue, in
5 the event that there is a new round of lawsuits, based upon
6 the current action of the Commission.

7 My comment here is to support the project approval
8 as recommended by coastal staff, with the conditions.

9 Just in a closing note, there are a lot of
10 attorneys talking -- that I am sure your attorney will
11 clarify this point if I am in error -- the stipulated
12 judgment, it is my understanding, was between the city and
13 Mr. Page. I don't believe this Coastal Commission was a
14 party to this stipulated judgment, and if you are not a party
15 of it, to it, it is my understanding that it is appropriate
16 for this Commission to exercise your role and
17 responsibilities according to the Coastal Act, because it is
18 also my understanding that Pacific Grove's Local Coastal Plan
19 is not fully certified, and that is why this project is
20 before you.

21 Thank you very much.

22 CHAIR CALCAGNO: Paul Miller.

23 MR. MILLER: Paul Miller. I live in -- that was
24 my wife, Kirstie Wilde, who spoke to you a few moments ago.

25 Very, very briefly, this is, I think the fourth or

1 fifth time that I have spoken to the Commission on the
2 subject of the page house over the years. I attended,
3 probably, two dozen meetings and hearings in the City of
4 Pacific Grove, starting in 1989, leading to this day right
5 now. I have gotten to know Lee Otter almost like a brother
6 over the years in discussing the Page house, and debating
7 these various issues.

8 What is interesting about this is that Mr. Page is
9 standing here and asking you to approve the house the way the
10 city approved it, namely, the way it is specified in the
11 stipulated judgment. Mr. Otter is saying, that is also what
12 he is doing, and yet Mr. Page differs because there are some
13 substantial differences between the conditions proposed by
14 the staff, and the stipulated judgment.

15 I am going to just speak about one of these, which
16 is the requirement that the house be moved back, back behind
17 the land which existed in the storm wave run up shown under
18 the geological report. Just so you understand very well what
19 we are talking about. We are not talking about land which is
20 inundated with water on a regular basis. This is land which
21 is more than 22 feet above mean sea level, and which in the
22 seven years I have lived next door, I have never seen the
23 waves run anywhere near it, including last year when we had
24 what I was told a 100-year storm, with 70 mile-an-hour winds
25 blowing from the southwest.

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1 We went through this at the last meeting, when a
2 previous Commissioner made representations about the opinions
3 of city officials on this subject. I have written to the
4 Commissioners a year ago about that, but I just wanted to
5 remind Mr. Staffel of something that he said at that meeting,
6 when this now departed Commissioner made the representation
7 that the city was opposed to Mr. Page's house being located
8 where he wants to locate it, namely where the city had
9 already approved it.

10 Mr. Staffel said,

11 "I want to thank you, Commissioner Karas for
12 giving us this input, because local agency
13 input is very important."

14 And, I couldn't agree more with Mr. Staffel, and
15 you have seen the letters from the mayor, and the planning
16 director of the City of Pacific Grove indicating that they
17 never said what the Commissioner said they had said.

18 So, we are talking about -- unlike the aquarium or
19 one of the many other structures around the coast, where the
20 foundations of these buildings are struck on a daily basis by
21 the waves of the Pacific Ocean, we are talking about Mr. Page
22 wanting to build on a piece of land where the geologist said
23 it was safe to build, where the EIR consultant said it was
24 safe to build, where the city said it was safe to build, and
25 where the stipulated judgment allowed him to build.

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1 And, so I for one do not agree with staff that
2 they are consistent with the stipulated judgment, and I think
3 that you should go along with Mr. Page, and the court, and
4 the city, and seven years of hearings back and forth, and let
5 Mr. Page build the house the way it was approved by the City
6 of Pacific Grove.

7 Thank you very much.

8 CHAIR CALCAGNO: Susan Jordan.

9 MS. JORDAN: Susan Jordan, from LCP.

10 You know, originally, I wasn't going to comment on
11 this, but as I sit here and listen to the testimony by the
12 lawyer and the neighbors, I start to get a little bit
13 concerned about what I hear going on here.

14 It seems to me that these are two lots, where
15 really nothing should be built to begin with, but because of
16 the takings finding, they are going to allow a structure to
17 go forward.

18 It seems to me that the applicant is saying that
19 he shouldn't -- because he has gotten the city's approval, he
20 shouldn't have to get a coastal permit. But, he is just like
21 everybody else who lives in this state, and who has a house
22 along the coast. He has to come in, apply for a permit, and
23 go with -- you know, get the recommendation of the staff, and
24 then you have to act.

25 I don't think that anything that the staff has

1 done is inconsistent with the stipulated agreement. I think
2 they are just doing a review under the Coastal Act to make it
3 consistent with the LUP. So, I would urge you to follow your
4 staff's recommendation.

5 CHAIR CALCAGNO: Is there anyone else to speak on
6 this?

7 [No response.]

8 Mr. Page.

9 MR. PAGE: Good afternoon, my name is Stephen
10 Page. I am the applicant in this case. Thank you, Chairman,
11 for allowing me to speak, and for my neighbors and attorney
12 to speak.

13 This is the third, and hopefully, the final time
14 we will appear before you regarding this permit. I am going
15 to ask you to approve my permit today, without compliance
16 with staff's 13 special permit conditions. This project is
17 already the subject of a legally binding stipulated judgment
18 with the City of Pacific Grove.

19 The stipulated judgment covers all of the material
20 points requested by staff's special permit conditions
21 rendering them unnecessary.

22 Some of you Commissioners were privy to this
23 permit's seven year history. In correspondence sent to
24 staff, and each of your offices, we have tried to familiarize
25 you with prior events that make it necessary to appear a

1 third time before you. Additionally, we want to make our
2 request to you today concise and to the point. To those of
3 you who I have not met before, let me briefly recant this
4 permit's history.

5 We originally applied for a coastal permit for a
6 single family residence in January of 1994. After 11 months
7 of staff process we appeared before the Commission --
8 coincidentally enough, in San Diego on November 17, 1994.
9 The Commissioners, at that time, were so incensed at our
10 prior treatment at the hands of Pacific Grove they voted
11 unanimously 10 to 0 to approve our permit with the 13 special
12 permit conditions.

13 By design, or accident, staff did not provide
14 copies of four deed restriction documents we were required to
15 sign as a condition of permit compliance until January 28,
16 1995, 76 days after your permit approval. An applicant has
17 60 days to appeal special permit conditions after receiving
18 Commission approval. By sending our deed restriction
19 documents for our review seven days after Commission
20 approval, our permit issued in 1994 was dead on arrival. We
21 had no appeal rights.

22 The deed restrictions sought to take 85 percent of
23 our property to be permanently maintained as open space for
24 the public good without payment of compensation for its
25 taking. Further, they sought to combine two separate lots

1 that exists on our property, for no local purpose.

2 Additionally, they required us to landscape our
3 property with flora of the state's choosing, not my wife's.

4 Throughout 1995 we fought staff regarding these
5 deed restrictions, pleading that we be allowed to obtain a
6 permit with reasonable conditions. Copies of correspondence
7 from February 7 to September 25, 1995 reflect the futility of
8 our requests. And, a week ago, I sent you this document,
9 with all of those copies of correspondence to staff.

10 We realized the complete hopelessness of our
11 situation when dealing with staff when we were told, "Either
12 you sign the deed restrictions as is, or you don't get a
13 permit."

14 If an armed man asked you for your wallet in a
15 dark alley, what do you do? We signed and submitted the
16 unreasonable deed restrictions, hoping to end this nightmare.
17 At last, staff, emboldened by a compliance decided this
18 nightmare was not yet over. Not satisfied with the legally
19 binding stipulated judgment conditions and Pacific Grove's
20 approval of our building plans, staff sought to move our
21 proposed residence landward of the 23-foot contour line that
22 existed on our property -- and I have shown this in a drawing
23 before you.

24 As you can see, due to the odd shape of our
25 property, staff's request was impractical. We couldn't move

1 the house back. There is no where to move it back to.

2 After months of wrangling on this one remaining
3 special permit condition, Lee Otter agreed to meet Mr. Miller
4 and I on the site to develop the situation. Mr. Otter
5 suggested that we replace sand removed during construction of
6 a shared driveway onto the portion of our property -- now,
7 that is approximately 600 feet, about a 1.4 percent of our
8 property affected -- thereby satisfying Condition 3.b. by
9 placing our property landward of the 23-foot contour line.

10 At staff's request, we submitted a further \$5000
11 worth of drawings showing compliance with Condition 3.b., and
12 here they are showing the house is now residing landward of
13 the 23-foot contour line.

14 We thought we were done, and we would be
15 immediately issued our permit. Imagine our surprise when we
16 were required to submit yet another study showing the effects
17 of wave run up duplicating a previous study on modifications
18 completed at staff's suggestion and request.

19 We appealed the necessity to pay for yet another
20 study, and were granted a permit amendment hearing before you
21 in Eureka in September of 1995. During that hearing, then
22 Commissioner Sam Karas lied to devastating effect. He stated
23 that PG's mayor and community director were adamantly against
24 our amendment request.

25 In our exhibits we have included letters from

1 Mayor Koffman and Development Director Lobay, disputing Mr.
2 Karas' testimony, and denying their opposition to our
3 amendment request. However, the damage was done. The
4 Commission voted to deny our amendment request that would
5 have given us our permit.

6 This was the proverbial straw that broke the
7 camel's back. We filed suit again in federal court against
8 the City of Pacific Grove, the Monterey Peninsula Parks
9 District, and the California Coastal Commission. During
10 April of this year, a federal judge refused to hear our case,
11 and suggested that we return to state court, where an earlier
12 case against the City of Pacific Grove was still pending.

13 We appealed the federal judge's decision, to the
14 Ninth Circuit Court of Appeals, where this case is still
15 pending.

16 Concurrently, we tried to settle our claims with
17 the California Coastal Commission. At first, Marjorie Cox,
18 the assistant attorney general representing the Coastal
19 Commission, seemed enthusiastic to settle our claims against
20 the Commission, as did we. Inexplicably, she stopped
21 returning my counsel's phone calls in August, and has not
22 done so to date.

23 Mr. Douglas suggested that we reapply for a new
24 permit, as our administrative remedies for our original
25 permit had expired. We paid an additional \$750 and here we

1 are before you for the third time, seven years later, after
2 we began this process, still no permit.

3 This time staff has outdone itself. In addition
4 to requiring the same Constitutionally abusive deed
5 restrictions, they now require that we construct boardwalks
6 so we can inspect our property. What happens if we sign
7 these deed restrictions, and our children stray off of these
8 boardwalks? Are we going to be fined \$10,000 a day for a
9 Coastal Commission violation?

10 Ladies and gentlemen, enough is enough. In our
11 documents submitted to each of you, one week prior to this
12 meeting, we describe our objections to each of the special
13 permit conditions.

14 We respectfully request that you instruct staff to
15 issue our permit today, and deny staff's request that we
16 comply with all 13 special permit conditions.

17 Specifically, we request that we not be required
18 to sign confiscating deed restrictions taking 85 percent of
19 our property, without payment of compensation, in Condition 3
20 and 6; that we not be required to unlawfully combine two
21 separate lots as a condition of permit issuance. We had
22 fully intended, to perhaps donate the second lot to some
23 charitable organization. We can't donate it if there are any
24 deed restrictions, and get a tax benefit.

25 Our application as submitted for Parcel 1 only.

1 complies with the 15 percent lot coverage standard, and I
2 have shown that in an exhibit, and it is before you.

3 We request that we not be required to landscape
4 our lot with flora of the state's choosing. Our immediate
5 neighbors to the north and south of us are not, so why should
6 we? And, we respectfully request that you deny Conditions 7,
7 8, and 9.

8 We have attached a letter to our document,
9 indemnifying the Coastal Commission against wave run up. We
10 should not be required to perform any further studies.

11 The Millers and I have agreed to share a driveway,
12 minimizing impacts to dune habitat. I have a copy of a filed
13 easement agreement between us, as required by staff. I have
14 that with me, and I would be delighted to show you.

15 We agree to Conditions 5 and 10. We have already
16 done them.

17 We are adamantly against Conditions 1, 2, 11, 12,
18 and 13.

19 We have spent \$1.4 million during the previous
20 seven years in finance, legal, and engineering studies alone,
21 complying with state and local government permit requests.

22 This entire permit application has been fraught
23 with treachery, and I have shown you some of those examples
24 in exhibits.

25 Due to the inherent conflict between state and

1 federal courts, regarding property rights violations, we
2 appear to have no legal redress for all that has happened to
3 us. Please issue our permit today, denying the necessity to
4 comply with staff's 13 special permit conditions.

5 If you feel that we must comply with one or more
6 of the 13 special permit conditions, do not send the permit
7 back for staff review. Please vote today on this permit.
8 Please don't make us come back.

9 Thank you for your time in listening to my
10 testimony.

11 CHAIR CALCAGNO: Thank you.

12 Are you going to use this as your rebuttal? or is
13 your attorney --

14 MR. PAGE: I'll save time for rebuttal.

15 CHAIR CALCAGNO: You are going to do the rebuttal?

16 MR. PAGE: Either I, or my attorney will.

17 CHAIR CALCAGNO: Well, at this point, we are ready
18 for a two or three minute rebuttal.

19 MR. PAGE: Okay.

20 CHAIR CALCAGNO: So, you can start, or however you
21 want to do it.

22 Mr. PAGE: I will just take questions from the
23 Commissioners.

24 CHAIR CALCAGNO: You would rather take questions?

25 MR. PAGE: Yes.

1 CHAIR CALCAGNO: You will still have that
2 opportunity.

3 MR. PAGE: A quick rebuttal to staff, if I can
4 allowed to speak then, would be on these issues.

5 We are being asked to combine --

6 CHAIR CALCAGNO: You want to get your --

7 COMMISSIONER RANDA: Take it with you.

8 CHAIR CALCAGNO: -- microphone. Take the
9 microphone off of the pedestal, and fine.

10 MR. PAGE: Okay, thank you.

11 We not be made to combine lots 1 and 2 on the
12 property. As submitted, our application complies to the lot
13 coverage ratios for just Parcel 1. If you grant us our
14 permit, we ask that it be for Parcel 1 only, and we fully
15 intend to donate the second parcel to some charitable
16 organization, but we can't do that and get a tax benefit if
17 there are any restrictions on it, whatsoever.

18 We have spoken to the director of the Big Sur Land
19 Trust, and he informed us of those issues.

20 We request that we not be required to do another
21 wave run up study. We have an updated report from Fox
22 Neilson and Associates, dated December 7, 1994, that should
23 satisfy staff's request regarding those issues.

24 We request that we not be made to comply with any
25 of the specific permit conditions that I stated, because they

1 are unnecessary. They duplicate all of the things we fought
2 hard for with the City of Pacific Grove during the prior four
3 years before we got to you in 1994.

4 Thank you.

5 CHAIR CALCAGNO: At this time, the Chair is going
6 to close the hearing.

7 Staff, do you have rebuttal?

8 DISTRICT DIRECTOR GROVE: If I may, I will begin
9 by making a few responses, and then there are some things
10 that other members of the staff here at the table would like
11 to respond to.

12 A couple of things. I want to clarify some
13 statements that were just made. At no time, did we ever
14 instruct Mr. Page to come back and reapply for this project.
15 We, in fact, were prepared to issue his permit to him, based
16 on the Commission's previous decision, but for the need to be
17 able to accurately identify where to site the project so that
18 it would be outside of the wave run up area.

19 It was our understanding, because of the changes
20 of the landscape there, in order to get that accurate
21 information, and it would be a cost of approximately \$1200,
22 so that we could determine where the wave run up area would
23 be, site the house outside of that hazardous area, and the
24 project would be able to go forward. We had met all of the
25 conditions, and we were prepared to issue the permit.

1 So, it was only at Mr. Page's election to come
2 back before the Commission. We did instruct him that that
3 was an option that was always available to him, but we worked
4 at all times to try to make sure that his permit would be
5 issued.

6 I'll --

7 COMMISSIONER STEINBERG: No, just go ahead.

8 DISTRICT DIRECTOR GROVE: Hold your question, and
9 I'll just finish with a few more comments.

10 It is very important for the Commission to realize
11 that in terms of what we are recommending for conditions of
12 approval, nothing in these conditions conflict with the
13 stipulated agreement with the city; however, that was the
14 agreement between the city and the applicant. It was not
15 something that this Commission was a party to.

16 And, when this project, given its location,
17 requires a coastal development project. That means that it
18 is under your jurisdiction, in the absence of a certified
19 LCP, and in that case, we must use the Coastal Act as the
20 standard of review, and look to the LUP for guidance.

21 In that sense, there were certain issues that were
22 not addressed by the stipulated agreement, and in the case,
23 for example, of the wave run up, we have added that condition
24 because the Coastal Act clearly directs that development
25 should be directed out of hazardous areas, where there is

1 room to do that.

2 So, those are the general comments that I wanted
3 to make to you. There are a couple of other things. For
4 example, with respect to Mr. Page's insinuation that he could
5 go ahead with just the one lot, and have appropriate coverage
6 for this site, we do not believe that the site coverage would
7 be adequate with only the one lot under the currently
8 proposed project, and that he needs the acreage with both
9 lots in order to meet the 15 percent coverage standard that
10 is in the LUP.

11 There are a few other details that were mentioned
12 that I know Mr. Otter wants to respond to, and I know Mr.
13 Douglas may have some comments.

14 EXECUTIVE DIRECTOR DOUGLAS: Before Mr. Otter
15 comments on a number of the points, let me just again
16 reiterate that in our conversations, and dealings with Mr.
17 Page, after the Commission acted, it was clear to me that he
18 simply did not agree with the permit conditions that this
19 Commission adopted, and that while we were prepared to move
20 forward and issue the permit, if he met -- once he met those
21 conditions, he was not prepared to do so.

22 And, kind of at the end, it really came down to
23 doing an updated geology, or technical report, that would
24 give us an idea of where the wave run up would be. That was
25 information that we needed, given the facts of the situation,

1 and that the Commission required. He didn't want to do that.
2 We couldn't issue the permit.

3 So, as the time went by, and for whatever reason,
4 he choose not to do that, we felt obligated to let him know
5 that the time was running, and that his permit was going to
6 expire, and that he always had a right to reapply, because
7 the six months had gone by that he could apply for a new
8 permit. At no time did we tell him to file for a new permit.
9 So, I think it is important to keep that accurately in
10 perspective.

11 With that, Lee, if you have some additional points
12 to make.

13 CHIEF PLANNER OTTER: Just a couple of
14 clarifications.

15 With respect to the assertion that I directed that
16 the sand from grading the shared driveway be dumped on the
17 proposed building site here, that is not what occurred,
18 actually. I did discuss in detail with the applicant what
19 needed and what did not need a coastal permit, by way of ones
20 that work on their own yard.

21 And, the permit for the shared driveway, on the
22 other hand, is a completely separate action. It did require
23 that any leftover sand from the driveway grading be deposited
24 somewhere in the Asilomar Dunes formation, and that
25 provision, as it happened, was used to, you know, to support

1 the deposit of sand on the site.

2 This grading activity, as originally reported to
3 us as a violation, and upon my investigation I concluded
4 that, in fact, it was within the terms of the coastal permit
5 for the shared driveway, and in fact, no violation existed,
6 and therefore the building up of the site's elevation through
7 the deposit of sand there was, even though he may not admit
8 for it to happen at that particular site, was in fact
9 covered.

10 A second clarification has to do with the
11 assertion by Mr. Page that he would be limited to walking on
12 boardwalks on his property. In fact, the purpose of
13 allowing, but not necessarily requiring there to be
14 boardwalks, is to facilitate an owner to be able to move
15 about his property, and doing so without having to disturb
16 the native plant life, which perhaps at some expense had been
17 installed on the property. And, so this is an attempt to
18 work with the land owners in the neighborhood to make things
19 work better, and to address problems that the landowners,
20 themselves, had been concerned about. And, so this is an
21 empowerment for the landowner in this case, and I think a
22 highly appropriate one at that, because it has such good
23 consequences, in terms of environmental protection.

24 So, I want to make it clear for the record, once
25 again, that this would not preclude the landowner from

1 utilizing his property in all ways that were consistent with
2 the deed restriction.

3 EXECUTIVE DIRECTOR DOUGLAS: Mr. Chairman, I know
4 counsel wants to make a couple of additional comments, and I
5 hope that they do, especially relative to the offer of a
6 settlement and how we handled that, and then I will make some
7 closing comments.

8 CHIEF COUNSEL FAUST: Mr. Chairman, I wanted to
9 make comments in three areas.

10 First, with regards to the 1993 stipulated
11 judgment, in the lawsuit that Mr. Page brought against the
12 City of Pacific Grove, we were not -- we, the Commission --
13 were not a party to that lawsuit. We didn't have any
14 knowledge of that lawsuit.

15 Stipulated judgment is not an order that the court
16 makes after a full hearing and trial and so on. It is rather
17 a way to memorialize a settlement agreement. And, that is
18 what happened here.

19 We were not a party to that settlement agreement.
20 That settlement agreement is not binding upon this
21 Commission. It does not, in any way, displace this
22 Commission's jurisdiction. When someone applies for a
23 permit, this Commission has jurisdiction. This Commission
24 needs to make its decision pursuant to the appropriate
25 standards that are provided by the legislature.

1 In this instance, the City of Pacific Grove does
2 not have a certified LCP. They would rather have a certified
3 Land Use Plan, and so the standard of review for the
4 Commission is the Chapter 3 policies. The Chapter 3 policies
5 form the basis of your review of this matter today, as they
6 did in 1994.

7 When you made your decision in 1994, that
8 decision, as Ms. Patterson noted earlier, was challenged by
9 some local citizens, and it went into Monterey County
10 Superior Court, and the Monterey County Superior Court judge
11 upheld this Commission's decision, as Ms. Patterson indicated
12 earlier. The court found that the Commission had properly
13 looked at the Constitutional issues, as well as the
14 environmental issues, and had struck an appropriate balance
15 between the tension of those two, perhaps conflicting,
16 policies, such that there was the minimum amount of
17 environmental disruption, while yet giving Mr. Page an
18 appropriate development within the meaning of the
19 Constitution for his site.

20 Later, Mr. Page, as he indicated, and as his
21 attorney indicated, sued the Commission, among others, in
22 federal court on a takings claim. Mr. Page's lawsuit was
23 thrown out. The United States District Court judge ruled
24 against him, in all respects, and it is in the context of
25 those two items of litigation that I need to discuss this

1 proposed settlement agreement with you.

2 Mr. Page's attorney did recently make a settlement
3 proposal to Deputy Attorney General Marjorie Cox. Marjorie
4 Cox discussed that settlement agreement with me. We
5 discussed it with several other individuals in the Attorney
6 General's Office as well, and then brought the matter to Mr.
7 Douglas' attention, and we all discussed it.

8 Their settlement proposal calls for the Commission
9 -- and recall now that the Commission has been involved in
10 two lawsuits and has won them both -- their settlement
11 agreement called for the Commission to pay them \$1.5 million,
12 approximately, and then to issue them a permit without any
13 significant conditions, with two rather minor conditions.

14 We discussed that, and we determined that in our
15 opinion, to consider that -- to go along with a settlement
16 proposal like that would be a gift of public funds. There
17 simply is no basis for the state to agree to pay money to
18 somebody who has been the loser in litigation. The state has
19 prevailed in that litigation.

20 There was no reasonable settlement agreement, to
21 even bring to the Commission. We discussed it with Mr.
22 Douglas. Mr. Page had a permit application pending, that was
23 the end of the matter.

24 Finally, I want, briefly, because staff has been
25 involved, to discuss this matter of the deed restrictions,

1 versus the original permit conditions.

2 Mr. Page and his attorney have talked at length
3 about how this Commission approved a permit with 13
4 conditions in 1994; how he had no problems with those 13
5 conditions, but all of a sudden staff twisted them around in
6 one way or another and prevented him from getting his permit,
7 and kept him from appealing, and so on and so forth.

8 The language of the permit conditions was language
9 that this Commission placed upon that permit. That is your
10 language. Let me give you just a couple of examples: the
11 23-foot line that he discussed, was specifically -- the
12 23-foot line was specifically contained in the 1994 permit
13 conditions. It is specifically contained in exactly the same
14 language in the proposal that the staff brings to you today.

15 The revised geology report was contained
16 specifically in the Commission's permit language, as it is in
17 exactly the same language in the staff recommendation today.
18 This is nothing that your staff changed off of the record, in
19 any way. Mr. Page simply disagreed with the permit
20 conditions' language that this Commission imposed in 1994, as
21 he does today. It really should be looked at in that simple
22 a manner. This is not something that really is devious at
23 all.

24 Mr. Page obtained a permit in 1994. He didn't
25 agree with the permit, but he didn't challenge the permit.

1 He is back here today because he would like to have you
2 removed that condition language.

3 You made a decision in 1994, which was taken to a
4 Monterey County Superior Court. The Monterey judge looked at
5 that, as I noted earlier, and found that you struck an
6 appropriate balance. Your staff recommends the same today.

7 COMMISSIONER RANDA: I have one question of
8 counsel, through the Chair.

9 CHAIR CALCAGNO: Where do I --

10 COMMISSIONER WAN: You can have her, and then I'll
11 go now.

12 CHAIR CALCAGNO: Okay.

13 Commissioner Randa, then Commissioner Wan, and
14 then back to Commissioner Steinberg.

15 COMMISSIONER RANDA: Exhibit 2 of the applicant's
16 document talks about a phone conversation between Marjorie
17 Cox and Mary Margaret O'Connell, discussing the Commission
18 being informed, and in fact, rejecting this offer.

19 Are you telling me, Mr. Faust, that just talking
20 to Peter Douglas was all that happened in this case? and that
21 is why it wasn't before us in a closed door session?

22 CHIEF COUNSEL FAUST: I am not privy to Exhibit 2
23 of the document regarding which you speak, but I can tell you
24 that I am telling you that this matter was discussed among
25 the attorneys and with Mr. Douglas, and was not taken further

1 to this Commission, because in our opinion there was nothing
2 to take to this Commission.

3 [Pause in the proceedings.]

4 CHAIR CALCAGNO: Does someone else have any other
5 questions of anyone else on staff, while counsel is reviewing
6 that information?

7 [No response.]

8 If it is strictly questions that you have to ask
9 the counsel, we will just stay in limbo.

10 EXECUTIVE DIRECTOR DOUGLAS: Well, while he is
11 looking at that, I can also respond.

12 This Commission is involved in a lot of
13 litigation, and there are often situations in which opposing
14 counsel makes recommendations or suggestions, and based on
15 the advice of counsel, discussions with litigating counsel,
16 staff counsel, decisions are made by me, as your Executive
17 Director, on behalf of the Commission that affect litigation.
18 That is perfectly appropriate. That has happened countless
19 numbers of times.

20 There are clear situations, where matters are
21 brought to the Commission in closed session, and there are
22 clear situations when they aren't, when they can be handled
23 by the staff on behalf of the Commission, and I think this is
24 one of those situations where there was no question about
25 what the answer should be. So, there was nothing unusual

1 about that.

2 CHAIR CALCAGNO: Counsel, have you reviewed it?

3 CHIEF COUNSEL FAUST: Mr. Chairman, yes.

4 CHAIR CALCAGNO: Your answer.

5 CHIEF COUNSEL FAUST: I have looked at it. It is
6 a representation of a transcript of a voice mail message in
7 which Ms. Cox indicates that the settlement offer has been
8 rejected by the Commission, and there is no counter offer at
9 this time, which is consistent with what I was just saying.

10 I told you in detail the way we discussed the
11 matter, and Ms. Cox, apparently, in a voice mail message
12 communicated that to Ms. O'Connell, the attorney for Mr.
13 Page.

14 COMMISSIONER RANDA: Yes, but Ms. O'Connell also
15 said to us that this Commission, our Commission, the
16 Commissioners, did not have this heard in a closed door
17 session, so it is news to us that there was a settlement.
18 Maybe not news to staff, but it is news to us.

19 CHIEF COUNSEL FAUST: Through the Chair.

20 I had not indicated before, and I am not
21 indicating now, and as far as I know no one on behalf of the
22 Commission has ever indicated that this matter was brought,
23 in the form of this settlement agreement, to this Commission
24 as a full Commission. And, I indicated the reasons why it
25 was not.

1 I am not saying anything different, Commissioner
2 Randa.

3 CHAIR CALCAGNO: At this time, Commissioner Wan.

4 COMMISSIONER WAN: I initially had a concern
5 about, as I think Commissioner Staffel did, about the issue
6 of merging two lots in the sense of if he wasn't going to
7 build on it anyway, maybe we could deed restrict it, but I
8 understand now, from your comments, that the reason for the
9 merger is that the total amount of property is necessary to
10 meet the 15 percent lot coverage of the LUP? is that correct?
11 is that the reason why this is being done in this manner?

12 CHIEF PLANNER OTTER: That is right, you need to
13 have that full acre in order for you to reach the 15 -- I
14 mean, in order that a house of this size will not go over the
15 15 percent limit, that is correct.

16 COMMISSIONER WAN: Okay.

17 Well, the other thing -- one of the things that
18 concerns me, and we are walking a tight rope here, is that if
19 we don't -- if we aren't careful, we can get sued from either
20 side. And, we have been to court, and the court has
21 basically said that what the Commission did initially was the
22 right way to walk the tightrope, and I am not really
23 comfortable with doing anything other than that, since there
24 has already been a court ruling on this.

25 So, that is my concerns here. We do need to

1 balance them, but apparently, the initial conditions which
2 are the same, which is what the court ruled on and said that
3 was the right way to do it, we probably ought to stick with
4 it.

5 CHAIR CALCAGNO: Commissioner Steinberg.

6 COMMISSIONER STEINBERG: Thank you.

7 I did, this morning, meet Mr. Page for the first
8 time. He had communicated with me by telephone after my
9 appointment was announced, before my appointment became
10 official.

11 I have a few questions. First, regarding threat
12 of litigation that Commissioner Wan raised. I think we have
13 to have a consistent rather than a double standard. We have
14 another person, Mr. Haney, for example, came before us last
15 month, and previously posed the threat of litigation, and
16 many members of the Commission said they were not going to be
17 influenced by that threat. I think we have to make decisions
18 on their merits.

19 Secondly, on the question of the settlement offer,
20 I am really confused here. Was there, or was there not, a
21 written offer of settlement?

22 CHIEF COUNSEL FAUST: I have in front of me a copy
23 of a letter dated October 30, 1996 which constitutes -- or
24 appears to constitute a written offer to settle all state and
25 federal court litigation.

1 COMMISSIONER STEINBERG: Okay.

2 My question is this. I have been in executive
3 session, where legal counsel has discussed possible
4 settlement offers, and advised us as to whether or not in
5 their judgment the proposed settlement offers were
6 meritorious or not. So, my question is, taking what you said
7 at face value, which is that you did not regard this as a
8 meritorious settlement offer, from the standpoint of your
9 client, the Coastal Commission, why would it still not be
10 brought to our attention?

11 CHIEF COUNSEL FAUST: Through the Chair.

12 Commissioner Steinberg, this is not a question, in
13 my opinion, of whether or not this is a meritorious
14 settlement offer. Meritorious or not, a settlement offer
15 would be one in which one could appropriately weigh the pros
16 and the cons and put up those various positives, and
17 negatives, and come to some sort of discretionary decision
18 about whether it was a good one, a bad one, a perhaps good
19 one, whatever. Any decision of that sort, whatsoever,
20 properly goes before this Commission, as you have just
21 indicated, and as we have on numerous occasions discussed.

22 This is not such a settlement agreement. This is
23 a settlement agreement that in my opinion you cannot enter
24 into consistent with California law and the Constitution.
25 This is someone who has lost all litigation against the

1 Commission, offering to have you, on behalf of the State of
2 California, give him a \$1.5 million, as well as remove the
3 conditions of the permit, outside of the permit process. You
4 have no legal or Constitutional basis to do that. That is a
5 gift of public funds.

6 If people could obtain money from the State of
7 California in that simple a fashion, we wouldn't have the
8 sort of government that we are used to having. This is not
9 the way we go about doing our business.

10 COMMISSIONER STEINBERG: I appreciate your --

11 CHIEF COUNSEL FAUST: If they had won the first
12 time, if they had won at some point, and we were coming here
13 with a settlement in the context of their having won their
14 litigation, even at that early stage, that is an entirely
15 different situation.

16 COMMISSIONER STEINBERG: I understand your point,
17 and I appreciate the civics lecture, but why wouldn't you
18 give that civics lecture in the context of the executive
19 session?

20 CHIEF COUNSEL FAUST: He applied for a new permit,
21 and in my opinion, there was nothing to bring to you. You
22 can judge my opinion for whatever it is worth. You can say I
23 was wrong. That is fine --

24 EXECUTIVE DIRECTOR DOUGLAS: And, as I indicated
25 --

1 CHIEF COUNSEL FAUST: -- and that may be the case,
2 but nonetheless, that was my opinion, and I --

3 COMMISSIONER STEINBERG: There was a written offer
4 of settlement that you didn't bring to us, because I
5 construed it as that you didn't feel it was meritorious, you
6 construed it in some other way. But, you made a decision
7 with the Executive Director not to bring it before an
8 executive session.

9 EXECUTIVE DIRECTOR DOUGLAS: And, as we indicated
10 before, this has been the historic practice of the
11 Commission.

12 Not only is it not something that you can legally
13 do, but it is something that this Commission has decided it
14 doesn't want to waste its time on, and has delegated
15 responsibility to the Executive Director to do.

16 So, you know, that is the basis for an action
17 here, that I took, based on the advice of counsel, which is
18 consistent with past practice of the Commission.

19 CHAIR CALCAGNO: Commissioner --

20 COMMISSIONER STAFFEL: Mr. Chair.

21 CHAIR CALCAGNO: -- Denisoff.

22 COMMISSIONER DENISOFF: Yeah, a couple of
23 questions for staff.

24 Under Mr. Page's agreement with the City of
25 Pacific Grove, is he still required to comply with the MOA

1 with Fish and Game, and all of the CESA requirements?

2 CHIEF PLANNER OTTER: I am not an expert in the
3 terms of that settlement agreement, because as it has been
4 explained before, we are not a party to it, but the
5 Department of Fish and Game contacts that I have, said in
6 fact, this does not remove Mr. Page's -- the settlement
7 agreement does not remove Mr. Page's obligation to comply
8 with the Fish and Game Code.

9 COMMISSIONER DENISOFF: Okay.

10 And, the second question I have might be kind of
11 strange, and I apologize if this maybe something you cannot
12 do, and I hope I don't get a civics lecture, because --
13 although I need one, I know -- is what would prohibit us
14 from, due to the 15 percent coverage of the two lots, from
15 putting that as a condition, but then, within that condition,
16 allowing the applicant, after this, to deed one of the
17 parcels to land trust, or whatever, as long as it is deeded
18 with conditions, so that the landowner would still get his --

19 COMMISSIONER RANDA: Can't do it with conditions.

20 COMMISSIONER DENISOFF: Can't do it? Okay, it is
21 a silly question, there you go.

22 COMMISSIONER STEINBERG: It is not a voluntary --

23 EXECUTIVE DIRECTOR DOUGLAS: And, it --

24 COMMISSIONER RANDA: First of all, I take issue.
25 Testimony was presented by the applicant, that the first

1 parcel is within the 15 percent lot coverage. So, we can,
2 right now, based on that evidence alone, and on the fact that
3 merging of the parcel doesn't meet the requirements, in fact,
4 exceeds the parcels of what we have already approved, because
5 as you testified, that there have been half-acre parcels that
6 you have approved property on, including Miller, and up to
7 one acre, and we have just created a 1.8-acre parcel.

8 So, as far as I am concerned, the .7 of an acre
9 that he already has on his Parcel 1 is sufficient for this
10 project. So, I oppose the idea of the merging, because he
11 sounds like he wants to donate it anyway. I mean, what are
12 we --- he gets a tax write off. We are happy. They are
13 happy.

14 CHAIR CALCAGNO: Commissioner Staffel.

15 COMMISSIONER STAFFEL: You know this is -- the
16 applicant is caught in a Catch-22, you know. We can sit
17 here, and they can try to win legal arguments and not get
18 their house built. We can dig in and do things.

19 You know, you probably should have had the
20 Commission, had them as an indispensable party early on, and
21 maybe we wouldn't be here, but, you know, isn't there a way?

22 I mean, I am a little concerned that the
23 Commission says that the stipulated judgment, because
24 Commission was not a party, it is really kind of, you know,
25 no force and effect, even from a practical standpoint.

1 And, if you go down these conditions, and you
2 know, in Special Condition No. 1, incorporation of city's
3 mitigation requirements. I mean, that should not be a big
4 deal from the applicant's standpoint.

5 The updated geology report, where there is a
6 geology report in effect, it is out of date, I mean, can't
7 the Commission, from our standpoint, waive that? I mean, is
8 that something that we have got to do?

9 You just go through these things, but we are
10 talking about the merger of parcels, and that is a little bit
11 trickier, but I really think that is more -- I don't know. I
12 am having a little bit of trouble requiring that merger of
13 parcel issue, particularly, where if the applicant would come
14 forward and stipulate, or state on the grounds -- no, don't
15 say that -- state on the record, they don't plan to develop
16 Parcel 2, and we can come up with a formula for the coverage.

17 I mean, these things are solvable. They are
18 really solvable. And, you know, the counsel for both sides
19 are having their heads knocked together, and for this thing,
20 going on and on and on.

21 The shared driveway and the utility access rights,
22 you know, you want -- they are doing that with the shared
23 driveway. I mean, I guess we want, what, we want an easement
24 document? They should do that for their own protection.

25 Then, we get to the deed restrictions, and there

1 are some things here that they just fundamentally object to.

2 Oh, the revised development plan, I guess the
3 question I have, you know, the stipulation details out
4 certain aspects of this development, and I guess that our
5 revised development requirements, they do differ from the
6 stipulated judgment, correct? They do. Our setbacks and our
7 requirements, and that differs from what is in here, correct?

8 DEPUTY ATTORNEY GENERAL PATTERSON: They don't
9 conflict. They just confirm it.

10 I would point out, Commissioner --

11 COMMISSIONER STAFFEL: They don't conflict? They
12 just confirm it?

13 DEPUTY ATTORNEY GENERAL PATTERSON: I would point
14 out, Commissioner, that is a building permit. That was a
15 stipulated judgment to issue a building permit.

16 A Coastal Development Permit was required
17 regardless --

18 COMMISSIONER STAFFEL: I understand that.

19 DEPUTY ATTORNEY GENERAL PATTERSON: -- and so that
20 is why it is not binding.

21 But, I would just like to take one step further,
22 if I might. I think we can solve the merger problem. I
23 think there is a way for the Commission to craft a
24 restriction that would allow that lot to be -- the Parcel 1
25 or 2, whichever the smaller one is -- to be donated to a

1 non-profit, or whatever, public entity, to be held for
2 non-development purposes. The problem we have is he has
3 contacted some entities -- I believe he said the Big Sur Land
4 Trust -- which don't want to take properties with
5 restrictions on it.

6 I think they will take it with restrictions on it
7 that are consistent with their mission, and that is to hold
8 property for conservation purposes. I know we can craft
9 something in that manner. The other alternative -- but, the
10 other alternative was to merge it.

11 COMMISSIONER STAFFEL: Okay.

12 COMMISSIONER RANDA: I think there is a taking
13 issue on that parcel.

14 COMMISSIONER STAFFEL: I guess I go through this,
15 and my question is the revised development plan, they can
16 build pursuant to what we have, what is in the stipulated --

17 COMMISSIONER RANDA: That is right.

18 COMMISSIONER STAFFEL: -- agreement, correct?
19 They don't have to change one thing. They talk about the
20 setback and all of this stuff. They don't have to do that?
21 I mean, I am getting two conflicting stories here.

22 Can they? or can they not? Yes or no?

23 [Pause in the proceedings]

24 Is it yes?

25 CHIEF PLANNER OTTER: If they don't have to move

1 the house on account of the changed geologic conditions, the
2 answer is, yes.

3 COMMISSIONER STAFFEL: So, the answer is, maybe?

4 DISTRICT DIRECTOR GROVE: Wait -- can I make sure
5 that I understand the question.

6 Were you saying that with that stipulated
7 agreement they could go ahead and build?

8 COMMISSIONER STAFFEL: Well, they could go ahead
9 and -- it spells out certain aspects. I think, it even
10 spells out -- I mean, it is pretty specific in the judgment
11 --

12 DISTRICT DIRECTOR GROVE: It is very specific --

13 COMMISSIONER STAFFEL: -- what they can or cannot
14 do.

15 DISTRICT DIRECTOR GROVE: -- and, it is related to
16 a building permit; however, they cannot build without a
17 Coastal Development Permit.

18 COMMISSIONER STAFFEL: I understand that.

19 DISTRICT DIRECTOR GROVE: Okay.

20 COMMISSIONER STAFFEL: I mean, and presumably the
21 court thought the Coastal Development Permit would be
22 consistent with this, and that we would not try to change the
23 requirements contained within the judgment.

24 DISTRICT DIRECTOR GROVE: Well, I am not going to
25 second guess the court, but I think, again, it is important

1 to realize, relative to those areas where it overlaps,
2 nothing that we have recommended conflicts with the
3 stipulated agreement; however, because the Coastal Act is the
4 standard for review, and we are looking to the LUP, which is
5 very different than what the analysis was done for the
6 stipulated agreement.

7 There are certain additional conditions which are
8 necessary to issue this permit consistent with the Coastal
9 Act.

10 COMMISSIONER STAFFEL: Although, they took into
11 consideration the city's LUP, and their requirements under
12 the LUP, which came before this Commission at some point in
13 time, correct?

14 DISTRICT DIRECTOR GROVE: They certainly did, but
15 that does not substitute for the Commission's review. You
16 need to review this project for its consistency with the
17 Coastal Act, and we've laid out the issues and the means that
18 we think that this project --

19 COMMISSIONER STAFFEL: So, we disagree with the
20 city's finding on the LUP and where this is to be placed?

21 [Public comment.]

22 DISTRICT DIRECTOR GROVE: Excuse me, I didn't hear
23 that.

24 COMMISSIONER STAFFEL: We disagree with the city's
25 finding on where this residential unit can be placed?

1 DISTRICT DIRECTOR GROVE: Well --

2 COMMISSIONER STAFFEL: Pursuant to their
3 interpretation of their LUP, as approved by this Commission?
4 yes or no?

5 DISTRICT DIRECTOR GROVE: A very important point
6 is that since the city entered into that stipulated
7 agreement, this site has been altered, so we don't know if we
8 agree or disagree with the city, because the conditions on
9 the site have changed since the city entered into that
10 stipulated agreement.

11 COMMISSIONER STAFFEL: And, have changed how?

12 DISTRICT DIRECTOR GROVE: They deposited new sand
13 on the site, which has changed the contours.

14 And, the problem, in terms of how -- when the
15 original work was done for establishing the wave run up area,
16 the consultant based his area on the contour height, and said
17 that at the 23rd contour it would be outside of the wave run
18 up area; however, when the new sand was deposited, by being
19 at a higher level the contour moves forward, and so without
20 having additional geological information, we can't confirm
21 that that newly created 23rd contour will, in fact, be
22 outside of the wave run up area.

23 EXECUTIVE DIRECTOR DOUGLAS: And, in fact, it is
24 my recollection that there was an amendment request to change
25 this condition, and there was extensive discussion before the

1 Commission of this very issue, on how the topography had been
2 changed, and that this additional geologic information was
3 necessary, and the Commission denied that request, after
4 extensive discussion on this very point.

5 So, that is the condition that, you know, he just
6 refused to comply with, that didn't allow us to make the
7 finding that it would be set back an appropriate distance.

8 COMMISSIONER RANDA: I would like the applicant to
9 address that issue --

10 CHAIR CALCAGNO: Wait, wait --

11 COMMISSIONER RANDA: -- I believe you brought --

12 CHAIR CALCAGNO: -- let the --

13 COMMISSIONER RANDA: -- a study up here on
14 geology?

15 CHAIR CALCAGNO: -- Commissioner Staffel has the
16 floor.

17 Are you done?

18 COMMISSIONER STAFFEL: Well, I just -- you know,
19 as I go through these, and again some of this, I think, if
20 the applicant really wanted to reach agreement, as well, I
21 think we can get this thing done, and or we can play legal
22 games, and not have anything built in the foreseeable future,
23 which I think would be unfortunate, and for both sides.

24 VICE CHAIR FLEMMING: I second that, Tim.

25 COMMISSIONER STAFFEL: And, I don't think the

1 applicant's requests, with respect to getting the house built
2 are that unreasonable.

3 I think they should realize that just because they
4 have a stipulated judgment it doesn't mean that they waive
5 all future Coastal Commission oversight. I mean, that is not
6 going to happen, either.

7 So, and then, with respect to what was in effect
8 at the LUP, and the types of restrictions in place for
9 similar types properties, at this location -- and again,
10 maybe there haven't been -- again, maybe they were all built
11 back in 1929, so they aren't similar. Is that the problem?
12 They were all built before the Coastal Act?

13 CHIEF PLANNER OTTER: Yes --

14 COMMISSIONER STAFFEL: So, I guess, you know, I
15 just think we ought to direct you folks to give them room
16 some place, come up with an agreement and get this thing
17 done, and in an acceptable way.

18 Otherwise, I am almost persuaded to go for it
19 pursuant to the applicant's request, and get this thing over
20 with, because I think it has gone on way too long --

21 COMMISSIONER STEINBERG: I so move.

22 COMMISSIONER STAFFEL: -- and I don't think that
23 is the best response to this whole situation, because I do
24 think it poses some problems for us, but in light of the
25 history of this thing, it may be the best way to proceed.

1 COMMISSIONER STEINBERG: I move per applicant, Mr.
2 Chairman.

3 CHAIR CALCAGNO: There is a motion on the floor,
4 but I think we have to make sure it is corrected.

5 Staff, how would that -- I think you know what Mr.
6 --

7 EXECUTIVE DIRECTOR DOUGLAS: The appropriate
8 motion is to move per staff, and then if you want to make any
9 amending motions to change any of the conditions then that is
10 the appropriate thing to do.

11 COMMISSIONER RANDA: I think there is a motion to
12 move, per applicant, though.

13 COMMISSIONER STEINBERG: My motion then would be
14 to amend the staff report per applicant, which I think would
15 be to substitute the stipulated judgment for all of the
16 special conditions.

17 COMMISSIONER AREIAS: The staff recommendation is
18 not before us.

19 EXECUTIVE DIRECTOR DOUGLAS: No, the appropriate
20 motion -- the appropriate motion is per staff, and I thought

21 --

22 COMMISSIONER AREIAS: That motion has not been
23 made.

24 COMMISSIONER RANDA: That is right.

25 COMMISSIONER AREIAS: That motion is --

1 CHAIR CALCAGNO: We are trying to work out the
2 motion that Mr. Steinberg, or Commissioner Steinberg has in
3 mind, that he wants to make, so let's clarify his issues so
4 we can proceed.

5 CHIEF COUNSEL FAUST: Mr. Chairman, in the
6 instance in which your staff is recommending approval, any
7 instance, the first motion is per staff, and I think that is
8 what Commissioner Steinberg is going to make. So, if he
9 does, and there is a "second" then I'll go on to explain what
10 the next motion would be.

11 COMMISSIONER STEINBERG: All right, you are saying
12 that it is necessary to make the motion per staff --

13 CHIEF COUNSEL FAUST: Per staff, and you --

14 COMMISSIONER STEINBERG: -- then make amending
15 motions.

16 CHIEF COUNSEL FAUST: -- get a "second" --

17 \\\

18 [MOTION]

19 COMMISSIONER STEINBERG: So, for that purpose, I
20 make a motion per staff.

21 COMMISSIONER BELGARD: Second.

22 CHAIR CALCAGNO: Okay, and it has been moved and
23 second per staff.

24 CHIEF COUNSEL FAUST: Then, Commissioner Steinberg
25 wants to change the staff recommendation --

1 COMMISSIONER STEINBERG: Right, thank you very
2 much.

3 CHIEF COUNSEL FAUST: -- and so his next motion
4 would be, if I understood him correctly, to substitute the
5 stipulated judgment, the terms and conditions of the
6 stipulated judgment with the City of Pacific Grove in 1993, I
7 believe it was, stipulated judgment for all of the special
8 conditions of the staff recommendation.

9 COMMISSIONER STEINBERG: That is --

10 CHIEF COUNSEL FAUST: I believe I understood that
11 correctly.

12 COMMISSIONER STEINBERG: -- that is the civics
13 lesson that I do need --

14 VICE CHAIR FLEMMING: I have a question on the --

15 COMMISSIONER STEINBERG: -- thank you.

16 VICE CHAIR FLEMMING: -- on the amendment.

17 COMMISSIONER BELGARD: And, I'll second that
18 first.

19 CHAIR CALCAGNO: It has been moved and second.

20 Now, Commissioner Flemming, what was your request?

21 VICE CHAIR FLEMMING: I have a question on the
22 amended motion.

23 Does that cover -- simply using the stipulated --
24 what do you call it -- stipulated judgment agreement, does
25 not, however, cover all of the Coastal Act needs. We would

1 have to keep this where it wouldn't -- where it is a legal
2 document, where we come to agreement on what we can do to
3 meet the Coastal Act requirements --

4 COMMISSIONER STEINBERG: Mr. Chairman, that would
5 necessitate --

6 VICE CHAIR FLEMMING: -- as Tim was going down the
7 list, as to what was agreeable, and what wasn't.

8 COMMISSIONER RANDA: Mr. Chairman.

9 CHAIR CALCAGNO: Let's proceed here cautiously.
10 Counsel, as we are moving, advise us. I think you
11 want to --

12 CHIEF COUNSEL FAUST: Mr. Chairman --

13 CHAIR CALCAGNO: -- help the Commission as much as
14 you possibly can on this issue.

15 CHIEF COUNSEL FAUST: -- you have an amending
16 motion on the floor, and I can clarify it again if any
17 Commissioner wishes --

18 CHAIR CALCAGNO: Clarify.

19 CHIEF COUNSEL FAUST: Okay, the amending motion is
20 to eliminate all of the staff recommended conditions, and to
21 substitute for those staff recommended conditions, the terms
22 and conditions that are contained in the 1993 stipulated
23 judgment for the building permit, between Mr. Page and the
24 City of Pacific Grove.

25 Mr. Steinberg, correct me if I am wrong, but that

1 is my understanding of your amending motion.

2 COMMISSIONER STEINBERG: Yes.

3 COMMISSIONER RANDA: Mr. Chair.

4 CHIEF COUNSEL FAUST: And, so that is the motion
5 that is presently pending --

6 CHAIR CALCAGNO: Is that the motion that the
7 second -- the amendment.

8 Secunder, is that what you agree on?

9 COMMISSIONER BELGARD: That is what I understand
10 it to be.

11 COMMISSIONER RANDA: Mr. Chairman --

12 CHAIR CALCAGNO: Okay, so we now --

13 CHIEF COUNSEL FAUST: So, now you can hold
14 discussion on that motion.

15 CHAIR CALCAGNO: -- we have a motion on the floor,
16 and we have an amendment to that motion, and at this time we
17 are going to keep discussion to the amendment.

18 COMMISSIONER RANDA: Mr. Chairman.

19 CHAIR CALCAGNO: Commissioner Wan.

20 COMMISSIONER WAN: I am really concerned, because
21 this is to incorporate the terms and conditions of a building
22 permit, and it doesn't incorporate, or deal with coastal
23 development issues.

24 It doesn't deal with any of the issues that this
25 Commission has to meet its concerns under the Coastal Act.

1 We don't have any -- I mean there is a whole bunch of them,
2 the habitat issues, the wave run up issues, all kinds of
3 issues. A building permit is different from a Coastal
4 Development Permit, and I am very concerned that this does
5 not make any sense for us to do it in this way.

6 CHAIR CALCAGNO: Commissioner Areias.

7 COMMISSIONER AREIAS: I would like to -- I want to
8 ask staff what the practical effect, and legal effect, would
9 be of the passage of Mr. Steinberg's motion?

10 EXECUTIVE DIRECTOR DOUGLAS: Well, the practical
11 effect is that you would be approving a permit pursuant to
12 building permit conditions, but not the conditions that are
13 crafted to reflect Coastal Act requirements, and in our view
14 there is no legal basis for that result.

15 COMMISSIONER AREIAS: So, it would not be
16 consistent with the LCP?

17 EXECUTIVE DIRECTOR DOUGLAS: It would not be
18 consistent with the Coastal Act.

19 COMMISSIONER RANDA: Mr. Chairman --

20 EXECUTIVE DIRECTOR DOUGLAS: That is the standard
21 of review here --

22 COMMISSIONER RANDA: Mr. Chairman.

23 EXECUTIVE DIRECTOR DOUGLAS: -- and there is no
24 fully certified LCP, as I understand it, so it is the Chapter
25 3 policies of the Coastal Act for which the staff has

1 especially crafted conditions, which the city permit,
2 building permit, and the stipulated judgment don't cover.

3 They don't have anything to do with --

4 COMMISSIONER AREIAS: Quickly, summarize for me,
5 Mr. Douglas, or one of the other staff people, quickly
6 summarize the difference between the stipulated judgment,
7 which, as I understand it, is basically a compromise between
8 the city and the applicant, an agreement worked out of court,
9 but certified, in effect, by the court, or validated by the
10 court, and the staff recommendation?

11 CHIEF PLANNER OTTER: All right, through the
12 Chair, anticipating this question, I have taken an entire
13 minute to review what we have here, and so my quick take on
14 it is this.

15 That the updated geological report is one distinct
16 difference, because in the report that was already done it
17 said this report is no good after three years, and that three
18 years is long past, so --

19 COMMISSIONER AREIAS: Mr. Otter --

20 CHIEF PLANNER OTTER: -- we can't --

21 COMMISSIONER AREIAS: -- Mr. Otter, why is that
22 geology -- explain to me quickly, why that geology report is
23 so important.

24 CHIEF PLANNER OTTER: Well, because the --

25 COMMISSIONER AREIAS: The geology has been there

1 for a long time.

2 CHIEF PLANNER OTTER: -- right --

3 COMMISSIONER AREIAS: Three years doesn't seem
4 like --

5 CHIEF PLANNER OTTER: -- the closest --

6 COMMISSIONER AREIAS: -- in geological terms that
7 doesn't seem like a long time.

8 EXECUTIVE DIRECTOR DOUGLAS: Right, except the
9 site changed.

10 CHIEF PLANNER OTTER: Right, yes.

11 Well, to answer the first part -- I mean the
12 second part first, there has been changes in the topography,
13 but the fact is the consultant did find that this was within
14 the storm wave run up area predicted probability, both at 50
15 years and at 100 years, and so that is a hazardous area, and
16 the Coastal Act says that new development must avoid such
17 hazards.

18 So, simply shifting the house you would be able to
19 avoid that hazard, or if it turns out that the elevation has
20 been raised enough, he might be able to avoid it already. We
21 don't know. We simply don't know, and so we can't say
22 whether or not it is consistent with the Coastal Act --

23 COMMISSIONER AREIAS: Okay, so that is --

24 CHIEF PLANNER OTTER: -- and we have to get that
25 information --

1 COMMISSIONER AREIAS: -- one difference. That is
2 one --

3 CHIEF PLANNER OTTER: -- yes, that's right.

4 COMMISSIONER AREIAS: Is that the only difference?

5 CHIEF PLANNER OTTER: No.

6 Another important distinction has to do with the
7 merger of the lots. Neither the city nor the applicant
8 realized there were two lots here, and so to make this action
9 match up with the city's, it is necessary for both parcels to
10 be considered as a entirety, and so the --

11 COMMISSIONER AREIAS: And, so at the time that the
12 stipulated agreement was reached, the city didn't realize
13 that there were two lots?

14 CHIEF PLANNER OTTER: That is true.

15 COMMISSIONER AREIAS: What else.

16 DISTRICT DIRECTOR GROVE: If I may add, too, the
17 other option would be what we discussed, the other
18 alternative, which, if there was a proposal to dedicate this
19 land, so that it would be used for conservation purposes,
20 that might be another alternative; however, something needs
21 to be addressed so that the total lot coverage does not
22 exceed the 15 percent on standards --

23 COMMISSIONER AREIAS: And, that wasn't addressed
24 in the stipulated agreement?

25 DISTRICT DIRECTOR GROVE: No.

1 COMMISSIONER AREIAS: What else.

2 CHIEF PLANNER OTTER: The conditions regarding
3 confirmation of the shared driveways, and the easements for
4 that purpose. This is to harmonize it with the prior
5 Commission permit, which allowed those shared driveways.

6 So, that again was not something that was before
7 the city at the time, so this is a --

8 COMMISSIONER AREIAS: But, it was something that
9 subsequently, the applicant and Mr. Miller worked out between
10 themselves?

11 CHIEF PLANNER OTTER: Well, as I understand, they
12 are not objecting to this, and they have actually
13 accomplished -- most of that they haven't submitted for
14 confirmation, though.

15 COMMISSIONER AREIAS: So, it is not a problem? it
16 just hasn't been submitted and worked out with our staff?

17 CHIEF PLANNER OTTER: That's right.

18 COMMISSIONER AREIAS: Okay, what else?

19 CHIEF PLANNER OTTER: Okay, and finally the deed
20 restrictions, Condition No. 6 here, most critically it would
21 clarify that the part of the property which was not used for
22 a single family residence would be placed under the deed
23 restrictions, which would preclude most forms of development
24 in the future, with specific exceptions, as we talked about
25 the boardwalk for example, another specific exception would

1 be for the driveway, things of that sort, that necessarily
2 had to go within that protected area.

3 So, the city did not require the recordation of
4 such deed restrictions.

5 COMMISSIONER AREIAS: That was the same thing that
6 Ms. Grove mentioned earlier, right? or is it different, in
7 terms of the conservation habitat that you talked about? how
8 is it different?

9 DISTRICT DIRECTOR GROVE: The two are related.

10 The first is the standard in the LUP, which
11 basically sets out that the site coverage shall not exceed 15
12 percent, and then the relation is that that remaining 85
13 percent, we have a deed restriction so that would go into a
14 conservation easement, and would alert any future owners that
15 there was a restriction, and development was not allowable in
16 that area.

17 COMMISSIONER AREIAS: Okay.

18 DISTRICT DIRECTOR GROVE: So, the two support each
19 other.

20 CHIEF PLANNER OTTER: Yes, and I would add the
21 caution that this is just a quick review of the highlights,
22 and certainly, there are other corrections and
23 clarifications, but these are the critical points, I believe.

24 CHAIR CALCAGNO: Commissioner --

25 DISTRICT DIRECTOR GROVE: If I may, the most

1 serious concern is the placement of the house, the structure,
2 because by changing the topography it can make a very big
3 difference in where that house may be placed, and whether or
4 not it would end up within the wave run up area.

5 COMMISSIONER RANDA: Mr. Chairman.

6 CHAIR CALCAGNO: Commissioner Randa, and then
7 Commissioner Rynerson has been waiting a long time --

8 COMMISSIONER RANDA: I understand what staff is
9 just saying, and it was an issue I planned to hit on right
10 now.

11 If the maker of the amendment would entertain the
12 idea of a change in his amendment --

13 COMMISSIONER STEINBERG: Yes, and --

14 COMMISSIONER RANDA: -- and if the applicant would
15 address this --

16 COMMISSIONER STEINBERG: -- I would just like to
17 hear from the applicant, and then I might --

18 COMMISSIONER RANDA: -- well, let me pose to you
19 what --

20 COMMISSIONER STEINBERG: -- be open to something,
21 but Commissioner --

22 COMMISSIONER RANDA: -- I think resolves that --

23 COMMISSIONER STEINBERG: -- Areias has some
24 additional questions of the applicant --

25 COMMISSIONER RANDA: -- one issue --

1 COMMISSIONER STEINBERG: -- for him to respond,
2 also.

3 CHAIR CALCAGNO: Okay.

4 COMMISSIONER RANDA: -- first of all, I don't
5 think -- if I recall, you had taken a document and sat it
6 down there and said your geologist had addressed the issue
7 since the change in topography -- but, don't hit that issue
8 yet. I am going to give you a whole bunch, okay?

9 Start with that, and would you be amenable to a
10 revision, in other words, we would include Special Condition
11 No. 3 as long as the word in subparagraph B, change the word
12 "landward" to "above". Would that accomplish it, and also
13 would you -- are you still willing to accept the liability
14 issue -- the indemnification issue?

15 And, if you would address both of those, and the
16 geology report, I think this thing is moving.

17 MR. PAGE: May I have permission to address the
18 Commission?

19 CHAIR CALCAGNO: Yes.

20 MR. PAGE: Either we haven't done a very good job
21 of explaining this, or staff continues to use this as a
22 stalking horse, but let explain the change in site
23 topography.

24 There was a tiny corner of our property that was
25 located at 19 feet above sea level. We moved sand, created

1 as a consequent of the construction of the shared driveway,
2 and at staff's request put it over here. It affected less
3 than 1.4 percent of the property. It was a tiny bit of sand
4 that built up the corner of the house four feet. It wasn't a
5 dramatic change.

6 Second point, the house has always been situation
7 where the City of Pacific Grove approved it in the stipulated
8 judgment. We have never tried to move the siting of the
9 house. It has been proposed there for seven years. We've
10 never changed it.

11 Third, we are willing to indemnify the California
12 Coastal Commission against wave run up issues. We have
13 stated that all along.

14 Fourth, again, staff is misrepresenting the facts.
15 We submitted an updated Fox Nielson and Associates
16 engineering, geology, and environmental consulting report,
17 dated December 7, 1994 -- so it is not out of date -- stating
18 that if the house is located landward of a 23-foot contour
19 line, it is safe from wave run up. We are willing to
20 indemnify the Coastal Commission anyway. The requirement for
21 this permit special condition is mute. We are indemnifying
22 the Commission.

23 The house is where it has always been. The sand
24 placement was minor, these are none issues.

25 COMMISSIONER RANDA: And, the sand placement was a

1 direct result from one of the conditions we placed on you?

2 MR. PAGE: Correct. We minimized dune impact,
3 between Mr. Miller and I, by sharing a driveway, at some
4 inconvenience to us, at staff's request.

5 COMMISSIONER RANDA: So, I am going to ask that we
6 amend the amendment -- or if you will just accept my
7 amendment, with Special Condition 3, being 3.a. and b?
8 acceptable to you?

9 MR. PAGE: Let me just check, please.

10 COMMISSIONER RANDA: Okay.

11 MR. PAGE: Also, staff is insisting on the
12 combination of lots.

13 Staff, on its report, page 20, states the driveway
14 that is made of a permeable substance, not be counted against
15 lot coverage calculations. Our 15 percent of Parcel 1 is
16 4535 square feet. Our house, 3680 square feet, 570 feet of
17 patio, is 4250 square feet, less than 15 percent lot coverage
18 on Parcel 1 alone. We shouldn't be required to combine
19 Parcel 2.

20 We have checked with the IRS. If there are any
21 deed restrictions whatsoever placed on Parcel 2, we cannot
22 get a tax benefit for it. It is as simple as that. Staff is
23 trying to put conditions on it, and then getting us to remove
24 it afterwards, renders the property valueless.

25 COMMISSIONER RANDA: I understand that.

1 If you are willing to take that --

2 COMMISSIONER STEINBERG: Well, let me --

3 COMMISSIONER RANDA: -- amendment, and then we can

4 --

5 COMMISSIONER STEINBERG: -- I didn't hear the
6 responses --

7 COMMISSIONER RANDA: continue.

8 COMMISSIONER STEINBERG: -- to your question,
9 pardon me.

10 Are you --

11 COMMISSIONER RANDA: On Special Condition --

12 COMMISSIONER STEINBERG: saying that Special
13 Conditions 3.a. and 3 --

14 COMMISSIONER RANDA: Roman numeral III.3.

15 MR. PAGE: Yes, and if you could change the word,
16 instead of saying "landward" to just say "above".

17 COMMISSIONER RANDA: In Subparagraph b?

18 MR. PAGE: Correct.

19 COMMISSIONER RANDA: Okay.

20 So, if you would --

21 COMMISSIONER STEINBERG: All right.

22 COMMISSIONER RANDA: -- accept that, and the
23 liability --

24 MR. PAGE: One other clarification point.

25 Our house is designed, the floor level is sited at

1 26 feet above sea level, so we are beyond the --

2 COMMISSIONER STEINBERG: I understand that.

3 MR. PAGE: -- or above the 100-year wave run up
4 threat.

5 COMMISSIONER RANDA: Okay, excellent.

6 MR. PAGE: And, again, we are indemnifying the
7 Commission, regardless.

8 COMMISSIONER RANDA: Okay.

9 So, that change would be -- would that be
10 sufficient for you?

11 COMMISSIONER STEINBERG: What we are talking about
12 now, Mr. Faust, is the same amendment that we previously have
13 discussed to the staff report, except that we are
14 incorporating Special Conditions 3.a. and 3.b. with the
15 change in the wording of 3.b. from "landward" --

16 COMMISSIONER RANDA: And, even 3.c. is okay. It
17 is the same thing as what you just spoke, about the --

18 COMMISSIONER STEINBERG: -- well, 3.c. is also
19 consistent with that, I believe.

20 MR. PAGE: Yes, that is correct.

21 COMMISSIONER STEINBERG: So, it is 3.a., 3.b., and
22 3.c. would be incorporated in my amendment, except in 3.b.
23 the word "landward" would be changed to --

24 COMMISSIONER RANDA: Above.

25 COMMISSIONER STEINBERG: -- the word "above".

1 MR. PAGE: Another point of clarification, we were
2 already in compliance --

3 CHAIR CALCAGNO: The Chairman is going to
4 intercede here with counsel.

5 I can understand what the Commission is trying to
6 do, and I think it is grateful of the Commission, but I do
7 have some concern, from a legal matter, that trying to add
8 conditions, and work out an agreement in this manner is not
9 the proper procedure of this Commission, and we are only
10 opening the doors to have everything we are doing shot down.

11 COMMISSIONER RANDA: I disagree with you, Mr.
12 Chairman.

13 CHAIR CALCAGNO: If -- could I have counsel answer
14 my question, and then we will proceed.

15 CHIEF COUNSEL FAUST: Mr. Chairman, the first
16 requirement in a situation like this is that all of the
17 Commission be clear on exactly what it is upon which they are
18 going to vote, that there be clarity of whatever the proposal
19 is that is on the table.

20 In that respect, I stated it before, I believe
21 consistent with the intent of the maker of the motion. And,
22 I think the maker of the motion was, in this instance, as I
23 understood him, attempting to further clarify what that
24 motion would be, adding some things to it.

25 Now, this Commission has -- you are correct, Mr.

1 Chairman -- not frequently done that. It has on occasion
2 done that. It needs the consent of the second, and again
3 there needs to be clarity with respect to what the proposal
4 is.

5 The more things that get added on -- I will
6 caution all of the Commission -- the harder it is for
7 everyone to understand exactly what it is upon which they are
8 voting.

9 So, I would caution the maker of the motion, with
10 respect to that. There needs to be clarity.

11 There -- we were sued last time by both sides, if
12 you please, in this litigation. I think there is every
13 reason to assume that no matter what this Commission does you
14 are going to be sued again, by somebody. And, so make sure
15 that it is clear what it is you are doing.

16 The second thing is, you also need to make clear
17 what the basis is for what you are doing. What is the
18 factual basis for the proposal that you are adopting? how
19 does that deal with the impacts which have been identified,
20 and so on? Go through the analysis, and you need to make a
21 record for whatever your proposals are.

22 Those are the things that this Commission needs to
23 keep in mind as it goes about this process.

24 CHAIR CALCAGNO: All right, thank you, counsel,
25 that helps to clarify our position.

1 Now, I have been trying to get to Commissioner
2 Rynerson.

3 COMMISSIONER RANDA: Thank you, I appreciate that

4 --

5 CHAIR CALCAGNO: Proceed.

6 COMMISSIONER RANDA: -- because I want to make
7 sure the record is very clear.

8 Mary Margaret O'Connell's testimony before this
9 body, both in the letter of November 4, 1996, and additional
10 documentation dated November 6, 1996 covers substantially
11 many of the findings under which this basis is laid out.

12 I want to add, with the issue that staff is
13 correct -- and particularly page 12, 13, 14, and 15 of the
14 November 4 letter, which talked findings and declarations,
15 and that they all be incorporated into the basis of our
16 decision.

17 The staff is correct that the applicant's property
18 is the only remaining vacant privately owned land on the
19 entire Pacific Grove shoreline; therefore, it is unjust to
20 impose criteria and conditions on the property as if there
21 was still potential for increased urbanization of the area,
22 on the seaward side of the street. There will never be
23 parcel to parcel development. There will never be the risk
24 of interruption to the view shed due to construction of
25 additional homes.

1 This important turn of events has really been
2 overlooked by staff. The very purposes sought to be served by
3 hyper-restrictions are unnecessary and overburdensome to the
4 applicant, given the purchase of the remaining buildable lots
5 by public entities.

6 The property is a lovely parcel; however, it is
7 not an ESHA -- an environmentally sensitive habitat area.
8 Further, it is unnecessary for the staff to have included
9 this stale information from the old application, and appeal
10 process, since this is a new permit, and the incorporation of
11 the remaining buildable lots into Asilomar State Beach makes
12 those arguments moot, and inapplicable to the applicant's
13 current reapplication.

14 I will go on and read, but I would rather submit,
15 because those are the issues that I cared about, which was
16 view shed and the ESHA issue.

17 I think that anything that we would put in a
18 condition is tantamount to a taking, is eligible for a
19 compensation, and I believe that you deserved your right of
20 due process to have at least read those deed restrictions,
21 because I believe those deed restrictions put you in
22 violation of a superior court order, and that superior court
23 is held by the same applicable laws as this agency here, and
24 they have to also look at the Coastal Act as did the City of
25 Pacific Grove when they granted your application.

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1 So, I -- under their land use plan -- so I will
2 not play the game that this has not met the Coastal Act. I
3 believe it has, and I think it has been under tremendous
4 scrutiny.

5 MR. PAGE: Thank you, Commissioner Randa.

6 CHAIR CALCAGNO: Okay, at this time, Commissioner
7 Rynerson --

8 COMMISSIONER RYNERSON: Thank you --

9 CHAIR CALCAGNO: -- you have the floor --

10 COMMISSIONER RYNERSON: -- Mr. Chairman --

11 CHAIR CALCAGNO: -- and it is all yours, and
12 nobody is going to bother you.

13 COMMISSIONER RYNERSON: No, my main concern here
14 is that this amendment is being based on a stipulated
15 judgment for a building permit. That does not give us the
16 kind of status that we need, the strength of the Coastal Act
17 policies, should we be sued again, which seems to be very
18 likely, from one corner or another.

19 So, it seems to me that this is a very weak read
20 on which to base an amendment.

21 CHAIR CALCAGNO: Okay, Commissioner Holanda got
22 tired or waiting, he left.

23 Commissioner Areias.

24 \\\

25 \\\

1 [MOTION TO CONTINUE]

2 COMMISSIONER AREIAS: I am going to make a
3 suggestion, and I don't know if it will be accepted, or not,
4 but clearly this is not the shortest route to Mr. Page
5 getting his project, you know. It may be a symbolic victory
6 today, but obviously, there are going to be lawsuits, and
7 protests, and this is not the best staff work I've ever seen,
8 with all due respect. And, Mr. Page is obviously, no
9 shrinking violet and doesn't run away from a fight.

10 And, some way or another things have broken down
11 here. I would like to offer as a substitute motion that this
12 be continued, taken up at the San Francisco meeting, and if
13 this isn't worked out between staff and Mr. Page, to mutual
14 accommodation, then I hope that neither one of you would show
15 up. And, I offer that as a substitute motion.

16 CHAIR CALCAGNO: A substitute motion.

17 Is there a "second"?

18 [No response.]

19 The motion dies for lack --

20 COMMISSIONER WAN: I'll second it, just to --

21 CHAIR CALCAGNO: The motion, the substitute motion
22 has a "second". It is now on the floor.

23 COMMISSIONER AREIAS: Do you want me to repeat it
24 again?

25 COMMISSIONER WAN: Yes, I would like to hear you

1 state it again.

2 VICE CHAIR FLEMMING: Yes, at least a little more
3 guidance.

4 COMMISSIONER AREIAS: I am very frustrated with
5 this. As I said, this is not the best staff work I've ever
6 seen, and Mr. Page, as I said, doesn't run away from a fight.

7 And, I think that both sides have got to be put in
8 a room, and withhold food and water, and maybe air, and work
9 this out, because this is ridiculous. It is an embarrassment
10 to all of you. It is an embarrassment to us.

11 And, I would, you know, I hate to say it, but I
12 don't know of another way to do it. If we approve -- I am
13 afraid that if we approve Mr. Steinberg's motion, based on
14 the City of Pacific Grove's -- the application to the City of
15 Pacific Grove, and the stipulated agreement, that there is
16 going to be lawsuits, and this thing is going to continue on,
17 and on, and on, and nobody benefits.

18 I would rather see those reasonable minds that can
19 be objective on the staff on this issue, and whoever is
20 representing Mr. Page, or himself, work this through and come
21 up with a stipulated agreement to us next month, that we can
22 validate.

23 CHAIR CALCAGNO: Nancy.

24 VICE CHAIR FLEMMING: All right, I would like to
25 add to that, Rusty.

1 I am going to support this, accept I would like to
2 add that with the direction, or the inclination to really
3 listen to what was just read, the conditions there have
4 changed. It does not require the intense restrictions that
5 we are putting on it. I would like to see us go more in that
6 direction, and work with Mr. Page.

7 But, he is right, butting heads here is not
8 working, and it will get us all in litigation, and Mr. Page
9 will never get to build his house, and he has been
10 struggling.

11 So, I am going to support Rusty's motion.

12 COMMISSIONER STEINBERG: Mr. Chairman.

13 CHAIR CALCAGNO: Commissioner Steinberg.

14 COMMISSIONER STEINBERG: Thank you.

15 I appreciate Commissioner Areias' statements, and
16 I agree with almost everything that he said, which is why I
17 oppose his motion.

18 I think the only way to bring this to a head is to
19 bring it to a head today. I think this symbolizes the
20 problem we have in many governmental agencies, all too often,
21 and in this agency in particular, and I think we have to
22 force the issue and make a decision today.

23 I think there is a limit as to how many items we
24 can keep continuing and continuing.

25 COMMISSIONER AREIAS: And, I appreciate that Mr.

1 Steinberg. That is why I was a little embarrassed to make the
2 suggestion.

3 But, you are not going to get a resolution today.
4 This is going to continue on for months and months, and lots
5 of people with successful legal careers are going to become
6 prosperous, and Mr. Page is not going to get his house built
7 in time for this summer, much less next summer -- or next
8 summer, much less this summer, and it is not going to happen.

9 I think that we have got to give specific
10 instructions to the staff, and to Mr. Page, to lock
11 themselves in a room, and if some people are so emotional on
12 either side, then they ought to get somebody else to sit in
13 in their place.

14 COMMISSIONER RANDA: I think we are shirking our
15 responsibilities, because we are moving back out into the
16 hallway, what we have been able to do right here in this
17 room. This reminds me of "Hey, let's take it out of the room
18 where nobody hears it, and bring it back nice and clean, and
19 make it sanitized." This is how bad it is.

20 This poor guy, for a 3000-square foot house, has
21 spent near \$1.4 million, and he hasn't built his house.

22 COMMISSIONER AREIAS: Ms. Randa, it may seem like
23 we are shirking our responsibility, but your suggestion is on
24 legally seismically active ground. That stipulated agreement
25 with the city, this thing is not going to stand, and you are

1 going to have a legal challenge, and that is why I would like
2 to give them one more run at it.

3 COMMISSIONER RANDA: Well, I'd say trail to
4 tomorrow.

5 COMMISSIONER STAFFEL: Mr. Chair, Mr. Chair, if I
6 could comment.

7 CHAIR CALCAGNO: All right.

8 COMMISSIONER STAFFEL: You know, I concur with
9 some of the comments from Commissioner Areias, but I think,
10 really, by approving this we are actually going in the right
11 direction, when we are talking about where the residential
12 unit was to be located on the property, as agreed by the City
13 of Pacific Grove.

14 I believe if we support Commissioner Steinberg's
15 direction that will actually facilitate resolution quicker
16 than to continue, because there has been a bureaucratic
17 morass with this, and so that would force it.

18 I don't think it is going to resolve it
19 completely. I think it is going to go back, and finally what
20 is probably going to have to happen is the court will have to
21 sort this thing out, and actually do it in a way that is
22 consistent with the Coastal Act, and how they do that, I
23 don't know, but they will, you know, almost -- they will use
24 the -- there is a way to do it.

25 I am convinced there is a way to construct a

1 remedy that is consistent with the Coastal Act and the best
2 way to get there is to support Commissioner Steinberg's
3 motion.

4 VICE CHAIR FLEMMING: Tim, also, the amendment?
5 you agree with the amendment?

6 COMMISSIONER RANDA: The geological --

7 COMMISSIONER STAFFEL: I agree with the amendment,
8 and actually, I didn't like the way it was done, but I think,
9 even the discussion of the placement of the residential unit
10 on the property, that discussion was helpful, and if we can
11 fashion that condition, and again, you know, it is like
12 making --

13 COMMISSIONER AREIAS: Can I ask the --

14 COMMISSIONER STAFFEL: -- it is actually --

15 COMMISSIONER AREIAS: -- can I ask the applicant
16 one --

17 COMMISSIONER STAFFEL: -- going in the right
18 direction, and the right direction in a very unfavorable
19 factual situation.

20 CHAIR CALCAGNO: Okay, and now to try to bring the
21 Commission up to where I see we are.

22 First of all, there is a substitute motion on the
23 floor, that was moved by Commissioner Areias, and seconded by
24 Commissioner Wan.

25 Then we have an amendment --

1 COMMISSIONER STEINBERG: Pardon me, that is a
2 motion for a continuance.

3 COMMISSIONER AREIAS: Yes, my substitute motion is
4 to continue --

5 CHAIR CALCAGNO: To continue.

6 COMMISSIONER AREIAS: -- but, Mr. Chairman, I
7 would like to ask the applicant, with your permission, which
8 way he'd like to go?

9 MR. PAGE: We would like to decide it today.

10 CHAIR CALCAGNO: Do you want to come forward and
11 --

12 COMMISSIONER AREIAS: He doesn't want to build his
13 house.

14 MR. PAGE: I would like the motion proposed by Mr.
15 Steinberg, voted on today.

16 I think we have shown compliance with several of
17 the key conditions. The stipulated judgment is very, very
18 similar in all of the requirements to the Coastal Commission,
19 save the confiscatory taking issues that we have fought
20 continuously.

21 The house is situation where it has always been.
22 The movement of sand was minor. The lot on the application
23 stands as a valid application with the single lot. We have
24 agreed to the modifications, and agreed to be bound by
25 Condition 3 and parts a. b. and c. with the modification to

1 part b. Let's vote on this today. Let's not send us away.
2 We have been seven years of this.

3 COMMISSIONER AREIAS: You'll be back.

4 CHAIR CALCAGNO: Okay, can I ask the applicant
5 these questions:

6 First of all, if we were to vote on the matter
7 that is before us at the present time, and tell me where do
8 we stand on the lot that is going to be deeded? or
9 restricted?

10 MR. PAGE: I have no intentions of doing anything
11 with the second lot.

12 CHAIR CALCAGNO: But, yet we don't have any
13 language to guarantee us that.

14 COMMISSIONER RANDA: Well, we have to grant a
15 permit, and we don't have to. There is no permit before this
16 body for that second parcel, correct Mr. applicant?

17 MR. PAGE: Yes. It is my property to do with as I
18 want, with all due respect, Chairman Calcagno, and it is my
19 intention to do that, but I can't do it with any restrictions
20 placed on it and get any --

21 CHAIR CALCAGNO: I can understand --

22 MR. PAGE: -- sort of tax benefit.

23 CHAIR CALCAGNO: -- that, and I am trying to get
24 to that problem. I understand that if there is any
25 restrictions, you are not going to gain any tax value by

1 dedicating it to anyone, whether -- whoever it might be.

2 MR. PAGE: Correct.

3 CHAIR CALCAGNO: I understand that, and I am
4 trying to figure a way for us to get around that. Evidently,
5 the staff has reviewed that, and there must not be a way.

6 COMMISSIONER WAN: The problem I have with that,
7 obviously, is the thing that you are constantly talking
8 about, Commissioner Randa, and that is takings.

9 If it is a separate lot, regardless of what the
10 conditions of those lots are, either he, or someone else who
11 owns that lot in the future, can have the right to develop
12 something on it.

13 COMMISSIONER RANDA: Until they come before us,
14 and then it will --

15 COMMISSIONER WAN: And, we can --

16 COMMISSIONER RANDA: -- take then seven years.

17 COMMISSIONER WAN: -- no, and we will be required,
18 as you know, if it is under separate ownership, or it is a
19 separate parcel, to grant some type of development on that
20 parcel.

21 COMMISSIONER RANDA: I believe it is not large
22 enough.

23 MR. PAGE: I actually have a solution.

24 The second lot, the contour above sea level is
25 averaging around 16 to 18 feet. Staff is telling us we can't

1 build a residence above 23 feet. This property is never
2 developable, according to staff's rules.

3 So, if I ever brought an application back here
4 before you, it would be rightfully denied by staff because it
5 was below the 23-foot contour line. I can never take sand
6 from anywhere else on the property and place it here to build
7 that up, so the lot is not developable for all practical
8 purposes, anyway.

9 VICE CHAIR FLEMMING: Okay, could I ask staff a
10 question?

11 CHAIR CALCAGNO: Okay, Commissioner Flemming, and
12 then we are going to get ready to vote.

13 VICE CHAIR FLEMMING: Because this is the key
14 issue, because it seems to me that Mr. Page has shown that
15 he, even with the one parcel, meets the less than 15 percent.
16 Staff says, "No".

17 We also have evidence that the land can't be used.
18 Why could we not stipulate that it would be deeded over to, I
19 don't know, the Coastal Conservancy, somebody that needs it.

20 MR. PAGE: We can't have any restrictions on the
21 property whatsoever agreed to, prior to transference. The
22 IRS says --

23 VICE CHAIR FLEMMING: Not even a verbal agreement?

24 MR. PAGE: Not even a verbal, because it is a
25 binding contract.

1 COMMISSIONER STEINBERG: Then it would not be
2 voluntary gift.

3 MR. PAGE: Correct.

4 VICE CHAIR FLEMMING: Oh, there you go. I
5 understand that clearly.

6 MR. PAGE: It has to be voluntary. It has to be
7 from my heart.

8 VICE CHAIR FLEMMING: Good point, okay.

9 What is the difference here? in this 15 percent
10 judgment, and their view of it, and your view of it? this is
11 where I am not clear, and this is the key issue, I think.

12 EXECUTIVE DIRECTOR DOUGLAS: Well, I will ask Lee
13 Otter to explain, but our understanding, based on the
14 evidence as we have analyzed it, is that in order to comply
15 with the 15 percent, limiting it to 15 percent of the lot
16 coverage, given the size of the house that he is proposing,
17 he would need both lots, in order to comply with that. That
18 is -- and Lee, if you would explain that.

19 VICE CHAIR FLEMMING: Well, why do his numbers
20 conflict with yours?

21 COMMISSIONER RANDA: He explained it. I would
22 like the applicant to tell --

23 CHIEF PLANNER OTTER: Perhaps I can shed some
24 light on this topic by elaborating on the applicant's
25 assertion that he would be within the 15 percent coverage

1 standard just considering Parcel No. 1 alone.

2 In order to do that, you would have to discount
3 the driveway coverage completely. Yet, the Land Use Plan
4 says that driveway areas, for the most part, count as site
5 coverage because, of course, the native plants and animals
6 can't possible use that area once developed.

7 So, the language cited is on page 20 of your staff
8 report, and it is actually not a staff requirement, but a
9 quotation out of the certified Land Use Plan. It says,
10 however:

11 "A driveway area, up to 12-feet in width,
12 the length of the front setback shall not
13 be considered a coverage if it is surfaced
14 by a material approved by the site plan
15 review committee."

16 What that means is the 75-foot required setback --
17 that is the front setback that is required along Sunset Drive
18 -- that does not count, and that has not been counted in our
19 calculations. And, so that you can't calculate it that way
20 and have the math come out right. You need Parcel No. 2 to
21 make the math for the house come out correctly. Otherwise,
22 we are way over 15 percent.

23 MR. PAGE: If I could read from staff's own
24 report:

25 "A driveway area of up to 12-feet in

1 width, the length of the front step back
2 shall not be considered as coverage if
3 surfaced by a material approved by the
4 site plan review committee."

5 We are going to construct this driveway out of
6 crushed granite, just the same as the shared driveway we
7 constructed with the Miller's. It is a permeable substance.
8 It shouldn't be counted as site coverage. It is in your own
9 staff report.

10 COMMISSIONER WAN: Chairman Calcagno.

11 CHIEF PLANNER OTTER: Again, through the Chair --
12 well --

13 COMMISSIONER WAN: Can I just say, let's call for
14 the question on this.

15 VICE CHAIR FLEMMING: I really want to hear this,
16 because I think the percent of coverage is terribly
17 important, Sara. I really want to hear the staff's answers
18 to this. It is going to take -- give me five minutes.

19 CHAIR CALCAGNO: The Chair is going to rule, let's
20 hear the staff report. Let's get an answer on that.

21 CHIEF PLANNER OTTER: All right.

22 In the City of Pacific Grove, the site coverage
23 standard applies to the house, driveway, and any other paved
24 or surfaced area where the native plants cannot grow. This
25 collectively cannot exceed 15 percent.

1 Some exceptions are specified. One of the
2 exceptions is a driveway up to 12-feet in width, the length
3 of the front setback. That has already been incorporated
4 into our calculations, and this is -- it is already
5 discounted from the get-go on this. So, you can't subtract
6 it twice, is what I am saying.

7 So, Parcel 2, you know, has to be considered along
8 with Parcel 1, whether or not they are merged, but they would
9 have to be considered together in order to arrive at the 15
10 percent; otherwise, you will be way over the limit. So,
11 discounting is built into it.

12 COMMISSIONER RANDA: But, isn't there some
13 allowance for the driveways being split by somebody else? We
14 don't have two driveways running simultaneously. We have
15 one. We are sharing. It is kind of like a half.

16 MR. PAGE: It is one driveway, and for all
17 practical purposes, we are not going to develop the second
18 lot. We are not allowed to, so you have achieved your
19 objective.

20 CHAIR CALCAGNO: Okay, what does our counsel have
21 to say before we call for the question on this issue.

22 Counsel, your last words of advice.

23 CHIEF COUNSEL FAUST: Only, Mr. Chairman, that the
24 first vote would be on the motion to continue, which is the
25 motion that is now pending on the floor, and then depending

1 on what occurs with that motion, you will move onto the
2 others.

3 COMMISSIONER RANDA: I urge a "No" vote on this
4 motion.

5 CHAIR CALCAGNO: Okay, roll call for continuance,
6 to the San Francisco meeting.

7 SECRETARY GOEHLER: Commissioner Steinberg?

8 COMMISSIONER STEINBERG: No, I vote "No".

9 SECRETARY GOEHLER: Commissioner Wan?

10 COMMISSIONER WAN: Yes.

11 SECRETARY GOEHLER: Commissioner Wear?

12 [No response.]

13 Commissioner Areias?

14 COMMISSIONER AREIAS: Yes.

15 SECRETARY GOEHLER: Commissioner Belgard?

16 COMMISSIONER BELGARD: No.

17 SECRETARY GOEHLER: Commissioner Flemming?

18 VICE CHAIR FLEMMING: No.

19 SECRETARY GOEHLER: Commissioner Giacomini?

20 [No response.]

21 Commissioner Rynerson?

22 COMMISSIONER RYNERSON: Yes.

23 SECRETARY GOEHLER: Commissioner Randa?

24 COMMISSIONER RANDA: No.

25 SECRETARY GOEHLER: Commissioner Rick?

1 COMMISSIONER RICK: No.

2 SECRETARY GOEHLER: Commissioner Staffel?

3 COMMISSIONER STAFFEL: No.

4 SECRETARY GOEHLER: Chairman Calcagno?

5 CHAIR CALCAGNO: No.

6 SECRETARY GOEHLER: three, seven.

7 CHAIR CALCAGNO: Okay, motion defeated.

8 COMMISSIONER STEINBERG: My motion back on the
9 table now?

10 CHAIR CALCAGNO: Your motion now for -- your
11 amending motion is on the table.

12 CHIEF COUNSEL FAUST: And, Mr. Chairman, that --
13 let me just state it, and Commissioner Steinberg, please --

14 COMMISSIONER STEINBERG: Thank you.

15 CHIEF COUNSEL FAUST: -- if I don't state it
16 correctly, this is the time to clarify it, so the
17 Commissioners are clear upon which it is voting.

18 The motion, as I understand it, the amending
19 motion, is to delete the staff recommended conditions, to
20 substitute the terms and conditions of the 1993 stipulated
21 judgment in the lawsuit between Page and the City of Pacific
22 Grove, and to further add onto that the staff recommended
23 Conditions 3.a. 3.b. and 3.c. that is my understanding of the
24 motion.

25 COMMISSIONER STEINBERG: And, there was a one-word

1 change --

2 CHIEF COUNSEL FAUST: Oh, the change of "above" so
3 that the house could be vertical rather than landward of.

4 COMMISSIONER STEINBERG: Yes, and that includes
5 the indemnification by Mr. Page.

6 CHIEF COUNSEL FAUST: If you would, for my
7 clarification, and for the record's clarification, please
8 state that, because I am not familiar with that.

9 COMMISSIONER STEINBERG: This was the -- Mr. Page,
10 this was the indemnification with regard to geologic
11 conditions? is that correct Mr. Page?

12 MR. PAGE: Sorry.

13 COMMISSIONER STEINBERG: The indemnification with
14 the --

15 MR. PAGE: Excuse me, actually, if you read 3.a.
16 carefully, it actually talks about merger of the lot, and I
17 would like to eliminate that specific wording in Condition
18 3.a. We could actually be in a box with that one.

19 COMMISSIONER STEINBERG: Would you --

20 MR. PAGE: It says, representing -- i.e. 15
21 percent of 1.08 acres representing deeded Parcels 1 and 2
22 combined. We should strike that language.

23 COMMISSIONER STEINBERG: All right.

24 Mr. Legal -- counsel, the error was that 3.a.
25 included a reference to the combination of parcels.

1 CHIEF COUNSEL FAUST: I think that one
2 possibility, Commissioner, would be to strike the
3 parenthetical phrase, beginning with "In other words, i.e. 15
4 percent of" going through the word "combined" closed
5 parenthesis.

6 COMMISSIONER STEINBERG: Thank you for clarifying.

7 CHIEF COUNSEL FAUST: Otherwise, you wish to keep
8 3.a.?

9 COMMISSIONER STEINBERG: Yes.

10 CHIEF COUNSEL FAUST: Okay.

11 COMMISSIONER STEINBERG: Thank you.

12 MR. PAGE: And, I agree to provide an
13 indemnification letter to the California Coastal Commission
14 indemnifying them against liability for wave run up.

15 And, we have, in fact, included a draft copy of
16 that in our materials submitted to you previously.

17 COMMISSIONER STEINBERG: And, then, let me simply
18 ask the other Commissioners, not whether they agree or
19 disagree with the motion, but do all Commissioners understand
20 the motion?

21 COMMISSIONER WAN: I have one question of staff.
22 One last question, and then a final comment.

23 The change to "above" the 23-foot mark, does that
24 enable the applicant to put the house on pilings and move it
25 forward?

1 MR. PAGE: I didn't understand.

2 COMMISSIONER WAN: I asked staff, excuse me.

3 CHIEF PLANNER OTTER: In consultation with our own
4 staff geologist, we came to this conclusion, that if the
5 house were to be built where it is presently shown on the
6 site plan, it would need the type of foundation that would
7 resist the storm wave run up, if it turns out that it is in
8 the storm wave run up area.

9 So, if it turns out it is in this hazardous area,
10 then they need the kind of foundation so the storm waves
11 could run up actually under the house, and if the sand is too
12 soft, it would just simply melt away under the force of the
13 storm wave, but the house would be left standing, if you
14 built the right type of foundation. So, it would look like a
15 house on piers, after such a storm event.

16 So, the house would rest on the sand as it exists
17 today, but given a storm wave event, it would be on these
18 underground pilings, or caissons, so that is the -- you might
19 view them as hidden concrete pilings would be the nature of
20 the foundation constructed according to the geologist's
21 recommendations.

22 COMMISSIONER WAN: And, might this -- if it is
23 turned out to be, in a storm run up area -- might this result
24 in the need for some kind of protective device in the future?

25 CHIEF PLANNER OTTER: That would be our concern,

1 yes.

2 COMMISSIONER WAN: And, we don't have any
3 assurance that in the future if such a protective device were
4 needed, that the applicant wouldn't -- or the owner of the
5 house at the time wouldn't come in, request it under the
6 Coastal Act?

7 EXECUTIVE DIRECTOR DOUGLAS: No, we don't and in
8 fact --

9 COMMISSIONER WAN: And, cause impacts to the
10 neighboring beach, right.

11 EXECUTIVE DIRECTOR DOUGLAS: -- that is one of the
12 concerns that we have. I mean, no matter what you say today,
13 it may be at some point in the future that that may be
14 required. We don't know that it would be.

15 But, any condition that says that you agree not to
16 build any protective device, I think, is unenforceable.

17 COMMISSIONER WAN: So, that is the reason why we
18 ask for information about where the storm run up line is,
19 because of --

20 EXECUTIVE DIRECTOR DOUGLAS: That it be landward,
21 as --

22 COMMISSIONER WAN: -- that it be landward --

23 EXECUTIVE DIRECTOR DOUGLAS: -- opposed to above.

24 COMMISSIONER WAN: -- rather than above.

25 EXECUTIVE DIRECTOR DOUGLAS: And, that was the

1 essence of the debate when the amendment was made before, but
2 that is up to you to decide that.

3 CHAIR CALCAGNO: Okay, we basically have an
4 amendment to the main motion on the floor.

5 Roll call.

6 SECRETARY GOEHLER: Commissioner Wan?

7 COMMISSIONER WAN: No.

8 SECRETARY GOEHLER: Commissioner Wear?

9 [No response.]

10 Commissioner Areias?

11 COMMISSIONER AREIAS: No.

12 SECRETARY GOEHLER: Commissioner Belgard?

13 COMMISSIONER BELGARD: Yes.

14 SECRETARY GOEHLER: Commissioner Flemming?

15 VICE CHAIR FLEMMING: Pass.

16 SECRETARY GOEHLER: Commissioner Rynerson?

17 COMMISSIONER RYNERSON: No.

18 SECRETARY GOEHLER: Commissioner Randa?

19 COMMISSIONER RANDA: Yes.

20 SECRETARY GOEHLER: Commissioner Rick?

21 COMMISSIONER RICK: No.

22 SECRETARY GOEHLER: Commissioner Staffel?

23 COMMISSIONER STAFFEL: Yes.

24 SECRETARY GOEHLER: Commissioner Steinberg?

25 COMMISSIONER STEINBERG: Yes.

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1 SECRETARY GOEHLER: Commissioner Flemming?

2 VICE CHAIR FLEMMING: Yes.

3 SECRETARY GOEHLER: Chairman Calcagno?

4 CHAIR CALCAGNO: Yes.

5 SECRETARY GOEHLER: Six, four.

6 CHAIR CALCAGNO: The amendment passed.

7 Now to --

8 COMMISSIONER RANDA: I would like the findings --

9 CHAIR CALCAGNO: -- the motion as --

10 COMMISSIONER RANDA: -- to be included, the
11 findings of --

12 CHAIR CALCAGNO: -- amended.

13 COMMISSIONER RANDA: -- November 4 --

14 MR. PAGE: Thank you, Commissioners.

15 COMMISSIONER RANDA: -- letter, and the findings
16 of Margaret Mary O'Connell's November 4 documentation as a
17 part of the findings.

18 COMMISSIONER WAN: Do we have a main motion to do?

19 CHAIR CALCAGNO: We have a main motion, as
20 amended, to still vote on.

21 COMMISSIONER WAN: Right.

22 CHAIR CALCAGNO: At this time, we will have the
23 roll call.

24 SECRETARY GOEHLER: Commissioner Areias?

25 COMMISSIONER AREIAS: No.

1 SECRETARY GOEHLER: Commissioner Belgard?
2 COMMISSIONER BELGARD: Yes.
3 SECRETARY GOEHLER: Commissioner Flemming?
4 VICE CHAIR FLEMMING: Yes.
5 SECRETARY GOEHLER: I'm sorry?
6 VICE CHAIR FLEMMING: Yes.
7 SECRETARY GOEHLER: Okay.
8 Commissioner Giacomini?
9 [No response.]
10 Commissioner Rynerson?
11 COMMISSIONER RYNERSON: No.
12 SECRETARY GOEHLER: Commissioner Randa?
13 COMMISSIONER RANDA: Yes.
14 SECRETARY GOEHLER: Commissioner Rick?
15 COMMISSIONER RICK: No.
16 SECRETARY GOEHLER: Commissioner Staffel?
17 COMMISSIONER STAFFEL: Yes.
18 SECRETARY GOEHLER: Commissioner Steinberg?
19 COMMISSIONER STEINBERG: Yes.
20 SECRETARY GOEHLER: Commissioner Wan?
21 COMMISSIONER WAN: Yes.
22 SECRETARY GOEHLER: Chairman Calcagno?
23 CHAIR CALCAGNO: Yes.
24 SECRETARY GOEHLER: Six, four.
25 CHAIR CALCAGNO: Motion carried.

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We will take a five minute break -- as amended.

MR. PAGE: Thank you very, very much indeed,
Commissioners.

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[Whereupon the hearing was concluded.]

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LAW OFFICES OF
MARY-MARGARET O'CONNELL

CALIFORNIA
COASTAL COMMISSION

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November 4, 1996

TO: MEMBERS OF THE CALIFORNIA COASTAL COMMISSION

FR: Mary-Margaret O'Connell, Esq.
Representative of applicant Page Family

RE: Staff Report and Proposed Conditions
Application Number 3-96-102

With due respect to the members of the Coastal Commission and its staff, through this memorandum the Stephen Page family registers their strenuous objection to the analysis and resulting conditions that the Commission staff seeks to impose on the Page family residence to be constructed at 1450 Sunset Drive, Asilomar Dunes are, City of Pacific Grove, Monterey County.

The conditions are excessive, over-broad, burdensome, and outside the spirit and intent of the California Coastal Act and applicable case law. The conditions as stated will result in the taking of 85% of the Page family property without compensation. There is no legitimate necessity to cause the merging of the two parcels that comprise the Page property. Further, the staff erroneously labels the Page property as an Environmentally Sensitive Habitat when, in truth and in fact, the property is only adjacent to any sensitive habitat.

Further, the staff has either misconstrued the terms of a court judgement pertinent to the property or seeks to impose restrictions and conditions that far exceed the conditions imposed on the property pursuant to the court judgement. (Monterey County Superior Court, case number M 26049.) The conditions also exceed the legitimate conditions that should be placed on the Page property under the totality of the circumstances and any interpretation of the Coastal Act.

The Page family submits the following arguments, explanations, and mitigation in the order the topics appear in the staff report under consideration:

*STAFF NOTE # 1: Status of two parcel property: Staff refers to a revised Assessor's Parcel Map and indicates that the revised map is included in the staff packet as Exhibit 3. There is no Exhibit 3

EXHIBIT NO. E
APPLICATION NO.
PAGE
P-3-96-102

in the packet materials provided to the Page family or their legal representative. Any revision fails to take into consideration the legal reality that there are two parcels in the Page family property: Parcel I, the landward lot whereon the Page family wishes to build their residence, and Parcel II a smaller seaward lot which the Pages may wish to dedicate or enter some other disposition. The Pages object to any merger of the two lots.

*STAFF NOTE # 2: Legal Background: Staff omits significant legal history pertinent to the Page project:

(1.) Federal litigation: Page has appealed the dismissal of the federal court action against the Commission, the city, and the Regional Park District. The pending staff report does not inform you that Page offered to settle this action in lieu of pursuing his right of appeal. The settlement offer was conveyed to the legal representative of the Coastal Commission on August 2, 1996. (EXHIBIT 1.) We were told that Page's settlement offer was communicated to the Commission and the Commission rejected the offer without returning a counter offer. (EXHIBIT 2.) We do not believe that the offer was in fact communicated to the Commission. A review of the pertinent agendas reveal that no Page litigation issues have ever been before the Commission for consideration. (EXHIBIT 3, agendas in reverse chronological order.) While the agendas list several other types of litigation considered in closed session, the Page federal litigation, the appeal, and the settlement offer have not been before the Commission.

Page is gravely concerned that the rightful decision makers comprising this Commission have not reviewed Page's good faith offer to settle. He is further concerned that decisions pertinent to the Commission's alleged response to his litigation and unnecessary and expensive responses to his appeal have been made by individuals other than this body. It is grossly inappropriate to circumvent the lawful review powers of this body.

Stephen Page asks: Who reviewed and rejected his settlement offer of August 2, 1996? Who reviewed the federal litigation and rendered decisions about the course of that litigation throughout 1996? Who reviewed the pending appeal and empowered the legal representatives to file the unnecessary, unfounded, and expensive motion to dismiss against Mr. Page?

Page was entitled to have this body make decisions about his property.

(2.) Page family has offered to sell their property to any public entity: Following Page's application for appeal of the federal matter, Page submitted a good faith offer to sell the family property to any public entity. The offer was submitted to the representatives of the Coastal Commission, the Monterey Regional Park District, and the City of Pacific Grove. The city and the Park District indicated some interest. (EXHIBIT 4.) Although City and Park District agendas reveal that both entities

have commissioned an appraisal, there has been no communication to Page about the status of his offer to sell. In the hopes of moving the process along, last month Page communicated alternative options to the Park District and the City.

(3.) September 13, 1995 Amendment Request was Page's attempt to correct staff's refusal to honor specific directions communicated to Stephen Page and adjacent land owner Paul Miller. (EXHIBIT 5, Declarations of Page and Miller.) Page contends that the wave run-up issue and the requirement for an additional updated geologic report is a red herring. This matter will be discussed more fully herein below.

(4.) History of litigation: There were three law suits pertinent to this property. Staff failed to include the 1993 state litigation of PAGE V. CITY OF PACIFIC GROVE, THE CITY COUNCIL OF THE CITY OF PACIFIC GROVE; HON. FLORENCE SHAEFER; HON. ROBERT DAVIS; HON. TERRENCE ZITO, HON. ELEANOR ROGGE, Monterey Superior Court No. M 26049. This matter was resolved in December 1993 by a detailed stipulated judgement containing terms and conditions setting forth permissible development. In the judgement, Page agreed to certain terms and conditions that exceeded the letter of the requirements of the LUP. The application packet before this Commission contains certain of the pertinent documents. Unfortunately, staff scattered the operative documents throughout the staff packet resulting in considerable confusion for any reader.

A complete understanding of the true limits of the Stipulated Judgement is essential to an understanding of the Page Family's objections to several of the proposed conditions presently pending before this Commission. Staff appears to have misinterpreted terms of the state judgement imposed upon this property and the impact of the judgement on the development of the property. The Page Family has included a true and accurate copy of the totality of documents relevant to the stipulated judgement as EXHIBIT 6: signed stipulation which refers to that document's attached Exhibit 1, Council Resolution 6322 which incorporates by reference a city Exhibit B, the City Attorney's findings memorandum which incorporates by reference a city Exhibit C, the conditions of approval, and a city Exhibit D, the CEQA Mitigation Measures. Also incorporated by reference is the Final Environmental Impact Report and landscape reports of Bruce Cowan.

The final Environmental Impact Report is included in the Commission packet as Exhibit B. Staff did not include the Cowan reports. Unfortunately, staff buried and scattered the other operative documents in staff Exhibit M, which is a collection of stale exhibits from the internal appeal process within the city from 1992. As a matter of law, the only operative documents relevant to the city's position are: the executed Stipulated Judgement of December 2, 1993; Council Resolution 6322; City attorney's findings memo; conditions of approval; CEQA Mitigation Measures; and the Final Environmental Impact Report including the

Cowan landscape reports. Page has provided the relevant Cowan materials as EXHIBIT 9.)

Through this law office Page is presently negotiating with the City of Pacific Grove in the hopes of avoiding litigation against the city's proposed easements and deed restrictions that exceed the terms of the Stipulated Judgement. A contempt action to enforce the terms of the Judgement was filed on August 6, 1996 but not served pending the outcome of the negotiations. The pertinent declaration in support of the contempt/enforcement action is presented at EXHIBIT 7 and sets forth the interrelation of the judgement documents and true interpretation of terms and conditions.

(5.) Expiration of permits: Staff misstates the operative expiration dates for permits: City approvals for the Page property will not begin to run until the Coastal Commission issues (as opposed to grants) a development permit. (EXHIBIT 8.) The November 1994 Coastal Permit was never issued. The actual permit and deed restrictions were transmitted to Page well after the 60 day window for the administrative review by the court permitted by the Coastal Act. Staff's delay in transmitting the packet essentially cost Page the right to litigate the flaws in the November 1994 permit action.

STAFF SUMMARY: The Page family contends that the property is not an environmentally sensitive habitat as intended by section 30240(a). The property is adjacent to certain sensitive habitats. The property is bordered by land controlled by public entities and dedicated as park land. A neighboring lot immediately adjacent to the Page property was developed years ago. Therefore, the typical concerns about creating a negative precedent with respect to land use patterns is moot. The single proposed home and approved landscape plan will not obstruct the scenic views of this multiple mile coastal park way. The existence of the small seaward lot is consistent with the needs of public access without further limitation. The city's purchase of remaining buildable parcels in the development area eliminated any prejudice to the implementation to the city's certified LUP. The Page family is willing to indemnify the Commission regarding any issues pertinent to the alleged hazardous storm wave run-up area.

The Page family further contends that it is manifestly unfair for staff to propose deed restrictions and ask this Commission to impose said restrictions when, in fact, the terms and conditions of the deed restrictions have not been provided, in advance, for the Commission's review or Page's review. Following the permit application proceedings in 1994, staff provided Page with deed restrictions that were clearly meant for Los Angeles, and so stated. Significantly, the situs of the Page property is nothing like the circumstances in Los Angeles or any other developed urban area. The "form" deed restrictions were over-broad, burdensome, and if imposed again, will result in the taking of 85% of the Page property without compensation.

Further, the deed restrictions are superfluous because any changes, remodeling, additions, shoreline protection work, or other action are required by law to be submitted for review prior to any such work. Further, the deed restrictions, as formerly stated, appear to preclude any revisions in the future. It is manifestly unfair to saddle the Page family with coercive and limiting deed restrictions, while at the same time, promising the family that they are free to apply for future permits for potential changes. The deed restrictions, as suggested by staff, could be used against future changes such as a dog run, a child's play house, a fence enclosing a child's play area, etc.

Further, any standard or special condition imposed by the Commission will run with the land, as a matter of law. There is no need to impose separate deed restrictions. Deed restrictions are cumulative and duplicative, and in certain instances, exceed the terms and intent of proposed special conditions.

More importantly, as will be explained fully hereinbelow, staff's recommendations would impose conditions on the Page family that have not been imposed on similarly situated properties and, if imposed, have never been enforced.

ISSUE SUMMARY CHART: The Page family objects to many of the characterizations stated in the summary chart.

The property is not ESHA. The conditions, as suggested, do result in a taking of 85% of the property without compensation. The situs of the property and totality of circumstances fails to present any scenic issues sufficient to justify the restraints suggested in the special conditions. The shoreline hazard issue is a red herring. There are no issues requiring this property owner to provide "public access in new development" or to "preserve existing public access" on Parcel I.

The stipulated state judgement sets forth the terms applicable to this property and supersedes the generalities in the LUP. Neither the LUP nor the stipulated judgement required merger of applicant's lots.

The Page family is supportive of, and respects, the conditions pertinent to archaeological history of indigenous peoples that may be found on the site.

STAFF RECOMMENDATION:

III. Special Conditions:

1. Incorporation of City's Mitigation Requirements: Staff asks you to impose the terms of the EIR as a special condition (Staff EXHIBIT B.). Staff fails to state that the certain terms of the Final Environmental Impact Report were amended by the terms and conditions of the Stipulated Judgement. It is manifestly unfair for staff to attempt to impose special conditions that the Superior

Court of the State of California has deleted or amended. The staff is essentially asking you to burden the Page family with terms that are outside the Stipulated Judgement.

*REQUEST: We ask that the Coastal Permit contain no special conditions drawn from the EIR.

*REQUEST: We further request that there be specific language in any permit issued that specifically grants to Page and his successors in interest the right to revise, amend, change, etc. any permit condition or project plans subject to applicable regulations of the Coastal Commission and/or city, depending on the possible future implementation of ordinances for the LUP by the city.

2. Updated Geology Report: Staff fails to cite the authority for the expiration of the 1990 Geologic Report. With the exception of the alleged problematic movement of driveway materials to a corner of the Page property in 1995, staff relied on the 1990 report during the 1994 Commission hearing on Page's original permit application. As stated herein above and demonstrated through EXHIBIT 5, Page and Miller were directed by staff to deposit driveway grading materials on Page's property. It is manifestly unfair to "create" the allusion that the addition (as opposed to removal) of grading materials to the Page property has created some sort of detrimental impact on tsunami inundation, set back lines, floor elevations, or the alleged 50-100 year wave run up. (EXHIBIT 5, Declarations.)

Staff analyst Lee Otter met with applicant and Paul Miller on site on February 3, 1995 and recommended that the displaced sand from the shared driveway construction be placed on Page's building site to elevate the construction area. It is outrageous to demand that Page now pay additional monies to prove that staff's recommendation was appropriate.

The updated report would be appropriate if Page had removed materials on the seaward portions of his property or lowered the seaward elevation of his property. Undoubtedly, staff is trained and experienced enough to verify that there was no lowering of any important elevations. Undoubtedly staff has also reviewed the situs of the project during this reapplication procedure and is trained and experienced enough to verify that there has been no significant lowering of the important elevations by any action, Page's or God's.

*REQUEST: We ask that you spare the Page Family the unnecessary expense of an additional geologic report. We further request that the operative word regarding placement of the home be changed to the word "above" instead of landward of the alleged 50 year run up line. We further request that if there remains any concern by the Commission, that the concerns may be allayed by Page indemnifying the Commission pertinent to these issues.

3. Revised Development Plans: The Page family objects to the following unnecessary and unfounded required revisions:

a. merger of lots, calculations: merger of the lots is not required for this development. As indicated by staff at page 20, paragraph #2:

. . . a driveway area of up to 12 feet in width the length of the front setback shall not be considered as coverage if surfaced by a material approved by the Site Plan Review Committee. An additional 5% may be used for immediate outdoor living space, if left in a natural condition, or landscaped so as to avoid impervious surfaces, and need not be included in the conservation easement . . .

The proposed condition a ignores the reality that the Page plans do, in fact, include a permeable surfacing that precludes the driveway's inclusion in coverage calculations. The applicable true calculations are:

total sq. footage of .7 ac parcel	=	30,232 sq. ft.
building footprint: 3,680 sq. ft.		
patio footprints : 570 sq. ft.		
total footprint	=	4,250 sq. ft.
15% coverage calculation	=	4,534 sq. ft.

Therefore, Page has a 284 square feet to spare. There is no legitimate reason to force the merger of the parcels. Further, such a merger would preclude the Page family from some future dedication or other resolution involving the smaller seaward lot.

*REQUEST: Deletion of the special condition that requires merger of the two lots. Further, that no deed restrictions be requested pertinent to any merger.

b. 50-year run up/flooding: *REQUEST: that language of this condition be modified to substitute the word "above" for the word "landward."

c. elevation: *REQUEST: that the requirement for an updated geologic report be deleted.

f. grading plan revisions: *REQUEST: further clarification of this condition by staff. Certain terms of this condition may be superfluous given the terms of the stipulated judgement.

g. drainage system: *REQUEST: that this condition be deleted. This conditions is contained within the terms of the stipulated judgement and therefore, it is unnecessary to restate it in the Coastal development permit.

h. underground utility lines: The Page family supports underground utilities, however, the family continues to object to

the imposition of cumulative restrictions. This condition is already part of the city's permit conditions and the stipulated judgement.

*REQUEST: That this condition be deleted.

i. *exterior finishes: This condition is already contained within city permit conditions and the stipulated judgement.

*REQUEST: That this condition be deleted.

> general review requirement: said reviews are required by city and therefore unnecessarily repetitive and burdensome to impose as a Coastal permit condition.

4. Merger of Parcels: as stated hereinabove, Page has requested deletion of this condition. A merger requirement is unnecessary and, in and of itself, is a taking of the smaller seaward lot without compensation. The lot should remain a separate legal entity in the event that Page wishes to dedicate the lot or sell it.

*REQUEST: if the Commission requires merger of the lots, the Page family requests compensation for the seaward lot.

5. Shared Driveway/Utility Access Rights: this condition has been met. Easements have been recorded and run with the land.

*REQUEST: delete condition.

6. Deed Restrictions: The Page family strenuously objects to the imposition of deed restrictions prior to this Commission's review of the actual documents. Likewise, the Pages object to the requirement of deed restriction documents that have not been included in the staff packet. The reviewing Commissioners should not be expected to vote on a pig-in-a-poke. The Page family should not be required to respond to these conditions without knowing what actual restrictive terms are in store for them. More importantly, many of the proposed restrictions are contained within the stipulated judgement and need no restatement or contradiction.

a. Cowan landscaping plan: staff failed to include a copy of the Cowan reports. Certain aspects of the Cowan reports have been modified by the stipulated judgement. Page has included the Cowan reports as EXHIBIT 9. Further arguments are stated herein below.

b. fencing: This deed restriction ignores the reality that a family with children will be living on this property. It is necessary to balance wild life issues with family safety and family responsibility. There should be no advance limit as to permissible types of fencing.

*REQUEST: that no deed restriction or condition governing fencing be imposed.

c. monitoring program: This deed restriction flies in the face of the terms of the stipulated judgement which clearly modified the monitoring requirements and reduced time frames to a relatively reasonable period. The Mitigation Agreement was modified. The judgement limited the monitoring program to three years. Further, as will be discussed fully hereinbelow, the monitoring programs imposed on others are, in fact, not implemented. Therefore, imposition of a restriction on Page that is not implemented against others exposes the Page family to additional selective harassment such as they have suffered throughout the duration of this building project. The terms of the stipulated judgement control this issue.

*REQUEST: deletion of this condition as a condition or a deed restriction.

d. drain outfall/etc.: It is not necessary to make this condition a deed restriction. Typically such alternative possibilities are merely conditions of a permit.

*REQUEST: deletion of this requirement as a deed restriction.

e. protection of scenic/natural habitat values: The Page property is not ESHA. A full explanation of the ESHA adjacent nature of the property is set forth in EXHIBIT 10, history of the property. Additional information pertinent to the actual status of the property is recited in EXHIBIT 11, a 1996 study referring to the substandard habitat on the Page property and outlining the lack of effect of deed restrictions and conservation easements. (EXHIBIT 11, pages 6, 13-15, 25, 27-29, 31-32.)

The proposed deed restrictions contained in item (e) are based upon the erroneous assumption that the property is ESHA. The deed restrictions, as suggested, are over-broad, restrictive, burdensome, and result in the taking of 85% of the Page property without compensation. Further, the basic premise of the language of this restriction ignores the reality of the stipulated judgement and the terms and conditions of that state court judgement. No further conditions need to be placed on the property.

Perhaps the most outrageous condition required by this deed restriction is the requirement that

. . . homeowner access [be] accommodated within the restored area (on pedestrian boardwalks or by similar means) . . .

Does staff seriously believe that such a deed restriction is within the guidelines of Lucas v. South Carolina Coastal Council? While there is one boardwalk path through the adjacent parkland, there is no requirement that the public stay on the boardwalk. The method chosen to channel high level public traffic through public park land would not be imposed on a private property owner.

The Page family asks the Commissioners to ponder the reality of a family situation with children. If a Page child or juvenile friend or relative dares to step off the restricted boardwalk, what is the consequence? What about the child's first party after moving into this area wherein he invites his class to his home? Is Mrs. Page restricted from performing Tai Chi exercises in the sand of her own property? Or running in the soft sand to build up muscles for a cross country race? Is the Page family and their guests to be prevented from freely traversing the entire property to its fullest extent? What limits will be put on the family's freedom of access to the entirety of the seaward parcel? And what about the potential family dog, shall he or she be trained to the boardwalk? The city of Pacific Grove prides itself on encouraging citizens to collect compost, what fate the compost pile with such a restriction?

The "boardwalk" restriction is even more ludicrous when read in combination with the "generous" natural outdoor living allotment of 5% of the entire property:

. . . and an "immediate outdoor living area" left in a natural condition or landscaped to as to avoid impervious surfaces not to exceed 5 percent of the entire property, the restriction shall cover all of the combined Parcels I and II . . .

One envisions a family bar-b-que wherein guests are warned to stay closeted within the confines of the 5% perimeter of the house or only on approved board walk paths.

These conditions make the family a prisoner in their own home. No family should be forced to limit their lifestyle in such a manner. The economically viable uses permitted by Lucas and its progeny do not restrict "uses" to simply the limited structure of the home. There is no legitimate state interest to be gained by such limiting deed restrictions. It is silly to mandate free passage by wildlife and restrict the property owner to less. It is improper to impose a deed restrictions that, in reality, dedicates the property to the public without compensation.

Obviously, the investment backed expectations of any family purchasing a building lot includes use of the lot for something other than the house structure. The family wants a house and a yard, otherwise, they would be moving into a condominium.

***REQUEST:** deletion of any deed restriction containing any of the language of item (e). If this Commission determines to impose such restrictive conditions, the family hereby requests compensation for the taking of the property. The Page family also refers the Commissioners to the other "requests" as stated hereinabove and below as it relates to the totality of the restrictions cited in item (e).

f. additions: It is not necessary to impose a deed restriction on these issues. Existing City and Commission permit

application procedures are in place that govern additions, alternations, modifications, etc.

*REQUEST: deletion of this deed restriction.

h. assumption of risk: The Page family is in agreement with the concept of this deed restriction, however, the family objects to imposition of such a restriction prior to review of the actual document by the Commissioners and the Page family. It is clearly a violation of due process to ask the Page family to respond to conditions that are not provided for their review.

*REQUEST: prior to the November 14, 1996 hearing on the re-application, staff is to provide the actual documents that comprise the restriction desired in item (h) and any and all other deed restrictions to be considered by applicant and Commissioners.

7. Final Residential Landscaping Plan: The terms of this Special Condition contradict the terms of the stipulated judgement and the revisions to the "Basic Landscape and Restoration Plan" drafted by Bruce Cowan and included herein as EXHIBIT 9.

The actual restoration goals as set forth in the stipulated judgement are limited. As stated at page 2, in pertinent part

Because this project involves a home, the Plan is a compromise between a restoration and a landscape. . . .

Accordingly, pursuant to the terms of the stipulated judgement, the applicant is required to restore as dune habitat only sand that is moved and deposited as a result of grading for construction. Monitoring is reduced to three years. If applicant plants anything else on the property, certain limited plants are required. There is no affirmative duty to restore the whole property.

It is important to recognize that the requirements of monitoring, conservation easements, and deed restrictions are of little, if any, real value, given the history of such requirements. (EXHIBIT 11, 1996 Study of Deed Restrictions/Easements.) It is of equal importance that it is manifestly unfair to saddle the Page family with the mandate to create an ESHA out of only an ESHA adjacent property. (EXHIBIT 10.)

*REQUEST: That no additional terms and conditions be imposed separate from the stipulated judgement operative against this property. The stipulated judgement is sufficient without additional action by the Commission.

8. Maintenance and Restoration Plan: For the reasons recited herein above and below, the property is now subject to a stipulated court judgement that has modified certain terms and conditions of the Cowan Landscape Plan. Further, a clear reading of the landscape plan cites the primary purpose of the plan as being

"residential." The Page family has no affirmative duty to turn the property into ESHA habitat.

*REQUEST: deletion of condition. The terms of the stipulated judgement are sufficient.

9. Mitigation Agreement: This requirement is unnecessary given the fact Tidestrom's Lupine has not been actually seen on the immediate property. However, applicant has complied with said mitigation agreement.

12. Mitigation Measures: Staff Exhibit B, the Final Environmental Report, has been modified by the stipulated judgement. It is manifestly unfair of staff to require applicant to comply with a document that was modified by court action. While certain monitoring features remain intact, it is improper to refer to the EIR as if the document still exists as a whole.

*REQUEST: If this condition is imposed, the remaining operative language of the EIR and any modifications of the stipulated judgement should be set forth specifically in the condition. Please do not invite confusion by merely referring to the old EIR.

IV. FINDINGS AND DECLARATIONS:

1. Project description and background:

Based upon the above objections and accompanying exhibits submitted by the applicant, staff findings are not suitable for this project.

Staff is correct that applicant's property is the only remaining vacant privately owned land on the entire Pacific Grove shoreline. Therefore, it is unjust to impose criteria and conditions on the property as if there is still potential for increased urbanization of the area on the seaward side of the street. There will never be parcel to parcel development. There will never be the risk of interruption to the viewshed due to construction of additional homes. This important turn of events has really been overlooked by staff. The very purposes sought to be served by hyper-restrictive conditions are unnecessary and over-burdensome to applicant given the purchase of the remaining buildable lots by public entities.

The property is a lovely parcel, however, it is not ESHA. Further, it is unnecessary for the staff to have included the stale information from the old application and appeal process. The incorporation of the remaining buildable lots into Asilomar State Beach makes those arguments moot and inapplicable to the applicant's current re-application.

Prior to the purchase of the undeveloped lots, there was a concern about development on all of the Rocky Shores parcels. That concern is gone. There will be no crowded cluster of development on the seaward side of the shoreline park. The reality now is that only the Page home will join the Miller home. Therefore, the Page family asks the commissioners to base your decisions on present realities instead of stale inapplicable arguments.

Further, the mandamus review of the Commission's action as reviewed in Mapstead v. Coastal Commission also has no relevance to the current re-application. The Mapstead action reviewed the former permit application and Commission decision. As we have already pointed out, the former action was based upon different realities, different potentials, different situations, and other issues that do not exist at this time. The seeming critical nature of the then-Page application as the first of potentially new developments at Rocky Shores arguably required a strict approach at that time. The purchase of all remaining Rocky Shores building lots has greatly altered the real issues today.

Staff's recitation of LUP policies at page 15 is not instructive here. This property is the subject of a stipulated judgement wherein the city is a party to that judgement. The stipulated judgement set the terms for development. Further, even for those LUP policies that remain unaffected by the judgement, we ask that you not be swayed by the rote recitation of LUP policies that are not followed, such as conservation easements, monitoring, etc. There is no legitimate reason to burden the Page property with restrictions that are not imposed on others or which have been ignored to the benefit of others.

2. Basis for Decision:

The Page family urges you to discount the notion that the LUP and the Coastal Act are the sole standards of review for the Page property. Such a viewpoint ignores the reality of the stipulated judgement. In truth and in fact, the conditions suggested by staff in this re-application process do take 85% of the Page property without compensation. The Coastal Act permits development of a single family residence in order to provide a reasonable economic use of the Page property. The Page family should not be prisoners of the foot print of their house and the artificially established 5% outside living area.

The Page family purchased the property with the expectation of residential use. There is nothing in the concept of "residential use" that requires a family to walk their property on artificial boardwalks or forecloses the construction of a reasonable fence for child-safety purposes or the reflection of the considerations of a responsible dog owner. Investment backed expectations of a residential property include use of that property like any family uses their property. It is unreasonable for staff to conclude that the only investment expectation was construction of a structure and imprisonment within that structure.

3. Environmentally Sensitive Habitat Area:

As stated herein above, Parcel I of this property is not ESHA. It is ESHA adjacent. There is no reason to impose criteria on the property as if it is ESHA. As indicated by recent studies, the Page property has been considered a substandard dune area for years. (EXHIBIT 10; EXHIBIT 11.) The construction of the Page home will cause the movement of certain limited amounts of materials and create an opportunity to "restore" a dune environment in the moved and relocated materials. This limited recreation of the dune environment is a term and condition of the stipulated judgement. It is manifestly unfair for the Commission to require more. We urge you to accept the reality that the Cowan landscape restoration plan was modified in the stipulated judgement. Do not ask more than is required.

Further, contrary to staff's comments at page 19, the alleged "cumulative impacts" of this project to Rocky Shores or Asilomar Dunes is deminimus. The Page home is the last that will be built on the coast of Pacific Grove.

Further, regarding staff's comments at page 20, the deed restrictions are unnecessary and exceed the terms of the stipulated judgement. Furthermore, it is burdensome to saddle Page with conditions that are not enforced when imposed on others.

Similarly, the comparative analysis of the Page property with any other property can only be properly reviewed after careful consideration of the supplementary information provided to the Commissioners by Mr. Page regarding the history of his development efforts and the numerous obstacles thereto. Mr. Page's supplementary information was sent under separate cover and is hereby incorporated herein as if fully set forth.

The Page family also strenuously objects to staff's Project Analysis at page 22 for all of the reasons that have been hereinbefore recited.

More importantly, the legal analysis cited by staff at page 24 through 29 actually support the objections of the Page family instead of proposed staff conditions. A reading of the appellate cases cited demonstrates that the Commission will be taking 85% of the Page property without compensation if the proposed conditions and restrictions are imposed as stated. Reality demands that you consider a family's use of their entire property as part of the economically viable use of the land. Investment backed expectations include this family's ability to "use" its surrounding property. The suggested restrictions on the Page family are not proportional to the needs of the state. There is no legitimate state interest to be gained by the objectionable conditions suggested.

It is facile to believe that a "takings" analysis rests only on consideration of the house structure in reference to (1.)

possible alternatives to the proposed residential use and 2.) the legitimate investment backed expectation of the applicant.

The analysis is not whether a fish farm or a house should be built. The analysis should focus on the totality of the legitimate investment backed expectations of this applicant. Nothing in this record negates the fact that the expectations of this applicant involve a family residence: yard and house.

The Page family also vigorously restates their objection to the notion that construction of this home will harm visual resources. We point out that the landscape plan calls for the use of Cypress trees. These magnificent trees will lift their arms and spread their grace far above the permitted height of the family home. Whatever is done around the home or in the yard will be similarly shielded. The Page family is astounded to see that again, no one has realized this reality. It is absurd to consider the house a visual impairment when specimens of this signature coastal tree will be planted. The trees are an obstruction to a clear shot to the ocean. Surely, the Commission will not require the elimination of Cypress trees once they mature! If planted in significant colonies, the trees could shield the house from street views.

The Page family also vigorously restates their objection to the perceived shorelines hazards.

The Page family also strenuously objects to the demand stated at page 36 that a merger of Parcel I and II will enhance public access. The Commission is not requiring any vertical or bluff top access. That should be the end of the concern.

Finally, the Page family reiterates that the stipulated judgement contains the specific terms pertinent to the development of this property. Obviously, the city entered the stipulated judgement with the LCP-LUP in mind.

CONCLUSION

For all the reasons stated above, the Page family respectfully requests that the Commissioners reject and delete the terms and conditions identified above and issue a development permit that rejects any and all restrictive, over-broad, and burdensome conditions that constitute a taking of the Page property.

**Paul M. Miller
1500 Sunset Drive
Pacific Grove, California 93950**

November 5, 1996

Mary-Margaret O'Connell
Attorney-at-Law
550 Hartnell Street
Monterey, Ca 93940

Dear Ms. O'Connell,

Declaration of Paul M. Miller

I have lived next door to the Page property for seven years. (His property and mine are often referred to as "Rocky Shores.") I was the original applicant to build a house on Mr. Page's property, have researched the property extensively and consulted with many experts about it, and have attended dozens of hearings on matters related to the Page project going back to certification of the Pacific Grove LUP and continuing up to the present.

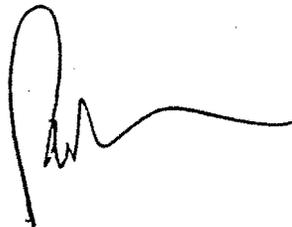
I have often observed that Mr. Page's building site is nearly 100% overgrown with a very, very thick and lush carpet of Hottentot Fig iceplant. One day in early 1995, I walked the property with Mr. Page and with Lee Otter of the Coastal Commission staff. While walking on the iceplant on Mr. Page's property, Mr. Otter observed how thick the iceplant was, and then Mr. Otter made the comment, "This is no more ESHA than an asphalt parking lot would be." Further discussion with Mr. Otter made clear that he was referring to the fact that the iceplant was impenetrable and made growth of any native plants impossible, just like paving would.

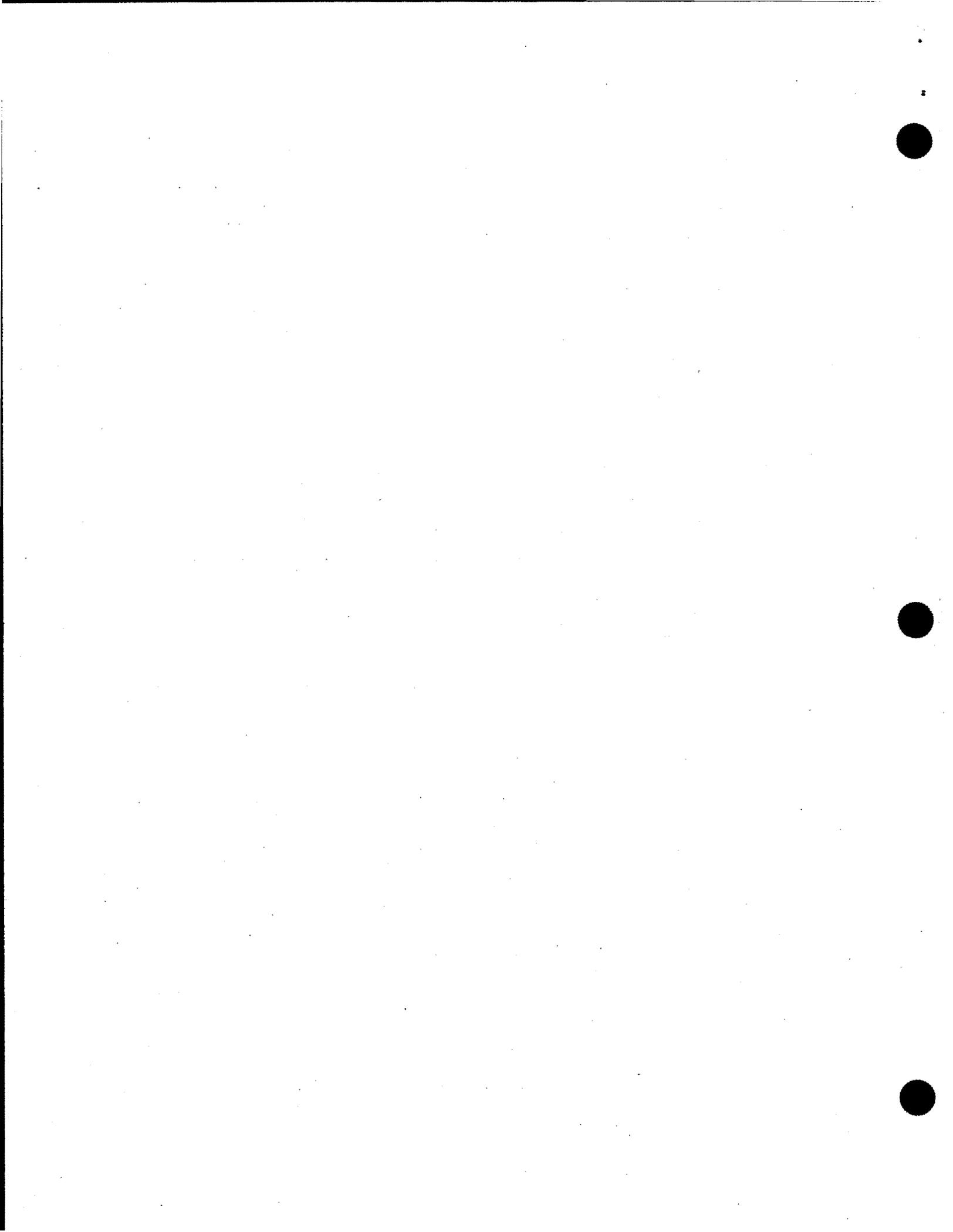
The iceplant which covers Mr. Page's building site is a very common plant in the Asilomar neighborhood. According to Tom Moss, Ecologist for State Parks, the iceplant was PLANTED by State Parks all over Asilomar State Beach for many years until 1985 or so. The plant spreads vigorously and eliminates everything in its path, Mr. Moss said. I have discussed this issue with all the living people who own or have ever owned property at Rocky Shores. All of them state that they never introduced Hottentot Fig iceplant at Rocky Shores.

The City of Pacific Grove continues to plant Hottentot Fig along the shoreline less than 1 mile from Page's property. Perhaps more significantly, the City maintains its Municipal Golf Course directly across the street from the Page property . . . much of that golf course is covered in Hottentot Fig. According to botanist (and city councilman) Vern Yadon, the regular watering of the golf course fairways has caused an "explosion" of Hottentot Fig on the golf course and on neighboring properties, such as Mr. Page's.

I have regularly walked Mr. Page's property over the last 7 years, and have never seen a Tidestrom's lupine or a Menzies Wallflower anywhere on his property. I have never seen a legless lizard either. I am not a botanist or a zoologist, but I am quite familiar with all 3 species have seen them in the Asilomar neighborhood. But not on Mr. Page's property. As you know, none of the surveys of his property have ever found one of these "endangered" species either.

I certify under penalty of perjury that the foregoing facts and events occurred as described herein.

A handwritten signature in black ink, appearing to be the name 'P. W. Moss', written in a cursive style.



Final Report

**INVENTORY AND ASSESSMENT
OF
ASILOMAR DUNES DEDICATION OFFERS AND DEED RESTRICTIONS**

Submitted to

City of Pacific Grove
Community Development Department

By

Sally Rideout
Undergraduate Intern
Environmental Science and Policy
San Jose State University

July 19, 1996



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I. INTRODUCTION

Adequate environmental protection and management of the Asilomar Dunes area of Pacific Grove Coastal Zone has long been a concern of the City of Pacific Grove. Since the annexation of the Asilomar Dunes tract in 1979, the City has steadily pursued the development of a policy framework to address the protection of significant natural resources in the Asilomar Dunes area. As evidenced by the inclusion of specific policies and goals in the 1994 General Plan, the Pacific Grove Coastal Land Use Plan, and the draft Coastal Parks Plan, the City is committed in its endeavor to provide environmental protection to the Asilomar Dunes area.¹

One of four jurisdictions in the Monterey Bay region that has yet to have the implementing ordinances of their Local Coastal Program certified by the State, the City intends to implement a Conservation Easement Program within the City's Local Coastal Program (LCP) Coastal Parks Plan based upon past Coastal Commission permit Approvals. With certification of the LCP implementing ordinances drawing near, the City has several concerns regarding the Commission's long term treatment of methods utilized to protect significant natural resources in the Asilomar Dunes area. In the past, the Coastal Commission utilized dedication offers and deed restrictions as conditions designed to mitigate the adverse effects to coastal resources from private development.

Of immediate concern to the City, is the likelihood that existing "offers to dedicate" (OTDs) may expire and be lost forever. A second related, and equally important concern involves the future application of OTD conditions with the goal of protecting significant natural resources which occur on privately held parcels. The City questions the adequacy of this approach and fears that municipal efforts to protect Asilomar Dunes area natural resources via the planned Conservation Easement Program may be prejudiced by inconsistent treatment of OTD conditions over the last 23 years. According to Judith MacClelland, the City's Chief Planner, the Conservation Easement Program is a keynote element of the Coastal Parks Plan and therefore, a verifiable protocol is necessary "to establish consistency for the LCP implementing ordinances" and ultimately, to

ensure maximum compliance with the Coastal Parks Plan, should the dedication offer approach be adopted.²

Upon initiation of this study, neither the City nor the Coastal Commission Central District Office had a clear idea of the number, location, or current status of OTDs or Deed Restrictions (DRs) imposed pursuant to Coastal Commission Permit Approvals. Deficiencies and inconsistent information management within and among agencies has resulted in an incomplete record of documentation for parcels in the Asilomar Dunes area. As identified in the 1988 Asilomar Dunes Habitat Survey, information management has been hindered by the lack of a "single repository" for relevant parcel data.³ Without a formal information exchange system in place, then, as now, compliance reports were sent to either the City or the Coastal Commission. As a result, no single agency has complete knowledge of, or immediate access to information regarding the status of previously imposed land controls. An inventory of existing baseline information was therefore necessary to conduct a comprehensive assessment of the Coastal Commission Asilomar Dunes area protocol.

Much of the information regarding Asilomar Dunes parcels currently subject to OTD and DR actions is scattered between several agencies including, the Pacific Grove Community Development Department, the San Francisco Regional and Santa Cruz Central Coast District offices of the Coastal Commission, the State Coastal Conservancy offices in Oakland, and the County of Monterey Office of the Recorder located in Salinas. Most of the information collected for this report was found in the Permit files of the Coastal Commission Central Coast District office. As was the case with all agencies and departments contacted during this project, the Coastal Commission has lacked the resources to implement a systematic monitoring program for its jurisdictional policies and information management consists largely of hard copy storage.

The Commission's basic resource data for the Central Coast region was collected as part of the LCP formation process, with further data collection derived on a project-by project basis through the Coastal Development Permit (CDP) process. Individual permit information is collected from local permitting authorities by an assigned Coastal Commission analyst and tracked primarily by

using handwritten log books. A systematic method to "ensure that conditions [are tracked] which require future follow-up, such as monitoring requirements", is currently being developed by the Commission, but important baseline information retrieval is time-consuming and hampered by staff and budget constraints.⁴

II. PURPOSE OF REPORT

This report was prepared for the City of Pacific Grove in conjunction with the San Jose State University Environmental Studies Department Internship Program. At issue is the adequacy and effectiveness of conservation easements utilized by the Coastal Commission in the form of OTDs, as protective tools for significant natural resources. Time constraints of the University's Internship Program, coupled with the lack of a centralized and complete record of parcel history preclude an intense investigation of the following issue areas: survey of similar programs; generation of public support; funding sources; qualified grantee agencies or organizations; federal tax benefits; efficacy of Coastal Commission policy in environmental protection. Therefore, the primary goal of this report is to provide, to the greatest extent possible, an accurate historical record of baseline data concerning the application of Conservation Easements in the Asilomar Dunes area.

Related objectives are as follows:

Identify and determine the number, nature, and current status of Asilomar Dunes Parcels subject to OTDs and DRs issued by the Coastal Commission;
Define and assess the established protocol developed by the Coastal Commission;
Recommend improvements to the established protocol and present a general approach to guide future implementation.

III. RESEARCH METHODOLOGY

This project was conducted during the period from February 15 through May 23, 1996. Representatives of the Central Coast District and San Francisco Regional offices of the Coastal Commission, and the State Coastal Conservancy were contacted by telephone and notified of the City's intent to conduct this project. Additional telephone interviews with several staff members from each agency and/or department provided a great deal of information used to supplement this report. All representatives were open to taking the time necessary to provide information and were friendly and enthusiastic in their discussions of this issue.

The Coastal Commission Central Coast District Office agreed to allow a review of the District's CDP logbooks and appropriate files. Information regarding the number of accepted OTDs was provided by the State Coastal Conservancy; hard copy documentation will be provided on request. Recordation data was collected from the Monterey County Recorder's office and will be supplemented by records received from the San Francisco office of the Coastal Commission. San Francisco Office staff are currently conducting a manual file search for supplemental CDP information to complete the administrative record.⁵

An electronic DataBase of Pacific Grove CDPs had recently been compiled from the Central Coast District logbook entries and a hard copy containing approximately 240 entries, dated 1973 to present, was immediately provided for the City's use. Despite this contribution, a manual examination of the District's logbooks was conducted to ensure that all Pacific Grove CDPs had been accurately included in the Commission's DataBase records. Particular emphasis was placed on the logbook entries to determine if pre-annexation Asilomar Dunes area CDPs had been included in the DataBase. This additional care was necessary because the Asilomar area was part of unincorporated Monterey County until its annexation to Pacific Grove in 1979 and many of the 1973 to 1980 logbook entries identified CDP requests with incomplete location descriptions.⁶

The CDP files of questionable logbook entries were requested for review from the Coastal Commission Central Coast District, while the DataBase record was cross referenced with the

City's Address File to determine which entries could be summarily excluded from this study. Again, additional care was necessary to reduce error due to differences in filing systems between the City and the Coastal Commission. The Pacific Grove Community Development Department (PGCDD) stores hard copy files by address, while the Coastal Commission stores files by CDP number. Once development permits in areas outside of Asilomar Dunes were excluded from the study, an extensive manual review of the files of candidate coastal development projects potentially subject to OTD actions was conducted to determine an accurate listing of existing OTDs.

Information retrieved from the Coastal Commission and Coastal Conservancy, was cross-referenced with the 1976-1995 "Grantor-Grantee" Index at the Monterey County Office of the Recorder. This index lists all recorded transactions by property owner name at the time of recordation. Over the last 23 years, several of the Asilomar Dunes parcels have changed hands, therefore requiring an informal title search to ensure that recorded restrictions and OTDs were appropriately reconveyed, and to effectively determine whether the imposed conditions on certain parcels were ever recorded at all.

Asilomar Dunes area information was collected with the goal of providing Pacific Grove with a complete record of CDP and parcel data. Hard copies of relevant Coastal Commission Development Permits, Landscape Plans, Biotic Surveys, recorded DRs, OTDs, and accompanying maps showing the locations of restricted areas were obtained to the greatest extent possible, and transferred to the PGCDD. All known DRs and OTDs were electronically inventoried using the PGCDD Excel and Access DataBase programs.

Very little evidence of site-specific or program monitoring was discovered during the information retrieval carried out for this report. No landscaping monitoring reports were contained in the Coastal Commission Central Coast District Permit files, although a few reports carried out by applicants were found in the PGCDD Property files. A complete assessment of the Commission's OTD and DR approach cannot be undertaken without a review of documented compliance and monitoring efforts, however, the time constraints of this study preclude a more intense

investigation into the existence and locations of any monitoring activity reports. It is assumed that monitoring records may be found with the help of the California Department of Fish and Game and Department of Parks and Recreation, and the authors of the original botanical surveys.

In the absence of landscape restoration, maintenance and monitoring reports for individual parcels, data contained in the comprehensive 1988 Asilomar Dunes Habitat Survey and Policy recommendations, conducted by David Shonman, was used to determine the suitability of the Coastal Commission method of protection to affected parcels. Established Habitat Sensitivity Ratings of parcels were plotted and compared with plotted locations of CDP imposed DRs, OTDs, and LRMPs.⁷ For the purposes of this report, the data contained in Shonman was useful in determining the appropriateness of past Coastal Commission actions in the Asilomar Dunes area. Additionally, information in the Shonman report will be extremely useful in setting criteria for the Conservation Easement Program and also provides information that will enable all involved agencies, organizations, and property owners to avoid incurring permanent monetary commitments for parcels that do not contain significant natural resources. In the future, the Shonman Report, and subsequent comprehensive surveys will provide valuable information regarding habitat types and endangered species locations to guide the tailoring of individualized, site-specific conservation easements or deed restrictions.

IV. RESULTS AND DISCUSSION:

A. Established Protocol

Originally, the Coastal Commission Policy towards protection of Asilomar Dunes area resources consisted of deed restrictions and dedication offers as conditions of development.⁸ Assuming that the flow of information regarding individual permit actions is complete, the following procedure is characteristic of the Coastal Commission's informal conservation easement experiment for the Asilomar Dunes area.

As the experiment unfolded, each OTD and/or Deed Restriction was worded differently while the Commission developed what would ultimately become a roughly standardized format tailored to each site. In general, OTDs were designed to prohibit development outside of designated building envelopes, and deed restrictions (DRs) were included as enforcing agreements to ensure the Permittee's implementation of Landscape Restoration, Management and Monitoring Plans (LRMPs).

Dedication offers were typically in the form of a Scenic or Open-Space easement and had a term of 21 years, within which "an appropriate public agency or nonprofit organization" could accept responsibility.⁹ All OTDs and DRs run with the land and are binding to all heirs and successors of the affected parcels. Coastal Development Permits issued from 1973 to 1994 followed the dedication offer method.

Most OTD and/or DR conditions required recordation prior to permit approval or permit transmittal which equated with immediate recordation. Some of the earlier OTDs required recordation "prior to occupancy", or "prior to the commencement of construction".¹⁰ The condition was satisfied upon receipt of written proof of recordation by the Commission's San Francisco Office Legal Department. After recordation, the location and description of the affected parcel was sent to the State Coastal Conservancy.

The Coastal Conservancy works with various nonprofit groups, land trusts, and the Coastal Commission. In its augmenting role to the Coastal Commission, the Conservancy evaluates and ranks OTDs in the following order: expiration date, the site's buffering capability in relationship to existing development densities, and viewshed value.¹¹ Parties interested in accepting dedication offers must submit evidence of liability insurance and a land management plan for review and approval by the Commission and the Conservancy. In some cases, the Conservancy will confer quasi-public entity status to the accepting party (grantee) which provides immunity from liability.¹² Once the management plan is approved and signed off, a certificate of acceptance is issued to the grantee, who then assumes monitoring responsibilities.

Under certain conditions, the Coastal Conservancy will accept OTDs. Although primarily interested in OTDs that offer more active forms of public recreation, the Conservancy considers itself to be a "last resort acceptor of land", and will accept Open Space or Scenic easement OTDs only if they are in danger of expiration.¹³ Upon acceptance by the Conservancy, temporary monitoring responsibility is assumed until another appropriate organization is found to accept permanent responsibility.

OTDs and the accepted easements require little long term management. As stated previously, the OTDs were used in conjunction with deeded enforcement agreements or landscaping requirements. OTDs restrict development only, while the deed restrictions apply to sensitive habitat restoration, management and monitoring. Subsequently, monitoring of OTDs is straightforward and may consist solely of a cursory field inspection to ensure that no development has occurred on protected areas. The Conservancy conducts such monitoring efforts in the Asilomar area every 2 years.¹⁴ Additional inspections may occur through the Conservancy's complaint procedure and are carried out on a case by case basis, as complaints are received.

Coastal Development Permit applicants are also required to conduct site-specific Botanical Surveys as needed following the standards and habitat classifications set forth in the comprehensive Shonman report.¹⁵ LRMPs of varying intensity are based upon the assessments

and recommendations contained in site-specific Botanical Surveys, are the responsibility of the applicant, and are subject to the review and approval of the Coastal Commission.

Deed restrictions regulating the applicants' submitted LRMPs, are required to ensure maximum compliance, and are recorded in a time frame similar to that described above regarding OTD requirements. The deed restrictions typically include an enforcement agreement between the Commission and the applicant and require that restoration and maintenance be conducted by the applicant for a period of 5 years. Provisions are included that prohibit the introduction of invasive vegetation and require the periodic removal of such species by the applicant and successors in perpetuity.

B. Effects of Supreme Court Decisions on Coastal Commission Conservation Easement Policy.

Two significant Supreme Court cases, *Nollan v. California Coastal Commission* (1987) and the 1994 *Dolan v. City of Tigard* have substantially affected the Commission's original policy.¹⁶ A brief summary of each decision is included here for context. In *Nollan*, the Court set the standard for judicial review of land use regulations in that they must "substantially advance the legitimate state interest", and subsequently established three tests of the standard. First, the condition must regulate an area in which the government has a legitimate interest. Second, the proposed development must threaten the government's legitimate interest, and third, there must be some essential subject matter "nexus" between imposed permit conditions and the threat to the public interest resulting from development. The *Nollan* ruling however, never defined the required "nexus" between permit conditions and the burden of proposed development.¹⁷

Unlike earlier challenges to land use regulations, *Dolan* essentially challenged adjudicatory decisionmaking supporting the imposition of permit conditions, rather than legislative determinations. At issue was the City of Tigard's rationale for the levying of a required transfer of real property interest (in the form of an access easement dedication), as opposed to a simple use limitation. In the *Dolan* decision, the Court further defined the *Nollan* nexus to include a standard

of "rough proportionality" as the rule of reason in determining the degree of mitigation imposed, to the nature and extent of the projected impact. As a result, the Court stipulated that "local governments make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development, using the rough proportionality standard".¹⁸ In effect, the burden of proving that a condition or mitigation is not roughly proportional to impacts has shifted from the property owner to the government at the administrative level.

In response to the *Nollan/Dolan* decisions, the Coastal Commission has replaced the original OTD policy with the less restrictive approach of straight deed restrictions. Deed Restrictions are now required by the Coastal Commission to perform all protective actions regarding sensitive habitat, Scenic and Open-Space areas, as well as the enforcement mechanism for the implementation of LRMPs.¹⁹ As a result, management and monitoring are carried out by the applicant only, and enforcement is limited primarily to that which occurs during the permit process or litigation which can be costly, time-consuming and adversarial.

C. Evaluation

Based upon the information presented above, there is clear evidence that OTDs, as they have historically been applied, cannot be used as a sole instrument for sensitive habitat protection. In its very basic form a conservation easement is more restrictive than a use-limiting deed restriction in that a measure of control is taken from the property owner and given to the grantee with the transfer of real property interest. However, without a supplemental deed restriction to enforce landscaping requirements, an Open Space OTD serves to restrict *development* only, and has very little bearing on sensitive habitat even when accepted. The effectiveness of the existing OTDs in the protection of sensitive resources remains questionable and dependent upon: the extent of monitoring allowed (if any) within the language of each recorded document.

This partially explains the logic behind the Coastal Commission's abandonment of the OTD requirement in the face of the *Nollan/Dolan* decisions, and is exactly the situation with the

existing Asilomar Dunes area OTDs. Within the context of the *Nollan/Dolan* decisions, the risk of potential litigation is quite high due to the imposition of an Open-Space or Scenic easement OTD to mitigate adverse effects of development to *sensitive habitat*, rather than the adverse effects to scenic or open-space resources. Therefore, as a means to protect sensitive habitat areas, OTDs (as historically applied) may leave the permitting agency open to legal challenges following the *Nollan/Dolan* Supreme Court decisions.

Another explanation of the Commission's abandonment of the OTD method involves the concept of acceptance. An OTD literally means nothing unless it is accepted. Given the reality of the Commission's monitoring capabilities, combined with inconsistent information sharing between agencies, no reliable means exists to monitor or enforce the conditions of an unaccepted OTD other than through the CDP or local permit process. Whether by design or by circumstance, reliance on permit processes has resulted in the situation where no agency has the resources available to monitor the status or efficacy of this type of permit condition. Conversely, had an accepting party been designated from the start, consistent monitoring would be more likely to occur because the accepting party has a direct interest in monitoring.

D. Benefits of Conservation Easements

The use of dedication offers as a tool to protect natural resources is not without advantages and therefore should not be dismissed out of hand. From a long term policy point of view, the use of Conservation Easement OTDs provides local jurisdictions with a measure of certainty regarding individual lot development and relief from enforcement costs. Furthermore, easements are relatively flexible and can be tailored to fit the characteristics of individual parcels, while reflecting the policy goals of the permitting agency. If duly recorded and accepted, an Open Space OTD provides a guarantee-in-perpetuity that the affected property will remain under Open-Space Conditions, and likewise for scenic or sensitive habitat resource protection. However, in terms of efficacy, there appears to be very little difference between a deed restriction and an offer to dedicate. The primary differences seem to involve private property rights control (as discussed above) and financing. With a deed restriction, monitoring and its associated costs are typically

borne by the individual applicant whereas an established program lends itself to the development and implementation of collective monitoring with the associated costs spread among the community or inhabitants of a specific area of concern.

At the very least, a recorded OTD, like a deed restriction, should show up in the chain of title whenever property is sold, and alerts planners and potential buyers of the property's conditional uses. The downside of this aspect is that buyers are also immediately aware of the restricted development potential of the lot, which may negatively affect the property's market value.²⁰ On the other hand, assuming that the OTD is accepted, the permanent guarantee that a portion of the parcel, as well as portions of adjacent properties, will remain in open space may result in an increase in market value.

An appealing aspect of conservation easements is the opportunity for the potential grantor to receive a tax benefit in return for the transfer of real property interest. If given the option, the property owner who chooses the OTD method rather than be subjected to a straight deed restriction, may be eligible for a reduction in federal income, estate, and gift taxes pursuant to certain criteria outlined in the tax code, provided that the easement is dedicated to or accepted by a specific qualified agency or organization, and an actual reduction in property value occurs as a result of the easement.²¹ Once again, easement acceptance is the primary determining factor along with a reduction in property value.

In the theoretical sense, this aspect may be initially appealing to administrators because it appears to offset the likelihood of a successful "takings" challenge; a tax benefit may be possible to compensate for a decline in property value as a result of the dedication of an easement. Regardless, a potential reduction in taxes may not be an effective main selling point of a conservation easement program because: the Internal Revenue Service (IRS) has complete discretion in granting a tax deduction and; the tax code is subject to constant change.²² The potential grantor must be made fully aware that the only guarantee is that a tax credit is possible if the conservation easement dedication method is chosen, and that there is no possibility for such a benefit with a straight deed restriction.

Although subject to change, the IRS criteria for deduction eligibility are consistently specific and quite stringent, which may prove daunting for potential grantors. Where the *Nollan/Dolan* decisions have resulted in an increased documentation burden upon public decisionmakers, the IRS demands well-documented proof from the grantor that the easement qualifies for a tax deduction. Three separate sets of criteria (subject to IRS discretion) applicable to the Asilomar Dunes area cover three broad categories: Significant Natural Habitat, and Open Space for Scenic Enjoyment, and Open Space Pursuant to Governmental Policy.²³ Descriptions of specific IRS criteria are lengthy and beyond the scope of this report, however, an analysis of current IRS criteria could be undertaken by the City to determine if past documentation efforts and established local policies are consistent with the IRS criteria.

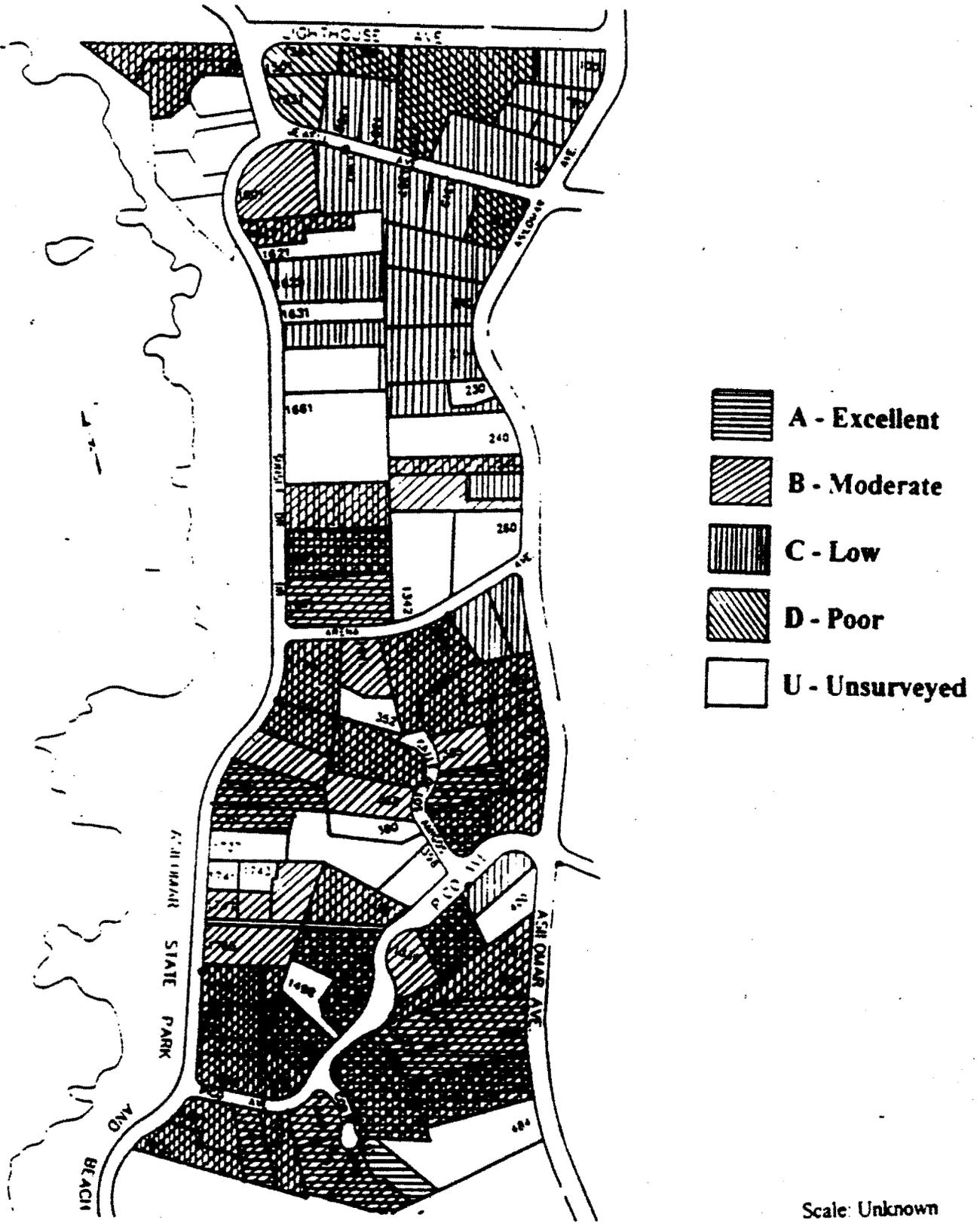
Such an analysis would be extremely valuable to the City for several reasons: first, to give a general idea of the stringency of IRS requirements to policymakers and the public; second, to provide a documentation framework in support of the proposed Conservation Easement Program; lastly, the IRS requirements may provide the essential "nexus" for the use of OTDs in the Asilomar Dunes area. If little else, the analysis may accomplish the dual feat of boosting compliance (by increasing public acceptance of Conservation Easements) while providing a clear record of the rationale behind the Conservation Easement Program.

E. Status of Previously Imposed Coastal Commission Permit Conditions

1. Habitat Quality and Distribution of Endangered Species.

Exhibit 1 displays Asilomar Dunes native habitat quality and locations by parcel, as classified by Cowan, and surveyed by Shonman (1988). Although the Habitat Sensitivity ratings given in these two studies are very comprehensive, a generalized classification is given in Exhibit 1. A complete description of established Habitat Sensitivity ratings is contained in Appendix A. Excellent habitat is denoted by an "A" rating and is indicated by horizontal lines. Moderate habitat areas are denoted as having a "B" rating and are presented as areas with diagonal lines sloping upward to the right. The "C" rating equates with a lower quality habitat area and is

Exhibit 1: Asilomar Dunes Area Habitat Classifications



Scale: Unknown

Source: Generated from the Shonman Report: Asilomar Dunes Habitat Survey and Policy Recommendations, 1988.

indicated by vertical lines. A rating of "D" indicates that an area is of poor quality dune habitat and is displayed in Exhibit 1 by diagonal lines sloping upward to the left.

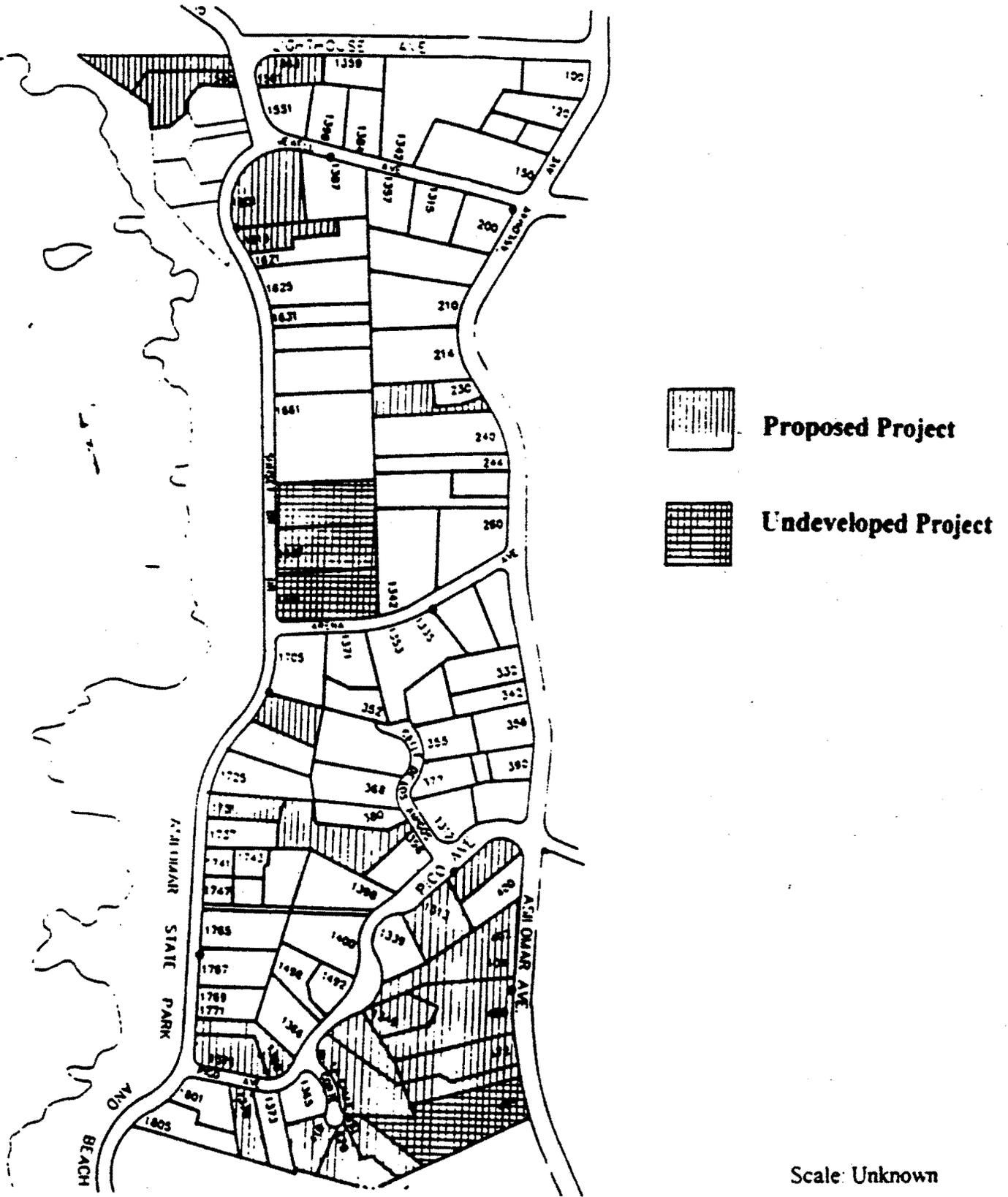
As portrayed in Exhibit 1, most "A" rated habitat areas occur in the vicinity of Pico Avenue, and the La Calle Corta and Calle De Los Amigos cul-de-sacs. As indicated by dense cross-hatchings, these areas also support the most diverse vegetation and habitat areas (A-C), which primarily occur across contiguous parcels. Excellent habitat area has also been observed on at least one parcel north of Arena Avenue, and may potentially exist on lots 6-8, along Sunset Drive. Parcels located between Arena and Jewell Avenues generally support habitat areas of moderate (B), and moderate to low (B and C) quality. Parcels lying north of Jewell and east of Sunset are either fully landscaped or dominated by Pines and ice plant. In general, habitat quality appears to decline across the Asilomar Dunes tract in a northeasterly direction.

Parcels upon which endangered species have been observed are displayed in Exhibit 2. Although at least six endangered species rely on Asilomar Dunes area habitat areas, the two previously conducted biological assessments focused on two plant species: Tidestrom's Lupine, (indicated by horizontal lines), and Menzie's Wallflower (vertical lines).²⁴ As demonstrated by Exhibit 2, Tidestrom's Lupine occurs more frequently across the area and is most prevalent along the contiguous parcels in the vicinity of Pico Ave., La Calle Corta, Calle De Los Amigos, and northward to Arena Ave.

2. Status of Previously Imposed OTDs and DRs.

Exhibit 3 shows the locations of 24 Asilomar Dunes area parcels subject to Coastal Commission CDP review from 1976-May, 1996. The review of the Central Coast District CDP files, revealed that 21 of the 24 parcels shown are subject to Coastal Commission land control ongoing requirements imposed as conditions of permit approval. A drive-by field inspection conducted in April 1996, confirmed that the 21 parcels have been developed, and that the three remaining projects subject to potential OTD requirements were never developed (Exhibit 3, cross-hatched). The Titherington/McAlister (1368 Arena) CDP expired, and the Rizon Inc. (Lots 9 & 10) and Canfield (484 Asilomar) CDPs were denied.²⁵ A development proposal for Lot 9 is currently under review by the Coastal Commission, and conditional development requirements for Parcel 7-21-05 are currently under litigation.

Exhibit 3: Asilomar Dunes Area Parcels Subject to Coastal Commission Approval (1973-1996)



Scale: Unknown

The status of conditions imposed to the remaining approved projects are summarized by the original CDP approval date in Table I.

TABLE I
Status of Dedication Offers, Deed Restrictions and Landscaping Requirements

APN	Original Approval	OTD	DR	LRMP	Recorded	Accepted
7-071-012	1976	X		X		
7-061-041	1977		X	X		
7-041-015	1977		X	X	1979	
7-061-035	1978	X		X	1979	
7-072-013	1978	X		X		
7-041-023	1980	X		X	1980	
7-041-025	1982	X		X	1989	X
7-072-023	1984	X		X	1986	X
7-072-024	1984	X		X	1986	X
7-072-025	1985	X		X	1987	
7-072-026	1985	X		X	1987	
7-072-006	1985	X		X	1987	
7-072-019	1987		X	X	1988	
7-031-014	1988	X	X	X	1988	
7-061-042	1989		X	X	1989	
7-072-020	1990		X	X		
7-072-022	1993	X	X	X	Pending	
7-021-006	1994		X	X	1994	
7-072-003	1995		X	X	1996	
7-071-011	1996		X	X	Pending	
7-021-005*	Pending		X	X	Pending	

APN = Assessor's Parcel Number

OTD = Offer To Dedicate

DR = Deed Restriction

LRMP = Landscape Restoration, Maintenance and Monitoring Plan and/or Program

* Parcel use is currently under litigation.

Twelve of the 21 parcels are subject to OTD requirements, with the earliest CDP approved in 1976. The eleven remaining parcels are subject to deed restrictions of varying intensity. However,

an exhaustive search of the County of Monterey Recorder title and deed indexes, in addition to the CDP file review, failed to locate documentation of recordation for OTD conditions on the following parcels:

7-071-012; 1368 Pico, permit approved in 1976

7-072-013; 1379 Pico, permit approved in 1978

In the absence of documented evidence of recordation, it is assumed that the conditions imposed on these parcels were never recorded. The possibility of gaining recordation compliance after a 20 years is unknown, and beyond the scope of this report. A third unrecorded OTD covers portions of parcel 7-072-022 (450 Asilomar). This project has not been implemented, and is currently subject to a CDP extension.

Seven OTDs have been recorded since 1978; with the earliest known recorded OTD condition required for parcel 7-061-035 and recorded in 1979. No evidence of this OTD was found in the files of the Coastal Conservancy nor the Coastal Commission. However, documentation of recordation was discovered for this parcel after a search of the 1968-1995 Grantor-Grantee index of the Monterey County Office of the Recorder. The OTD covering portions of parcel 7-061-035 is due to expire in the year 2000.

Parcels subject to recorded, but unaccepted OTD conditions that are not contained in the Coastal Conservancy DataBase records are as follows:

7-061-035 (1731 Sunset Dr.) Recorded: 6/26/79

7-041-023 (1619 Sunset Dr.) Recorded: 9/15/80

Parcels subject to recorded, but unaccepted OTD conditions that are contained in the Conservancy DataBase are:

7-031-014 (1501 Sunset Dr.) Recorded: 9/1/88
7-072-006 (472 Asilomar Ave.) Recorded: 8/20/87
7-072-025 (472 Asilomar Ave.)
7-072-026 (472 Asilomar Ave.)

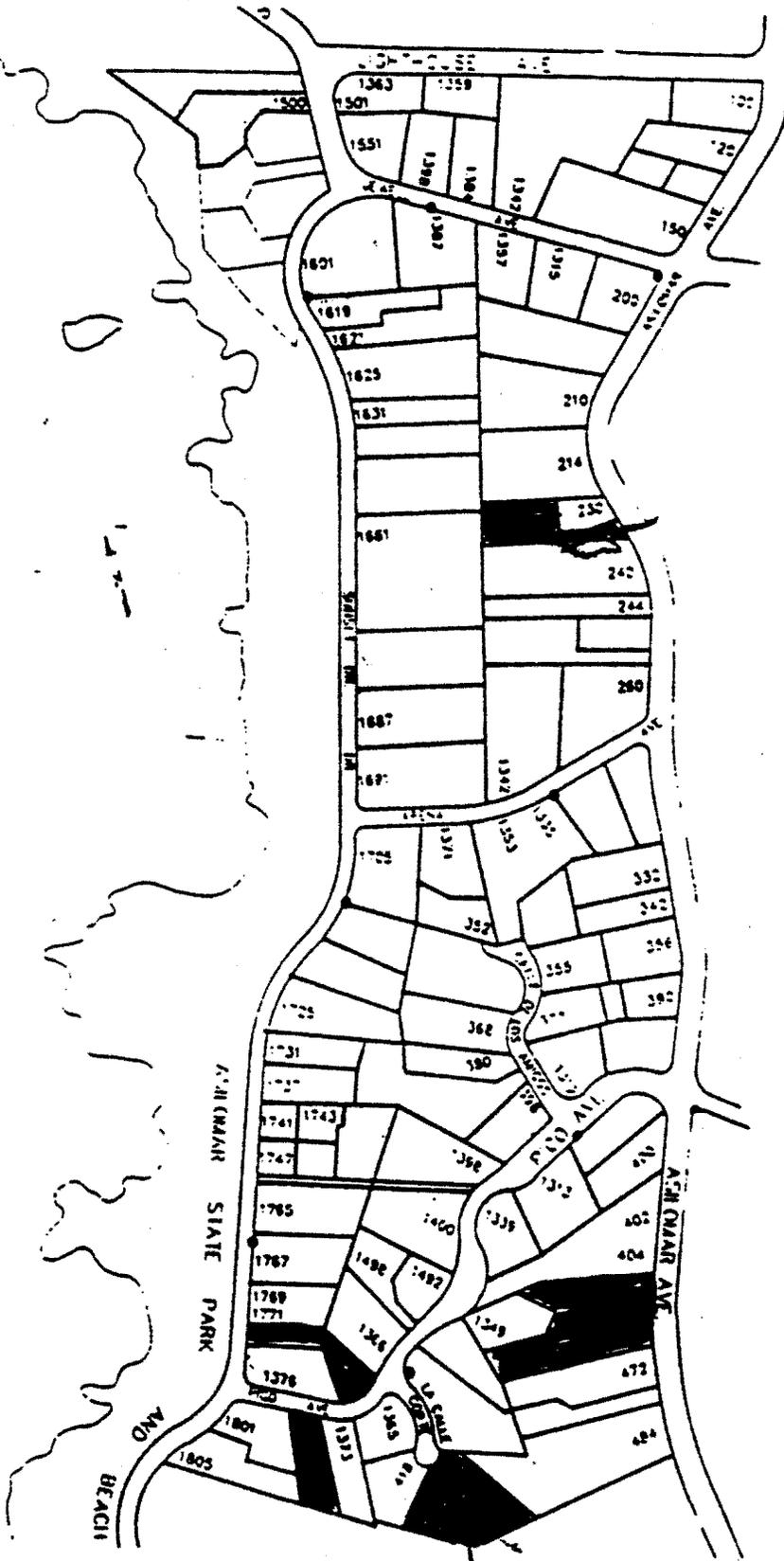
Exhibit 4 shows the locations and status of all known OTDs originally required in the Asilomar Dunes area. The four recorded, but unaccepted OTDs are denoted by yellow shading; the two unrecorded OTDs; red shading. Two of the parcels with OTDs also are subject to DRs which require LRMP implementation: parcel 7-072-020 (450 Asilomar); parcel 7-031-014 (1501 Sunset) has been recorded and awaits acceptance. It should be noted that Parcels 7-072-006, 025 and 026 are under single ownership. As a result, a total of six parcels are affected by unaccepted OTDs.

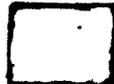
Three OTDs covering three parcels are known to have been temporarily accepted by the Coastal Conservancy and await permanent acceptance.²⁶ Parcels accepted by the Coastal Conservancy are indicated in Exhibit 4 by blue shading and are as follows:

7-041-025; (1663 Sunset Dr.)
7-072-023; (421 La Calle Corta)
7-072-024; (420 La Calle Corta)

At one time, Parcels 7-072-023 and 024 were a single parcel, which was originally offered for dedication by Roma Rentz in 1980. Although these parcels have changed ownership over time, the Coastal Commission has successfully pursued reconveyances of the original OTDs with each new owner.²⁷

Exhibit 4: Asilomar Dunes Area Parcels Subject to Dedication Offers



-  Recorded
-  Unrecorded
-  Accepted

Scale Unknown

Exhibit 5 shows the locations of parcels subject to Deed Restrictions and Landscape Restoration, Maintenance and Monitoring plans. Recorded DRs and LRMPs are denoted by shaded areas. All 21 parcels are subject to the implementation of site-specific LRMPs (Table I) and are indicated by horizontal lines. Of the 21 parcels, nine are subject to deed restrictions exclusively requiring implementation of an LRMP, and are indicated by vertical lines. As shown in Table I, documentation of recordation was found for six of the nine parcels subject to LRMPs. As previously discussed, the Commission has required straight deed restrictions that served to limit the allowed use of parcels in light of the *Nollan/Dolan* decisions. Parcels subject to this condition are indicated in Exhibit 5 by diagonal lines and are as follows:

7-021-005; (1450 Sunset Dr.)	currently under litigation
7-021-006; (1500 Sunset Dr.)	CDP approved in 1994
7-072-003; (404 Asilomar Ave.)	CDP approved in 1995
7-071-011; (1376 Pico Ave.)	CDP approved in 1996

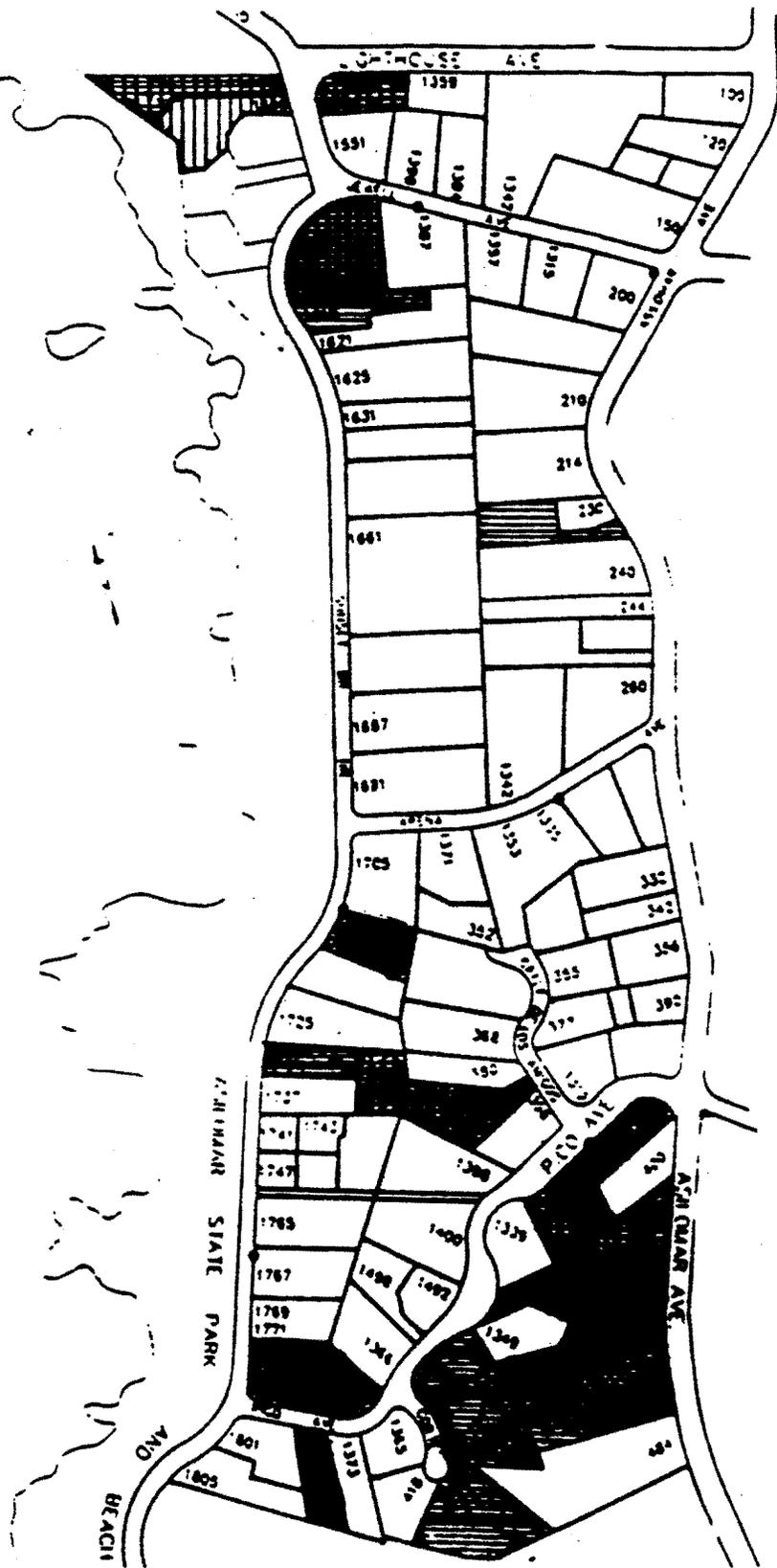
Documentation of recordation was not found for the following two parcels subject to LRMP deed restrictions:

7-061-041; (1715 Sunset Dr.)	CDP approved in 1977
7-072-020; (1301 Pico Ave.)	CDP approved in 1990

It is therefore assumed that the deed restrictions of these parcels were never recorded. However, it may be possible to enforce the recordation requirements of parcel 7-072-020 because of the more recent approval date. Additionally, it should be noted that although the Permittee for parcel 7-061-041 never recorded the required deed restriction, the current landscaping of the site appears to be consistent with the original CDP landscaping requirements.²⁸

Exhibit 5: Asilomar Dunes Area Parcels Subject to Deed Restrictions and DRMPs

*LAR
LRMP's*



-  DR
-  LRMP
-  Recorded
-  Unrecorded

Scale: Unknown

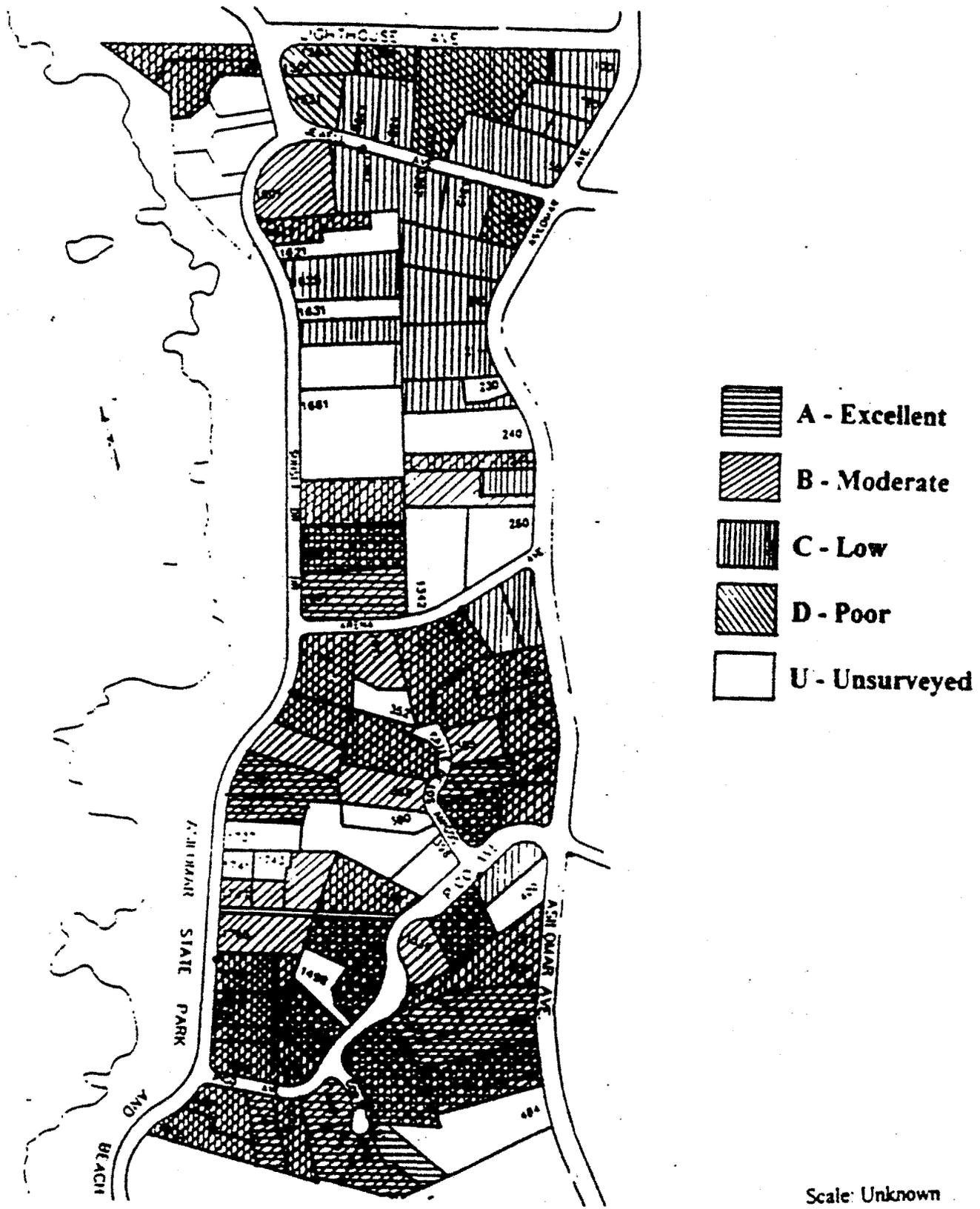
Source Coastal Commission Central District Office Permit Files, Monterey County Recorder Grantor-Grantee Files

3. Comparison of Coastal Commission Policy actions with Established Habitat Sensitivity Ratings and Locations of Endangered Species.

Assuming a complete and thorough flow of information, a visual comparison between Exhibits 1-5 indicates a general trend toward more stringent controls as habitat quality increases.

Notwithstanding the policy response to *Nollan/Dolan*, the Coastal Commission conditions appear to be consistent, in general, with the standards established in the Shonman Report. Parcels with relatively large populations of Tidestrom's Lupine, Menzie's Wallflower and/or excellent habitat areas, were initially conditioned with OTDs, and following the *Nollan/Dolan* decisions, deed restrictions. Areas with good quality habitat were conditioned with deed restrictions requiring restoration of native dune flora, maintenance of restored areas, and restrictions limiting landscaping plantings and applicant-funded monitoring. It appears then, that Coastal Commission policy adequately reflects environmental conditions of the area, however, without access to individual monitoring reports, there is no way to analyze the efficacy of this approach to habitat protection.

Exhibit 1: Asilomar Dunes Area Habitat Classifications



Scale: Unknown

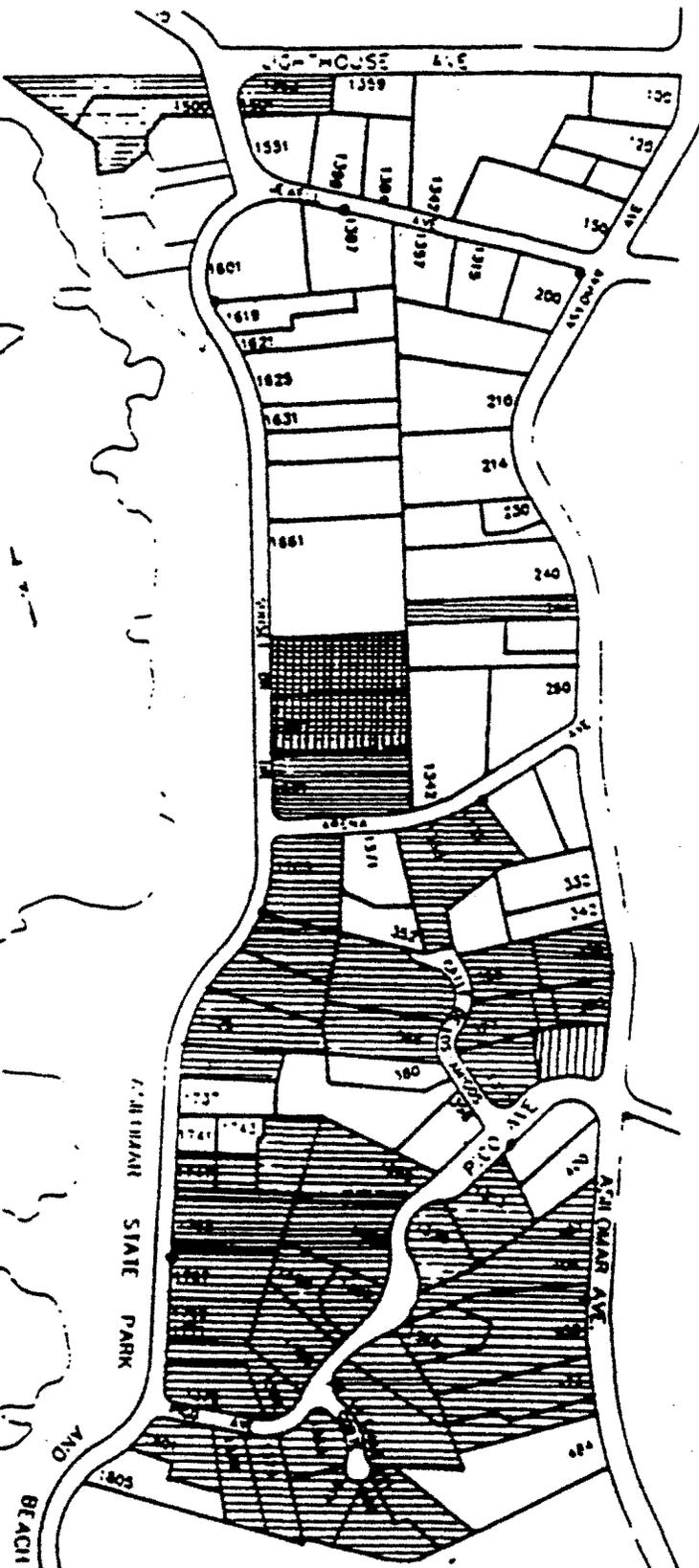
Source: Generated from the Stonman Report: Asilomar Dunes Habitat Survey and Policy Recommendations, 1988.

indicated by vertical lines. A rating of "D" indicates that an area is of poor quality dune habitat and is displayed in Exhibit 1 by diagonal lines sloping upward to the left.

As portrayed in Exhibit 1, most "A" rated habitat areas occur in the vicinity of Pico Avenue, and the La Calle Corta and Calle De Los Amigos cul-de-sacs. As indicated by dense cross-hatchings, these areas also support the most diverse vegetation and habitat areas (A-C), which primarily occur across contiguous parcels. Excellent habitat area has also been observed on at least one parcel north of Arena Avenue, and may potentially exist on lots 6-8, along Sunset Drive. Parcels located between Arena and Jewell Avenues generally support habitat areas of moderate (B), and moderate to low (B and C) quality. Parcels lying north of Jewell and east of Sunset are either fully landscaped or dominated by Pines and ice plant. In general, habitat quality appears to decline across the Asilomar Dunes tract in a northeasterly direction.

Parcels upon which endangered species have been observed are displayed in Exhibit 2. Although at least six endangered species rely on Asilomar Dunes area habitat areas, the two previously conducted biological assessments focused on two plant species: Tidestrom's Lupine, (indicated by horizontal lines), and Menzie's Wallflower (vertical lines).²⁴ As demonstrated by Exhibit 2, Tidestrom's Lupine occurs more frequently across the area and is most prevalent along the contiguous parcels in the vicinity of Pico Ave., La Calle Corta, Calle De Los Amigos, and northward to Arena Ave.

Exhibit 2: Asilomar Dunes Area Parcels With Endangered Species (Observed)



- fre*
-  Tidestrom's Lupine (Lupinus tidestromii)
 -  Menzie's Wallflower (Erysimum menziessii)
 -  U - Unsurveyed

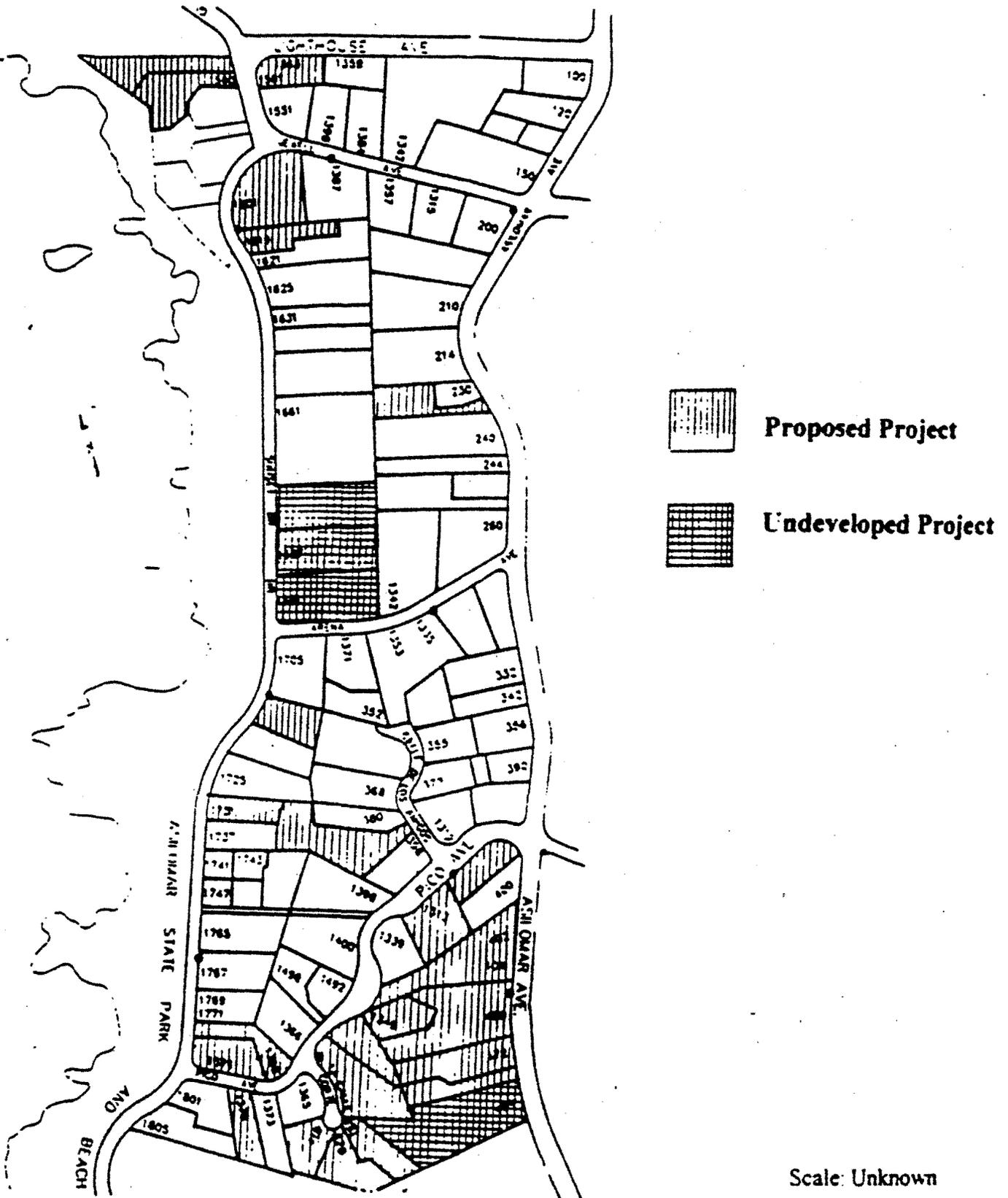
Scale: Unknown

Source: Generated from the Shonman Report. Asilomar Dunes Habitat Survey and Policy Recommendations. 1988

2. Status of Previously Imposed OTDs and DRs.

Exhibit 3 shows the locations of 24 Asilomar Dunes area parcels subject to Coastal Commission CDP review from 1976-May, 1996. The review of the Central Coast District CDP files, revealed that 21 of the 24 parcels shown are subject to Coastal Commission land control ongoing requirements imposed as conditions of permit approval. A drive-by field inspection conducted in April 1996, confirmed that the 21 parcels have been developed, and that the three remaining projects subject to potential OTD requirements were never developed (Exhibit 3, cross-hatched). The Titherington/McAlister (1368 Arena) CDP expired, and the Rizon Inc. (Lots 9 & 10) and Canfield (484 Asilomar) CDPs were denied.²⁵ A development proposal for Lot 9 is currently under review by the Coastal Commission, and conditional development requirements for Parcel 7-21-05 are currently under litigation.

Exhibit 3: Asilomar Dunes Area Parcels Subject to Coastal Commission Approval (1973-1996)



Source: Generated from Coastal Commission Central District Office Permit Files

The status of conditions imposed to the remaining approved projects are summarized by the original CDP approval date in Table I.

TABLE I
Status of Dedication Offers, Deed Restrictions and Landscaping Requirements

APN	Original Approval	OTD	DR	LRMP	Recorded	Accepted
7-071-012	1976	X		X		
7-061-041	1977		X	X		
7-041-015	1977		X	X	1979	
7-061-035	1978	X		X	1979	
7-072-013	1978	X		X		
7-041-023	1980	X		X	1980	
7-041-025	1982	X		X	1989	X
7-072-023	1984	X		X	1986	X
7-072-024	1984	X		X	1986	X
7-072-025	1985	X		X	1987	
7-072-026	1985	X		X	1987	
7-072-006	1985	X		X	1987	
7-072-019	1987		X	X	1988	
7-031-014	1988	X	X	X	1988	
7-061-042	1989		X	X	1989	
7-072-020	1990		X	X		
7-072-022	1993	X	X	X	Pending	
7-021-006	1994		X	X	1994	
7-072-003	1995		X	X	1996	
7-071-011	1996		X	X	Pending	
7-021-005*	Pending		X	X	Pending	

APN = Assessor's Parcel Number

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* Parcel use is currently under litigation.

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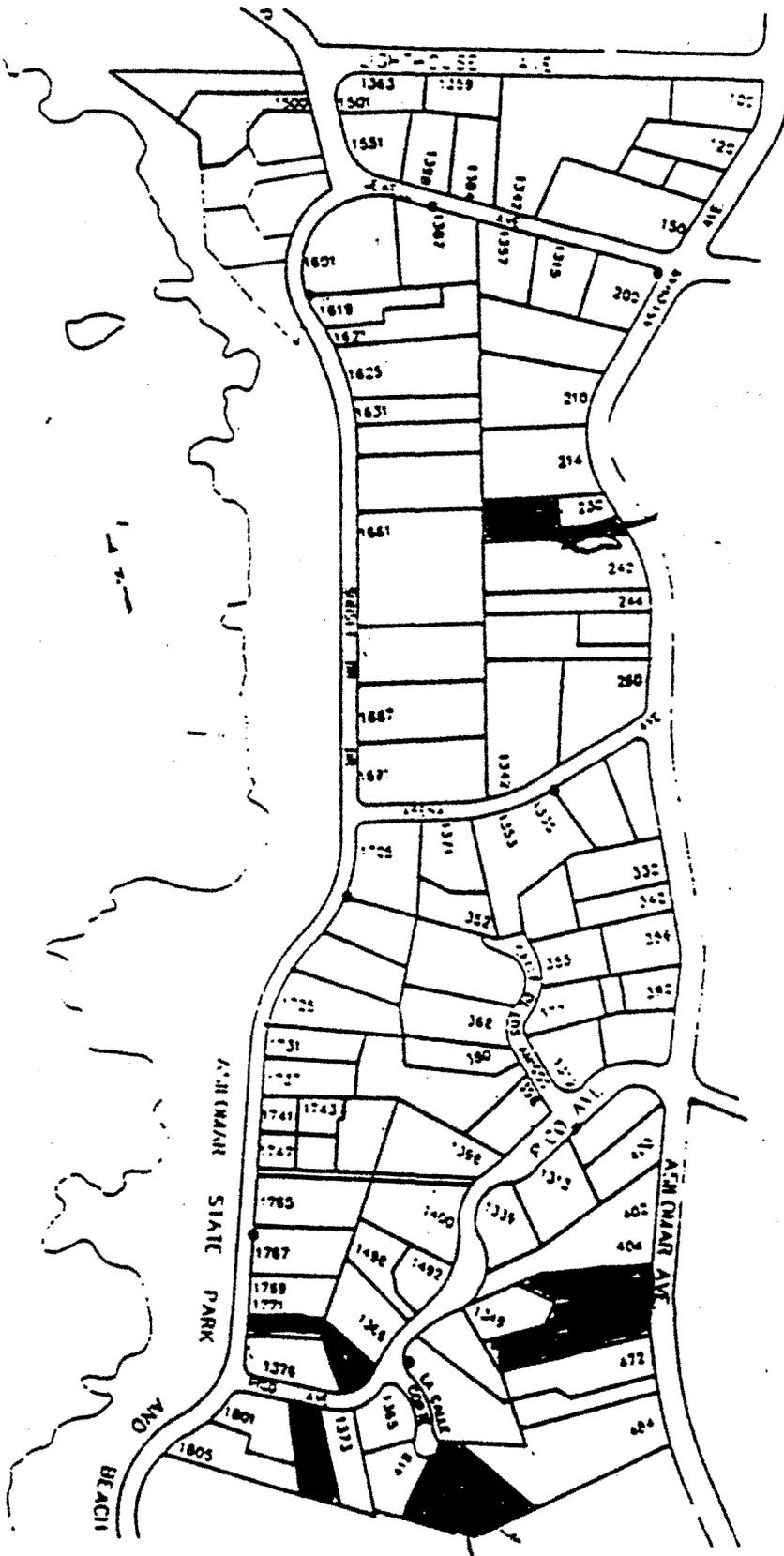
7-041-025; (1663 Sunset Dr.)

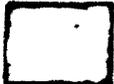
7-072-023; (421 La Calle Corta)

7-072-024; (420 La Calle Corta)

At one time, Parcels 7-072-023 and 024 were a single parcel, which was originally offered for dedication by Roma Rentz in 1980. Although these parcels have changed ownership over time, the Coastal Commission has successfully pursued reconveyances of the original OTDs with each new owner.²⁷

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-  Recorded
-  Unrecorded
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Scale Unknown

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It is therefore assumed that the deed restrictions of these parcels were never recorded. However, it may be possible to enforce the recordation requirements of parcel 7-072-020 because of the more recent approval date. Additionally, it should be noted that although the Permittee for parcel 7-061-041 never recorded the required deed restriction, the current landscaping of the site appears to be consistent with the original CDP landscaping requirements.²⁸

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V. RECOMMENDATIONS

1. The City of Pacific Grove should accept responsibility for the 7 existing Scenic and Open-Space OTDs located in the Asilomar Dunes area.

In the event that the City does not accept the existing OTDs, the State Coastal Conservancy will eventually be required to assume responsibility if no other qualified grantee is found. However, the Coastal Conservancy has indicated that as a rule, it is not interested in scenic or open-space easements preferring instead to devote its resources to the pursuit of easements designed to protect more active forms of public recreation.²⁹ Additionally, the Conservancy is headquartered in Oakland, leaving control and enforcement of these easements in the hands of a State decisionmaking body located some distance away. Furthermore, the Conservancy will accept only temporary responsibility until a permanent grantee is found. Given the success rate of this approach over the last 23 years, it appears unlikely that a suitable grantee will be found in the immediate future. It should be noted that the Conservancy considers the City to be the most likely candidate to accept existing OTDs.³⁰

Since the oldest known OTD is due to expire in the year 2000, and because acceptance is the crucial component to any conservation easement program, it is imperative that the City come to a decision regarding the permanent acceptance of the 7 OTDs. As previously discussed, the existing OTDs require little monitoring because they restrict development only, and do not include provisions to ensure long term monitoring of biotic resources. As a consequence, little expertise is necessary to conduct monitoring and subsequent expenditures and personal injury liability would be slight. Acceptance of these OTDs will not only further the City's established goals and objectives set forth in the LCP and General Plan, but will reinforce the City's commitment to protect significant natural resources in the Asilomar Dunes area.

2. Prior to the implementation of a Conservation Easement Program, the City must work with the Coastal Commission and State Coastal Conservancy to locate a qualified nonprofit organization or public agency willing to accept monitoring responsibility.

As illustrated by the checkered history of OTDs in the Asilomar Dunes area, a conservation easement is only as good as the level of monitoring conducted by the Grantee. Acceptance is crucial and should not be an item left for consideration long after the Conservation easement Program has been implemented. The City must designate an appropriate Grantee(s) prior to implementation to aid in compliance, aid the grantors' pursuit of a possible tax benefit, and to avoid the mistakes and problems that have occurred in the past.

Potential Grantees include:

The State Coastal Conservancy;

California Department of Fish and Game;

California Department of Parks and Recreation;

The City of Pacific Grove;

Private nonprofit land trust or similar conservation organizations.

3. The City must develop and maintain a set of criteria to determine parcels suitable to a Conservation Easement Program.

Ideally, a single grantee should be found to assume easement responsibility. The use of a single grantee would enhance compliance by the strength of organization; one grantee, one policy, less confusion. Unfortunately, easements require a permanent commitment of funding; terms and monitoring costs extend in perpetuity. A reliable method of determining which properties should be protected and how, must be developed by the City. Properties should be identified and avoided that would add to the monitoring burden, but would not protect a significantly valuable resource. Furthermore, an organization or agency willing to accept responsibility for easements designed to protect sensitive habitat, may be less willing to also accept easements designed to

protect open space. Therefore, a set of criteria may be necessary to reduce the unnecessary diversion of staff and fiscal resources.

A tiered approach based upon comprehensive biological assessments in conjunction with the established IRS categories may be the most prudent starting point. The 1988 Shonman report provides an excellent overview of Asilomar Dunes biological resources, and is utilized here as a generalized example to support the use of a tiered easement program.

Based upon the information contained in Shonman, and assuming that current habitat conditions and endangered species distributions are the same, or similar to those observed in 1988, parcels lying along and between Arena and Pico appear to be likely candidates for conservation easements designed exclusively to protect significant habitat areas (refer to Exhibit 1). The diversity and contiguity of habitat locations and the presence of endangered species across parcels suggests that parcels in this area would require a more stringent level of protection and comprehensive long term management and monitoring than that yielded by a straight deed restriction or the implementation of an LRMP. The grantee for such easements must possess considerable resources and expertise that will enable effective management and preservation of sensitive habitat areas.

Conservation easements designed to protect Scenic and Open-Space resources should be considered for parcels bordered by Sunset Drive, Arena, Asilomar and Jewell Avenues. These parcels appear to be best suited for permit conditions that require habitat restoration, maintenance and long term monitoring as an initial approach to the protection of sensitive biotic resources. Despite the occurrence of endangered species, with few exceptions, parcels in located in this subarea of the Asilomar Dunes tract require various degrees of habitat restoration (refer to Exhibit 1 and Appendix A). Thus, these parcels may be ill-suited for easements designed to protect sensitive habitat areas. Furthermore, the relatively low density of this residential area, its location adjacent to Sunset Drive and Asilomar State Park, and the presence of several large and contiguous vacant lots, is an indication that most parcels in this area are perhaps best suited for easements designed to protect Open-Space and Scenic resources.

In this case, the most logical grantee would be the City (refer to the argument presented in VI.1). Should the City follow this suggestion, supplemental deed restrictions and LRMPs would be required subject to the review and approval of the City to remove exotic vegetation and restore the natural dune habitat. If used in conjunction with the established policy of deed restrictions to implement and enforce LRMPs, or perhaps tied to a Noxious Weed Abatement Program or similar ordinance, the OTD accomplishes at least the same amount of protection of natural resources across small private parcels as that afforded land purchased for municipal open space and with relatively small fiscal commitment and little personal injury liability to the City.³¹

4. Should the City of Pacific Grove decide to pursue the Conservation Easement Program, steps should be taken to conduct a comprehensive critical assessment of the efficacy of past Coastal Commission resource protection policy.

In the absence of site-specific botanical assessments and monitoring reports, the information contained in the 1988 Shonman report was the only tool available for a comprehensive overview of area conditions. As noted in that report, biotic conditions in the Asilomar Dunes area are subject to constant change which produces both economic and ecological effects to parcels, and property owners. Subsequently, a comprehensive survey of the area should be conducted every five years.³² Since the Shonman Survey and Report was conducted nearly 8 years ago, and a complete record of monitoring compliance is not readily available, a new survey of current area habitat and endangered species conditions is necessary prior to the implementation of the Conservation Easement Program..

To promote objectivity, an independent qualified biologist should be hired by the City to conduct an updated biological cumulative assessment of the Asilomar Dunes area pursuant to the guidelines set forth in the Shonman report. This survey should be repeated in five year intervals to continue the historical record. In addition to a new survey, the City must devote the resources necessary to complete the OTD inventory; steps should be taken to obtain copies of privately

conducted landscape monitoring reports. Without these reports, the extent and efficacy of applicant-sponsored monitoring is unknown.

Updated and comprehensive environmental information will improve the City's ability to set criteria determining the suitability of parcels to an individually tailored easement, and will also serve to provide additional support for the program in general. Since the Shonman report is included in the City's LCP Land Use Plan, every effort should be made to follow the recommendations therein, in a timely manner.

5. Should the City decide to retain responsibility for all future conservation easements including those designed to protect sensitive habitat and endangered species, consideration should be given to the formation of a special assessment district or the creation of a joint public-private nonprofit venture which may be necessary to ensure a permanent source of funding.

Although the time constraints of this report did not allow an investigation into these management and funding alternatives, a coordinated effort will be the most effective means to reduce the individual and governmental costs of permanent monitoring, should an accepting grantee not be established. The City should devote resources to enable a thorough investigation of these and similar options. Coordinated efforts such as these may meet with public resistance, and therefore two suggestions for enhanced cooperation between potential grantors and the City are presented below.

As a condition of development permit approval, applicants must be required to sign and record an agreement with the City to waive protest of the formation of a special assessment district (as suggested in Shonman, Section V.B.7), to provide funding for long term sensitive habitat monitoring on private parcels in the Asilomar Dunes area of the Coastal Zone. Should the City deem the "waive to protest" agreement too stringent or beyond the scope of its governing authority, as a condition of approval, applicants must then be required to sign and duly record an "agreement to negotiate" with the City to determine an appropriate and effective funding

mechanism for the long term monitoring of sensitive habitat found on private parcels in the Asilomar Dunes Coastal Zone.

The "waive of protest" suggestion is designed to reduce opposition to the formation of a special protection district, and is currently used by the City to mitigate parking impacts. The second suggestion is designed to promote the participation of an otherwise unwilling property owner. Assuming that no one is against the idea of protecting significant natural resources *in general*, the basic goal of this approach is to bring reluctant parties to the table, discover their important issues, and receive an agreement in principle: an enforceable agreement to negotiate final terms. The overall concept behind this suggestion is to utilize public concerns as "reservoir" of ideas. By tapping into this reservoir and addressing legitimate concerns, the public is given a stake in the outcome of the program, which should increase the success rate of implementation.

6. The City of Pacific Grove Community Development Department must maintain accurate and current records.

It is recommended that the City take a proactive approach to information management, based upon the problems of information retrieval encountered during this research project. During the course of this study, the inadequacies of existing information management were painfully evident. Since the inception of the Coastal Commission, all involved agencies have experienced office location and staff changes and more recently, have started to update files and equipment. These circumstances, coupled with the lack of a central repository or a sophisticated regional land use information management system, have resulted in a situation where gaps and discrepancies in permit histories have occurred. As a result, no single agency has access to or complete knowledge of the existence or status of existing OTDs and DRs. Records are incomplete; early permits, DR and OTD compliance documentation, site-specific botanical surveys, and site plans for the Pacific Grove area (as well as the region) have been misplaced or perhaps irretrievably lost.³³

Until such time that an interagency information tracking system can be coordinated, the City of Pacific Grove must request copies of relevant CDPs and documentation of recordation from the appropriate agencies and area biologists at the time of permit approval or compliance.

7. Parcels subject to OTD and DR controls, should be catalogued utilizing a Geographic Information Systems (GIS) program.

Although GIS is not considered to be a comprehensive analysis tool for land use management, it can provide the basis for analyses necessary to document and evaluate incremental environmental changes resulting from specific actions. Incorporation of GIS into the City's overall information management scheme would greatly enhance the assessment of past and present efforts to protect the significant natural resources of the Asilomar Dunes area by providing a precise graphic display of the locations and boundaries of sensitive habitat areas, OTDs, and DRs, at different points in time. It is important to note that GIS cannot discriminate between different causes and effects, however, the application of GIS can significantly affect the productivity and quality of cumulative effects assessment by its "explicit consideration" of spatial dimensions "ranging from regional to local to site-specific applications".³⁴ The progress of past and future efforts to protect the significant natural resources of the Asilomar Dunes could easily be tracked with the GIS method.

8. Work with the appropriate agencies to develop a coordinated information management system.

The City should make every effort to develop a coordinated information management system with the Coastal Commission and Coastal Conservancy to effectively track permit conditions in the future. This is necessary to avoid the mistakes and oversights made in the past, and to provide a complete record of parcel history, enhance compliance, reduce the likelihood of legal challenges, promote area-wide monitoring, and increase the efficiency of information sharing.

To facilitate a coordinated policy approach between agencies, relevant information regarding the current status of Asilomar Dunes area OTDs and DRs collected during the information retrieval

stages of this report should be distributed to the Coastal Commission and the Coastal Conservancy.

9. Create a Permanent "Property Manager" or "Compliance Officer" Staff Position within the Community Development Department.

The City should give serious consideration to the creation of a new staff position to aid in information management. Many municipalities in the Bay Area rely on their "Property Manager" or "Compliance Officer" to maintain current and complete records of parcel data and permit history at hand for quick reference. These positions provide the valuable service of increasing efficiency and productivity at the local level by reducing the time involved in locating important information, and providing a central repository for required compliance documentation.

Should the City pursue this recommendation, the Property Manager would be responsible solely for the retrieval of monitoring compliance information and the maintenance of the Community Development Department property records. These responsibilities need not be limited to the land controls in the Asilomar Dunes area but could include all environmental monitoring carried out on a City-wide basis. The specific duties of the Property Manager would be to ensure that monitoring is being carried out, and to systematically track the status of mitigations and conditions imposed pursuant to CEQA, the City's Environmental Determinations, and Coastal Commission actions.

Requiring only minimal environmental or planning expertise, the Property Manager position could be staffed by a community volunteer or student intern, or a member of the City's Natural Resources Committee. Much of the initial "management" will involve a substantial amount of organization and planning up front, and may necessitate the temporary hiring of a professional. However, once an established system is in place, the position would be an ideal venue for students wishing to learn more about the operation of a City Planning Department or citizens wishing to participate in community planning. An important consideration of this approach is the likelihood of a frequent staffing turnover which may produce logistical problems such as discrepancies in

filing patterns and a need for frequent training. Ideally, the position should be permanent and could probably be staffed on a part-time basis. Of course, if budget constraints allow, the position could be funded through the City's general revenues.

VI. CONCLUSION

Based upon the information gathered in this report, there is a clear need for more coherent management of the sensitive habitat of the Asilomar Dunes area. The historical record of existing land controls as applied by the Coastal Commission over the last 23 years, has revealed two significant problem areas: Information management and OTD Acceptance. Over time, the lack of adequate information management within and among involved agencies and departments has resulted in a predicament where no governing body has complete knowledge of the status of previously imposed land controls or related permit compliance. Consequently, this circumstance has resulted in the loss of two potential OTDs and as many required deed restrictions. Efficient information management is absolutely necessary to: monitor permit compliance; assess the efficacy of applied policy; promote OTD acceptance; enhance public support; and reduce the likelihood of successful legal challenges.

As illustrated throughout this report, acceptance is critical to the successful implementation of a conservation easement program. Without adequate information management, acceptance is unlikely. Without acceptance, little official monitoring occurs; enforcement is hampered; willing participants may incur high costs of site-specific monitoring and reductions in property values, while violators may escape punishment. Without acceptance there is no opportunity for potential grantors to realize possible tax benefits, and the governing authority may become increasingly susceptible to legal challenges.

Prior to the implementation of the Conservation Easement Program, the City must locate an appropriate accepting organization or agency to assume responsibility for future OTDs. To prevent the irretrievable loss of existing Open Space OTDs, the City must claim accepting

responsibility of the 7 OTDs recorded between 1978 to present. As explained previously, this action requires little expenditure of funds and will serve as evidence of the City's commitment to the protection of the area's significant natural resources. To avoid the permanent monitoring costs of parcels that do not contain or contribute to significant natural resources, the City should develop and adopt specific criteria to determine parcels best suited for the conservation easement program. In addition to the historical record provided by this report, information resources to investigate include: federal income tax deduction criteria; established policy goals and objectives; surveys of similar programs; site-specific monitoring and compliance reports; and regularly scheduled comprehensive natural resource assessments. Once criteria have been established, an accepting body must be designated to assume monitoring responsibility.

It is in the City's best interest to take a proactive approach to information management. This report provides, to the greatest extent possible, a complete record of Coastal Commission land controls imposed in the Asilomar Dunes area from 1973 to present. However, without a formal information management and exchange system in place, there is no guarantee that the mistakes and oversights of the past will not be repeated. Therefore, the City must maintain accurate and current records regarding the Asilomar Dunes area to: enhance management efficiency and productivity; reduce error; provide a well-documented foundation in support of the Conservation Easement Program; promote public support; and prevent successful legal challenges.

These goals would be accomplished effectively by incorporating GIS into the Asilomar Dunes area management scheme and by the creation of a permanent staff position designed exclusively to collect and track relevant permit and compliance data. A qualified independent consultant should be retained to conduct a program assessment in five year intervals. To promote a coordinated interagency approach to management and the determination of suitable accepting grantees, the City must work with the Coastal Commission and the State Coastal Conservancy to create an integrated information exchange system.

Should the City decide to assume responsibility of all future OTDs, a thorough investigation of management and funding alternatives should be undertaken. In the absence of an established

accepting grantee or management program, development permit applicants should be required to sign and record a "waiver of protest agreement" to the formation of a special assessment district or an "agreement to negotiate", subject to the discretion of the City. These agreements are designed to promote full participation of all affected property owners in a management program.

The recommendations and suggestions included in this report are designed to enhance the protection of the significant natural resources of the Asilomar Dunes area while balancing City of Pacific Grove and private property owner interests. By design, conservation easements require a permanent commitment of time, money, governmental and public support, in return for natural resource protection that is guaranteed-in-perpetuity. Therefore, it is critical that the City thoroughly consider the recommendations and suggestions contained herein, prior to implementation of the Conservation Easement Program.

¹ City of Pacific Grove 1994 General Plan. Section 6.6. Natural Resources Goals, Policies and Programs: Goal 1, Policies 1.2.4.5; Goal 3; Goal 6, Policy 12. Pacific Grove Land Use Plan, adopted in 1989. Sections: 2.3.3-4; 2.3.5; 3.4.4.1-6. Pacific Grove Coastal Parks Plan. pp. 78-9.

² Judith MacClelland, Chief Planner City of Pacific Grove (Personal Communication) April 1996.

³ Shonman, David. Asilomar Dunes Habitat Survey With Policy Recommendations. 1988 Report commissioned by the City of Pacific Grove to update and revise the 1981 "Habitat Sensitivity and Identification" report prepared for the City by the botanist, Bruce Cowan. Although Shonman is referring to the misplacement of "more than a dozen" botanical surveys of Asilomar Dunes Parcels carried out prior to 1988, the identical situation exists today for multi-jurisdictional compliance data relating to parcels subject to Pacific Grove and Coastal Commission actions.

⁴ California Coastal Commission Central Coast District. Lee Otter, Chief Planner. Jeri Sheele, Coastal Analyst. Personal Communication, May 1996. Hyman, Rick et al., Regional Cumulative Assessment Project Findings and Recommendations: Monterey Bay Region, September 1995. pp. 147-49.

⁵ California Coastal Commission, San Francisco. Deborah Bove, Legal Assistant. Personal Communication. May 1996.

⁶ California Coastal Commission Central Coast District. Logbook review, March 1996. The CDPs in question contained no location at all, or incomplete listings, namely: "Mty CO" or simply, "PG".

⁷ Shonman, David. Asilomar Dunes Habitat Survey and Policy Recommendations. Report. 1988.

⁸ California Coastal Commission Central Coast District. Lee Otter, Chief Planner. Personal Communication. May 14, 1996.

⁹ California Coastal Commission Central Coast District. Coastal Development Permit file review. 1996.

¹⁰ California Coastal Commission Central Coast District. Lee Otter, Chief Planner. Personal Communication. May 14, 1996.

¹¹ State Coastal Conservancy. Karen Rust, Project Manager: Public Access Program. Personal Communication. May 14, 1996.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ California Coastal Commission Central Coast District Coastal Development Permit Files.

¹⁶ *Nollan v. California Coastal Commission* [(1987) 483 US 107 S. Ct. 3141]. *Dolan v. Tigard* [(1994) -US-, 114 S.Ct. 2309] Definitive ruling regarding dedications as a mitigation for development wherein the Court upheld its previous ruling in *Nollan* regarding judicial review and the nexus requirement.

¹⁷ California Environmental Law Review. Proportionality of Mitigation to Impact 94:245. Justice Scalia supports the Decision in *Nollan* by stating: " without these requirements local governments would be free to withhold beneficial permits on any ground, and thereby force landowners to provide services" unrelated to the burdens imposed by their proposed developments.¹⁷

¹⁸ California Environmental Law Review. Proportionality of Mitigation to Impact 94:247-9.

¹⁹ California Coastal Commission. Jeri Sheel, Coastal Analyst. Personal Communication. April, 1996.

²⁰ The economic effects to property owners and to the City resulting from an OTD program are unknown. An in depth discussion of potential economic effects resulting from such a program is beyond the scope of this report, and should be conducted if the City chooses to implement its Conservation Easement Program.

²¹ Internal Revenue Code. Section 170(h). Treas. Reg. Section 1.170A-14.

²² Diehl, Janet, Barrett, Thomas S. The Conservation Easement Handbook. 1988. The Trust for Public Land, San Francisco. p. 40.

²³ Diehl, Janet, Barrett, Thomas S. The Conservation Easement Handbook. 1988. The Trust for Public Land, San Francisco. pp. 15-9.

²⁴ City of Pacific Grove 1994 General Plan.

²⁵ Pacific Grove Property Files. California Coastal Commission Permit Files. Review conducted: April 1996.

²⁶ State Coastal Conservancy. Karen Rust, Project Manager: Public Access Program. Personal Communication. May 14, 1996.

²⁷ Ibid.

²⁸ Drive-by field inspection, April 1996.

²⁹ State Coastal Conservancy. Karen Rust, Project Manager: Public Access Program. Personal Communication. May 14, 1996.

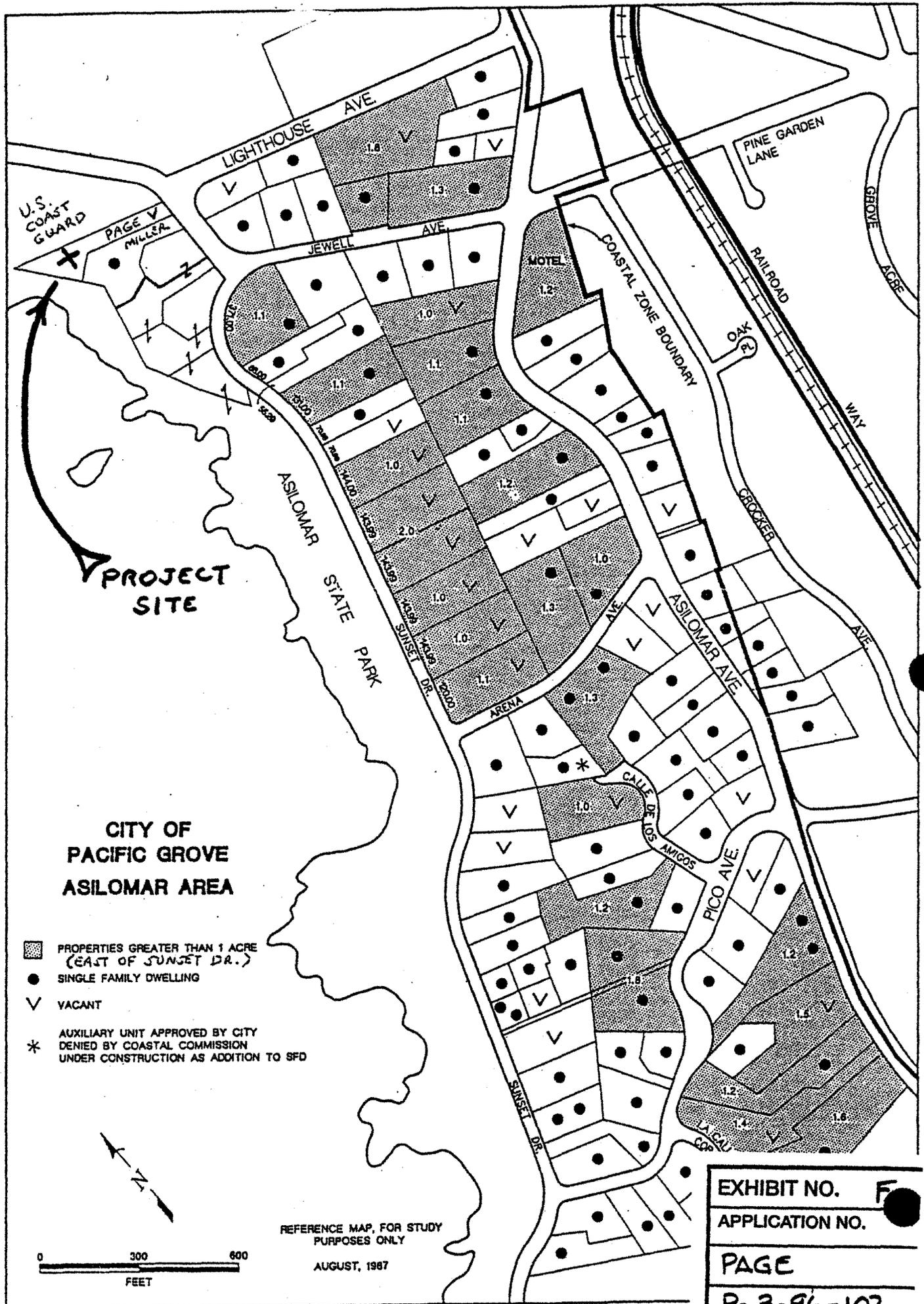
³⁰ Ibid.

³¹ Liability for existing OTDs is minimal by design, since the Coastal Conservancy provides liability immunity, and required monitoring is not extensive. In the future, the extent of liability would probably increase proportionally to the extent of monitoring required by the grantee.

³² Shonman, David. Asilomar Dunes Habitat Survey and Policy Recommendations. Report. 1988 p. 15.

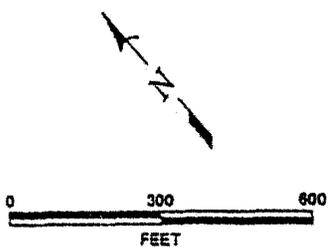
³³ Deborah Bove. Legal Counsel, California Coastal Commission (personal communication). May 16, 1996.

³⁴ Smit, Barry., Spaling, Harry. Methods for Cumulative Effects Assessment. Environmental Impact Assessment Review 1995;15:89-91.



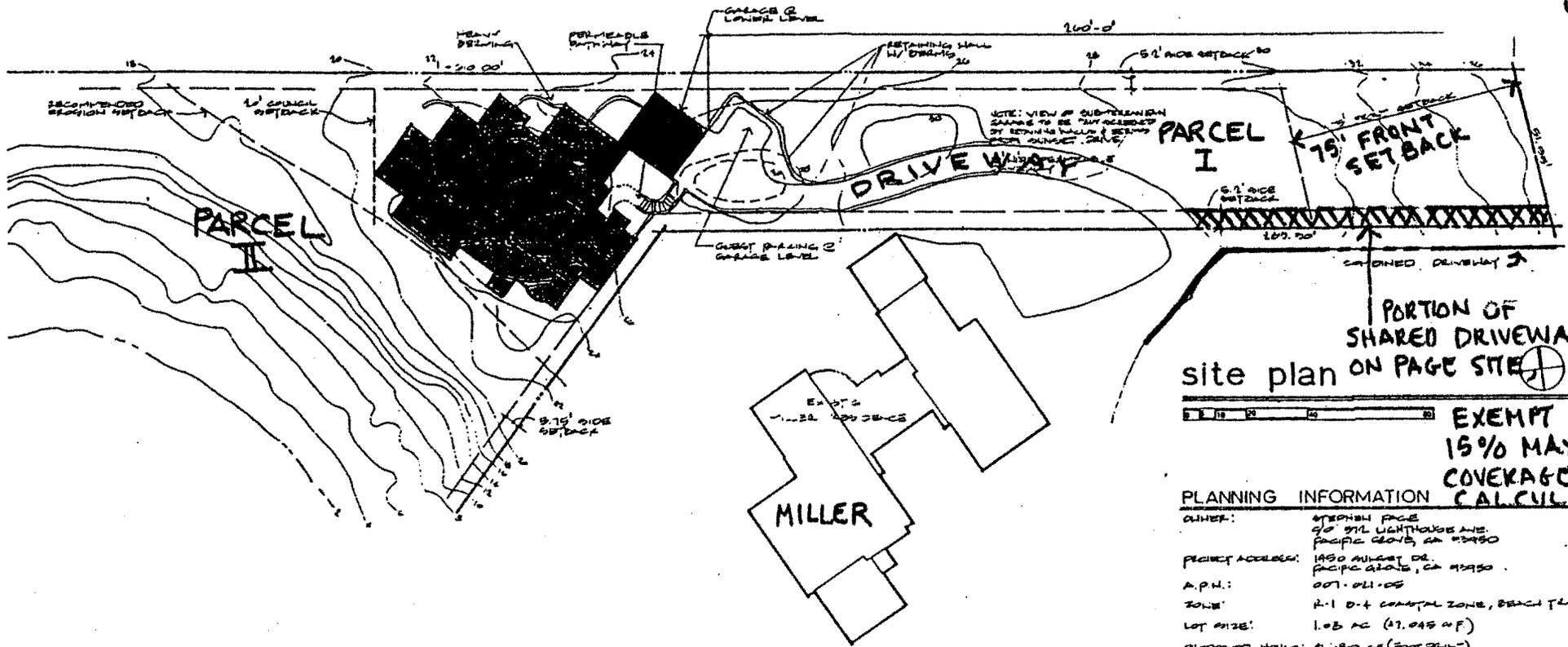
**CITY OF
PACIFIC GROVE
ASILOMAR AREA**

- PROPERTIES GREATER THAN 1 ACRE (EAST OF SUNSET DR.)
- SINGLE FAMILY DWELLING
- ▽ VACANT
- * AUXILIARY UNIT APPROVED BY CITY DENIED BY COASTAL COMMISSION UNDER CONSTRUCTION AS ADDITION TO SFD



REFERENCE MAP, FOR STUDY PURPOSES ONLY
AUGUST, 1987

EXHIBIT NO.	F
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S
SET DRIVE

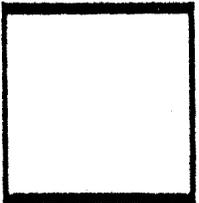
PORTION OF SHARED DRIVEWAY
site plan ON PAGE SITE

EXEMPT FROM
15% MAX
COVERAGE
CALCULATION

PLANNING INFORMATION
OWNER: STEPHEN PAGE
70 OIL LIGHTHOUSE AVE.
PACIFIC GROVE, CA 93950
PROJECT ADDRESS: 1450 SUNSET DR.
PACIFIC GROVE, CA 93950
A.P.N.: 007-021-05
ZONE: R-1 D-4 COASTAL ZONE, BEACH TRACT
LOT SIZE: 1.03 AC (47,045 SF)
PROPOSED HOUSE: 4,230 SF (FOOTPRINT)
GARAGE: 630 SF (DETACHED, 1-2 CAR HOUSING)
PATIO: 270 SF
TOTAL LOT COV.: 4,230 SF (9%)
DRIVEWAY & GARAGE: 11,000 SF (PEBBLE DRIVE)
TOTAL LOT COV.: 15% (8' TOWER) RECALCULATED BY L&L BUILT ABOVE MAXIMUM COV.

EXHIBIT NO. G
APPLICATION NO.
PAGE
P-3-96-102

		
JOHN E. MATTHAMS INTERNATIONAL DESIGN GROUP 572 LIGHTHOUSE AVE. PACIFIC GROVE CA. (408)848-1281		
DESIGNED	DATE	REVISIONS
DRAWN	2/11/94	
APPROVED		
SCALE	CONSULTANT	



A New Residence for:
Mr. & Mrs. Stephen Page
1450 Sunset Drive Pacific Grove, California

