

CALIFORNIA COASTAL COMMISSION

NORTH COAST AREA
FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
(415) 904-5260

F 7b



Filed:	October 3, 1997
49th Day:	November 21, 1997
180th Day:	April 1, 1998
Staff:	Jo Ginsberg
Staff Report:	October 17, 1997
Hearing Date:	November 7, 1997
Commission Action:	

STAFF REPORT: PERMIT AMENDMENT

APPLICATION NO.: 1-95-054-A

APPLICANTS: DONNA FEINER

PROJECT LOCATION: 3451 "E" Road, off Navarro Ridge Road, Albion,
Mendocino County, APN 123-080-31.

DESCRIPTION OF PROJECT PREVIOUSLY APPROVED: Installation of a curtain drain and outlet pipe on a vacant parcel for the purpose of attempting to lower the groundwater table sufficiently to make it feasible to install a septic system which could serve potential future development.

DESCRIPTION OF AMENDMENT: (1) Revise Special Condition No. 4 to require recordation of a deed restriction in lieu of recordation of the permit; (2) revise Special Condition No. 2 to extend the three-year time period during which the curtain drain is authorized to stay in place an additional two years; and (3) revise Special Condition No. 3 to extend the two-year time period allowed for submittal of a Health Department evaluation of the curtain drain an additional two years.

SUBSTANTIVE FILE DOCUMENTS: Mendocino County LCP; Coastal Permits 1-91-75 and 1-95-10 (Feiner, Kefauver, and Cirino); Sierra Club v. California Coastal Comm. (1993) 12 Cal.App.4th 602; Reconsideration of findings regarding Mendocino County Land Use Plan.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission approve the requested amendment to the coastal development permit originally granted for the installation of a curtain drain to test the suitability of the site for potential future development. The conditions of the original permit (1) imposed limits on the amount of area that could be graded and required the use of a small backhoe to minimize disturbance to the ESHA; (2) required the applicant to either remove the curtain drain and restore the site within a three-year time period if the drain is ineffective or seek additional authorization to retain the drain; and (3) required recordation of the permit to inform future buyers of the conditions of the permit. The proposed amendment would simply substitute a requirement for recordation of a deed restriction for the requirement for recordation of the original permit to meet the recording requirements of the County Recorder's Office and would change the conditions to allow for the curtain drain to be installed, functioning, and removed within a different three-year period than the three-year period provided for in the original permit to adjust for delays in getting started on the project. Staff believes that, as conditioned, the proposed development with the proposed amendment is consistent with Chapter 3 of the Coastal Act and will not result in any significant adverse impacts to coastal resources such as pygmy vegetation or other environmentally sensitive habitat.

STAFF NOTES

1. Commission Jurisdiction and Standard of Review.

A botanical survey of the subject site determined that the vacant subject parcel is almost entirely covered with pygmy vegetation, a rare and valuable resource, and that three rare and endangered plant species occur throughout the parcel.

In a lawsuit filed by the Sierra Club against the County of Mendocino and the Coastal Commission (Sierra Club v. Calif. Coastal Comm. (1993) 12 Cal. App. 4th 602.), the court of appeals ruled that the Commission's decision to certify the Mendocino County Land Use Plan without designating and treating all pygmy forest areas as an Environmentally Sensitive Habitat Area (ESHA) was not supported by substantial evidence in light of the whole record, and ordered the Commission to set aside its findings regarding pygmy forests and to set aside that part of the County LCP. The County of Mendocino petitioned the State Supreme Court to accept an appeal of the court of appeals' decision, but the appeal was not accepted by the Supreme Court.

To comply with the court's order, the approved LUP policies dealing with pygmy forest were set aside. In February of 1994, the Commission "segmented" the County's LCP and created a separate portion consisting of the pygmy forest areas of the County's coastal zone, wherein the Commission retains permit authority until such time as the County completes a certified LCP for this segment. The Coastal Act thus provides the standard of review, not the County's LCP. It is currently the Commission's practice to treat all pygmy forest areas as ESHA, and the Coastal Act's ESHA policies need to be applied to determine if development within the pygmy forest is approvable.

2. Subject Amendment.

In January of 1996, the Commission approved the original application for installation of a curtain drain on the subject parcel. Special Condition No. 4 required recordation of the permit to ensure that any future buyers of the property would be aware of conditions of the permit requiring removal of the curtain drain (Special Condition No. 2) and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain (Special Condition No. 1). Special Condition No. 4 required this recordation prior to issuance of the coastal development permit. However, staff at the County of Mendocino recorder's office have subsequently refused to record the permit, and indicated that it would only be proper to record a deed restriction. Furthermore, as the attempt to record the permit prior to permit issuance has taken many months, the applicant is in danger of being unable to meet the time requirements imposed by Special Conditions No. 2 and 3. The applicant has thus submitted an amendment request to revise Special Condition No. 4 to require recordation of a deed restriction in lieu of recordation of the permit, and to revise Special Conditions No. 2 and 3 to extend those time periods.

3. Procedural Note.

Section 13166 of the California Code of Regulations states that the Executive Director shall reject an amendment request if it lessens or avoids the intent of the approved permit unless the applicant presents newly discovered material information, which he or she could not, with reasonable diligence, have discovered and produced before the permit was granted.

In this case, the amendment request before the Commission would not lessen or avoid the intent of the originally approved permit as it does not make substantive changes to the project or the permit conditions but, as discussed above, merely substitutes the requirements of a permit condition to record a deed restriction for a requirement to record the permit, and, given that the permit has not yet issued, changes the specific three-year time period during which the conditions allow the curtain drain to be installed.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. Approval with Conditions

The Commission hereby approves the proposed amendment to the coastal development permit, subject to the conditions below, on the grounds that the proposed development with the proposed amendment, as conditioned, will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Standard Conditions: See attached.

III. Special Conditions:

Special Condition No. 1 of Coastal Permit No. 1-95-54, which restricts vegetation removal, shall remain in effect. Special Conditions No. 2, 3, and 4 shall be replaced by the following revised conditions:

2. Future Review.

The curtain drain to be installed pursuant to this permit is authorized to be left in place only until January 1, 2001. Unless this authorization is amended, the curtain drain shall be removed in its entirety and the disturbed area restored to its natural contours and vegetation no later than January 1, 2001.

By January 1 of 2000, the permittee or the permittee's successor in interest shall submit a complete coastal permit amendment application to either (a) remove the curtain drain (if it has not been effective) and restore the disturbed area; (b) extend again for good cause the time period during which the drain is authorized to stay in place; or (c) construct a residence and septic system that will rely on the curtain drain.

Any permit application submitted for removal of the curtain drain shall contain the following information:

- a. an evaluation by a qualified soils scientist or biologist indicating what, if any, adverse impacts to the pygmy habitat would result from removal of the curtain drain, and comparing such impacts to the impacts of leaving the curtain drain in place;

b. a recommendation by a qualified soils scientist or biologist as to the best method of removal of the curtain drain to minimize adverse impacts to the pygmy habitat;

c. a plan for restoration of the disturbed area that includes a timeframe and monitoring schedule, as well as any necessary mitigation measures.

3. County Environmental Health Evaluation.

By January 1 of 2000, the permittee or the permittee's successor in interest shall submit a copy of the determination/evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system.

4. Deed Restriction.

PRIOR TO ISSUANCE of the Coastal Development Permit, the applicants shall execute and record a deed restriction, in a form and content acceptable to the Executive Director, stating that the curtain drain approved by Coastal Permit No. 1-95-54 is subject to the special conditions of the permit, which require:

a. that all excavation necessary for the installation of the curtain drain and outlet pipe shall be performed only with a small backhoe, that no large equipment shall be employed and that removal of vegetation is authorized only for the installation of the curtain and outlet pipe;

b. that the curtain drain may remain in place only until January 1, 2001 and that unless the permit is amended, it shall be removed in its entirety and the disturbed area restored to its natural contours and vegetation; and that by January 1, 2000 the permittee shall submit an amendment application to either remove the curtain drain if it has not been effective and restore the disturbed area; extend for good cause the time period during which the drain is authorized to stay in place; or construct a residence and septic system that will rely on the curtain drain.

c. that by January 1, 2000, the permittee shall submit a copy of the determination/evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system.

The document shall run with the land binding all successors and assigns and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction.

At such time as the permittee submits the permit amendment request required by Special Condition No. 2, the permittee may include in the amendment request a request to remove Special Condition No. 4 by the execution of a Consent to the Extinguishment of Recordation. Consideration by the Coastal Commission of the permittee's request shall be based upon: (a) a sufficient showing by the landowner and/or permittee of compliance with all of the conditions of the permit and amendments thereto; and (b) the extent to which there remains a need to make any future buyers of the property aware of the conditions of this permit requiring removal of the curtain drain (Special Condition No. 2) and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain (Special Condition No. 1).

IV. Findings and Declarations.

The Commission finds and declares the following:

1. Site and Project Description:

A. SITE DESCRIPTION.

The subject property is located east of Highway One, just north of Navarro Ridge Road, about 1.5 miles east of the village of Albion and Highway One in Mendocino County. The site is generally flat, being part of an ancient marine terrace, but slopes gently to the west, and is vegetated by pygmy forest and North Coast Bishop pine forest.

According to the botanist who surveyed the parcel, the subject parcel is almost entirely covered by pygmy vegetation and contains a large number of specimens of three sensitive plant species, two of which are rare and endangered, and one of which is very rare, according to the California Native Plant Society--Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge).

No views to or along the coast are afforded through the parcel, and the site is not visible from either Highway One, "E" road, or Navarro Ridge Road. The vacant parcel is designated in the Mendocino County Land Use Plan as Rural Residential-10 (RR-10), meaning that there may be one parcel for every ten acres, and that the site is intended for residential use. The subject parcel, which is approximately 1.61 acres in size, is a legal, non-conforming lot.

B. PROJECT DESCRIPTION.

On January 11, 1996, the Commission authorized installation of a curtain drain and outlet pipe on the subject property to lower the groundwater table for the purpose of determining whether the parcel can adequately support a septic system to serve possible future residential development on the site. The

curtain drain will be approximately 100 feet long, one foot wide, and five feet deep; the outlet pipe will be approximately 200 feet long.

The soils scientist who surveyed the property indicated that the groundwater levels on the site were monitored through an appropriate wet weather period, and that groundwater was observed within 24 inches of the soil surface during the observation period. A minimum of 24 inches to the highest level of groundwater is required by the Mendocino County Department of Environmental Health and the State Water Quality Control Board before any type of on-site sewage disposal system can be proposed. Since the water table on the site is currently too high for a septic system to be installed, a curtain drain is necessary to lower the winter groundwater table to acceptable levels to allow an on-site sewage disposal system. On slopes of less than 5%, curtain drains must be installed and proven to work, as evidenced by a groundwater monitoring program, before an on-site sewage disposal system can be proposed. Since the subject parcel contains a slope of between 2% and 3%, a curtain drain needs to be installed and shown to be effective before an on-site sewage disposal system may be proposed.

A special condition of the original permit required recordation of the terms, conditions, and findings of the permit prior to issuance of the permit to ensure that future buyers of the property would be aware of the conditions of the permit requiring removal of the curtain drain and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain. However, staff at the County Recorder's Office would not record the permit, and asserted that it was proper only to record a deed restriction. In addition, because of the time delay in attempting recordation of the permit, the permit was never issued, the project was never commenced, and it will not be possible for the applicant to meet certain time deadlines imposed by the special conditions of the original permit. The applicant, thus, is requesting that the permit be amended to revise three special conditions. The applicant is requesting that Special Condition No. 2 be revised to extend the three-year time period during which the curtain drain is authorized to be left in place by an additional two years, that Special Condition No. 3 be revised to extend the two-year time period allowed for submittal of a Health Department evaluation of the curtain drain an additional two years, and that Special Condition No. 4 be revised to require recordation of a deed restriction in lieu of recordation of the permit.

2. Protection of Environmentally Sensitive Habitat:

Section 30107.5 of the Coastal Act defines "environmentally sensitive habitat 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.

Section 30240 of the Coastal Act states in part that:

- (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.

A botanical survey performed on the subject parcel indicated that the entire parcel contains true pygmy forest. In addition to the presence of both pygmy soil and pygmy vegetation, the botanical survey also states that the entire site is vegetated with three rare and endangered plant species: Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge). These rare and endangered plant species grow in what are considered environmentally sensitive areas as they are rare and valuable habitats that are easily disturbed or degraded by human activities. In approving the original permit, the Commission found that the entire parcel is an environmentally sensitive habitat area (ESHA) pursuant to Coastal Act Section 30107.5 due to the presence on the parcel of both true pygmy forest and large numbers of these rare and endangered plants (see Finding 3, pages 6 and 7 of the original staff recommendation attached as Exhibit No. 5).

Coastal Act Section 30240 requires that "environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." As the entire parcel constitutes an environmentally sensitive habitat area, Section 30240 restricts development on the parcel to only those uses that are dependent on the resource. The original permit proposed only to install a curtain drain for the purpose of attempting to lower the groundwater table adequately to make it feasible to install a septic system in the future to accommodate future residential development. Installation of the curtain drain does not constitute a new use on the subject parcel, as its purpose is only to test whether a new use (septic system and residential development) would be possible. Since no new use was proposed, it was determined by the Commission when it approved Coastal Permit 1-95-54 that the installation of the curtain drain did not conflict with the use limitations of Coastal Act Section 30240.

The impacts of the curtain drain to the pygmy forest ESHA at the site will mainly be through the vegetation removal necessary for the installation of the curtain drain and outlet pipe. In addition, the soils scientist who examined the parcel has indicated that the areas both downslope and upslope of the curtain drain will experience a reduction in winter groundwater levels. The area downslope of the curtain drain is intended to be used for the sewage disposal system, and the effective downslope distance of groundwater reduction as influenced by the curtain drain on this slope will not exceed the area identified for the on-site sewage disposal systems. The area upslope of the

drain will also experience a reduction in winter groundwater levels, which could impact the pygmy forest ESHA by reducing the amount of rainfall recharge to the root zone. Although the pygmy forest ESHA experiences distinct wet and dry periods naturally, this reduction in recharge could have a negative impact on the vegetation. This impact can be mitigated by having the clearing for any approved homesite be in this area upslope of the curtain drain. According to the soils scientist, the effect of the curtain drain upslope of the drain will not extend more than about 50 feet upslope given the soil and slope conditions present.

The development approved by the Commission pursuant to Coastal Permit 1-95-54 was sited to accommodate the existing clearings on the site as much as possible. In addition, the Commission attached several special conditions to minimize significant adverse impacts to sensitive habitat. These conditions remain intact, except for (1) minor changes to the time deadlines in Special Conditions No. 2 and 3 to reflect the different period of time during which the curtain drain is now proposed to be installed and functioning, and (2) minor changes to Special Condition No. 4 to require that a deed restriction rather than the permit itself be recorded, as further described below.

Special Condition No. 1 requires that all excavation necessary for the installation of the curtain drain and outlet pipe be performed only with a small backhoe (rather than any large equipment) and be limited only to those areas within 10 feet of the curtain drain or outlet pipe, and allows the removal of only such vegetation as is necessary for the installation of the curtain drain. This condition remains unchanged from the condition attached by the Commission to Permit 1-95-54.

Special Condition No. 2, as amended, requires that the curtain drain to be installed pursuant to this permit be left in place only until January 1, 2001; unless this permit is amended, the curtain drain must be removed and the disturbed area restored by that date. In addition, by January 1, 2000, the permittee must submit a complete coastal permit amendment application to either (a) remove the curtain drain and restore the disturbed area; (b) extend again for good cause the period of time during which the curtain drain may remain in place; or (c) construct a residence and septic system that will rely on the curtain drain. Finally, if the applicant or successor in interest applies to remove the curtain drain, information prepared by a qualified soils scientist or biologist will need to be submitted, indicating what, if any, adverse impacts to the pygmy habitat would result from removal of the curtain drain, compared to leaving it in place; how to minimize these impacts; and what steps are necessary to restore the disturbed area. Therefore, if the curtain drain is not effective in adequately lowering the water table such that a septic system may be installed, or residential development is not proposed for some other reason and the curtain drain is no longer necessary, the Commission will have the opportunity of determining if the curtain drain should be removed, and, if so, how best this removal should take place.

The changes to Special Condition No. 2 do not involve substantive changes, just a change to the specific three-year time period when the curtain drain is allowed to be installed, functioning, and removed (if it has not been effective and the applicant doesn't seek authorization to retain it). Instead of providing for the curtain drain to be installed, functioning, and removed between January of 1996 and January of 1999, Special Condition No. 2, as amended, provides for the curtain drain to be installed, functioning, and removed (if it has not been effective and the applicant doesn't seek authorization to retain it) between November, 1997 and January 1, 2001.

Special Condition No. 3, as amended, requires that by January 1, 2000, the permittee shall submit a copy of the evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system. Again, no substantive change has been made to the requirements of the condition, only that the required evaluation be submitted by January 1, 2000 rather than January 11, 1998 (two years from the date of approval of the original permit) to reflect the different time period during which the curtain drain is now proposed to be installed, functioning, and removed (if it has not been effective and the applicant doesn't seek authorization to retain it).

To better ensure that any future buyers of the property are aware of the conditions of this permit requiring removal of the curtain drain, submittal of an amendment request, and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain, the Commission attached Special Condition No. 4 to the original permit. This condition originally required that a copy of the terms, conditions, and findings of the permit approval be recorded stating the conditions of the permit. The condition contains provisions for the permittee or landowner to seek the Commission's approval of rescinding the recordation of the permit at the time the applicant submits the amendment request required by Special Condition No. 2. Consideration by the Coastal Commission of the permittee's request shall be based upon a sufficient showing of compliance with the permit as conditioned and a determination by the Commission that there no longer remains a relative need at that point to make future buyers of the property aware of the permit conditions requiring removal of the curtain drain and avoidance of pygmy vegetation.

As amended, Special Condition No. 4 now requires that a deed restriction stating the requirements of the permit be recorded instead of the permit itself. The change is necessary to satisfy the procedural requirements of the County Recorder's Office. As the same basic information will be recorded in the deed restriction as would have been recorded had the County accepted the permit for recording, the amendment does not result in a substantive change in the condition and accomplishes the same purpose as the original condition.

The Commission thus finds that as conditioned, the proposed development with the proposed amendment is consistent with Coastal Act Section 30240, as the development is not a new use and thus is allowable within an ESHA, and that with the proposed revised special conditions, the development remains designed and located so as to minimize adverse impacts to sensitive habitat.

As is noted in the findings for approval of the original permit, the Commission reiterates that its determination that the curtain drain is consistent with the Coastal Act in no way should be construed as committing the Commission to approve future residential development on the site. At such time as the applicant may wish to install an on-site sewage disposal system and/or proceed with residential development of the subject parcel, a new coastal permit will be necessary, and the Commission will have to consider what development would be allowable consistent with the Coastal Act, including Section 30010 and those policies of the Coastal Act that protect environmentally sensitive habitat areas.

3. Mendocino County LCP:

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act:

- (a) Prior to certification of the Local Coastal Program, a Coastal Development Permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a Coastal Development Permit on grounds it would prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

As explained above, to comply with court order, the portion of the Mendocino County Local Coastal Program relating to the pygmy forest has been set aside. Since the County of Mendocino has not yet submitted proposed alternative policies for certification, the jurisdiction over pygmy forest areas has been returned to the Commission.

The proposed development with the proposed amendment, which does not constitute a new use, will be sited and designed to minimize adverse impacts on sensitive habitat consistent with the policies of Chapter 3 of the Coastal Act. Therefore, the Commission finds that as conditioned, approval of the proposed development with the proposed amendment will not prejudice the ability of the County to prepare a Local Coastal Program for the pygmy forest consistent with the policies of Chapter 3 of the Coastal Act, as required by Section 30604(a).

4. California Environmental Quality Act (CEQA):

Section 13096 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(i) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment.


The proposed project has been conditioned to be found consistent with the policies of the Coastal Act. Mitigation measures will minimize all adverse environmental impacts. These mitigation measures include requirements that: (1) all excavation necessary for the installation of the curtain drain and outlet pipe shall be performed only with a small backhoe and shall be limited to those areas within 10 feet of the curtain drain or outlet pipe to minimize impacts to the pygmy vegetation; (2) the curtain drain is authorized to be left in place only temporarily unless it is determined that it is effective, and if it is to be removed the disturbed area shall be restored; (3) the permittee shall submit a copy of the determination/evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system; and (4) a deed restriction be recorded that states the conditions of the permit to ensure that future buyers of the property are aware of the conditions of the permit requiring removal of the curtain drain and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain.

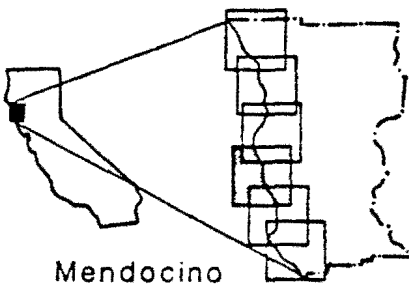
As discussed previously in Finding 3 above, the Commission concludes that the proposed project has been mitigated to minimize adverse impacts to ESHA. As conditioned, there are no other feasible alternatives or feasible mitigation measures available beyond those required which would substantially lessen any significant adverse impacts which the activity may have on the environment. Therefore, the Commission finds that, as conditioned to mitigate the identified impacts, the proposed development with the proposed amendment is consistent with the requirements of the Coastal Act and can be found to conform to CEQA.

ATTACHMENT A

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 of 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 development during construction, 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.	1
APPLICATION NO.	1-95-54-A (Feiner)
LOCATION MAP	
 California Coastal Commission	



APPROXIMATE
LOCATION

LOCATION MAP

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miles



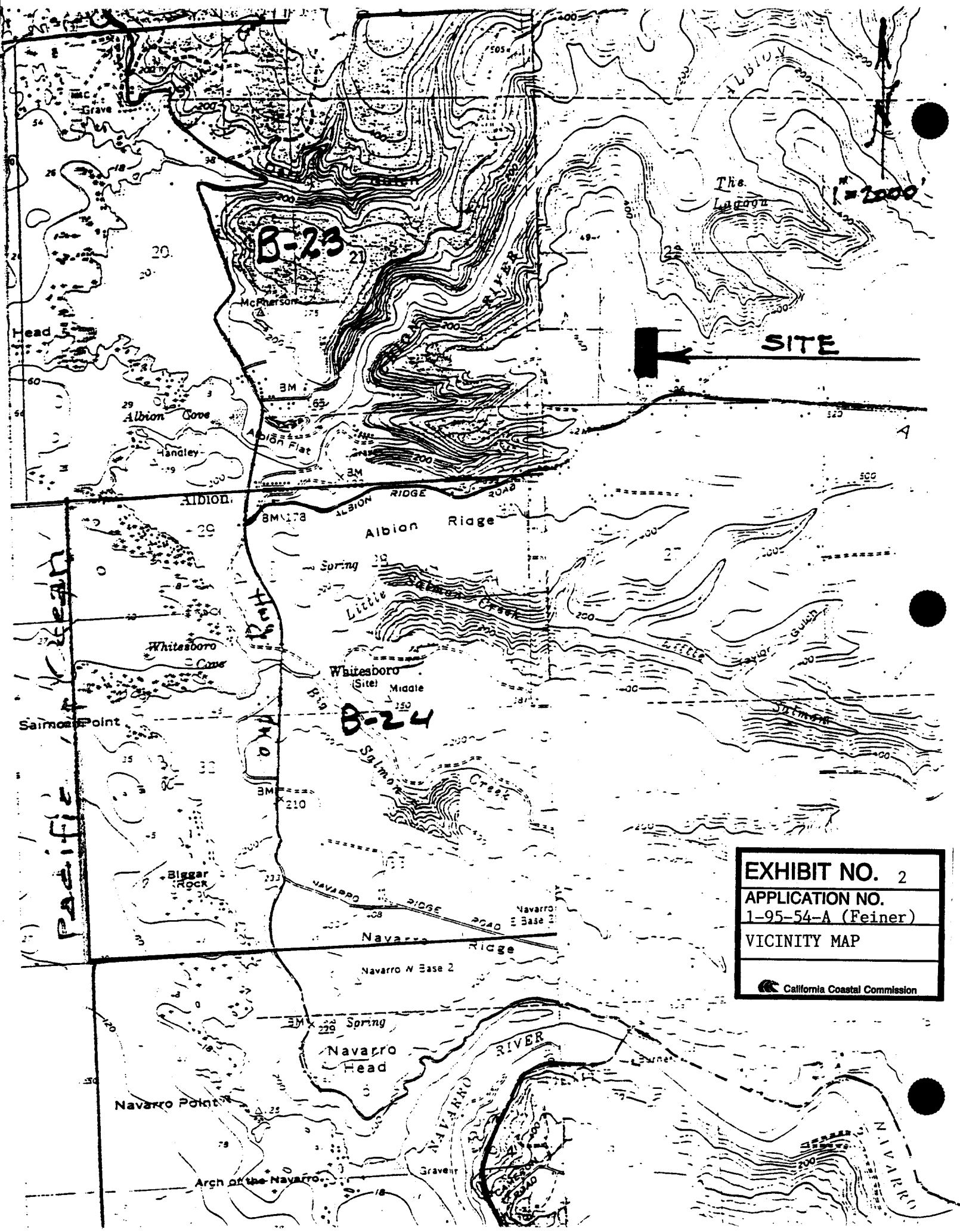


EXHIBIT NO.	2
APPLICATION NO.	1-95-54-A (Feiner)
VICINITY MAP	

 California Coastal Commission

EXHIBIT NO. 3
 APPLICATION NO.
 1-95-54-A (Feiner)
 SITE PLAN

California Coastal Commission

TOPOGRAPHIC MAP

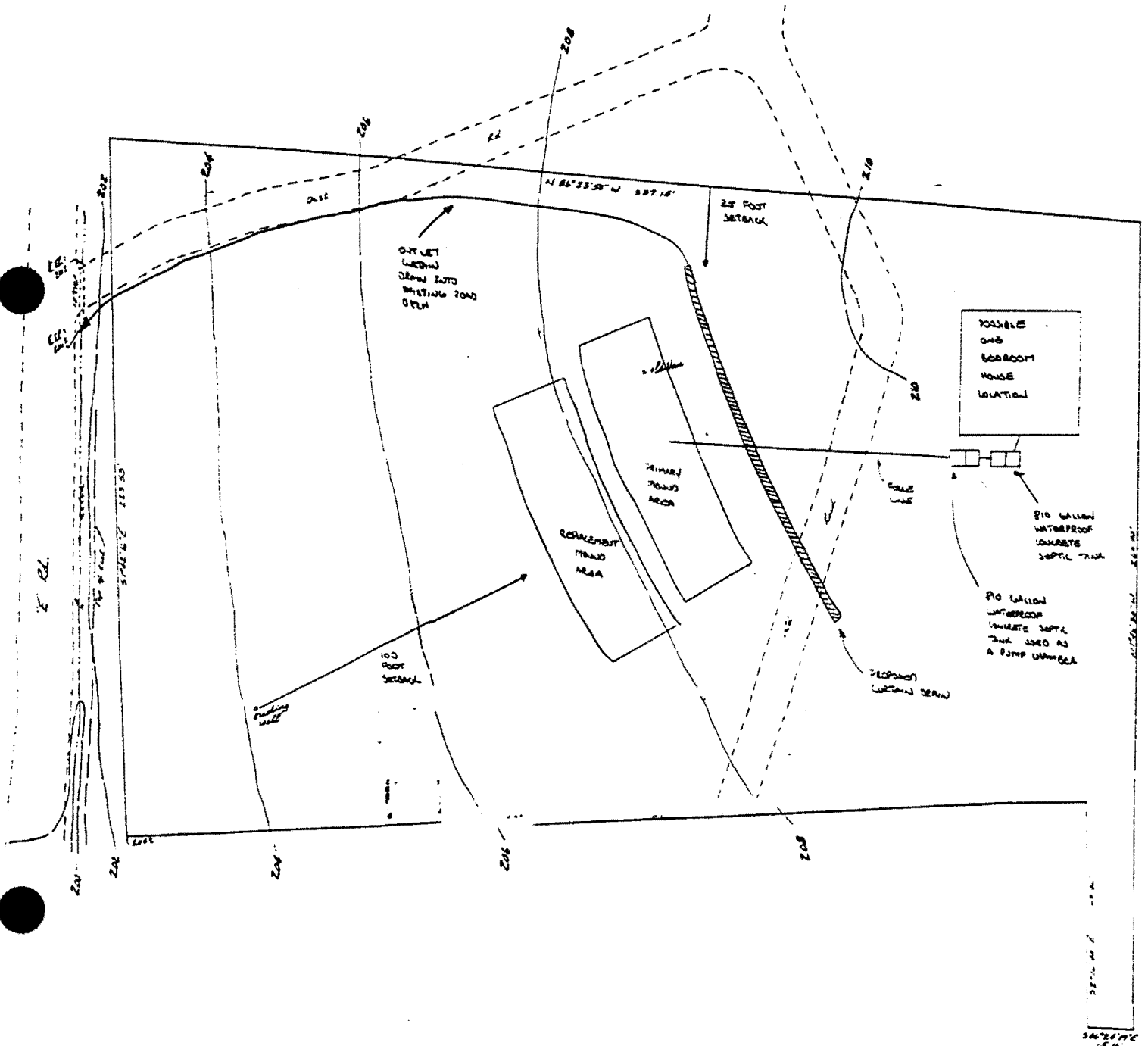
of a portion of the lands of Feiner being a portion of the S
 of the SW 1/4 of Section 22, T 16 N, R 17 W, N D & M

Marina County
 Scale 1" = 20'

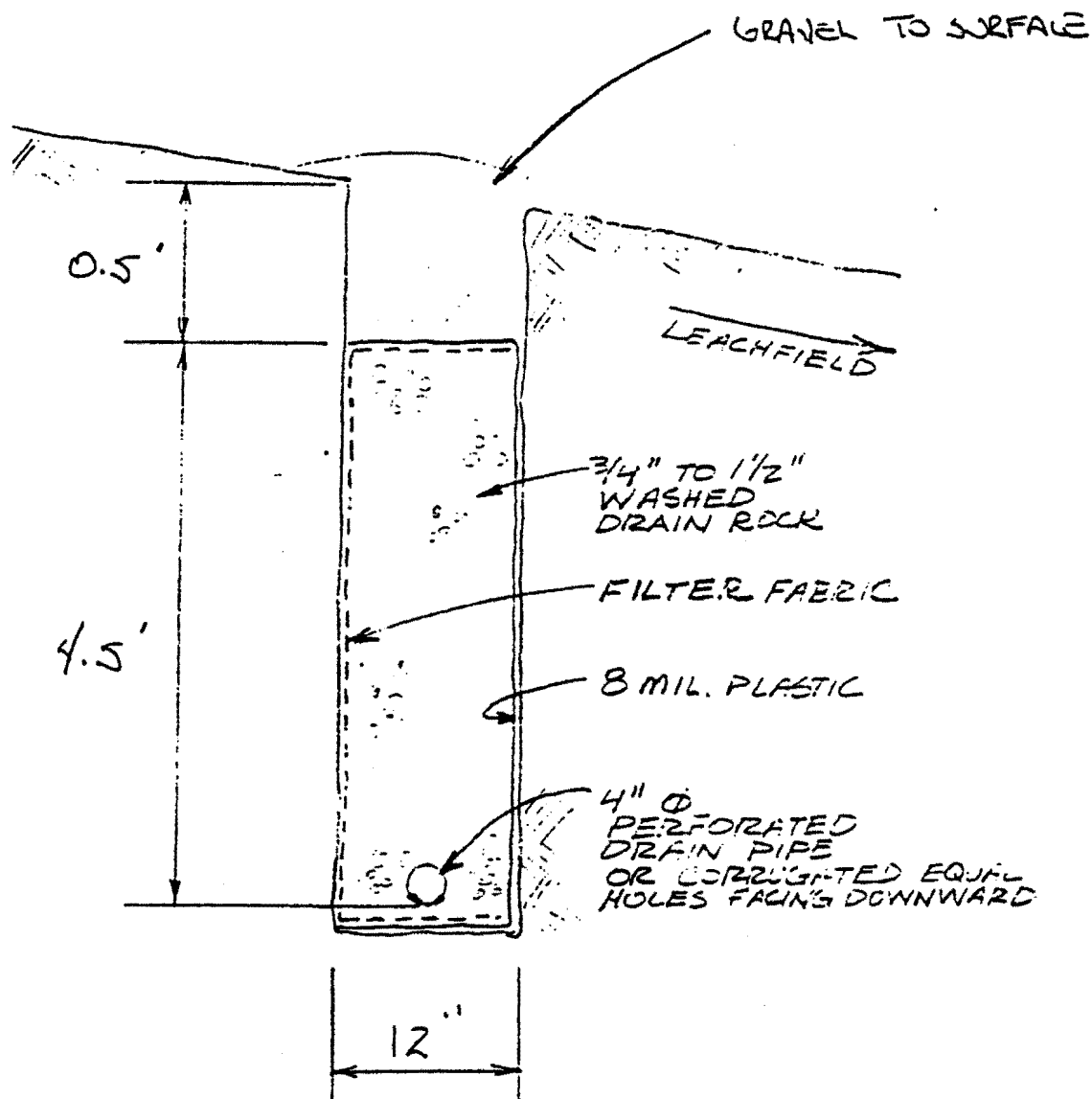
California
 August, 1991

Sheet one of one

also prepared by Richard A. Scale, L.S. 1166



RE-VEGETATE SOIL UPSHORE
OF DRAIN SO SILT DOES
NOT PLUG UP DRAIN



CURTAIN DRAIN

NOT TO SCALE

EXHIBIT NO. 4

APPLICATION NO.

1-95-54-A (Feiner)

Proposed Curtain
Drain

CALIFORNIA COASTAL COMMISSION

NORTH COAST AREA
FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
(415) 904-5260

Th 16b

**EXHIBIT NO.** 5**APPLICATION NO.**
1-95-54-A (Feiner)
Original Staff
Report

California Coastal Commission

Filed:	December 8, 1995
49th Day:	January 26, 1996
180th Day:	June 5, 1996
Staff:	Jo Ginsberg
Staff Report:	December 22, 1995
Hearing Date:	January 11, 1996
Commission Action:	

STAFF REPORT: REGULAR CALENDAR**APPLICATION NO.:** 1-95-54**APPLICANTS:** DONNA FEINER**PROJECT LOCATION:** 3451 "E" Road, off Navarro Ridge Road, Albion,
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Lot area: 1.61 acres
Plan designation: Rural Residential-10 (RR-10)


SUBSTANTIVE FILE DOCUMENTS: Mendocino County LCP; Coastal Permit Nos. 1-91-75 and 1-95-10 (Feiner, Kefauver, and Cirino); Sierra Club v. California Coastal Comm. (1993) 12 Cal.App.4th 602; Reconsideration of findings regarding Mendocino County Land Use Plan.

STAFF NOTE

A botanical survey of the subject site has determined that the vacant Feiner parcel is almost entirely covered with pygmy vegetation, a rare and valuable resource, and that three rare and endangered plant species occur throughout the parcel.

In a lawsuit filed by the Sierra Club against the County of Mendocino and the Coastal Commission (Sierra Club v. Calif. Coastal Comm. (1993) 12 Cal. App. 4th 602.), the court of appeals ruled that the Commission's decision to certify the Mendocino County Land Use Plan without designating and treating

1-95-54
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Page Two

EXHIBIT NO. 5
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all pygmy forest areas as an Environmentally Sensitive Habitat Area (ESHA) was not supported by substantial evidence in light of the whole record, and ordered the Commission to set aside its findings regarding pygmy forests and to set aside that part of the County LCP. The County of Mendocino petitioned the State Supreme Court to accept an appeal of the court of appeals' decision, but the appeal was not accepted by the Supreme Court.

To comply with the court's order, the approved LUP policies dealing with pygmy forest were set aside. In February of 1994, the Commission "segmented" the County's LCP and created a separate portion consisting of the pygmy forest areas of the County's coastal zone, wherein the Commission retains permit authority until such time as the County completes a certified LCP for this segment. The Coastal Act thus provides the standard of review, not the County's LCP. It is currently the Commission's practice to treat all pygmy forest areas as ESHA, and the Coastal Act's ESHA policies need to be applied to determine if development within the pygmy forest is approvable.

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends approval with conditions because, as conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act and will not result in any significant adverse impacts to coastal resources. To minimize impacts to the pygmy vegetation, the permit is conditioned to require that excavation be done with a small backhoe and be limited to those areas within 10 feet of the curtain drain or outlet pipe. In addition, the permit is further conditioned so that if the curtain drain will not be used to accommodate residential development, the curtain drain must be removed and the disturbed area restored.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. Approval with Conditions

The Commission hereby grants, subject to the conditions below, a permit for the proposed development on the grounds that the development, as conditioned, will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Standard Conditions: See attached.

III. Special Conditions:

1. Vegetation Removal Restrictions.

All excavation necessary for the installation of the curtain drain and outlet pipe shall be performed only with a small backhoe and shall be limited to those areas within ten (10) feet of the curtain drain or outlet pipe to minimize impacts to the pygmy vegetation. No large equipment whatsoever shall be employed. This permit authorizes removal of vegetation only to allow for the installation of the curtain drain and outlet pipe; no additional vegetation removal for any other purpose is permitted at this time.

2. Future Review.

The curtain drain to be installed pursuant to this permit is authorized to be left in place only for a three-year period. Unless this authorization is amended, the curtain drain shall be removed in its entirety and the disturbed area restored to its natural contours and vegetation no later than three years after approval of this permit.

Within two years of approval of this coastal permit, the permittee or the permittee's successor in interest shall submit a complete coastal permit amendment application to either (a) remove the curtain drain (if it has not been effective) and restore the disturbed area; (b) extend for good cause the time period during which the drain is authorized to stay in place; or (c) construct a residence and septic system that will rely on the curtain drain.

Any permit application submitted for removal of the curtain drain shall contain the following information:

- a. an evaluation by a qualified soils scientist or biologist indicating what, if any, adverse impacts to the pygmy habitat would result from removal of the curtain drain, and comparing such impacts to the impacts of leaving the curtain drain in place;
- b. a recommendation by a qualified soils scientist or biologist as to the best method of removal of the curtain drain to minimize adverse impacts to the pygmy habitat;
- c. a plan for restoration of the disturbed area that includes a timeframe and monitoring schedule, as well as any necessary mitigation measures.



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3. County Environmental Health Evaluation.

Within two years of approval of this coastal permit, the permittee or the permittee's successor in interest shall submit a copy of the determination/evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system.

4. Recordation of Permit.

PRIOR TO ISSUANCE of the Coastal Development Permit and subject to the review and approval of the Executive Director, the applicant shall submit evidence demonstrating that a copy of the terms, conditions, and findings of this permit as adopted by the Commission has been recorded with the deed to the subject property. The recorded document shall run with the land and bind all successors and assigns. At such time as the permittee submits the permit amendment request required by Special Condition No. 2, the permittee may include in the amendment request a request to remove Special Condition No. 4 by the execution of a Consent to the Extinguishment of Recordation. Consideration by the Coastal Commission of the permittee's request shall be based upon: (a) a sufficient showing by the landowner and/or permittee of compliance with all of the conditions of the permit and amendments thereto; and (b) the extent to which there remains a need to make any future buyers of the property aware of the conditions of this permit requiring removal of the curtain drain (Special Condition No. 2) and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain (Special Condition No. 1).

IV. Findings and Declarations.


The Commission finds and declares the following:

1. Site and Project Description:

A. SITE DESCRIPTION.

The subject property is located east of Highway One, just north of Navarro Ridge Road, about 1.5 miles east of the village of Albion and Highway One in Mendocino County. The site is generally flat, being part of an ancient marine terrace, but slopes gently to the west, and is vegetated by pygmy forest and North Coast Bishop pine forest.

According to the botanist who surveyed the parcel, the subject parcel is almost entirely covered by pygmy vegetation and contains a large number of specimens of three sensitive plant species, two of which are rare and endangered, and one of which is very rare, according to the California Native Plant Society--Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge).

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No views to or along the coast are afforded through the parcel, and the site is not visible from either Highway One, "E" road, or Navarro Ridge Road. The vacant parcel is designated in the Mendocino County Land Use Plan as Rural Residential-10 (RR-10), meaning that there may be one parcel for every ten acres, and that the site is intended for residential use. The subject parcel, which is approximately 1.61 acres in size, is a legal, non-conforming lot.

B. PROJECT DESCRIPTION.


The applicant proposes to install a curtain drain and outlet pipe on the subject property to lower the groundwater table for the purpose of determining whether the parcel can adequately support a septic system to serve possible future residential development on the site. The proposed curtain drain would be approximately 100 feet long, one foot wide, and five feet deep; the proposed outlet pipe would be approximately 200 feet long. The Commission notes that the proposed development at this time is only for the curtain drain itself, not for a septic system or any residential development.

The soils scientist who surveyed the property indicated that the groundwater levels on the site were monitored through an appropriate wet weather period, and that groundwater was observed within 24 inches of the soil surface during the observation period. A minimum of 24 inches to the highest level of groundwater is required by the Mendocino County Department of Environmental Health and the State Water Quality Control Board before any type of on-site sewage disposal system can be proposed. Since the water table on the site is currently too high for a septic system to be installed, a curtain drain is necessary to lower the winter groundwater table to acceptable levels to allow an on-site sewage disposal system. On slopes of less than 5%, curtain drains must be installed and proven to work, as evidenced by a groundwater monitoring program, before an on-site sewage disposal system can be proposed. Since the subject parcel contains a slope of between 2% and 3%, a curtain drain needs to be installed and shown to be effective before an on-site sewage disposal system may be proposed.

2. Locating and Planning New Development:

Section 30250(a) of the Coastal Act states that new development shall be located within or near existing developed areas able to accommodate it or in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. The intent of this policy is to channel development toward more urbanized areas where services are provided and potential impacts to resources are minimized.

The proposed development is for installation of a curtain drain for the purpose of trying to lower the groundwater table sufficiently so that a septic system may be installed to accommodate future residential development. The subject site is located in a developed residential area of the coast. The Commission thus finds that the proposed project is consistent with Coastal Act Section 30250(a) to the extent that it is located in a developed area.

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3. Protection of Environmentally Sensitive Habitat:

Section 30107.5 of the Coastal Act defines "environmentally sensitive habitat 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.

Section 30240 of the Coastal Act states in part that:


(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 previously certified Mendocino County Land Use Plan maps indicate that the subject parcel is entirely covered with pygmy vegetation. Although the Court of Appeal in Sierra Club v. California Coastal Commission instructed that the LCP policies related to pygmy forest be set aside, the Land Use Plan map designations of pygmy and pygmy-type vegetation, which are derived from studies done by the consulting firm of Blayney-Dyett, may still be used by the Commission to determine where pygmy forest areas are located. According to the County, Blayney-Dyett primarily used aerial photos to determine the presence of pygmy vegetation on various parcels in Mendocino County. In addition, the U.S. Soil Conservation Service soils maps indicate the presence of pygmy soils on the entire parcel.

Pygmy forests are a unique resource in California. There are several small forested areas known as pygmy forests in Mendocino County between Fort Bragg and the Navarro River. These forests contain unusually dwarfed trees and shrubs that grow very slowly, typically reaching heights of only a few feet due to the extremely hard, acidic, nutrient-poor soils that stunt the growth of the mature trees. In Mendocino County, true pygmy forest occurs on Aborigine and Blacklock soils. True pygmy forests are valuable to scientists because they are probably the best example of a living community in balance with its ecosystem. According to Mendocino County, pygmy forest vegetation covers about 1,050 acres in the coastal zone, including areas in public ownership at Jug Handle State Reserve and Van Damme State Park.

As stated above, the California Court of Appeal in Sierra Club v. California Coastal Commission determined that the Mendocino County LCP as certified by the Coastal Commission inadequately addressed the issue of whether the pygmy forest constituted ESHA, and that the Commission must reconsider this issue. Coastal Act Section 30107.5 defines an environmentally sensitive area as "any

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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."

For purposes of this project, the Commission is considering the portions of the subject property that contain both pygmy soils and true pygmy vegetation to be ESHA. The Commission finds that true pygmy forest constitutes an ESHA because the pygmy soils result in a rare and truly unique ecosystem, marked by decidedly stunted growth of adapted woody vegetation including several species endemic only to these and related soils. Furthermore, the pygmy forest is extremely vulnerable to significant adverse impacts from development. In addition to the obvious impacts resulting from physically clearing pygmy vegetation from a site for development, the pygmy forest can be altered by changes in the ground water or surface water or by increases in the nutrient load in the soil resulting from site development. Such changes could affect the soils to the extent that the vegetation that grows in it no longer displays true pygmy characteristics. Thus, pygmy forest meets the Coastal Act definition of ESHA.

A botanical survey performed on the subject parcel indicated that the entire parcel contains true pygmy forest. In addition to the presence of both pygmy soil and pygmy vegetation, the botanical survey also states that the entire site is vegetated with three rare and endangered plant species: Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge). These rare and endangered plant species grow in what are considered environmentally sensitive areas as they are rare and valuable habitats that are easily disturbed or degraded by human activities. Therefore, independent of the presence of true pygmy forest, the parcel is considered an environmentally sensitive habitat area (ESHA) pursuant to Section 30107.5 due to the presence on the parcel of large numbers of these rare and endangered plants.

Coastal Act Section 30240 requires that "environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." As the entire parcel constitutes an environmentally sensitive habitat area, Section 30240 restricts development on the parcel to only those uses that are dependent on the resource. At this time, the applicant is proposing only to install a curtain drain for the purpose of attempting to lower the groundwater table adequately to make it feasible to install a septic system in the future to accommodate future residential development. Installation of the curtain drain does not constitute a new use on the subject parcel, as its purpose is only to test whether a new use (septic system and residential development) would be possible. Since no new use is proposed at this time, the proposed development does not conflict with the use limitations of Coastal Act Section 30240.

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The soils scientist who surveyed the site for the project observed the soil and vegetative patterns on the parcel to enable him to design and locate the curtain drain in a manner that will afford the highest potential for adequately lowering the winter water table. In addition, the type of disposal system that will be proposed was also considered in locating the curtain drain on the parcel. If the curtain drain is successful in lowering the winter water table to below 36 inches, a highline leachfield can be proposed. This type of disposal field allows some options in its placement on the site. The leaching trenches would need to be aligned on the contour but the length of the lines and the number of lines can be selected to best fit the site. If, however, as the soils scientist expects, the curtain drain is successful in lowering the winter water table to below 24 inches but not below 36 inches, a Wisconsin mound disposal system would be necessary. The Wisconsin mound system does not allow the same flexibility in design as a highline system. The design criteria for a Wisconsin mound system are very specific in terms of length and width. The Wisconsin mound must also be aligned on the contour. With this in mind, the soils scientist designed and located the curtain drain to allow the most restrictive (and most likely) Wisconsin mound disposal system alternative.

The impacts of the curtain drain to the pygmy forest ESHA the site will mainly be through the vegetation removal necessary for the installation of the curtain drain and outlet pipe. In addition, the soils scientist who examined the parcel has indicated that the areas both downslope and upslope of the curtain drain will experience a reduction in winter groundwater levels. The area downslope of the curtain drain is intended to be used for the sewage disposal system, and the effective downslope distance of groundwater reduction as influenced by the curtain drain on this slope will not exceed the area identified for the on-site sewage disposal systems. The area upslope of the drain will also experience a reduction in winter groundwater levels, which could impact the pygmy forest ESHA by reducing the amount of rainfall recharge to the root zone. Although the pygmy forest ESHA experiences distinct wet and dry periods naturally, this reduction in recharge could have a negative impact on the vegetation. This impact can be mitigated by having the clearing for any approved homesite be in this area upslope of the curtain drain. According to the soils scientist, the effect of the curtain drain upslope of the drain will not extend more than about 50 feet upslope given the soil and slope conditions present.

The proposed development has been sited to accommodate the existing clearings on the site as much as possible. In addition, the Commission has attached several special conditions to minimize significant adverse impacts to sensitive habitat.

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Special Condition No. 1 requires that all excavation necessary for the installation of the curtain drain and outlet pipe be performed only with a small backhoe (rather than any large equipment) and be limited only to those areas within 10 feet of the curtain drain or outlet pipe, and allows the removal of only such vegetation as is necessary for the installation of the curtain drain.

Special Condition No. 2 requires that the curtain drain to be installed pursuant to this permit be left in place only for a maximum period of three years; unless this permit is amended, the curtain drain must be removed and the disturbed area restored. Within two years of approval of this permit, the permittee shall submit a complete coastal permit amendment application to either (a) remove the curtain drain and restore the disturbed area; (b) extend for good cause the period of time during which the curtain drain may remain in place; or (c) construct a residence and septic system that will rely on the curtain drain. If the applicant or successor in interest applies to remove the curtain drain, information prepared by a qualified soils scientist or biologist will need to be submitted, indicating what, if any, adverse impacts to the pygmy habitat would result from removal of the curtain drain, compared to leaving it in place; how to minimize these impacts; and what steps are necessary to restore the disturbed area. Therefore, if the curtain drain is not effective in adequately lowering the water table such that a septic system may be installed, or residential development is not to be proposed for some other reason and the curtain drain is no longer necessary, the Commission will have the opportunity of determining if the curtain drain should be removed, and, if so, how best this removal should take place.

Special Condition No. 3 requires that within two years of approval of this coastal permit, the permittee shall submit a copy of the evaluation made by the Mendocino County Department of Environmental Health as to whether the water table has been sufficiently lowered by the curtain drain to support a septic system.

To better ensure that any future buyers of the property are aware of the conditions of this permit requiring removal of the curtain drain, submittal of an amendment request, and avoidance of disturbance of pygmy vegetation other than that required for the installation of the curtain drain, the Commission attaches Special Condition No. 4. This condition requires that the terms, conditions, and findings of the permit be recorded with the deed. The condition contains provisions for the permittee or landowner to seek the Commission's approval of rescinding the recordation of the permit at the time the applicant submits the amendment request required by Special Condition No. 2. Consideration by the Coastal Commission of the permittee's request shall be based upon a sufficient showing of compliance with the permit as conditioned and a determination by the Commission that there no longer remains a relative need at that point to make future buyers of the property aware of the permit conditions requiring removal of the curtain drain and avoidance of pygmy vegetation.

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The Commission thus finds that the proposed project, as conditioned, is consistent with Coastal Act Section 30240, as the proposed development is not a new use and thus is allowable within an ESHA, and is also designed and located so as to minimize adverse impacts to sensitive habitat.


The Commission finds that its determination that the proposed curtain drain is consistent with the Coastal Act in no way should be construed as committing the Commission to approve future residential development on the site. At such time as the applicant may wish to install an on-site sewage disposal system and/or proceed with residential development of the subject parcel, a new coastal permit will be necessary, and the Commission will have to consider what development would be allowable consistent with the Coastal Act, including Section 30010 and those policies of the Coastal Act that protect environmentally sensitive habitat areas.

4. Mendocino County LCP:

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act:

- (a) Prior to certification of the Local Coastal Program, a Coastal Development Permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a Coastal Development Permit on grounds it would prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

As explained above, to comply with court order, the portion of the Mendocino County Local Coastal Program relating to the pygmy forest has been set aside. Since the County of Mendocino has not yet submitted proposed alternative policies for certification, the jurisdiction over pygmy forest areas has been returned to the Commission.

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The proposed development, which does not constitute a new use, will be sited and designed to minimize adverse impacts on sensitive habitat consistent with the policies of Chapter 3 of the Coastal Act. Therefore, the Commission finds that approval of the proposed development, as conditioned, will not prejudice the ability of the County to prepare a Local Coastal Program for the pygmy forest consistent with the policies of Chapter 3 of the Coastal Act, as required by Section 30604(a).

5. CEQA:

Section 13096 of the Commission's administrative regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(i) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment.

As discussed previously in Finding 3 above, the Commission concludes that the proposed project has been mitigated to minimize adverse impacts to ESHA. As conditioned, there are no other feasible alternatives or feasible mitigation measures available beyond those required which would substantially lessen any significant adverse impacts which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, can be found consistent with the requirements of the Coastal Act and can be found to conform to CEQA.

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ATTACHMENT A

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 of 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 development during construction, 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.

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