

CALIFORNIA COASTAL COMMISSION

NORTH COAST AREA

FREMONT, SUITE 2000

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 Commission Action:

STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: 1-96-26

 APPLICANTS: **MARK & CAMMY BURTCHETT and
ROBERT & DEBRA FRAZIER**

PROJECT LOCATION: South side of Loop Place Road, near the west end of 6th Avenue in the Westhaven area of Humboldt County, APN 514-152-22.

PROJECT DESCRIPTION: (1) Construct a two-story, 30-foot-high, 3,747-square-foot, single-family residence with an attached three car garage, (2) install a driveway, septic tank & leach-field system, and a 6-foot-high, 125± foot-long, solid board fence, (3) merge two parcels, (4) record an offer to dedicate a 6-foot-wide, 194± foot-long, easement for public access, (5) remove brush and up to 30 spruce or alder trees within the house site and easement area, and (6) create a 2-foot-wide, unimproved dirt trail within the easement area.

Lot area:	30,200 sq. ft. (0.71 acres)
Building coverage:	2,306 sq. ft.
Pavement coverage:	750 sq. ft.
Landscape coverage:	2,000 sq. ft.
Parking spaces:	3
Zoning:	RS-X, Residential Single Family, further subdivision prohibited.
Plan designation:	Not certified (Area of Deferred Certification)
Project density:	One dwelling unit per 0.71 acres
Ht abv fin grade:	30 feet

LOCAL APPROVALS RECEIVED: Humboldt County Health Department septic system approval, Humboldt County Planning & Building Department Notice of Merger and Certificate of Subdivision Compliance approval, and Westhaven Community Services District water hook-up approval

SUBSTANTIVE FILE DOCUMENTS: Humboldt County, Trinidad Area LUP and findings.

STAFF NOTES

1. Standard of Review.

Humboldt County has a certified Local Coastal Program. However, certain properties in the Trinidad Area of Humboldt County have not been certified, including properties along the route of the so-called "6th Avenue Trail" in unincorporated community of Westhaven. Therefore, coastal development permit authority for new development within the uncertified area is still retained by the Coastal Commission and the standard of review is the Coastal Act.

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends approval of the project with five special conditions to protect public access, and one to minimize geologic instability due to surface water runoff. Construction of the residence in the proposed location will interfere with the public's right of access that may exist over a portion of the "6th Avenue Trail". The trail is used by area residents and their guests to gain access to the sea. To avoid interference with any rights of public access that may exist over the trail, the applicants voluntarily propose to: (1) record an offer to dedicate an easement for public access to another portion of their property, and (2) re-create a new trail within the new easement area. Staff believes the offered access trail would be equivalent in time, place, and manner to the existing trail that would be blocked by the development. Therefore, although there is an unresolved question as to the existence of public prescriptive rights, the applicants' proposal protects the rights of the public and the project is consistent with the access policies of the Coastal Act. The first five special conditions require implementation of the applicants access proposals are designed and also protect the prescriptive rights of public access that may exist at the site.

The sixth and last special condition requires the applicants to submit final surface water runoff drainage plans consistent with the recommendations of the geologic report for the review and approval of the Executive Director, to ensure the development will not contribute to a geologic hazard. As conditioned, the staff believes the proposed project is consistent with the Coastal Act.

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. Approval with Conditions.

The Commission hereby grants a permit, subject to the conditions below, for the proposed development on the grounds that the development 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

1-96-26

MARK & CAMMY BURTCHETT and ROBERT & DEBRA FRAZIER

Page 3

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. Recordation of an Offer to Dedicate an Easement for Public Access.

PRIOR TO ISSUANCE of the coastal development permit, the applicants shall submit evidence for the review and approval of the Executive Director that the applicants' proposed offer to dedicate an easement for public access over the subject property, APN 514-152-22, in the location shown on the attached site plan in Exhibit No. 6 has been properly recorded. The offer shall be recorded prior to issuance of the coastal development permit, shall be irrevocable for 21 years from the date of recordation, shall be in a form and content acceptable to the Executive Director of the California Coastal Commission, shall include legal descriptions of both the entire property and the easement area, shall run with the land, and shall be recorded free of prior liens which may affect the interest being conveyed.

The location of the offer to dedicate an easement for public access is described as follows: Beginning at the north corner of the property at the end of Loop Place Road, a 6-foot-wide easement shall run parallel to, and along, the northeasterly property line for a distance of approximately 150± feet to the south corner of the property, and from there, the easement shall run parallel to, and along, the southerly property line for a distance of approximately 44± feet, until it intersects and connects with an existing trail that exits the property and continues down the bluffs to Scenic Drive.

2. Improvement of Offered Access.

PRIOR TO, OR CONCURRENT WITH CONSTRUCTION OF THE single-family residence, the applicants shall improve the offered public access easement area in the manner proposed by the applicants by: (a) removing all trees, brush, or tree limbs that could potentially interfere with public access, and (b) creating a meandering, 2-foot-wide, unimproved dirt trail that is similar to the existing trail that crosses the property.

3. Public Access During the Construction Period.

The level of public access over the subject property that is presently in evidence shall continue to be allowed through the construction period to the maximum feasible extent consistent with public safety needs.

4. Public Rights.

By acceptance of this permit, the applicants acknowledge, on behalf of themselves and their successors in interest, that issuance of the permit shall not constitute a waiver of any public rights which may exist on the property. The applicants shall also acknowledge that issuance of the permit and construction of the permitted development shall not be used or construed to interfere with any public prescriptive or public trust rights that may exist on the property.

5. Future Development.

PRIOR TO ISSUANCE of the coastal development permit, the applicants shall execute and record a document, in a form and content acceptable to the Executive Director, stating that the subject permit is only for the development described in Permit No. 1-96-26 and that any future additions or other development as defined in Public Resources Code Section 30106 on any parcel containing the 6th Avenue Trail will require an amendment to Permit No. 1-96-26 or will require an additional coastal development permit from the California Coastal Commission or from its successor agency. The document shall be recorded as a covenant running with the land binding all successors and assigns in interest to the subject property.

6. Final Surface Water Runoff Drainage Plans.

PRIOR TO ISSUANCE of the coastal development permit, the applicants shall submit a surface water drainage plan for the review and approval of the Executive Director that shows the location of the proposed residence, the two septic system leach-field areas, and the steep slope area about 30 feet behind the rear of the residence. The plan shall show both the direction and collection points of the surface water runoff from the roof of the residence and from the area around the residence. The plans shall be consistent with the recommendations in the May, 1996 geologic report that was prepared for the project and property by Walter A. Sweet, Civil Engineer. The project shall be developed in accordance with the plans approved by the Executive Director.

IV. FINDINGS AND DECLARATIONS.

The Commission hereby finds and declares as follows:

1. Project and Site Description.

The applicants propose to: (1) Construct a two-story, 30-foot-high, 3,747-square-foot, single-family residence with an attached three car garage, (2) install a driveway, septic tank & leach-field system, and a 6-foot-high, 125± foot-long, solid board fence, (3) merge two parcels, (4) record an offer to dedicate a 6-foot-wide, 194± foot-long, easement for public access, (5) remove brush and up to 30 spruce or alder trees within the house site and easement area, and (6) create a 2-foot-wide, unimproved dirt trail within the easement area.

The subject property is located west of Highway 101, between Loop Place Road and Scenic Drive in the Westhaven area of Humboldt County. The property does not front the ocean and lies east of Scenic Drive, the first public road along the Pacific Ocean. However, the entire property is easily within 1,000 yards of the sea. See Exhibits No. 1 through No. 6.

The subject property is located within an old subdivision that was laid out many years ago, before the passage of Proposition 20 and the Coastal Act. The proposed project is located within an established neighborhood that is experiencing residential infill development. The Commission continues to retain permit authority for the project as the property lies within an area that has not been certified. See Exhibit No. 2. The County's General Plan designates the subject property as RV, meaning Rural Village, 3 units per acre. The subject property is zoned as RS-X, meaning Residential Single-Family with a combining zone to prohibit further subdivision of the land.

The applicants purchased six of the parcels in the old subdivision several years ago. The present status of those six parcels is described below. As shown in Exhibit No. 5, two of the six parcels are located between Beach Avenue and Scenic Drive. These two parcels have not been developed. Two other parcels located between Loop Place Road and Beach Avenue are now proposed for development under this permit application. Finally, the two remaining parcels are located between Loop Place Road and Scenic Drive. These last two parcels were developed with a single-family residence that was approved by the Coastal Commission in 1992 under Permit No. 1-92-13 (Burtchett & Frazier). These last two parcels are now noted as APN 514-152-21 in Exhibit No. 5. After Permit No. 1-92-13 was approved and issued to the applicants, the permit was assigned from the applicants to Mark and Sandi Sommer. Shortly thereafter, the approved residence was built. Because of site constraints, the Sommer residence used a portion of the two lots that are now the subject of this permit application to install a septic system leach-field area and to develop a spring site for fresh water. Under special conditions of approval for Permit No. 1-92-13, the leach-field area and the spring site were both protected by recorded easements that sprang into effect when the applicants sold APN 514-152-22 to the Sommer's.

The applicants are seeking after-the-fact authorization for two portions of the project that have allegedly occurred without the benefit of permit approval. Those two portions are: (1) installation of the septic system leach-field area, and (2) merger of two parcels that make up the subject property for this permit. The two parcels were previously noted as APN 514-152-04 (15,500 square feet in size) and APN 514-152-05 (14,700 square feet in size). The merged parcel is now noted as APN 514-152-22 and is 30,200 in size. The merged parcel is about 200 feet wide along Loop Place Road and between 150 feet and 181 feet deep.

The subject property has two distinct topographic features. The approximate front half of the property nearest to Loop Place Road is about 260 feet above

1-96-26

MARK & CAMMY BURTCHETT and ROBERT & DEBRA FRAZIER

Page 6

sea level. This portion of the property has a flat-to-very slight grade that slopes gently downhill from Loop Place Road to the south. The front half of the property consists of an open grassy meadow with scattered clumps of small-to-medium sized spruce and alder trees. This portion of the property will be used to site the proposed residence and its on-site septic tank and leach-field system. This portion of the property has also been used to install a separate leach-field system that serves another property, APN 514-152-21, located two lots to the west of the subject property under Permit No. 1-92-13 (Burtchett & Frazier).

The approximate rear half of the property is steeply sloping and forested. This portion of the property includes a scarp face that has a short steep slope in excess of 20 percent. The base of the scarp is less steep due to an old road grade that cuts across the slope and continues downhill to Scenic Drive, which is at an elevation of about 160 feet above sea level and 100 feet below the elevation of Loop Place Road. The old road grade represents the remnants of Beach Avenue, a paper street that was never paved and has since been formally abandoned by the County. As a result of the road abandonment, the southerly property line now extends to the approximate middle of the former right of way for Beach Avenue. A portion of the rear half of the property contains the spring site and easement area for the Sommer residence which is located two lots to the west of the subject property, on APN 514-152-21. Otherwise, the only development proposed for the rear half of the property are: (1) the topping of up to 10 spruce trees to increase the coastal view from the rear of the residence, and (2) the removal of small alder trees near the southeast corner of the property to create a 2-foot-wide, 44+ foot-long, portion of a relocated foot path locally known as "the 6th Avenue Trail".

The trail in question is a portion of an unimproved, foot path that crosses through the approximate middle of the subject property. The trail is conveniently located for area residents and their guests who wish to walk to the beach. For Westhaven residents who happen to live on the east side of Highway 101 and who wish to walk to the beach, the easiest route to the beach is to take 6th Avenue and cross over Highway 101 to get to the westerly end of 6th Avenue, and from there, to Loop Place Road and the "6th Avenue Trail".

On the subject property, the trail starts along Loop Place Road and meanders through the middle of the open grassy meadow area and continues down the scarp face where it intersects with the old road grade of Beach Avenue. From there, the trail leaves the subject property and continues down a very steep forested slope to Scenic Drive. The portion of the trail that is downhill from Beach Avenue crosses over the other two undeveloped properties owned by the applicants, APN's 514-152-08 and 514-152-01. The approximate location of the existing trail on the subject property is shown on the site plan in Exhibit No. 6.

The applicants propose to construct the residence in the northwest corner of the property near Loop Place Road. Construction of the residence in the

proposed location will physically block or interfere with the public's continued use of the trail. There is no alternative location to site the proposed residence without interfering with continued use of the trail because the only other potential building site must be reserved for septic system leach-field areas in the northeast corner of the property. Consequently, to avoid adverse impacts to the public's right of access where acquired through use, the applicants propose to relocate the trail to run along the easterly and portions of the southerly side of the property. To implement the proposal, the applicants propose to: (1) record an offer to dedicate an easement for public access, (2) brush cut blackberry brambles and remove all trees, brush, or tree limbs that could potentially interfere with public access within the easement area, and (3) create a meandering, 2-foot-wide, unimproved dirt trail within the easement area. In so doing, this re-located portion of the 6th Avenue Trail over the subject property will provide equivalent access conditions in time, place, and manner, as the existing portion of the trail which will be lost due to construction of the residence. The location of the easement for public access is described as follows:

Beginning at the north corner of the property at the end of Loop Place Road, a 6-foot-wide easement shall run parallel to, and along, the northeasterly property line for a distance of approximately 150± feet to the south corner of the property, and from there, the easement will run parallel to, and along, the southerly property line for a distance of approximately 44± feet until it intersects and connects with an existing trail that exits the property and continues down the bluffs to Scenic Drive.

Relocating the trail to the easterly side and the southeasterly corner of the property will create a certain amount of privacy for both the trail users and the future occupants of the proposed residence. As relocated, the trail will be about 100 feet from the residence. The two septic system leach-field areas in the grassy meadow area will separate the trail from the residence. In addition, the applicants propose to install a 6-foot-high, 125± foot-long, solid board fence parallel to the easterly property line and located between the proposed easement area and the balance of the property. The fence will be constructed of cedar or redwood. Approximately 5 to 6 spruce trees 3 inches in diameter and about 20 feet in height will be removed or trimmed to create a 2-foot-wide, foot path within the easement area.

To clear an area for the house site, the applicants propose to remove about 5 spruce and 5 alder trees. The spruce trees are 6-to-10 inches in diameter and about 20 to 30 feet in height. The alder trees are about 4 to 6 inches in diameter and about 20 feet in height. Although spruce and alder trees often grow within environmentally sensitive, riparian corridors, such trees grow equally well outside such areas in the north coast because of the area's substantial rainfall. In addition, such trees are frequently the first trees to colonize an old field and start the gradual process of plant succession from an old field or meadow to a young forest.

2. Local Coastal Program Background.

The subject property is within an "area of deferred certification" or ADC. In October of 1982, the Commission adopted a resolution certifying in part the Trinidad Area Land Use Plan of Humboldt County's Local Coastal Program. However, the resolution denied certification of the plan for certain geographic areas. These uncertified areas include: (a) the route of the 6th Avenue Trail in Westhaven and; (b) all privately-owned lands, other than lands owned by the Humboldt County Northcoast Land Trust, located west of Scenic Drive and west of Patricks Point Drive, where these two roads are the first public roads paralleling the sea. In denying certification for these areas, the Commission suggested that the plan's policies for the protection of public rights of access where acquired through use be modified to conform with the natural resource, hazard, and public access policies of the Coastal Act, particularly public access Section 30211 of the Coastal Act. Since the County did not accept the suggested modifications, these geographic areas became an "area of deferred certification" or ADC. Consequently, the authority for granting coastal development permits within the ADC is still retained by the Commission. See Exhibit No. 2.

3. New Development.

Coastal Act Section 30250(a) requires in applicable part that new development be located in or near existing developed areas able to accommodate it and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.

The Humboldt County Health Department has determined that a suitable area exists on the property for a septic system. The Westhaven Community Services District has approved a water hook-up for the project. The Commission therefore finds that the project is consistent with Section 30250(a) to the extent that adequate services are available to accommodate the project.

The proposed lot merger will combine two existing parcels into one. The subject parcels are located in an old subdivision that is undergoing residential infill development. Most of the residences in the Westhaven area are served by community water from the Westhaven Community Services District. Since the area is zoned as Residential Single Family with a prohibition against further land divisions, the proposed merger is consistent with this prohibition. As merged, there will only be one parcel. The parcel merger will not result in an increase in the potential residential development allowable, and, in fact, will reduce the number of parcels by one.

As the proposed lot merger will not allow for increased density, the project will not result in a greater demand on coastal resources. As discussed in the findings below, the conditioned project will not adversely affect coastal access. Therefore, the Commission finds that the proposed project is consistent with Coastal Act Section 30250(a) because the development will be located in an existing developed area with adequate services to accommodate it, and the development will have no adverse impacts on coastal resources.

4. Public Access.

Coastal Act Sections 30210, 30211, 30212 and 30214 require the provision of maximum public access opportunities, with limited exceptions.

Section 30210 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 30211 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 30212 states:

(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, or,

(3) agriculture would be adversely affected. Dedicated access way shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the access way.

Section 30214 states:

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

(1) Topographic and geologic site characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

(c) In carrying out the public access policies of this article, the commission and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management costs and encourage the use of volunteer programs.

To approve the proposed project, the Commission must find the project to be consistent with the policies of Chapter 3 of the Coastal Act, including the public access policies outlined in Sections 30211, 30210, 30212 and 30214 of the Act listed above. The project's consistency with each of these policies is described below.

1. Consistency With Section 30211.

Section 30211 states, in part, that "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization." Applicants for coastal development permits must demonstrate that their proposed developments are consistent with the Coastal Act, including the requirements of Section 30211. In implementing this section of the Act the permitting agency, either the Commission or the local government where there is a certified LCP, must consider whether a proposed development will interfere with or adversely affect an area over which the public has obtained rights of access to the sea. If the agency finds that there may be

such an interference or effect, then it also must determine whether there is substantial evidence to support the conclusion that the area has been impliedly dedicated to public use. Because the authority to make a final determination on whether such a dedication has taken place resides with the courts, both the Commission's Legal Division and the Attorney General's Office have recommended that agencies dealing with implied dedication issues should use the same analysis as the courts. Essentially, this requires the agencies to consider whether there is substantial evidence indicating that the basic elements of an implied dedication are present. The agencies also must consider whether the applicant has demonstrated that the law prevents the area from being impliedly dedicated, even if the basic elements of implied dedication have been met.

A right of access through use is, essentially, an easement over real property which comes into being without the explicit consent of the owner. The acquisition of such an easement by the public is referred to as an "implied dedication." The doctrine of implied dedication was confirmed and explained by the California Supreme Court in Gion v. City of Santa Cruz (1970) 2 Cal.3d 29. The right acquired is also referred to as a public prescriptive easement, or easement by prescription. This term recognizes the fact that the use must continue for the length of the "prescriptive period," before an easement comes into being.

The rule that an owner may lose rights in real property if it is used without consent for the prescriptive period derives from common law. It discourages "absentee landlords" and prevents a landowner from a long-delayed assertion of rights. The rule establishes a statute of limitation, after which the owner cannot assert normal full ownership rights to terminate an adverse use. In California, the prescriptive period is five years.

For the public to obtain an easement by way of implied dedication, it must be shown that:

- a. The public has used the land for a period of five years or more as if it were public land;
- b. Without asking for or receiving permission from the owner;
- c. With the actual or presumed knowledge of the owner;
- d. Without significant objection or bona fide attempts by the owner to prevent or halt the use, and
- e. The use has been substantial, rather than minimal.

In general, when evaluating the conformance of a project with 30211, the Commission cannot determine whether public prescriptive rights actually do exist; rather, that determination can only be made by a court of law. However, the Commission is required under Section 30211 to prevent development from interfering with the public's right of access to the sea where acquired through use or legislative authorization. As a result, where there is substantial evidence that such rights may exist, the Commission must ensure that proposed development would not interfere with any such rights.

In the present case, the applicant has proposed public access as part of the project. The applicant elected to grant such access to ensure that proposed development would not interfere with any public access rights which may exist. Consequently the Commission must evaluate any evidence of implied dedication to determine the extent to which the proposed public access is equivalent in time, place, and manner to any public use that has been made of the site in the past. To the extent any proposed dedication of access is equivalent, proposed development will not interfere with any existing public access rights. Therefore, if the Commission determines that the proposed access is in fact, equivalent in time, place, and manner to the access use made of the site in the past, the Commission need not do an exhaustive evaluation to determine if substantial evidence of an implied dedication exists because regardless of the outcome of the investigation, the Commission could find the project consistent with Section 30211.

a. Potential for Development to Interfere with Public's Right of Access to Sea.

As noted previously, the proposed residence will be constructed partially on top of the 6th Avenue Trail. Therefore, to the extent that public access use has been made of this area in the past, such access would be eliminated by the proposed development.

However, the applicants propose as part of their application to provide a similar trail leading to the same destination along the eastern and southerly sides of the subject property.

Although in this case no formal investigation of historic use has been undertaken by Commission staff, a significant amount of information has been submitted that indicates that portions of the applicant's property, have been used to provide public access to the sea.

As previously mentioned, the 6th Avenue Trail is a convenient pedestrian connection between the community of Westhaven and nearby beaches along Trinidad Bay. A portion of the 6th Avenue Trail crosses the subject property from Loop Place Road to Beach Avenue (now abandoned), and from there, the trail continues downhill to Scenic Drive. From Scenic Drive, one can walk along the shoulder of the road to three nearby access ways that are all within one-half mile of the subject property. These access ways are: (1) Luffenholtz Beach County Park, (2) Moonstone County Park, and (3) the Houda Point Access which is owned by the Humboldt North Coast Land Trust and which provides a roadside parking area with public access to two sandy pocket beaches below the bluffs. See Exhibit No. 4.

The trail was identified in the Coastal Commission's 1981 review of Humboldt County's first submittal of its Trinidad Area Land Use Plan for certification. The LCP for an area that includes the subject property remains uncertified because of an unresolved issue regarding the adequacy of

protection of the public's right of access where acquired through use. The 6th Avenue Trail is identified in the County's certified Land Use Plan under Chapter 3, pages 56 and 58. The Plan notes that portions of this trail route have already been dedicated as a condition of a coastal development permit. The plan recommends that opportunities to provide an access way between 6th Avenue and Scenic Drive be investigated, and if possible, established commensurate with the County's Trail Plan and with the County's coastal access policies under Section 3.50 B of the Trinidad Area Land Use Plan.

In 1992, a group of 19 people come forward with a petition when Permit No. 1-92-13 (Burtchett & Frazier) was being reviewed by the Coastal Commission. The petition stated in applicable part:

As members of The Sixth Avenue Community, we the undersigned wish to express a profound concern about the future of what is commonly referred to as the "Sixth Avenue Trail". Over the past ten or more years, this trail has been used by us, the members of the community of Sixth Avenue, as the only beach access reachable on foot from our neighborhood. All other beach access points require driving or cycling, which defeats the notion of "taking a walk", a purpose to which this trail has been expressly used for over a decade. ... We feel it is important to secure continued access to this valuable community resource, and ask to be strongly considered in any future plans regarding the Sixth Avenue Trail.

Over the years, the trail users have used the trail without asking for or receiving permission from the property owner(s)/applicants and with the actual or presumed knowledge of the same. Over the years, trail users have cut some vegetation along the trail and cut steps into the more steeply sloping portion of the trail. The trail users have apparently used the trail without significant objection or bona fide attempts by the applicants to prevent or halt the use. The property owner(s)/applicants have not fenced the property. Previously installed "no trespassing" signs have been removed by other parties. In addition, the applicants have not presented any evidence demonstrating that the law has prevented the trail from being impliedly dedicated.

b. Sufficiency of Landowner Attempts to Negate Implied Dedication of Access.

There are some limitations that prevent property from being impliedly dedicated, even if the basic elements of implied dedication have been met. The court in Gion explained that for a fee owner to negate a finding of intent to dedicate based on uninterrupted use for more than five years, he must either affirmatively prove he has granted the public a license to use his property or demonstrate that he made a bona fide attempt to prevent public use. Thus, persons using the property with the owner's "license" (e.g., permission) are not considered to be the "general public" for purposes of establishing public access rights. Furthermore, various groups of persons

1-96-26

MARK & CAMMY BURTCHETT and ROBERT & DEBRA FRAZIER

Page 14

must have used the property without permission for prescriptive rights to accrue. If only a limited and definable number of persons have used the land, those persons may be able to claim a personal easement but not dedication to the public. Moreover, even if the public has made some use of the property, an owner may still negate evidence of public prescriptive rights by showing bona fide affirmative steps to prevent such use. A court will judge the adequacy of an owner's efforts in light of the character of the property and the extent of public use.

The applicants have not contested the issue of whether an implied dedication of public access has occurred. In addition, the Commission has not received information providing evidence that any steps that would negate an implied dedication of access have been taken. In particular, no evidence has been submitted that a notice of consent to use the land pursuant to Section 813 of the California Civil Code has ever been recorded.

Section 813 of the Civil Code, adopted in 1963, allows owners of property to grant access over their property without concern that an implied dedication would occur if they did not take steps to prevent public use of the land. Section 813 provides that recorded notice is conclusive evidence that subsequent use of the land, during the time that such notice is in effect, by the public for any use or for any purpose is permissive.

As no such notice has been recorded, an implied dedication could not have blocked on that basis.

The courts have recognized the strong public policy favoring access to the shoreline, and have been more willing to find implied dedication for that purpose than when dealing with inland properties. A further distinction between inland and coastal properties was drawn by the Legislature subsequent to the Gion decision when it enacted Civil Code section 1009. Civil Code section 1009 provides that if lands are located more than 1,000 yards from the Pacific Ocean and its bays and inlets, unless there has been a written, irrevocable offer of dedication or unless a governmental entity has improved, cleaned, or maintained the lands, the five years of continual public use must have occurred prior to March 4, 1972. In this case, the subject site is within 1,000 yards of the sea; therefore, the required five year period of use need not have occurred prior to March of 1972 in order to establish public rights.

It is important to note that section 1009 explicitly states that it is not to have any effect on public prescriptive rights existing on the effective date of the Statute (March 4, 1972). Therefore, public use of property for the prescriptive period prior to the enactment of section 1009 or utilization of application procedures set forth in the section is sufficient to establish public rights in the property.

(c) Provision of Public Access Equivalent in Time, Place, and Manner.

As noted previously, where there is substantial evidence of the existence of a public access right acquired through use, and a proposed development would interfere with that right, the Commission may deny a permit application under Public Resources Code Section 30211. As an alternative to denial, however, the Commission may condition its approval on the development being modified or relocated to preclude the interference or adverse effect. This is because the Commission has no power to extinguish existing public rights, even though it may authorize development which affects the exercise of those rights.

A full assessment of the degree to which the criteria for implied dedication has been met in this case could only be made after a more intensive investigation of the issue has been performed. A survey of potential users of the site would provide very helpful information to augment the information about use supplied in unsolicited petitions and letters regarding use of the trail. In short, although there is an unresolved question as to the existence of public prescriptive rights in the 6th Avenue Trail, the applicants' offer to dedicate an easement for public access across the property and to create an unimproved trail within the easement area, would serve to protect any existing public access rights that would be blocked by the proposed development.

Section 30214 of the Coastal Act directs the Commission to implement the public access policies of the Act in a manner which balance various public and private needs. This section applies to all the public access policies, including those dealing with rights acquired through use. Therefore, the Commission must evaluate the extent to which the proposed public access is equivalent in time, place, and manner to the public use that has been made of the site in the past. If the Commission determines that the proposed access is in fact, equivalent in time, place, and manner to the access use made of the site in the past, the Commission need not do an exhaustive evaluation to determine if substantial evidence of an implied dedication exists because regardless of the outcome of the investigation, the Commission could find the project consistent with Section 30211. If an investigation indicated substantial evidence of an implied dedication exists, the proposed project would not interfere with such public rights because the re-located portion of the trail on the subject property is equivalent in time, place, and manner to that portion of the trail which will be blocked by the proposed residence. If an investigation indicated that substantial evidence of an implied dedication was lacking, the Commission could still find that the applicants' offer to dedicate an easement for public access and to re-locate a portion of the trail within the offered easement area would not interfere with the public's right of access where acquired through use and would be consistent with Section 30211.

The portion of the 6th Avenue Trail to be relocated to a new area on the subject property provides equivalent public access as the portion of the existing trail on the property because: (a) the new trail has beginning and ending points that connect with the existing trail, and (b) the relocated

trail is only about 100 feet east of the existing trail and (c) the existing trail consists of an unimproved, 2-foot-wide, dirt trail, and the proposed trail will also consist on an unimproved, 2-foot-wide, dirt trail within a 6-foot-wide easement area.

Thus, the Commission finds that the applicants' offer to dedicate an easement for public access across the property and to create an unimproved trail within the easement area is equivalent in time, place, and manner, to that portion of the existing trail that is located on the subject property. Therefore, although there is an unresolved question as to the existence of public prescriptive rights, the applicant's proposal protects the rights of the public, and the Commission finds that the proposed project is consistent with Section 30211 of the Coastal Act.

2. Consistency with Section 30212

Section 30212 of the Coastal Act states that public access from the nearest public roadway to the shoreline and along the coast need not be provided in new development projects where (1) it would be inconsistent with the protection of fragile coastal resources, or (2) adequate access exists nearby. However, the Commission notes that Section 30212 of the Coastal Act is a separate section of the Act from Section 30211, the policy that states that development shall not interfere with the public's right of access to the sea where acquired through use. The limitations on the provision of new access imposed by Section 30212 do not pertain to Section 30211. Whether or not public prescriptive rights of access have accrued over trails that pass through environmentally sensitive habitat area or in areas near other public access, Section 30211 requires that development not be allowed to interfere with those rights.

Moreover, in the absence of the offered accessway, adequate access does not exist nearby. No other route providing pedestrian access from Westhaven to Scenic Drive and the sea exists in the subject area. Thus, without the grant of access easement proposed by the applicant, pedestrian public access to this section of the coast from the area would be blocked.

In addition, the offered access will not adversely affect fragile coastal resources. The site contains no environmentally sensitive habitat. Furthermore, the site is not known to contain archaeological resources.

Therefore, the Commission finds that the offer to dedicate public access proposed by the applicant is consistent with Section 30212 of the Coastal Act as the access will be provided consistent with the protection of coastal resources and adequate access does not exist nearby.

3. Consistency with Section 30210

Section 30210 of the Coastal Act states that 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. As proposed by the applicant, and as further conditioned below by Special Conditions No. 1 through No. 5 which collectively protect the public's right of access where acquired through use, both now and into the future, the Commission finds that the project is consistent with Section 30210 of the Coastal Act as discussed in the conclusion below.

4. Conclusion

Wherever possible, it is advantageous to secure either an offer to dedicate an easement for public access or an actual dedication and recordation of public access rights. Unless this is done, the controversy over implied dedication is merely postponed, and passage of time may complicate problems of proof. Even where the evidence of implied dedication is clear, the public is best served by recordation of an actual dedication which clarifies the rights of everyone.

To ensure that the proposed project will not interfere with any implied dedication of access which may have occurred, both now and into the future, the Commission attaches Special Conditions No. 1 through 5.

Special Condition No. 1 requires the applicants to provide evidence for the review and approval of the Executive Director that their offer to dedicate an easement for public access over the property has been properly recorded prior to issuance of the coastal development permit.

Special Condition No. 2 requires the applicants to improve the offered public access in the manner proposed by the applicants to ensure the access will be usable by the public. Within the offered easement area, this special condition requires the applicants to: (a) remove all trees, brush, or tree limbs that could potentially interfere with public access, and (b) create a meandering, 2-foot-wide, unimproved dirt trail that provides equivalent access conditions as the existing trail that crosses the property. Special Condition No. 2 also requires that all access improvements, including major vegetation removal, within the proposed easement area be completed prior to, or concurrent with, construction of the single-family residence.

Special Conditions No. 3 and 4 protects the public's right of access over the property since public prescriptive rights have not been adjudicated by a court of law at this time.

Special Condition No. 4 states that by acceptance of the permit, the applicants agree that the issuance of the permit and the completion of the development does not prejudice any subsequent assertion of any public rights of access to the shoreline (prescriptive rights), such as rights of implied dedication over the 6th Avenue Trail, and that approval by the Commission of this permit shall not be used or construed, prior to the settlement of any claims of public rights, to interfere with any rights of public access to the shoreline acquired through use which may exist on the property.

Lastly, Special Condition No. 5 applies to any future development of the property. The special condition requires the applicants to execute and record a document for the review and approval of the Executive Director stating that any future additions or other development on a parcel containing the 6th Avenue Trail will require additional authorization. The special condition is necessary since Coastal Act Section 30610(a) exempts by regulation certain improvements to existing single-family residences, such as fences and storage sheds, which, depending on their location, have the potential to block or adversely interfere with the public's right of access over the property. In this way, the County or the Commission will be able to review all future development to ensure that it will not interfere with public access or have any adverse impacts on public prescriptive rights that may exist on the parcel.

In conclusion, although there is an unresolved question as to the existence of public prescriptive rights, the applicant's offer to dedicate an easement for public access and to relocate and improve a portion of the 6th Avenue Trail within the easement area protects the rights of public access where acquired through use. The proposed project as conditioned is consistent with Section 30211 because, whether or not a court-of-law were to adjudicate that existing use of the site for coastal access constitutes a public prescriptive right, for the reasons stated above, the Commission finds that the proposed development would not interfere with those access rights.

5. Geologic Hazards.

Coastal Act Section 30253 requires in applicable part that new development minimize risks to life and property in areas of high geologic hazard.

The location of the proposed residence was reviewed by Walter B. Sweet, Civil Engineer for soil and geologic suitability. The geologic report concludes that the residence can be safely located in the proposed location during its expected economic lifespan if certain specific recommendations are implemented during the design and construction of the residence.

The first recommendations of the report have to do with site grading and drainage. Because uncontrolled surface water runoff will increase the risk of geologic instability in the bluffs, the report recommends that:

- (1) the ground area within 4 feet of the foundation of the residence and garage be sloped away from the foundations by a minimum positive drainage gradient of 2 percent;
- (2) the ground area more than 4 feet from the foundation of the residence and garage be sloped away from the foundations by a minimum positive drainage gradient of 1 percent to approved drainage controls/facilities;
- (3) roof drainage be directed away from all foundations and footings by solid pipe, and that

- (4) collected or concentrated drainage not be directed towards or over the tops of slopes, nor towards existing or proposed septic disposal leach field areas.

The report prohibits fill soils from being placed on the sloping areas of the parcel. No such fill is proposed by the applicants. The report also establishes minimum compaction requirements for any fill used elsewhere on the property, including certain minimum requirements regarding excavation and installation of the concrete slab-on-grade floor of the garage.

The report examines the bearing capacity of the native undisturbed soils to establish weight loading requirements for the foundations of the proposed residence and garage. Among other things, the report recommends that all conventional foundations and footings be setback a minimum of 25 feet from the down slopes greater than 20 percent. Since the bluff scarp that is located over on the approximate rear half of the property has a down slope greater than 20 percent, the applicants propose a 30-foot setback between the foundations and footings of the proposed residence and the top edge of the bluff scarp.

To ensure that the project will minimize risks to life and property in an area of high geologic hazard, the Commission attaches Special Condition No. 6, which requires the applicants to submit a final surface water runoff drainage plan consistent with the recommendations of the geologic report for the review and approval of the Executive Director, prior to issuance of the permit.

The Commission also finds that the minor amount of tree topping/removal within the sloping area of the property that is proposed by the applicants will not increase geologic instability. Although up to 10 spruce trees will be topped to improve coastal views from the rear of the residence, this practice will not kill the trees and the tree's roots will hold native soils in place. Also, the removal of a portion of a thick stand of small alder trees in the southeast corner of the property to create a 2-foot-wide, 44± foot-long, segment of a relocated portion of the 6th Avenue Trail will not increase geologic instability. The Commission therefore finds that the project, as conditioned, is consistent with Section 32053 of the Coastal Act.

6. Visual Resources.

Coastal Act Section 30251 requires in applicable part that permitted development be sited and designed to protect views to and along the ocean and scenic coastal areas; that the development minimize the alteration of natural land forms; that the development be visually compatible with the character of the surrounding area, and that new development in highly scenic areas be subordinate to the character of its setting.

The Trinidad Area Land Use Plan for Humboldt County designates highly scenic areas as "coastal view areas" and/or "coastal scenic areas". Although areas located nearby on lands between Scenic Drive and the sea are so designated, the subject property is not located within a highly scenic area.

The project meets the requirements of Section 30251. The project is not visible from any public road or public viewing area and thus will not affect public views to and along the sea and coastline. In addition, only a minimum amount of grading is required to remove brush and trees within the house site and easement area. The foundation work for the residence will not result in any significant alteration of the property's natural land forms. In addition, the project is visually compatible with the character of the surrounding area as other one and two-story, single-family residences are located next to or near the site. The Commission therefore finds that the project is consistent with Section 30251.

7. Alleged Violation.

Although development in the form of a lot merger and installation of a septic system leach field system has allegedly taken place prior to submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Approval of the permit does not constitute a waiver of any legal action with regard to the alleged violation, nor does it constitute an admission as to the legality of any development undertaken on the subject property without a coastal development permit.

8. Humboldt County LUP/Prejudice to LCP.

As previously discussed, the subject property lies within an area of deferred certification. Therefore, the standard of review that the Commission must apply to the project is the Coastal Act. The area remains uncertified primarily because of an issue involving the adequacy of the County's Land Use Plan's policies in protecting the public's right of access to the sea where acquired through use.

Section 30604 of the Coastal Act authorizes permit issuance if the project is consistent with Chapter 3 of the Coastal Act and if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare or implement a local coastal program that is in conformance with Chapter 3 of the Coastal Act. As discussed above, approval of the project as conditioned is consistent with the Chapter 3 policies of the Coastal Act, including Section 30210 to provide public access, Section 30211 to protect public access where acquired through use, Section 30250(a) to ensure that new development has adequate services to accommodate it, and without adverse impacts to coastal resources, 30251 to ensure that new development is sited and designed to protect coastal views, minimize landform alteration, and be compatible with the character of the surrounding area, and finally, 30253 to ensure that new development minimize risks to life and property in an area of high geologic hazard. Thus, approval of the project as conditioned, will not prejudice the Humboldt County's ability to implement a certifiable LCP for this area.

9. California Environmental Quality Act (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 above, alternatives have been considered and the project has been mitigated: (a) with four special conditions to ensure non-interference with whatever rights of public access that may exist over the 6th Avenue Trail, and (b) with one special condition to minimize risks to life and property in an area of high geologic hazard. The project, as conditioned, will not have a significant adverse effect on the environment, within the meaning of 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.

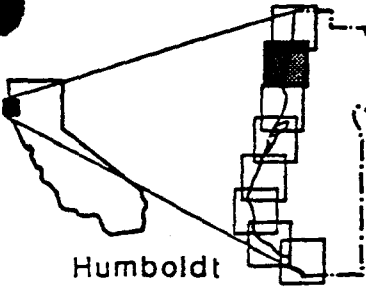


EXHIBIT NO. 1

APPLICATION NO.
1-96-26

Regional Location

California Coastal Commission

Big Lagoon Park
Patrick's Point State Park

ANDERSON LN

TRINIDAD BEACH STATE PARK

Trinidad Head

TRINIDAD INDIAN RANCHERIA

LITTLE RIVER BEACH STATE PARK

Approximate site location

SHARP PT

DRY

LAGOON

BEACH

STATE

PARK

LAGOON

Big Lagoon

INDIAN RANCHERIA

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LOCATION MAP



1.40 TRINIDAD PLANNING AREA MAP

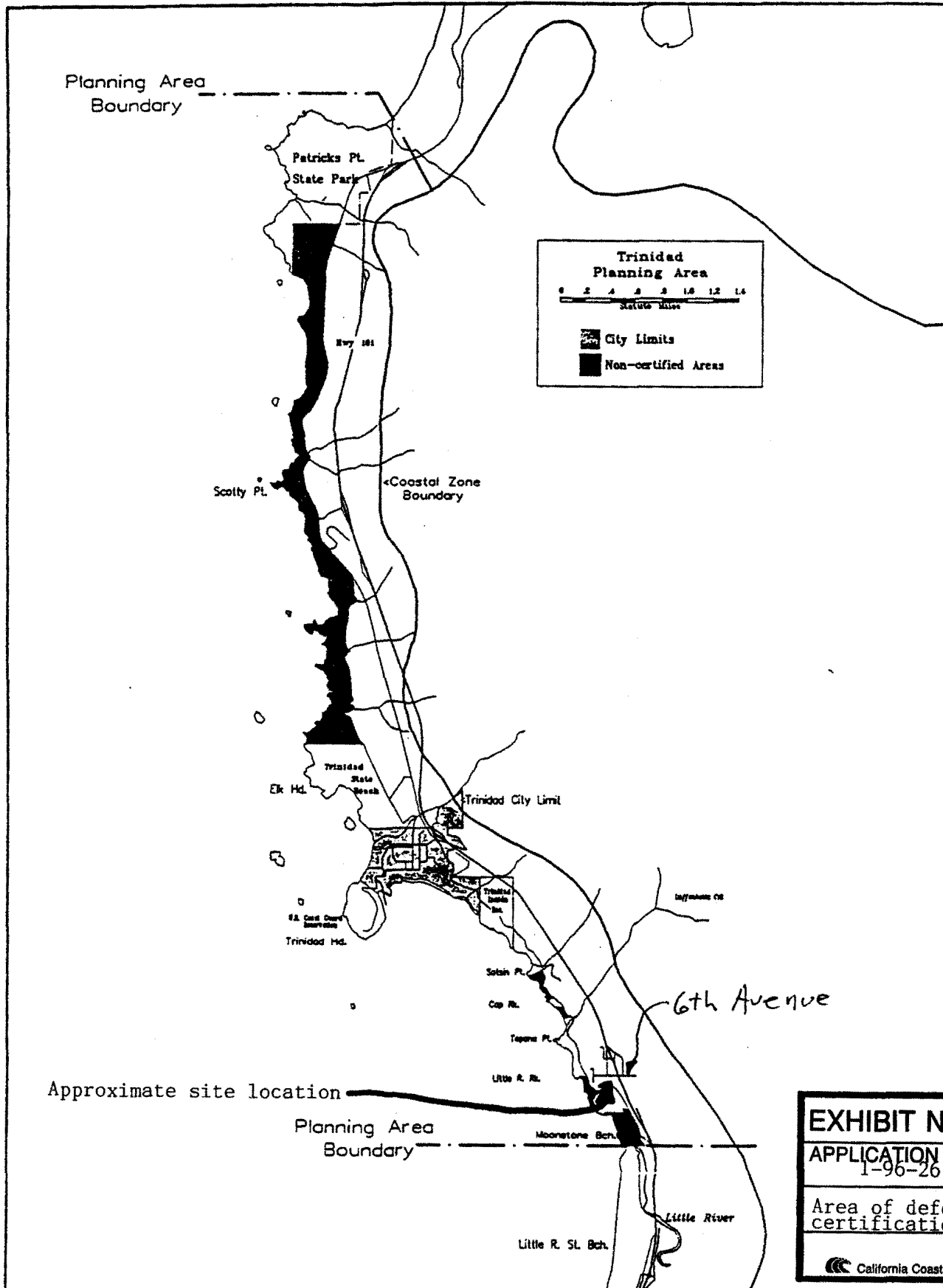


EXHIBIT NO. 2

APPLICATION NO.
1-96-26

**Area of deferred
certification**

California Coastal Commission

MAP 6

TRINIDAD AREA PLAN Land Use Designations

Urban

- Urban Limit Line
- RE Residential Estates (0-2 units / acre)
- CG Commercial General

Rural

- City Service Area
- Westhaven Service Area
- TC Commercial Timberland
- RX Residential Ex Urban (0-2 units / acre)
- RR(a) Rural Residential (0-1 unit / 2 acres)
- RR(b) " " (0-1 unit / 5 acres)
- RR(c) " " (0-1 unit / 2 1/2 acres)
- RR(d) " " (0-1 unit / 5 acres)
- RR(e) " " (0-1 unit / acre)
- RR(f) " " (0-1 unit / 5 acres)
- RV Rural Village
- CR Commercial Recreation
- PR Public Recreation
- PF Public Facility
- NR Natural Resources

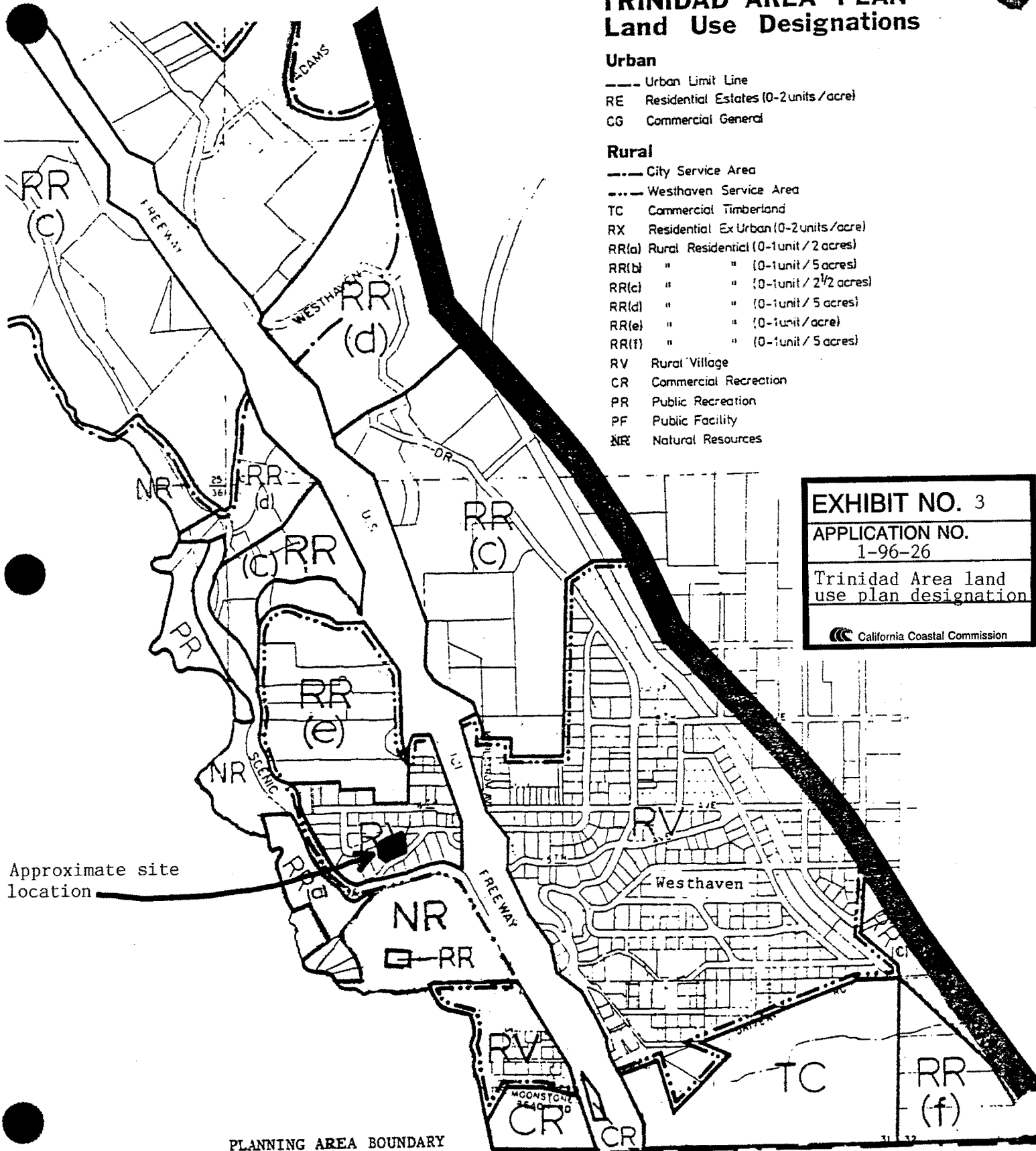


EXHIBIT NO. 3
APPLICATION NO. 1-96-26
Trinidad Area land use plan designation
California Coastal Commission

PLANNING AREA BOUNDARY

(Mckinleyville Planning Area)

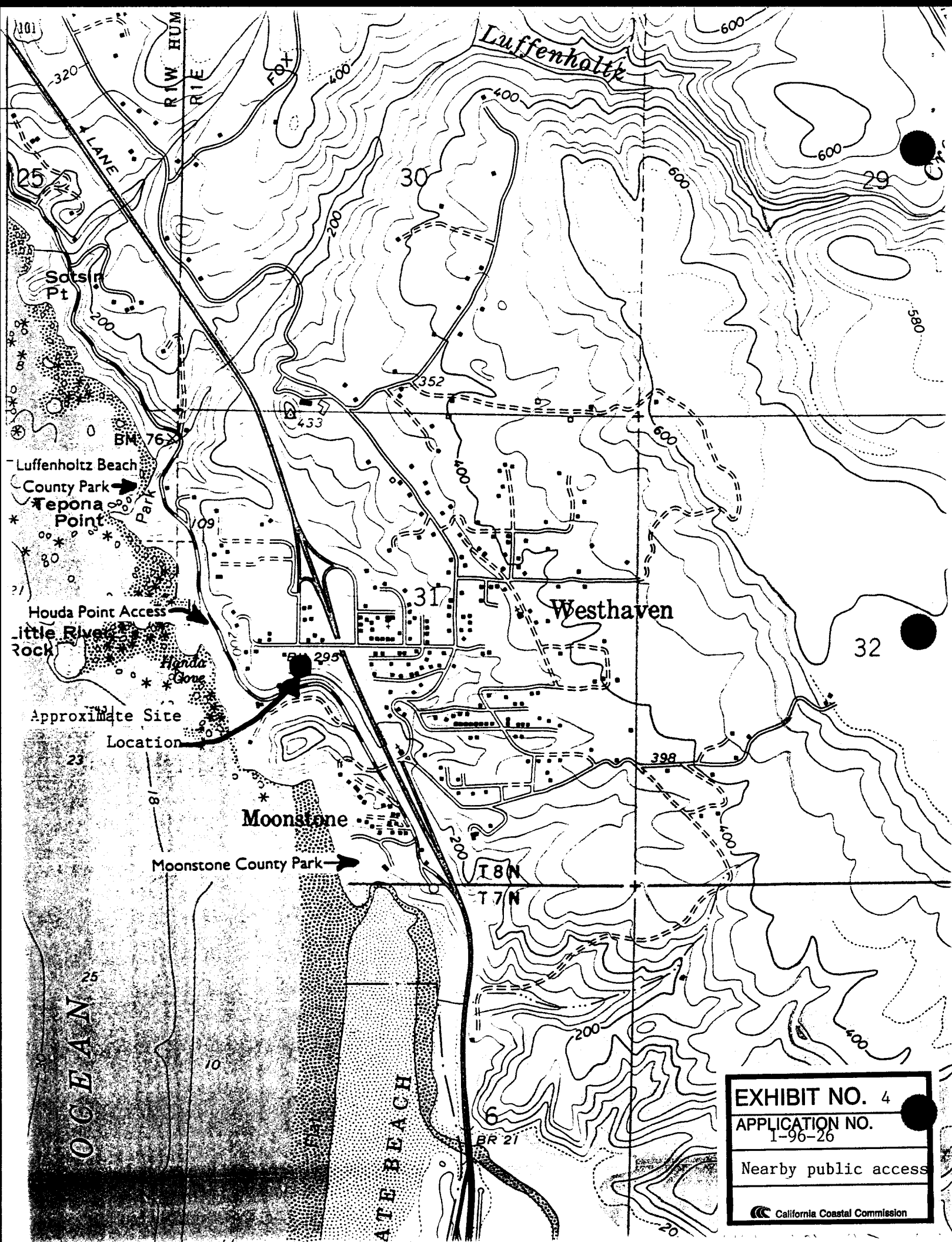


EXHIBIT NO. 4

APPLICATION NO.
1-96-26

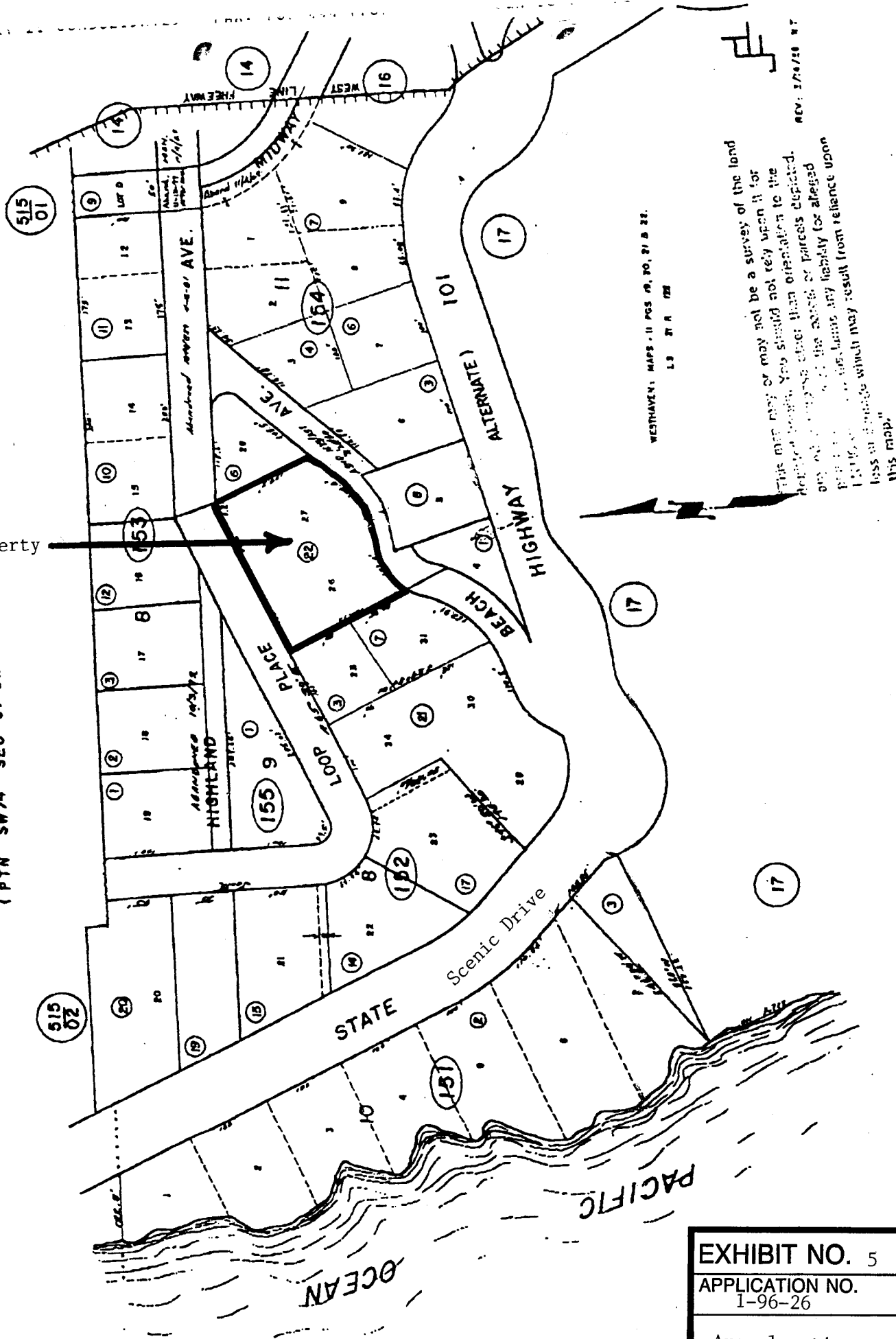
Nearby public access

California Coastal Commission

WESTHAVEN
(PTN SW 1/4 SEC 31 8N 1E)

514-15
T.C.A. 141-00
1 - 100'

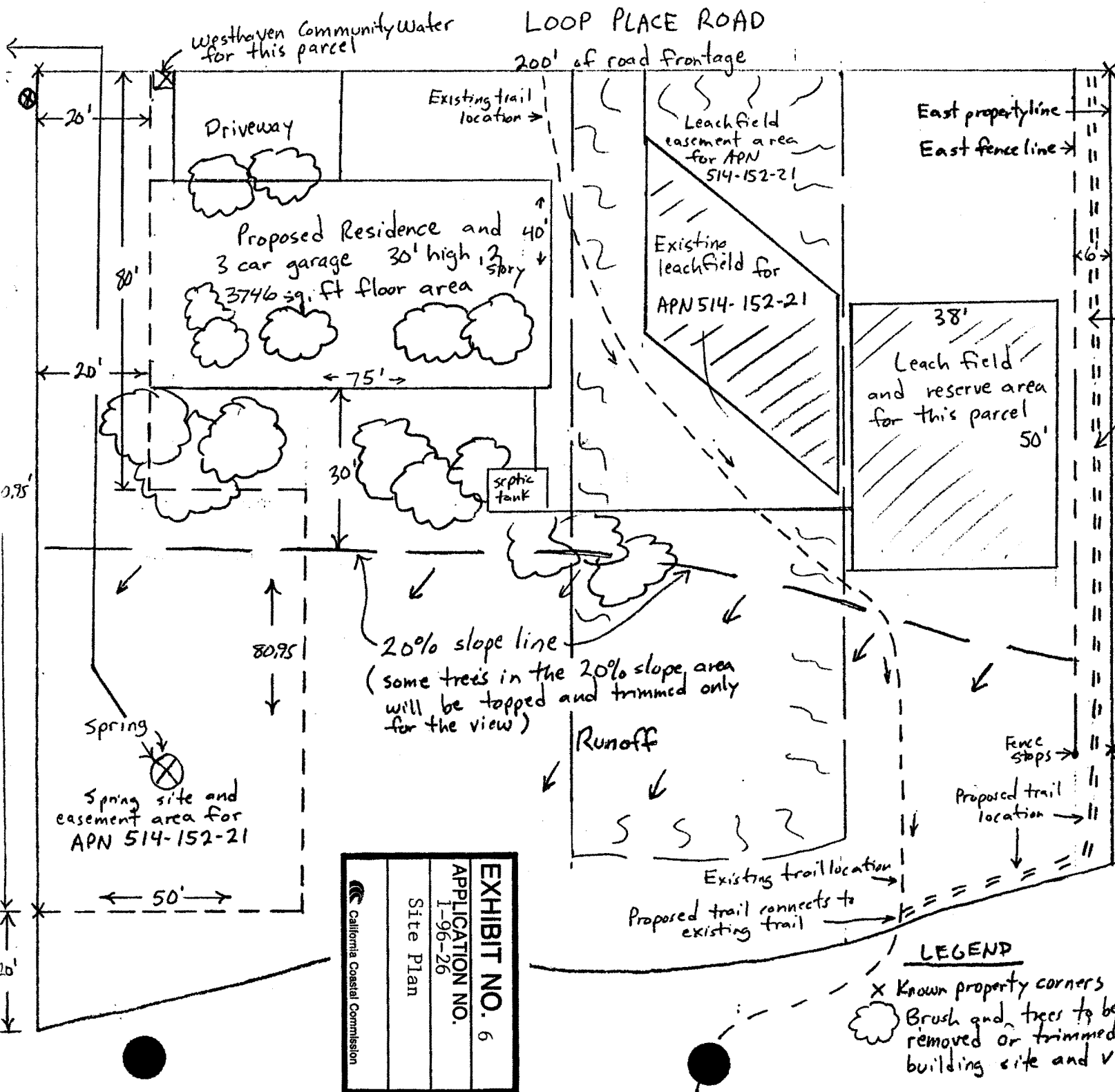
Subject property



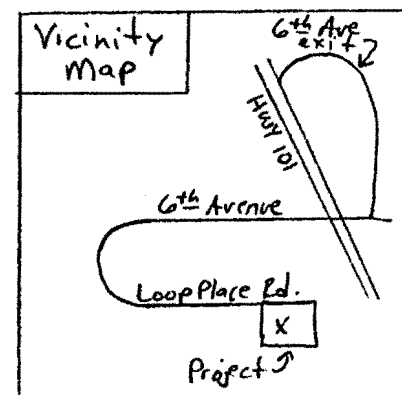
WESTHAVEN, MAPS - II PGS. 19, 20, 21 & 22.
L.S. J. R. 1922

This map may or may not be a survey of the land
herein shown. You should not rely upon it for
any purpose other than orientation to the
land shown. The state or parcels depicted
on this map are not to be relied upon for
any purpose other than orientation to the
land shown. Any liability for alleged
loss or damage which may result from reliance upon
this map.

EXHIBIT NO. 5
APPLICATION NO. 1-96-26
Area location
California Coastal Commission



Proposed location of 6th Ave. trail 6' wide. Approximately 10 small trees and brush to be removed from this area.



Loop Place Road
Westhaven, CA.
Mark Burtchett
Robert Frazier
Ph 707-444-7703
555 H Street
Eureka, CA. 95501

APN 514-152-22

Scale 1" = 25'

LEGEND

- X Known property corners
- Brush and trees to be removed or trimmed for building site and view.

California Coastal Commission	EXHIBIT NO. 6
	APPLICATION NO. 1-96-26
	Site Plan

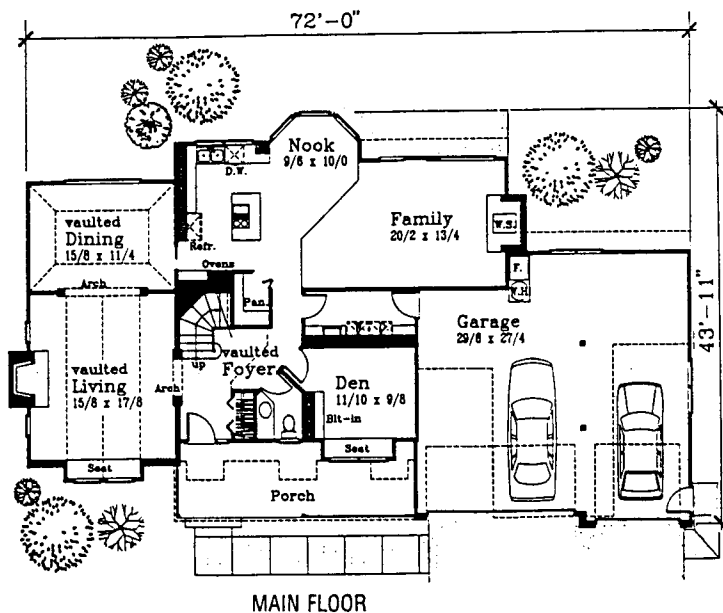
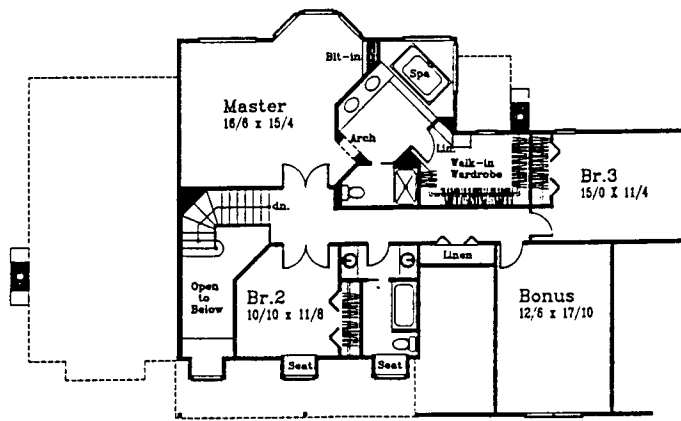
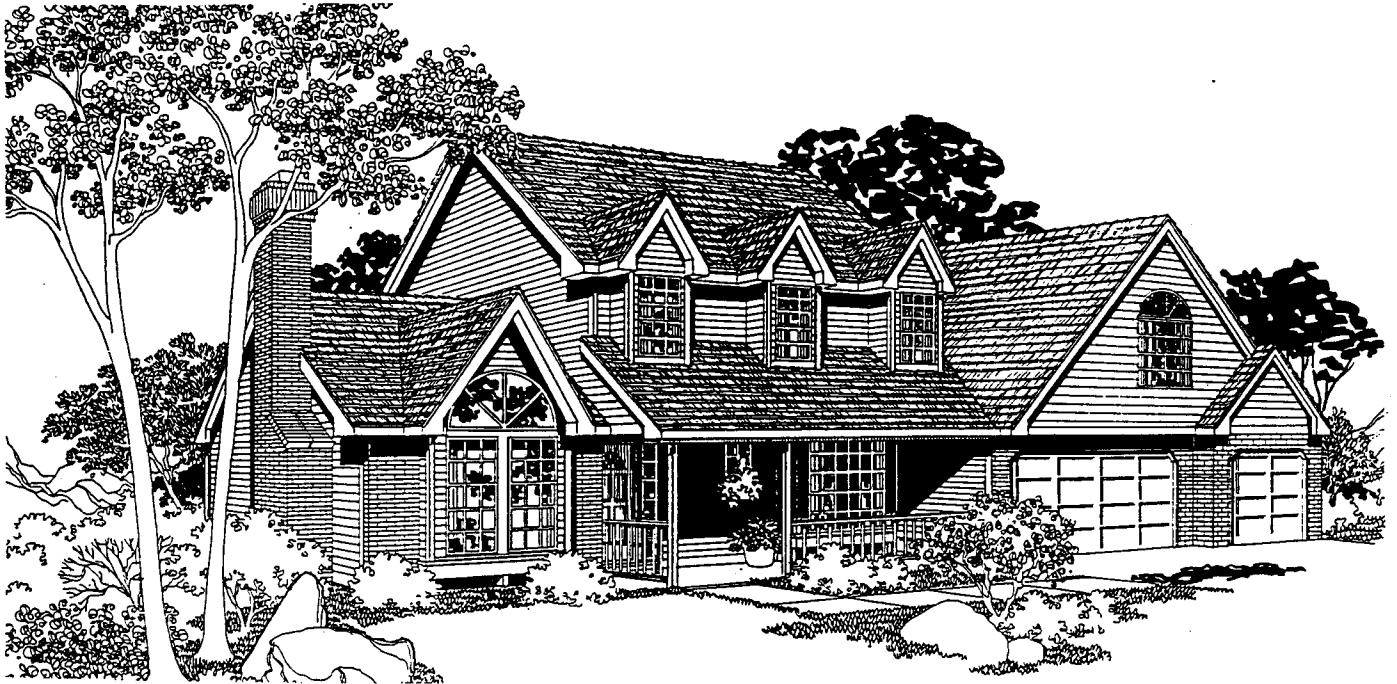


EXHIBIT NO. 7

APPLICATION NO.
1-96-26

Front house view
and floor plans

10-27-80 15. 10/27/80