

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

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Staff: LJM-SD
Staff Report: 3/18/98
Hearing Date: 4/7-10/98

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved With Conditions

APPEAL NO: A-6-ENC-97-70

APPLICANT: Christopher and Gregory Kirkorowicz

PROJECT LOCATION: 5242 Manchester Avenue, Encinitas, San Diego County.
APN 259-201-03, 04

PROJECT DESCRIPTION: Construction of a 1,728 sq. ft. stable facility involving the placement of approximately 8,700 cubic yards of fill within the 100-year floodplain and wetlands on a 21.47 acre site.

APPELLANTS: San Elijo Lagoon Conservancy and Coastal Commissioners Rusty Areias, Sara Wan and Christine Kehoe

STAFF NOTES:

On October 7, 1997, the Commission opened the public hearing on this appeal and found that substantial issue exists with respect to the grounds on which the appeal was filed. The hearing was subsequently continued by the Commission. The subject report is the staff recommendation on the permit, which is now before the Commission as a de novo permit application.

SUMMARY OF STAFF'S PRELIMINARY RECOMMENDATION:

Staff is recommending that the proposed project be denied because it is inconsistent with several provisions of the City's certified LCP pertaining to floodplain development and protection of wetlands. The proposed fill of wetlands to accommodate vehicle access and turn-around is not permitted under the City's certified LCP and other alternatives that would allow for the provision of safe access to the site and avoid the fill of wetlands have not been adequately explored.

Staff has identified that an approximately 18,000 sq. ft. building pad can be created on the site along Manchester Avenue and avoid wetland fill. However, the applicant and the City need to pursue other alternatives to provide safe access to the site that would avoid the need to fill wetlands. The entire site is within the 100-year floodplain and the City's LCP contains restrictions on the filling of the floodplain. However, the LCP does allow for exceptions to the restrictions on filling of the floodplain to provide for minimal private development. Staff has identified possible alternatives for the site that could provide minimal private development, avoid wetland fill and require less fill of the floodplain. These alternatives include a scaled down stable facility (over that proposed herein) or one, two or three single-family residences (depending on the number of lots) clustered on the 18,000 sq. ft. pad area (non-wetland area). However, staff is unable to determine the amount of fill necessary to achieve minimal private development because the legal status of the lots that comprise the site has not been determined through a certificate of compliance. Also, even if wetland fill was determined to be unavoidable and acceptable, the proposed mitigation is not consistent with the requirements of the City's LCP.

SUBSTANTIVE FILE DOCUMENTS: Appeal application dated 6/2/97; Certified City of Encinitas Local Coastal Program (LCP); City of Encinitas Resolution Nos. 97-02 & 97-46; Extended Initial Assessment Case No. 94-140 DR/FP/CDP/EIA for Kirkorowicz Private Equestrian Stables by Craig R. Lorenz & Associates dated August 1996; Wetland Habitat Mitigation, Maintenance & Monitoring Plan for the Kirkorowicz Stables Project by Dudek and Associates dated August 9, 1996; Biological Resources Survey Report for the Kirkorowicz Stables Project by Vincent N. Scheidt dated July 1996.

PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

I. Denial.

The Commission hereby denies a permit for the proposed development on the grounds that the development will not be in conformity with the adopted Local Coastal Program, and will have significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. Findings and Declarations.

The Commission finds and declares as follows:

1. Detailed Project Description. The proposed development involves the construction of an approximately 1,728 sq. ft. stable on a 21.47 acre site. The proposed facility will consist of an enclosed stable, a storage area for supplies and manure, open area for the horses to stand, a driveway and a car/horse trailer turn-around area. The stable facility will be constructed on an approximately 27,000 sq. ft. building pad area created by placing approximately 8,700 cubic yards of fill on the site. The stable and surrounding pad area are proposed to accommodate and board up to 39 horses. The site is currently used to board horses.

Currently, the only structures on the site are open corrals and fences. The entire site is located within the 100-year floodplain of Escondido Creek and the fill for the proposed stable facility will be located in the northwestern portion of the site taking direct access from Manchester Avenue. Based on the biological study prepared by the applicant, a portion of the area where the building pad is proposed contains wetlands. The City of Encinitas determined that the project will require fill of approximately .44 acres of wetlands. Approximately two-thirds of the proposed approximately 27,000 sq. ft. building pad area will be located on the non-wetland portion of the site.

The project site is located on the east side of Manchester Avenue, a short distance south of Encinitas Boulevard/Rancho Santa Fe Road in the Olivenhain community of the City of Encinitas. The site is bounded by Manchester Avenue and residential development to the west, single-family residential development to the north and south and vacant land and Escondido Creek to the east. Because the proposed development is being reviewed by the Commission on appeal, the standard of review is the certified City of Encinitas Local Coastal Program (LCP) and well as the public access and recreation policies of the Coastal Act.

2. Wetlands. Due to the dramatic loss of wetlands (over 90% loss of historic wetlands in California) and their critical function in the ecosystem, and in response to Section 30233 of the Coastal Act, the City's LCP contains very detailed policies and ordinances relative to wetlands protection. The following LCP provisions are applicable to the subject development: Resource Management Policy 10.6 of the certified LUP states, in part:

The City shall preserve and protect wetlands within the City's planning area. "Wetlands" shall be defined and delineated consistent with the definitions of the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, the Coastal Act and the Coastal Commission regulations, as applicable, and shall include, but not be limited to, all lands which are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water. There shall be no net loss of wetland acreage or resource value as a result of land use or development, and the City's goal is to realize a net gain in acreage and value whenever possible.

Within the Coastal Zone, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following newly permitted uses and activities:

- a. Incidental public service projects.
- b. Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
- c. Restoration purposes.
- d. Nature study, aquaculture, or other similar resource dependent activities.

Identification of wetland acreage and resource value shall precede any consideration of use or development on sites where wetlands are present or suspected. With the exception of development for the primary purpose of the improvement of wetland resource value, all public and private use and development proposals which would intrude into, reduce the area of, or reduce the resource value of wetlands shall be subject to alternatives and mitigation analyses consistent with Federal E.P.A. 404(b)(1) findings and procedures under the U.S. Army Corps permit process. Practicable project and site development alternatives which involve no wetland intrusion or impact shall be preferred over alternatives which involve wetland intrusion or impact. Wetland mitigation, replacement or compensation shall not be used to offset impacts or intrusion avoidable through other practicable project or site development alternatives. When wetland intrusion or impact is unavoidable, replacement of the lost wetland shall be required through the creation of new wetland of the same type lost, at a ratio determined by regulatory agencies with authority over wetland resources, but in any case at a ratio of greater than one acre provided for each acre impacted so as to result in a net gain. Replacement of wetlands on-site or adjacent, within the same wetland system, shall be given preference over replacement off-site or within a different system.

The City shall also control use and development in surrounding area of influence to wetlands with the application of buffer zones. At a minimum, 100-foot wide buffers shall be provided upland of salt water wetlands, and 50-foot wide buffers shall be provided upland of riparian wetlands. Unless otherwise specified in this plan, use and development within buffer areas shall be limited to passive recreational uses with fencing, desiltation or erosion control facilities, or other improvements deemed necessary to protect the habitat, to be located in the upper (upland) half of the buffer area when feasible. All wetlands and buffers identified and resulting from development and use approval shall be permanently conserved

or protected through the application of an open space easement or other suitable device.

In addition, Section 30.34.040(B)(3)(a) of the City's Implementation Plan contains similar language as above, limiting wetland fill to projects involving nature study, restoration, incidental public services and mineral extraction.

The project site is located entirely within the floodplain of Escondido Creek, one of the two major creeks which drain into San Elijo Lagoon, an environmentally sensitive habitat area and regional park that is managed jointly by the California Department of Fish and Game and the San Diego County Parks and Recreation Department. The creek in this location supports several native and riparian habitats that include Southern Willow Riparian Scrub, remnant salt marsh, and Coastal and Valley Freshwater Marsh.

Based on review of the biological survey prepared for a portion of the site for the City's environmental review, Commission staff and the City determined that wetlands, as defined in the LCP, are present on the site and the proposed development will permanently fill approximately .44 acres of these wetlands. While the wetland area that will be impacted is described as disturbed and low quality, the area has been delineated as wetlands by the biological consultant. In addition, neither Section 30233 of the Coastal Act nor the City's LCP differentiate between low quality and high quality wetlands; all wetlands are provided the same protection.

As stated in the previous section of this report, fill of wetlands within the City's Coastal Zone is limited to only four types of newly permitted uses and activities. These include nature study, restoration projects, incidental public service projects and mineral extraction. The proposed fill and enclosed stable facility do not qualify as any of the permitted uses within a wetland pursuant to the City's LCP. Additionally, the City's LCP specifically states that practical alternatives that avoid wetland intrusion shall be preferred over alternatives that involve wetland impact. Because the wetland fill to accommodate the proposed development is not permitted under the City's LCP, the project must be denied and redesigned to avoid the wetland fill altogether. If redesigned, the applicant would still have a pad area on which to construct a stable facility and impacts to wetlands would be avoided, consistent with the LCP.

In review of the development by the City, it was determined that fill in the wetlands was unavoidable in order to provide safe access to the site. In addition, the City found that because the site had been "historically" used for the grazing and boarding of large animals, and the project does not change that use, that the project is not a "newly permitted use or activity" and therefore Policy 10.6 (cited above) does not apply relative to permitted uses within a wetland. However, the City's finding on historic use is not entirely accurate. Although it is possible that the site has been used for the free grazing of large animals, there is no evidence that boarding of such has been a historic use because the fences and corral structures that exist on the site appear to have been constructed since

the applicant purchased the property in 1989. Furthermore, even if boarding of horses were a historic use of the site, Policy 10.6 applies to all development, regardless of whether development constitutes new use of a site or facilitation of an existing use. Under Policy 10.6, fill of wetlands is prohibited except for the four identified purposes. The placement of 8,700 cubic yards of fill and the construction of a stable facility that eliminates .44 acres of wetlands is not one of the identified allowable uses.

Although the subject site is comprised of approximately 21 acres, access to the site is only available from Manchester Avenue along the northwest corner of the site (ref. Exhibit #3 attached). In addition, the site has approximately 250 ft. of street frontage on Manchester Avenue from which access can be obtained. The City determined that due to the horizontal curve along Manchester Avenue and the obstruction of visibility by the dirt embankment on the northwest side of Manchester Avenue (across from the project site), that only one access driveway could be permitted on this site and that it must be located along the most southerly portion of the frontage on Manchester Avenue. According to the City Engineer, this is the only location on the site which allows for clear and safe stopping sight distance (minimum 300 ft.) for cars and trucks entering and exiting the site. This stopping distance is derived from the Highway Design Manual (CALTRANS) utilized by the City which cites that for a two-lane road with a speed limit of 40 miles per hour, the minimum safe stopping sight distance is 300 ft.

Based on the site plan submitted by the applicant, of the approximately 250 ft. of frontage on Manchester Avenue, only the southern approximately 50 ft. is wetlands. The problem lies in that the location of the driveway required by the City is in the area of street frontage that contains wetlands. In addition, the location of the driveway also dictates the location of the turn-around area as it must be in direct alignment with the driveway in order to facilitate adequate area to maneuver vehicles towing horse trailers. Only the driveway and turn-around area are proposed to be located within wetlands. Therefore, the proposed fill in wetlands is more than just the minimum necessary to create a driveway. The proposed fill is also accommodating a turn-around area opposite the driveway.

Again, as noted above, fill of wetlands to accommodate site access is not permitted pursuant to the City's LCP. In discussing this issue with the applicant and the City, it was stated that no other alternatives are available to avoid fill of wetlands and still provide safe access to and from Manchester Avenue for the subject site and to provide the necessary area for cars/trucks towing horse carriers to enter and turn-around on the site. While the applicant has provided an exhibit which indicates that the proposed fill pad could be reduced slightly (reducing the amount of wetland fill from .44 acres to .35 acres) by "rounding" a small corner of the pad area east of the proposed driveway (ref. Exhibit #4 attached), the applicant has stated that no other reduction in the size of the proposed fill could be accomplished without adversely affecting vehicular access/turnaround on the pad.

Based on the site plan submitted by the applicant, Commission staff estimates that if the driveway access could be relocated and all wetland fill eliminated, the proposed buildable area would be reduced from approximately 27,000 sq. ft. to approximately 18,000 sq. ft. Relative to relocation of the proposed driveway, only one other alternative has been specifically addressed by the City and the applicant. The applicant's engineer provided information that the embankment across Manchester from the subject site cannot be "trimmed-back" to provide a greater site distance because only a portion of the embankment lies within the existing Manchester Avenue Right-of-Way.

However, there appear to be other alternatives for providing safe site access without filling of wetlands. These include reducing the speed limit on Manchester Avenue such that safe site stopping distances could also be reduced, installing advance warning signs or flashing caution lights indicating cross traffic ahead, installing speed bumps to reduce vehicle speeds, installing stop signs at the site entrance, realigning Manchester Avenue to eliminate the curve in this area or any combination of alternatives. The intent of addressing other alternatives is to allow for placement of the driveway for the subject site such that vehicles can safely enter/exit the site and fill of wetlands can be avoided. There may be other alternatives that could avoid the need to fill wetlands and still provide safe vehicle access to the site. The City has not provided information to demonstrate that these alternatives are infeasible.

Furthermore, even if the proposed wetland fill could be permitted, the City's LCP requires that mitigation for unavoidable wetland impacts occur through creation of new wetlands of the same type, at a ratio determined by the regulatory agencies with authority over wetland resources, but in any case greater than a 1:1 ratio. (emphasis added) The proposed mitigation program does not meet the required LCP standards. Historically, when the Commission has found unavoidable impacts to wetlands to be acceptable, it has always been based on an acceptable mitigation plan. Such acceptable mitigation involves the conversion of upland, non-wetland areas, to wetlands by active planting with appropriate wetland species. The proposed mitigation program only includes mitigation for wetland impacts at a ratio of 1:1 along with enhancement (removal of non-native species) of an adjacent wetland area. Also, the mitigation plan does not involve the creation of new habitat through active planting; it only involves the removal of fill/sedimentation within a designated area of the site and the allowance for it to naturally revegetate on its own. As such, the proposed mitigation plan for impacts to wetlands is inconsistent with LCP policies.

In summary, the fill of wetlands to provide access to the site is not permitted pursuant to the City's certified LCP and other alternatives to provide such safe access and avoid the fill of wetlands have not been adequately reviewed. In addition, even if wetland impacts were found to be acceptable, the proposed mitigation for impacts is inconsistent with LCP policies. Therefore, the Commission finds the proposed development must be denied.

3. Floodplain Development. Because of the potential for adverse impacts on both down- and upstream areas and habitats, fill of floodplains is severely limited in the City's LCP. Specifically, Land Use Policy 8.2 of the City's certified LUP pertains to floodplain development and states, in part:

[...] No development shall occur in the 100-year floodplain that is not consistent and compatible with the associated flood hazard. Only uses which are safe and compatible with periodic flooding and inundation shall be considered, such as stable, plant nurseries, a minimum intrusion of open parking, some forms of agriculture, and open space preservation, as appropriate under zoning, and subject to applicable environmental review and consistency with other policies of this plan. No grading or fill activity other than the minimum necessary to accommodate these uses found safe and compatible shall be allowed. Such grading shall not significantly redirect and impede flood flows or require floodway modifications. Exceptions from these limitations may be made to allow the following:

a. Minimum private development (defined as one dwelling unit per legal parcel under residential zoning, and an equivalent extent of development under non-residential zoning) only upon a finding that strict application would preclude a minimum use of the property.

[...]

These exceptions shall be allowed only to the extent that no other feasible alternatives exist and minimum disruption to the natural floodplain environment is made. [...]

As stated, the proposed development involves the placement of fill on an irregularly shaped approximately 21 acre site that is located entirely within the 100-year floodplain of Escondido Creek to accommodate an enclosed stable facility for the keeping and boarding of horses. The applicant asserts that the approximately 21 acre site has been used to board and graze large animals (horses and cows) since before adoption of the Coastal Act in 1976. The only structures currently on the site are fences and numerous corrals. It appears (based upon photographs of the area) that these were constructed after the property was purchased by the applicant in 1989. None of these structures have been reviewed under a coastal development permit; they will be addressed in a separate enforcement action.

Within the Rural Residential Zone, which is applied to the subject site by the City's certified LCP, private stables for the boarding of horses and/or other large animals are permitted by right to accommodate a maximum of two animals per lot plus one animal per each additional one-half acre over one acre. The approval of the proposed development by the City allowed for a maximum of 39 horses to be accommodated on the

approximately 21 acre site. Because the entire site is periodically flooded, the applicant asserts that the proposed fill and enclosed stables are needed to house/accommodate animals safely during flood events.

In review of the subject development, the proposed enclosed stable is not a structure that by itself, could be considered a safe and compatible use within the 100-year floodplain. Typically stable facilities that could be found compatible with periodic flooding would be open corral type structures that do not impede or redirect flood flows. In addition, the driveway and turn-around area are not considered a safe and compatible use within the 100-year floodplain because in order to be effective, they require fill to elevate them out of the floodplain which would impede and redirect flood flows.

In the case of the proposed development, the entire site is located within the 100-year floodplain. As such, any development on the site, except that compatible with periodic flooding, requires fill of the floodplain. As noted above, the LUP includes allowances for exceptions to the above cited floodplain limitations if it is found that strict application would preclude minimal use. The applicant asserts that current use of the site is significantly constrained because horses cannot be safely boarded during floods and because a driveway is necessary to safely access the site. Although the above cited LUP policy specifically defines minimal private development as a single-family residence (under residential zoning), in this particular case, the Commission finds that because fill of the floodplain would be necessary for safe development of a single-family residence, that a fill pad of similar size to accommodate the proposed enclosed stable could also be acceptable.

In order to find fill of a floodplain acceptable, the City's LCP requires that only the fill necessary to accommodate minimal private development be approved. Although it is not clear whether the proposed use is minimal private development, even if it were, it is not clear how much fill would be necessary to obtain minimal private development. This is in part, because it has not been determined how many legal lots comprise the subject site. The applicant asserts that the subject 21.47 acre site is comprised of three (3) lots. Commission staff has requested that the applicant provide a Certificate of Compliance from the City of Encinitas or other evidence that the site is in fact made up of three (3) legal lots. However, the applicant has not provided the Commission with evidence to support this claim. The applicant has submitted a letter from the City Planner of City of Encinitas which states that one lot is recognized as legal by a 10/8/76 certificate of compliance. The letter further states that a second lot is also recognized as legal because it is shown on an 1894 subdivision map and that there is no evidence that a third lot (which is shown on the same 1894 subdivision map) is not a legal lot. The concern is that the second and third lots are "landlocked" with no direct street access and no certificate of compliance has been provided for these lots. As such, the legal status of the lots is questionable.

Given that it is not known whether or not the subject 21.47 acre site is comprised of one, two or three legal lots, the Commission is unable to determine the amount of fill in the floodplain that would be consistent with the LCP. There appears to be alternatives to the proposed stable facility that would require less fill of the floodplain. Such alternatives could include the construction of one to three single-family residences clustered on the non-wetland portion of the site along Manchester Avenue. In review of assessors parcel maps of the site and aerial photographs submitted by the applicant, it appears that at least one and possibly three residences of similar size to the existing single-family residences along Manchester to the north of the subject site could be accommodated on the non-wetland portion of the site along Manchester Avenue. It may be that one, two or three single-family residences would require less fill in the floodplain than a stable facility. This is in part because the size of the access/turn-around area necessary to accommodate vehicles towing horse trailers is much greater than the area necessary to accommodate the access/turn-around for vehicles associated with one single-family residence or possibly three single-family residences.

The applicant asserts that if the proposed stable facility is reduced to avoid wetland fill, the remaining pad area, approximately 18,000 sq. ft., will not be big enough to accommodate the proposed stable facility and still have adequate upland area in which to keep animals when the remaining areas of the site are flooded. However, even though up to 39 horses are permitted on the site based on the City's approval, the City's LCP does not state that 39 horses have to be accommodated out of the 100-year floodplain. In fact, based on information provided by the applicant and the City, the building pad size as currently proposed, would only accommodate a maximum of 27 horses. Thus, while up to 39 horses may be permitted on the site, not all can or must be accommodated on the proposed pad area out of the 100-year floodplain.

In summary, the certified LCP does allow exceptions to restrictions on the filling of the 100-year floodplain, but only for the amount of fill necessary to accommodate minimal private development described as one residence per lot. Relative to the proposed development, minimal private development may be the construction of the proposed stable facility, but on a smaller scale, or the construction of one to three single-family residences. However, because the legal status of the lots that may comprise the site has not been determined, the Commission cannot, at this time, determine the development potential for the site nor the minimum amount of fill necessary to accommodate minimal private development.

4. Public Access. The project site is located just south of Rancho Santa Fe Road, which in this area of the City delineates the Coastal Zone boundary, as well as the first public roadway. As the proposed development will occur between the first public road and the sea, pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and recreation policies of the Coastal Act.

While the proposed development is located well inland of the coast, public access and recreational opportunities, in the form of hiking and equestrian trails, do exist in the area, providing access along Escondido Creek and into San Elijo Lagoon Ecological Reserve and Regional Park. There are currently no such trails existing or planned on the subject site. The development will not impede access to the lagoon or to any public trails. Therefore, the proposed development would have no adverse impacts on public access or recreational opportunities, consistent with the public access policies of the LCP and the Coastal Act.

5. Local Coastal Planning. Section 30604 (a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. In this case, such a finding can be made.

The City of Encinitas received approval of its LCP in November of 1994 and began issuing coastal development permits on May 15, 1995. The proposed development was originally approved by the City of Encinitas Planning Commission and subsequently appealed to the City Council. The City Council approved the development on May 14, 1997. Because the subject development is located within 100 ft. of wetlands, it falls within the Commission's appeals jurisdiction. On June 2, 1997, the development approval was appealed to the Coastal Commission.

The subject site is zoned and planned for rural residential development in the City's certified LCP. The proposed development is consistent with the rural residential zone and plan designation. The subject site is also located within the Special Study Overlay Zone which is used to indicate those areas where development standards may be more stringent to minimize adverse impacts from development. In addition, the proposed development is subject to the Floodplain Overlay Zone. This is applied to areas within the Special Study Overlay Zone where site-specific analysis of the characteristics of the site indicate the presence of a flood channel, floodplain or wetland. The subject site has been identified to be entirely within the 100-year floodplain and directly impact wetlands.

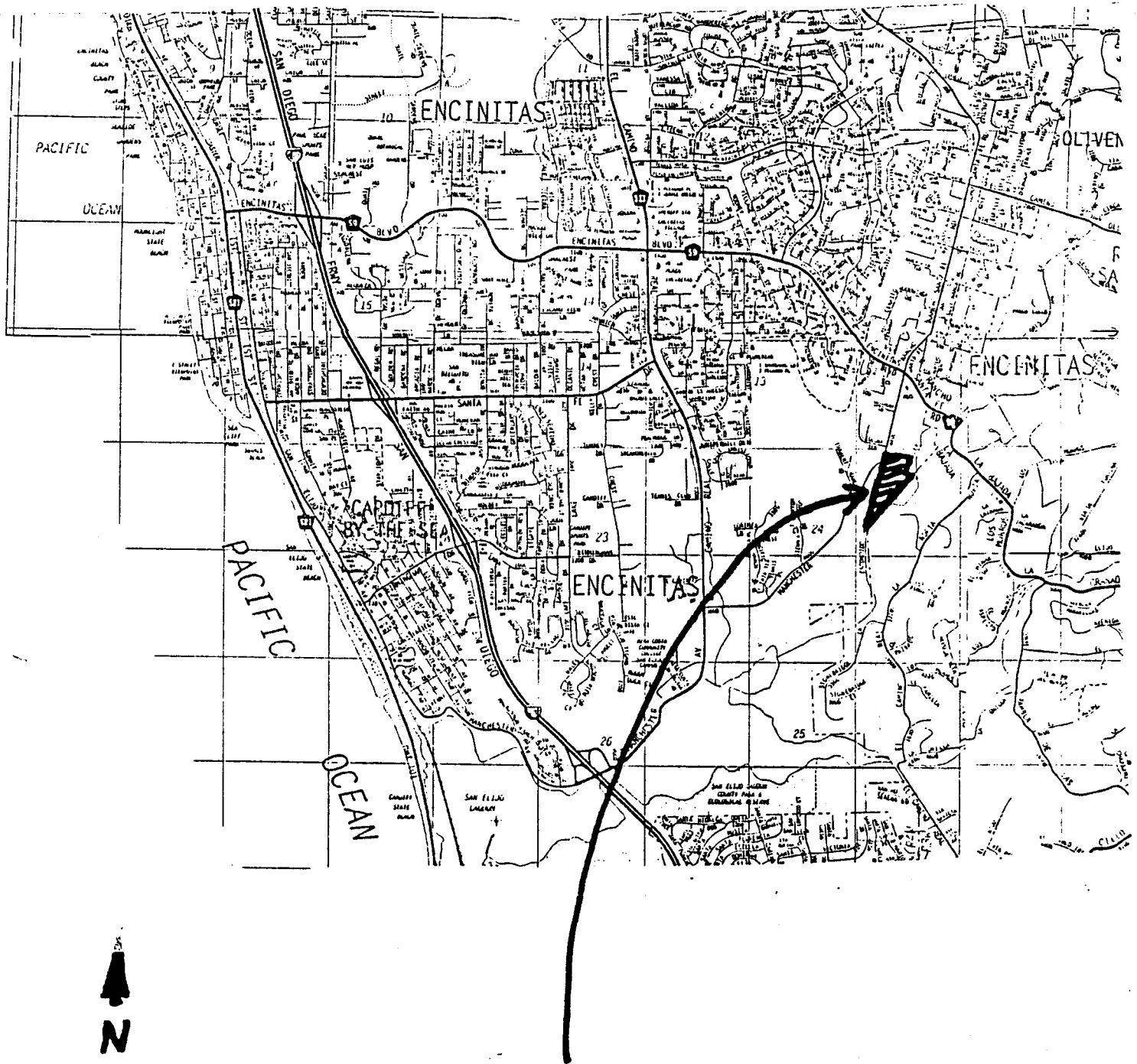
As noted previously, the proposed development which includes both fill of the 100-year floodplain and wetlands is inconsistent with several policies of the City's certified LCP. While the need to fill the floodplain can be permitted to provide minimal private development, in this particular case, the amount of fill that would be permitted is not known at that time as the legal status of all the lots that comprise the site has not yet been verified. In addition, the proposed fill of wetlands is not a permitted use pursuant to the certified LCP and other alternatives to avoid wetland fill have not been adequately explored. As such, the Commission finds that the proposed development must be denied.

6. California Environmental Quality Act. Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be

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

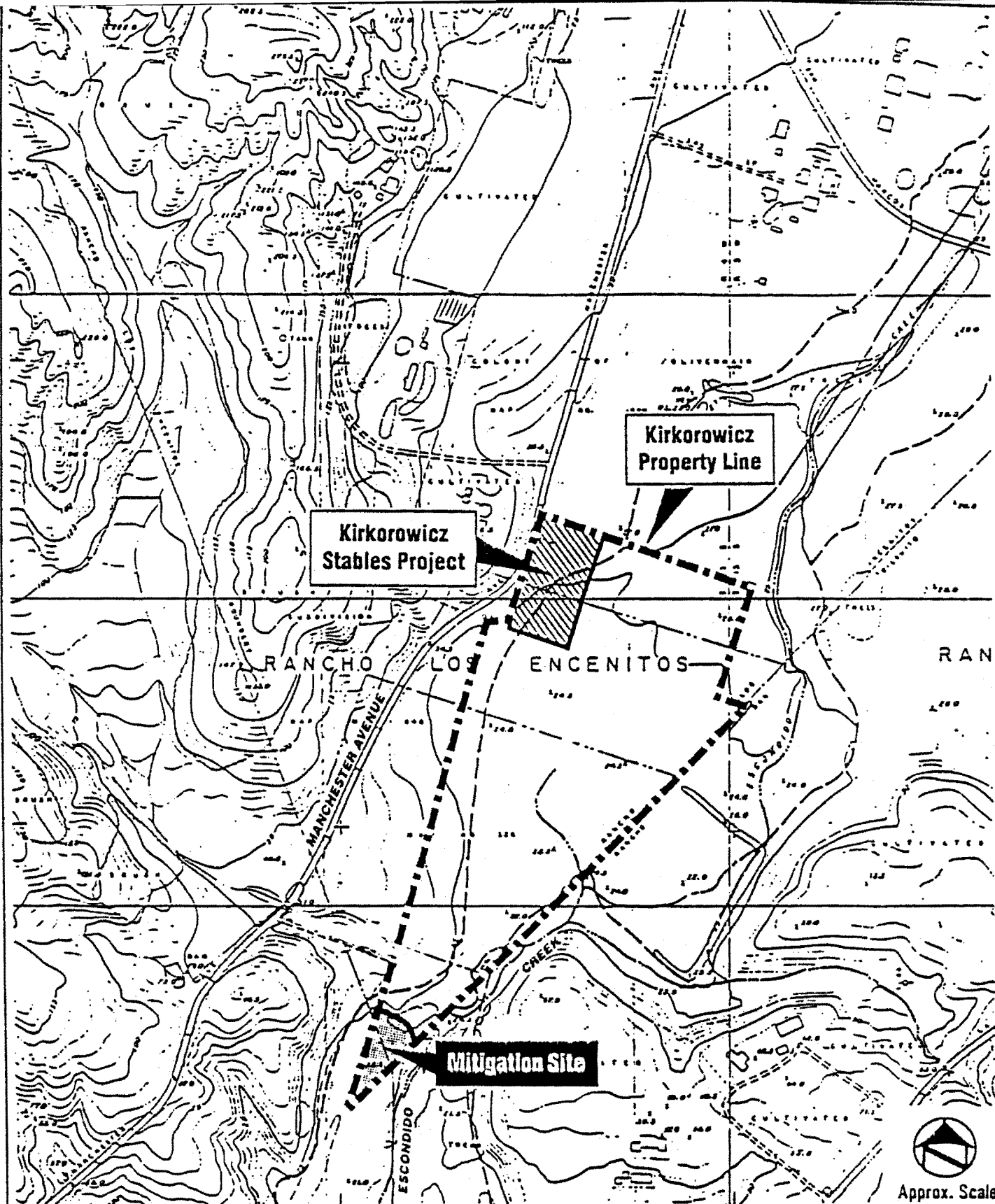
As discussed herein, the proposed development would result in adverse impacts to coastal resources in that fill of wetlands has not been avoided. There are feasible alternatives available which would substantially lessen any significant adverse impacts which the proposal may have on the environment while still allowing for minimal private development. These potential alternatives include other means to address safe access to the site to avoid wetland impacts. Therefore, as currently proposed, the Commission finds the proposed project is not the least environmentally-damaging feasible alternative, and therefore is inconsistent with CEQA.

(7070R)




PROJECT SITE

EXHIBIT NO. 1
APPLICATION NO.
A6-ENC-97-70
Location Map



SOURCE: County of San Diego 1:2400 Topographic Survey

Approx. Scale
1" = 425'

EXHIBIT NO. 2
APPLICATION NO.
A6-ENC-97-70
Overall Site Plan
 California Coastal Commission

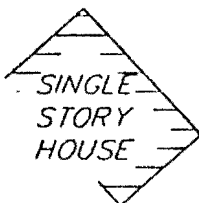
GRADING → FILL 87
AREA 114 JURIS. WETLAND

JURISDICTIONAL
WETLAND LINE

2

EXHIBIT NO. 3
APPLICATION NO. A6-ENC-97-70
Fill Area Site Plan As Approved By City
California Coastal Commission

PARCEL



EX LINED DITCH

REMOVE
EX. BLDS

RELOCATE
EX. FENCE

PROPOSED 12'x12' STABLES

OVERHANG

WETLAND
IMPACT
AREA

30' FY SETBACK LINE

18"x44' CMF

ACCESS
DRIVE

MANCHESTER AVENUE

R/W

PARCEL

AREA N JURIS. }
WETLANDS

JURISDICTIONAL
WETLAND LINE



EXHIBIT NO. 4

APPLICATION NO.

A6-ENC-97-70

Fill Area Site Plan As

Revised By Applicant

California Coastal Commission

PROPOSED 12'x12' STABLES

REMOVE
EX. BLDG

RELOCATE
EX. FENCE

OVERHANG

WETLAND
IMPACT
AREA

30' FY SETBACK LINE

18"x44' CMP

ACCESS
DRIVE

MANCHESTER AVENUE

R/W



EX LINED DITCH

PP GUY
ESMT

1%

W

W

MH

MH

26

28

30

32

33

33

32

30

30'

8.0'

80'

27'

S

W

W

MH

MH

LJM

Christopher Kirkorowicz
3551 Fortuna Ranch
Encinitas, CA 92024

December 8, 1997

RECEIVED

DEC 09 1997

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

California Coastal Commission
c/o Lee J. McEachern
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

CASE #: A-6-ENC-97-070

Thank you very much for meeting with me and Anne Omsted (Monday, November 24, 1997).

As a follow up to our discussion I wish to address the following points:

- 1) Policy 8.2 - the flood plain ordinance does support the idea of raising the barn over above flood waters.
 - a) it calls for safety - barn that is subject to flooding clearly is not safe. Examples are known to you.
 - b) equivalent of one building pad/lot applies only when proposed improvements will cause problems with passage of flood waters. This specific pad will have absolutely no effect on passage of flood waters.
 - c) Policy 8.2 was subject to judiciary review back in 1994. Specifically, fill was placed to accommodate parking lot and part of the building [Home Depot].

While Home Depot is not in the Coastal Zone, wording of 8.2 is the same regardless of an area [and was essentially the same back in 1994].

This issue went up to appellate level and court(s) ruled that "open parking" does not mean parking that is subject to inundation.

Letter from Applicant
1 of 9

2) Issue of fences on the property.

Construction of "animal" fences was well known to the Coastal Commission and it was not viewed as an issue, although such fences were viewed at one time as an issue by the City of Encinitas, which insisted that such fences need permits.

This issue was addressed by the judiciary, beginning in 1989 and finally ending in 1991. All along court(s) judgment was that such fences are exempt from permits. City of Encinitas used flood plain regulations, Coastal Act and any and all other arguments and tried again and again. Please note that the dismissal by Court in 1991 was issued prior to the defense having even to present its case [Ex 1]. Judges took under advisement that keeping of horses and cattle on the property was an existing use, and in addition it was permitted by right. [By contrast any other form of agriculture requires a use permit]. Further the use of animal fences follows the guidelines offered by the Federal Government and by the Government of California. [Ex 2, Ex 3] Court took a position that if there is a wrong way of keeping animals and a correct way, no responsible agency should force people to do the wrong thing.

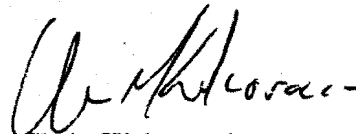
3) Issue of wetlands value.

a) While L.C.P. does not make direct reference to pristine wetlands vs highly disturbed wetlands, it does make references to Federal Regulations which in turn do consider value of wetlands.

b) Local Coastal Plan, and Coastal Act does take under consideration type of wetlands.

Specifically, the definition(s) list: "salt water marshes, fresh water marshes, open or closed brackish water marshes, swamps, mudflats, and fens." [Ex 4 and Ex 5] Clearly it does not match the type of vegetation that would be impacted by proposed pad.

I believe that it gives you the flexibility that would not exist if type of vegetation impacted by the proposed pad matched L.C.P. and Coastal Act definition of wetlands.


Chris Kirkorowicz

STAPLE HERE

STAPLE HERE

NAME LAST	FIRST	MID. INIT.	APPEARANCE DATE	VIOLATION DATE	CONTROL DATE	COMPLAINT NUMBER
KIRKROWICZ	GREGORY		11-20-91	10-03-91	11-07-91	EN00861

DATE: 8-25-92 DEFT: Kirkorowicz, Gregory Pro Per ☐ Custody CITATION: EN00861

Deputy District Attorney Defense Counsel (Appt. / TAC / Ret.) Atty Wayne Brechtel Interpreter Sworn

☐ Deft. failed to appear ☐ Affidavit requested ☐ WARRANT ordered, Bail set \$ ☐ Issue per Directive
 Warrant ordered, ☐ set aside ☐ HELD to date set below ☐ Recalled ☐ To re-issue ☐ Post & forfeit

Yes The Court Advised defendant of his right to remain silent and that the prosecutor will have the opportunity to cross-examine him if he chooses to testify.

PEOPLE'S DEFENSE WITNESSES SWORN & TESTIFIED

People's Exhibits

Encinitas - Adams #1 - marked - Various papers.
Charles Granger returned to people.

☒ PEOPLE / DEFENSE REST. ☐ Defense motion pursuant to PC 1118. Argument by counsel.

Motion GRANTED / DENIED as to Ct(s) all counts all exhibits not admitted
 Opening statements: PEOPLE: ☐ Given ☐ Waived DEFENSE: ☐ Given ☐ Waived ☐ No affirmative evidence presented

DEFENSE WITNESSES SWORN & TESTIFIED

Defense Exhibits

marked #A. Municipal Codes -
Aerial photos + pictures

☐ PEOPLE / DEFENSE REST. ☐ REBUTTAL: #B - ☐ PARTIES REST

Closing statements: PEOPLE: ☐ Given ☐ Waived ☐ Submitted DEFENSE: #C ☐ Given ☐ Waived ☐ Submitted all exhibits returned to defense.
☐ Matter taken under submission.

MOTION for: DEFENSE / GRANTED ☐ as modified ☐ See SUPPLEMENTAL DOCKET

☐ Order filed & signed. ☐ Order to be filed by: _____

COURT FOUND DEFENDANT: GUILTY _____ NOT GUILTY _____

☐ Motion of People/Court/Defense: ☐ Case ☐ Count(s) _____ DISMISSED

☐ By stipulation of counsel with consent of defendant, tape(s) retained by Court until appeal time has lapsed.

☐ Defendant waived: ☐ arraignment ☐ time for judgment ☐ See SENTENCING/PROBATION ORDER DOCKET

(F)	1	2	3	4	5	6	7	8	9	10	11	12	13
(S/P)	<u>D</u>												
(AF)													

SENTENCING ☐ IT IS ADJUDGED THAT: ☐ Imposition of sentence suspended for _____ mos./yrs. on Ct(s) _____ on the following conditions:

- ☐ SERVE _____ hrs/days CUSTODY of Sheriff, _____ days susp., _____ days credit time served + _____ PC 4019 credits.
 REPORT: ☐ Forthwith ☐ On: _____ ☐ _____ days susp. on condition _____
☐ FINE \$ _____ (PA inc.), \$ _____ fees, \$ _____ susp., \$ _____ CTS + \$ _____ A/R + _____ PRIOR BAL = DUE \$ _____
☐ IN LIEU OF: ☐ Fine ☐ Custody Deft. may/must complete _____ hrs/days ☐ COMMUNITY SERVICE at \$ _____ per hr.
 WORK RELEASE, Call 560-3258 ☐ Enroll by: _____ ☐ May serve off line in custody at \$ _____ per hr/day.
☐ TRAFFIC SCHOOL on Ct. _____ & pay \$ _____ fee. ☐ Pay \$ _____ fine in lieu of traffic school, \$ _____ A/R fee=DUE: \$ _____
☐ TRAFFIC SCHOOL Certificate filed. Ct. _____ to be dismissed upon payment of fees.
☐ Not drive without valid Calif. drivers license or without liability insurance. File proof of correction on ct. _____
☐ Not violate any laws (incl./other) than minor traffic infractions. ☐ Not drive with a measurable amount of alcohol in system.
☐ Violate no same or similar offense. ☐ In lieu of \$ _____ and/or _____ day/mo. license suspension, attend _____ AA meetings.
☐ Driver's license: ☐ Restricted ☐ Suspended for _____ days/mos. Commencing: ☐ Forthwith
☐ Other: _____

PAY FINE AND/OR FILE PROOF BY: _____

BAIL BOND ☐ Forfeited ☐ No further proceedings ☐ Fine from Bail, refund any bal. ☐ File consent by _____

☐ Declaration Non-Collusion filed ☐ Forfeiture set aside ☐ Reinstated ☐ Continued ☐ Exonerated ☐ No obj. by DA, hearing waived
☐ Upon \$ _____ reinstatement fee paid to Court purs. to PC 1305.1 ☐ FEE WAIVED ☐ NO ACTION on Bail/Bond forfeiture

REFERRAL ☐ Deft. ordered to report ☐ forthwith ☐ by: _____ to Revenue/Recovery re: \$ _____ Atty fees ☐ Indigent

"ALL FINES, FEES and PROOF DUE TO THE COURT BY DATE ABOVE. Make check payable to: CLERK OF THE COURT. You may appear at or mail to:
 NORTH COUNTY MUNICIPAL COURT, 333 Via Vera Cruz, San Marcos, Ca. 92069 OR, if box is checked: ☐ 325 S. Melrose Dr., Suite 120, Vista, Ca. 92083
 *NOTE: The Dept. of Motor Vehicles will be notified to SUSPEND your driver's license if judgment is not satisfied as ordered above.

JUDGE: ☐ KNAUF ☒ BURLEY ☐ RAMIREZ ☐ LEEGER ☐ HARRIS ☐ EARWICKER ☐ DRAPER ☐ RYAN ☐ RUDLOFF ☐ WAGNER ☐ ELMS

COMMISSIONER: ☒ ORNELAS ☐ BRANDENBURG ☐ JONES ☐ By stipulation: Comm./Judge Pro Tem _____ BY: _____ Clerk

Sign: _____ Address: _____

Phone: _____ Social Security # _____ City: _____ Zip: _____

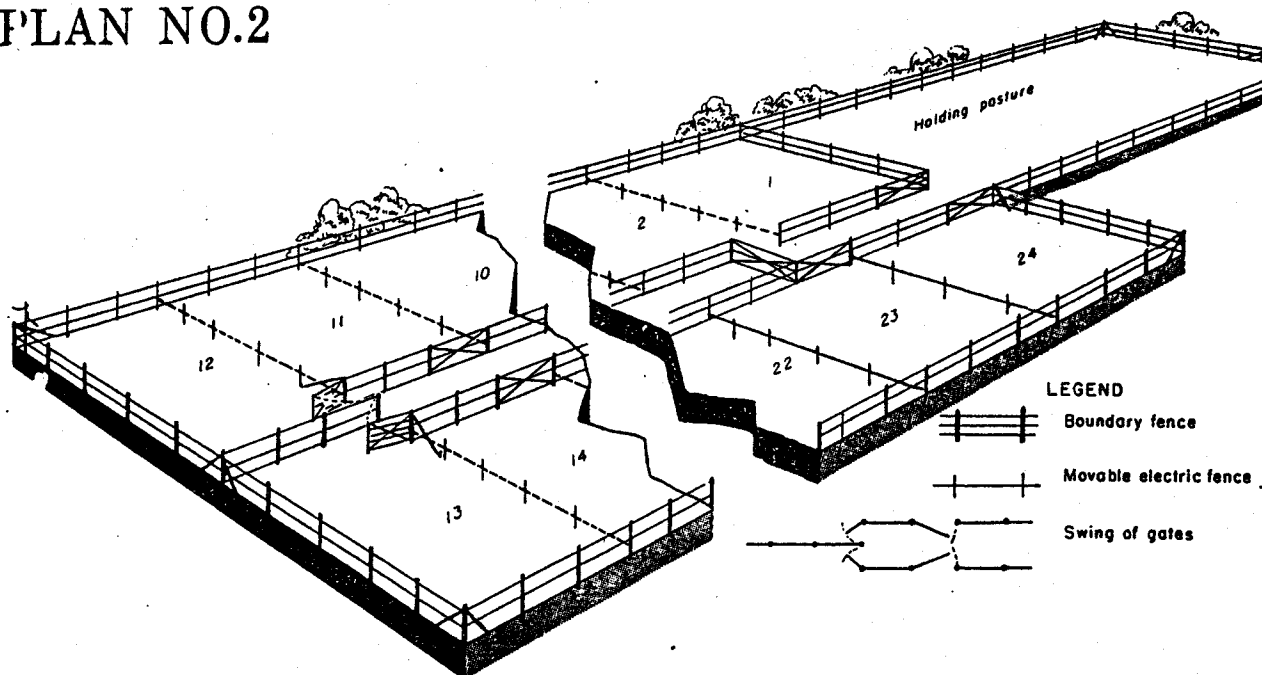
NCMC 308 (Revised 3/92) DIST: Jail _____ Deft. _____ Atty _____ DA _____ WRP _____ R&R _____ DISPO / ABSTR to DA AUG 28 1992

NCMC 303 (Revised 7/91) DIST: Jail _____

EX 1

3 of 9

PLAN NO.2



Plan No. II provides for 24 separate pastures, each having an opening from a central permanent lane. Each pasture provides one day's feed for the herd. Pastures are grazed in the same order as they are numbered. Portable electric fences are used as cross fence. Only two strings of fence are required. Each day one string of electric fence is moved or jumped over the other.

This plan has the advantage over Plan No. I, because livestock do not trample over the pasture which was grazed the previous day.

Several modifications of either Plan No. I or Plan No. II are possible. The growth period before grazing is longer with more pastures and shorter with fewer pastures.

OTHER POINTS on MANAGEMENT

1. The ideal pasture should contain about 2/3 grass and 1/3 legumes.
2. A good growth on the pasture will reduce the danger of bloat.
3. Use split applications (four or more times during grazing season) of nitrogen fertilizer to improve the grass in a pasture.
4. Use phosphate fertilizer to improve the legumes in a pasture. Also where needed, use lime or sulfur for the legumes and other rare mineral elements.
5. Provide adequate salt or mineral mixture and livestock water in each pasture unit.
6. After grazing, mow off old growth and drag to scatter the manure as necessary to promote uniform grazing.
7. During early spring growth, two pastures may be used together for the first days of grazing. Also, when the feed is ahead of the livestock, some pastures can be mowed for hay rather than grazed.

SOIL CONSERVATION SERVICE

1523 E. Valley Parkway #205

Escondido, CA 92027

Phone: 714-745-2061

USDA, Soil Conservation Service

332 S. Juniper St., Suite 110

Escondido, CA 92025

(619) 745-2061

For more detailed information and on-site technical assistance, contact your local Soil Conservation District representative.

Ex 2

4 OF 9



BACKYARD
RANCHES

A Horse Management Program
For San Diego County

ACKNOWLEDGMENTS

Published 1990 by the:

SAN DIEGO COUNTY ASSOCIATION OF RESOURCE CONSERVATION DISTRICTS

Alex Adams, GMERCD
George Borst, Mission
Ernest Blake, Palomar
Raymond Foster, Ramona-Julian
William Hutchings, Upper San Luis Rey

In cooperation with
U.S.D.A Soil Conservation Service

By:

Henry Adams, Range Conservationist
U.S.D.A. Soil Conservation Service

Contributors:

Greater Mountain Empire RCD
Shannon Barker

Palomar/Ramona/Julian RCD
Bill Middleton, Bob and Julene Gyde

San Luis Rey RCD
Ogdon Watson, Associate Director

Soil Conservation Service
Mac Parkins, Jason Jackson

Cooperative Extension Service
Herb Weisheit

Environmental Health Services, San Diego County
Keith McBarron, Vector Ecologist

Neil Connelly
Landowner

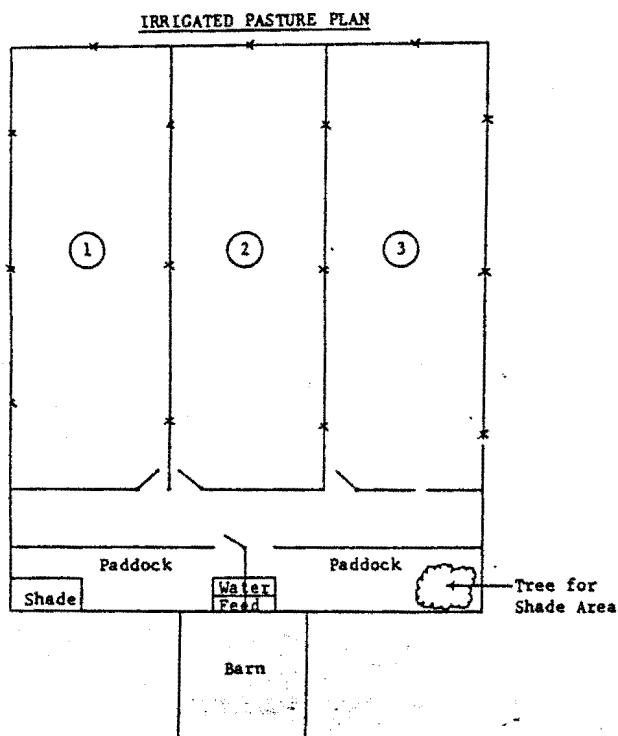
Illustrations
Pat Barker, SCS Volunteer

3. Overgrazing forces animals to eat undesirable (sometimes poisonous) plants. Many undesirable plants can replace desirable plants on overgrazed land.
4. Horses graze plants very close to the ground and weaken or destroy the roots of plants during overgrazing.
5. Trampling has an adverse effect on plants and soils.
6. **RULE OF THUMB:** Five to six gallons per minute is required to adequately maintain one acre of irrigated pasture.

Key Recommendations to Keep Pastures Productive, Attractive and Non-Polluting

1. Cross fence pasture to 2 or more units to control grazing under a rotation system of use.

2. Limit grazing to a short period each day and feed with hay or feed in a stall or paddock. Urban area horse owners must figure that pasture will supplement the hay, not the hay will supplement the pasture.



CONSIDERATIONS:

1. Barn and paddock should be located uphill of pasture area for proper drainage.
2. House should be located downwind of pasture if an air-conditioning effect and fire protection are needed.

Day	1	2	3
1	D	R	I
2	D	R	D
3	G	R	D
4	G	I	R
5	G	D	R
6	G	D	R
7	I	G	R
8	D	G	I
9	D	G	D
10	R	G	D
11	R	I	G
12	R	D	G
13	R	D	G
14	I	R	G

D - DRY
R - REST
I - IRRIGATE
G - GRAZE

3 - PASTURE ROTATION
(10-day regrowth period)
PASTURE

3. To reduce risk of hoof infection and minimize soil compaction do not turn out horses on wet ground.

. TRANSIENT HABITATION UNIT Shall mean living quarters intended exclusively for occupation by transient persons. A transient habitation may include a hotel or motel room or suite of rooms, a cabin or campground space. (Ord. 91-03)

. TRANSITIONAL HOUSING - This use is designed to be transitional to more permanent housing for homeless individuals and families, once they have had an opportunity to solve their employment, transportation, child care, and other problems related to homelessness. Social service programs, child care, and similar support services for the resident households may also be provided as part of a transitional housing facility. Transitional Housing facilities should specifically be limited in terms of the length of time they are available to individual households (e.g., 180 days) to make room for other homeless households. Parking standards would be established by preparing a parking study through the use permit process. (Ord. 92-17)

. USE shall mean the purpose for which land or a building is arranged, designed, or intended, or for which either land or building is or may be occupied or maintained.

. WETLANDS: Pursuant to Section 30121 of the Public Resources Code as amended, "wetlands" shall mean lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens. (Ord. 95-04)

. WHOLESALE shall mean the selling of any type of goods for purpose of resale.

. YARD shall mean any open space on the same lot with a building or dwelling which open space is unoccupied and unobstructed except for the projections permitted by this Code.

. YARD, FRONT shall mean a space between the front yard setback and the front line or future street line, and extending the full width of the lot.

. YARD, REAR shall mean a space between the rear yard setback and the rear lot line, extending the full width of the lot.

. YARD, SIDE shall mean a space extending from the front yard, or from the front yard lot line where no front yard is required by this Code, to the rear yard or rear lot line.

. ZONING CODE AND/OR ORDINANCE shall mean the zoning regulations of the City of Encinitas.

Cx 3

8 of 9

area, area of special scenic significance, and any land where logging activities could adversely effect public recreation area or the biological productivity of any wetland, estuary, or stream especially valuable because of its role in a coastal ecosystem.

Section 30119.

"State university" means the University of California and the California State University.

(Amended by Ch. 143, Stats. 1983.)

Section 30120.

"Treatment works" shall have the same meaning as set forth in the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq.) and any other federal act which amends or supplements the Federal Water Pollution Control Act.

Section 30121.

"Wetland" means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

Section 30122.

"Zoning ordinance" means an ordinance authorized by Section 65850 of the Government Code or, in the case of a charter city, a similar ordinance enacted pursuant to the authority of its charter.

(Added by Ch. 919, Stats. 1979.)

ex 5

RECEIVED

JAN 14 1998

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

January 8, 1998

Mr. Chris Kirkorowicz

Rancho Santa Fe, CA. 92067

Dear Chris,

My apologies for the delay in getting this to you! Per your request, the following is a re-cap of my meeting with Mr. McEachern.

Mr. McEachern was kind enough to meet with me in his office on Thursday, December 11, 1997. Our meeting was relatively brief but we discussed several issues including: horse keeping; mitigation for wetland habitat per established guidelines; and fill, relative to the need for safe ingress and egress as mandated by the City of Encinitas.

Mr. McEachern was and is knowledgeable about the need for horses to be able to get to "high ground" in wet weather. There is no argument or conflict in this area. I stressed that the need for your development is not only to provide that "high ground" but also I felt that there is a need to put in a proper facility with adequate fencing, etc.. He did not specifically agree but acknowledged that all would benefit.

The "Wetlands" that would be destroyed by the project seems to be a surmountable issue. Mr. McEachern did point out that the land in question was classified by your biologist as "Wetlands". In any event, according to the initial 'Staff Report' the only complaint by the Commission was that the mitigation required by the City of Encinitas, was for a 1:1 ratio. I pointed out that there is a provision for "Wetlands" to be re-created elsewhere, according to their own criteria, and that you could easily comply with a greater ratio. He did agree that this condition could probably be met, but also pointed out that there are members on the Board who will not vote for any project that destroys any amount, no matter how insignificant, of "Wetlands".

Letter of Comment

1 of 2

Kirkorowicz, page 2

Now, the fill for ingress and egress, as required by the City of Encinitas, will obviously destroy the "Wetlands". This seems to be the point they are using to deny the project. Mr. McEachern argued that by allowing the fill, it would essentially open the door for all the neighboring property owners to "fill" their low spots as well, in effect set a precedent. I argued that this was not a slippery slope at all. That the demand by the City of Encinitas was deemed for the greater good of the community because of the traffic hazard presented by the bend in the road. The City of Encinitas made their decision, not in a "creative" attempt to circumvent the existing guidelines, as argued by Mr. McEachern, but actually in the spirit of the agreement with the Coastal Commission and the City's duty to consider the entire community.

I believe that the City of Encinitas made not only a informed decision but a correct decision.

If they deny the project, it will constitute a 'taking of land'. This will require approval by the Attorney General of California. A time consuming and expensive process with, at this point, no definite outcome. If they are truly considering this route, they will only pursue it if they are certain they can win, however, with mitigation for all points available, I doubt they will consider this option.

However, they may only approve a pad large enough for a single family residence. Reducing the scope of the project may meet the needs of the Conservancy, but will create a loss of income issue, and not alleviate the safety issue.

Our meeting was congenial and professional. I am sending a copy of this to Mr. McEachern, just in case I have misunderstood or misrepresented any part of our conversation. As you know these are my impressions.

Sincerely,



Glenda Hibser

cc: California Coastal Commission
Mr. McEachern

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JAN 13 1998

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Christopher Kirkorowicz

3551 Fortuna Ranch
Encinitas, CA 92024

January 12, 1998

California Coastal Commission Members
c/o Lee J. McEachern
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

CASE #: A-6-ENC-97-070

Regarding the project in question, discussion typically centers on the entrance to the property, since entrance is where impacts on wetlands occurs.

I am somewhat concerned that the Coastal Commission might get the impression that this project is somehow "blessed" by unsafe road (And otherwise this project could get by with smaller pad). The line of site requirements, which determine where the entrance must be, is not the only reason why size of the pad cannot be reduced. Smaller pad would make operating horse stable impractical. Operating horse stable is quite complex, and to do it properly, it requires area that is safe from flooding well beyond providing actual horse stalls. What is needed is an area to store feed (ie hay), shavings and manure, an area to load and unload horses, and an area where horses can be exercised during times when property is either flooded or too muddy to take horses off the pad.

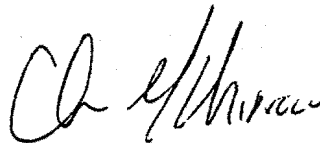
The area of pad was carefully evaluated by the people within the horse community and by the City of Encinitas. The main concern voiced was that area of pad was too small.

Therefore, further reduction that did cut into turning radius of entering/exiting vehicles is a concern. However, I believe that it can work (just barely).

If further reduction in the size of the pad was required as a condition of approval, it will most likely make profitable operation of the stable quite impossible. Reduction in the size of project can be synonymous with no project.

Clearly regulatory taking occurs when project is reduced below practical size, as if the Coastal Commission allowed for an 8 x 10 foot shack and claimed that it constitute a dwelling unit.

I wonder whether the Coast Commission prefers arrangement where three legal dwellings would be proposed upon the site, one per each legal lot. Certainly impacts on wetlands would be greater. In addition, I would still be entitled to board two large grazing animals/acre, just like my neighbors who have homes on pads along the road and keep livestock in the back.



Christopher Kirkorowicz

Letter from Applicant

Christopher Kirkorowicz
3551 Fortuna Ranch
Encinitas, CA 92024

RECEIVED

JAN 22 1998

January 20, 1998

California Coastal Commission Members
c/o Lee J. McEachern
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

CASE #: A-6-ENC-97-070

You have received information and testimonies to the effect that the wetlands that proposed pad would impact are quite recent in origin. In fact, appearance of those wetlands clearly correlates with agricultural water diversion that started some time after 1981.

At first this diversion was achieved by the means of a dike(s) across Escondido Creek. Once this was disallowed, a ditch was excavated in 1997. This digging was done without obtaining any permits, and contrary to the advice given by various regulatory agencies. If this diversion is allowed to continue (which is doubtful, since among other effects, it deprives of water a "biological core and linkage area" within M.H.C.P.), it will continue only as long as agricultural use continues.

Please refer to the attached report prepared by Dudek & Associates, which details changes in vegetation and changes in hydrology in the area below La Bajada and above the "narrows," which is the general area where property in question is located.


Christopher Kirkorowicz

Letter from Applicant
1 of 4



A California Corporation

Engineering, Planning,
Environmental Sciences and
Management Services

Corporate Office:
605 Third Street
Encinitas, California 92024

760.942.5147
Fax 760.632.0164

19 January 1998

1174-01

Mr. Chris Kirkorowicz
355 Fortuna Ranch
Encinitas, CA 92024

Subject: Historic Vegetation Analysis for the Kirkorowicz Property

Dear Mr. Kirkorowicz:

At your request, Dudek & Associates, Inc. (DUDEK) has reviewed historic photographs of Escondido Creek in the vicinity of your property. The purpose of this analysis was to characterize the present and historic distribution of wetland habitat and to determine the source of these changes, if possible.

Eleven aerial photographs taken between 1972-97 were analyzed for wetland vegetation distribution in Escondido Creek. All of the aerial photographs are black and white except the two 1997 photographs which are color. Each photograph was taken from a vertical perspective except the September 1997 photograph which was taken at a low oblique angle. The scale of each photograph varies from year-to-year. Each photograph shows a portion of Escondido Creek where it flows between Rancho Santa Fe Road and the narrows located adjacent to Kentmere farms. The photographs analyzed were taken on the following dates:

November 9, 1972
September 26, 1973
July 31, 1975
January 31, 1977
January 2, 1980
January 9, 1981
August 22, 1981
January 11, 1986
September 6, 1990
January 1997
September 1997 (low oblique angle)

1972-73 PHOTOGRAPHS

Vegetation in the valley depicted on these photographs appears to be highly disturbed. The installation of a gravity feed truck sewer through the area was most responsible for this disturbance in 1973. A low flow channel is clearly present in the central portion of the valley. Both photographs indicate the presence of dense wetland vegetation along the low flow channel in the vicinity of Rancho Santa Fe Road (La Bajada dip). The vegetated low flow channel transitions to a non-vegetated channel further to the southwest, becoming a straight channel located along the southern property line of the subject property. Several vehicle tracks and/or cattle tracks and braided water courses are evident adjacent to the subject property. If these "tracks" are evidence of high flow, there is no indication that these topographic features support wetland vegetation, such as willow trees and shrubs. The lack of wetland vegetation suggests an insufficient frequency and persistence of surface flow and/or groundwater to sustain this vegetation type.

2 of 4

1975-80 PHOTOGRAPHS

This period is represented in three photographs taken in 1975, 1977, and 1980. The low flow channel is present in its historic location and continues to support wetland vegetation. The secondary water courses that flow during flood events are more defined due to vegetation growth that is differentiated by subtle topographic changes. There continues to be no sign of significant wetland vegetation such as dense willow trees and shrubs on the subject property. However, scattered individual trees or large shrubs are present and appear to be associated with these secondary water courses that periodically carry flood water.

1981 PHOTOGRAPHS

Two photographs were examined that were taken during this period on 9 January and 22 August. The winter condition exhibits widespread flooding through the valley. Upstream of the property, a pond of water is present that is located northwest of the low flow channel. In addition to the low flow channel, there are several other active water courses. One water course connects through the pond and joins with yet another water course that crosses the subject property. The vegetation character appears to be relatively stable from the 1977 photograph except that individual plants are more distinct. This visual effect may be due to the quality and scale of the photographs.

The photograph of the summer (August) condition depicts a floodplain that is vegetated with low growing plants. The vegetation is differentiated by evidence of ephemeral water courses that braid through the property during flood events. Except for one grouping of large plants, no other large individuals are apparent on the subject property in this photograph. Except for the aforementioned pond, the secondary water courses are not visible in this photograph due to the absence of flowing water.

1986-90 PHOTOGRAPHS

Two photographs taken 11 January 1986 and 9 September 1990 were examined. On the winter 1986 photograph, the secondary water course that first appeared in the winter 1981 photograph is still visible. The other ephemeral water courses seen in 1981 (winter) are not evident in the 1986 photograph, most likely because of the absence of flowing water. Vegetation on the subject property appears more pronounced in 1986 and gives the impression of having developed from downstream areas up into the subject property. If these are wetland species, their presence is most likely due to a more frequent and dependable summer water source originating upstream and flowing through the secondary water course.

The 1990 image was photographed in September. The secondary water course is particularly distinct despite the summer season in which the photograph was taken. The same secondary water course was not apparent in the summer 1981 photograph. The difference between these two photographs would indicate that the secondary water course was becoming more established. A mass of vegetation is present within the secondary water course. Other braided water courses that were visible in the 1981 photograph are not visible in this summer photograph. The main low flow channel is still present and similarly located as it appears in the 1972 photograph.

1997 PHOTOGRAPHS

Two aerial photographs were examined from 1997. Both photographs are in color. One photograph was taken at a low oblique angle (no horizon present) and the other was taken from vertical position. The oblique angle photograph was taken from a much closer vantage point than all of the vertical aerial photographs previously described. An excavated water channel is present that appears to connect the secondary water course to the main low flow channel. This channel was not observable on the January 1997 photograph and on aerial photographs from previous years.

The low oblique aerial photograph shows scattered willows located southwest of several horse corrals. The willows appear to be associated with the secondary water course. The secondary water course is well defined by the presence of wetland vegetation located within the confines of the water flow. The close association of these two features would indicate a distributional limitation on the vegetation that is most likely based on water availability during the normally dry summer season.

There are present other scattered individuals of a similar nature, i.e. wetland plants, located away from the secondary water course, that appear to occupy topographic low points where water would persist after flood events. These plants are in areas where other braided water courses were observed in the earlier winter photographs. However, the plants are not as dense and concentrated as the vegetation shown in the secondary water course located to the northwest, suggesting that the source of water is not sufficient to promote or sustain the same level of wetland vegetation establishment.


CONCLUSIONS

Establishment of wetland vegetation requires a dependable source of summer water that may be derived either from persistent surface hydrology or from the presence of sub-surface groundwater. The gradual development of wetland vegetation in the vicinity of the subject property would imply an increase in the availability of summer water over the period of vegetation establishment. A secondary water course appears in winter 1981, but does not appear to carry low flow water during summer months until 1990. As this water course has established, there has been concurrent establishment of wetland vegetation primarily in the vicinity of the secondary water course. This relationship between summer water availability and wetland vegetation establishment is consistent with the natural regeneration of wetland vegetation observed in San Diego County.

Please call me at (760) 942-5147, if you require further clarification of this analysis.

Very truly yours,

DUDEK & ASSOCIATES, INC.


MICHAEL SWEESY, ASLA
Project Manager

Christopher Kirkorowicz
3551 Fortuna Ranch
Encinitas, CA 92024

January 20, 1998

RECEIVED

JAN 22 1998

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

California Coastal Commission Members
c/o Lee J. McEachern
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

CASE #: A-6-ENC-97-070

In discussing issues concerning correct interpretation of the Encinitas flood plain regulations (Policy 8.2), I have previously noted an existing legal case. Back in 1994, the City was found to interpret its flood plain policy correctly. It was affirmed in 1995. More importantly, the judiciary review addressed several issues that directly apply to the project at hand. Since seeing is believing, I have taken the step to provide Coastal Commission with pertinent parts of that legal case.

Regarding Policy 8.2, the "Flood Plain Ordinance."

- A. I have gone to great efforts to point out that in order to have a "safe" stable facility, there must be an area where horses can be kept above flood waters. In this specific case it means raising the North-Western corner of the property.

When it comes to interpreting Encinitas flood plain ordinance, we do have the benefit of the Judiciary review. In the case of Home Depot, the Court has determined that elevating open parking lot (and part of the building) above flood waters provides for safety, and is therefore precisely what Policy 8.2 calls for. Exhibit attached, pages 7 through 9 titled "Building and Grading or Filling In Flood Plain." Please note that the Court did not advocate a "flow through" parking lot.

- B. Similarly I have gone to great lengths to point out that Policy 8.2 does not limit fill in flood plain to an equivalent of one building pad/lot. Such restriction is only applied if development does cause significant rise in the elevation of flood waters. And that is certainly not the case with the project in question.

In the case of Home Depot, several acres of the flood plain were filled, even though area of project constituted only one lot. It was all done with full blessing of the Judiciary. Exhibit attached, also pages 7 through 9. Clearly only allowing equivalent of one building pad per lot was not upheld by the Judiciary.



Christopher Kirkorowicz

Letter from Applicant
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1 petition for the reasons set forth below.

2 Petitioner has raised the following arguments in its memorandum
3 of points and authorities:

4 1. The Specific Plan for the project is inconsistent with the
5 General Plan for the following reasons:

6 a. The Specific Plan violates express General Plan
7 prohibitions against development on environmentally
8 constrained portions of the Specific Plan Area.

9 b. The Specific Plan violates express General Plan
10 prohibitions against any wetland losses.

11 c. The Specific Plan violates express General Plan
12 prohibitions against building in a floodplain and grading
13 or filling in a floodplain.

14 d. The Specific Plan violates express General Plan
15 prohibitions against boundary line adjustments resulting
16 in increased floodplain and wetland impacts.

17 e. The Specific Plan violates express General Plan
18 prohibitions against development resulting in traffic
19 levels of service E or F.

20 f. The Specific Plan violates express General Plan
21 requirements for wetland buffer areas.

22 g. The Specific Plan violates express General Plan
23 requirements for compatibility with surrounding
24 development.

25 h. The Specific Plan violates GP provisions designed to
26 protect mature trees, steep slopes and native vegetation.

27 i. By permitting a massive commercial use on light
28 industrial zoned property, the Specific Plan violates

1 land use designations and standards and effectuates a
2 change in zoning.

3 2. The Specific Plan for the project is inconsistent with the
4 Encinitas Municipal Code because it violates provisions in regard
5 to consistency, building compatibility and floodplain overlay zones.

6 3. The City violated CEQA by failing to analyze the project's
7 cumulative impacts as to other pending projects and the feasible
8 project alternative of Encinitas Ranch and by failing to prepare a
9 subsequent or supplemental EIR to address new information in regard
10 to intrusion of the Home Depot building into the floodplain and the
11 feasibility of the Encinitas Ranch alternative.

12 Additional arguments were raised in the petition but were not
13 addressed in the moving points and authorities, hence, the Court
14 deems these arguments to be waived by Petitioner or without merit
15 pursuant to CRC 313(a). (see Petition, ¶¶ 40(b), 40(c), 40(e),
16 40(f), 42 and 56.)

17 In addition, although the petition pled inconsistencies with
18 various elements and goals of the General Plan, only the following
19 policies were discussed in Petitioner's memorandum of points and
20 authorities: Land Use Element Policies 6.1, 6.6, 8.2, 6.3 and 8.11,
21 Circulation Element Policy 1.3, Public Safety Element Policies 1.1
22 and 2.6, Resource Management Element Policies 3.6, 10.6 and 14.1 and
23 Recreation Element Policy 1.11.¹

24 As for the General Plan challenge, the parties concede that it
25

26 ¹Although a footnote in Petitioner's points and authorities makes note of other policies (see
27 page 4, footnote 4), Petitioner does not allege that the Specific Plan is inconsistent with any
28 of these policies. Instead, Petitioner simply alleges that these policies are "adversely
impacted" by the Specific Plan. This allegation is insufficient for purposes of Government
Code § 65454.

1 must be reviewed pursuant to CCP 1085. However, Petitioner asserts
2 that the standard of review for the CEQA challenge is governed by
3 Public Resources Code ("PRC") § 21168.5, whereas Respondents and
4 Real-Party-in-Interest argue that the standard of review is governed
5 by PRC § 21168. The Court is unpersuaded by Petitioner's argument
6 that PRC § 21168 is the standard to apply as to the CEQA challenges
7 "because the 'dominant' concern of the City's actions challenged by
8 Neighborhood's petition is the adoption of the Home Depot Specific
9 Plan, a quasi-legislative act." However, the first and second causes
10 of action of the petition which contain the CEQA challenges are
11 clearly premised on the alleged inadequacies of the EIR, the
12 Addendum and the Statement of Overriding Considerations and the
13 failure of the City to prepare a subsequent or supplemental EIR.
14 Since the City's decision to certify a Negative Declaration and
15 adopt a Statement of Overriding Considerations was a proceeding in
16 which by law a hearing was required to be given, evidence required
17 to be taken and discretion vested in the City in the determination
18 of the facts, the court finds that PRC § 21168 is the applicable
19 standard of review.

20 I. INCONSISTENCY WITH GENERAL PLAN

21 The applicable standard of review to be applied as to the
22 General Plan challenge is whether the City's determination of
23 consistency was "arbitrary, capricious, and entirely lacking in
24 evidentiary support". (A Local and Regional Monitor v. City of Los
25 Angeles (1993) 12 Cal.App.4th 1773, 1794.)

26 The Final EIR addresses the alleged inconsistencies between the
27 General Plan and the proposed project. (see A.R. K: 3181-3186, 3389-
28 3430.) In addition, the administrative record contains the City's

1 responses to written public comments. (see A.R. E:1197-1202.)

2 **A. Development on environmentally constrained portion of SPA**

3 Petitioner argues that the Specific Plan violates express
4 General Plan prohibitions against development on environmentally
5 constrained portions of the Specific Plan Area by permitting the
6 Home Depot building and a large portion of its parking lot to
7 intrude upon the floodplain, by the unmitigated loss of 2.3 wetland
8 acres and by impacting sensitive slopes via cutting and grading,
9 citing Land Use Element Policies 8.10 and 8.11. (A.R. U:6032, 6033,
10 6051, 6052.)

11 The Land Use Element provides that a number of areas within the
12 City either contain resources that are sensitive to development or
13 there are constraints which will effect future development. Hence,
14 certain goals and policies have been adopted which set forth
15 guidelines for development in those areas, including Policies 8.10
16 and 8.11. (A.R. U:25.) The Court finds that the City's determination
17 of consistency of the Specific Plan with Policies 8.10 and 8.11 of
18 the Land Use Element was not arbitrary, capricious, and entirely
19 lacking in evidentiary support.

20 Policy 8.10 provides in relevant part:

21 "Lands in the Ecological Resource/Open Space/Parks
22 category,... will be limited to uses and activities related to
23 habitat enhancement; educational and scientific nature study;
24 passive recreation which will have no significant adverse
25 impact on habitat values; and, aquaculture having no
26 significant adverse effect or negative visual impact on
27 natural processes or scenic quality."

28 Here, assuming that the Home Depot project is located on land
designated as Ecological Resource/Open Space/Parks (note: the Final
EIR recognizes that the Specific Plan does not use this
designation), to the extent that the project includes extensive

1 wetland enhancement measures, it can be said that the project
2 substantially advances the objectives of Policy 8.10. As discussed
3 below, the project also meets the policy's requirements pertaining
4 to wetland buffer zones.

5 Furthermore, Policy 8.11 on its face does not prohibit all
6 development on areas constrained as floodplain, wetlands and wetland
7 buffer areas, biological resource areas, steep topography and major
8 transmission lines. Rather, under this Policy detailed site studies
9 are required to determine "the exact extent of the constraints, and
10 the application of the policies of the General Plan to determine
11 what, if any, encroachment into those constrained areas is to be
12 allowed." (A.R. U:6032, 6033.)

13 B. wetland losses

14 Petitioner argues that pursuant to Resource Management Element
15 Policy 10.6, the City shall preserve and protect wetlands and there
16 shall be no net loss of wetland acreage or resource value as a
17 result of land use or development. Where wetland intrusion or impact
18 is unavoidable, replacement of the lost wetland shall be required
19 through the creation of net wetland of the type lost at a ratio of
20 greater than one acre provided for each acre impacted so as to
21 result in a net gain.

22 Petitioner argues that the project will impact at least 3 acres
23 of wetlands in Planning Area 1 and this 3 acre loss is mitigated by
24 a mere 0.7 acres of newly created wetlands, resulting in a 2.3 acre
25 loss. (A.R. K:3314.) Although the EIR and Specific Plan propose to
26 "enhance" 3.2 acres of existing wetlands via removal of exotic weeds
27 and replanting of wetland species, Petitioner argues that this
28 "enhancement" is not within the existing unimpacted wetlands

1 boundary and does not address or mitigate the 2.3 acres net acre
2 loss of wetlands.

3 However, the Court is persuaded by the City's argument that the
4 approval was based upon the City's determination that overall the
5 project will result in restoration and improvement of wetland
6 resources and the impacts to wetlands, southern maritime chaparral,
7 coastal sage scrub and California gnatcatchers will be offset by the
8 mitigation measures proposed as part of the project. As the City
9 notes, the Army Corps of Engineers, in consultation with the United
10 States Fish and Wildlife Service, has accepted the proposed wetlands
11 enhancement program as adequate to mitigate potential biological
12 impacts to the wetlands. (A.R. E:1199.) The project substantially
13 complies with Policy 10.6. Hence, the City's determination was not
14 arbitrary, capricious or totally lacking in evidentiary support.

15 **C. building and grading or filling in floodplain**

16 Petitioner argues that pursuant to Land Use Element Policy 8.2,
17 no development shall occur in the 100-year floodplain that is not
18 consistent and compatible with the associated flood hazard. Policy
19 8.2 also enumerates those uses which could be found safe and
20 compatible such as "stables, plant nurseries, a minimum intrusion
21 of open parking" etc., however, no grading or filling activity other
22 than the minimum necessary to accommodate those uses found safe and
23 compatible shall be allowed. Petitioner also relies on Public Safety
24 Element Policy 2.6 provides that except as provided in Public Safety
25 Element Policy 1.1, no development or filling shall be permitted
26 within any 100-year floodplain.

27 Petitioner alleges that 2,500 square feet of the Home Depot
28 building and a "large" portion of its 531 space parking lot will be

1 located in Planning Area 1's 100-year floodplain (A.R. F:1573-1575)
2 and 10 feet of fill will be needed to site the store and parking lot
3 in the floodplain. (A.R. K:3257, 3343)

4 Although the FEIR erroneously concluded that no structures were
5 proposed within the 100-year floodplain (A.R. K:3397), this was
6 corrected in the Addendum.

7 In its opposition, the City pointed out that although Land Use
8 Element Policy 8.2 states as a general proposition that structural
9 improvements are not permitted within the 100-year floodplain, the
10 Municipal Code standards that implement this policy allow structures
11 and fill within the floodplain if there is no "degradation of
12 sensitive habitat". (A.R. C:691.) In addition, due to the sensitive
13 nature of the site, the City recognized when preparing the General
14 Plan that some encroachment would be necessary in order to allow
15 development on the site, hence, Land Use Element Policy 8.11 allows
16 such encroachment.

17 In addition, Policy 8.2 does not prohibit building, grading or
18 filling in the floodplain and instead, merely provides that
19 development within a floodplain must be "limited, designed to
20 minimize hazards", the operative words being "limited" and
21 "minimize". The City alleges that only two percent of the building
22 will be within the technical boundary of the 100-year floodplain and
23 this portion will be elevated safely above any flood risk when the
24 parking lot is built. (See A.R. F:1574, 1670.) This minimal
25 development is clearly consistent with Policy 8.2 as a consistent
26 and compatible use with the associated flood hazard.

27 As for the cited Public Safety Element policies, the City
28 persuasively points out that these policies all refer back to

1 controlling policy 8.2.

2 **D. boundary line adjustments and increased floodplain and wetland**
3 **impacts**

4 Petitioner argues that pursuant to Land Use Element Policy 8.2,
5 the City shall not approve subdivisions or boundary line adjustments
6 which would allow increased impacts for development in 100-year
7 floodplains. Petitioner also argues that pursuant to Resource
8 Management Element Policy 10.6, the City shall not approve
9 subdivisions or boundary line adjustments which would allow
10 increased impacts from development in wetlands or wetland buffers.

11 Petitioner argues that to accommodate Home Depot on Planning
12 Area 1, the boundary line between Planning Area 1 (zoned light
13 industrial) and Planning Area 2 (zoned residential), must be shifted
14 380 feet to the south. This adjustment amounts to a 5.7 acre
15 addition to Planning Area 1 and a similar reduction in Planning Area
16 2 and accounts for more than one-half of the 10 acre development
17 area. Without the boundary line adjustment, Planning Area 1 could
18 not accommodate the project. Petitioner rejects the City's claims
19 that the shift will actually reduce impacts to wetlands and
20 floodplains since without the shift, the project could not have been
21 built and impacts would not occur.

22 The FEIR concludes that by adjusting the existing lot line
23 between Planning Area 1 and Planning Area 2, the entire disturbed
24 field area of Planning Area 1 can be utilized for the home
25 improvement structure and parking area while reducing impacts to the
26 wetland area. This boundary adjustment moves the lot line away from
27 the wetlands and floodplain areas. (A.R. E:1200.)

28 In its opposition, the City reiterates that the boundary line

Christopher Kirkorowicz
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Encinitas, CA 92024

November 19, 1997

California Coastal Commission Members
c/o Lee J. McEachern
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

CASE #: A-6-ENC-97-070

The aerial photo was taken in September 1997. It covers the area just below the La Bajada bridge (which is located immediately to the North). It presents the property consisting of 21 acres, area of proposed pad, and adjacent lands.

This picture demonstrates:

1. width of the flood plain
2. curve of the Manchester Avenue
3. pads on which neighbors' homes are built along the Manchester Avenue (to the North of proposed pad)
4. area of proposed pad for the barn(s)
5. proposed entrance/exit
6. types and distribution of vegetation
7. area of proposed mitigation
8. adjacent land uses - including several horse facilities
9. location of the Escondido Creek (obscured by the canopy of trees)
10. ditch excavated by neighbor which diverts water from Escondido Creek

I hope it will help you all visualize the situation on the ground as it really is.



Christopher Kirkorowicz

Letter/Aerial Photograph
1 of 2

PROPOSED AREA
OF MITIGATION

PROPERTY
LINE

W

PROPOSED
ENTRANCE

OUTLINE OF
THE PAD

S

ESCONDIDO
CREEK

N



WATER
DIVERSION
DITCH

EXCAVATED
BY
NEIGHBOUR

E