

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

3111 CAMINO DEL RIO NORTH, SUITE 200

SAN DIEGO, CA 92108-1725

619-21-8036

**RECORD PACKET COPY**

Filed: 1/5/99
49th Day: 2/23/99
180th Day: 7/3/99
Staff: LRO-SD
Staff Report: 1/26/99
Hearing Date: 3/9-12/99

STAFF REPORT: REQUEST FOR RECONSIDERATION

Application No.: A-6-ENC-98-109

W 20a

Applicant: West Village Center (Attn: Mr. Peter Fletcher)

Description: Request for reconsideration of denial of a permit for construction of a one-story, approximately 29 ft. high, 4,390 sq.ft. office/retail structure and a 200 sq.ft. kiosk on a 9 acre site containing an existing approximately 60,000 sq.ft. commercial center.

Site: 160- 162 South Rancho Santa Fe Rd., Encinitas (San Diego County)
APNs 259-191-25, 259-191-32

Commission Action and Date: On December 10, 1998, the Commission found, on appeal, that the project as approved by the City of Encinitas, raised a substantial issue with respect to its conformity with the certified Local Coastal Program (LCP). The Commission then denied the application to construct the 4,390 sq.ft. office/retail structure and 200 sq.ft. kiosk.

PROCEDURAL NOTE:

The Commission's regulations provide that at any time within thirty (30) days following a final vote to deny a coastal development permit, the applicant of record may request that the Commission reconsider the denial. (14 CA. Admin. Code 13109.2)

The grounds for reconsideration of a permit denial are provided in Coastal Act Section 30627, which states, in part:

The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision. (Section 30627(b)(3).)

If the Commission grants reconsideration, the de novo hearing would be scheduled for a subsequent Commission hearing.

APPLICANT'S CONTENTIONS:

In the attached letter dated 1/5/99, the applicant contends that errors of law and fact occurred and that these errors have the potential of altering the Commission's decision. The applicant asserts the following in support of its contention: 1) When it approved fill of the site in 1996, the Commission did not impose any restrictions on construction of buildings on the site, and when the Commission granted reconsideration of its initial denial of the fill it did not do so based on the applicant's deletion of a structure from the proposed project; 2) The Commission failed to apply the policies of the LCP of the City of Encinitas because it applied the floodplain restrictions of the LCP to the project but the project is no longer mapped on FEMA maps as being within the 100-year floodplain; 3) The proposed project creates no significant environmental impact, and the Commission's finding that the development could result in serious damage to the lagoon watershed is erroneous; and 4) The proposed building is not an amendment to the prior 1996 permit for fill of the site because all work performed under the 1996 permit has been completed and all conditions have been satisfied.

Summary of Staff's Preliminary Recommendation:

The staff recommends that the Commission deny the request for reconsideration because no new relevant information has been presented that could not have been reasonably presented at the hearing and no errors in fact or law have occurred that have the potential of altering the Commission's decision.

I. MOTION AND STAFF RECOMMENDATION:

Motion:

"I move that the Commission grant reconsideration of Coastal Development Permit No. A-6-ENC-98-109-R."

Staff Recommendation:

The staff recommends a NO vote. This will result in a denial of reconsideration and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

Resolution to Deny Reconsideration.

The Commission hereby denies the request for reconsideration of the proposed development on the grounds that no new relevant evidence has been presented that could not have been presented at the hearing nor has there been an error of fact or law with the potential of altering the Commission's initial decision.

II. FINDINGS AND DECLARATIONS.

1. Detailed History. The applicant is requesting that the Commission reconsider its denial of the applicant's request to construct a one-story, approximately 29 ft. high, 4,390 sq.ft. office/retail structure and a 200 sq.ft. kiosk on a 9 acre site containing an existing approximately 60,000 sq.ft. commercial center. The site comprises two parcels and is located on the south side of Rancho Santa Fe Road, just east of Manchester Avenue in the City of Encinitas. Surrounding uses include vacant land and Escondido Creek to the south and east, an elementary school, school offices, and convenience store to the north and the commercial center and Manchester Avenue to the west.

In 1984 the Commission approved CDP #6-84-368/Fletcher, for the demolition of existing buildings, grading consisting of 28,225 cubic yards of material (including 26,100 cubic yards of imported fill) and street and storm drain improvements on the subject property. The permit was approved with conditions which required the development to be revised to eliminate all grading within the 100-year floodplain and recordation of a waiver of liability, requiring the applicant to acknowledge that the site may be subject to hazard and damage from flooding and to assume the liability from this hazard. The conditions were satisfied and the permit was released.

Then, in September of 1985, the Commission approved CDP#6-85-418/Fletcher for the construction of an approximately 62,250 sq.ft. commercial center on the site in seven one- and two-story buildings. The permit also included approval of construction of some parking and landscape improvements for the center within the 100-year floodplain. This permit was approved with conditions requiring the submittal of a sign program for the center and recordation of a waiver of liability for the development, again requiring the applicant to acknowledge that the site may be subject to hazard from flooding and to assume the liability from this hazard. Subsequently, the conditions were satisfied, the permit was released and the center was constructed.

Subsequently, in February of 1994, the Commission approved CDP #6-93-155/County of San Diego for the construction of a new bridge over Escondido Creek (La Bajada Bridge). The bridge was to replace an existing "dip" crossing which frequently flooded during storm events. This permit was approved by the Commission subject to a number of special conditions, which included mitigation for all unavoidable impacts to wetlands. To accommodate construction of the bridge and its approach, the easternmost portion of the site subject to this appeal, was needed, and obtained by the County utilizing its power of eminent domain. As a result of the bridge construction, Rancho Santa Fe Road adjacent to the site was elevated. The applicant contended that the bridge construction had damaged his property by altering on-site drainage in the easternmost parking lot and landscaped area (where the subject development is proposed), which caused site drainage

from the eastern parking to be redirected eastward to the landscaped area, instead of to the existing catch basin for the parking lot. The applicant asserted that this redirection of a portion of the parking lot drainage led to ponding of water in a low spot of the landscaped/floodplain area of the site.

The City of Encinitas received approval of its LCP in November of 1994 and began issuing coastal development permits on May 15, 1995. In May of 1995, the applicant sought approval of a coastal development permit from the City of Encinitas for construction of a 2,000 sq. ft. retail structure and proposed fill to support the structure, describing the project as necessary to protect the existing commercial center from flooding. At that time, Commission staff provided written comments to the City outlining specific LCP consistency concerns raised by the proposed development. The proposed development was originally approved by the City's Olivenhain Community Advisory Board (CAB) on September 5, 1995 and that decision was appealed to the City of Encinitas Planning Commission and subsequently to the City Council. The City Council approved the development on February 14, 1996, finding the project to be an incidental public service project and consistent with Land Use Element Policy 8.2 in that the project "is necessary to protect the existing commercial center from flood impacts due to the location of the 100-year floodplain...."

Because the proposed development was located within 100 feet of wetlands, it was within the Commission's appeal jurisdiction. On March 4, 1996, the City's permit was appealed to the Coastal Commission (Ref. A-6-ENC-96-34). On April 11, 1996, the Commission found that a substantial issue existed with regard to the reason for the appeal. At the de novo hearing on May 7, 1996, the Commission found that the proposed development would constitute unpermitted fill of floodplain and wetlands, inconsistent with the City's LCP and was denied. The Commission's findings were based, in part, on a wetlands study submitted by the applicant (Ref. Wetland Delineation Report by Dudek and Associates dated 5/24/96). The study concluded that a "narrow artificial/emergent wetland" existed on the site covering approximately 240 sq. ft. (0.005 acres) at the base of the fill slope for the bridge. The study also stated that the wetland was of low quality, topographically isolated from the main drainage of Escondido Creek and was being artificially supported from parking area drainage and irrigation runoff from surrounding ornamental landscaping. The proposed 2,000 sq.ft. structure would have filled all of the approximately 240 sq.ft. of wetlands.

In addition, the Commission found that the project was inconsistent with the LCP policy that restricts development in a floodplain to that which is safe and compatible with flooding. The Commission determined that the proposed fill and structure were not safe and compatible with periodic flooding. For those reasons, the Commission denied a permit for the project. On June 3, 1996 the applicant filed a request for reconsideration of the Commission's denial, in part on the grounds that the project was revised to reduce the amount of fill and to eliminate the structure. On July 12, 1996 the Commission agreed to reconsider the project (Ref. A-6-ENC-96-34-R).

The Commission approved the revised project on August 14, 1996. The approved project included the filling of the 240 sq. ft. of "marginal wetlands" on the subject site. The Commission found that the proposed fill of 750 cubic yards could be permitted under the floodplain policies of the LCP because it was not fill for a permanent structure but was fill to prevent ponding of floodwater and therefore was consistent and compatible with periodic flooding. The Commission also found that the fill was consistent with the wetland protection policies of the LCP (which restrict fill of wetlands to certain limited uses) because it was intended to protect existing public works improvements located in this area (storm drain, sewer, lights etc.) by correcting a drainage problem created by construction of the nearby La Bajada bridge.

At the time the applicant proposed to fill the site, FEMA maps identified the site as being within the 100-year 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 wetland and riparian habitats that include Southern Willow Riparian Scrub, Cismontane Alkali Marsh, and Coastal and Valley Freshwater Marsh. Based on a wetlands delineation prepared for the Army Corps of Engineers (ACOE) in 1996, it was determined at that time that there were approximately 4,610 sq.ft. of wetlands on the subject property. As noted previously, 240 sq.ft. of these wetlands were permitted to be filled pursuant to CDP #A-6-ENC-96-34-R.

Subsequently, the applicant complied with conditions, received the permit and implemented the development. The applicant subsequently proposed to place a one-story, 4,390 sq. ft. office/retail building on the 750 cy. of fill permitted by the previous permit, as described above. The City approved the project based on its finding that the floodplain policies did not apply because the filled area was no longer within the mapped floodplain. According to the City staff report, the previously approved fill and grading raised the site out of the floodplain, as evidenced by the new FEMA mapping (Flood Insurance Rate Map Panel 1061 dated revised November 10, 1997). The City's decision on the development was appealed to the Commission pursuant to A-6-ENC-98-109 on 8/28/98. At their December 10, 1998 meeting, the Commission found that a substantial issue existed with the regard to the reason for the appeal and held a de novo hearing. The Commission denied the permit, finding that the project was inconsistent with the certified LCP and the Commission's action on the prior-approved fill. Specifically, the Commission found that it had approved the fill of the site because it believed the fill was only to address a ponding problem and not to support a structure. The record of the Commission's prior action indicated that it had found that the filled area would be maintained as an open grassy area and for that reason the fill could be found consistent with the LCP policies, which prohibit fill for permanent structures in the floodplain. The Commission also found that the proposed structure constituted an amendment to the prior permit in that it revised the prior project, which was fill in a floodplain to address a ponding problem to a different project, which was fill in the floodplain for a permanent

structure. The Commission found that the proposal to construct a structure at this time constituted piecemeal development inconsistent with the floodplain policies of the certified LCP.

2. Reconsideration Request. The applicant's request for reconsideration (ref. Exhibit #1 attached) contends that errors of fact or law occurred which have the potential of altering the Commission's decision on this permit. The applicant identifies four bases in support of this contention. Each of these is discussed below.

First, the applicant contends that no building restrictions were placed on the applicant's building site by the approval of the grading project in August of 1996. The applicant then further asserts that the Commission's "July 12, 1996 granting of reconsideration based on the applicant's deletion of the building is erroneous." These assertions do not indicate that an error of law or fact occurred. In its denial of the proposed building, the Commission acknowledged that it had not imposed a building restriction when it approved a permit for the fill in 1996. Thus, there was no error of fact in this regard. Further, the fact that the earlier permit lacked a building restriction does not require the Commission to approve a building on the site. At the time the Commission approved the earlier permit, the applicant had deleted the proposed structure from its proposal. Therefore, the Commission did not need to impose a building restriction. The Commission denied the proposed building in part because it amended the earlier fill project and caused it to become inconsistent with the LCP, which prohibits fill in the floodplain for permanent structures. Thus, there was no error of law in this regard. With respect to the Commission's decision to grant reconsideration of its initial denial of a permit to fill the site, the record demonstrates that the Commission granted reconsideration in part because the applicant had deleted the proposed structure from the project. The April 18, 1996 staff report and the Commission discussion at the May 7, 1996 hearing demonstrate that the proposed 2,000 sq.ft. structure along with 1,800 cubic yards of fill in the floodplain were initially denied by the Commission, in part because the project involved fill in the floodplain for a structure. The July 25, 1996 staff report and the discussion at the August 14, 1996 hearing on reconsideration both demonstrate that the applicant requested reconsideration, in part, because he had deleted the structure from the proposed project and that the Commission granted reconsideration, in part, because of the applicant's deletion of the structure. Thus, there was no error of fact or law in this regard.

Second, the applicant contends that the proposed structure is consistent with the LCP for the City of Encinitas because the LCP does not restrict development on areas that used to be mapped as 100-year floodplain but are no longer mapped as such. The applicant states that the record is clear that the project site is not in the 100-year floodplain because the FEMA maps that depict the floodplain have been revised. The applicant believes that the portions of the LCP relative to flood plain development are not applicable to the subject development.

The applicant's contention does not indicate that an error of law or fact occurred. In its findings for denial of the proposed building, (see the staff report dated November 17, 1998) and the Commission discussion at its hearing on 12/10/98, the Commission acknowledged that the FEMA maps were revised such that the subject site is no longer shown as being within the 100-year floodplain. Thus, there was no error of fact in this regard. Further, the Commission's findings for denial of the building demonstrate that the Commission had sufficient evidence to find the proposal inconsistent with the certified LCP even though the FEMA floodplain maps had been revised. In brief, the Commission found that its earlier approval of fill of the site was based on the fact that the 750 cubic yards of fill was the minimum amount necessary to correct a drainage problem for this area and protect existing public utility improvements, and that the fill was consistent with the LCP policies because the filled area would remain as an open grassy area similar to other open space uses which are acceptable in the floodplain, and the fill was not proposed to accommodate a structure or public improvement, but only to correct on-site drainage.

Furthermore, when the Commission approved the earlier fill, it did not intend to change the floodplain nature of the area or to exclude it from future application of floodplain policies and ordinances. For these reasons, the Commission found that the proposed building constituted a proposed amendment of the prior permit and that such amendment was inconsistent with the LCP. The Commission also found that even though the site is no longer located within the FEMA mapped 100-year floodplain to the permitted fill, it may still be subject to flood hazard which has been acknowledged by a representative from FEMA. Thus, the Commission evaluated the proposed project for conformity with the certified LCP and therefore, there was no error of law in this regard.

Third, the applicant contends that the proposed project "creates no significant environmental impact." The applicant disputes the Commission's finding that the development on the site could result in serious damage to the lagoon watershed and that the site would be subject to flood hazard. The applicant asserts that the environmental planning documents from the City of Encinitas and the Dept. of Fish and Game support its contention that the project will not adversely affect the environment. These contentions do not demonstrate an error of fact or law. In its findings, the Commission acknowledged the conclusions of the Dept. of Fish and Game and the Helix Environmental Study (3/98). The Department of Fish and Game's 9/25/98 letter on this matter was included as an exhibit to the 11/17/98 staff report (Exhibit No. 4 of said report). Thus, there was no error of fact in this regard. In its findings in support of denial of the proposed building, the Commission found that the deposition of fill and subsequent development with permanent structures in the floodplain on an incremental basis, can cumulatively constrict the floodplain and limit the ability for the geography to handle flood waters, which can lead to potential flood erosion impacts both down- and upstream. The Commission further found that the proposed project, as an amendment of the earlier approved fill would result in fill of the floodplain inconsistent with the LCP policies, which limit development in the floodplain in part to protect the lagoon watershed by preventing downstream and upstream erosion. The Department of Fish and Game and

the Helix report did not address the segmented and incremental effects of filling the site first and then later building a structure. Thus, there was no error of law in this regard.

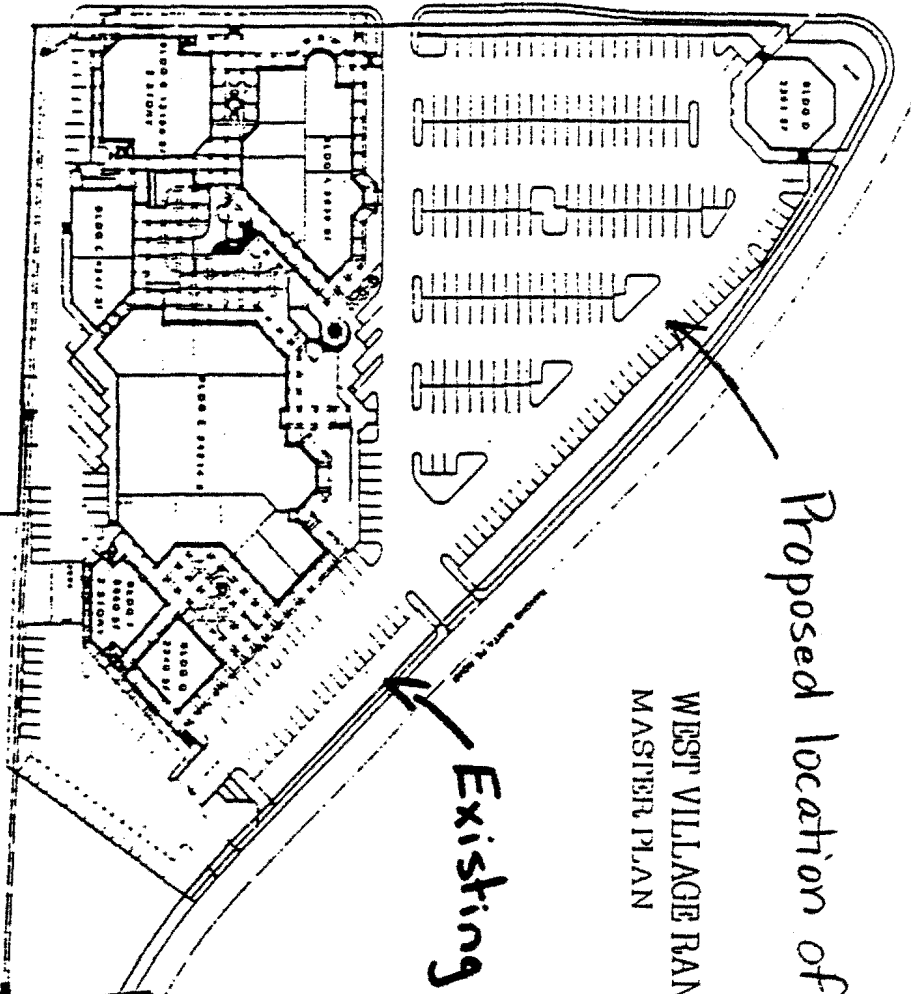
The applicant's fourth and final contention is that the 1998 coastal development permit application is not an amendment of the 1996 permit since the applicant has performed all work authorized by the 1996 permit and has satisfied all the conditions of that permit. This contention does not demonstrate an error of law or fact. In its findings in support of denial, the Commission found that the proposed building constituted an amendment to the prior permit because the lack of a building was a critical component of the Commission's approval of the earlier fill. Thus, adding a building revised the prior approved project into a project that is inconsistent with the LCP floodplain policies. In its findings for denial of the structure, the Commission stated:

The Commission finds that the applicant's proposal to construct a structure in this area is a modification of the prior permitted project and requires an amendment to that prior permit. The Commission further finds that this current application should be treated as a proposal to amend that prior permit. Because the City's LCP policies prohibit fill for permanent structures in the floodplain, the Commission finds that the amendment of the prior permit is inconsistent with the City's certified LCP policies and ordinances regarding floodplain development. (Page 11 of the staff report dated November 17, 1998)

The subject development clearly represents an amendment to the prior permitted permit and thus, no error of law occurred.

In summary, the Commission finds that the applicant has not presented any relevant new facts or information that could not have been available at the time this matter was heard by the Commission. In addition, the applicant has not demonstrated any errors of fact or law, but instead makes the same points that it made at the hearing on the application. Each of these points was addressed and thoroughly examined by the Commission. As such, the Commission finds that pursuant to Section 30627 of the Coastal Act, no grounds for reconsideration exist and therefore, the request is denied.

SITE PLAN
00000 FLOOR AREA 000000
1/11/00 10:00 AM 11/11/00



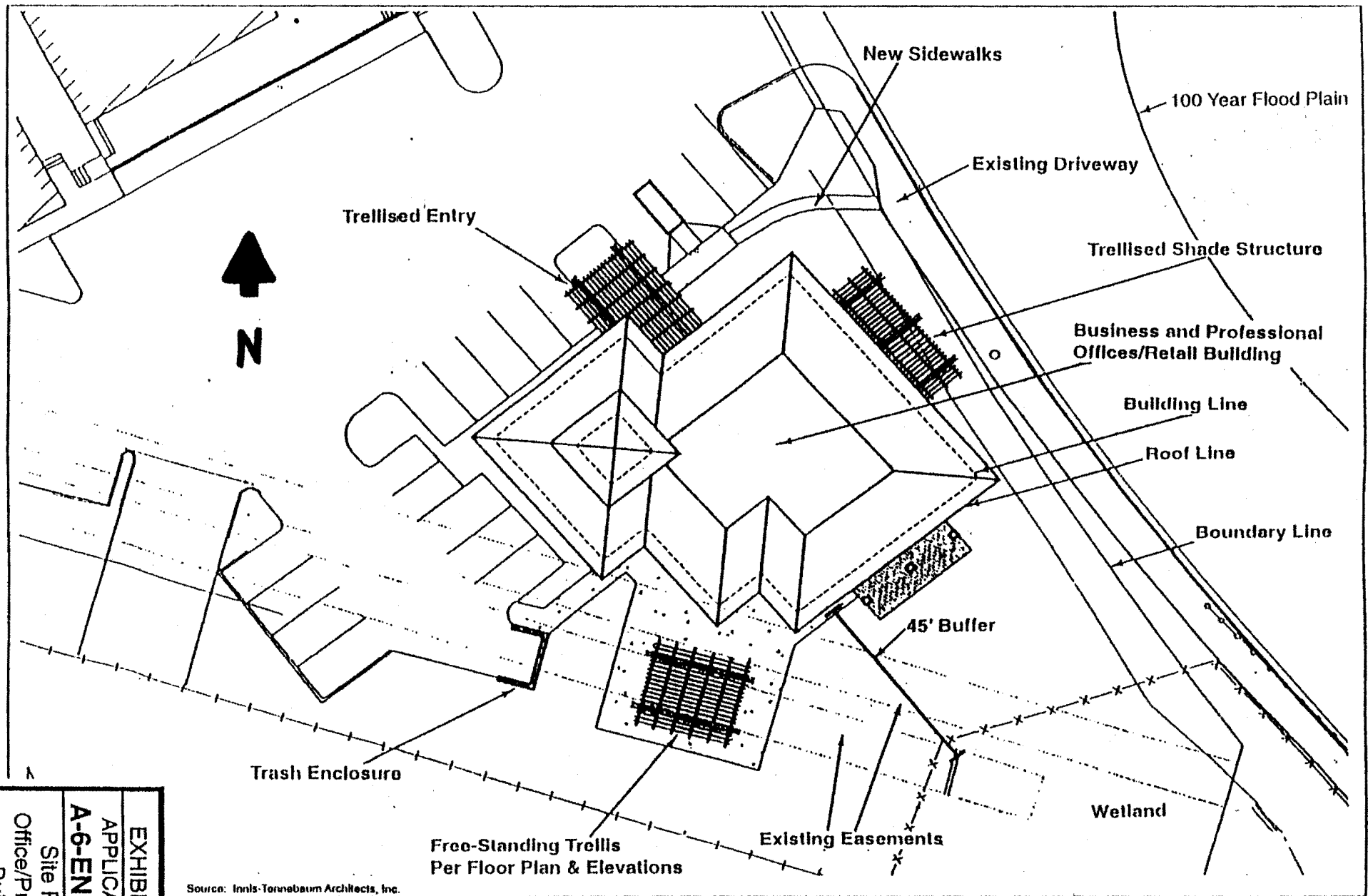
Proposed location of Kiosk.

WEST VILLAGE RANCHO SAN PTA FE
MASTER PLAN

*Existing 60,000 SAFT.
Retail Center*

*Proposed location for
4,390 SAFT. Office/Retail
Structure*

EXHIBIT NO. 2
APPLICATION NO.
A-6-ENC-98-109
Site Plan




Source: Innis-Tennebaum Architects, Inc.

Proposed Office/Professional Building

WEST VILLAGE CENTER

Figure 3

 California Coastal Commission	Site Plan for Office/Professional Building	APPLICATION NO. A-6-ENC-98-109	EXHIBIT NO. 3
--	--	--	---------------

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA
3111 CAMINO DEL RIO NORTH, SUITE 200
SAN DIEGO, CA 92108-1725
(619) 521-8036



Filed: 8/28/98
49th Day: Waived
180th Day: 2/24/99
Staff: LRO-SD
Staff Report: 11/17/98
Hearing Date: 12/8-11/98

STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

Th 7a

DECISION: Approved With Conditions

APPEAL NO.: A-6-ENC-98-109

APPLICANT: West Village Center (Attn: Mr. Peter Fletcher)

PROJECT DESCRIPTION: Construction of a one-story, approximately 29 ft. high, 4,390 sq.ft. office/retail structure and a 200 sq.ft. kiosk on a 9 acre site containing an existing approximately 60,000 sq.ft. commercial center.

PROJECT LOCATION: 160-162 South Rancho Santa Fe Rd., Encinitas (San Diego County) APNs 259-191-25, 259-191-32

APPELLANTS: San Elijo Lagoon Conservancy, Attn: Doug Gibson

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed. Staff also recommends that the Commission find that the proposed development is inconsistent with the floodplain policies and ordinances of the certified LCP and deny the de novo permit.

A previous Commission action on this site, permitted the placement of 750 cubic yards of fill within the 100-year floodplain to address a drainage problem created by the construction of an adjacent bridge project. The fill resulted in an alteration of the mapped 100-year floodplain (FEMA Flood Insurance Rate Maps) on the subject site. As such, according to recently updated FEMA maps, the project site is no longer located within the 100-year floodplain. However, while the Commission did previously permit a small amount of fill to address a site drainage problem, if the fill had been proposed to support a permanent structure on the site, it would not have been consistent with the City's certified LCP. In fact, the Commission originally denied the applicant's request to place 1,800 cubic yards of fill and a 2,000 square foot building on this site. However, the applicant modified the project to eliminate the proposed building and reduce the amount

EXHIBIT NO. 1
APPLICATION NO.
A-6-ENC-98-109-R
Original Staff Report

of fill to the minimum necessary to correct the drainage problem. As a result, the Commission agreed to reconsider its denial of the project and it subsequently approved the project as revised. In approving the placement of fill, the Commission was able to find it consistent with the certified LCP because the project did not include a structure and was the minimum amount of fill needed to prevent ponding of floodwaters on the site. Although the fill area is no longer within the 100-year floodplain, the applicant is essentially revising the prior permitted project by adding a structure. The staff recommends that the Commission find substantial issue with the City's approval of this revised project, and treat the de novo permit application as an amendment to the prior permitted project. Since the prior permitted project -- fill to correct a drainage problem -- would not be approvable as revised to include a retail/office structure, the staff recommends denial of the application.

SUBSTANTIVE FILE DOCUMENTS: Certified City of Encinitas Local Coastal Program (LCP); City of Encinitas Resolution Nos. 98-33 approving a Design Review Permit and Coastal Development Permit; CDP Nos. A-6-ENC-96-34, A-6-ENC-96-34-R, 6-84-368, 6-85-418, 6-93-155; City of Encinitas Agenda Report dated 8/12/98; Wetland Delineation Report by Dudek and Associates dated 5/24/96.

I. Appellants Contend That:

The proposed development is inconsistent with the policies of the certified LCP which pertain to floodplain development. Specifically, the subject area where the proposed structure is proposed to be located is a floodplain area that was previously permitted to be filled in order to address on site drainage concerns caused by an adjacent bridge project. The area was to remain open. The proposed development of this area with an office/retail structure will set an adverse precedent of allowing piecemeal development of the floodplain by first permitting fill for an allowable purpose and subsequently permitting permanent structures that would not have been allowed had they been proposed along with the fill.

II. Local Government Action.

The Coastal Development Permit was approved by the Planning Commission on 5/28/98. Several special conditions were attached which address permit expiration, trash bin enclosures, overall design of building materials, parking lot layout, signage and building and fire conditions.

III. Appeal Procedures.

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal

III. Appeal Procedures.

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits. Projects within cities and counties may be appealed if they are located within mapped appealable areas. The grounds for appeal are limited to the assertion that "development does not conform to the certified local coastal program." Where the project is located between the first public road and the sea or within 300 ft. of the mean high tide line, the grounds of appeal are limited to those contained in Section 30603(b) of the Coastal Act. Those grounds are that the development does not conform to the standards set forth in the certified local coastal program or the access policies set forth in the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless it determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to a de novo hearing on the merits of the project.

If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project. If the Commission conducts a de novo hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also Chapter 3 policies when reviewing a project on appeal.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo hearing, any person may testify.

Staff Recommendation On Substantial Issue.

The staff recommends the Commission adopt the following resolution:

Staff recommends that the Commission determine that SUBSTANTIAL ISSUE exists with respect to the grounds on which the appeal was filed, pursuant to PRC Section 30603.

MOTION

Staff recommends a NO vote on the following motion:

I move the Commission determine that Appeal No. A-6-ENC-98-109 raises no substantial issue with respect to the grounds on which the appeal has been filed.

A majority of the Commissioners present is required to pass the motion.

Findings and Declarations.

1. Project Description/Permit History. Proposed is the construction of a one-story, approximately 29 ft. high, 4,390 sq.ft. office/retail structure and a 200 sq.ft. kiosk within an existing retail/commercial center. The proposed building would be situated on a previously graded, open landscaped area at the east end of the shopping center. The kiosk structure would replace three existing parking stalls toward the northern end of the commercial center. The project site lies within a portion of an approximately 9 acre property which contains an existing 60,000 sq.ft. retail/commercial center consisting of eight buildings known as "West Village Commercial Center". The site comprises two parcels and is located on the south side of Rancho Santa Fe Road, just east of Manchester Avenue in the City of Encinitas. The existing commercial center currently occupies one parcel in its entirety and a portion of the second parcel.

A portion of the second parcel, which is where the subject building is proposed, was the subject of a previous permit (A-6-ENC-96-34-A-R) where deposition of approximately 750 cy. of fill within the 100-year floodplain was permitted to address drainage concerns on a portion of the eastern parking lot. Surrounding uses include vacant land and Escondido Creek to the south and east, an elementary school, school offices and a convenience store to the north and the commercial center and Manchester Avenue to the west.

In 1984 the Commission approved CDP #6-84-368/Fletcher, for the demolition of existing buildings, grading consisting of 28,225 cubic yards of material (including 26,100 cubic yards of imported fill) and street and storm drain improvements on the subject property. The permit was approved with conditions which required the development to be revised to eliminate all grading within the 100-year floodplain and recordation of a

waiver of liability, requiring the applicant to acknowledge that the site may be subject to hazard and damage from flooding and to assume the liability from this hazard. The conditions were satisfied and the permit was released.

Then, in September of 1985, the Commission approved CDP#6-85-418/Fletcher for the construction of an approximately 62,250 sq.ft. commercial center on the site in seven one- and two-story buildings. The permit also included approval of construction of some parking and landscape improvements for the center within the 100-year floodplain. This permit was approved with conditions requiring the submittal of a sign program for the center and recordation of a waiver of liability for the development, again requiring the applicant to acknowledge that the site may be subject to hazard from flooding and to assume the liability from this hazard. Subsequently, the conditions were satisfied, the permit was released and the center was constructed.

Subsequently, in February of 1994, the Commission approved CDP #6-93-155/County of San Diego for the construction of a new bridge over Escondido Creek (La Bajada Bridge). The bridge was to replace an existing "dip" crossing which frequently flooded during storm events. This permit was approved by the Commission subject to a number of special conditions, which included mitigation for all unavoidable impacts to wetlands. To accommodate construction of the bridge and its approach, the easternmost portion of the site subject to this appeal, was needed, and obtained by the County utilizing its power of eminent domain. As a result of the bridge construction, Rancho Santa Fe Road adjacent to the site was elevated. The applicant contended that the bridge construction had damaged his property by altering on-site drainage in the easternmost parking lot and landscaped area (where the subject development is proposed), which caused site drainage from the eastern parking to be redirected eastward to the landscaped area, instead of to the existing catch basin for the parking lot. The applicant asserted that this redirection of a portion of the parking lot drainage led to ponding of water in a low spot of the landscaped/floodplain area of the site.

The City of Encinitas received approval of its LCP in November of 1994 and began issuing coastal development permits on May 15, 1995. In May of 1995, the applicant sought approval of a coastal development permit from the City of Encinitas for construction of a 2,000 sq. ft. retail structure and proposed fill to support the structure, describing the project as necessary to protect the existing commercial center from flooding. At that time, Commission staff provided written comments to the City outlining specific LCP consistency concerns raised by the proposed development. The proposed development was originally approved by the City's Olivenhain Community Advisory Board (CAB) on September 5, 1995 and that decision was appealed to the City of Encinitas Planning Commission and subsequently to the City Council. The City Council approved the development on February 14, 1996, finding the project to be an incidental public service project and consistent with Land Use Element Policy 8.2 in that the project "is necessary to protect the existing commercial center from flood impacts due to the location of the 100-year floodplain...."

Because the proposed development was located within 100 feet of wetlands, it was within the Commission's appeal jurisdiction. On March 4, 1996, the City's permit was appealed

to the Coastal Commission (Ref. A-6-ENC-96-34). On April 11, 1996, the Commission found that a substantial issue existed with regard to the reason for the appeal. At the de novo hearing on May 7, 1996, the Commission found that the proposed development would constitute unpermitted fill of floodplain and wetlands, inconsistent with the City's LCP and was denied. The Commission's findings were based, in part, on a wetlands study submitted by the applicant (Ref. Wetland Delineation Report by Dudek and Associates dated 5/24/96). The study concluded that a "narrow artificial/emergent wetland" existed on the site covering approximately 240 sq. ft. (0.005 acres) at the base of the fill slope for the bridge. The study also stated that the wetland was of low quality, topographically isolated from the main drainage of Escondido Creek and was being artificially supported from parking area drainage and irrigation runoff from surrounding ornamental landscaping. The proposed 2,000 sq.ft. structure would have filled all of the approximately 240 sq.ft. of wetlands.

In addition, the Commission found that the project was inconsistent with the LCP policy that restricts development in a floodplain to that which is safe and compatible with flooding. The Commission determined that the proposed fill and structure were not safe and compatible with periodic flooding. For those reasons, the Commission denied a permit for the project. On June 3, 1996 the applicant filed a request for reconsideration of the Commission's denial, in part on the grounds that the project was revised to reduce the amount of fill and to eliminate the structure. On July 12, 1996 the Commission agreed to reconsider the project (Ref. A-6-ENC-96-34-R).

The Commission approved the revised project on August 14, 1996. The approved project included the filling of the 240 sq. ft. of "marginal wetlands" on the subject site. The Commission found that the proposed fill of 750 cubic yards could be permitted under the floodplain policies of the LCP because it was not fill for a permanent structure but was fill to prevent ponding of floodwater and therefore was consistent and compatible with periodic flooding. The Commission also found that the fill was consistent with the wetland protection policies of the LCP (which restrict fill of wetlands to certain limited uses) because it was intended to protect existing public works improvements located in this area (storm drain, sewer, lights etc.) by correcting a drainage problem created by construction of the nearby La Bajada bridge.

Prior to being filled, the project site was located within the FEMA mapped 100-year 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 wetland and riparian habitats that include Southern Willow Riparian Scrub, Cismontane Alkali Marsh, and Coastal and Valley Freshwater Marsh. Based on a wetlands delineation prepared for the Army Corps of Engineers (ACOE) in 1996, it was determined at that time that there were approximately 4,610 sq.ft. of wetlands on the subject property. As noted previously, 240 sq.ft. of these wetlands were permitted to be filled pursuant to CDP #A-6-ENC-96-34-R.

Because the proposal is an appeal of a local decision, the standard of review is the certified LCP. In addition, because the development is located between the first public road and the sea, the public access and recreation policies of the Coastal Act are also applicable.

2. Floodplain Development. Because of its potential for adverse impacts on both down- and up-stream areas and habitats, fill of floodplains is severely limited in the City's LCP. Policy 8.2 on Page LU-19 of the City's certified LUP pertains to floodplain development within the City 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 stables, 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 those uses found safe and compatible shall be allowed. [...] 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 thereof would preclude minimal reasonable use of the property.
- b. Development of circulation element roads, other necessary public facilities, flood control projects where no feasible method for protecting existing public or private structures exists and where such protection is necessary for public safety or to protect existing development, [...] [Emphasis added]

In addition, Section 30.34.040(b)(2) of the City's Implementation Plan also pertains to floodplain development and states, in part:

Within the 100-year floodplain, permanent structures and/or fill for permanent structures, roads and other public improvements consistent with the Land Use Element will only be allowed if the applicant can demonstrate the following:

- a. The development is capable of withstanding periodic flooding, and does not require construction of flood protective works,...
- b. Existing environmentally sensitive habitat areas will not be significantly adversely affected.
- c. The development will not result in a net reduction of existing riparian habitat areas within the floodplain.

- d. The design of the development incorporates the findings and recommendations of a site specific area watershed hydrologic study...
- e. There will be no significant adverse water quality impacts to downstream wetlands, lagoons and other environmentally sensitive habitat areas.

The area where the proposed structure is proposed to be located is a floodplain area that was previously permitted to be filled in order to address on-site drainage concerns caused by an adjacent bridge project. The Commission permitted the fill because the applicant explicitly eliminated plans to build a structure and reduced the amount of fill in order to make the project consistent with the above-cited policies. The appellant contends that the City's approval of development of this area with a permanent structure will set an adverse precedent in the watershed by permitting filling in the floodplain for allowable uses and, subsequently, permitting the filled areas to be developed with permanent structures that are not consistent with periodic flooding. As noted above, the LCP states that only development consistent with periodic flooding shall be permitted within the 100-year floodplain, such as stables, plant nurseries, some limited parking, open space and some agriculture uses. The portion of the commercial center where the proposed retail/office structure is proposed is the area which was filled pursuant to the previous Commission permit. As cited previously, this area was filled to an elevation of approximately three feet above the 100-year floodplain and is, thus, no longer in the FEMA mapped 100-year floodplain. However, the project site could still be subject to flooding. While the Commission's action on the previous permit did not specifically restrict future development of this area, the findings for approval were based on the fact that this area would remain an open grassy area. Specifically, the findings stated, in part:

...The proposed fill can also be found consistent with the above cited LCP policies and ordinances as it is compatible with the associated flood hazard, it will remain as an open grassy area (which is similar to the agriculture and open space uses that are listed as accepted in the floodplain) and, the fill is not proposed to accommodate a structure or even a public improvement, but only to correct on-site drainage.

While the Commission did allow some fill in this area through the previous permit, the fill was to address on-site drainage concerns caused by the construction of the La Bajada Bridge and not to raise the area out of the floodplain to create a building pad for future development. If a building had been proposed with the previous fill, it would have been inconsistent with the above cited LCP policies. These policies only allow structures in the floodplain if they are consistent with periodic flooding. The proposed retail/office structure is not a use consistent with periodic flooding.

Floodplains are an important part of many ecosystems as they are often associated with environmentally sensitive resource areas such as lagoons, estuaries, rivers and coastal streambeds. Development (construction of structures, grading, filling, etc.) within a floodplain not only presents a danger to proposed structures, but also can impact

downstream resources through increased sedimentation. As such, development in the floodplain is severely restricted in the City's LCP.

The Commission finds that the City has in effect allowed the applicant to revise the prior project to include a structure even though the Commission approved the applicant's prior project only because the structure had been eliminated. The applicant should have sought an amendment to the Commission's permit for the fill rather than applying for a new permit with the City. By applying for a new permit, the applicant has revised a prior approved project in a way that results in piecemeal filling of the floodplain inconsistent with the policies of the LCP. Therefore, the Commission finds that the grounds for the project raises a substantial issue with respect to the project's consistency with the City's certified Local Coastal Program.

STAFF RECOMMENDATION ON THE COASTAL PERMIT

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.:

1. Project Description. As previously cited in the findings for substantial issue of this staff report, proposed is the construction of a 4,390 sq.ft. office/retail sales structure and a 200 sq.ft. kiosk on 9 acre parcel containing an existing approximately 60,000 sq. ft. retail/commercial center (West Village Commercial Center). As noted previously, the proposed structure will be located in a floodplain area of the site that was permitted to be filled with 750 cubic yards of fill material pursuant to CDP #A-6-ENC-96-34-R only for the purpose of correcting a drainage problem, and not to support a permanent structure. The remainder of the project description/project history is discussed in full detail in the findings on Substantial Issue section of this report (reference pages 4-7) and is hereby incorporated by reference.

2. Floodplain Development As stated above, the Commission approved a prior permit for 750 cy of fill on this site after initially denying the applicant's proposal to place 1,800 cy of fill and a 2,000 sq. ft. structure on the site. The applicant's current proposal to construct a 4,390 sq. ft. structure on the filled area modifies the prior project in a manner that is inconsistent with the City's LCP policies. Because of its potential for adverse impacts on both down- and up-stream areas and habitats, fill of floodplains is severely limited in the City's LCP. Policy 8.2 on Page LU-19 of the City's certified LUP pertains to floodplain development within the City 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 stables, 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 those uses found safe and compatible shall be allowed. [...] 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 thereof would preclude minimal reasonable use of the property.
- b. Development of circulation element roads, other necessary public facilities, flood control projects where no feasible method for protecting existing public or private structures exists and where such protection is necessary for public safety or to protect existing development, [...] [Emphasis added]

In addition, Section 30.34.040(b)(2) of the City's Implementation Plan also pertains to floodplain development and states, in part:

Within the 100-year floodplain, permanent structures and/or fill for permanent structures, roads and other public improvements consistent with the Land Use Element will only be allowed if the applicant can demonstrate the following:

- a. The development is capable of withstanding periodic flooding, and does not require construction of flood protective works,...
- b. Existing environmentally sensitive habitat areas will not be significantly adversely affected.
- c. The development will not result in a net reduction of existing riparian habitat areas within the floodplain.
- d. The design of the development incorporates the findings and recommendations of a site specific area watershed hydrologic study...
- e. There will be no significant adverse water quality impacts to downstream wetlands, lagoons and other environmentally sensitive habitat areas.

The proposed office/retail structure is proposed to be located in an open portion of the commercial center that does not contain any buildings, but is comprised of various utility and landscape improvements and an area that had been previously identified as wetlands. When the Commission approved CDP #A-6-ENC-96-34-R, which permitted the

deposition of 750 cubic yards of fill in this area, the area was within the 100-year floodplain of Escondido Creek. The Commission found the previous fill to be consistent with LCP policies and ordinances because it only consisted of the minimal amount of fill necessary to protect existing public works improvements located in the area (storm drain, sewer, lights, etc.) as well as the applicant's existing parking area from ponding caused by construction of nearby La Bajada Bridge. The Commission also found the fill consistent with the LCP policies because it did not include a permanent structure.

The Commission's finding that the 750 cy. of fill was within the 100-year floodplain of Escondido Creek was based upon the County of San Diego Floodplain Maps and exhibits provided by the applicant. These maps depict the floodplain on the basis of elevations. The term floodplain is defined in the City's LCP as follows:

Floodplain shall mean the channel and the relatively flat area adjoining the channel of a natural stream or river which has been or may be covered by floodwater; specifically, those areas shown as subject to inundation on the flood insurance rate maps published by the Federal Emergency Management Agency or the current City maps designating floodplains.

The deposition of the fill raised a portion of the landscaped area approximately three feet above the elevation associated with the FEMA mapped 100-year floodplain, with the remaining area sloping gradually to the east. In this way, the applicant was able to address the on-site drainage problem and to continue to use this area in the same way it had been used in the past without the threat of ponding caused by the identified on-site drainage problem.

As noted previously, the subject site is no longer within the FEMA mapped 100-year floodplain due to the fill that was permitted by the Coastal Commission. The FEMA Flood Insurance Rate Map has been subsequently amended (dated 11/10/97) to reflect this change. In addition, a letter to Commission staff dated 10/8/98 from the County of San Diego Department of Public Works indicates that the subject site is not located within the area subject to the 100-year floodplain, as confirmed by a ground and field inspection.

The Commission finds that the applicant's proposal to construct a structure in this area is a modification of the prior permitted project and requires an amendment to that prior permit. The Commission further finds that this current application should be treated as a proposal to amend that prior permit. Because the City's LCP policies prohibit fill for permanent structures in the floodplain, the Commission finds that the amendment of the prior permit is inconsistent with the City's certified LCP policies and ordinances regarding floodplain development

In its approval of the 750 cubic yards on which the subject development is proposed, the Commission did not intend for the area to be developed with buildings in the future. In its findings for approval of the fill A-6-ENC-96-34 (Revised Findings dated 10/21/96) the Commission stated:

...Based on information presented by the applicant, placement of the 750 cubic yards of fill in this area is the minimal necessary to affect positive drainage for this area. As such, in this particular case, the Commission finds that placement of the proposed small amount of fill (750 cubic yards) within the floodplain will help to protect existing public utility improvements, allow use of the center and landscaped area to continue without the threat of flood, and not adversely impact up- or downstream resources. The proposed fill can also be found consistent with the above cited LCP policies and ordinances as it is compatible with the associated flood hazard, it will remain as an open grassy area (which is similar to the agriculture and open space uses that are listed as accepted in the floodplain) and, the fill is not proposed to accommodate a structure or even a public improvement, but only to correct on-site drainage. [Emphasis added]

Thus, the Commission intended to approve a use consistent with the floodplain policies; a use that was compatible with periodic flooding and that would provide some protection for existing structures. The Commission did not intend to change the floodplain nature of the area or to exclude it from future application of floodplain policies and ordinances. Furthermore, the applicant's intent when he proposed to fill the floodplain was to correct a drainage problem caused by the adjacent bridge project. In fact, the Commission approved the prior fill only after the applicant revised the project to eliminate the permanent structure and to reduce the amount of fill to the minimum necessary to correct the drainage problem.

The construction of a building in this location would clearly be inconsistent with the policies of the certified LCP. The proposed building is not compatible with periodic flooding. Even if the proposed structure were an allowable use under the policies of the certified Land Use Plan, it is not allowed under the standards of the City's Implementing Ordinances. Specifically, Section 30.34.040(b)(2) of the City's Implementing Ordinances only allows permanent structures and/or fill for permanent structures if the applicant can demonstrate, among other things, that the development is capable of withstanding periodic flooding. The applicant has not demonstrated that that the proposed 4,390 sq.ft. office/retail structure is capable of withstanding periodic flooding. Thus, the proposed development modifies the prior approved project in a manner that is inconsistent with the provisions of the City's LCP pertaining to floodplain development.

Furthermore, although the site is no longer located within the FEMA mapped 100-year floodplain due to the permitted fill it may still be subject to flood hazard. This is acknowledged based on a telephone conversation with a representative from FEMA. The FEMA maps are used mostly for insurance purposes. These maps are the legal document that a local government adopts to participate in the floodplain management program. Zones are established from these maps which are used by local government for determining the minimum elevations at which structures may be constructed to avoid construction of buildings below the elevation of the floodplain. Again, if filling of the floodplain occurs, as is the case with the subject site, this does not necessarily mean that the area will not be subject to flooding.

In addition, the Commission finds that to permit a permanent structure in an area that was previously filled only to correct an on-site drainage problem would establish a significant adverse precedent of allowing piecemeal filling of the floodplain inconsistent with the LCP policies. The deposition of fill and subsequent development with permanent structures in the floodplain on an incremental basis, can cumulatively constrict the floodplain and limit the ability for the geography to handle flood waters, which can lead to potential flood erosion impacts both down- and upstream.

In addition, the prior permit found the wetlands fill to be an allowable use because it was intended to protect public utilities from flood hazard, etc. Construction of a retail/office structure is not an allowable use of a wetland. Thus, the proposed structure makes the revised project inconsistent with the wetland policies of the LCP. With regard to the construction of the proposed kiosk, this aspect of the proposed development alone appears to be consistent with the LCP policies since it is located on the portion of the site that is outside of the 100-year floodplain where the remainder of the existing commercial center is located outside of the area that was previously permitted to be filled. If the structure were to be proposed separately, it would likely be approvable as consistent with the certified LCP.

For all the above reasons, the Commission finds that the proposed development of a one-story, 4,390 sq.ft. office/retail structure is inconsistent with the LCP policies and ordinances protecting floodplain and therefore the proposed development must be denied.

3. Public Access. The project site is located adjacent to and 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 roadway and the sea (San Elijo Lagoon in this case), 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 public recreation policies of the Coastal Act.

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

4. 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 cannot be made.

The subject site is zoned and planned for general commercial and rural residential uses in the City's certified LCP. The proposed structure is proposed on a portion of the site designated for general commercial development and is consistent with that designation. However, 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 a site indicate the presence of a flood channel, floodplain or wetlands. The subject site was previously within the FEMA mapped 100-year floodplain and contained wetlands. Even though the site was previously permitted to be filled (which included filling of the wetlands) which resulted in an alteration of the 100-year floodplain, the project site is still an historic floodplain area and may still be subject to hazard from flooding.

As noted in the previous sections of this report, the proposed development which includes construction of an office/retail building on an area that previously filled within the 100-year floodplain is inconsistent with several policies of the City's certified LUP as well as with the provisions of the Floodplain Overlay Zone. The proposed structure is not a permitted use within the 100-year floodplain and is not necessary to protect existing development nor is it the least environmentally damaging alternative. In fact, when the applicant first proposed to construct a building in this location, it was denied by the Commission. Only upon reconsideration and at the applicant's proposal to remove the proposed structure, did the Commission find that it could permit the limited fill in the floodplain to protect existing structures/improvements, consistent with the City's LCP. In other words, the structure in this location would have not been permitted originally due to its inconsistency with the floodplain policies. In addition, if this site were allowed to be developed as proposed, it could set an adverse precedent for filling other important floodplain areas within the City, and then later allowing development to occur on such sites. As such, the Commission finds the proposed development must be denied.

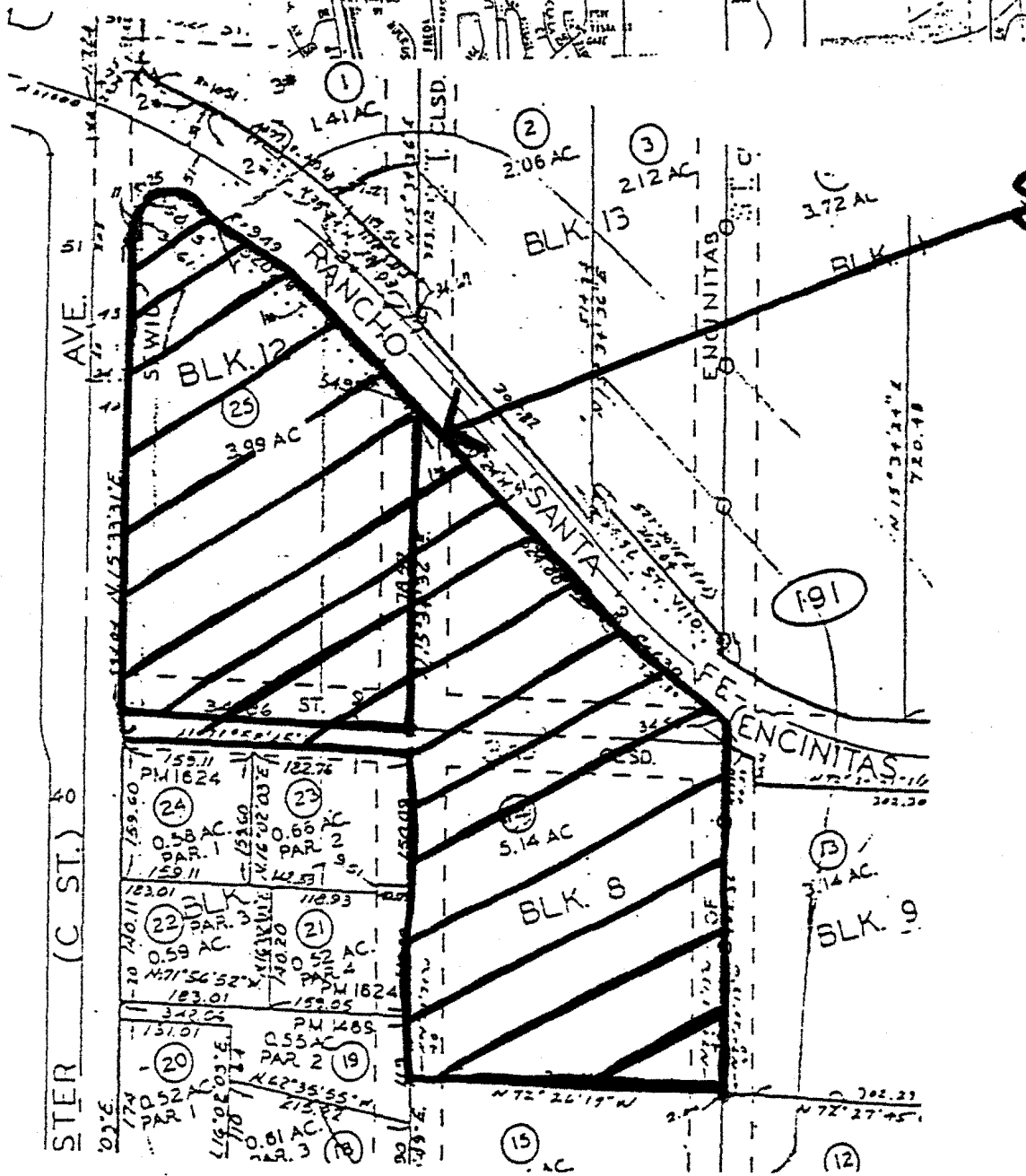
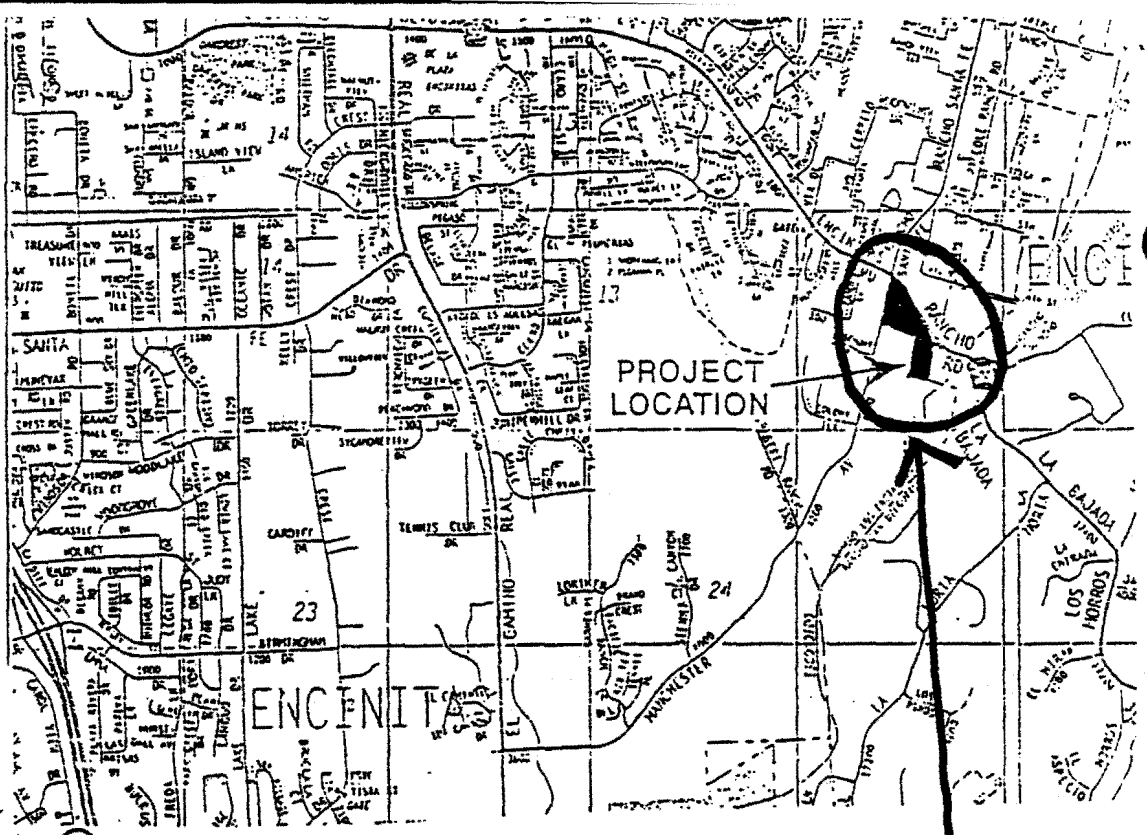
5. California Environmental Quality Act (CEQA). Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit to be consistent with any applicable requirements of the California Environmental Quality Act (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 stated previously, the development as proposed would result in impacts to coastal resources in the form of development in an area that was previously within the mapped floodplain, and subsequently filled, which could adversely impact downstream coastal resources. In addition, there are feasible alternatives to the proposed development. These feasible alternatives include the no project alternative which would allow the existing commercial center to operate as it always has, with some parking, landscaping and sidewalks in the easternmost portion of the site, subject to possible inundation in a

major storm event. In addition, there are other development alternatives available to add square footage to the center that do not include construction of structures within a hazardous area. Such alternatives could include construction of the proposed retail building within the existing parking lot—an area presently outside of the 100-year floodplain. Such a proposal would eliminate some existing parking, however, according to a parking analysis submitted by the applicant in the previous permit, the center provides more parking than is required by current LCP standards. In addition, the proposed structure could also potentially be added as an addition to one of the existing single-story buildings on the site.

As currently proposed, the subject development, which proposes a permanent structure in a previous floodplain area that was permitted to be filled consistent with the Coastal Act, in order to address flooding problems and to protect existing structures on site, raises a serious policy question with regard to development in the “historic” floodplain. In addition, the proposed development is not the least environmentally damaging alternative and cannot be found consistent with the requirements of the City of Encinitas LCP, nor with the requirements of the Coastal Act to conform to CEQA. Thus, the proposed project must be denied.

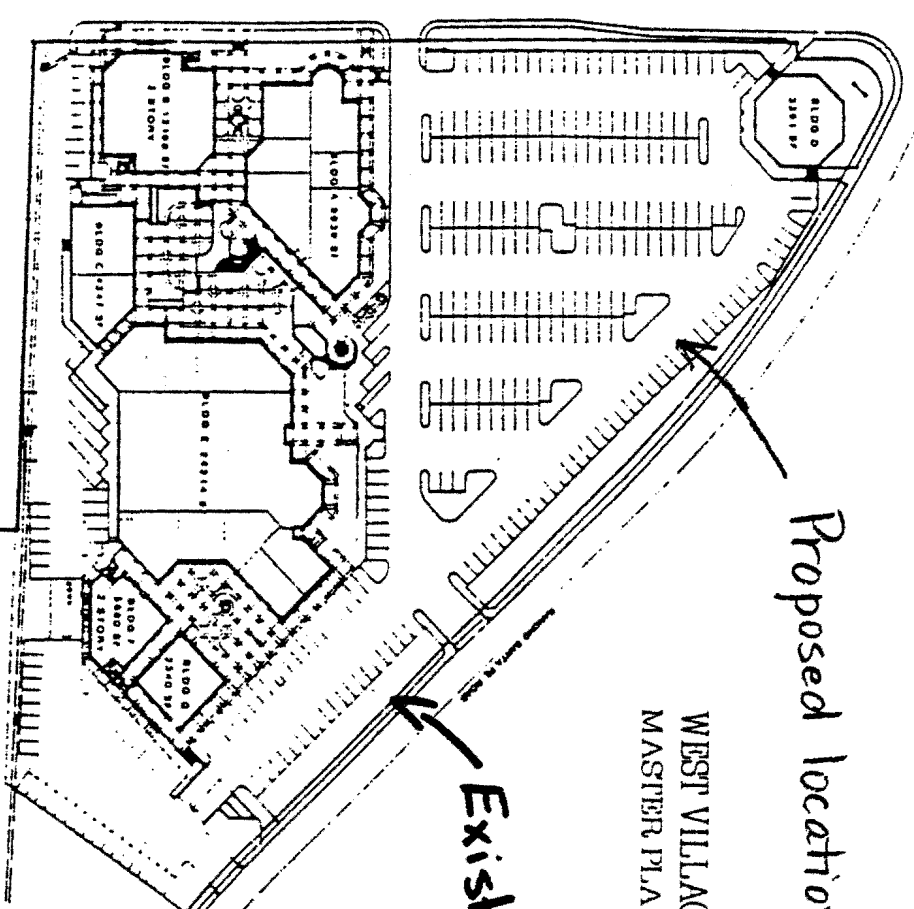
(A-6-ENC-98-109-R)



Subject Site



EXHIBIT NO. 1
 APPLICATION NO.
A-6-ENC-98-109
 Location Map



SITE PLAN
 GROSS FLOOR AREA 22222
 100% COMPLETED 2000 0000

WEST VILLAGE RANCHO SANTA FE
 MASTER PLAN

Proposed location of kiosk.

Existing 60,000 sqft.
 Retail Center

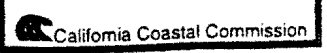
Proposed location for
 4,390 sqft. office/retail
 structure

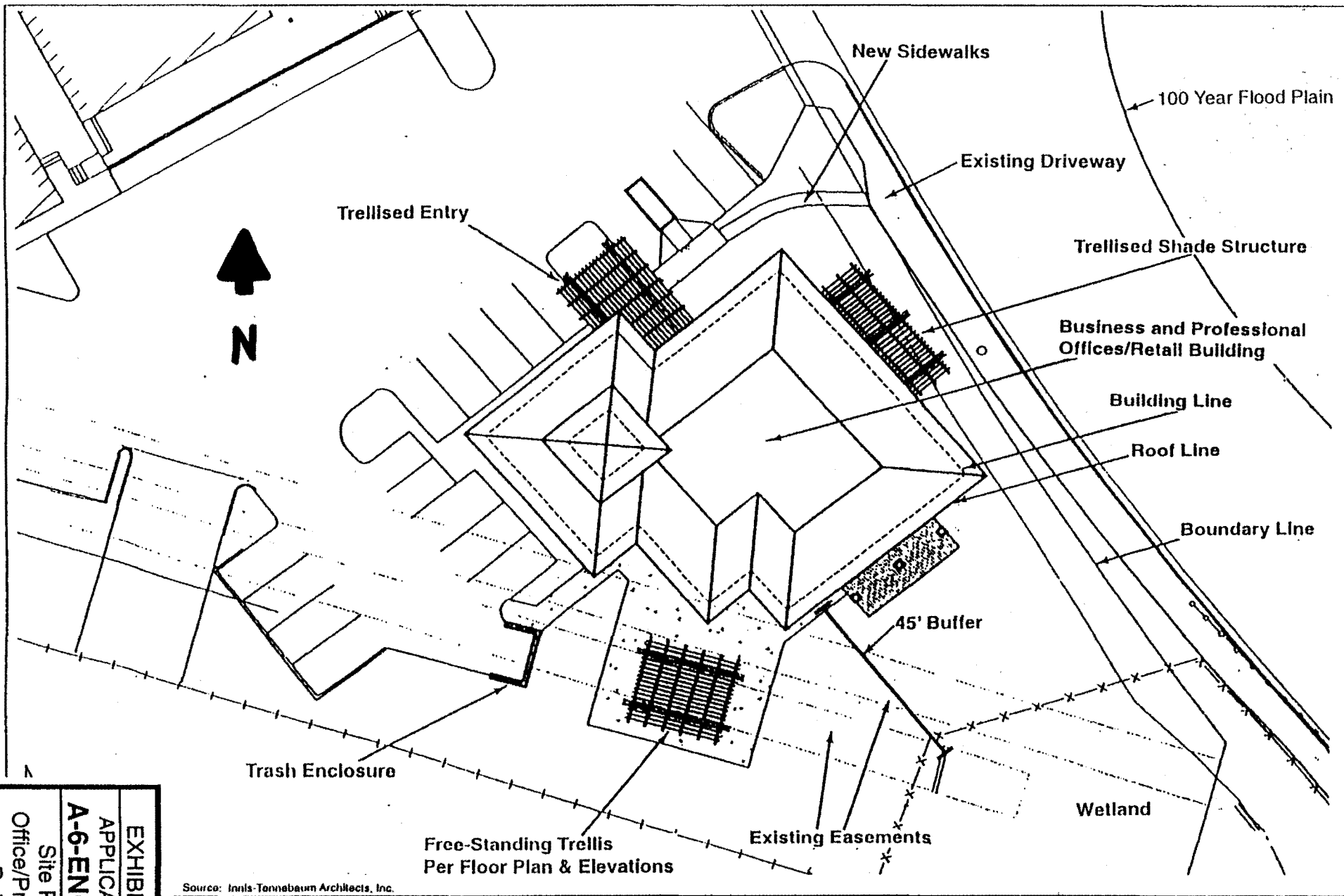
EXHIBIT NO. 2
 APPLICATION NO.
A-6-ENC-98-109
 Site Plan



INNIS - TENNEBAUM ARCHITECTS
 854 INDIAN STREET, DOCK 8, SAN DIEGO, CALIFORNIA 92101 234-0108

CONSULTANT





Source: Innis-Tennebaum Architects, Inc.

EXHIBIT NO. 3
 APPLICATION NO.
A-6-ENC-98-109
 Site Plan for
 Office/Professional
 Building
 California Coastal Commission

Proposed Office/Professional Building
 WEST VILLAGE CENTER

Figure 3

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25


STATE OF CALIFORNIA
COASTAL COMMISSION

WEST VILLAGE CENTER)	
)	
CITY OF ENCINITAS,)	Appeal No. A-6-98-109
)	
COUNTY OF SAN DIEGO)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday
December 10, 1998
Agenda Item No. 7.a

Hyatt Regency Hotel
No. 5 Embarcadero Center
San Francisco, California

EXHIBIT NO. 2
APPLICATION NO. A-6-ENC-98-109-R
Applicant's Request for Reconsideration
 California Coastal Commission

A P P E A R A N C E S

RECEIVED

DEC 30 1998

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

COMMISSIONERS

- Rusty Areias, Chair
- Sara Wan, Vice Chair
- Penny Allen
- Shirley Dettloff
- Nancy Flemming
- Christine Kehoe
- Pedro Nava
- Dave Potter
- Annette Rose
- Michael Ryan
- Andrea Tuttle

- Bill Brennan, Transportation & Housing Agency
- Ron Oliver, Trade & Commerce Agency

STAFF:

- Peter M. Douglas, Executive Director
- Ralph Faust, Chief Counsel
- Matthew Rodriguez, Deputy Attorney General
- Deborah Lee, District Director

-o0o-

I N D E X T O S P E A K E R S

<u>STAFF</u>	<u>Page Nos.</u>
District Director Lee, Staff Report.....	3, 22
Executive Director Douglas.....	3, 22, 24
 <u>PUBLIC TESTIMONY</u>	
Peter Fletcher, Applicant.....	9
Anne Fletcher, Applicant Representative.....	15
 <u>COMMISSIONER REMARKS</u>	
Allen.....	12
Flemming.....	24, 25
Kehoe.....	9, 13, 23, 25
Ryan.....	26
Tuttle.....	9
 <u>ACTION</u>	
Motion by Kehoe.....	25
Vote.....	27
 <u>CONCLUSION</u>	28

-o0o-

PRISCILLA PIKE

Court Reporting Services

39672 WHISPERING WAY
OAKHURST, CA 93644

TELEPHONE
(559) 683-8230

1 California Coastal Commission

2 December 10, 1998

3 West Village Center -- Appeal No. A-6-98-109

4 * * * * *

5 CHAIR AREIAS: Next item.

6 DISTRICT DIRECTOR LEE: The next item on your
7 agenda is Item 7.a. This is an appeal of a local decision
8 from the City of Encinitas for a site which has some history
9 before the Commission.

10 Specifically, it is Appeal No. A-6-98-109, an
11 application for the construction of a one-story 4400-square
12 foot office retail structure, and a separate kiosk on a 9-
13 acre site which already contains an existing 60,000 square
14 foot commercial center.

15 Staff is recommending the Commission find
16 substantial issue, and then deny the proposed development;
17 therefore, staff will be taking a few minutes for the
18 presentation.

19 EXECUTIVE DIRECTOR DOUGLAS: So, unless there are
20 three Commissioners who want to hear a debate on substantial
21 issue? --

22 CHAIR AREIAS: No.

23 EXECUTIVE DIRECTOR DOUGLAS: -- we will just go
24 right into it.

25 DISTRICT DIRECTOR LEE: Thank you.

1
2 The subject site is located at the southeast
3 corner of Rancho Santa Fe Road and Manchester Avenue in the
4 City of Encinitas. Escondido Creek runs close to the site,
5 along its southeastern boundary, and portions of the subject
6 site were historically in its 100-year flood plain.

7 The permit and planning history on the property is
8 important to note, and I would like to review it briefly. In
9 1984, the original approval on the site was for the
10 demolition of existing structures, 28,000 cubic yards of
11 grading, which was largely imported fill and infrastructure
12 improvements.

13 Subsequently, in 1984, that permit was
14 specifically approved with conditions to eliminate all
15 grading within the flood plain. And, then, in 1985, the
16 Commission approved a Coastal Development Permit for the
17 construction of the 60,000-square foot commercial center,
18 that is comprised in 7 buildings, with some parking areas and
19 landscaping in the 100-year flood plain, but none of the
20 buildings were allowed within the 100-year flood plain.

21 In 1994, the Commission then approved a permit for
22 the County of San Diego for a new bridge at the La Bajada
23 dip, over Escondido Creek, directly east of the subject
24 property. Later that year, the City of Encinitas also
25 obtained permit authority and began issuing Coastal
Development Permits for its jurisdiction, in May of 1995.

1
2 Subsequently, in 1996, the city approved a
3 proposal for the construction of a 2000 square structure with
4 1800-cubic yards of fill, describing it as necessary to
5 protect the existing commercial center from associated
6 flooding impacts, exacerbated by the county's bridge
7 reconstruction.

8 The Commission filed an appeal based on both the
9 proposed fill, and related wetlands impacts. Substantial
10 issue was found by the Commission on a number of points, and
11 the Commission ultimately denied the permit.

12 In June of 1996, the applicant filed for
13 reconsideration which the Commission granted in part, due to
14 the fact that the applicant modified the project,
15 specifically to reduce the amount of fill, and eliminate the
16 proposed building from the Commission action.

17 In August of 1996, the Commission approved a
18 revised project for only 750-cubic yards of fill, which was
19 specifically authorized to address localized drainage issue,
20 and ponding problems, on the applicant's site. It was not
21 authorized as fill to support a structure as the proposed
22 building was expressly deleted by the applicant.

23 It was also recognized that by correcting the
24 drainage problem, the applicant could, and would continue to
25 use the area as before, for outdoor sales, balloon rides, and
other activities.

1
2 Subsequent to the bridge reconstruction, and the
3 applicant's completion of the restricted fill on the site,
4 apparently as a matter of course, the county requested that
5 FEMA reevaluate the flood plain delineation, which has
6 resulted in certain mapping revisions. Based on updated
7 flood plain mapping, the specific area proposed for the
8 currently proposed 4400-square foot structure is not shown in
9 the 100-year flood plain.

10 The applicant believes this map revision supports
11 an argument to now allow unrestricted development on the
12 site. Staff disagrees, and believes this incremental
13 approach to development would result in significant
14 cumulative impacts for the San Alijo Lagoon watershed, and
15 raises a very serious policy question for the Commission.

16 The certified LCP provisions clearly specify that
17 no development, both structures or fill for structures,
18 should occur in the 100-year flood plain, unless it is
19 compatible with periodic flooding, and sensitive resources
20 are not adversely affected.

21 These policies are very explicit, and clear, but
22 they must also be looked at and placed in context, especially
23 given the development history on the subject site. The
24 applicant's argument, and the city's permit hinges on a very
25 limited and literal reading of the policies, ignoring the
context of their application on the site.

1
2 Two applications for limited but permissible
3 alterations of the flood plain, one for the bridge
4 reconstruction, and the other for restricted fill on the
5 subject site to correct a minor drainage problem, have
6 resulted in a revised flood plain delineation, which the
7 applicant then submits and states should allow further
8 development on the property.

9 The current application and appeal must be
10 reviewed in a broader context. It is really a continuation
11 and a revision of the prior actions. In all of the permit
12 history, at each action, any proposed structure in the flood
13 plain was denied, or specifically deleted by the applicant to
14 obtain favorable consideration by this Commission.

15 To segment the development process in this manner,
16 where some limited fill might be authorized, and then
17 individually, or cumulatively, precipitate revised flood
18 plain mapping, which would then be used to argue for
19 wholesale development of the property, runs counter to the
20 intent and purpose of the flood plain policies.

21 The key question that we have raised for the
22 Commission is whether or not the fill and the building would
23 have ever been allowed, and we think the answer is, "No."
24 There may still be a flooding hazard on this site, we are not
25 convinced that these mappings represent an exact science. In
our discussions with the FEMA representative, they concurred

1
2 with that, indicating that the revised mapping, alone, does
3 not mean that the site would be removed from all hazard.

4 And, cumulatively, it is not just the direct fill,
5 but it is the overall loss of pervious surface, impacts to
6 ground water recharge areas, the potential loss of open space
7 values, and the increased indirect impacts from construction
8 and development activities that we believe this pattern of
9 segmented and incremental development could result in serious
10 damage to the lagoon water shed.

11 We believe that the Commission record is clear on
12 this matter, but we do acknowledge that there is a technical
13 question, a literal reading of the revised flood plain
14 mapping, that warrants your consideration.

15 But, we are recommending that you view the
16 application of the LCP policies, the intent and purpose, in
17 the context of this permit history, and that ultimately we
18 recommend the Commission deny the requested development.

19 That would conclude my remarks.

20 I do have slides available, if the Commission
21 would like to view them.

22 VICE CHAIR WAN: Any Commissioners want to see the
23 slides?

24 [No Response.]

25 Okay, with that, I will call for ex-parte
communications? Any ex-parte communications?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Commissioner Tuttle.

COMMISSIONER TUTTLE: Yes, within the last week I received a phone call from Doug Gibson, who is the executive director of the San Alijo Lagoon Conservancy, alerting me to this issue on the agenda, and trying to give me some of the background of the issue.

And, I think that all points that were made -- of course he was supportive of the staff's position -- and I think that all points that he made were covered in the staff report.

COMMISSIONER KEHOE: My staff person, Craig Adams, talked to various parties, including Friends of the Lagoon, and I think Anne Fletcher. He visited the site and took some Polaroids. I didn't have these conversations, but Craig Adams did.

VICE CHAIR WAN: Any other?

[No Response.]

Thank you, with that, I will open the public hearing.

Mr. Fletcher, can you tell me how long you will need for your presentation?

MR. FLETCHER: Madam Chairman, we will not exceed 15 minutes, hopefully less.

VICE CHAIR WAN: Yes, I would hope you would be less than that, okay.

1

MR. FLETCHER: Yes.

2

3

VICE CHAIR WAN: But, 15 minutes includes all three speakers?

4

5

MR. FLETCHER: All three speakers, yes, Madam Chairman.

6

7

VICE CHAIR WAN: Thank you.

8

Staff, will you time, please.

9

DISTRICT DIRECTOR LEE: Yes.

10

11

12

13

MR. FLETCHER: Madam Chairman, my name is Peter Fletcher. I am president of the West Village, Inc. application. We are a family real estate business, and my family is around me today.

14

15

16

17

18

As an introduction to the project, I will make a few comments, and then turn our presentation over to Anne, who will answer what we consider are some gross exaggerations, mischaracterizations, and errors made in the recent report from the staff that you just heard.

19

20

21

22

This appeal involves our efforts to construct a single-story office building on a previously graded prepared site within the boundaries of an existing shopping center, constructed by us in 1986.

23

24

25

Some Commissioners, I believe Chairman Wan, and Commissioners Flemming and Areias were there when we received the approval for grading on this site in 1996. This was unanimously approved over the objection of the staff, and

PRISCILLA PIKE

Court Reporting Services

39672 WHISPERING WAY
OAKHURST, CA 93644

TELEPHONE
(559) 683-8230

1
2 today's appellant, the San Alijo Lagoon Conservancy -- the
3 same team that are now opposing us again.

4 Despite overwhelming evidence to the contrary,
5 your staff continues to oppose us on unsupportable grounds.
6 They seem to be arguing to you that you should apply new
7 policies to this application, that have not yet been
8 promulgated.

9 Our position is two fold: there are no further
10 environmental questions; number two, there are no conflicts
11 with the certified City of Encinitas LCP coastal regulations.
12 These two statements are supported by the letters and support
13 documents before you now in the blue folder, which I believe
14 has been passed out to each of you. This was done because of
15 the sheer mass of paperwork that this particular application
16 has created because of issues, and brought back and forth, so
17 we are trying to keep it down for you.

18 Our first exhibit here is a large photo of the
19 site. You have a smaller exhibit as No. 1 in your letter.
20 It will visually show you that this site is right on
21 Encinitas Blvd. It has 200 feet of commercial frontage.
22 Encinitas Blvd. also known as Rancho Santa Fe Blvd. at this
23 point, carries over 20,000 car a day. It is a major
24 thoroughfare. The blue dot is the proposed building
25 location, and you will see this throughout our exhibits.

 Would you pass that to the Commissioners. We will

PRISCILLA PIKE

Court Reporting Services

1
2 endeavor to get these a little closer to you.

3 COMMISSIONER ALLEN: It's the same one that is in
4 the packet you gave us.

5 MR. FLETCHER: Yes, it is, Ma'am.

6 COMMISSIONER ALLEN: Yes, and we have that right
7 in front of us.

8 VICE CHAIR WAN: We have that in front of us.

9 MR. FLETCHER: Yes, they say a picture is worth
10 1000 words, so maybe that will cut some of my performance off
11 here.

12 The Encinitas zoning map before you is an
13 interesting display. You will note the distance from the
14 coast to this site is from to 4 to 5 miles. We are at the
15 very upstream limits of your jurisdiction. In fact,
16 Encinitas Blvd. is the boundary.

17 San Alijo Lagoon is located several miles south of
18 us, where that group -- one of the groups supervising that
19 reserve is opposing us.

20 The convenience -- there is 5 acres across the
21 street from us, which your staff very oddly refers to as a
22 convenience store. Within the last year, the City of
23 Encinitas, and the County of San Diego, have rezoned a total
24 of over 5 acres for commercial, general commercial, and heavy
25 commercial for a shopping center. Both of these parcels, as
pointed out by Mr. Wicklund here, are closer to Encinitas

PRISCILLA PIKE

Court Reporting Services

39672 WHISPERING WAY
OAKHURST, CA 93644

TELEPHONE
(559) 683-8230

1
2 Creek, than the West Village Center site.

3 The next item is Exhibit 3, which is an earlier
4 exhibit that you had in '96, when we asked for a grading
5 permit. This shows the extent of San Diego County's work, in
6 developing -- in blue, the bridge, and how it impacted our
7 site. It also shows our master plan.

8 This roadway is the only east-west connection
9 between Del Mar and Carlsbad, between Interstate 5 and
10 Interstate 15. It just carries a lot of traffic.

11 You might pass that, Scott, if you would, please.

12 The zoning map here is significant, if you would
13 also like to see that.

14 COMMISSIONER ALLEN: We can see it.

15 COMMISSIONER KEHOE: Yes, we can see it.

16 VICE CHAIR WAN: It is pretty visible.

17 MR. FLETCHER: All right.

18 The next item is Exhibit 4, which is also from the
19 '96 application for grading.

20 When Mrs. Fletcher and I purchased this property
21 in 1984, there were some 9 buildings on this site, over 100
22 years old. This is the earliest development. It was a large
23 ranch in the area, which the buildings were then being used
24 for commercial purposes.

25 This shows the historic use of the property. It
gives you an idea of just where we are. It certainly

1
2 discredits a lot of the claims that somehow we are moving
3 into our pristine area. This area has been developed, as I
4 said, for over 100 years.

5 It also shows the 3-acre support area to the
6 south, which we own, which makes this a rather unique
7 shopping center. We have a staging area, a promotion area,
8 and to the east of that is another 3 acres, which the State
9 of California, through the Wildlife Conservation Board, has
10 been negotiating over the last 10 years to acquire from us.
11 That is the part that is referred to in Assemblyman
12 Kaloogian's letter before you, as well as a support letter
13 from the San Alijo Foundation, which is also in your folder
14 for your review. They were the original organizers of the
15 San Alijo Lagoon Reserve. They own title to the estuary
16 area, and are certainly significant as to their attitude, and
17 they support our project.

18 In conclusion, we will be asking, based on the
19 actual facts that you will receive, that the appeal must be
20 denied, as the appellants' arguments are not supportable by
21 the facts at hand.

22 And, secondly, the certified city approved
23 building application should be referred back to Encinitas for
24 coastal permit issuance.

25 Thank you very much. I am now going to turn this
over to my better half, my daughter Anne, who will complete

1
2 the presentation.

3 MS. FLETCHER: Good morning, ladies and gentlemen.
4 Anne Fletcher, corporate counsel for West Village.

5 VICE CHAIR WAN: Would you pull the microphone
6 down. Thank you.

7 MS. FLETCHER: Ladies and gentlemen of the
8 Commission, the narrow issue presented by the appeal of the
9 San Alijo Lagoon Conservancy is whether the Encinitas LCP
10 prohibits the development of property lawfully graded and
11 filled, pursuant to Encinitas Local Coastal Policy 8.2(b).

12 In affect, staff is urging the Commission to adopt
13 a new policy, whereby property previously in the flood plain
14 is forever subject to flood plain development restrictions,
15 irrespective of whether FEMA, the Federal Emergency
16 Management Agency, has remapped the property out of the 100-
17 year flood plain.

18 The appellants' interpretation, supported by
19 staff, finds no support in the Encinitas Local Coastal
20 Program. Further, should this Commission choose to adopt
21 such a policy, it should not apply retroactively to property
22 lawfully graded and filled pursuant to 8.2(b). Briefly,
23 8.2(b) allowed for filling the flood plain due to damage from
24 public works project.

25 To give you some background regarding our prior
application, West Village, Inc. operates a neighborhood

1
2 retail center on property located in the incorporated City of
3 Encinitas. In 1994, the La Bajada bridge was constructed,
4 which resulted in severe drainage and grade problems.
5 Encinitas became a certified city in May of '95.

6 Ultimately, in August of 1996, this Commission
7 approved the regrading and filling of the site, providing for
8 approximately 750 cubic yards of fill. No building
9 restrictions were placed upon the site by the Commission at
10 that time, despite the appellant's assertion. All of the
11 conditions of the prior permit have been satisfied. The fill
12 is in place, and the property is ready to support a building
13 on it.

14 The question of amending the prior permit is not
15 applicable. I have the original transcripts of the
16 reconsideration hearing in July, July 12, 1996, and August
17 14, both were attached to the second staff report in this
18 matter.

19 I also have a copy of my letter of August 18 --
20 actually, I should say my father's letter to Charles Damm,
21 dated July 18, which was after the reconsideration hearing
22 took place. Mr. Damm can confirm the date of this letter.
23 It was not part of the determination of reconsideration that
24 the building was deleted. The building was deleted because
25 the tenant was no longer available, and was deleted by us,
unilaterally. The only thing before the Commission in August

PRISCILLA PIKE

Court Reporting Services

39672 WHISPERING WAY
OAKHURST, CA 93644

TELEPHONE
(559) 683-8230

1
2 of 1996 was the grading.

3 At the time of the earlier Commission approval,
4 the building site, although historically supporting buildings
5 for over 100 years was partially in the flood plain, under
6 the then current FEMA maps. It is important to note that the
7 City of Encinitas Local Coastal Program does not restrict the
8 subsequent use of property filed under 8.2(b). I have the
9 entire general plan with me, if anybody would like to look at
10 it. I have gone through it. There is no subsequent
11 restriction on property that has been filed. We have asked
12 the staff to identify the authority for that assumption.
13 They have been unable to do so, because it does not exist.

14 On or about November 10, FEMA -- of 1997 -- FEMA
15 with the County of San Diego acting as lead agency remapped
16 the area surrounding the newly constructed La Bajada Bridge.

17 In 1998, we submitted our second application.
18 Appellant asserts, and staff concurs, that flood plain
19 restrictions remain applicable. It should be noted the
20 standard of review for an appeal item from a certified is
21 does the project comply with the LCP.

22 In this case, associate planner Craig Olson, on
23 behalf of the certified City of Encinitas, sent your staff a
24 letter, which is included as Item 5 in the blue folders,
25 which reads in relevant part:

"Flood plain shall mean the channel and

1
2 the relatively flat area adjoining the
3 channel of a natural stream or river,
4 which has been, or may be covered by
5 flood water, specifically those areas
6 shown as subject to inundation on the
7 flood insurance rate maps published by
8 the Federal Emergency Management Agency,
9 or the current city maps designating floodways."

10 Included as Item 6 is a letter from Douglas
11 Isabelle -- excuse me, department of public works deputy
12 director of the County of San Diego, where he confirmed to
13 your staff that the site is out of the 100-year flood plain.

14 It is now undisputed that we are out of the
15 100-year flood plain; therefore, the relevant portions of the
16 LCP, relative to flood plain development, are no longer
17 applicable.

18 Appellant and staff have also argued the question
19 of intent of the Commission in August of 1996. The prior
20 permit is included as Item 7 in your folders, contains no
21 restriction prohibiting subsequent development of the site.
22 The staff report refers to language from the 1996 findings
23 that the prior application contained no buildings. This is
24 true in August, because we had unilaterally deleted the
25 building, ourselves; however, this language in the staff
findings does not prohibit future development.

1
2 Attachment Item 8 is a letter from former
3 Commissioner Bill Rick, dated October 9, '98, who was asked
4 to give his input regarding staff's contention of prior
5 restrictions. Mr. Rick says as follows:

6 "It is clear from my examination of the
7 documents, and my own personal recollection
8 that the Commission approved the importing
9 of 750 cubic yard of fill in the then
10 existing flood plain, granted this permit
11 knowing that the grading would create
12 additional building area, and was placing
13 no building restraint on the filled land."

14 Mr. Rick could not have been more explicit.

15 Former Commissioner Byron Wear, who "seconded" the
16 original motion for approval in August of '96 has also
17 provided a letter, which is Item 9:

18 "The findings for approval did not include " --
19 as is now claimed by the appellant --

20 "any future restriction on building on the
21 subject site."

22 As a matter of fact, in his testimony, the
23 appellant's representative Andrew Morrow, pointed out that
24 approval of either grading plan would create a building pad.
25 That would be pages 33 and 34 in the August transcript,
attached to the second staff report.

1
2 Former Commissioner Patricia Randa, who made the
3 original motion for approval also provided a letter, which is
4 Item 10:

5 "I specifically recall that when I made the
6 motion to approve the earlier project, it was
7 not my intention to include any limitation
8 on the site regarding future development."

9 As is clear, the opinions of the former
10 Commissioners, and the transcripts from the prior hearings
11 are entirely consistent with our position, specifically, that
12 the prior application, and the prior permit did not restrict
13 the property from subsequent development.

14 One should also look, as to what, if any,
15 environmental factors may exist with this application. What
16 we are proposing is an office building be placed on a
17 commercially zoned and previously graded pad.

18 During the course of the project, the potential
19 impact has been reviewed twice, once by the City of
20 Encinitas, and secondly by the Department of Fish and Game.
21 The result of the city's environmental review is included as
22 Item 11 before you, the Helix Environmental Planning, March
23 1998 initial study. It is clear from such report no coastal
24 resources will be affected.

25 In addition, Fish and Game, Ronald D. Rempel,
regional manager of Region 5 states in Item 12 in your

1
2 folder, after their complete environmental analysis,
3 including a July 9 site visit, quote:

4 "After review of the project-related
5 materials, the department has concurred
6 with the city that there will be no
7 significant impacts to wildlife or habitat
8 from this project. The existing pad has
9 been previously graded, and is out of the
10 Escondido Creek flood plain, so no additional
11 direct impacts will occur. It should also
12 be noted that no additional fill is being
13 proposed by West Village, in connection with
14 the current application. No wetlands will be
15 affected."

16 Other than the Coastal Commission staff and the
17 appellant -- who did not show up today, and I think that
18 raises the question of abandonment of the appeal -- our
19 project enjoys solid support from the community and all
20 public agencies involved.

21 In conclusion, the appeal should be denied. The
22 only test truly applicable is does the project comply with
23 the LCP? We contend, that in all respects, this application
24 does comply.

25 We, therefore, request that the Commission deny
the appeal, and allow our project to proceed.

1
2 I would like the record to reflect that I am
3 giving to staff our July 18, 1996 letter, which I referenced
4 earlier, and I would like that included as Item 15 of the
5 appellant's exhibits.

6 DISTRICT DIRECTOR LEE: Your time has just about
7 elapsed.

8 MS. FLETCHER: Okay.

9 That concludes my remarks, thank you.

10 CHAIR AREIAS: Thank you, Ms. Fletcher.

11 Staff.

12 EXECUTIVE DIRECTOR DOUGLAS: Before Deborah
13 responds, let me just indicate to the Commission that Mr.
14 Doug Gibson was here. He wanted to testify, but he had an
15 accident, and had to be taken to the airport to go home, but
16 he indicated to me that he supported the staff recommend-
17 ation.

18 CHAIR AREIAS: Okay, so noted.

19 Staff.

20 DISTRICT DIRECTOR LEE: I'll be brief.

21 We believe that the certified LCP clearly
22 restricts development, or fill for permanent structures, from
23 the flood plain, and that the limited, and permissible fill,
24 for a major bridge reconstruction, and drainage problems on
25 this site associated with that bridge reconstruction should
not create an opportunity for later proposing a structure

1
2 within the historic flood plain, when originally the fill and
3 a structure would not have been authorized.

4 We think, cumulatively, this type of approach does
5 lead to the likelihood of very significant environmental
6 impacts due to reduced open space, increased impervious
7 surfacing, and just the general activity of increased
8 development and construction work within and around the
9 lagoon view shed.

10 And, we think this sets a very serious precedent
11 for the interpretation and the application of the flood plain
12 development standards for the City of Encinitas.

13 Just with regard to the other site that the
14 applicant identified for prospective conveyance to the
15 Wildlife Conservation Board, staff did not feel that we could
16 ever identify that as part of the application, because it was
17 on a separate parcel, and we did not feel it was subject to
18 consideration.

19 Again, staff would recommend that the Commission
20 deny the application.

21 VICE CHAIR WAN: Thank you.

22 Commissioner Kehoe.

23 COMMISSIONER KEHOE: Do you want a motion, Madam
24 Chair?

25 VICE CHAIR WAN: If you want to make a motion, you
make --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COMMISSIONER KEHOE: I am ready to make a motion,
unless -

VICE CHAIR WAN: -- the motion first.

COMMISSIONER KEHOE: -- the Commissioners want
more discussion?

And, I would move that we deny the project.

VICE CHAIR FLEMMING: Second.

COMMISSIONER KEHOE: I would be happy to speak to
that.

VICE CHAIR WAN: And, would you like to speak to
the motion?

EXECUTIVE DIRECTOR DOUGLAS: Madam --

COMMISSIONER KEHOE: Yes, just briefly.

EXECUTIVE DIRECTOR DOUGLAS: -- Chair, before you
go on, the motion ought to be per applicant, since the staff
is recommending denial, just to make it technically correct.

COMMISSIONER KEHOE: Okay.

VICE CHAIR WAN: Move as per applicant, then
recommend a "No" vote.

EXECUTIVE DIRECTOR DOUGLAS: That is correct.

VICE CHAIR WAN: Okay.

EXECUTIVE DIRECTOR DOUGLAS: That is what we are
doing.

COMMISSIONER KEHOE: Find it -- that is the de
novo --

1
2 VICE CHAIR WAN: Move as per applicant, and
3 recommend --

4 [MOTION]

5 COMMISSIONER KEHOE: Yes, I move per applicant,
6 and recommend a "No" vote.

7 VICE CHAIR FLEMMING: Second.

8 VICE CHAIR WAN: Moved by Commissioner Kehoe,
9 seconded by Commissioner Flemming.

10 Commissioner Kehoe, would you like to speak to the
11 motion?

12 COMMISSIONER KEHOE: Just briefly.

13 You know, I believe there is a record that the
14 Commission did not intend for the area on the east of the
15 developed parcel, adjoining the riparian area, to be
16 developed. I believe it is piecemeal.

17 The record shows that open grassy area was the
18 intended use for the filled portion of the site, and that the
19 Commission would not have allowed both fill and structure to
20 be considered in a single application.

21 So, what you are doing here is just incremental,
22 and that is why I am not supporting it.

23 VICE CHAIR WAN: Commissioner Flemming, you were
24 the seconder, do you want to say anything?

25 VICE CHAIR FLEMMING: I was a seated Commissioner
at the time of their original hearing, and I agree with your

1
2 summary.

3 VICE CHAIR WAN: Commissioner Ryan.

4 COMMISSIONER RYAN: I just wanted to ask a
5 question of staff, of the proposed building that they have in
6 their application here, if it is going to exacerbate the
7 flooding problem? or the drainage problem in the area?

8 DISTRICT DIRECTOR LEE: We didn't have any
9 detailed information on that, but I think that is the
10 cumulative issue, in terms of incrementally changing areas
11 that were allowed to have some limited alteration, and then
12 to find that subsequently that would then give you entry to
13 go ahead and further build over, and expand impervious
14 surfacing, removing the open nature of the area, just would
15 contribute to increased flooding in the overall area, if you
16 did that on a site-by-site basis.

17 COMMISSIONER RYAN: Thank you.

18 VICE CHAIR WAN: Any other questions or comments?

19 COMMISSIONER NAVA: Call for the question.

20 VICE CHAIR WAN: Any objection to a unanimous roll
21 call?

22 COMMISSIONER NAVA: No.

23 COMMISSIONER KEHOE: No.

24 VICE CHAIR WAN: Seeing none --

25 EXECUTIVE DIRECTOR DOUGLAS: Madam Chair --

VICE CHAIR WAN: Would you like a roll call?

1
2 EXECUTIVE DIRECTOR DOUGLAS: Yes, I think we need
3 a roll call.

4 VICE CHAIR WAN: Call the roll.

5 SECRETARY RANALLI: Commissioner Allen?

6 COMMISSIONER ALLEN: No.

7 SECRETARY RANALLI: Commissioner Dettloff?

8 COMMISSIONER DETTLOFF: No.

9 SECRETARY RANALLI: Commissioner Flemming?

10 VICE CHAIR FLEMMING: No.

11 SECRETARY RANALLI: Commissioner Kehoe?

12 COMMISSIONER KEHOE: No.

13 SECRETARY RANALLI: Commissioner Nava?

14 COMMISSIONER NAVA: No.

15 SECRETARY RANALLI: Commissioner Potter?

16 COMMISSIONER POTTER: No.

17 SECRETARY RANALLI: Commissioner Rose?

18 COMMISSIONER ROSE: No.

19 SECRETARY RANALLI: Commissioner Ryan?

20 COMMISSIONER RYAN: No.

21 SECRETARY RANALLI: Commissioner Tuttle?

22 COMMISSIONER TUTTLE: No.

23 SECRETARY RANALLI: Vice Chairman Wan?

24 VICE CHAIR WAN: No.

25 CHAIR AREIAS: Areias "No".

SECRETARY RANALLI: Zero --

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Chairman Areias?

CHAIR AREIAS: No.

SECRETARY RANALLI: Zero, eleven.

VICE CHAIR WAN: Thank you. The project is denied.

*

*

[Whereupon the hearing was concluded.]

West Village Inc.

at Rancho Santa Fe

January 5, 1999

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

Via Federal Express

RECEIVED

JAN 05 1999

Ms. Deborah Lee
South Coast Deputy Director
California Coastal Commission
3111 Camino del Rio North, Suite 200
San Diego, CA 92108-1725

Hand Delivered

CALIFORNIA
COASTAL COMMISSION
SAN DIEGO COAST DISTRICT

Re: *Appeal No. A-6-ENC-98-109*
Request for Reconsideration

Dear Mr. Douglas and Ms. Lee:

We request reconsideration of the December 10, 1998 decision to deny issuance of a Coastal Development Permit on the above matter, pursuant to Public Resources Code Sections 30626, 30627 and Article 18 of the Coastal Commission Administrative Regulations on grounds including but not limited to the following errors of fact and/or law:

1. No building restrictions were placed on applicant's building site by the approval of the grading project in August of 1996.

In testimony at the December 10, 1998 hearing, by South Coast Deputy Director Deborah Lee, she stated the following:

"In June of 1996, the applicant filed for reconsideration which the Commission granted in part, due to the fact the applicant modified the project specifically to reduce the amount of fill, and eliminate the proposed building from the Commission action.

In August of 1996, the Commission approved the revised project for only 750 cubic yards of fill, which was specifically authorized to address localized drainage issue and ponding problems on the applicant's site. It was not authorized as fill to support a structure as the proposed building was expressly deleted by the applicant." (Official Reporter's Transcript, 12/10/98 Hearing {hereinafter "RT"} Page 5, Lines 11 through 21.)

This argument is also repeated in the staff report dated 11/17/98, with reference to this matter. The August 1996 permit and transcript from the July, 1996 and August, 1996 hearings reveal that no building restrictions were attached to the prior approval.

162 S. Rancho Santa Fe Road, Suite E-90, Encinitas, California 92024. (760) 436-6463

EXHIBIT NO. 3
APPLICATION NO. A-6-ENC-98-109-R
Official Transcript of 12/10/98 Coastal Commission Meeting

January 5, 1999

Further, the contention that the July 12, 1996 granting of reconsideration was based on applicant's deletion of the building is erroneous.

2. The Local Coastal Program of the City of Encinitas Controls on the Standard of Review of an Action Taken by a Local Government on a Coastal Development Application.

Public Resources Code Section 30603(b) reads in relevant part as follows:

"(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division."

It is undisputed that the project site is no longer located within the 100-year flood plain. (RT, Page 6, Line 6 through 8) However, the Commission determined that flood plain restrictions continue to remain applicable despite the 1997 FEMA remapping. The proposed kiosk was not in the 100-year floodplain under the prior mapping. The standard of review of an appeal item from a certified city is as stated above in Section 30603(b) of the Coastal Act. Associate Planner, Craig Olson, on behalf of the certified City of Encinitas, sent to staff a letter attached as part of Exhibit 4 of the 11/17/98 staff report that stated as follows:

"Please be advised that the City's Municipal Code (Chapter 30.04) definition of "Floodplain" (enclosed) reads: "FLOODPLAIN shall mean the channel and the relatively flat area adjoining the channel of a natural stream or river which has been or may be covered by floodwater; specifically, those areas shown as subject to inundation on the flood insurance rate maps published by the Federal Emergency Management Agency or the current City maps designating floodways."

Further, Mr. Olson also included a memorandum from Hans Carl Jensen, City of Encinitas Senior Civil Engineer, which stated as follow:

"The FEMA maps issued June 19, 1997 by FEMA depict the legal floodplain within the City of Encinitas. The maps have been amended in the area of the La Bahada (sic) Bridge by FEMA on November 10, 1997."

As is apparent, there are no provisions in the Encinitas Local Coastal Program which require that flood plain restrictions continue to attach to property that has been taken out of the 100-year flood plain by FEMA remapping. There is no policy, "once flood plain, forever flood plain". Therefore, since Applicant's property is out of the 100-year flood plain, the portions of the LCP relative to flood plain development are not applicable.

3. The Project As Proposed Creates No Significant Environmental Impact.

Staff contended at the December 10, 1998 hearing that alleged "segmented and incremental development could result in serious damage to the lagoon water shed", (RT, Page 8, Line 6 through 9) and staff further alleged the site would be subject to flood hazard. (See RT, Page 7, Line 23 and Page 26, Lines 8-15.) There is absolutely no evidence to support such statements. To the contrary,

January 5, 1999

the Helix Environmental Planning, Inc. March, 1998 study prepared by the City of Encinitas, and the letter of Fish and Game dated September 25, 1998 contradict the assertion.

The Commission should base its decision upon the environmental evidence in the record, not unsupported conjecture.

4. The 1998 Application is Not an Amendment to the 1996 Application.

Staff asserted that the present application for a building is, in effect, an amendment to the prior application and grading permit. All work performed in the 1996 permit was completed and all conditions were satisfied. The criteria for amendment, on the other hand, is provided in California Coastal Commission Regulations Section 13166, which provides:

"(1) An application for an amendment shall be rejected if, in the opinion of the executive director, the proposed amendment would lessen or avoid the intended effect of a partially approved or conditioned permit unless the applicant presents newly discovered material information, which he could not, with reasonable diligence, have discovered and produced before the permit was granted."

This provision has no applicability to the present application. The present project is separate and distinct from the previous application and must be reviewed on its own merits.

5. Conclusion

In sum, it is apparent, both from the foregoing and from review of the record, the present application meets the standards of Section 30627 of the Public Resources Code:


"...an error of fact or law has occurred which has the potential of altering the initial decision."

Applicant also reserves the right to supplement this request for reconsideration. Applicant specifically bases its request for reconsideration on the transcript of the December 10, 1998 and incorporates by reference all oral and written testimony, and exhibits presented at the hearing and the entire administrative record.

Thank you for your anticipated courtesy.

Sincerely,

WEST VILLAGE, INC.


Anne Fletcher
Corporate Counsel

