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Staff:	T. S. Tauber
Staff Report:	December 17, 1999
Hearing Date:	January 14, 2000
Commission Action:	

STAFF REPORT: Permit Amendment**APPLICATION NO.: 1-95-054-A2****APPLICANT: DONNA FEINER****PROJECT LOCATION:** 3451 "E" Road, off Albion Ridge Road, Albion, Mendocino County, (APN 123-080-31)**DESCRIPTION OF PROJECT
PREVIOUSLY APPROVED:**

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

**DESCRIPTION OF PREVIOUSLY
APPROVED AMENDMENT:**

(1-95-054-A) Substituted a requirement for recordation of a deed restriction for the original requirement for recordation of the original permit to meet the recording requirements of the County Recorder's Office and changed the conditions to allow for the curtain drain to be installed, functioning, and removed within a different three-year period than the three-year period provided for in the original permit to adjust for delays in getting started on the project.

DESCRIPTION OF
CURRENT AMENDMENT
REQUEST:

Authorize installation of a 1,380 square-foot, one-story manufactured home, construction of a 675 square-foot detached garage, installation of a water tank and a Wisconsin mound septic system, construction of a driveway and fence, conversion of a test well to a production well, and retention of a previously approved curtain drain.

SUBSTANTIVE FILE
DOCUMENTS:

Mendocino County LCP; Coastal Permits 1-93-38 (Burdick), 1-91-75 and 1-95-10 (Feiner, Kefauver, and Cirino), Lucas v. South Carolina Coastal Council (1992) 505 U.S., 112 S.Ct. 2886; Sierra Club v. California Coastal Comm. (1993) 12 Cal.App.4th 602; Reconsideration of findings regarding Mendocino County Land Use Plan.

SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission approve, with conditions, the requested amendment to the coastal development permit originally granted for the installation of a curtain drain to test the suitability of the site for potential future development. The conditions of the original permit included a condition that the applicant either remove the curtain drain and restore the site within a three-year time period if the drain is ineffective or to construct a residence and septic system that will rely on the curtain drain. The proposed amendment would allow the installation of a 1,380-square-foot, one-story manufactured home, a 675-square-foot detached garage, pump house and water tank, Wisconsin mound septic system, driveway, fence, conversion of a previously approved test well to a production well, and authorization to retain the previously approved curtain drain. Staff believes that, as conditioned, the development with the proposed amendment is consistent with the Coastal Act even though it will result in significant adverse impacts to coastal resources such as pygmy vegetation and other environmentally sensitive habitat.

A botanical survey of the subject site has determined that pygmy vegetation, a rare and valuable resource, and three rare and endangered plant species occur throughout the entire parcel. Because rare and endangered plant species and pygmy forest vegetation exist throughout the entire parcel, the policies of Section 30240 of the Coastal Act apply to the entire parcel. Section 30240(a) requires that "Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Application of Section 30240, by itself, could require denial of the project, because the project would result in significant disruption of habitat values and is not a use dependent on those sensitive habitat resources. However, the Commission must also consider Section 30010, and the United States Supreme Court decision in Lucas v. South Carolina Coastal Council (1992) 505 U.S., 112 S.Ct. 2886 and other relevant cases on takings law.

Section 30010 provides that the Coastal Act shall not be construed as authorizing the Commission to exercise its power to grant or deny a permit in a manner which will take private property for public use. Under the Lucas decision, where a permit applicant has demonstrated that he or she has a sufficient real property interest in the property which would allow the proposed project and that project denial would deprive his or her property of all economically viable use, then denial of the project by a regulatory agency might result in a taking of the property for public use unless the proposed project would constitute a nuisance under State law. The permit applicant also must demonstrate that project denial would interfere with reasonable investment-backed expectations.

While applicants are entitled under Section 30010 to an economically viable use of their property, this section does not authorize the Commission to avoid application of the policies of the Coastal Act, including Section 30240. Instead, the Commission is only directed to avoid construing these policies in a way that would take property. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the Act. Thus, the Commission may deny a specific development proposal, while indicating that a more modest alternative proposal be approved, and thus assure the property owner of some economically viable use.

The approved project will have the least amount of disturbance to pygmy vegetation while allowing the applicant an economically viable use of her property. The approved project is similar to the Burdick project (1-93-38) which was before the Commission in September of 1994 and is the most recent coastal development permit granted by the Commission for residential development in a pygmy forest area. As approved, the development will be configured to limit the amount of disturbance to the pygmy vegetation, confined to the far eastern edge of the property in a consolidated building envelope, leaving over 80% of the parcel undisturbed.

STAFF NOTE:

1. Commission Jurisdiction and Standard of Review

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

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

Commission's practice to treat all pygmy forest areas as ESHA, and the Coastal Act's ESHA policies need to be applied to determine if development within the pygmy forest is approvable.

2. Procedural Note

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

In this case, the amendment request before the Commission would not lessen or avoid the intent of the originally approved permit. The amendment request is consistent with the intent of the originally approved permit, which contemplated that an amendment request be submitted for development of a residence that utilizes the originally approved curtain drain if the drain was successful in making the site suitable for a septic system.

I. MOTION, STAFF RECOMMENDATION, AND RESOLUTION:

Motion:

I move that the Commission approve the proposed amendment to Coastal Development Permit No. 1-95-054 for the development as proposed by the applicant.

Staff Recommendation of Approval:

Staff recommends a YES vote. Passage of this motion will result in approval of the permit amendment and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution to Approve with Conditions:

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

II. Standard Conditions: See attached.

III. Special Conditions:

1. Deed Restriction

- A. This permit is only for the development described in Coastal Development Permit No. 1-95-054-A2. Pursuant to Title 14 California Code of Regulations section 13250(b)(6), the exemptions otherwise provided in Public Resources Code section 30610(a) shall not apply. Accordingly, any future improvements to the single family house authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources section 30610(d) and Title 14 California Code of Regulations sections 13252(a)-(b), shall require an amendment to Permit No. 1-95-054-A2 from the Commission and shall be confined to the building envelope identified in Special Conditions No. 1(b) and 2 below and generally shown in Exhibit No. 3 of the staff recommendation.
- B. The use of those portions of the parcel outside of the 5,520-square-foot building envelope and the 5,244-square-foot septic system envelope, in the locations generally shown on the site plan attached to the Commission's findings for Coastal Permit Application No. 1-95-054-A2 as Exhibit No. 3, shall be limited to natural open space for habitat protection and conservation uses. All development activity outside the designated building and septic system envelopes is prohibited, including the alteration of landforms, removal of vegetation, use of heavy machinery or equipment, or the erection of structures of any type, except for (1) the installation and maintenance of septic pipes, the conversion of the existing test well to a production well and associated well pipes, drainage facilities, and portions of the driveway approved pursuant to Special Condition No. 2; (2) any vegetation clearance required by the California Department of Forestry and Fire Protection (CDF) to meet fire safety standards; (3) the removal of unpermitted debris or of unauthorized structures; and (4) ancillary garden uses that do not require additional vegetation clearance such as stacking firewood, placement of lawn furniture and stepping stones, planting a garden, etc., but only within those portions of the deed restricted area outside the development envelopes where vegetation clearance is required by CDF. Development permitted outside the building and septic system envelopes is also subject to coastal permit requirements.
- C. PRIOR TO ISSUANCE of the coastal development permit, the applicant shall execute and record a deed restriction, in a form and content acceptable to the Executive Director, reflecting all of the above restrictions on development of the parcel. The deed restriction shall include legal descriptions of both the applicant's entire parcel and the designated development envelopes identified in Special Conditions 1(b) and 2 below. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to this coastal development permit.

2. Final Site, Building, and Drainage Plans

PRIOR TO ISSUANCE of the Coastal Development Permit, the applicants shall submit for the Executive Director's review and approval final site, building, and drainage plans that incorporate the following specifications:

- a. A main residence, detached garage, well, septic system, pump house, water tank and driveway are permitted. No other structures or improvements are permitted on the subject parcel.
- b. The main residence shall have no more than two bedrooms and the combined building footprint of the residence and detached garage shall be no greater than 2,055 square feet.
- c. The residence and detached garage shall be located within the designated 5,520-square-foot building envelope required by Special Condition No. 1 and as generally shown in Exhibit No. 3 of the staff recommendation. The primary septic system and the replacement field shall be located in the 5,244-square-foot septic system envelope required by Special Condition No. 1 and shall be a minimum of 100 feet from the existing well.
- d. The driveway shall be the minimum length and width, allowing for any necessary turnarounds, as required by the County and by the California Department of Forestry and Fire Protection, and shall be located, as much as possible, within the existing cleared area.
- e. Runoff from roof downspouts and other drainage from the site shall be dispersed and diffused on the ground rather than concentrated in one location.
- f. All final plans shall conform to the provisions of the Mendocino County Coastal Zoning Ordinance.

Development shall only occur consistent with the final plans reviewed and approved by the Executive Director.

IV. Findings and Declarations

The Commission finds and declares the following:

1. SITE & PROJECT DESCRIPTION

A. Site Description

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

According to the botanist who surveyed the parcel, the subject parcel is almost entirely covered by pygmy vegetation and contains a large number of specimens of three sensitive plant species, two of which are rare and endangered, and one of which is very rare, according to the California Native

Plant Society--Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge).

No views to or along the coast are afforded through the parcel, and the site is not visible from either Highway One, "E" road, or Albion Ridge Road. The vacant parcel is designated in the Mendocino County Land Use Plan as Rural Residential-10 (RR-10), meaning that there may be one parcel for every ten acres, and that the site is intended for residential use. The subject parcel, which is approximately 1.6 acres in size, is a legal, non-conforming lot. The Commission approved Coastal Development Permit Nos. 1-91-75 in 1991 and 1-95-10 in 1995 for a lot line adjustment following boundary line disputes between the applicant and adjacent owners, which resulted in a slightly decreased size of the subject lot to its current 1.6 acres. In approving each lot line adjustment permit, the Commission found that there was no alternative lot configuration that avoided establishing a building site within the pygmy forest area. The applicant does not own any of the parcels adjacent to the subject site.

B. Project Description

On January 11, 1996, the Commission authorized installation of a curtain drain and outlet pipe on the subject property to lower the groundwater table for the purpose of determining whether the parcel can adequately support a septic system to serve possible future residential development on the site. In approving the original permit, the Commission found that the entire parcel is an environmentally sensitive habitat area (ESHA) pursuant to Coastal Act Section 30107.5 due to the presence on the parcel of both true pygmy forest and large numbers of these rare and endangered plants (see Finding 3, pages 6 and 7 of the original staff recommendation attached as Exhibit No. 4).

The Commission found that the proposed curtain drain could be approved within an environmentally sensitive habitat area consistent with Section 30240 of the Coastal Act because the installation of a curtain drain did not constitute a change in use of the property and as conditioned, the project's impacts on environmentally sensitive habitat would be reduced to a level of insignificance.

The applicant has submitted the subject amendment pursuant to Special Condition No.2 of permit 1-95-054-A which states:

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

Mendocino County Department of Environmental Health determined that the curtain drain effectively lowers the groundwater table and therefore, the parcel is adequate to support a septic system. As a result, the applicant seeks a permit amendment for authorization of residential development on the site.

The proposed development includes installation of a 1,380-square-foot, one-story manufactured home, construction of a 675-square-foot detached garage, installation of a water tank and a Wisconsin mound septic system, construction of a driveway and fence, conversion of the existing test well to a production well, and authorization to retain the previously permitted curtain drain. The proposed development will be configured to limit the amount of disturbance to the pygmy vegetation as much as possible while maintaining mandatory setbacks. The residence, garage, water tank, and pump house are proposed to be located on the far eastern edge of the property in a consolidated, building envelope measuring 5,520-square-feet. The septic envelope includes a primary and secondary mound area behind the curtain drain and measures 5,244-square-feet. The total development envelope is 10,764-square-feet, which is approximately 15% of the 69,696-square-foot parcel (1.6 acres). Therefore, approximately 85%, or 58,932-square-feet, of the parcel will remain undisturbed.

2. Locating and Planning New Development:

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

The proposed development includes a 1,380-square-foot, one-story residence, detached garage, pump house and water tank, Wisconsin mound septic system, driveway and fence on a 1.6 acre parcel located east of the village of Albion in a developed residential area of the coast. The applicant has received approval from the Mendocino County Department of Environmental Health for the Wisconsin mound septic system and the residence would be served by an existing test well (1-90-289-W) that will be converted to a production well as authorized by the proposed amendment. The proposed development, therefore, is consistent with Coastal Act Section 30250(a) to the extent that it is located in a developed area and has adequate water and septic capability.

3. Protection of Environmentally Sensitive Habitat Consistent With Section 30010 of the Coastal Act:

Section 30107.5 of the Coastal Act defines "environmentally sensitive habitat area" as:

any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Section 30240 of the Coastal Act states in part that:

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

Coastal Act Section 30010 states that:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

A botanical survey performed on the subject parcel indicates that true pygmy forest exists throughout the entire parcel. In addition to the presence of both pygmy soil and pygmy vegetation, the botanical survey also states that the entire site is vegetated with three rare and endangered plant species: Pinus contorta bolanderi (Bolander's beach pine), Cupressus pigmaea (pygmy cypress), and Carex californica (California sedge). These rare and endangered plant species grow in what are considered environmentally sensitive areas because they are rare and valuable habitats that are easily disturbed or degraded by human activities.

Pygmy forests are a unique resource in California. There are several small forested areas known as pygmy forests in Mendocino County between Fort Bragg and the Navarro River. These forests contain unusually dwarfed trees and shrubs that grow very slowly, typically reaching heights of only a few feet due to the extremely hard, acidic, nutrient-poor soils that stunt the growth of the mature trees. In Mendocino County, true pygmy forest occurs on Aborigine and Blacklock soils. True pygmy forests are valuable to scientists because they are probably the best example of a living community in balance with its ecosystem. According to Mendocino County, pygmy forest vegetation covers about 1,050 acres in the coastal zone, including areas in public ownership at Jug Handle State Reserve and Van Damme State Park. There are numerous residentially designated parcels in the coastal zone containing at least some pygmy vegetation, including thirteen parcels comprising approximately 24 acres that are entirely covered with true pygmy forest.

As stated above, a California Court of Appeal in Sierra Club v. California Coastal Commission (1993) 12 Cal. App. 4th 602, determined that the Mendocino County LCP as certified by the Coastal Commission inadequately addressed the issue of whether the pygmy forest constituted ESHA, and that the Commission must reconsider this issue. Coastal Act Section 30107.5 defines an environmentally sensitive area as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

For purposes of this project, the Commission is considering the subject parcel, which contains both pygmy soils and true pygmy vegetation, to be ESHA because the presence of both pygmy soil and pygmy vegetation throughout the entire parcel indicate that the entire parcel contains true pygmy forest. The Commission finds that true pygmy forest constitutes an ESHA because the pygmy soils

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

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

Section 30240 requires that "environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." As the entire parcel constitutes an environmentally sensitive habitat area, Section 30240 restricts development on the parcel to only those uses that are dependent on the resource. The applicant proposes to install a 1,380-sq.-ft. one-story, manufactured single family residence, construct a 675-sq.-ft. detached garage, septic and water system, driveway, and fence, convert a previously approve test well to a production well, and permanently retain a previously approved curtain drain. As single-family residences do not have to be located within ESHA's to function, the Commission does not consider single-family residences to be a use dependent on ESHA resources. Application of Section 30240, by itself, would require denial of the project, because the project would result in significant disruption of habitat values and is not a use dependent on those sensitive habitat resources. However, the Commission must also consider Section 30010, and the recent United States Supreme Court decision in Lucas v. South Carolina Coastal Council (1992) 505 U.S., 112 S.Ct. 2886.

Section 30010 of the Coastal Act provides that the Coastal Act shall not be construed as authorizing the Commission to exercise its power to grant or deny a permit in a manner which will take private property for public use. Application of Section 30010 may overcome the presumption of denial in some instances. The subject of what government action results in a "taking" was addressed by the U.S. Supreme Court in Lucas v. South Carolina Coastal Council (1992). In Lucas, the Court identified several factors that should be considered in determining whether a proposed government action would result in a taking. For instance, the Court held that where a permit applicant has demonstrated that he or she has a sufficient real property interest in the property to allow the proposed project, and that project denial would deprive his or her property of all economically viable use, then denial of the project by a regulatory agency might result in a taking of the property for public use unless the proposed project would constitute a nuisance under State law. Another

factor that should be considered is the extent to which a project denial would interfere with reasonable investment-backed expectations.

The Commission interprets Section 30010, together with the Lucas decision, to mean that if an applicant demonstrates that Commission denial of the project would deprive his or her property of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act policy would otherwise prohibit it, unless the proposed project would constitute a nuisance under state law. In other words, Section 30240 of the Coastal Act cannot be read to deny all economically beneficial or productive use of land because Section 30240 cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property owner of some economically viable use.

In the subject case, the applicant purchased the parcel in January, 1991 for \$40,000. The parcel was designated in the County's certified LUP in 1985 for residential use. Residential development has previously been approved by the Commission on other nearby parcels within pygmy forest areas. Furthermore, the County's LUP policies, which permitted development within pygmy forest areas provided the impacts were minimized and there were no feasible alternatives, were still considered valid at the time the applicant purchased the parcel, as the court had not yet ruled on the Sierra Club case and directed the Commission to reconsider the LUP pygmy policies. As a result, the applicant had reason to believe that she had purchased a parcel upon which she would be able to build a residence. The Commission's subsequent approval of Coastal Development Permit Nos. 1-91-75 and 1-95-10 (Feiner, Kefauver, and Cirino) for lot line adjustments affecting the size and configuration of the parcel may have further reinforced the applicant's belief that she would later be able to obtain a coastal development permit to build a residence on the site.

The Commission finds that in this particular case, other allowable uses for the subject site, such as a recreational park or a nature preserve, are not feasible and would not provide the owner an economic return on her investment. Commission staff consulted with Gary Shannon and Associate Resource Ecologist, Renee Pasquinelli with California State Parks and confirmed that the agency does not have an interest in purchasing the parcel, as it is too small and isolated to be of value as a habitat preserve, and is surrounded by residentially developed parcels. In addition, it is within a few miles of several large state parks that contain and preserve pygmy habitat (Van Damme State Park, Jug Handle State Ecological Reserve, Russian Gulch State Park), so there is no impetus for the agency to purchase the lot for habitat preservation. Furthermore, the applicant attests that no other public agency has indicated any interest in purchasing the property.

Similar circumstances surrounded the Burdick project (1-93-38) when the Commission considered the project in 1994. The Commission granted Burdick a coastal development permit to construct a single family residence within a pygmy forest area, but limited the size and configuration of the development to minimize impacts to the pygmy vegetation.

The Commission thus concludes that in this particular case there is no other viable alternative use for the site other than residential development. Therefore, the Commission finds, pursuant to Section 30010 of the Coastal Act and the Lucas decision, that it must approve some residential

development on the subject parcel to assure the applicant of some economically viable use of her property. The Commission therefore finds that a residential project, which includes a fairly modest-sized house, detached garage, driveway, fence, and septic system, can be allowed to permit the applicant a reasonable use of her property.

At the time that the Burdick project was considered by the Commission in September of 1994, the Mendocino County staff reviewed its building permits to determine the average size of houses approved. The report determined that the average size of houses approved in this area is approximately 1,700 square feet, and the average size of a combined garage/storage structure is approximately 700 square feet. The Commission granted a coastal development permit to Burdick in 1994 to allow construction of a 1,888-sq.-ft. residence, a 528-sq.-ft. attached garage, and a 48-sq.-ft. storage shed. The proposed residence is 1,380-sq.-ft., and the proposed attached garage is 675-sq.-ft. Therefore, the Commission finds that because the proposed house and garage are within the range of existing residences, and within the range of the Commission's previous approval of residential development in a pygmy area, the proposed residential development will provide the property owner with an economically viable use.

While applicants are entitled under Section 30010 to an economically viable use of their property, this section does not authorize the Commission to avoid application of the policies of the Coastal Act, including Section 30240, altogether. Instead, the Commission is only directed to avoid construing these policies in a way that would take property. Aside from this instruction, the Commission is still otherwise directed to enforce the requirements of the Act. Therefore, in this situation the Commission must still comply with Section 30240 by protecting the sensitive pygmy vegetation on the remainder of the applicants' property, and avoiding impacts that would degrade the pygmy habitat, to the extent this can be done without taking the property. With regard to the extent of development proposed, the Commission does not find it necessary to reduce the size of the proposed structures. Given the size of the 1.6 acre parcel and the 1,380-square-foot house and 675-square-foot garage, water tank, septic tanks, and pump house, the proposed development will result in a building envelope measuring 5,520-square-feet, and a septic envelope measuring 5,244-square-feet, leaving approximately 85% of the lot undisturbed.

However, to minimize and mitigate to the greatest extent feasible the adverse impacts to the ESHA, the Commission finds it is necessary to restrict those portions of the property on which development can take place in the following manner:

To minimize the removal of the pygmy vegetation and the disturbance of the pygmy soils, and also to protect the rare and endangered plant species, the Commission attaches Special Condition No. 2, requiring all development to be limited to a building envelope that is the minimum size necessary to accommodate the proposed house and garage, and a septic system envelope that is the minimum size necessary to accommodate the primary Wisconsin mound septic system and the replacement mound.

The designated building envelope will accommodate all proposed development. The development envelopes have been located where they will have minimum impacts on the pygmy forest, while still being consistent with CDF regulations, which require a 30-foot property boundary setback, and

County Environmental Health regulations, which require a 100-foot separation between wells and Wisconsin mound systems.

Commission staff requested the applicant submit an analysis of alternative proposals for residential development on the subject parcel that would minimize adverse impacts to the pygmy habitat. Due to required setbacks and the location of the existing well, the project as proposed has the least impact to pygmy habitat. The curtain drain must be placed 100 feet upslope from the well, and the house must be located above the septic system for proper flow. As shown on the site plan in Exhibit No. 3, all of the proposed development would be clustered on the easterly half of the 1.6 acre parcel. Although the parcel is relatively level and uniformly covered with pygmy vegetation, the configuration of the proposed development has been located near previously disturbed portions of the site as much as possible to lessen impacts. Given the relatively small size of the property and the modest proposal for a single family home and detached garage, the Commission finds that the approved development plan minimizes the potential loss of pygmy habitat to the maximum extent practical while allowing for residential use of the parcel.

To further minimize clearance of sensitive habitat, the Commission attaches Special Condition No. 2(d), which requires that the proposed driveway be the minimum width necessary, pursuant to County and CDF regulations, and be located, as much as possible, within the cleared area of the parcel. The Commission will review final site plans, pursuant to Special Condition No. 2, to determine if the proposed driveway is located such that it minimizes impacts to the sensitive habitat.

Concentrated runoff from roof downspouts and other drainage from the proposed development could increase erosion and alter the hydrodynamics of the pygmy forest, adversely affecting the habitat. The Commission thus attaches Special Condition No. 2(e), requiring that drainage be diffused and dissipated over large areas to reduce impacts from runoff on the pygmy habitat. Such diffusion could be achieved by placing concrete energy-absorbing and water-dispersing structures under the downspouts.

To ensure that any future development within the prescribed building envelope will not be located where it will adversely affect the sensitive habitat, the Commission attaches Special Condition No. 1(a), requiring recordation of a deed restriction regarding future development. This condition requires that any future development within the prescribed building envelope, including any additions or other structures that might otherwise be exempt from coastal permits under the administrative regulations, will be reviewed by the Commission so that the Commission can ensure that the development within the building envelope will be located and designed in a manner that will not disrupt the habitat values of the sensitive area.

In addition, the Commission attaches Special Condition No. 1(b), establishing an open space deed restriction over portions of the property outside the building and septic system envelopes required in Special Conditions No. 1(b) and 2. Development outside these envelopes is restricted to the installation and repair of water well pipes, septic pipes and the driveway, vegetation clearance required by CDF, removal of debris or unauthorized structures, and ancillary garden uses. Such activities that are defined as development in Public Resources Code 30106 will require a coastal permit, as is the case with all development in the coastal zone. These restrictions will ensure that

the minimum amount of sensitive habitat is disturbed and that the use of the deed restricted area is limited to natural open space for habitat protection and conservation uses.

It is not the Commission's intention that the deed restricted area provide public entry or public use of any kind. The deed restricted area will remain in the applicant's ownership. Rather, the Commission is requiring the deed restricted area solely to protect the existing sensitive habitat from significant adverse impacts resulting from the applicants' development, and is thus restricting development on that portion of the property subject to the open space deed restriction. The Commission finds that a reasonable development can be achieved consistent with the direction of Section 30240 by adoption of a condition (Special Condition No. 1) that limits site impacts by, among other means, prohibiting uses outside the development envelopes that are inconsistent with habitat protection and conservation.

With Special Condition No. 1, the Commission ensures that any future development that might otherwise not require a coastal permit will not take place in the environmentally sensitive habitat area, and also that any future buyers of the property are made aware of the development restrictions on the site because the deed restriction will run with the land in perpetuity.

In conclusion, the Commission finds that the special conditions attached to the permit will minimize the disturbance of the ESHA and will thus minimize adverse impacts to the sensitive habitat while providing for a reasonable use of the property that will avoid an unconstitutional taking of private property.

Adverse impacts resulting from development on the site have been minimized by the imposition of the conditions discussed above, but not eliminated. The Commission considered requiring off-site mitigation for the destruction of sensitive pygmy habitat. In this particular case, however, the Commission finds that there is no feasible off-site mitigation available at this time. Pygmy forest, unlike wetlands and other habitat, thrives only under a combination of very specific soil and topographic conditions, and such conditions cannot be reproduced randomly off-site. Restoration of existing degraded pygmy forest is an option for off-site mitigation, and Commission staff explored the possibility of the applicant contributing to such restoration efforts at one of the nearby State parks that contains degraded pygmy habitat. However, Commission staff consulted with Associate Resource Ecologist, Renee Pasquinelli of California State Parks, and determined that at this time, no program exists whereby in-lieu fees from a permit applicant could be applied to pygmy forest restoration. Although the State Parks does engage in occasional restoration of pygmy vegetation at the Parks, it is not feasible for the agency to accept in-lieu fees for the purpose of pygmy restoration. The Commission therefore, is not requiring such off-site mitigation for the proposed project. The Commission notes, however, that if at some future time such a restoration program is in place, other development on pygmy parcels might be approved subject to requirements for in-lieu fees to be used for off-site mitigation. Burdick (1-93-38) is the only other project similar to the applicant's project that has been considered since the court ruling on the adequacy of the LUP policies on pygmy forest.

The Commission further notes that, although the proposed project will have individually adverse impacts on pygmy forest habitat, the project will not result in significant cumulative adverse impacts on pygmy forest habitat. According to the County, there are approximately 1,050 acres of

pygmy forest located within the Mendocino County coastal zone, much of which is already protected within State parks. Although quite a number of residentially developed parcels in the coastal zone contain some pygmy forest habitat, only thirteen residentially designated parcels contain true pygmy forest throughout the entire parcel, comprising approximately 24 acres. In addition, of these thirteen, only five are currently undeveloped. Furthermore, based upon existing land use designations, there is zero potential for the creation of new parcels within the pygmy forest areas.

Thus, only a few additional parcels may need to be allowed to develop in a manner that cannot avoid destroying some pygmy forest habitat. Moreover, the infill development of residential parcels containing pygmy forest habitat will not adversely affect the habitat by reducing the amount of habitat in some areas below some critical mass necessary to maintain the viability of the habitat. Unlike most ESHAs, the principal value of the pygmy forest habitat derives from the vegetation itself, rather than the wildlife that lives within the pygmy forest. Thus, maintaining a continuous corridor through the ESHA and ensuring that the ESHA does not drop down in size below some critical width is not particularly important; pygmy forest vegetation can remain viable even if its elements are interrupted. Therefore, the Commission finds that while it is approving development on a parcel that contains pygmy forest throughout the entire parcel, the viability of the pygmy forest habitat is not threatened by this development and the development will not result in significant cumulative adverse impacts on the overall habitat.

4. Mendocino County LCP:

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

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

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

As described herein, the special conditions attached to the permit minimize the adverse impacts to ESHA while providing for a reasonable economic use of the property consistent with Section 30010

of the Coastal Act. Therefore, the Commission finds that approval of the proposed amendment, as conditioned, will not prejudice the ability of the County to prepare a Local Coastal Program for the pygmy forest consistent with the Coastal Act.

5. CEQA:

Section 13096 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(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 that the activity may have on the environment. The proposed project has been conditioned in order to be found consistent with the Coastal Act. Mitigation measures have been attached.

To protect the three rare and endangered plant species that occur on the subject parcel, and to minimize the removal of pygmy vegetation, the Commission attaches Special Condition No. 2, requiring that all development on the subject parcel be limited to the building and septic system envelopes that allow for the minimum amount of pygmy disturbance on the parcel. The Commission also prohibits the construction of additional structures outside the designated building envelopes.

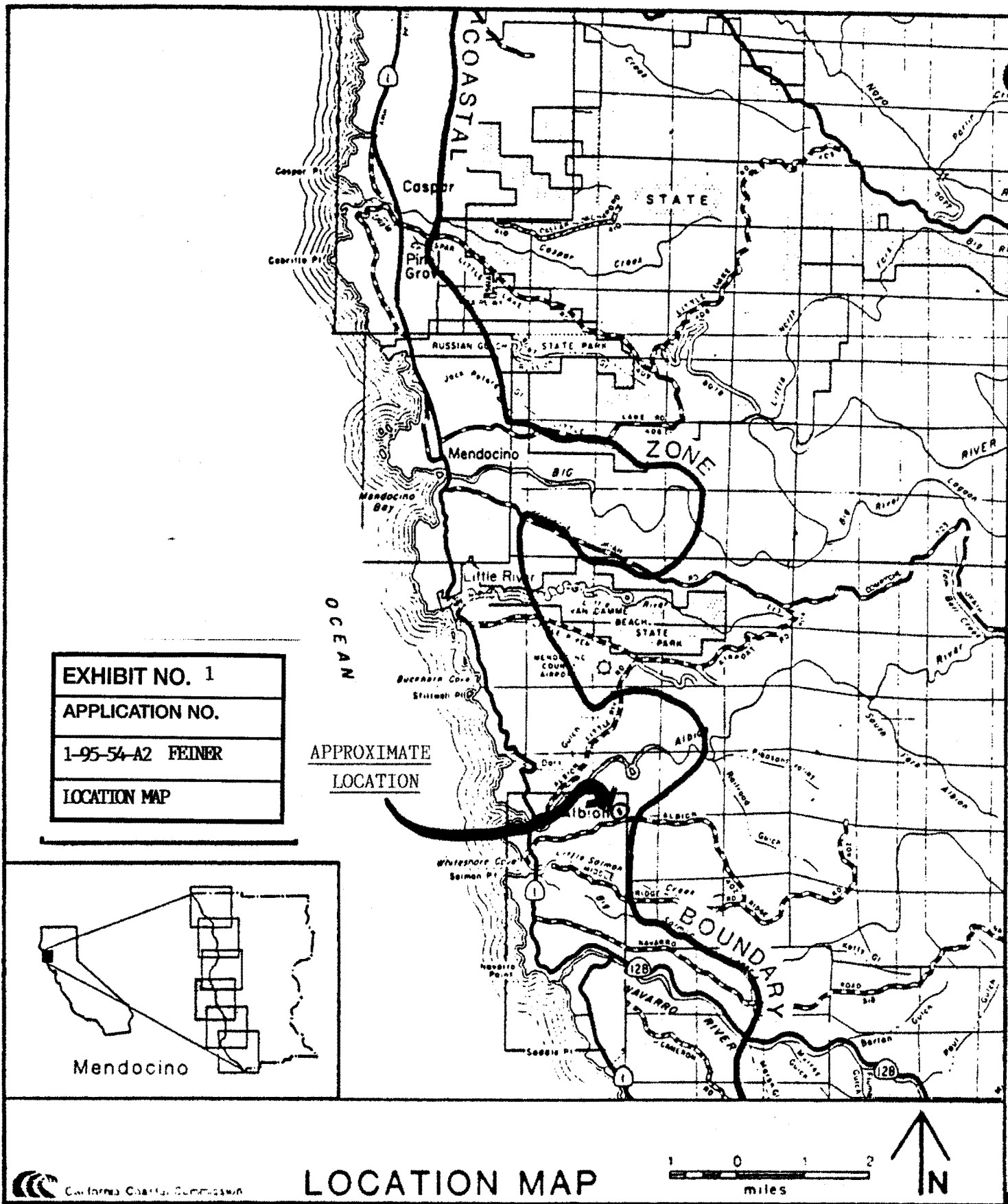
In addition, the Commission attaches Special Condition No. 1, requiring establishment of an open space deed restriction over all portions of the property outside the building and septic envelopes, restricting all development therein, except for the installation and maintenance of septic pipes, well pipes, and necessary portions of the driveway, vegetation clearance required by the California Department of Forestry and Fire Protection, the removal of unauthorized debris or structures, and the establishment of ancillary garden uses. Furthermore, the Commission requires recordation of a deed restriction regarding future development to ensure Commission review of any future development within the development envelopes on the subject parcel. This requirement will ensure that no future development will be located where it will have significant adverse impacts on the sensitive habitat area.

As conditioned, there are no other feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impacts which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, can be found consistent with the requirements of the Coastal Act to conform to CEQA.

ATTACHMENT A

Standard Conditions

1. Notice of Receipt and Acknowledgment. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.



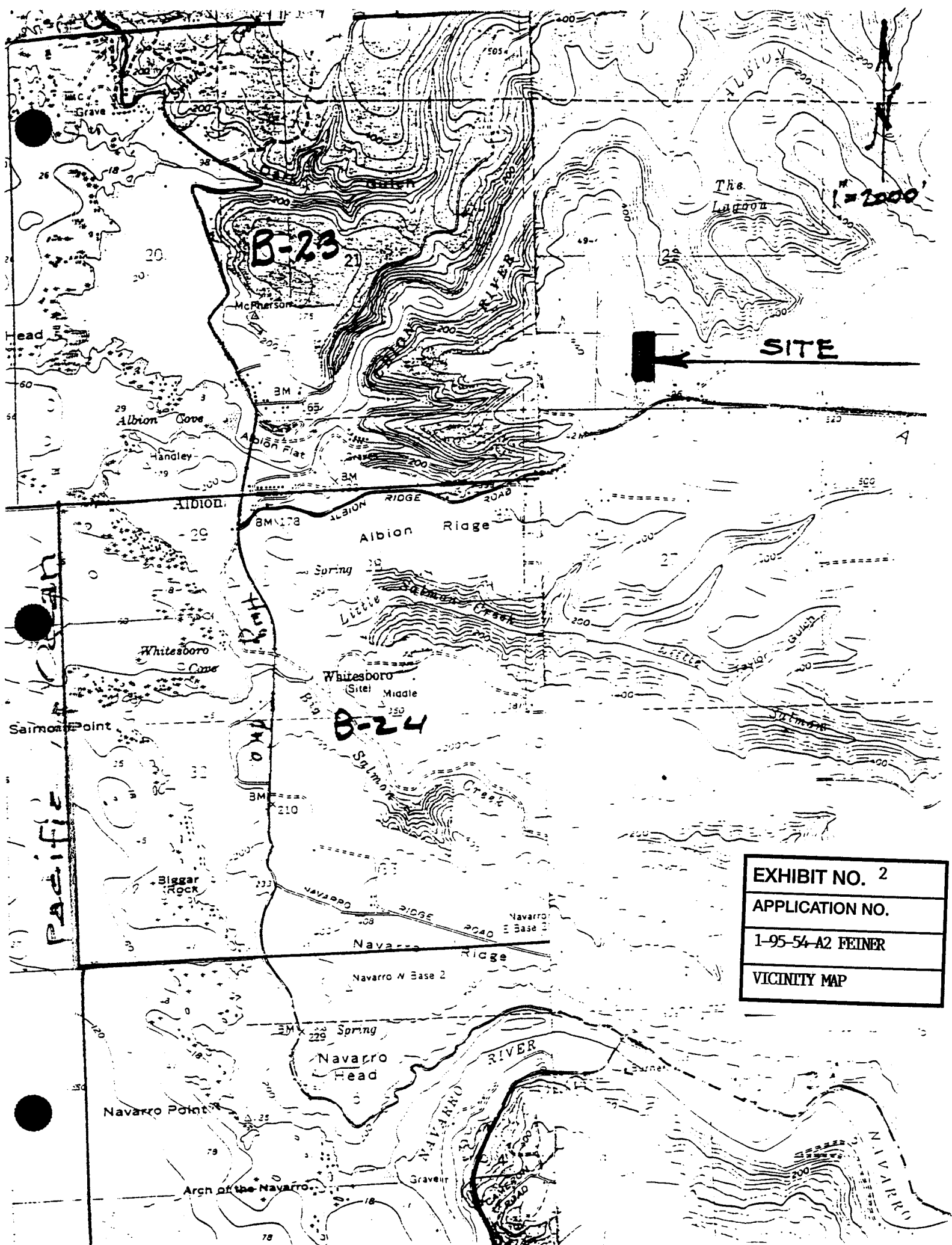


EXHIBIT NO. 2
APPLICATION NO.
1-95-54-A2 FEINER
VICINITY MAP

TOPOGRAPHIC MAP

of a portion of the lands of Alameda County being a portion of the
of the S 1/4 of Section 34, T 40 N, R 11 W, S 1/4 of Sec 34

Alameda County
Scale 1" = 40'

Sheet 1 of 2

Map prepared by Dunna and Feiner, P.E. 1999

Total parcel area = 1.6 acres
= 69,696 sq.ft.

Building Envelope = 5,520 sq.ft.
Septic Envelope = 5,244 sq.ft.

Total Development
Envelope = 10,764 sq.ft.

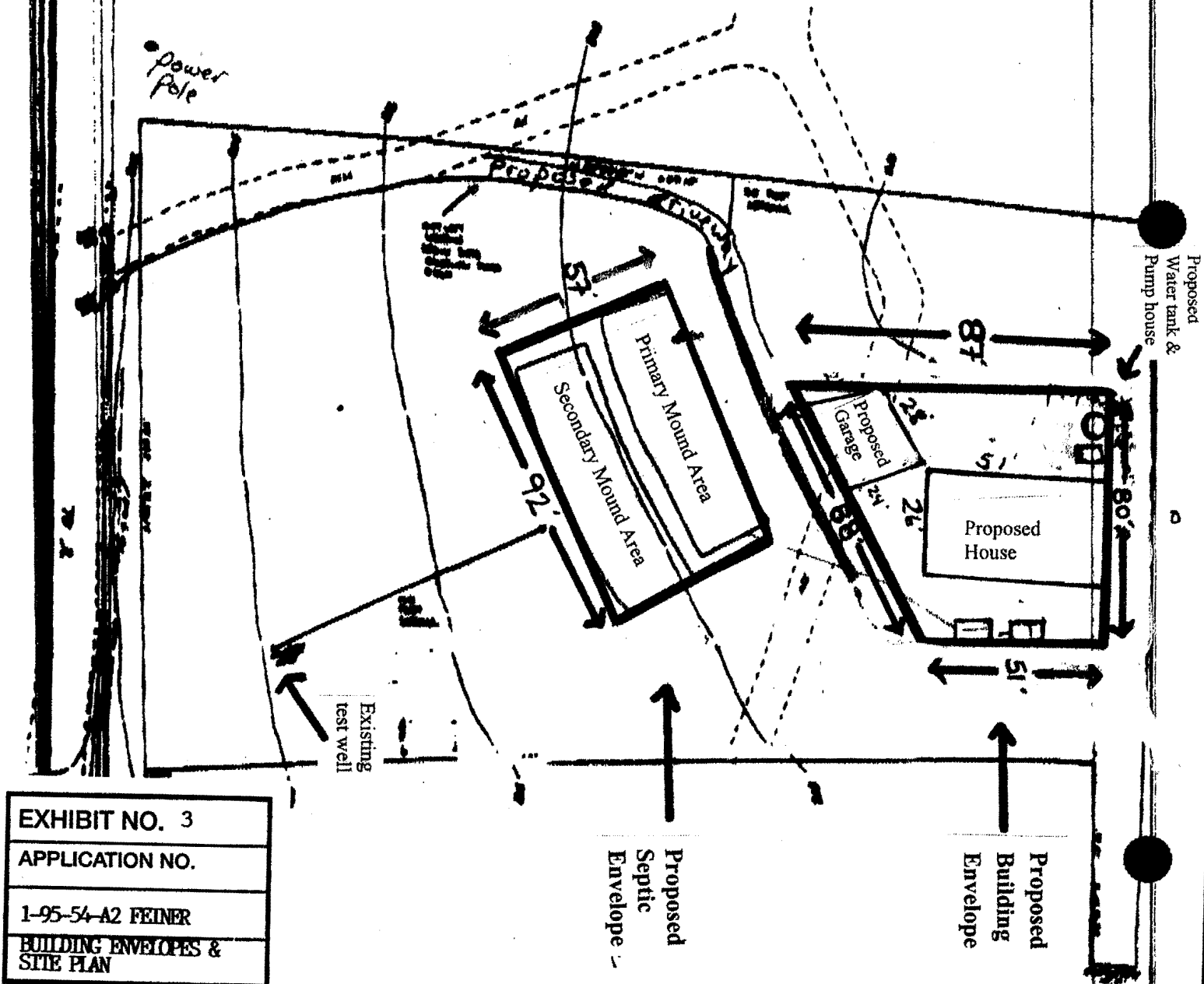


EXHIBIT NO. 3

APPLICATION NO.

1-95-54-A2 FEINER

BUILDING ENVELOPES &
SITE PLAN

CALIFORNIA COASTAL COMMISSION

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

Th 16b

**EXHIBIT NO. 4****APPLICATION NO.**

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

STAFF REPORT: REGULAR CALENDAR

APPLICATION NO.: 1-95-54

APPLICANTS: DONNA FEINER

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

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

Lot area:	1.61 acres
Plan designation:	Rural Residential-10 (RR-10)

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

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

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

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all pygmy forest areas as an Environmentally Sensitive Habitat Area (ESHA) was not supported by substantial evidence in light of the whole record, and ordered the Commission to set aside its findings regarding pygmy forests and to set aside that part of the County LCP. The County of Mendocino petitioned the State Supreme Court to accept an appeal of the court of appeals' decision, but the appeal was not accepted by the Supreme Court.

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

SUMMARY OF STAFF RECOMMENDATION:

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

STAFF RECOMMENDATION:

The staff recommends that the Commission adopt the following resolution:

I. Approval with Conditions

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

II. Standard Conditions: See attached.

III. Special Conditions:

1. Vegetation Removal Restrictions.

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

2. Future Review.

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

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

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

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

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EXHIBIT NO. 46
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3. County Environmental Health Evaluation.

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

4. Recordation of Permit.

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

IV. Findings and Declarations.

The Commission finds and declares the following:

1. Site and Project Description:

A. SITE DESCRIPTION.

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

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

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

B. PROJECT DESCRIPTION.

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

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

2. Locating and Planning New Development:

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

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

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3. Protection of Environmentally Sensitive Habitat:

Section 30107.5 of the Coastal Act defines "environmentally sensitive habitat area" as:

any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Section 30240 of the Coastal Act states in part that:

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

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

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

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

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area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

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

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

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

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

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

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

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

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

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

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

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

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

4. Mendocino County LCP:

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

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

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

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

5. CEQA:

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

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

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