

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
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W-17a**RECORD PACKET COPY****Prepared November 21, 2002****To:** Coastal Commissioners and Interested Parties**From:** Peter Douglas, Executive Director
Chris Kern, District Supervisor
Peter Imhof, Coastal Program Analyst

Subject: Commission Determination of Applicable Hearing and Notice Provisions (pursuant to California Code of Regulations, Title 14, Section 13569) for a coastal development permit approved by the City of Pacifica City Council for a 43-unit residential subdivision and development approved for the 4000 block of Palmetto Avenue, Pacifica (APNs 009-402-250 and -260). Commission determination of the applicable hearing and notice provisions for a coastal development permit approved, on appeal from the decision of the Planning Commission, by the City of Pacifica City Council for a 43-unit subdivision and residential development including roadway and infrastructure improvements.

1.0 Executive Summary

The City of Pacifica Local Coastal Program ("LCP") was certified on June 7, 1994. The City assumed primary authority over the issuance of Coastal Development Permits on June 10, 1994. After certification of a Local Coastal Program, the Coastal Commission is authorized under 14 CCR Section 13569 to resolve disputes concerning whether development approved by the local government is categorically excluded, non-appealable, or appealable.

On August 12, 2002, on appeal from the Pacifica Planning Commission, the Pacifica City Council approved CDP-203-01 for a 43-unit subdivision and residential development including roadway and infrastructure improvements. The Commission received a Notice of Final Local Action ("FLAN") from the City on August 21, 2002. The City's FLAN designated the project as non-appealable (**Exhibit 3**).² The City Council's findings of approval, incorporating the Planning Commission's findings, found the project generally consistent with the LCP, but did not make specific findings with respect to the existence of wetlands within 100 feet of the

¹ The Commission never received an Initial Notice from the City about the City's processing of the application for the approved development as required by Sections 13565 and 13568 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(g). Thus the Commission received no notice from the City of the City's determination with respect to the project's appealability prior to receipt of the City's Notice of Final Local Action.

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approved development or whether the City approval was appealable to the Commission. Based on information received by Commission staff in connection with its review of the environmental impact report ("EIR") for the project, the Executive Director concluded that wetlands as defined under both 14 CCR Section 13577 and the certified LCP exist within 100 feet of the approved development. The information indicating the presence of wetlands principally includes the conclusions and facts stated in the draft and final EIR's, the wetland delineations performed in connection with CEQA review of the project, and the data sheets recording direct field observations by the applicant's biological consultant in connection with the wetland delineations. These items are discussed in detail below. The applicant denied the staff's request for a site visit by the Commission biologist in advance of this hearing (**Exhibit 30**).

By letter dated August 23, 2002, Commission staff informed the City and the applicant that pursuant to 14 CCR Section 13569 the Executive Director had determined that the project was appealable and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and Pacifica Zoning Code Section 9-4.4304(n) and requested that the City issue an accurate FLAN correctly describing the procedures for appeal (**Exhibit 4**). The August 23, 2002 letter also informed the City and applicant that pursuant to Section 13572 and Pacifica Zoning Code Section 9-4.4304(l), the CDP approved by the City (CDP-203-01) would remain suspended and would not become effective until a corrected notice had been issued and the ten-day appeal period to the Commission had elapsed. On September 5, 2002, the Commission received an appeal of the City's decision by John Curtis. This appellant is separately interested in the issue of appellate jurisdiction and has questioned City staff's opinions about appealability at various stages of the City's proceedings. The City informed Commission staff of its disagreement with the Executive Director's determination and contested the applicability of Section 13569 by letter dated September 11, 2002. The applicant has also taken issue with the Executive Director's determination and the Commission's authority to resolve questions of project appealability pursuant to Section 13569. The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Commission Section 13569 proceeding invalid and the CDP approved by the City to be immediately effective (**Exhibit 30**). On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate.

Under Section 13569, when a local jurisdiction does not agree with the Executive Director's determination regarding the appropriate status of a particular proposal, i.e. appealable, non-appealable or categorically excluded, the Commission is required to hold a hearing and make the determination at the next meeting in the appropriate geographic region of the state following the Executive Director's determination. By letter dated September 17, 2002, Commission staff informed the City that the December Commission meeting in San Francisco would be the first opportunity for a Section 13569 hearing in the appropriate geographic region of the state (**Exhibit 9**).

2.0 Executive Director's Recommendation

The Executive Director recommends that the Commission adopt the attached findings and resolution determining that the development approved by the Pacifica City Council is within 100 feet of wetlands, as defined in Section 13577 of the Commission's regulations, and that the development approved by the City is therefore appealable to the Commission.

Motion. *I move that the Commission reject the Executive Director's determination that the development approved by Pacifica City Council under CDP-203-01 on August 12, 2002 is appealable to the Coastal Commission.*

Staff Recommendation. *Staff recommends a NO vote. Failure of this motion will result in: (1) the Commission upholding the Executive Director's determination that the action by the Pacifica City Council on August 12, 2002 approving CDP-203-01 is appealable to the Coastal Commission; and (2) the adoption of the following resolution and findings. The affirmative vote of a majority of the Commissioners present is necessary to pass the motion.*

Resolution. *The Commission, by adoption of the attached findings, determines consistent with Section 13569 of Title 14 of the California Code of Regulations, that the development approved by the Pacifica City Council under CDP-203-01 on August 12, 2002 is development appealable to the Commission.*

3.0 Recommended Findings and Declarations

The Commission finds and declares as follows:

3.1 Project Description

The project approved by the City consists of a subdivision and development of 43 residential units, including 19 single-family detached homes and 24 townhouses, an interior driveway and road network (including the improvement of the Edgemar Road right-of-way), necessary infrastructure and a private park/open space area on a total of 5.8 acres of land (the 4.2 acre bowl site plus approximately 1.6 acres of roadway construction and grading) at the 4000 block of Palmetto Avenue in Pacifica (APNs 009-402-250 and -260). **(Exhibit 3)** The project would involve in excess of 36,000 cubic yards each of cut and fill and substantial grading of the sloped site to create building pads. As part of the project, an existing 18-inch culvert draining to the ocean would be capped and buried and would not be incorporated into the new drainage system.

The approved project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. The project area is in the Fairmont West Neighborhood and is zoned as "high density residential," which allows a density of 16 to 25 dwelling units per acre, subject to site conditions. The site itself is a large, sloping, bowl-shaped site. The land to the west of the project area, between Palmetto Avenue and the shoreline, is presently undeveloped and consists of coastal scrub habitat.

In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. According to wetland studies of the site to date, several areas within 100 feet of the approved development are dominated by wetland vegetation and show evidence of other wetland indicators. In addition, these studies indicate the existence of a periodically inundated area characterized by the applicant's consultant as a drainage ditch along Edgemar Road and a small, excavated area south of Edgemar Road, within 100 feet of the approved development, which are dominated by wetland vegetation. Edgemar Road is presently in a state of disrepair and is partially overgrown with vegetation.

3.2 Project Background

In connection with CEQA review of the project, the City of Pacifica first issued a Notice of Preparation of an EIR on August 27, 2001. A draft EIR ("DEIR") was published in March 2002, and a final EIR ("FEIR") was issued in June 2002. Commission staff commented on both the Notice of Preparation by letter dated October 4, 2001 and on the DEIR by letter dated May 3, 2002 (**Exhibits 16 and 17**). The DEIR stated that a City CDP, if approved, would authorize development within 100 feet of wetlands and would be appealable to the Commission (DEIR, IV-B-13). Both Commission staff CEQA comment letters informed the City and the applicant of the staff's concerns about potential wetland impacts of the approved project.

According to the FLAN, CDP-203-01 was originally approved by the Pacifica Planning Commission on July 15, 2002. The Planning Commission approval of the CDP was subsequently upheld on appeal to the Pacifica City Council on August 12, 2002.

The Commission received the City's FLAN, dated August 19, 2002, on August 21, 2002, designating the project as non-appealable (**Exhibit 3**). The FLAN was the first notice provided to the Commission by the City of the City's coastal development permit review process and its designation of the development as non-appealable. The Commission did not receive from the City any initial notice of coastal development permit review or appeal designation as required by Commission regulation and City ordinance.

By letter dated August 23, 2002, Commission staff informed the City and the applicant that, pursuant to 14 CCR Section 13569, the Executive Director had determined that the development approved by the City was appealable to the Commission and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and the Pacifica Zoning Code Section 9-4.4304(n) and requested that the City re-notice the project as appealable (**Exhibit 4**). In the same letter, the Commission informed the City and the applicant that pursuant to Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(l), CDP-203-01 would remain suspended and would not become effective until a corrected notice had been issued and the appeal period to the Commission had run. On September 5, 2002, the Commission received an appeal of the City's action on the development from John Curtis. By letter dated September 11, 2002, the City informed Commission staff of its disagreement with the Executive Director's determination of appealability and the applicability of Section 13569. The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Commission's Section 13569 proceeding invalid and the CDP approved by the City to be immediately effective. On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate.

3.3 Authority for Commission Determination of Appeal Designation

The Commission's appellate jurisdiction over CDPs issued for development projects by local governments pursuant to the authority granted under a certified LCP is defined by Coastal Act Section 30603. Section 30603(a) provides, in part, that:

After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff. [Emphasis added.]

After the certification of an LCP, the Commission is authorized under 14 CCR Section 13569 (Determination of Applicable Notice and Hearing Procedures) to resolve disputes between local governments and the Executive Director concerning the determination of the appropriate designation for development approved by a local coastal development permit (i.e., whether it is categorically excluded, non-appealable, or appealable) when an applicant, interested person or local government questions the appropriate designation and the Executive Director's determination differs from that of the local government. The purpose of this regulation is to provide an administrative process for the resolution of disputes over the appeal status of development approved by a local coastal development permit. Section 13569 provides:

The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program. Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:

(a) The local government shall make its determination as to what type of development is being proposed (i.e. categorically excluded, appealable, non-appealable) and shall inform the applicant of the notice and hearing requirements for that particular development. The local determination may be made by any designated local government employee(s) or any local body as provided in local government procedures.

(b) If the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion;

(c) *The executive director shall, within two (2) working days of the local government request (or upon completion of a site inspection where such inspection is warranted), transmit his or her determination as to whether the development is categorically excluded, non-appealable or appealable:*

(d) *Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request.* [Emphasis added.]

The Coastal Act conveys to local governments with certified Local Coastal Programs the primary permitting authority over projects proposed within their jurisdiction in the Coastal Zone, but confers to the Commission appellate review authority over specified types of development. Under Section 13569, it is contemplated that a local government would make an initial determination of project appealability "at the time the application for development within the coastal zone is submitted." Under Sections 13565 and 13568 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(g), the City is required to provide Initial Notice to the Commission of coastal development permit review before the first public hearing, designating the project as appealable, non-appealable or categorically excluded.³ In this case, the Commission never received an initial hearing notice of the City's coastal development permit review process as required by these regulations. The first notice that the Commission received from the City of the City's determination of project appealability in the context of the City's CDP

³ § 13565. *Notice of Appealable Developments.*

Within ten (10) calendar days of accepting an application for an appealable coastal development permit (or local government equivalent) or at least seven (7) calendar days prior to the first public hearing on the development proposal, the local government shall provide notice by first class mail of pending application for appealable development. This notice shall be provided to . . . the Commission. . . .

§ 13568. *Notice of Non-Appealable Developments.*

(a) *Notice of developments within the coastal zone that require a public hearing under local ordinance, but which are not appealable pursuant to Public Resources Code Section 30603 (and which are not categorically excluded) shall be provided in accordance with existing local government notice requirements which shall provide at a minimum:*

Notice of developments shall be given at least ten (10) calendar days before a hearing in the following manner:

. . .
(5) *notice by first class mail to the Commission.*
. . .

Pacifica Zoning Code Section 9-4.4304(g). *Notice by mail.* *At least seven (7) calendar days prior to the first public Planning Commission hearing on a proposed coastal development permit, the Director shall provide notice by first-class mail of the pending coastal development permit application to: . . . (4) the California Coastal Commission . . .*

review process for the project was the FLAN.⁴ This FLAN which the Commission received from the City did not describe the procedures for appeal of the local decisions as required by Section 13571 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(n).

The Commission's regulations anticipate that there may be disagreements regarding whether a particular project comes within the Commission's appeal jurisdiction. The procedures outlined in Section 13569 recognize that an administrative dispute resolution process would be preferable to (and quicker) than litigation. The applicant or any interested person may challenge the local government's appeal designation under Section 13569 by requesting a determination from the Commission's Executive Director. As stated above, an interested person has appealed the City's action to the Commission and has questioned City staff's opinions about appealability at various stages of the City's proceedings. As also stated above, contrary to the City's current position, the DEIR stated that a City coastal development permit, if approved, would authorize development within 100 feet of wetlands and would be appealable to the Commission. If the Executive Director and the local government are in disagreement over the appropriate processing status, as is the situation here, the Commission is charged with making the final determination. Since, in this case, the Executive Director has made a determination of appealability with which the City differs, the matter has been scheduled for hearing by the Commission.

Where, as here, (1) a disagreement as to the appealability of development approved by a local government has arisen; (2) Commission hearing under Section 13569 is required to resolve the disagreement; (3) the City failed to provide the Commission with an initial hearing notice of its processing of the project as required by 14 CCR Section 13565 and Pacifica Zoning Code Section 9-4.4304(g); and (4) the FLAN did not describe the procedures for appeal of the local decision to the Commission as required by 14 CCR Section 13571(a) and Pacifica Zoning Code Section 9-4.4304(n), any CDP approved by the local government is suspended and cannot become effective under Section 13572 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(l), until either (1) the Commission determines that the project is not in fact appealable, or (2) a corrected notice has been issued and the appeal period to the Commission has run.

Section 13571(a) provides that:

(a) Notice After Final Local Decision. (This section shall not apply to categorically excluded developments.) Within seven (7) calendar days of a local government completing its review and meeting the requirements of Section 13570, the local government shall notify by first class mail the Commission and any persons who specifically requested notice of such action by submitting a self-addressed, stamped envelope to the local government (or, where required, who paid a reasonable fee to receive such notice) of its action. Such notice shall include conditions of approval and written findings and the procedures for appeal of the local decision to the Coastal Commission. [Emphasis added.]

⁴ The Initial Study and the DEIR prepared by the City originally stated that the project was in the Commission's appeal jurisdiction. The FEIR later disclaimed these earlier statements and expressly declined to make any assertion concerning Commission appellate jurisdiction in the context of CEQA review (FEIR I-4).

Section 13572 provides:

A local government's final decision on an application for an appealable development shall become effective after the ten (10) working day appeal period to the Commission has expired unless either of the following occur:

- (a) an appeal is filed in accordance with Section 13111;*
- (b) the notice of final local government action does not meet the requirements of Section 13571;*

When either of the circumstances in Section 13572(a) or (b) occur, the Commission shall, within five (5) calendar days of receiving notice of that circumstance, notify the local government and the applicant that the effective date of the local government action has been suspended. [Emphasis added.]

Pacifica Zoning Code Section 9-4.4304(1), similar to Section 13572, provides that CDPs for appealable development become effective only after the ten-working day appeal period has expired without appeal. These provisions make clear that a CDP for appealable development that is approved by local government action does not become effective until after the Commission receives a valid notice of final local action and the time period for appeals to the Commission has passed. Where the appealability of development approved by a local government is in dispute, the CDP cannot become effective before the outcome of the dispute resolution hearing. In the event that the Commission determines that the development approved by the local government is appealable to the Commission, Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(1)(2) require that the appeal period run before the permit can become effective. Commission staff notified the City and the applicant by letter dated August 23, 2002 that the permit approved by the City would remain suspended until after the Commission's resolution of the dispute and any appeal period had run (Exhibit 4).

3.4 Analysis of Appeal Jurisdiction and Project Appealability

The following analysis of the development approved by the City that is the subject of this dispute discusses available evidence of the presence of wetlands on or near the property and concludes that the approved development is appealable to the Commission because it is located within 100 feet of wetlands as that term is defined in Section 13577, the Commission regulation used to determine whether a development is appealable to the Commission pursuant to Section 30603 of the Coastal Act.⁵

In addition, the approved development would also involve work to Palmetto Avenue, including curb cuts at the entrance road from Palmetto Avenue into the approved subdivision. Section 13577(i) defines the "first public road paralleling the sea" as that road nearest to the sea which:

- (A) is lawfully open to uninterrupted public use and is suitable for such use;*
- (B) is publicly maintained;*

⁵ In so finding, the Commission notes that the Commission biologist was not able to visit the project site, since the applicant denied staff the right to access the site prior to the Commission hearing.

- (C) *is an improved, all-weather road open to motor vehicle traffic in at least one direction;*
- (D) *is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and*
- (E) *does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.*

When based on a road designated pursuant to this section, the precise boundary of the permit and appeal jurisdiction shall be located along the inland right-of-way of such road.

Since the approved development is located seaward of the inland right-of-way of the first public road, such development occurs between the sea and the first public road and constitutes a separate basis for appeal jurisdiction under Coastal Act Section 30603.

3.4.1 Wetland Definition for Purposes of Commission Appeal Jurisdiction

For purposes of determining appellate jurisdiction under Section 30603, Section 13577(a) of the Commission regulations defines "wetland" as follows:

- (1) *Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:*
 - (A) *the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
 - (B) *the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
 - (C) *in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.*

(2) *For the purposes of this section, the term "wetland" shall not include wetland habitat created by the presence of and associated with agricultural ponds and reservoirs where:*

(A) the pond or reservoir was in fact constructed by a farmer or rancher for agricultural purposes; and

(B) there is no evidence (e.g., aerial photographs, historical survey, etc.) showing that wetland habitat pre-dated the existence of the pond or reservoir. Areas with drained hydric soils that are no longer capable of supporting hydrophytes shall not be considered wetlands.

Coastal Act Section 30603(a)(2) and 14 CCR Section 13577 provide for appeals to the Commission of local actions approving development within 100 feet of the upland limit of any wetland meeting the definition of wetlands provided in Section 13577 of the Commission's regulations. Under this definition, an area qualifies as a wetland if the water table is at, near or above the land surface long enough to promote the formation of hydric soils or support the growth of hydrophytes. The Section 13577 wetland definition contains only one exception for man-made features, relating to "wetland habitat created by the presence of and associated with agricultural ponds and reservoirs" under certain conditions.

The definition of wetland used to determine whether a development is appealable to the Commission that is contained in Section 13577(a) of the Commission regulations is functionally identical to the definition of wetlands which is contained in the City's LCP and which is the standard of review for the Commission's review of the project on appeal pursuant to Coastal Act Section 30604. The LCP wetland definition contained in Zoning Code Section 9-4.4302(aw) also tracks the language of the Coastal Act Section 30121 definition of wetland (adding, however, the words "streams" and "creeks" to the Coastal Act definition wording):

"Wetland" shall mean land which may be covered periodically or permanently with shallow water, including saltwater marshes, freshwater marshes, streams, creeks, open or closed brackish water marshes, swamps, mudflats, and fens.

The LUP definition separately defines wetland as

land where the water table is the at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes. In certain types of wetlands vegetation is lacking and soils are poorly developed or absent. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.

The LCP wetland definition contained in Pacifica Zoning Code Section 9-4.4302(aw) is effectively the same as the Coastal Act Section 30121 definition of wetland, with the exception of the two, additional terms, "streams" and "creeks". The first sentence of the LUP definition similarly tracks the language of the Section 13577(a) wording. The balance of the LUP definition paraphrases Section 13577(a), clarifying how the special case of wetlands without either wetland vegetation or evidence of hydric soils can be identified. Since the LCP wetland definitions mirror the operative language of both Coastal Act Section 30121 and Section

13577(a), the scope of the wetland definition under the LCP is effectively identical to that contained in the Coastal Act and Commission regulations. More particularly, the broader Coastal Act and Pacifica Zoning Code definitions encompass and inform the definition contained in 14 CCR Section 13577(a) and the LUP. If the subject property contains wetlands that meet the standards of 14 CCR Section 13577(a), then the subject property also contains wetlands that meet the more general wetland definitions contained in both the Coastal Act and the certified LCP. In any event, as described further below, for purposes of determining whether the development approved by the City is appealable to Commission, the development approved by the City is appealable to the Commission and includes development within 100 feet of wetlands as defined according to all of the above-referenced definitions.

3.4.2 Evidence Concerning Wetlands

The following correspondence, studies and reports prepared in the course of the City's permit action and CEQA review have addressed the presence of wetlands on and near the project site:

- Thomas Reid Associates ("TRA") initial biological survey, dated April 1997 (**Exhibit 18**).
- Letter from Michael Josselyn, Wetland Research Associates ("WRA") to the Syndicor Real Estate Group, dated April 30, 1997 (**Exhibit 19**).
- WRA wetland delineation for the "Pacific Cove" Parcel, dated August 1999 (**Exhibit 20**).
- WRA revised jurisdictional wetlands map, dated November 30, 1999 (**Exhibit 21**).
- Letter from Thomas Fraser, WRA, to the City of Pacifica, dated December 27, 1999 (**Exhibit 22**).
- Army Corps letter to Tom Fraser, dated January 3, 2000 (**Exhibit 23**).
- Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000 (Peer review of the July 1999 WRA wetland delineation and the December 27, 1999 WRA LCP wetland delineation letter) (**Exhibit 24**).
- WRA wetland delineation for the "Edgemar Road Parcel," dated March 2000 (**Exhibit 25**).
- Army Corps letter to Tom Fraser, dated May 11, 2001 (**Exhibit 26**).
- Draft EIR, March 2002.
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated March 19, 2002 (**Exhibit 27**).
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated May 22, 2002 (**Exhibit 28**).
- FEIR, June 2002.

The January 24, 2000 Memorandum from Taylor Peterson of TRA to Allison Knapp refers to a third July 1999 wetland delineation prepared by WRA. A copy of this July 1999 WRA delineation, which may have been an earlier version of the August 1999 WRA delineation of the project site, has not been provided to the Commission. The applicant has refused to allow its wetland consultants to provide Commission staff with any documents and the City was unable to locate a copy of this delineation in its administrative record (**Exhibit 30**).

3.4.3 Site Review

As noted above, the applicant refused Commission staff access to the project site in advance of this dispute resolution hearing. As a result, the Commission biologist has not visited the site.

3.4.4 Discussion

Under the wetland definition stated in 14 CCR Section 13577(a)(1), the definition for purposes of determining Coastal Commission appeal jurisdiction, wetlands are defined as "land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes . . ." As this definition has consistently been applied by the Commission, the presence of any one of the three Army Corps wetland criteria, wetland hydrology, a predominance of wetland vegetation, or hydric soils, can be sufficient evidence to qualify an area as a wetland. For purposes of the Commission's appeal jurisdiction over development approved by local government jurisdictions under certified LCPs, any development located within 100 feet of an area meeting the definition in 14 CCR 13577 is appealable to the Commission.⁶

The standard practice for wetland field delineation is contained in the 1987 Corps of Engineers Wetlands Delineation Manual. Guidelines are provided for the field identification of hydrophytic vegetation, hydric soils, and wetland hydrology.

Wetland vegetation is a community characteristic based on the relative frequency of upland and wetland species among the dominant vegetation. A predominance of wetland plants is demonstrated when greater than 50 percent of the dominant species present are listed as FAC, FACW, or OBL in the U.S. Fish and Wildlife Service List of Plant Species That Occur in Wetlands, Region O – California. The estimated likelihood of occurring in wetlands is between 33% and 67% for FAC species, between 67% and 99% for FACW species, and > 99% for OBL species.

Hydric soils are soils that formed under conditions of saturation, flooding or ponding long enough during the growing season to develop anaerobic conditions in the upper part. The resultant physical and chemical conditions produce characteristic changes in the soil that can be detected in the field. Low chroma colors (due to the leaching and removal of ferrous iron) and redoximorphic features (analogous to rust concentrations) are the two most common field indicators of hydric soils. Flooding or pond for more than 7 consecutive days, the presence of a rotten egg smell, and the accumulation of organic matter also indicate hydric soils.

⁶ As discussed above, the Section 13577(a) wetland definition is effectively the same as the LUP wetland definition.

Wetland hydrology is demonstrated when field indicators of inundation or saturation are present. One "primary" or two "secondary indicators are required to demonstrate hydrology. The best indicator is the observation of standing water or soil saturation, which is indicated by the accumulation of water in a soil pit. Other "primary" indicators are watermarks, drift lines, indicative of inundation. Algal mats are considered to fall under the category "sediment deposits." Secondary indicators are the presence of oxidized rhizospheres (root channels) associated with living plant roots in the upper 12 inches of the soil, presence of waterstained leaves, local soil survey hydrology data for identified soils, and the FAC-neutral test of the vegetation. The FAC-neutral test is the determination of predominance of wetland indicator species after excluding all FAC plants.

Available information, including the initial TRA site survey, the WRA wetland delineations and the various WRA correspondence, the TRA peer review, and the evidence and conclusions presented in the EIR, indicates that at least two areas within 100 feet of the approved development exhibit the presence of all three wetland criteria: (1) the area associated with what the applicant's biologist refers to as the unmaintained "drainage ditch" along Edgemar Road and (2) the excavated area on the parcel south of Edgemar Road adjacent to the project site. In addition, two other areas on the project site appear to also qualify as wetlands: (1) what WRA's August 1999 delineation characterizes as "upland areas" dominated by arroyo willow that appear to carry winter surface flow and may contain a ponded area and (2) a wetlands area on the west side of the site.

The applicant has refused Commission staff's request to visit the project site. As a result, the Commission biologist has been unable to view any of the areas first-hand. Because the applicant has denied the Commission access to the project site, the Commission infers that evidence of Section 13577 wetlands may be present on the site because the applicant apparently believes a site visit would uncover evidence supporting the existence of wetlands. In the absence of available information, the Coastal Act requires the Commission to act in a manner mostly strongly protective of coastal resources.

As discussed below, WRA's conclusions that the areas associated with what WRA refers to as the unmaintained "drainage ditch" are not LCP wetlands are based on an apparent misunderstanding and/or misapplication of the provisions of 14 CCR Section 13577(a). The Section 13577(a) wetland definition contains only one exception for man-made features, specifically for "wetland habitat created by the presence of and associated with agricultural ponds and reservoirs" under certain conditions. The fact that certain areas exhibiting wetland criteria may be the result of man-made conditions is not otherwise relevant in applying this definition.

Each of these areas, the evidence showing them to be wetlands under 14 CCR Section 13577, and the applicant's contentions that they are not wetlands, are discussed in sequence below:

(1) Area South and Immediately Adjacent to Edgemar Road (Wetland Area 1)

The area that WRA refers to as a "drainage ditch" in its March 2000 delineation of the Edgemar Road Parcel qualifies as a wetland under 14 CCR Section 13577. The March 2000 WRA delineation found that all three wetland criteria were present in this area, but that the area was

exempt as a drainage ditch dug in uplands (**Exhibit 25**).⁸ The copy of the WRA March 2000 delineation provided to the Commission by the City is missing the wetland map on page 7 of the report. (The City has advised that it does not have a copy of the map.) However, based on the description of this area in the delineation and in WRA's March 19, 2002 letter to the City of Pacifica, this area lies within the public right-of-way on the eastern edge of the approximately 50-foot wide Edgemar Road, which straddles the boundary of the Bowl and Edgemar parcels, and is located less than 100 feet from the project site.

The March 2000 WRA delineation determined that "[a]ll three wetland criteria are present" in this area, based on field work performed on June 11, 1999, but that the area is exempt as a drainage ditch. WRA's March 19, 2002 letter states that other than a greater prevalence of invasive plants, "the site conditions have remained unchanged" since the date of WRA's earlier site observations in connection with the delineation.

Wetland hydrology

The applicable data sheet (Plot 2A) attached to WRA's March 2000 delineation records that "[h]ydrologic indicators [are] present" in this area, including the primary indicators of inundation and saturation of the upper 12 inches of soil (**Exhibit 25**).

WRA's March 19, 2002 letter to the City acknowledges that, although this area may be man-made, it exhibits "prolonged hydrology" (**Exhibit 27**). WRA additionally notes in its March 19, 2002 letter to the City of Pacifica that "[v]egetation and silt has [sic] accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road." WRA further notes that this area "receives water from areas upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway" and noted observations of ponding on Edgemar Road from water overflowing from the blocked ditch.

Therefore, the Commission finds that the wetland hydrology criterion is satisfied in the area south and immediate adjacent to Edgemar Road.

Wetland vegetation

The data sheet for Plot 2A attached to WRA's March 2000 delineation states that the "[s]ite is dominated by hydrophytic vegetation" and lists the dominant plant species as *salix lasiolepis* (FACW) (**Exhibit 25**). Therefore, the Commission finds that the area adjacent to Edgemar Road

⁷ The DEIR concluded based on this information that two, small areas south of Edgemar Road "meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica's [LCP] criteria" (DEIR, IV-B-2) and that these areas are "within 100 feet of the site" (DEIR, IV-B-13).

⁸ The DEIR concluded based on this information that two, small areas south of Edgemar Road "meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica's [LCP] criteria" (DEIR, IV-B-2) and that these areas are "within 100 feet of the site" (DEIR, IV-B-13).

2-02-02-EDD (Pacifica Bowl)

is a wetland as defined by 14 CCR Section 13577 because the area supports the growth of hydrophytes.

Hydric soils

The area also has hydric soils. The data sheet for Plot 2A attached to WRA's March 2000 delineation states, "Hydric soil indicators are present" in this area, including an aquic moisture regime and gleyed or low-chroma colors after sampling of 12-inch soil profiles (**Exhibit 25**). Therefore, the Commission finds that the adjacent to Edgemar Road is a wetland as defined by 14 CCR Section 13577 because the area has hydric soils.

Conclusion

In June 1999, WRA conducted a wetland delineation of the Edgemar Road Parcel that was described in a March 2000 report. All three wetland criteria were found to be present in this area. Arroyo willow (FACW) made up 100% of the dominant species present, demonstrating a preponderance of hydrophytic vegetation. The soil was characterized as having low chroma colors and an aquic moisture regime (saturated and reduced soils) which are both demonstrative of hydric soils. Finally, wetland hydrology was apparent because the soil was covered with water and saturated in the upper 12 inches. Therefore, since wetland hydrology, wetland vegetation, and hydric soils were present, the Commission finds that this area is a wetland under CCR Section 13577.

Inapplicability of Exception for Agricultural Ponds and Reservoirs Contained in 14 CCR Section 13577

As noted above, WRA found that all three wetland criteria are present at this area, but concluded that the area is not a wetland. In its analysis, WRA erroneously concludes that man-made features, even if exhibiting wetland criteria, are exempt from the Section 13577(a) definition.

The Section 13577(a) wetland definition contains only one exception for man-made features, specifically for "wetland habitat created by the presence of and associated with agricultural ponds and reservoirs" under certain conditions. The fact that certain areas exhibiting wetland features may be the result of man-made conditions is therefore not relevant in applying this definition unless these conditions relate to agricultural ponds and reservoirs. In concluding that the area along the Edgemar right-of-way does not constitute a wetland, WRA relies on Appendix D of the Commission's 1981 Statewide Interpretive Wetland Guidelines, which includes an exception for drainage ditches:

For purposes of identifying wetlands using technical criteria contained in this guideline, one limited exception will be made. That is, drainage ditches as defined herein will not be considered wetlands under the Coastal Act. A drainage ditch shall be defined as a narrow (usually less than 5 feet wide), man-made non-tidal ditch excavated from dry land.

WRA states that since the area was once a drainage ditch, it falls within the 1981 Guidelines drainage ditch exception. However, the 1981 Guidelines were intended as guidance in applying the policies of the Coastal Act prior to LCP certification. Coastal Act Section 30620(a)(3) provides:

Interpretive guidelines designed to assist local governments, the commission, and persons subject to this chapter in determining how the policies of this division shall be applied in the coastal zone prior to the certification of local coastal programs. However, the guidelines shall not supersede, enlarge, or diminish the powers or authority of the commission or any other public agency. [Emphasis added.]

Section 30620(a)(3) of the Coastal Act expressly states that the guidelines are designed to provide assistance in applying the policies of the Coastal Act prior to LCP certification. Section 13577 of the Commission's regulations was enacted after the 1981 guidelines. For purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, the 1981 Guidelines accordingly do not supersede, enlarge or diminish the Commission's regulatory authority under the regulations, and in any case, are not applicable in evaluating the presence of wetlands under Section 13577(a). Section 13577(a) contains only one exception for man-made features related to agricultural ponds and reservoirs. To read an additional exception into the regulation would narrow the scope of the definition and contradict its plain wording.

Notably, the applicant's biological consultant, while applying the 1981 Guidelines exception, himself acknowledges that the area through lack of maintenance and siltation no longer effectively functions as a drainage ditch. For example, as WRA notes in its March 19, 2002 letter, "Vegetation and silt has [sic] accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road." WRA further notes that the area they refer to as the drainage ditch area "receives water from areas upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway" and notes observations of ponding on Edgemar Road from water overflowing from the blocked ditch. These observations indicate that, even if the area in question was originally excavated as a drainage ditch, long neglect has caused it to lose its function as such. Therefore, even if the 1981 Guidelines were applicable in evaluating the presence of wetlands under Section 13577(a) for purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, it is highly questionable whether as a factual matter the exception referenced in the Guidelines would apply to the area in question because through long lack of maintenance and siltation the area's function as a drainage ditch has been compromised.

In correspondence to Commission staff, the applicant has also argued that the drainage ditch cannot qualify as a wetland under the holding of Beach Colony II v. California Coastal Commission, 151 Cal. App. 3d 1107 (1984). According to the applicant, this decision provides authority for the rule that wet areas that are the result of human activity or man-made structures do not qualify as wetlands under the Coastal Act. However, Beach Colony II addresses the relationship of the common law doctrine of avulsion to the Coastal Act and applies to the limited circumstance of land that becomes inundated as the result of a sudden, violent event. That

decision is not applicable to the conditions on this project site. While the wetland characteristics of certain portions of the project site, including the area characterized by WRA as a drainage ditch, may be the direct or indirect result of man-made activities, these conditions did not come about as the result of a sudden, violent event and do not come within the sole exception for agriculturally-related man-made features stated in Section 13577(a)(2).

Therefore, as discussed above and based on the presence of all three wetland criteria in this location, the Commission finds that the area characterized by the applicant's biological consultant as a "drainage ditch" along the eastern edge of the Edgemar Road right-of-way is a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development.

(2) Topographic Depression on Parcel South of Edgemar Road (Wetland Area 2)

WRA's March 2000 wetland delineation of the Edgemar Road Parcel, located adjacent to the project site, indicates the presence of a second wetland area exhibiting all three wetland criteria located within 100 feet of the approved development (**Exhibit 25**). WRA's May 22, 2002 comment letter on the DEIR argues that this area is man-made and has low biological value, but does not contradict the results of its earlier delineation (**Exhibit 28**). For the reasons discussed below, the Commission finds that this area is a wetland under 14 CCR Section 13577.

According to information provided by WRA, this second wetland area lies within 100 feet of Edgemar Road, which will be repaired and reconstructed as part of the development approved by the City. The WRA May 22, 2002 letter attaches a figure showing the wetland area in relation to Edgemar Road and the graded portion of the site and acknowledges that a 100 foot distance, measured from the "center of this pit" (not the upland limit of wetland vegetation, the wetland boundary for purposes of 14 CCR Section 13577), intersects Edgemar Road (**Exhibit 28**). The applicant argued in comments on the DEIR that Edgemar Road, a public right-of-way which is to be graded and improved as part of the approved development, was not part of the project. However, the FEIR responded that the proposed improvements to Edgemar Road by any entity, public or private, came within the CEQA Guidelines' definition of "project" (FEIR, III-17). Since the CDP approved by the City encompasses the proposed repair and re-grading of Edgemar Road, this work also forms part of the approved development for purposes of Coastal Commission review. Based on this information and the results of WRA's March 2000 delineation, the approved development is located within 100 feet of the boundaries of this wetland area.

The wetland delineation prepared by WRA dated March 2000 for the "Edgemar Road Parcel," based on data collected on June 11, 1999, recorded field observations indicating this area is characterized by the presence of all three wetland criteria.

Wetland hydrology

The data sheet for Plot 1A attached to WRA's March 2000 delineation states that hydrologic indicators and algal mats are present, including sediment deposits as a primary indicator of wetland hydrology (**Exhibit 25**). Therefore, the Commission finds that the wetland hydrology

criterion is satisfied in Wetland Area 2 because the area exhibits primary indicators of wetland hydrology.

Wetland vegetation

The data sheet for Plot 1A attached to WRA's March 2000 delineation states that the "[s]ite is dominated by hydrophytic vegetation" and lists the dominant wetland plant species as *Rumex crispus* (FACW-), *Hordeum brachyantherum* (FACW), *Juncus balticus* (OBL) and *Lotus comiculatus* (FAC) (**Exhibit 25**). Therefore, the Commission finds that the Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area has a predominance of wetland vegetation.

Hydric soils

The data sheet for Plot 1A attached to WRA's March 2000 delineation states that hydric soil indicators are present in this area, including gleyed or low-chroma colors based on sampling of 12-inch soil profiles (**Exhibit 25**). Therefore, the Commission finds that the Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area has hydric soils.

The Army Corps determined that wetlands identified on the Edgemar parcel did not come under its jurisdiction because of their isolated nature (**Exhibit 26**). The fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps applicable Section 404 definition. The DEIR concluded based on the information in the wetland delineation that two, small areas south of Edgemar Road "meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica's [LCP] criteria" (DEIR, IV-B-2) and that these areas are "within 100 feet of the site" (DEIR, IV-B-13). After the applicant submitted "extensive correspondence" arguing that these wet areas did not qualify as LCP wetlands, the FEIR concluded specifically with respect to this wetland area that "[t]he City has not made a determination as to whether this wet area meets the jurisdictional definition of an LCP wetland and does not need to make such a determination for the EIR" because the area is upslope from the graded area of the project and would not be affected (FEIR, I-4) [emphasis added].

Conclusion

WRA delineated this area as part of their June 1999 fieldwork. The depression at least periodically ponds water and all three wetland criteria are present. The dominant species present were meadow barley (FACW), Baltic rush (OBL), bird-foot trefoil (FAC), and curly dock (FACW). Thus, there was a prevalence of hydrophytic vegetation. The soils had low chroma coloration in association with abundant, distinct mottles (a redoximorphic feature), which satisfies the hydric soil criterion. Hydrology was demonstrated by the presence of sediment deposits, which indicates previous inundation.

Because this area exhibits all 3 wetland criteria as documented in WRA's March 2000 delineation, the Commission finds that it qualifies as a wetland within the meaning of 14 CCR

Section 13577 and is located within 100 feet of the approved development and shown on the attachment to WRA's May 22, 2002 comment letter.

(3) Ponded Area in Riparian Scrub Vegetation (Wetland Area 3)

The April 1997 TRA initial biological survey concluded, without specifying its exact location, that central coast riparian scrub habitat, that "may be characterized as a wetland," covered approximately 1.1 acres of the site and adjoining parcel, and determined that wetland species including arroyo willow, twinberry, rushes, sedges, and English ivy were present along with at least "one small pool approximately 4 feet wide x 10 feet long x 1 foot deep" in the riparian scrub habitat. The TRA initial survey, while it did not include a scaled map showing the exact location of this area, described it as being located on the project site. The TRA initial survey recommended a wetland delineation to determine the presence of other wetland criteria (**Exhibit 18**). WRA's April 30, 1997 letter to the Syndicor Real Estate Group, documenting WRA's April 28, 1997 site visit also notes areas of central coast riparian scrub habitat on the site that "are dominated by wetland plants and therefore warrant a more in-depth inspection to determine the presence of the other two criteria [hydric soils and wetland hydrology] necessary for a federal jurisdictional wetland" and concludes that wetland hydrology may also be present on the site (**Exhibit 19**). WRA's August 1999 wetland delineation for the Pacifica Cove Parcel makes no mention of this area.

WRA's December 27, 1999 letter recognized one area dominated by arroyo willow and one area dominated by twinberry on the project site, but erroneously concluded that the site did not contain LCP wetlands because both of these species are classified as facultative (FAC) species, equally likely to occur in uplands and wetlands, and only secondary indicators of wetland hydrology and no hydric soils were present (**Exhibit 22**). In fact, arroyo willow is a facultative wet (FACW) species, found 67% to 99% of the time in wetlands, and not a FAC species as stated by WRA. (Secondary indicators of wetland hydrology are not as significant an indication as primary indicators.) The Army Corps determined that no Corps jurisdictional wetlands were present on the project site (**Exhibit 23**). However, the fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps applicable Section 404 definition.

TRA's January 24, 2000 peer review of the December 27, 1999 WRA LCP wetland delineation letter documents several discrepancies in WRA's application of the LCP definition. The peer review notes that WRA's LCP analysis ignores evidence of hydric soils found by the July 1999 WRA delineation. The TRA peer review also observes that WRA's LCP analysis finds only the facultative species willow and twinberry to be dominant in areas on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation as the applicant has refused to allow its wetland consultants to provide Commission staff with documentation and the City did not have a copy of this delineation (**Exhibit 30**).

Wetland hydrology

As noted above, TRA's April 1997 initial biological survey recorded observations of at least "one small pool approximately 4 feet wide x 10 feet long x 1 foot deep" in the riparian scrub habitat on the project site, without specifying its exact location. The August 1999 WRA wetland delineation included no discussion of this area. The observations noted in TRA's initial survey indicate areas which were inundated or saturated for periods of long duration, which are primary indicators of wetland hydrology. Therefore, the Commission finds that the wetland hydrology criterion is satisfied in Wetland Area 3 because the area has primary indicators of wetland hydrology.

Wetland vegetation

TRA's April 1997 initial biological survey determined that wetland species including arroyo willow, twinberry, rushes, sedges, and English ivy were present in this area (**Exhibit 18**). In addition, WRA's April 30, 1997 letter to the Syndicor Real Estate Group, documenting WRA's April 28, 1997 site visit also notes areas of central coast riparian scrub habitat on the site that "are dominated by wetland plants . . ." (**Exhibit 19**). The TRA January 24, 2000 peer review notes that WRA's December 27, 1999 LCP analysis found only the facultative species willow to be dominant in this area on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation.⁹ Based on the available evidence, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because the area has a predominance of wetland vegetation.

Hydric soils

The TRA January 24, 2000 peer review makes reference to evidence of hydric soils found by the July 1999 WRA delineation. As noted, the Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation, but assumes in the absence of any contradictory evidence that the reference is accurate. Because the applicant has refused to allow the Commission's Biologist to examine WRA's July 1999 Wetland Delineation and to visit the site, the Commission relies on the January 24, 2000 TRA Review. Therefore, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because available evidence indicates that the area meets the hydric soils criteria.

Conclusion

The available evidence indicates that portions of the riparian scrub habitat on the site may qualify as wetlands under 14 CCR Section 13577 because of the presence of wetland vegetation and wetland hydrology and the likely presence of hydric soils. As noted above, the fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps' applicable Section

⁹ The applicant has refused to allow its wetland consultants to provide the Commission with copies of the July 1999 delineation, and the City did not have a copy of this delineation in its files. The August 1999 delineation of the project site does not record any observations of obligate wetland species, and does not explain the reason for revisions deleting such observations contained in the earlier July 1999 delineation.

404 definition. Because the applicant has denied the Commission access to the project site, the Commission infers that evidence of Section 13577 wetlands may be present on the site because the applicant apparently believes a site visit would uncover evidence supporting the existing of the wetlands. In the absence of available information, the Coastal Act requires the Commission to act in a manner mostly strongly protective of coastal resources.

The April 1997 TRA initial biological survey identified a wetland area in the stand of willows that extends from the southeastern portion of the Pacifica Cover parcel across Edgemar Road onto the eastern portion of Edgemar property. The exact location was not specified and no map was provided in the report. This area meets at least two of the standard wetland criteria. Arroyo willow (FACW) was the only dominant plant species. Thus, hydrophytes are predominant at the site. Associated species included twinberry (FAC), rushes and sedges (generally FACW or OBL), and English ivy (not listed). Although the commission's Biologist has not been afforded the opportunity to review the supporting evidence, the only information available to the Commission at the time supports the determination that hydric soils are present at the area. A pond about 4 ft x 10 ft x 1-ft deep was present, which meets the hydrology criterion. The Commission finds that both a preponderance of hydrophytic vegetation and wetland hydrology were present and that this area is a wetland under CCR Section 13577. Therefore, based on the available evidence, the Commission accordingly finds that central coast riparian scrub and willow habitat described in the April 1997 TRA initial biological survey, located on the project site, is a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development.

(4) Wetlands Area on the West Side of the Site (Wetland Area 4)

WRA's August 1999 report based on data collected on June 11, 1999 identified a wetlands area on the west side of the site that met all three standard wetland criteria. The wetland delineator recorded the presence of oxidized rhizospheres and algal mats, which are demonstrative of wetland hydrology; the presence of low chroma colors associated with redoximorphic features and organic streaking, which are demonstrative of hydric soils; and a single dominant plant, twinberry (FAC), which is demonstrative of a predominance of hydrophytic vegetation. WRA's August 1999 wetland delineation of the Pacifica Cove parcel, based on a field information collected on June 11, 1999, identified a wetlands area on the west side of the site meeting all three ACOE jurisdictional criteria that "had two secondary hydrology indicators, oxidized root channels and algal mats" present, was "dominated by hydrophytic vegetation," particularly, twinberry (*Lonicera invulcrata*) (FAC), and "had hydric soils indicators present."

However, when wetland delineators from the Army Corps of Engineers visited the site on November 29, 1999, they found no field evidence of any one of the standard wetland criteria. The Army Corps concluded, despite WRA's initial observations indicating the presence of all three wetland indicators, that this area did not qualify as wetland for purposes of Army Corps jurisdiction (**Exhibit 23**). To resolve this discrepancy, the Commission Biologist discussed the matter with Mr. Dan Martel, a senior delineator for the Corps who was present on the November site visit. Mr. Martel found that the solid colors were higher chroma than those characteristic of hydric soils and that redoximorphic features were not present. Similarly, he could find no evidence of the hydrology indicators that had previously been reported, despite the fact that algal mats are persistent and relatively obvious features. Mr. Martel did find that twinberry was

present, but that the community character of the vegetation was upland, although small patches may have been dominated by twinberry. The Commission Biologist concluded that the initial reporting of hydrology and hydric soil indicators was probably due to inexperience on the part of the delineator and was in error. Although small patches may be mostly twinberry, this indicator species is in the frequency class "FAC," which means that it is expected to occur in uplands and wetlands with equal probability. Given the site characteristics described by Mr. Martel, the small depression appears to be "upland" and twinberry is apparently not acting as a hydrophyte in this situation.

TRA's January 24, 2000 peer review of the December 27, 1999 WRA LCP wetland delineation letter, however, documents several discrepancies in WRA's application of the LCP definition. Although it accepts WRA's premise that areas considered "drainage ditches" are not wetlands falling within ACOE's jurisdiction, the peer review notes that WRA's LCP analysis ignores the hydric soils found by the July 1999 WRA delineation. The TRA peer review also observes that WRA's LCP analysis finds only the facultative species willow and twinberry to be dominant in areas on the site where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. Without a site visit by Commission staff, the Commission cannot rule out the possibility that the area is a wetland both 14 CCR Section 13577 and the certified LCP.

Wetland hydrology

Field observations noted in the August 1999 WRA wetland delineation record the presence of secondary indicators of hydrology, including oxidized root channels in the upper 12 inches of soil. As discussed above, the Commission biologist's conversations with the Army Corps wetland specialist who visited the site call these observations into question.

Wetland vegetation

Field observations recorded in the August 1999 WRA wetland delineation indicate a predominance of hydrophytic vegetation, specifically, twinberry (*Lonicera invulcrata*) (FAC) (Plot 1A).

The TRA January 24, 2000 peer review notes that WRA's December 27, 1999 LCP analysis found only the facultative species twinberry to be dominant in areas on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation to explain this inconsistency. Without the July 1999 WRA delineation, the Commission is unable to verify these conclusions.

Hydric soils

Field observations recorded in the August 1999 WRA wetland delineation state the presence of hydric soil indicators, including gleyed or low chroma colors, organic streaking in sandy soils, and common, faint mottles in 12-inch soil profiles (Plot 1A). As discussed above, the Commission biologist's conversations with the Army Corps wetland specialist who visited the site call these observations into question.

Conclusion

As noted, the applicant has denied Commission staff the opportunity to visit the site. A site visit by the Commission Biologist would be desirable to resolve inconsistencies in the evidence contained in the file documents and independently confirm the wetland status of this area under the applicable 14 CCR Section 13577 and LCP wetland definitions.

3.5 Location Within 300 Feet of the Top of a Coastal Bluff

Coastal Commission staff originally informed the City and the applicant that the City's action might be appealable to the Commission under Coastal Act Section 30603(a) on the separate ground that the development approved by the local government was located within 300 feet of the top of a seaward facing coastal bluff. Further evaluation of the site in light of the applicable regulations indicates that the development approved by the local government does not appear to be located within 300 feet of a coastal bluff, as defined in the Commission regulations.

Section 13577(h) defines "coastal bluff" as follows:

- (1) those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion; and*
- (2) those bluffs, the toe of which is not now or was not historically subject to marine erosion, but the toe of which lies within an area otherwise identified in Public Resources Code Section 30603(a)(1) or (a)(2).*

"Bluff line or edge" is defined by the same provision as follows:

[T]he upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge. The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations.

At the southern end of the bluff area west of Palmetto Avenue in the vicinity of the project site, there is a deep, vegetated gully that extends inland from the bluff at roughly a right angle to the general trend of the bluff line along the seaward face of the bluff. Applying the definition of "bluff line or edge" stated in Section 13577(h), the point reached by the angle bisecting the line coinciding with the general trend of the bluff line along the seaward face of the bluff and a line

coinciding with the general trend of the bluff line along the gully would lie roughly along the general trend of the bluff line and greater than 300 feet from the project. For this reason, the City's action does not appear to be independently appealable on this ground.

3.6 Conclusion

Based on the information available, the Commission finds that the development approved by the City under CDP-203-01 is located within 100 feet of wetlands as defined in 14 CCR Section 13577 and therefore that such development is appealable to the Commission under Section 30603(a).

EXHIBITS

1. Regional Location Map
2. Site Map
3. City of Pacifica Notice of Final Local Action on CDP-203-01
4. Letter from Peter Imhof to Michael Crabtree, City of Pacifica, dated August 23, 2002
5. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated September 9, 2002
6. Letter from Jaquelynn Pope, Warshaw & Pope, to Peter Imhof, dated September 10, 2002
7. Letter from Cecilia M. Quick, City of Pacifica City Attorney, to Peter Imhof, dated September 11, 2002
8. Letter from Keith Fromm, North Pacifica, LLC, to Chris Carr [sic], dated September 13, 2002
9. Letter from Peter Imhof to Michael Crabtree, City of Pacifica, dated September 17, 2002
10. Letter to Keith Fromm, North Pacifica LLC, from Peter Imhof, dated September 17, 2002
11. Letter from Keith Fromm, North Pacifica, LLC, to Peter Douglas and Peter Imhof, dated September 23, 2002
12. Letter from Keith Fromm, North Pacifica, LLC, to Chris Kern, dated September 23, 2002
13. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 2, 2002
14. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 4, 2002
15. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 7, 2002

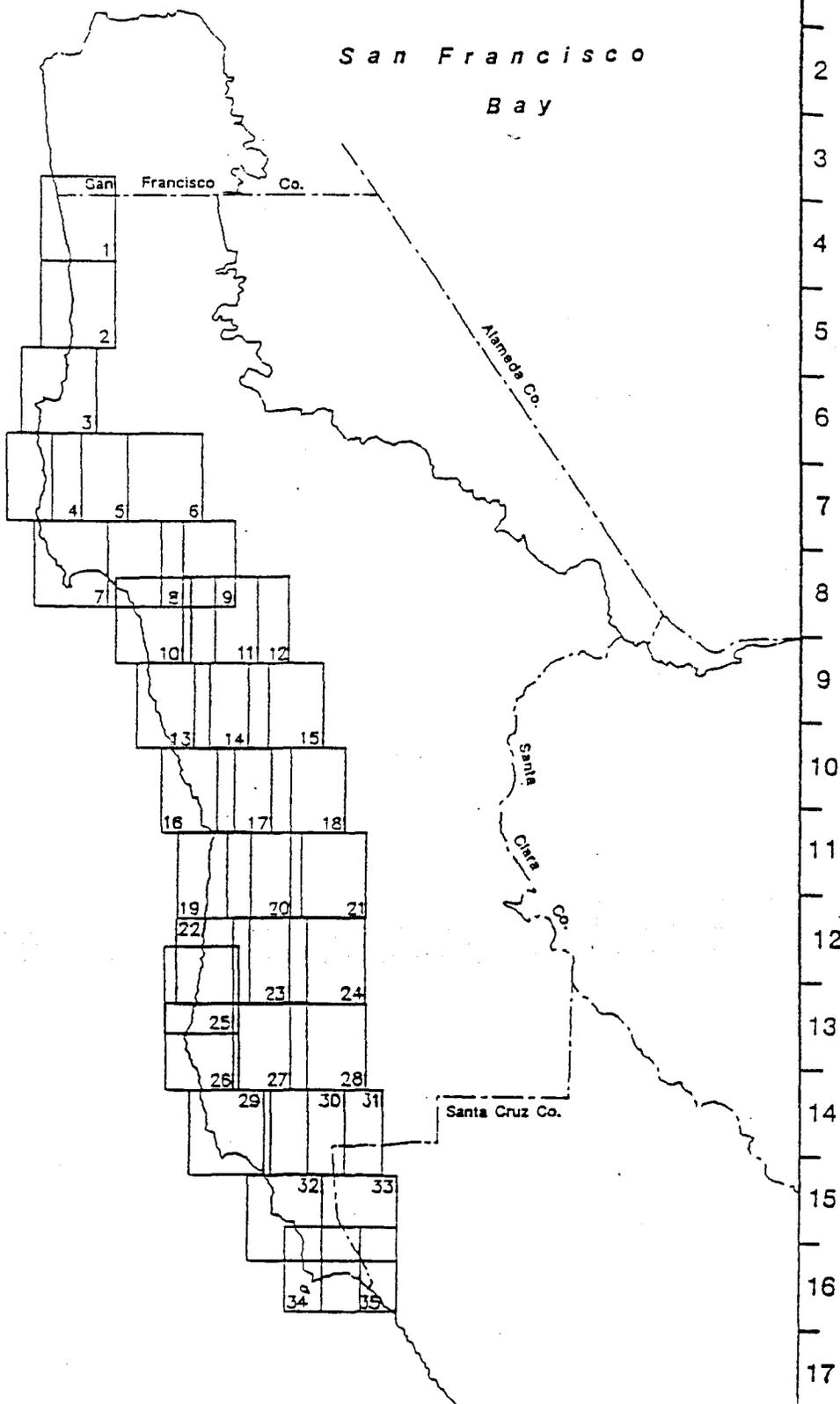
2-02-02-EDD (Pacifica Bowl)

16. Commission staff comment letter on Notice of Preparation of EIR, dated October 4, 2001
17. Commission staff comment letter on draft EIR, dated May 3, 2002
18. TRA Initial Biological Survey, dated April 1997
19. Letter from WRA to the Syndicor Real Estate Group, dated April 30, 1997
20. WRA Wetland Delineation for the "Pacific Cove Parcel," dated August 1999
21. WRA revised jurisdictional wetlands map, dated November 30, 1999
22. Letter from WRA to the City of Pacifica, dated December 27, 1999
23. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated January 3, 2000
24. Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000
25. WRA Wetland Delineation for the "Edgemar Road Parcel," dated March 2000
26. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated May 11, 2001
27. Letter from WRA to the City of Pacifica, dated March 19, 2002
28. Letter from WRA to the City of Pacifica, dated May 22, 2002
29. Memorandum from Commission Biologist John Dixon to Peter Imhof, et al., dated November 21, 2002
30. Letter from Robert J. Kalmbach, North Pacifica LLC to Peter Imhof, dated November 22, 2002

A B C D E F G H I J K L M N O

EXHIBIT 1
2-02-2-EDD (Pacific Bowl)
Regional Location Map

PACIFIC
OCEAN



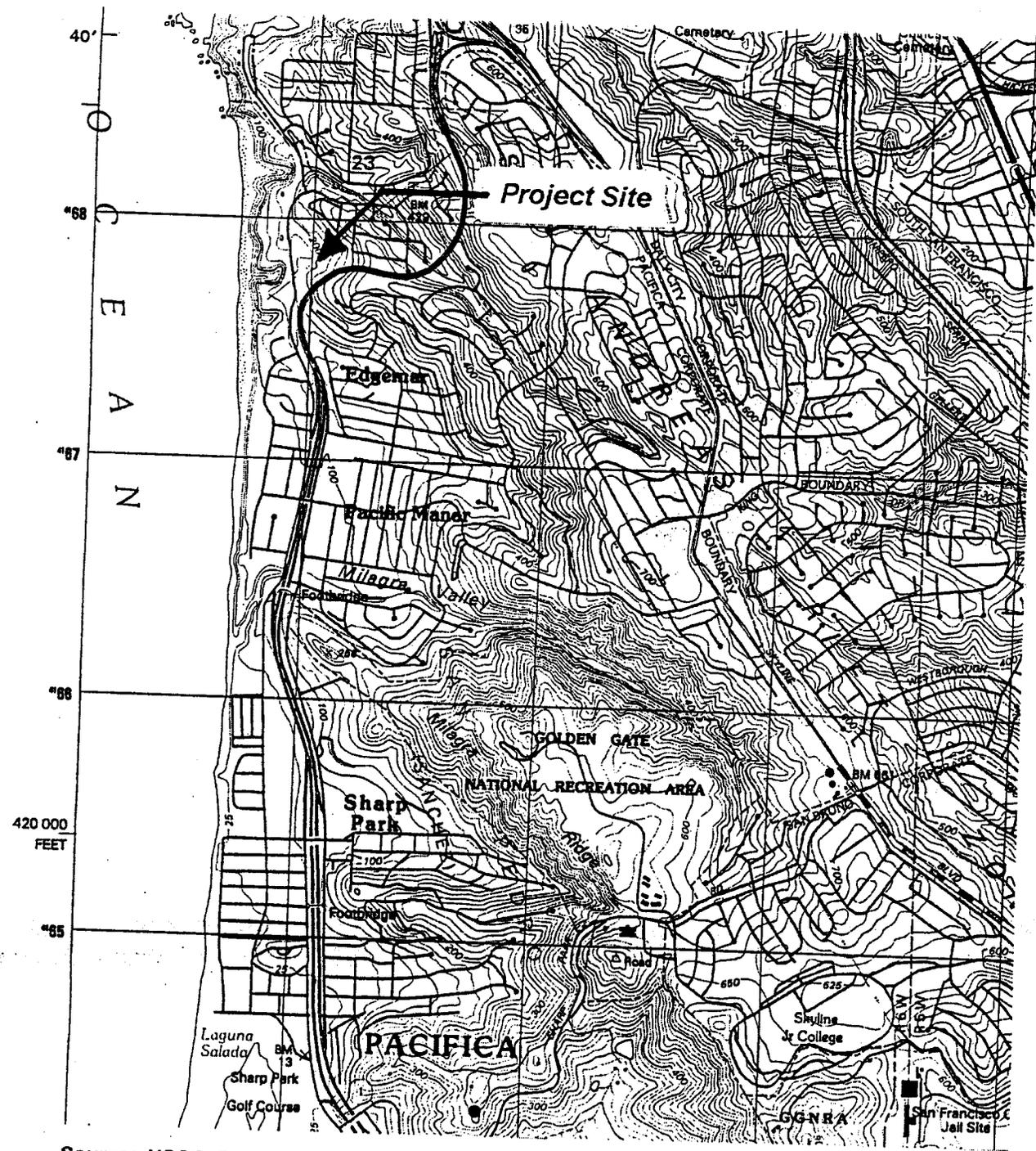
Central Coast District Index Map 7

California Coastal Commission



ounty of San Mateo

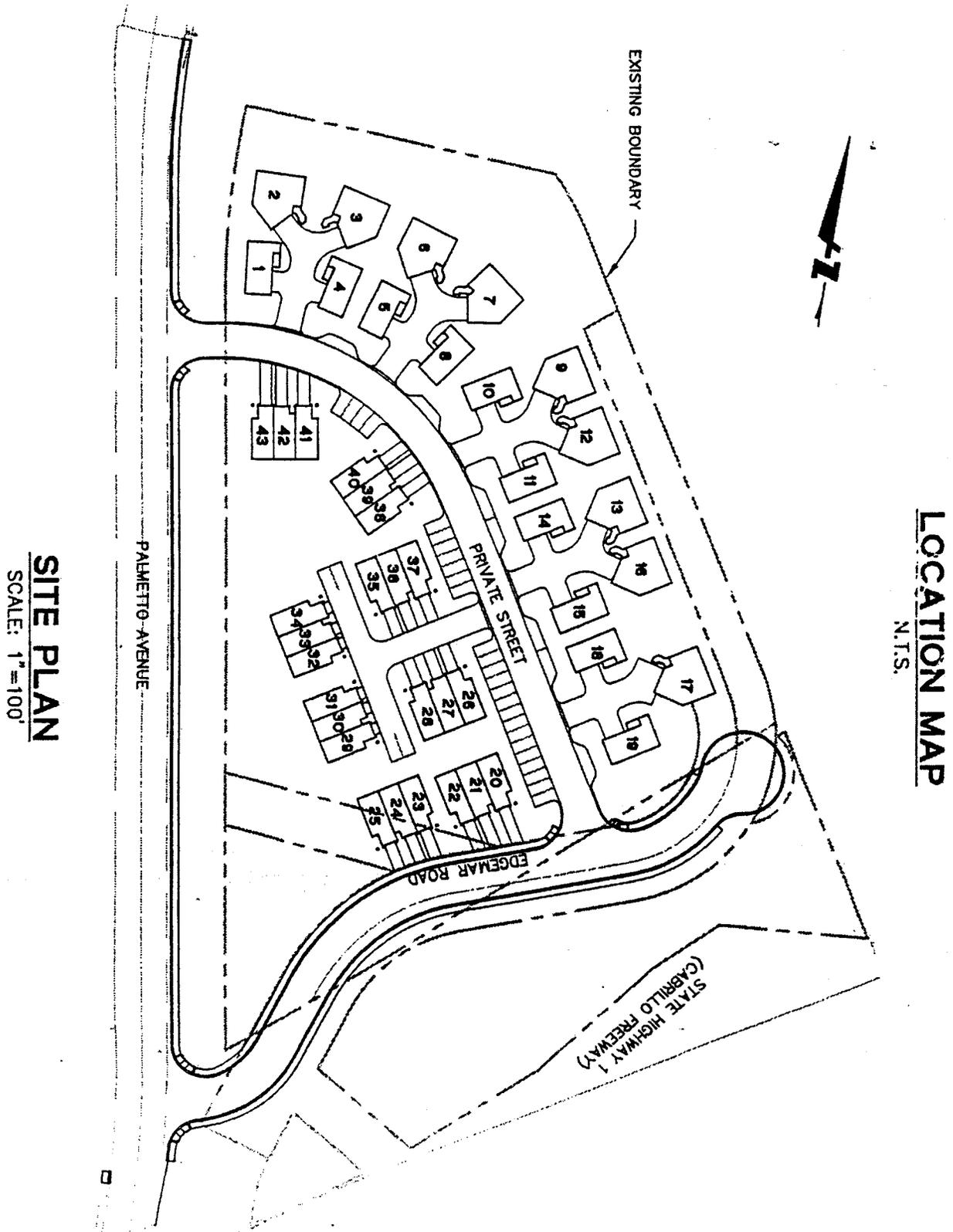
Figure II-1 Site Location



Source: USGS, San Francisco South Quadrangle, 1993

EXHIBIT 2
2-02-2-EDD (Pacific Bowl)
Site Map

Figure II-2 Site Plan



LOCATION MAP
N.T.S.

SITE PLAN
SCALE: 1"=100'

Source: BKF, 20001

Figure II-3 Grading Plan

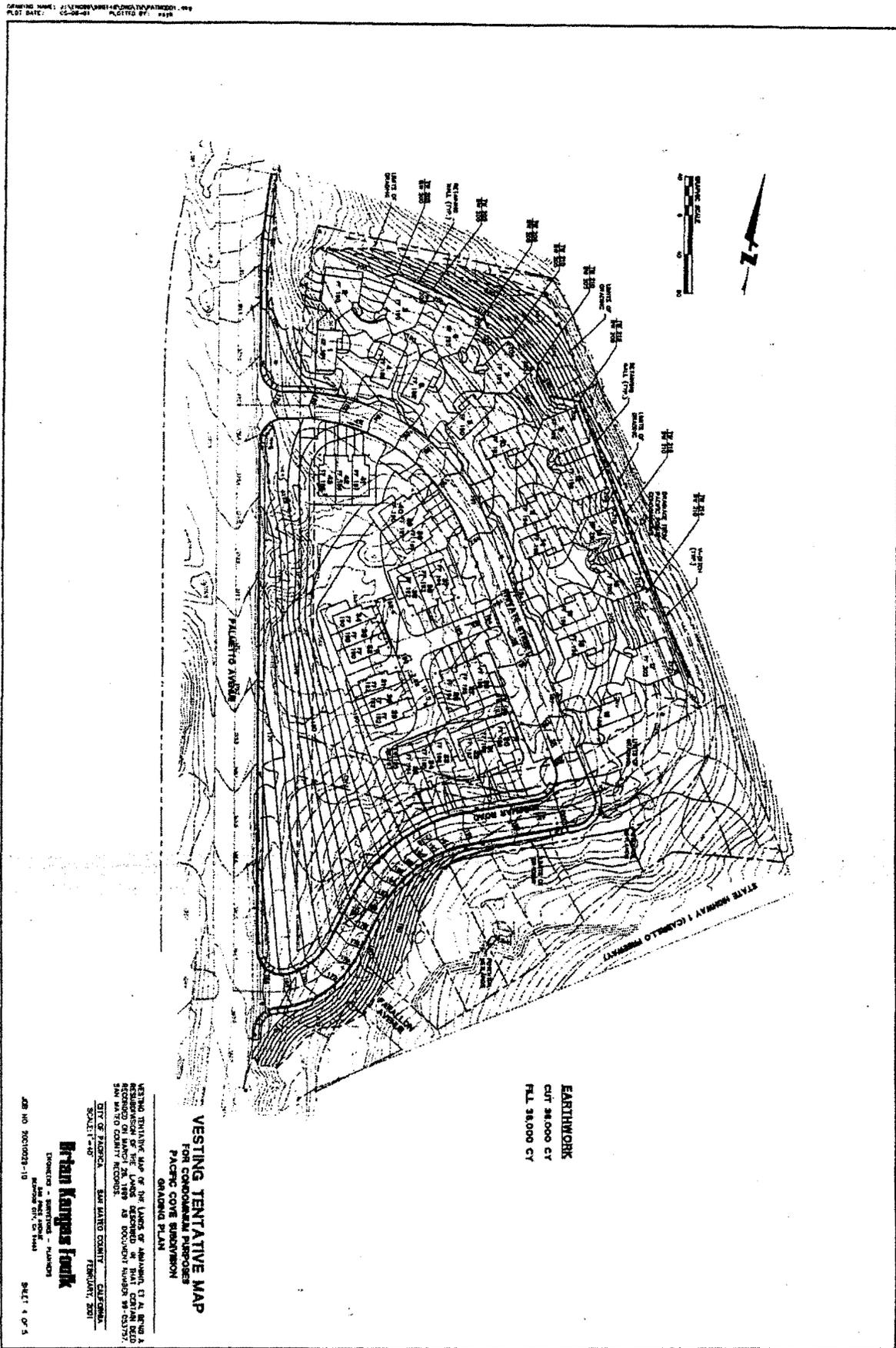
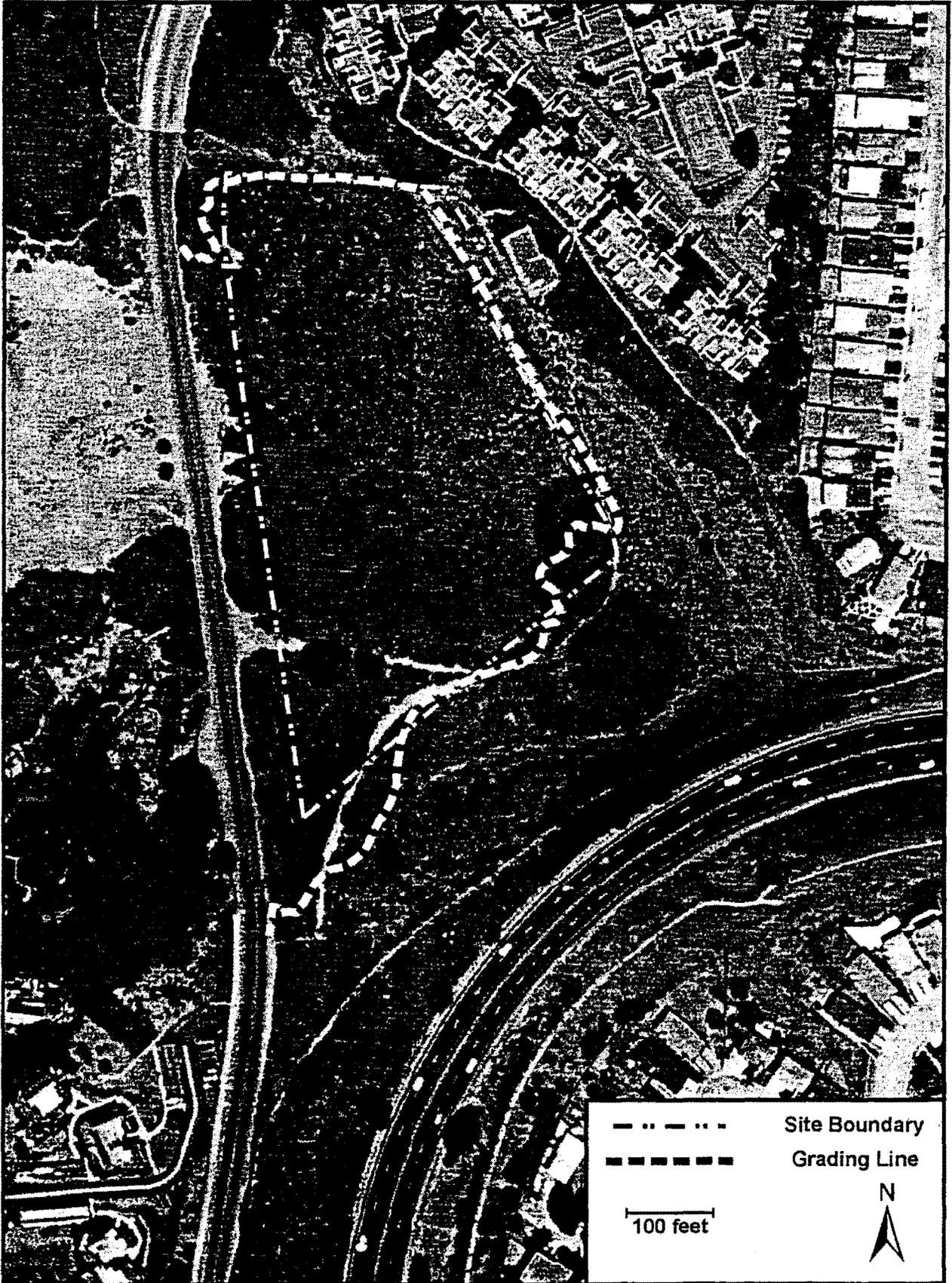
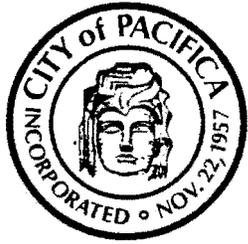


Figure II-4
Aerial Photo of the Site





CITY HALL • 170 Santa Maria Avenue • Pacifica, California 94044-2506

Telephone (650) 738-7300 • Fax (650) 359-6038
www.ci.pacifica.ca.us

Scenic Pacifica

NOTICE OF FINAL LOCAL ACTION

August 19, 2002

RECEIVED
AUG 21 2002
CALIFORNIA
COASTAL COMMISSION

VIA CERTIFIED MAIL

Attn: Coastal Planner
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

**RE: COASTAL DEVELOPMENT PERMIT # (CDP-203-01)
Construction of 43 Residential Units, 4000 Block of Palmetto Avenue, Pacifica (APN: 009-402-250, & -260)**

Pursuant to Coastal Act Section 30603(d), Coastal Commission Regulations Section 13571, and Pacifica Zoning Code Section 9-4.4304(n), this notice will serve to confirm that the City of Pacifica approved the above-referenced Coastal Development Permit, and to furnish the following additional information:

APPLICANT NAME/ADDRESS: North Pacifica, LLC, 6114 La Salle Avenue, Suite 207, Oakland, CA 94611

PROJECT DESCRIPTION: Development of a vacant 4.2 acre site with 43 residential units. The project will consist of 19 single-family detached homes and 24 townhouses.

DECISION: The subject permit was approved by the City Council on appeal, on August 12, 2002, based on the required findings contained and adopted in the July 15, 2002 Planning Commission staff report (attached).

APPEAL PROCEDURES: The appeals process may involve the following:

- LOCAL** The local appeal period ended on _____, and no appeal was filed; or,
 The permit was appealed to and decided by the City Council, exhausting the local appeals process.
- STATE** The project IS within the Appeals Zone and the permit IS appealable to the State of California Coastal Commission if the appeal is made in writing to the Coastal Commission within 10 working days from the next business day following the date of receipt of this notice by the Executive Director of the Commission. For additional information, contact the California Coastal Commission @ 45 Fremont, Suite 2000, San Francisco, CA 94105-2219 (415) 904-5260; or,
 The project is NOT in the Appeals Zone and the permit is NOT appealable to the Coastal Commission.

Additional information may be obtained by contacting the Pacifica Planning Department at 1800 Francisco Boulevard, Pacifica, (650) 738-7341.

Michael Crabtree
City Planner

EXHIBIT 3
2-02-2-EDD (Pacific Bowl)
City of Pacifica
Notice of Final Action
on CDP-203-01

Attachments: Letter of Approval with conditions Staff Report(s)

ModelDoc/Coastal/NOA

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

EXHIBIT 4

2-02-2-EDD (Pacific Bowl)

Letter from Peter Imhof
to Michael Crabtree, City of Pacifica,
dated Aug. 23, 2002



August 23, 2002

Michael Crabtree
Director
Planning Department
City of Pacifica
170 Santa Maria Avenue
Pacifica, CA 94044

**RE: Defective Local Government Notice, CDP-203-01
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)**

Dear Mr. Crabtree:

On August 21, 2002, we received the City's Notice of Final Local Action, dated August 19, 2002 concerning the referenced coastal development permit (the "Notice"). The Notice does not comply with Section 13571 of the Commission regulations or the corresponding provisions of Section 9-4.4304(n) of the City's Zoning Code, which has been certified as part of the City's Local Coastal Program ("LCP"). The Notice is deficient in that it incorrectly states that the project is not appealable to the Coastal Commission.¹ Based on the information contained and referenced in the Notice and the Environmental Impact Report ("EIR") for this project, the Executive Director has determined that the project falls within the Coastal Commission's appellate jurisdiction pursuant to Section 30603 of the Coastal Act. In conformity with Sections 13569, 13570 and 13571 of the Commission regulations and Pacifica Zoning Code Sections 9-4.4304(n) and 9-4.4305(c), the City should accordingly issue a corrected Notice of Final Local Action indicating that the permit is appealable. Pursuant to Section 13572 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(l), CDP-203-01 will remain suspended and will not become final until a corrected notice has been issued and the appeal period to the Commission has run.

Coastal Commission Appellate Jurisdiction

Section 30603 of the Coastal Act lists the types of local actions that are appealable to the Commission. These local actions include:

¹ We note that we never received an Initial Notice from the City in connection with the referenced permit designating this project as either appealable or non-appealable, as required by Sections 13565 and 13568 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(g).

Defective Local Government Notice, CDP-203-01
Pacifica Bowl Residential Development
August 23, 2002

- (1) *Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.*
- (2) *Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.*

For purposes of Commission appeal jurisdiction, Section 13577(a)(1) of the Commission regulations defines "wetland" as follows:

Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:

- (A) *the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
- (B) *the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) *in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.*

Section 13577 sets the boundary for Coastal Commission appeal jurisdiction as 100 feet from the upland limit of any wetland meeting this definition.

Section 13577(h) defines "coastal bluff" as follows:

- (1) *those bluffs, the toe of which is now or was historically (generally within the last 200 years) subject to marine erosion; and*
- (2) *those bluffs, the toe of which is not now or was not historically subject to marine erosion, but the toe of which lies within an area otherwise identified in Public Resources Code Section 30603(a)(1) or (a)(2).*

"Bluff line or edge" is defined by the same provision as follows:

[T]he upper termination of a bluff, cliff, or seacliff. In cases where the top edge of the cliff is rounded away from the face of the cliff as a result of erosional processes related to the presence of the steep cliff face, the bluff line or edge shall be defined as that point nearest the cliff beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the cliff. In a case where there is a steplike feature at the top of the cliff face, the landward edge of the topmost riser shall be taken to be the cliff edge. The termini of the bluff line, or edge along the seaward face of the bluff, shall be defined as a point reached by bisecting the angle formed by a line coinciding with the general trend of the bluff line along the seaward face of the bluff, and a line coinciding with the general trend of the bluff line along the inland facing portion of the bluff. Five hundred feet shall be the minimum length of bluff line or edge to be used in making these determinations.

Approved Project

The approved project consists of a subdivision and development of 43 residential units, including 19 single-family detached homes and 24 townhouses, an interior driveway and road network, necessary infrastructure and a private park/open space area on 4.2 acres of land at the 4000 block of Palmetto Avenue in Pacifica. The project would involve grading of approximately 5.8 acres of the site, including 36,000 cubic yards each of cut and fill. The project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. There are five, mature Monterey cypress trees on the site.

Discussion

Based on review of the approved permit, the City's findings of approval, and the materials previously circulated in connection with the certification of the EIR, the Executive Director has determined that the City's approval includes development that is located within 100 feet of a wetland, as that term is defined in the Commission regulations for purposes of identifying the Commission's appellate jurisdiction. In addition, as discussed below, the City's approval may also be appealable because it includes development less than 300 feet from the top of the seaward face of the coastal bluff west of Palmetto Avenue.

(a) Within 100 feet of Wetlands

In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. According to wetland studies of the site to date, several areas on the site are dominated by wetland vegetation and show evidence of other wetland indicators. In addition, these studies indicate the existence of a drainage ditch

Defective Local Government Notice, CDP-203-01
Pacifica Bowl Residential Development
August 23, 2002

along Edgmar Road and a small, excavated area south of Edgmar Road, within 100 feet of the project area, which are dominated by wetland vegetation.

Several studies have addressed the presence of wetlands on the project site. Thomas Reid Associates ("TRA") prepared an initial biological survey of the site in April 1997, which identified a potential wetland and recommended a wetland delineation. Wetland Research Associates ("WRA") conducted a field study in June 1999 and also identified an area of potential Army Corps of Engineers ("ACOE") jurisdictional wetland on the site. Review by ACOE included a site visit in November 1999 and a determination that no ACOE jurisdictional wetlands were present on the site. WRA prepared a wetland delineation dated March 2000, however, which recorded sample locations dominated by wetland vegetation and also characterized by hydric soils and wetland hydrology. A WRA letter to the Syndicor Real Estate Group, dated April 30, 1997, also notes the presence on the site of central coast riparian scrub habitat and arroyo willow habitat dominated by wetland vegetation. In subsequent correspondence, notably letters to the City dated March 19, 2002 and May 22, 2002, WRA concluded that no wetlands, as defined under either the Clean Water Act or the LCP, existed "within the proposed grading footprint of the project," and further concluded that the drainage ditch along Edgmar Road "is exempt from jurisdiction as a wetland under Statewide Interpretive Guidelines" because it is a drainage ditch.

The City Council's permit approval findings, which, according to the Notice, are contained in the Planning Commission's July 15, 2002 staff report, include generalized findings that the proposed project conforms to the LCP and will not have significant adverse effects on coastal resources. No specific finding, however, was made with respect to the presence of wetlands on or near the site.

Under the wetland definition contained in 14 CCR Section 13577, the definition for purposes of determining Coastal Commission appeal jurisdiction, wetlands are defined as "land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes . . ." Available information, including the March 2000 WRA wetland delineation and the various WRA correspondence, indicate that areas within 100 feet of the approved development meet these criteria. Based on this information, Commission staff concludes that the project lies within the Commission's appeal jurisdiction. We note that the Section 13577 wetland definition contains only one exception for man-made features, specifically for "wetland habitat created by the presence of and associated with agricultural ponds and reservoirs" under certain conditions. The fact that certain areas exhibiting wetland features may be the result of man-made conditions is not otherwise relevant in applying this definition.

(b) Within 300 feet of the Seaward Face of a Coastal Bluff

The City's approval may also be appealable under Section 30603 of the Coastal Act because it includes development less than 300 feet from the top of the seaward face of the bluffs west of Palmetto Avenue. Although the Commission's post-certification maps demark the area west of

**Defective Local Government Notice, CDP-203-01
Pacifica Bowl Residential Development
August 23, 2002**

Palmetto Avenue in the vicinity of the project site as 300 feet from the bluff top, the maps document the location of the bluff top at the time of map certification. Recent aerial photographs of the area show eroded gullies and evidence of bluff erosion which appear to bring the bluff top within 300 feet of the project at some locations. Neither the City Council's permit approval findings nor the project EIR address the distance of the project from the bluff top. To the extent the project is less than 300 feet from the bluff top, the project also comes within the area of Commission appellate jurisdiction on this ground.

Determination of Appeal Jurisdiction

Section 13569 of the Commission regulations provides for Commission review of local government determinations of permit appealability. If the City disagrees with the Executive Director's determination that the project comes within the Commission's appellate jurisdiction pursuant to Section 30603, a Commission hearing will be scheduled in accordance with Section 13569(d) to resolve the disagreement.

Please contact me at 415-904-5268 if you have any questions concerning this letter.

Sincerely,



Peter T. Imhof
Coastal Planner
North Central Coast District

cc: North Pacifica LLC
6114 La Salle Avenue, Suite 207
Oakland, CA 94611

2-02-2-EDD (Pacific Bowl)

Letter from Keith Fromm, North
Pacifica, LLC to Peter Imhof,
dated September 9, 2002

NORTH PACIFICA LLC
6114 La Salle Avenue, Suite 207,
Oakland, CA 94611
(510) 655-5780 FAX (510) 654-8957

September 9, 2002

BY FAX AND U.S. MAIL

California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Att'n: Mr. Peter T. Imhof, Coastal Planner,
North Central Coast District

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the
"Property" or "Project")

Gentlemen:

This letter is in response to your letter dated August 23, 2002 to the City of Pacifica (the "Commission Letter" herein). The purpose of this response letter is to attempt to persuade the Commission that the City of Pacifica's Notice of Final Action dated August 19, 2002 (sometimes hereinafter referred to as the "Notice") was, indeed, valid.

Summary of Commission Letter.

The Commission Letter alleges that:

1. The City's Notice dated August 19, 2002 delivered to the Coastal Commission in respect to this project, on August 21, 2002, was "deficient" and "defective".
2. The commencement of the ten (10) day period set forth in Public Resources Code Section 30603(c)¹ for filing an appeal has been deemed by the Executive Director of the Coastal

¹Public Resources Code Section 30603(c) states: "*Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time.*"

Commission to "remain suspended and will not become final" for an indefinite period, until a "corrected" Notice of Final Action has been issued by the City.

3. The Coastal Commission's executive director has "determined", contrary to the findings of the City which were based on substantial evidence comprising many public hearings, dozens of witnesses, all the evidence contained in the administrative record for this project, the unanimous conclusions of two expert biologists and the conclusions of the certified Final Environmental Impact Report, that, notwithstanding all such evidence to the contrary, there are wetlands within 100' of the project and the project is within 300' of the seaward face of the coastal bluff west of Palmetto Avenue, and, that, therefore, the project is within the Coastal Commission Appeals Zone.

The claimed invalidity of the Notice is not based on an allegation by the Coastal Commission that it is not an accurate "notification of its [the City's] final action" on the coastal development permit, as is prescribed under Public Resources Code Section 30603(d), nor that it was not delivered by certified mail within the statutorily prescribed time period, nor even that it does not include all the information prescribed in the Coastal Commission's own regulation 14 CCR 13571², i.e. the conditions of approval, written findings and the procedures for appeal of the local decision to the Coastal Commission, all of which were, indeed, included in the notice, nor that it does not include each of the items set forth in Pacifica Municipal Code Section 9-4.4304(n), (which, as the Commission Letter pointed out, has been certified as part of the City's Local Coastal Program) which is the same as 14 CCR 13571, except that it only requires "procedures for appeal of the action to the California Coastal Commission if the development is within the Appeals Zone."

Rather, such claimed invalidity is based upon, essentially, a difference of opinion between the Executive Director of the Coastal Commission and the Planning Commission and City Council of Pacifica as to what quasi-judicial conclusions should have been drawn by the City in its August 12, 2002 public hearing from evidence in the administrative record regarding the existence or non-existence of wetlands and the distance of the project from the top of the seaward face of a coastal bluff.

Summary of Responses.

1. The Notice of Final Action is valid. It complies with all statutory requirements and is an accurate notification of the final local action taken by the City.
2. The City and not the Executive Director or Staff of the Coastal Commission is the administrative body which has the sole authority to determine whether or not the City's approval of the Coastal Development Permit is appealable to the Coastal Commission.

²14 CCR 13571 (i.e. Such notice shall include conditions of approval and written findings and the procedures for appeal of the local decision to the Coastal Commission.)

3. The purpose of the Notice was achieved irrespective of the Executive Director's view of its validity.
4. Coastal Commission Regulation 14 CCR §13572 is inapplicable to the facts at hand. 14 CCR §13572 is invalid to the extent that it seeks to amend Public Resources Code Section 30603(c) or extend a statutory limitation period.
5. Failure or refusal to comply with mandatory statutory provisions by delaying or interfering with the effectiveness of the Coastal Development Permit will subject the Coastal Commission to liability not excused by Landgate.

1. The Notice of Final Action is Valid. It Complies With All Statutory Requirements and Is An Accurate Notification of the Final Local Action Taken By the City.

A. Distinction Between Validity of Notice and Agreement with Decision Reported in Notice. The Commission Letter seeks here to shoot the messenger, because the Executive Director does not agree with the message. There is a legal distinction between (a) whether or not a notice is invalid, and, (b) whether or not one disagrees with the conclusions which were accurately reported in a valid notice.

The Notice of Final Action is a document which simply gives notice of an historical event which has already taken place in the past. In this case, the Notice, dated August 19, 2002, gave an accurate notification that the City Council of the City of Pacifica, on August 12, 2002, made an administrative and quasi-judicial decision, based on findings contained and adopted in a July 15, 2002 Planning Commission Staff Report, that the Coastal Development Permit was approved (and that the project was not within 100' of wetlands nor 300' of a coastal bluff), and was not within the Coastal Commission Appeals Zone. Delivery to the Coastal Commission of the Notice is not a legally cognizable opportunity for the Executive Director of the Coastal Commission to insist on a revision of history by substituting in the Notice the opinion of the Executive Director as to, substantively, what the City should have decided, rather than what the City actually did decide.

The Notice of such decision could only be "deficient" or "defective" if (a) it was not delivered in the time period and manner prescribed by law, (b) failed to report such decision accurately, or, possibly, (c) failed to include all of the necessary informational items or materials required by law. It cannot be considered "deficient", "defective" or "invalid", however, simply because someone, including the Executive Director of the Coastal Commission, disagrees with the conclusions which were accurately reported in the Notice and which had already taken place, in a legally conducted public hearing, before a duly authorized quasi-judicial agency, prior to the preparation of the Notice.

The Notice of Final Action is akin to a transcript of a witness' testimony or a conformed copy of a recorded document. The transcript or conformed copy may state on its face: "*This is a true and correct record*" of a certain witness' testimony on a certain date, or, "*This is a true and correct copy of the original*" of a certain document which was recorded in the public records. Neither the transcript nor the conformed copy is "deficient" or invalid because someone believes that, when the witness testified, he was lying or mistaken, or the original document, accurately depicted in a conformed copy, should never have been recorded. Neither, therefore, is the Notice of Final Action, "defective" simply because the Executive Director of the Coastal Commission disagrees with the determinations reached by the City Council on August 12, 2002, which were faithfully and accurately reported in the Notice of Final Action, on August 19, 2002.

B. The Notice of Final Action Is Valid Because it Complied In Every Respect With the Legal Requirements for Such Notice.

It is without controversy that the Notice of Final Action complied with the stated requirements of Public Resources Code Section 30603(d) as an accurate notification of the City's final action. The City's final action was an approval of the Coastal Development permit and that is what the Notice accurately reported. Likewise, the Notice set forth each and every item required under 14 CCR §13571 i.e. the conditions of approval, the written findings of the City of Pacifica and the procedures for appeal of the local decision to the Coastal Commission. In this regard, the Notice set forth: "*Appeal Procedures: The appeals process may involve the following:..and then accurately reported the City's official determination that "the project is NOT in the Appeals Zone and the permit is NOT appealable to the Coastal Commission."*

Since the City lawfully exercised its statutorily conferred quasi-judicial discretion and determined the project was not in the Coastal Commission appeals zone, it was not necessary, under the Pacifica Municipal Code Section 9-4.4304(n), (which, as the Commission Letter pointed out "has been certified as part of the City's Local Coastal Program"), to set forth procedures for appeal of the City's decision to the Coastal Commission. But the notice actually did set forth such procedures anyway. On its face, the Notice indicated what the appeal procedure would be if the project were in the Coastal Commission appeals zone and indicated that such an appeal "*is made in writing to the Coastal Commission within 10 working days from the next business day following the date of receipt of this notice by the Executive Director of the Commission. For additional information, contact the California Coastal Commission @45 Fremont, Suite 2000, San Francisco, CA 94105-2219, (415) 904-5290*".

Thus, contrary, to the Commission Letter's assertion, the Notice does indeed comply, in every detail, with Section 13571 of the Commission regulations, as well as Public Resources Code Section 30603(d) and Pacifica Municipal Code Section 9-4.4304(n).

In essence, in stating that "the City should accordingly issue a corrected Notice of Final Local Action indicating that the permit is appealable", the Commission Letter urges the City to falsify and misrepresent, in the Notice, the actual findings that the City adopted in its public hearings on August 12, 2002, July 15, 2002 and June 17, 2002, by preparing a new "corrected"

notice, which substitutes therefor, a conclusion which the City expressly and intentionally did not find, i.e. that "the permit is appealable."

Indeed, considering the converse, if the City were to accede to the Executive Director's demand to issue a second Notice that stated that the City of Pacifica had determined that the project was in the Appeals Zone when, in fact, the record is absolutely clear that the City decided otherwise, then that Notice would be invalid, because it would be an inaccurate notice of the City's action and a misrepresentation of its findings. Thus, if the Executive Director's reasoning were to be accepted, the first notice would be ineffective because the Executive Director disagreed with its contents and the second notice would be vulnerable to a claim that it was ineffective because it misstated what transpired in the August 12, 2002 meeting. Thus, under such a scenario, depending upon who seeks to challenge the Notice, the statutory ten (10) day period would never begin to run, the approval of the Coastal Development Permit would never become final and the legislative intent of Public Resources Code Section 30603(c) would be defeated.

2. The City and Not the Executive Director or Staff of the Coastal Commission Is the Administrative Agency Which Has the Sole Authority to Determine Whether or Not the City's Approval of the Coastal Development Permit is Appealable to the Coastal Commission.

The Commission Letter further states that unless and until the City prepares such a "corrected" Notice which misrepresents the City's actual findings but satisfies the Executive Director's opinion as to what "should have been" (but were not), the findings of those public hearings, such Notice will never be recognized by the Coastal Commission to have validly satisfied Commission Regulation Section 13572 and Pacifica Zoning Code Section 9-4.4304.(1) and, be valid and not defective, and "CDP-203-01 will remain suspended and will not become final..."

The Commission Letter indicates "the Executive Director has determined that the City's approval includes development that is located within 100' feet of a wetland", the "Commission staff concludes that the project lies within the Commission's appeal jurisdiction" and "the Executive Director has determined that the project falls within the Coastal Commission's appellate jurisdiction pursuant to Section 30603 of the Coastal Act." But all of such "determinations" are in direct conflict with the duly authorized quasi-judicial determinations made by the City in respect to those two issues.

The Commission Letter has cited no legal authority which permits the statutorily authorized and publicly noticed quasi-judicial determinations of the City of Pacifica, to be overruled by either the Staff or the Executive Director of the Coastal Commission, much less, through ex parte, in camera, non-noticed, private deliberations for which no judicially reviewable record has been prepared of the proceedings and the evidence considered therein.

If any Commission Staff member or the Executive Director had the power to simply pick and choose from a City only those determinations regarding appealability with which the Coastal Commission staff or executive director agreed, there would be no purpose in the City ever making such a determination and including notice of it in the Notice of Final Local Action. The decision would simply be left for the Coastal Commission staff or executive director to make and report after Notice of the Final Local Action had been received³. To the contrary however, the Commission's jurisdiction to review the City's decision is limited by the appeals procedure set forth in the California Public Resources Code.

A determination by the Executive Director of the Coastal Commission that the Notice is defective or that the permit is suspended until a revised Notice is delivered has no force of law. The validity of the Notice is determined by whether or not it actually complies with the statute, not whether or not the Executive Director thinks it does. The question of whether or not a Notice of Final Local Action complies with the legal requirements of Public Resources Code Section 30603(d), 14 CCR 13571 and Municipal Code Section 9-4.4304(n) is a question of law, which, if in dispute, is to be determined by a Court and not the Staff or Executive Director of the Coastal Commission.⁴

³As general rules of statutory interpretation, in determining legislative intent ". . . a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.]" (Dyna-Med, Inc. v. Fair Employment & Housing Com., supra, 43 Cal.3d at pp.1386-1387.) **[**17]** Statutes should be given "a reasonable and commonsense interpretation consistent with the apparent legislative purpose and intent and which, when applied, will result in wise policy rather than mischief or absurdity." [Citation.]" (Id. at p. 1392.)

⁴In reviewing administrative regulations and their authorizing statute, "the courts are the ultimate arbiters of the construction of a statute," not the administrative agency. (California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 11 [270 Cal.Rptr. 796, 793 P.2d 2].) "Of course, the interpretation of statutes is a matter of law, and this court is not bound by the trial court's interpretation of the sections. (Cf. Estate of Dodge (1971) 6 Cal.3d 311, 318 [98 Cal.Rptr. 801, 491 P.2d 385].) "[w]hile the construction of a statute by officials charged with its administration . . . is entitled to great weight, nevertheless, '[w]hatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts.' Morris v. Williams (1967) 67 Cal.2d 733 [63 Cal.Rptr. 689],

A. The City Has The Legal Authority and Discretion to Make A Finding Regarding Whether The Project is Within the Coastal Commission Appeals Zone.

The Coastal Act provides that once a local government has adopted a local coastal program, it takes over from the Coastal Commission all authority to issue coastal development permits. (§§ 30500, 30600, subd. (d).) The City as an administrative and quasi-judicial agency is vested, by statute as well as by its own ordinances, with the authority and discretion under, inter alia, Public Resources Code Section 30519 and Pacifica Municipal Code Section 9-4.4304(k), to make all decisions and findings relating to the issuance of a Coastal Development Permit, including, whether or not such Coastal Development Permit is within the Coastal Commission Appeals Zone. Such decisions and findings include the administrative and quasi-judicial determinations as to whether or not a particular portion of land constitutes a wetland, whether any such area is within 100' of the project, whether or not a particular geological formation constitutes a coastal bluff, whether the project is less than 300' feet from the top of the seaward face of a coastal bluff, and, therefore, whether or not a project is within the Coastal Commission Appeals Zone. (Pacifica Municipal Code §9-4.4302)

That these decisions are under the exclusive jurisdiction of the City (and not the Coastal Commission, much less its Executive Director or staff) is made clear by Public Resources Code Section 30519(a) which states:

“(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof.” [emphasis added]

The City's determination that the project was not appealable is consistent with its exercise of its powers pursuant to this Section. Such a quasi-judicial determination can only be overturned by judicial review upon a finding that the City's decision was not supported by substantial evidence. In fact, the City's decision is completely supported by the evidence. A detailed analysis of the evidence is being prepared, and will be provided to you if and when it is appropriate.

3. The Purpose of the Notice Was Achieved Irrespective of the Executive Director's View of its Validity. Executive Director Has No Authority to Invalidate Notice.

The Coastal Commission was the only recipient of the Notice of Final Action (apart from the applicant who is satisfied with the Notice). There were no other persons who requested, in the manner prescribed by the Coastal Commission Regulation 13571, or the Pacifica Municipal

Code, (or, indeed, at all) a copy of such Notice. The purpose of the Notice was to notify the Coastal Commission of the action taken by the City in its August 12, 2002 meeting.

If, as the Commission Letter seems to imply, the Executive Director does not rely upon and is not bound by the reported conclusion in the Notice, that the project is not appealable to the Coastal Commission, there would be no purpose served in requiring the City to re-issue a "corrected" Notice which stated that the permit approval was so appealable. For, if the Coastal Commission does not rely on such a Notice and is not bound by its conclusion that the permit approval is not appealable, then two members of the Coastal Commission (or an "aggrieved person" as such term is defined in the Public Resources Code), could simply have ignored the contents of the Notice, and, within the ten (10) day period after its receipt, filed an appeal of the permit approval to the Coastal Commission under Public Resources Code Section 30625. Upon the filing of such an appeal, if it is the position of the Coastal Commission that, indeed, the Coastal Commission has the jurisdiction to consider such appeal, it would be pointless and unwarranted for the Coastal Commission to subject North Pacifica LLC to the additional delay of waiting, possibly forever, for the City to accede to the Coastal Commission's demand to reissue a "corrected" Notice or to participate in hearings before the Coastal Commission to argue the correctness of the Notice. For to do so would yet further deprive the Applicant of the protections of the 49 day statutory deadline prescribed for holding a lawful appeal before the Coastal Commission, where, at least the Coastal Commission has determined, such an appeal would be lawful. Thus, the interpretation of the Coastal Commission's regulations and the procedure urged by the Commission Letter seeks not only to defeat the ten (10) day statutory period for filing an appeal, but, as well, the 49 day period for holding such an appeal, even if such an appeal were, according to the Coastal Commission, to be lawfully filed.

Alternatively, if, indeed, the Final Notice and the conclusions reported therein were binding upon the Executive Director and the Coastal Commission, no appeal could lawfully be filed to the Coastal Commission and, when the ten (10) day period under Public Resources Code Section 30603(c) elapsed, the permit approval became final.

4. The Commission Letter Seeks to Dispense With Constitutional Due Process.

The Executive Director contends that, based on a private, ex parte, non-noticed, in camera review of some of the evidence in the administrative record conducted over a brief period commencing sometime on or after August 21, 2002 and ending, at the latest, sometime on August 22, 2002, the Executive Director would have made a different quasi-judicial determination than the City Council and Planning Commission made after conducting numerous public hearings based on all of the evidence. The Commission Letter, therefore, concludes the Executive Director's view is correct and the City's incorrect, which leads to the Commission Letter's further conclusion that the August 19, 2002 Notice must be "deficient" or "defective". Thus, the Commission Letter concludes, though the Notice was timely sent and accurately reports what was the Final Action of the City on August 12, 2002, since such final action is not the action that the Executive Director would have taken had the Executive Director been (which was not) the quasi-judicial agency legally charged with making such quasi-judicial

determination, the Notice of the City's Final Action, in addition to the final action itself, must be "defective".

In this reasoning, the Commission Letter unlawfully seeks to appropriate unto the Executive Director a power that not even a Court would possess to overturn a city's lawfully conducted quasi-judicial determination, i.e. the power to overturn such a decision without (a) application of the "substantial evidence" test, (b) statutory authority to overturn such a quasi-judicial determination, and, (c) a duly noticed, public hearing including a written record of judicially reviewable findings.

The Notice was duly and timely delivered and duly and accurately reported the conclusions reached by the City of Pacifica in its City Council meeting of August 12, 2002, and the Commission Letter makes no allegation that it does not. The Executive Director believes, based on his review of the administrative record or portions thereof, that the evidence should have led the City to a different conclusion that there were wetlands within 100' of the project and that the project was within 300' of a coastal bluff, which means the project would be within the Coastal Commission Appeals Zone.

On the other hand, the administrative record establishes that the Planning Commission and the City Council and the City Staff exhaustively reviewed all of the evidence regarding this project and all three bodies concluded that there were no wetlands within 100' of the project and that the project was not within 300' of a coastal bluff, and, therefore, concluded the project was not within the Coastal Commission Appeals Zone.

Postal records indicate that the Coastal Commission received the Notice from the City of Pacifica at 9:31 a.m. on August 21, 2002. The Commission Letter is dated August 23, 2002. It is detailed, five pages in length, was custom-tailored to this particular project, has many technical references and must have taken a considerable length of time to prepare. We know as of approximately 2:30 p.m. on August 22, 2002 it was still a work in progress, but that its conclusions had already been reached, because, at that time, we were advised by Michael Crabtree, the City of Pacifica Planner, that he had already spoken with Peter Imhof who had indicated that he was in the course of preparing such a letter containing the conclusions which the letter does, in fact, contain. These time parameters do not leave a great deal of time for the Executive Director to have conducted thorough research into the comprehensive administrative records for this project (in excess of 1,500 pages, dozens of maps, and dozens of hours of recorded testimony in public hearings) and given thoughtful consideration to such evidence in reaching his determination that the City of Pacifica erred in its decision that the project was not within 100' of wetlands nor within 300' of the coastal bluff, and, therefore, not within the Coastal Commission Appeal Zone.

It is also to be noted that the decision of the Executive Director, on or about August 22, 2002, was made, *ex parte*, in camera, without the benefit of any input from the applicant or any live testimony from any of the experts who prepared the reports, any public hearings, any public notice, any testimony, the availability of any live experts who prepared the reports to answer any

questions or clarify the reports, or any reviewable record as to exactly what evidence was reviewed and what was not reviewed, what findings were made and upon what specific evidence such findings were based.⁵

In short, the Executive Director's decision which purports to overrule the City's own duly authorized and lawfully conducted quasi-judicial decision, was made without the benefit of any of the customary due process protections normally accorded a quasi-judicial determination, nor any statutory authority to make such an overruling determination.

Conversely, it must be emphasized that the findings of the Planning Commission and City Council were arrived at on the basis of an administrative record compiled over three years, comprising the substantial evidence of the various and numerous expert biologists' reports, (some hired by the applicant, some hired by the City, but whose conclusions were unanimous), the Army Corps of Engineers, the draft and final EIR, public comments, many staff reports, many public hearings, the Coastal Commission's own jurisdiction maps, the witnesses' testimony, and all of the other evidence in the administrative record as reviewed in conjunction with an examination by attorneys (some hired by the applicant, some hired by the city) of applicable statutory, regulatory and case law, all of which led the City reasonably to conclude, after exhaustive deliberation and study, there were no wetlands within 100' of the project and the project was not within 300' of the seaward face of the coastal bluff west of Palmetto Avenue, and, therefore, the project was not within the Coastal Commission Appeals Zone.

5. A Determination of Appeal Jurisdiction Under the Procedure Set Forth in 14 CCR Section 13569 Would Be Inappropriate Because:

- (a) It is intended to apply only to questions that arise upon the initial submission of an Application, not after an application is approved,
- (b) No "Interested Person" has posed a challenge to the City's determination of non-appealability
- (c) To require such a determination process would be illegally inconsistent with Public Resources Code Section 30603(c) which makes no provision to extend the statutory 10 day appeals period to accommodate the procedure envisioned in 14 CCR §13569.

⁵An administrative agency is required to "render findings sufficient both to enable the parties to determine whether and on what basis they {Page 83 Cal.App.4th 115} should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974)11 Cal.3d 506. In this instance, the Executive Director of the Coastal Commission is not even an administrative agency with authority to make any such determination as to the correctness of the City of Pacifica's findings.

(d) Such a procedure would be unconstitutional because it would deprive the applicant of a substantive constitutional entitlement to the protection of Public Resources Code Section 30603(c).

The Commission Letter also suggests that the City should submit the issue of whether or not the Coastal Permit is appealable to the Coastal Commission to the procedure set forth in Coastal Commission Regulation 14 CCR Section 13569. Under the subject circumstances, this would be inapplicable for a number of reasons:

1. This procedure, by its very terms, is contemplated to apply only to questions which arise at the time of the submission of the coastal development permit application.⁶
2. This procedure, by its terms (§13569(b)), only applies "*if the determination of the local government is challenged by the applicant or an interested person, or if the local government wishes to have a Commission determination as to the appropriate designation*" as to whether the project is appealable to the Coastal Commission. Neither the local government, (i.e. the City of Pacifica), nor the Applicant, has made such a challenge or wishes such a determination by the Coastal Commission, and, no "interested person", as defined and contemplated by 14 CCR §16010, has made such a challenge. The definition of "interested person" cannot reasonably be interpreted to include either the executive director of the Coastal Commission or the Coastal Commission's staff.

Under 14 CCR §16010(d): "Interested Person" means public agencies having jurisdiction over the project, public agencies which approve or comment on the project, consultants hired with respect to the project, and individuals or groups known to be interested in the project."

The Commission Letter states that the Executive Director and the Staff of the California Coastal Commission disagree with the City of Pacifica's determination that the project is not appealable to the Coastal Commission. Neither the Executive Director nor the staff is: (a) a public agency, (b) a consultant hired with respect to the project, or, (c) a group or individual known to be interested in the project. It is obvious that the Executive Director of the Commission is not intended to be an "interested person" since under 14 CCR §13569(b) it is the Executive Director, to whom the challenge is first referred for his opinion. It would make no

⁶14 CCR 13569: "The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted ...Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable..."

sense for the Executive Director to refer his own challenge to himself to obtain his own opinion on whether or not his challenge is justified.

Likewise, it would make no sense that the Commission staff was intended to be "a group or individual or group known to be interested in the project", since, (a) staff is not an individual or group "known to be interested in the project", (b) staff functions in only a capacity as representative of the Coastal Commission, and the Coastal Commission is not intended to have a right of appeal to itself except as exercised pursuant to Public Resources Code § 30625 which mandates the exercise of the right by two Coastal Commissioners⁷, (not the executive director or staff), and, (c) it is staff, itself, who would be preparing, for the Coastal Commission's deliberations, the staff report to objectively evaluate both the challenge and the decision being challenged. Indeed, the Commission cannot vote on a permit matter unless it has received a staff recommendation. (Cal. Code Regs., tit. 14, section 13090.) One can scarcely expect staff to be, on the one hand, in its role as challenger, the proponent of the challenge, and, on the other hand, the preparer of the unbiased staff report prepared to guide the Coastal Commission's deliberations on the issue.

3. To require such a procedure after a permit has already been approved would violate the requirements of Public Resources Code Section 60603(c) because such a procedure would take in excess of ten (10) days from the City's receipt of the Notice of Final Action. Since there is no provision in the Public Resources Code to extend such statutory period pending the outcome of the procedure under 14 CCR §13569, the appeal period would expire prior to a determination under the 14 CCR §13569 procedure, rendering such determination moot.

4. It is easy to envision how the 14 CCR §13569 procedure urged upon the City by the Commission Letter would lead to a routine and systemic pattern of violations of applicants' constitutional right to due process. For example, under Public Resources Code Section 60603(c), an applicant for whom a development permit has been issued by the City, has a constitutional entitlement to have such permit be final, effective and non-appealable ten (10) working days after the Notice has been delivered to the Commission, if no appeal to the Commission has been filed within such ten (10) day period. If each or any such Applicant were required to suspend its rights to such entitlement under Section 60603(c), simply because a member of the Commission staff routinely raised a question regarding the City's determination of permit appealability, such entitlement to the ten (10) working day deadline could be defeated every time, simply by the raising of such a question, even, if, at the conclusion of the 14 CCR

⁷The Coastal Act provides that once a local government has adopted an LCP, it takes over [**7] from appellant the authority to issue coastal development permits. (§§ 30500, 30600, subd. (d).) However, actions taken by the local government on coastal development permit applications may be appealed to appellant in the case of certain types of developments: (§§ 30603, subd. (a).)The appeal may be taken by the applicant, two members of the commission, or an aggrieved person—one who has appeared at the public hearings held by the local government or otherwise informed the local government of his or her concerns. (§§30625, subd. (a), 30801.)

§13569 procedure, the Coastal Commission ultimately determined there was absolutely no merit whatsoever to the staff member's challenge.

6. Coastal Regulation §13572 Is Invalid to the Extent it Conflicts With And Seeks to Amend Public Resources Code § 30603(c) and Seeks to Extend a Statutory Limitation Period.

Administrative agencies are authorized only to adopt regulations which are consistent with their authorizing statute. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748 [63 Cal.Rptr. 689, 433 P.2d 697].) Administrative regulations which alter or amend their authorizing statute or enlarge or impair its scope are void and must be struck down. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1389 [241 Cal.Rptr. 67,743 P.2d 1323].)

Coastal Commission Regulation §13572, as interpreted by the Commission Letter, seeks, impermissibly, to expand the unequivocal ten (10) day limitation period prescribed in Public Resources Code §30603(c) for an appeal to the Coastal Commission and for the approval of a coastal development permit to become final. It does so by inserting, in conflict with both the language and intent of Public Resources Code §30603, an additional ground and mechanism to suspend the passage of such appeal limitation period. An administrative agency has no authority to expand a limitation period set by the Legislature. (*Hittle v. Santa Barbara County Employees Retirement Assn.* (1985) 39 Cal.3d 374, 387 [216 Cal.Rptr. 733, 703P.2d 73].)

Public Resources Code §30603(c) provides that:

"Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time."

Thus, the Public Resources Code provision, using mandatory language ("shall become final") recognizes only one possible occurrence or obstacle in the way of an approved permit becoming, by operation of law, final, i.e. an appeal which is submitted within ten (10) days from the date of receipt by the commission of the notice of such approval. If no such appeal occurs within the ten (10) day period, under this statutory provision there is no administrative agency or officer, including the Coastal Commission or its executive director, that has any authority or discretion to stand in the way of the approval automatically becoming final and unappealable.

On the other hand, Coastal Commission §13572, as interpreted by the Commission Letter, purports to insert an additional obstacle and a further administrative discretion, procedure and time period in the way of such approval achieving such mandatory finality, i.e. an opportunity for the Coastal Commission, itself, to contest whether or not the notice of final action meets the additional requirements of the Commission's own regulation §13571 as to form and content and to issue a notice that the effective date of the permit approval has been "suspended".

14 CCR §13572 states: "A local government's final decision on an application for an appealable development shall become effective after the ten (10) working day appeal period to the Commission has expired unless either of the following occur: (a) an appeal is filed in accordance with Section 13111; (b) the notice of final local government action does not meet the requirements of Section 13571; When either of the circumstances in Section 13572(a) or (b) occur, the Commission shall, within five (5) calendar days of receiving notice of that circumstance, notify the local government and the applicant that the effective date of the local government action has been suspended."

The practical effect of the Coastal Commission Regulation is to purport to place in the hands of the Coastal Commission, or, indeed, any employee thereof who may be authorized or merely appear to be authorized to write a letter on Coastal Commission stationery, the absolute, unilateral means to defeat a statutorily mandated limitation period merely by sending a notice which states, rightly or wrongly, that the Notice of Final Action is defective.

It can hardly have been intended by the Legislature that such limitation period could, in all practical terms, be defeated by any employee of the Coastal Commission wielding a pen and a piece of Coastal Commission letterhead.

"Certainly the language of a statute should never be so construed as to nullify the will of the legislature, or to cause the law to conflict with the apparent purpose had in view by the lawmakers." (Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 802 [151 P.2d 505, 157 A.L.R. 324].)"

Under the interpretation of the Coastal Commission Regulation urged upon the City by the Commission Letter, the only way the applicant may achieve the finality accorded automatically under Public Resources Code Section 30603(c), and cause the "suspension" to be lifted is to (a) accede to whatever demand the Commission or, indeed, any member of its administrative or clerical staff may exact to withdraw the suspension of the approval, or, (b) to contest the Commission's action in a writ proceeding.

In either situation, even if the applicant prevails in the writ, he has still lost the benefit of the speedy finality of the approval intended by the Legislature in its enactment of Public Resources Code Section 30603(c). Thus, in this way, Coastal Commission's Regulation 13572, as interpreted in the Commission Letter, is invalid, because it impermissibly seeks to corrupt the intent and purpose of Public Resources Code Section 30603(c) by unilaterally conferring upon itself a measure of discretion and, in a sense, a "toll booth" neither intended nor permitted under Public Resources Code Section 30603(c), plus a way, without cause, to evade the strict time limit imposed by Public Resources Code Section 30603(c), for which there is no effective remedy.

For, even a successful writ proceeding takes time, and whatever time it takes is longer than the ten (10) days in which the Public Resources Code intended the approval would become final and no longer subject to challenge by or before the Coastal Commission. In this regard, the Coastal Commission Regulation, as interpreted in the Commission Letter, has very substantially and illegally amended the statutory provision and enlarged the scope of the Coastal Commission's own discretion to suspend the time period for the effective date of the approval, from zero to however many months it may take an applicant to effectively prosecute a writ proceeding.

Meanwhile, in the course of such a potentially meritorious writ proceeding, the applicant may still suffer irreparable injury because the applicant's associated development permits, other than the coastal development permit, may be rapidly heading towards expiration or may even expire, and, therefore, the applicant may even suffer the total loss of his project during the pendency of the writ proceeding, irrespective of whether his writ action is ultimately successful. For this reason, this regulation, if interpreted in the manner advocated by the Commission Letter, is invalid and must be stricken down by a court.

In reviewing administrative regulations and their authorizing statute, "the courts are the ultimate arbiters of the construction of a statute," not the administrative agency. (California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 11 [270 Cal.Rptr. 796, 793 P.2d 2].)

7. Delay or Interference by the Coastal Commission With the Coastal Development Permit Would Subject the Coastal Commission to Liability Not Excused Under the Holding of Landgate v. California Coastal Commission. Government Code Section 815.6 Also Gives Rise To Liability for Damages.

In Landgate, Inc. v. California Coastal Commission, (1998) 17 C.4th 1006, the Court held that a delay resulting from the mistaken assertion of jurisdiction by the Coastal Commission did not amount to a temporary taking where it could be demonstrated that the action taken was in furtherance of some legitimate governmental objective. The Court expressly admonished, however, its conclusion would have been different if the position taken by the Coastal Commission "*was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective*" and would, therefore, constitute an unconstitutional temporary taking of an applicant's property.

Where, however, the Coastal Commission has demonstrated a routine and systemic pattern of "*mistaken assertion of jurisdiction*" such "mistakes" can no longer be viewed as "reasonable", particularly where at least one Court has already drawn to the attention of the Coastal Commission the unreasonableness of the Commission's "mistake". A mistake which may be viewed as reasonable the first time, cannot be so viewed if routinely repeated over and over again.

In a case, involving a very similar Notice of Final Action and a very similar argument by the Coastal Commission, the Court discredited the reasonableness of the Coastal Commission's stance. In *Transamerica Realty Services v. California Coastal Commission*, 23 Cal. App. 4th 1536, which, though it may not be cited in subsequent court proceedings, is nevertheless a case with which the Coastal Commission has personal knowledge, the Second District Court of Appeal stated that, even where the Commission's own regulations provided for notice of a City's final action as the starting point for the ten (10) day appeal period, the Commission could not extend the appeal period prescribed in Public Resources Code 30603(c), by deeming the City's notice to be "defective", if to do so would have the effect of inserting, where one did not exist in the statute, a pre-condition to the effectiveness of Public Resources Code Section 30603(c).

"The court's duty is "to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted." (Code Civ. Proc., §§ 1858.)" *Transamerica* (supra)

In considering the Commission's regulations, the Court acknowledged that the Commission could require notice of the final action, but it could not expand the appeal period to 10 working days after receipt of notice, where the statute stated the appeal period would expire 10 working days after the City's approval of the permit.

Though the current version of Section 30603(c) has been amended to require that a notice be served upon the Coastal Commission, such section still does not state that the Executive Director of the Commission or its staff has the authority to suspend the limitation period contained in such Section 30603(c) by deeming the notice "defective", or otherwise. And, as in Transamerica, the Commission still lacks the authority, through its own regulations, much less a unilateral decision of its Executive Director, to "insert" into such Section 30603(c) a power unto itself which is not bestowed by that statutory provision. In Transamerica, as now, a Notice that was deemed "defective" by the Commission did not stop the running of the statute under Section 30603(c). In Transamerica, as now, under its own regulations the Coastal Commission may have been entitled to receive a Notice of Final Action, but, then, as now, neither the Coastal Commission, nor its Executive Director nor staff, could stop the expiration of the appeals period in Section 30603(c) by declaring such notice "defective".

The Commission Letter, purposely ignores the Court's lesson in Transamerica, and, in so doing, forfeits all legitimacy to claim a reasonable "mistaken assertion of jurisdiction" and the immunity from liability afforded by the Landgate decision.

Further, in Landgate, the delay occurred during the application procedure preceding the issuance of a coastal development permit and was characterized as a normal delay in the processing of the application. In the instant situation, however, the coastal permit has already been validly issued, and constitutes a vested entitlement both under the Public Resources Code and the United States Constitution. An unjustified interference or delay in the exercise of this vested entitlement as a result of a "mistaken assertion of jurisdiction" by the Coastal Commission would not be characterized as a "normal delay in processing" because the

processing has already been completed and the permit has already been issued and is vested. Thus, any such "mistaken assertion of jurisdiction" would constitute rather, an "abnormal", extraordinary, intentional and unlawful interference with a vested entitlement, for which the Coastal Commission would be liable for damages. At stake is the approval for a development project having a retail sales value of approximately \$30,000,000. The damages chargeable for an unjustified interference or delay with such an already approved project would be very substantial.

An additional potential source of liability is found in Government Code Section 815.6 which states:

"Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty."

The purpose of Public Resources Code Section 30603(c) is to achieve finality in the approval of a coastal development permit and to prevent the applicant from suffering the costs of any further delays in an official recognition of such approval. The purpose of Public Resources Code Section 30519(a) is to establish exactly which administrative agency has the power to issue such approval so as to avoid any confusion or delay in the rendering and effectiveness of such approval.

Public Resources Code Section 30519(a) imposes such a mandatory duty upon the Coastal Commission to "no longer exercise" development review authority over projects after a local coastal program has been certified and to delegate all such functions to the local authority which has certified such program:

"(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof..."

The Coastal Commission is under a mandatory duty to refrain from exercising development review authority over the Coastal Development Permit (including the determination as to whether or not the project is within the Coastal Commission Appeal Zone) and to delegate to the City such authority, where, as here, the City has a certified local coastal program. Since under the development review authority provided for in Chapter 7, the Coastal Commission was empowered to determine the existence or non-existence of wetlands and whether or not a project was appealable to the Coastal Commission, Section 30519(a) expressly

removed such power from the Coastal Commission and delegated it to the City once the City certified its local coastal program. The failure or refusal of the Coastal Commission to comply with such mandatory duties by taking any steps that interfere with or delay the intended effect of such Section 30603(c) would subject the Commission to liability under Section 815.6 for the damages caused by the delay resulting from the Commission's refusal to comply with such mandatory provisions, i.e. Public Resources Code Section 30519(a) and 30603(c).

Even though, as explained above, the Commission's purported suspension of the Coastal Development Permit is manifestly invalid and void, it, nevertheless, in the eyes of third parties, represents a cloud on the validity of the Coastal Development Permit that renders the entire project unmarketable and totally deprives it of all economic value. Thus, the Commission's purported suspension is, wrongfully, causing North Pacifica LLC substantial damages during each day in which it remains outstanding.

For the reasons above-stated, we respectfully request, that the Coastal Commission, by a notice in writing to the City and North Pacifica LLC, immediately retract the Commission Letter and signify your acknowledgment that the approval of the Coastal Development Permit, which was the subject of the Notice, is not appealable to the Coastal Commission. Thank you for your consideration of the foregoing and anticipated agreement to our request herein.

Yours very truly,



Keith M. Fromm
Member

WARSHAW & POPE
Attorneys at Law

EXHIBIT 6
2-02-2-EDD (Pacific Bowl)
Letter from Jaquelynn Pope, Warshaw
& Pope, to Peter Imhof,
dated September 10, 2002

MARK WARSHAW

JAQUELYNN POPE

September 10, 2002

RECEIVED

SEP 12 2002

CALIFORNIA
COASTAL COMMISSION

VIA FACSIMILE
(415) 904-5400

Peter T. Imhof
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Coastal Development Permit -203-01
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and 260)

Dear Mr. Imhof:

This office represents North Pacifica LLC, the applicant for the above referenced Coastal Development Permit. We are writing to you in response to your letter of August 23, 2002 to the City of Pacifica Planning Director, Michael Crabtree.

In that letter you have informed the City of Pacifica that its Notice of Final Local Action regarding North Pacifica's CDP is defective. You have stated that the City should issue a "corrected" Notice of Final Local Action, and that the CDP will remain suspended until the "corrected" Notice has been issued and the appeal period has run.

We have reviewed the authorities that you cite in support of the Commission's position, and we do not believe that they establish any legal right in the Commission to take such action. Rather, it is clear that the City of Pacifica has complied with the requirements of its certified Local Coastal Program, and that the Notice is not defective under either the State statute, the Commission regulations or the local ordinance. Thus the Commission's reliance on 14 CCR §13571 is misplaced.

The Commission is wrongfully attempting to delay the statutory 10-day limitation period of Public Resources Code § 30603(c) by alleging that it has the right to "suspend" North Pacifica LLC's permits based on its Executive Director's determination that the City's

934 Hermosa Avenue, Suite 14
Hermosa Beach, CA 90254
Telephone (310) 379-3410 Fax (310) 376-6817

substantive decision is incorrect. However, the filing of the Notice of Final Local Action does not trigger the jurisdiction of the Commission to review the City's decision for "correctness," rather such a review would properly be conducted only in the event that the decision was appealable and if an appeal was filed.

The Commission's attempt to impose the procedures set forth in 14 CCR § 13569 is completely insupportable, as that review can only arise where there is a question or challenge as to the City's determination as to whether it is an appealable development. Here, no such question or challenge arose. The procedures of § 13569 are expressly intended to take place at the time the application is first received and patently not intended to extend the 10-day limitation period, after the application has already been approved. Additionally, it is clear that § 13569 depends as the source of its authority upon the development review authority under Chapter 7 of the Coastal Act. However, Public Resources Code § 30519(a) specifically removes such authority from the Coastal Commission and delegates that authority to the City once the Local Coastal Program has been certified, as is the case here.

THE NOTICE OF FINAL LOCAL ACTION IS NOT DEFECTIVE

Municipal Code Provisions (Local Coastal Program)

Contrary to the contention of your letter, the City's Notice of Final Local Action is clearly in compliance with § 9-4.4304(n) of the Pacifica Municipal Code. That section provides that the Notice of Final Local Action shall be sent to the California Coastal Commission within seven calendar days of the action, and that the notice shall include (1) written findings; (2) conditions of approval and (3) procedures for appeal of the action to the California Coastal Commission if the development is within the Appeals Zone. In this case, the City determined that the project was not within the appeals zone, thus the Notice would have been effective under § 9-4.4304(n) if it had contained only the findings and conditions of approval. Nonetheless, the Notice also includes the procedure for appealing to the Coastal Commission. There is no basis for the Coastal Commission's assertion that the Notice fails to comply with the local ordinance.

The notice was also in compliance with § 9-4.4305, in that that section provides only that CDP's may be appealed to the California Coastal Commission in compliance with Public Resources Code § 30603. As you know, that statute limits the Coastal Commission's appeals jurisdiction to projects that meet specific criteria. Projects that meet those criteria are the only types of developments that may be appealed to the Coastal Commission. The City determined that this project did not fit any of those criteria and therefore the project is not appealable pursuant to Public Resources Code § 30603 and Pacifica Municipal Code § 9-4.4305(c). The Notice of Final Local Action is not inconsistent with this ordinance either.

Commission Regulations

Public Resources Code § 30603(d) provides that the local government must provide notice of its "final action" to the Coastal Commission within seven calendar days of the date of taking the action. 14 CCR §13571(a) specifies that the Notice should include the conditions of approval and written findings and the procedures for appeal of the local decision of the Coastal Commission. These requirements are essentially the same as those found in the Pacifica certified Local Coastal Program at § 9-4.4304(n) except that the requirement to include procedures for appeal is limited in section § 9-4.4304(n) to the circumstance where the City has found that the development is within the Appeals Zone. Since § 9-4.4304(n) was certified by the Coastal Commission, it is clear that the Commission intends 14 CCR § 13571(a) to be interpreted to require the notice of procedures for appeal to be included only in those same circumstances.

The Commission also cites 14 CCR § 13570 to support its contention that it has jurisdiction to indefinitely suspend the effective date of North Pacifica LLC's permits. However, §13570 states only that a local decision on an application for a development is not complete until all local rights of appeal have been exhausted as defined in §13573. Section 13573 merely provides that an appellant must exhaust local appeals before appealing to the Coastal commission. Since all local appeals have been exhausted here, §§ 13570 and 13573 are irrelevant.

Thus there is no support for the Commission's position that the Notice is defective and/or that it has the power to suspend the effective date of North Pacifica LLC's permits.

THE COMMISSION CANNOT USE 14 CCR § 13569 TO EXPAND THE 10 DAY LIMITATION PERIOD OF PUBLIC RESOURCES CODE § 30603(d).

Section 13569 is Irrelevant to §§ 13571 and 13572

Even though the City's Notice of Final Local Action contains all the information required by the Pacifica Local Coastal Program, (Pacifica Municipal Code § 9-4.4304(n)) and the Commission regulations (14 CCR § 13571), the Commission nonetheless attempts to suspend North Pacifica LLC's permits under the provisions of 14 CCR § 13572, on the grounds that the Notice needs to be "corrected" to be in compliance with not only § 13571, but also §§ 13570 and 13569. However, §13572 provides that the effective date of the local government action can be suspended only when the Notice does not meet the requirements of § 13571. It makes no mention of §§ 13569 or 13570. (As discussed above, § 13570 pertains to the exhaustion of local administrative remedies and is irrelevant here in any event.) As shown above, the Notice indisputably meets the requirements of § 13571, and the provisions of § 13569 cannot justify suspension pursuant to § 13572.

Section 13569 Cannot Trigger Substantive Review Jurisdiction

Section 13569 contemplates a limited review by the Commission that would take place, if at all, at the inception of the processing of the application. It is clearly the intent of that regulation that review would be conducted during the City's processing of the application not after the processing has been completed and the permit has been approved. To argue, as the Commission does, that it is appropriate under that section to subject the applicant to extraordinary and indefinite delay after the application process has been concluded, is clearly an attempt to circumvent the clear intention of the legislature in Public Resources Codes § 30603(c) and (d) to limit delay to ten days.

Under the interpretation of §13569 urged by the Commission, the mere act of filing the Notice of Final Local Action justifies a substantive review of the City's decision for "correctness" prior to and/or regardless of whether any appeal is filed. In addition to imposing impermissible delay, this also defeats the express mandate of Public Resources Code § 30603(a), which limits the jurisdiction of the Commission on appeal, and § 30519, which precludes the Commission, once the Local Coastal Program has been certified, from exercising development review authority except pursuant to § 30603.

The City Complied With Appropriate Notice Provisions

The Commission's contention that it was entitled to Notice pursuant to § 13565 is insupportable due to the fact that that provision concerns appealable developments, and the City determined that the within development was not appealable. For this reason the provisions of ten days Notice of Hearings set forth in § 13568 and /or at least seven day Notice of Hearing of Pacifica Municipal Code § 9-4.4303(g) apply rather than § 13565. Although the Commission claims not to have received the ten-day Notice of Hearing, North Pacifica LLC provided the City with stamps to allow the Notices to be sent out, and has been advised that the Notices were indeed sent out.

Even if the Coastal Commission did not receive a Notice, it would not trigger a right of substantive review.

The Provisions of § 13569 For Commission Review Were Never Triggered

Even if § 13569 were relevant for any reason here, which it is not, the Commission's reliance on that regulation would be misplaced for the simple reason that it never came into play. Under § 13569, the City is not obliged to make a determination as to whether the project is appealable or non-appealable pursuant to subdivision (a) unless an applicant, interested person or local government has a question as to the appropriate designation. Even if that determination has been made, the City only has an obligation to notify the Commission under subdivision (b) in the event that an applicant, interested person or local government challenges the determination.

In the present case, no one ever questioned or challenged the determination that the project was not appealable. Therefore the Executive Director's power to make the determination him or herself under subdivision (c) never attached. Under the regulation the Executive Director is not empowered to make such a determination on his or her own authority, without the requisite challenge.

Since the Executive Director had no power to make any determination regarding the appealability of the project, it cannot require the City and the Applicant to participate in a hearing pursuant to subsection (d) in order to challenge the Executive Director's determination.

Section 13569 Is Not Supported by the Cited Statutory Authority

Although § 13569 purports to apply to a City that has a certified Local Coastal Program, it is clear from a review of the statutes cited as the authority for §13569 that such an interpretation has no statutory support. A regulation cannot expand the powers given to an agency by the legislature. Regulation 13569 lists §§ 30333 and 30620 of the Public Resources Code as its authority. Section 30333 is simply the general enabling statute that authorizes the Commission to enact regulations to carry out the purposes and provisions of the California Coastal Act.

Public Resources Codes § 30620 is located in Article Two of Chapter Seven of the California Coastal Act. Article Two is entitled Development Control Procedures. Chapter Seven is directed for the most part towards providing procedures for development review by the Commission and appeals to the Commission prior to the certification of a City's Local Coastal Program.

Public Resources Code § 30519 provides that Chapter Seven's provisions will no longer apply once a Local Coastal Program is certified, except for the provisions of § 30603 regarding the procedures for appeals after certification. Section 30519 specifically precludes the assertion of the development review powers set forth in Chapter Seven after the implementation of the Certified Local Coastal Program:

(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof.

(Emphasis added).

The direct authority for §13569 seems to be subsection (a)(2) of § 30620, which requires the Commission to make provisions for notification to the Commission and other persons of any action taken by a local government pursuant to Chapter Seven to ensure that the Commission can make a preliminary review of the action for conformity with Chapter Seven. Since a City does not have to act in conformity with Chapter Seven once the Local Coastal Program is certified, it is obvious that neither subsection (a)(2) nor § 13569 is relevant beyond that time.

The provisions of § 30603 itself do not in any way impose a requirement on a City to conform with Chapter Seven, or to give Notice to the Commission in order to allow the Commission to make a "preliminary review."

While it is true that subsection (d) of § 30620 specifically references appeals pursuant to § 30603, and that a regulation pursuant to that subsection could be valid after the certification of the Local Coastal Program, that subsection (d) relates only to review of an appeal to determine whether it is patently frivolous. It cannot stand as authority for the provisions of § 13569. Moreover, it is consistent with the short statute of limitations provided by § 30603(c), in that it requires the determination to be made within five days, which is within the ten day limitations period. Thus § 30620 cannot be read to justify a regulation that expands and/or extends and/or delays the ten-day period as the Commission is attempting to do.

CONCLUSION

The Commission is Seeking to Employ Pre-Certification Powers.

In taking the position that the Notice of Final Local Action is "defective" because it is "incorrect," the Commission is asserting that the Executive Director has the unilateral power to make this determination without notice or a hearing. Although the Executive Director does have the power in a pre-certification setting to trigger the jurisdiction of the Commission to make such a determination, (Public Resources Code § 30602) he or she does not have the power to do so once the Local Coastal Program has been certified. The Executive Director's actions and/or the Commission's actions purporting to suspend the effective date of the permit are therefore null and void.

The Notice is Not Defective

The Notice of Local Action complies with the requirements of § 13571 and the Commission is thus not empowered to suspend the effective date of the permits pursuant to § 13572 and its attempt to do so is void.

The Commission Has No Power to Determine the Appealability of the Project Under § 13569.

The Commission cannot assert its power under § 13569(c) because there were no questions and/or challenges regarding the City's determination at the time the application was received. Therefore there is no jurisdiction for the Commission to compel the City and/or North Pacifica LLC to participate in a hearing pursuant to § 13569(d).

Even though, as explained above, the Commission's purported suspension is manifestly invalid and void, it, nevertheless, in the eyes of third parties, represents a cloud on the validity of the Coastal Development Permit that renders the entire project unmarketable and totally deprives it of all economic value. Thus, the Commission's purported suspension is, wrongfully, causing North Pacifica LLC substantial damages during each day in which it remains outstanding.

For all these reasons North Pacifica LLC hereby requests that the Coastal Commission forthwith rescind and vacate its August 23, 2002 purported suspension of the effective date of North Pacifica LLC's Coastal Development Permit by sending a written notice of such rescission to both the City of Pacifica and North Pacifica LLC, without further delay.

Very truly yours,


JAQUELYNN POPE

JCP/abs

cc: City of Pacifica

To: David

Cecilia M. Quick
City Attorney
(650) 738-7408
FAX (650) 359-8947

Office of the City Attorney
City of Pacifica
170 Santa Maria Avenue
Pacifica, California 94044



Scenic Pacifica

September 11, 2002

Peter T. Imhof
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

EXHIBIT 7
2-02-2-EDD (Pacific Bowl)
Letter from Cecilia M. Quick,
City of Pacifica City Attorney,
to Peter Imhof dtd Sept. 11, 2002

Re: Coastal Development Permit 203-01
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)

Dear Mr. Imhof:

I am writing to you in response to your letter of August 23, 2002, addressed to the City's Planning Director, Michael Crabtree.

The California Coastal Commission ("Commission") contends that the City inadequately prepared the City's Notice of Final Local Action, dated August 19, 2002, in that the City incorrectly determined that the permit was not appealable to the Commission. The Commission believes that the approved project is within 100 feet of a wetland, and thus within the Commission's appellate jurisdiction. In addition, the Commission contends that the development is less than 300 feet from the top of the seaward face of the coastal bluff west of Palmetto Avenue, justifying an independent ground for appellate jurisdiction.

The City Council determined that the project was not within the Commission's jurisdiction. The DEIR states in several sections that there were no jurisdictional wetlands on the project site or within 100 feet of the site. One such reference is found at IV-B-4 of the DEIR, which states, "[d]uring a June 1999 wetland delineation by Wetlands Research Associates [WRA], two months after the most recent rain, surface water was not noted in this habitat. WRA revisited the site in March 2002 and confirmed that the only saturated areas were either off-site or associated with abandoned drainage ditches on site." Additional evidence supporting the Council's determination is found in the DEIR at IV-B-2, which states, "[a]fter a portion of the site in the riparian scrub habitat was observed to be wet on a recurring basis during the rainy season, WRA revisited the site, addressing these observations, concluding that the wet areas were due to faulty drainage along the trace of Edgemar Road and did not qualify as wetlands under California Coastal Commission criteria." In the Summary of Public Comments, page I-3, the City's EIR consultant discusses whether there are wetlands on or near the subject property. The consultant concludes, "[t]he analysis in the EIR concludes that none of the seasonally wet areas affected by the project meet the jurisdictional definition of a 'wetland' in the City of Pacifica's Local Coastal Program."

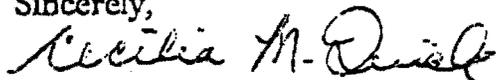
Peter Imhoff Letter
September 11, 2002
Page 2

Finally, as stated in the Council Report prepared for the approval of this project, staff refers to the above quoted sections, and further refers to the map provided to the City by the Commission. This map evidenced that the project site did not fall within the Commission's appeal zone. Specifically, this map at the time the Council approved the project showed that any coastal bluff was well beyond the 300 feet jurisdictional requirement from the project. Therefore, the City Council possessed substantial evidence that at the time it certified the EIR the project was not located near any wetlands or coastal bluffs that would warrant jurisdiction of the Commission.

Because the evidence before the City Council would not warrant any other determination, the City is unable to alter its Notice of Final Local Action. Furthermore, even if an alternate determination were warranted, the planning staff would not have the authority to modify its determination without Council authorization. Because staff does not believe an alternate determination is warranted, it has no intention of bringing this matter back to the Council.

The Commission asserts that Section 13572 of the Commission's regulations mandate that the permit remain suspended until the City issues a corrected notice. However, Section 13572 is inapplicable. This section states in part, "[a] local government's final decision on an application for an *appealable development* shall become effective after the ten (10) working day appeal period to the Commission has expired unless either of the following occur: (a) an appeal is filed . . . (b) the notice of final local government action does not meet the requirements of Section 13571; When either of the circumstances [above] occur, the Commission shall, within five (5) calendar days of receiving notice of that circumstance, notify the local government and the applicant that the effective date of the local government action has been suspended." (Cal. Code Regs., tit. 14, § 13572 [emphasis added].) This section addresses the circumstances when a decision approving an *appealable development* becomes final. To date the only determination by the City is that the matter is non-appealable to the Commission. Accordingly, Section 13572 has no bearing, and the permit is not suspended.

Sincerely,



Cecilia M. Quick
City Attorney

Cc: Mayor and Councilmembers
City Manager ✓
City Planner
Keith Fromm (North Pacifica LLC)

EXHIBIT 8**2-02-2-EDD (Pacific Bowl)**

Letter from Keith Fromm, North
Pacifica, LLC to Chris Carr {sic},
dated September 13, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202
FAX (310) 556-8282

By Fax

September 13, 2002

Mr. Chris Carr
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Coastal Development Permit, CDP -203-01
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and 260)

Dear Mr. Carr:

This letter is to confirm the Coastal Commission's position regarding the above referenced Coastal Development Permit and North Pacifica LLC's position, as they were expressed in our telephone conversation this afternoon, Friday, September 13, 2002.

I called Peter Imhof, of your office, today, and left a voice mail for him to discuss the status of the Coastal Development Permit that was approved by the City of Pacifica on August 12, 2002 for the "Bowl" project that is located in the City of Pacifica. You responded, in his stead, to that message.

On August 12, 2002, when the City of Pacifica approved the coastal development permit, the City made the finding that the approval was not appealable to the Coastal Commission under the criteria of Public Resources Code § 30603, which sets forth the exclusive circumstances under which the Commission can exercise appeals jurisdiction. According to the provisions of the Pacifica Local Coastal Program, which was certified by the Coastal Commission and, as part of such certification, implemented in the Pacifica Municipal Code, the permit, therefore, became effective on August 12, 2002, due to the City of Pacifica's finding that the permit was not appealable to the Coastal Commission. In this regard, Pacifica Municipal Code Section 9-4.4304(1) states:

"(1) For non-appealable projects, the coastal development permit shall be effective at the conclusion of the final action by the City."

However, regardless of the fact that the permit is not appealable, the Commission notified the City on August 23, 2002 that it was suspending the permits, allegedly pursuant to 14 CCR § 13572, until the City acquiesced either to change its finding that

the permit was not appealable, or to participate in a hearing before the Commission on that issue under 14 CCR §13569, which is clearly not applicable to this situation.

On September 11, 2002, Cecilia Quick, the City Attorney for the City of Pacifica, responded to the Commission's letter and informed it that the Commission did not have the authority to suspend the permits under 14 CCR §13572, because that regulation applies only to appealable development permits. The City of Pacifica declined either to change its finding or submit the matter of the Commission's jurisdiction to the Commission. Additionally, on September 10, 2002, we served you via facsimile with two letters addressing the points that were asserted by the Commission in its letter of August 23, 2002.

Today, I inquired, in light of the City's response and the authority put before the Commission in the letters from North Pacifica LLC and its attorney, if the Commission would rescind its purported suspension of the permits, which suspension is contrary to the law, and retract its assertion of jurisdiction.

In response you informed me that the Commission rejected the City's position and the authority submitted by North Pacifica LLC, and that it is the Commission's position that it has absolute jurisdiction to suspend the permits and to hold a hearing on the issue of jurisdiction in the absence of any request to do so by the City, and regardless of whether the City agrees to participate. You also asked me (on behalf of North Pacifica LLC) to request or submit to a hearing before the Commission on the issue of the Commission's appeals jurisdiction which I declined to do.

In reference to the issue as to the City's finding that there are no wetlands within 100 feet of the property, you asked me for permission to send the Commission biologist, John Dixon, to the Bowl to do a first hand investigation of the site. I refused to give permission, but offered to provide the Commission with additional documentation of the extensive testing and investigation that has already been done by two eminent biologists, one hired by North Pacifica LLC and one hired by the City, both of whom concluded, after exhaustive and careful deliberations, that there were no LCP wetlands on the project or within 100 feet thereof. I also inquired if it might be helpful to make Mike Josselyn, the biologist who has done much of the investigation and testing for North Pacifica, available to Mr. Dixon on an informal basis. I further questioned, what was the point of having yet another biologist examine the site. At best, he would agree with the other two experts, and, at worst, we would end up with a disagreement among three experts, two deciding one way and one deciding the other. I pointed out that experts may tend to disagree, but the existence of an expert who may disagree with the two experts relied upon by the City does not make the City's decision either wrong or lacking in substantial evidence.

I cannot also help but wonder, if, indeed, Mr. Dixon's opinion on this issue was so important and so determinative as to the eventual fate of the approval of the coastal development permit, why the Coastal Commission did not seek permission to dispatch

him to examine the site during the preparation of the EIR or in response to the draft EIR, or prior to the City's several public hearings, when his observations may have been addressed, held up to public scrutiny and possible challenge and subjected to the other due process protections in the duly authorized public forum which was considering the certification of the EIR and the approval of the permits.

It seems entirely unfair that the Coastal Commission could, in essence, simply lie in wait, until after the whole environmental investigation process and public hearing was entirely concluded, the EIR certified, the permits approved and duly issued and then leap out to "suspend" the validly issued permits, marching out Mr. Dixon as a "johnny come lately" to second-guess, in the Commission's own backyard, the experts who did participate in the process and did hold up their work and conclusions to public scrutiny, challenge and the rigors of due process. This is akin to someone, who chose never to participate as a contestant in the elimination rounds of a national beauty pageant, either at a neighborhood, city or state level, approaching the newly crowned Miss America and saying, "I'll take that crown, I'm more worthy of it and if you disagree, you and I will hold a contest in my house and have my parents decide the issue".

I would also point out again, as I did in our telephone conversation, that there is a great deal of environmental data, including biological reports and supplemental biological reports, for our project, within the public records of the City of Pacifica, which substantiates the City's findings that there were no wetlands within 100' of the project and that the project is not appealable to the Coastal Commission. As I pointed out in our conversation, this information and data has, at all times, as items in the public record, been available to the Coastal Commission for review. But, as you have admitted in our conversation today, the Commission did not even review such additional information or have such information before it, when the Commission elected to suspend our Coastal Development Permit. Once again, it is very unfair that the Coastal Commission could elect to suspend our permits based on some of the evidence, when the City approved those permits based on all of the evidence. Once again, we would state, if the Commission had a problem with the sufficiency of the City's evidence for rendering its decision regarding appealability, the time to have challenged such evidence would have been during the approval process, when it was subject to the protections of due process, not after the approval process was completed, much less, without even having examined the entirety of such evidence, before imposing the suspension.

You declined to meet with me to discuss this matter, and/or have Dr. Josselyn meet with Mr. Dixon on the grounds that you would prefer to have this handled under the "procedure" of having the Commission hold a hearing to determine its own jurisdiction and to have Mr. Dixon present his findings from an on-site investigation in such a forum.

I stated that we are concerned about the extraordinary delay resulting from the Commission's action in purporting to suspend the permits, which essentially stops dead North Pacifica's ability to make any use or realize any economic value from its validly issued permits or the property to which they pertain, while, nevertheless, such permits,

each day, march one day closer to their expiration dates and North Pacifica is left to continue to bear the enormous costs to carry and preserve its project. Under the procedure for appealable developments that is set forth in Public Resources Code § 30603, an appeal must be received by the Commission by the close of business on the tenth working day from receipt of the Notice of the Final Local Action. If a timely appeal is received, the Commission must hold a hearing on that appeal no later than 49 days thereafter.

On September 9, 2002, Peter Imhof informed me an appeal had been received on September 5, 2002. He stated that that appeal was being held as "unripe" until the Commission held its "appealability" hearing, which, itself, depended upon the City's request to hold such a hearing, a request the City has expressly and quite rightfully declined to make. In our conversation today, I asked you, now that the Commission had taken the position that it had appeals jurisdiction and had, in fact, received an appeal, would the Commission process that appeal in compliance with the statutory deadlines, or, is it your position, as well, that our project is still "suspended" indefinitely or until the City accedes to your demand to request and submit to a hearing, purportedly under Coastal Commission Regulation 14 CCR § 13569, which the City still declines to do.

You stated that the project approvals were still suspended pending such a request by the City for a hearing under 14 CCR § 13569, but that if the City would not agree to request the "appealability" hearing, then the Commission itself would set the hearing, probably for sometime in October. Only after that time would the Commission consider the appeal to be "ripe", and begin to process it according to statute. I asked, under such a circumstance who would be the "interested person" necessary under 14 CCR § 13569 to make such a request for such a hearing and you replied that the Coastal Commission itself would be the interested person who makes the request to itself. I replied that the Coastal Commission cannot legally be the "interested person" in raising a challenge to be decided by itself. You replied that you were familiar with this argument because you had read it in our papers and simply disagreed with it.

I stated to you, that while we disagreed that the Commission had any appeals jurisdiction, since it is the Commission's position that it has appeals jurisdiction, it does not make any sense to simply hold, in abeyance, the appeal that has been filed, rather than simply to begin to process it. It appears clear that the circuitous and tortuous process that the Commission has chosen to insist on in this matter can be designed only to ensure that the longest possible delay and the greatest cost burden is imposed on North Pacifica LLC. As I told you, North Pacifica LLC is incurring costs of approximately \$5,000 to \$10,000 per day for this project. Under the Commission's proposed timeline, it seems unlikely that North Pacifica LLC will receive a final decision from the Commission until next spring, if the Commission is successful in its Kafkaesque attempt to bootstrap its way into jurisdiction over this project.

Although you have assured me that the Commission has jurisdiction in this situation and that this matter is "well-trodden" territory, we have found nothing in case

law or the statutes or ordinances that authorizes the Commission's actions in this matter, nor did you provide me with any authority beyond your own assurances. Therefore, if the Commission does not immediately rescind the "suspension" of North Pacifica's permits, North Pacifica will have no alternative but to challenge the Commission's jurisdiction in the Courts and seek redress from the Commission for the very substantial damages North Pacifica is incurring for every day in which its valid permits are wrongfully impaired by the Commission's manifestly unlawful, not to mention highly unfair actions.

We would, therefore, ask you, one last time, to please reconsider your position in this matter and immediately rescind your purported suspension of our coastal development permit.

Very truly yours,



Keith Fromm
Member and Counsel

CALIFORNIA COASTAL COMMISSION

5 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

EXHIBIT 9

2-02-2-EDD (Pacific Bowl)

Letter from Peter Imhof to
Michael Crabtree, City of Pacifica,
dated September 17, 2002



September 17, 2002

Michael Crabtree
Director
Planning Department
City of Pacifica
170 Santa Maria Avenue
Pacifica, CA 94044

**RE: Section 13569 Appeal Jurisdiction Hearing
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)**

Dear Mr. Crabtree:

As you know, on August 23, 2002, the Executive Director determined that the City's Notice of Final Local Action on the above-referenced project was deficient in that it did not state that the project was appealable to the Commission. The Executive Director's determination also indicated that pursuant to Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(n), CDP-203-01 will remain suspended and will not become final until a corrected notice has been issued and the appeal period to the Commission has run.

As more fully outlined in my August 23, 2002 letter to the City, the information we have received concerning this issue to date, including without limitation the conclusions stated in the EIR, wetland delineations performed by the applicant's consultants, and supporting data sheets (which record field observations noting the presence of wetland indicators at areas on and near the site), supports the Executive Director's determination that wetlands as defined in 14 CCR Section 13577 exist within 100 feet of the proposed development. We also clearly informed the City of our concerns regarding the existence of wetlands on the project site during CEQA review in both our comment letter on the notice of preparation of the EIR, dated October 4, 2001, and our comment letter on the draft EIR, dated May 3, 2002.

We have received the City Attorney Cecilia Quick's September 12, 2002 letter stating the City of Pacifica's position with respect to the City's Notice of Final Local Action for the referenced project. Since the City's determination of project appealability is not in accordance with the Executive Director's determination, we will schedule a Commission hearing to resolve this question pursuant to the provisions of 14 CCR Section 13569(d).

City of Pacifica re: Section 13569 Appeal Jurisdiction Hearing
CDP-203-01, Pacifica Bowl Residential Development
September 17, 2002

Section 13569(d) of the Commission regulations provides:

Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request.

The December 2002 Commission meeting will be held in San Francisco from December 10 through 13, 2002. This location is the appropriate geographic region for the dispute resolution hearing as San Francisco is the only location where the Commission will meet in the next few months in proximity to the project site. We will advise the City and the applicant of the exact hearing date and location when this hearing item has been calendared. Staff reports for the Commission's December meeting will be mailed out to interested persons in mid to late November. We will be contacting the applicant separately to arrange a visit of the project site by a Commission staff biologist concerning the question of wetlands on the site in advance of the December hearing.

Concerning the effectiveness of the coastal development permit approved by the City for this project, we note that under the Coastal Act and the Commission regulations as well as the City's certified Local Coastal Program, a coastal development permit approved by a local government which falls within the Commission's appeal jurisdiction does not become effective until the 10-day appeal period stated in 14 CCR Section 13572 has expired. Notably, Section 9-4.4304(n) of the City's certified Local Coastal Program reiterates Section 13572's limitation on the effectiveness of the City's permit. Because the City provided notice of final local action designating the project as non-appealable, no appeal period has commenced. Since the Executive Director's Determination of project appealability differs from that of the City, the preliminary question of the Commission's appeal jurisdiction over this project must be resolved pursuant to Section 13569 before the permit may become effective.¹ The Commission does not consider any coastal development permit issued prior to resolution of this question to be effective, and any development undertaken pursuant to such a permit could constitute a violation of the Coastal Act and be subject to enforcement action.

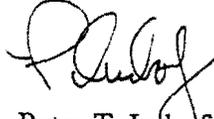
Finally, the Commission received an appeal of the City's permit approval of this project by John Curtis on September 5, 2002. This appellant is separately interested in the disputed question of appeal jurisdiction. Mr. Curtis' appeal will be held in abeyance until after the Coastal Commission determination of appeal jurisdiction pursuant to Section 13569 and will be filed at such time as any Commission appeal period commences.

¹ As noted in my August 23, 2002 letter, the Commission never received an Initial Notice concerning the City's permit action regarding the proposed development as required by Sections 13565 and 13568 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(g). Thus the Commission had no notice of the City's determination with respect to project appealability prior to receipt of the City's Notice of Final Local Action.

City of Pacifica re: Section 13569 Appeal Jurisdiction Hearing
CDP-203-01, Pacifica Bowl Residential Development
September 17, 2002

Please contact me at 415-904-5268 if you have any questions concerning this letter.

Sincerely,



Peter T. Imhof
Coastal Planner
North Central Coast District

cc: Cecilia Quick
City Attorney

Keith Fromm
North Pacifica LLC
6114 La Salle Avenue, Suite 207
Oakland, CA 94611

CALIFORNIA COASTAL COMMISSION

455 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

EXHIBIT 10

2-02-2-EDD (Pacific Bowl)

Letter to Keith Fromm, North Pacifica,
LLC from Peter Imhof
dated September 17, 2002



September 17, 2002

Keith Fromm
North Pacifica LLC
6114 La Salle Avenue, Suite 207
Oakland, CA 94611

**RE: Section 13569 Appeal Jurisdiction Hearing
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)**

Dear Mr. Fromm:

As you know, on August 23, 2002, the Executive Director determined that the City's Notice of Final Local Action on the above-referenced project was deficient in that it did not state that the project was appealable to the Commission. The Executive Director's determination also indicated that pursuant to Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(n), CDP-203-01 will remain suspended and will not become final until a corrected notice has been issued and the appeal period to the Commission has run.

As more fully outlined in my August 23, 2002 letter to the City, the information we have received concerning this issue to date, including without limitation the conclusions stated in the EIR, wetland delineations performed by the applicant's consultants, and supporting data sheets (which record field observations noting the presence of wetland indicators at areas on and near the site), supports the Executive Director's determination that wetlands as defined in 14 CCR Section 13577 exist within 100 feet of the proposed development. We also clearly informed you and the City of our concerns regarding the existence of wetlands on the project site during CEQA review in both our comment letter on the notice of preparation of the EIR, dated October 4, 2001, and our comment letter on the draft EIR, dated May 3, 2002.

Concerning the effectiveness of the coastal development permit approved by the City for this project, we note that under the Coastal Act and the Commission regulations as well as the City's certified Local Coastal Program, a coastal development permit approved by a local government which falls within the Commission's appeal jurisdiction does not become effective until the 10-day appeal period stated in 14 CCR Section 13572 has expired. Notably, Section 9-4.4304(n) of the City's certified Local Coastal Program reiterates Section 13572's limitation on the effectiveness of the City's permit. Because the City provided notice of final local action designating the project as non-appealable, no appeal period has commenced. Since the Executive Director's Determination of project appealability differs from that of the City, the

Keith Fromm, North Pacifica LLC, re: Section 13569 Appeal Jurisdiction Hearing
CDP-203-01, Pacifica Bowl Residential Development
September 17, 2002

process. We therefore request that you reconsider your refusal to allow Commission staff access to the site.

With reference to your September 13, 2002 letter, the Commission staff is willing to consider any additional information you wish to submit in support of your contention that the project site is not within the Commission's appeal jurisdiction and to meet with you to discuss the issues raised by this project. However, as we have stated, we believe that any meeting will be more productive after staff, including the Commission biologist, has had the opportunity to review any additional information that you submit.

Finally, as we previously informed you, the Commission received an appeal of the City's permit approval of this project by John Curtis on September 5, 2002. This appellant is separately interested in the disputed question of appeal jurisdiction. Mr. Curtis' appeal will be held in abeyance until after the Coastal Commission determination of appeal jurisdiction pursuant to Section 13569 and will be filed at such time as any Commission appeal period commences.

Please contact me at 415-904-5268 if you have any questions concerning this letter.

Sincerely,



Peter T. Imhof
Coastal Planner
North Central Coast District

cc: Michael Crabtree
Director, Pacifica Planning Department

Cecilia Quick
City Attorney

EXHIBIT 11

2-02-2-EDD (Pacific Bowl)

Letter from Keith Fromm, North
Pacifica, LLC to Peter Douglas &
Peter Imhof, dtd Sept. 23, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202 FAX (310) 556-8282

September 23, 2002

Mr. Peter Douglas, Executive Director
Mr. Peter Imhof, Coastal Planner
California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the
"Property" or "Project")

Dear Messrs. Douglas and Imhof:

This letter is in response to your letter, from Peter Imhof, to us dated September 17, 2002. In both Mr. Imhof's letter of August 23, 2002 and again in his letter dated September 17, 2002, he stated that the Executive Director of the Coastal Commission, who, we understand, is Mr. Peter Douglas, made two administrative and/or quasi-judicial determinations pertaining to our coastal development permit which, on August 12, 2002, was issued by the City of Pacifica: (1) that the City of Pacifica's Notice of Final Local Action was deficient and (2) that our coastal development permit was suspended.

In respect to Mr. Imhof's original letter dated August 23, 2002, on the afternoon of August 22, 2002 Mr. Imhof engaged in a telephone conversation with Mr. Michael Crabtree, City Planner for the City of Pacifica in which Mr. Imhof advised, at that time, that Mr. Douglas had already made such a determination and that Mr. Imhof was in the course of preparing what became his August 23, 2002 letter to advise the City of Mr. Douglas' determination. In Mr. Imhof's letter dated September 17, 2002, he stated, however, that such determination by Mr. Douglas was made on August 23, 2002, at least one day later than the date Mr. Imhof indicated in Mr. Imhof's telephone conversation with Mr. Crabtree that such determination had been made. Since there appears to be some uncertainty as to *when* this administrative and/or quasi-judicial proceeding took place, there is, understandably, some uncertainty, in our minds, as to *whether* it actually took place, and, if it did take place, *whether it took place in accordance with the requirements of constitutional due process.*

The Coastal Act, under Chapter 4, Article 2.5, entitled "Fairness and Due Process" is very emphatic that all quasi-judicial decisions made by the Coastal Commission must be made in scrupulous adherence to the laws of due process:

30320. (a) The people of California find and declare that the duties, responsibilities, and quasi-judicial actions of the commission are sensitive and extremely important for the well-being of current and future generations and that the public interest and principles of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority...

(b) The people of California further find that in a democracy, due process, fairness, and the responsible exercise of authority are all essential elements of good government which require that the public's business be conducted in public meetings, with limited exceptions for sensitive personnel matters and litigation, and on the official record."

30321. For purposes of this article, "a matter within the commission's jurisdiction" means any permit action...

As you are no doubt aware, the California Supreme Court has determined that all administrative decisions require written findings sufficient to enable a reviewing court to trace and examine the agency's mode of analysis in rendering its determination.

"It was said (p. 515) that "implicit in section 1094.5 [of the Code of Civil Procedure] is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." Also, it was said (p. 516) that "a findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood that the agency will randomly leap from evidence to conclusions. [Citations.] In addition, findings enable the reviewing court to trace and examine the agency's mode of analysis. [Citations.]" *Topanga Assn. For A Scenic Community v. County of Los Angeles*, 11 Cal.3d 506 [113 Cal.Rptr. 836, 522 P.2d 12],

Since our Coastal Development Permit is a very valuable entitlement i.e. property for the purposes of both the U.S. Constitution and the California Constitution as well as the Coastal Act itself, we may not be deprived of it without due process.

In our previous correspondence we stated, with reference to the applicable law, that the executive director of the Commission has no legal authority to suspend our coastal development permit or to make the administrative and/or quasi-judicial determinations referenced hereinabove and, despite our requests for same, you have provided no authority which proves us wrong. The

foregoing excerpts from the Coastal Act and the Topanga case, make it clear, that even if the Commission itself (as distinguished from its executive director) had such authority (which, for the reasons stated in our previous correspondence, it also does not have), it would still need to exercise such authority and take such actions in accordance with the requirements of due process. A determination by Mr. Douglas, that our permit, (which by its own terms has, from the date of its issuance, a very short life until its expiration date), was "suspended" constitutes such a deprivation which requires due process. An invalid or unauthorized "suspension" of such a permit, may, from a practical standpoint, render the permit entirely unusable until its expiration date, resulting in a total deprivation of the permit's entitlements and utility. Even a driver's license may not be suspended without a hearing conducted under the rules of due process. The decision to suspend a validly issued coastal development permit due to a mere allegation of a decision-making error on the part of the duly authorized issuing local entity is, as stated, itself, an administrative and/or quasi-judicial determination.

Therefore, assuming, only for the sake of argument that Mr. Douglas had such authority (which, as we have stated we absolutely dispute) to suspend our coastal development permit and did, in fact, conduct some kind of administrative or quasi-judicial proceeding in which he made such determination, such determination would still be invalid if it was not conducted in a proceeding which was in compliance with constitutional due process as described in the Coastal Act and the Topanga case. Therefore, as the party affected by such quasi-judicial determination allegedly made by Mr. Douglas we hereby demand under the Public Records Act (including, but not limited to Gov Code §6253), forthwith, all of the following records and documents which comprise evidence as to:

1. Exactly what date and time was the proceeding conducted in which Mr. Douglas made such determination?
2. Exactly where did such proceeding take place?
3. What notice was given of such proceeding and to whom? Please provide a true copy of such notice and proof of delivery of such notice to the parties listed.
4. What are the names, addresses and telephone numbers of all persons who were present in said proceeding?
5. What evidence was presented and considered in such proceeding?
6. Was a staff report prepared for this proceeding, and, if so, when and by whom and please produce same?
7. What are the names, addresses and telephone numbers of the witnesses who gave testimony in said proceeding?

- 8 Where is the record and minutes of such proceeding?
- 9 Who prepared such record and minutes and when?
10. Who received a copy of such record and minutes of such proceeding?
11. Who initiated such proceeding and by what instrument or document. Please produce same?
12. To whom was such instrument delivered and when was it received?
13. By what statute or authority were such proceedings conducted?

Since we intend to challenge the legality of this "determination" by Mr. Douglas, and the propriety of the proceeding in which it allegedly took place, and, if necessary, to cross-examine, under oath, each of the witnesses and persons who were present therein, including the person who prepared the record and minutes of such proceeding, we will need and are entitled to the particulars of this alleged proceeding.

If, for any reason, however, either because such proceeding never, in fact, took place, or if it took place, it was invalid because, inter alia, it did not comply with the requirements of due process, then we hereby demand that you immediately vacate the "suspension" of our permit, because to fail or refuse to do so, will only further increase the damages, comprising, among other things, costs of several thousands of dollars per day, resulting from such an unauthorized suspension in violation of North Pacifica LLC's constitutional rights.

Therefore, kindly, immediately provide the requested documentation substantiating that the Mr. Douglas's suspension of our permit was the result of a proceeding in compliance with procedural and substantive due process, or, alternatively, an immediate retraction, in writing of such suspension. Failure or refusal immediately to provide the documentation requested herein, will, of course, be used as further evidence that such suspension was unlawful.

Yours very truly,



Keith M. Fromm
Council and Member

EXHIBIT 12
2-02-2-EDD (Pacific Bowl)
Letter from Keith Fromm, North
Pacifica, LLC to Chris Kern,
dated September 23, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202
FAX (310) 556-8282

By Fax

September 23, 2002

Mr. Chris Kern
California Coastal Commission
45 Fremont, Suite 2000
San Francisco, CA 94105-2219

Re: Coastal Development Permit, CDP -203-01
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and 260)

Dear Mr. Kern:

This letter is further to our telephone conversation of last week. I indicated, therein, that, as a courtesy and without in any way compromising or prejudicing our position and conviction that the Coastal Commission has no jurisdiction whatsoever over our project and its approved permits, I would present to you a summary of some of the substantial evidence upon which the City made its correct and duly authorized determination that there were no wetlands on or within 100' of the project and, therefore, its determination that the project was not appealable to the Coastal Commission.

As for the fact that the project is not within 300' of the top of the seaward face of a coastal bluff, the evidence, in the public record, for that finding comprised, among other things, the Coastal Commission's own post-certification map which shows the project is located far more than 300' from the top of the seaward face of such a bluff. Such evidence also comprised other maps and aerial photographs which were considered, and visual physical inspection, which establishes this fact to be obvious to any observer.

Mr. Imhof's letter of August 23, 2002 (the "Commission Letter") indicates that the Coastal Commission's map may be outdated and inaccurate. Alternatively, it may still be quite accurate, at least as to this issue. Indeed, it is established law that these maps would be binding upon the City in respect to such a determination. (*Rosco Holdings Inc. v. State of California* (1989) 212 Cal.App.3d 642. Consequently, it certainly cannot be said that a determination as to the 300' distance, in reliance upon such a map, would not be based on substantial evidence, since that is one of the purposes for which such map was prepared and why it is regarded to have a binding effect on a City's determinations. But, in any event, since the project is not even close to being within

said 300' whether or not the map is perfectly accurate is irrelevant to this issue.

The City Validly, Based on Substantial Evidence, Made The Determination that The Project is Not Within the Coastal Commission Appeals Zone. The Validity of Such a Determination by the City is Strongly Presumed and is Governed by the "Substantial Evidence Test"

As was noted in the case of Kirkorowicz v. California Coastal Comm.(2000) 83 Cal. App. 4th 980, and is conceded in the Coastal Commission's own interpretive guidelines, there is a certain degree of discretionary judgment which must be exercised in the determination of the presence or absence of wetlands, which may depend on the skills and evaluation of judgment calls of one or more qualified professionals.

"Thus, the presence or absence of hydrophytes and hydric soils make excellent physical parameters upon which to judge the existence of wetland habitat areas for the purposes of the Coastal Act, but they are not the sole criteria. In some cases, proper identification of wetlands will require the skills of a qualified professional." (Interpretive Guideline, supra, at p. 78, appen. D.)" 83 Cal.App. 4th at 983

The City reviewed a great deal of evidence in the three (3) years in which it considered this project and received both numerous written reports (including updated reports dated March 19, 2002 and May 22, 2002 from Wetlands Research Associates) and extensive, ongoing, clarificatory oral evidence and feedback from two expert biologists, Wetlands Research Associates and Thomas Reid Associates, both of whom determined that areas located on the site which, initially, had shown signs of possibly being wetlands, were not wetlands, primarily because they lacked the necessary source of hydrology to promote hydrophytic vegetation and lacked the necessary hydric soils. In short then, in accordance with the Commission's own interpretive guidelines the "skills of a qualified professional", indeed, two qualified professionals were used (three if you count the Army Corps of Engineers) in the "proper identification of wetlands" and the unanimous conclusion of those qualified professionals was that there were no such wetlands present.

The whole of the record indicates that the City received, inter alia, two biological reports, one by Wetlands Research Associates, Inc. dated December 27, 1999, and one by Thomas Reid Associates, the EIR preparer itself, dated January 24, 2000, as well as a letter from the Army Corps of Engineers dated January 3, 2000, all of which concluded definitively, there were no wetlands, under any applicable definition, on the project site.

Quoting from the December 27, 1999 letter, Wetlands Research Associates, after expressly considering the definition of "wetlands" under the Local Coastal Plan, concluded:

"The LCP contains a definition of wetlands that has been used to identify any possible wetlands on the Pacific Cove site...Based on the observations made in this study, hydrologic indicators were not present as required to meet the LCP definition that "the

*water table is at, near, or above the land surface". Furthermore, the site did not support hydric soils. The presence of *Lonicera involucrata*, a hydrophyte that is listed as a facultative species, does not necessarily mean that the site has wetland hydrology since this plant is found equally in either wetlands or uplands.*

Based on these observations, there are no areas on the subject parcel that meet the City of Pacifica LCP definition of wetlands. Furthermore, the Corps has confirmed that there are no areas that meet the federal definition of wetlands."

The January 24, 2000, peer review by Thomas Reid and Associates, hired by the City, also quoted the LCP definition of wetlands and thereafter concluded as follows:

"In his analysis, Tom Fraser of WRA found that hydrophytic vegetation is present, but that wetlands soils are not. The particular species of plants he names in this analysis are facultative, meaning they occur equally in wetland situations and upland situations. That is, they do not require saturated soils in order to grow, like an obligate wetland plant does. Thus, he reasoned that it is important to find hydric soils in concert with this vegetation to meet the LCP definition.

I found two discrepancies between the original delineation and this LCP analysis, but in the end I would agree with the conclusion that the site does not contain a wetland as defined in the LCP."

The Thomas Reid Associates report also concluded that there is no evidence that the site supports a wetland as defined in the City's zoning code. Conversely, there were no expert reports or testimony in the whole of the record which arrived at a contrary opinion that there were any wetlands on the site.

In summary then, the City had ample substantial evidence within the record to support its conclusion that there were no wetlands on the site.

Likewise, another patch located, outside of the site, on a public street, was also examined in detail and determined not to be a wetland, because, it was simply an un-maintained drainage ditch and by the Coastal Commission's own guidelines such a drainage ditch is not considered to be a wetland.

In regard to the drainage ditch, the administrative record shows that the City, in arriving at its determination that the drainage ditch was not a wetland, considered the contents of the Coastal Commission's own Statewide Interpretive Guideline for Wetlands and Other Wet Environmentally Sensitive Habitat Areas (Adopted on February 4, 1981), Appendix D:

"For the purposes of identifying wetlands using technical criteria contained in this guideline, one limited exception will be made. That is, drainage ditches as defined herein will not be

considered wetlands under the Coastal Act. A drainage ditch shall be defined as a narrow (usually less than 5 feet wide), man-made non-tidal ditch excavated from dry land."

In its supplementary report dated March 19, 2002, regarding the existence or non-existence of "wetlands" on the Fish property adjacent to the project site, Wetlands Research Associates stated as follows:

"In our delineation report to the Corps of Engineers on the Fish parcel (March 2000), we noted the presence of two areas that exhibited prolonged hydrology. One was a man-made excavation that is outside the current proposed project covered by this EIR. The second was a drainage ditch along a portion of the upper edge of Edgemar Road which is also outside the grading area proposed under this EIR. We noted that this feature is a drainage ditch that had been dug on uplands and receives water from areas that are upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway...As a public street, the City of Pacifica is charged with the maintenance of this road and its drainage ditch. Under routine maintenance, this roadside ditch would carry storm runoff to the City's drainage system. The Corps concluded that they did not have jurisdiction over this ditch.

The City of Pacifica LCP does not consider drainage ditches to be environmentally sensitive areas or wetlands. In addition, the California Coastal Commission determined that ditches were not considered wetlands in the Commission adopted Statewide Interpretive Guidelines for Wetlands and Other Wet Environmentally Sensitive Habitat Areas (Adopted on February 4, 1981). In its determination, the Commission stated in Appendix D:

"For the purposes of identifying wetlands using technical criteria contained in this guideline, one limited exception will be made. That is, drainage ditches as defined herein will not be considered wetlands under the Coastal Act. A drainage ditch shall be defined as a narrow (usually less than 5 feet wide), man-made non-tidal ditch excavated from dry land"

The feature along the upper edge of Edgemar Road meets the definition of a drainage ditch and is subject to maintenance under the City's standards. **It does not qualify as a LCP wetland.**

The DEIR (IV-B-2) itself stated:

"After a portion of the site in the riparian scrub habitat was observed to be wet on a recurring basis during the rainy season, WRA revisited the site, addressing these observations, concluding that the wet areas were due to faulty drainage along the trace of Edgemar Road and did not qualify as wetlands under California Coastal Commission criteria".

On page IV-B-4 of the DEIR, the same conclusion of no wetlands in respect to the Drainage Ditch was reinforced:

"During a June 1999 wetland delineation by Wetlands Research Associates, two months after the most recent rain, surface water was not noted in this habitat. WRA revisited the site in March 2002 and confirmed that the only saturated areas were either off-site or associated with abandoned drainage ditches on site."

The final area, also outside of the project, which initially exhibited some possibility of being a wetland was considered and examined in detail. There is evidence within the record that (a) this area is located in excess of 100' from the "project" as such term is defined in CEQA¹, (b) this area was a man-made, occasionally wet, excavation and, that the City, in its determination that this area was not a wetland, gave consideration to the binding authority of the California Court of Appeal, in Beach Colony II v. California Coastal Commission, (1984) 151 Cal.App. 3d 1107, which mandated a conclusion that such area could not properly be identified as a regulated or protected "wetland" under the Coastal Act and, hence, is not a regulated or protected "wetland" under the Local Coastal Plan for the City of Pacifica.

In Beach Colony II the Court rejected a claim by the Coastal Commission that a man-induced flooding of formerly dry upland constitutes a protected "wetland" where the wet area exists solely as the result of the man-induced damage to the real property. The Court reached this conclusion even though the area met the technical definition of wetland because it was submerged with water. The Court held that "*except for the interference of certain man-made structures (bridge pilings) preventing normal flotsam and jetsam pushed ahead by flood waters from following [its] natural course*", *the subject area would not have been wet and therefore could not qualify as a "wetland" under the Coastal Act.*" (Id. at 1114).

In determining whether the "wetland" should be protected under the Coastal Act, the Court asked three questions: (1) was the area part of a dynamic system?; (2) is the property in question part of a "wetland" system in which periodic changes can be expected?; and (3) is the tract part of

¹A line of 100' drawn from any point in this area does not touch the project at any point. Rather, at its point closest to the project such line ends within Edgemar Road which is a public street and for which the City itself is responsible for maintenance, irrespective of the existence or non-existence of the project. Since maintenance by the City of its own public streets is a ministerial duty of a City for which no discretionary permit need be obtained, Edgemar Road is not part of the project, both because it is not within the confines of the boundaries of our project area and because, under CEQA a "project" only comprises activities which are subject to a discretionary permit (Public Resources Code §21080, 14 CCR §15060). (Public Resources Code Section 21080(b) states: "This division does not apply to any of the following activities:..ministerial projects proposed to be carried out or approved by public agencies...")

an "historic" wetland? (Id. at 1113-14).

In answering these questions, the Court found that the "dynamics" diverting the river channel and directly causing the deluge "were not natural" and "it would not have occurred except for the interference of certain man-made structures." (Id. at 1114). It found further that the property was not part of a wetland system in which periodic changes could occur. The Court also found no evidence that the area encompassed historic wetlands, and even noted that the U.S. Army Corps of Engineers, charged with enforcing the analogous federal regulation protecting wetlands, "specifically disclaims jurisdiction to monitor dry lands merely because they were once part of a wetland system." (Id. at 1115 [citing 42 Fed. Reg. 37,128 (July 19, 1977)].)

Like the wet areas in Beach Colony II, the record contained substantial evidence that the occasionally wetness of the excavation existed only due to the interference of man-made excavation preventing surface waters from flowing off the site in their natural course. (151 Cal. App. 3d at 1114). Prior to the excavation, there is no evidence of ponding in that area, or that it was part of any "dynamic", "historical" or "wetland" system. Therefore, under the Beach Colony II holding, the City was bound, as a matter of law, to conclude there was no "wetland" either upon or within 100' of the project.

Contrary to the Commission Letter's statement that, "*the fact that certain areas exhibiting wetland features may be the result of man-made conditions is not otherwise relevant in applying this definition*", the City is bound by the law of California, which includes the interpretations of the law rendered by the Court of Appeal of the State of California, and, specifically, the holding of Beach Colony II.

In reviewing administrative regulations and their authorizing statute, "*the courts are the ultimate arbiters of the construction of a statute,*" not the administrative agency. (California Assn. of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 11 [270 Cal.Rptr. 796, 793 P.2d 2].) "*[w]hile the construction of a statute by officials charged with its administration . . . is entitled to great weight, nevertheless, [w]hatever the force of administrative construction . . . final responsibility for the interpretation of the law rests with the courts.*" Morris v. Williams (1967) 67 Cal.2d 733

Thus, as a matter of law, in light of the Beach Colony II case, the Commission Letter is simply incorrect where it states that the fact that the area was the result of man-made conditions is irrelevant to a determination of wetlands. However the Coastal Commission may interpret its own regulations, including the wetland definition contained in 14CCR Section 13577, such interpretation is, as a matter of law, subordinate to and/or qualified by the interpretation of the wetland definition rendered by the courts.

As already noted, in respect to the determination that the project was not within 300' from the top of the seaward face of the coastal bluff west of Palmetto Avenue, the administrative record contains such substantial evidence as the Coastal Commission's own post-certification maps which

show quite clearly that the project is not within 300' of the top of the seaward face of such coastal bluff, as well as various aerial maps and many other maps. Additionally, simple visual inspection makes it obvious that the project is not located within such a distance. Even the Commission Letter does not assert that the project is within such a distance, it merely speculates that it may be within such a distance. There is sufficient relevant evidence in the administrative record that a reasonable mind might accept as sufficient to support the conclusion reached by the City, that the project was not within either 100' of a wetland, nor 300' of the top of the seaward face of a coastal bluff.

The administrative record demonstrates quite clearly that the City's decision of August 12, 2002 that the project was not within the appeals zone is supported by a plethora of substantial evidence and was a reasonable conclusion to be drawn from such evidence. The Notice of Final Action dated August 19, 2002, accurately reflected such decision, complied with the statutory requirements as to form and contents and was, therefore, a valid notice. Consequently, under no circumstances may the City's decision now be appealed to the Coastal Commission. All other contentions contained in the Commission Letter, are, therefore, moot.

We hereby demand that the Commission withdraw its claim that our Coastal Development Permit has been suspended. Such claim is unlawful and, because, even if invalid, it has the chilling effect, in the minds of third parties, of depriving North Pacifica LLC of all use and economic value of its project by rendering the project undevelopable and unmarketable², it is causing us irreparable injury as well as substantial monetary damages for every day that it is not withdrawn. No development of the project can occur without a valid, non-expired coastal development permit. The coastal development permit is only valid for a relatively short time under any circumstances and an invalid "suspension" of it might very well result in the permit expiring before it can ever be proven in Court that the "suspension" was invalid. The fact that the Commission has been made aware that its suspension of our permit is without lawful authority and knows the consequences and damages which its unauthorized and illegal actions are causing and yet still

²Few reasonable developers, builders, banks etc., would voluntarily place at risk many millions of dollars and rely upon the validity of the Coastal Development Permit issued by the City, even if, as a matter of law, it is absolutely valid, if such persons know to do so will entangle them in expensive and protracted delays and/or litigation and/or enforcement proceedings with the Coastal Commission, even if such litigation and/or enforcement proceedings by the Coastal Commission are entirely devoid of legal merit, authority or jurisdiction.

refuses to withdraw same makes the Commission's actions that much more reprehensible and responsible for the damages such actions are causing to North Pacifica LLC.

Yours very truly,



Keith M. Fromm
Member and Counsel

cc. Peter Douglas, Executive Director, California Coastal Commission
cc. Peter Imhof, California Coastal Commission

List of Exhibits

Report dated March 19, 2002 from Wetlands Research Associates, Inc.

Report dated December 27, 1999 by Wetlands Research Associates, Inc.

Memorandum dated January 24, 2000 from Thomas Reid Associates comprising peer review of findings by Wetlands Research Associates, Inc.

2-02-2-EDD (Pacific Bowl)
Letter from Keith Fromm, North
Pacifica, LLC to Peter Imhof,
dated October 2, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202 FAX (310) 556-8282

October 2, 2002

Mr. Peter Imhof, Coastal Planner
California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the
"Property" or "Project")

Dear Mr. Imhof:

In our previous letters to you, we attempted without either any success or even the courtesy of any response from the Coastal Commission, to persuade you that the executive director's purported suspension of our Coastal Development Permit was invalid and not supported by law, and we asked repeatedly that it be retracted so as to remove the cloud upon our Coastal Development Permit, which, for all practical purposes, deprives both our permit and our project of all economic value.

By this letter we wish to point out, yet one more clear demonstration as to why this purported suspension is unlawful, unreasonable and constitutes, in the truest sense of the terms, an arbitrary and capricious act on the part of Mr. Douglas, and/or the Commission.

In your letter of August 23, 2002, to the City of Pacifica, you state that the City employed the wrong definition of "wetlands" in determining whether or not the project was appealable to the Coastal Commission, wherein the City employed the LCP definition of "wetlands" instead of the definition contained in the Coastal Commission Regulation 13577.¹

Yet, it was the Commission itself that instructed the City to use the LCP definition of "wetlands" in making its determinations regarding the existence or non-existence of wetlands in relation to our project and the processing of our Coastal Development Permit. In its letter to Mr. Crabtree dated January 21, 2000, (a true copy of which is attached hereto for your convenience) the Commission, per Virginia Esperanza, Coastal Planner, expressly instructed Mr. Crabtree:

¹*"Under the wetland definition contained in 14 CCR Section 13577, the definition for purposes of determining Coastal Commission appeal jurisdiction, wetlands are defined..."* Letter of Peter Imhof, Coastal Commission, dated August 23, 2002 to Michael Crabtree.

"Wetlands/Biological Resources. The EIR should contain a detailed description of the existing site habitat, particularly the wetland areas and other sensitive habitats. The EIR should include a discussion of the size and location of the wetlands, and a description of the vegetation, soils and hydrology. Delineation should be based on the definition of wetlands contained in the LCP."

It is the essence of arbitrariness and caprice that, in the first instance the Commission expressly instructs the City to employ the LCP definition of wetlands to determine the existence or non-existence of wetlands, and, later, after many years of work and literally millions of dollars have been expended in reliance upon such instruction, the Commission then states that the City erred by complying with the Commission's instruction in employing the LCP definition and not the definition contained in the Commission Regulations.

According to the Commission's current logic, there is no scenario under which the City could have acted properly. If, as it did, it complied with the Commission's January 21, 2000 instruction, then, it is alleged, the City erred in not employing the Commission Regulations definition of wetlands. If, on the other hand, the City had employed the Commission Regulations definition, it would have violated the Commission's January 21, 2000 instruction. This is the essence of arbitrary, capricious and irrational conduct on the part of the Commission and, yet, one more reason why the suspension must immediately be lifted on our Coastal Development Permit.

As demonstrated in our previous letters, the Commission's January 21, 2000 letter was quite correct in instructing the City to employ the LCP definition, since, under Coastal Act Section 30519, once there is a certified LCP, the Commission no longer has any power to exercise development review authority (including the authority to determine the absence or existence of wetlands) and such power is delegated to the City to be exercised pursuant to and in compliance with its certified LCP. But, additionally, the Commission, by its own actions, is estopped from even contesting this point, since it cannot now suspend the permit on the grounds that the City erred by complying with the Commission's own explicit instructions as to how the delineation of the existence or non-existence of wetlands was to be determined.

As was said in City of Long Beach v. Mansell, 9 Cal.3d 462, at pages 496-497:

"The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (See also City of Fontana v. Atkinson (1963) 212 Cal.App.2d 499 [28 Cal.Rptr. 26].)

Additionally, the Commission's about-face on how the delineation of wetlands was to be handled flies in the face of Gov Code Sections 66474.2 and 65589.5(j) both of which freeze the ordinances, policies and standards for evaluating the application for a vesting tentative tract map (which is the project to which the Coastal Development Permit pertains) to those which existed as of the date the application was deemed complete (i.e. June 5, 2001). Certainly, as evidenced by the January 21, 2000 letter, the standards that existed at that time were that the existence or non-existence of wetlands was to be determined by the City utilizing the LCP definition.

Furthermore, as it is clear that the Commission letter of January 21, 2000 evidences that the standard employed by the Commission as of that date was the "LCP" standard, there is the additional issue that the Commission is now violating North Pacifica's constitutional rights to equal protection under the law, if the Commission has not, at least since January 21, 2000, suspended each and every coastal development permit issued to each applicant wherein the local agency employed the LCP standard and not the Commission regulation standard.

The Commission's actions are clearly arbitrary, irrational, unlawful and unconstitutional and are causing us irreparable harm in that our valid permit, which constitutes a constitutional entitlement and property right, for which we toiled several years and spent millions of dollars, may well expire before the Commission lifts its purported and unlawful suspension of it and we are able, in any practical way, to obtain any of our lawfully entitled benefit from it. For these additional reasons, we once again demand that you forthwith retract your purported suspension of our Coastal Development Permit and refrain from purporting to exercise any further jurisdiction, of any nature, over it.

Yours very truly,



Keith M. Fromm
Counsel and Member

cc. Mr. Chris Kern, Coastal Commission
Mr. Peter Douglas, Executive Director, Coastal Commission

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OCT 11 2002

CALIFORNIA
COASTAL COMMISSION

October 4, 2002

EXHIBIT 14

2-02-2-EDD (Pacific Bowl)

Letter from Keith Fromm, North
Pacifica, LLC to Peter Imhof,
dated October 4, 2002

Mr. Peter Imhof, Coastal Planner
California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the
"Property" or "Project")

Dear Mr. Imhof:

This letter is in response to your letter to us dated September 17, 2002. On September 9, 2002, this writer on behalf of North Pacifica LLC and our attorney, Ms. Jaquelynn Pope, faxed to your office two responses comprising, collectively, about 27 pages of legal authorities explaining why the procedure you proposed in your August 23, 2002 letter and, essentially restated in your September 17, 2002 letter was, for a very great number of reasons, not in accordance with nor authorized by law. We have never received a response to either letter.

What is remarkable to us is that your September 17, 2002 letter, not only is not influenced in the slightest way by any of such legal authorities, but does not address any of our objections therein or, indeed, even make mention of our September 9, 2002 letters, as if the letters had never even been sent, or, worse, were simply not even worthy of response or acknowledgment. In my telephone conversation with Chris Kern on September 13, 2002, he indicated that he had received a copy of said letters and read them, so we know they were reviewed, in your office, by at least Mr. Kern. So it appears, whatever communications we make to you, if you disagree with them, will simply fall on deaf ears, but we will try again, if for no other reason at this point but to make a record for judicial review and to establish that the Coastal Commission and its representatives have, in every sense of the word, exhibited a demonstrated indifference to the law.

Your letter of September 17, 2002 illustrates, by its practical effect, how your proposed procedure engenders unnecessary delays and abuses and exactly why the arguments contained in our September 9, 2002 letters must be correct.

Executive Director Has No Authority to Overturn a Quasi-Judicial Decision of the City.
The City's Decision Is Strongly Presumed, By Law, to be Valid, Only a Court May
Overturn It and Then Only on the Basis of the Substantial Evidence Test.

Your letter seeks, wholly contrary to law, to shift the well-settled legal burden of establishing the validity of the City's quasi-judicial determinations that (a) there are no wetlands within 100' of the project, (b) the project is not appealable to the Coastal Commission, and, (c) the coastal development permit is valid and not suspended.

The law is quite clear that the City's determinations in these regards are presumed to be valid and binding upon everyone, including the executive director of the Coastal Commission. Therefore, once the City decided the project was not appealable to the Coastal Commission, as a matter of law, it became not appealable to the Coastal Commission and because it is not appealable, Section 13572 of your Coastal Commission Regulations is simply inapplicable. That you state: "*The Commission does not consider any coastal development permit issued prior to resolution of this question to be effective, and any development undertaken pursuant to such a permit could constitute a violation of the Coastal Act and subject to enforcement action*" is simply an admission that the Commission refuses to proceed in a manner required by law.

The City Council's determination that the coastal development permit was validly issued, the Notice of Final Local Action was not defective, there were no wetlands within 100' of the project and the project is not appealable to the Coastal Commission, as a matter of law, comes with a strong presumption of regularity. (California Manufacturers Assn. v Industrial Welfare Com. (1980) 109 Cal.App.3d 95; Sequoyah Hills Homeowners Assn v. City of Oakland (1993) [23 Cal.App. 4th 704].

The onus is upon anyone, including the Coastal Commission's executive director, Mr. Douglas, who seeks to overcome such presumption and to overturn such a City Council determination, to do so in a court proceeding and to prove that an abuse of discretion has been shown. (Coastal Act, section 30802, Code Civ. Proc. section 1094.5; Youngblood v. Board of Supervisors (1978) 22 Cal.3d 644, 651; Coastal Commission v. Superior Court (1989) [210 Cal.App. 3d 1488]).¹

¹Even if the executive director of the Coastal Commission were to contend that the City had no jurisdiction to have made the determination that the coastal development permit was not appealable, which would seem somewhat senseless because the City has a legal obligation to make such determination (see Pacifica Municipal Code Section 9-4.4304(n) and 14 CCR §13571), his remedy would still require that he submit such issue to the court under a writ of administrative mandamus and not simply purport, unilaterally, to suspend the permits.

"If a tribunal has subject matter jurisdiction in the fundamental sense, its decision will be res judicata notwithstanding that the decision is incorrect. "It is an established rule that where a tribunal has jurisdiction of the parties and of the subject-matter it necessarily has the authority and discretion to decide the questions submitted to it even though its determination is erroneous. [Citation.] This rule applies to quasi-judicial tribunals as well as to courts." (Cullinan v. Superior Court (1938) 24 Cal.App.2d 468, 471-472 [75 P.2d 518]; accord Hollywood Circle, supra, 55 Cal.2d at p. 731; Ang, supra, 97 Cal.App.3d at

The Coastal Act, itself, spells out this very remedy and expressly states that it applies to the Coastal Commission itself:

30802. Any person, including an applicant for a permit or the commission, aggrieved by the decision or action of a local government that is implementing a certified local coastal program or certified port master plan, or is exercising its powers pursuant to Section 30600.5, which decision or action may not be appealed to the commission, shall have a right to judicial review of such decision or action by filing a petition for writ of mandate in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure within 60 days after the decision or action has become final..."

As stated in Coastal Commission v. Superior Court (1989) [210 Cal.App. 3d 1488] at p. 1493:

"As early as 1944 the California Supreme Court articulated the rule that a party's failure to seek judicial review of an administrative agency determination would prevent the party from later challenging the merits of that determination in a collateral proceeding. (Stockton v. Department of Employment (1944) 25 Cal.2d 264, 267-268 [153 P.2d 741].) [2b] This principle has been repeatedly restated by both the Supreme Court and the courts of appeal and applied in a variety of contexts, including cases involving the Coastal Commission. (See, e.g., Monroe v. Trustees of the California State Colleges (1971) 6 Cal.3d 399, 405-406 [99 Cal.Rptr. 129, 491 P.2d 1105]; Knickerbocker v. City of Stockton (1988) 199 Cal.App.3d 235, 243-244 [244 Cal.Rptr. 764]; Walter H. Leimert Co. v. California Coastal Com. (1983) 149 Cal.App.3d 222, 233 [196 Cal.Rptr. 739]; Briggs v. State of California ex rel. Dept. Parks & Recreation (1979) 98 Cal.App.3d 190, 196, fn. 3 [159 Cal.Rptr. 390] (also a Coastal Commission case); DeCelle v. City of Alameda (1963) 221 Cal.App.2d 528, 535 [34 Cal.Rptr. 597];

p. 678 (at p. 1501). Coastal Commission v. Superior Court (1989) [210 Cal.App. 3d 1488]", at 1510

There can be no question that the City had the subject-matter jurisdiction to decide whether or not the permit was appealable to the Coastal Commission since this subject-matter jurisdiction is set forth, inter alia, in the Pacifica Municipal Code Section 9-4.4304(n) and 14 CCR §13571 and the executive director would not be claiming that the City made the *incorrect* decision if the City had no authority to make *any* such decision to begin with. Obviously, the executive director of the Coastal Commission would not be insisting that the city *change* its decision and say the permit was appealable rather than that it was not, if the City had no authority to make any such a decision, one way or the other.

see also *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 [131 Cal.Rptr. 90, 551 P.2d 410].”

An abuse of discretion is established only if the city council has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence (Code Civ. Proc., section 1094.5, subd. (b)). Even a court, much less the executive director of the Coastal Commission, may neither substitute its view for that of the city council, nor reweigh conflicting evidence presented to that body. (*Board of Trustees v. Munro* (1958) 163 Cal.App 2d 440, 445. *Sequoyah Hills Homeowners Assn v. City of Oakland* (1993) [23 Cal.App. 4th 704].

Under the substantial evidence test, a reviewing court may not reweigh the evidence, as it would if it were to apply the independent judgment test. A reviewing court is limited to determining whether the record contains relevant information that a reasonable mind might accept as sufficient to support the conclusion reached. All reasonable doubts must be resolved in favor of the agency's determination, and the court may not set aside the agency's decision even though the opposite conclusion is more reasonable. See *Western States Petroleum Ass'n v. Superior Court* (1995) 9 C4th 559, *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 C3d 376.

In short, then, if Mr. Douglas feels that the City's determination that the project was not appealable to the Coastal Commission was in error, his sole remedy, assuming he has standing at all, is to obtain a writ of administrative mandate under Code of Civil Procedure Section 1094.5, not to unilaterally declare the permit, "suspended". Likewise, the Coastal Commission, itself, has the right (and it is the Coastal Commission's sole remedy) to challenge the City's determination, to bring an administrative writ action under the authority of Coastal Act, Section 30802. If the Coastal Commission fails or refuses to challenge the City's determination in this manner and within the time limits set forth in said Coastal Act, Section 30802, its right to do so is forever forfeited.

The Issue That There Are No Wetlands on the Property is Already Res Judicata Binding upon the Coastal Commission.

Your letter admits that *"We also clearly informed you and the City of our concerns regarding the existence of wetlands on the project site during CEQA review in both our comment letter on the notice of preparation of the EIR, dated October 4, 2001, and our comment letter on the draft EIR, dated May 3, 2002."*

This is quite correct, which means that your remedy for addressing such concerns about the EIR was to file a writ of administrative mandate to overturn the EIR as inadequate. Since, however, you failed to do so within the statute of limitations for filing such an action, the findings of the EIR that there were no wetlands on the property became, as a matter of res judicata, binding upon you, even if you believe such findings to have been erroneous, (indeed,

even if they were erroneous).² Once again, we would recite the same authorities cited in the previous section of this letter:

"As early as 1944 the California Supreme Court articulated the rule that a party's failure to seek judicial review of an administrative agency determination would prevent the party from later challenging the merits of that determination in a collateral proceeding. [citations omitted, see above]"

The Coastal Commission's failure to seek judicial review of the City's certification of the EIR (and its findings therein that there were no wetlands on the project site) prevents the Coastal Commission from later challenging the merits of that determination in a collateral proceeding, including your proposed collateral proceeding under Coastal Commission Regulation 13569³. The law is crystal clear on this point.

²"If a tribunal has subject matter jurisdiction in the fundamental sense, its decision will be res judicata notwithstanding that the decision is incorrect. "It is an established rule that where a tribunal has jurisdiction of the parties and of the subject-matter it necessarily has the authority and discretion to decide the questions submitted to it even though its determination is erroneous. [Citation.] This rule applies to quasi-judicial tribunals as well as to courts." (Cullinan v. Superior Court (1938) 24 Cal.App.2d 468, 471-472 [75 P.2d 518]; accord Hollywood Circle, supra, 55 Cal.2d at p. 731; Ang, supra, 97 Cal.App.3d at p. 678 (at p. 1501). Coastal Commission v. Superior Court (1989) [210 Cal.App. 3d 1488]", at 1510

³In a footnote in your September 17, 2002 letter you complain that the Coastal Commission never received an Initial Notice concerning the City's permit action under Pacifica Zoning Code Section 9-4.4304(g). This is clearly untrue and attached hereto is a copy of such notice dated June 6, 2002 from Lee Diaz, City Planner to Peter Imhof, Coastal Planner, Coastal Commission. Further, as you have stated: "We also clearly informed you and the City of our concerns...during CEQA review in both our comment letter on the notice of preparation of the EIR, dated October 4, 2001 and our comment letter on the draft EIR, dated May 3, 2002", you were well aware of and an active participant in the City's proceedings on this matter and intimately familiar with our project. You cannot now say, with any credibility or sincerity, that you lacked notice of them and are estopped by your conduct from even making it an issue. If you wished to launch a dispute, as you have done now, regarding whether or not the project is appealable, (assuming you or anyone at the Coastal Commission even has standing to do so as an "interested person", which we strongly dispute), you could have manufactured such a dispute in October, 2001 or May, 2002, before the permit approval was rendered, just as easily as you have done so now, after the project was approved and the permit validly issued. The difference is, by doing it now, it costs us more delay and significantly more money. It also, however, deprives us now of an entitlement, for constitutional purposes, as opposed to a mere expectation of one.

Coastal Commission Seeks to Exercise "De Novo" Powers of Review Before It Has Established It Has Any Appeals Jurisdiction.

In the second paragraph of your letter you state that based on some of the evidence in the administrative record, you (or Mr. Douglas) believe the City came to the wrong conclusion when it exercised its quasi-judicial discretion in determining there were no wetlands within 100' of the project. You also state that you expressed your concerns about this issue as early as October 4, 2001 and again on May 3, 2002.

Your statement "*Because the City provided notice of final local action designating the project as non-appealable, no appeal period has commenced*" is nonsensical. The correct implication to be drawn is "*Because the City provided notice of final local action designating the project as non-appealable, no appeal period is applicable.*" Your third paragraph on page 1 then goes on to reference "appealable projects", which, once again, is inapplicable to the project at hand. Since the project was duly found by the City, the administrative and quasi-judicial agency authorized to make such determination, to be unappealable to the Coastal Commission, there was no 10 day appeal period under Section 13572 to be concerned with.

Once again, if the Coastal Commission or Mr. Douglas disagrees with the City's determination in this regard, their sole and exclusive remedy is an administrative writ under Section 1094.5 of the Code of Civil Procedure to attempt to convince a court that the City's decision constituted an abuse of discretion and was not based on substantial evidence.⁴

Likewise, your statement "*Since the Executive Director's Determination of project appealability differs from that of the City, the Commission's appeal jurisdiction over this project must be resolved pursuant to Section 13569 before the permit may become effective*" has no legal support whatsoever. It is irrelevant what the executive director thinks about project appealability. That determination has clearly been delegated to the City under Public Resources Code Section 30519, as explained in our September 9, 2002 letters. Once again, if Mr. Douglas believes the City made a mistake in making such a project appealability determination, the sole remedy available to Mr. Douglas, assuming he has any standing, is to petition for a writ of administrative mandate to overturn the City's decision.

There is no statutory provision which requires a project that has already been found, in a quasi-judicial proceeding to be non-appealable, to then undergo a further quasi-judicial proceeding to determine if the first quasi-judicial determination was in error.

⁴But, since the Coastal Commission never challenged the sufficiency of the EIR in a writ proceeding, within the allotted statutory time period, it will still be bound by res judicata on all findings contained in the EIR, including the finding that there were no wetlands affecting the project.

"Once a developer has fully complied with all of the requirements of the act and has obtained a permit, he should not be required to postpone construction for prolonged periods of time while awaiting the commencement of litigation which seeks to challenge the legality of his proposed development." *Sierra Club v. CCC* (1979) 95 CA3d 495

That would, in essence, be a de novo appeal of the City's determination that the project was not appealable. As explained in our September 9, 2002 letters, the Public Resources Code Section 30603 is quite clear that, once an LCP has been certified, the sole appeals jurisdiction of the Coastal Commission is when the circumstances in Section 30603 are applicable. The predicate to such an occurrence is that the City has made a finding that the project is appealable to the Coastal Commission. Since, in this case, the City found otherwise, the predicate condition never occurred and the Coastal Commission has no appeals jurisdiction either under Public Resources Code Section 30603 or under its own Regulation 13569.

Once again, if the Coastal Commission, or Mr. Douglas, disagrees with the City's determination that the project is not appealable to the Coastal Commission its sole and exclusive remedy is an administrative writ under Code of Civil Procedure Section 1094.5.

There are other problems with your interpretation of the applicability of Regulation 13569. Firstly, it is clear that it is intended to be applicable at the inception of a project not after it has been approved. Secondly, by your interpretation of that procedure, there is no limitations period on it, it could apply any time, even months or years after a project has been approved, if the challenge to the project's appealability does not arise until such later date, clearly defeating the legislative intent to achieve finality under Public Resources Code Section 30603.

"To the contrary, it would be illogical and unfair to grant third parties, such as appellants, the right to challenge permits when such a challenge would be time barred if brought by the party who was initially granted the permit. A permit holder also must have legal confidence after a definite point in time in investing financial resources to implement an approved development. Once the 60-day statute of limitations has run, the permit issued must be deemed good as against the world." *Ojavan v. Cal Coastal Commission* (1994) 26 CA4th 516 (referring to Coastal Act Section 30801, but equally applicable to Coastal Act Section 30802.)

Thirdly, as explained in our September 9, 2002 letters, since Regulation 13569 was promulgated pursuant to the authority of a provision of the Public Resources Code located in Chapter Seven, by virtue of Public Resources Code Section 30519, it is inapplicable to any project, including this one, for which an LCP has been certified.

Fourthly, there is no dispute about the appeals jurisdiction. The City made a determination, the permittee agreed with that determination and no legally eligible "interested person" has ever disputed such determination. For the reasons set forth in our September 9, 2002 letters, neither the Coastal Commission, the Coastal Commission staff nor the executive director may be an "interested person" under Section 13569 and once the City made the determination that the permits were approved and they were not appealable to the Coastal

Commission, the issue became moot, in any case. In short, Section 13569 is clearly not applicable and not authorized by law for the use you propose of it.

Regarding your request to have your biologist inspect our property, since the Coastal Commission has absolutely no authority over our project, and we believe, for the reasons stated in our various correspondences that the Coastal Commission and/or its representatives are acting in a manner blatantly and intentionally contrary to law, we absolutely decline voluntarily to permit your biologists or anyone else under your direction to enter the property for any reason. It is clear from your unlawful actions, and your total refusal to address, or, indeed, even to acknowledge our objections thereto, that your sole intent is to delay our project unnecessarily and cause us harm.

"Brownie Points" and Impartiality

For the record, I must recount a portion of the telephone conversation I had with you on or about September 9, 2002. In that conversation, you stated that you were aware of correspondence which was sent by North Pacifica LLC to the appellant, Mr. Curtis, and some of his fellow members of an organization known as the "Committee to Save the Fish and Bowl". You had received this communication, on an ex parte basis, (perhaps even on a hearsay basis), from one of the recipients of such letter (or maybe just someone who heard about the letter), and you stated to me: "*You didn't score any brownie points with the Commission by sending that letter.*"

My response to your comment was: "*It was my understanding that the Commission's decisions were to be based on the law and not the allocation of brownie points.*"

What was so disturbing about your comment, is not that it was so highly improper and violative of the "principles of fundamental fairness and due process of law" and "impartiality" required by Section 30320 of the Coastal Act, but that it was so entirely candid and revealing of the real manner in which the Coastal Commission functions. Here, at least in the eyes of the Coastal Commission, the supposedly constitutionally protected due process had not yet even begun in determining whether or not the project was appealable or whether North Pacifica would even be subject to the Coastal Commission's jurisdiction, and yet it had already been made clear to us that, in the eyes of "the Commission", North Pacifica had already lost "brownie points". In other words, a representative of the Coastal Commission admitted that, based on an ex parte, probably hearsay, communication from a project opponent, North Pacifica had a strike against it, before even having embarked on what is supposed to be a fair and unbiased statutory procedure. In short, "the Commission" had already picked its favorites and established its lack of impartiality even before the process had even begun.

30320. (a) The people of California find and declare that the duties, responsibilities, and quasi-judicial actions of the commission are sensitive and extremely important for the well-being of current and future generations and that the public interest and principles of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority.

You also made another comment in that conversation which, in retrospect, appeared to be a foreshadowing of things to come. You stated: "You may decide it is too expensive to develop property in the City of Pacifica".

The Coastal Commission's Proposed Procedure is Arbitrary and Unreasonable and is Designed Solely to Delay our Project and to Injure North Pacifica LLC.

Not only is the Coastal Commission's proposed procedure manifestly unfair, it is also arbitrary and unreasonable and is intentionally designed solely to delay our project and to injure North Pacifica LLC. This may be illustrated as follows:

The Coastal Commission (or at least its Executive Director) contends that the project is appealable to the Coastal Commission. If it were appealable to the Coastal Commission the procedure would be to have received Mr. Curtis' appeal within 10 days after the Notice of Final Local Action (i.e. on or before September 5, 2002), conducted a "substantial issue" determination within five (5) days thereafter (approx. September 12, 2002), conducted the appeal within 49 days after receipt of Mr. Curtis' appeal (i.e. October 24, 2002) and rendered its decision within 21 days thereafter (i.e. November 13, 2002). Under such a circumstance, North Pacifica's permits would, by law, have been suspended, which means they would be no closer to their expiration dates at the end of the appeals process than they were at the beginning of it. The entire appeal process would have been completed (assuming no continuances) no later than November 13, 2002 and, whatever the Coastal Commission may have decided within such appeal, as far as the City was concerned, the permits would not be any closer to their expiration dates than they were when originally issued.

Under your proposed scenario, however, you seek to inject this wholly unnecessary, unauthorized and unwarranted procedure of a hearing under your own Regulation 13569, which based on your letter of September 17, 2002, does not even commence, until around December 10, 2002 i.e one month after the whole appeals process would have been completed in its entirety.

If it were to be determined in such 13569 hearing that, indeed, the permit was never appealable to the Coastal Commission, then, obviously, the Coastal Commission's "suspension" of the permits would have been invalid, ab initio, and, over one-third (33 1/3%) of the permit's useful life would already, unnecessarily have been exhausted, and without any justification whatsoever, North Pacifica, would have been deprived of all economic utility and value of its property during that period, while, at the same time still having borne the burdens of carrying the costs for the project as well as the costs for undergoing the wholly unwarranted 13569 proceeding. As North Pacifica disclosed to the Coastal Commission in its previous letters such costs amount to \$5,000 to \$10,000 per day. Thus, this wholly unjustified delay would entail monetary losses to North Pacifica of \$600,000 to \$1,200,000 in addition to the loss of the use of the Property and permits. The Coastal Commission's probable response: "*Oops, mistaken assertion of jurisdiction, immune from liability under the Landgate holding.*"

On the other hand, if, as is more likely, the Coastal Commission accepts its own appeal to itself, purportedly under Regulation 13569 and agrees with itself that the project was appealable to itself, then, in mid-December, 2002, it sets Mr. Curtis' appeal to be held no later than 49 days thereafter, which places the appeal date at approximately January 31, 2003, with a decision (assuming no continuances) on the appeal within 21 days thereafter, or approximately February 21, 2003, i.e. *over three months later than it would have been if the Coastal Commission had just treated the project as having been appealable from the beginning*. Under this scenario, the extra costs to North Pacifica would be \$450,000 to \$900,000 over what they would have been if the City had simply conducted the appeal in accordance with the statutory deadlines for conducting such an appeal.

The third alternative would be for North Pacifica to surrender to the Coastal Commission's demand to voluntarily concede that the Coastal Commission has appeals jurisdiction, in order to obviate the 13569 hearing and, potentially, speed up the process of an appeal before the Coastal Commission. Under this scenario, North Pacifica is punished by having to relinquish the force of law of the City's finding that the project is not appealable to the Coastal Commission and to, therefore, endure the delays and possible extra costs, or worse, entire loss of its project, unnecessarily, a penalty of potentially many millions of dollars.

Under any scenario, the Coastal Commission's actions lead to North Pacifica being unjustly punished. If the project is not appealable, North Pacifica suffers the loss and the costs of over 4 months of its permit's validity while the Coastal Commission had purportedly, but, unjustly "suspended" it. If the project is appealable, North Pacifica suffers the costs of over 3 months of unnecessary delay, and if North Pacifica simply surrenders to the Coastal Commission's demand that the Coastal Commission be permitted to conduct the appeal, North Pacifica suffers the loss of the City's presumptively valid determination that the project is not appealable to the Coastal Commission, and, subjects itself to an unnecessary appeal which may result in the entire loss of its project..

So, under any scenario devised by the Coastal Commission, North Pacifica is punished simply because the City, after three years of exhaustive processing and required modifications and conditions, found its permit to be fully in accordance with the applicable laws and not appealable to the Coastal Commission.

That it is the Coastal Commission's intention to prolong the process and impose the maximum hardship upon North Pacifica can be easily demonstrated. Obviously, if, indeed, the Coastal Commission truly has appeals jurisdiction over this project as its representatives contend it does in their letters, then it could simply dispense with this wholly perfunctory procedure of conducting an appeal to itself as to whether or not it has appeals jurisdiction. It also would not be bothering to try to get the City to change the Notice to read "appealable" instead of "not appealable". It could simply attempt, expeditiously, to get on with the appeal within the statutory deadlines, in which event, at the latest, the appeal, under protest by North Pacifica, should have been completed by November 13, 2002.

Even in connection with its purported hearing under its Regulation 13569, the Coastal Commission's intent to delay the process and maximize the injuries to North Pacifica is manifest. For, instead of setting the purported 13569 hearing at the next available meeting of the Coastal Commission, which is October 8, 2002, it chose, instead to delay it for an additional two months, knowing full well that each day of delay costs North Pacifica \$5,000 to \$10,000 per day, i.e. imposing a totally avoidable and unnecessary additional cost to North Pacifica of from in excess of \$300,000 to in excess of \$600,000. The justification for such \$300,000 to \$600,000 plus delay and extra cost to North Pacifica LLC? *"The December 2002 Commission meeting will be held in San Francisco from December 10 through 13, 2002. This location is the appropriate geographic region for the dispute resolution hearing as San Francisco is the only location where the Commission will meet in the next few months in proximity to the project site."*

The Coastal Commission is aware that for less than \$200 anyone in California can transport himself or herself to anywhere else in California. The Coastal Commission is going to be at its own hearings anyway, so there is no inference one can draw from the Coastal Commission's decision to delay its bogus 13569 hearing but that it intends to visit the maximum financial cost upon North Pacifica LLC and, even if wrong in its assessment that the Coastal Commission has appeals jurisdiction, burn up as much of North Pacifica's unexpired permit life as possible.

This is a classic case where the Coastal Commission's conduct *"was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective"* and would, therefore, constitute a taking, by the Coastal Commission, of North Pacifica's property. *Landgate, Inc. v. California Coastal Commission*, (1998) 17 C.4th 1006.

"It is in the nature of our work that we see many virtuoso performances in the theatres of bureaucracy but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment on Healing's mandate petition. To state the Coastal Commission's position is to demonstrate its absurdity." *Healing v. California Coastal Com.* (1994) 22 Cal. App. 4th 1158, 1170 [27 Cal. Rptr. 2d 758]

In another case, Buckley, in which the Coastal Commission, in a similar fashion asserted "mistaken" jurisdiction, on the 15th day of trial in 1995, the judge issued his ruling:

"I am part of the government, as a judge, and I have seen governmental arrogance at it worst until now, and the Coastal Commission exhibited an arrogance that should be for another country, not the United States."

Things have not progressed much since 1994 and the executive director of the Coastal Commission today is the same one as in Healing and Buckley.

As the plaintiff, Peggy Buckley, herself lamented, "*Government can take your property, damage your property, bankrupt you and devastate your life without fear of liability or of having to pay damages,*" she says. "*All a governmental entity has to do is say, 'Oh, your honor, we just made a mistake' even if it is totally illegal and not have to pay a cent.*"

We have tried to find a way to reason with the Coastal Commission regarding North Pacifica's Coastal Development Permit, however, the Coastal Commission has refused either to meet with us or even to respond to our correspondence. It appears futile at this point to make any further efforts to persuade you that your actions are completely devoid of legal foundation. Rather it is clear that our only alternative is to seek immediate judicial intervention. For this reason we have instructed our attorneys to forthwith commence writ proceedings against the Coastal Commission.

Yours very truly,



Keith M. Fromm
Counsel and Member

cc. Mr. Chris Kern, Coastal Commission
Mr. Peter Douglas, Executive Director, Coastal Commission

2-02-2-EDD (Pacific Bowl)

Letter from Keith Fromm, North Pacifica, LLC to Peter Imhof, dated October 7, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202 FAX (310) 556-8282

October 7, 2002

Mr. Peter Imhof, Coastal Planner
California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the "Property" or "Project"), Pacifica, CA

Dear Mr. Imhof:

This letter is in response to your letter to us dated October 3, 2002. In it I will try to deconstruct the logical inconsistencies contained in your letter.

Violation of Due Process.

You state:

"If, as the Executive Director has preliminarily determined, the City's approval is development appealable to the Commission because of the existence of wetlands on the project site, the Executive Director's determination does not deprive your client of due process because the City's action approving the subject development is not yet effective."

You ignore, however, the flip-side of that proposition, which is:

If, contrary to the Executive Director's preliminary determination, the City's approval is not "development appealable" to the Commission, the Executive Director's determination does deprive North Pacifica LLC of due process because the City's action approving the subject development was effective as of the date of such approval, and, the delay and interference caused by the Executive Director's wrongful "suspension" of the permit, deprived North Pacifica of an entitlement for the period of such delay.

In this second instance, it is conceivable that the delay may stretch out so long that the coastal development permit (the "Permit" herein) may expire (or at least, have so little unexpired time remaining on it that it is, as a practical matter, rendered useless).

before the City's decision regarding non-appealability is vindicated. If the Executive Director acted in error in "suspending" the Permit, then the "suspension" was void from its inception and the effective period of the Permit will not have been "tolled" or otherwise extended merely because the Executive Director's "suspension" of the Permit was in error. Thus, the entire Permit could be lost, if the Executive Director's "preliminary determination" turns out to have been in error.

Your letter does not address how North Pacifica could be made whole if the supposedly fair and impartial hearing ("13569 hearing" herein) purportedly pursuant to Regulation 13569, were, after many months, to determine that the Executive Director's "preliminary determination" was in error and that the Permit was, in fact, not appealable.

Under the scenario you envision, (even in respect to any jurisdiction in which a local government has a certified LCP and, therefore, has exclusive development review authority and the Commission has no development review authority), the Executive Director of the Commission may defeat any approved coastal development permit simply by "preliminarily" challenging the local government's determination that such Permit is non-appealable, thereby "suspending" such Permit, and then running the clock on its remaining unexpired life. Irrespective of what a 13569 hearing may determine, the Permit soon expires according to its own terms before the Permittee has ever had an opportunity to make use of it. As has been briefed in our previous letters, this is not in accordance with the statutory scheme set forth in the Coastal Act.

How Fair and Impartial Can A 13569 Hearing Be? Whatever it Decides It Violates North Pacifica's Due Process Rights.

As set forth above, if the Commission, in the purported 13569 hearing finds that the Permit was not appealable, then it acknowledges liability for violating North Pacifica's due process rights. On the other hand, according to your October 3, 2002 letter, if the 13569 hearing determines the Permit was appealable, the Commission is exonerated from any wrongdoing. Therefore, the Commission, going into the 13569 hearing, has a multi-million dollar incentive to find one way and no incentive to find the other way. How fair and impartial could such a hearing be expected to be?

This highlights exactly why 13569 hearings were not intended to be held after a coastal development permit has been approved by the local governmental authority, since it could not be the legislative intent that the Commission be placed in the position where it is so necessarily biased as to the outcome of a hearing in which it purports to serve as a "neutral" adjudicator. The existence of such a bias, in and of itself, would deprive the permittee of due process in respect to any such purported 13569 hearing.

Difference between LCP Standard and Commission's Interpretation of 13577(a) Standard.

In your October 3, 2002 letter, you appear to be confused about the significance

of the difference between the LCP definition of wetlands and the Commission's Interpretation of its own Regulation 13577(a).

You state:

"Since the LCP wetland definition contained in Pacifica LCP (see Zoning Code Section 9-4.4302(av)) is identical to the Coastal Act Section 30121 definition of wetland, and since those definitions both inform and encompass the more specific definition contained in 14 CCR Section 13577(a), for all practical purposes there is in any case no difference between the applicable LCP and Coastal Act definitions; that is, if the subject property contains wetlands that meet the standards of 14 CCR Section 13577(a), then the subject property also contains wetlands that meet the more general wetland definition contained in both the Coastal Act and the certified LCP".

This statement is entirely untrue. Firstly, you ignore the definition of "wetlands" set forth on p. C-99 of the Pacifica Local Coastal Program, Land Use Plan, which is more specific than the Coastal Act/Municipal Code definition to which you referred.

It reads:

"A wetland is defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes. In certain types of wetlands, vegetation is lacking and soils are poorly developed or absent. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location, within, or adjacent to, vegetated wetlands or deep water habitat."

To put it quite simply, the LCP definition on p. C-99 of the LCP is more restrictive than the Commission's interpretation of Regulation 13577(a). The LCP definition requires that "two prongs" be found in order to determine the existence of wetlands, i.e. 1. a long standing source (i.e. water table) of hydrology, plus either 2. hydrophytic vegetation, or 3. hydric soils. The hydrophytic vegetation (and/or hydric soils) must arise as the result of the water table staying above, at or near the land surface long enough to promote the hydrophytes or the hydric soils. Hydrophytes that arise from a source other than such water table (for example, moisture in the air), do not qualify as an identifying factor of wetlands, since hydrophytes can arise, equally, in dry upland situations. If an area exhibits only one of the three prongs, then it is not a "wetland" under the LCP definition.

On the other hand, the way the Commission interprets its Regulation 13577(a), the Commission requires only "one prong" to make a finding of "wetlands", i.e. if there exists hydrophytic vegetation on the property, (even though hydrophytic vegetation may

equally exist on dry upland areas), the Commission interprets its Regulation 13577(a) to justify a finding that such area is or may be a "wetland" for the purposes of dragging this property into its appeal jurisdiction.

So, contrary to your statement, a finding of "wetlands" under Regulation 13577(a) does not ensure such a reciprocal finding under the LCP definition, since the former may lack the necessary second prong to qualify as a wetland under the latter, LCP definition.

Obviously, if the two definitions were synonymous, the Executive Director would not have contended that the City employed the incorrect definition of wetlands in its determination that the project was non-appealable, when the City, quite properly, used the LCP definition.

Standard for Determining "Wetlands"

In respect to your contentions regarding wetlands, your stance is inconsistent and illogical. In your letter you concede that the standard for determining the existence of wetlands on appeal is that contained in the City of Pacifica's certified LCP, the two-prong standard.

But, somehow, you contend that the definition of "wetlands" for the purposes of conducting a review on appeal is different from the definition of "wetlands" for the purpose of determining whether there can be an appeal. You seem to indicate, therefore, that it is possible for the Commission to find that "wetlands" exist on the site for the purpose of asserting jurisdiction to hold an appeal, but, on the other hand, for the purpose of the appeal itself, (i.e., for purposes of determining whether the project is in compliance with the LCP), to find there never were any "wetlands" on the site.

The Commission's apparent logic for such a proposition is to use the broader and looser Commission interpretation of Regulation 13577(a)'s definition of wetlands as a dragnet to drag the greatest number of approved projects within the appeals jurisdiction of the Commission, and, then, on a de novo basis, to examine and challenge every other aspect of those projects, to see if the projects can be turned down on other grounds, even if, under the applicable appeals standard, (i.e. the LCP definition) there never were any wetlands, on the site to begin with. Once again, this approach is not in accordance with the law.

For one thing, Regulation 13569, the very Regulation upon which you rely to hold the 13569 hearing on appealability, states very clearly that the standard to be used for determining appealability, including the issue of the existence or non-existence of wetlands, is the LCP standard (and not Regulation 13577(a) or the Commission's interpretation thereof):

Regulation 13569 reads:

The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program...

In your previous letters you have stated that the Executive Director's determination that there were or may be wetlands on the property was made in accordance with the Commission's interpretation of the definition under Regulation 13577(a) and not the LCP definition. Yet, in your October 3, 2002 letter, you state that the Executive Director's determination was made in accordance with Regulation 13569, which, however, cannot be true if, as you have stated, the Executive Director used the Regulation 13577(a) definition, and not the LCP standard mandated by Regulation 13569, since the two standards are mutually exclusive.

What should be clear at this point is that, where a City has a certified LCP, there is only one standard applicable for the purpose of determining the existence or absence of "wetlands" and that is the LCP definition, which is the two prong test. The Commission's interpretation of Regulation 13577(a), i.e. the one prong test, is not applicable for the purpose of compliance with Regulation 13569 regarding the determination of appealability and is also not applicable for determining the ultimate question on an appeal, i.e. whether the approved project complies with the LCP.

The LCP standard is the one and only applicable standard and it is the standard which was used by the City in determining that the project was not appealable. That is the standard which the Commission instructed the City to use in its January 21, 2000 letter. That is the standard that the City is mandated to use under Regulation 13569 and that is the standard which the City is mandated to use under Coastal Act Section 30603 and 30519. That, to summarize, is the only legally applicable standard and the City applied it correctly on the basis of substantial evidence.

Therefore, the Executive Director is simply unlawfully interfering with our approved and effective Coastal Development Permit.

The 13569 Hearing Will Apply the Wrong Standard.

Regulation 13569, as stated above, expressly states that the LCP standard is to be used to determine the existence or absence of wetlands for the purpose of determining appealability. But your letter makes clear that the standard which will be applied in such 13569 hearing is the standard set forth in Regulation 13577(a) and, presumably, that will be the recommendation contained in your staff report to the Commission. We, thus, know right from the outset, that the Commission will use the incorrect legal standard

simply to justify the Executive Director's erroneous determination.

Who Gets to Decide Whether a Coastal Development Permit is Appealable or Not, the City or the Executive Director of the Coastal Commission? Answer: The City.

The determination as to whether a Permit is appealable or not is mandated by statute to be made by the City and not the Executive Director of the Coastal Commission.

From a practical standpoint, this point is obvious. If it were not the City's responsibility to make the decision as to whether or not a project was appealable, the Commission would not have the City fill out a form which answers this question. Why bother asking the City to fill out the form and check off the box as to whether or not the project is appealable, if the City's answer does not make any difference to the Commission or its executive director anyway and can simply be overruled and the permit suspended and/or appealed, at will, by the Executive Director? Likewise, why would the Executive Director insist, as he did, that the City must change its designation regarding appealability of the Permit, if the City's determination on this issue had no significance and was merely a superfluous exercise?

From a legal standpoint, the City's responsibility and authority to make the determination regarding the issue of appealability is well-defined. Public Resources Code Section 30519 states that, where the local coastal program of a local government has been certified, the development review authority for a project, including whether or not it is appealable to the Coastal Commission, is vested solely in the local government, i.e. the City.

Regulation 13569 itself states:

"The determination of whether a development is categorically excluded, non-appealable or appealable for purposes of notice, hearing and appeals procedures shall be made by the local government at the time the application for development within the coastal zone is submitted ..."

The Pacifica Municipal Code, Sections 9-4.4304(k) and (l) require the City to make determinations and take certain actions depending upon whether the City has decided the project is appealable or non-appealable to the Coastal Commission.

The Pacifica Municipal Code, Section 9-4.4304(1)(1) states that for non-appealable projects, the City's final action (i.e. approval of the Permit) shall become effective at the conclusion of the final action by the City.

In other words, it is the City that determines whether or not a coastal development permit is appealable, based upon substantial evidence, and if the City determines that such coastal development permit is not appealable to the Coastal Commission the coastal development permit is effective the moment it has been approved.

Where does it say the issue of appealability is to be determined by the executive director of the Coastal Commission and not the City? Answer: Nowhere.

Where does it say that once a local coastal program has been certified the executive director of the Coastal Commission can suspend the effectiveness of a Permit which already became effective when the City found it to be non-appealable? Answer: Nowhere.

What if the City was wrong when it made the determination that the Permit was non-appealable? What is the remedy? Answer: Public Resources Code Section 30802, which provides that any aggrieved person, including the Coastal Commission, can file a writ of administrative mandate to challenge the City's determination that the Permit was non-appealable by proving that the City did not have substantial evidence in the whole of the record, upon which to make such determination.

So is the Permit appealable or non-appealable? The Permit is non-appealable because the City, whose responsibility it was to make such determination, concluded it was non-appealable. The only way the Permit can now become appealable is if a Court, pursuant to a writ proceeding under Coastal Act Section 30802, says the City made an error that amounted to an abuse of discretion, and adjudges that the Permit is appealable. Neither the executive director nor the Coastal Commission has any authority to declare the Permit appealable without obtaining such a Court order.

But, the City's determination, like any quasi-judicial decision is strongly presumed to be regular and until such administrative writ has been obtained and the Court has found the City erred and abused its discretion in its determination of non-appealability, the Permit was, is and remains effective since the moment it was approved by the City.

Once again, we state for the record, the executive director's purported suspension of North Pacifica's coastal development permit is contrary to and not authorized by law. Likewise, in the absence of a court order obtained pursuant to writ proceedings under Coastal Act Section 30802, the proposed 13569 hearing before the Commission is also not authorized by law and any appeal purported to be undertaken by the Commission would, likewise, also not be authorized by law.

We would ask you, yet one more time, to remove this purported suspension from our coastal development permit, and to cease and desist from interfering, in any manner, with our use of it and from conducting any further hearings which are not authorized by law, including, your proposed 13569 hearing and any purported "appeal" to the Commission of our permit.

Yours very truly,



Keith M. Fromm
Member and Counsel

CALIFORNIA COASTAL COMMISSION

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EXHIBIT 16

2-02-2-EDD (Pacific Bowl)

Commission staff comment letter,
on Notice of Preparation of EIR,
dated October 4, 2001



October 4, 2001

Lee Diaz
Senior Planner
City of Pacifica
170 Santa Maria Avenue
Pacifica, CA 94044

**RE: Notice of Preparation of Environmental Impact Report
Pacific Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)**

Dear Mr. Diaz:

Thank you for the opportunity to comment on the Notice of Preparation of an Environmental Impact Report ("EIR") for the proposed Pacific Bowl Residential Development at 4000 Palmetto Avenue in the City of Pacifica, dated August 27, 2001. This letter will offer comments on behalf of the Coastal Commission, and reflects Commission staff's views with respect to issues potentially raised by the project under the City of Pacifica's Local Coastal Program and the Coastal Act that should be addressed by the report.

A. Proposed Project

According to the Notice of Preparation, the proposed project that is the subject of the EIR consists of the development of 43 residential units, including 19 single-family detached homes and 24 townhouses) at the 4000 block of Palmetto Avenue. The project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. The project area in the Fairmont West Neighborhood and is zoned as "high density residential," which allows a density of 16 to 25 dwelling units per acre, subject to site conditions. The land to the west of the project area, between Palmetto Avenue and the shoreline, is presently undeveloped and consists of coastal scrub habitat.

B. Local Coastal Program and Coastal Act Issues

Our analysis of the proposed project as described in the Notice of Preparation has preliminarily identified the following potential issues under the City of Pacifica's Local Coastal Program and the Coastal Act. In order to provide adequate information for Coastal Development Permit review of the project, the draft EIR should include thorough discussion and analysis of each of these potential issues.

1. Traffic

Pacifica LUP Policy Number 25 provides:

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, . . . (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

In consonance with this policy, the EIR should evaluate the impacts of the proposed potential cumulative impacts of the project to traffic and circulation. In evaluating cumulative impacts to traffic, the EIR should consider the growth projections contained in the LCP and the San Mateo County Countywide Transportation Plan.

2. Impacts to Environmentally Sensitive Habitat

Pacifica LUP Policy Number 18 provides:

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. Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat and recreation areas.

To allow the City to assess potential impacts to adjacent environmentally sensitive habitat areas (ESHA), the EIR should describe any ESHAs that are located on or near the site. The EIR should consider the potential effects of the project to any ESHA within 300 feet of the project site. The EIR should in particular evaluate the habitat value of undeveloped areas west of the project site, to the west of Palmetto Avenue. The EIR should in particular discuss the existence of wetlands on or near the site and identify any protected species which may be present on or near the site.

3. Public Access

City of Pacifica Land Use Plan ("LUP") Policy Number 2 provides:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

The EIR should accordingly consider all impacts of the proposed development on public access. The analysis should include discussion of present and historic use of the site for coastal access.

4. Visual Resources

Pacifica LUP Policy Number 24 provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas . . . shall be subordinate to the character of its setting.

Section 9-4.4408(b) of the Pacifica Zoning Code provides that, with respect to new development within coastal view corridors,

- (1) Structures shall be sited in order to minimize alteration of natural topography and landforms, tree removal, and grading only to the extent necessary to construct buildings and access roads;
- (2) Structures shall be sited on the least visible area of the property and screened from public view using native vegetation, as feasible;
- (3) Structures shall incorporate natural materials and otherwise shall blend into the natural setting;

....

The EIR should also address the visual resources at the site, and identify views of the ocean and scenic coastal areas which may be affected by the proposed development. The EIR should evaluate potential impacts of the development to visual resources and to discuss appropriate mitigation to integrate the development visually with its coastal setting.

Please feel free to call me at 415-904-5268 if you have any questions concerning the issues discussed in this letter.

Sincerely,



Peter T. Imhof
Coastal Planner
North Central Coast District

CALIFORNIA COASTAL COMMISSION

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EXHIBIT 17**2-02-2-EDD (Pacific Bowl)**

Commission staff comment letter
on draft EIR, dated May 3, 2002



May 3, 2002

Lee Diaz
Senior Planner
City of Pacifica
170 Santa Maria Avenue
Pacifica, CA 94044

**RE: Draft Environmental Impact Report
Pacifica Bowl Residential Development
4000 Palmetto Avenue (APN 009-402-250 and -260)**

Dear Mr. Diaz:

This letter provides Coastal Commission staff's comments on the Draft Environmental Impact Report ("DEIR") for the proposed Pacific Bowl Residential Development at 4000 Palmetto Avenue in the City of Pacifica, dated March 2002. This letter addresses a number of issues and potential impacts under the City of Pacifica's Local Coastal Program and the Coastal Act that should be addressed by the DEIR.

A. Proposed Project

As stated in the DEIR, the proposed project consists of a subdivision and development of 43 residential units, including 19 single-family detached homes and 24 townhouses, an interior driveway and road network, necessary infrastructure and a private park/open space area on 4.2 acres of land at the 4000 block of Palmetto Avenue in Pacifica. The project would involve substantial grading of the site, including 36,000 cubic yards each of cut and fill. The project also includes removal of five, mature Monterey cypress trees. As part of the project, an existing 18-inch culvert draining to the ocean will be capped and buried and will not be incorporated into the new drainage system.

The project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. The project area is in the Fairmont West Neighborhood and is zoned as "high density residential," which allows a density of 16 to 25 dwelling units per acre, subject to site conditions. The land to the west of the project area, between Palmetto Avenue and the shoreline, is presently undeveloped and consists of coastal scrub habitat

In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. There are five, mature Monterey cypress trees on the site. An Army Corps field review in November 1999 concluded that the site contains no jurisdictional wetlands meeting Corps wetland criteria, although the DEIR notes that "[a] portion of the site . . . is wet

on a seasonal basis," and several wetland species were found on the site. U.S. Fish & Wildlife Service has determined that the site does not serve as habitat for any federally protected species.

B. Local Coastal Program and Coastal Act Issues

Our analysis of the proposed project as described in the DEIR has preliminarily identified the following potential issues under the City of Pacifica's Local Coastal Program and the Coastal Act. In order to provide adequate information for Coastal Development Permit review of the project, the DEIR should include thorough discussion and analysis of these potential issues.

1. Impacts to Environmentally Sensitive Habitat

City of Pacifica Land Use Plan ("LUP") Policy Number 18 provides:

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. Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat and recreation areas.

Pacifica LUP Policy Number 14, mirroring the language of Section 30233 of the Coastal Act, permits the filling or dredging of wetlands only for specifically enumerated purposes and "where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects."

Pacifica Zoning Code Section 9-4.4403(e) generally prohibits development within recognized wetlands habitat areas. A habitat survey including a wetlands delineation is called for under Section 9-4.4403(b). "Wetland" is defined in Section 9-4.4302(aw) as "land which may be covered periodically or permanently with shallow water, including saltwater marshes, freshwater marshes, streams, creeks, open or closed brackish water marshes, swamps, mudflats or fens." This definition follows verbatim the definition of wetland in Section 30121 of the Coastal Act, and should be read for purposes of Commission appeal jurisdiction in conjunction with the definition of wetland given in Section 13577(a)(1) of the Commission regulations:

Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:

(A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;

- (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.*

Section 13577 sets the boundary for Coastal Commission appeal jurisdiction as 100 feet from the upland limit of any wetland meeting this definition.

In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. There are five, mature Monterey cypress trees on the site, which are proposed to be removed as part of the project. Field surveys found no sensitive or protected plant or animal species on the site.

Thomas Reid Associates ("TRA") prepared an initial biological survey of the site in April 1997, which identified a potential wetland and recommended a wetland delineation. Wetland Research Associates ("WRA") conducted a field study in June 1999 and also identified an area of potential Army Corps of Engineers ("ACOE") jurisdictional wetland on the site. Review by ACOE including a site visit in November 1999 determined that no ACOE jurisdictional wetlands were present on the site. According to the DEIR, WRA prepared a wetland delineation in December 1999 which concluded that there were also no LCP wetlands on the site.¹ According to the DEIR, the WRA delineation determined that the seasonally wet conditions on the site, including standing water found in an unmaintained drainage ditch, do not constitute LCP wetlands. However, the DEIR notes that "[a] portion of the site . . . is wet on a seasonal basis," and that several wetland species were found on the site. In concluding that the project has a less than significant impact on wetlands, the DEIR also states that the proposed project avoids grading "[t]he two small wetland areas adjacent to the Bowl site . . . that meet Corps criteria for wetlands . . ." The DEIR also notes that "[t]here are probable LCP wetlands on the adjoining parcel within 100 feet of the site" that have been surveyed.

The wetland definition contained in 14 CCR Section 13577 applicable to the proposed project for purposes of Coastal Commission appeal jurisdiction does not coincide with the definition applicable to determining the presence of ACOE jurisdictional wetlands. Under the Section 13577 wetland definition, the presence of any one of three wetlands parameters causes an area to qualify as wetlands: (1) wetlands hydrology, (2) hydric soils, or (3) hydrophytic vegetation. By contrast, the federal definition of "waters of the United States," including "wetlands," contained in 33 CFR 328.3(a)(1-8) and 33 CFR 328.3(b-c), requires that all three parameters simultaneously be present for an area to qualify as wetlands. While the wetland boundary may be the same under both the federal and state definitions in certain instances, this is not necessarily true.

The DEIR should evaluate potential impacts of the proposed to wetlands on the site based on the wetland definition contained in Section 13577 of the Commission regulations. Statements in the

¹ The DEIR does not attach the WRA wetland delineation or field notes.

DEIR indicating the presence of seasonally wet areas and hydrophytic vegetation indicate that wetlands for purposes of LCP compliance may be present on the site or within 100 feet of the site. The DEIR should attach and incorporate by reference both the complete WRA wetland delineation including field notes and any survey of offsite wetlands. To the extent that any wetlands are present on the site and the proposed project includes development on or near such wetlands, wetland fill is only permissible in conformity with LCP Policy Number 14 and Section 30233 of the Coastal Act.

2. Water Quality

Pacifica LUP Policy Number 12 provides:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The DEIR states that the proposed project will develop approximately 3 acres of the 4.2 acre site and increase runoff rates from the site by about 70 percent. The DEIR should evaluate project alternatives and mitigation measures that will decrease runoff rates, including minimizing impervious surface area by use of permeable paving and/or installing catch basins to allow infiltration of rain water.

The proposed project involves substantial amounts of cut and fill, including the cutting and removal of the eastern slopes of the bowl-shaped site to use as fill material for building pads on the western portion of the site. The proposed cut and fill will leave exposed, unvegetated slopes which could contribute to erosion and sedimentation of runoff during and after construction. The DEIR should evaluate impacts to water quality from erosion and sedimentation, as well as all feasible construction period and post-construction mitigation measures to prevent erosion. Such measures should include construction-period drainage controls and filtration devices and a landscaping and drainage plan for cut slopes.

3. Public Access

Pacifica LUP Policy Number 1 provides:

Maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Pacifica LUP Policy Number 2 provides:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Pacifica LUP Policy Number 3 provides:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources; (2) adequate access exists nearby; or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

The DEIR does not address public access, potential impacts to public access of the proposed project or components of the project that would provide coastal access. In particular, despite the proximity of the project site to the bluff and shore, there is no discussion of existing nearby coastal access or present and historical use of the site for coastal access. The DEIR should discuss existing nearby coastal access, present and historical use of the site for coastal access, and all impacts of the proposed development on public access. The DEIR should further evaluate project alternatives and mitigation measures which maximize public access.

4. Visual Resources

Pacifica LUP Policy Number 24 provides:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas . . . shall be subordinate to the character of its setting.

Section 9-4.4408(b) of the Pacifica Zoning Code provides that, with respect to new development within coastal view corridors,

- (1) Structures shall be sited in order to minimize alteration of natural topography and landforms, tree removal, and grading only to the extent necessary to construct buildings and access roads;*
- (2) Structures shall be sited on the least visible area of the property and screened from public view using native vegetation, as feasible;*
- (3) Structures shall incorporate natural materials and otherwise shall blend into the natural setting;*

- (4) *New development shall be consolidated or clustered within the slopes of the natural topography, as feasible;*
- (5) *Landscape screening and restoration shall be required to minimize the visual impact of new development . . .*

The DEIR indicates that public views from Highway 1 and Palmetto Avenue will not be substantially altered by the proposed project, although private views from residences east of the proposed project will be affected. In addition to protecting public views, the Pacifica LCP in Section 9-4.4408(b)(1) states that “[s]tructures shall be sited in order to minimize alteration of natural topography and landforms, tree removal, and grading . . .” The proposed project includes the removal of five, mature Monterey cypress trees and substantial landform alteration and grading, including 36,000 cubic yards each of cut and fill. The DEIR should evaluate available alternatives to grading and landform alteration which may potentially impact views. The visual resource studies including photo montages contained in the DEIR should accurately reflect the proposed site grading as well as the Pacifica Zoning Code requirement that projects shall incorporate natural materials and landscape screening. What materials and landscape screening are proposed as part of the project?

5. Geologic Stability

Pacific LUP Policy Number 26 provides, in relevant part:

New development shall:

- (1) *Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (2) *Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

...
The proposed project involves substantial regrading of the site and some 36,000 cubic yards each of cut and fill. As part of the project, the developer proposes to create building pads on the western portion of the site on approximately 20 feet of compressed fill material consisting principally, according to the DEIR, of colluvial deposits comprised of silty sands and sandy silts taken from the eastern slopes of the site. The compacted fill is to be keyed in, according to the plans contained in the DEIR, to “competent material” at the western end of the site. The DEIR speculates that the site is underlain by Franciscan formation chert and shale. The DEIR should carefully evaluate the underlying soils and materials, and include discussion of the results of adequate geologic site investigations, test borings, and engineering analyses to assess the stability of the proposed compacted fill building pad. The DEIR should evaluate all project alternatives and available mitigation measures to insure geologic stability of the proposed development.

6. Traffic

Pacific LUP Policy Number 25 provides:

Comment Letter, Pacifica Beach Draft EIR
May 3, 2002

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, . . . (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

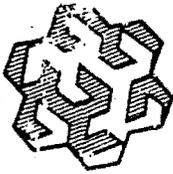
In consonance with this policy, the DEIR should evaluate the impacts of the proposed project to traffic and circulation. In evaluating cumulative impacts to traffic, the DEIR does not discuss available public transit service or the possibility of extending transit service to reduce traffic impacts. The DEIR also does not discuss non-automobile circulation within the development or onsite recreational facilities. The DEIR should discuss each of these items as possible measures to mitigate traffic impacts.

Please feel free to call me at 415-904-5268 if you have any questions concerning the issues discussed in this letter.

Sincerely,



Peter T. Imhof
Coastal Planner
North Central Coast District



THOMAS REID ASSOCIATES

560 WAVERLEY ST., SUITE 201 (BOX 880), PALO ALTO, CA 94301

Tel: 415-327-0429

Fax: 415-327-4024

tra@igc.org

EXHIBIT 18

2-02-2-EDD (Pacific Bowl)

TRA Initial Biological Survey,
dated April 1997

Robert Kalmbach
Syndicor Real Estate Group, Inc.
914 Westwood Blvd., Suite 500
Los Angeles, CA 90024

April 29, 1997

Dear Mr. Kalmbach,

At your request, I have conducted a biological survey and prepared a report for the property in the City of Pacifica commonly referred to with the following parcel nos:

009-031-010

009-035-010, 020, 030, 040, 050, 120, and 130

009-402-250 and 260

If you have any questions or require any further information, please don't hesitate to call.

Sincerely,

Patrick Kobernus
Associate

1

Biological Assessment Report for Palmetto Avenue Parcel in Pacifica

On Thursday April 17, and Friday April 25, 1997, the unimproved land in the City of Pacifica, County of San Mateo, commonly referred to as assessors parcel nos. 009-031-010 and 009-035-010, 020, 030, 040, 050, 120, 130 and parcel nos. 009-402-250 and 260 and the land appurtenant thereto, was surveyed for biological resources by Patrick Kobernus, staff biologist for Thomas Reid Associates. Mr. Kobernus is familiar with each of the habitats found on the site, having conducted biological surveys and habitat restoration activities in these types of habitats for the past two years. The surveys were conducted in the afternoon on both occasions, and consisted of walking the site slowly for approximately two and a half hours (total time).

1) Description of Habitats

The site consists of northern coastal scrub, central coast riparian scrub, and coastal terrace prairie plant communities (CDFG, 1986). The site is dominated by northern coastal scrub which occupies most of the interior "bowl" portion of the site. Second in areal extent is central coast riparian scrub which extends along the eastern boundary of the site and partially into the interior bowl. And along the southern portion of the site on the cut slopes below Highway 1, on the property area known as the "fish" there are patches of coastal terrace prairie habitat.

The site is currently dominated by native plant habitats but is being overtaken in some areas by exotic pest plants. The western boundary of the site along Palmetto Avenue, has extensive iceplant (*Carpobrotus edulis*) covering the sand dunes. German ivy (*Senecio mikanioides*) is invading the northern coastal scrub habitat in several areas, and is most dense on the southwest corner of the site where it is proliferating under the canopy of Monterey cypress trees (*Cupressus macrocarpa*). And along the eastern boundary of the site, along the cut slopes above the central coast riparian scrub habitat, there is an extensive pampas grass (*Cortaderia jubata*) infestation. Due to the density of the riparian scrub habitat, this native habitat appears to be the least compromised by exotic pest plants.

The central coast riparian scrub habitat is the only habitat on the site that may be characterized as wetland, and covers approximately 1.1 acres of the site. Further surveying is recommended. Arroyo willow (*Salix lasiolepis*) is the dominant species. Other species include: twinberry (*Lonicera involucrata*), rushes (*Juncus sp.*), sedges (*Carex sp.*), and English ivy (*Hedera helix*). One small pool approximately 4 feet wide x 10 feet long x 1 foot deep was observed in the riparian scrub habitat. There may be additional small intermittent pools scattered beneath the dense riparian canopy.

2) Special Status Species

A search of the California Natural Diversity Database (CNDDDB) revealed seven sensitive species within a 2 mile radius of the site. These are: bumblebee scarab beetle (*Lichnanthe ursina*), Tomales isopod (*Caecidotea tomalensis*), San Bruno elfin butterfly (*Incisalia mossii bayensis*), Mission blue butterfly (*Icaricia icarioides missionensis*), saltmarsh common yellowthroat (*Geothlypis trichas sinuosa*), San Francisco garter snake (*Thamnophis sirtalis tetrataenia*), and California red-legged frog (*Rana aurora draytonii*).

Species federally and/or state listed as threatened or endangered which could potentially use the site based on habitat type are listed and discussed below.

<u>Species</u>	<u>Status</u>
Mission blue butterfly (<i>Icaricia icarioides missionensis</i>)	Federally Endangered
San Bruno elfin butterfly (<i>Incisalia mossii bayensis</i>)	Federally Endangered
San Francisco garter snake (<i>Thamnophis sirtalis tetrataenia</i>)	Federally Endangered
California red-legged frog (<i>Rana aurora draytonii</i>)	Federally Threatened

Mission Blue Butterfly: The Mission blue butterfly's distribution is closely associated with it's larval host plants *Lupinus varicolor*, *L. albifrons*, and *L. formosus*. Although the site does contain a few *Lupinus varicolor* plants, it is very unlikely that the mission blue could survive on such a sparse patch. In addition, the climate at this location is likely to be too cool and moist for the Mission blue to survive here.

San Bruno Elfin Butterfly: The San Bruno elfin butterfly's distribution is closely associated with it's larval host plant, pacific stonecrop (*Sedum spathulifolium*). The site survey did not find the host plant for the San Bruno Elfin butterfly and it is highly unlikely that the butterfly could survive at the site.

San Francisco Garter Snake: The San Francisco Garter snake requires pond and/or marsh habitat with deep pools and extensive emergent vegetation. Due to the lack of any significant pools or marshy areas with emergent vegetation, the site is unlikely habitat for the San Francisco garter snake.

California Red-legged Frog: Adult California red-legged frogs require dense, shrubby or emergent riparian vegetation closely associated with deep (>.7 meters) still or slow moving water (Federal Register Listing, 1996). Due to the lack of deep pools at the project site, the riparian habitat here presents unlikely habitat for the California red-legged frog.

The riparian habitat at the site provides potential nesting and foraging habitat for several unlisted, but potentially sensitive species that are designated as California Species of Special Concern. Cooper's hawk (*Accipiter cooperii*), sharp-shinned hawk (*Accipiter striatus*), northern harrier hawk (*Circus cyaneus*), merlin (*Falco columbrius*), saltmarsh common yellowthroat (*Geothlypis trichas sinuosa*), and yellow warbler (*Dendroica petechia*) could utilize the site. It is unlikely that any of these species are using the site for nesting, since this survey was done in the nesting season, and no nesting activity was observed for these species.

3) Plant and Animal species identified on site

The following table lists all plant and animal species identified at the site on April 17, 1997. Habitats found at the site are known to support additional species than those listed here, and this list should not be considered a complete inventory of all species utilizing the site.

Habitat	Common Name	Species
Northern Coastal Scrub	Coyote brush	<i>Bacharis pilularis</i>
	Lizardtail	<i>Eriophyllum staechedifolium</i>
	California blackberry	<i>Rubus ursinus</i>
	California sagebrush	<i>Artemisia californica</i>
	Poison oak	<i>Toxicodendron diversilobum</i>
	Coffeeberry	<i>Rhamnus californica</i>
	California bee plant	<i>Schrophularia californica</i>
	Bracken fern	<i>Pteridium aquilinum</i>
	Sticky monkeyflower	<i>Mimulus aurantiacus</i>
	Yerba-buena	<i>Satureja douglasii</i>
	Beach strawberry	<i>Fragaria chiloensis</i>
	Biennial Evening Primrose	<i>Oenothera Glazioviana</i>
	California everlasting	<i>Gnaphalium californicum</i>
	Coast honeysuckle	<i>Lonicera Hispidula</i>

Habitat	Common Name	Species
Central Coast Riparian Scrub	Arroyo willow	<i>Salix lasiolepis</i>
	Twinberry	<i>Lonicera involucrata</i>
	Rush	<i>Juncus sp.</i>
	Sedge	<i>Carex sp.</i>
Coastal Terrace Prairie	Yarrow	<i>Achillea millefolium</i>
	Varied lupine	<i>Lupinus variicolor</i>
	Sanicle	<i>Sanicula sp.</i>
	California buttercup	<i>Ranunculus sp.</i>
	California polypody	<i>Polypodium californicum</i>
	Soap plant	<i>Chlorogalum pomeridianum</i>
	Blue-eyed grass	<i>Sisyrinchium californicum</i>
	California acaena	<i>Acaena californica</i>
	Brownie thistle	<i>Cirsium quercetorum</i>
	Hedgenettle	<i>Staches sp.</i>
	Purple Needle grass	<i>Nassella pulchra</i>
	Suncup	<i>Camissonia ovata</i>
	Indian paint brush	<i>Castilleja sp.</i>
	Exotic Plant Species	German ivy
English ivy		<i>Hedera helix</i>
Pampas grass		<i>Cortaderia jubata</i>
Monterey cypress		<i>Cupressus macrocarpa</i>
Cotoneaster		<i>Cotoneaster sp.</i>
Ripgut brome		<i>Bromus diandrus</i>
Soft chess		<i>Bromus secalinus</i>

Habitat	Common Name	Species
Exotic Plant Species (continued)	Wild oat	<i>Avena sp.</i>
	Cutleaf plantain	<i>Plantago coronopus</i>
	Wild radish	<i>Raphanus sativus</i>
	Iceplant	<i>Carpobrotus edulis</i>
	Bristly Ox-tongue	<i>Picris echiodes</i>
	Sweet alyssum	<i>Lobularia maritima</i>
	Curly dock	<i>Rumex crispus</i>
	Wild onion	<i>Allium sp.</i>
	Field Mustard	<i>Brassica rapa</i>
*Animals - Birds	White crowned sparrow	<i>Zonotrichia leucophrys</i>
	Song sparrow	<i>Melospiza melodia</i>
	Anna's hummingbird	<i>Calypte anna</i>
	Bushtit	<i>Psaltriparus minimus</i>
	American goldfinch	<i>Carduelis tristis</i>
	Killdeer	<i>Charadrius vociferus</i>
Animals - Mammals	Bottha's pocket gopher	<i>Thomomys bottae</i>
	California meadow vole	<i>Microtus californicus</i>
	Gray fox	<i>Urocyon cinereoargenteus</i>
	Domestic cat	<i>Felis catus</i>

* No reptiles or amphibians were observed at the site on the day of survey.

4) Heritage trees on site

Five Monterey pine trees are located on the southwest corner of the site. The trees are approximately 20 to 30 feet in height and range from approximately 1 to 3 feet in diameter breast height (DBH). The city of Pacifica criteria for heritage trees is that any tree with a circumference over 50" is considered a heritage tree. Four of the five trees on the site meet this criteria.

5) Recommendations

1) Federal and/or State requirements for the site should be ascertained and met including any applicable requirements of the US Fish and Wildlife Service and the California Department of Fish and Game.

Sources

CDFG, 1986. Natural Community Descriptions for the California Natural Diversity Database.

Federal Register, May 23, 1996 (Volume 61, number 101). Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the California Red-Legged Frog. Department of the Interior, US Fish and Wildlife Service, 50 CFR Part 17.

* CAECIDOTEA TOMALENSIS
* Tomales Isopod

-----Status----- NDDB Element Ranks -----Other Lists-----
* Federal: Sp of Concern (C2) Global: G2 CDFG:
* State: None State: S2 Audubon:
* CNPS List:
* ---Habitat Associations--- CNPS RED Code:
* General: INHABITS LOCALIZED FRESH-WATER PONDS OR STREAMS WITH STILL OR
* NEAR-STILL WATER IN SEVERAL BAY AREA COUNTIES.
* Microhabitat: Not available at this time.
*** Element ID: ICMAL01220 *****

Occurrence Number: 2 --Dates Last Seen--
Quality: Poor Element: 1984/01/26
Type: Natural/Native occurrence Site: 1984/01/26
Presence: Presumed Extant
Trend: Unknown
Main Info Source: SERPA, L. 1984 (PERS)

Quad Summary: San Francisco South (3712264)
County(ies): San Francisco

Location: LAKE MERCED, NE SIDE OF NORTH LAKE.

Lat/Long: 37d 43m 37s / 122d 29m 04s Township: 02S
UTM: Zone-10 N4175439 E545433 Range: 06W
Mapping Precision: NON-SPECIFIC (1/5 Mile) Section: UN XX Qtr
Symbol Type: POINT Meridian: M
Group Number: 08626 More Information? N Acres: 0
Map Index Number: 08626 More Map Detail? N Elevation: 50 ft

Threats:

Comments: Ecological Notes - OCCURS IN WATER AMONG CATTAILS. General
Notes - ONLY 3 INDIVIDUALS FOUND DURING A 45-MINUTE COLLECTION.
A SINGLE SPECIMEN WAS COLLECTED BY BOGATIN IN 1971 (CAS,
#UNKNOWN). Owner/Manager - SFO CITY/COUNTY

LICHNANTHE URSINA
Bumblebee (=pacific Sand Bear) Scarab Beetle

-----Status----- NDDB Element Ranks -----Other Lists-----
Federal: Sp of Concern (C2) Global: G2 CDFG:
State: None State: S2 Audubon:

---Habitat Associations--- CNPS List:
General: INHABIT COASTAL SAND DUNES FROM SONOMA COUNTY SOUTH TO SAN MATEO COUNTY. CNPS RED Code:
Microhabitat: USUALLY FLY CLOSE TO SAND SURFACE NEAR THE CREST OF THE DUNES.

*** Element ID: IICOL67020 *****

Occurrence Number: 4 --Dates Last Seen--
Quality: Unknown Element: XXXX/XX/XX
Type: Natural/Native occurrence Site: XXXX/XX/XX
Presence: Presumed Extant
Trend: Unknown
Main Info Source: CARLSON, D. C. 1980 (LIT)

Quad Summary: San Francisco South (3712264), Montara Mountain (3712254)
County(ies): San Mateo

Location: LAGUNA SALADA, JUST W OF PACIFICA.

Lat/Long: 37d 37m 31s / 122d 29m 39s Township: 03S
UTM: Zone-10 N4164188 E544621 Range: 06W
Mapping Precision: NON-SPECIFIC (1 Mile) Section: UN XX Qtr
Symbol Type: POINT Meridian: N
Group Number: 08569 More Information? N Acres: 0
Map Index Number: 08569 More Map Detail? N Elevation: 15 ft

Threats: A PORTION OF THE HABITAT IS A GOLF COURSE.

Comments: Distribution Notes - COLLECTED FROM THE DUNES AT SALADA BEACH.
Ecological Notes - SPECIMENS COLLECTED FROM SAND DUNES, FROM APRIL TO AUGUST, WITH A PEAK IN MAY/JUNE. General Notes - COLLECTION DATE UNKNOWN. Owner/Manager - DPR

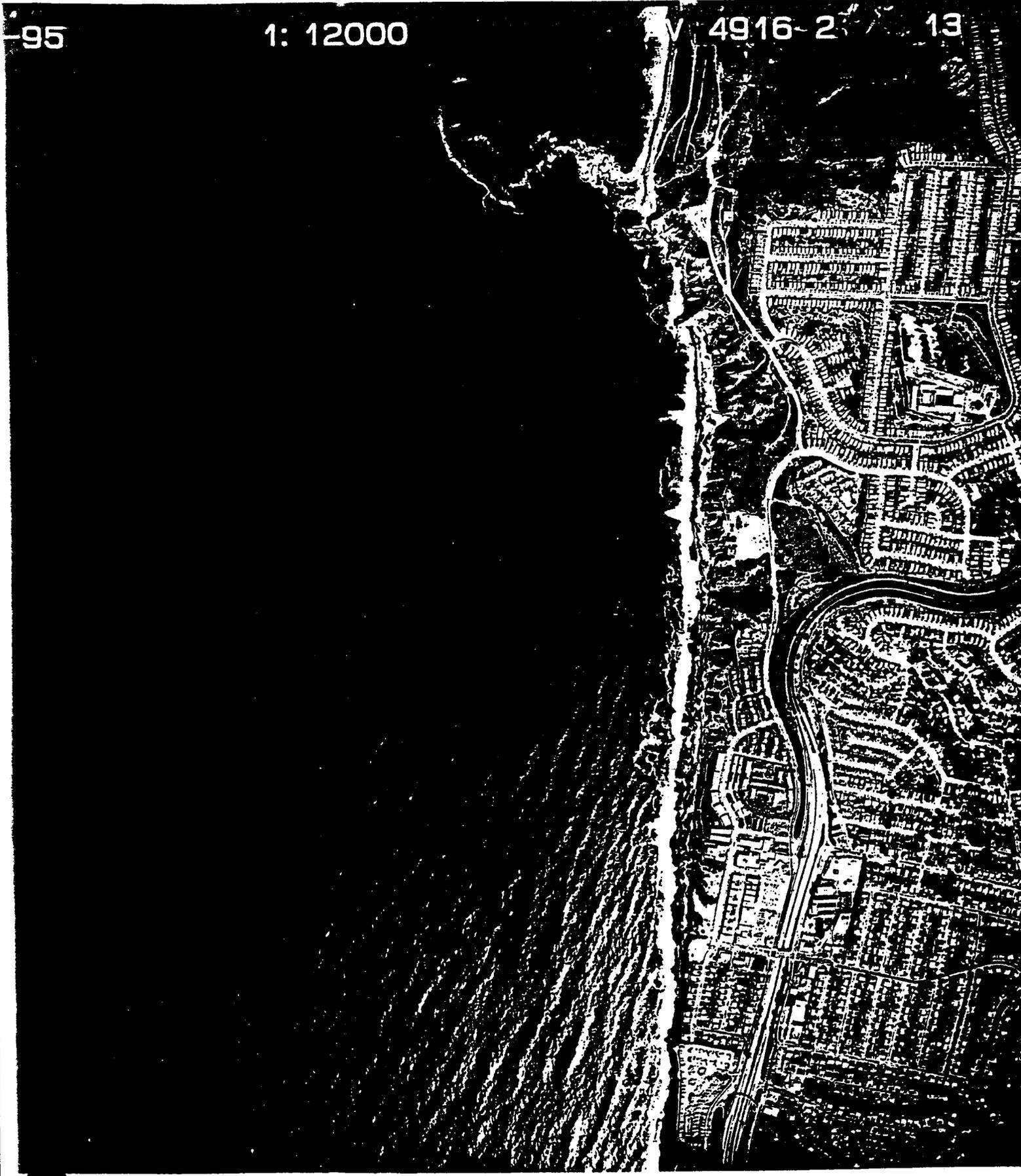
9/7/95

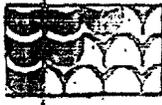
95

1: 12000

AV 4916-2

13





Wetlands Research Associates, Inc.

April 30, 1997

EXHIBIT 19

2-02-2-EDD (Pacific Bowl)

Letter from WRA to the Syndicor
Real Estate Group
dated April 30, 1997

Robert Kalmbach
Syndicor Real Estate Group, Inc.
914 Westwood Blvd. Suite 500
Los Angeles, CA 90024

RE: Unimproved land in the City of Pacifica, County of San Mateo, commonly referred to as assessors parcel nos. 009-031-010 and 009-035-010, 020, 030, 040, 050, 120, 130 and parcel nos. 009-402-250 and 260 and land appurtenant thereto

Dear Bob:

Pursuant to your request, I conducted a site reconnaissance on April 28, 1997 on unimproved land in the City of Pacifica, County of San Mateo, commonly referred to as assessors parcel nos. 009-031-010 and 009-035-010, 020, 030, 040, 050, 120, 130 and parcel nos. 009-402-250 and 260 and land appurtenant thereto for the purposes of (1) determining the presence of any federal §404 jurisdictional wetlands and (2) the presence of habitat suitable for any federal or state protected species. In addition, I reviewed the draft report prepared by Thomas Reid Associates concerning their evaluation of the subject parcels.

Federal jurisdictional wetlands

I conducted a reconnaissance survey to determine if any portions of the project site are "waters of the United States" and, in particular, wetlands subject to federal jurisdiction under Section 404 of the Clean Water Act. As stated in the federal regulations, wetlands are defined as:

Those areas that are inundated or saturated by surface or ground waters at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

The three criteria used to delineate wetlands stated in the *Corps of Engineers Wetlands Delineation Manual* (1987) are the presence of (1) hydrophytic vegetation, (2) hydric soils, and (3) wetland hydrology. According to the manual:

The three technical criteria specified are mandatory and must all be met for an area to be identified as wetland. Therefore, areas that meet these criteria are wetlands.

The subject parcels are primarily dominated by northern coastal scrub with patches of coastal terrace prairie habitat (Thomas Reid and Associates, 1997). These areas are dominated by upland plants, have non-hydric soils, and do not have wetland hydrology. Areas identified as

2169-G East Francisco Blvd., San Rafael, CA 94901 (415) 454-0868/FAX (415) 454-0129

Francisco Garter Snake, including significant areas of shallow seasonal pools with emergent vegetation. In its February 18, 1997 guidance on the red-legged frog, the US Fish and Wildlife Services stated that suitable habitat consisted of:

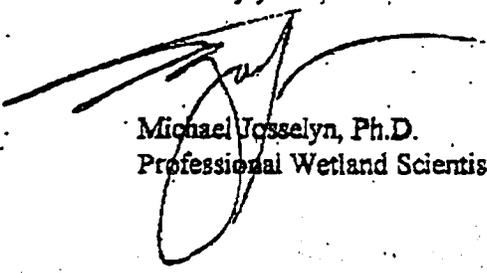
All life history stages are most likely to be encountered in and around breeding sites, which are known to include coastal lagoons, marshes, springs, permanent and semipermanent natural ponds, ponded and backwater portions of streams, as well as artificial impoundments such as stock ponds, irrigation ponds, and siltation ponds.

None of these habitats are present on the site and therefore, I conclude that this site is unsuitable habitat for the red-legged frog and the San Francisco garter snake.

My opinion is based on 20 years of experience in wetland and endangered species biology as a Professor of Biology at San Francisco State University and President of Wetlands Research Associates, Inc., an environmental consulting firm dealing with wetland and endangered species ecology. Our firm has completed over 150 wetland delineations in the Bay area and has experience in a wide variety of habitats. In addition, we have evaluated sites for potential endangered species including those known for this region. I have prepared Section 7 consultations and Habitat Conservation Plans for the federally threatened red-legged frog for coastal properties in San Mateo and Monterey Counties.

Please call if you have any further questions on this preliminary survey.

Sincerely yours,



Michael Josselyn, Ph.D.
Professional Wetland Scientist.

EXHIBIT 20
2-02-2-EDD (Pacific Bowl)
WRA Wetland Delineation for the
"Pacific Cove Parcel,"
dated August 1999

RECEIVED
NOV 12 2002
CALIFORNIA
COASTAL COMMISSION

Delineation of Potential Jurisdictional Wetlands

**Pacific Cove Parcel
Pacifica, California**

PREPARED FOR:

Trumark Companies
4135 Blackhawk Plaza Circle, Suite 280
Danville, California 94506
Contact: Jason Kliewer
(925) 648-8300

PREPARED BY:

Wetlands Research Associates, Inc.
2169 East Francisco Blvd., Suite G
San Rafael, California 94901
Contact: Tom Fraser
(415) 454-8868

August 1999

1.0 INTRODUCTION

Wetlands Research Associates, Inc. was requested by Trumark Companies to determine the presence of wetlands subject to federal jurisdiction under Section 404 of the Clean Water Act on a parcel of land in Pacifica, San Mateo County. The Study Area covers approximately 4.7 acres and is located on a parcel that lies northwest of Highway 1 and east of Palmetto Avenue in Pacifica (Figure 1).

As stated in the federal regulations for the Clean Water Act, wetlands are defined as:

"Those areas that are inundated or saturated by surface or ground waters at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas."

(EPA, 40 CFR 230.3 and CE, 33 CFR 328.3)

During June 1999, Wetlands Research Associates, Inc. biologists conducted a wetland delineation study within the Study Area. The delineation study determined the presence or absence of wetland indicators used by the U.S. Army Corps of Engineers in making a jurisdictional determination. The three criteria used to delineate wetlands are the presence of: (1) hydrophytic vegetation, (2) wetland hydrology, and (3) hydric soils. According to the *Corps of Engineers Wetlands Delineation Manual* (1987):

"...[E]vidence of a minimum of one positive wetland indicator from each parameter (hydrology, soil, and vegetation) must be found in order to make a positive wetland delineation."

2.0 METHODS

The methods used in this study to delineate potential jurisdictional wetlands of the U.S. are based on the *U.S. Army Corps of Engineers Wetlands Delineation Manual* (Corps 1987). The routine method for wetland delineation described in the *Corps Manual* (1987) was used to identify areas subject to Corps Section 404 jurisdiction within the Study Area.

Prior to conducting field surveys, the Soil Survey of San Mateo County, Eastern Part, and San Francisco County, California (USDA Soil Conservation Service 1991) and the U.S. Fish and Wildlife Wetland Inventory Maps (U.S. Fish and Wildlife Service 1987, San Mateo quadrangle) were reviewed. Field studies to examine vegetation, hydrology, and soils were conducted during June 1999.

The Corps requires that data on vegetation, hydrology, and soil be recorded on standard forms. Completed data forms for this study are provided in Appendix A. For purposes of this study the

vegetated wetland areas were considered seasonal wetlands and, therefore, meet the criteria as "Problem Areas" as defined in the Corps Manual. Once a sampling area was determined to be either a potential wetland or upland, a 1 inch = 40 feet Topographic vesting tentative map (Tronoff Engineers, Surveyors, Planners; 1997) was used to draw boundaries between potential wetland and upland areas based on data collected. The sizes of potential jurisdictional areas were measured using AutoCAD 14.

The vegetation, hydrology, and soil criteria used to make wetland determinations in wetland areas are summarized below.

Vegetation

Plant species identified in the Study Area were assigned a wetland status according to the U.S. Fish and Wildlife Service (Reed 1988) list of plant species that occur in wetlands. This wetland classification system is based on the expected frequency of occurrence in wetlands as follows:

OBL	Always found in wetlands	>99% frequency
FACW	Usually found in wetlands	67-99%
FAC	Equal in wetland or non-wetlands	34-66%
FACU	Usually found in non-wetlands	1-33%
NL	Not listed (upland)	<1%

Plants with OBL, FACW, and FAC classifications are classified as hydrophytic vegetation in the *Corps Manual* (1987) methodology. If more than 50 percent of the dominant plants (dominant is ≥ 20 percent of the cover) are wetland plants, the area is considered to have met the hydrophytic vegetation criterion.

Hydrology

The jurisdictional wetland hydrology criterion in a non-tidal area is satisfied if the area is inundated or saturated for a period (minimum of five percent of the growing season or 18 days in the San Francisco Bay Area) sufficient to create anoxic soil conditions during the growing season. Evidence of wetland hydrology can include direct evidence (primary indicators), such as visible inundation or saturation, surface sediment deposits, and drift lines, or indirect indicators (secondary indicators), such as oxidized root channels and algal mats. If secondary indicators are used, at least two secondary indicators must be present to conclude that an area has wetland hydrology.

Soils

Hydric soils formed under wetland (anaerobic) conditions have characteristic low chroma colors and an associated quantity of redox concentrations (mottles) near the surface, typically within the upper 12 inches (USDA, NRCS 1998). Chroma designations are determined by comparing a soil sample with a standard Munsell soil color chart (Kollmorgen 1975). Various combinations of low chroma

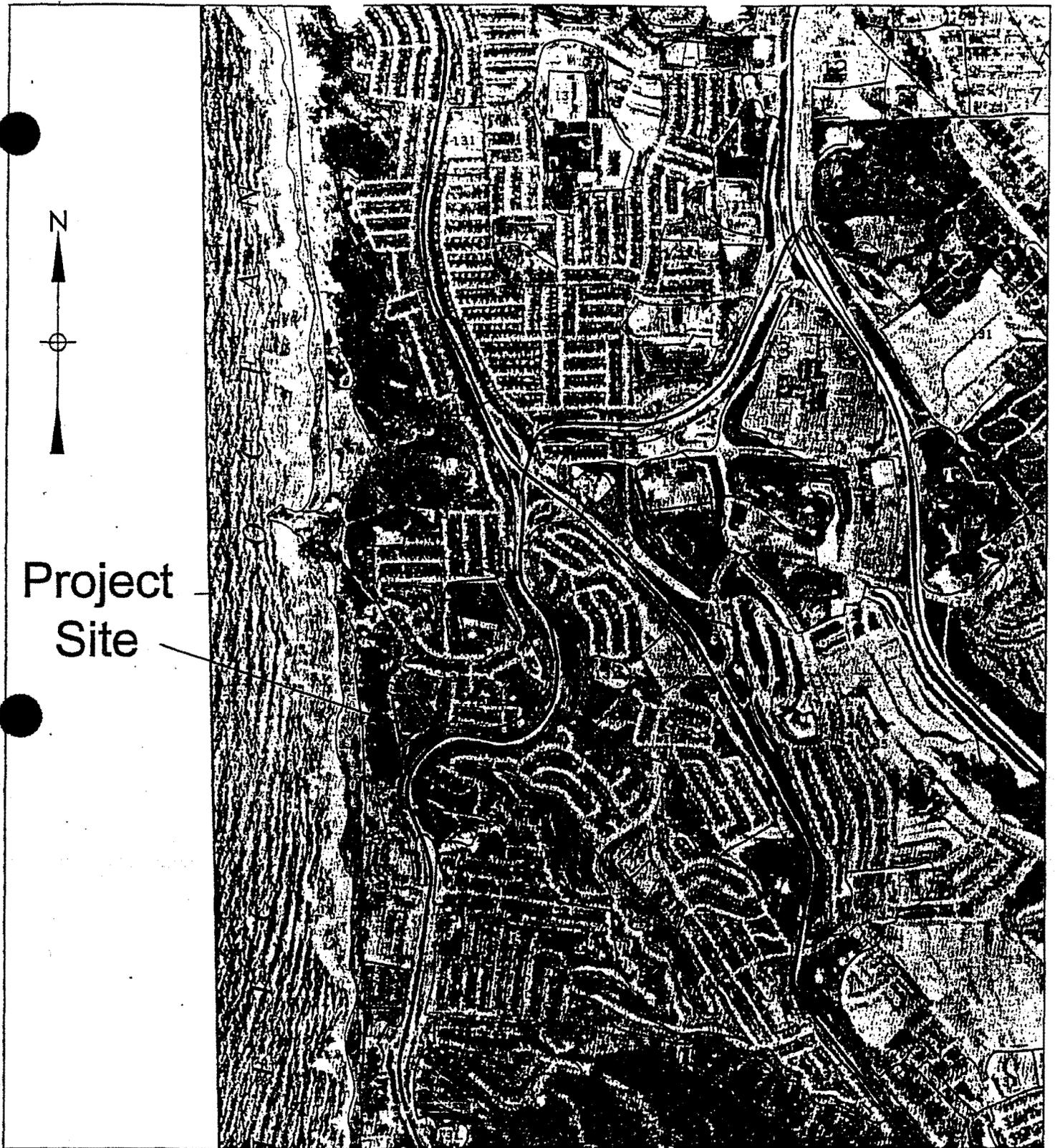
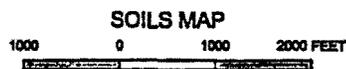


Figure 2

PURPOSE: Delineation of Jurisdictional Wetlands and Waters of the United States (Section 404 of the Clean Water Act)

USDA SCS Soil Survey, San Mateo County Soils, 1991



SCALE 1:24,000

Trumark Companies
 4135 Blackhawk Plaza Circle, Suite 280
 Danville, California 94506
 Contact: Jason Kiewer
 Phone: 925-648-8300

Jurisdictional Wetland Delineation

LOCATION: Pacifica, California

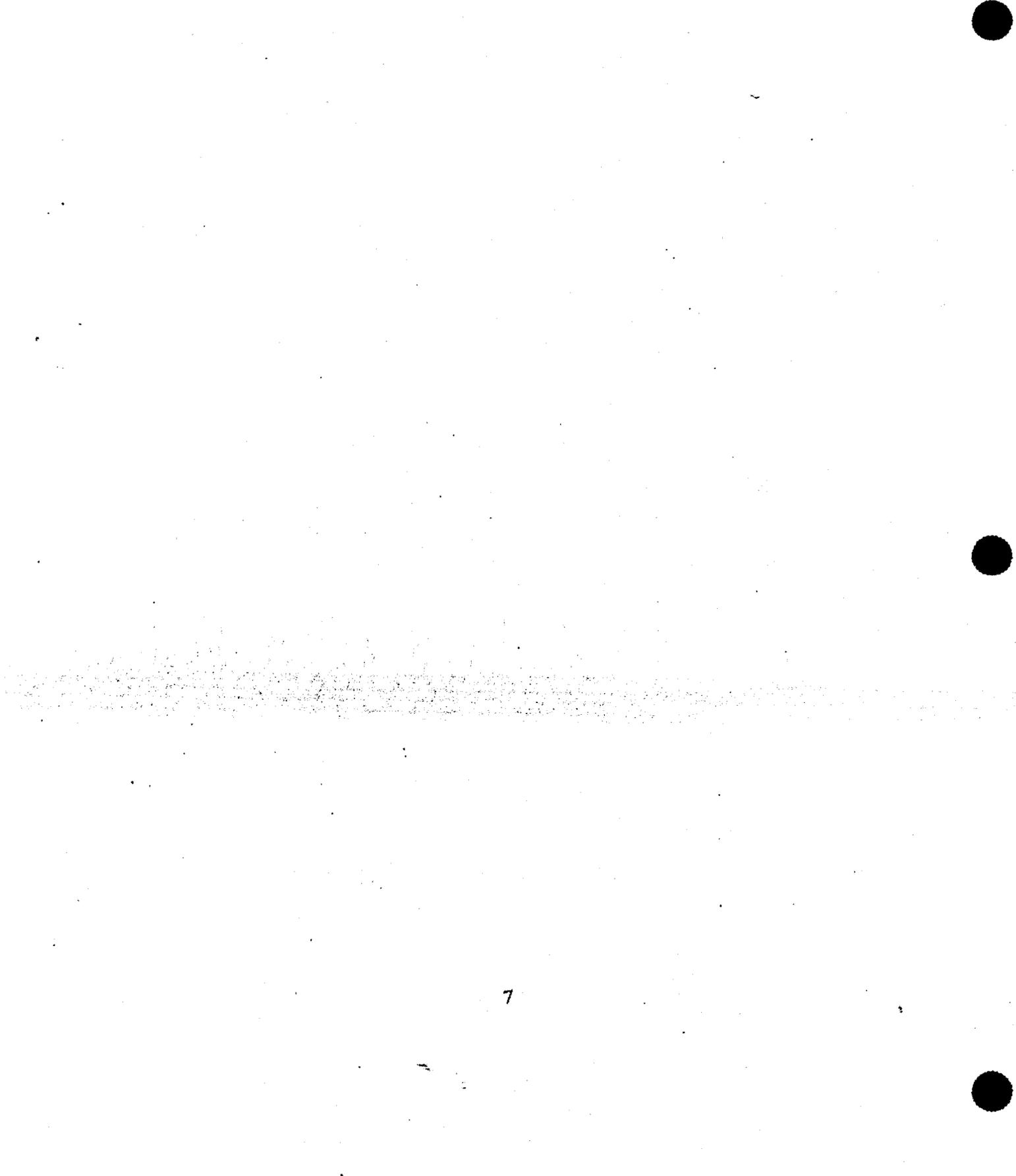
COUNTY: San Mateo

APPLICATION BY: Trumark Companies

SHEET: 2 of 3

DATE: AUGUST 1999

Figure 3. Aerial photo showing jurisdictional wetlands.



the site delineation.

Soils in the potential jurisdictional wetland area had a low chroma matrix (10YR 4/2) within the upper 12 inches with mottles (7.5YR 5/6). Soils in upland areas had soils with matrix chroma of 2 or 3, but lacked mottles. Certain upland areas were dominated by hydrophytic vegetation such as arroyo willow, and appeared to carry surface flow during winter storms, but the well-drained nature of most of the soils on this site and the steep slopes over much of the site apparently prevent the long-term saturation of these soils which would lead to the development of hydric soil characteristics.

5.0 AREA OF POTENTIAL CORPS OF ENGINEERS JURISDICTION

A potential jurisdictional wetland within the Pacific Cove Study Area is characterized by seasonal soil saturation in a single isolated area of the site that apparently has slightly higher clay content in the subsurface soils. The depression on the site which contains wetlands appears to be naturally occurring. The potential jurisdictional wetland area within the site covers 0.03 acre (1,257 ft²).

6.0 REFERENCES

- Environmental Laboratory. 1987. Corps of Engineers Wetlands Delineation Manual. Department of the Army, Waterways Experiment Station, Vicksburg, Mississippi 39180-0631.
- Kollmorgen Corporation. 1975. Munsell Soil Color Charts. Kollmorgen Corporation, Baltimore.
- Reed, P. B., Jr. 1988. National list of plant species that occur in wetlands: California (Region 0). U. S. Fish and Wildlife Service Biological Report 88 (26.10).
- Tronoff Engineers, Surveyors, Planners. 1997. A 1 inch = 40 feet topographic vesting tentative map of the Pacific Cove site.
- U.S. Geological Survey. 1980. San Francisco South quadrangle. 7.5 minute (topographic).
- U.S. Soil Conservation Service. 1991. Soil Survey of San Mateo County, Eastern Part, and San Francisco County, California. In cooperation with the University of California Agricultural Experiment Station; 120 pp. + appendices.

DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)

Project/Site: Pacific Cove - Fish and Bowl Parcel	Date: <u>6/11/99</u>
Applicant/Owner: <u>Trumark Companies</u>	County: <u>San Mateo</u>
Investigator: <u>Wetlands Research Associates, Inc.</u>	State: <u>CA</u>
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Community ID: _____
Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Transect ID: _____
Is the area a potential Problem Area? <u>seasonal wetland</u> (if needed explain on reverse.) <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Plot ID: <u>1A</u>

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. <u>Lonicera involucrata</u>	<u>S</u>	<u>FAC</u>	9. _____	_____	_____
2. _____	_____	_____	10. _____	_____	_____
3. _____	_____	_____	11. _____	_____	_____
4. _____	_____	_____	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____
Percent of Dominant Species that are OBL, FACW and/or FAC: (excluding FAC-) _____			<u>100%</u>		
Remarks: <u>Site is dominated by hydrophytic vegetation.</u>					

HYDROLOGY

<p>Recorded Data</p> <input type="checkbox"/> Stream, Lake or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other	<p>Wetland Hydrology Indicators :</p> <p>Primary Indicators :</p> <input type="checkbox"/> Inundated <input type="checkbox"/> Saturated in Upper 12 Inches <input type="checkbox"/> Water Marks <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input type="checkbox"/> Drainage patterns in Wetlands
<p>No Recorded Data Available</p> <p>Field Observations :</p> <p>Depth of Surface Water : _____ (in.)</p> <p>Depth to Free Water in Pit : _____ (in.)</p> <p>Depth To Saturated Soil : _____ (in.)</p>	<p>Secondary Indicators (2 or more required) :</p> <input checked="" type="checkbox"/> Oxidized Root Channels in Upper 12 Inches <input type="checkbox"/> Water-Stained Leaves <input type="checkbox"/> Local Soil Survey Data <input type="checkbox"/> FAC-Neutral test <input checked="" type="checkbox"/> Other (Explain in Remarks)
Hydrology Remarks : <u>Algal mats and oxidized root channels present.</u>	

DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)

Project/Site: Pacific Cove - Fish and Bowl Parcel	Date: <u>6/11/99</u>
Applicant/Owner: <u>Trumark Companies</u>	County: <u>San Mateo</u>
Investigator: <u>Wetlands Research Associates, Inc.</u>	State: <u>CA</u>
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Community ID: _____
Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Transect ID: _____
Is the area a potential Problem Area? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (if needed explain on reverse.) seasonal wetland	Plot ID: <u>1B</u>

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. <u>Senecio mikanoides</u>	<u>H</u>	<u>NL</u>	9. _____	_____	_____
2. <u>Baccharis pilularis</u>	<u>S</u>	<u>NL</u>	10. _____	_____	_____
3. <u>Rubus sp.</u>	<u>H</u>	<u>FAC</u>	11. _____	_____	_____
4. <u>Brassica nigra</u>	<u>H</u>	<u>NL</u>	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____

Percent of Dominant Species that are OBL, FACW and/or FAC: 25%
(excluding FAC-)

Remarks : Site is not dominated by hydrophytic vegetation

HYDROLOGY

<p>Recorded Data</p> <p><input type="checkbox"/> Stream, Lake or Tide Gauge</p> <p><input type="checkbox"/> Aerial Photographs</p> <p><input type="checkbox"/> Other</p> <p>_____ No Recorded Data Available</p> <p>Field Observations :</p> <p>Depth of Surface Water : _____ (in.)</p> <p>Depth to Free Water in Pit : _____ (in.)</p> <p>Depth To Saturated Soil : _____ (in.)</p>	<p>Wetland Hydrology Indicators :</p> <p>Primary Indicators :</p> <p><input type="checkbox"/> Inundated</p> <p><input type="checkbox"/> Saturated in Upper 12 Inches</p> <p><input type="checkbox"/> Water Marks</p> <p><input type="checkbox"/> Drift Lines</p> <p><input type="checkbox"/> Sediment Deposits</p> <p><input type="checkbox"/> Drainage patterns In Wetlands</p> <p>Secondary Indicators (2 or more required) :</p> <p><input type="checkbox"/> Oxidized Root Channels In Upper 12 Inches</p> <p><input type="checkbox"/> Water-Stained Leaves</p> <p><input type="checkbox"/> Local Soil Survey Data</p> <p><input type="checkbox"/> FAC-Neutral test</p> <p><input type="checkbox"/> Other (Explain In Remarks)</p>
<p>Hydrology Remarks : <u>No hydrologic indicators present.</u></p>	

DATA FORM
 ROUTINE WETLAND DETERMINATION
 (1987 COE Wetlands Delineation Manual)

Project/Site: Pacific Cove - Fish and Bowl Parcel	Date: <u>6/11/99</u>
Applicant/Owner: <u>Trumark Companies</u>	County: <u>San Mateo</u>
Investigator: <u>Wetlands Research Associates, Inc.</u>	State: <u>CA</u>
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Community ID: _____
Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Transect ID: _____
Is the area a potential Problem Area? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No (if needed explain on reverse.) seasonal wetland	Plot ID: <u>2</u>

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. <u>Salix lasiolepis</u>	<u>T</u>	<u>FACW</u>	9. _____	_____	_____
2. <u>Baccharis pilularis</u>	<u>S</u>	<u>NL</u>	10. _____	_____	_____
3. <u>Rhamnus californica</u>	<u>S</u>	<u>NL</u>	11. _____	_____	_____
4. _____	_____	_____	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____

Percent of Dominant Species that are OBL, FACW and/or FAC: 33%
 (excluding FAC-)

Remarks : Site is not dominated by hydrophytic vegetation

HYDROLOGY

<p>Recorded Data</p> <p><input type="checkbox"/> Stream, Lake or Tide Gauge</p> <p><input type="checkbox"/> Aerial Photographs</p> <p><input type="checkbox"/> Other</p> <p>No Recorded Data Available</p>	<p>Wetland Hydrology Indicators :</p> <p>Primary Indicators :</p> <p><input type="checkbox"/> Inundated</p> <p><input type="checkbox"/> Saturated in Upper 12 Inches</p> <p><input type="checkbox"/> Water Marks</p> <p><input type="checkbox"/> Drift Lines</p> <p><input type="checkbox"/> Sediment Deposits</p> <p><input type="checkbox"/> Drainage patterns in Wetlands</p> <p>Secondary Indicators (2 or more required) :</p> <p><input type="checkbox"/> Oxidized Root Channels in Upper 12 Inches</p> <p><input type="checkbox"/> Water-Stained Leaves</p> <p><input type="checkbox"/> Local Soil Survey Data</p> <p><input type="checkbox"/> FAC-Neutral test</p> <p><input type="checkbox"/> Other (Explain in Remarks)</p>
<p>Field Observations :</p> <p>Depth of Surface Water : _____ (in.)</p> <p>Depth to Free Water in Pit : _____ (in.)</p> <p>Depth To Saturated Soil : _____ (in.)</p>	
<p>Hydrology Remarks : <u>No hydrologic indicators present.</u></p>	



Wetlands Research Associates, Inc.

Transmittal

To: Ms. Angie Wulfow
From: Tom Fraser
Date: November 30, 1999
Subject: Pacific Cove parcel revised delineation map

Angie:

Please find enclosed a revised version of the jurisdictional wetlands map for the Pacific Cove parcel in Pacifica, California. This revised map shows no jurisdictional wetlands on the parcel as determined by Dan Martel of the U.S. Army Corps of Engineers during a site visit yesterday.

The landowner would like to receive a letter and map indicating the lack of Corps jurisdiction at the site. Call me if you have any questions.

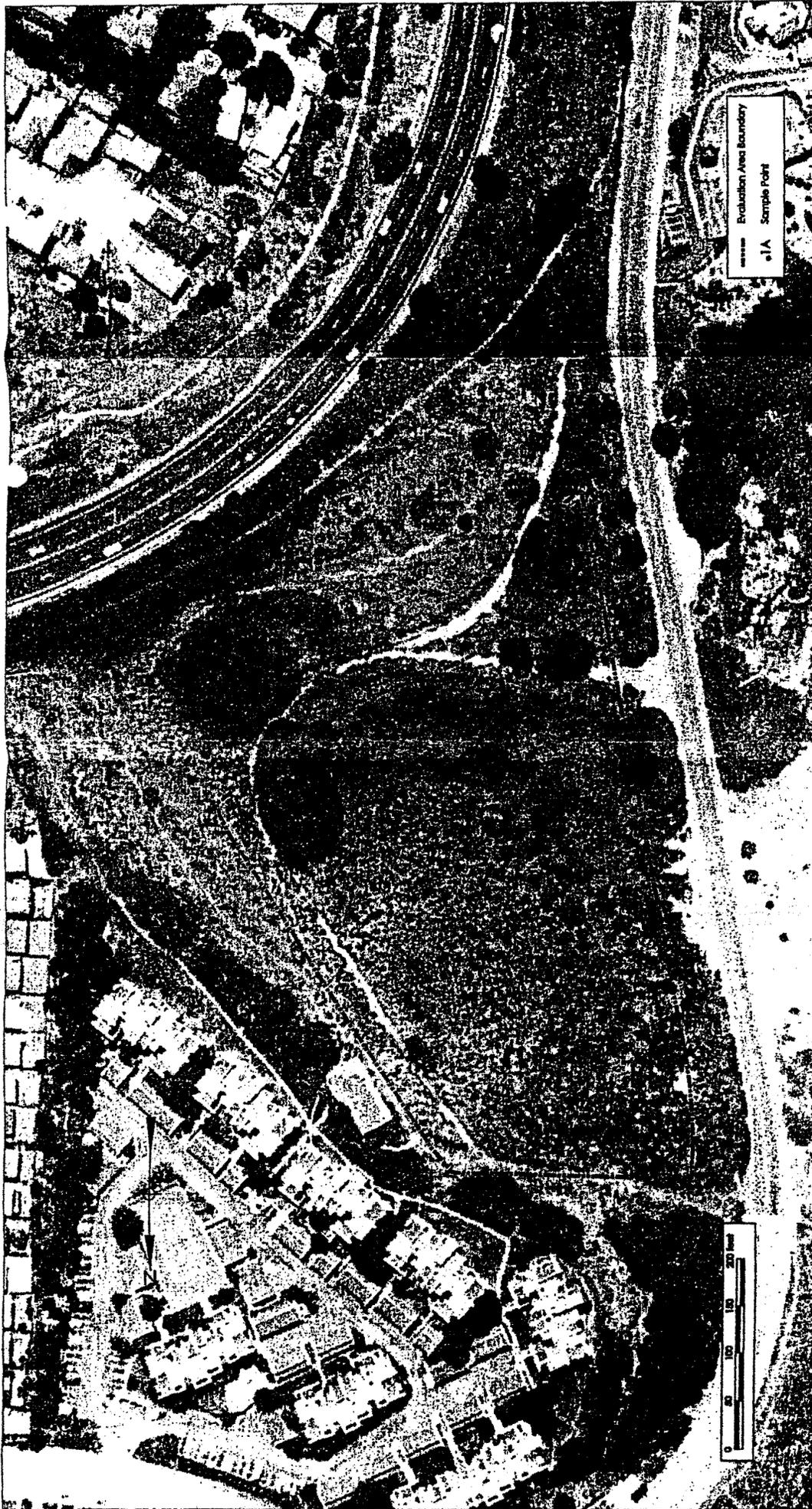
Thank you very much for your assistance with this project.

Sincerely,

Tom Fraser
Associate

encl.

cc: Jason Kliewer, Trumark Company



Evolution Area Boundary
#1A Sample Point

0 50 100 150 200 feet

Jurisdictional Wetland Delineation

LOCATION: Pacific Cove Site, Pacifica, CA

COUNTY: San Mateo

APPLICATION BY: Tunstark Company

SHEET: 3 of 3 DATE: AUGUST 1989

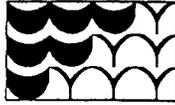
WETLANDS MAP
0 50 100 150 200 feet

SCALE 1:1200

Tunstark Company
4158 Pescadero Avenue, Suite 200
Pescadero, CA 94060
Contact: James H. Tunstark
Phone: (650) 438-0000

PURPOSE: Delineation of Jurisdictional Wetlands and Waters of the United States (Section 404 of the Clean Water Act)

SOURCE: Aerialphoto Air Photo



Wetlands Research Associates, Inc.

EXHIBIT 22

2-02-2-EDD (Pacific Bowl)

Letter from WRA
to the City of Pacifica
dated December 27, 1999

December 27, 1999

City of Pacifica
Planning Department
Attn: Mike Crabtree
170 Santa Maria Ave.
Pacifica, CA 94044

Re: Pacific Cove Development
Local Coastal Program jurisdictional wetlands

Dear Mr. Crabtree:

On behalf of the landowner, Trumark Companies, Wetlands Research Associates, Inc. (WRA) conducted a wetland study to determine whether any areas on the Pacific Cove site meet the wetland definition utilized by the City of Pacifica in its certified Local Coastal Program, which implements the California Coastal Act. The project site is located in Pacifica, California (Figure 1) west of Route 1 and east of Palmetto Avenue. The site covers approximately 4.7 acres.

A wetland delineation report was also submitted to the Army Corps of Engineers, San Francisco District using their methodologies and wetland definition. The Corps (Angie Wulfow: 415-977-8452) determined that the Pacific Cove site did not contain any wetlands subject to federal jurisdiction following a site visit on November 29, 1999.

The City of Pacifica Local Coastal Plan (LCP), which has been certified by the Coastal Commission to implement the Coastal Act, defines wetlands as follows:

"A wetland is defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes."

(City of Pacifica Local Coastal Program, Land Use Plan: See Plan Conclusions, subsection Rare and Endangered Species: Habitat Protection, Recreational use of Wetlands and Development near Wetlands and Creeks, page C-99.)

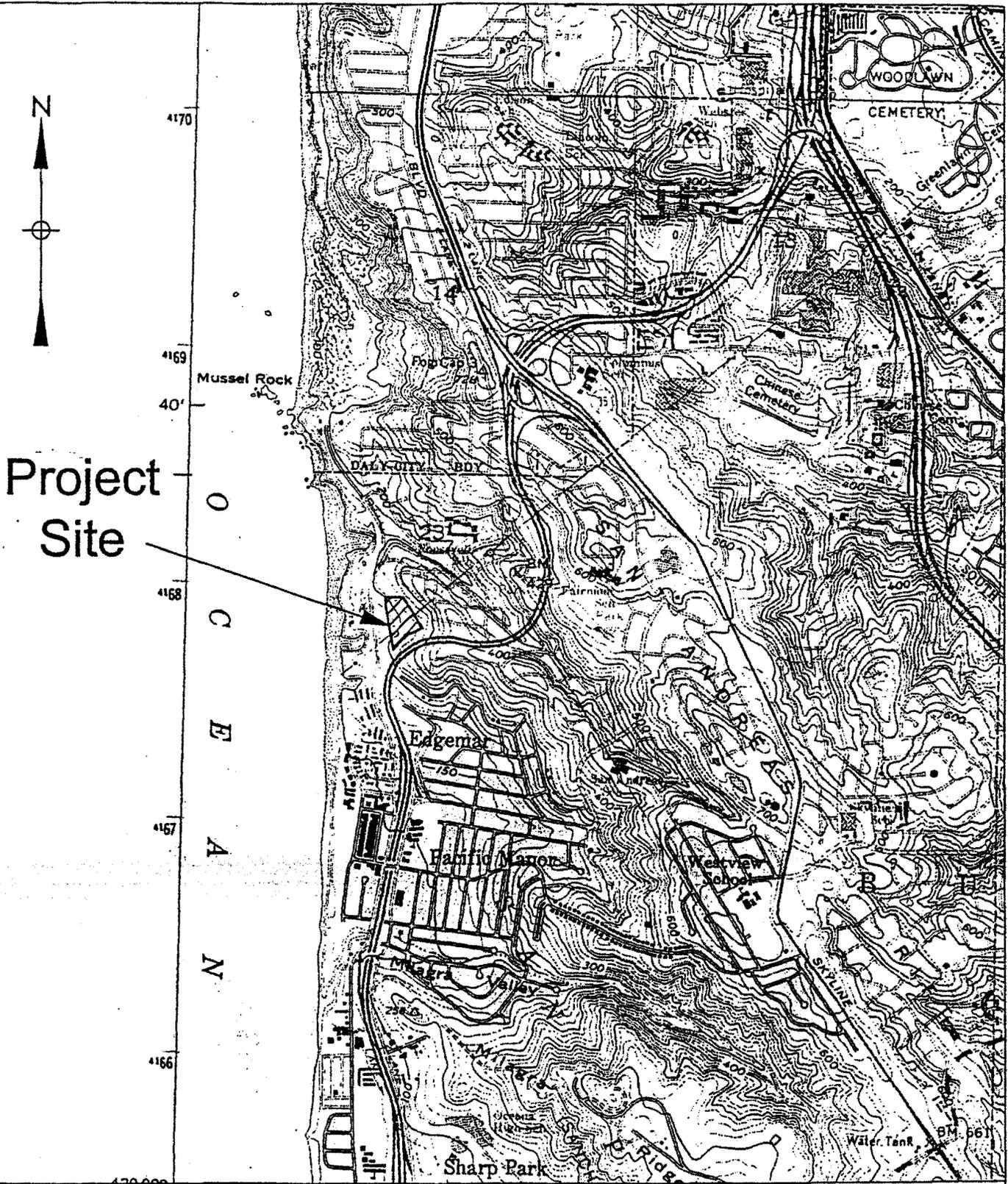


Figure 1

PURPOSE: Delineation of Jurisdictional
 Wetlands and Waters of the United States
 (under Section 404 of the Clean Water Act)
 SOURCE: San Francisco South Quadrangle, 1980,
 showing location of Pacific Cove Parcel

LOCATION MAP
 1000 0 1000 2000 FEET
 SCALE 1:24,000
 Trumark Companies
 4135 Blackhawk Plaza Circle, Suite 280
 Danville, California 94506
 Contact: Jason Kilewer
 Phone: 925-648-8300

Jurisdictional Wetland Delineation
 LOCATION: Pacifica, California
 COUNTY: San Mateo
 APPLICATION BY: Trumark Company
 SHEET: 1 of 3 DATE: AUGUST 1999

The primary difference between the definition used by the City of Pacifica and the Corps of Engineers is that the former requires only two criteria in order to define a wetland: hydrology is one and *either* the presence of hydric soils *or* the presence of hydrophytes must be found. The Corps of Engineers requires that *all three* parameters be present to identify a wetland under federal jurisdiction. The two parameter LCP approach could therefore potentially result in the determination of more areas as wetlands than the Corps of Engineers three parameter approach. The Land Use Plan portion of the City of Pacifica's LCP was certified by the Coastal Commission as in conformity with Coastal Act policies (including wetland protection policies) on March 4, 1980.

There are no specific methodologies designated by the City of Pacifica to determine wetland hydrology, hydric soils, or hydrophytes. Because of the significant research conducted by the Corps of Engineers on wetland boundary determination and the preparation of a manual to delineate wetlands (Corps Manual, 1987), the Corps guidance was used in this study with the exception that only two parameters were necessary to designate a wetland as defined in the City's LCP.

In June 1999, a study of vegetation, hydrology, and soils was conducted. Vegetation, hydrology, and soils were examined at sampling points in depressions or other areas that exhibited the potential for meeting wetland criteria. The results were recorded on standard 1987 *Corps Manual* data sheets which can be used to elucidate the criteria necessary to meet the LCP wetland definition. These data sheets were submitted to the Corps in a delineation report in August 1999. Corps project manager Angie Wulfow and Corps wetlands specialist Dan Martel visited the site on Monday November 29, 1999 and determined that there are no wetlands on the Pacific Cove site that meet the criteria to be classified as jurisdictional wetlands under Section 404 of the Clean Water Act.

Vegetation

Most of the site is dominated by a mix of coastal scrub vegetation including coyote brush (*Baccharis pilularis*), coffeeberry (*Rhamnus californica*), and poison oak (*Toxicodendron diversilobum*). All of these shrub plant species are classified as non-wetland plants. There is one area dominated by willow (*Salix* sp.), and another small area dominated by twinberry (*Lonicera involucrata* var. *ledbourii*). These two species are classified by the U.S. Fish and Wildlife Service as facultative hydrophytic vegetation and would meet one of the parameters used by the City of Pacifica's LCP. However, the fact that these species are not obligate wetland species means that they may also be found in upland conditions and therefore the presence of positive indicators of wetland hydrology would also be required.

Hydrology

An area exhibits wetland hydrology if it is inundated or if the soil is saturated for at least five percent of the growing season or approximately 18 days in the maritime climate of Pacifica. Because observations were made at a time of year when surface water, ground water or saturated soils are generally not apparent (e.g. seasonal wetlands), evidence of wetland hydrology can be determined based on the observation of hydrologic indicators as described in the 1987 *Corps Manual*. Wetland hydrology indicators include: oxidized root channels, surface sediment deposits, drift lines, and others. On the Pacific Cove site, all depressions, topographic low areas, and the two areas

dominated by hydrophytic vegetation were examined for these hydrological indicators. No primary hydrology indicators were present. Oxidized root channels (a secondary hydrologic indicator) were faint and not "reasonably abundant" as required by the Corps manual to meet the hydrology criteria. This observation was confirmed by the Corps staff during their site visit. Therefore, the hydrologic criteria, which is essential to the determination of a "wetland" under the City of Pacifica's LCP, was not present on the site.

The USGS topographic map for this area (San Francisco South quadrangle, 1980) shows no marsh symbols or "blue-line streams" on the project site (Figure 1). Based on this evidence, WRA and the Corps concluded that the sandy soils on the site were too well drained to support wetland hydrology.

Soil

The Natural Resource Conservation Service defines a hydric soil as:

"A hydric soil is a soil that formed under conditions of saturation, flooding, or ponding long enough during the growing season to develop anaerobic conditions in the upper part."

(Federal Register July 13, 1994, U.S. Department of Agriculture, Natural Resource Conservation Service.)

All hydric soils must satisfy requirements of the definition. Because it is difficult to determine whether or not a soil develops anaerobic conditions without direct measurement of soil oxygen levels or redox potential, the Natural Resource Conservation Service has issued guidance for the observation of indicators in soils that can be used to determine whether or not the soils are hydric (USDA 1998). These indicators are generally formed by biological or chemical reactions in anaerobic soils and therefore act as surrogates for actual observations of anaerobic conditions. Indicators are primarily morphological indicators used for field identification of hydric soils. Accordingly, a hydric soil is a soil that meets the definition, and the presence of one (or more) of the indicators is evidence that the definition has been met.

In the field, a shovel was used to collect soil samples (between 12 and 18 inches deep). Soil profiles were described using terminology contained in *Field Book for Describing and Sampling Soils* (Schoeneberger et al, 1998) including horizon depths, color, redoximorphic features, texture, structure, and consistence. Soils were examined for hydric indicators contained in the *Field Indicators of Hydric Soils in the United States* (USDA, 1998). Soil color was determined using a Munsell soil color chart (Kollmorgen Corporation 1990).

The Soil Survey of San Mateo County, Eastern Part, and San Francisco County, California (SCS 1991) indicates that the Study Area has two soil types: Orthents, cut and fill-Urban land complex 5 to 75 percent slopes and Rock outcrop-Orthents complex, 30 to 75 percent slopes (Figure 2). The County Soil Survey describes Orthents as very shallow to very deep, very poorly drained to excessively drained soils on uplands including hills and ridgetops; alluvial fans; coastal terraces; floodplains; and tidal flats. These soils formed in alluvium derived from various kinds of rock; sandy coastal deposits; hard and soft sandstone, shale, siltstone, serpentine, and volcanic rock; and

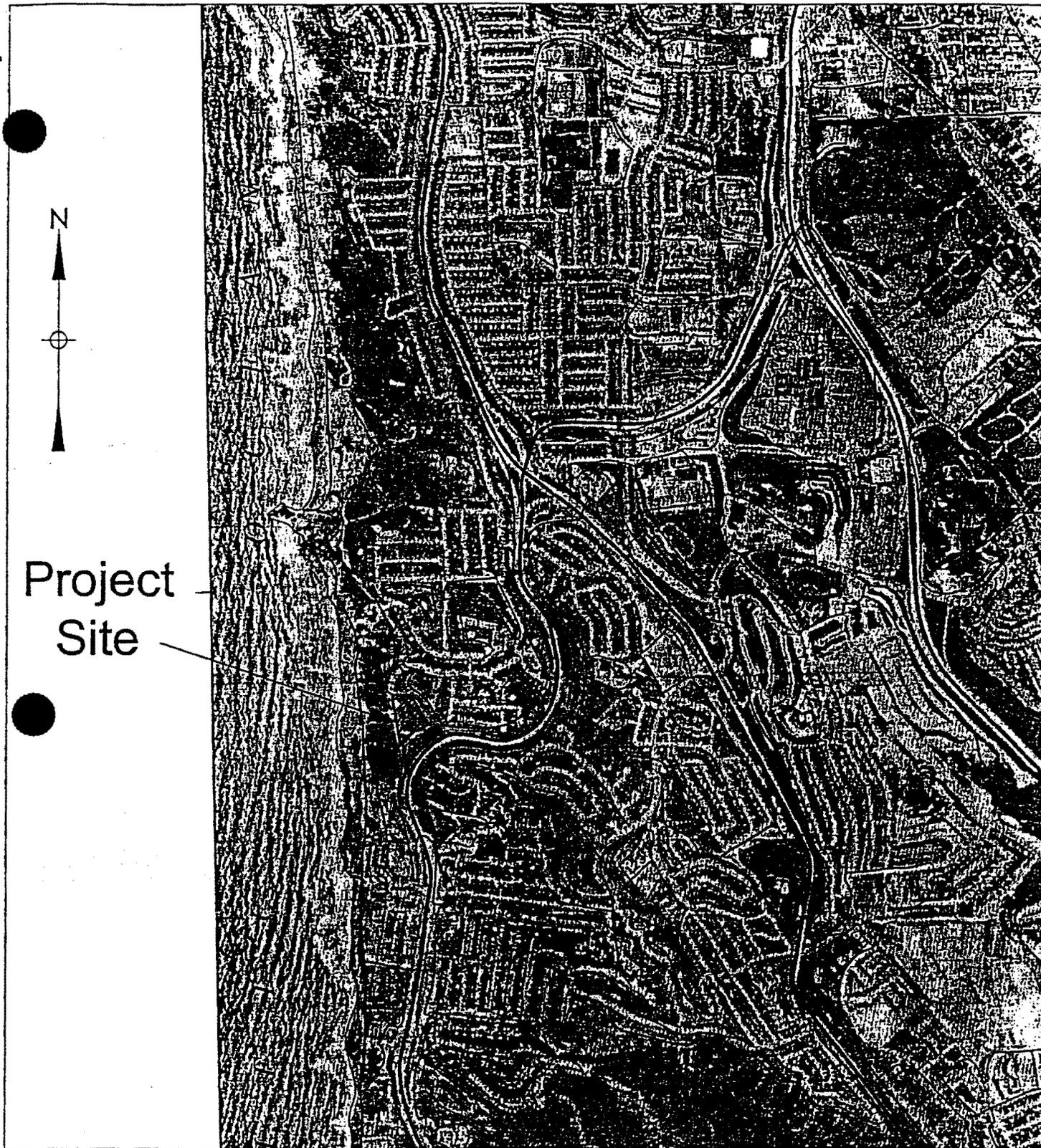


Figure 2

<p>PURPOSE: Delineation of Jurisdictional Wetlands and Waters of the United States (Section 404 of the Clean Water Act)</p> <p>USDA SCS Soil Survey, San Mateo County Soils Map 1991</p>	<p align="center">SOILS MAP</p> <p align="center">1000 0 1000 2000 FEET</p> <p align="center">SCALE 1:24,000</p> <p align="center">Trumark Companies 4135 Blackhawk Plaza Circle, Suite 280 Danville, California 94506 Contact: Jason Klawer Phone: 925-648-8300</p>	<p align="center">Jurisdictional Wetland Delineation</p> <p>LOCATION: Pacifica, California</p> <p>COUNTY: San Mateo</p> <p>APPLICATION BY: Trumark Companies</p> <p>SHEET: 2 of 3 DATE: AUGUST 1999</p>
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various manmade fill material. Orthents soils are extremely variable. They consist of areas of undisturbed loamy material on coastal terraces; areas that have been mechanically altered for residential and other urban uses and have cuts that have slopes of 3:1 to 1.5:1 and fills that are 0 to 75-feet deep or more; smoothed areas on alluvial fans and plains; reclaimed areas near San Francisco Bay; and areas on the margins of the bay that consist of earthy material, rock fragments, plant matter, and manmade debris. Runoff is medium to very rapid, and the hazard of water erosion is moderate to very high.

Field observations confirmed the soil type. The soil is a sandy loam and appears to be well-drained. Soil mottling was absent throughout most of the site. In the area of the *Lonicera involucrata*, soil mottling was variable and faint (less than 1%). Because the soil color was light (chroma=2), consistent mottling greater than 2% is required in order for the soil to be considered hydric (NTCHS Field Indicators, 1998).

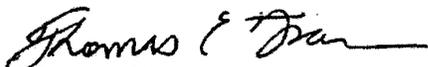
Discussion

The City of Pacifica has adopted a Land Use Plan, Local Coastal Program ("LCP"), to implement the provisions of the California Coastal Act. The LCP contains a definition of wetlands that has been used to identify any possible wetlands on the Pacific Cove site. This definition is identical to the definition of wetlands contained in the LCP of the County of San Mateo, which was certified by the CCC in 1982.

Based on the observations made in this study, hydrologic indicators were not present as required to meet the LCP definition that "the water table is at, near, or above the land surface". Furthermore, the site did not support hydric soils. The presence of *Lonicera involucrata*, a hydrophyte that is listed as a facultative species, does not necessarily mean that the site has wetland hydrology since this plant is found equally in either wetlands or uplands.

Based on these observations, there are no areas on the subject parcel that meet the City of Pacifica LCP definition of wetlands. Furthermore, the Corps has confirmed that there are no areas that meet the federal definition of wetlands.

Sincerely,



Thomas Fraser

Associate Wetland Scientist

References

- Department of the Army. 1987. Corps of Engineers Wetlands Delineation Manual. Department of the Army, Waterways Experiment Station, Vicksburg, MS 39180-0631.
- Federal Register July 13, 1994, US Department of Agriculture, Natural Resource Conservation Service.
- Kollmorgen Instrument Corporation. 1990. Munsell Soil Color Charts. Baltimore, MD.
- National Technical Committee for Hydric Soils (NTCHS), 1986. Definition of Hydric Soils.
- Reed, P.B., 1988. National list of plant species that occur in wetlands: California (Region 0). U.S. Fish and Wildl. Serv. Biol. Rep. 88(26.10). 135 pp.
- Schoeneberger PJ, Wysocki DA, Benham EC, and Broderson WD. 1998. Field Book for Describing and Sampling Soils, Natural Resources Conservation Service, USDA, National Soil Survey Center, Lincoln, NE.
- US Fish and Wildlife Service. 1985. National wetland inventory map. Half Moon Bay quadrangle. U.S. Fish and Wildlife Service, Corvallis, OR.
- US Department of Agriculture, Soil Conservation Service. 1961. Soil Survey of San Mateo Area. In cooperation with the University of California Agricultural Experiment Station.
- USDA, Soil Conservation Service. 1992. Field Office Official List of Hydric Soil Map Units of San Mateo Area, California. USDA, Soil Conservation Service. Davis, Calif.
- USDA, Natural Resources Conservation Service. 1998. Field Indicators of Hydric Soils in the United States, Version 4.0. Hurt GW, Whited PM and Pringle RF, eds. USDA, NRCS, Ft. Worth, TX.



REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

JAN 3 2000

EXHIBIT 23
2-02-2-EDD (Pacific Bowl)
Letter from C. Fong, ACOE,
to T. Fraser, WRA,
dated January 3, 2000

Regulatory Branch

Subject: File Number 24709S

Mr. Tom Fraser
Wetlands Research
2169-G East Francisco Blvd.
San Rafael, California 94901

Dear Mr. Fraser:

Thank you for your submittal of September 24, 1999, requesting confirmation of the extent of Corps of Engineers jurisdiction at the Pacific Cove parcel in the City of Pacifica, San Mateo County, California. Enclosed is a map showing that there are no areas that meet the criteria for waters of the U.S., including wetlands, within the study boundary of this parcel. This determination is based on a field visit by Corps staff on November 29, 1999.

We have based this jurisdictional delineation on the current conditions of the site. A change in those conditions may also change the extent of our jurisdiction. This jurisdictional delineation will expire in five years from the date of this letter. However, if there has been a change in circumstances which affects the extent of Corps jurisdiction, a revision may be done before that date.

If you have any questions, please call Angie Wulfow of our Regulatory Branch at telephone 415-977-8452. All correspondence should reference the file number at the head of this letter.

Sincerely,

Calvin C. Fong
Chief, Regulatory Branch

Enclosure

MEMORANDUM

EXHIBIT 24

2-02-2-EDD (Pacific Bowl)

Memorandum from Taylor Peterson,
TRA, to Allison Knapp, City of
Pacifica, dated January 24, 2000

SUBJECT: Bowl Project Wetland Peer Review
TRA FILE: ebbp
DATE: January 24, 2000
FROM: Taylor Peterson
TO: Allison Knapp, City of Pacifica
cc: Michael Crabtree, City of Pacifica

Christine Schneider of our staff asked me to complete a peer review of wetland data on the Pacific Cove or "Bowl" Project in Pacifica. I am a senior biologist at Thomas Reid Associates, I have completed several courses with the Wetland Training Institute in wetland delineation techniques, and have done a number of wetland delineations. I have been an environmental consultant since 1980. The information I have reviewed includes the following:

1. A draft of the biology section of the project EIR;
2. "Delineation of Potential Jurisdictional Wetlands Pacific Cove Parcel Pacifica, California" by Tom Fraser of Wetlands Research Associates, July 1999;
3. Letter to Michael Crabtree, City of Pacifica Planning Department, from Tom Fraser of Wetlands Research Associates, Inc., dated December 27, 1999 regarding LCP jurisdictional wetlands;
4. Letter to Tom Fraser, Wetlands Research Associates, dated January 3, 2000 from the Department of the Army, San Francisco District, Corps of Engineers; and
5. Excerpts of Pacifica's zoning code related to wetlands and biology, including pages 462-4, 462-11, 462-12, and 462-13.

My understanding of the chain of events is that Patrick Kobernus of our staff visited the site and identified that the central coast riparian scrub habitat on the "fish" portion of the site could potentially be characterized as wetland, based on the presence of willow, rushes, sedges and standing water. Following that, Wetlands Research Associates (WRA) was hired to prepare a wetland delineation at the site. Tom Fraser of WRA did a delineation in July 1999, in which he determined that there was an area of 0.03 acre on the site that was potential jurisdictional wetland. Jurisdictional wetland is wetland that meets the federal government's definition of this habitat and thus falls under the jurisdiction of the Army Corps of Engineers through section 404 of the Clean Water Act. Tom subsequently had the Army Corps of Engineers verify his wetland delineation, and the US ACE determined that in fact there are no jurisdictional wetlands on the project site. In December 1999, Tom Fraser also completed an analysis of whether the project site contains wetland as defined in the City of Pacifica LCP, and found that it does not.

I have reviewed the delineation methodology and whether the conclusions are logical, based on the data provided. The methodology used by WRA follows that in the 1987 manual published by the USACE, and is in keeping with current practice. The area which Patrick identified as possible wetland was found by WRA to be a drainage ditch which does not fall

within USACE jurisdiction. Tom Fraser's conclusions in the delineation are conservative, meaning he delineated the area which had any chance at all of being considered a wetland under the federal definitions. In fact, the USACE made its own determination, based on a site visit, that the site does not currently support federal jurisdictional wetland. I consider that to be definitive, unless conditions at the site change significantly.

The City of Pacifica Local Coastal Plan (LCP), defines wetlands as, "land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes." In his analysis, Tom Fraser of WRA found that hydrophytic vegetation is present, but that wetland soils are not. The particular species of plants he names in this analysis are facultative, meaning they occur equally in wetland situations and upland situations. That is, they do not require saturated soils in order to grow, like an obligate wetland plant does. Thus, he reasoned that it was important to find hydric soils in concert with this vegetation to meet the LCP definition.

I found two discrepancies between the original delineation and this LCP analysis, but in the end I would agree with the conclusion that the site does not contain a wetland as defined in the LCP.

The first discrepancy is related to soils. Hydric soils are found in the delineation, then, based on his visit to the site with the USACE, he states in the LCP analysis that the site does not contain hydric soils. I am assuming that the USACE disagreed with the original wetland delineation which found small pockets of possibly hydric soil, and that the US ACE finding overrides the conclusion in the delineation.

The second discrepancy is related to vegetation. In the original delineation, several species of plants are found to be dominant, including plant species that are obligate or facultative-wet (that is, they require wetter conditions to grow). These plants are left out of the LCP analysis, which states the dominant species are willow and twinberry (both facultative species). I find, however, that this does not affect the results. In reviewing the species in the delineation and comparing it to my personal field knowledge, these additional plants are species that often grow outside of wetlands in areas that are just damp enough to support them. On the coast side, these plants are probably more dependent on moisture from fog drip than from the water table. Since hydric soils are not found on the site, I suspect this vegetation does not represent habitat that is functioning as a wetland.

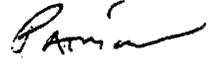
In looking at the definitions of wetland in the zoning code, and comparing it to the data at hand, I find no evidence that this site supports saltwater marsh, freshwater marsh, stream, creek, open or closed brackish water marsh, swamp, mudflat or fen habitat, and thus does not contain wetland as defined in the zoning code.

This brings me to my last comment, which is about functions and values. The project site does not contain federal jurisdictional wetlands, as determined by the US ACE, so there is no permitting concern there. The project site also does not contain wetlands as defined in the LCP or the zoning code. That is not to say, however, that developing the site will not have significant biological impacts. This still needs to be addressed in the EIR, which should look at the site in relation to off-site areas, and determine its biological functions and values and whether there are significant cumulative impacts related to biology. The California Department of Fish and Game

should also be invited to visit the site during the EIR process to discuss any concerns the Department may have related to development of this site.

Please do not hesitate to telephone if there are any questions regarding this analysis. I am best reached at (650) 917-0913.

MEMORANDUM

SUBJECT: Visit to Fish/Bowl site w/ CDFG
TRA FILE: G:\BIO\CDFGMemo.wpd
DATE: 2/2/00
FROM: Patrick 
TO: Christine

I visited the Fish/Bowl project site in Pacifica with Jeanine Dewald of CDFG on 2/2/00. We walked the site for approximately 30 minutes and I discussed with her the biological issues of the site and the development plans. Ms. Dewald had the following recommendations:

- 1) The willow area of the site should be more thoroughly surveyed in the spring for any nesting neo-tropical migrant songbird species (i.e. saltmarsh common yellowthroat, yellow warbler).
- 2) The site should be controlled for invasive exotic species, in particular iceplant (*Carpobrotus edulis*), pampas grass (*Cortaderia jubata*), and cape ivy (*Delairea odorata*).
- 3) The western portion of the parcel that is made up of sand dunes and coastal dune scrub vegetation should be controlled of iceplant and restored to coastal dune scrub habitat.

Ms. Dewald would like copies of the biological assessment(s), wetland delineation, and any other information that is pertinent to the biological resources of the site.

If you have any questions regarding her recommendations, give her a call. I think it would be good to clarify with her what she recommends (in reference to #1 above) what should be done if any sensitive neotropical songbirds are found on the site.

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WETLANDS RESEARCH ASSOCIA

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EXHIBIT 25

2-02-2-EDD (Pacific Bowl)

WRA Wetland Delineation
for the "Edgemar Road Parcel,"
dated March 2000

**Delineation of Potential
Jurisdictional Wetlands**

**Edgemar Road Parcel
Pacifica, California**

PREPARED FOR:

**North Pacifica, LLC
914 Westwood Blvd., Suite 500
Los Angeles, California 90024
Contact: Robert Kalmbach
(510) 655-5780**

PREPARED BY:

**Wetlands Research Associates, Inc.
2169 East Francisco Blvd., Suite G
San Rafael, California 94901
Contact: Tom Fraser
(415) 454-8868**

March 2000

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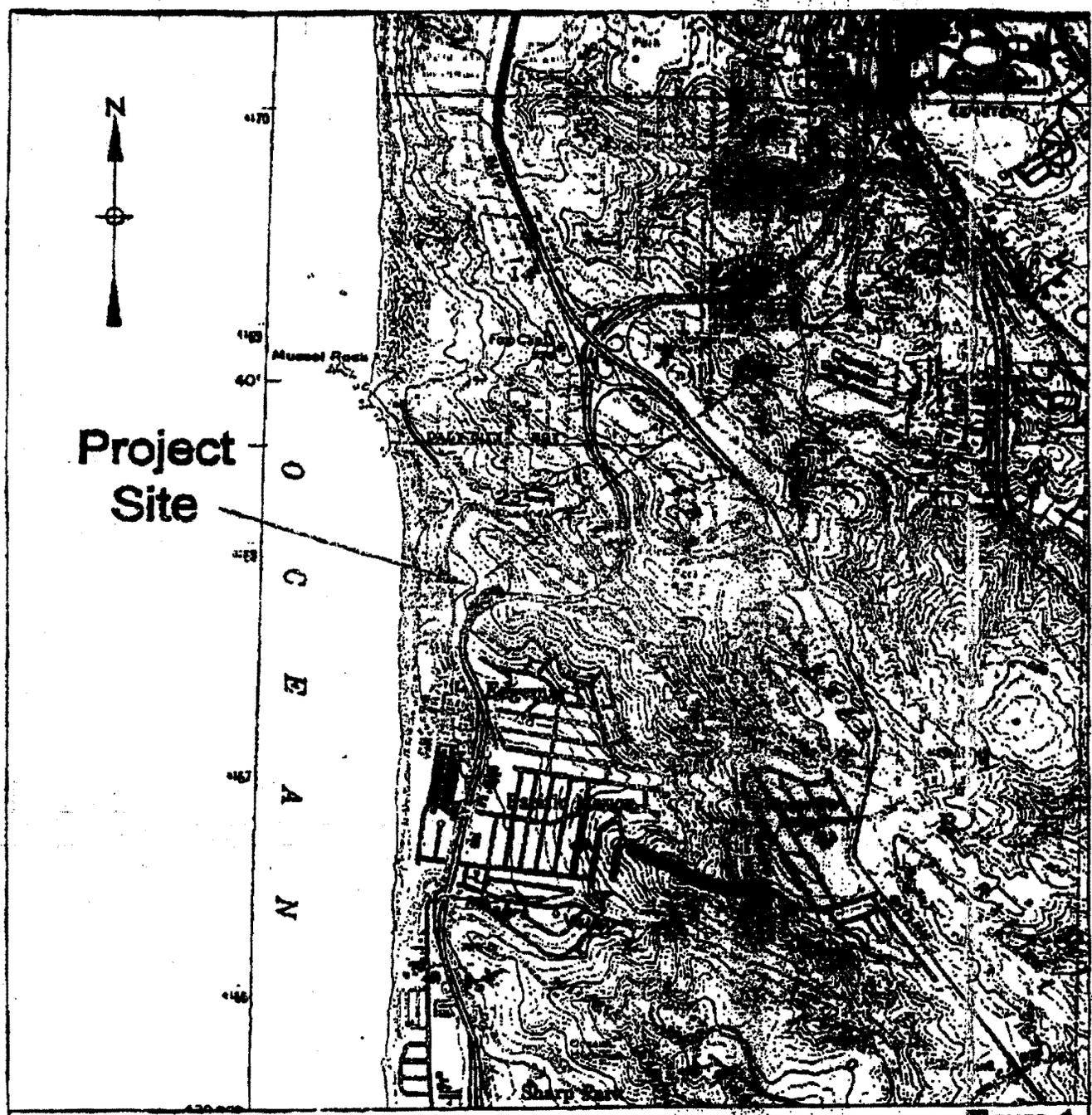


Figure 1

PURPOSE: Delineation of Jurisdictional Wetlands and Waters of the United States (Section 404 of the Clean Water Act)

USGS San Francisco South Quadrangle, 1980, showing location of Pacific Cove Parcel

LOCATION MAP

SCALE 1:24,000

North Pacifica, LLC
 814 Westwood Blvd., Suite 800
 Los Angeles, California 90024
 Contact: Robert Kuhnbergh
 Phone: 310-465-6780

Jurisdictional Wetland Delineation

LOCATION: Ogden Road Parcel, Pacifica, CA

COUNTY: San Mateo

APPLICATION BY: North Pacifica, LLC

SHEET: 1 of 3 **DATE:** March 2000

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WETLANDS RESEARCH ASSOCIATION

425 4th St. N. 50700

"Problem Areas" as defined in the Corps Manual. Once a sampling area was determined to be either a potential wetland or upland, a 1-inch = 40 feet topographic wetting tentative map (Tronoff Engineers, Surveyors, Planners; 1997) was used to draw boundaries between potential wetland and upland areas. The sizes of potential jurisdictional areas were measured using AutoCAD 14.

The vegetation, hydrology, and soil criteria used to make wetland determinations in wetland areas are summarized below.

Vegetation

Plant species identified in the Study Area were assigned a wetland status according to the U.S. Fish and Wildlife Service (Reed 1988) list of plant species that occur in wetlands. This wetland classification system is based on the expected frequency of occurrence in wetlands as follows:

OBL	Always found in wetlands	>99% frequency
FACW	Usually found in wetlands	67-99%
FAC	Equal in wetland or non-wetlands	34-66%
FACU	Usually found in non-wetlands	1-33%
NL	Not listed (upland)	<1%

Plants with OBL, FACW, and FAC classifications are classified as hydrophytic vegetation in the Corps Manual (1987) methodology. If more than 50 percent of the dominant plants (dominant is ≥20 percent of the cover) are wetland plants, the area is considered to have met the hydrophytic vegetation criterion.

Hydrology

The jurisdictional wetland hydrology criterion in a non-tidal area is satisfied if the area is inundated or saturated for a period (minimum of five percent of the growing season or 18 days in the San Francisco Bay Area) sufficient to create anoxic soil conditions during the growing season. Evidence of wetland hydrology can include direct evidence (primary indicators), such as visible inundation or saturation, surface sediment deposits, and drift lines, or indirect indicators (secondary indicators), such as oxidized root channels and algal mats. If secondary indicators are used, at least two secondary indicators must be present to conclude that an area has wetland hydrology.

Soils

Hydric soils formed under wetland (anaerobic) conditions have characteristic low chroma colors and an associated quantity of redox concentrations (mottles) near the surface, typically within the upper 12 inches (USDA, NRCS 1998). Chroma designations are determined by comparing a soil sample with a standard Munsell soil color chart (Kollmorgen 1975). Various combinations of low chroma colors and quantities of redox concentrations can be used as field indicators of hydric soils and associated anaerobic conditions. Hydric soils formed under continuous saturation, typically have

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a gleyed (grayish) matrix color in surface horizons as a result of removal or transformation (reduction) of iron. Hydric soils formed under a seasonal hydrology with accumulations of dark organic matter at the surface and have oxidized iron deposited in masses or along pores as a result of alternating saturation and drying. These soils are considered hydric if the following indicators of hydric conditions are present: (1) chroma 1 or less or (2) chroma 2 and distinct or prominent redox concentrations.

3.0 STUDY AREA DESCRIPTION

The Study Area covers approximately 1.5 acres and lies on a hillside that slopes from east to west with elevations ranging from 185 feet to 240 feet mean sea level. The Study Area is currently an undeveloped vacant lot. Portions of an abandoned asphalt roadway (Edgeman Road) cross the lower edge of the site.

The principal hydrological sources for the Study Area are precipitation, groundwater, surface run-off, and seasonal water flow in drainages from off-site sources. The Study Area is primarily a steep to moderately sloped parcel with sheet runoff during heavy rainfall and winter months. Surface flow on the site is generally carried toward the adjacent and lower vacant Pacific Cove parcel.

The Soil Survey of San Mateo County, Eastern Part, and San Francisco County, California (SCS 1991) indicates that the Study Area has two soil types: Orthents, cut and fill-Urban land complex 5 to 75 percent slopes and Rock outcrop-Orthents complex, 30 to 75 percent slopes (Figure 2). The County Soil Survey describes Orthents as very shallow to very deep, very poorly drained to excessively drained soils on uplands including hills and ridgetops; alluvial fans; coastal terraces; floodplains; and tidal flats. These soils formed in alluvium derived from various kinds of rock; sandy coastal deposits; hard and soft sandstone, shale, siltstone, serpentine, and volcanic rock; and various manmade fill material. Orthents soils are extremely variable. They consist of areas of undisturbed loamy material on coastal terraces; areas that have been mechanically altered for residential and other urban uses and have cuts that have slopes of 3:1 to 1.5:1 and fills that are 0 to 75 feet deep or more; smoothed areas on alluvial fans and plains; reclaimed areas near San Francisco Bay; and areas on the margins of the bay that consist of earthy material, rock fragments, plant matter, and manmade debris. Runoff is medium to very rapid, and the hazard of water erosion is moderate to very high. The soils of the Study Area are sandy loams on coastal terraces and show the impacts of disturbance related to highway development and on-site construction.

The Study Area is dominated by northern coastal scrub with small areas of coastal terrace prairie habitat. These areas are dominated by upland plants such as slender wild oat (*Avena barbata*), coyote brush (*Baccharis pilularis*), black mustard (*Brassica nigra*), poison oak (*Toxicodendron diversilobum*). A sloped area on the eastern end of the project site is dominated by arroyo willow (*Salix lasiolepis*). The wetland area identified on the site is dominated by wetland plant species.

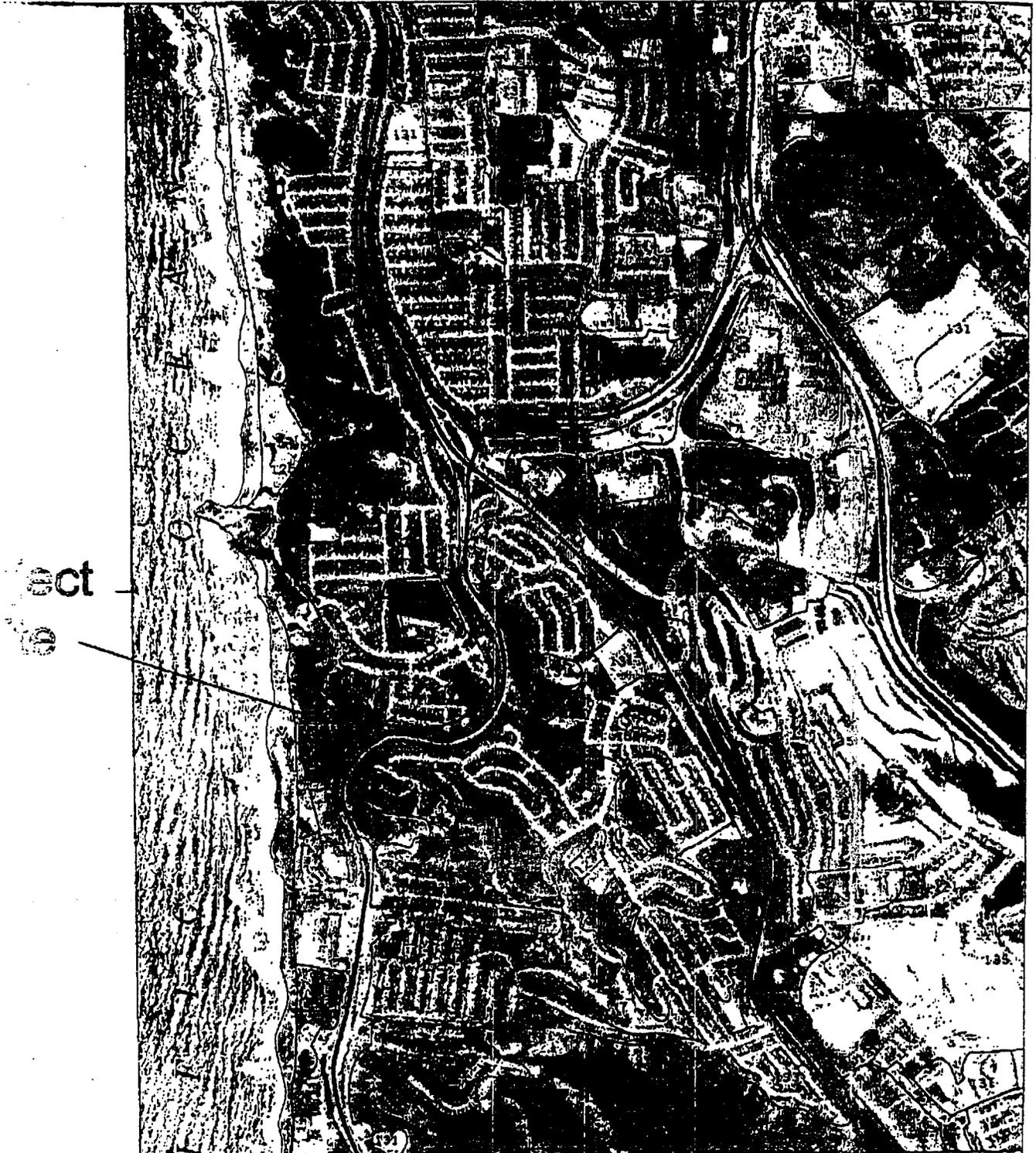


Figure 2

Delineation of Jurisdictional
 Waters of the United States
 (of the Clean Water Act)
 Survey, San Mateo County Sells

SOILS MAP
 1000 0 1000 2000 FEET
 SCALE 1:24,000
 North Pacific, LLC
 814 Westwood Blvd., Suite 600
 Los Angeles, California 90024
 Contact: Robert Kelmbeck
 Phone: 610-685-6780

Jurisdictional Wetland Delineation
 LOCATION: Edgemoor Road Parcel, Pacifica, CA
 COUNTY: San Mateo
 APPLICATION BY: North Pacific, LLC
 SHEET: 2 of 3 DATE: MARCH 2000

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4.0 RESULTS

A routine level wetland delineation was conducted at the Edgemar Road Parcel Study Area in June 1999. The site was field reviewed for potential jurisdictional wetland areas, and four sampling points were established to determine whether areas met the Corps wetland criteria. Field data collected at sampling points are shown on Corps data sheets in Appendix A. From this sampling, a potential jurisdictional wetland was identified. The potential jurisdictional area is described in the following sections and depicted on the enclosed site map (Figure 3).

Potential jurisdictional wetlands were identified within the Study Area in a small depression at the south end of the site that appears to pond water seasonally. The site indicates a drainage ditch dug in uplands that lies along the edge of the abandoned Edgemar Road.

4.1 Wetland Criteria

Vegetation

Dominant vegetation in the potential Section 404 wetland consisted of hydrophytic species including meadow barley (*Hordeum brachyantherum*, FACW), Baltic rush (*Juncus balticus*, OBL), bird-foot trefoil (*Lotus corniculatus*, FAC), and curly dock (*Rumex crispus*, FACW). Dominant plants in upland areas included slender wild oat (*Avena barbata*, NL), coyote brush (*Baccharis pilularis*, NL), black mustard (*Brassica nigra*, NL), small quaking grass (*Briza minor*, FACW), coffeeberry (*Rhamnus californica*, NL), and arroyo willow (*Salix lasiolepis*).

Hydrology

The principal hydrological sources for the potential jurisdictional wetland appears to be seasonal surface flow and direct precipitation. The wetland is the result of excavation into a man-made terrace used for access to the site. At the time of the June 1999 field visit, neither ponding nor saturation existed in wetlands on the site. A subsequent site visit on March 10, 2000 indicated that the excavated area was ponded with rainwater.

In June 1999, wetland plot 1A had a single primary wetland hydrology indicator of sediment deposits. The upland plots did not possess any wetland hydrology indicators.

Soils

Soils in the Study Area corresponded fairly well to the mapped soil types (Orthents). Saturated soil conditions that resulted in the formation of hydric soil indicators observed at the wetland sampling point are seasonal, as evidenced by the lack of groundwater to 1 m depth in all soil pits dug during the site delineation.

Soils in the potential jurisdictional wetland areas have a low chroma matrix (10YR 3/2) with mottles

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WETLANDS RESEARCH ASSOCIATION

within the upper 12 inches with mottles (7.5YR 5/8). Soils in riparian areas had soils with matrix chroma of 2 or 3, but lacked mottles. Certain upland areas were dominated by hydrophytic vegetation such as arroyo willow, and appeared to carry surface flow during winter storms, but the well-drained nature of most of the soils on this site and the steep slopes over much of the site apparently prevent the long-term saturation of these soils which would lead to the development of hydric soil characteristics.

5.0 AREA OF POTENTIAL CORPS OF ENGINEERS JURISDICTION

The potential jurisdictional wetland within the Edgemar Road Parcel Cove Study Area is characterized by seasonal soil saturation in an excavated area that allows for local ponding. The potential jurisdictional wetlands area on the site is 0.005 acres (215 ft²).

The ditch along the eastern edge of Edgemar Road is an artificial feature that should not be considered a Section 404 jurisdictional water of the United States. The ditch was created by excavation on dry uplands. This exclusion from jurisdiction is described in the preamble to the November 13, 1986 Federal Register publication 33 C.F.R. part 320 in which the present jurisdictional definitions were set forth (see 51 F.R. 41217). The preamble states: "For clarification it should be noted that we generally do not consider the following waters to be 'Waters of the United States', (a) Non-tidal drainage and irrigation ditches excavated on dry land."

The area of arroyo willow on the northeastern portion of the site was examined and determined not to be a "water of the United States". The soils are well drained and the surface slope is steep allowing for rapid runoff. No running water was observed in March 2000 despite very heavy rainfall in February 2000. On several visits to the site following rainstorms, no surface water was observed flowing within the willow area. The soils did not meet hydric soil criteria. Therefore, this area was not mapped as a potential jurisdictional area.

6.0 REFERENCES

Aerotopia. Aerial photograph of the project area in Pacifica, California.

Environmental Laboratory. 1987. Corps of Engineers Wetlands Definition Manual. Department of the Army, Waterways Experiment Station, Vicksburg, Mississippi 39180-0631.

Kollmorgen Corporation. 1975. Munsell Soil Color Charts. Kollmorgen Corporation, Baltimore.

Reed, P. B., Jr. 1988. National list of plant species that occur in wetlands: California (Region 0). U. S. Fish and Wildlife Service Biological Report 88 (26.10).

Tronoff Engineers, Surveyors, Planners. 1997. A 1 inch = 40 feet topographic vesting tentative map of the Edgemar Road site.

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U.S. Geological Survey. 1980. San Francisco South quadrangle. 7.5 minutes (topographic).

U.S. Soil Conservation Service. 1991. Soil Survey of San Mateo County, Eastern Part, and San Francisco County, California. In cooperation with the University of California Agricultural Experiment Station; 120 pp. + appendices.

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WETLANDS RESEARCH RESULTS

P. 11/16

APPENDIX A - Corps Delineation Data Sheets

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WETLANDS RESEARCH ASSOCIATION

P. 12/00

**DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)**

Project/Site: Pacific Cove - Fish and Sewer Parcel		Date: 8/11/00
Applicant/Owner: Trumark Companies		County: San Mateo
Investigator: Wetlands Research Associates, Inc.		City: CA
Do Normal Circumstances exist on the site?	<input checked="" type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Agency ID: _____
Is the site significantly disturbed (Atypical Situation)?	<input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Project ID: _____
Is the area a potential Problem Area? (if needed explain on reverse.)	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Project No: _____

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. Rumex crispus	H	FACW-	9.		
2. Hordeum brachyantherum	H	FACW	10.		
3. Juncus balticus	H	OBL	11.		
4. Lotus corniculatus	H	FAC	12.		
5.			13.		
6.			14.		
7.			15.		
8.			16.		

Percent of Dominant Species that are OBL, FACW and/or FAC: **100%**
(excluding FAC-)

Remarks: **Site is dominated by hydrophytic vegetation.**

HYDROLOGY

<p>Recorded Data</p> <p><input type="checkbox"/> Stream, Lake or Tide Gauge</p> <p><input type="checkbox"/> Aerial Photographs</p> <p><input type="checkbox"/> Other</p> <p>No Recorded Data Available</p>	<p>Wetland Hydrology Indicators:</p> <p>Primary Indicators:</p> <p><input type="checkbox"/> Inundation</p> <p><input type="checkbox"/> Seasonally Upper 12 inches</p> <p><input type="checkbox"/> Water Table</p> <p><input type="checkbox"/> Soil Lines</p> <p><input type="checkbox"/> Sediment Deposits</p> <p><input type="checkbox"/> Oxidation-reduction in Wetlands</p> <p>Secondary Indicators (2 or more required):</p> <p><input type="checkbox"/> Color and Clarity Changes in Upper 12 inches</p> <p><input type="checkbox"/> Water-Related Odors</p> <p><input type="checkbox"/> Local Hydrology Data</p> <p><input type="checkbox"/> FAC History Data</p> <p><input type="checkbox"/> Other (Specify in Remarks)</p>
<p>Field Observations:</p> <p>Depth of Surface Water: 0 (in.)</p> <p>Depth to Free Water in Pit: not reached (in.)</p> <p>Depth to Saturated Soil: not reached (in.)</p>	
<p>Hydrology Remarks: Algal mats present - Hydrologic indicators present.</p>	

APR-11-2001 13:17

WETLANDS RESEARCH ASSOCIATION

03/30/2002 P. 13/20

SOILS

Map Unit Name
(Series and Phase): Orthents, cut and fill-Urban land complex S-75% Drainage Class: well-drained

Taxonomy (Subgroup): Orthents Field Observations
Cecilia Mapping Type? Yes No

Profile Description:

Depth (Inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance / Contrast	Texture, Concretions, Structure, etc.
0-12"	A	10YR 3/2	7.5YR 5/5	abundant, distinct	

Hydric Soil Indicators:

<input type="checkbox"/> Histosol	<input type="checkbox"/> Concretions
<input type="checkbox"/> Histic Epipedon	<input type="checkbox"/> High Organic Content in Surface Layer in Organic Soils
<input type="checkbox"/> Sulfidic Odor	<input type="checkbox"/> Organic Sleazling in Sandy Soils
<input type="checkbox"/> Aquic Moisture Regime	<input type="checkbox"/> Listed On Local Hydric Soils List
<input type="checkbox"/> Reducing Conditions	<input type="checkbox"/> Listed On National Hydric Soils List
<input checked="" type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Other (Explain in Remarks)

Profile Remarks: Hydric soil indicators present.

WETLAND DETERMINATION

Hydrophytic Vegetation Present?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Wetland Hydrology Present?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Hydric Soil Present?	<input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Remarks: All three wetland criteria are present.		Is this Sampling Point a Hydric Wetland? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No

Approved By HOUFACE 3/82

APR-11-2001 13:17

WETLANDS RESEARCH ASSOCIATES

DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)

Project/Site: Pacific Cove - Fish and Bowl Parcel		Date: 8/11/99
Applicant/Owner: Trumark Companies		County: San Mateo
Investigator: Wetlands Research Associates, Inc.		State: CA
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Community ID: _____
Is the area a potential Problem Area? (if needed explain on reverse.) <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		Project ID: 12

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. <i>Saccharis pilularis</i>	S	NL	9. _____		
2. <i>Avena barbata</i>	H	NL	10. _____		
3. <i>Briza minor</i>	H	FACW-	11. _____		
4. _____			12. _____		
5. _____			13. _____		
6. _____			14. _____		
7. _____			15. _____		
8. _____			16. _____		

Percent of Dominant Species that are OBL, FACW and/or FAC: **33%**
 (excluding FAC-)

Remarks: **Site is not dominated by hydrophytic vegetation**

HYDROLOGY

<p>Recorded Data</p> <p><input type="checkbox"/> Stream, Lake or Tide Gauge</p> <p><input type="checkbox"/> Aerial Photographs</p> <p><input type="checkbox"/> Other</p> <p>No Recorded Data Available</p>	<p>Wetland Hydrology Indicators:</p> <p>Primary Indicators:</p> <p><input type="checkbox"/> Inundation</p> <p><input type="checkbox"/> Sediment in Upper 18 inches</p> <p><input type="checkbox"/> Water Table</p> <p><input type="checkbox"/> Dist. Lines</p> <p><input type="checkbox"/> Sediment Deposits</p> <p><input type="checkbox"/> Unusually Abundant Wetlands</p> <p>Secondary Indicators (2 or more required):</p> <p><input type="checkbox"/> Occurrence of Grasses in Upper 18 inches</p> <p><input type="checkbox"/> Water-Blurred Leaves</p> <p><input type="checkbox"/> Local Rooting Data</p> <p><input type="checkbox"/> FAC-2/3/4/5/6/7/8/9/10/11/12/13/14/15/16/17/18/19/20/21/22/23/24/25/26/27/28/29/30/31/32/33/34/35/36/37/38/39/40/41/42/43/44/45/46/47/48/49/50/51/52/53/54/55/56/57/58/59/60/61/62/63/64/65/66/67/68/69/70/71/72/73/74/75/76/77/78/79/80/81/82/83/84/85/86/87/88/89/90/91/92/93/94/95/96/97/98/99/100</p> <p><input type="checkbox"/> Other (Specify in Remarks)</p>
<p>Field Observations:</p> <p>Depth of Surface Water: _____ (in.)</p> <p>Depth to Free Water in Pit: _____ (in.)</p> <p>Depth To Saturated Soil: _____ (in.)</p>	<p>Hydrology Remarks: No hydrologic indicators present.</p>

APR-11-2001 13:17
SOILS

WETLANDS RESEARCH ASSOCIATION

11/13/00

Map Unit Name (Series and Phase): <u>Orthents, cut and fill-Urban land complex S-78%</u>		Drainage Class: <u>well drained</u>			
Taxonomy (Subgroup): <u>Orthents</u>		Field Observations Condition Mapped Type? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No			
Profile Description:					
Depth (Inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance / Contrast	Textures, Concretions, Structures, etc.
0-12"	A	10YR 3/2		no mottles present	
Hydric Soil Indicators:					
<input type="checkbox"/> Histosol	<input type="checkbox"/> Concretions				
<input type="checkbox"/> Histic Epipedon	<input type="checkbox"/> High Organic Content in Surface Layer in Sandy Soils				
<input type="checkbox"/> Sulfidic Odor	<input type="checkbox"/> Organic Streaking in Sandy Soils				
<input type="checkbox"/> Aquic Moisture Regime	<input type="checkbox"/> Listed On Local Hydric Soils List				
<input type="checkbox"/> Reducing Conditions	<input type="checkbox"/> Listed On National Hydric Soils List				
<input type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Other (Explain in Remarks)				
Profile Remarks: No hydric soil indicators present.					

WETLAND DETERMINATION

Hydrophytic Vegetation Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Is this Sampling Point Within a Wetland? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No
Wetland Hydrology Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Hydric Soil Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Remarks: None of the three wetland criteria are present.	

Approved By: HOUFACE S/S2

APR-11-2001 13:18

WETLANDS RESEARCH ASSOCIATES

REVISED 11/83

P. 10/00

DATA FORM
ROUTINE WETLAND DETERMINATION
 (1987 COE Wetlands Definition Manual)

Project/Site: Pacific Cove - Fish and Bowl Parcel		Date: 8/11/88
Applicant/Owner: Trumark Companies		County: San Mateo
Investigator: Wetlands Research Associates, Inc.		State: CA
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Community ID: _____
Is the area a potential Problem Area? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	seasonal wetland	Township ID: _____
(If needed explain on reverse.)		Parcel ID: 2A

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. Salix lasiolepis	T	FACW	9.		
2.			10.		
3.			11.		
4.			12.		
5.			13.		
6.			14.		
7.			15.		
8.			16.		

Percent of Dominant Species that are OBL, FACW and/or FAC: **100%**
 (excluding FAC)

Remarks: Site is dominated by hydrophytic vegetation.

HYDROLOGY

Recorded Data <input type="checkbox"/> Stream, Lake or Tide Gauge <input type="checkbox"/> Aerial Photographs <input type="checkbox"/> Other No Recorded Data Available	Wetland Hydrologic Indicators: Primary Indicators: <input checked="" type="checkbox"/> Inundated <input checked="" type="checkbox"/> Saturation in Upper 10 inches <input type="checkbox"/> Water Table <input type="checkbox"/> Drift Lines <input type="checkbox"/> Sediment Deposits <input type="checkbox"/> Oxidation Patterns in Wetlands Secondary Indicators (2 or more required): <input type="checkbox"/> Organic Soil Chemistry in Upper 12 inches <input type="checkbox"/> Water-logged Leaves <input type="checkbox"/> Local Subsurface Data <input type="checkbox"/> FAC-optional test <input type="checkbox"/> Other (Specify in Remarks)
Field Observations: Depth of Surface Water: _____ (in.) Depth to Free Water in Pit: _____ (in.) Depth To Saturated Soil: _____ (in.)	Hydrology Remarks: Hydrologic indicators present.

APR-11-2001 13:18

WETLANDS RESEARCH ASSOCIATION

P. 1/1/00

SOILS

Map Unit Name
(Series and Phase): Rock outcrop Orthents complex, 30-75% slopes Drainage Class: Floody to well-drained

Taxonomy (Subgroup): Orthents Field Observations: _____
 Contain Manganese? Yes No

Profile Description:

Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Color (Munsell Moist)	Mottle Abundance / Contrast	Texture, Compaction, Structure, etc.
0-12"	A	10YR 2/1			

Hydric Soil Indicators:

<input type="checkbox"/> Mosaic	<input type="checkbox"/> Concretions
<input type="checkbox"/> Mistic Epipedon	<input type="checkbox"/> High Organic Content in Surface Layer in Sandy Soils
<input type="checkbox"/> Sulfidic Odor	<input type="checkbox"/> Organic Streaking in Sandy Soils
<input checked="" type="checkbox"/> Aquic Moisture Regime	<input type="checkbox"/> Listed On Local Hydric Soils List
<input type="checkbox"/> Reducing Conditions	<input type="checkbox"/> Listed On National Hydric Soils List
<input checked="" type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Other (Explain in Remarks)

Profile Remarks: Hydric soil indicators present.

WETLAND DETERMINATION

Hydrophytic Vegetation Present? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Wetland Hydrology Present? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Hydric Soil Present? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	
Is this Sampling Point a Wetland? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Remarks: <u>All three wetland criteria are present, but area is exempt as a rock outcrop.</u>	

Prepared by HOUSSAGE S/S

APR-11-2001 13:19

WETLANDS RESEARCH ASSOCIATES

P. 11/1/20

**DATA FORM
ROUTINE WETLAND DETERMINATION
(1987 COE Wetlands Delineation Manual)**

Project/Site: Pacific Cove - Fish and Bowl Parcel		Map: 971122
Applicant/Owner: Trumark Companies		County: San Mateo
Investigator: Wetlands Research Associates, Inc.		State: CA
Do Normal Circumstances exist on the site? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	Is the site significantly disturbed (Atypical Situation)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	City/Township: _____
Is the area a potential Problem Area? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No	(If needed explain on reverse.) seasonal wetland	Project ID: 28

VEGETATION

Dominant Plant Species	Stratum	Indicator	Dominant Plant Species	Stratum	Indicator
1. <u>Salix lasiolepis</u>	<u>T</u>	<u>FACW</u>	9. _____	_____	_____
2. <u>Baccharis pilularis</u>	<u>S</u>	<u>NL</u>	10. _____	_____	_____
3. <u>Rhamnus californica</u>	<u>S</u>	<u>NL</u>	11. _____	_____	_____
4. _____	_____	_____	12. _____	_____	_____
5. _____	_____	_____	13. _____	_____	_____
6. _____	_____	_____	14. _____	_____	_____
7. _____	_____	_____	15. _____	_____	_____
8. _____	_____	_____	16. _____	_____	_____

Percent of Dominant Species that are OBL, FACW and/or FAC: **33%**
(excluding FAC-)

Remarks: **Site is not dominated by hydrophytic vegetation**

HYDROLOGY

<p>Recorded Data</p> <p><input type="checkbox"/> Stream, Lake or Tide Gauge</p> <p><input type="checkbox"/> Aerial Photographs</p> <p><input type="checkbox"/> Other</p> <p>No Recorded Data Available</p>	<p>Wetland Hydrology Indicators:</p> <p>Primary Indicators:</p> <p><input type="checkbox"/> Inundation</p> <p><input type="checkbox"/> Surface Water in Upper 12 inches</p> <p><input type="checkbox"/> Water Table</p> <p><input type="checkbox"/> Drill Logs</p> <p><input type="checkbox"/> Sediment Deposits</p> <p><input type="checkbox"/> Organic Deposits in Wetlands</p> <p>Secondary Indicators (2 or more required):</p> <p><input type="checkbox"/> Callus Root Growth in Upper 12 inches</p> <p><input type="checkbox"/> Water-Soaked Leaves</p> <p><input type="checkbox"/> Local Soil Moisture Data</p> <p><input type="checkbox"/> FAC Hydrology</p> <p><input type="checkbox"/> Other (List in Remarks)</p>
<p>Field Observations:</p> <p>Depth of Surface Water: _____ (in.)</p> <p>Depth to Free Water in Pit: _____ (in.)</p> <p>Depth To Saturated Soil: _____ (in.)</p>	<p>Hydrology Remarks: No hydrologic indicators present.</p>

APR-11-2001 13:19

WETLANDS RESEARCH ASSOCIATION

303 438 8125

P. 13/00

SOILS

Map Unit Name
 (Series and Phase): Rock outcrop-Orthents complex, 30-75% slopes **Drainage Class:** Poorly- to well-drained

Taxonomy (Subgroup): Orthents **Field Observations:**
 Confirm Mapped? Yes No

Profile Description:

Depth (inches)	Horizon	Matrix Color (Munsell Moist)	Mottle Colors (Munsell Moist)	Mottle Abundance / Contrast	Texture, Concretions, Structure, etc.
0-12"	A	10YR 2/2		no mottles present	

Hydric Soil Indicators:

<input type="checkbox"/> Histosol	<input type="checkbox"/> Concretions
<input type="checkbox"/> Histic Epipedon	<input type="checkbox"/> High Organic Content in Surface Layer in Sandy Soils
<input type="checkbox"/> Sulfidic Odor	<input type="checkbox"/> Organic Streaking in Sandy Soils
<input type="checkbox"/> Aquic Moisture Regime	<input type="checkbox"/> Listed On Local Hydric Soils List
<input type="checkbox"/> Reducing Conditions	<input type="checkbox"/> Listed On National Hydric Soils List
<input type="checkbox"/> Gleyed or Low-Chroma Colors	<input type="checkbox"/> Other (Explain in Remarks)

Profile Remarks: No hydric soil indicators present.

WETLAND DETERMINATION

Hydrophytic Vegetation Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Wetland Hydrology Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Hydric Soil Present? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Is this Sampling Point Within a Wetland? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
Remarks: None of the three wetland criteria are present.	

Approved By HOUSEACE 3/02



DEPARTMENT OF THE ARMY
SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS
333 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105-2197

EXHIBIT 26

2-02-2-EDD (Pacific Bowl)

Letter from C. Fong, ACOE,
to T. Fraser, WRA,
dated May 11, 2001

REPLY TO

MAY 11 2001

Regulatory Branch

Subject: File Number 25142S

Mr. Michael Jossetyn
Wetland Research Associates, Inc.
2169-G East Francisco Blvd.
San Rafael, California 94901

Dear Mr. Fraser:

Thank you for your submittal of February 19, 2001 requesting a reevaluation of the extent of Corps of Engineers jurisdiction at the Edgemar parcel located in Pacifica, San Mateo County, California

Based on the current conditions of the site, we have determined that the wetlands identified on the site in our July 21, 2000 delineation are isolated, non-navigable, intrastate waters, and are therefore not subject to regulation under Section 404 of the Clean Water Act (33 U.S.C. 1344). A change in the conditions on the site may also change the extent of our jurisdiction. This jurisdictional determination will expire in five years from the date of this letter. However, if there has been a change in circumstances that affects the extent of Corps jurisdiction, a revision may be done before that date.

This determination does not obviate the need to obtain other Federal, State or local approvals required by law, including compliance with the Endangered Species Act (16 U.S.C. 1531 et seq.).

If you have any questions, please call Bob Smith of our Regulatory Branch at telephone 415-977-8450. All correspondence should reference the file number at the head of this letter.

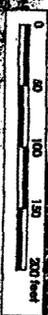
Sincerely,

A handwritten signature in black ink, appearing to read "Calvin C. Fong".

Calvin C. Fong
Chief, Regulatory Branch

Copy furnished:

US EPA, San Francisco, CA
RWQCB, Oakland, CA



PURPOSE: Delineation of Jurisdictional Wetlands and Waters of the United States (Section 404 of the Clean Water Act)
SOURCE: Aerialphoto Air Photo

WESTLANDS MAP
SCALE 1:1200

Titanium Corporation
4115 Bayview
Daly City, California 94020
Contact: James K. Baker
Phone: 652-944-3000

LOCATION: Pacific Cove Site, Pacifica, CA
COUNTY: San Mateo
APPLICATION BY: Titanmark Company
SHEET: 3 of 3 DATE: AUGUST 1999

Jurisdictional Wetland Delineation

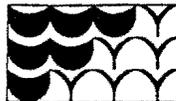
Evolution Area Boundary
Sample Point

 Jurisdictional determination for the Pacific Cove parcel, City of Pacifica, San Mateo County, California, under Section 404 of the Clean Water Act.
US Army Corps of Engineers
San Francisco District
Regulatory Branch

	Study Area Boundary		Parcel has no areas of Corps jurisdiction.
			

FILE NO: 247095 DATE: December 29, 1999 *AW*

Letter from WRA
to the City of Pacifica,
dated March 19, 2002



Wetlands Research Associates, Inc.

March 19, 2002

City of Pacifica
Planning Department
170 Santa Maria Avenue
Pacifica, CA 94044

RE: Pacific Cove Development

Dear Sirs:

The City has asked that our firm provide a confirmation on its determination as to the absence of any LCP wetlands on the subject property. Prior to conducting a site visit, I reviewed our delineation report dated August 1999, the Corps of Engineers determination dated January 3, 2000, a letter prepared by Tom Fraser of my staff on his analysis of the absence of LCP wetlands on the site, and a peer review summary prepared by Christine Schneider of TRA.

I walked the project site on March 11, 2002. I did not observe any standing water within the portion referred to as the Bowl parcel in our previous reports. The site has remained unchanged in use. I inspected those areas where we took data for our previous analyses and observed no hydrologic indicators. Invasive plant species are more prevalent than reported previously. Otherwise, the site conditions have remained unchanged and the conclusion reached in the above mentioned reports that no LCP wetlands are present within the Bowl parcel remains valid.

In our delineation report to the Corps of Engineers on the Fish parcel (March 2000), we noted the presence of two areas that exhibited prolonged hydrology. One was a man-made excavation that is outside the current proposed project covered by this EIR. The second was a drainage ditch within the City right-of-way for Edgemar Road (along a portion of the upper edge of Edgemar Road). This area is also outside the grading area proposed under this EIR. We noted that this feature is a drainage ditch that had been dug on uplands and receives water from areas that are upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway. Vegetation and silt has accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road. Some temporary puddles have formed on the asphalt; however, I did not observe on March 11 nor have I ever observed during numerous site visits to the Bowl parcel, any ponding downslope of Edgemar Road within the Bowl parcel itself.

2169-G East Francisco Blvd., San Rafael, CA 94901 (415) 454-8868/FAX (415) 454-0129

As this area is a public street, I understand that the City of Pacifica is charged with the maintenance of this road and its drainage ditch. Under routine maintenance, this roadside ditch would carry storm runoff to the City's drainage system. The Corps of Engineers concluded that they did not have jurisdiction over this ditch or any other portion of the Fish parcel.

The City of Pacifica LCP does not consider drainage ditches to be environmentally sensitive areas or wetlands. In addition, the California Coastal Commission determined that ditches were not considered wetlands in the Commission adopted *Statewide Interpretive Guideline for Wetlands and Other Wet Environmentally Sensitive Habitat Areas* (Adopted on February 4, 1981). In its determination, the Commission stated in Appendix D:

For the purposes of identifying wetlands using technical criteria contained in this guideline, one limited exception will be made. That is, drainage ditches as defined herein will not be considered wetlands under the Coastal Act. A drainage ditch shall be defined as a narrow (usually less than 5 feet wide), man-made non-tidal ditch excavated from dry land.

The feature along the upper edge of Edgemar Road meets the definition of a drainage ditch and is subject to maintenance under the City's standards. It does not qualify as a LCP wetland.

Please call with any questions on this matter.

Sincerely yours,



Michael Josselyn, PhD
Certified Professional Wetland Scientist

cc. Robert Kahnbach
Keith Fromm



Wetlands Research Associates, Inc.

EXHIBIT 28
2-02-2-EDD (Pacific Bowl)
Letter from WRA
to the City of Pacifica,
dated May 22, 2002

May 22, 2002

City of Pacifica
Planning Department
170 Santa Maria Avenue
Pacifica, CA 94044

RE: Pacific Cove Development

Dear Sirs:

I have been requested by Thomas Reid Associates, the consultant preparing the DEIR for the proposed Pacific Cove Development to provide further information about the presence of any jurisdictional wetlands (both federal and LCP) within property that is off-site from the proposed project.

My March 19, 2002 letter to the City provided my opinion on the absence of any Clean Water Act (as administered by the Corps of Engineers) or LCP (as administered by the City of Pacifica) wetlands within the proposed grading footprint of the project. This opinion covered the proposed grading footprint of the project as outlined in the attached map.

My March 19, 2002 letter also dealt with my opinion on the drainage ditch that exists along Edgemar Road. Because it is a drainage ditch, it is exempt from jurisdiction as a wetland under the Statewide Interpretative Guidelines.

TRA also requested my opinion on the presence of an excavation that now supports certain wetland vegetation. I have attached a figure that shows the location of this excavated pit and a distance of 100 ft from the center of this pit to the grading area of the project¹. This excavation was determined to be non-jurisdictional by the Corps of Engineers on the basis that it is an 'isolated' feature that is not connected to any "waters of the United States". While there is no specific exclusion for excavated pits in the Coastal Act, it is nonetheless the result of man-made activities and was excavated out of dry upland. It contains no fish and is too small to be used by waterbirds. Given its small size and disturbed nature, it has low biological values. As a result, a 100 ft buffer is not necessary to protect its current or likely future values. While this letter is not intended to

¹ The portion of the project site intersected by the 100 ft buffer distance is Edgemar Road, a public street. Edgemar Road currently exists within 100 ft of the excavated feature and to the extent that grading occurs in this area, it is that necessary to repair an existing public facility.

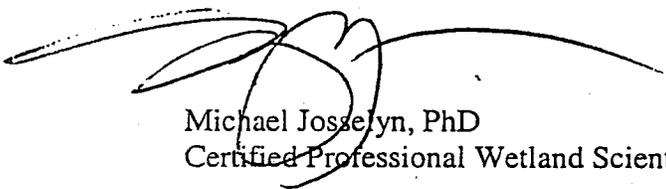
2169-G East Francisco Blvd., San Rafael, CA 94901 (415) 454-8868/FAX (415) 454-0129

provide a detailed analysis of buffer issues related to this feature, it is likely that only a minimal buffer, if any, is necessary since it is currently contained within a disturbed area on the site.

The 100 ft distance from this feature encompasses an existing public street that will be repaired. The 100 ft distance does not affect any proposed portion of the development itself outside of the existing public street. In addition, the grading is proposed down slope from the excavated area and therefore neither sediments nor runoff from the grading or completed project will affect its quality. Therefore, it seems reasonable to expect that grading within this distance will have no effect on the excavated pit.

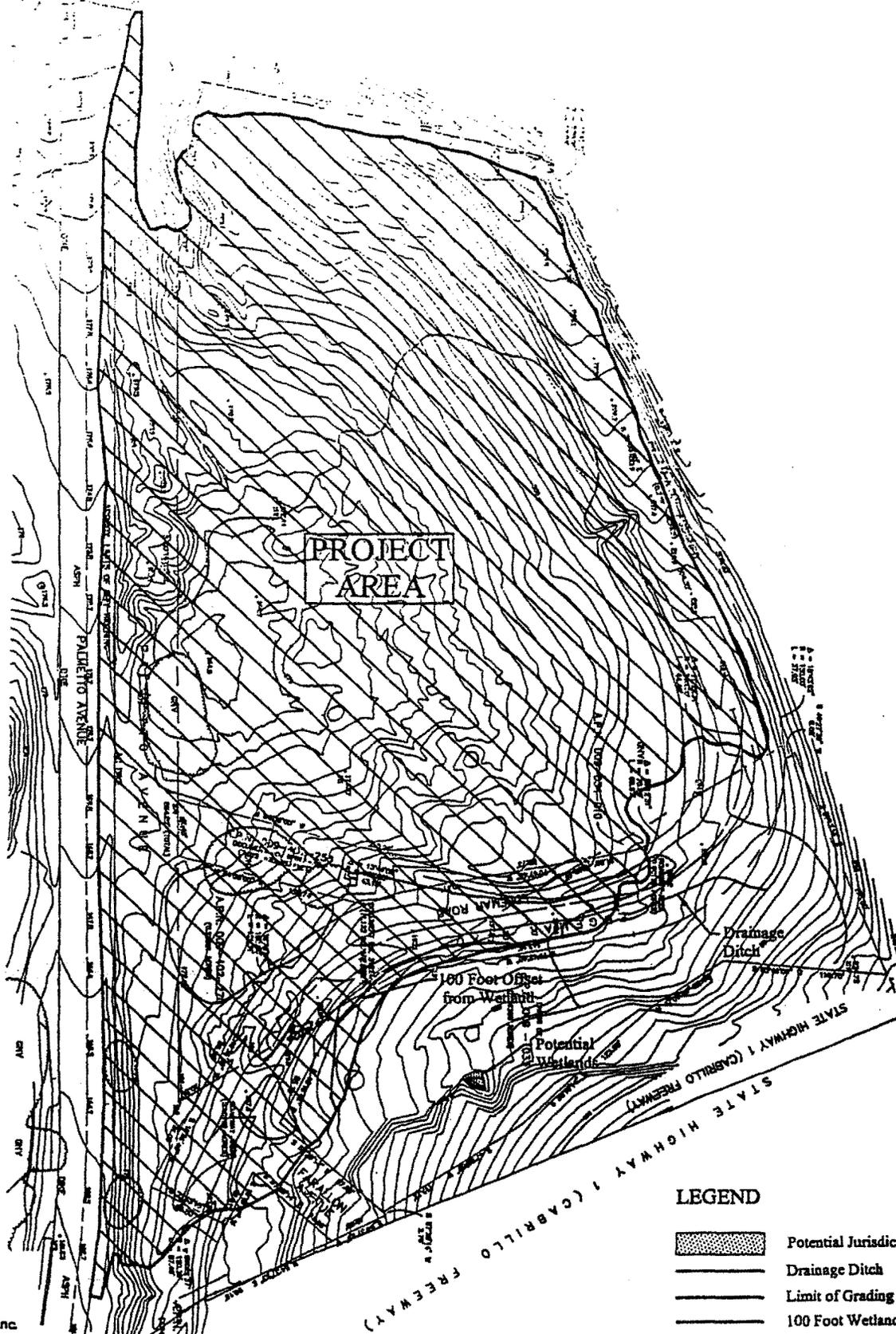
Please call me with any questions.

Sincerely yours,



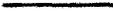
Michael Josselyn, PhD
Certified Professional Wetland Scientist

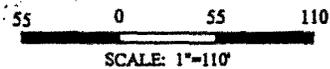
cc. Robert Kalmbach
Keith Fromm
Thomas Reid



Wetlands Research Associates, Inc.

LEGEND

-  Potential Jurisdictional Wetlands
-  Drainage Ditch
-  Limit of Grading
-  100 Foot Wetland Offset



Wetlands Research Associates, Inc.
 2169-G East Francisco Blvd.
 San Rafael, CA 94901
 Contact: Michael Josselyn
 Phone: 415-454-8868
 Fax: 415-454-0129

PACIFICA BOWL

PROJECT: 7031
 DATE: May 21, 2002
 FILE: 7031\dwg\wra\pacific_a_grad.dwg

Figure 1

**OFFSITE POTENTIAL
 WETLAND**

UTM: UTM-INTL., NAD 83 10N

CALIFORNIA COASTAL COMMISSION

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EXHIBIT 29

2-02-2-EDD (Pacific Bowl)

Memorandum from Commission
Biologist John Dixon to Peter Imhof,
et.al., dated Nov. 21, 2002



MEMORANDUM

FROM: John Dixon, Ph.D.
Ecologist / Wetland Coordinator

TO: Peter Imhof, Chris Kern, Ann Cheddar, Amy Roach

SUBJECT: Wetlands on or adjacent to the Pacifica Bowl property

DATE: November 20, 2002

Documents reviewed:

1. P. Kobernus (Thomas Reid Associates (TRA)). 1997. Biological Assessment Report for Palmetto Avenue Parcel in Pacifica. A report dated April 1997 transmitted with a letter to R. Kalmbach (Syndicor) dated April 29, 1997.
2. M. Josselyn (Wetland Research Associates (WRA)). 1997. Letter report to R. Kalmbach (Syndicor Real Estate Group) dated April 30, 1997 concerning a wetland reconnaissance of the Palmetto Avenue parcels in Pacifica (Parcels 009-031-010, etc).
3. WRA (Contact: T. Fraser). 1999. Delineation of Potential Jurisdictional Wetlands, Pacific Cove Parcel, Pacifica, California. A report to Trumark Companies dated August 1999.
4. T. Fraser (WRA) letter report on behalf of Trumark Companies to Mike Crabtree (City of Pacifica Planning Department) dated December 27, 1999 re: Pacific Cove Development Local Coastal Program jurisdictional wetlands.
5. C. Fong (Army Corps of Engineers, S.F. District) letter to T. Fraser (WRA) dated January 3, 2000 concerning jurisdictional delineation of the Pacific Cove parcel.
6. WRA (Contact: T. Fraser). 2000. Delineation of Potential Jurisdictional Wetlands, Edgemar Road Parcel, Pacifica, California. A report to North Pacifica, LLC dated March 2000. (The reviewed copy was incomplete - only Figures 1 & 2, text pages 3 & 9, and data sheets for plots 1A, 1B, 2A, & 2B were included)
7. T. Peterson (TRA). 2000. Memo report to A. Knapp (City of Pacifica) dated January 24, 2000, subject: Bowl Project Wetland Peer Review.

8. M. Josselyn (WRA). 2002a. Letter to City of Pacifica dated March 19, 2002 re: Pacific Cove Development. (Confirms prior determination that there are no LCP wetlands on subject property).
 9. M. Josselyn (WRA). 2002b. Letter to City of Pacifica dated May 22, 2002 re: Pacific Cove Development. (Discusses potential wetlands on adjacent property).
 10. City of Pacifica. 2002. Pacifica Bowl Development Project Environmental Impact Report. A public review draft report dated March 2002.
-

The initial biological assessment of the site identified an area of central coast riparian scrub that was mostly arroyo willow, but contained other wetland species, such as rushes and sedges, and a 4 ft x 10 ft pond 1 ft deep. At about the same time, WRA visited the site and concluded that there were no indicators of wetland soil or hydrology in the area of the willows, but that a patch of twinberry in a depressional area warranted additional study. There was no mention of the ponded area, although WRA was in possession of the biological assessment.

In June 1999, WRA conducted a wetland delineation on the site and concluded that the patch of twinberry (*Lonicera involucrata*) was a potential Corps jurisdictional wetland because there was positive evidence of hydric soils (chroma 2 with common mottles, and organic streaking), of wetland hydrology (oxidized rhizospheres and algal mats), and of a prevalence of hydrophytic vegetation (twinberry, a wetland indicator species, was the only dominant plant listed in the August 1999 report). However, in November, 2002, the Corps field checked the delineation and concluded that there were "no areas that meet the criteria for waters of the U.S., including wetlands, within the study boundary of this parcel." In December, 2002, WRA acknowledged the Corps' determination and provided a new analysis of LCP wetlands. Without referencing or explaining their June findings, WRA asserted that there were no primary hydrological indicators present (although algal mats are generally considered a primary indicator under the category of sediment deposits) and that the oxidized rhizospheres did not meet the Corps criteria because they were not "reasonably abundant." Similarly, the earlier evidence of hydric soils was discounted. WRA explained that, "Soil mottling was absent throughout most of the site. In the area of the *Lonicera involucrata*, soil mottling was variable and faint (less than 1%)¹. Because the soil color was light (chroma=2), consistent mottling greater than 2% is required in order for the soil to be considered hydric..." Yet, in the earlier report, mottles were described as "common," which is a cover class where mottles occupy 2-20%.of the exposed surface of the soil sample. In order to resolve these apparent discrepancies, I spoke to Dan Martel,² the Army Corps of Engineers wetland specialist who visited the site on November 29, 1999. Mr. Martel, who is a very experienced wetland delineator, remembered the site visit and also referred to field notes compiled during the course of his field investigation. He found no surface or soil indicators of wetland hydrology. Algal mats are relatively persistent

¹ This description confuses mottle contrast (faint, distinct, prominent) with mottle abundance.

² Telephone conversation on October 29, 2002.

features and would still have been apparent had they been present in June. He recorded soil colors with chromas greater than 2 (between 2 and 3) and found no mottles or other redoximorphic features. Mr. Martel stated that the site is far too dry to produce "organic streaking," which is a characteristic of sandy soils in wet areas with a fluctuating water table. Mr. Martel also found that twinberry was mixed with coyote bush and other upland plants. For the patch as a whole, the vegetation did not have a wetland character, although within small areas twinberry may have been predominant. Based on Mr. Martel's observations, I conclude that the small depression with twinberry is probably not a wetland under Section 13577 of the California Code of Regulations. Although small patches may be mostly twinberry, this indicator species is in the frequency class "FAC," which means that, in the absence of additional species-specific data, it is expected to occur in uplands and wetlands with equal probability. Given the site characteristics described by Mr. Martel, the small depression appears to be "upland" and twinberry is apparently not acting as a hydrophyte in this situation. In any event, Mr. Martel's observations do not support a finding that the vegetation community may be characterized as having "predominantly hydrophytic cover". I conclude that WRA's June 1999 observations of positive indicators for all three wetland criteria for the patch of twinberry in the depression area were inaccurate for unknown reasons, possibly an inexperienced delineator. Although it seems unlikely that there are LCP wetlands present, it would be necessary to make a site visit to verify this conclusion.

There appear to be a least two, perhaps three, other areas either on or adjacent to the subject parcel that do qualify as wetlands under Section 13577 of the California Code of Regulations. The first area is the ponded area within the stand of central coast riparian scrub identified in the 1997 Biological Assessment. It had positive indicators of both hydrology and hydrophytic vegetation. The ponded area was not mapped but appeared to be within the dense stand of willows that extends from the southeast corner of the subject property to the northeast corner of the adjacent Edgemar property. In the Thomas Reid "Peer Review," Taylor Peterson³ states that, "...Patrick Kobernus of our staff visited the site and identified that the central coast riparian scrub habitat on the "fish"⁴ portion of the site could potentially be characterized as wetland, based on the presence of willow, rushes, sedges and standing water." and "[t]he area which Patrick identified as possible wetland was found by WRA to be a drainage ditch...." The Draft EIR (p. IV-B-2) states that "In December 1999 WRA completed an analysis...and concluded the LCP wetlands also are not present on the Bowl site. After a portion of the site in the riparian scrub habitat was observed to be wet on a recurring basis during the rainy season, WRA revisited the site, addressing these observations, concluding that the wet areas were due to faulty drainage along the trace of Edgemar Road and did not qualify as wetlands under California Coastal Commission criteria." I do not have a document that contains this discussion. However, the EIR appears to be referring to the area that Patrick Kobernus originally described. Based on the original description

³ Mr. Peterson states that he reviewed various excerpts of Pacifica's zoning code and reports 3-5 & 20 in my citation list. The 1999 WRA delineation report is cited as dated July 1999 vice August 1999. However, the title is identical and I assume it is the same report as item 3 in the documents I cite.

⁴ Although I have not seen a map showing an area designated "Fish," it appears to refer to the Edgemar property, based on descriptions in the Draft EIR.

(Document 1, above) and the description in the EIR, at least a portion of the area of central coast riparian scrub qualifies as a wetland under Section 13577 of the California Code of Regulations (WRA's assertions notwithstanding) because it has positive indicators of both hydrology and wetland vegetation. The exact location is not specified, but (despite Mr. Peterson's reference to the "Fish" property) may be on the subject ("Bowl") property, because the EIR continues (emphasis added), "WRA also completed a wetland delineation of the adjacent Fish parcel, in March 2000. The Corps initially verified two small areas of wetlands on the Fish parcel that met Corps criteria. Corps jurisdiction was appealed by the applicant on the basis of their isolation, and the Corps withdrew regulation of these areas. Although the Corps does not have jurisdiction over these adjacent wetlands, they meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica's Local Coastal Plan (LCP) criteria." These two areas would also be considered wetlands under Section 13577 of the California Code of Regulations. I do not have a map showing these wetlands, however the EIR states (p. IV-B-13), "There are probable LCP wetlands on the adjoining parcel within 100 feet of the site."

WRA's comments in Documents 8 & 9, above, suggest that the ponded area identified in the 1997 Biological Assessment and the area WRA identified in their delineation of the Edgemar property as a "ditch" may be the same. Dr. Josselyn (2002a, above) referring to this area states that "The Corps of Engineers concluded that they did not have jurisdiction over this ditch...." This is confusing because the draft EIR states that the Corps originally asserted jurisdiction over two areas on the Edgemar property but later concluded that they did not have jurisdiction because the wetlands were isolated. The Corps never takes jurisdiction of "ditches." So, it is not clear if there are a total of two or three wetland areas on or adjacent to the subject property. One wetland is in a depression about 100 feet south of Edgemar Road. A second wetland appears to be immediately adjacent to Edgemar Road in the northeastern portion of the Edgemar property. There may be a third LCP wetland adjacent to Edgemar Road on the Pacifica Bowl property.

We are missing a number of important documents that could further substantiate the existence of wetlands under CCR Section 13577 either on or adjacent to the subject site. We should have a complete copy of Document 3, above (we are missing page 7 (map of wetlands)). We should have a complete copy of Document 6, above (we are missing pages 1 & 7 (map of wetlands)). We should also have WRA's assessment of the ponded area (that was first described in the Biological Assessment) referenced in the draft EIR, if different from Document 6. We should have the Thomas Reid field observations of hydrology on March and April 2001 and January 2002 mentioned in the draft EIR and we should have the correspondence with the Corps regarding their jurisdiction over wetlands on the "Fish" or Edgemar property, including the Corps' initial and final assessments. We should also have a map showing these three wetland areas.

Finally, there is a puzzling reference in the "peer review." It states that, "In the original delineation, several species of plants are found to be dominant, including plant species

that are obligate or facultative-wet.... These plants are left out of the LCP analysis....” The documents listed by the reviewer are two WRA reports: 1. “Delineation of Potential Jurisdictional Wetlands Pacific Cove Parcel Pacifica, California” dated July 1999, and 2. Letter to Michael Crabtree, City of Pacifica dated December 27, 1999 regarding LCP jurisdictional wetlands. The second document appears to be Document 4 above. The first document is apparently the “original delineation” referred to and has the same title as Document 3 above but is dated July instead of August. The August report has no reference to dominant obligate or facultative-wet species in the delineated area. We should have the document referred to by the reviewer in order to properly assess the potential wetland area.

2-02-2 EDD (Pacific Bowl)
Letter to Peter Imhof from
North Pacifica, LLC
dated Nov. 22, 2002

NORTH PACIFICA LLC
914 Westwood Blvd., Suite 500,
Los Angeles, CA 90024
(310) 556-0202 FAX (310) 556-8282

November 22, 2002

Mr. Peter Imhof, Coastal Planner
California Coastal Commission
45 Fremont, Suite 2000,
San Francisco, CA 94105-2219

Re: Coastal Development Permit for Development at 4000 Palmetto Avenue (the
"Property" or "Project"), Pacifica, CA

Dear Mr. Imhof:

This letter is in response to your telephone call to me of this morning and your phone call to Keith Fromm of North Pacifica LLC, in the afternoon, in which you indicated you were assembling documentation in preparation for proceedings that the Coastal Commission has proposed it will conduct on December 11, 2002 regarding North Pacifica's Coastal Development Permit.

In your conversation with Mr. Fromm, he did point out to you there is currently outstanding a valid and non-vacated "Alternative Writ of Mandate" issued by the Superior Court of San Mateo County on October 9, 2002 expressly prohibiting you from doing exactly what you are doing.

The Writ reads in pertinent part:

"...this Court finds good cause to order an alternative writ of Mandate and to require you, *the respondent Coastal Commission, its officers and agents, and all persons acting by and through its orders* to:

VACATE and retract the Coastal Commission's order of August 23, 2002 and/or September 17, 2002 and/or any order and/or other action purporting to suspend said Coastal Development Permit approved and issued by the City of Pacifica to North Pacifica LLC, on or about August 12, 2002, CDP No. 203-01, *and further desist and refrain absolutely and forever from taking any further actions or proceedings regarding or concerning in anyway the aforesaid Coastal Development Permit, CDP No. 203-01*", or

IN THE ALTERNATIVE, to show cause before this Court on October 31,

2002...why a peremptory Writ of Mandate ordering you to do so should not issue."

While a hearing was held on October 31, 2002, no order or judgment was entered therefrom and, thus, the prohibition in the Alternative Writ is still in effect. As you can see, such prohibition applies to you, personally, as one of the Coastal Commission's "officers and agents, and all persons acting by and through its orders". The Court order expressly requires you to: *"further desist and refrain absolutely and forever from taking any further actions or proceedings regarding or concerning in anyway the aforesaid Coastal Development Permit, CDP No. 203-01"*.

There is yet another problem with the proceeding which you propose to conduct. In addition to the Alternative Writ, on October 9, 2002 the Court also issued a "Stay Order" The Stay Order ordered, in pertinent part:

"IT IS HEREBY ORDERED that the action taken by the respondent herein, the California Coastal Commission, purporting to suspend the Coastal Development Permit approved and issued by the City of Pacifica to petitioner, North Pacifica LLC, CDP No. 203-01, shall be stayed until 15 days after the Court issues a final decision on the Petition for Writ of Mandate and/or Prohibition herein".

Thus, even if, for the sake of argument, as you contend, the Alternative Writ does not prevent you from holding these proceedings, a determination at the proposed Coastal Commission proceedings on or about December 11, 2002, that the Permit was appealable and, therefore, was suspended, would be in direct violation of the Stay Order, since, under no scenario, prior to your proposed December 11, 2002 proceedings, will a final court decision on the Petition for Writ of Mandate and/or Prohibition be rendered and fifteen days have elapsed thereafter. For your convenience, we include true copies of the Court's orders, referenced hereinabove.

Thus, the actions you are currently taking in preparation for these proceedings you propose to conduct are clearly in violation of these Court orders and, in fact, are in contempt of court. We must, therefore, echo the words of the Court and demand that you desist and refrain absolutely from taking any further actions or proceedings regarding or concerning in anyway the aforesaid Coastal Development Permit, CDP No. 203-01, including your proposed December 11, 2002 proceedings, unless and until the Court has lifted its prohibitions there against.

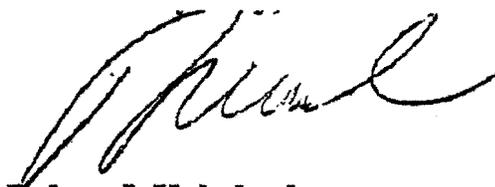
In response to your request for documentation, co-operation and/or access to the property for the purposes of conducting such unauthorized and prohibited proceedings, please be advised that as such proceedings are illegal and prohibited by the Court, North Pacifica LLC will not, in any way, assist you to violate the court's orders by conducting such illegal and unauthorized proceedings. Therefore, so as to be perfectly clear, North Pacifica will provide you with no documentation, information or assistance for these

prohibited proceedings and we absolutely refuse to permit and do hereby forbid any person on behalf of the Coastal Commission to inspect or enter upon our property for any reason whatsoever. Any attempt to enter upon such property for the purpose of assembling evidence or support for your illegal proposed December 11, 2002 proceedings shall constitute an unlawful trespass and illegal search of North Pacifica's property.

Should you or any representative of the Commission violate said prohibition and enter upon our property to conduct a search, inspection or to seek to obtain evidence or support for presentation to the Coastal Commission in these wholly unauthorized proceedings, or for any other purpose whatsoever, in defiance of both the court orders and our express prohibitions, North Pacifica shall alert the Court and the police as to such trespass and unauthorized activities for the purpose of pursuing all appropriate enforcement proceedings and sanctions, including, but not limited to, enforcement orders, contempt of court proceedings, monetary sanctions and the invalidation of any administrative proceedings seeking to make use of any alleged evidence which has been illegally obtained and/or obtained in violation of North Pacifica's constitutional rights. Such conduct may additionally constitute grounds for an action by North Pacifica LLC against the Coastal Commission, its Executive Director, each of its members and you personally, for violation of North Pacifica LLC's civil rights. We think it is incumbent upon you to advise the Commission that these Court orders are outstanding and that the proceedings you and it proposes to conduct on December 11, 2002 in relation to North Pacifica's Coastal Development Permit are in violation of such pending court orders and may subject the Commission members, personally, to liability and sanctions for wilfully defying such court orders.

We cannot emphasize too strongly how egregious and contemptuous is your conduct in purporting to conduct these proceedings in blatant defiance of the Court's pending and unequivocal orders to desist from doing so.

Yours very truly,



Robert J. Kalmbach
Member

cc. Peter Douglas, Executive Director, California Coastal Commission
Joel Jacobs, Esq., Attorney General's Office,
Jaquelynn Pope, Esq.
Keith M. Fromm, Esq.

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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SAN MATEO

14 NORTH PACIFICA, LLC

Case No. **CV 426268**

15 Petitioner

16 v.

ALTERNATIVE WRIT
OF MANDATE

17
18 CALIFORNIA COASTAL
19 COMMISSION

20 Respondent.

21 _____ /
22 CITY OF PACIFICA, JOHN CURTIS

23 Real Parties in Interest
24 _____ /

25 TO THE CALIFORNIA COASTAL COMMISSION:
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A Verified Petition for writ of Mandate and/or Prohibition has been filed in this Court. After reviewing that petition, the Petitioner's Ex Parte Application for Alternative Writ and Request for Stay and Declaration and Points and Authorities in Support thereof, this Court finds good cause to order an alternative writ of Mandate and to require you, the respondent Coastal Commission, its officers and agents, and all persons acting by and through its orders to:

VACATE and retract the Coastal Commission's order of August 23, 2002 and/or September 17, 2002 and/or any order and/or other action purporting to suspend said Coastal Development Permit approved and issued by the City of Pacifica to North Pacifica LLC, on or about August 12, 2002, CDP No. 203-01, and further desist and refrain absolutely and forever from taking any further actions or proceedings regarding or concerning in anyway the aforesaid Coastal Development Permit, CDP No. 203-01, or

IN THE ALTERNATIVE, to show cause before this Court on October 31, 2002 at 9:00 Am, in the courtroom of the Honorable _____, Dept. 15, at _____, why a peremptory Writ of Mandate ordering you to do so should not issue.

~~Oral argument on the issues presented shall be heard by this Court at its courtroom at _____, on _____ at _____~~

The written ^{Opposition} ~~return~~ shall be filed on or before October 23, 2002 and ^{shall not exceed 25 pages in length} Petitioner's Reply to the ^{Opposition} ~~return~~ shall be filed on or before October 25, 2002.

IT IS FURTHER ORDERED that a copy of this Alternative Writ and a copy of the petition and this Order be served ¹²⁴ ~~at least~~ October 9, 2002 calendar days before the hearing date.

BY ORDER OF THIS COURT.

Date: **OCT 9 2002**

DANIEL SHEA

PEGGY THOMPSON
Clerk of the Superior Court

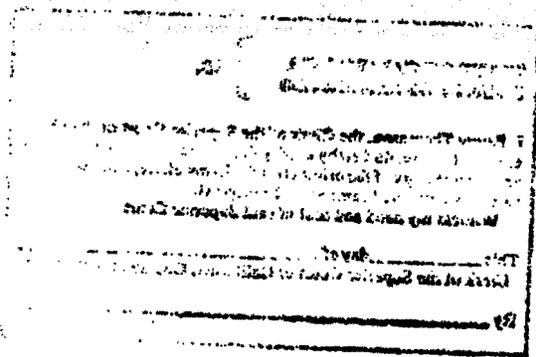
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including the Declaration of Keith Fromm, and the Declaration Re: Notice of Ex Parte Application for Stay and Alternative Writ.

IT IS HEREBY ORDERED that the action taken by the respondent herein, the California Coastal Commission, purporting to suspend the Coastal Development Permit approved and issued by the City of Pacifica to petitioner, North Pacifica LLC, CDP No. 203-01, shall be stayed until 15 days after the Court issues a final decision on the Petition for Writ of Mandate and/or Prohibition herein.

Dated: 10-9-02

W. R. J.
JUDGE, SUPERIOR COURT
Acting Presiding Judge



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FILED
 SAN MATEO
 NOV 22 2002
 By *[Signature]*
 DEPUTY CLERK

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 13 COUNTY OF SAN MATEO

14 NORTH PACIFICA, LLC

Case No. **CN426268**

15 Petitioner

16 v.

STAY ORDER

17 CALIFORNIA COASTAL
 18 COMMISSION

19 Respondent.

20 _____
 21
 22 CITY OF PACIFICA, JOHN CURTIS

23 Real Parties in Interest
 24 _____

25 GOOD CAUSE APPEARING from the Verified Petition on file in this action, the Points
 26 and Authorities in support thereof, the Ex Parte Application for Stay and Alternative Writ,
 27

