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Filed:	August 3, 2004
49 th Day:	September 21, 2004
Staff:	Robert Merrill
Staff Report:	August 26, 2004
Hearing Date:	September 9, 2004
Commission Action:	

STAFF REPORT: APPEAL**SUBSTANTIAL ISSUE & DE NOVO**

APPEAL NO.:	A-1-DNC-04-043
APPLICANTS:	Trinity Development
AGENT:	Jim Vining
LOCAL GOVERNMENT:	County of Del Norte
DECISION:	Approval with Conditions
PROJECT LOCATION:	270 Lake Side Loop (lot 47), adjacent to Lake Earl off of Vipond Drive, north of Crescent City, Del Norte County (APN 110-450-47).
PROJECT DESCRIPTION:	Construct a 2,762-square-foot, two-story, single-family residence with an attached garage, a 50-foot-long driveway, a septic tank and leach field, and a proposed well

APPELLANT: Friends of Del Norte

SUBSTANTIVE FILE: 1) Del Norte County CDP No. B27644C; and
DOCUMENTS 2) Del Norte County Local Coastal Program

SUMMARY OF STAFF RECOMMENDATION:

1. Summary of Staff Recommendation: Substantial Issue

The staff recommends that the Commission, after public hearing, determine that a SUBSTANTIAL ISSUE exists with respect to the grounds on which the appeal has been filed, because the appellant has raised a substantial issue with the local government's action and its consistency with the certified Local Coastal Program (LCP).

The development, as approved by the County, consists of the construction of a 2,762-square-foot, two-story residence with an attached garage covering 2,560 square feet of ground area. The project also includes a 50-foot-long driveway, a septic tank and leach field, and a proposed well. Construction of the approved residence requires the clearing of forest area, and some timber removal has occurred without benefit of a coastal development permit. The project site is on a half-acre parcel located near the east shoreline of Lake Earl, north of Crescent city on Lake Side Loop off of Vipond Drive.

One of the contentions of the appeal is that the approved construction of the single-family residence and its associated vegetation and tree removal will result in significant adverse impacts to eagles, inconsistent with LCP ESHA protection policies.

There have been sightings of bald eagles and other raptors in the Lake Earl area. In addition, a letter from the U.S. Fish and Wildlife Service (USFWS) comments that the removal of timber and conversion of the site to a residence would result in a take of the bald eagle. The County staff report and findings make no specific finding as to whether environmentally sensitive bald eagle habitat exists on the property and do not address the consistency of the project with respect to bald eagle habitat with the requirements of LUP Marine and Water Resources Policy VI.C.6 that 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.

As the approved permit for the current residential development does not include any conditions for protection of environmentally sensitive bald eagle habitat, staff recommends that the Commission find that a substantial issue is raised as to whether the project is consistent with the requirements of LUP Marine and Water Resources Policy VI.C.6 that 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.

Staff further recommends that the Commission continue the *de novo* portion of the appeal hearing to a subsequent meeting because the Commission does not have sufficient information from the applicant to determine if the approved development can be found consistent with the provisions of the certified LCP and the public access policies of the Coastal Act regarding the protection of environmentally sensitive bald eagle habitat and wetlands.

The motion to adopt the Staff Recommendation of Substantial Issue is found on page 4.

STAFF NOTES:

1. Appeal Process

After certification of Local Coastal Programs (LCPs), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits (Coastal Act Section 30603).

Section 30603 states that an action taken by a local government on a coastal development permit application may be appealed to the Commission for certain kinds of developments, including developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, within one hundred feet of a wetland or stream, within three hundred feet of the mean high tide line or inland extent of any beach or top of the seaward face of a coastal bluff, or within a sensitive coastal resource area.

Furthermore, developments approved by counties may be appealed if they are not designated the "principal permitted use" under the certified LCP. Finally, developments which constitute major public works or major energy facilities may be appealed, whether approved or denied by the city or county. The grounds for an appeal are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program and, if the development is located between the first public road and the sea, the public access policies set forth in the Coastal Act.

The subject development is appealable to the Commission because the approved development is located (1) between the sea and the first public road paralleling the sea; and (2) within one hundred feet of a wetland.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that the appeal raises no substantial issue of conformity of the approved project with the certified LCP. Since the staff is recommending substantial issue, unless three Commissioners object, it is presumed that the appeal raises a substantial issue and the Commission may proceed to its *de novo* review.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised.

The only persons qualified to testify before the Commission on the substantial issue question are the applicants, the appellant and persons who made their views known to the local government (or their representatives). Testimony from other persons regarding substantial issue must be submitted in writing.

Unless it is determined that there is no substantial issue, the Commission would continue with a full public hearing on the merits of the project at a subsequent meeting. If the Commission were to conduct a *de novo* hearing on the appeal, because the proposed development is located between the first public road and the sea, the applicable test for the Commission to consider would be whether the development is in conformity with the certified Local Coastal Program and with the public access and public recreation policies of the Coastal Act.

2. Filing of Appeal

The appellant filed an appeal (Exhibit No. 9) with the Commission in a timely manner on August 3, 2004, within 10 working days of receipt by the Commission on July 20, 2004 of the County's Notice of Final Action (Exhibit No. 8).

I. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE:

Pursuant to Section 30603(b) of the Coastal Act and as discussed below, the staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed. The proper motion is:

MOTION:

I move that the Commission determine that Appeal No. A-1-DNC-04-043 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

Staff Recommendation:

Staff recommends a **NO** vote. Failure of this motion will result in a *de novo* hearing on the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

Resolution to Find Substantial Issue:

The Commission hereby finds that Appeal No. A-1- DNC-04-043 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the approved project with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

I. FINDINGS AND DECLARATIONS.

The Commission hereby finds and declares:

A. APPELLANT'S CONTENTIONS.

The Commission received one appeal from the Friends of Del Norte of the County of Del Norte's decision to approve the development.

The project as approved by the County consists of the construction of a 2,762-square-foot, two-story residence with an attached garage covering 2,560 square feet of ground area. The project also includes a 50-foot-long driveway, a septic tank and leach field, and a proposed well. Construction of the approved residence requires the clearing of forest area, and some timber removal has occurred without benefit of a coastal development permit. The project site is on a half-acre parcel located near the east shoreline of Lake Earl, north of Crescent city on Lake Side Loop off of Vipond Drive.

The appellant's contentions are summarized below, and the full text of the contentions is included as Exhibit No. 9 in the copy of the appeal submittals attached. A supplemental letter to the appeal received on August 19, 2004 and prepared by Chad Roberts, Phd is attached at the end of the appeal. The letter reviews the environmental resources of the subject property but does not raise new grounds for appeal. The appellant also submitted with the appeal an addendum containing copies of 55 documents and photos that are referenced in the text of the appeal. Due to the volume of these materials, the addendum to the appeal is not attached as an exhibit but is available for review in the Commission's North Coast District office in Eureka.

The appeal raises 11 contentions as follows:

1. **Adequacy of Wetland Delineations.**

The appellants contend that there are potential wetlands on the subject parcel but that no adequate wetland delineation to map the extent and location of the potential wetlands has been performed. The appellants note that the site borders a natural area that contains an arm of Lake Earl, and that Generalized Natural Wetland Inventory Maps and Department of Fish & Game maps show the subject parcel as "forested wetland." The appellants contend that the only wetland study that has specifically examined the northern portion of the property for wetlands is a 1983 study that did not use accepted methods to determine the extent of wetlands and was prepared at a time when the Lake Earl lagoon was kept at a much lower level than it was beginning in the late 1980s. The appellant contends therefore, that the study would not have reflected the current hydrology of the area. The appellant contends the County should have required a new wetland delineation of the property before acting on coastal development permit under appeal. The appellants claim that the County's approval is inconsistent with LUP Policy VII-D, Wetlands, of the Marine and Water Resources chapter of the LUP.

2. **No Wetland Buffer Established for Lagoon Perimeter**

The appellant contends that no 100-foot wetland buffer to protect the wetlands on the site have been established. The appellant contends therefore, the project as approved is inconsistent with LUP Wetlands Policy VII-D, of the Marine and Water Resources chapter of the LUP which states that the primary tool to reduce impacts around wetlands shall be a buffer of 100 feet in width, which can only be reduced if it is determined that there are no adverse impacts on the wetland.

3. **Inappropriate "Farmed Wetlands" RCA Zoning Designation for Adjoining Lagoon**

The appellant contends that the lagoon wetlands surrounding the subdivision do not meet the County's stated definition of farmed wetland and that therefore, the existing "Farmed Wetlands RCA zone that applies to the lagoon wetlands surrounding the subdivision is inappropriate.

4. **Wetland Fill**

The appellant contends that construction of the approved well would likely result in wetland fill and the destruction of wetland habitat. The approved well would be located in the low northern portion of the property at the 10-foot level where the appellant claims inadequate wetland studies have been performed. Because the wetland area has not been adequately delineated, the appellant contends that the project as approved did not address the well and its installation as a form of wetland fill that must be reviewed for conformance with LCP wetland policies including LUP Wetlands Policy VII-D, of the Marine and Water Resources chapter of the LUP.

5. Residential Wells in Flood Hazard Areas

The appellant contends that as approved, the well would be located in a flood hazard zone. The appellant notes that the well would be located in the federal flood hazard zone for the area. This zone indicates the flood plain of the Smith River. The appellants contend that approval of the well in the flood hazard zone is inconsistent with LUP Flood Hazard Policy IV.D.3 of the Hazard Areas chapter of the LUP, which discourages inappropriate development in flood prone areas and states that critical utility facilities shall not be located in flood prone areas, unless appropriate mitigating factors are implemented.

6. Water Quality

The appellant contends that the approved residence raises two water quality concerns related to (1) the potential for household lawn chemicals to migrate into the groundwater and the lagoon from the approved development with adverse impacts to water quality and lagoon habitat, and (2) the inadequacy of the approved septic system which will lead to potential contamination of groundwater, drinking water wells at the periphery of the lagoon, and the lagoon waters. The appellant contends that the septic system should be a mound system capable of functioning reliably in high groundwater areas rather than the traditional system approved. The appellant contends that with these potential adverse impacts of the approved project on water quality, the project as approved is inconsistent with LUP Policy VI-C of the Marine and Water Resources chapter of the LUP which requires that all surface and subsurface waters shall be maintained at the highest level of quality to insure the safety of public health and the biological productivity of coastal waters.

7. Vegetation Removal in Environmentally Sensitive Habitat (ESHA) for Listed Species.

The appellant contends that the approved removal of trees from the parcel to clear area for the house adversely affects species afforded federal Endangered Species Act protection including the bald eagle and peregrine falcon. The appellant notes that there have been numerous bald eagle sitings in the forested habitat areas around Lake Earl. The appellant points out that the trees have already been cleared from the site without benefit of a coastal development permit or approval from the California Department of Forestry and Fire Protection (CDF). The appellant notes that in response to a request for Technical Assistance, the U.S. Fish & Wildlife Service states that the removal of approximately 12 Sitka Spruce trees ranging from 12 to 58 inches in diameter at breast height on the subject parcel and four other adjoining lots within the subdivision is likely to result in a take of bald eagle due to disruption of normal behavior patterns which include, but are not limited to breeding, feeding, or sheltering. The appellant contends the County has not made findings based on substantial evidence that the approved

construction of the single-family residence and its associated vegetation and tree removal will not result in significant adverse impacts to eagles, inconsistent with LCP ESHA protection policies.

8. **Removal of Vegetation Without a Coastal Development Permit is a Violation of the Coastal Act**

The appellant contends that trees and vegetation on the subject parcel were cleared in mid-March, 2004, without either a coastal development permit or a permit/exemption from the California Department of Forestry and Fire Protection (CDF) and a required consultation from the U.S. Fish & Wildlife Service. The appellant notes that the County staff report indicates the trees were removed to establish the building, sewage disposal area, and an access drive and the trees were approximately 3 feet in diameter or less. The appellant contends that this unauthorized development has already likely resulted in the removal of potential habitat and buffers to habitat for bald eagles.

9. **Lot Size Inadequate for Sewage Disposal Systems**

The appellant contends that the size of the subject parcel is inadequate for the placement of a septic system on a parcel that also requires the installation of a drinking water well. The appellant claims that after excluding the area below the 12-foot mean sea level flood hazard line on the lot, only about one-third of an acre exists on which to place a septic system and a well. The appellant claims the useable area of the lot is far less than 50% of the lot size, and that therefore creation of the lot was inconsistent with the minimum lot size requirements of the LCP.

10. **Oversized Home is Visually Incompatible with Highly Scenic Area**

The appellant contends that the approved development is within a highly scenic area and that the construction of the approved home and other houses built by the applicant nearby are larger than neighboring homes and are not compatible with the existing character of the neighborhood in size and bulk. The appellants contend that all of these homes will be visible from boats on the lagoon and from State Park trail destination viewpoints across the lagoon and will significantly detract from the relatively natural pristine character of the lagoon.

11. **Failure to Protect Lagoon From Significant Degradation and Disruption**

The appellant contends that the approved installation of a well at elevation 10 feet above mean sea level would interfere with potential future restoration of the Lake Earl lagoon to 12 feet which the appellant considers to be the natural basin level.

B. **LOCAL GOVERNMENT ACTION.**

On May 5, 2004, the Del Norte County Planning Commission approved Coastal Development Permit No. B27644C for the subject development. The County attached to its coastal development permit nine special conditions of approval, included in their entirety in Exhibit No. 8.

Of particular relevance to the contentions of the appeal are Special Condition Nos. 4-7. Special Condition No. 4 requires the placement of the structures in accordance with the applicant's submitted plot plan and required setbacks. Special Condition No. 5 requires that all development adhere to the designated building site as designated on the final map for the McNamara subdivision Phase III. Special Condition No. 6 states, "the corrective action that has been undertaken shall not be disturbed by future construction activity." Special Condition No. 7 requires the preparation of a revegetation plan for any disturbance related to the construction of the proposed well and implementation of the plan prior to issuance of a Certificate of Occupancy for the development. In approving the proposed project, the County adopted findings in their staff report that conclude the project is in conformance with the terms and conditions of the subdivision as approved by the County and subsequently modified and approved by the Commission. The findings specifically note that the wetland determinations were made as part of the approval of the subdivision and the rezone which established the building envelope and the setback from the mapped RCA-2(r) area, and that the development will be sited consistent with this previous determination.

The decision of the Planning Commission was appealed at the local level to the County Board of Supervisors. On July 13, 2004, the Board of Supervisors held a public hearing and denied the appeal, upholding the permit as approved by the Planning Commission. The County then issued a Notice of Final Action, which was received by Commission staff on July 20, 2004, (Exhibit No. 8). The project was appealed to the Commission in a timely manner on August 3, 2004, within 10 working days after receipt by the Commission of the Notice of Final Local Action.

C. SITE DESCRIPTION

The project site is on a half-acre parcel located near the east shoreline of Lake Earl, north of Crescent city on Lake Side Loop off of Vipond Drive (See Exhibits 1 and 2).

The parcel is part of a subdivision that is known as McNamara Subdivision Unit III that was approved by the Commission on appeal in 1999 (Appeal No. A-1-DNC-97-019). The subdivision divided a 26.94-acre parcel into nine approximately half-acre residential lots and a 22-acre remainder. The coastal development permit for the subdivision was appealed to the Commission in 1997. After certifying a related LCP amendment in 1998 necessary to allow the subdivision to be found consistent with the certified LCP, the Commission acted on the de novo portion of the appeal in April of 1999. The Commission conditioned its approval of the coastal development permit on the submittal

of a revised tentative map showing the elimination of one of the originally proposed ten residential lots, to ensure that all lots would have buildable areas outside of what was thought at the time to be the extent of environmentally sensitive habitat areas on the overall property and to conform to the minimum lot size requirements of the LCP.

The subject parcel is known as Lot H of the McNamara Subdivision Unit III, and is also referred to as Lot 47 (See Exhibit 4). The approved residential development is the first to be approved within the subdivision.

The subdivision occupies part of a peninsula that juts out into Lake Earl. The Lake Earl Wildlife Area encircles portions of the subdivision and borders the northern property line of the subject parcel. This portion of the wildlife area adjacent to the subject parcel contains forested wetlands that extend to the shoreline of an arm of Lake Earl. As Lake Earl is a coastal lagoon, water levels can vary dramatically. Currently, lake levels are managed by breaching the sand spit between Lake Earl and the ocean when lake levels reach an elevation of 8-10 feet above mean sea level. At times during the winter when lake levels rise, the shoreline of the lake will be within or close to the property boundaries. At other times of the year when lake level are down, the shoreline will be much farther away.

The vacant subject parcel is relatively flat, sloping very gradually toward the north. Prior to clearing activities that reportedly occurred without benefit of required permits in March of 2004, much of the parcel was covered with Spruce Forest vegetation.

D. PROJECT DESCRIPTION

The project as approved by the County consists of the construction of a 2,762 square foot, two-story residence with an attached garage covering 2,560 square feet of ground area (See Exhibits 5, 6 and 7). The approved project also includes a 50-foot-long driveway, a septic tank and leach field, and a proposed well. The house would be 80 feet long and 32 feet wide, and set back approximately 50 feet from Lakeside Loop. The septic system would be installed between the house and the street and the well would be installed in the extreme northeast corner of the property. Construction of the residence requires the clearing of forest area, and some timber removal has already occurred without benefit of any needed permits.

E. SUBSTANTIAL ISSUE ANALYSIS

Section 30603(b)(1) of the Coastal Act states:

"The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the

certified local coastal program or the public access policies set forth in this division."

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., tit. 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following factors:

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, an appellant nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5.

Allegations Raising Substantial Issue

a. **Vegetation Removal in Environmentally Sensitive Habitat (ESHA) for Listed Species.**

The construction of the approved residence requires the clearing of forest area. The appellant contends that the approved removal of trees from the parcel to clear area for the house adversely affects species afforded federal Endangered Species Act protection

including the bald eagle and peregrine falcon. The appellant notes that there have been numerous bald eagle sitings in the forested habitat areas around Lake Earl. The appellant points out that the trees have already been cleared from the site without benefit of a coastal development permit or approval from the California Department of Forestry and Fire Protection (CDF). The appellant notes that in response to a request for Technical Assistance, the U.S. Fish & Wildlife Service states that the removal of approximately 12 Sitka Spruce trees ranging from 12 to 58 inches in diameter at breast height on the subject parcel and four other adjoining lots within the subdivision is likely to result in a take of bald eagle due to disruption of normal behavior patterns which include, but are not limited to breeding, feeding, or sheltering. The appellant contends the County has not made findings based on substantial evidence that the approved construction of the single-family residence and its associated vegetation and tree removal will not result in significant adverse impacts to eagles, inconsistent with LCP ESHA protection policies.

LCP Policies and Standards

LUP Policy VI.C.6 of the County of Del Norte LUP's Marine and Water Resources chapter states:

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 shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Discussion

LUP Marine and Water Resources Policy VI.C.6 states that 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 shall be sited and designed to prevent impacts which could significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

The appellant contends that the approved project is inconsistent with this policy as the project involves the removal of Sitka Spruce forest vegetation that should be considered environmentally sensitive habitat area for the federally listed bald eagle (*Haliaeetus leucocephalus*). The appellant notes that there have been numerous sitings of bald eagles in the forested areas along the shores of Lake Earl.

The appellant also points out that trees have already been cleared from the site without benefit of a coastal development permit or approval from the California Department of

Forestry and Fire Protection (CDF). The removal of the trees is a necessary part of the project, as the approved residence would be constructed in the location where the trees existed. The follow-up to that unauthorized timber removal has provided additional evidence that environmentally sensitive bald eagle habitat may exist on the property. On March 25, 2004, CDF issued a Notice of Violation of Forest Practices Laws to the applicant indicating that the commercial timber operations were conducted on the property without an approved Timber Harvest Plan or appropriate exempt conversion application in association with residential construction within an approved subdivision (See Exhibit 11). The notice indicates that the U.S. Fish and Wildlife Service (USFWS) has requested that CDF contact USFWS to seek Technical Assistance prior to accepting any Exemption Notice or approving any THP within 500 feet of the forested edge of Lake Earl due to potential impacts to the bald eagle. The notice further states that the applicant is responsible for seeking this consultation with USFWS in association with the proposed exempt conversion timber operations. The applicant's consultant later requested technical assistance from USFWS. In a letter dated May 15, 2004 from the U.S. Fish and Wildlife Service to forestry consultant James Erler, of Erler Forest Service, USFWS (See Exhibit 12), USFWS staff states the following:

"According to the California Department of Fish and Game and data on file in this office, the bald eagle is a winter resident at Lake Earl. Numerous records exist of foraging bald eagles using perch/roost trees in the forested habitat adjacent to Lake Earl, which is inclusive of unit 3 of the McNamara subdivision. The proposed removal of approximately 12 potential perch/roost trees eliminates their use by the species. Their removal also facilitates the development of the lots, increasing human activity and disturbance of bald eagles as a result. The proposed action is likely to result in take of bald eagle due to a significant disruption of normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering. We recommend that the project proponent seek an incidental take permit for the bald eagle, prior to implementing any habitat alteration activity within the project area."

The County staff report on the approved project acknowledges that there have been sightings of bald eagles and other raptors in the Lake Earl area. However, the staff report does not address the comments of USFWS that the removal of the timber and conversion of the site to a residence would result in a take of the bald eagle. The staff report makes no specific finding as to whether environmentally sensitive bald eagle habitat exists on the property and does not address the consistency of the project with respect to bald eagle habitat with the requirements of LUP Marine and Water Resources Policy VI.C.6 that environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

The County staff report instead indicates that the subject of bald eagles was addressed as part of the original subdivision and through various timber harvest proposals on nearby

parcels in the area. The County staff report does not address how bald eagle protection may have been addressed in the coastal development permit for the subdivision.

As discussed previously, the coastal development permit for the subdivision was appealed to the Coastal Commission and approved in 1999. A review of the findings for Appeal No. A-1-DNC-97-019 indicates that the coastal development permit findings for the subdivision do not address the issue of bald eagle habitat and there are no special conditions of the permit that impose restrictions on the project to protect environmentally sensitive bald eagle habitat. There is no indication in the findings that the Commission was aware of any specific evidence about the presence of bald eagle habitat on the subject property.

The Commission only later became aware of potential bald eagle habitat protection issues. In the Commission's review in July of 1999 of two unrelated appeals of coastal development permits approved by the County for major vegetation removal involving the harvesting of less than three acres of trees at each site (A-1-DNC-99-037, McNamara) and A-1-DNC-99-038, Foster) the issue of protection of bald eagle habitat was raised. As part of the consideration of the appeal, evidence was before the Commission in the form of correspondence with the Department of Fish and Game and the U.S. Fish and Wildlife Service that the sites were noted to contain typical habitat characteristics to support bald eagle and peregrine falcon use. The Commission found that the appeals raised a substantial issue of conformance with the requirements of LUP Marine and Water Resources Policy VI.C.6 that environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values and directed that detailed site-specific studies using established eagle and falcon survey protocols to establish whether the sites contained environmentally sensitive raptor habitat or not. In both instances, the applicants did not provide the requested information and the appeals never were acted on de novo.

As the approved permit for the current residential development does not include any conditions for protection of environmentally sensitive bald eagle habitat, a substantial issue is raised as to whether the project is consistent with the requirements of LUP Marine and Water Resources Policy VI.C.6 that environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

The Commission often conditions permits it approves to require the applicant to relocate, redesign, or buffer proposed development specifically to protect environmentally sensitive habitat. Thus, the appeal raises issues of regional and statewide significance. Furthermore, given the May 15, 2004 letter from the USFWS indicating that the removal of trees for the development is likely to result in take of bald eagle and significant disruption of bald eagle behavior patterns, and the fact that the County's findings do not address the consistency of the project to LUP Marine and Water Resources Policy VI.C.6 with respect to the protection of environmentally sensitive bald eagle habitat, there is not

a high degree of factual and legal support for the local government's decision that the approved development is consistent with the ESHA protection hazard provisions of the certified LCP.

Therefore, the Commission finds that the project as approved by the County raises a substantial issue with respect to conformance of the approved project with the LCP policies regarding the protection of environmentally sensitive bald eagle habitat, including LUP Marine and Water Resources Policy VI.C.6.

III. INFORMATION NEEDED FOR *DE NOVO* REVIEW OF APPLICATION

As stated above, Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed. Section 30621 of the Coastal Act instructs the Commission to provide for a *de novo* hearing on all appeals where it has determined that a substantial issue exists with respect to the grounds on which an appeal has been filed. If the Commission finds substantial issue as recommended above, staff also recommends that the Commission continue the *de novo* hearing to a subsequent date. The *de novo* portion of the appeal must be continued because the Commission does not have sufficient information to determine what, if any, development can be approved, consistent with the certified LCP.

Given that the project the Commission will be considering *de novo* has come to the Commission after an appeal of a local government action, the Commission has not previously been in the position to request information from the applicant needed to determine if the project can be found to be consistent with the certified LCP. Following is a discussion of the information needed by the Commission to evaluate the proposed development.

Wetland Survey of Northern Portion of Lot 47

The appeal has raised questions as to whether the any wetlands that might exist on the property have been fully delineated. Although wetland and habitat surveys were performed in the 80s and 90's of the area in conjunction with the environmental review by the County of the McNamara Unit III Subdivision, no current site-specific wetland delineation was provided for the County's review of the current project. Since the earlier wetland information was developed, the California Department of Fish and Game has published a map identifying major wetland types present at the current managed water survey elevation of Lake Earl at 8-10 feet (See Exhibit No. 10). The map indicates that the subject property is within an area categorized as "Forest Wetland." In addition, information in the record suggests that the wetland surveys performed for the subdivision in the 80s and 90s may not have taken into account the changing hydrology of the area

due to management of Lake Earl Lake levels at a higher elevation (8-10 feet above mean sea level) than lake levels were managed in the 1980s (usually at 4 feet above mean sea level). Information presented in the appeal and the local record suggests that the northern portion of the applicant's parcel where the water well is proposed is at an elevation of approximately 10 feet, and may be inundated when Lake Earl lake levels are high

If the area is a wetland, the Commission will need to evaluate the conformance of the project with LCP wetland protection policies, including Marine and Water Resources Policy VII.D.4a., Wetlands, of the County of Del Norte LUP. This policy limits the filling of wetlands to those uses identified in Section 30233 of the Coastal Act. Section 30233 does not include residential development as a permissible use for fill in a wetland. In addition, the Commission will need to evaluate the conformance of the project with Marine and Water Resources Policy VII.D.4f., Wetlands, of the County of Del Norte LUP. This policy states that *Development in areas adjacent to environmentally sensitive habitat areas shall be sited and designed to prevent impacts which could significantly degrade such areas, and shall be compatible with the continuance of such habitat areas. The primary tool to reduce the above impacts around wetlands between the development and the edge of the wetland shall be a buffer of one-hundred feet in width. A buffer of less than one-hundred feet may be utilized where it can be determined that there is no adverse impact on the wetland.*

To evaluate the consistency of the project with these policies, an analysis of the impacts of the development on wetlands needs to be provided. The analysis should include (1) a wetland delineation or the northern area of the parcel based on the LCP and Coastal Act definitions of wetlands, (2) an evaluation of the impacts of the proposed development on the wetland and a recommendation for a buffer width, and (3) if the analysis indicates wetlands are present and recommends a buffer of less than 100 feet, a comprehensive evaluation demonstrating that a reduced buffer would not result in significant adverse impact on the wetland.

Analysis of Impact of Development on Bald Eagle Habitat

As discussed previously, the USFWS has provided technical assistance to the applicant indicating that removal of trees and conversion of the site to residential use will likely result in a take of bald eagle. The potential impacts of the development on bald eagle habitat raises a substantial issue of conformance of the project as approved by the County with the LCP policies regarding the protection of environmentally sensitive bald eagle habitat, including LUP Marine and Water Resources Policy VI.C.6. To evaluate the consistency of the proposed project with this policy, an analysis of the impacts of the proposed development on bald eagle habitat needs to be provided. The evaluation should (1) determine the extent of the habitat on the subject property and adjoining property, (2) identify the nature and extent of the impacts of the development on the habitat, (3) evaluate the cumulative impacts of residential development in the area on the habitat, (4)

determine what width of buffer is needed between the development and the habitat to protect the habitat from significant degradation by the impacts of the development, and (5) identify other feasible mitigation measures. The analysis should be prepared by a qualified wildlife biologist familiar with bald eagle ecology. The biologist should consult with the staff of the U.S. Fish and Wildlife Service in the preparation of the analysis. The evaluation is necessary for staff to be able to evaluate the consistency of the proposed development with the ESHA protection policies of the LCP.

Information Needed to Evaluate Project Consistency With Coastal Act Section 30010

It is possible that the evaluation of the impacts of the development on environmentally sensitive bald eagle habitat and wetlands requested above may indicate that there is no feasible site to build a residence and still maintain the minimum required buffer from the habitat. In that event, application of the ESHA and ESHA buffer policies of the certified LCP by themselves to the project may require denial of the project. However, the Commission must also consider Section 30010, and the United States Supreme Court decision in Lucas v. South Carolina Coastal Council (1992) 505 U.S., 112 S.Ct. 2886.

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

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

alternative proposal could be approved, and thus assure the property owner of some economically viable use.

Therefore, if the information derived from the requested wetland survey and buffer width evaluation indicate that the project cannot be found consistent with the ESHA and ESHA buffer policies of the certified Del Norte County Local Coastal Program, the Commission will need to evaluate whether an alternative proposal could be approved, and if not, whether denial of the project would interfere with the applicant's reasonable investment-backed expectations. In that event, the Commission will need to request additional information from the applicant concerning alternative proposals and the applicant's reasonable investment-backed expectations to make such determinations prior to holding a *de novo* hearing on the project.

Without all of the above information, the Commission cannot reach a final determination concerning the project's consistency of the project with the ESHA policies of the LCP. Therefore, before the Commission can act on the proposed project *de novo*, the applicant must submit all of the above-identified information.

III. EXHIBITS:

1. Regional Location Map
2. Vicinity Map
3. Parcel Map
4. Approved Subdivision
5. Site Map
6. Elevations
7. Photos
8. Notice of Final Local Action
9. Appeal, (Friends of Del Norte)
10. Fish & Game Wetland Map
11. CDF Notice of Violation
12. USFWS Letter – Habitat Removal

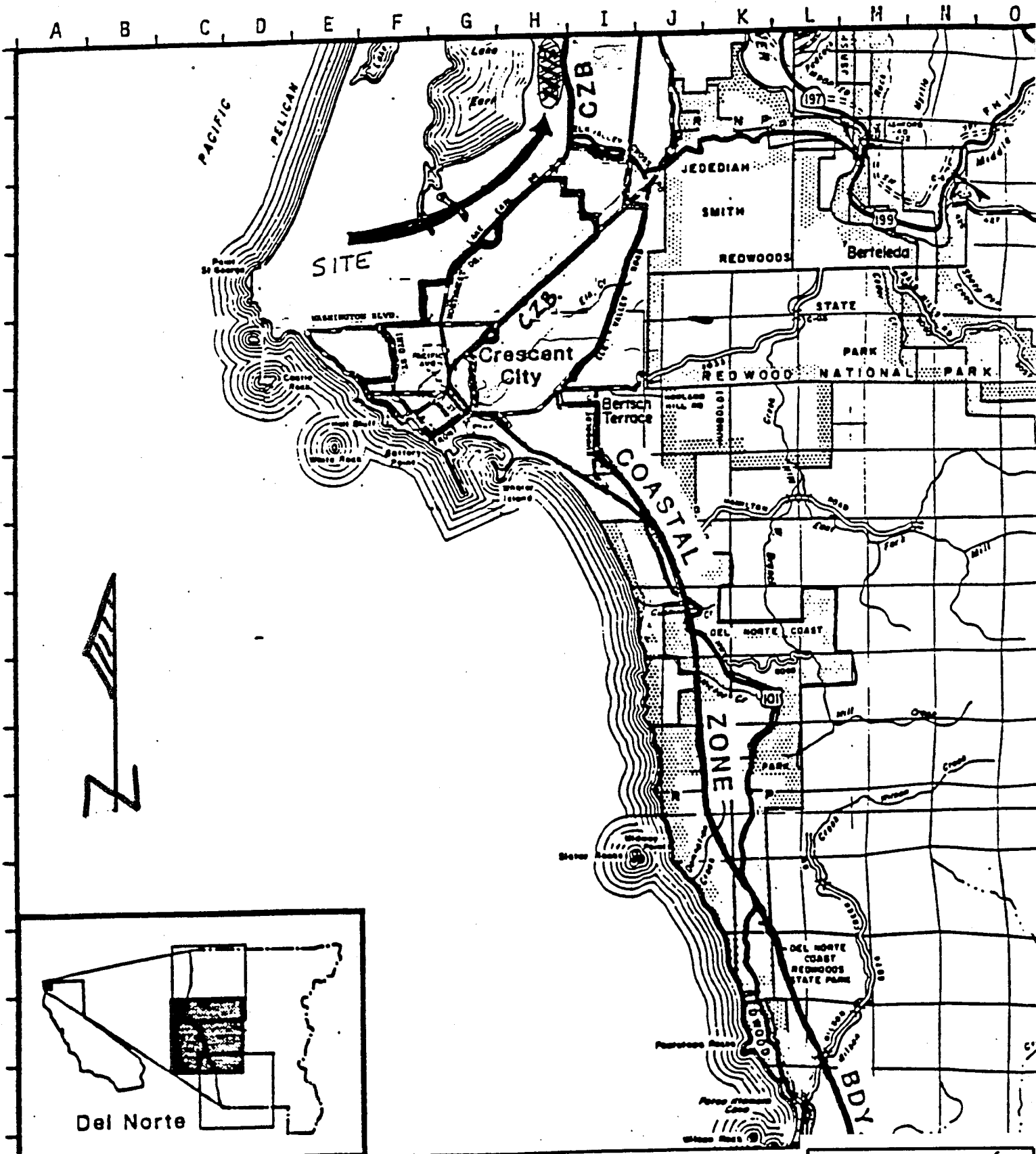


EXHIBIT NO. 1

APPLICATION NO.
A-1-DNC-04-043

TRINITY DEVELOPMENT
REGIONAL LOCATION

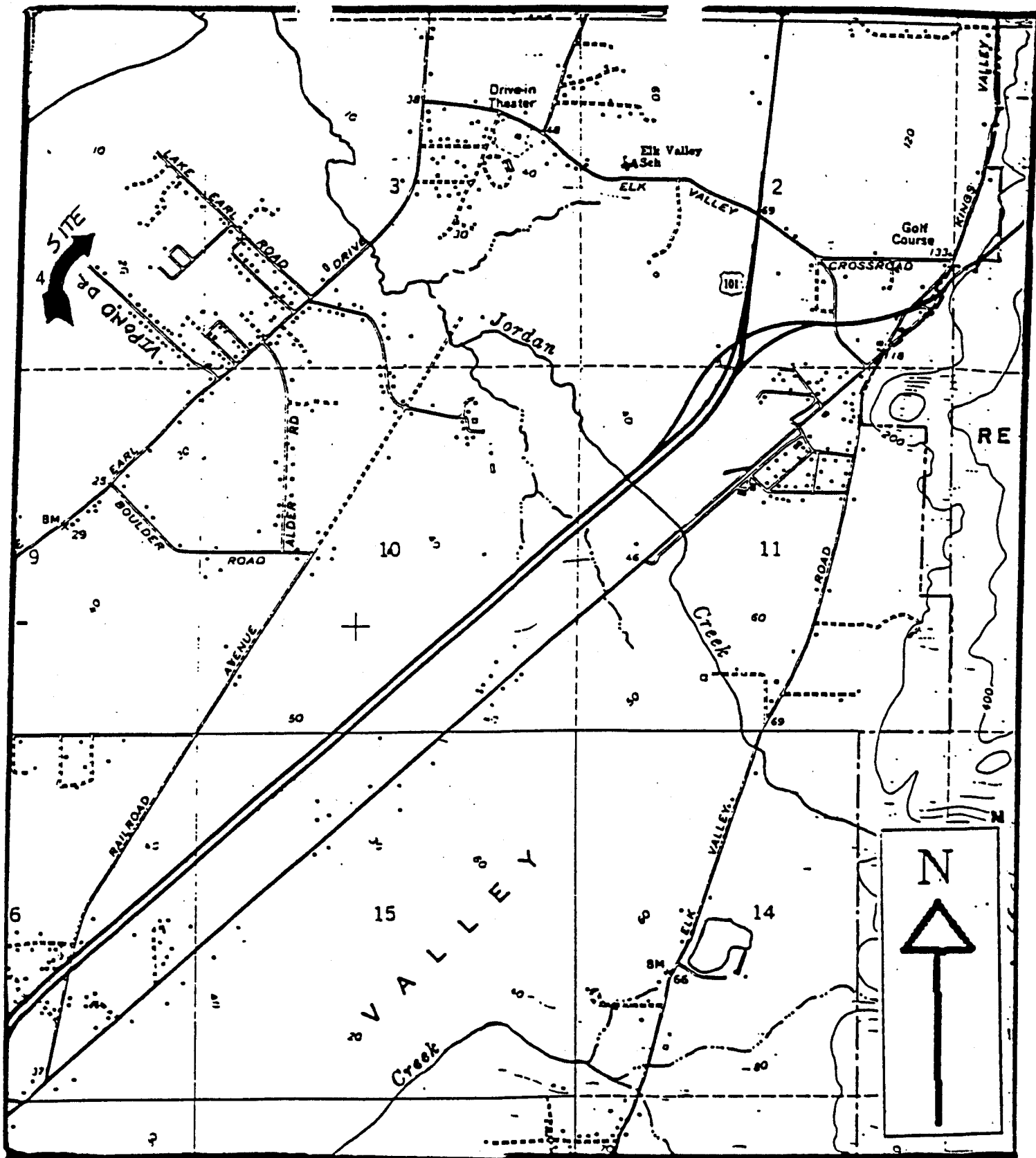


LOCATION MAP



County of Del Norte

376



LOCATION MAP

377X

EXHIBIT NO. 2
APPLICATION NO. A-1-DNC-04-043
TRINITY DEVELOPMENT VICINITY MAP

POR. SEC. 4, T. N., R. 1W., H. B. & M.

McNAMARA SUBDIVISION

BK. 10 PG. 120 R.S.

BK. 11 PG. 61-63 R.S. UNIT 2

BK. 13 PG. 85-87 R.S.



SUBJECT
PARCEL

Trinity Development

CDP New Res.

B27644C

110-450-47

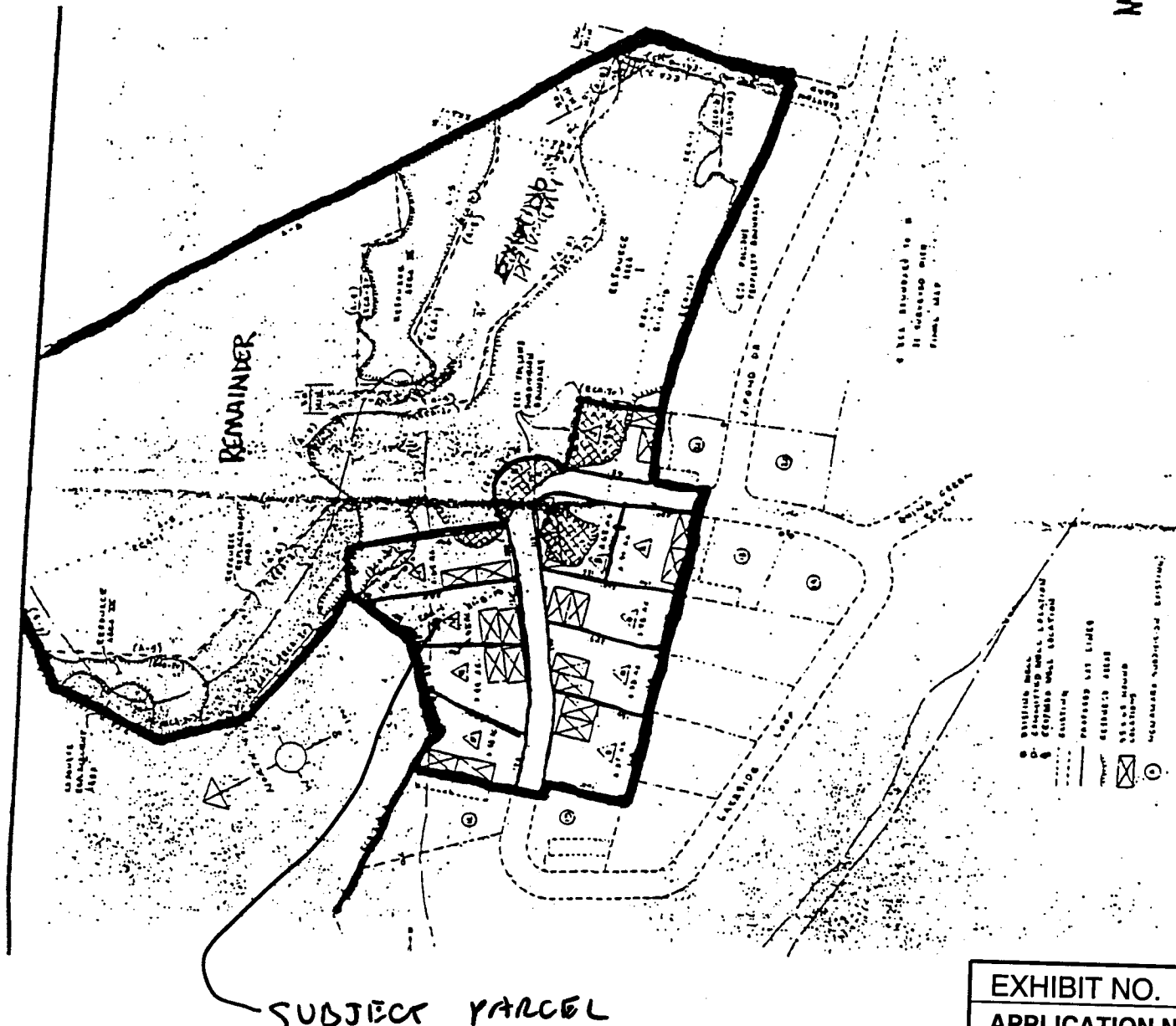
EXHIBIT NO. 3

APPLICATION NO.

A-1-DNC-04-043

TRINITY DEVELOPMENT

PARCEL MAP



SUBJECT PARCEL

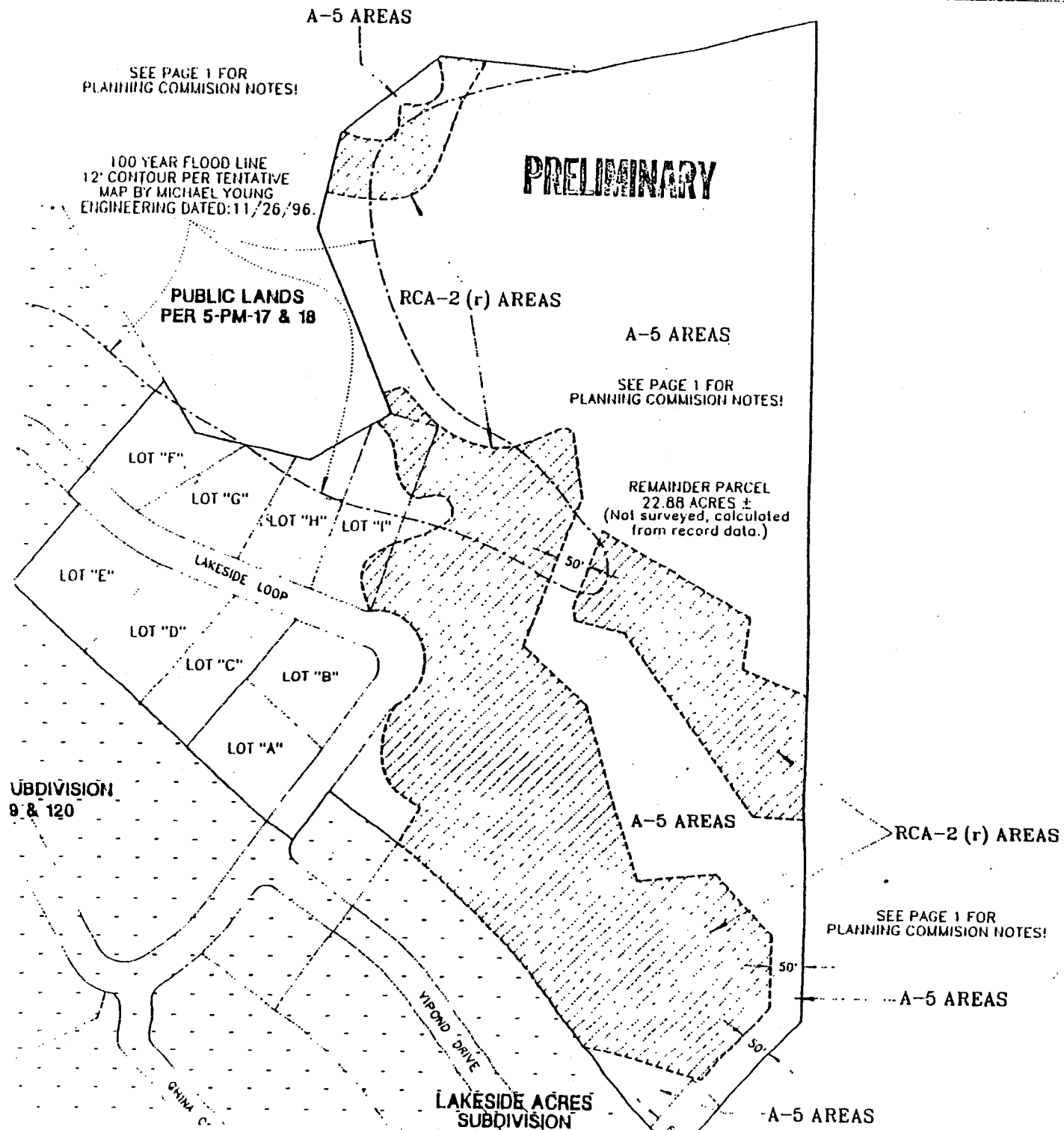
McNAMARA SUBDIVISION UNIT III

MJ9702C
McNAMARA, RICHARD
Major Subdivision
110-020-64

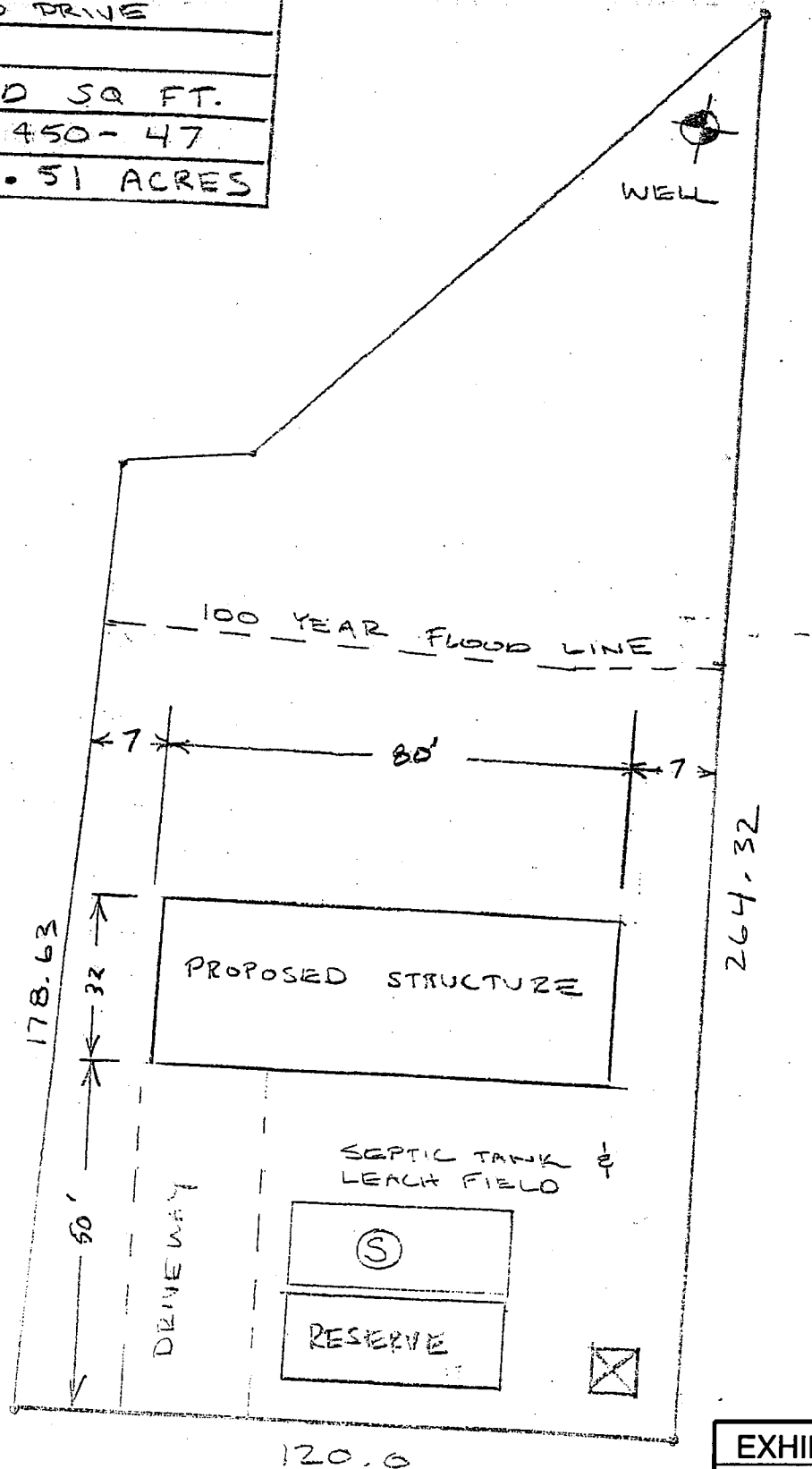
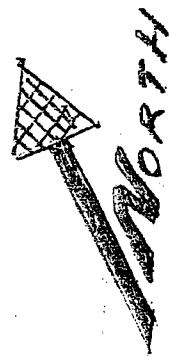
EXHIBIT NO. 4
APPLICATION NO. A-1-DNC-04-043
TRINITY DEVELOPMENT
APPROVED SUBDIVISION (1 of 2)

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(2 of 2)



TRINITY DEVELOPMENTS	
LAKE SIDE LOOP HOME	
OFF VIVANO DRIVE	
SCALE 1/32	
2262: HEATED SQ FT.	
PARCEL # 110-450-47	
LOT # 4	.51 ACRES



LAKE SIDE LOOP

Trinity Developm
CDP New Res.

EXHIBIT NO. 5
APPLICATION NO.
A-1-DNC-04-043
TRINITY DEVELOPMENT
SITE MAP

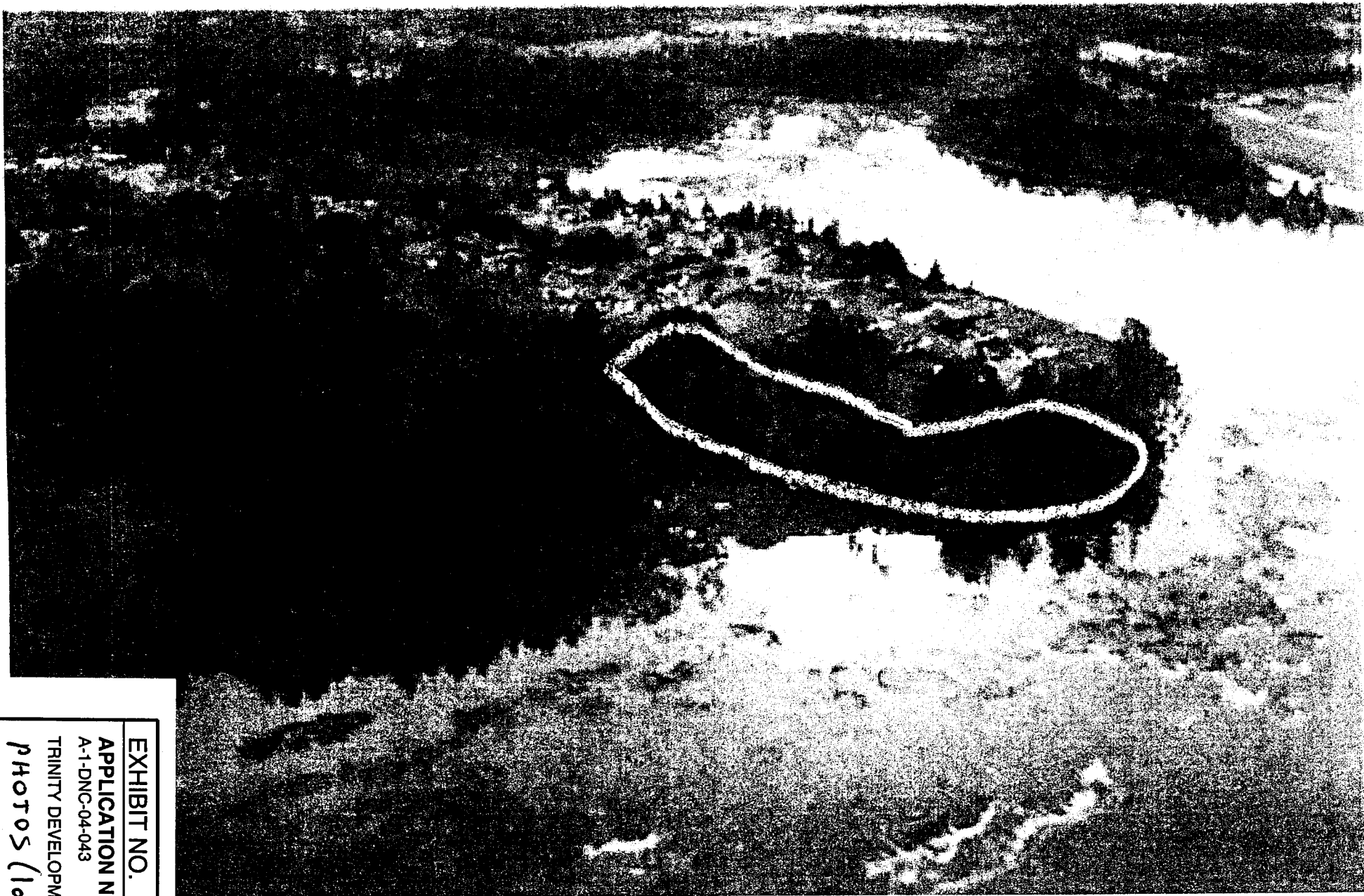


EXHIBIT NO. 7
APPLICATION NO. A-1-DNC-04-043 TRINITY DEVELOPMENT PHOTOS (1 of 2)

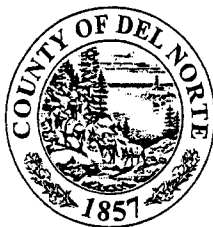
Lake Earl lagoon on Dec. 30, 2003 at 9.35ft above mean sea level, with the peninsula of Lakeside Loop and McNamara subdivision visible. Area circled in yellow is approximately the location of the lots of concern, i.e. lots 9-12 and 45-48. All locations are approximate.

1



(2042)

67



COUNTY OF DEL NORTE
BOARD OF SUPERVISORS

981 H Street, Suite 200
Crescent City CA 95531
(707) 464-7204

July 16, 2004

RECEIVED

JUL 20 2004

CALIFORNIA
COASTAL COMMISSION

Joe Gillespie
Friends of Del Norte
P.O. Box 229
Gasquet, CA 95543

RE: Lakeside Loop Building Permit
Lot 47

Dear Mr. Gillespie:

On July 13, 2004 the Del Norte County Board of Supervisors held a public hearing to consider the appeal The Friends of Del Norte filed regarding the issuance of a Coastal Building Permit for lot 47 of Phase III of the McNamara Subdivision.

During the hearing comments were heard from County Counsel, Richard Miles, Joe Gartland, Frank Galea, Jim Erler, Scot Feller, Eileen Cooper and Dohn Henion. Following discussion by the Board, Supervisor Sampels moved to deny the appeal, seconded by Supervisor Blackburn and carried unanimously.

Enclosed is a copy of County Codes 21.51.010 and 21.52.010 regarding further appeal process.

Sincerely,

Donna M. Walsh
Clerk of the Board
Of Supervisors

Cc: California Coastal Commission
Trinity Development
Community Development Department

EXHIBIT NO. 8
APPLICATION NO. A-1-DNC-04-043
TRINITY DEVELOPMENT
NOTICE OF FINAL ACTION (10412)

21.51.010 Final county action. A. Finality of County Action. A county decision on an application for a development shall be deemed final when (1) the county decision on the application has been made and all required findings have been adopted, including specific factual findings supporting the legal conclusions that the proposed development is or is not in conformity with the certified local coastal program; and (2) when all local rights of appeal have been exhausted as set forth herein.

B. Notice of Final County Action.

1. Notice After Final County Decision. (This section shall not apply to exempt development.) Within seven calendar days of a final county decision on an application for any development, the county shall provide notice of its action by first-class mail to the applicant, the California Coastal Commission, and to any persons who specifically requested notice of such final action who paid a reasonable fee to receive such notice. Such notice shall include conditions of approval and written findings and the procedures for appeal of the local decision to the California Coastal Commission.

2. Failure to Act--Notice.

a. Notification by Applicant. If the county has failed to act on an application within the time limits set forth in Government Code Sections 65950 through 65957.1, thereby approving the development by operation of law, the person claiming a right to proceed pursuant to Government Code Sections 65950 through 65957.1 shall notify, in writing, the county and the California Coastal Commission of his or her claim that the development has been approved by operation of law. Such notice shall specify the application which is claimed to be approved.

b. Notification by the County. When the county determines that the time limits established pursuant to Government Code Sections 65950 through 65957.1 have expired, the county shall, within seven calendar days of such determination, notify any person entitled to receive notice pursuant to subsection B(1) of this section, that it has taken final action by operation of law pursuant to Government Code Sections 65950 through 65957.1. The appeal period for projects approved by operation of law shall begin to run only upon the receipt of the local government notice in the California Coastal Commission office. (This section shall apply equally to a county determination that the project has been approved by operation of law and to a judicial determination that the project has been approved by operation of law.)

C. Effective Date of County Action.

1. The county's final decision on an application for a project which is not appealable to the California

Chapter 21.52CALIFORNIA COASTAL ZONE ENTITLEMENT PROCEDURES--
CALIFORNIA COASTAL COMMISSION APPEALSSections:

- 21.52.010 Exhaustion of local appeals.
21.52.020 Basis of appeals.

21.52.010 Exhaustion of local appeals. A. An appellant shall be deemed to have exhausted local appeals for purposes of this section and shall be qualified as an aggrieved person where the appellant has pursued his or her appeal to the local appellate body as required by Chapter 21.51 except that exhaustion of all local appeals shall not be required if any of the following occur:

1. The county requires an appellant to appeal to more local appellate bodies than have been certified as appellant bodies for permits in the coastal zone, in the implementation section of the Local Coastal Program;
2. An appellant was denied the right of the initial local appeal by county ordinance which restricts the class of persons who may appeal a local decision;
3. An appellant was denied the right of local appeal because county notice and hearing procedures for the development did not comply with the provisions of the adopted Local Coastal Program procedures;
4. The county charges an appeal fee for the filing or processing of appeals.

B. Where a project is appealed by any two members of the Coastal Commission, there shall be no requirement of exhaustion of local appeals. Provided, however, that the county may provide, by ordinance, that notice of Coastal Commission appeals may be transmitted to the county appellate body (which considers appeals from the local body that rendered the final decision) and the appeal to the Coastal Commission may be suspended pending a decision of the appellate body modifies or reverses the previous decision, the Coastal Commissioners shall be required to file a new appeal from that decision. Adoption of such an ordinance would be subject to Coastal Commission certification as in amendment to the Local Coastal Program. (Ord. 83-03(part))

21.52.020 Basis of appeals. A. Action taken by the county on a coastal development permit (or entitlement serving as a coastal development permit) may be appealed to the California Coastal Commission for only the following types of development:

1. Developments approved by the county between the

sea and the first public road paralleling the sea or within three hundred feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance as designated on the Local Program permit appeal maps;

2. Developments approved by the county not included within subsection A(1) of this section that are located on tidelands, submerged lands, public trust lands, within one hundred feet of any wetland, estuary, stream, or within three hundred feet of the top of the seaward face of any coastal bluff as designated on the Local Coastal Program permit appeals maps;

3. Any development approved by the county that is not designated as the principal permitted use in Title 21;

4. Any development which constitutes a major public works project of a major energy facility.

B. The grounds for an appeal pursuant to subsection A(1) of this section shall be limited to one or more of the following allegations:

1. The development fails to provide adequate physical access or public or private commercial use or interferes with such uses;

2. The development fails to protect public views from any public road or from a recreational area to, and along, the coast;

3. The development is not compatible with the established physical scale of the area;

4. The development may significantly alter existing natural landforms;

5. The development does not comply with shoreline erosion and geologic setback requirements.

C. The grounds for an appeal pursuant to subsection A (1), (3) or (4) of this section shall be limited to an allegation that the development does not conform to the certified local program.

D. Any action described in subsection A of this section shall become final after the tenth working day, unless an appeal is filed within that time. (Ord. 83-03(part))

Chapter 21.60

ENFORCEMENT

Sections:

- 21.60.010 Application.
- 21.60.020 Judicial Review--Projects appealable to Coastal Commission.
- 21.60.030 Judicial review--Projects not appealable to the Coastal Commission.

DEL NORTE COUNTY COMMUNITY DEVELOPMENT DEPARTMENT
981 H STREET, SUITE 110
CRESCENT CITY, CA 95531

RECEIVED

MAY 10 2004

NOTICE OF ACTION

CALIFORNIA
COASTAL COMMISSION

- I. Notice is hereby given that the **Planning Commission** of Del Norte County took the following action on May 5, 2004 regarding the application for development listed below:

Action: ☒ Approved ☐ Denied ☐ Continued ☐ Recommended EIR
☐ Forwarded to Board of Supervisors

Application Number: B27644C

Project Description: Coastal Development Permit

Project Location: 270 Lake Side Loop, Lot 47, off Vipond Drive, Crescent City

Assessor's Parcel Number: 110-450-47

Applicant: Trinity Development

Applicant's Mailing Address: 840 L Street, #1, Crescent City, CA 95531

Agent's Name & Address: Jim Vining, 840 L Street, #1, Crescent City, CA 95531

A copy of any conditions of approval and/or findings adopted as part of the above action is attached.

II. If Approved:

- ☒ This County permit or entitlement serves as a Coastal permit. No further action is required unless an appeal is filed in which case you will be notified.

This County permit or entitlement DOES NOT serve as a Coastal permit. Consult the Coastal Zone Permit procedure section of your NOTICE OF APPLICATION STATUS or the Planning Division of the Community Development Department if you have questions.

III. Notice is given that this project:

Is not appealable to the California Coastal Commission, however, a local appeal period does exist.

☒ Is appealable to the California Coastal Commission.

☒ Any appeal of the above decision must be filed with the Clerk of the Board of Supervisors by May 17, 2004 for consideration by the Board of Supervisors.

☒ Any action of the Board of Supervisors on this item may be appealed to the California Coastal Commission within 10 working days or 21 calendar days subject to the requirements of Chapter 21.52 DNCC and Coastal Regulations.

Must be forwarded to the California Coastal Commission for final action. You will be notified of its status by the Coastal Commission Office.

(Continued on the next page)

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Is not subject to Coastal Commission regulations, however, a local appeal process is available. .
Written appeals must be filed with the Clerk of the Board of Supervisors by
N/A. Consideration will be by the Board of Supervisors.

Requests for deferment of road improvement standards or for modification of road improvement standards must be filed in writing with the Clerk of the Board of Supervisors by
May 17, 2004, with a copy provided to the Secretary of the Planning Commission. Consideration will be by the Board of Supervisors.

Parcel map must be filed within 24 months of the date of approval.

Record of Survey and new deeds must be filed within 24 months of the date of approval.

New deeds must be filed within 24 months of the date of approval.

EXTENSIONS – MAJOR & MINOR SUBDIVISIONS OR BOUNDARY ADJUSTMENTS – Maps (or Records of Survey/Deeds) must be filed within 12 months after the original date of expiration.

NOTICE – SECTION 1.40.070

The time within which review of this decision must be sought is governed by the California Code of Civil Procedure, Section 1094.6, and the Del Norte County Ordinance Code, Chapter 1.40. Any petition seeking judicial review must be filed in the appropriate court not later than the 90th day following the date on which this decision was made; however, if within 10 days after the decision was made, a request for the record of the proceedings is filed and the required deposit in an amount sufficient to cover the estimated cost of preparation of such record is timely deposited, the time within which such petition may be filed in court is extended to no later than the 30th day following the date on which the record is either personally delivered or mailed to you or your attorney of record.

FISH AND GAME FILING FEES

Projects subject to CEQA are also subject to the following fees as required by the California Department of Fish and Game:

Applicable Fee - ___Neg. Dec. (\$1,275) ___EIR (\$875) ___Exempt

This fee is due and payable to the County Clerk's Office. If not paid within 10 days of the date of action of the Planning Commission, your project may be invalid by law (PRC 21089(b)) and will be referred to Fish and Game's Department of Compliance and External Audits in the Clerk's monthly deposit and report to Fish and Game.

ATTENTION PROSPECTIVE SUBDIVIDER

As a prospective subdivider of property, this notice is to advise you that **all taxes** must be paid in full prior to the recordation of your map. If the map is filed **after December 16th**, **you must pay all taxes due PLUS NEXT YEAR'S TAXES** before the map can be recorded.

If you have any questions regarding the payment of taxes, call the Del Norte County Tax Collector's Office at (707) 464-7283.

(6 of 12)

Agent: Jim Vining

APP# B27644C

STAFF REPORT

APPLICANT: Trinity Development/The McNamara Family Trust

APPLYING FOR: Building Permit for a new residence

AP#: 110-450-47

LOCATION: 270 Lakeside Loop

PARCEL(S)

EXISTING

EXISTING

SIZE: .51 acres

USE: undeveloped

STRUCTURES: none

PLANNING AREA: PA#3

GENERAL PLAN: Rural Neighborhood 3/1

ADJ. GEN. PLAN: Rural Neighborhood, Resource Conservation Area

ZONING: R1-B13

ADJ. ZONING: R1-B13, RCA -2(r)

1. PROCESSING CATEGORY: NON-COASTAL APPEALABLE COASTAL X
NON-APPEALABLE COASTAL PROJECT REVIEW APPEAL

2. FIELD REVIEW NOTES: DATE: 4/9/04

HEALTH DEPT X
PLANNING X

BUILDING INSP X
ENGINEERING/SURVEYING X

ACCESS: Lakeside Loop via Vipond Drive
TOPOGRAPHY: flat

ADJ. USES: Res., RCA, undeveloped residential
DRAINAGE: sheet flow-unnamed drainage to Lake Earl

DATE OF COMPLETE APPLICATION: 4/15/04

3. ERC RECOMMENDATION: Application complete. CEQA Class 3 exempt. Exempt Ministerial Building Permit. Previous SEIR (SCH#96122060. Approval with listed findings and conditions.

4. STAFF RECOMMENDATION: Trinity Development, contractors for the McNamara Family Trust, have applied for a building permit to construct a residence on lot "H" of the Third Phase of the McNamara Subdivision. The subject lot is located at 270 Lakeside Loop on the north side of the improved street. The parcel is relatively flat with a slight slope toward the rear of the parcel. The property has been partially cleared and wooden frames for a future foundation have been constructed.

Lot "H" is Assessor's Parcel Number (APN) 110-450-47 and has been referred to as lot #47. The subject lot is Lot "H" of the third phase of the McNamara Subdivision. The County reviewed this phase in 1997. The applicants applied for a coastal development permit to subdivide the then 26.94-acre property into ten residential lots (approximately 1/2 acre each in size) with a 22-acre remainder parcel. A supplemental environmental document was prepared and circulated as an update to a previously prepared and circulated Environmental Impact Report. Though circulated through the state Clearinghouse and mailed

04/28/04

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(7 of 12)

directly to the staff of the Coastal Commission, commenting agencies were limited to the Department of Fish and Game (requesting a 100-foot setback from Lake Earl) and from Regional Water Quality Control Board (advising of their permit process). At the March 1997 Planning Commission meeting, the Commission approved the subdivision of ten lots with 16 conditions and a rezone of a portion of the property establishing the RCA-2(r) corridor. The appeal period for this action ended on March 31, 1997. On April 3, 1997, the County received an appeal notice from the Coastal Commission dated April 1, 1997. The appeal of the Coastal Commission had four main areas of concern: (1) the subdivision as approved by the County would ultimately result in the placement of fill in a wetland and riparian habitat for residential uses; (2) the development failed to protect the riparian wetland habitat area; (3) alternatives to the placement of the fill were not examined; and (4) one of the lots in the subdivision did not meet the minimum lot useable area standards. The staff report of the Coastal Commission, 33 pages in length and attached to this report (including its exhibits) was submitted to the Coastal Commission for their consideration and action. On April 16, 1999, by a vote of 11 to 0 the California Coastal Commission granted to Richard C. McNamara Coastal Permit A-1-DNC-97-019 subject to the condition that Lot "J" be eliminated and combined into the remainder parcel leaving lots "A" through "I" as separate residential parcels and a 22.5 acre remainder parcel. The area for the approved parcels was zoned R1-B13 and the wetland restoration component, originally proposed to mitigate wetland fill impacts associated with the development, was deemed not necessary as the Coastal approval eliminated the proposed wetland associated with Lot "J". The Coastal Commission's adopted staff report determined that "(t)he proposed subdivision is located well beyond 100-feet away from other wetland resources on adjoining properties including Lake Earl and the adjacent area zoned as agriculture and/or farmed wetlands. With respect to riparian resources on the property itself, both the County and the California Department of Fish and Game have determined that no additional buffer is needed for the proposed road alignment, which is adjacent to a riparian habitat area. Further, with the exception of Lot J, the future development of the proposed residential lots that are located adjacent to sensitive habitat areas are not expected to result in adverse impacts to sensitive habitat areas. Each of these lots contain adequate area to develop a single-family residence, while also providing an adequate spatial buffer and/or a buffer composed of fencing or vegetative screening that would prevent significant impact to environmentally sensitive resources." Also within the Coastal staff report adopted by the Commission, public access was addressed. The adopted report states that the Lake Earl Wildlife Area includes sensitive habitat areas and is used extensively for hunting and fishing. The Coastal staff report further states that the Department of Fish and Game maintains a limited access policy to this coastal resource for resource management and public safety concerns. The report notes that public access is available a short distance from the subdivision at the ends of Lakeview Drive and Buzzini Road. The shoreline is accessible by boat or other flotation device, as the Department of Fish and Game own the shoreline. The Coastal Commission made the finding that the project, which does not include any new public access, is consistent with the public access policies of the Coastal Act. The Coastal Commission also determined that there were no feasible alternatives or feasible mitigation measures available beyond those required, which would substantially lessen any significant adverse impact that the project may have on the environment.

Subsequently the map was recorded, and the lots formally created. The recorded map contains the restrictions of the County and reflects the action of the Coastal Commission deleting lot "J". On March 3, 2004, Trinity Developments filed a building permit to construct a 2700 square foot house on the subject property. The proposed house is two stories and will be 25 feet in height. The house is proposed to be 50 to 53 feet from the front property line to allow the placement of the sewage disposal system in the front yard. The well will be located at the rear of the property below the 12-foot contour to provide adequate separation between the well and sewage disposal system. The lot is 120 feet in width and the proposed house is 80 feet in width leaving 40 feet for the side yards. The East Side yard is narrower

than the West Side yard so the apparent split is approximately 8 to 10 feet on the East Side and approximately 30 feet on the West Side. The minimum side yard construction setback to the property line is six feet.

Sewage disposal will be on-site and located in the approximate location as that previously approved by the County and subsequently by the Coastal Commission. An engineered on-site sewage for this property has been designed by Lee Tromble Engineer pursuant to the approval by the Regional Water Quality Control Board in June of 2002. (Lots F and I may require mound systems. Lot H, the subject parcel, does not require a mound system.) A map from the Coastal staff report is included, which identifies the approved sewage disposal areas in the front yard of the subject property. The same map identifies the location of the on-site well at the rear of the property. Wells are specifically allowed below the 12-foot contour as a part of the approval of the subdivision in order to maintain maximum separation between the well(s) and the on-site sewage system. The applicants have filed a well permit with the Health Department.

The building footprint is visible at the site, as the applicants have placed the forms for a foundation. As previously stated the building footprint reasonably conforms to the site approvals of the County and the Coastal Commission, while complying with health and safety standards for an on-site sewage disposal system and an on-site well. The location of the building foot print places the improvements (other than the well) approximately 180 feet from the mapped RCA-2(r) on the northeasterly property line and approximately 98 to 100 feet from the rear property line on the northwest. (The adjacent property owner to the rear of the parcel is the Department of Fish and Game that purchased the wetlands and a varying amount of land adjacent to the wetlands from the McNamara's in the early 80's. Therefore, the wetland on State property was not mapped in these areas as part of the original subdivision project nor as a part of this project.) The mapped RCA-2(r) on the adjoining lot "I" is approximately 65 feet from the common property line between the two lots. The side yard of the applicants would be added to the 65 feet resulting in the placement of the residence approximately 75 feet from the RCA-2(r) line. The RCA-2(r) in this location is a previously disturbed area prior to the subdivision. This general area is used as a discharge point for the street drainage system. The runoff sheet flows to the wetland prior to eventual discharge into Lake Earl. The adjoining lot, Lot "I", will have an intervening residence between the proposed residence for Lot "H" and the mapped RCA-2(r) area.

The subject of sightings of bald eagles and other raptors in the Lake Earl area in general has been discussed and addressed as part of the original subdivision, timber harvest proposals along the Lake and on the Standard Veneer pond. Lengthy discussions and written documentation was submitted by various agencies and individuals focusing on a timber harvest proposal of the McNamara's on the remainder parcel, Scott Feller at Brush and Jordan Creeks, and Foster at Standard Veneer pond. The Foster parcel (three acres in size) was primarily a discussion of its immediate proximity to the Standard Veneer pond and the pond on the East Side of Lake Earl Drive. The timber harvest plan for the Foster property did not proceed and the Department of Fish and Game subsequently acquired the property. The timber harvest plan for the Scott Feller parcel was also challenged and subsequently did not proceed with the resultant acquisition of the 102 acres by the Department of Fish and Game. The McNamara timber harvest and grading permit was also challenged and did not proceed. The subject lands (the remainder parcel) are still in the ownership of the McNamara's and the large trees and understory on the property relatively unchanged. In a letter from the Department of Fish and Game to the Coastal Commission (August of 1999), the department identifies the importance of "tall trees adjacent to open water" and the potential loss of "tall shoreline forest". The Department specifically identifies the "stands of tall conifers at or near the water's edge" and requests monitoring to determine the degree of use of

the McNamara (remainder parcel) and the Foster timber harvest areas prior to issuing a permit for the timber harvest. The approval action of the County was not amended by the Coastal Commission. The action of the County and the Coastal Commission imposed a specific condition (#13) which prohibits the construction of any structures (except a well) or removal of native habitat (except where a drainage or access project have been specifically approved or where a windfall tree threatens a nearby structure) below the 12-foot contour. This condition continues a determination made in the 1985 review in recognition of the potential use of the taller spruce trees along the project boundary, which are now either in state ownership and/or below the 12-foot contour (for the area now known as Lakeside Loop). Lot "H" has spruce trees approximately 3 feet in diameter along the 12 foot contour. Trees above the 12-foot contour and toward Lakeside Loop were removed to establish the building site, the sewage disposal area, its reserve area, and access pursuant to the previous approvals mentioned above. The trees removed were approximately 3 feet in diameter or less. The "taller" spruce trees along the shoreline are undisturbed and those offsite (3 to 6 feet or more in diameter) were not disturbed as a function of this building permit.

Attached to this staff report is a letter from Walter Morse regarding the building activity on the subject lot (lot "H"). Also enclosed are letters from the County to the property owners calling for corrective action and a follow-up on-site inspection of the requested corrective actions. A second letter from Mr. Morse is also included. In the second letter Mr. Morse, among other issues, questions the permit process for this parcel and for others.

The Local Coastal Plan (LCP) has basically three procedures to follow regarding the issuance of coastal development permits. The first is the issuance of a permit (including building permits) after action by the Planning Commission. This procedure involves public notice and a discussion opportunity before the Commission. The second procedure is the issuance of a permit through the Community Development Department without going before the Planning Commission. Notification is required but the action is not at a scheduled meeting of the Commission. The third are for items exempted from the permit procedure. This group of exempted items includes remodels of an existing building for example, but also can include items specifically excluded from the securing a coastal development permit. In 1986 the Coastal Commission adopted Categorical Exclusion No. E-86, which excluded the principal permitted uses in several zone districts within the Coastal Zone. Included in the exclusion action are one-family residences and accessory buildings to the one-family residence. The exclusion includes a series of maps identifying the areas excluded. Sheet 9 of 21 maps identifies the exclusion area for the Vipond/Lakeview area. The scale of the maps leaves a lot to be desired especially at locations on the fringe of the exclusion area. The width of the drawn line can be 50 to 100 feet in width on the actual ground. The subject lot "H" is on this fringe. (The adjoining lot "I" is bisected by the exclusion maps therefore the comments in the response letters to the applicants and to Mr. Morse that caution that lot "I" may automatically require a hearing before the Planning Commission.) The exclusion map boundary runs toward the northeast periphery of the subject lot "H". Again the width of the line in reality could place the building site outside of the permit requirement area or a small portion of the building site could be within the permit requirement area. In telephone conversation with Coastal staff it was determined that the County would process this permit before the Planning Commission on the basis that the map is not precise enough to determine the location of the jurisdiction on the ground and therefore the appropriate process requirement. Since there is obvious interest in this project and potentially others, and the lack of clarity and precision in the exclusion map, the project is before the Commission as a public hearing item in order to satisfy the ambiguity regarding the appropriate permit process procedure applicable to this project.

Staff recommends that after consideration of the staff report and its attachments, the Commission hold

the public hearing and after receipt of any public comment and the consideration of such comment, the Commission adopt the recommended findings and approve the issuance of Building Permit B27644C at 270 Lakeside Loop with the recommended findings and conditions.

5. FINDINGS:

- A. The issuance of the building permit as a coastal development permit is in conformance with the terms and conditions of the subdivision as approved by the County and subsequently modified and approved by the Coastal Commission;
- B. The placement of the well within the flood hazard area (below the 12 foot contour) is consistent with condition 13 of the subdivision as approved by the County and subsequently reviewed by the Coastal Commission;
- C. The adjacent Lake Earl Wildlife Area includes sensitive habitat areas and is used extensively for hunting and fishing, the Department of Fish and Game maintains a limited access policy to this coastal resource for resource management and public safety concerns therefore vertical access was not required of the subdivision and not required of this building permit as access would be inconsistent with public safety, would have adverse impacts on environmentally sensitive habitat areas designated on the land use plan, and the size of the parcel does not allow for an adequate vertical access corridor without passing within 25 feet of a proposed dwelling;
- D. Lateral access along the rear of the existing parcel is not applicable the shoreline and the area between the shoreline and this property is publicly owned;
- E. The wetland determination were made as part of the previous action approving the subdivision and the rezone which established the building envelope and the distance or setback from the mapped RCA-2(r) area. The building permit sites the improvement consistent with this previous determination, which were made with the participation and opportunity for input by the Department of Fish and Game;
- F. The issuance of the building permit is consistent with the parcel approval in the actions of the County and the Coastal Commission approving the subdivision;
- G. The subdivision creating the subject parcel was the subject of an EIR and supplemental environmental document for which there have been no substantial changes proposed in the project from its approval, there have been no substantial changes in the circumstances in which the subdivision was approved, nor has any new information of substantial importance been documented that would change the mitigation measures imposed on this subdivision lot;
- H. The issuance of a building permit, a non-discretionary project, in compliance with the conditions of the subdivision approval in 1999 limits the County to a determination of the building permit consistent with local ordinances, health and safety standards, and consistency with the conditions of approval of the parent subdivision;
- I. Issuance of the building permit is consistent with Section 15303 (CEQA Class 3 exempt), as the project is one single-family residence being placed in a previously designated residential zone (R1-B13).

6. CONDITIONS:

- 1) Issuance of the building permit shall be subject to final review and approval by the Building Inspection Division;
- 2) The project shall comply with the requirements of the Uniform Fire Code applicable at the time of complete application (4/04);
- 3) All construction shall comply with Section 14.16.027 and Section 14.16.028 of Del Norte County Code regarding the addressing and the posting of address numbers;
- 4) The placement of the structures shall be in accordance with the applicant's submitted plot plan and meet required setbacks. Prior to issuance of the final building permit the applicant shall allow CDD staff to review the foundation layout for compliance with the approved site plan;
- 5) All development shall adhere to the designated building site as designated on the final map for the McNamara Subdivision Phase III (Bk. 13 of maps pgs. 85-87);
- 6) The corrective action that has been undertaken shall not be disturbed by future construction activity;
- 7) Any disturbance related to the construction of the proposed well shall require a revegetation plan prior to issuance of a Certificate of Occupancy. Prior to a Certificate of occupancy the revegetation plan shall be implemented, inspected and accepted by the Community Development Department;
- 8) This entitlement is specifically conditioned on the applicant agreeing to indemnify and hold harmless the County of Del Norte, the Planning Commission of the County of Del Norte, the Board of Supervisors of the County of Del Norte, their officers, employees and agents against any and all claims arising out of the issuance of the entitlement and specifically against any expense arising from defending any legal action challenging the issuance of the entitlement, including but not limited to the value of time devoted to such defense by County officers, employees and agents and the amount of any judgement, including costs of suit and attorney fees, recovered against the County or any of its officers, employees or agent in such legal action. The County of Del Norte reserves the option to either undertake the defense of any such legal action or to tender such defense to the applicant. Should the County tender such defense to the applicant and the applicant fail or neglect to diligently defend such legal action, the County may consider such failure or neglect to be a material breach of this conditions and forthwith revoke this entitlement; and
- 9) An encroachment permit from the Community Development Department, Engineering and Surveying Division shall be obtained for any work in the County right-of-way.

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE

MAILING ADDRESS

E STREET - SUITE 200

P. O. BOX 4908

EUREKA, CA 95501-1865

EUREKA, CA 95502-4908

VOICE (707) 445-7833

FACSIMILE (707) 445-7877



RECEIVED

AUG 03 2004

CALIFORNIA
COASTAL COMMISSIONAPPEAL FROM COASTAL PERMIT
DECISION OF LOCAL GOVERNMENTPlease Review Attached Appeal Information Sheet Prior To Completing
This Form.SECTION I. Appellant(s)

Name, mailing address and telephone number of appellant(s):

Friends of Del Norte (FDN)PO Box 229Gasquet, CA 95543(707) 465-8904

Zip

Area Code

Phone No.

SECTION II. Decision Being Appealed1. Name of local/port
government:Del Norte County2. Brief description of development being
appealed:Building Permit B27644C, residence
on Lakeside Loop with Phase III of McNamara
Subdivision, adjacent to Lake Earl3. Development's location (street address, assessor's parcel
no., cross street, etc.):270 Lakeside Loop, Del Norte Co.
(Crescent City) APN 110-450-47

4. Description of decision being appealed:

a. Approval; no special conditions: _____

(b.) Approval with special conditions: _____

c. Denial: _____

Note: For jurisdictions with a total LCP, denial
decisions by a local government cannot be appealed unless
the development is a major energy or public works project.
Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-1-DNC-04-043DATE FILED: 8/3/04DISTRICT: North Coast

H5: 4/88

EXHIBIT NO. 9

APPLICATION NO.

A-1-DNC-04-043

TRINITY DEVELOPMENT

APPEAL (FRIENDS OF
DEL NORTE) (1 of 41)

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT. (Page 2)

5. Decision being appealed was made by (check one):

- a. ☐ Planning Director/Zoning Administrator c. ☐ Planning Commission
b. ☒ City Council/Board of Supervisors d. ☐ Other _____

6. Date of local government's decision: July 13, 2004 / NOD July 16 2004

7. Local government's file number (if any): _____

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

Trinity Development/McNamara
840 L Street
Crescent City, CA 95531

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) Eileen Cooper
1093 Hwy 101 N
Crescent City, CA 95531

(2) Joe Gartland / Friends of Del Norte
P.O. Box 229
Gasquet, CA 95543

(3) _____

(4) _____

SECTION IV. Reasons Supporting This Appeal

Note: Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section, which continues on the next page.

State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

Please see attachments
Grounds for appeal #2, 3, 4, 5 (Flood hazard)
and LCP violations - as in attached
appeal

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Eileen Cooper (Board member) ^{FDN}
 Signature of Appellant(s) or
 Authorized Agent

Date August 2, 2004

NOTE: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby authorize _____ to act as my/our representative and to bind me/us in all matters concerning this appeal.

 Signature of Appellant(s)
 Date _____



Friends of Del Norte

P.O. Box 229

Gasquet, California 95543

1-707-951-3020

friendsdelnorte@yahoo.com

PROTECTING THE WILDLANDS, WATERS, and WILDLIFE OF DEL NORTE COUNTY FOR 30 YEARS.

August 3, 2004

Hand Delivered to Address Below
with Enclosures as listed

RECEIVED

AUG 03 2004

CALIFORNIA
COASTAL COMMISSION

The California Coastal Commission
Attention Mr. Robert Merrill
Coastal Manager, North Coast District Office
Delivered to 710 E Street, Suite 200
Eureka, California 95501

RE: Appeal to the California Coastal Commission by the Friends of Del Norte from the decision of County of Del Norte granting a coastal development permit for Lot 47 in Phase 3 of the McNamara subdivision, located at 270 Lakeside Loop, on the Lake Earl coastal lagoon periphery

Dear Commissioners and Staff:

Friends of Del Norte hereby appeals the County of Del Norte approval of a coastal development permit for Lot 47 of Phase 3 of the McNamara Subdivision, located at 270 Lakeside Loop, on the Lake Earl Coastal Lagoon periphery.

This appeal is based upon a failure by the County of Del Norte to comply with its Local Coastal Plan, the Coastal Act, and the California Environmental Quality Act. In approving the development permit for Lot 47, the County of Del Norte failed to comply with express provisions of its Local Coastal Plan. It also did not follow existing conditions placed by the Coastal Commission for the McNamara subdivision. The County of Del Norte processed and approved the development application without adequate environmental review as required by the California Environmental Quality Act, notwithstanding the extensive evidence before it which required CEQA review in the form of an environmental impact report. The attached Statement of Appeal sets forth in detail the numerous grounds upon which Friends of Del Norte appeal the County's approval.

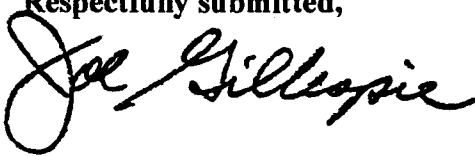
(4 of 41)

Lot 47 is the first of several undeveloped shoreline lots comprising Phase 3 of the McNamara subdivision. While those other lots have yet to be considered by the County of Del Norte for their respective Coastal Development Permits, we believe that the underlying facts, policies and laws set forth in this appeal will equally apply to those applications should they be submitted. Accordingly we ask the Coastal Commission to consider the overall effect the subdivision development can have on the ecology of coastal resources, and upon prospective homeowners, should the issues in this appeal not be properly addressed.

Friends of Del Norte requests that the Coastal Commission grant its appeal as respectfully set forth in the accompanying Statement of Appeal.

Please note that we will be submitting more information before the Coastal Commission meeting, including but not limited to information regarding listed species and wetlands.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joe Gillespie". The signature is fluid and cursive, with the first name "Joe" written in a larger, more prominent script than the last name "Gillespie".

Joe Gillespie
President, Friends of Del Norte

Enclosures:

Friends of Del Norte Appeal of Planning Commission decision on lot 47, submitted to Del Norte County Board of Supervisors May 17, 2004, submitted here as part of the appeal record at County level.

Memo from attorneys Fred Neighbor and Sharon Duggan to Joe Gillespie, Friends of Del Norte, and dated June 21, 2004, submitted here as part of the appeal record at County level.

Friends of Del Norte Appeal References: two lists of the references submitted to County and actual copies of the references (reference #s 1-100) as part of the record at County level, and hand delivered to Coastal Commission with this Appeal.

STATEMENT OF APPEAL

Summary

Friends of Del Norte appeals the decision of County of Del Norte granting a coastal development permit for Lot 47 in Phase 3 of the McNamara subdivision, i.e. 270 Lakeside Loop on the Lake Earl coastal lagoon periphery, because it violates the law.

On July 13, 2004, Del Norte County ("County") approved on appeal the issuance of a local coastal development permit for the construction of a single family residence with onsite well and septic system on Lot 47 of the McNamara subdivision ("subdivision"). The subdivision is situated adjacent to Lake Earl coastal lagoon ("lagoon"). Depending upon the lagoon's elevation, Lot 47 is next to, or partially submerged in, Lake Earl. The County relied upon information and findings from an Environmental Impact Report ("EIR") prepared in 1985 (at phase one of the subdivision) in determining that issuance of the permit would not result in adverse environmental impacts. The County approved the issuance of the permit for lot 47 without adequate environmental review as required by the California Environmental Quality Act and thus there was no updated assessment of any changes in environmental conditions or project impacts. Since the 1985 EIR there have been substantial changes in the conditions of the Lake Earl lagoon environs. Most significantly, the State of California has initiated management plans which allow for the lagoon to regularly reach elevations far in excess on the ambient conditions that existed in 1985. The higher lagoon elevations have resulted in a substantial increase in both the size of the lagoon and wetland acreage. The lagoon regularly inundates a portion of Lot 47. This is a condition never fully assessed in the 1985 EIR or any subsequent environmental document and which significantly changes the equation for septic treatment, well construction and wetland delineation. In addition, substantial information not considered or assessed in the 1985 EIR has been promulgated which establishes that endangered species, particularly the Bald Eagle and the Tidewater Goby, have or could be impacted by development of Lot 47. As approved this project will result in significant adverse impacts to coastal resources based on the following substantive grounds:

- 1) no wetland delineation, and
- 2) no wetland buffer on lagoon periphery lots;
- 3) incorrect, outdated zoning of the lagoon itself as RCA-2-farmed wetland, and incorrect interpretation that no wetland buffer is required for farmed wetlands;
- 4) residential wells that are located in wetlands/the lagoon, constituting destruction and fill of wetlands;
- 5) placement of critical utility facilities (residential wells) in a flood hazard zone without mitigations;
- 6) threats to water quality and biological productivity of the lagoon from non-conforming septic systems, and use of household chemicals such as lawn fertilizers;

- 7) threats to the bald eagle, tidewater goby, brown pelican and other species of special biological significance due to septic system issues and removal of the ESHA (forested edge) of the lagoon;
- 8) violation of the Coastal Act by removing large, mature trees and native vegetation from the ESHA on lots 47 and 48 without a coastal development permit;
- 9) undersizing of lots and oversizing of houses, with placement of on-site septic, in violation of guidelines;
- 10) oversized homes are visually incompatible within highly scenic area, and
- 11) failure to protect the Lake Earl lagoon ESHA from significant degradation and disruption.

Management History of the Lake Earl Coastal Lagoon

This project as approved will obstruct current management of the lagoon, as well as any future adaptive management and further restoration of its water levels. This conflict is largely avoidable.

Lake Earl lagoon is the largest coastal lagoon in California and the continental western United States, and is designated in the Coastal Act as one of California's most important wetlands.¹ A vital refuge on the Pacific Flyway, it has outstanding biological productivity and diversity of state and national significance.² The lagoon is designated as an environmentally sensitive habitat area (ESHA) in the County's Local Coastal Plan (LCP),³ and the Coastal Commission concluded in 1999 that the lagoon's forested edge habitat is part of the ESHA.

Estuarine coastal lagoons fluctuate naturally. A lagoon will fill with winter rains and rise, until it breaches the sand bar at its mouth and empties out into the ocean. At least for a period of weeks, the lagoon is open to the ocean and tidal until the sand bar builds up again naturally and closes it.

Lake Earl lagoon reached at least 12ft and breached naturally before and at the time of European contact, and for periods thereafter.⁴ For many years loggers, who wanted it high to float logs, were in conflict with ranchers, who wanted it drained for cattle pasture, and fought bitterly over lagoon management. After the mills closed, for some period of time, perhaps decades, ranchers were able to do as they wished.

¹ We have heard the Lake Earl lagoon referenced to the Coastal Act as "one of the holy 19," referring to the 19 most significant coastal wetlands in California.

² For the lagoon and its uplands, there are records of: 300 species of birds; 250 plant varieties; 21 fish species; 40 types of mammals, including deer, elk, coyote, black bear, bobcat and cougar, and 11 threatened and endangered species. See CA Dept. of Fish and Game draft Management Plan/DEIR, 2003.

³ Local Coastal Plan for Del Norte County, excerpts. Friends' ref. # 49.

⁴ See Dec. 1855 survey map of lagoon, drawn by J. Kellisberger, U.S. Deputy Surveyor, and press clippings packet previously submitted to Coastal Commission. Friends' ref. # 94.

The lagoon, if allowed to breach naturally, might reach a height of 12-14ft above mean sea level (msl) before breaking through a high sand bar to the ocean.⁵ As the lagoon refills with water, it also spreads out horizontally, fills periphery marshes and sloughs, and creates more wetlands. For example, the lagoon at a height of 10ft msl creates nearly twice as much surface wetland than at 4ft msl.⁶ At 10ft the shoreline is nearly 60 miles around; this is more than twice the wetland edge habitat at 4ft.

In the late 1970s and early 1980s the State of California acquired many of the large ranches around the lagoon, making the State the single largest landowner. During most of the 1980s the County had a long-term U.S. Army Corps breaching permit which continued the ranchers' informal practice of breaching the lagoon whenever it reached ~ 4ft msl, essentially so that its natural basin could be used as a cattle ranch. The EIR for the McNamara subdivision was completed in 1985, with a stated life expectancy of four years, and then all subsequent environmental documents (negative declarations) were tiered upon it to the present, for nearly 20 years.

However, when the County's 4ft breach permit expired in the late 1980s, DFG began to restore the lagoon by allowing it to fluctuate to higher natural levels of 8-10ft msl in the winter before intervening with mechanical breaching. The lagoon began to reach 10ft regularly during the winter, and often higher, rising up on the periphery lots of the McNamara subdivision. It also attained higher levels in the summer. The environmental setting of the McNamara subdivision changed dramatically, but the environmental documents and studies did not. This 8-10ft+ lagoon management has continued for 17 years and to the present.

Since lagoon restoration was initiated by California Dept. of Fish and Game (DFG) in the late 1980s, the lagoon has been reaching 8-10ft+ above mean sea level (msl) regularly during the winter, which means that the lagoon is immediately adjacent to the subdivision boundary and rises up on its periphery lots. DFG's requests to the County in 1984, and again in 1991, 1993 and 1997,⁷ for a 100ft shoreline buffer on these lots have been ignored. The Coastal Commission has not enforced these requests due to incorrect and misleading information given it by the County about the location of the lagoon and several other matters.

In addition to significant impacts to coastal resources caused by this project, it is probable that the future homeowners of lot 47 and the other contiguous lots will be inadvertently placed into unfortunate, but largely avoidable, conflict with the current management of the West's largest coastal lagoon. The County could have easily mitigated at least some of these conflicts. DFG continues to purchase property from willing sellers around the perimeter of the lagoon, and has done so steadily for the past 25 years. The Agency now owns ~99% of the lagoon basin up to the 10ft msl level (outside of the LCP "white hole" Pacific Shores subdivision). The publicly-owned lagoon and its uplands are more than 10,000 coastal acres, which are managed as the Lake Earl Wildlife Area and Tolowa Dunes State Park.⁸

⁵ California Dept. of Fish & Game draft EIR for Lake Earl management options, summer 2003.

⁶ Tetra Tech report, Chap. 6, Effects of Breaching, p. 6-3, Friends' ref. # 80.

⁷ Friends' ref. # 55, and then #s 3, 4, 5.

⁸ Friends' ref. #s 74, 75.

Group of Lots

Lot 47 is the first of eight undeveloped, contiguous and forested lots on the northwestern periphery of the partially developed McNamara subdivision to be approved and appealed to this Commission. We have similar concerns about the other seven lots. We ask that the Commission review them as a group or a whole because the lots are still in one ownership and because of the combined, cumulative impacts of developing this group.

This group of lots is the most environmentally sensitive in the subdivision because these undersized lots are on the periphery, directly on the Lake Earl lagoon, and covered with large, mature sitka spruce trees. These trees are used for perching by bald eagles and peregrine falcons as they hunt the edges of the lagoon. During the winter rains, the Lake Earl coastal lagoon rises up on these lots at 8-10ft above mean sea level (msl), before mechanical breaching releases its waters into the ocean. The current preferred lagoon management option of DFG and the County is winter breaching at 8-10ft msl. (We would contend that some further restoration may be possible in the future; in any case, the lagoon would breach naturally at 12-14ft msl.) The lagoon was formed by the mouth of the Smith River more than 10,000 years ago, and the surface waters of the two bodies are re-connected during Smith River floods. When the Smith River pours down through Tolowa Slough into Lake Earl, the lagoon water level rises at least to 12ft msl, which is the current established federal flood hazard level on these lots.

1991 and 1997-1999 Coastal Commission proceedings re: Phase 3 of McNamara Subdivision

The 1985 environmental impact report (EIR) for the McNamara subdivision is nearly 20 years old. It states that the lagoon is 1000 feet away from the subdivision boundary in the summer, and more than 100 feet away in the winter. These statements, combined with the rough map provided in the EIR, describe a lagoon that is artificially kept at ~ 4ft msl or below. However, since the late 1980s, DFG has allowed the lagoon to be higher and more natural. It has been allowed to reach levels of ~ 10ft msl before mechanical breaching, and frequently it has gone over 10ft. In other words, the lagoon has been rising up on these periphery lots of concern every winter now for 17 years. It is not "over 100ft" away. A small portion of lot 47 is below the 10ft level; on some of the other lots, larger segments appear to be between 8-10ft and lower.

In 1991, the County circulated a Notice of Preparation for a draft "focused" supplemental EIR for Phase 3.⁹ DFG and Coastal Commission wrote responses, requesting detailed information. The EIR package included a draft wetland delineation for lots 47 and 48, indicating that wetlands on the periphery lots extend close to the 12ft level. The Coastal Commission's response to the package shows an understanding of the fluctuating nature of the lagoon and DFG's efforts to restore it:

"The focused EIR...should take into consideration that the upper water level of Lake Earl is likely to be managed in the range of 8 to 10 feet above mean sea level. ...this rise in elevation may effect the groundwater elevation in the surrounding area, including the project area. ...

⁹ SCH# 91103037, McNamara Subdivision - Phase 3- Friends' submittal to Coastal Comm. #95.

*Again, we hope that the location, density, design and installation of any approved septic systems will take into consideration a rise in lake elevation and its relationship to the site's groundwater conditions. The septic system issue is particularly important, given the apparent limitation of available alternatives should systematic septic system failure occur. Equally important is the project's close proximity to the resources of Lake Earl and given the fact that failing septic systems are a major cause of adverse impacts on environmentally sensitive coastal resources, including public recreation."*¹⁰

After this first round of comments from the agencies, the McNamaras decided to drop this plan and the focused supplemental EIR.

In 1997, responding to a new plan from the McNamaras, the County approved Phase 3 of the subdivision, where the lot(s) at issue is located. The County filed a negative declaration, indicating that this time there were no significant environmental impacts. They tiered their decision on the original 1985 EIR, project description, and setting, and adopted its findings – and provided no adjustment for what was now a significantly higher lagoon. In 1997 the Planning Staff was still incorrectly stating at a County Planning Commission meeting, that the Lake shoreline was 500 feet away:

*"Staff also indicated that the Fish and Game request for a 100 foot setback from the shoreline of the lake is moot, as it is approximately 500 feet away according to the mapping."*¹¹

The minutes from this meeting became part of the Coastal Commission record. In fact, the lagoon was not 500 feet away, or even 100 feet away, from the subdivision boundary. At the time of the Planning Commission meeting, it had been coming up on the subdivision periphery lots in winter for nearly a decade.

Coastal Commissioners then filed a *de novo* appeal of Phase 3 on March 21, 1997, primarily because of wetland issues relating to the riparian area. This was not resolved by the Commission until 1999. In responding to Coastal Commission staff questions, County staff continued to repeat this incorrect information:

*"As discussed by the review of the original subdivision Unit 1 project, and the Planning Commission hearing and findings, the Lake shoreline is approximately 500 ft. away from the Unit 3 project..."*¹²

¹⁰ Coastal Commission, James Muth, letter to State Clearinghouse, re SCH #91103037, pg. 2, Friends' Ref. 95.

¹¹ Minutes, Del Norte County Planning Commission, March 5, 1997, pg. 3, marked draft, part of Coastal Commission record. See full discussion on pages 3-4 of these minutes.

¹² County Response to Coastal Commission Staff letter dated 4/21/97 re McNamara RCA rezone, pg. 6 and pg. 22 of exhibits.

This inaccurate information from the County was incorporated in the Staff Report for the final 1999 Coastal Commission hearing:

"...It is noted that...the lake is over 100 feet from the project area and that the adjacent Department of Fish and Game lands are designated as Resource Conservation Area-2 (farmed wetlands) which have no buffer requirements." ¹³

The Coastal Commission then prudently directed the County to "make the project consistent with LUP policies pertaining to buffer requirements and environmentally sensitive habitat areas." The County did not do this.

The County also gave the Coastal Commission assurances as to how the septic systems would be handled. Later they were not handled as described. The septic systems do not conform to the original project description in the 1985 EIR or to the Coastal Commission descriptions in 1997/1999.

Sewage was an important issue in the 1985 EIR. DFG expressed concerns that sewage problems might affect their ability to restore the lagoon and manage it at higher levels in the future. The EIR therefore, not taking these concerns too seriously but attempting to accommodate them, stated that DFG would be able to manage the lagoon without water quality impacts, because lots with septic systems located at 12ft-16ft msl would have Wisconsin mounds.¹⁴ These mounds can function with a separation to ground water of only 2 feet (or ground water levels of up to ~10ft msl). The original EIR project description specifically establishes that the highest anticipated groundwater level of the project is 10ft msl. Important water quality impacts were evaluated based on this description.

Based on information from the County, the Coastal Commission in 1999 stated that:

"Because of high ground water conditions on the property and updated sewage disposal regulations in Del Norte County, each of the ten proposed residential building lots will have to rely upon a "Wisconsin mound" septic system, each lot cannot be less than 20,000 square feet in size...." ¹⁵

The project before you today does not conform to this description. No mound system has been required for lot 47 or most of the other lots below 16ft msl. Implementation has not followed through on the conditions described in the original EIR and the 1999 Coastal Commission documents.

¹³ Staff Report, Coastal Commission de novo appeal hearing, McNamara Subdivision, April 16, 1999 (Appeal # A-1-DNC-97-019), pg. 6.

¹⁴ 1985 EIR, McNamara Major Subdivision, MJ8301C, pgs. 33-35.

¹⁵ Staff Report, Coastal Commission de novo appeal hearing, McNamara Subdivision, April 16, 1999 (Appeal # A-1-DNC-97-019), pgs. 7- 8.

In conclusion, the County provided information regarding the McNamara Subdivision that was outdated and incorrect, and descriptions of conditions that were later not followed. For these reasons alone, we believe that you will want to give this coastal development permit further review.

This further review by the Commission was in fact anticipated in its 1999 decision, which conveys the sense that these matters are unfinished. The Staff Report anticipates that the discussion about buffers has not been concluded, and that individual lots in the subdivision will "come back" for further mitigation and creation of buffers:

"In addition, the future development of the proposed residential lots would be subject to coastal development permit requirements. Thus the County will have the opportunity to evaluate the potential impacts associated with the development of individual lots and may impose conditions designed require mitigation (sic) measures to prevent impacts to sensitive coastal resources such as requirements to locate individual homes away from sensitive areas and to create suitable buffers.." ¹⁶
(Emphasis added)

The County, however, did not rise to this opportunity, and so we must ask the Coastal Commission to step in to perform this anticipated further evaluation.

Related Coastal Commission Actions

Another Coastal Commission proceeding in 1999 is related. The Commission then ruled that the Friends of Del Norte appeals of Foster and McNamara grading permits were based on substantial issues. (In this case the McNamaras had also started clearing the forest without CDF and County permits.) Further, the Commission recognized the forested edge of the lagoon as part of the lagoon Environmentally Sensitive Habitat Area ("ESHA"), and required both parties to conduct surveys for bald eagles and conduct a cumulative impacts assessment for habitat loss due to tree removal. The State later acquired Foster's buffer piece, and the McNamara issues on their 22 acre remainder parcel immediately to the north of Phase 3 of the subdivision of concern, are still pending. ¹⁷ The Coastal Commission has not received the required bald eagle surveys or cumulative impacts assessment.

Discussion of Substantial Issues raised by this appeal

Subdivision history notwithstanding, we are appealing the County's decision on lot 47 because of numerous, current violations of the Local Coastal Plan, Coastal Act, and CEQA. The relevant Del Norte County Local Coastal Plan ("LCP") and Coastal Act policies are cited at the end of each numbered section.

¹⁶ Staff Report, Coastal Commission Appeal # A-1DNC-97-019, Richard C. McNamara, April 16, 1999, pg. 27.

¹⁷ Coastal Commission letter to Richard and Genevieve McNamara and Dale Foster, dated Nov. 12, 1999.

1) *No Wetland Delineation was conducted for lagoon perimeter lots.*

The LCP is very clear in requiring ESHA and wetland delineation and mapping. The County has no such map for lot 47 and the other periphery lots.

Because County staff in 1997 persisted in saying incorrectly that the lagoon was 500 feet away, no wetland delineation for the perimeter of the lagoon on these lots was done. During review of Phase 3 of the subdivision in 1997-1999, the County record incorporated the 1985 EIR and stated that the lagoon was "500 feet away," and "over 100 feet" away.¹⁸

The DFG property (the lagoon) immediately adjacent to these lots is zoned RCA-2-Farmed wetlands (fw). However, the RCA zoning stops at the McNamara subdivision property line, although ample evidence exists that the lagoon has been reaching the 8-10ft level on and near these lots at least once each winter for the past 17 years.¹⁹ By definition, those portions of the lots covered by the lagoon for some portion of the year are wetland.

Additionally, a small portion of lot 47 is covered by the 10ft lagoon, and evidence exists that wetlands on this lot may extend to the 12ft msl level. As already discussed, wetland mapping was drafted in the early 1990s for a second subdivision EIR, which was later abandoned in favor of the more limited subdivision and County negative declaration in 1997. However, a small fragment of that mapping is captured on a tentative lot map, which shows wetlands reaching near the 12ft msl level on lots 47 and 48.²⁰ This information should have been submitted to the Coastal Commission in 1997 but apparently was not.

The wetland studies referenced by the County in their response are those completed in January, 1993 and updated in 1997 by Karen Theiss and Associates. This work focused almost entirely on the riparian area which drains into Lake Earl to the east and north of Lot 47 and 48. The arm of Lake Earl which comes up to meet this drainage, forming a little slough, appears to have been unexamined for wetlands, with one exception:

A) Wetland/Vegetation Mapping in this area was conducted by D. Hanson, dated 6/7/83. It was not a formal wetland delineation, and it was conducted at a time when the lagoon was kept very low, i.e. when it was breached whenever it reached approximately 4ft msl. After lagoon restoration to breaching at 8-10ft msl in the late 1980s, the hydrology of this area would have changed significantly, and suppressed wetland plants would have re-emerged. In any case,

¹⁸ Staff report, California Coastal Commission de novo appeal hearing (Appeal # A-1-DNC-97-019), April 16, 1999, pg. 6.

¹⁹ Lake Earl elevation data based on Del Norte County continuous monitoring data as summarized by Tetra Tech and Phil Williams & Associates hydrology study. Friends' Ref. # 34 and 82. Also ref. # 51.

²⁰ Friends' References submitted May 17, 2004, items 10 and 11, show this tentative lot map prepared by Michael Young for McNamara subdivision phases 2 and 3. Also Friends' ref. # 95.

the Hanson delineation did not use accepted Coastal Commission protocol to determine the extent of wetlands; wetlands were identified by indicator species (plants) only. No soil analysis or hydrological information was used to determine wetlands around the perimeter of the lagoon.

B) The D. Hanson study was incorporated into the 1985 County EIR for the McNamara subdivision, and incorporated by reference in the 1997/99 Phase 3 proceedings.

It also appears that the D. Hanson study –more than 20 years old– was used by the County in establishing its RCA-2-fw zoning for Lake Earl and the slough surrounding the lots of concern. This zoning is probably the reason that Karen Theiss was not asked to revisit this area in 1993 and 1997.

In conclusion, it appears that part of lot 47 is a wetland, but there is no official or available wetland delineation map for this lot or the other lots of concern. (Only part of lot 48 was mapped by Theiss in 1993/97 as part of the drainage/riparian area study.) However, Generalized National Wetland Inventory maps and DFG maps show the lots of concern, including 47, as “forested wetland.”²¹ This information should be followed up with a specific wetland delineation. As stated, the LCP clearly requires delineation of wetlands and ESHAs.

Lake Earl lagoon and its surrounding forested wetlands are regarded by DFG and the Coastal Commission as an ESHA.²² The lagoon is named in the Coastal Act as one of California’s 19 most important wetlands for restoration. It is the largest coastal lagoon in California and in the contiguous western United States, and is a vital stopping place on the Pacific Flyway for migratory birds. The lagoon’s forested edge ESHA should also be evaluated and mapped in a scientific manner. The USFWS has suggested that, in terms of bald eagles and peregrine falcons, all vegetation within 500ft of the forested edge of the lagoon should be considered.²³

LCP Policy, Marine and Water Resources, VII. D. Wetlands:

4. g. Due to the scale of the constraints maps, questions may arise as to the specific boundary limits of an identified environmentally sensitive habitat area. Where there is a dispute over boundary or location of an environmentally sensitive habitats area, the following may be requested of the applicant:

- i.) A base map delineating topographic lines, adjacent roads, location of dikes, levees, flood control channels and tide gates.*
- ii.) Vegetation map*
- iii.) Soils map*

²¹ Friends’ Reference #6, submitted to County May 17, 2004.

²² Friends’ ref. #17, and 22.

²³ Friends’ ref. #14 and 18.

Review of this information shall be in cooperation with the Dept. of Fish and Game and the County's determination shall be based upon specific findings as to whether an area is or is not an environmentally sensitive habitat area based on land use plan criteria, definition, and criteria included in commission guidelines for wetland and other wet environmentally sensitive habitat areas as adopted February 4, 1981. The Dept. of Fish and Game shall have up to fifteen days upon receipt of County notice to provide review and cooperation.

2) No Wetland Buffer was established for lagoon perimeter lots.

No 100 foot wetland buffer was set on these periphery lots, as required in the County's LCP. The LCP requires that wetlands, of such great resource value as Lake Earl ESHA, are to receive buffers of 100 feet, and as necessary to maintain biological productivity.

Regarding Phase 3, the Coastal Commission's prudent response following the ESHA discussion in its 1997/99 proceedings, Findings IV. F. Conclusion, #2, directs the County to: "make the project consistent with LUP policies pertaining to buffer requirements and environmentally sensitive habitat areas."

However, the County provided no buffer, and the project description failed to accurately show that ESHA wetlands of high wildlife value existed on and next to the lots.

On numerous occasions DFG and the Coastal Commission have requested 100-300ft undisturbed vegetated buffer zones around this important lagoon, as per attached letters. The USFWS has also indicated the need for buffers up to 500ft "from the forested edge of the lagoon."²⁴

The County tries to make the case that DFG has given their nod of approval for its actions. Nothing could be further from the truth. DFG has asked in writing numerous times for at least a 100ft wetland buffer around the lagoon during the review process of this subdivision.²⁵ They have cited concern for conflict between residential development without buffering, and recreational hunting, as well as buffering for the resource. DFG also cited cumulative impacts of wetland loss for a lagoon they fully intend to maintain at high levels.

More recently, in the County General Plan revision process, DFG and the Coastal Commission both requested a 300ft buffer around the lagoon, starting from the Lake Earl Wildlife Area boundary.²⁶ The County ignored these requests in finalizing the General Plan and in approving lot 47.

²⁴ Friends' ref. # 14 and 18.

²⁵ Friends' ref. # 3, 4, 5, and 55.

²⁶ Friends' ref. # 28, 29.

Now we are faced with the probable abandonment by bald eagles of this portion of the forested edge of the lagoon, due to the removal of favorite perch trees and significant human disturbance.²⁷ No buffering to the forested wetland edge of the lagoon has been provided. The significant cumulative effects of habitat loss for bald eagles due to the removal of vegetation from the adjacent lots has not been considered adequately. The significant cumulative effects of this project in conjunction with other McNamara conversions and THPs in close proximity has not been addressed.

LCP Policy, Marine and Water Resources,

LCP IV: Sensitive Coastal Habitats:

Under Table 1: Sensitive Habitat Types and Their Principle Locations:

Wetlands: Lake Earl and the ponds and sloughs in the Lake Earl and coastal dune region are designated as principle location of ESHA.

LCP Policy, Marine and Water Resources,

LCP VII.D: Wetlands, 4: Policies and Recommendations

f.) Development in areas adjacent to environmentally sensitive habitat areas shall be sited and designed to prevent impacts which could significantly degrade such areas, and shall be compatible with the continuance of such habitat areas. The primary tool to reduce the above impacts around wetlands between the development and the edge of the wetland shall be a buffer of 100 feet in width. A buffer of less than 100 feet may be utilized where it can be determined that there is no adverse impact on the wetland. A determination to be done in cooperation with the California Dept. of Fish and Game and the County's determination shall be based on specific findings as to the adequacy of the proposed buffer to protect the identified resource.

3) *Decisions were tiered upon incorrect, outdated RCA zoning "Farmed Wetlands."*

The County has provided no ESHA/wetland buffer for lot 47, and denied DFG requests for a minimum 100ft lagoon shoreline buffer, because the County incorrectly believed that DFG lands surrounding the subdivision are farmed wetlands, and that farmed wetlands do not require a buffer.

This is not substantiated by Del Norte County LCP wetland buffer policy or wetland definitions. The LCP/LUP provides for 100 foot wetland buffers for all wetlands, and does not exempt farmed wetlands and other wetlands. Farmed wetlands are defined under ESHA-coastal wetlands.²⁸ Furthermore, the lagoon wetlands surrounding the subdivision do not meet the County's stated definition of farmed wetland, which is based on activity.

²⁷ Friends' ref. # 3, 19

²⁸ Friends' ref. # 86, 87, 88.

DFG purchased the lagoon basin surrounding the subdivision in 1981. Cattle were probably grazed here during the years that the County and ranchers kept the lagoon at ~ 4ft or lower. However, after the DFG acquisition, there are no records of cattle leases. As noted, starting with lagoon restoration in the late 1980s, this area once again became the basin of the fluctuating lagoon and was regularly covered by water.

Environmentally-Sensitive Habitat Areas:

Coastal Wetland - Land within the coastal zone which may be covered periodically or permanently with shallow water...Farmed wetlands shall be defined as wetland areas which are used for agricultural purposes such as grazing, planting or forage during parts of the year. (Emphasis added)

Further, the lagoon wetlands surrounding the lagoon do meet the definition of ESHA:

An area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities. First is whether a habitat or species is rare. Second is whether a habitat or species is especially valuable. And third is that an ESHA are those areas that could be easily disturbed or degraded by human activities and developments. All three elements must be present.

4) Wetland Destruction & Fill

Because wetlands were not delineated on these periphery lots, and because the lagoon was incorrectly characterized as "farmed wetlands," the County did not clarify that: a) the well locations were located in wetlands, and b) the lagoon regularly would approach or inundate the well locations.

The building of these wells constitutes coastal development which must be reviewed and evaluated. The Coastal Act is very clear on this point. *California Coastal Act definitions 30106. "Development" means, on land, in or under water, the placement or erection of any solid material or structure... As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.*

Because the lots are so undersized, the well locations were placed at and below the 10ft level on these lots, where they would be engulfed by the lagoon under current management. The well for lot 47 is placed at the 10ft level; some of the others are below. The building of these wells will cause destruction and fill of wetlands and significant ESHA vegetation. The County has not addressed or mitigated the concerns that were raised in our appeal: How will wells be built in the lagoon wetlands with heavy equipment? What ESHA vegetation must be removed to

build the wells? When the lagoon is high, and during Smith River floods, how will the wells be accessed for maintenance or repair?

There is a feasible, less damaging alternative; there is room to place the well at 11ft msl. However, based on vegetation, the undelineated wetlands appear to extend almost to 12ft msl.

The County RCA land use provisions allow for wells within RCA-2r, which are riparian areas. This is done to accommodate wells that draw water from streams. However, the undelineated RCA area upon lot 47 is on the perimeter of the lagoon and is actually part of the 10ft msl lagoon. This type of wetland should be zoned RCA-2w.²⁹ This type does not allow for wells, especially residential wells, as a permitted new use.³⁰

According to the LCP policies below, the County is supposed to “discourage inappropriate development in flood prone areas.” Further, “Critical utility facilities shall not be located in flood prone areas, unless appropriate mitigating factors are implemented.” The wells for all of these lots of concern, including lot 47, are located in the flood plain of the Smith River. The federal flood hazard zone in this area (based solely on the River and not the annual fluctuations of the lagoon) is 12ft msl. The County has not discussed or proposed “appropriate mitigating factors” for this situation, as required by the LCP.

Although the 12ft flood stage is referred to in the DEIR as a 100 year flood, there is evidence that it occurs more frequently. According to the last published U.S. Army Corps study, this stage has been reached 8 times in the last century. A hydrology study for DFG’s draft Lake Earl management plan/EIR circulated in 2003 indicates that flooding at the 12ft level will occur every 8.2 years.³¹

Finally, the County does not address the fact that the lagoon is not always controllable, and that there have been rare circumstances when the breach site is not accessible, or that due to tides and storms the lagoon cannot be breached when desired. During the 1970s, Smith River flooding prevented access via Kellogg Road to the breach site. It is then possible for the lagoon to rise to levels of 14ft or higher.

Violation of County’s 1985 EIR Findings & Contingencies

It is worth noting further in this regard that the County has failed to enforce the findings and contingencies of its 1985 EIR, upon which all subsequent decisions were intended to be tiered. EIR Contingencies 8 and 18, respectively, prohibit

²⁹ Friends’ Ref.# 10 and 11.

³⁰ Friends’ ref. # 86, 87, 88, Coastal Program Implementing Zoning Amendments.

³¹ Friends’ ref. # 62.

"the construction of any structures" and "the removal of native wooded habitat" below the 12ft msl flood hazard level. These are designed to protect the lagoon edge habitat. Yet even these conditions are being violated by the proposed construction of residential wells below the 12ft elevation. (Nor have these conditions been recorded, as required by the County in 1985, in the McNamara Subdivision CC&Rs.)

A photograph of Lot 8, an already developed periphery lot, is Friends' ref. # 96, showing its chain link fence as partially submerged when lagoon is between 9-10ft. This is a violation of EIR contingencies 8 and 18 prohibiting construction of structures and vegetation removal below the 12ft msl level. The photo also indicates suppression of wetland vegetation through mowing, and possible evidence of damage to lagoon edge wetland vegetation down gradient from the lawn, perhaps due to use of lawn chemicals. The migration of chemicals into the lagoon is a serious concern, as anticipated in the Coastal Commission's 1991 letter regarding this subdivision.

LCP Policy, Marine and Water Resources,

LCP VII.D: Wetlands, 4: Policies and Recommendations

a. The diking, filling, or dredging of wetlands shall be permitted in accordance with other applicable provisions of this program, where there is no feasible less environmentally damaging alternative and where feasible mitigation measures have been provided to minimize adverse environmental effects. Such projects shall be limited to those identified in Section 30233 of the Coastal Act.

LCP Hazard Areas, IV. D. 3. Policies for Flood Hazards:

P-1. The County shall maintain and continue to implement its existing flood plain zoning districts, thereby continuing its policies to discourage inappropriate development in flood prone areas. (emphasis added)

P-3. Critical utility facilities shall not be located in flood prone areas, unless appropriate mitigating factors are implemented. (emphasis added)

P-5. The Coastal Program's land use policy shall recognize that flood plains have unique and significant public values, including wildlife habitats or recreational, aesthetic and scientific value, open space, and groundwater recharge. The value of the flood plain as an environmental resource and the public benefits to be derived from it should be considered.

5) Residential Wells in Flood Hazard Area

See issue 4), Wetland Encroachment and Fill. As stated, the County has located residential wells in a flood hazard zone, and has not mitigated any of the impacts.

LCP Hazard Areas, IV. D. 3. Policies for Flood Hazards:

P-1. The County shall maintain and continue to implement its existing flood plain zoning districts, thereby continuing its policies to discourage inappropriate development in flood prone areas. (emphasis added)

P-3. Critical utility facilities shall not be located in flood prone areas, unless appropriate mitigating factors are implemented. (emphasis added)

P-5. The Coastal Program's land use policy shall recognize that flood plains have unique and significant public values, including wildlife habitats or recreational, aesthetic and scientific value, open space, and groundwater recharge. The value of the flood plain as an environmental resource and the public benefits to be derived from it should be considered.

6) Water Quality Issues

The water quality issues discussed here are:

- a) the potential migration of household/lawn chemicals into the groundwater and the lagoon ESHA, with significant negative effects to:
 - the water quality of the lagoon ESHA and surrounding ESHA wetlands;
 - water dependent biological resources, including sensitive endangered tide water goby, cutthroat trout, etc.
- b) non-conforming, potentially inadequate/failing septic systems that will significantly degrade:
 - the water quality of the lagoon ESHA and surrounding ESHA wetlands;
 - the water quality of the surrounding groundwater;
 - biological resources, including the sensitive endangered tide water goby;
 - and also have the potential to pollute drinking water, to the detriment of human health.

The first issue could have been partially mitigated simply by enforcing the 1985 EIR contingencies,³² that vegetation is not to be disturbed below 12' msl, and coming up with a few new rules for property owners in the CCRs, such as prohibiting the use of herbicides/pesticides that are harmful to aquatic resources. Even though prohibited below the 12ft level in 1985, the removal of vegetation and possibly the use of lawn chemicals within the flood hazard zone are being allowed by the County and developers.³³ New rules of enforcement and mitigation need to be established for lot 47 and this current group of sensitive lots.

The County could have mitigated the second issue by requiring a mounded septic system for lot 47, which it had indeed already required in the 1985 EIR³⁴ and in the 1997 Negative Declaration, and as the Coastal Commission had required in 1999.³⁵

³² Friends' ref.# 89, 90.

³³ Friends' ref. # 96.

³⁴ Friends' ref. # 89.

³⁵ County and Coastal Commission record.

Because of the proximity of the project to the lagoon, failing septic systems, and the migration of human pollution and chemicals into groundwater and the lagoon ESHA is a serious concern, as anticipated in the Coastal Commission's 1991 letter³⁶ regarding this subdivision, and letters from DFG.³⁷ See issue 4), *Wetland Encroachment and Fill, Violations of 1985 County EIR Findings & Contingencies*, for a brief discussion.

On Nov. 12, 1991, Coastal Commission response comments to Phase 3 state:

*"Again, we hope that the location, density, design, and installation of any approved septic systems will take into consideration a rise in lake elevation and its relationship to the site's groundwater conditions....The septic system issue is particularly important, given the apparent limitation of available alternatives should systematic septic system failure occur. Equally important is the project's close proximity to the resources of Lake Earl and given the fact that failing septic systems are a major cause of adverse impacts on environmentally sensitive coastal resources, including public recreation."*³⁸

Federally endangered tidewater goby inhabits the shallow edges of the lagoon, and is "highly sensitive to minor amounts of pollutants," according to the DFG, stated in their response comments to this project, Nov. 26, 1991.³⁹ Tetra-Tech Final Intensive Habitat Study for Lake Earl, scientific studies of 2000, identify the shallow area of the lagoon at this project site to be important goby habitat.⁴⁰

Groundwater flows toward the lagoon edge which is the goby habitat. Contaminated groundwater from numerous inadequate septic systems of the periphery lots (unmounded systems) can pollute the lagoon edge habitat, where the "highly sensitive" goby lives. This contaminated groundwater can also pollute the drinking water wells at the periphery of the lagoon.

The original engineer for the 1985 EIR, Michael Young, established that the anticipated high groundwater level is 10ft msl for the subdivision. He established this as the project description and setting of the EIR, and for the 1997 negative declaration and 1999 Coastal Commission proceedings. He also required, in the 1985 EIR (and 1997 negative declaration, Coastal Commission proceedings, and in his water quality reports) that all septic systems at or below 16ft msl would be mound systems. He did so in order to meet water quality standards. He did so in response to DFG, and the Commission, so that septic systems would function with a 10ft msl lagoon, and would not inhibit the management of the lagoon up to 10ft

³⁶ Friends' ref. # 95.

³⁷ Friends' ref. # 76.

³⁸ Friends' ref. # 95.

³⁹ Friends' ref. # 76.

⁴⁰ Friends' ref. # 33, 36.

msl. He stated that it was necessary to provide a 5 foot vertical separation from the bottom of septic leach lines to high groundwater.

The Coastal Commission, in 1997/1999, reaffirmed the project description as having an anticipated high groundwater level of 10ft msl., and confirmed mound systems would be used for lots of elevations between 12ft msl and 16ft msl..

However, a mound system is not being provided for lot 47 or most of the lots that are below 16ft msl.⁴¹ The septic system for lot 47 is at ~14ft msl.⁴² and will not have adequate vertical separation from the established 10ft msl high groundwater level. This is inconsistent with the 1985 EIR project description and setting, and the Coastal Commission 1999 project description and requirements, and RWQCB requirements. This will result in groundwater contamination. Why did this happen?

In 2002 (post-1985 EIR, post-CCC 1999 proceedings, and post-original RWQCB waivers) a second engineer, Lee Tromble, changed required mound systems to regular systems, without environmental review.⁴³ He did so based on the incorrect assertion of a lower groundwater level existing, at 6.5 ft to 7ft msl. This is not true to the 1985 EIR project setting and description, or the CCC 1999 project setting and description, or the original RWQCB waiver conditions.⁴⁴ This is not true for the 10ft+ msl highest lagoon level that has existed for the past 17 years. The anticipated highest groundwater level around the lagoon is slightly higher than the 10ft msl lagoon, because the groundwater flows down into the lagoon, as shown by 1990 DWR groundwater studies near the lagoon, and as shown by Michael Young's earlier studies. Groundwater mounding would make the groundwater even higher.

Lee Tromble designed his septic system to function with a lower groundwater level of 6.5-7ft msl. His unfounded assertion of a lower groundwater level is based on a prior groundwater study dated June 5, 1990.⁴⁵ This groundwater elevation data in this study was obtained during a period when the lagoon was at approximately 4ft above mean sea level (msl) on March 31, 1990.⁴⁶ Mr. Young's more comprehensive groundwater studies did show that the groundwater fluctuates to higher levels when the lagoon is high, and the June 5, 1990 report was only a part of Young's study.⁴⁷

Lee Tromble's assertion is incorrect, and is not consistent with the findings and opinions of Michael Young:

⁴¹ Friends' ref. # 59, 60.

⁴² Friends' ref. # 51, 40.

⁴³ Friends' ref. # 60.

⁴⁴ Friends' ref. # 64.

⁴⁵ Friends' ref. # 60.

⁴⁶ Friends' ref. # 61.

⁴⁷ Friends' ref. # 39, 40.

*"This property has previously been the subject of extensive evaluation work...which included extensive ground water monitoring data to determine the highest anticipated ground water level...Our previous work indicated that the highest anticipated ground water under this site (lots 14-19) was elevation 10ft msl. During our most recent work, we observed ground water at elevation 4.5ft msl which was approximately the level of Lake Earl at the time of observations in October 1988. This observation is consistent with our previous data and conclusion that the ground water level under this site is at or near the level of Lake Earl. The highest historical level of Lake Earl is elevation 10.1ft msl. Our field observation in some, but not all, excavations observed traces of mottling beginning at approximately the elevation 7ft to 10ft msl range. This is consistent with previous observations that the highest anticipated ground water level for this site is elevation 10ft msl."*⁴⁸

Because of the constituency of the soil, both Young and Tromble agreed that a 5 foot vertical separation is required between the bottom of shallow leaching trenches (which are ~ 2ft below the surface) and the "highest anticipated groundwater." However, Wisconsin Mound systems can function with only two feet of vertical separation. Therefore, only mound systems should be used at 12ft msl to 16ft msl, and high groundwater of 10ft msl.

In 1987-1990, the Department of Water Resources (DWR) groundwater study continuously monitored groundwater levels near the lagoon, and compared this data to continuously monitored lagoon water elevations.⁴⁹ This study shows that groundwater is higher than lagoon levels and varies directly with lagoon elevations. It also shows that groundwater in the lagoon basin flows toward the lagoon. Please keep in mind that for the periphery lots, ground water flows from the septic systems towards the drinking water wells.

Thus, Mr. Tromble's septic system for lot 47 (and in fact, the septic design for each lot in Phase 3) is not designed to function within the full range of normal site conditions. It is not unreasonable to contend that the conventional septic systems designed for the project will result in significant water quality impacts (i.e., failed sewage system contaminating the waters of Lake Earl and the groundwater on site, with resulting potential harm to humans, endangered and other species of concern, and other flora and fauna).⁵⁰

The County's own 1984 DEIR recognized that

"with the lake at 10ft (msl) immediate problems with sewage disposal would be expected at surface elevations of 12 feet to 13 feet. If 10ft msl was maintained sewage problems would be expected at surface elevations 16 feet."

⁴⁸ Friends' ref. # 39, 40.

⁴⁹ Friends' ref. # 62.

⁵⁰ Friends' ref. # 64, 76, 95.

We have submitted Engineered Subdivision Layout maps ⁵¹ that also show horizontal separation distances of less than the RWQCB required 100ft between septic systems and wells (lots 13/12 and 13/45).

Most periphery lots fail to maintain RWQCB 100ft required separation between septic systems and the 10ft msl lagoon. And all periphery lots fail to maintain a 100ft buffer from lagoon wetlands to septic systems,⁵² because the lagoon and its surrounding wetlands were never accurately delineated and zoned.

Thus, human waste discharge can contaminate the groundwater, because of inadequate vertical separation distance between the septic systems and 10ft high groundwater levels. Human health can be affected, because drinking water wells are at minimal distances, or for some lots too close to septic systems. Pollution of the lagoon can occur, because there is inadequate horizontal separation distance of much less than RWQCB required 100ft between the lagoon and septic systems in many lots. The lagoon and wells can be contaminated because groundwater flows toward the lagoon and toward the periphery drinking water wells.

In 2002, the McNamaras obtained waste discharge waivers for unrounded systems based on incorrect information given to the RWQCB about the anticipated high groundwater levels around Lake Earl.⁵³

Furthermore, property owners have made changes on their own that are similarly inconsistent with the recorded maps, environmental review mitigations, approvals and studies (for lots 4, 6, 8, as shown in our reference # 54).

On lots 7, 9, and 48, which are currently undeveloped, the reserve septic systems are mapped below 12ft msl. These reserve systems will not function even with a 10ft msl groundwater level. And if wetlands exist up to 12ft msl, these septic systems would be in the wetlands, and would degrade the ESHA.

Wetlands have yet to be delineated on the periphery lots. An adequate buffer that protects water quality cannot be established until the wetlands are delineated properly. The project must be redesigned to actually meet RWQCB design criteria for water quality, and Coastal Commission 1999 stated water quality design criteria, in order to satisfy the following LCP policies.

LCP Policy, Marine and Water Resources, VI. C:

1. The County seeks to maintain and where feasible enhance the existing quality of all marine and water resources.

⁵¹ Friends' ref. # 43, 44, 51.

⁵² Friends' ref. # 51.

⁵³ Friends' ref. # 60.

3. All surface and subsurface waters shall be maintained at the highest level of quality to insure the safety of the public health and the biological productivity of coastal waters.

4. Wastes from industrial, agricultural, domestic or other uses shall not impair or contribute significantly to a cumulative impairment of water quality to the extent of causing a public health hazard or adversely impacting the biological productivity of coastal waters.

5. Water conservation measures (e. g., flow restrictors, industrial recycling of usable waste waters) should be considered by present users and required in new development to lessen cumulative impacts on existing water systems and supplies.

6. 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 shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

WATER QUALITY ISSUES CHRONOLOGY

The following chronology sequences the events that led to development of septic/water systems in the subdivision which can significantly degrade water quality, do not meet water quality standards of the North Coast Basin Plan, and do not comply with Coastal Commission and LCP requirements:

- RWQCB requires that highest anticipated groundwater level be determined for the subdivision, Oct. 23, 1984 ⁵⁴
- 1982-1990, Michael Young, engineer for project, does groundwater research which establishes that the highest anticipated groundwater level for the subdivision is 10.1 feet msl. This is based on the fact that ground water was observed to vary with the level of the lagoon within close proximity to the lagoon and within the subdivision area. Groundwater can be anticipated to go as high as 10.1ft msl. (this has been the usual high level of the lagoon since 1987). This is also consistent with mottling between 7ft to 10ft msl. Groundwater flows towards the lagoon which is a low basin. Surrounding groundwater is higher than the lagoon. ⁵⁵
- 1985 Final EIR for the subdivision finds and adopts that the highest anticipated groundwater level for the subdivision is 10 feet msl. Final EIR for entire subdivision states that all lots of elevation 16ft msl or below will have mound systems.

⁵⁴ Friends' ref. # 64.

⁵⁵ Friends' ref. # 39, 40.

- Final EIR also states, in Response to Comments that the septic systems for the entire subdivision will not inhibit California Dept. of Fish and Game's ability to manage the lagoon at higher levels, because all development will be restricted below 12ft msl, and those lots with an elevation of 16ft msl or below will be mound systems.
- Final EIR evaluates that the groundwater flows towards the lagoon generally from east to west, and that the intended communal septic system is located so that waste water flows away from wells.
- Final adopted project changes the design from a communal septic system to individual septic systems. As currently designed, waste water from individual septic systems now flows toward drinking water wells on the periphery lots.
- RWQCB acknowledges the findings and individual septic system design, establishing 10ft msl as the highest anticipated groundwater level, and mound systems for lots at or below 16ft msl.⁵⁶
- Final EIR requires that any significant changes in location and design of septic/water systems or conditions must be re-evaluated.
- RWQCB requires that any significant changes in location and design of septic/water systems or conditions must be re-evaluated.⁵⁷
- Michael Young (1985 to 1990) designs and recommends mound systems for lots 4, 5, 6, 7, 8, 10, 11, 12, 14, 15 (periphery lots with septic systems that have less than 6.5 feet clearance below surface elevation, or less than 16.5 feet msl.) Shallow trenches are required for lots with highest ground water to surface clearance of between 6.5 feet to 8.5 feet msl., or between 16.5- 18.5 feet msl. (Bottom of shallow trench is designed to about 1.5 feet below surface, and must maintain 5 feet separation to highest anticipated ground water of 10 feet msl.)⁵⁸
- 1990, Dept. of Water Resources (DWR) groundwater monitoring study for Lake Earl is plotted, showing conclusively that groundwater surrounding lagoon varies with the lagoon, and is higher than lagoon.⁵⁹
- Subsequently property owners (lots 4, 6, 8) employ engineer Lee Tromble, with approval by County health officer, to change mound systems to shallow systems based on individual "wet weather test" observations during instances when lagoon is at a low level of ~ 4 feet msl.⁶⁰

⁵⁶ Friends' ref. # 64.

⁵⁷ Ibid.

⁵⁸ Friends' ref. # 39, 40.

⁵⁹ Friends' ref. # 62.

⁶⁰ Friends' ref. # 54, 82, 34.

- 1997-1999, Phase 3 of Subdivision is processed and adopted as negative declaration, with Coastal Commission approval incorporating findings of original EIR and Michael Young's groundwater research.
- 2002, Subsequently engineer Lee Tromble applies for waste discharge waiver for McNamara Subdivision Phase 3, based on lower groundwater levels and "wet weather testing" during instances of low lagoon level of about 4ft msl.⁶¹

7) *Vegetation Removal in the ESHA adversely affecting listed species.*

This project has, and will, impact resources and species of critical concern as designated and adopted by State and Federal law, in particular the bald eagle and peregrine falcon. The LCP is clear that special protection shall be given to areas and species of special biological significance. The subdivision is such an area, particularly the forested lots of concern. To demonstrate this, we enclose a photo of an adult bald eagle perching in a tree on one of the lots of concern on June 16, 2004 (which also calls into question the conventional wisdom that bald eagles are lagoon residents only in winter).⁶² Further, the Coastal Commission stated in 1999 that the forested edge of the lagoon should be considered as part of the lagoon ESHA.⁶³

The portion of the subdivision currently under discussion (Lakeside Loop) is located at the end of a peninsula that juts out into Lake Earl. When the lagoon is at higher elevations (6-7ft and above) the peninsula is surrounded on two sides by biologically rich marsh and slough areas.⁶⁴ This may be the reason for regular bald eagle sightings.⁶⁵ On May 15, 2004, the U.S. Fish and Wildlife Service (USFWS) determined that proposed removal of 12 Sitka spruce trees on lots 45-48 in Phase 3 of the McNamara subdivision would likely result in a taking of a federally and state listed endangered species, the bald eagle, and that an incidental take permit was required.⁶⁶ At the time of this appeal, USFWS has not received an application for a take permit.

Previously the California Department of Forestry and Fire Protection (CDF) in a memo to DFG dated December 11, 2000, stated that "consultations (with USFWS) are warranted on all proposed actions within 500 feet of the forested edge of Lake Earl" in order "to evaluate the direct and cumulative effects of removing potential nesting and perch habitat for bald eagle adjacent to Lake

⁶¹ Friends' ref. # 59, 60, 81, 82, 34.

⁶² Friends' refs. 65, 66.

⁶³ Coastal Commission letter to Richard and Genevieve McNamara and Dale Foster, dated Nov. 12, 1999.

⁶⁴ Friends' ref.# 1, aerial photo of peninsula with lagoon at 9.35ft msl.

⁶⁵ Friends' ref.# 69, casual bald eagle sightings. No official surveys have been conducted.

⁶⁶ Friends' reference # 68, submitted to County June 22, 2004.

Earl.”⁶⁷ On November 19, 2001, DFG stated that THPs in the forested edge of Lake Earl must address the potential for the project to contribute to the cumulative impacts to the bald eagle and peregrine falcon.⁶⁸

As pointed out by Professor Paul Springer, a wildlife biologist and professor emeritus at Humboldt State University, removal of trees not only eliminates perching, roosting and nesting sites, but also reduces or eliminates the space needed to provide buffers from disturbance by adjacent human activity and development.⁶⁹ The May 15th USFWS letter makes the same point.

The County’s previous environmental assessment of the McNamara subdivision, contained in the 1985 EIR and 1997 Negative Declaration, while identifying that bald eagles have been recorded in the Lake Earl area, summarily concludes that *“the wildlife species to be found on or immediately adjacent to the (McNamara) project site are those tolerant and adaptable to human activity.”* There is no documentation to support this conclusion which begs the question why the bald eagle was even listed endangered in the first place if it was so “tolerant and adaptable to human activity.”

The conclusions of the County are contradicted by the opinion and finding of DFG and USFWS, both responsible agencies endowed with the expertise to assess impacts to endangered species.

The 1985 EIR states under Significant Environmental Effects and Proposed Mitigation measures:

*“ 2. Possible further vegetation removal as a result of human use of properties...the significance of this effect was not definable as it depends upon future actions that may or may not take place by future property owners. As a result, it is potentially significant...”*⁷⁰

The 2003 aerial photo of the subdivision (the lagoon at 10.78ft msl) shows that only a few trees remain upon the developed parts of the subdivision.⁷¹ Compare this to the pre-subdivision aerial photo (circa 1989),⁷² which shows a thickly vegetated lagoon edge. This stands testimony to the fact that “further vegetation removal as a result of human use of properties” has been significant.

Neither at the hearing before the Planning Commission on May 5, 2004, nor in the prior environmental documents for the complete subdivision of the McNamara

⁶⁷ Friends’ ref. 14

⁶⁸ Friends’ ref. 72.

⁶⁹ Friends’ ref. #s 25-27.

⁷⁰ 1985 EIR, pg 39.

⁷¹ Friends’ ref. # 32.

⁷² Friends’ ref. # 30.

property, was there any meaningful assessment and discussion of the potential adverse impacts to endangered species resulting from this project. There is no evidence that the County has ever performed an assessment of cumulative impacts for the eagle and other sensitive or endangered species resulting from the McNamara subdivision in conjunction with other . The Coastal Commission in November 1999 expressed concern that "over time the removal of significant timber stands has reduced and fragmented wildlife habitat for listed species in the Lake Earl area." It specifically requested the McNamaras to submit new survey data regarding the bald eagle and peregrine falcon and to provide a cumulative effects assessment of vegetation removal in the Lake Earl area. As of February 2000 the Coastal Commission had not received this information and it appears that neither the McNamaras, nor the County, have ever completed these surveys or cumulative effects assessment.

The County has not made, nor could it make on the basis of substantial evidence, a finding that the construction of a single family residence with associated vegetation and tree removal on lot 47, will not result in significant adverse impacts to eagles. Nor has it made such a finding with respect to the cumulative adverse impacts caused by this and the many other similar projects that are planned or developed adjacent to Lake Earl. There is no indication that the County ever consulted with DFG or USFWS regarding the potential impacts to eagles or other listed species (e.g. peregrine falcon, tidewater goby).

The construction of this single family residence on lot 47 has likely already resulted in "habitat restriction" for the eagle by virtue of the spruce trees that have been removed (with no permits) incidental to site preparation. In addition, it is clear from the rejected application that a total of 12 spruce trees ranging up to almost 5 feet in diameter, are targeted for removal on lots 45-48, with lots 9-12 likely to follow in the near future. USFWS has determined such action to "likely result in the take of bald eagles..."

*Coastal Act 30230. Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance...Please refer to the LCP Policies above, Marine and Water Resources, VI. C:1,3,6
and Marine and Water Resources, LCP VII.D: Wetlands,4.f, about wetland buffer.*

8) **Violation of the Coastal Act, by major vegetation removal from the ESHA without a coastal development permit**

It is a violation of the Coastal Act to remove major vegetation without a coastal development permit, unless approved as part of a Timber Harvest Plan. The trees and vegetation on lot 47 (and 48) were cleared in mid-March, 2004, without a permit/exemption from the California Department of Forestry or a required consult from USFWS. A Notice of Violation of Forest Practice Laws was dated March

25, 2004,⁷³ and the McNamaras and Trinity Developments then applied for a permit/exemption on March 29, 2004.⁷⁴ This was subsequently rejected by CDF because applicants had failed to consult with USFWS as required. When eventually obtained, the USFWS consult effectively stated that the trees already cleared likely constituted a taking of bald eagles.

The County's own staff report regarding the issuance of building permit #B27664C for lot 47 confirms that trees above the 12-foot contour have already been removed to establish the building, sewage disposal area, and access. The County stated that the trees were approximately 3 feet in diameter or less. Thus this project has already likely resulted in the removal of potential habitat and buffers to habitat for bald eagles. See also photos of Lot 47, the lot at issue, and Lot 48 with trees removed and logs piled up.⁷⁵

California Coastal Act definitions 30106.

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511). As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. (Emphasis added.)

9) Public Works- Lot Size and Onsite Sewage Disposal Systems

Excluding the area below the 12ft msl flood hazard line on lot 47, only about one third of an acre exists on which to place a well and septic system.⁷⁶ This is extremely inadequate, according to the LCP, which recommends one full acre. There appears to be insufficient room for development on the end lot, # 48, especially because both well and septic systems must be provided. Consideration

⁷³ Friends' ref.# 92.

⁷⁴ Date of Notice posted on tree, Friends' ref. # 67.

⁷⁵ Friends' ref. #67.

⁷⁶ For this discussion, see maps provided in Friends' ref. # 51 and 54.

should be given to combining lots 47 and 48 to address water quality concerns and avoid having the wells encroaching into the lagoon and wetlands.

Lot 48 contains about 10,000 square feet, or far less than 50%, of useable area, above the 12ft msl level and outside of RCA-2r zoning. If wetlands do exist up to approximately 12ft msl, this lot should have never been created, according to the County's Coastal Zoning Ordinance. This is far below what is recommended for lots that contain both wells and septic systems, and it is certainly inadvisable because of high groundwater conditions on the property. The reserve septic system is at an elevation just above 12ft msl, with anticipated high ground water level of at least 10ft msl. There is no buffer for the RCA-2r area, and the reserve septic system is only 10 feet away from the potential wetland area below 12ft msl.

Until an accurate wetland delineation for the lagoon wetlands on the periphery lots is done, it will be uncertain if other of the periphery lots meet the 50% non-RCA area criteria of the Coastal Zoning Ordinance. If wetlands are found at about the 12ft msl level, it is possible that lots 8, 9, 10 and 11 may have slightly more than 50% area in wetlands. While lot 8 is already developed, the others are not.

On lot 9, the reserve septic system appears to be located below 12ft msl. This reserve system will not function even with a 10ft msl groundwater level. And if wetlands exist up to 12ft msl, the septic system would be in the wetlands, and would be a disturbance of the ESHA.

The size of homes and septic loading are important in a marginal location such as this, with non-conforming design. The original calculations for the McNamara subdivision septic systems were based on 3 bedroom homes. Mike Young states clearly that if the homes are larger than 3 bedrooms, the calculations must be redone. The proposed 2700 square foot home on lot 47 may have more bedrooms or bedroom equivalents, and thus produce more wastewater, than originally anticipated.

The size of house for calculating wastewater flows has been changed from what was calculated many years ago, which assumed 3 bedrooms and 2 baths, and lot size was supposed to be 20,000 sf in size. The Coastal Commission Staff description of the project in 1997/99 noted that mounds would be used, and that lots would be 20,000 sf.

County Coastal Zoning Ordinance Section 21.11A.050 (D):

Parcels may be created which include RCA land areas subject to the provision of a non-RCA area totaling at least fifty percent of the minimum lot size (as required by the non-RCA zone) for parcels designated as one unit/two acres or higher in density or a minimum of one acre for parcels designated as one unit per/three acres or lower in density.

*LCP Public Works V. On-Site Sewage Disposal Systems
conclusion:*

Therefore, based on these various approaches, it is recommended that the maximum density in rural areas not served by a public sewer system or engineered on-site disposal system, be one dwelling unit per acre. This is not to recommend that development on any one acre site should be allowed. The recommendation is that the overall density for unsewered areas should not exceed one unit per acre. Individual sites still need to be evaluated using Regional Water Quality guidelines to determine their suitability for an on-site system.

10) Oversized homes are visually incompatible within highly scenic area

The LCP policy below, clearly states that proposed development within highly scenic areas shall fulfill two required conditions: conform to land use criteria and be visually compatible with their highly scenic surroundings. These two requirements are not met in this area.

Aesthetics V. C. LCP Policies: The visual resources of Del Norte County are important to the County's tourist economy and are a continuing source of enjoyment to its residents. Policies designed to maintain the scenic resources in the Coastal Zone of Del Norte County are stated here:

- 1. The County encourages the continuation of existing land uses, where appropriate, to maintain open views in highly scenic areas.*
- 2. Proposed development within established highly scenic areas shall be visually compatible with their scenic surroundings, by being reflective of the character of the existing land uses while conforming to the land use criteria. As set forth in the land use component and subsequent zoning ordinance.*

The new houses just built by Trinity Developments in the summer of 2004 on the inside of Lakeside Loop are larger than neighboring homes and are not appropriate to the existing character of the neighborhood in size and bulk.⁷⁷ These new houses are advertised as 2,600-3,000 square feet in heating space.⁷⁸ This dense cluster of large homes will be visible from boats on the lagoon and from State Park trail destination viewpoints across the water at the lagoon edge, and will significantly detract from the relatively natural pristine character of the lagoon.⁷⁹

The project site is a peninsula that juts out into the lagoon, and is clearly visible on the water and from the shoreline trails. The homes will be distinctly visible if the forested edge buffer of the lagoon is removed or reduced significantly. Removing the vegetation to the 12' msl level will result in a thin band of trees, as it has in the

⁷⁷ Photos of new homes built by Trinity Developments on lots 40-42, Friends' ref #93.

⁷⁸ Friends's ref. # 100; Advertising in Daily Triplicate July 31, 2004.

⁷⁹ Friends' ref. # 99; See circled trail viewpoints on Tolowa Dunes State Park map.

developed part of the subdivision,⁸⁰ which do not serve as an effective visual buffer.

These scenic views meet the LCP criteria for highly scenic coastal areas, as views of special interest to the general public; as forested uplands (in contrast to the broad expanse of lagoon), and as views with special integrity and unimpaired conditions. This is an area of special interest, being the largest coastal lagoon in the State and on the West coast outside of Alaska. This is a view of unimpaired open space in a nature preserve, a unique view and experience of a relatively pristine lagoon.

Currently only a few houses dot the eastern shoreline; the character is distinctly rural. The few houses built on the outer Lakeside Loop of the subdivision already slightly detract from the natural character of this lagoon area. The dense cluster of these oversized homes at buildout will be out of character with the highly scenic quality of the shoreline. Without a scenic vegetative buffer, the relatively pristine character of the landscape will be degraded.

The Del Norte County LCP criteria, which the lagoon area meets, for designating highly scenic areas are as follows:

1. *Views of special interest to the general public (e.g., Pacific Ocean, lighthouses, old growth forest).*
2. *Visually distinctive scenes resulting from unique contrasts or diversity in landscape patterns (e.g., offshore rocks, forested uplands).*
3. *Views with special integrity or unimpaired conditions (e.g. open space, nature preserves).*

11) **Failure to Protect Lagoon ESHA from significant degradation and disruption**

An accurate map of the wetlands around the lagoon would show that wells are in the lagoon ESHA wetlands. The County has no such map. Wells are planned at 10ft msl and lower. The lagoon has been managed up to 10ft msl, and has reached its highest extent annually for 17 years. Wetlands extend higher than 10ft msl and probably to nearly 12ft msl.

Some wells will be submerged by the 10ft msl lagoon, and they are the only source of drinking water for these homes. Yet there has been no provision made so that all the wells can function while submerged. Without such provision, the wells of this subdivision will obstruct the 10ft msl management of the lagoon. And without redesigning the septic system, in conformance to an anticipated high groundwater level of 10ft msl, this project will obstruct the 10ft msl management of the lagoon.

⁸⁰ Photo of lot 8, from boating on the lagoon, Friends' ref. # 96, and aerial photos, Friends' ref # 70, 71.

On lot 47, the well is at 10ft msl. This area is characterized as forested wetland (US Wetland Inventory Maps, Tetra Tech report). Although current management of Lake Earl is at 10ft msl, the door is not closed to future adaptive management and additional restoration. In fact, where feasible, future restoration of this important Coastal Resource is mandated by the Coastal Act, LCP and California Resource Codes. Currently, there is very limited development around the lagoon, and eventual restoration of the lagoon to a natural basin level of 12ft msl is a reasonable expectation, at least in terms of practical feasibility and cost (#38, 46, 48). However, the buildout of these expensive homes on the periphery of the lagoon will certainly foreclose, or significantly reduce, this reasonable possibility of further restoration.

The DEIR for Lake Earl Management identified 8-10ft msl as the preferred management level for the lagoon, which was endorsed by the Del Norte County Board of Supervisors. However, the biological evaluation recognized that fishery resources and overall biological productivity were enhanced by higher levels. The rejection of higher management was based on conflicts with current infrastructure – roads and homes. However, they did not close the door on future adaptive management and restoration.

Cumulative Impacts and future Lagoon Restoration

Coastal Act 30230. Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance...

LCP Policy, Marine and Water Resources,

LCP IV: Sensitive Coastal Habitats:

Under Table 1: Sensitive Habitat Types and Their Principle Locations:

Wetlands: Lake Earl and the ponds and sloughs in the Lake Earl and coastal dune region are designated as principle location of ESHA.

LCP Policy, Marine and Water Resources,

LCP VII.D: Wetlands, 4: Policies and Recommendations

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

LCP Policy, Marine and Water Resources, VI. C:

6. 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 shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Thank you very much for considering this information, and our appeal.

ROBERTS, KEMP & ASSOCIATES LLC
APPLIED ECOLOGICAL SCIENCES AND ENVIRONMENTAL PLANNING SOLUTIONS

19 August 2004

Mr. Robert Merrill
California Coastal Commission
710 E Street, Suite 200
Eureka, CA 95501

RECEIVED

AUG 19 2004

CALIFORNIA
COASTAL COMMISSION

Subject: Review of Environmental Resources, McNamara Subdivision Lot 47

Dear Mr. Merrill:

At the request of Mr. Joe Gillespie, President of the Friends of Del Norte (FODN), I conducted a limited-scope review of certain historically relevant and existing biological information related to the circumstances of Lot 47, Phase III, of the McNamara Subdivision, Del Norte County. The approval of this proposed development by the County is the subject of an appeal before the Coastal Commission by the FODN.

The scope of my review was limited to the following tasks:

1. A review of several existing documents obtained from the FODN that related to the proposed project, including:

- (a) Biological mapping prepared as part of the application for the "Tentative Map of the Second and Third McNamara Subdivision," prepared by Michael Young and Associates (handwritten preparation date on map: 06/02/90) (FODN submitted Ref. ##11, 91);
- (b) The September 1991 Notice of Preparation of a supplemental DEIR for Phase 3, McNamara subdivision, prepared by Del Norte County (FODN Ref. #95);
- (c) The January 1993 "Wetlands Investigation Report Mc Namara III Subdivision," prepared for this project by Karen Theiss, late of Karen Theiss and Associates (FODN ref #84);
- (d) The May 13, 1997, addendum letter report to Michael Young and Associates from Karen Theiss and Associates;
- (e) Two maps identified as exhibits 5 and 6 from the Coastal Commission's 1999 review of the County's approval for the McNamara Subdivision, Phase III;
- (f) Descriptive text from the currently certified Del Norte County Local Coastal Plan (LCP) ("Marine and Water Resources," particularly sections IV, VI, and VII) and zoning code (Ordinance Chapter 21.11A) that addresses the "Resource Conservation Area 2" (RCA-2) map designations and the associated County policies to protect these areas (FODN Ref. ##49, 86, 87, 88); and
- (g) The text of the California Coastal Act, as it existed in January 2004.

2. A brief site review of the affected project area. This review was conducted from the existing county road right-of-way that includes Lakeside Loop, as well as from lands in public ownership that are part of the Lake Earl Wildlife Area. In addition, it should be noted that I am familiar with the general environment in the project area on the basis of approximately 25 years of biological studies in northern coastal California, and particularly on the basis of my recent preparation of the biological sections in the Department of Fish & Game's EIR for the Lake Earl Management Plan.

Based upon these reviews, it appears to me that there are three issues or sets of circumstances that raise questions about the consistency of the proposed lot development with the requirements of the Coastal Act and the County's certified LCP. Some of these questions are specific for the proposed lot, and the majority of the circumstances suggest that the interpretation of the Coastal Act that is embodied in the Del Norte County LCP, or in the County's implementation of the LCP, differs from the actual requirements of the Act.

A. Potential Impacts to Wetlands from the Development of Lot 47

The initial request I received from the FODN was to look at the potential existence of wetlands immediately adjacent to or within Lot 47. In doing so I found that the informational basis for identifying wetlands and environmentally sensitive areas in and adjacent to this parcel had been amended several times to yield an ultimate result that appears to be inconsistent with the requirements of the Coastal Act as these are reflected in the certified LCP.

The 1990 draft tentative map for this subdivision includes mapped areas that were identified as "RCA-2w" (wetland); this area comprises most of a tentatively identified "parcel 51" in that original map. The original tentative map also includes an area designated as "RCA-2wb" (wetland buffer); part of this area is included in the aforesaid "parcel 51," and the balance is included in a nominal "parcel 52" in that tentative map. These parcels are generally located in a drainage swale immediately adjacent to and southeast of the boundary of lands owned by the California Department of Fish & Game.

It appears, based on the 1991 Notice of Preparation issued by the County for a Supplemental Draft Environmental Impact Report (EIR) on this phase of the project (apparently this EIR was not completed), that this "RCA-2w" identification included the northern end of Lot 47, and that the County requested from the applicant a study that was to be conducted by a qualified biological consultant to identify the degree of wetlands present both in the vicinity of Lot 47 and in the larger area proposed for subdivision. The sequence of events reflected in the documents within the County's project files suggests that the applicant commissioned a study by Karen Theiss in order to address the County's desire for additional information.

The 1993 Theiss study (cited above) presents information obtained from within the project site that led Theiss to conclude that substantial areas located north and northeast of the current location of the Lakeside Loop satisfied the criteria used by both state and federal agencies for identification as wetland. The report that Theiss produced as a result of her study unequivocally characterizes large areas of the site as wetlands pursuant to the criteria used by the Department of Fish & Game, which is the same set of criteria used by the Coastal Commission in conducting its reviews under the Coastal Act. Theiss's report includes a map that unequivocally identifies three "Wetland Areas." The data included within her report support her identification of these areas as wetlands.

A portion of Theiss's "Wetland Area I" includes the bottom of the drainage swale that immediately adjoins the southeastern boundary of lands owned by the Department of Fish & Game. This is the same area that included the nominal "parcel 51" and "parcel 52" of the original tentative map. That is, in 1993 the County received confirmation that the proposed project did, in fact, propose development within wetlands.

Subsequent to the completion of Theiss's report there is a hiatus in documents related to wetlands, which apparently reflects substantial alteration of the proposed development project by the applicant. When the proposed project is subsequently reviewed by the County again there are significant alterations in the project. One of the alterations includes the redesign of the project in a manner that removes "parcel 51"

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and "parcel 52," the areas of which are incorporated into parcels numbered differently. The renumbered parcels that include a portion of the former "parcel 51" are Lots 47 and 48. Based upon my comparison of the original tentative map and the currently proposed project, approximately a quarter of Lot 47 is within what was "parcel 51;" approximately half of currently proposed Lot 48 is within what was "parcel 51." That is, the existing documents in the County's files confirm that some portion of the current Lot 47, and an even larger fraction of Lot 48, includes areas that may satisfy the Coastal Act's and LCP definition as wetland.

Theiss located a sample point ("test site 8") adjacent to Lot 47, in the current location of Lakeside Loop south of Lot 47; she characterized this site as "mixed," with vegetation that was consistent with identification of the site as a "wetland" sample under state wetland criteria. My brief field review did not include actually entering Lot 47, and I cannot confirm Theiss's sampling results within the site, if any. I looked into Lot 47 from the land owned by the Department of Fish and Game. My visual inspection led me to conclude that existing site conditions today are consistent with a conclusion that wetlands within the Department-owned land extend into Lot 47, and a substantial portion of Lot 48 also appears to be wetland.

It is unclear why at least some portion of Lot 47 has not been designated with a zoning designation such as "RCA-2 (w)," or as "RCA-2 (wb)," designations that would be consistent with the evidence in the County's files [for example, the 1991 Notice of Preparation cited earlier refers to a proposed (apparently by the applicant) zone reclassification to "RCA-2w" and "RCA2-wb"]. In the interval in which the applicant was redesigning the project, Theiss's "Wetland Area I" was somehow re-identified as "riparian habitat;" this "riparian" characterization of the mapped area is shown in the maps submitted to the Commission as part of the 1999 application. This re-characterization has apparently allowed the County to assign an "RCA-2 (r)" zoning classification to this region, the net effect of which has been to relieve the County of the need to require a 100-foot buffer between potential development sites and the wetland boundary, pursuant to certified LCP policies covering "development in areas adjacent to environmentally sensitive habitat areas" (it should be noted that this policy appears in the LCP's Marine and Water Resources section VII.D.4.f, the section covering "wetlands"), as well as to County Code section 21.11A.020.B. Such a buffer would be required if the area were properly characterized as wetland.

Based upon my experience working with the requirements of the Coastal Act, it appears to me that the County's actions are not consistent with the requirements of the Act. Residential development is not one of the uses allowed within wetlands pursuant to section 30233(a) of the Act; section 30233 of the Act is explicitly incorporated into the County's certified LCP policy section covering wetlands (Marine and Water Resources section VII.D.4.a). Disruption of habitat values in wetlands as a consequence of development on adjacent lands is not consistent with section 30233(b). More significantly, development that creates adverse biological effects on Coastal Zone biological resources would be contrary to the plain-language requirements of Coastal Act Section 30231:

"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."

Further, developments in close proximity to the wetland complex that surrounds the Lake Earl lagoon have a potential for damaging the ecological functions of this wetland complex with statewide significance. The Lake Earl complex is clearly an environmentally sensitive area that is covered by Coastal Act section 30107.5:

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

Such environmentally sensitive areas require additional, not fewer, protections than other wetland areas. The significant potential that development sited immediately adjacent to the Lake Earl wetlands will have a significant effect on the lagoon also appears to be contrary to the requirement of Coastal Act section 30240 (it should be noted that this policy is restated as County policy in the certified LCP, in Marine and Water Resources section VI.C.6):

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

“(b) 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 those areas, and shall be compatible with the continuance of those habitat and recreation areas.”

The lack of an adequate wetland buffer to protect the state-owned lands included in or associated with the Lake Earl Wildlife Area seems to me to be contrary to the intent, if not to the explicit requirements, of the Coastal Act, as well as to the policy requirements in the County’s certified LCP for protecting wetlands associated with Lake Earl. This comment applies to the entire development area served by the Lakeside Loop, not merely to the current proposal for Lot 47, including the existing residential area on the southern part of the Loop.

In summary, Lot 47 of the McNamara Subdivision, Phase III, appears to have a significant potential for adversely affecting Coastal Zone resources that are protected by the certified LCP, as well as by the underlying Coastal Act requirements for protecting Coastal Zone resources of statewide significance. The existing County approval for this subdivision phase does not appear to include adequate measures to protect those resources. It is unclear why the evidence available to the County was interpreted in a manner that resulted in less-satisfactory protection of these significant Coastal Zone resources.

B. Potential Impacts to Riparian Areas

As part of the assessment summarized in the previous section, the distinction between the degree of protection for riparian areas and that for wetland areas under the County’s certified LCP became evident (these areas are covered by different policy sections). Such an approach to protecting aquatic resources is not consistent with the current understanding of the dynamics of aquatic ecosystems in the United States.

“Riparian areas are transitional between terrestrial and aquatic ecosystems and are distinguished by gradients in biophysical conditions, ecological processes, and biota. They are areas through which surface and subsurface hydrology connect waterbodies with their adjacent uplands. They include those portions of terrestrial ecosystems that significantly influence exchanges of energy and matter with aquatic ecosystems (i.e., a zone of influence). Riparian areas are adjacent to perennial, intermittent, and ephemeral streams, lakes, and estuarine-marine shorelines.” (“Riparian Areas – functions and strategies for management,” National Research Council, National Academy of Sciences, Washington DC; 2002, page 33.)

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Some riparian areas are wetlands; others aren't. Nearly all riparian areas provide important functions for aquatic ecosystems, however, including terrestrial and aquatic habitat support, water quality maintenance, floodplain protection (including flood level attenuation), and similar functions.

The Coastal Act policy excerpts presented above (particularly section 30231) clearly identify the Act's intent to protect riparian ecosystems from disruption. It is unclear to me how the Del Norte County LCP can adequately protect riparian areas (some or many of which are wetlands) that perform many of the functions that are performed by wetlands without protective policies that mirror those of wetlands. In particular, riparian areas require buffers no less than do wetland areas. The County's certified Local Coastal Plan, however, does not include a requirement to provide buffers that would protect riparian areas from the impacts of development in adjacent areas. In this respect, the certified LCP appears to be inconsistent with the requirements of the Coastal Act to the extent that it provides less protection for riparian areas than for other elements of the state's aquatic ecosystems.

C. Misidentification of Other Wetland Areas in the LCP

The third circumstance that appears inconsistent with the Act arises specifically with respect to the land use designation applied to lands owned by the Department of Fish & Game north, west, and south of the "Lakeside Loop." The County's LCP zoning map, Area C-8, designates these areas as "RCA-2 (fw)" (that is, as "farmed wetlands"). The County's certified LCP characterizes "farmed wetlands" as "wetland areas which are grazed, planted, or cut for forage during parts of the year." (Marine and Water Resources section VII.D.1).

These areas are quite evidently not farmed, have not been farmed in the recent past, and are, in fact, quite luxuriant emergent marshes with dominant vegetation more than a meter tall, dominated by slough sedge (*Carex obnupta*) and other perennial species that are characteristically not found in abundance in farmed wetlands, transitional agricultural areas, diked former tidelands, or wetlands identified by any of the other names applied to grazed seasonal wetlands along California's northern coast. A "farmed wetland" designation is clearly inappropriate for these perennial marshes.

The functions provided by these perennial marshes are substantially different from those that would be provided by a similarly sized area of farmed (i.e., grazed) wetland. The habitat and ecosystem-support functions available from these dense marshes include suitable habitat for marsh-nesting songbirds, wintering rails, and a variety of bird and mammal species that avoid open pasturelands, as well as a significantly greater production (and ultimate export) of fixed organic matter to Lake Earl and the nearshore Pacific Ocean. These dense wetlands provide significant flood-buffering functions, protecting adjacent upland areas from the effects of waves and high waters in Lake Earl. The dense vegetation acts as a filter or trap for sediments that likely would otherwise end up in the lagoon, and provides numerous avenues through which polluted runoff is prevented from reaching the aquatic environment or is "treated" by passage through the wetland.

Were this area to be used and/or managed as a farmed (i.e., grazed) wetland, substantial degradation of the existing wetland characteristics would occur and the majority of the functions currently provided in this area would be altered significantly or lost. Such an effect would not be consistent with Coastal Act sections 30107.5, 30231, or 30240, quoted above. In short, this land use designation / zone classification is clearly inappropriate for these wetlands of statewide significance; the appropriate classification clearly should be "RCA-2(w)." In addition, these wetlands should all receive the benefit of the existing 100-foot buffer requirement included in existing County code section 21.11A.020.B, and/or a suitably broad corridor along the perimeter of these wetlands should be designated "RCA-2(wb)."

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Mr. Robert Merrill
Review of Environmental Resources, McNamara Subdivision Lot 47
19 August 2004
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It is my understanding that the Friends of Del Norte will provide (or have provided), under separate cover, copies of the documents I have cited in this letter report.

Thank you for this opportunity to assist the Commission in its protection of California's coastal environment. Please don't hesitate to contact me if you have questions.

Sincerely,

Roberts, Kemp & Associates LLC

A handwritten signature in black ink that reads "Chad Roberts". The signature is written in a cursive, slightly slanted style.

Chad Roberts, Ph.D.
Senior Ecologist
SWS Professional Wetland Scientist No. 268

Copy:
Joe Gillespie, FODN

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TRINITY DEVELOPMENT
FISH & GAME
WETLAND MAP

Also shows wetlands present for the preferred alternative (8-107). Wetland maps at other alternatives would be considered similar to this map; however, data do not exist to map wetland types at the other alternatives.

This map is for planning purposes only.

Leho levels are shown as 8 feet NSL (California Department of Water Resources, 1998).

Vegetation: modified from Teah Tech, Inc. (1999), Fisher (1988), and National Wetlands Inventory (1987), with aerial photograph verification.

Streams: California Department of Forestry and Fire Protection (2001).

Base data and facilities: California Department of Fish and Game.

Map by California Department of Fish and Game, Eureka (August 2002).

0 2500 5000 7500 Feet

STATE OF CALIFORNIA - THE RESOURCES AGENCY
DEPARTMENT OF FORESTRY AND FIRE PROTECTION
1025 Highway 101 North
Crescent City, CA 95531
(707) 464-4969

ARNOLD SCHWARZENEGGER, Governor

Date: March 25, 2004

KEVIN FUGATE
TRINITY DEVELOPMENTS
840 "L" STREET, SUITE #1
CRESCENT CITY, CA 95531

NOTICE OF VIOLATION OF FOREST PRACTICE LAWS
For Harvest Document: 1-04NON-008-DEL LAKESIDE LOOP SUBDIVISION

Section 4604 of the Public Resources Code (PRC) requires the Department to inspect timber operations for compliance with the Forest Practice Act and rules of the Board of Forestry.

Violations were observed on the above referenced timber operation. Violations may be a cause for action against a Timber Operator's License (see PRC 4573 and 4576); prosecution as a misdemeanor (see PRC 4601); injunctive action (see PRC 4605 and 4606); correction of violations by the director with the costs billed to the responsible parties, and if not paid become a lien upon the property (see PRC 4606-4610); or a combination of the foregoing actions. Civil penalties may also be imposed (see PRC 4601.1). The following letter details code sections violated, mitigations required and date by which all work must be completed.

These violations only apply to those listed immediately below as the "Violator". The "Notice" to others is for informational purposes only. The "comments" section below, identifies the violation by code section and the date by which correction must be completed.

Violator: Fugate & Fugate dba M&M Cutters (attn: Kevin Fugate)
Harvest Document Number: 1-04NON-008-DEL LAKESIDE LOOP SUBDIVISION
Inspection Number: 1
Inspection Date: March 25, 2004
Person Contacted: KEVIN FUGATE

EXHIBIT NO. 11
APPLICATION NO. A-1-DNC-04-043
TRINITY DEVELOPMENT (1 of 2)
CDF NOTICE OF VIOLATION

VIOLATION PRC 4581: TIMBER HARVEST OPERATIONS WITH NO THP OR OTHER APPROPRIATE HARVEST DOCUMENT.

COMMENTS:

VIOLATION PRC 4581 – THE LICENSED TIMBER OPERATOR (M&M CUTTERS #A-7510) CONDUCTED COMMERCIAL TIMBER OPERATIONS WITHOUT AN APPROVED THP OR APPROPRIATE EXEMPT CONVERSION APPLICATION IN ASSOCIATION WITH RESIDENTIAL CONSTRUCTION WITHIN AN APPROVED SUBDIVISION. ON-SITE CONTACT, KEVIN FUGATE dba "TRINITY DEVELOPMENTS" AND WORKING UNDER LTO #7510 (M&M CUTTERS), WAS ADVISED TO CEASE ALL TIMBER OPERATIONS AND ASSOCIATED POTENTIAL TIMBERLAND CONVERSION ACTIVITY, UNTIL SUCH TIME THAT AN APPROPRIATE EXEMPT CONVERSION APPLICATION IS RECEIVED AND ACCEPTED BY THIS DEPARTMENT. MR. KEVIN FUGATE AGREED TO CEASE ALL RELATED ACTIVITIES UNTIL SUCH DOCUMENTS ARE ACCEPTED. GIVEN THE VERY MINOR SCOPE OF THE WORK UNDERTAKEN THUS FAR, NO FURTHER LEGAL ACTION SHALL BE TAKEN BY THIS DEPARTMENT IF THE DOCUMENT DISCUSSED ABOVE IS PREPARED AND ACCEPTED BY CDF PRIOR TO FURTHER TIMBER OPERATIONS.

(At this time, Mr. Fugate plans to do some future minor clearing and tree removal for home construction purposes within Lots 12, 45, 47 and 48 of the Lakeside Loop (McNamara) Subdivision. Non-timber related activities have already occurred on Lots 40-42. Some minor timberland clearing (<1/4 acre) has already occurred on Lots 47-48 and a small deck of logs are decked on-site. It was agreed that the logs shall be retained on-site until such time the Exempt Conversion document is procured. Consulting RPF, Jim Erler, has been retained by Mr. Fugate for this purpose. Both Mr. Fugate and Mr. Erler were advised that USF&WS has previously determined by a request for Technical Assistance from CDF on an earlier project adjacent to Lake Earl (attached) that the CDF shall contact the Service to seek Technical Assistance prior to accepting any Exemption Notice or approving any THP within 500 feet of the forested edge of Lake Earl Coastal Lagoon due to potential impacts to the Bald Eagle, a "listed" species. Mr. Kevin Fugate and Mr. Erler were advised that they are responsible to seek this consultation in association with the proposed exempt conversion timber operations. House construction and other non-timber related activities are not the purview of this Department and may continue as dictated by Del Norte County requirements. Del Norte County Planning Dept. representatives have recently been on-site and are administering other sub-division and RCA zoning issues and are not the responsible agency for commercial timber harvesting issues).

THOMAS P. OSIPOWICH
Unit Chief

by:



Michael Hudson, RPF #1814
Division Chief/Resource Management

cc:
CDF Area Office, Santa Rosa
CDF Unit, Fortuna
CDF Inspector
RPF, James Erler
Timberland Owner, Richard & Genevieve McNamara Trustees
Timber Operator, M&M Cutters
On Site Contact, Kevin Fugate-Trinity Developments
Other: Kim Witcher

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FILE COPY

United States Department of the Interior

FISH AND WILDLIFE SERVICE

1655 Heindon Road

Arcata, CA 95521

Phone (707) 822-7201 FAX (707) 822-8411



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In Reply Refer To:
AFWO
1-14-2004-TA-2216.1

MAY 15 2004

Mr. James Erler, RPF #2323
Erler Forestry Service
1100 Malaney Drive
Crescent City, CA 95531

Subject: Response to Request for Technical Assistance Regarding Habitat Removal on the McNamara Subdivision at Lake Earl, Del Norte County, California

Dear Mr. Erler:

This responds to your request for U.S. Fish and Wildlife Service (Service) technical assistance, received in our office on April 23, 2004, on the development of five lots within unit 3 of the McNamara subdivision, including the removal of approximately 12 Sitka spruce (*Picea sitchensis*) trees ranging from 12 to 58 inches diameter-at-breast height. At issue in the request is the potential for incidental take of the federally listed bald eagle (*Haliaeetus leucocephalus*), as a result of the effects of the proposed action to the existing habitat. After review of the information pertaining to this request, the Service provides the following technical assistance.

According to the California Department of Fish and Game and data on file in this office, the bald eagle is a winter resident at Lake Earl. Numerous records exist of foraging bald eagles using perch/roost trees in the forested habitat adjacent to Lake Earl, which is inclusive of unit 3 of the McNamara subdivision. The proposed removal of approximately 12 potential perch/roost trees eliminates their use by the species. Their removal also facilitates the development of the lots, increasing human activity and disturbance of bald eagles as a result. The proposed action is likely to result in take of bald eagle due to a significant disruption of normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering. We recommend that the project proponent seek an incidental take permit for the bald eagle, prior to implementing in any habitat alteration activity within the project area.

Sincerely,

Michael M. Long
Field Supervisor

cc:

CDF: L. Markham, 135 Ridgeway Avenue, Santa Rosa, CA 95402

DFG: K. Moore, 619 Second Street, Eureka, 95501

EXHIBIT NO. 12

APPLICATION NO.

A-1-DNC-04-043

TRINITY DEVELOPMENT
U. S. F. W. S. LETTER-
HABITAT REMOVAL

