

Th 9a

State of California

California Coastal Commission
North Central Coast District

MEMORANDUM

TO: Commissioners and Interested Parties Date: May 9, 2006
FROM: Charles Lester, Deputy Director
North Central Coast District

SUBJECT: **Addendum to Commission Meeting for Thursday, May 11, 2006**
North Central Coast District

AGENDA # APPLICANT

COASTAL PERMIT APPLICATION

Th 9a A-2-PAC-05-018 (NORTH PACIFICA, L.L.C.)

Letter, Jaquelynn Pope, dated May 8, 2006 (Enclosure 1, Petition for Writ of
Mandate available from Commission staff for review at hearing)
Letter, Adelaide C. McCord, received May 1, 2006
Letter, Patricia Fischer, received May 1, 2006

WARSHAW & POPE
Attorneys at Law
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254

Jaquelynn Pope
Mark Warsaw

Tel. 310.379.3410
Fax 310.376-6817

May 8, 2006

VIA FEDERAL EXPRESS
Peter Douglas, Executive Director
Christopher Kern District Supervisor
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

RECEIVED

MAY 09 2006

CALIFORNIA
COASTAL COMMISSION
NORTH CENTRAL COAST

Re: May 8, 2006 *de novo* Hearing.
A-2-PAC-05-018 (North Pacifica LLC)
4000 Block of Pamento Avenue, Pacifica, San Mateo County
Appellant: John Curtis

Dear Mr. Douglas and Mr. Kern:

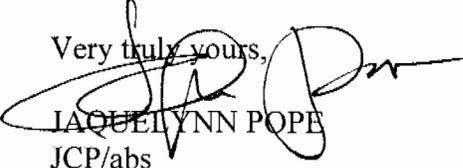
Enclosed please find the following:

1. Petition for Writ of Mandate in *North Pacifica v. California Coastal Commission* filed March 10, 2006, in Los Angeles Superior Court, LASC No. BS 102068.
2. May 8, 2006 letter from Jaquelynn Pope, attorney for North Pacifica to Commissioner Chairwoman Meg Caldwell. Please note that an individually addressed, identical copy of this letter was sent to each Coastal Commissioner and Alternatives David Allgood and Trent Orr. The letter was sent via Federal Express on May 8, 2006.

Please place the enclosed documents, along with this letter, in the Administrative Record and make copies available to the individual Commissioners.

Thank you for your attention to this matter.

Very truly yours,


JAQUELYNN POPE
JCP/abs

cc: All Comissioners (w/o encs.)

WARSHAW & POPE
Attorneys at Law
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254

Jaquelynn Pope
Mark Warshaw

Tel. 310.379.3410
Fax 310.376-6817

May 8, 2006
(COPIED TO STAFF)

(Via Federal Express)
MEG CALDWELL, Chair
California Coastal Commission
Director, Environmental And Natural Resources
Law & Policy Program
Stanford Law School
559 Nathan Abbott Way
Owen House Room 6
Stanford, CA 94305-8610

RECEIVED

MAY 09 2006

CALIFORNIA
COASTAL COMMISSION
NORTH CENTRAL COAST

Re: Appeal No: A-2-PAC-05-018
Applicant: North Pacifica
Local Government: City of Pacifica
Project Location: 4000 Block of Palmetto Avenue,
Pacifica, San Mateo County

Dear Ms Caldwell:

This office represents North Pacifica LLC. We are writing concerning the *de novo* hearing on North Pacifica's Coastal Development permit that has been scheduled to take place on May 11, 2006.

North Pacifica objects to the Commission holding this hearing, or any further administrative proceedings regarding North Pacifica, on the grounds that each of the Commissioners violated the Bagley-Keene Open Meetings Act and the Commission's own regulations at the time of the January 11, 2006 "substantial issue" hearing regarding North Pacifica's Coastal Development Permit and, therefore, such hearing and all actions taken therein were void. Further, the statute of limitations for holding any kind of appellate hearing concerning North Pacifica's Coastal Development Permit has expired and, thus, the Commission has no jurisdiction to hold the scheduled May 11, 2006 hearing or any other appeal of North Pacifica's Coastal Development Permit.

Each of you acted in disregard of the law by participating in the January 11, 2006 hearing, with North Pacifica *in absentia*, even though each of you had been advised by your chief counsel, Ralph Faust, and by your District Director, Charles Lester, that the notice of the hearing that had been sent to North Pacifica was defective, and that North Pacifica had not received timely notice of the hearing.

At that meeting, Attorney Faust admitted to the Commission:

The meeting notice to North Pacifica is, apparently, defective because it does not appear to have been mailed until January 3 of this year. Normally, staff would have mailed the meeting notice and the staff report on the previous Friday, on December 30, which is the same day that the staff report was posted to the web site. This was a 3-day holiday weekend, as the Commission is aware, and I am not aware of what happened. I don't know that Dr. Lester is, either, but for whatever reason it didn't get mailed until the Tuesday. So there is a violation of the 10-day calendar notice that should have been provided to North Pacifica.

Reporter's Transcript of January 11, 2006 Commission meeting, p. 10:5-15.
[emph. added]

THE SUBSTANTIAL ISSUE HEARING WAS UNLAWFUL AND VOID

14 CCR 13090 provides that a Commissioner may vote only at a properly noticed public hearing:

(a) A vote on an application may be taken only at a properly noticed public hearing after the commission has received the staff recommendation identified in section 13057 and obtained public testimony, if any, in accordance with section 13066.

14 CCR 13090.

Clearly, once the Commissioners had been advised that the public hearing had not been properly noticed, the Commissioners should have instructed the staff to re-notice the hearing properly, in order to comply with Commission regulation 13090. Instead, each Commissioner ignored regulation 13090 and went ahead with the hearing, with North Pacifica *in absentia*, and each Commissioner unlawfully voted at the improperly noticed hearing to accept the staff's recommendation that a substantial issue existed.

Moreover, in addition to the Commission's own regulations, North Pacifica was also entitled to ten days notice of the January 11, 2006 hearing under § 11125 of the Bagley-Keene Open Meetings Act (Government Code §§ 11120 et seq.) The Bagley-Keene Open

Meetings Act applies to all actions taken at public meetings of state bodies, and clearly applies to the Commission's actions at the January 11, 2006 "substantial issue" hearing:

§ 11122. "Action taken"

As used in this article "action taken" means a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action.

Cal Gov Code § 11122.

Obviously, the Commission's determination that the "substantial issue" exists is such an action, and should not have been taken once the Commissioners were aware that the mandatory ten-day notice requirement had been violated. Under § 11130.3 of the Bagley-Keene Act, North Pacifica is entitled to void the Commission's substantial issue determination, because the Commission did not give North Pacifica notice as required by § 11125.

Further, since each Commissioner was informed by its attorney and staff of the violation, it is clear that the Commission's January 11, 2006 action in violation of the Bagley-Keene Act was intentional. Under Government Code § 11130.7, the intentional violation by a Commission of the Bagley-Keene Act is a misdemeanor:

§ 11130.7. Offenses

Each member of a state body who attends a meeting of that body in violation of any provision of this article, and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled under this article, is guilty of a misdemeanor.

Cal Gov Code § 11130.7.

Here, the Commissioners attended the January 11, 2006 meeting and conducted a hearing concerning North Pacifica's permit, even though the Commissioners knew that the statutory notice provisions had been violated. The Commissioners must be held to have intended the results of their action is so doing. Namely, North Pacifica was not only deprived of sufficient notice to allow it to attend the meeting, it was also deprived of procedural and substantive information regarding the recommendations of the staff report, and further, was deprived of the opportunity to attend the meeting. This not only deprived North Pacifica of information regarding the meeting, and what took place there, but, in addition, deprived the public of the information that North Pacifica would have placed in the record and of any information North Pacifica may have adduced at the

meeting. Further, presumably the same untimely notice was delivered to other interested members of the public and, thus, they, as well, were deprived of information to which they were entitled and, conversely, North Pacifica was deprived of information those members of the public might have adduced at such meeting had they received the proper and timely notice.

Each Commissioner is required to be familiar with the law, including the Bagley-Keene Act, and the above provisions. In fact, the law requires that each member of the Commission be provided with a copy of the Bagley-Keene Open Meetings Act at the time of their appointment:

§ 11121.9. Providing copy of article to members of state bodies

Each state body shall provide a copy of this article to each member of the state body upon his or her appointment to membership or assumption of office.

Cal Gov Code § 11121.9.

Thus, it is clear, that each individual Commissioner may be held to account for each Commissioner's misfeasance and/or malfeasance in the conduct of each Commissioner's duties.

THE COMMISSION'S UNFAIR TACTICS IN SCHEDULING THE *DE NOVO* HEARING

In scheduling the *de novo* hearing for May 11, 2006, the Commissioners are compounding the injuries to North Pacifica that have accrued from the original void hearing.

On March 10, 2006, pursuant to the Government Code § 11130.3, North Pacifica filed, in Los Angeles Superior Court, a Petition for Writ of Mandate, which seeks to void the January 11, 2006 "substantial issue" determination on the grounds that North Pacifica did not receive the required statutory notice. North Pacifica purposely set the hearing on the Writ Petition to be held on April 24, 2006, prior to the Commission's regularly scheduled May, 2006 meeting.

However, rather than allow the Court to consider whether the Commissioners' January 11, 2006 "substantial issue" determination was void, the Commission has filed a Motion to Transfer Venue from Los Angeles to San Mateo County. The effect of the filing of the Motion was to suspend the power of the Los Angeles Superior Court to award any relief pending the hearing on the Motion to Transfer Venue. Thus, the April 24, 2006 hearing date for North Pacifica's Motion to Transfer Venue was taken off-calendar, and the Los Angeles Superior Court has no power to act on the Writ petition until after the June 2, 2006 date for the hearing on the Motion to Transfer Venue.

A State agency such as the Coastal Commission should not be engaging in this kind of gamesmanship. In fact, since the January 11, 2006 hearing took place in San Pedro, California in Los Angeles County, and since North Pacifica's main business office is located in Los Angeles County, and since both the Commission and the Attorney General's office maintain offices in Los Angeles County, it is obvious that the Los Angeles Superior Court is a proper venue for the Writ Petition. As a State agency, there is no reason for the Commission to prefer venue in one California State Court over another, and there is no legitimate basis to defer hearing on the merits of North Pacifica's Writ Petition.

Furthermore, if the Commissioners believe that their actions on January 11, 2006 were lawful and valid, then there is no reason not to allow North Pacifica's Writ of Mandate to be heard prior to any *de novo* hearing.

Rather, it is obvious that the Commission knows that the January 11, 2006 action was improper and void, and seeks to cloud judicial review of its improper action by preventing North Pacifica from obtaining prompt review of the notice issue. Instead, the Commission hopes, that by rushing to hold the *de novo* hearing prior to the resolution of the notice issue, it may argue in any subsequent review that it somehow corrected the improper notice for the January 11, 2006 "substantial issue" hearing by giving timely notice of the *de novo* hearing. This is not the law.

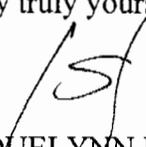
It is obviously unfair to North Pacifica to insist that it participate in a costly and meaningless void proceeding such as the May 11, 2006 *de novo* hearing will be. Holding the *de novo* hearing under these circumstances will compound, rather than correct the injuries that North Pacifica has incurred as a result of the improper notice of the "substantial issue" hearing.

In light of the above, North Pacifica is requesting that the Commission dismiss the Curtis appeal on the grounds that the Commissioner's violated the law by participating in the January 11, 2006 "substantial issue" hearing. Since the Commission's actions of January 11, 2006 are void, the Commission has therefore failed to take action on the Curtis appeal within the 49-day statutory limitation period. (The Staff Report for the January 11, 2006 hearing indicates that the 49-day period expired on February 6, 2006.) Thus, since the 49-day statute of limitations is jurisdictional (Encinitas Country Day School v. California Coastal Comm. (2003) 108 Cal App. 4th 575), the Commission has no jurisdiction to conduct the Curtis appeal either on May 11, 2006 or at any time thereafter, and, therefore, has a ministerial duty to dismiss it.

Since, as set forth above, each Commissioner has a legal responsibility to ensure that public meetings are held in compliance with the provisions of the Bagley-Keene Act, we ask that each individual Commissioner's vote on this request be placed on the record, so that each may, individually, be held to account for his or her individual actions and the consequences thereof.

A copy of this letter has been forwarded to the Commission Staff. Please ensure that it is placed in the public record.

Very truly yours,



JAQUELYNN POPE

cc: All Commissioners
✓ Peter Douglas, Executive Director
Joel Jacobs, Deputy Attorney General

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MAY 01 2006

CALIFORNIA
COASTAL COMMISSION

April 27, 2006

(each)

Dear Sirs

Please send me a list of all of the Commissioners, the alternates and the four non-voters.

Also, the agenda number for the hearing of May 11, 2006 concerning the property at the 4000 block of Palmetto re: the subdivision and construction of a 43 residential unit development including 19 single family detached homes and 24 townhouses, 72,000 cubic yards of grading, and related infrastructure improvements.

Permit number A-2-Pac-05-018

Applicant North Pacifica LLC
Attention Mr. Keith Fromm
Ms. Adelaide C. McCord

Agenda number to me

agenda numbers

 Ms. Adelaide C. McCord
132 Paradise Dr
Pacifica, CA 94044-1044

Also, a listing of commissioners including Chris L. Kern, Program manager at the North Central Coast District office.

(The land south of us is filled land.)²
(The value of our houses would be decreased.)

5) We moved here in 1967 because it was a rural area. We were told they were building 2 story apartments below our house on Paradise. Robert Dolger sold the property to Actna Heerhauser and they had a developer build condominiums with jutting  roofs and spoiled our view which we paid more for, plus now there are 20 foot trees blocking our view and they have spread to the end of our lot and if allowed to grow will block our view totally. The enclosed letter is in answer of Pacifica Manor management in Belmont, California, three months after I called them. You will note that they were having to pay \$200,000 for water intrusion, which they planned to get from the owners of the condos. The people at the end of our block hear frogs croaking in the "Fish Bowl". There is plenty of open space. Where they want to build will make it crowded and it is on a curve, affecting traffic. plus this end of Pacifica is only able to accommodate the people here now, traffic wise and the post office, etc. You will have to agree, it is an underhanded trick to hold the hearing in Costa Mesa - about 450 miles south where people from the area concerned are likely not able to travel that far. It didn't pass here so they keep "hammering" away.

PACIFIC POINT HOMEOWNERS' ASSOCIATION

August 21, 2003

Adelaide C. McCord
132 Paradise Drive
Pacifica, CA 94044

RE: Letter dated May 16, 2003

Dear Ms. McCord:

First, please accept our apologies for not responding sooner to your letter dated May 16, 2003. Pacific Point condominiums has recently implemented a change of management and in the process, our response to your letter was delayed.

We understand and can appreciate your concern relative to maintaining the view from your home. Many of the owners at Pacific Point share your concerns and also value the opportunity to enjoy beautiful views at our location.

We understand that in the past the Association may have provided tree-trimming services as a courtesy to you. Unfortunately, we find ourselves in a much different position today and are unable to approve the costs of the work you request. We are currently facing a project expected to cost upwards of \$250,000.00 to solve water intrusion issues at the project, which will doubtlessly require special financial assessments to our owners. Due to such issues of deferred maintenance, we simply do not have the resources to provide any services, which are not legally required.

The Association faces a problem similar to you in that we recently made a request to an owner of the property below ours to have their landscaping trimmed so as to not to encroach upon the view of some of our homeowners. That owner advised us that we would be allowed to perform the work at our own expense, using a contractor first approved by that owner.

Therefore, we can only suggest the same arrangement to you. We will allow you to assume financial responsibility for trimming the trees which are obstructing your view, provided that the Association must first be given the opportunity to approve the scope of work and the contractor you select (which contractor must show proof of insurance for liability reasons). Such approval and access to our property will not be unreasonably withheld. Should you decide to proceed with this project, kindly submit this information for approval to:

Dan Kane, Property Manager
The Manor Association
500 Harbor Boulevard
Belmont, CA 94002
RE: Pacific Point Condominiums

We would make every effort to respond promptly to your request. We realize that our answer will be disappointing to you and regret that fiscal responsibilities require us to decline to pay for your request. As illustrated above, we have recently experienced a similar disappointment and understand your concerns.

Sincerely,


Daniel L. Kane

Managing Agent

(There is no obstruction to their view!)

RECEIVED

MAY 01 2006

CALIFORNIA
COASTAL COMMISSION

**AGAINST
PERMIT NUMBER A-2-PAC-05-018
SUBDIVISION/CONSTRUCTION
4000 BLOCK, PALMETTO, PACIFICA
I LIVE IN AN ADJOINING AREA.**

**California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, Ca. 94105-2219**

**I am totally against building the subdivision at 4000 block of Pacifica Ave.
Pacifica (San Mateo) County, Ca. (APN)s 009-402-250f,009-402-260.**

The land proposed for this project is a soft drainage area where water flows from as far as the freeway at the top of the hill. It is soft and wet. I feel disturbing the Ground there would cause massive erosion and landslides.

The property lies on one side of Palmetto Ave, and on the other side is sand dunes. During the last storm a huge portion of the dune/hill area broke off and slid into the ocean. In time with this kind of sliding and erosion those dunes will be dropped into the ocean and Palmetto Ave. may need to be rebuilt further into the purposed construction area.

The whole idea is faulty, to build in such a fragile area.

Thank you,

Sincerely,

Patricia Fischer

**Patricia Fischer
5017 Palmetto Ave,
Pacifica, Ca. 94044**

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JAQUELYNN POPE SBN 78600
WARSHAW & POPE
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254
Tel. (310) 379-3410
Fax (310) 376-6817

Attorneys for Petitioner and Plaintiff, North Pacifica LLC

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

MAR 10 2006

John A. Clarke, Executive Officer/Clerk
By _____ Deputy
D. GILES

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

BS102038

NORTH PACIFICA LLC,

Petitioner and Plaintiff

v.

CALIFORNIA COASTAL
COMMISSION,

Respondent and Defendant

**VERIFIED PETITION FOR
WRITS OF MANDATE;
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF.**

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MAY 09 2006

CALIFORNIA
COASTAL COMMISSION
NORTH CENTRAL COAST

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INTRODUCTION

This Petition concerns the admitted failure of the California Coastal Commission (“Commission”) to give petitioner and plaintiff herein, North Pacifica LLC (“NP”), timely and lawful notice of the Commission’s January 11, 2006 meeting in San Pedro, California. The Commission has **admitted** that the Notice¹ was untimely and defective. Nonetheless, and in spite of strenuous objections from NP, the Commission held the untimely and defectively noticed hearing anyway. As a result of the untimely and defective Notice, the actions taken by the Commission at its January 11, 2006 meeting regarding the appeal of NP’s Coastal Development Permit (“CDP”) are null and void. Because the statute of limitations has now expired, the Commission cannot cure the untimely and defective Notice, and has no appeals jurisdiction over NP’s CDP.

NP brings this action pursuant to the Bagley-Keene Open Meeting Act (Government Code §§ 11120 et seq.). NP seeks two Writs of Mandate and Declaratory and Injunctive relief to void and nullify any and all actions taken by the Commission at its meeting in San Pedro, California, on January 11, 2006, at which the Commission (with NP *in absentia*), found and determined that a “substantial issue” existed as to an appeal that had been filed by John Curtis (“Curtis”), a local Pacifica resident, challenging the approval by the City of Pacifica (the “City”) of NP’s CDP.

The Commission violated Government Code § 11125 of the Bagley-Keene Open Meeting Act by failing and refusing to give NP and the prescribed members of the public the mandatory, statutorily required minimum of 10 days’ advance notice of the January 11, 2006 meeting and substantial issue hearing. Thus, pursuant to Government Code § 11130.3, any action taken by the Commission at the January 11, 2006 meeting regarding NP’s CDP is null and void, including, but not limited to the Commission’s finding and determination that a “substantial issue” exists.

¹ As used herein “Notice” refers to the Important Notice of Public Hearing that the Commission mailed to NP no earlier than January 3, 2006.

1 In addition, the untimely Notice of the January 11, 2006 meeting also violated the
2 Commission's own regulation, 14 CCR 13063, which requires that the Commission mail notice
3 of the hearing and a copy of the Staff Report to NP at least ten calendar days prior to the hearing.
4 For this reason also, any and all actions taken by the Commission at the January 11, 2006
5 meeting are in violation of the Coastal Act, are outside the Commission's authority and are null
6 and void.

7 Finally, the untimely Notice violated NP's due process rights by preventing NP from
8 having a meaningful opportunity to participate in the hearing and for that reason also, any and all
9 actions taken by the Commission at the January 11, 2006 meeting are outside the Commission's
10 authority and are null and void.

11 The Commission went ahead and determined that a substantial issue existed even though
12 NP, prior to the January 11, 2006 hearing, had objected, in writing, to the untimely and defective
13 Notice and even though the Commission staff as well as the Commission's legal counsel
14 admitted at the January 11, 2006 hearing that NP had not been given timely Notice, and that the
15 Notice that NP had received was in violation of the ten-day notice requirement (Reporter's
16 Transcript, p.10: 5-15 (Exhibit 11)).

17 Prior to the January 11, 2006 meeting, NP had submitted to the Commission evidence
18 clear, on its face, that the Commission's Notice was untimely and defective, to wit, a copy of the
19 envelope in which the Notice had been enclosed. The envelope containing the untimely and
20 defective Notice bore a postage meter stamp of January 3, 2006, thus establishing conclusively
21 that the Notice was not and could not possibly have been in compliance with the minimum ten
22 day advance notice period required by the Bagley-Keene Open Meeting Act (and the
23 Commission's own regulation 14 CCR 13063), for a hearing scheduled to be held on January 11,
24 2006. NP had protested that it only received the untimely and defective Notice in the afternoon
25 of Thursday, January 5, 2006, a mere three business days before the hearing, which was to be
26 held in the morning of Wednesday, January 11, 2006. As such, NP informed the Commission
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1 that NP was afforded insufficient notice even to attend the hearing, much less prepare a
2 presentation therefor and make a meaningful presentation thereat.

3 At the January 11, 2006 meeting, the Commission staff as well as the Commission's legal
4 counsel admitted to the Commission that the Notice was defective, and that Commission staff
5 had not provided NP with the ten-day notice that was required, and that the Notice had not been
6 timely mailed. The Commission, nevertheless, failed and refused to cure or correct the untimely
7 and defective Notice by properly re-noticing, and properly rescheduling and conducting a
8 properly noticed substantial issue hearing at any time on or prior to February 6, 2006, the date
9 that, according to the Commission's own public documents, the statute of limitations expired for
10 conducting such a substantial issue hearing. Instead, the Commission held the meeting on
11 January 11, 2006 anyway with full knowledge, recognition and intent that the Notice therefor
12 had been untimely and defective as a matter of law.

13 In electing to hold a void hearing based on an untimely and defective Notice rather than
14 re-notice the hearing, the Commission has lost jurisdiction over NP's CDP. The California
15 Coastal Act (Public Resources Code § 30000, et seq.) mandates that the Commission must hold a
16 hearing on any appeal within 49 days of the filing of the appeal (PRC § 30621). California
17 courts have interpreted this provision to mean that the Commission must, at a minimum,
18 determine, within the 49-day limitations period, whether a substantial issue exists. (*Encinitas*
19 *Country Day School v. California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584-85).
20 The Commission has informed NP that the 49-day statutory limitation period for holding an
21 appeals hearing expired on February 6, 2006 (Staff Report, p.1 (Exhibit 5)).

22 Thus, here, because the Commission's January 11, 2006 actions are void due to untimely
23 and defective Notice, the Commission failed to hold a valid hearing on appeal by February 6,
24 2006 (the date of the expiration of the 49-day limitation period). Therefore, NP additionally
25 seeks a Second Writ of Mandate and declaratory and injunctive relief holding that the
26 Commission has permanently lost appeals jurisdiction over NP's CDP because of the expiration
27 of the 49-day statutory limitation period.

1 **FIRST PETITION FOR WRIT OF MANDATE: TO VOID AND NULLIFY**
2 **JANUARY 11, 2006 ACTION OF COMMISSION**

3 ***COUNT ONE: VIOLATION OF THE NOTICE REQUIREMENTS OF THE***
4 **BAGLEY-KEENE OPEN MEETING ACT**

5 1. Petitioner, North Pacifica LLC (“NP”), is a California Limited Liability
6 Company, duly registered and in good standing with the State of California. It has offices
7 located in Los Angeles, California.

8 2. NP is a small real estate company that has two principals, Keith Fromm and
9 Robert Kalmbach. NP owns the development rights to a 4.2 acre parcel of property located in
10 Pacifica, California, commonly known as “the Bowl.” On August 12, 2002, after a processing
11 period in excess of three years, at least eight public hearings, the testimony of scores of
12 witnesses, preparation and public review of dozens of expert reports and thousands of pages of
13 documents and other evidence, and the certification of a Final Environmental Impact Report, all
14 of which, as of the date of its approval, cost NP in excess of \$2 million, the City of Pacifica
15 (“City”) approved NP’s application for a Coastal Development Permit (“CDP”) for a 43-unit
16 residential development project to be built on the Bowl. As a project comprising both real estate
17 and personal property such as, for example, permits, NP’s project is unique and irreplaceable.

18 3. The California Coastal Commission (“Commission”) is a state body and public
19 agency that has been created by the California Coastal Act (Public Resources Code §§ 30000, et
20 seq.), and is empowered in limited circumstances to hear appeals by interested persons from a
21 local government’s approval of a CDP. (Pub. Res. Code §§ 30603, 30621, 30625.) The
22 Commission has informed NP that on December 19, 2005, an appeal by John Curtis was filed
23 with the Commission challenging the City’s approval of NP’s CDP (“Curtis Appeal”). (Staff
24 Report p.1, (Exhibit 5)) The Commission has also informed NP that the 49-day statutory
25 limitation period for holding a hearing on the “Curtis Appeal” expired on February 6, 2006.
26 (Staff Report, p.1, (Exhibit 5)).
27
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1 4. The Commission has six district offices and holds twelve regularly scheduled
2 meetings a year, in various cities in each district. The meeting on January 11, 2006 was held in
3 the City of San Pedro, in the County of Los Angeles, California.

4 5. Venue in Los Angeles County is proper under CCP §§ 393(b) and 395(a) because
5 that is where the action arose and where the injury occurred.

6 6. Venue is also proper in Los Angeles County pursuant to CCP § 401, which
7 provides that whenever it is provided by any law of this State that a proceeding against a state
8 commission “may be commenced in, tried in, or removed to the County of Sacramento, the same
9 may be commenced and tried in any city or city and county of this State in which the Attorney
10 General has an office.” (emphasis added) Government Code § 955 provides that actions against
11 the state may be removed by the Attorney General to Sacramento County. Thus, since an action
12 against the Commission may be removed to the County of Sacramento, it may also, under CCP §
13 401, be commenced in any city in which the Attorney General has an office. Since the Attorney
14 General has an office in Los Angeles, venue for this case is proper in Los Angeles.

15 7. The Bagley-Keene Open Meeting Act (Gov. Code §§ 11120, et seq.) was enacted
16 to ensure openness in government:

17 It is the public policy of this state that public agencies exist to aid in the
18 conduct of the people's business and the proceedings of public agencies be
 conducted openly so that the public may remain informed.

19 In enacting this article the Legislature finds and declares that it is the intent
20 of the law that actions of state agencies be taken openly and that their
 deliberation be conducted openly.

21 Government Code § 11120.

22 8. The Bagley-Keene Act mandates that every state body must carry out its meetings
23 openly and in conformance with the Bagley-Keene Open Meeting Act. (Gov. Code
24 § 11127). To ensure that the public remains informed and retains control over its public
25 agencies, the Bagley-Keene Open Meeting Act includes specific requirements for notice to the
26 public (Gov. Code § 11125), and further provides that any interested person may have any action
27 taken by a State body in violation of the notice requirements of Government Code § 11125
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1 declared null and void by the Court (Gov. Code § 11130.3). The Commission is a state body as
2 defined in the Bagley Keene Open Meeting Act. (Gov. Code §§ 11121, 11121.1).

3 9. Section 11125 of the Bagley-Keene Open Meeting Act requires that the
4 Commission give *at least ten days advance notice of its meetings*, as follows:

5 (a) The state body shall provide notice of its meeting to
6 any person who requests that notice in writing. Notice shall be
7 given and also made available on the Internet at least 10 days in
8 advance of the meeting, and shall include the name, address, and
9 telephone number of any person who can provide further information
10 prior to the meeting, but need not include a list of witnesses
11 expected to appear at the meeting. The written notice shall
12 additionally include the address of the Internet site where notices
13 required by this article are made available.

14 Government Code § 11125(a) (emphasis added).

15 10. Government Code § 11125(b) requires the Notice to include a specific agenda for
16 the meeting:

17 (b) The notice of a meeting of a body that is a state body shall include a
18 specific agenda for the meeting, containing a brief description of the items
19 of business to be transacted or discussed in either open or closed session. A
20 brief general description of an item generally need not exceed 20 words. A
21 description of an item to be transacted or discussed in closed session shall
22 include a citation of the specific statutory authority under which a closed
23 session is being held. No item shall be added to the agenda subsequent to
24 the provision of this notice, unless otherwise permitted by this article.

25 Government Code § 11125(b).

26 11. The notice requirements of Government Code § 11125 are ministerial and
27 mandatory and a state agency does not have discretion to substitute a different type of notice for
28 the notice required by § 11125.

12. On December 16, 2005, Keith Fromm, one of the two principals of petitioner NP,
and also co-counsel for NP, appeared before the Commission at its regularly scheduled meeting
in San Francisco, California, to represent NP in a Commission hearing pursuant to regulation
13569, concerning the issue of whether or not the Commission had appeals jurisdiction over
NP's CDP. On that date, Mr. Fromm submitted to the Commission two written requests for
notice of all Commission proceedings regarding NP's CDP. Prior to being permitted to make

1 his oral presentation to the Commission, Mr. Fromm submitted two requests in writing to the
2 Commission asking that he be permitted to speak as a representative of NP at the December 16,
3 2005 hearing and that the Commission give him notice of any future Commission meeting and/or
4 action regarding NP's Coastal Development Permit. The requests were made on a "Request to
5 Speak" form required by the Commission and provided by the Commission to any persons who
6 wish to speak at a Commission meeting. The Commission provides both white and pink forms.
7 The white form is entitled "Request to Speak Non-Permit Items" and the pink form is entitled
8 "Request to Speak Permit Items."

9 13. The "Request to Speak" forms request information as to the speaker's name,
10 organization represented, address, etc., as well as the specific item on the agenda to be addressed.
11 The "Request to Speak" form also includes a portion at the bottom, entitled "Request for Notice
12 of Future Hearings," to be filled in to obtain notification of future hearings, and Commission
13 business regarding the agenda item matter indicated on the form. Mr. Fromm filled in the
14 "Request for Notice of Future Hearings" portion of both of the forms and thereby requested that
15 notice be sent to the address of 914 Westwood Blvd. #500, Los Angeles, California 90024. Mr.
16 Fromm submitted both of the forms to the Commission staff. (True and correct copies of both of
17 the "Request to Speak" forms submitted to the Commission by Mr. Fromm are appended hereto
18 as Exhibit "1".)

19 The Chairperson of the Commission called Mr. Fromm's name from the pink "Request to
20 Speak" form at the time of the December 16, 2005 hearing regarding NP, and Mr. Fromm did
21 make an oral presentation at said December 16, 2005 hearing on behalf of NP, pursuant to the
22 "Request to Speak" form that he had submitted to the Commission.

23 14. The address that Keith Fromm filled in on the Request for Notice of Future
24 Hearings, 914 Westwood Blvd., #500, Los Angeles, California, 90024, is the same address as
25 was listed on every other brief, letter and legal document that Mr. Fromm and/or NP had
26 submitted to the Commission regarding the December 16, 2005 hearing. These submissions
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1 included five separate briefs, and various letters that were sent to the Commission and/or its
2 attorneys during the period of November and December, 2005.

3 15. On or after January 3, 2006, the Commission mailed a copy of an "Important
4 Public Hearing Notice" to Keith Fromm. The envelope was addressed to "Keith Fromm, North
5 Pacific [sic] LLC"; however, it was sent to NP's Northern California office address, rather than
6 to 914 Westwood Blvd., #500, Los Angeles, California, 90024, which was Mr. Fromm's
7 Southern California address, as Mr. Fromm had requested in his December 16, 2005 request for
8 Notice, and which was his usual address. The Notice stated that a hearing concerning a New
9 Appeal of NP's Coastal Development permit would be held on January 11, 2006, in San Pedro,
10 California. The Notice envelope addressed to Mr. Fromm bore postage in the form of a Pitney
11 Bowes postage meter stamp dated January 3, 2006.

12 Mr. Fromm received a faxed copy of the "Important Public Hearing Notice" and Staff
13 Report on January 5, 2006, soon after it was received at NP's Northern California address. This
14 untimely six-day Notice of the January 11, 2006 hearing which was not sent to Keith Fromm
15 until January 3, 2006, (and was even then addressed to the wrong address), violated section
16 11125 of the Bagley-Keene Open Meeting Act, which requires a mandatory minimum of at least
17 ten days advance notice. (A true and correct copy of the face of the envelope received by Mr.
18 Fromm, bearing the postage meter stamped date of January 3, 2006, is appended hereto as
19 Exhibit "2," and a true and correct copy of the Important Public Hearing Notice is appended
20 hereto as Exhibit "3".)

21 16. On the afternoon of Thursday, January 5, 2006, NP's attorney, Jaquelynn Pope,
22 received the regular mail delivery in her office in Hermosa Beach, California. Included in the
23 mail was a large manila envelope from the Commission that also bore postage in the form of a
24 Pitney Bowes postage meter stamp dated January 3, 2006. (A true and correct copy of the face of
25 the envelope sent to Attorney Pope bearing the postage meter stamped date of January 3, 2006 is
26 appended hereto as Exhibit "4").

1 17. The envelope that Attorney Pope received from the Commission on the afternoon
2 of January 5, 2006, also contained a copy of the same “Important Public Hearing Notice”
3 regarding the appeal of NP’s CDP, which stated that the hearing on the Curtis Appeal was set to
4 be held in San Pedro, California, on January 11, 2006. The untimely six-day Notice violated
5 section 11125 of the Bagley-Keene Open Meeting Act, which requires a minimum of ten days
6 advance notice.

7 18. The envelopes Keith Fromm and Attorney Pope received from the Commission
8 also contained a 22-page Staff Report that had over 60 pages of exhibits attached and also
9 incorporated by reference several hundred pages of other documents which were within the
10 Commission’s files in San Francisco, but which were not attached as exhibits to this Staff
11 Report. The staff report was entitled “Staff Report - Appeal. Substantial Issue & De Novo
12 Review” (“Staff Report”). (A true and correct copy of the Staff Report is appended hereto as
13 Exhibit “5”.)

14 19. The determination as to whether a Substantial Issue exists is critical to NP
15 because the Commission cannot hold a *de novo* hearing on an appeal if it does not find that a
16 substantial issue exists. If the Commission does find that a substantial issue exists, the
17 Commission holds a *de novo* hearing on the issues raised by the appeal. Such an action
18 immediately vacates the local government’s approval of the CDP, and forces the applicant to
19 start all over again. The 22-page Staff Report received by NP on January 5, 2006, recommended
20 that the Commission take the following actions at the January 11, 2006 hearing: (1) find that a
21 Substantial Issue exists, and (2) hold its *de novo* hearing on NP’s application for a CDP and deny
22 NP’s CDP.

23 20. The “Important Public Hearing Notice” (Exhibit C) received with the Staff
24 Report on January 5, 2006, requested that NP provide the Commission with any responsive
25 materials to the 22- page Staff Report (as well as the 60 pages of exhibits and hundreds of pages
26 of documents that were not even transmitted to NP with the Staff Report but rather existed within
27 the Commission’s files in San Francisco and were merely incorporated *by reference* in the Staff
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1 Report) by January 6, 2006, i.e. only one day after NP received the copy of the staff report and
2 the Notice of the hearing. At most, NP had only three business days, i.e., Friday, January 6;
3 Monday, January 9; and Tuesday, January 10, to prepare, in any manner, for the hearing that was
4 to commence on the morning of Wednesday, January 11, and, further, had only two business
5 days (i.e., Friday, January 6, and Monday, January 9) to prepare and submit any materials to the
6 Commission by Tuesday, the day before the hearing, in hopes that they could still be distributed
7 to and reviewed by the Commissioners.

8 21. On Tuesday morning, January 10, 2006, at or about 10:00 a.m., NP, by fax (with
9 an email copy to the Commission's counsel, deputy attorney general, Joel Jacobs) filed written
10 objections with the Commission protesting that the Commission had not given NP timely and/or
11 adequate notice of the January 11, 2006 hearing. (See "Brief No. 1, North Pacifica LLC's
12 Objections to: Defective Notice: Lack of Jurisdiction Due to Defective Notice, Failure to
13 Comply with Reg. 13063; Lack of Jurisdiction Due to Defective 13569 Hearing: Failure to
14 comply with Reg. 13111; Unlawful Despoliation of Evidence Contained in Appeal; Various
15 other Objections." (A true and correct copy of Brief No. 1 is appended hereto as Exhibit "6".)

16 22. In its objections, NP advised the Commission that due to the extreme
17 insufficiency of notice, NP could neither prepare for nor even attend the January 11, 2006
18 meeting. Indeed, as of the morning of January 10, 2006, the day before the hearing and the date
19 on which NP submitted its Objections, NP had received only two business days' notice (i.e.,
20 Friday, January 6, and Monday, January 9) in which to prepare and submit any response
21 whatsoever to the Commission and its Staff Report by January 10, 2006, in time for any review
22 by the Commissioners prior to the hearing of January 11, 2006.

23 23. Further, on the afternoon of January 10, 2006, NP filed additional objections to
24 the untimely and inadequate Notice, including the Declaration of Jaquelynn Pope, which set
25 forth the details of NP's receipt of the Notice on January 5, 2006, and included the Declarations
26 of NP's experts, Mike Josselyn and Dan Schafer, who stated that they had not had sufficient
27 notice to respond to the points raised in the Commission's 22-page Staff Report (which included
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1 not only the exhibits but other materials that were incorporated by reference and not even
2 included with the Staff Report). (“Objections to Lack of Notice of Substantial Issue and De
3 Novo Hearings Set for January 11, 2006; Objections to Breach of Confidentiality of Settlement
4 Negotiations; Objection to Appellant’s Failure to Serve NP with Copy of Appeal.”) (A true and
5 correct copy of NP’s second set of Objections, including the Declarations of Jaquelynn Pope,
6 Mike Josselyn, and Dan Schafer is appended hereto as Exhibits “7”, “8”, “9” and “10”,
7 respectively.)

8 24. At the January 11, 2006 meeting, the Commission staff as well as the
9 Commission’s legal counsel **admitted** to the Commission that NP had received defective Notice,
10 that the Notice was not timely mailed, and that there was a violation of the 10-day notice that
11 should have been provided to North Pacifica:

12 The meeting notice to North Pacifica is, apparently, defective because it
13 does not appear to have been mailed until January 3 of this year. Normally,
14 staff would have mailed the meeting notice and the staff report on the
15 previous Friday, on December 30, which is the same day that the staff
16 report was posted to the web site. This was a 3-day holiday weekend, as
17 the Commission is aware, and I am not aware of what happened. I don't
18 know that Dr. Lester is, either, but for whatever reason it didn't get mailed
19 until the Tuesday. So, there is a violation of the 10-day calendar notice that
20 should have been provided to North Pacifica.

21 Reporter’s Transcript of January 11, 2006 meeting, (“RT”) p. 10:5-15 (emphasis added). (A true
22 and correct copy of the Reporter’s Transcript of the January 11, 2006 meeting is appended hereto
23 as Exhibit “11”. The original Reporter’s Transcript will be lodged with the Court prior to
24 hearing of this matter).

25 25. However, notwithstanding the admittedly untimely and defective Notice, the
26 Commission, with full knowledge and recognition of the defective Notice, failed and/or refused
27 to cure or correct the untimely Notice, by properly re-noticing, and properly rescheduling and
28 conducting a properly and lawfully noticed hearing on the appeal. Rather, the Commission
simply held its untimely and unlawfully noticed appeal hearing on January 11, 2006, with NP *in*
absentia, and took action in accordance with the Staff Report’s recommendation and determined
and decided that the Curtis Appeal presented a substantial issue. In fact, under the

1 Commission's procedure, since no three Commissioners voted to hold a hearing as to whether
2 the appeal raised a substantial issue, the Commission adopted the staff's recommendation on the
3 basis of the Staff Report and decided that the appeal raised a substantial issue without a hearing.
4 (RT p. 13: 10-19 (Exhibit 11; A true and correct copy of the Commission's January 12, 2006
5 letter informing NP that the Commission had determined that the appeal raised a substantial issue
6 is appended hereto as Exhibit "12").

7 26. Section 11130.3 of the Bagley-Keene Open Meeting Act provides that any
8 interested person may apply to the court for a determination that an action taken by a state body
9 in violation of §11125 is null and void:

10 (a) Any interested person may commence an action by mandamus,
11 injunction, or declaratory relief for the purpose of obtaining a judicial
12 determination that an action taken by a state body in violation of
13 Section 11123 or 11125 is null and void under this section. Any action
14 seeking such a judicial determination shall be commenced within 90 days from
15 the date the action was taken. Nothing in this section shall be construed
16 to prevent a state body from curing or correcting an action challenged
17 pursuant to this section.

18 Government Code § 11130.3(a) (emphasis added).

19 27. The Bagley-Keene act includes a specific definition of "action taken":

20 § 11122. "Action taken"

21 As used in this article "action taken" means a collective decision made by the
22 members of a state body, a collective commitment or promise by the members of
23 the state body to make a positive or negative decision or an actual vote by the
24 members of a state body when sitting as a body or entity upon a motion,
25 proposal, resolution, order or similar action.

26 Government Code § 11122.

27 28. At the January 11, 2006 meeting, the Commission made a collective decision that
28 the Curtis Appeal raised a substantial issue on appeal. This constitutes an "action taken" as
29 defined by § 11122 of the Bagley-Keene Act (RT p.13:6-15 (Exhibit 11; and Exhibit 12).

30 29. The Commission's untimely Notice of the January 11, 2006 hearing was also not
31 in substantial compliance with the mandatory minimum 10-day advance notice requirement of
32 Government Code §11125. The doctrine is inapplicable when statutory notice requirements,

1 including the time within which notice must be given, are not met. The substantial compliance
2 doctrine is generally applicable to a timely notice and is only applied in cases of minor technical
3 deficiencies.

4 30. Further, the untimely Notice did not satisfy the statutory purpose of Government
5 Code § 11125 in that NP was not given ten days' advance notice of the hearing. NP and those
6 members of the public also entitled to the mandatory, statute-required timely notice were
7 prejudiced by the Commission's failure and/or refusal to comply with the notice requirements of
8 Government Code §11125. NP's attorneys and principals were not even able to *attend* the
9 meeting because of the untimely Notice. Further, NP did not have an adequate period of time to
10 prepare for the hearing and did not have time to obtain and present expert opinions and/or reports
11 that would rebut the conclusions in the 22-page Staff Report (including the exhibits and the other
12 materials, in the Commission's files, incorporated by reference in the Staff Report but which
13 were not even included with the Staff Report). NP was deprived of any opportunity to educate
14 and/or lobby any of the individual Commissioners as to the merits of its case. Further, NP's
15 attorneys did not have adequate time to brief the many legal issues raised by the Staff Report.

16 31. NP did not have actual knowledge of the January 11, 2006 hearing prior to the
17 receipt of the Important Public Hearing Notice and Staff Report, which the Commission has
18 admitted were not mailed to NP until January 3, 2006, at the earliest. The Commission has
19 alleged that it mailed NP notification of the appeal in December, 2005, however, this would not
20 satisfy the statutory notice requirements of Government Code § 11125, in that such notification
21 of appeal does not give notice of the date, time, and place of the meeting, nor does it include a
22 specific agenda of the meeting, any description, and/or even identify the kind of hearing.
23 Moreover, neither Keith Fromm nor Mr. Fromm's co-counsel Jaquelynn Pope, received the
24 notification of appeal from the Commission in December (Declarations of Keith Fromm and
25 Jaquelynn Pope, filed separately).

26 32. The mere posting of the Agenda and/or Staff Report on the Commission's website
27 on or about December 28 and 30, 2005, without mailing the Notice at least ten days prior to the
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1 meeting to NP, would not comply with the Bagley-Keene Act, if indeed such posting ever
2 occurred as alleged by the Commission.

3 33. NP did not check the Commission website on December 30, 2005, or at any other
4 time prior to receiving the Notice and Staff Report itself, and therefore did not obtain actual
5 knowledge from the Commission website (Declarations of Keith Fromm and Jaquelynn Pope,
6 filed separately).

7 34. Statutory notice requirements are not satisfied by actual knowledge without
8 notification conforming to the statutory requirements. *County of Alameda v. Lackner* (1978) 79
9 Cal. App. 3d 274, 282. Thus, even if NP had received actual knowledge of the details of the
10 January 11, 2006, meeting in a timely fashion by means of the posting on the Commission
11 website, which it did not, that would not have satisfied the statutory requirements for notice.

12 35. As a result of the untimely Notice, NP was unable to provide information to
13 enable the Commission and the public to make an informed decision, as is specifically
14 contemplated by the Bagley-Keene Open Meeting Act. NP had no opportunity even to present
15 materials that may have persuaded three of the Commissioners at least to vote to hold a hearing
16 on the issue. Additionally, members of the public who may have supported NP's project and/or
17 may have had additional information, evidence or testimony to present that would or might have
18 supported a finding by the Commission that there was no "substantial issue," were also deprived
19 of the public's right to open hearings under the Bagley-Keene Open Meeting Act.

20 36. The Commission acted contrary to law and without legal authority in holding its
21 January 11, 2006 hearing in violation of the notice requirements of § 11125 of the Bagley-Keene
22 Open Meeting Act. NP therefore seeks a declaration and Writ of Mandate from this Court
23 pursuant to § 11130.3 of the Bagley-Keene Open Meeting Act and asks that this Court:

24 (a) declare that the Commission's actions of January 11, 2006, in which the Commission
25 held a hearing (with NP *in absentia*), voted and determined that a substantial issue exists as to
26 the appeal filed December 19, 2005 regarding NP's CDP, are null and void (See Action for
27 Declaratory Relief, included hereinafter); and/or

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1 (b) grant NP's petition and issue a Writ of Mandate ordering the Commission to vacate,
2 nullify, and void the Commission's actions of January 11, 2006, at which the Commission (with
3 NP *in absentia*), determined and decided that a substantial issue exists as to the Curtis appeal
4 allegedly filed December 19, 2005, regarding NP's CDP.

5 37. NP is entitled to such relief pursuant to Government Code § 11130.3 and has no
6 other plain, speedy, or adequate remedy in that NP must seek such relief for the violation of
7 Government Code § 11125 within 90 days of the Commission's action (Gov. Code § 11130.3(a))
8 and there is no direct appeal available from the Commission's substantial issue hearing.

9 38. The Bagley-Keene Act applies to any agency action, as defined above, and does
10 not require that NP exhaust its administrative remedies. Further, it is not necessary to exhaust
11 administrative remedies when the administrative agency acts outside of its jurisdiction, and/or its
12 action is void. *City of Lodi v. Randtron*, (2004) 118 Cal. App. 4th 337, 360.

13 39. Moreover, NP has exhausted its administrative remedies by objecting to the
14 January 11, 2006 hearing on the basis that the Notice was statutorily untimely and defective.
15 There is no procedure for an administrative appeal from the Commission's actions at the January
16 11, 2006 meeting. Further, there is no administrative remedy available to NP by which NP could
17 obtain a determination that the Commission's January 11, 2006 actions regarding NP's CDP are
18 null and void. Nor is there any statutory authorization for the Commission to reconsider or
19 rehear its action finding a substantial issue exists.

20 40. Further, even if there were an administrative remedy to exhaust, which there is
21 not, the Commission has now lost any appeals jurisdiction over NP's CDP that it may have had
22 because it failed to take valid action within the 49-day statutory limitation period under the
23 Coastal Act, and the statutory limitation period has now expired. Under §§ 30621 and 30625 of
24 the Coastal Act, a local government's approval of a CDP will become final unless the
25 Commission takes action on an appeal within 49 days of the date that the appeal was filed. At a
26 minimum, the Commission must, within the 49-day statutory limitation period, make a (valid)
27 determination as to whether a substantial issue exists. *Encinitas Country Day School v.*

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1 *California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584. (See Third Petition for Writ
2 of Mandate, included hereinafter.)

3 41. NP will be irreparably injured if the action taken by the Commission on January
4 11, 2006, in determining that a substantial issue exists is not annulled in that such determination
5 is illegal and null and void and was made without NP and/or the public having any meaningful
6 opportunity to inform the Commission of the reasons why the appeal does not present any
7 substantial issue. Section 30625(b)(2) of the Coastal Act provides that the Commission shall
8 hear an appeal unless it determines that no substantial issue exists. Thus, if NP had prevailed on
9 the substantial issue determination, the Commission could not have heard the Curtis Appeal and
10 NP could have gone forward with its project, in compliance with the development permits and
11 CDP that had already been issued by the City. However, as a result of the Commission's illegal
12 determination that a substantial issue on appeal exists, the Commission has vacated the City's
13 approval of NP's CDP, and has informed NP that the Commission intends to hold a *de novo*
14 hearing on the issue of whether NP's application for a CDP should be granted (Exhibit 12).

15 42. NP's application for its CDP was originally filed in July, 1999 (i.e. over six years
16 ago) and has been the subject of at least eight public hearings, the testimony of scores, if not
17 hundreds of witnesses, dozens of expert reports, review of thousands of pages of documents and
18 evidence and, to date, its processing has cost NP many millions of dollars. Due to the untimely
19 and unlawful Notice, the effect of the Commission's illegal determination that a substantial issue
20 exists is to force NP to start all over again in a *de novo* proceeding and, essentially and
21 unlawfully, to cause NP to lose the benefit of over six years in time and millions of
22 unrecoverable dollars in costs in processing its CDP, which CDP NP lawfully obtained from the
23 City.

24 **COUNT TWO: VIOLATION OF THE NOTICE REQUIREMENTS OF 14 CCR § 13063**
25 **OF THE COMMISSION REGULATIONS**

26 43. NP incorporates by reference paragraphs 1 - 42 as though set forth in full herein.
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1 44. The California Coastal Act expressly provides that the public has a right to fully
2 participate in decisions affecting coastal planning, conservation, and development. (Pub. Res.
3 Code § 30006.)

4 45. The Coastal Commission has adopted regulation 14 CCR 13063 concerning
5 notice of its meetings regarding permit applications and appeals for CDP's. Regulation 13063
6 provides that notice must be mailed to all interested persons (including the applicant, all affected
7 cities and counties, all public agencies having jurisdiction and all persons who have requested
8 notice) at least ten calendar days prior to the meeting, as described in the regulation:

9 (a) At least 10 calendar days prior to the date on which the application
10 will be heard by the Commission, the executive director shall mail written
11 notice to each applicant, to all affected cities and counties, to all public
12 agencies which have jurisdiction, by law, with respect to a proposed
13 development, to all persons who have requested it, and to all persons known
14 by the executive director to have a particular interest in the application,
15 including those specified in section 13054(a).

16 14 CCR 13063(a) (Emphasis added.) 14 CCR 13063 (a)(1)-(6) sets forth the information
17 required to be included in the Notice, including the date, time, and place of the meeting, and the
18 procedures concerning the hearing.

19 46. The Commission staff and the Commission's legal counsel acknowledged to the
20 Commission that the Commission had violated the ten-day notice requirements by failing to mail
21 the Notice to NP at least ten calendar days prior to the January 11, 2006 hearing date (RT p.
22 10:5-15 (Exhibit H)) Nonetheless, the Commission went forward with the January 11, 2006
23 hearing with full knowledge and recognition that the hearing had been defectively noticed in
24 violation of the law.

25 47. The notice required by the Commission's regulation 13063 is a mandatory
26 ministerial act that must be performed at a specific time and in a specific manner, as a matter of
27 law.

28 48. The Commission notification of appeal allegedly sent by the Commission to NP
in December, 2005, does not comply with regulation 13063 because it does not include the time,
date and place of hearing, or information regarding Commission procedures.

1 49. The Commission's action in holding its January 11, 2006 hearing on appeal and
2 determining that a substantial issue exists (with NP absent) without giving NP notice as required
3 by law was contrary to law and an error of law, and therefore the Commission's action in
4 determining that a substantial issue exists was taken without and in excess of the Commission's
5 lawful authority and jurisdiction. Thus, the Commission's January 11, 2006 action and
6 determination that a substantial issue exists are void and a nullity.

7 50. Mandate will lie to compel the Commission to nullify and/or rescind the
8 Commission's January 11, 2006 void acts in making a determination that a substantial issue
9 exists as to the Curtis Appeal without the legally required proper notice. *Aylward v. State Board*
10 *of Examiners* (1948) 31 Cal. 2d 833, 839.

11 51. Additionally (assuming that all Notice recipients were treated equally and Notices
12 to all parties were sent out by the Commission at the same time by means of the same method of
13 postage metered envelopes dated January 3, 2006), due to the unlawful untimely Notice, the
14 effect of the Commission's illegal and void actions, and void determination is also to
15 permanently and irreparably deprive all affected cities and counties, all public agencies having
16 jurisdiction and all persons who have requested Notice (all of whom are entitled, by law, to the
17 notice prescribed in Reg. 14 CCR §13063), of any meaningful opportunity to attend the January
18 11, 2006 hearing and/or present additional information, evidence or testimony that would or
19 might have supported a vote and contrary determination by the Commission as to whether there
20 was a "substantial issue."

21 **COUNT THREE: VIOLATION OF NP'S DUE PROCESS RIGHTS -**
22 **FAILURE TO PROVIDE MEANINGFUL NOTICE AND A MEANINGFUL**
23 **OPPORTUNITY TO BE HEARD**

24 52. NP incorporates by reference paragraphs 1-51 as though set forth in full herein.

25 53. Article 1, section 7 of the California Constitution and the 14th Amendment of the
26 U.S. Constitution provide that no person may be deprived of property without due process of
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1 law. Due process of law requires, at a minimum, a meaningful notice and a meaningful
2 opportunity for a hearing prior to the deprivation of property.

3 54. The United States District Court for the Northern District of California has
4 already determined that NP has a constitutionally protected property interest in its development
5 permits, including its CDP for the Bowl, which protected property interest existed before the
6 development permits were approved by the City of Pacifica on August 12, 2002. *North Pacifica*
7 *v. City of Pacifica* (2002) 234 F. Supp. 1053, 1059-60.

8 55. The untimely Notice that NP received on January 5, 2006, from the Commission
9 regarding the January 11, 2006 Commission meeting in San Pedro, California, did not satisfy the
10 requirements of due process in that it did not give NP an opportunity to be heard at a meaningful
11 time and in a meaningful manner.

12 56. Section 30625(b)(2) of the Coastal Act provides that the Commission shall hear
13 an appeal unless it determines that no substantial issue exists. Thus, if NP had prevailed at the
14 on the issue as to whether the Curtis appeal raises a substantial issue on January 11, 2006, it
15 could have gone forward with its project. However, because of the untimely and unfair Notice,
16 NP was completely prejudiced as to any meaningful opportunity to persuade the Commission
17 that the appeal did not raise any substantial issue.

18 57. NP was also deprived of the protection under the law and the statutorily intended
19 benefits of the mandatory minimum advance notice requirements of the Bagley-Keene Open
20 Meeting Act and Coastal Commission Regulation 14 CCR 13063, including, *inter alia*, any
21 meaningful opportunity for any affected cities and counties, public agencies having jurisdiction,
22 and all persons who have requested notice, to attend the January 11, 2006 meeting, and/or
23 present additional information, evidence or testimony that would or might have supported a vote
24 and contrary finding by the Commission that there was no “substantial issue.”

25 58. NP suffered severe and irreparable prejudice as a result of the Commission’s
26 failure and refusal to give NP timely and meaningful notice and an opportunity to be heard, as
27 follows:
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1 a. NP Lost Its Opportunity to Have a Substantial Issue Hearing. Once the
2 Commission staff has issued a Staff Report recommending that the Commission find that a
3 substantial issue exists, the Staff's recommendation will be adopted by the Commission without
4 a public hearing on the question and without any testimony from the applicant or the public
5 unless three Commissioners ask to hold a substantial issue hearing (RT 13:3-14, (Exhibit 11)).
6 Thus, unless three Commissioners ask to hold the hearing, the Commission does not allow
7 testimony or argument as to whether or not a substantial issue exists. Therefore, in order to
8 persuade three Commissioners to ask to have a substantial issue hearing and receive public
9 testimony on the subject, it is necessary to educate, inform, and lobby the Commissioners prior
10 to the date of the substantial issue hearing as to the issues they will be deciding in the hearing.
11 Here, because of the untimely and inadequate shortened Notice, NP did not have the opportunity
12 prior to the hearing to attempt to persuade the Commissioners to even hold a substantial issue
13 hearing, much less persuade the Commissioners that there was no substantial issue presented by
14 Curtis' appeal.

15 b. Likewise (assuming that all notice recipients were treated equally and notices to
16 all interested persons were sent out by the Commission at the same time by means of the same
17 method of postage-metered envelopes dated January 3, 2006), because of the untimely and
18 inadequate notice, NP was also deprived of the opportunity and protection under law to benefit
19 from any public participation and potential support from any other affected cities and counties,
20 public agencies having jurisdiction, and all persons who have requested Notice, to apprise the
21 Commissioners of and/or present additional information, evidence, or testimony that would or
22 might have supported a vote and contrary finding by the Commission that a public hearing and
23 debate should, indeed, be held and/or that there was no "substantial issue" presented by the
24 Curtis Appeal.

25 c. NP Had Inadequate Time to Assemble Evidence to Address and Rebut the
26 Conclusions of the Staff Report. The Staff Report for the January 11, 2006 meeting in San Pedro
27 recommended that the Commission find a substantial issue on appeal as to three issues involving
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1 the alleged impact of NP's project on: (1) alleged wetlands as defined by the Local Coastal
2 Program ("LCP"); (2) water quality; and (3) ESHA (Environmentally Sensitive Habitat Area)
3 (Exhibit E, pp. 3-15). The alleged issues of water quality and ESHA were raised as issues by
4 the Commission in the Staff Report for the first time (i.e., NP had never previously been notified
5 by the Commission Staff that the issues listed in the Staff Report as to water quality or ESHA
6 were of any concern to the Staff).

7 59. The Staff Report prepared for the January 11, 2006 meeting in San Pedro contains
8 22 pages of dense and highly technical allegations, some of which were raised for the first time
9 in the Staff Report. It additionally has approximately 60 more pages of dense and highly
10 technical exhibits regarding these issues. The Staff Report also refers to and incorporates by
11 reference many more exhibits, spanning hundreds of pages, that were exhibits to the Staff Report
12 for the December 16, 2005 meeting and/or were within the Commission's files in San Francisco
13 but which were not attached as exhibits to the Staff Report for the January 11, 2006 San Pedro
14 meeting. Further, the Staff Report for the January 11, 2006 meeting in San Pedro references still
15 more materials from other sources that were not made exhibits to either the Staff Report for the
16 January 11, 2006 meeting in San Pedro, or the prior December 16, 2005 meeting. NP was
17 unable, in the very short time between receipt of Notice and the hearing date, to assemble the
18 technical evidence that already existed, and would need to be researched, and/or to obtain expert
19 testimony and/or submit expert reports to rebut the many erroneous conclusions in the Staff
20 Report, especially with the Staff raising in the Staff Report two brand new, highly technical
21 issues, water quality and ESHA.

22 Wetlands. The issue of alleged wetlands had already been very well-studied during
23 the three-year period in which the City had reviewed NP's project and completed and certified an
24 environmental impact report prior to approving NP's development permits. During the City's
25 review process, over thirteen studies, maps, and wetland delineations had been prepared
26 regarding the alleged wetlands, all of which supported and became the bases for the City's
27 finding that NP's project would not have a negative impact on any LCP (Local Coastal Program)
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1 wetlands. Additionally, both the draft EIR and the Final EIR address this issue. Further,
2 testimony and evidence establishing that there were no LCP wetlands affecting the subject
3 property were presented in detail in live testimony at the June, 2002 Planning Commission
4 hearing and the August 12, 2002 City Council hearing. However, because of the legally
5 untimely and inadequate Notice of the January 11, 2006 meeting, NP did not have time to review
6 and/or obtain expert review of the already existing studies and EIRs and testimony in order to
7 rebut the Staff Report's allegation that there was a substantial issue regarding the alleged
8 wetlands. Although the Commission had access to all of the aforementioned studies, it did not
9 include all of them as a part of the record, nor does the Staff Report cite to any evidence that
10 supports NP and/or the City's determination that NP's project would not have a negative impact
11 on any LCP wetlands.

12 Water Quality. Similarly, the Staff Report includes a highly technical discussion
13 of alleged flaws in the project's control of storm water, but the Staff Report ignores the fact that
14 a 35-page document entitled "*Stormwater Management Report*", dated August 7, 2002, was
15 prepared for NP's project at the behest of the City, which demonstrates that all of the concerns
16 listed in the Staff Report regarding stormwater control were already adequately covered and
17 considered by the City in its approval of the project, and that, therefore, there is no substantial
18 issue on the subject. NP learned of this issue for the first time when it received the Staff Report
19 on January 5, 2006.

20 As a result of the untimely Notice, NP did not have time to engage its storm water experts
21 and have them prepare a meaningful and authoritative rebuttal to the Staff Report's erroneous
22 conclusions concerning the project's control of storm water. Indeed, due to the fact that NP had
23 no notice that the Staff Report would even raise this issue, NP was unable, within the short time
24 before the hearing, to even *obtain* expert review of the Staff Report and "*Stormwater*
25 *Management Report*" and/or to have an expert prepare a written rebuttal to the Staff Report for
26 the record.

1 ESHA. As with the aforementioned alleged water quality issue, NP learned in the
2 Staff Report, for the first time, that the Commission believed that an ESHA issue allegedly
3 existed with regard to the project. ESHA is highly technical (as in the water quality issue) and it
4 was impossible for NP, upon receiving the untimely and unlawful notice, to immediately retain
5 an expert to meaningfully and comprehensively research and prepare written reports to
6 adequately rebut the erroneous ESHA concerns set forth in the Staff Report within the extremely
7 short, three business day period available (i.e., between the late afternoon of Thursday, January
8 5, 2006, when NP received notice of the hearing, and the morning of January 11, 2006, when the
9 hearing took place).

10 60. NP Had Inadequate Time to Obtain Expert Testimony Rebutting the Staff
11 Report's Conclusions. NP's wetlands expert, Mike Josselyn, informed NP that he did not
12 believe the record supported the Staff Report's conclusions, but that he would require
13 approximately one business week to rebut the Staff Report based on existing studies and
14 materials. NP's water quality expert, Dan Schaefer, stated that he believed that the Commission
15 was applying an inappropriate standard but that he would require approximately one business
16 week to review the staff report for accuracy and to determine which standard the Commission
17 was applying, and to review existing materials and prepare a report rebutting the Staff Report.
18 (Declarations of Mike Josselyn and Dan Schaefer, Exhibits I and J). The Commission's unlawful
19 and untimely Notice to NP prevented NP from presenting any expert evidence to the
20 Commission.

21 61. NP Had Inadequate Time to Prepare Briefs on the Legal Issues Raised by the
22 Staff Report. In addition to the technical and factual issues raised by the Staff Report, the Staff
23 Report also raised complicated legal issues regarding, *inter alia*: (1) the legal definition of
24 wetlands; (2) the legal status of drainage ditches as being exempt from classification as wetlands;
25 (3) the statutory limitation period under CEQA for attempting to overturn a certified EIR, and
26 whether the findings in the EIR were *res judicata* after expiration of such limitation period; (4)
27 the legal and factual issue as to whether the Commission's findings were barred as a matter of
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1 *res judicata* by a previous Court ruling in a previous lawsuit between the Commission and NP;
2 and (5) which water quality standards may properly be imposed on NP's project, etc. The short,
3 untimely, inadequate, and defective Notice prevented NP from doing anything more than merely
4 identifying these issues. Because of the untimely and defective Notice, NP was unable to
5 prepare and include any substantive briefing on these issues for the Commission or the record.

6 62. The Commission's January 11, 2006 determination that the Curtis Appeal raises a
7 substantial issue had the effect of vacating and invalidating NP's CDP and thus constitutes a
8 taking (and/or damaging, for state constitution purposes) of a constitutionally protected property
9 interest. The Commission's failure to give NP lawful, timely, and adequate notice deprived NP
10 of an opportunity to be heard at a meaningful time and in a meaningful manner. Therefore, the
11 Commission has deprived NP, without due process, of its constitutionally protected property
12 interest in its CDP.

13 63. The January 11, 2006 actions of the Commission are void, unconstitutional, and
14 beyond the power of the Commission in that the untimely and inadequate notice given to NP
15 resulted in NP being denied a fair opportunity to be heard before deprivation of its
16 constitutionally protected property interest.

17 64. NP is entitled to a writ of mandate to void, set aside and vacate the Commission's
18 January 11, 2006 actions on the grounds that the Commission violated NP's constitutional due
19 process rights to a meaningful hearing before deprivation of NP's constitutionally protected
20 property rights.

21 **SECOND WRIT OF MANDATE**

22 **VIOLATION OF NP'S DUE PROCESS RIGHTS -**

23 **FAILURE TO PROVIDE NOTICE PURSUANT TO 14 CCR 13111;**

24 **SPOILIATION OF RECORD AND EVIDENCE**

25 65. NP incorporates by reference paragraphs 1 – 64 as though set forth in full herein.
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1 66. At the time that the City approved NP's development permits on or about August
2 12, 2002, the City also found that NP's CDP was not within the geographical boundaries of the
3 Commission's appellate jurisdiction.

4 67. Nonetheless, on or about September 5, 2002, John Curtis submitted the Curtis
5 Appeal to the Commission. Under 14 CCR §13111, the appellant Curtis was also required to
6 notify any interested persons of the appeal and to deliver a copy of the appeal to said parties.
7 Regulation 13111 specifically provides that the "unwarranted failure to perform such notification
8 may be grounds for dismissal of the appeal by the Commission."

9 68. NP never received notice of the Curtis Appeal from John Curtis, nor did John
10 Curtis ever deliver a copy of his completed Notice of Appeal to NP, as required by 14 CCR
11 §13111. On or about April 9, 2003, in connection with federal lawsuit C-01-4823 concerning
12 NP's project, the deposition of John Curtis was taken by NP's attorneys. At his deposition,
13 Curtis admitted and confirmed that he had never delivered a copy of his appeal to NP. To the
14 date of this Petition, NP has never received a complete, unexpurgated copy of Curtis' appeal.

15 69. On or about October, 2002, NP's attorney, Jaquelynn Pope, and its principals,
16 Keith Fromm and Robert Kalmbach, visited the Coastal Commission offices in San Francisco at
17 a pre-appointed time in order to review the Commission files regarding NP. The appeal
18 submitted by John Curtis was part of the Commission files. The appeal contained in the file
19 consisted of a multi-page written appeal and evidentiary exhibits, as well as attachments. The
20 attachments included various issues of the Pacifica Tribune from the months of June, July and
21 August 2002. The exhibits included a videotape of the August 12, 2002 City Council meeting at
22 which the CDP and other development permits for NP's project were approved by the City.

23 70. At his April 9, 2003 deposition, John Curtis confirmed that the appeal he had
24 submitted to the Commission on or about September 5, 2002, had included as evidentiary
25 exhibits and attachments, copies of the Pacifica Tribune from the months of June, July, and
26 "perhaps" August 2002, and had also included a copy of the videotape of the August 12, 2002
27 City Council meeting at which NP's CDP and other development permits were approved.

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1 71. The Staff Report for the January 11, 2006 meeting includes a copy of the written
2 portion of the Curtis Appeal, including a completed three page form entitled "Appeal from
3 Coastal Permit Decision of Local Government," and ten handwritten pages attached thereto. The
4 handwritten pages reference various evidentiary exhibits entitled "A" through "H." John Curtis
5 listed the exhibits on page 2 of the appeal form. Exhibit "H" is listed as a "VHS copy of the City
6 Council's August 12, 2002 meeting, prepared by Pacifica Community Television (Local Channel
7 26). Exhibit "E" is described as copies of the Pacifica Tribune for 6-12-02, 6-19-02, 7-10-02, 7-
8 17-02, 7-24-02, 7-31-02, 8-07-02, 8-14-02, 8-21-02. (The Curtis Appeal is appended as Exhibit 7
9 to Staff Report for January 11, 2006 meeting, Exhibit 5 hereto.)

10 72. Even though John Curtis confirmed at his deposition that he submitted to the
11 Commission the Videotape of the August 12, 2002 City Council meeting and the copies of the
12 Pacifica Tribune listed above as exhibits to his appeal, and even though the exhibits are actually
13 listed on the appeal form that John Curtis submitted to the Commission, neither the August 12,
14 2002 videotape, nor the newspapers nor any of the other five evidentiary exhibits listed on the
15 appeal form were ever served on NP by Curtis or the Commission. Additionally, neither the
16 August 12, 2002 videotape, nor the newspapers, nor any of the other five evidentiary exhibits
17 listed were reproduced in the Staff Report for the January 11, 2006 hearing, nor provided to the
18 Commission (i.e. the Commissioners voting, as a tribunal, on the matter) for its consideration at
19 the January 11, 2006 hearing. Thus, the Notice that NP received was defective as well as
20 untimely, in that the copy of the Curtis Appeal attached to the Staff Report was incomplete and
21 did not give NP notice of the evidence to be presented to the Commission.

22 73. Furthermore, the August 12, 2002 videotape appears to have been expurgated
23 from the Commission files altogether. Subsequent to NP's initial October, 2002 review of the
24 Commission files regarding NP's project, NP's attorney, Jaquelynn Pope, and its principal
25 Robert Kalmbach again inspected the Commission's files regarding NP's project at the
26 Commission offices in San Francisco. At that time, the August 12, 2002 videotape was missing
27 from the files.

1 74. The missing videotape of the August 12, 2002 City Council meeting, at which
2 NP's CDP was approved, recorded the City Council's and the City's staff's discussion of the
3 substantial evidence that supported the City's decision that NP's project was consistent with the
4 City's LCP. Additionally, Curtis' appeal to the City Council concerned and discussed the same
5 issues as Curtis' subsequent appeal to the Coastal Commission. The missing videotape of the
6 August 12, 2002 City Council meeting contained a recollection of the City's own rebuttal of
7 Curtis' arguments and thus provided compelling evidence that Curtis' appeal presented no
8 substantial issue, evidence that the Coastal Commissioners should have, but never saw nor
9 considered in their January 11, 2006 substantial issue hearing. The missing videotape contains
10 evidence that supports NP, and rebuts most if not all of the conclusions set forth by the
11 Commission staff in the Staff Report for the January 11, 2006 meeting, and provides crucial
12 evidence if not conclusive evidence that there was no substantial issue contained in Curtis'
13 appeal.

14 75. The Commission's failure to serve NP with a complete and unexpurgated copy of
15 the appeal, but rather with an inadvertently or intentionally doctored and censored version of
16 same, deprived NP of meaningful notice in that NP was not given notice of the actual appeal and
17 all the evidence that constituted part of that appeal and that had been submitted to the
18 Commission--most particularly evidence that supported NP's position and rebutted that of the
19 Commission's Staff Report. This also deprived NP of a meaningful opportunity to be heard
20 regarding this evidence. If NP had received a copy of the complete Curtis Appeal, as required by
21 the Commission's own regulations, and if NP had received timely Notice of the January 11, 2006
22 substantial issue hearing, NP would have had time to establish that the August 12, 2002
23 videotape had been unlawfully expurgated from the Commission's files, and that the hearing was
24 therefore unfair and should, for this important reason as well, not proceed.

25 76. Further, the failure of the Commissioners to consider the August 12, 2002
26 videotape deprived NP of a fair hearing and a meaningful opportunity to be heard, in that the
27 evidence on the videotape supporting NP's case was never presented to the actual
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1 Commissioners themselves, though the evidence had been submitted by Curtis as part and parcel
2 of the Curtis appeal, to the Commission (staff) for consideration by the Commissioners in their
3 official deliberations.

4 77. The Commission's failure to provide NP with meaningful notice and a
5 meaningful opportunity to be heard deprived NP of due process at the January 11, 2006
6 substantial issue hearing, and the Commission's January 11, 2006 action, including its resolution,
7 vote and determination, that a substantial issue has been raised by the Curtis appeal is therefore
8 null and void.

9
10 **THIRD PETITION FOR WRIT OF MANDATE**
11 **TO COMPEL THE COMMISSION TO DISMISS THE CURTIS APPEAL**
12 **BECAUSE THE COMMISSION HAS LOST JURISDICTION OVER NP'S CDP AND/OR**
13 **TO PERMANENTLY ENJOIN THE COMMISSION FROM CONDUCTING THE**
14 **CURTIS APPEAL OR ANY APPEAL BECAUSE THE COMMISSION HAS LOST**
15 **JURISDICTION**

16 78. NP incorporates by reference paragraphs 1-77 inclusive, as set forth above.

17 79. Under §§ 30621 and 30625 of the Coastal Act, a local government's approval of a
18 CDP will become final unless the Commission takes action on an appeal within 49 days of the
19 date that the appeal was filed. At a minimum, the Commission must, within the 49-day statutory
20 limitation period, make a (valid) determination as to whether a substantial issue exists. *Encinitas*
21 *Country Day School v. California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584.

22 80. On January 11, 2006, at its meeting in San Pedro, California, the Commission,
23 with NP *in absentia*, purportedly determined that the Curtis appeal raised a substantial issue
24 regarding NP's CDP. In fact, however, any action taken by the Commission at the January 11,
25 2006 hearing is null and void because the Commission failed to give NP and the prescribed
26 members of the public and governmental agencies (including but not limited to those enumerated
27 in the Bagley-Keene Open Meeting Act and Coastal Commission Regulation 13063, such as all
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1 affected cities and counties, all public agencies which have jurisdiction, by law, with respect to
2 the proposed development, all persons who have requested it, and all persons known by the
3 executive director to have a particular interest in the application and the public) the mandatory,
4 statutorily required minimum public notice of the January 11, 2006 hearing.

5 81. Further, the Commission's violation of NP's due process right to meaningful
6 notice and a meaningful opportunity to present its case also renders the Commission's actions at
7 the January 11, 2006 hearing null and void.

8 82. The Commission has informed NP and the public that the 49-day statutory
9 limitation period on the Curtis appeal expired on February 6, 2006. (See Staff Report, p. 1,
10 (Exhibit 5)).

11 83. The Commission failed to take, within the statutory limitation period, any valid
12 action regarding the Curtis appeal challenging the local government's approval of NP's CDP.
13 Therefore, pursuant to Public Resources Code § 30625, the City's decision approving NP's CDP
14 is final and the Commission has no jurisdiction to hold a *de novo* hearing on the Curtis appeal.

15 84. The Commission has nonetheless informed NP that the Commission does intend
16 to hold a *de novo* hearing on the Curtis appeal.

17 85. The Commission has no jurisdiction to hear an appeal of NP's CDP and therefore
18 has a mandatory duty to dismiss the Curtis appeal. It is therefore appropriate for this Court to
19 issue a writ of mandate compelling the Commission to dismiss the Curtis appeal and restraining
20 and permanently enjoining the Commission from exercising or attempting to exercise any further
21 appellate jurisdiction over NP's CDP.

22 86. It is not necessary to exhaust administrative remedies when the administrative
23 agency acts outside of its jurisdiction, and/or its action is void. *City of Lodi v. Randtron*, (2004)
24 118 Cal. App. 4th 337, 360. Moreover, NP has exhausted its administrative remedies in that,
25 prior to the January 11, 2006 meeting, NP submitted its objections to the Commission that the
26 Commission did not give NP lawful notice of the January 11, 2006 hearing. However,
27 notwithstanding the Commission staff's and Commission's legal counsel's admission that NP
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1 did not receive timely notice from the Commission, and notwithstanding NP's objections, and
2 presentation by NP to the Commission of clear evidence in the form of the postage meter stamps
3 dated *January 3, 2006*, that the Commission's Notice for the *January 11, 2006* hearing and
4 meeting was, as a legal matter, untimely and defective and, as a practical matter, entirely
5 insufficient and impracticable, the Commission failed and refused to cure or correct the untimely
6 and defective notice, by properly re-noticing, and properly rescheduling and conducting a
7 properly noticed hearing, for a date on or prior to February 6, 2006, the date upon which the
8 statutory limitation period for conducting such a hearing expired. NP has no other administrative
9 remedy that will prevent the Commission from proceeding in excess of its jurisdiction.

10 87. NP will be injured if the Commission is not mandated to dismiss the Curtis appeal
11 and/or is not otherwise permanently enjoined by this honorable Court from conducting such
12 appeal in that the Commission will proceed to hold a *de novo* hearing on NP's CDP, and NP's
13 CDP, which was duly approved by the local government, and which approval has, as a matter of
14 law, now become final, will, instead, be unlawfully invalidated and vacated by the Commission
15 which, by statute, no longer has any jurisdiction to take any such action.

16 88. NP will be additionally irreparably injured if the Commission is not mandated to
17 dismiss the Curtis appeal and/or otherwise permanently enjoined by this Court from conducting
18 such appeal, in that NP will incur further costs and delay, which may cause NP to lose the project
19 due to economic obsolescence, and/or the expiration of other development permits and
20 contractual rights to acquire the real property underlying the project. The value of NP's project
21 is in excess of \$10 million and its loss, if caused by the unlawful actions of the Commission, is
22 unlikely to be recoverable from any source. As a project comprising real and personal property,
23 such as the permit at issue here, NP's project is both unique and irreplaceable.

24 **FOURTH CAUSE OF ACTION**

25 **DECLARATORY RELIEF**

26 89. NP incorporates by reference paragraphs 1- 88 inclusive, as though set forth in
27 full.

1 90. An actual controversy now exists between NP and the Commission concerning
2 their respective rights, duties, and obligations as to the CDP that was approved by the City on
3 August 12, 2002, for NP's Bowl project. NP contends that the Commission's actions at the
4 January 11, 2006 hearing, including, *inter alia*, determination that the Curtis appeal raises a
5 substantial issue, are null and void for at least one or more of three reasons:

6 (A) The Commission violated the Bagley-Keene Open Meeting Act by failing and
7 refusing to give the statutorily mandated minimum notice of its January 11, 2006 hearing as
8 prescribed by Government Code § 11125, and therefore the Commission's January 11, 2006
9 actions and vote, determining that the Curtis appeal raises a substantial issue, are null and void
10 under § 11130.3 of the Bagley-Keene Open Meeting Act.

11 (B) The Commission violated its own regulation 14 CCR § 13063 by failing and
12 refusing to give the mandatory, prescribed minimum notice of its January 11, 2006 hearing as
13 required by law, and therefore the Commission's January 11, 2006 actions and vote, determining
14 that the Curtis appeal raises a substantial issue, were conducted in a manner contrary to law and
15 were, therefore, outside of and without the Commission's authority and, were thus, null and void.

16 (C) The Commission violated NP's state and federal due process rights by depriving
17 NP of NP's constitutionally protected property interest in NP's CDP without adequate notice and
18 an opportunity to be heard in a meaningful manner and at a meaningful time. Therefore, the
19 Commission's January 11, 2006 actions and vote determining that the Curtis appeal raises a
20 substantial issue are null and void.

21 91. The Commission admits that it did not serve NP with a timely Notice, that the
22 Notice was defective and that the Commission had violated the 10-day Notice requirement,
23 however, notwithstanding its admitted failure to comply with the express statutory requirements
24 for notice, the Commission nonetheless contests plaintiff's assertions and otherwise contends
25 that the Commission did comply with the Bagley-Keene Open Meeting Act, did comply with
26 Coastal Commission Regulation 14 CCR 13063, and did comply with the due process
27 requirements of the constitutions of the State of California and the United States of America and
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1 that the Commission's January 11, 2006 actions determining that the Curtis appeal raises a
2 substantial issue were valid actions and were not null and void.

3 92. Additionally, NP contends that, because of the untimely and defective Notice and
4 the Commission's void actions and vote in its January 11, 2006 hearing, the Commission has
5 failed to take any valid action on the Curtis appeal within 49 days of the filing of the appeal, and,
6 did not, at a minimum, make a valid determination within such 49 day statute of limitations, as to
7 whether or not a substantial issue exists. Therefore, under Public Resources Code §§ 30621 and
8 30625, as held by *Encinitas Country Day School v. California Coastal Commission* (2003) 108
9 Cal.App.4th 575, 584-585, the local government's decision approving NP's CDP has become
10 final, and the Commission has lost any appellate jurisdiction it may otherwise have had over
11 NP's CDP.
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13 93. The Commission contests plaintiff's assertions and otherwise contends that the
14 Commission did take valid action within 49 days of the filing of the Curtis appeal to determine
15 whether the Curtis appeal raises a substantial issue, and, that, therefore, the local government's
16 decision approving NP's CDP has not become final, and the Commission has not lost any
17 appellate jurisdiction it may have had over NP's CDP.

18 94. Plaintiff NP desires a judicial determination and declaration of the parties'
19 respective rights, duties, and obligations regarding NP's CDP, and specifically that the
20 Commission's January 11, 2006 actions and determination that the Curtis appeal raises a
21 substantial issue are null and void, and that the Commission has failed to take any valid action on
22 the Curtis appeal within the 49-day statutory limitation period and that, therefore, the
23 Commission has lost any appellate jurisdiction over NP's CDP that it may otherwise have had.
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1 **FIFTH CAUSE OF ACTION**

2 **INJUNCTIVE RELIEF**

3 95. Plaintiff NP incorporates by reference paragraphs 1-94 inclusive, as though set
4 forth in full.

5 96. On or about February 12, 2006, the Commission notified NP that the Commission
6 will schedule a *de novo* hearing on the Curtis Appeal challenging the local government's
7 approval of NP's CDP (Exhibit 12). Subsequently, the Commission has stated that the *de novo*
8 hearing will be set for sometime after April, 2006.

9 97. The Commission's proposed *de novo* hearing is contrary to law in that the
10 Commission has lost any appellate jurisdiction that it may have had over NP's CDP.

11 98. NP will be irreparably injured if the Commission is not prohibited from holding
12 the *de novo* hearing on the Curtis Appeal in that the Commission will proceed to hold a *de novo*
13 hearing on NP's CDP, and the CDP, which was approved by the local government, and which
14 approval has become final, will be instead unlawfully invalidated and vacated by the
15 Commission.

16 99. NP will be additionally irreparably injured if the Commission is not mandated to
17 dismiss the Curtis Appeal and/or otherwise permanently enjoined by the Court from conducting
18 such Curtis Appeal (or any other appeal), in that NP will incur further costs and delay, which
19 may cause NP to lose its unique and irreplaceable project due to economic obsolescence and/or
20 the expiration of NP's other development permits or its contractual rights to purchase the real
21 property underlying the project. The value of NP's project is in excess of \$10 million and its
22 loss, if caused by the Commission's unlawful actions, is unlikely to be recoverable from any
23 source.

24 100. NP has no other plain, speedy, and adequate remedy.

25 101. NP is entitled to a temporary restraining order, preliminary injunction, and
26 permanent injunction prohibiting the Commission from holding a *de novo* hearing on the Curtis
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1 appeal and/or any appeal or purported appeal of NP's CDP, as described in the prayer for relief
2 below, and from conducting any appeal of NP's CDP.

3 **WHEREFORE PLAINTIFF PRAYS:**

4 **FOR THE FIRST PETITION FOR WRIT OF MANDATE:**

5 1. That a peremptory writ of mandate issue commanding respondent, the California
6 Coastal Commission, to vacate, void, set aside, and annul the California Coastal Commission's
7 January 11, 2006 actions in which it made a determination that the appeal filed by John Curtis
8 raises a substantial issue.

9 **FOR THE SECOND PETITION FOR WRIT OF MANDATE:**

10 2. That a peremptory writ of mandate issue commanding respondent, the California
11 Coastal Commission, to vacate, void, set aside, and annul the California Coastal Commission's
12 January 11, 2006 actions in which it made a determination that the appeal filed by John Curtis
13 raises a substantial issue.

14 **FOR THE THIRD PETITION FOR WRIT OF MANDATE**

15 3. That a peremptory writ of mandate issue commanding respondent, the California
16 Coastal Commission, to dismiss the appeal filed by John Curtis regarding the Coastal
17 Development Permit approved for North Pacifica's Bowl project by the City of Pacifica.

18 **FOR NP'S CLAIM FOR DECLARATORY RELIEF:**

19 4. For a declaration that the actions taken by the California Coastal Commission at
20 its January 11, 2006 meeting in San Pedro, California in which it made a determination that the
21 appeal filed by John Curtis regarding NP's Coastal Development Permit raised a substantial
22 issue, are null and void.

23 5. For a declaration that the City of Pacifica's approval of NP's Coastal
24 Development Permit is final and that the Commission has lost any appellate jurisdiction over
25 NP's Coastal Development Permit that it may have had.

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1 **FOR NP'S CLAIM FOR INJUNCTIVE RELIEF:**

2 6. For a temporary restraining order, and preliminary and permanent injunctive
3 relief, prohibiting the California Coastal Commission from conducting a *de novo* hearing on the
4 appeal of John Curtis challenging the approval of NP's CDP and from conducting any other
5 appeal or purported appeal of NP's CDP.

6 **FOR ALL OF THE ABOVE:**

7 7. For attorneys fees pursuant to Government Code § 11130.5 and/or Government
8 Code § 800; and/or CCP 1028.5.

9 8. For damages according to proof;

10 9. For such other and further relief as the Court deems just and proper.

11 DATED: March __, 2006

12 
13 _____
14 JAQUELYNN POPE

15 VERIFICATION

16 I, the undersigned, declare:

17 I am one of the principals of the petitioner herein, North Pacifica, LLC. I have read the
18 above Petitions for Writ of Mandate and for Declaratory and Injunctive Relief and know its
19 contents. The facts alleged in the above petition are true of my own knowledge.

20 I declare under penalty of perjury that the foregoing is true and correct and that this
21 declaration is executed this day of March, 2006 at Oakland, California.

22 
23 _____
24 ROBERT KALMBACH

1 JAQUELYNN POPE SBN 78600
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5 Tel. (310) 379-3410
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7 Attorney for Petitioner

ORIGINAL FILED
MAR 30 2006
LOS ANGELES
SUPERIOR COURT

8
9 SUPERIOR COURT OF CALIFORNIA
10 IN AND FOR THE COUNTY OF LOS ANGELES

11 NORTH PACIFICA, LLC,

12 Petitioner,

13 vs.

14 CALIFORNIA COASTAL COMMISSION,

15 Respondent.

16) Case No.: BS 102068

17) **NOTICE OF ERRATA IN VERIFIED**
18) **PETITION FOR WRITS OF MANDATE;**
19) **COMPLAINT FOR DECLARATORY**
20) **AND INJUNCTIVE RELIEF**

21) Date: April 24, 2006

22) Time: 9:30 a.m.

23) Dept: 86

24) Hon. David P. Yaffe

25) Filed: March 10, 2006

26 PLEASE TAKE NOTICE OF THE FOLLOWING ERRATA and make the following
27 corrections to the Verified Petition for Writs of Mandate; Complaint for Declaratory and
28 Injunctive Relief on file herein:

Corrections to References to Exhibits

1. Page 9, paragraph 20, line 23: "(Exhibit C)" should be replaced with "(Exhibit 3)."
2. Page 17, paragraph 46, line 20: "(Exhibit H)" should be replaced with "(Exhibit 12)."
3. Page 20, paragraph 58a, line 5: "(Exhibit 11)" should be replaced with "(Exhibit 12)."
4. Page 21, paragraph 58c, line 3: "(Exhibit E)" should be replaced with "(Exhibit 5)."
5. Page 23, paragraph 60, line 18: "(Exhibits I and J)" should be replaced with "Exhibits 9 and 10".

1 JAQUELYNN POPE SBN 78600
2 WARSHAW & POPE
3 934 Hermosa Ave., Suite 14
4 Hermosa Beach, CA 90254
5 Tel. (310) 379-3410
6 Fax (310) 376-6817

7 Attorney for Petitioner

8 SUPERIOR COURT OF CALIFORNIA
9 IN AND FOR THE COUNTY OF LOS ANGELES

10 NORTH PACIFICA, LLC,
11 Petitioner,
12 vs.
13 CALIFORNIA COASTAL COMMISSION,
14 Respondent.

15 Case No.: BS 102068
16 **NOTICE OF ERRATA IN VERIFIED
17 PETITION FOR WRITS OF MANDATE;
18 COMPLAINT FOR DECLARATORY
19 AND INJUNCTIVE RELIEF**
20 Date: April 24, 2006
21 Time: 9:30 a.m.
22 Dept: 86
23 Hon. David P. Yaffe
24 Filed: March 10, 2006

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1 Correction to Year of Stormwater Management Report

2 6. Page 22, paragraph 59c, line 14:

3 “*Stormwater Management Report*” dated August 7, 2002...” should be corrected to
4 read: “*Stormwater Management Report*” dated August 7, 2000.

5

6 Dated: March 29, 2006

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JAQUELYNN POPE

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MAR 30 2006
LOS ANGELES
SUPERIOR COURT

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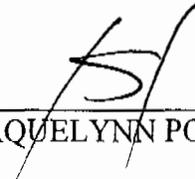
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JAQUELYNN POPE

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Attorneys for Petitioner and Plaintiff, North Pacifica LLC

CONFORMED COPY
OF ORIGINAL FILED
Los Angeles Superior Court

MAR 16 2008

John A. Clarke, Executive Officer/Clerk
By _____ Deputy

D. GILES

SUPERIOR COURT OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

BS102038

NORTH PACIFICA LLC,

Petitioner and Plaintiff

v.

CALIFORNIA COASTAL
COMMISSION,

Respondent and Defendant

**VERIFIED PETITION FOR
WRITS OF MANDATE;
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF.**

INTRODUCTION

1
2 This Petition concerns the admitted failure of the California Coastal Commission
3 (“Commission”) to give petitioner and plaintiff herein, North Pacifica LLC (“NP”), timely and
4 lawful notice of the Commission’s January 11, 2006 meeting in San Pedro, California. The
5 Commission has **admitted** that the Notice¹ was untimely and defective. Nonetheless, and in
6 spite of strenuous objections from NP, the Commission held the untimely and defectively noticed
7 hearing anyway. As a result of the untimely and defective Notice, the actions taken by the
8 Commission at its January 11, 2006 meeting regarding the appeal of NP’s Coastal Development
9 Permit (“CDP”) are null and void. Because the statute of limitations has now expired, the
10 Commission cannot cure the untimely and defective Notice, and has no appeals jurisdiction over
11 NP’s CDP.

12 NP brings this action pursuant to the Bagley-Keene Open Meeting Act (Government
13 Code §§ 11120 et seq.). NP seeks two Writs of Mandate and Declaratory and Injunctive relief to
14 void and nullify any and all actions taken by the Commission at its meeting in San Pedro,
15 California, on January 11, 2006, at which the Commission (with NP *in absentia*), found and
16 determined that a “substantial issue” existed as to an appeal that had been filed by John Curtis
17 (“Curtis”), a local Pacifica resident, challenging the approval by the City of Pacifica (the “City”)
18 of NP’s CDP.

19 The Commission violated Government Code § 11125 of the Bagley-Keene Open Meeting
20 Act by failing and refusing to give NP and the prescribed members of the public the mandatory,
21 statutorily required minimum of 10 days’ advance notice of the January 11, 2006 meeting and
22 substantial issue hearing. Thus, pursuant to Government Code § 11130.3, any action taken by
23 the Commission at the January 11, 2006 meeting regarding NP’s CDP is null and void,
24 including, but not limited to the Commission’s finding and determination that a “substantial
25 issue” exists.

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27
28 ¹ As used herein “Notice” refers to the Important Notice of Public Hearing that the Commission mailed to
NP no earlier than January 3, 2006.

1 In addition, the untimely Notice of the January 11, 2006 meeting also violated the
2 Commission's own regulation, 14 CCR 13063, which requires that the Commission mail notice
3 of the hearing and a copy of the Staff Report to NP at least ten calendar days prior to the hearing.
4 For this reason also, any and all actions taken by the Commission at the January 11, 2006
5 meeting are in violation of the Coastal Act, are outside the Commission's authority and are null
6 and void.

7 Finally, the untimely Notice violated NP's due process rights by preventing NP from
8 having a meaningful opportunity to participate in the hearing and for that reason also, any and all
9 actions taken by the Commission at the January 11, 2006 meeting are outside the Commission's
10 authority and are null and void.

11 The Commission went ahead and determined that a substantial issue existed even though
12 NP, prior to the January 11, 2006 hearing, had objected, in writing, to the untimely and defective
13 Notice and even though the Commission staff as well as the Commission's legal counsel
14 admitted at the January 11, 2006 hearing that NP had not been given timely Notice, and that the
15 Notice that NP had received was in violation of the ten-day notice requirement (Reporter's
16 Transcript, p.10: 5-15 (Exhibit 11)).

17 Prior to the January 11, 2006 meeting, NP had submitted to the Commission evidence
18 clear, on its face, that the Commission's Notice was untimely and defective, to wit, a copy of the
19 envelope in which the Notice had been enclosed. The envelope containing the untimely and
20 defective Notice bore a postage meter stamp of January 3, 2006, thus establishing conclusively
21 that the Notice was not and could not possibly have been in compliance with the minimum ten
22 day advance notice period required by the Bagley-Keene Open Meeting Act (and the
23 Commission's own regulation 14 CCR 13063), for a hearing scheduled to be held on January 11,
24 2006. NP had protested that it only received the untimely and defective Notice in the afternoon
25 of Thursday, January 5, 2006, a mere three business days before the hearing, which was to be
26 held in the morning of Wednesday, January 11, 2006. As such, NP informed the Commission
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1 that NP was afforded insufficient notice even to attend the hearing, much less prepare a
2 presentation therefor and make a meaningful presentation thereat.

3 At the January 11, 2006 meeting, the Commission staff as well as the Commission's legal
4 counsel admitted to the Commission that the Notice was defective, and that Commission staff
5 had not provided NP with the ten-day notice that was required, and that the Notice had not been
6 timely mailed. The Commission, nevertheless, failed and refused to cure or correct the untimely
7 and defective Notice by properly re-noticing, and properly rescheduling and conducting a
8 properly noticed substantial issue hearing at any time on or prior to February 6, 2006, the date
9 that, according to the Commission's own public documents, the statute of limitations expired for
10 conducting such a substantial issue hearing. Instead, the Commission held the meeting on
11 January 11, 2006 anyway with full knowledge, recognition and intent that the Notice therefor
12 had been untimely and defective as a matter of law.

13 In electing to hold a void hearing based on an untimely and defective Notice rather than
14 re-notice the hearing, the Commission has lost jurisdiction over NP's CDP. The California
15 Coastal Act (Public Resources Code § 30000, et seq.) mandates that the Commission must hold a
16 hearing on any appeal within 49 days of the filing of the appeal (PRC § 30621). California
17 courts have interpreted this provision to mean that the Commission must, at a minimum,
18 determine, within the 49-day limitations period, whether a substantial issue exists. (*Encinitas*
19 *Country Day School v. California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584-85).
20 The Commission has informed NP that the 49-day statutory limitation period for holding an
21 appeals hearing expired on February 6, 2006 (Staff Report, p.1 (Exhibit 5)).

22 Thus, here, because the Commission's January 11, 2006 actions are void due to untimely
23 and defective Notice, the Commission failed to hold a valid hearing on appeal by February 6,
24 2006 (the date of the expiration of the 49-day limitation period). Therefore, NP additionally
25 seeks a Second Writ of Mandate and declaratory and injunctive relief holding that the
26 Commission has permanently lost appeals jurisdiction over NP's CDP because of the expiration
27 of the 49-day statutory limitation period.

28

1 **FIRST PETITION FOR WRIT OF MANDATE: TO VOID AND NULLIFY**
2 **JANUARY 11, 2006 ACTION OF COMMISSION**

3 ***COUNT ONE: VIOLATION OF THE NOTICE REQUIREMENTS OF THE***
4 **BAGLEY-KEENE OPEN MEETING ACT**

5 1. Petitioner, North Pacifica LLC (“NP”), is a California Limited Liability
6 Company, duly registered and in good standing with the State of California. It has offices
7 located in Los Angeles, California.

8 2. NP is a small real estate company that has two principals, Keith Fromm and
9 Robert Kalmbach. NP owns the development rights to a 4.2 acre parcel of property located in
10 Pacifica, California, commonly known as “the Bowl.” On August 12, 2002, after a processing
11 period in excess of three years, at least eight public hearings, the testimony of scores of
12 witnesses, preparation and public review of dozens of expert reports and thousands of pages of
13 documents and other evidence, and the certification of a Final Environmental Impact Report, all
14 of which, as of the date of its approval, cost NP in excess of \$2 million, the City of Pacifica
15 (“City”) approved NP’s application for a Coastal Development Permit (“CDP”) for a 43-unit
16 residential development project to be built on the Bowl. As a project comprising both real estate
17 and personal property such as, for example, permits, NP’s project is unique and irreplaceable.

18 3. The California Coastal Commission (“Commission”) is a state body and public
19 agency that has been created by the California Coastal Act (Public Resources Code §§ 30000, et
20 seq.), and is empowered in limited circumstances to hear appeals by interested persons from a
21 local government’s approval of a CDP. (Pub. Res. Code §§ 30603, 30621, 30625.) The
22 Commission has informed NP that on December 19, 2005, an appeal by John Curtis was filed
23 with the Commission challenging the City’s approval of NP’s CDP (“Curtis Appeal”). (Staff
24 Report p.1, (Exhibit 5)) The Commission has also informed NP that the 49-day statutory
25 limitation period for holding a hearing on the “Curtis Appeal” expired on February 6, 2006.
26 (Staff Report, p.1, (Exhibit 5)).

1 4. The Commission has six district offices and holds twelve regularly scheduled
2 meetings a year, in various cities in each district. The meeting on January 11, 2006 was held in
3 the City of San Pedro, in the County of Los Angeles, California.

4 5. Venue in Los Angeles County is proper under CCP §§ 393(b) and 395(a) because
5 that is where the action arose and where the injury occurred.

6 6. Venue is also proper in Los Angeles County pursuant to CCP § 401, which
7 provides that whenever it is provided by any law of this State that a proceeding against a state
8 commission “may be commenced in, tried in, or removed to the County of Sacramento, the same
9 may be commenced and tried in any city or city and county of this State in which the Attorney
10 General has an office.” (emphasis added) Government Code § 955 provides that actions against
11 the state may be removed by the Attorney General to Sacramento County. Thus, since an action
12 against the Commission may be removed to the County of Sacramento, it may also, under CCP §
13 401, be commenced in any city in which the Attorney General has an office. Since the Attorney
14 General has an office in Los Angeles, venue for this case is proper in Los Angeles.

15 7. The Bagley-Keene Open Meeting Act (Gov. Code §§ 11120, et seq.) was enacted
16 to ensure openness in government:

17 It is the public policy of this state that public agencies exist to aid in the
18 conduct of the people's business and the proceedings of public agencies be
19 conducted openly so that the public may remain informed.

20 In enacting this article the Legislature finds and declares that it is the intent
21 of the law that actions of state agencies be taken openly and that their
22 deliberation be conducted openly.

23 Government Code § 11120.

24 8. The Bagley-Keene Act mandates that every state body must carry out its meetings
25 openly and in conformance with the Bagley-Keene Open Meeting Act. (Gov. Code
26 § 11127). To ensure that the public remains informed and retains control over its public
27 agencies, the Bagley-Keene Open Meeting Act includes specific requirements for notice to the
28 public (Gov. Code § 11125), and further provides that any interested person may have any action
taken by a State body in violation of the notice requirements of Government Code § 11125

1 declared null and void by the Court (Gov. Code § 11130.3). The Commission is a state body as
2 defined in the Bagley Keene Open Meeting Act. (Gov. Code §§ 11121, 11121.1).

3 9. Section 11125 of the Bagley-Keene Open Meeting Act requires that the
4 Commission give at least ten days advance notice of its meetings, as follows:

5 (a) The state body shall provide notice of its meeting to
6 any person who requests that notice in writing. Notice shall be
7 given and also made available on the Internet at least 10 days in
8 advance of the meeting, and shall include the name, address, and
9 telephone number of any person who can provide further information
10 prior to the meeting, but need not include a list of witnesses
11 expected to appear at the meeting. The written notice shall
12 additionally include the address of the Internet site where notices
13 required by this article are made available.

14 Government Code § 11125(a) (emphasis added).

15 10. Government Code § 11125(b) requires the Notice to include a specific agenda for
16 the meeting:

17 (b) The notice of a meeting of a body that is a state body shall include a
18 specific agenda for the meeting, containing a brief description of the items
19 of business to be transacted or discussed in either open or closed session. A
20 brief general description of an item generally need not exceed 20 words. A
21 description of an item to be transacted or discussed in closed session shall
22 include a citation of the specific statutory authority under which a closed
23 session is being held. No item shall be added to the agenda subsequent to
24 the provision of this notice, unless otherwise permitted by this article.

25 Government Code § 11125(b).

26 11. The notice requirements of Government Code § 11125 are ministerial and
27 mandatory and a state agency does not have discretion to substitute a different type of notice for
28 the notice required by § 11125.

12. On December 16, 2005, Keith Fromm, one of the two principals of petitioner NP,
and also co-counsel for NP, appeared before the Commission at its regularly scheduled meeting
in San Francisco, California, to represent NP in a Commission hearing pursuant to regulation
13569, concerning the issue of whether or not the Commission had appeals jurisdiction over
NP's CDP. On that date, Mr. Fromm submitted to the Commission two written requests for
notice of all Commission proceedings regarding NP's CDP. Prior to being permitted to make

1 his oral presentation to the Commission, Mr. Fromm submitted two requests in writing to the
2 Commission asking that he be permitted to speak as a representative of NP at the December 16,
3 2005 hearing and that the Commission give him notice of any future Commission meeting and/or
4 action regarding NP's Coastal Development Permit. The requests were made on a "Request to
5 Speak" form required by the Commission and provided by the Commission to any persons who
6 wish to speak at a Commission meeting. The Commission provides both white and pink forms.
7 The white form is entitled "Request to Speak Non-Permit Items" and the pink form is entitled
8 "Request to Speak Permit Items."

9 13. The "Request to Speak" forms request information as to the speaker's name,
10 organization represented, address, etc., as well as the specific item on the agenda to be addressed.
11 The "Request to Speak" form also includes a portion at the bottom, entitled "Request for Notice
12 of Future Hearings," to be filled in to obtain notification of future hearings, and Commission
13 business regarding the agenda item matter indicated on the form. Mr. Fromm filled in the
14 "Request for Notice of Future Hearings" portion of both of the forms and thereby requested that
15 notice be sent to the address of 914 Westwood Blvd. #500, Los Angeles, California 90024. Mr.
16 Fromm submitted both of the forms to the Commission staff. (True and correct copies of both of
17 the "Request to Speak" forms submitted to the Commission by Mr. Fromm are appended hereto
18 as Exhibit "1".)

19 The Chairperson of the Commission called Mr. Fromm's name from the pink "Request to
20 Speak" form at the time of the December 16, 2005 hearing regarding NP, and Mr. Fromm did
21 make an oral presentation at said December 16, 2005 hearing on behalf of NP, pursuant to the
22 "Request to Speak" form that he had submitted to the Commission.

23 14. The address that Keith Fromm filled in on the Request for Notice of Future
24 Hearings, 914 Westwood Blvd., #500, Los Angeles, California, 90024, is the same address as
25 was listed on every other brief, letter and legal document that Mr. Fromm and/or NP had
26 submitted to the Commission regarding the December 16, 2005 hearing. These submissions
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1 included five separate briefs, and various letters that were sent to the Commission and/or its
2 attorneys during the period of November and December, 2005.

3 15. On or after January 3, 2006, the Commission mailed a copy of an "Important
4 Public Hearing Notice" to Keith Fromm. The envelope was addressed to "Keith Fromm, North
5 Pacific [sic] LLC"; however, it was sent to NP's Northern California office address, rather than
6 to 914 Westwood Blvd., #500, Los Angeles, California, 90024, which was Mr. Fromm's
7 Southern California address, as Mr. Fromm had requested in his December 16, 2005 request for
8 Notice, and which was his usual address. The Notice stated that a hearing concerning a New
9 Appeal of NP's Coastal Development permit would be held on January 11, 2006, in San Pedro,
10 California. The Notice envelope addressed to Mr. Fromm bore postage in the form of a Pitney
11 Bowes postage meter stamp dated January 3, 2006.

12 Mr. Fromm received a faxed copy of the "Important Public Hearing Notice" and Staff
13 Report on January 5, 2006, soon after it was received at NP's Northern California address. This
14 untimely six-day Notice of the January 11, 2006 hearing which was not sent to Keith Fromm
15 until January 3, 2006, (and was even then addressed to the wrong address), violated section
16 11125 of the Bagley-Keene Open Meeting Act, which requires a mandatory minimum of at least
17 ten days advance notice. (A true and correct copy of the face of the envelope received by Mr.
18 Fromm, bearing the postage meter stamped date of January 3, 2006, is appended hereto as
19 Exhibit "2," and a true and correct copy of the Important Public Hearing Notice is appended
20 hereto as Exhibit "3".)

21 16. On the afternoon of Thursday, January 5, 2006, NP's attorney, Jaquelynn Pope,
22 received the regular mail delivery in her office in Hermosa Beach, California. Included in the
23 mail was a large manila envelope from the Commission that also bore postage in the form of a
24 Pitney Bowes postage meter stamp dated January 3, 2006. (A true and correct copy of the face of
25 the envelope sent to Attorney Pope bearing the postage meter stamped date of January 3, 2006 is
26 appended hereto as Exhibit "4").

1 17. The envelope that Attorney Pope received from the Commission on the afternoon
2 of January 5, 2006, also contained a copy of the same “Important Public Hearing Notice”
3 regarding the appeal of NP’s CDP, which stated that the hearing on the Curtis Appeal was set to
4 be held in San Pedro, California, on January 11, 2006. The untimely six-day Notice violated
5 section 11125 of the Bagley-Keene Open Meeting Act, which requires a minimum of ten days
6 advance notice.

7 18. The envelopes Keith Fromm and Attorney Pope received from the Commission
8 also contained a 22-page Staff Report that had over 60 pages of exhibits attached and also
9 incorporated by reference several hundred pages of other documents which were within the
10 Commission’s files in San Francisco, but which were not attached as exhibits to this Staff
11 Report. The staff report was entitled “Staff Report - Appeal. Substantial Issue & De Novo
12 Review” (“Staff Report”). (A true and correct copy of the Staff Report is appended hereto as
13 Exhibit “5”.)

14 19. The determination as to whether a Substantial Issue exists is critical to NP
15 because the Commission cannot hold a *de novo* hearing on an appeal if it does not find that a
16 substantial issue exists. If the Commission does find that a substantial issue exists, the
17 Commission holds a *de novo* hearing on the issues raised by the appeal. Such an action
18 immediately vacates the local government’s approval of the CDP, and forces the applicant to
19 start all over again. The 22-page Staff Report received by NP on January 5, 2006, recommended
20 that the Commission take the following actions at the January 11, 2006 hearing: (1) find that a
21 Substantial Issue exists, and (2) hold its *de novo* hearing on NP’s application for a CDP and deny
22 NP’s CDP.

23 20. The “Important Public Hearing Notice” (Exhibit C) received with the Staff
24 Report on January 5, 2006, requested that NP provide the Commission with any responsive
25 materials to the 22- page Staff Report (as well as the 60 pages of exhibits and hundreds of pages
26 of documents that were not even transmitted to NP with the Staff Report but rather existed within
27 the Commission’s files in San Francisco and were merely incorporated *by reference* in the Staff
28

1 Report) by January 6, 2006, i.e. only one day after NP received the copy of the staff report and
2 the Notice of the hearing. At most, NP had only three business days, i.e., Friday, January 6;
3 Monday, January 9; and Tuesday, January 10, to prepare, in any manner, for the hearing that was
4 to commence on the morning of Wednesday, January 11, and, further, had only two business
5 days (i.e., Friday, January 6, and Monday, January 9) to prepare and submit any materials to the
6 Commission by Tuesday, the day before the hearing, in hopes that they could still be distributed
7 to and reviewed by the Commissioners.

8 21. On Tuesday morning, January 10, 2006, at or about 10:00 a.m., NP, by fax (with
9 an email copy to the Commission's counsel, deputy attorney general, Joel Jacobs) filed written
10 objections with the Commission protesting that the Commission had not given NP timely and/or
11 adequate notice of the January 11, 2006 hearing. (See "Brief No. 1, North Pacifica LLC's
12 Objections to: Defective Notice: Lack of Jurisdiction Due to Defective Notice, Failure to
13 Comply with Reg. 13063; Lack of Jurisdiction Due to Defective 13569 Hearing: Failure to
14 comply with Reg. 13111; Unlawful Despoliation of Evidence Contained in Appeal; Various
15 other Objections." (A true and correct copy of Brief No. 1 is appended hereto as Exhibit "6".)

16 22. In its objections, NP advised the Commission that due to the extreme
17 insufficiency of notice, NP could neither prepare for nor even attend the January 11, 2006
18 meeting. Indeed, as of the morning of January 10, 2006, the day before the hearing and the date
19 on which NP submitted its Objections, NP had received only two business days' notice (i.e.,
20 Friday, January 6, and Monday, January 9) in which to prepare and submit any response
21 whatsoever to the Commission and its Staff Report by January 10, 2006, in time for any review
22 by the Commissioners prior to the hearing of January 11, 2006.

23 23. Further, on the afternoon of January 10, 2006, NP filed additional objections to
24 the untimely and inadequate Notice, including the Declaration of Jaquelynn Pope, which set
25 forth the details of NP's receipt of the Notice on January 5, 2006, and included the Declarations
26 of NP's experts, Mike Josselyn and Dan Schafer, who stated that they had not had sufficient
27 notice to respond to the points raised in the Commission's 22-page Staff Report (which included
28

1 not only the exhibits but other materials that were incorporated by reference and not even
2 included with the Staff Report). (“Objections to Lack of Notice of Substantial Issue and De
3 Novo Hearings Set for January 11, 2006; Objections to Breach of Confidentiality of Settlement
4 Negotiations; Objection to Appellant’s Failure to Serve NP with Copy of Appeal.”) (A true and
5 correct copy of NP’s second set of Objections, including the Declarations of Jaquelynn Pope,
6 Mike Josselyn, and Dan Schafer is appended hereto as Exhibits “7”, “8”, “9” and “10”,
7 respectively.)

8 24. At the January 11, 2006 meeting, the Commission staff as well as the
9 Commission’s legal counsel **admitted** to the Commission that NP had received defective Notice,
10 that the Notice was not timely mailed, and that there was a violation of the 10-day notice that
11 should have been provided to North Pacifica:

12 The meeting notice to North Pacifica is, apparently, defective because it
13 does not appear to have been mailed until January 3 of this year. Normally,
14 staff would have mailed the meeting notice and the staff report on the
15 previous Friday, on December 30, which is the same day that the staff
16 report was posted to the web site. This was a 3-day holiday weekend, as
17 the Commission is aware, and I am not aware of what happened. I don't
know that Dr. Lester is, either, but for whatever reason it didn't get mailed
until the Tuesday. So, there is a violation of the 10-day calendar notice that
should have been provided to North Pacifica.

18 Reporter’s Transcript of January 11, 2006 meeting, (“RT”) p. 10:5-15 (emphasis added). (A true
19 and correct copy of the Reporter’s Transcript of the January 11, 2006 meeting is appended hereto
20 as Exhibit “11”. The original Reporter’s Transcript will be lodged with the Court prior to
21 hearing of this matter).

22 25. However, notwithstanding the admittedly untimely and defective Notice, the
23 Commission, with full knowledge and recognition of the defective Notice, failed and/or refused
24 to cure or correct the untimely Notice, by properly re-noticing, and properly rescheduling and
25 conducting a properly and lawfully noticed hearing on the appeal. Rather, the Commission
26 simply held its untimely and unlawfully noticed appeal hearing on January 11, 2006, with NP *in*
27 *absentia*, and took action in accordance with the Staff Report’s recommendation and determined
28 and decided that the Curtis Appeal presented a substantial issue. In fact, under the

1 Commission's procedure, since no three Commissioners voted to hold a hearing as to whether
2 the appeal raised a substantial issue, the Commission adopted the staff's recommendation on the
3 basis of the Staff Report and decided that the appeal raised a substantial issue without a hearing.
4 (RT p. 13: 10-19 (Exhibit 11; A true and correct copy of the Commission's January 12, 2006
5 letter informing NP that the Commission had determined that the appeal raised a substantial issue
6 is appended hereto as Exhibit "12").

7 26. Section 11130.3 of the Bagley-Keene Open Meeting Act provides that any
8 interested person may apply to the court for a determination that an action taken by a state body
9 in violation of §11125 is null and void:

10 (a) Any interested person may commence an action by mandamus,
11 injunction, or declaratory relief for the purpose of obtaining a judicial
12 determination that an action taken by a state body in violation of
13 Section 11123 or 11125 is null and void under this section. Any action
14 seeking such a judicial determination shall be commenced within 90 days from
15 the date the action was taken. Nothing in this section shall be construed
16 to prevent a state body from curing or correcting an action challenged
17 pursuant to this section.

18 Government Code § 11130.3(a) (emphasis added).

19 27. The Bagley-Keene act includes a specific definition of "action taken":

20 § 11122. "Action taken"

21 As used in this article "action taken" means a collective decision made by the
22 members of a state body, a collective commitment or promise by the members of
23 the state body to make a positive or negative decision or an actual vote by the
24 members of a state body when sitting as a body or entity upon a motion,
25 proposal, resolution, order or similar action.

26 Government Code § 11122.

27 28. At the January 11, 2006 meeting, the Commission made a collective decision that
28 the Curtis Appeal raised a substantial issue on appeal. This constitutes an "action taken" as
defined by § 11122 of the Bagley-Keene Act (RT p.13:6-15 (Exhibit 11; and Exhibit 12).

29 29. The Commission's untimely Notice of the January 11, 2006 hearing was also not
in substantial compliance with the mandatory *minimum 10-day advance notice* requirement of
Government Code §11125. The doctrine is inapplicable when statutory notice requirements,

1 including the time within which notice must be given, are not met. The substantial compliance
2 doctrine is generally applicable to a timely notice and is only applied in cases of minor technical
3 deficiencies.

4 30. Further, the untimely Notice did not satisfy the statutory purpose of Government
5 Code § 11125 in that NP was not given ten days' advance notice of the hearing. NP and those
6 members of the public also entitled to the mandatory, statute-required timely notice were
7 prejudiced by the Commission's failure and/or refusal to comply with the notice requirements of
8 Government Code §11125. NP's attorneys and principals were not even able to *attend* the
9 meeting because of the untimely Notice. Further, NP did not have an adequate period of time to
10 prepare for the hearing and did not have time to obtain and present expert opinions and/or reports
11 that would rebut the conclusions in the 22-page Staff Report (including the exhibits and the other
12 materials, in the Commission's files, incorporated by reference in the Staff Report but which
13 were not even included with the Staff Report). NP was deprived of any opportunity to educate
14 and/or lobby any of the individual Commissioners as to the merits of its case. Further, NP's
15 attorneys did not have adequate time to brief the many legal issues raised by the Staff Report.

16 31. NP did not have actual knowledge of the January 11, 2006 hearing prior to the
17 receipt of the Important Public Hearing Notice and Staff Report, which the Commission has
18 admitted were not mailed to NP until January 3, 2006, at the earliest. The Commission has
19 alleged that it mailed NP notification of the appeal in December, 2005, however, this would not
20 satisfy the statutory notice requirements of Government Code § 11125, in that such notification
21 of appeal does not give notice of the date, time, and place of the meeting, nor does it include a
22 specific agenda of the meeting, any description, and/or even identify the kind of hearing.
23 Moreover, neither Keith Fromm nor Mr. Fromm's co-counsel Jaquelynn Pope, received the
24 notification of appeal from the Commission in December (Declarations of Keith Fromm and
25 Jaquelynn Pope, filed separately).

26 32. The mere posting of the Agenda and/or Staff Report on the Commission's website
27 on or about December 28 and 30, 2005, without mailing the Notice at least ten days prior to the
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1 meeting to NP, would not comply with the Bagley-Keene Act, if indeed such posting ever
2 occurred as alleged by the Commission.

3 33. NP did not check the Commission website on December 30, 2005, or at any other
4 time prior to receiving the Notice and Staff Report itself, and therefore did not obtain actual
5 knowledge from the Commission website (Declarations of Keith Fromm and Jaquelynn Pope,
6 filed separately).

7 34. Statutory notice requirements are not satisfied by actual knowledge without
8 notification conforming to the statutory requirements. *County of Alameda v. Lackner* (1978) 79
9 Cal. App. 3d 274, 282. Thus, even if NP had received actual knowledge of the details of the
10 January 11, 2006, meeting in a timely fashion by means of the posting on the Commission
11 website, which it did not, that would not have satisfied the statutory requirements for notice.

12 35. As a result of the untimely Notice, NP was unable to provide information to
13 enable the Commission and the public to make an informed decision, as is specifically
14 contemplated by the Bagley-Keene Open Meeting Act. NP had no opportunity even to present
15 materials that may have persuaded three of the Commissioners at least to vote to hold a hearing
16 on the issue. Additionally, members of the public who may have supported NP's project and/or
17 may have had additional information, evidence or testimony to present that would or might have
18 supported a finding by the Commission that there was no "substantial issue," were also deprived
19 of the public's right to open hearings under the Bagley-Keene Open Meeting Act.

20 36. The Commission acted contrary to law and without legal authority in holding its
21 January 11, 2006 hearing in violation of the notice requirements of § 11125 of the Bagley-Keene
22 Open Meeting Act. NP therefore seeks a declaration and Writ of Mandate from this Court
23 pursuant to § 11130.3 of the Bagley-Keene Open Meeting Act and asks that this Court:

24 (a) declare that the Commission's actions of January 11, 2006, in which the Commission
25 held a hearing (with NP *in absentia*), voted and determined that a substantial issue exists as to
26 the appeal filed December 19, 2005 regarding NP's CDP, are null and void (See Action for
27 Declaratory Relief, included hereinafter); and/or

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1 (b) grant NP's petition and issue a Writ of Mandate ordering the Commission to vacate,
2 nullify, and void the Commission's actions of January 11, 2006, at which the Commission (with
3 NP *in absentia*), determined and decided that a substantial issue exists as to the Curtis appeal
4 allegedly filed December 19, 2005, regarding NP's CDP.

5 37. NP is entitled to such relief pursuant to Government Code § 11130.3 and has no
6 other plain, speedy, or adequate remedy in that NP must seek such relief for the violation of
7 Government Code § 11125 within 90 days of the Commission's action (Gov. Code § 11130.3(a))
8 and there is no direct appeal available from the Commission's substantial issue hearing.

9 38. The Bagley-Keene Act applies to any agency action, as defined above, and does
10 not require that NP exhaust its administrative remedies. Further, it is not necessary to exhaust
11 administrative remedies when the administrative agency acts outside of its jurisdiction, and/or its
12 action is void. *City of Lodi v. Randtron*, (2004) 118 Cal. App. 4th 337, 360.

13 39. Moreover, NP has exhausted its administrative remedies by objecting to the
14 January 11, 2006 hearing on the basis that the Notice was statutorily untimely and defective.
15 There is no procedure for an administrative appeal from the Commission's actions at the January
16 11, 2006 meeting. Further, there is no administrative remedy available to NP by which NP could
17 obtain a determination that the Commission's January 11, 2006 actions regarding NP's CDP are
18 null and void. Nor is there any statutory authorization for the Commission to reconsider or
19 rehear its action finding a substantial issue exists.

20 40. Further, even if there were an administrative remedy to exhaust, which there is
21 not, the Commission has now lost any appeals jurisdiction over NP's CDP that it may have had
22 because it failed to take valid action within the 49-day statutory limitation period under the
23 Coastal Act, and the statutory limitation period has now expired. Under §§ 30621 and 30625 of
24 the Coastal Act, a local government's approval of a CDP will become final unless the
25 Commission takes action on an appeal within 49 days of the date that the appeal was filed. At a
26 minimum, the Commission must, within the 49-day statutory limitation period, make a (valid)
27 determination as to whether a substantial issue exists. *Encinitas Country Day School v.*

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1 *California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584. (See Third Petition for Writ
2 of Mandate, included hereinafter.)

3 41. NP will be irreparably injured if the action taken by the Commission on January
4 11, 2006, in determining that a substantial issue exists is not annulled in that such determination
5 is illegal and null and void and was made without NP and/or the public having any meaningful
6 opportunity to inform the Commission of the reasons why the appeal does not present any
7 substantial issue. Section 30625(b)(2) of the Coastal Act provides that the Commission shall
8 hear an appeal unless it determines that no substantial issue exists. Thus, if NP had prevailed on
9 the substantial issue determination, the Commission could not have heard the Curtis Appeal and
10 NP could have gone forward with its project, in compliance with the development permits and
11 CDP that had already been issued by the City. However, as a result of the Commission's illegal
12 determination that a substantial issue on appeal exists, the Commission has vacated the City's
13 approval of NP's CDP, and has informed NP that the Commission intends to hold a *de novo*
14 hearing on the issue of whether NP's application for a CDP should be granted (Exhibit 12).

15 42. NP's application for its CDP was originally filed in July, 1999 (i.e. over six years
16 ago) and has been the subject of at least eight public hearings, the testimony of scores, if not
17 hundreds of witnesses, dozens of expert reports, review of thousands of pages of documents and
18 evidence and, to date, its processing has cost NP many millions of dollars. Due to the untimely
19 and unlawful Notice, the effect of the Commission's illegal determination that a substantial issue
20 exists is to force NP to start all over again in a *de novo* proceeding and, essentially and
21 unlawfully, to cause NP to lose the benefit of over six years in time and millions of
22 unrecoverable dollars in costs in processing its CDP, which CDP NP lawfully obtained from the
23 City.

24 **COUNT TWO: VIOLATION OF THE NOTICE REQUIREMENTS OF 14 CCR § 13063**
25 **OF THE COMMISSION REGULATIONS**

26 43. NP incorporates by reference paragraphs 1 - 42 as though set forth in full herein.
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1 44. The California Coastal Act expressly provides that the public has a right to fully
2 participate in decisions affecting coastal planning, conservation, and development. (Pub. Res.
3 Code § 30006.)

4 45. The Coastal Commission has adopted regulation 14 CCR 13063 concerning
5 notice of its meetings regarding permit applications and appeals for CDP's. Regulation 13063
6 provides that notice must be mailed to all interested persons (including the applicant, all affected
7 cities and counties, all public agencies having jurisdiction and all persons who have requested
8 notice) at least ten calendar days prior to the meeting, as described in the regulation:

9 (a) At least 10 calendar days prior to the date on which the application
10 will be heard by the Commission, the executive director *shall* mail written
11 notice to each applicant, to all affected cities and counties, to all public
12 agencies which have jurisdiction, by law, with respect to a proposed
13 development, to all persons who have requested it, and to all persons known
14 by the executive director to have a particular interest in the application,
15 including those specified in section 13054(a).

16 14 CCR 13063(a) (Emphasis added.) 14 CCR 13063 (a)(1)-(6) sets forth the information
17 required to be included in the Notice, including the date, time, and place of the meeting, and the
18 procedures concerning the hearing.

19 46. The Commission staff and the Commission's legal counsel acknowledged to the
20 Commission that the Commission had violated the ten-day notice requirements by failing to mail
21 the Notice to NP at least ten calendar days prior to the January 11, 2006 hearing date (RT p.
22 10:5-15 (Exhibit H)) Nonetheless, the Commission went forward with the January 11, 2006
23 hearing with full knowledge and recognition that the hearing had been defectively noticed in
24 violation of the law.

25 47. The notice required by the Commission's regulation 13063 is a mandatory
26 ministerial act that must be performed at a specific time and in a specific manner, as a matter of
27 law.

28 48. The Commission notification of appeal allegedly sent by the Commission to NP
in December, 2005, does not comply with regulation 13063 because it does not include the time,
date and place of hearing, or information regarding Commission procedures.

1 49. The Commission's action in holding its January 11, 2006 hearing on appeal and
2 determining that a substantial issue exists (with NP absent) without giving NP notice as required
3 by law was contrary to law and an error of law, and therefore the Commission's action in
4 determining that a substantial issue exists was taken without and in excess of the Commission's
5 lawful authority and jurisdiction. Thus, the Commission's January 11, 2006 action and
6 determination that a substantial issue exists are void and a nullity.

7 50. Mandate will lie to compel the Commission to nullify and/or rescind the
8 Commission's January 11, 2006 void acts in making a determination that a substantial issue
9 exists as to the Curtis Appeal without the legally required proper notice. *Aylward v. State Board*
10 *of Examiners* (1948) 31 Cal. 2d 833, 839.

11 51. Additionally (assuming that all Notice recipients were treated equally and Notices
12 to all parties were sent out by the Commission at the same time by means of the same method of
13 postage metered envelopes dated January 3, 2006), due to the unlawful untimely Notice, the
14 effect of the Commission's illegal and void actions, and void determination is also to
15 permanently and irreparably deprive all affected cities and counties, all public agencies having
16 jurisdiction and all persons who have requested Notice (all of whom are entitled, by law, to the
17 notice prescribed in Reg. 14 CCR §13063), of any meaningful opportunity to attend the January
18 11, 2006 hearing and/or present additional information, evidence or testimony that would or
19 might have supported a vote and contrary determination by the Commission as to whether there
20 was a "substantial issue."

21 **COUNT THREE: VIOLATION OF NP'S DUE PROCESS RIGHTS -**
22 **FAILURE TO PROVIDE MEANINGFUL NOTICE AND A MEANINGFUL**
23 **OPPORTUNITY TO BE HEARD**

24 52. NP incorporates by reference paragraphs 1-51 as though set forth in full herein.

25 53. Article 1, section 7 of the California Constitution and the 14th Amendment of the
26 U.S. Constitution provide that no person may be deprived of property without due process of
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1 law. Due process of law requires, at a minimum, a meaningful notice and a meaningful
2 opportunity for a hearing prior to the deprivation of property.

3 54. The United States District Court for the Northern District of California has
4 already determined that NP has a constitutionally protected property interest in its development
5 permits, including its CDP for the Bowl, which protected property interest existed before the
6 development permits were approved by the City of Pacifica on August 12, 2002. *North Pacifica*
7 *v. City of Pacifica* (2002) 234 F. Supp. 1053, 1059-60.

8 55. The untimely Notice that NP received on January 5, 2006, from the Commission
9 regarding the January 11, 2006 Commission meeting in San Pedro, California, did not satisfy the
10 requirements of due process in that it did not give NP an opportunity to be heard at a meaningful
11 time and in a meaningful manner.

12 56. Section 30625(b)(2) of the Coastal Act provides that the Commission shall hear
13 an appeal unless it determines that no substantial issue exists. Thus, if NP had prevailed at the
14 on the issue as to whether the Curtis appeal raises a substantial issue on January 11, 2006, it
15 could have gone forward with its project. However, because of the untimely and unfair Notice,
16 NP was completely prejudiced as to any meaningful opportunity to persuade the Commission
17 that the appeal did not raise any substantial issue.

18 57. NP was also deprived of the protection under the law and the statutorily intended
19 benefits of the mandatory minimum advance notice requirements of the Bagley-Keene Open
20 Meeting Act and Coastal Commission Regulation 14 CCR 13063, including, *inter alia*, any
21 meaningful opportunity for any affected cities and counties, public agencies having jurisdiction,
22 and all persons who have requested notice, to attend the January 11, 2006 meeting, and/or
23 present additional information, evidence or testimony that would or might have supported a vote
24 and contrary finding by the Commission that there was no "substantial issue."

25 58. NP suffered severe and irreparable prejudice as a result of the Commission's
26 failure and refusal to give NP timely and meaningful notice and an opportunity to be heard, as
27 follows:
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1 a. NP Lost Its Opportunity to Have a Substantial Issue Hearing. Once the
2 Commission staff has issued a Staff Report recommending that the Commission find that a
3 substantial issue exists, the Staff's recommendation will be adopted by the Commission without
4 a public hearing on the question and without any testimony from the applicant or the public
5 unless three Commissioners ask to hold a substantial issue hearing (RT 13:3-14, (Exhibit 11)).
6 Thus, unless three Commissioners ask to hold the hearing, the Commission does not allow
7 testimony or argument as to whether or not a substantial issue exists. Therefore, in order to
8 persuade three Commissioners to ask to have a substantial issue hearing and receive public
9 testimony on the subject, it is necessary to educate, inform, and lobby the Commissioners prior
10 to the date of the substantial issue hearing as to the issues they will be deciding in the hearing.
11 Here, because of the untimely and inadequate shortened Notice, NP did not have the opportunity
12 prior to the hearing to attempt to persuade the Commissioners to even hold a substantial issue
13 hearing, much less persuade the Commissioners that there was no substantial issue presented by
14 Curtis' appeal.

15 b. Likewise (assuming that all notice recipients were treated equally and notices to
16 all interested persons were sent out by the Commission at the same time by means of the same
17 method of postage-metered envelopes dated January 3, 2006), because of the untimely and
18 inadequate notice, NP was also deprived of the opportunity and protection under law to benefit
19 from any public participation and potential support from any other affected cities and counties,
20 public agencies having jurisdiction, and all persons who have requested Notice, to apprise the
21 Commissioners of and/or present additional information, evidence, or testimony that would or
22 might have supported a vote and contrary finding by the Commission that a public hearing and
23 debate should, indeed, be held and/or that there was no "substantial issue" presented by the
24 Curtis Appeal.

25 c. NP Had Inadequate Time to Assemble Evidence to Address and Rebut the
26 Conclusions of the Staff Report. The Staff Report for the January 11, 2006 meeting in San Pedro
27 recommended that the Commission find a substantial issue on appeal as to three issues involving
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1 the alleged impact of NP's project on: (1) alleged wetlands as defined by the Local Coastal
2 Program ("LCP"); (2) water quality; and (3) ESHA (Environmentally Sensitive Habitat Area)
3 (Exhibit E, pp. 3-15). The alleged issues of water quality and ESHA were raised as issues by
4 the Commission in the Staff Report for the first time (i.e., NP had never previously been notified
5 by the Commission Staff that the issues listed in the Staff Report as to water quality or ESHA
6 were of any concern to the Staff).

7 59. The Staff Report prepared for the January 11, 2006 meeting in San Pedro contains
8 22 pages of dense and highly technical allegations, some of which were raised for the first time
9 in the Staff Report. It additionally has approximately 60 more pages of dense and highly
10 technical exhibits regarding these issues. The Staff Report also refers to and incorporates by
11 reference many more exhibits, spanning hundreds of pages, that were exhibits to the Staff Report
12 for the December 16, 2005 meeting and/or were within the Commission's files in San Francisco
13 but which were not attached as exhibits to the Staff Report for the January 11, 2006 San Pedro
14 meeting. Further, the Staff Report for the January 11, 2006 meeting in San Pedro references still
15 more materials from other sources that were not made exhibits to either the Staff Report for the
16 January 11, 2006 meeting in San Pedro, or the prior December 16, 2005 meeting. NP was
17 unable, in the very short time between receipt of Notice and the hearing date, to assemble the
18 technical evidence that already existed, and would need to be researched, and/or to obtain expert
19 testimony and/or submit expert reports to rebut the many erroneous conclusions in the Staff
20 Report, especially with the Staff raising in the Staff Report two brand new, highly technical
21 issues, water quality and ESHA.

22 Wetlands. The issue of alleged wetlands had already been very well-studied during
23 the three-year period in which the City had reviewed NP's project and completed and certified an
24 environmental impact report prior to approving NP's development permits. During the City's
25 review process, over thirteen studies, maps, and wetland delineations had been prepared
26 regarding the alleged wetlands, all of which supported and became the bases for the City's
27 finding that NP's project would not have a negative impact on any LCP (Local Coastal Program)

1 wetlands. Additionally, both the draft EIR and the Final EIR address this issue. Further,
2 testimony and evidence establishing that there were no LCP wetlands affecting the subject
3 property were presented in detail in live testimony at the June, 2002 Planning Commission
4 hearing and the August 12, 2002 City Council hearing. However, because of the legally
5 untimely and inadequate Notice of the January 11, 2006 meeting, NP did not have time to review
6 and/or obtain expert review of the already existing studies and EIRs and testimony in order to
7 rebut the Staff Report's allegation that there was a substantial issue regarding the alleged
8 wetlands. Although the Commission had access to all of the aforementioned studies, it did not
9 include all of them as a part of the record, nor does the Staff Report cite to any evidence that
10 supports NP and/or the City's determination that NP's project would not have a negative impact
11 on any LCP wetlands.

12 Water Quality. Similarly, the Staff Report includes a highly technical discussion
13 of alleged flaws in the project's control of storm water, but the Staff Report ignores the fact that
14 a 35-page document entitled "*Stormwater Management Report*", dated August 7, 2002, was
15 prepared for NP's project at the behest of the City, which demonstrates that all of the concerns
16 listed in the Staff Report regarding stormwater control were already adequately covered and
17 considered by the City in its approval of the project, and that, therefore, there is no substantial
18 issue on the subject. NP learned of this issue for the first time when it received the Staff Report
19 on January 5, 2006.

20 As a result of the untimely Notice, NP did not have time to engage its storm water experts
21 and have them prepare a meaningful and authoritative rebuttal to the Staff Report's erroneous
22 conclusions concerning the project's control of storm water. Indeed, due to the fact that NP had
23 no notice that the Staff Report would even raise this issue, NP was unable, within the short time
24 before the hearing, to even *obtain* expert review of the Staff Report and "*Stormwater*
25 *Management Report*" and/or to have an expert prepare a written rebuttal to the Staff Report for
26 the record.

1 ESHA. As with the aforementioned alleged water quality issue, NP learned in the
2 Staff Report, for the first time, that the Commission believed that an ESHA issue allegedly
3 existed with regard to the project. ESHA is highly technical (as in the water quality issue) and it
4 was impossible for NP, upon receiving the untimely and unlawful notice, to immediately retain
5 an expert to meaningfully and comprehensively research and prepare written reports to
6 adequately rebut the erroneous ESHA concerns set forth in the Staff Report within the extremely
7 short, three business day period available (i.e., between the late afternoon of Thursday, January
8 5, 2006, when NP received notice of the hearing, and the morning of January 11, 2006, when the
9 hearing took place).

10 60. NP Had Inadequate Time to Obtain Expert Testimony Rebutting the Staff
11 Report's Conclusions. NP's wetlands expert, Mike Josselyn, informed NP that he did not
12 believe the record supported the Staff Report's conclusions, but that he would require
13 approximately one business week to rebut the Staff Report based on existing studies and
14 materials. NP's water quality expert, Dan Schaefer, stated that he believed that the Commission
15 was applying an inappropriate standard but that he would require approximately one business
16 week to review the staff report for accuracy and to determine which standard the Commission
17 was applying, and to review existing materials and prepare a report rebutting the Staff Report.
18 (Declarations of Mike Josselyn and Dan Schaefer, Exhibits I and J). The Commission's unlawful
19 and untimely Notice to NP prevented NP from presenting any expert evidence to the
20 Commission.

21 61. NP Had Inadequate Time to Prepare Briefs on the Legal Issues Raised by the
22 Staff Report. In addition to the technical and factual issues raised by the Staff Report, the Staff
23 Report also raised complicated legal issues regarding, *inter alia*: (1) the legal definition of
24 wetlands; (2) the legal status of drainage ditches as being exempt from classification as wetlands;
25 (3) the statutory limitation period under CEQA for attempting to overturn a certified EIR, and
26 whether the findings in the EIR were *res judicata* after expiration of such limitation period; (4)
27 the legal and factual issue as to whether the Commission's findings were barred as a matter of
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1 *res judicata* by a previous Court ruling in a previous lawsuit between the Commission and NP;
2 and (5) which water quality standards may properly be imposed on NP's project, etc. The short,
3 untimely, inadequate, and defective Notice prevented NP from doing anything more than merely
4 identifying these issues. Because of the untimely and defective Notice, NP was unable to
5 prepare and include any substantive briefing on these issues for the Commission or the record.

6 62. The Commission's January 11, 2006 determination that the Curtis Appeal raises a
7 substantial issue had the effect of vacating and invalidating NP's CDP and thus constitutes a
8 taking (and/or damaging, for state constitution purposes) of a constitutionally protected property
9 interest. The Commission's failure to give NP lawful, timely, and adequate notice deprived NP
10 of an opportunity to be heard at a meaningful time and in a meaningful manner. Therefore, the
11 Commission has deprived NP, without due process, of its constitutionally protected property
12 interest in its CDP.

13 63. The January 11, 2006 actions of the Commission are void, unconstitutional, and
14 beyond the power of the Commission in that the untimely and inadequate notice given to NP
15 resulted in NP being denied a fair opportunity to be heard before deprivation of its
16 constitutionally protected property interest.

17 64. NP is entitled to a writ of mandate to void, set aside and vacate the Commission's
18 January 11, 2006 actions on the grounds that the Commission violated NP's constitutional due
19 process rights to a meaningful hearing before deprivation of NP's constitutionally protected
20 property rights.

21 **SECOND WRIT OF MANDATE**

22 **VIOLATION OF NP'S DUE PROCESS RIGHTS -**

23 **FAILURE TO PROVIDE NOTICE PURSUANT TO 14 CCR 13111;**

24 **SPOILIATION OF RECORD AND EVIDENCE**

25 65. NP incorporates by reference paragraphs 1 - 64 as though set forth in full herein.
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1 66. At the time that the City approved NP's development permits on or about August
2 12, 2002, the City also found that NP's CDP was not within the geographical boundaries of the
3 Commission's appellate jurisdiction.

4 67. Nonetheless, on or about September 5, 2002, John Curtis submitted the Curtis
5 Appeal to the Commission. Under 14 CCR §13111, the appellant Curtis was also required to
6 notify any interested persons of the appeal and to deliver a copy of the appeal to said parties.
7 Regulation 13111 specifically provides that the "unwarranted failure to perform such notification
8 may be grounds for dismissal of the appeal by the Commission."

9 68. NP never received notice of the Curtis Appeal from John Curtis, nor did John
10 Curtis ever deliver a copy of his completed Notice of Appeal to NP, as required by 14 CCR
11 §13111. On or about April 9, 2003, in connection with federal lawsuit C-01-4823 concerning
12 NP's project, the deposition of John Curtis was taken by NP's attorneys. At his deposition,
13 Curtis admitted and confirmed that he had never delivered a copy of his appeal to NP. To the
14 date of this Petition, NP has never received a complete, unexpurgated copy of Curtis' appeal.

15 69. On or about October, 2002, NP's attorney, Jaquelynn Pope, and its principals,
16 Keith Fromm and Robert Kalmbach, visited the Coastal Commission offices in San Francisco at
17 a pre-appointed time in order to review the Commission files regarding NP. The appeal
18 submitted by John Curtis was part of the Commission files. The appeal contained in the file
19 consisted of a multi-page written appeal and evidentiary exhibits, as well as attachments. The
20 attachments included various issues of the Pacifica Tribune from the months of June, July and
21 August 2002. The exhibits included a videotape of the August 12, 2002 City Council meeting at
22 which the CDP and other development permits for NP's project were approved by the City.

23 70. At his April 9, 2003 deposition, John Curtis confirmed that the appeal he had
24 submitted to the Commission on or about September 5, 2002, had included as evidentiary
25 exhibits and attachments, copies of the Pacifica Tribune from the months of June, July, and
26 "perhaps" August 2002, and had also included a copy of the videotape of the August 12, 2002
27 City Council meeting at which NP's CDP and other development permits were approved.

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1 71. The Staff Report for the January 11, 2006 meeting includes a copy of the written
2 portion of the Curtis Appeal, including a completed three page form entitled "Appeal from
3 Coastal Permit Decision of Local Government," and ten handwritten pages attached thereto. The
4 handwritten pages reference various evidentiary exhibits entitled "A" through "H." John Curtis
5 listed the exhibits on page 2 of the appeal form. Exhibit "H" is listed as a "VHS copy of the City
6 Council's August 12, 2002 meeting, prepared by Pacifica Community Television (Local Channel
7 26). Exhibit "E" is described as copies of the Pacifica Tribune for 6-12-02, 6-19-02, 7-10-02, 7-
8 17-02, 7-24-02, 7-31-02, 8-07-02, 8-14-02, 8-21-02. (The Curtis Appeal is appended as Exhibit 7
9 to Staff Report for January 11, 2006 meeting, Exhibit 5 hereto.)

10 72. Even though John Curtis confirmed at his deposition that he submitted to the
11 Commission the Videotape of the August 12, 2002 City Council meeting and the copies of the
12 Pacifica Tribune listed above as exhibits to his appeal, and even though the exhibits are actually
13 listed on the appeal form that John Curtis submitted to the Commission, neither the August 12,
14 2002 videotape, nor the newspapers nor any of the other five evidentiary exhibits listed on the
15 appeal form were ever served on NP by Curtis or the Commission. Additionally, neither the
16 August 12, 2002 videotape, nor the newspapers, nor any of the other five evidentiary exhibits
17 listed were reproduced in the Staff Report for the January 11, 2006 hearing, nor provided to the
18 Commission (i.e. the Commissioners voting, as a tribunal, on the matter) for its consideration at
19 the January 11, 2006 hearing. Thus, the Notice that NP received was defective as well as
20 untimely, in that the copy of the Curtis Appeal attached to the Staff Report was incomplete and
21 did not give NP notice of the evidence to be presented to the Commission.

22 73. Furthermore, the August 12, 2002 videotape appears to have been expurgated
23 from the Commission files altogether. Subsequent to NP's initial October, 2002 review of the
24 Commission files regarding NP's project, NP's attorney, Jaquelynn Pope, and its principal
25 Robert Kalmbach again inspected the Commission's files regarding NP's project at the
26 Commission offices in San Francisco. At that time, the August 12, 2002 videotape was missing
27 from the files.

28

1 74. The missing videotape of the August 12, 2002 City Council meeting, at which
2 NP's CDP was approved, recorded the City Council's and the City's staff's discussion of the
3 substantial evidence that supported the City's decision that NP's project was consistent with the
4 City's LCP. Additionally, Curtis' appeal to the City Council concerned and discussed the same
5 issues as Curtis' subsequent appeal to the Coastal Commission. The missing videotape of the
6 August 12, 2002 City Council meeting contained a recodation of the City's own rebuttal of
7 Curtis' arguments and thus provided compelling evidence that Curtis' appeal presented no
8 substantial issue, evidence that the Coastal Commissioners should have, but never saw nor
9 considered in their January 11, 2006 substantial issue hearing. The missing videotape contains
10 evidence that supports NP, and rebuts most if not all of the conclusions set forth by the
11 Commission staff in the Staff Report for the January 11, 2006 meeting, and provides crucial
12 evidence if not conclusive evidence that there was no substantial issue contained in Curtis'
13 appeal.

14 75. The Commission's failure to serve NP with a complete and unexpurgated copy of
15 the appeal, but rather with an inadvertently or intentionally doctored and censored version of
16 same, deprived NP of meaningful notice in that NP was not given notice of the actual appeal and
17 all the evidence that constituted part of that appeal and that had been submitted to the
18 Commission--most particularly evidence that supported NP's position and rebutted that of the
19 Commission's Staff Report. This also deprived NP of a meaningful opportunity to be heard
20 regarding this evidence. If NP had received a copy of the complete Curtis Appeal, as required by
21 the Commission's own regulations, and if NP had received timely Notice of the January 11, 2006
22 substantial issue hearing, NP would have had time to establish that the August 12, 2002
23 videotape had been unlawfully expurgated from the Commission's files, and that the hearing was
24 therefore unfair and should, for this important reason as well, not proceed.

25 76. Further, the failure of the Commissioners to consider the August 12, 2002
26 videotape deprived NP of a fair hearing and a meaningful opportunity to be heard, in that the
27 evidence on the videotape supporting NP's case was never presented to the actual
28

1 Commissioners themselves, though the evidence had been submitted by Curtis as part and parcel
2 of the Curtis appeal, to the Commission (staff) for consideration by the Commissioners in their
3 official deliberations.

4 77. The Commission's failure to provide NP with meaningful notice and a
5 meaningful opportunity to be heard deprived NP of due process at the January 11, 2006
6 substantial issue hearing, and the Commission's January 11, 2006 action, including its resolution,
7 vote and determination, that a substantial issue has been raised by the Curtis appeal is therefore
8 null and void.

9
10 **THIRD PETITION FOR WRIT OF MANDATE**

11 **TO COMPEL THE COMMISSION TO DISMISS THE CURTIS APPEAL**
12 **BECAUSE THE COMMISSION HAS LOST JURISDICTION OVER NP'S CDP AND/OR**
13 **TO PERMANENTLY ENJOIN THE COMMISSION FROM CONDUCTING THE**
14 **CURTIS APPEAL OR ANY APPEAL BECAUSE THE COMMISSION HAS LOST**
15 **JURISDICTION**

16 78. NP incorporates by reference paragraphs 1-77 inclusive, as set forth above.

17 79. Under §§ 30621 and 30625 of the Coastal Act, a local government's approval of a
18 CDP will become final unless the Commission takes action on an appeal within 49 days of the
19 date that the appeal was filed. At a minimum, the Commission must, within the 49-day statutory
20 limitation period, make a (valid) determination as to whether a substantial issue exists. *Encinitas*
21 *Country Day School v. California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584.

22 80. On January 11, 2006, at its meeting in San Pedro, California, the Commission,
23 with NP *in absentia*, purportedly determined that the Curtis appeal raised a substantial issue
24 regarding NP's CDP. In fact, however, any action taken by the Commission at the January 11,
25 2006 hearing is null and void because the Commission failed to give NP and the prescribed
26 members of the public and governmental agencies (including but not limited to those enumerated
27 in the Bagley-Keene Open Meeting Act and Coastal Commission Regulation 13063, such as all
28

1 affected cities and counties, all public agencies which have jurisdiction, by law, with respect to
2 the proposed development, all persons who have requested it, and all persons known by the
3 executive director to have a particular interest in the application and the public) the mandatory,
4 statutorily required minimum public notice of the January 11, 2006 hearing.

5 81. Further, the Commission's violation of NP's due process right to meaningful
6 notice and a meaningful opportunity to present its case also renders the Commission's actions at
7 the January 11, 2006 hearing null and void.

8 82. The Commission has informed NP and the public that the 49-day statutory
9 limitation period on the Curtis appeal expired on February 6, 2006. (See Staff Report, p. 1,
10 (Exhibit 5)).

11 83. The Commission failed to take, within the statutory limitation period, any valid
12 action regarding the Curtis appeal challenging the local government's approval of NP's CDP.
13 Therefore, pursuant to Public Resources Code § 30625, the City's decision approving NP's CDP
14 is final and the Commission has no jurisdiction to hold a *de novo* hearing on the Curtis appeal.

15 84. The Commission has nonetheless informed NP that the Commission does intend
16 to hold a *de novo* hearing on the Curtis appeal.

17 85. The Commission has no jurisdiction to hear an appeal of NP's CDP and therefore
18 has a mandatory duty to dismiss the Curtis appeal. It is therefore appropriate for this Court to
19 issue a writ of mandate compelling the Commission to dismiss the Curtis appeal and restraining
20 and permanently enjoining the Commission from exercising or attempting to exercise any further
21 appellate jurisdiction over NP's CDP.

22 86. It is not necessary to exhaust administrative remedies when the administrative
23 agency acts outside of its jurisdiction, and/or its action is void. *City of Lodi v. Randtron*, (2004)
24 118 Cal. App. 4th 337, 360. Moreover, NP has exhausted its administrative remedies in that,
25 prior to the January 11, 2006 meeting, NP submitted its objections to the Commission that the
26 Commission did not give NP lawful notice of the January 11, 2006 hearing. However,
27 notwithstanding the Commission staff's and Commission's legal counsel's admission that NP
28

1 did not receive timely notice from the Commission, and notwithstanding NP's objections, and
2 presentation by NP to the Commission of clear evidence in the form of the postage meter stamps
3 dated January 3, 2006, that the Commission's Notice for the January 11, 2006 hearing and
4 meeting was, as a legal matter, untimely and defective and, as a practical matter, entirely
5 insufficient and impracticable, the Commission failed and refused to cure or correct the untimely
6 and defective notice, by properly re-noticing, and properly rescheduling and conducting a
7 properly noticed hearing, for a date on or prior to February 6, 2006, the date upon which the
8 statutory limitation period for conducting such a hearing expired. NP has no other administrative
9 remedy that will prevent the Commission from proceeding in excess of its jurisdiction.

10 87. NP will be injured if the Commission is not mandated to dismiss the Curtis appeal
11 and/or is not otherwise permanently enjoined by this honorable Court from conducting such
12 appeal in that the Commission will proceed to hold a *de novo* hearing on NP's CDP, and NP's
13 CDP, which was duly approved by the local government, and which approval has, as a matter of
14 law, now become final, will, instead, be unlawfully invalidated and vacated by the Commission
15 which, by statute, no longer has any jurisdiction to take any such action.

16 88. NP will be additionally irreparably injured if the Commission is not mandated to
17 dismiss the Curtis appeal and/or otherwise permanently enjoined by this Court from conducting
18 such appeal, in that NP will incur further costs and delay, which may cause NP to lose the project
19 due to economic obsolescence, and/or the expiration of other development permits and
20 contractual rights to acquire the real property underlying the project. The value of NP's project
21 is in excess of \$10 million and its loss, if caused by the unlawful actions of the Commission, is
22 unlikely to be recoverable from any source. As a project comprising real and personal property,
23 such as the permit at issue here, NP's project is both unique and irreplaceable.

24 **FOURTH CAUSE OF ACTION**

25 **DECLARATORY RELIEF**

26 89. NP incorporates by reference paragraphs 1- 88 inclusive, as though set forth in
27 full.

28

1 90. An actual controversy now exists between NP and the Commission concerning
2 their respective rights, duties, and obligations as to the CDP that was approved by the City on
3 August 12, 2002, for NP's Bowl project. NP contends that the Commission's actions at the
4 January 11, 2006 hearing, including, *inter alia*, determination that the Curtis appeal raises a
5 substantial issue, are null and void for at least one or more of three reasons:

6 (A) The Commission violated the Bagley-Keene Open Meeting Act by failing and
7 refusing to give the statutorily mandated minimum notice of its January 11, 2006 hearing as
8 prescribed by Government Code § 11125, and therefore the Commission's January 11, 2006
9 actions and vote, determining that the Curtis appeal raises a substantial issue, are null and void
10 under § 11130.3 of the Bagley-Keene Open Meeting Act.

11 (B) The Commission violated its own regulation 14 CCR § 13063 by failing and
12 refusing to give the mandatory, prescribed minimum notice of its January 11, 2006 hearing as
13 required by law, and therefore the Commission's January 11, 2006 actions and vote, determining
14 that the Curtis appeal raises a substantial issue, were conducted in a manner contrary to law and
15 were, therefore, outside of and without the Commission's authority and, were thus, null and void.

16 (C) The Commission violated NP's state and federal due process rights by depriving
17 NP of NP's constitutionally protected property interest in NP's CDP without adequate notice and
18 an opportunity to be heard in a meaningful manner and at a meaningful time. Therefore, the
19 Commission's January 11, 2006 actions and vote determining that the Curtis appeal raises a
20 substantial issue are null and void.

21 91. The Commission admits that it did not serve NP with a timely Notice, that the
22 Notice was defective and that the Commission had violated the 10-day Notice requirement,
23 however, notwithstanding its admitted failure to comply with the express statutory requirements
24 for notice, the Commission nonetheless contests plaintiff's assertions and otherwise contends
25 that the Commission did comply with the Bagley-Keene Open Meeting Act, did comply with
26 Coastal Commission Regulation 14 CCR 13063, and did comply with the due process
27 requirements of the constitutions of the State of California and the United States of America and
28

1 that the Commission's January 11, 2006 actions determining that the Curtis appeal raises a
2 substantial issue were valid actions and were not null and void.

3 92. Additionally, NP contends that, because of the untimely and defective Notice and
4 the Commission's void actions and vote in its January 11, 2006 hearing, the Commission has
5 failed to take any valid action on the Curtis appeal within 49 days of the filing of the appeal, and,
6 did not, at a minimum, make a valid determination within such 49 day statute of limitations, as to
7 whether or not a substantial issue exists. Therefore, under Public Resources Code §§ 30621 and
8 30625, as held by *Encinitas Country Day School v. California Coastal Commission* (2003) 108
9 Cal.App.4th 575, 584-585, the local government's decision approving NP's CDP has become
10 final, and the Commission has lost any appellate jurisdiction it may otherwise have had over
11 NP's CDP.
12

13 93. The Commission contests plaintiff's assertions and otherwise contends that the
14 Commission did take valid action within 49 days of the filing of the Curtis appeal to determine
15 whether the Curtis appeal raises a substantial issue, and, that, therefore, the local government's
16 decision approving NP's CDP has not become final, and the Commission has not lost any
17 appellate jurisdiction it may have had over NP's CDP.

18 94. Plaintiff NP desires a judicial determination and declaration of the parties'
19 respective rights, duties, and obligations regarding NP's CDP, and specifically that the
20 Commission's January 11, 2006 actions and determination that the Curtis appeal raises a
21 substantial issue are null and void, and that the Commission has failed to take any valid action on
22 the Curtis appeal within the 49-day statutory limitation period and that, therefore, the
23 Commission has lost any appellate jurisdiction over NP's CDP that it may otherwise have had.
24
25
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27
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1 **FIFTH CAUSE OF ACTION**

2 **INJUNCTIVE RELIEF**

3 95. Plaintiff NP incorporates by reference paragraphs 1-94 inclusive, as though set
4 forth in full.

5 96. On or about February 12, 2006, the Commission notified NP that the Commission
6 will schedule a *de novo* hearing on the Curtis Appeal challenging the local government's
7 approval of NP's CDP (Exhibit 12). Subsequently, the Commission has stated that the *de novo*
8 hearing will be set for sometime after April, 2006.

9 97. The Commission's proposed *de novo* hearing is contrary to law in that the
10 Commission has lost any appellate jurisdiction that it may have had over NP's CDP.

11 98. NP will be irreparably injured if the Commission is not prohibited from holding
12 the *de novo* hearing on the Curtis Appeal in that the Commission will proceed to hold a *de novo*
13 hearing on NP's CDP, and the CDP, which was approved by the local government, and which
14 approval has become final, will be instead unlawfully invalidated and vacated by the
15 Commission.

16 99. NP will be additionally irreparably injured if the Commission is not mandated to
17 dismiss the Curtis Appeal and/or otherwise permanently enjoined by the Court from conducting
18 such Curtis Appeal (or any other appeal), in that NP will incur further costs and delay, which
19 may cause NP to lose its unique and irreplaceable project due to economic obsolescence and/or
20 the expiration of NP's other development permits or its contractual rights to purchase the real
21 property underlying the project. The value of NP's project is in excess of \$10 million and its
22 loss, if caused by the Commission's unlawful actions, is unlikely to be recoverable from any
23 source.

24 100. NP has no other plain, speedy, and adequate remedy.

25 101. NP is entitled to a temporary restraining order, preliminary injunction, and
26 permanent injunction prohibiting the Commission from holding a *de novo* hearing on the Curtis
27

1 appeal and/or any appeal or purported appeal of NP's CDP, as described in the prayer for relief
2 below, and from conducting any appeal of NP's CDP.

3 **WHEREFORE PLAINTIFF PRAYS:**

4 **FOR THE FIRST PETITION FOR WRIT OF MANDATE:**

5 1. That a peremptory writ of mandate issue commanding respondent, the California
6 Coastal Commission, to vacate, void, set aside, and annul the California Coastal Commission's
7 January 11, 2006 actions in which it made a determination that the appeal filed by John Curtis
8 raises a substantial issue.

9 **FOR THE SECOND PETITION FOR WRIT OF MANDATE:**

10 2. That a peremptory writ of mandate issue commanding respondent, the California
11 Coastal Commission, to vacate, void, set aside, and annul the California Coastal Commission's
12 January 11, 2006 actions in which it made a determination that the appeal filed by John Curtis
13 raises a substantial issue.

14 **FOR THE THIRD PETITION FOR WRIT OF MANDATE**

15 3. That a peremptory writ of mandate issue commanding respondent, the California
16 Coastal Commission, to dismiss the appeal filed by John Curtis regarding the Coastal
17 Development Permit approved for North Pacifica's Bowl project by the City of Pacifica.

18 **FOR NP'S CLAIM FOR DECLARATORY RELIEF:**

19 4. For a declaration that the actions taken by the California Coastal Commission at
20 its January 11, 2006 meeting in San Pedro, California in which it made a determination that the
21 appeal filed by John Curtis regarding NP's Coastal Development Permit raised a substantial
22 issue, are null and void.

23 5. For a declaration that the City of Pacifica's approval of NP's Coastal
24 Development Permit is final and that the Commission has lost any appellate jurisdiction over
25 NP's Coastal Development Permit that it may have had.

26
27
28

1 **FOR NP'S CLAIM FOR INJUNCTIVE RELIEF:**

2 6. For a temporary restraining order, and preliminary and permanent injunctive
3 relief, prohibiting the California Coastal Commission from conducting a *de novo* hearing on the
4 appeal of John Curtis challenging the approval of NP's CDP and from conducting any other
5 appeal or purported appeal of NP's CDP.

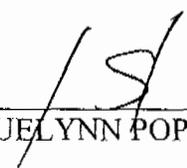
6 **FOR ALL OF THE ABOVE:**

7 7. For attorneys fees pursuant to Government Code § 11130.5 and/or Government
8 Code § 800; and/or CCP 1028.5.

9 8. For damages according to proof;

10 9. For such other and further relief as the Court deems just and proper.

11 DATED: March __, 2006

12 
13 _____
14 JAQUELYNN POPE

14 VERIFICATION

15 I, the undersigned, declare:

16 I am one of the principals of the petitioner herein, North Pacifica, LLC. I have read the
17 above Petitions for Writ of Mandate and for Declaratory and Injunctive Relief and know its
18 contents. The facts alleged in the above petition are true of my own knowledge.

19 I declare under penalty of perjury that the foregoing is true and correct and that this
20 declaration is executed this ____ day of March, 2006 at Oakland, California.

21
22 
23 _____
24 ROBERT KALMBACH

EXHIBIT 1

CALIFORNIA COASTAL COMMISSION

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



February 22, 2006

Jaquelynn Pope
Warshaw & Pope
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254

RE: Public Records Act request dated February 21, 2006

Dear Ms. Pope:

Enclosed are copies of the speakers' slips that you requested in your Public Records Act request dated February 21, 2006.

Sincerely,

A handwritten signature in cursive script, appearing to read "Chris Pederson", written over a horizontal line.

CHRISTOPHER PEDERSON
Supervising Staff Counsel

Enclosures

cc: Chris Kern, California Coastal Commission
Joel Jacobs, Deputy Attorney General

REQUEST TO SPEAK
Agenda No.: 2-02-2-EDD
NON-PERMIT ITEMS
Date: Dec. 16, 2005

KEITH FROMM
Name

NORTH PACIFICA LLC
Organization Represented (if any)
914 WESTWOOD BLVD #500

Address: LOS ANGELES CA 90024

Speaking in opposition to the staff recommendation.

Speaking in favor of the staff recommendation.

I am an owner/resident of affected property (circle owner or resident).

I will show slides (please give slides to a staff person before the hearing begins).

I will need an easel to show charts or photographs.

I have copies of my statement, or other handout materials.

Other equipment or assistance (specify) _____

DECLARATION OF CAMPAIGN CONTRIBUTION (please complete)

Within the past year, I have made campaign contributions of more than \$250 to the following Commissioner(s) or Alternate(s):

NONE

Name(s) of Commissioner(s), or Alternate(s), or "None"

See other side for time limits

NON-PERMIT

REQUEST FOR NOTICE
Name of Item: 2-02-2-EDD

FUTURE HEARINGS
Date: Dec. 16, 2005

NOTE THIS SECTION ONLY IF YOU ARE INTERESTED IN BEING NOTIFIED BY UPCOMING COMMISSION BUSINESS CONCERNING THIS SUBJECT.

KEITH FROMM

914 WESTWOOD BLVD #500

LOS ANGELES COUNTY CA ZIP 90024

PHONE: AREA CODE (310) 556-0202

2.5a
REQUEST TO SPEAK
Application/Appeal No.: 2-02-2-EDD
PERMIT ITEMS
Date: Dec. 16, 2005

KEITH FROMM
Name

NORTH PACIFICA LLC
Representing (self or name of group)

914 WESTWOOD BLVD #500
Address: LOS ANGELES CA 90024

CHECK ALL APPROPRIATE BOXES

In favor of project. I am/represent applicant. *per staff holder*

Opposed to project. I am/represent appellant.

Concerned about project but no firm position. I have handouts for the Commissioners.

I will show slides (please give slides to the staff before the hearing).

DECLARATION OF CAMPAIGN CONTRIBUTION (please complete)

Within the past year, I have made campaign contributions of more than \$250 to the following Commissioner(s) or Alternate(s):

NONE

Name(s) of Commissioner(s), or Alternate(s), or "None"

See other side for time limits

PERMIT

REQUEST FOR NOTICE
Application/Appeal No.: 2-02-2-EDD

OF FUTURE HEARINGS
Date: Dec. 16, 2005

FILL OUT THIS SECTION ONLY IF YOU ARE INTERESTED IN BEING NOTIFIED OF ANY UPCOMING COMMISSION BUSINESS CONCERNING THIS SUBJECT.

KEITH FROMM

914 WESTWOOD BLVD #500

LOS ANGELES COUNTY CA ZIP 90024

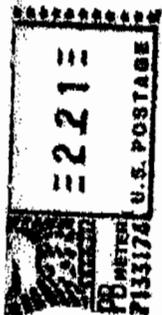
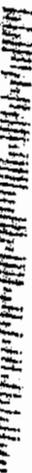
TELEPHONE: AREA CODE (310) 556-0202

EXHIBIT

2

CALIFORNIA
45 FR

SAN FRANCISCO, CA 94105-2219



FIRST CLASS MAIL

11919 NCC A-2-PAC-05-18

KEITH FROMM
NORTH PACIFIC LLC
6114 LA SALLE AVE., STE.207
OAKLAND, CA 94611

EXHIBIT 3

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT OFFICE
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
(415) 904-5260
www.coastal.ca.gov

Page: 1

Date: December 30, 2005

IMPORTANT PUBLIC HEARING NOTICE
NEW APPEAL**PERMIT NUMBER:** A-2-PAC-05-018**APPLICANT(S):** North Pacifica L.L.C.**APPELLANT(S):** John Curtis**DECISION BEING APPEALED:**

Subdivision and construction of a 43 residential unit development, including 19 single-family detached homes and 24 townhouses, 72,000 cubic yards of grading and related infrastructure improvements.

PROJECT LOCATION:

4000 block of Palmetto Avenue, Pacifica (San Mateo County) (APN(s) 009-402-250, 009-402-260)

HEARING DATE AND LOCATION:**DATE:** Wednesday, January 11, 2006**TIME:** Meeting begins at 10:00 AM **ITEM NO:** W 16.5a**PLACE:** LOS ANGELES HARBOR HOTEL

601 South Palos Verdes Street, San Pedro, CA

PHONE (310) 519-8200**HEARING PROCEDURES**

People wishing to testify on this matter may appear at the hearing or may present their concerns by letter to the Commission on or before the hearing date. The Coastal Commission is not equipped to receive comments on any official business by electronic mail. Any information relating to official business should be sent to the appropriate Commission office using U.S. Mail or courier service.

SUBMISSION OF WRITTEN MATERIALS:

If you wish to submit written materials for review by the Commission, please observe the following suggestions:

- We request that you submit your materials to the Commission staff no later than three working days before the hearing (staff will then distribute your materials to the Commission).
- Mark the agenda number of your item, the application number, your name and your position in favor or opposition to the project on the upper right hand corner of the first page of your submission. If you do not know the agenda number, contact the Commission staff person listed on page 2.
- If you wish, you may obtain a current list of Commissioners' names and addresses from any of the Commission's offices and mail the materials directly to the Commissioners. If you wish to submit materials directly to Commissioners, we request that you mail the materials so that the Commissioners receive the materials no later than Thursday of the week before the Commission meeting. Please mail the same materials to all Commissioners, alternates for Commissioners, and the four non-voting members on the Commission with a copy to the Commission staff person listed on page 2.

IMPORTANT PUBLIC HEARING NOTICE
NEW APPEAL

- You are requested to summarize the reasons for your position in no more than two or three pages, if possible. You may attach as many exhibits as you feel are necessary.

Please note: While you are not prohibited from doing so, you are discouraged from submitting written materials to the Commission on the day of the hearing, unless they are visual aids, as it is more difficult for the Commission to carefully consider late materials. The Commission requests that if you submit written copies of comments to the Commission on the day of the hearing, that you provide 20 copies.

ALLOTTED TIME FOR TESTIMONY:

Oral testimony may be limited to 5 minutes or less for each speaker depending on the number of persons wishing to be heard.

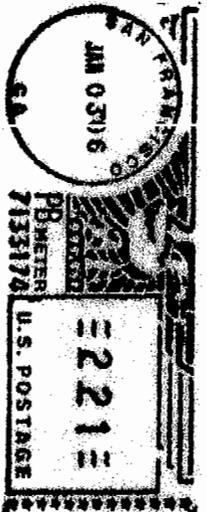
ADDITIONAL PROCEDURES:

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue is raised by the appeal. In its consideration of whether the appeal raises a substantial issue, the Commission may decide to take testimony from the public. In that case, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. If the Commission finds that a substantial issue is raised the Commission will proceed to a de novo public hearing on the merits of the project. If the Commission finds that no substantial issue is raised, the local government's action on the coastal development permit is final.

No one can predict how quickly the Commission will complete agenda items or how many will be postponed to a later date. The Commission begins each session at the time listed and considers each item in order, except in extraordinary circumstances. Staff at the appropriate Commission office can give you more information prior to the hearing date.

Questions regarding the report or the hearing should be directed to Chris L. Kern, Coastal Program Manager, at the North Central Coast District office.

COASTAL COMMISSION
101 STREET, SUITE 2000
DISCO, CA 94105-2219



FIRST CLASS MAIL

JACQUELYNN POPE
WARSHAW & POPE
934 HERMOSA AVE., #14
HERMOSA BEACH, CA 90254

4743 NCC A-2-PAC-05-18

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5260
FAX (415) 904-5400

W-16.5a



Filed: December 19, 2005
49th Day: February 6, 2006
Staff: CLK – SF
Staff Report: December 29, 2005
Hearing Date: January 11, 2006

**STAFF REPORT – APPEAL
SUBSTANTIAL ISSUE & DE NOVO REVIEW**

APPEAL NO.: A-2-PAC-05-018

APPLICANT: North Pacifica LLC

LOCAL GOVERNMENT: City of Pacifica

ACTION: Approval with Conditions

PROJECT LOCATION: 4000 Block of Palmetto Avenue, Pacifica, San Mateo County
APNs 009-402-250 and -260

PROJECT DESCRIPTION: Subdivision and construction of a 43 residential unit development, including 19 single-family detached homes and 24 townhouses, 72,000 cubic yards of grading and related infrastructure improvements on 5.8 acres of vacant land

APPELLANT: John Curtis

SUBSTANTIVE FILE DOCUMENTS: See Appendix A

STAFF RECOMMENDATION: Substantial Issue Exists; Denial

1.0	Substantial Issue Determination	3
1.1	Staff Recommendation on Substantial Issue.....	3
1.1.1	Motion.....	4
1.1.2	Staff Recommendation of Substantial Issue	4
1.1.3	Resolution to Find Substantial Issue.....	4
1.2	Findings and Declarations.....	4
1.2.1	Local Government Action.....	4
1.2.2	Appeal Process.....	4
1.2.3	Filing of Appeal	5
1.2.4	Appellants' Contentions.....	5
1.2.5	Project Description and Location.....	5
1.3	Substantial Issue Analysis.....	6
1.3.1	Wetlands	7
1.3.2	- Water Quality.....	12
2.0	De Novo Review	15
2.1	Staff Recommendation on Permit Application.....	16
2.1.1	Motion.....	16
2.1.2	Staff Recommendation of Denial.....	16
2.1.3	Resolution to Deny the Permit.....	16
2.2	Findings and Declarations.....	16
2.2.1	Wetlands	16
2.2.2	Water Quality.....	17
2.2.3	ESHA	18
2.2.4	Alternatives	20
2.2.5	Alleged Violation.....	21
2.2.6	California Environmental Quality Act (CEQA)	21
	Appendix A-Substantive File Documents.....	23

Executive Summary

The staff recommends that the Commission determine that a substantial issue exists with respect to the grounds on which the appeal has been filed and deny the permit application because the project is inconsistent with the policies of the Pacifica Local Coastal Program (LCP) concerning protection of wetlands and water quality.

The project would fill wetlands for residential development and would include substantial grading, vegetation removal, residential development, and road construction within the 100-foot buffer of wetlands located on and adjacent to the project site. Pacifica LUP Policy 14 does not permit filling of wetlands for residential development and restricts development within wetland habitat buffers. As such, the staff recommends that the Commission find that the appeal raises a substantial issue and deny the permit on the grounds that the proposed development is inconsistent with Pacifica LCP wetland protection policies.

The project does not include feasible site design, source control, or treatment control best management practices (BMPs) to reduce the volume or pollutant load of storm water leaving the

site. As a result, the project would result in a 70% increase in runoff of polluted storm water from the site, which would be discharged to the ocean without treatment. As such, the project is not designed or conditioned to protect the biological productivity and quality of coastal waters as required by LUP Policy 12. Therefore, the staff recommends that the Commission find that the appeal raises a substantial issue and deny the permit on the grounds that the project is inconsistent with Pacifica LCP water quality protection policies.

Grading associated with the proposed development would directly impact coastal terrace prairie habitat on the adjacent "Fish" parcel. Grading in coastal terrace prairie habitat would conflict with the certified LCP because coastal terrace prairie meets the LCP definition of *environmentally sensitive habitat* (ESHA) and LUP Policy 18 prohibits development in ESHA. Although the appeal does not raise this issue, the Commission must consider whether the proposed development meets other applicable policies of the certified LCP in evaluating the proposed development de novo. Therefore, the staff recommends that the Commission find that the appeal raises a substantial issue on the grounds that the appeal is filed and deny the permit on the additional grounds that the project is inconsistent with Pacifica LCP ESHA protection policies.

Denial of the proposed permit will not eliminate all economically beneficial or productive use of the applicant's property or unreasonably limit the owner's reasonable investment backed expectations of the subject property. Denial of this coastal development permit application would still leave the applicant available alternatives to use the property in a manner that would be consistent with the policies of the LCP.

For example, since the wetlands are all located on or near the southeastern and southern boundaries of the project site, development could be clustered in the northwestern portion of the site, allowing a similar number of residential units as approved by the City to be developed while avoiding the wetlands. Realignment of a portion of Edgemar Road and changes to the grading plan would also be necessary to avoid impacts to coastal terrace prairie ESHA on the adjacent "Fish" parcel. A clustered design would also reduce impervious surface coverage, which along with other feasible site design, source control and treatment control BMPs would allow the site to be developed in a manner that meets the water quality requirements of the LCP.

Project revisions necessary to bring the development into conformity with the certified LCP while feasible, would involve substantial site design and engineering work. Such fundamental project revisions are beyond the scope of project changes typically achieved through Commission-imposed conditions of approval on a permit application. Rather, it is the project applicant's responsibility to revise the project plans to address the issues that the Commission has identified. In this case, the applicant has indicated that it is unwilling to modify the project plans to conform to the requirements of the LCP. Therefore, the staff has no choice other than to recommend denial of the permit.

1.0 Substantial Issue Determination

1.1 Staff Recommendation on Substantial Issue

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

1.1.1 Motion

I move that the Commission determine that Appeal No. A-2-PAC-05-018 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.

1.1.2 Staff Recommendation of Substantial Issue

Staff recommends a NO vote. Failure to pass this motion will result in a finding of Substantial Issue and adoption of the following resolution and findings. If the Commission finds Substantial Issue, the Commission will hear the application de novo. The motion may pass only by an affirmative vote of a majority of the Commissioners present.

1.1.3 Resolution to Find Substantial Issue

The Commission finds that Appeal No. A-2-PAC-05-018 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 with the certified Local Coastal Plan (LCP) and/or the public access and recreation policies of the Coastal Act.

1.2 Findings and Declarations

The Commission hereby finds and declares:

1.2.1 Local Government Action

On August 12, 2002, on appeal from the Pacifica Planning Commission, the Pacifica City Council approved CDP-203-01 for a 43-unit subdivision and residential development including roadway and infrastructure improvements. The Commission received a Notice of Final Local Action from the City on August 21, 2002. The City designated the project as non-appealable. Commission staff disagreed with the City's determination that the project was not appealable, and informed the City and applicant that the CDP approved by the City would remain suspended and would not become effective until the dispute concerning appealability and any subsequent appeals of the City's permit were resolved. On December 16, 2005, the Commission determined consistent with Section 13569 of the Commission's regulations that the local approval is appealable to the Commission. The Commission hereby incorporates by reference the findings in support of the December 16, 2005 determination of appealability as if set forth in full.

1.2.2 Appeal Process

After certification of an LCP, Coastal Act Section 30603 provides for appeals to the Coastal Commission of certain local government actions on coastal development permit applications. Section 30603 states that an action taken by a local government on a CDP application may be appealed to the Commission for certain kinds of developments, including the approval of developments located within certain geographic appeal areas, such as those located between the sea and the first public road paralleling the sea, those within 100 feet of any wetland, estuary or stream, those within 300 feet of the mean high tide line or inland extent of any beach or top of the seaward face of a coastal bluff, or those located in 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 zoning ordinance or zoning district map. Finally,

developments that constitute major public works or major energy facilities may be appealed, whether such facilities are approved or denied by the local government.

The Commission received notice from the City on August 21, 2002 designating this project as non-appealable. Pursuant to 14 CCR Section 13569, the Commission has determined that this project is appealable because wetlands as defined in 14 CCR Section 13577(a)(1) are located within 100 feet of the project and because a portion of the approved development is located between the first public road and the sea.

1.2.3 Filing of Appeal

As stated above, the Commission resolved the dispute concerning appealability of the City's action on the local CDP on December 16, 2005. Accordingly, the ten-working-day appeal period ran from December 19, 2005 (the next business-day following the determination of appealability) through January 3, 2006.

On September 5, 2002, John Curtis appealed the City's approval of CDP-203-01 to the Commission. The Commission held the appeal pending resolution of the question of appealability. Curtis' appeal, received on September 5, 2002, was filed on the first day of the appeal period, which commenced on December 19, 2005. Pursuant to Section 30621 of the Coastal Act, the appeal hearing must be set within 49 days from the date on which an appeal is filed.

In accordance with the Commission's regulations, on December 20, 2005, staff requested all relevant documents and materials regarding the subject permit from the City to enable staff to analyze the appeal and prepare a recommendation as to whether a substantial issue exists. The regulations provide that a local government has five working days from receipt of such a request from the Commission to provide the relevant documents and materials.

1.2.4 Appellants' Contentions

The appellant contends that the approved development is inconsistent with the policies of the certified LCP concerning (1) wetlands, (2) water quality, (3) public access, (4) visual resources, (5) geological hazards, and (6) traffic. These contentions are summarized and discussed in greater detail below. (See Exhibit 7 for the full text of the appeal).

1.2.5 Project Description and Location

The project approved by the City consists of a subdivision and development of 43 residential units, including 19 single-family detached homes and 24 townhouses, an interior driveway and road network (including the improvement of the Edgemar Road right-of-way), necessary infrastructure and a private park/open space area on a total of 5.8 acres of land (the 4.2-acre bowl site plus approximately 1.6 acres of roadway construction and grading) at the 4000 block of Palmetto Avenue in Pacifica (APNs 009-402-250 and -260) (Exhibits 1-4). The project would involve in excess of 36,000 cubic yards each of cut and fill and substantial grading of the sloped site to create building pads. As part of the project, an existing 18-inch culvert draining to the ocean would be capped and buried and would not be incorporated into the new drainage system.

In November 2003, the applicant cleared and grubbed the site removing vegetation and disturbing the soil. The clearing and grubbing was the first stage of the development approved under the City's CDP. Because the CDP has been suspended pending the outcome of the

Commission's determination of appealability and final resolution of any appeals, the clearing and grubbing was unpermitted development. For purposes of evaluating the development for conformity with the policies of the certified LCP for both the substantial issue determination of the appeal and any subsequent de novo review of the project, the Commission will review the project as if this unpermitted development had not occurred.

The approved project is located in the City of Pacifica north of Highway 1, east of Palmetto Avenue and west of the Pacific Point housing site. The project area is in the Fairmont West Neighborhood and is zoned R-3-G (Multiple-Family Residential Garden District), which allows for an average density of 10 to 15 dwelling units per acre. However, as stated in both the Land Use Plan (LUP) portion of the City's certified LCP and the City's General Plan:

Site conditions will determine specific density and building type. Site conditions include slope, geology, soils, access, available utilities, public safety, visibility, and environmental sensitivity.

The site consists of two parcels: a 4.2-acre sloping, bowl-shaped parcel ("the Bowl") and a 1.6-acre parcel comprised of the Edgemar Road right-of-way. The land to the west of the project area, between Palmetto Avenue and the shoreline, is presently undeveloped and consists of coastal scrub habitat.

1.3 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.

The contentions discussed below present valid grounds for appeal in that they allege the project's inconsistency with policies of the certified LCP. These contentions allege that the approval of the project by the City raises issues related to LCP provisions regarding wetlands, water quality, public access, visual resources, geological hazards, and traffic.

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

[w]ith 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. The Commission's regulations simply indicate that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Cal. Code Regs., title 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 interpretation of its LCP; and
5. Whether the appeal raises only local issues, or those of regional or statewide significance.

Unless the Commission finds that none of the contentions in the appeal raises a substantial issue, the Commission must review the project on appeal de novo. Even where the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for writ of mandate pursuant to Code of Civil Procedure Section 1094.5.

In this case, for the reasons discussed below, the Commission determines that the development as approved by the City raises a substantial issue with regard to the appellant's contentions regarding wetlands and water quality.

1.3.1 Wetlands

The appellant contends that the approved development is inconsistent with Pacifica LUP Policy 14 because the project would result in unnecessary filling and dredging of wetlands. The appellant also contends that the approved development may impact potentially onsite and nearby wetlands.

Both the LUP portion and the IP portion of the Pacifica LCP contain wetland definitions. The LUP defines wetlands as:

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

This definition closely tracks the definition of wetlands contained in Section 13577(a) of the Commission's regulations. The LCP wetland definition contained in Pacifica Zoning Code Section 9-4.4302(aw) is effectively the same as the Coastal Act Section 30121 definition of wetland with the exception of the two, additional terms, "streams" and "creeks", stating:

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

The Commission's December 16, 2005 determination of appealability was based, in part, on the finding that the approved development is located within 100 feet of wetlands as defined in Section 13577(a) of the Commission's regulations. The Commission's findings concerning the

presence of wetlands are attached as Exhibit 8 and are incorporated herein as if set forth in full. In addition to determining that three wetland areas located on and adjacent to the project site meet the definition of wetland contained in Section 13577(a) for the purpose of determining appeal jurisdiction, the Commission's findings also conclude that:

Since the LCP wetland definitions mirror the operative language of both Coastal Act Section 30121 and Section 13577(a), the scope of the wetland definition under the LCP is effectively identical to that contained in the Coastal Act and Commission regulations. More particularly, the broader Coastal Act and Pacifica Zoning Code definitions encompass and inform the definition contained in 14 CCR Section 13577(a) and the LUP. If the subject property contains wetlands that meet the standards of 14 CCR Section 13577(a), then the subject property also contains wetlands that meet the more general wetland definitions contained in both the Coastal Act and the certified LCP. [Emphasis added.]

Accordingly, the Commission has determined that the areas identified in its December 16, 2005 action as Wetland Areas 1, 2, and 3 are not only wetlands for the purpose of determining Commission appeal jurisdiction, but that these areas also meet the LCP definition of wetland.

Pacifica LUP Policy 14 closely follows Coastal Act Policy 30233 stating in relevant part:

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this policy, where there is no feasible less environmentally damaging alternative and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In wetland areas only, entrance channels for new or expanded boating facilities; and in a degraded wetland, identified by the Department of Fish and Game for boating facilities if, in conjunction with such boating facilities, a substantial portion of the degraded wetland is restored and maintained as a biologically productive wetland; provided, however, that in no event shall the size of the wetland area used for such boating facility, including berthing space, turning basins, necessary navigation channels, and any necessary support service facilities, be greater than 25 percent of the total wetland area to be restored.

(4) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities.

(5) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(6) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable longshore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game shall be limited to very minor incidental public facilities, restorative measures, nature study.

Zoning Code Section 9-4.4403(e) specifies in relevant part:

(1) No new development shall be permitted within a recognized wetland habitat area;

(2) Limited new development may be permitted within a recognized wetland habitat buffer area subject to the following standards:

...

(ii) All diking, dredging, and filling activities shall comply with the provisions of the California Coastal Act, Sections 30233 and 30607.1;

...

(v) Alteration of the natural topography shall be minimized;

...

(vii) Alteration of landscaping shall be minimized unless the alteration is associated with restoration and enhancement of the wetlands;

Zoning Code Section 9-4.4302(f) establishes the LCP wetland buffer as follows:

(f) "Buffer" shall mean an area of land adjacent to primary habitat, which may include secondary habitat as defined by a qualified biologist or botanist, and which is intended to separate primary habitat areas from new development in order to ensure that new development will not adversely affect the San Francisco garter snake and wetlands habitat areas.

Wetland Area 1 is characterized in the applicant's March 2000 wetland delineation as a drainage ditch that lies along the edge of the Edgemar Road right-of-way. The precise location of Wetland Area 1 in relation to the approved development is not clear based on the City's administrative record for the approved development, but it appears to be located just outside of the limits of grading for the construction of Edgemar Road (Exhibit 5). Thus, it appears that the approved development would not directly impact Wetland Area 1, but that grading and road

construction would occur within a few feet of this wetland. Again, although the precise location of Wetland Area 1 in relation to the approved development is unclear based on the City's administrative record, it also appears that two of the approved detached single-family homes would be located within 100 feet of Wetland Area 1. Wetland Area 2 is located approximately 80 feet south of the approved Edgemar Road on the adjacent "Fish" parcel and would not be directly impacted by the approved development. However, the grading and road construction for Edgemar Road would occur within approximately 80 feet of Wetland Area 2. Wetland Area 3 is comprised of approximately 1.1 acres of riparian scrub located in southeast corner of the bowl parcel. The approved development would result in fill of a portion of Wetland Area 3 for the construction of detached single-family homes and related development and would also include substantial grading, road construction and construction of additional residential units within 100 feet of Wetland Area 3.

The LCP policy cited above defining San Francisco garter snake and wetland habitat buffers does not establish a specific wetland buffer distance for either of these habitat types. Thus, the policy requires wetland buffers to ensure that new development would not adversely affect wetland habitat to be determined on a case-by-case basis.

Wetland buffer areas are undeveloped areas surrounding wetlands that act to protect the wetlands from the direct effects of nearby disturbance (both acute and chronic), and provide necessary habitat for organisms that spend only a portion of their life in the wetlands such as amphibians, reptiles, birds, and mammals.

In most cases, the Commission considers 100 feet to be the minimum distance necessary to protect wetlands from adverse impacts of new development. Although not a standard under either the Coastal Act or the Pacifica LCP, the Commission usually considers a 100-foot buffer to be the minimum distance necessary to protect wetland habitat from adverse impacts related to development such as polluted runoff from developed areas, construction related erosion and sedimentation, and disturbance from noise, light, traffic and other activities related to increased human use and development, and to provide upland habitat areas. While 100 feet is by far the most common wetland buffer distance imposed by the Commission and local governments throughout the Coastal Zone, in some cases substantially greater wetland buffers are required when a wetland supports species that are particularly sensitive to disturbance impacts such as nesting birds or species that need large upland habitat areas near wetlands such as the California red-legged frog or San Francisco garter snake. Buffers of less than 100 feet are generally allowed only in cases where a wetland provides very limited habitat value and where restoration or enhancement of the wetland habitat is infeasible. Reduced buffers may also be necessary in cases where no feasible alternative exists that would allow a private property owner a reasonable economic use.

In this case, the most sensitive of the three wetland areas appears to be Wetland Area 3. Wetland Area 3 is described in the city certified Environmental Impact Report (EIR) for the project as comprised of approximately 1.1 acres of central coast riparian scrub dominated by arroyo willow and containing other wetland indicator plants. The EIR states that the project site does not provide habitat for any federally protected species, including the California red-legged frog or San Francisco garter snake, and that "[n]o sensitive or protected species were observed on the site during biological surveys." However, the EIR also states with respect to Wetland Area 3 that:

The riparian habitat at the site provides potential nesting and foraging habitat for several unlisted, but potentially sensitive species that are designated as California Species of Special Concern. Coopers hawk (*Accipiter cooperii*), sharp-shinned hawk (*Accipiter striatus*), northern harrier hawk (*Circus cyaneus*), merlin (*Falco columbrius*), saltmarsh common yellowthroat (*Geothlypis trichas sinuosa*), and yellow warbler (*Dendroica petechia*) could utilize the site. The initial biological survey of the site was done in the nesting season, and no nesting activity was observed for these species. The project will remove much of the riparian/wetland vegetation, and will greatly reduce the function and availability of the site for these bird species. The project is also likely to greatly reduce the value of the site for other more common bird species.

Thus, while Wetland Area 3 is identified as *potential* nesting and foraging habitat for several sensitive bird species, the local administrative record does not provide evidence of actual use of this area by particularly sensitive species. Rather, the evidence shows that Wetland Area 3 provides wetland habitat functions and values typical of coastal riparian wetlands. As such, the Commission finds that neither an increased buffer based on use by highly sensitive species, nor a decreased buffer based on severely limited habitat value would be justified for Wetland Area 3. The Commission therefore finds that a 100-foot buffer should be provided to protect Wetland Area 3 from adverse impacts of the approved development.

Wetland Areas 1 and 2 are smaller than and, based on the information contained in the EIR, do not provide the habitat values as Wetland Area 3. As such, a somewhat reduced wetland buffer may be appropriate under the LCP for these wetlands and the approximately 80-foot distance between the approved development and Wetland Area 2 would likely meet the requirements of the LCP buffer policies. However, little or no buffer is provided between the approved development and Wetland Area 1.

Pacifica LUP Policy 14 does not permit filling of wetlands for residential development and Zoning Code Sections 9-4.4302(f) and 9-4.4403(e) restrict development in wetland habitat buffers. Thus, the appeal raises valid issues concerning conformity of the approved development with LUP Policy 14 and Zoning Code Sections 9-4.4302(f) and 9-4.4403(e). As discussed below, the Commission finds that the issue raised in the appeal concerning conformity of the approved development with LUP Policy 14 and Zoning Code Sections 9-4.4302(f) and 9-4.4403(e) are significant due to the statewide significance of the issue and in terms of the precedential value for future actions by the City under its certified LCP.

Wetlands are important natural resources that provide a variety of ecological, economic, and social benefits. Local government actions on coastal development permits that raise wetland protection issues are therefore of greater than local concern. Wetlands for example are important spawning habitat and nursery areas and provide nutrients for commercially important fisheries. They promote groundwater recharge, improve water quality by removing excess nutrients and chemical contaminants, reduce flooding, and provide important habitat for native plant and animal species, including threatened and endangered species. Roughly 90% of California's wetlands have been lost due to human activities. Among the chief causes of the wetland loss in California is fill for residential development. The acute reduction in wetland habitat serves to increase the value of the wetland areas that remain. Thus, the Commission finds that protection of coastal wetlands is an issue of significant statewide concern. Although much of Pacifica is substantially built out, other undeveloped properties in the City contain known and potential

wetlands. To permit wetland fill for the approved residential development project would establish an adverse precedent for future actions under the LCP wetland protection policies when the City considers future development proposals in other areas in its jurisdiction containing wetlands.

For all of the reasons stated above, the Commission finds that the appeal raises a substantial issue concerning the conformity of the approved development with Pacifica LUP Policy 14 and Zoning Code Sections 9-4.4302(f) and 9-4.4403(e).

1.3.2 Water Quality

The appellant contends that the approved development is inconsistent with Pacifica LUP Policy 12 regarding protection of coastal water quality.

Pacifica LUP Policy 12 closely follows Coastal Act Policy 30231 stating:

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

The approved development would increase storm water runoff from the site by approximately 70% due to increased impervious surface coverage, and would substantially decrease the infiltrative function and capacity of the site. Pollutants commonly found in runoff associated with residential use include petroleum hydrocarbons including oil and grease from vehicles, heavy metals, synthetic organic chemicals including paint and household cleaners, soap and dirt from washing vehicles, dirt and vegetation from yard maintenance, litter, fertilizers, herbicides, and pesticides, and bacteria and pathogens from animal waste. The discharge of these pollutants to coastal waters can cause cumulative impacts such as: eutrophication and anoxic conditions resulting in fish kills and diseases and the alteration of aquatic habitat, including adverse changes to species composition and size, excess nutrients causing algae blooms and sedimentation increasing turbidity which both reduce the penetration of sunlight needed by aquatic vegetation which provide food and cover for aquatic species, disruptions to the reproductive cycle of aquatic species, and acute and sub-lethal toxicity in marine organisms leading to adverse changes in reproduction and feeding behavior. These impacts reduce the biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes and reduce optimum populations of marine organisms and have adverse impacts on human health.

To minimize impacts to the biological productivity and quality of coastal waters, development should be designed and carried out in a manner that controls the volume, velocity and pollutant load of storm water leaving the developed site. Critical to the successful function of post-construction structural Best Management Practices (BMPs) in removing pollutants in storm water to the maximum extent practicable, is the application of appropriate design standards for sizing BMPs. The Commission finds that sizing post-construction structural BMPs to accommodate (infiltrate, filter or treat) the runoff from the 85th percentile storm runoff event, in this case, is equivalent to sizing BMPs based on the point of diminishing returns (i.e. the BMP

capacity beyond which, insignificant increases in pollutants removal (and hence water quality protection) will occur, relative to the additional costs.

The approved development is not designed or conditioned to control the volume or pollutant load of storm water leaving the project site or to infiltrate, filter or treat the runoff from the 85th percentile storm runoff event. As approved and conditioned by the City, runoff from the project site would be directed to a 54-inch diameter, 180-foot storm drainpipe with a 24-inch outlet pipe and a 22-inch restrictor plate. This drainpipe would connect to the City's existing storm water system, which discharges untreated storm water to the ocean. The approved storm water detention system is designed to attenuate the rate of storm water discharge to the City's storm water system at peak flow during a 100-year storm event to less than the pre-development peak flow. Thus, the project would control the velocity of runoff from the site meeting one of the above-stated storm water pollution prevention goals. However, the approved development does not include measures to control either the volume or pollutant load of the runoff leaving the site. Thus, the approved development would result in a significant increase in polluted runoff from the project site, which would be discharged, without treatment to marine waters.

In addition to the storm water detention system described above, Conditions 9, 10, 11 and 25 of the City CDP address water quality impacts related to polluted runoff. Condition 9 specifies that all trash enclosures and dumpsters must be covered and protected from roof and surface drainage and that if water cannot be diverted from these areas, self-contained drainage systems that drain to sand filters shall be installed. Condition 10, specifies that landscaping shall be maintained and designed with efficient irrigation practices to reduce runoff, promote surface filtration, and minimize the use of fertilizers, herbicides, and pesticides. Condition 11 states that no wastewater (including equipment cleaning wash water, vehicle wash water, cooling water, air conditioner condensate, and floor cleaning wash water) shall be discharged to the storm drain system, the street or gutter. Condition 25 requires all storm drain inlets to be stenciled with "No Dumping Drains to Stream." Although these conditions represent positive measures to reduce storm water pollution, the project as approved would result in a 70% increase in runoff from the site, which would be discharged with no treatment into the ocean. As such, the conditions imposed by the City are inadequate to satisfy the requirements of the certified LCP with respect to protection of coastal water quality.

In order to meet the requirements of LUP Policy 12, the project should include additional site design and source control BMPs to reduce the volume of runoff and pollutants from the site, such as:

- Reduction of total impervious surface coverage
- Use of permeable materials for driveways and walkways
- Minimize directly connected impervious surfaces
- Direct rooftop and driveway runoff to onsite pervious areas such as landscaped areas, and avoid routing rooftop runoff to the roadway, drainage ditches, or other storm water conveyance systems
- Minimize vegetation clearing and grading

- Maximize canopy interception and water conservation by preserving existing native trees and shrubs, and planting additional native, drought tolerant trees and large shrubs
- Use of infiltration basins to increase infiltration
- Use of cisterns to collect and store runoff for use in landscaping irrigation

Such measures would decrease the volume of runoff and pollutants from the project site and are required in order to protect the biological productivity and quality of coastal waters pursuant to LUP Policy 12. In addition, given the significant increase in offsite runoff resulting from the approved development, structural or treatment control BMPs to remove pollutants from the storm water prior to discharge to marine waters are necessary to meet the requirements of the City's LCP.

Protection of the biological productivity and quality of coastal waters from impacts related to polluted storm water runoff is an issue of regional and statewide significance. Polluted runoff, also known as nonpoint source (NPS) pollution, is the leading cause of water quality impairments in California and the nation. New development can have significant adverse impacts on coastal water quality and biological productivity, if adequate erosion and runoff control measures are not properly designed and implemented during grading and construction. New development can also adversely affect water quality after construction if permanent pollution prevention, reduction and treatment measures are not provided and maintained for the life of the development.

Urban development increases pollutant load, volume, and velocity of runoff by (1) increasing the amount of impervious surfaces such as paved highways, streets, rooftops, and parking lots; and (2) creating new pollution sources such as higher levels of car emissions, car maintenance wastes, municipal sewage, pesticides, household hazardous wastes, pet wastes, trash, etc. The pollutants found in urban runoff can have damaging effects on both human health and aquatic ecosystems. In addition, the increased flows and volumes of storm water discharged from new impervious surfaces resulting from new development and redevelopment can significantly impact beneficial uses of aquatic ecosystems due to physical modifications of watercourses, such as bank erosion and widening of channels. Even where the additional runoff is piped to the shoreline, the detrimental impacts of freshwater on the marine ecosystem are increased by the higher frequency and longer duration of freshwater runoff to the marine waters. And where dry weather runoff is not properly controlled (such as over watering of landscaping), the natural ability of benthic marine organisms to rebound from pollutant and freshwater impacts of winter rain events is diminished.

The Commission shares responsibility for regulating nonpoint source water pollution in the Coastal Zone of California with State Water Resources Control Board (SWRCB) and the coastal Regional Water Quality Control Boards (RWQCBs). The Commission and the SWRCB are co-leads for the state in implementing the *Plan for California's Nonpoint Source Pollution Control Program*, which outlines a strategy to ensure that management measures and practices that reduce or prevent polluted runoff are implemented over a fifteen-year period. The Commission has primary responsibility for protecting coastal resources, including water quality, from the impacts of development in the coastal zone. The SWRCB and RWQCBs have primary responsibility for regulating discharges that may impact waters of the state through writing

discharge permits, investigating water quality impacts, monitoring discharges, setting water quality standards and taking enforcement actions where standards are violated.

Locally, polluted runoff is a significant issue that threatens the health of the City's popular beaches and leads to beach closures. The San Francisco Bay Regional Water Quality Control Board list the Pacific Ocean at Linda Mar, San Pedro, and Rockaway Beaches in Pacifica as impaired water bodies due to high coliform counts from urban runoff/storm sewers and nonpoint source (RWQCB 2002). Linda Mar beach, which is a popular Bay Area surfing beach, has frequently exceeded the state's standards for beach water quality during wet weather periods.

Five court decisions in California in the past year have rejected challenges to strong cleanup plans, permits, and pollution prevention programs. Three of these rulings focused on cleaning up contaminated storm water runoff—the largest source of pollution to California's coastal waters—in San Diego and Los Angeles. The cases, brought by industry groups, builders, and some municipalities, challenged storm water permits issued by the Regional Water Boards for San Diego and Los Angeles in 2001. The permits contain pollution prevention and control programs that require stepped-up industrial inspections, enhanced public education, additional efforts to meet water quality standards, and a number of other improvements. Similar but weaker permits were issued in Orange County, Riverside, and San Bernardino, as well as smaller municipalities throughout California in 2002. The San Bernardino Superior Court rejected the challenge to that county's permit in late 2004 (NRDC 2005).

In December 2004, the California Court of Appeal rejected a challenge to the San Diego permit (one of the strongest pollution prevention plans in the nation), holding that state regulators can require that bodies of water are clean, not merely require that polluters make an effort to reduce contaminated runoff.

The California Supreme Court similarly rejected challenges to the Clean Water Act by the cities of Burbank and Los Angeles in treating waste from sewage plants in April 2005. The Court held that polluters cannot use cost arguments to avoid complying with federal sewage cleanup rules. The U.S. Ninth Circuit Court of Appeals also rejected challenges to the Los Angeles Trash TMDL (Total Maximum Daily Loads), a new rule to eliminate thousands of tons of trash from the Los Angeles River and Southern California coastal waters over 14 years.

In summary, the approved development does not include feasible site design, source control, or treatment control BMPs to reduce the volume or pollutant load of storm water leaving the site, and would therefore result in a significant increase in runoff of polluted storm water from the site that would be discharged to the ocean without treatment. As such, the project is not designed or conditioned to protect the biological productivity and quality of coastal waters as required by LUP Policy 12. Therefore, the Commission finds that the appeal raises a substantial issue concerning the conformity of the approved development with Pacifica LUP Policy 12.

2.0 De Novo Review

Unless the Commission finds that a locally approved coastal development permit raises No Substantial Issue with respect to the policies of the certified LCP, the Commission must consider the merits of the proposed project de novo. The Commission may approve, approve with conditions (including conditions different than those imposed by the County), or deny the application.

2.1 Staff Recommendation on Permit Application

2.1.1 Motion

I move that the Commission approve Coastal Development Permit No.A-2-PAC-05-018 for the development as proposed by the applicant.

2.1.2 Staff Recommendation of Denial

Staff recommends a NO vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

2.1.3 Resolution to Deny the Permit

The Commission hereby denies a coastal development permit for the proposed development on the grounds that the development will not conform with the policies of the City of Pacifica certified Local Coastal Program. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

2.2 Findings and Declarations

The Commission hereby finds and declares:

The Commission hereby incorporates by reference the Substantial Issue findings above as if set forth in full.

2.2.1 Wetlands

As stated above, proposed development would fill Wetland Area 3 for the construction of single-family homes and related development, and would be located within 100 feet of Wetland Areas 1, 2, and 3. Pacifica LUP Policy 14 does not permit filling of wetlands for the construction of roads or residential development. In addition, Zoning Code Section 9-4.4403(e) specifies in relevant part:

- (1) No new development shall be permitted within a recognized wetland habitat area;
- (2) Limited new development may be permitted within a recognized wetland habitat buffer area subject to the following standards:

...

- (ii) All diking, dredging, and filling activities shall comply with the provisions of the California Coastal Act, Sections 30233 and 30607.1;

...

- (v) Alteration of the natural topography shall be minimized;

...

- (vii) Alteration of landscaping shall be minimized unless the alteration is associated with restoration and enhancement of the wetlands;

Zoning Code Section 9-4.4302(f) establishes the LCP wetland buffer as follows:

(f) "Buffer" shall mean an area of land adjacent to primary habitat, which may include secondary habitat as defined by a qualified biologist or botanist, and which is intended to separate primary habitat areas from new development in order to ensure that new development will not adversely affect the San Francisco garter snake and wetlands habitat areas.

The proposed development would fill a portion of Wetland Area 3 for the construction of residential development in conflict with LUP Policy 14 and Zoning Code Section 9-4.4403(e)(1), which expressly prohibit wetland fill for residential development. Therefore, the Commission finds that the approved development is inconsistent with the Pacifica LCP.

The proposed project would also include substantial development adjacent to Wetland Areas 1, 2, and 3 and must therefore be evaluated for consistency with the LCP wetland buffer policies. As discussed in Section 1.3.1 above, the Commission finds that a 100-foot buffer is necessary under the LCP to protect Wetland Area 3 from adverse impacts of the proposed development and that a reduced buffer would be allowable under the LCP for Wetland Areas 1 and 2.

Substantial grading, residential development and road construction would occur within 100 feet of Wetland Area 3 in conflict with Zoning Code Sections 9-4.4302(f) and 9-4.4403(e). The proposed grading and road construction for Edgemar Road would occur within a few feet of Wetland Area 1. Although a somewhat reduced buffer may be permissible under the LCP's case-by-case wetland buffer policy, the proposal to provide essentially no buffer between the development and Wetland Area 1 would not meet the requirements of Zoning Code Sections 9-4.4302(f) and 9-4.4403(e). Given the limited habitat values of Wetland Area 2, the approximately 80-foot distance between the proposed development and this wetland would meet the LCP habitat buffer policies. Thus, the proposed development would be located within the habitat buffers of Wetland Areas 1 and 3 but outside of the buffer of Wetland Area 2 if reduced to 80 feet.

In accordance with Zoning Code Section 9-4.4403(e), development may only be located in wetland buffer areas if alteration of the natural topography and landscaping are minimized. The proposed development would include substantial grading and removal of existing vegetation within the buffer areas of Wetland Areas 1 and 3 in conflict with these requirements. Therefore, the Commission finds that the proposed development would be inconsistent with Pacifica LCP Zoning Code Sections 9-4.4302(f) and 9-4.4403(e) because the development would be located with the wetland habitat buffers of Wetland 1 and 3 and would involve significant alteration of the natural topography and landscaping.

2.2.2 Water Quality

As stated above, polluted runoff is a significant issue in Pacifica that threatens the health of the City's popular beaches and leads to beach closures. The San Francisco Bay Regional Water Quality Control Board lists the Pacific Ocean at Linda Mar, San Pedro, and Rockaway Beaches in Pacifica as impaired water bodies due to high coliform counts from urban runoff/storm sewers and nonpoint source pollution (RWQCB 2002). Linda Mar beach, which is a popular Bay Area surfing beach, has frequently exceeded the state's standards for beach water quality during wet weather periods.

LUP Policy 12 requires the biological productivity and the quality of coastal waters to maintain optimum populations of marine organisms and for the protection of human health to be maintained and, where feasible, restored. The proposed development would increase storm water runoff from the site by approximately 70% due to increased impervious surface coverage, and would substantially decrease the infiltrative function and capacity of the site. As proposed, the project is not designed to control the volume or pollutant load of storm water leaving the project site or to infiltrate, filter or treat the runoff.

As proposed, runoff from the development site would be directed to a detention system to reduce the rate of discharge at peak flow. This system would serve only to attenuate the velocity of runoff discharged from the site. However, all of the increased runoff from the development would be discharged, without treatment to remove pollutants, into the ocean. Thus, the proposed development would unnecessarily result in a significant increase in storm water pollution.

The proposed development does not include feasible site design and source control measures to reduce the volume of runoff and pollutants from the project site. In addition, a project of this scale should include structural BMPs adequately sized and designed to accommodate (infiltrate, filter or treat) the runoff from the 85th percentile storm runoff event consistent with the Commission's implementation of the State's Coastal Nonpoint Source Pollution Control Program.

Failure to include feasible site design and source control BMPs to reduce the volume of runoff and pollutants from the site, and to provide treatment controls to remove pollutants before discharging runoff to the ocean is inconsistent with the requirements of LUP Policy 12 to protect the biological productivity and quality of coastal waters. Therefore, the Commission finds that the proposed development is inconsistent with the water quality protection policies of the Pacifica LCP.

2.2.3 ESHA

Grading associated with the proposed development would directly impact coastal terrace prairie habitat on the adjacent "Fish" parcel. As further discussed below, grading in coastal terrace prairie habitat would conflict with the certified LCP because coastal terrace prairie meets the LCP definition of *environmentally sensitive habitat*, and LUP Policy 18 prohibits development in environmentally sensitive habitat areas. Although the appeal does not raise this issue, the Commission must consider whether the proposed development meets other applicable policies of the certified LCP in evaluating the proposed development de novo.

LCP Zoning Code Section 9-4.4302 defines environmentally sensitive habitat as follows:

"Environmentally sensitive habitat" shall mean 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 would be easily disturbed or degraded by human activities or development.

Pacifica LUP Policy 18 closely tracks Coastal Act Policy 30240 stating:

Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas. Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts

which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

The project EIR identifies an area as coastal terrace prairie located within the limits of the grading area for the proposed development on the "Fish" parcel adjacent to the project site (Exhibit 6). The EIR includes a list of plants identified on (and adjacent to) the site corresponding with different identified habitat types. Three of the plant species listed as within the coastal terrace prairie habitat area are considered diagnostic species of this rare native grassland. As of the date of this staff report, the Commission staff has not received a vegetation survey indicating the relative abundance of these species or other information necessary to fully evaluate the quality of the identified coastal terrace prairie. However, the vegetation data contained in the EIR does not contradict the conclusion reached in the EIR that this area has been properly identified as coastal terrace prairie. In the absence of any evidence to the contrary, the Commission finds that the area indicated in the EIR as coastal terrace prairie is correctly identified.

Coastal terrace prairie is dense, tall grassland dominated by both sod and tussock forming perennial grasses. The distribution of coastal terrace prairie is discontinuous from Santa Cruz County north into Oregon, and may include different combinations of associated plant communities depending on the conditions at a particular location. The diversity of plant species in coastal terrace prairie is among the highest in grasslands of North America (Stohlgren et al. 1999). Coastal terrace prairie contains more plant species per square meter than any other grassland in North America. In addition, there are numerous rare, threatened, and endangered species associated with this habitat type. The California Native Plant Society (CNPS) reports:

"...prairie habitats support as many as 250 species of native wildflowers. For Santa Cruz County, the CNPS lists 13 species of concern in their Inventory of Rare and Endangered Plants of California (1995). The diversity of these prairie wildflower species, in turn, supports an even greater diversity of insect species, many of which are severely reduced in numbers (e.g., *Schinia* sp. - a genus of colorful diurnal noctuid moths; and solitary bees such as in the families Andrenidae and Anthophoridae) and some of which teeter on the verge of extinction (e.g., *Cicindela* Ohlone, Ohlone Tiger Beetle and *Adela oplerella*, Opler's long horned moth). Some known species have already been lost (e.g., *Lytta molesta*, molestan blister beetle) and, undoubtedly, others have disappeared before even being described. The reduction in numbers of plant species and numbers of populations of insects leads to a collapse in the prey base for many other species- birds, shrews, and bats, for instance." (CNPS)

As such, coastal terrace prairie is an especially valuable habitat because of its special nature and role in the ecosystem.

A recently completed study by Defenders of Wildlife ranked twenty-one United States ecosystems as the nation's most endangered; California's native grasslands ranked as the fifth most endangered ecosystem (Noss and Peters, 1995). Other studies have found that California has lost over 99% of its native grasslands, including 90 percent of the north coastal bunchgrass (Sierra Club, 2004, Noss and Peters, 1995). The loss of coastal terrace prairie has continued over the years due to development, conversion of habitat to agricultural uses, exotic weed invasion, habitat fragmentation, and erosion. The loss of coastal terrace prairie habitat over time has not

been quantified, but is considered significant by researchers in the field. Thus, the available evidence demonstrates that coastal terrace prairie is a rare habitat.

The California Department of Fish and Game has identified coastal terrace prairie as rare habitat. Additionally, other local governments in the Central Coast area of California have recognized the need to protect remaining coastal terrace prairie habitat. The City of Carmel-by-the-Sea has included coastal terrace prairie as an Environmentally Sensitive Habitat Area (ESHA) under the City's General Plan/Coastal Land Use Plan that includes policies for protection of the City's coastal environmental resources.

Furthermore, the County of Monterey, in its General Plan Draft Coastal Element, has currently proposed listing coastal terrace prairie as an Environmentally Sensitive Habitat Area:

“...protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.”

As discussed above, coastal terrace prairie is a rare and especially valuable native grassland habitat that supports several rare and endangered species and plays an important role in the ecosystem. The importance of coastal terrace prairie habitat is widely recognized by both government and non-government organizations, including the California Department of Fish and Game. As such coastal terrace prairie is an environmentally sensitive habitat (ESHA) as defined in LCP Zoning Code Section 9-4.4302.

The City did not evaluate the proposed grading of coastal terrace prairie identified in the EIR for conformity with LUP Policy 18. As such, the local administrative record provides little information about this impact and does not quantify the loss of coastal terrace prairie habitat that would result from the proposed development. Nonetheless, the area is clearly shown as located within the “grading line” in Figure IV-B-1 of the EIR (Exhibit 6).

Grading for road construction and residential development is not a use that is dependent on coastal terrace prairie habitat and is therefore prohibited in such areas pursuant to LUP Policy 18. Therefore, the Commission finds that the proposed development is inconsistent with LUP Policy 18.

2.2.4 Alternatives

Denial of the proposed permit will not eliminate all economically beneficial or productive use of the applicant's property or unreasonably limit the owner's reasonable investment backed expectations of the subject property. Denial of this coastal development permit application would still leave the applicant available alternatives to use the property in a manner that would be consistent with the policies of the LCP.

For example, since the wetlands are all located on or near the southeastern boundary of the project site, development could be clustered in the northwestern portion of the site, allowing a similar number of residential units as approved by the City to be developed while avoiding the wetlands. Because Wetland Area 3 is located between the approved development and Wetland Area 1, a 100-foot buffer from Wetland Area 3 would also serve as an adequate buffer for Wetland Area 1.

A clustered design would also reduce impervious surface coverage, which, along with other feasible site design, source control, and treatment control BMPs to increase onsite infiltration

and reduce the volume of runoff and the pollutant load of storm water leaving the project site, would allow the site to be developed consistent with the water quality requirements of the LCP.

Project revisions necessary to bring the development into conformity with the certified LCP while feasible, would involve substantial site design and engineering work. For example, to avoid wetland fill and provide adequate buffers between the development and Wetland Areas 1 and 3, it appears that at least five of the proposed detached single-family homes and two of the proposed triplex townhouse buildings would need to be either eliminated or relocated and Edgemar Road would need to be realigned. Avoiding wetland fill and providing adequate habitat buffers would also require significant changes to the proposed site grading. Realignment of a portion of Edgemar Road and changes to the grading plan would also be necessary to avoid impacts to coastal terrace prairie ESHA on the adjacent "Fish" parcel. Such fundamental project revisions are beyond the scope of project changes typically achieved through Commission-imposed conditions of approval on a permit application. Rather, it is the project applicant's responsibility to revise the project plans to address the issues that the Commission has identified. In this case, the applicant has indicated that it is unwilling to modify the project plans to conform to the requirements of the LCP. Therefore, the staff has no choice other than to recommend denial of the permit.

2.2.5 Alleged Violation

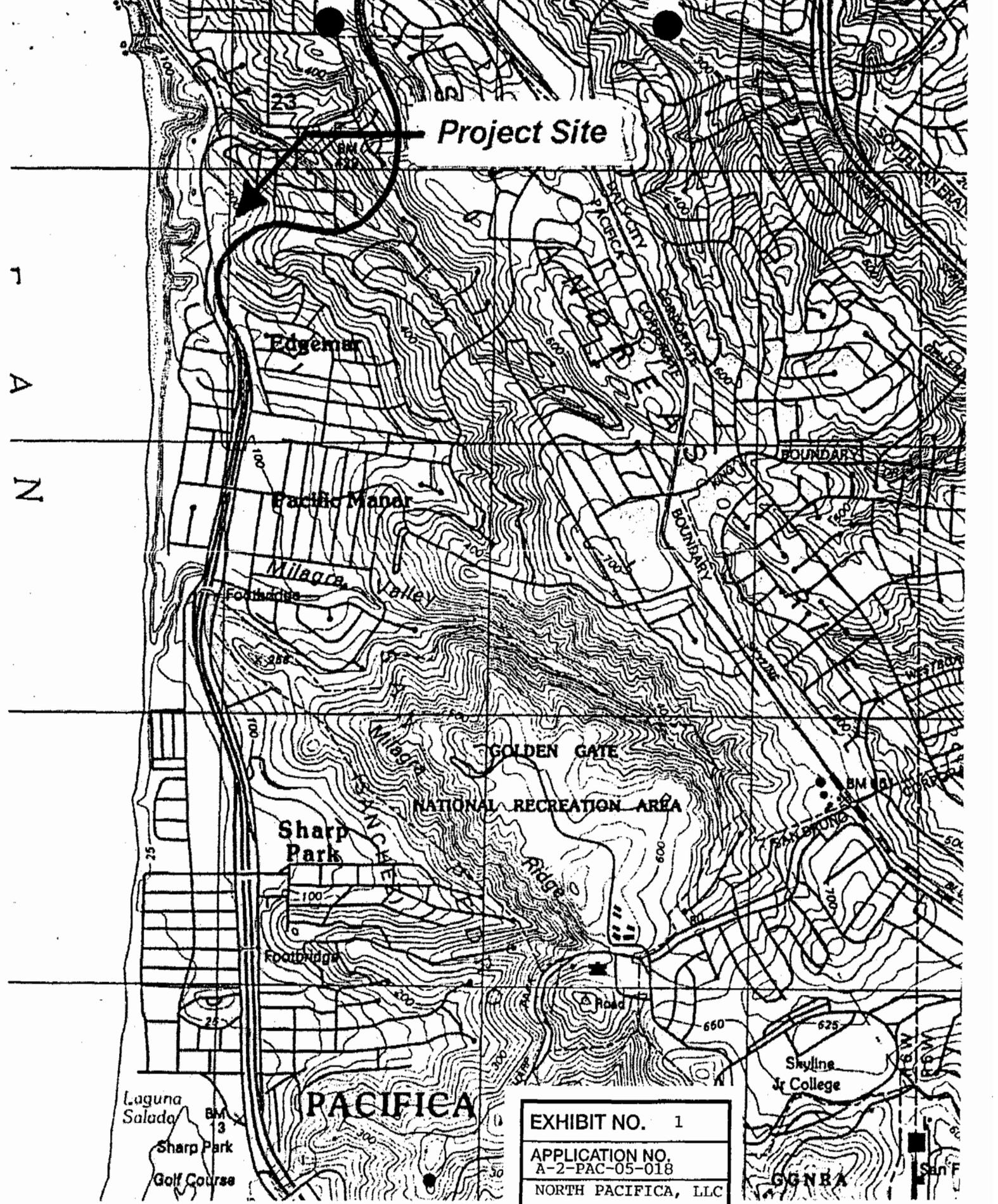
In November 2003, the applicant undertook development consisting of clearing and grubbing the project site. Because the City-approved CDP has been suspended pending the outcome of the Commission's determination of appealability and final resolution of any appeals, the clearing and grubbing constituted unpermitted development. Although development has taken place prior to Commission action on the CDP, consideration of the CDP on appeal by the Commission has been based solely upon the policies of the certified LCP. Commission action on the appeal does not constitute a waiver of any legal action with regard to the alleged violation, nor does it constitute an admission as to the legality of any development undertaken on the site without a coastal development permit.

2.2.6 California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. The Commission incorporates its findings on LCP policies at this point as if set forth in full. For the reasons described in the Commission findings above, the Commission finds that there are feasible mitigation measures and alternatives that would substantially lessen the significant adverse impacts of the development on the environment. Feasible alternatives to the proposed development include clustering the development in the northern two-thirds of the site to avoid the wetlands and reduce impervious surface coverage. By incorporating site design, source control and treatment control BMPs to increase onsite infiltration and to reduce the volume of runoff and the pollutant load of storm water leaving the project site, the water quality requirements of the LCP could be feasibly met.

Appendix A—Substantive File Documents

- California Department of Fish and Game, September 2004, Natural Diversity Database: Rarefind 2 Database, California Department of Fish and Game, Sacramento, California.
- California Native Plant Society, Santa Cruz Chapter, Plant Communities of Santa Cruz County, Coastal Terrace Prairie, <http://www.cruzcnpns.org/CoastalTerracePrairie.html>
- City of Pacifica, Pacifica Bowl Development Project Environmental Impact Report, Public Review Draft, March 2002.
- City of Pacifica, Pacifica Bowl Development Project, Response to Comments and Final Environmental Impact Report, June 2002.
- Hayes, Grey, 2003. Conservation Strategy for Coastal Prairie Conservation
- Holland, Robert F., Ph. D., California Department of Fish and Game, October 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California.
- Natural Resources Defense Council, Testing the Waters, 2005.
- Reed Noss and Robert L. Peters, Endangered Ecosystems: A Status Report on America's Vanishing Habitat and Wildlife, (Washington, D.C.: Defenders of Wildlife, 1995.
- San Francisco Bay Regional Water Quality Control Board, CWA Section 303(d) List of Water Quality Limited Segment, 2002.
- Stohlgren, T. J., D. Binkley, G. W. Chong, M. A. Kalkhan, L. D. Schell, K. A. Bull, Y. Otsuki, G. Newman, M. Bashkin, and Y. Son. 1999. Exotic plant species invade hot spots of native plant diversity. *Ecological Monographs* 69:25-46.
- “The State of Disappearing Species and Habitat: A Sierra Club Report.” Sierra Club. May 19 2004.



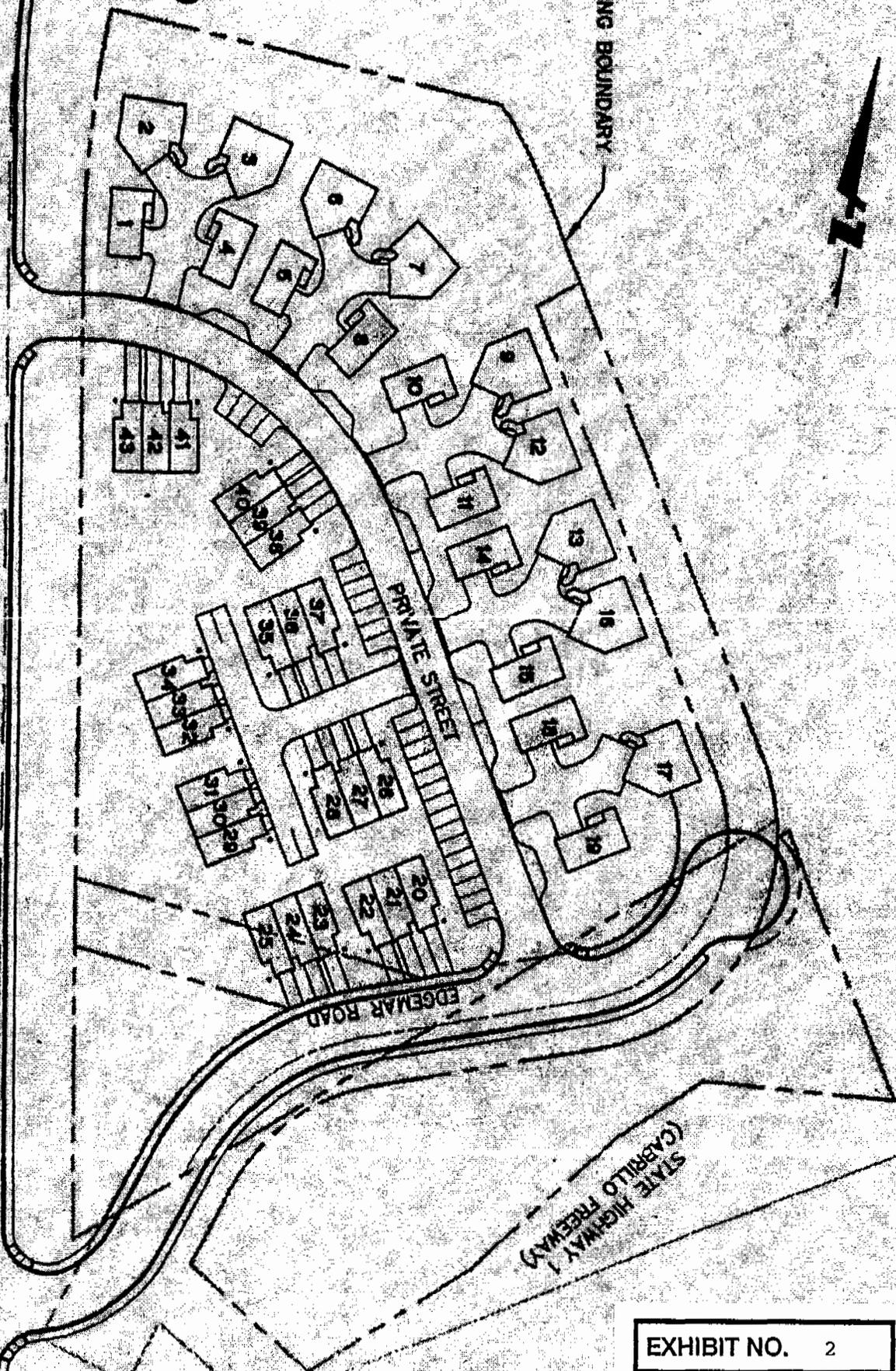
Project Site

1
A
N

EXHIBIT NO. 1
APPLICATION NO. A-2-PAC-05-018
NORTH PACIFICA, LLC
Location Map



EXISTING BOUNDARY



PALMETTO AVENUE

PRIVATE STREET

EDGEMAR ROAD

STATE HIGHWAY 1
(CABRALLO FREEWAY)

SITE PLAN

SCALE: 1"=100'

EXHIBIT NO. 2
APPLICATION NO. A-2-PAC-05-018
NORTH PACIFICA, LLC
Site Plan

Figure II-4 Building Elevations

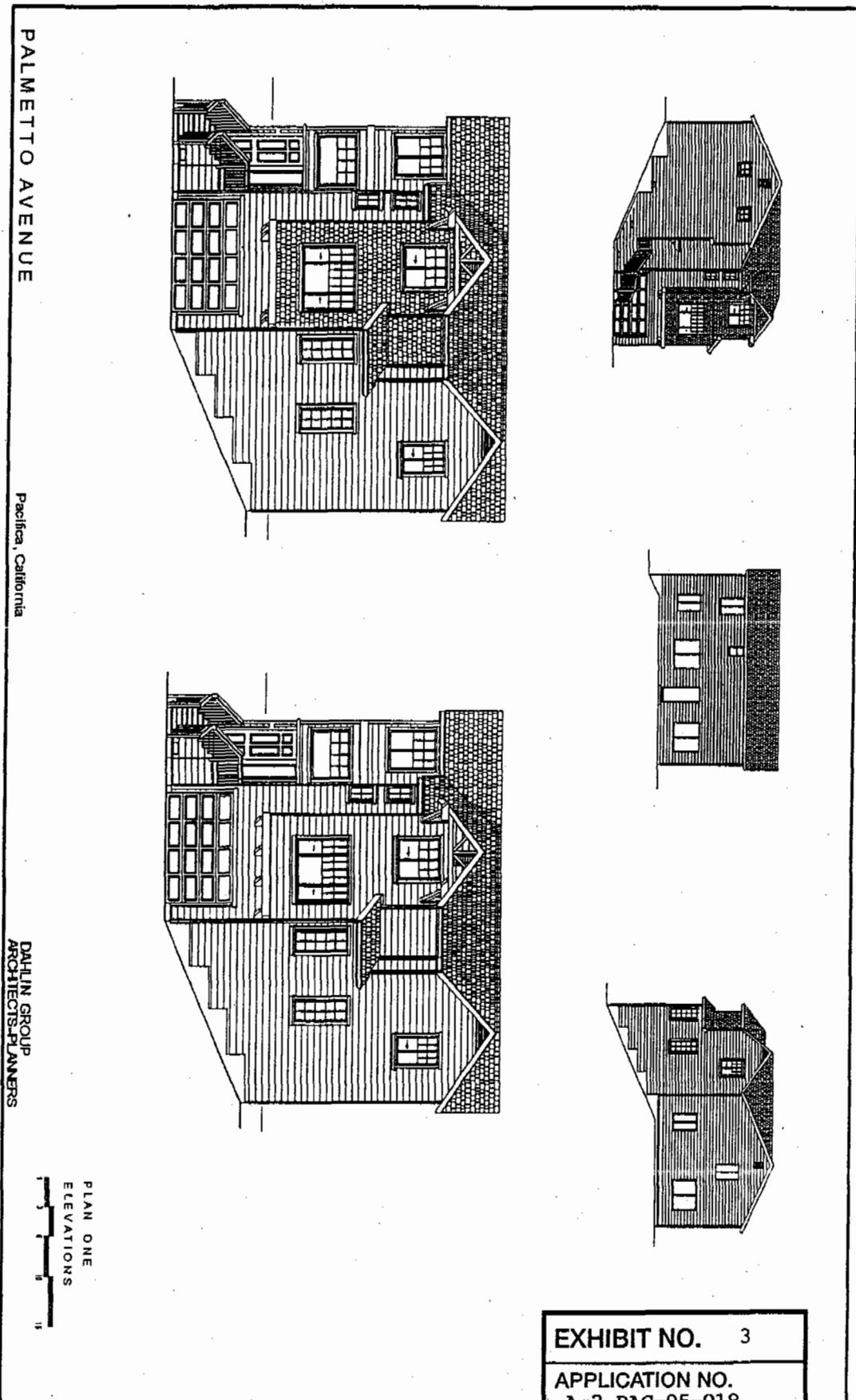


EXHIBIT NO.	3
APPLICATION NO.	A-2-PAC-05-018
	NORTH PACIFICA, LLC
Elevations (Page 1 of 4)	

Figure II-5 Building Elevations Single-Family Homes

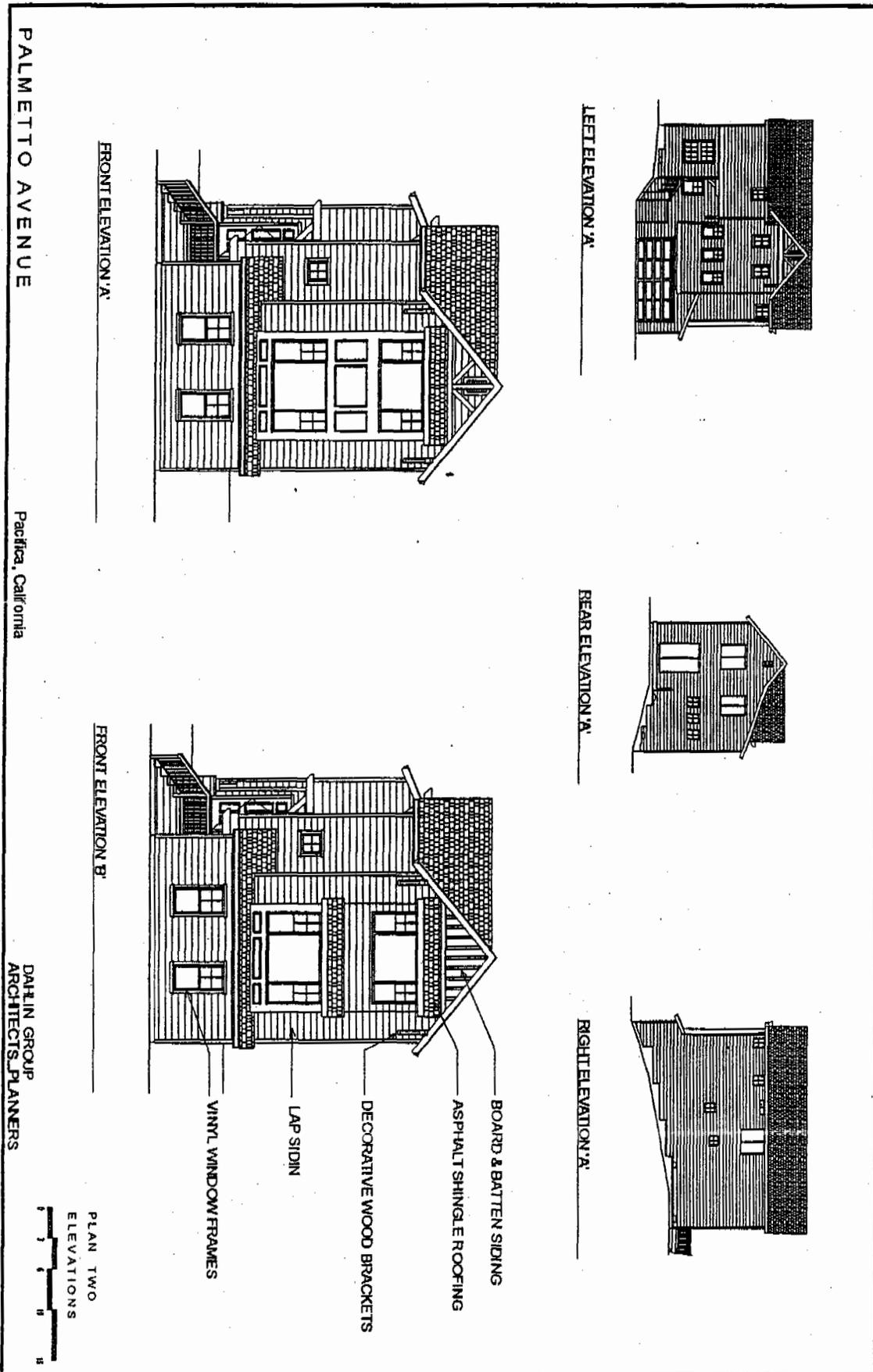


Figure II-6 Building Elevations Multi-Family Homes

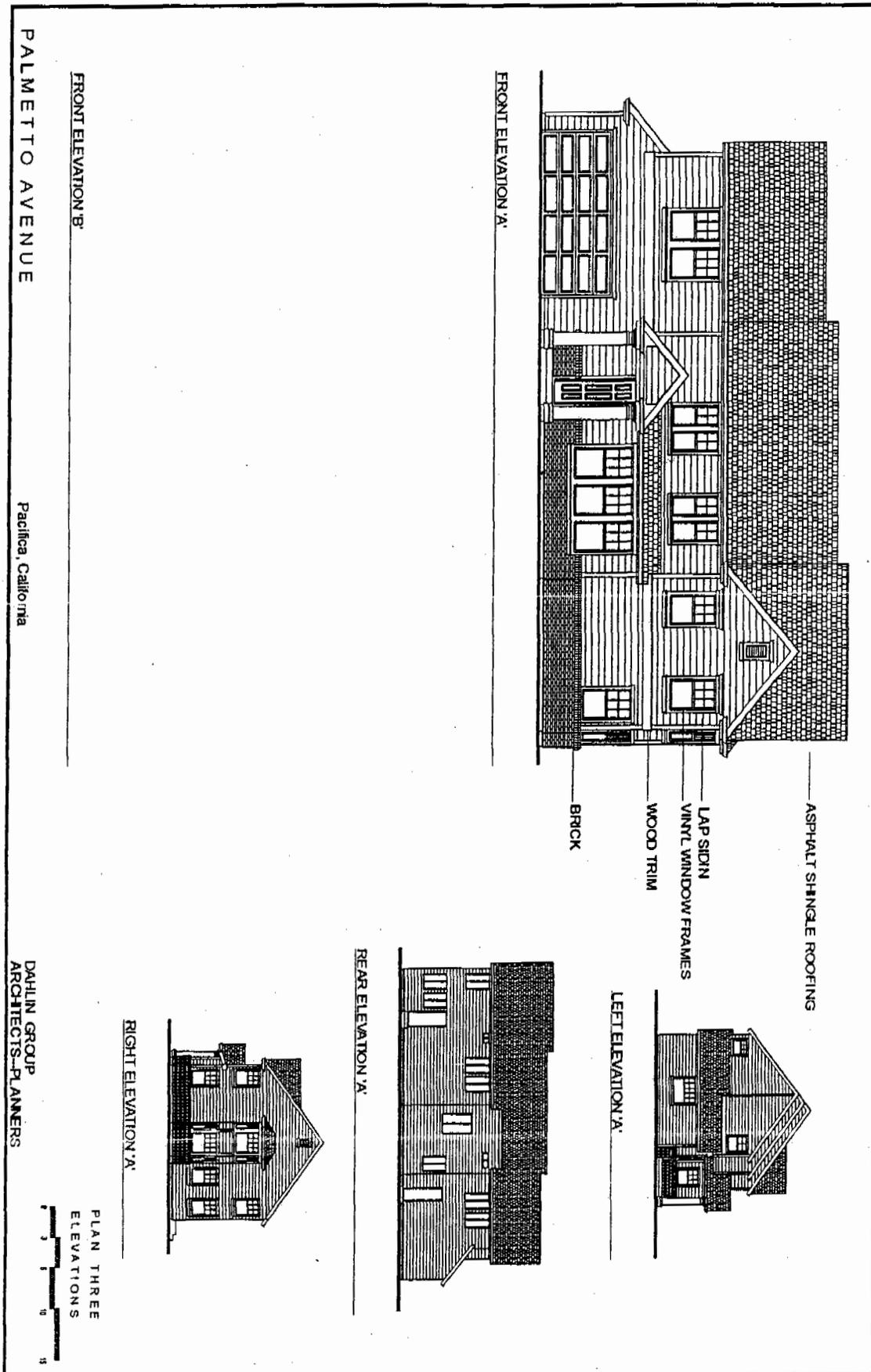
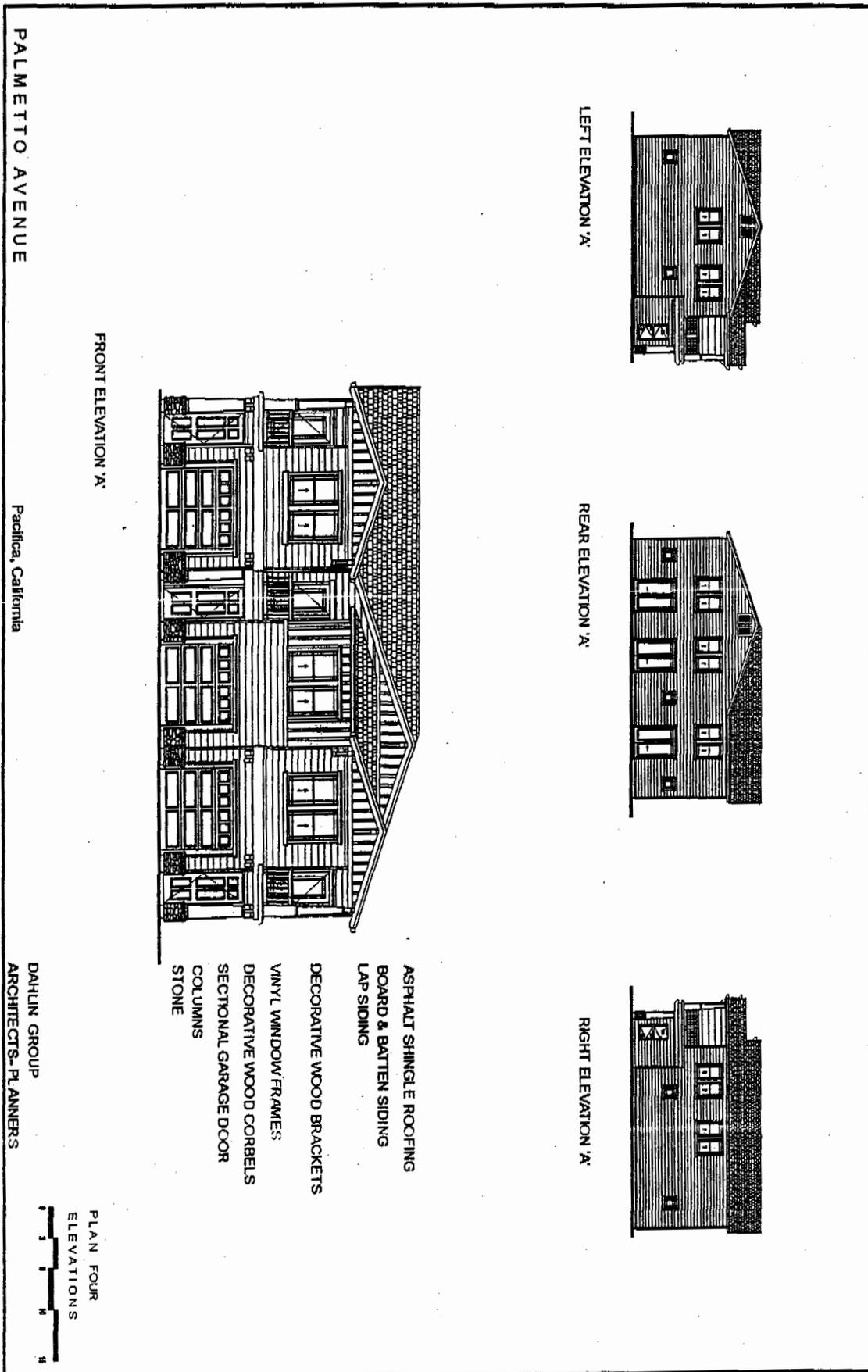
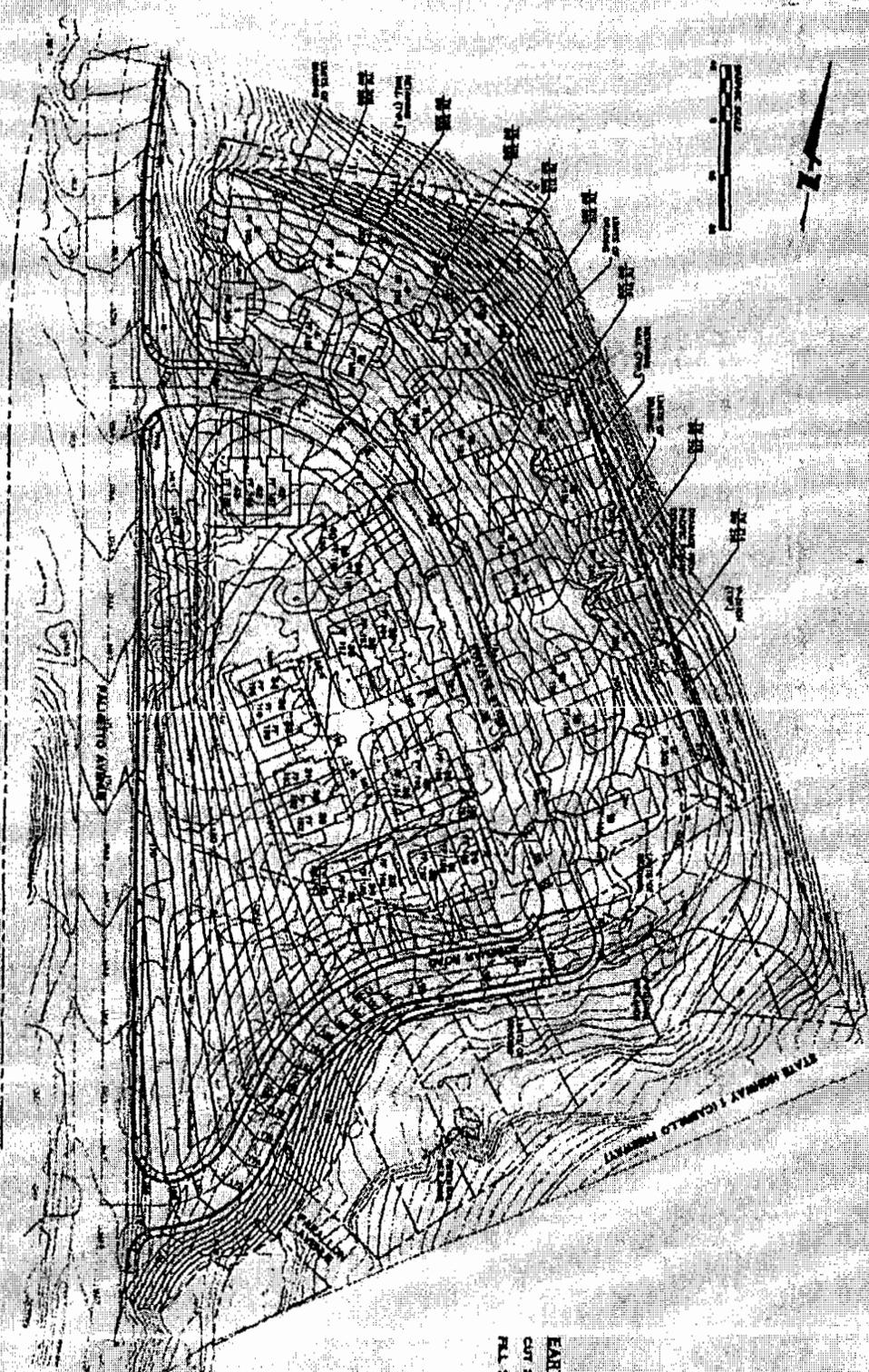


Figure II-7 Building Elevations Multi-Family Homes





EARTHWORK
 CUT 28,000 CY
 FILL 28,000 CY

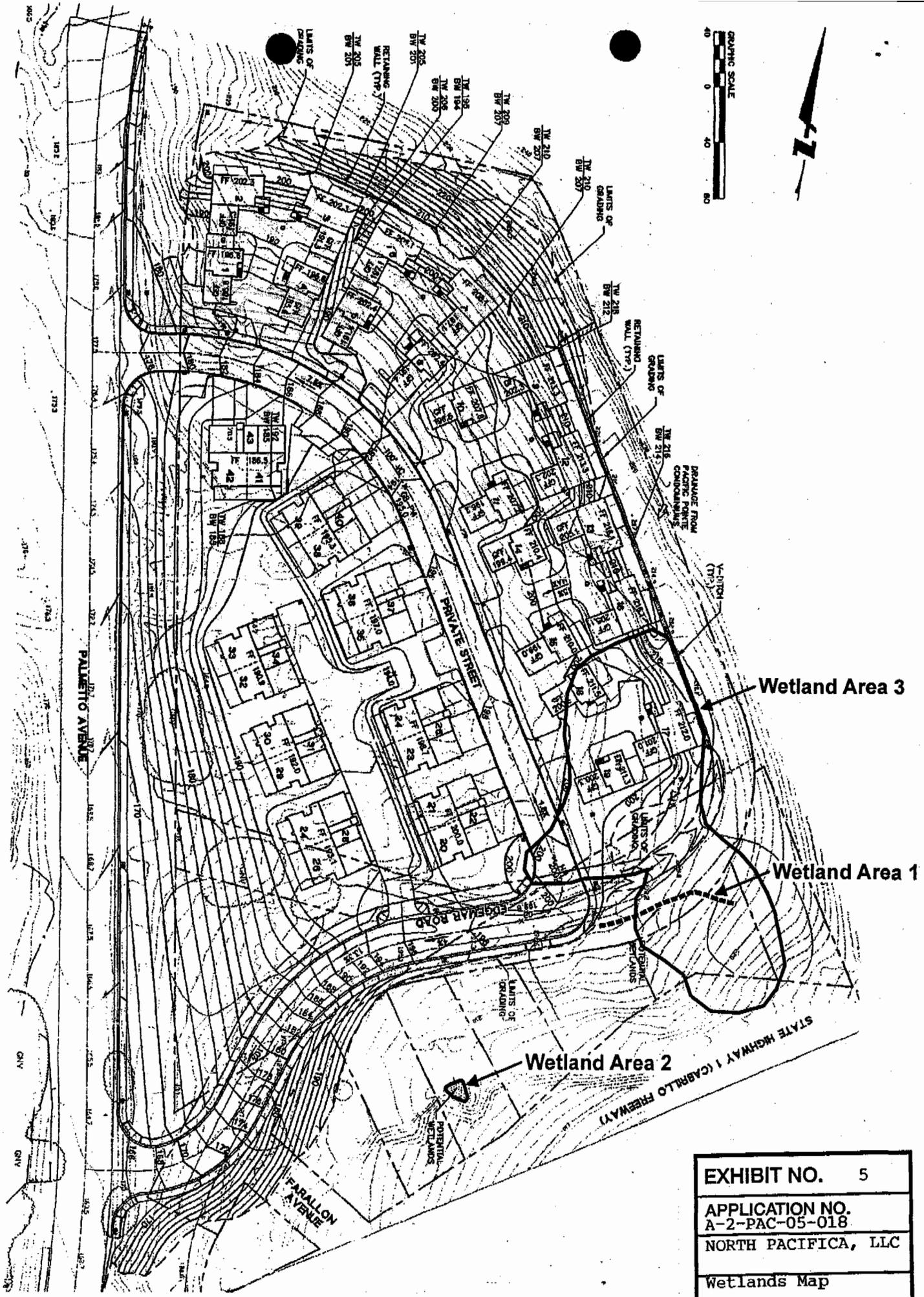
**VESTING TENTATIVE MAP
 FOR CONCOMBLY PURSUES
 PACIFIC COVE SUBDIVISION
 GRADING PLAN**

NOTICE: THIS IS A TENTATIVE MAP OF THE LANDS OF APPLANT, CA & SHOWN FOR INFORMATION ONLY. THE LANDS DESCRIBED IN THIS MAP ARE NOT TO BE USED FOR ANY OTHER PURPOSES. THE CITY OF PACIFICA, CALIFORNIA, HAS REVIEWED THIS MAP AND HAS DETERMINED THAT IT IS IN ACCORDANCE WITH THE SUBDIVISION MAP ACT AND THE SUBDIVISION MAP ACT REGULATIONS.

Erhan Kangas Inc.
 Licensed Surveyors - California
 10000 S. Main Street, Suite 100
 San Mateo, CA 94401
 (650) 351-1111

2011-11-10 10:00:00 AM 10/11/11 10:00:00 AM

EXHIBIT NO.	4
APPLICATION NO.	A-2-PAC-05-018
NORTH PACIFICA, LLC	
Grading Plan	



Wetland Area 3

Wetland Area 1

Wetland Area 2

EXHIBIT NO.	5
APPLICATION NO.	A-2-PAC-05-018
NORTH PACIFICA, LLC	
Wetlands Map	

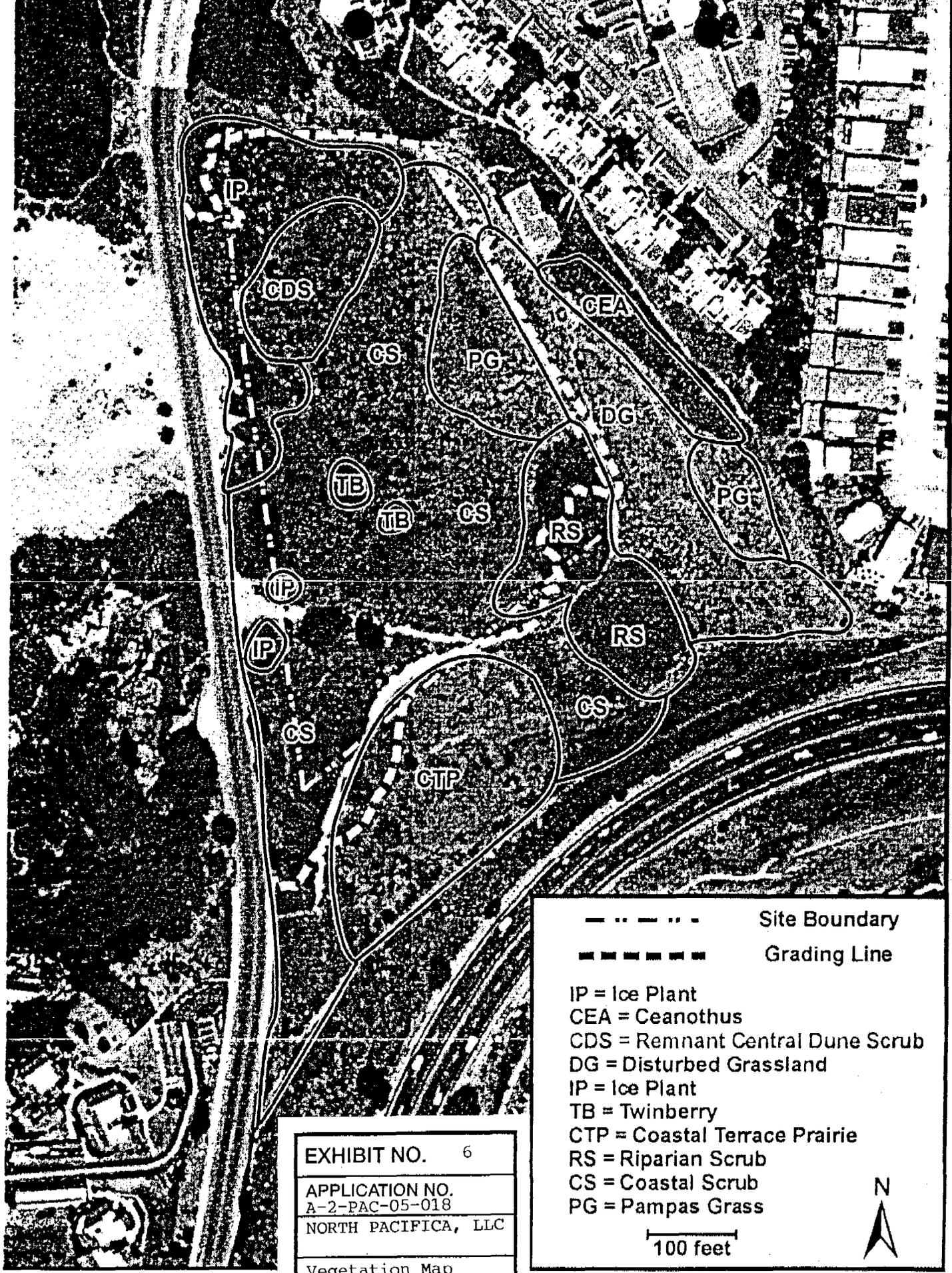


EXHIBIT NO. 6

APPLICATION NO.
A-2-PAC-05-018

NORTH PACIFICA, LLC

Vegetation Map

--- Site Boundary

==== Grading Line

IP = Ice Plant
 CEA = Ceanothus
 CDS = Remnant Central Dune Scrub
 DG = Disturbed Grassland
 IP = Ice Plant
 TB = Twinberry
 CTP = Coastal Terrace Prairie
 RS = Riparian Scrub
 CS = Coastal Scrub
 PG = Pampas Grass

100 feet

N

CALIFORNIA COASTAL COMMISSION

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

RECEIVED
SEP 05 2002



APPEAL FROM COASTAL PERMIT
DECISION OF LOCAL GOVERNMENT

CALIFORNIA
COASTAL COMMISSION

Please Review Attached Appeal Information Sheet Prior To Completing
This Form.

SECTION I. Appellant(s)

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

JOHN CURTIS
423 BELFAST AVE.
PACIFICA, CA 94044 650 1355-0404
Zip Area Code Phone No.

SECTION II. Decision Being Appealed

1. Name of local/~~port~~
government: CITY OF PACIFICA, CA

2. Brief description of development being
appealed: 43 RESIDENTIAL UNITS (12 SINGLE-FAMILY DETACHED HOMES
AND 21 TOWNHOUSES)

3. Development's location (street address, assessor's parcel
no., cross street, etc.): 400 BLOCK OF PALMETTO AVE. / PACIFICA, CA
APN 009-402-250 & 260

4. Description of decision being appealed:

- a. Approval; no special conditions: _____
- b. Approval with special conditions: AS AMENDED MITIGATION MONITORING
PLAN AND CONDITIONS OF APPROVAL 1-39
AT JULY 15, 2002 PACIFICA PLANNING COMMISSION
MEETING AND AMENDED AT CITY COUNCIL'S
AUGUST 12, 2002 MEETING
- 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-2-PAC-05-018

DATE FILED: 12/19/05

DISTRICT: NCC

H5: 4/88

EXHIBIT NO.	7
APPLICATION NO.	A-2-PAC-05-018
NORTH PACIFICA, LLC	
Appeal (Page 1 of 13)	

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. ^{Pacifica} City Council/Board of Supervisors
- d. Other _____

6. Date of local government's decision: AUGUST 12, 2002

7. Local government's file number (if any): CDP-203-1 (COASTAL DEVELOPMENT PERMIT.)

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:
NORTH PACIFICA LLC
1114 La Salle Avenue, Suite 207
OAKLAND, CA 94611

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.

ATTACHMENTS:

- (1) NAMES AND ADDRESSES CONTAINED IN PLANNING COMMISSION MINUTES MEETING JULY 1, 2002 (ATTACHMENT "A"), MEETING JULY 15, 2002 (ATTACHMENT "B"), EIR CERTIFICATION MEETING, PLANNING COMMISSION, JUNE 17, 2002 (ATTACHMENT "C").
- (2) CITY COUNCIL MEETING MINUTES FROM AUGUST 12, 2002, WITH NAMES AND ADDRESSES OF SPEAKERS IS NOT AVAILABLE AS OF DATE OF THIS APPEAL, BUT WILL BE SUBMITTED LATER. THEREFORE, I AM SUBMITTING A VHS COPY OF THE CITY COUNCIL'S AUG. 12, 2002 (ATTACHMENT "H")
- (3) MEETING, PREPARED BY PACIFICA COMMUNITY TELEVISION (LOCAL CHANNEL 26)
- (4) 807-2 COPY SENT TO CITY (RE: APPEALS OF "BOWL" DECISIONS) SUBMITTED BY MS. JACQUELYN POPE (ATTORNEY FOR NORTH PACIFICA LLC, HERMOSA BEACH CA) (ATTACHMENT "D")
- (5) COPIES OF PACIFICA TELEVISION (6-20-02, 6-19-02, 7-10-02, 7-17-02, 7-24-02, 7-31-02, 8-07-02, 8-14-02, 8-21-02) WITH EDITORIALS, ARTICLES AND LETTERS TO THE EDITOR CONCERNING THE BOWL (ATTACHMENT "E")
- (6) PROPERTY OWNERS (ATTACHMENT "F") - TO THE BEST OF MY KNOWLEDGE
- (7) PRINTOUT OF PERSONS EXPRESSING INTEREST IN BOWL DEVELOPMENT (FROM COMMITTEES TO SAVE THE FISH AND BOWLS) - CONTACT LIST (ATTACHMENT "G")

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.)

see statement and exhibits Attached

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.

John Curtis
Signature of Appellant(s) or
Authorized Agent

Date SEPTEMBER 5, 2007

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 _____

APPEAL TO COASTAL COMMISSION OF CITY OF PACIFICA COASTAL
DEVELOPMENT PERMIT (CDP-203-01) FOR THE PACIFICA BOWL
RESIDENTIAL DEVELOPMENT, 4000 BLOCK PALMETTO AVENUE,
A PN 009-402-250 and 260,
FILED BY JOHN CURTIS ON SEPTEMBER 5, 2002,

It is my understanding that the Executive Director
has notified the City of Pacifica that the City's Notice
of Final Local Action, dated August 19, 2002, does not
comply with Section 13571 of the Commission Regulations.
Furthermore, the Executive Director has determined that
the project does fall within the Coastal Commission's
appellate jurisdiction pursuant to Section 30603 of the
Coastal Act. Accordingly, the Executive Director has
decided that CDP-203-01 will remain suspended and
will not become final until a corrected Notice has
been issued and the appeal period to the Commission
has run.

Today (August 5, 2002) is the tenth and last working
day in the appeal period had the original Notice
from the City been accepted by the Executive Director.
I am submitting my appeal today and ask that the
Coastal Commission staff stamp it as "received" on
this date. I am doing this now in case some
decision is made in the future that marks the appeal
period ending today as the correct one. I ask that
Coastal Commission staff hold this appeal throughout
the process of determining, with the City, when the
correct appeal period begins. I respectfully request

that I may reserve the right to amend or withdraw my appeal in the future.

I am in this appeal, including copies of my appeals to the Pacifica City Council of the Planning Commission decision to certify the project E.I.C. and adopt a Mitigation Monitoring Plan for the project (see Exhibit 1), and my appeal of development permits for the project, including CDP-203-01 (see Exhibit 2). Both of these documents contain my objections to project violations and inconsistencies with Coastal Act policies and policies contained in the City's adopted LCP. I ask that both of these appeals be incorporated as part of this appeal for the Coastal Commission's consideration.

My intention in filing this is not to delay project approval or to cause the project applicants, North Pacifica LLC, any undue distress or to cost them financially. From the beginning of the planning process years ago, I have maintained that a reasonable and acceptable project could be constructed on the Bowl that minimizes adverse environmental impacts and protects coastal resources. I live on Pedro Point at the far south end of Pacifica. I cannot even see the site from my window. I have no financial interests or motives in opposing the project proposal, and I have acted strictly on my own and not trying to represent anyone else or others' financial interests.

REASONS FOR THIS APPEAL: REASONS WHY THE PROJECT IS APPEALABLE

The local action is appealable under Section 30603 of the Coastal Act, specifically subsections (1) and (2).

Section 13577 sets the boundary for Coastal Commission appeal jurisdiction as 100 feet from the upland extent of any wetland meeting the definition of "wetland" as set forth in Section 13577(a)(1) of the Commission's regulations.

The August 23, 2002 letter from Mr. Peter T. Imhof, Coastal Planner, North Central Coast District, to Mr. Michael Crabtree, Director, City of Pacific Planning Department, in reference to the 'Defective Local Government' Notice (CDP-203-01) states:

"In its present condition, the project site is vegetated with a mix of native coastal and invasive non-native species. According to wetland studies of the site to date, several areas on the site are dominated by wetland vegetation and show evidence of other wetland indicators. In addition, these studies indicate the existence of a drainage ditch along Edgemar Road and a small, excavated area south of Edgemar Road, within 100 feet of the project area, which are dominated by wetland vegetation."

Mr. Imhof cites multiple surveys, documents and letters from environment and hydrological

consultants on the Bowl project, I agree with Mr Imhof's analysis and conclusions.

The current Vesting Tentative Map, dated July, 2002, clearly indicates "potential wetlands" within 100 feet of the grading and construction site (See Exhibit 3). The previous Vesting Tentative Map, dated February, 2001 and superseded by the July, 2002 Map, also notes the "potential wetlands." (see Exhibit 4).

In addition to the documents cited in Mr. Imhoff's letter, I am submitting additional correspondence that document discussions between the EIR consultants and the applicants about the presence of wetlands and whether grading and reconstruction of Edgemar Road is part of the "project." These documents include a November 15, 1999 letter from Harza Engineering to Mr. Jason Kiewer, Trunark Companies (the previous project applicants) (see Exhibit 5); a Memorandum from Keith Froum, North Pacific LLC to Christine Schneider, Thomas Reid and Associates, dated January 12, 2002 (see Exhibit 6) questioning references to the existence of wetlands and stating "As you know, 'wetlands' are an emotional hot button for many members of the public and we cannot understand why the NEP, which is a document distributed to members of the public, would contain such references to 'wetlands' and potentially unjustifiably pile them up, when

It has already been established and the City has concurred that no 'wetlands' exist on the site." (Emphasis added); a February 4, 2002 letter from Ms. Jacquelyn Pope, the applicants' attorney, to Ms. Michelle Kenyon, the City's attorney (see Exhibit 7); a letter from Mr. Keith Fromm to Ms. Michelle Kenyon, dated February 4, 2002 (see Exhibit 8); a March 13, 2002 letter from Mr. Fromm to Ms. Kenyon (see Exhibit 9); a letter, dated March 19, 2002, from Dr. Michael Josselyn, Wetlands Research Associates to the City of Pacifica (see Exhibit 10); and another letter, dated May 22, 2002, from Dr. Josselyn to the City (see Exhibit 11); a letter from Mr. Fromm to the EIR consultant, Mr. Thomas Reid, dated May 24, 2002, that labels references to "wetlands" as "an emotional hot button and battle rallying cry to some members of the public" and notes "We objected that inclusion of such inaccurate references to 'wetlands' would unjustifiably incite project opponents and ultimately lead to costly delays and unwarranted appeals and/or litigation with, among others, project opponents and the California Coastal Commission." (Emphasis added.) (see Exhibit 12). These Exhibits speak for themselves and demonstrate an ongoing battle over on-site and off-site wetlands.

There is a parallel continuing argument on whether the reconstruction of Edgewater Road is part of the "project." This is important with respect to the proximity of wetlands to the project site. The

Project "Responses to Comments and Final Environmental Impact Report" notes on page 1-2 that "The total area to be graded is approximately 5.8 acres which includes the residential development, road access, utilities and drainage improvements," and notes the City Director of Public Works, Scott Holmes' conclusions that "these changes shown on the vesting tentative map go beyond conventional road maintenance."

The City's approval may also be appealable under Section 30603 of the Coastal Act because it may include development less than 300 feet from the top of the seaward face of the bluffs west of Palmetto Avenue. It should be noted that the "project" actually includes substantial grading and location of access roads and utilities in the 45 feet \pm city-owned right of way along the eastern side of Palmetto Avenue, so that the measured distance from the nearest bluff face is to the western limits of grading for the project, including the right of way, and not just to the official project site boundary or to the nearest proposed residences.

REASONS FOR THIS APPEAL:

- (A) The project proposal calls for substantial grading, including 36,000 cubic yards each of cut and fill, which may impact potential on-site and nearby

wetlands. This grading violates Pacifica LUP Policy Number 4 and Section 30233 of the Coastal Act, because there are feasible and less environmentally damaging alternatives to the project, including alternatives identified in the March, 2002 DEIR for the project. The project as proposed may include unnecessary filling and dredging of wetlands.

(B) There is insufficient examination of impacts to water quality caused by excessive cut and fill and grading to create elevated building pads and to elevate Edgemar Road for easier access to the adjacent "FRESH" parcels. The project violates Pacifica LUP Policy Number 12. Alternatives to the proposal that lessen impacts to water quality should be thoroughly examined.

(C) The project violates Public Access policies of the Pacifica LUP, Policies Numbers 1, 2 and 3. The site has historically been used for coastal access, particularly by those living to the east of the site.

(D) The project violates LUP Policy Number 24 and Section 9-4.4408(b) of the Pacifica zoning code and Coastal Act policies in reference to visual impacts. Structures have not been sited to minimize alteration of natural topography and land forms. There is a great amount of grading, cutting and filling, including a large amount of fill on the Palmetto Avenue right-of-way to create elevated, view pads for buildings and to

elevate Edgemar for easier access to adjacent "Fish" properties. The extensive amount of grading also includes removal of heritage Monterey Cypress trees and fill of potential wetlands on the low portion of the site. Structures are not clustered and sited on the least visible area of the site, within the slopes of the natural topography. The structures as proposed will have a negative visual impact from residences to the east of the site and from the public dunes/beach area to the west, owned by the Golden Gate National Recreation Area. The area of grading to elevate Edgemar Road may change, even though the City has approved the present plan. It should be noted that the applicants object to the location of Edgemar as contained in Conditions 18 and 30 and would like to move the road. An August 7, 2002 letter from Ms. Jacquelyn Pope, the applicants' attorney, to Ms. Michelle Kenyon, the City's attorney, states: "As set forth in the July 15, 2002 letter, there seems to be no reason why the road could not run along the Northern edge of the right of way, i.e., the southernmost Bowl project boundary, nor is there any reason for the street to be more than 28 feet wide. We are therefore requesting that the City Council restate the condition to allow North Pacific LLC the latitude to build the road as requested." The July 15, 2002 letter mentioned above and attached to the August 7, 2002 letter, states about the relocation of Edgemar Road that, "This would leave more usable land for the Fish lots." (see Exhibit 13.)

(E) The project violates Pacific LUP Policy Number 26 in that there is no scientific analysis of cliff retreat (about 1 to 3 feet per year and episodic events) over the economic lifetime of the project. This includes erosion that may require rapid relocation of Palmetto Avenue to the east onto land where the applicants proposed to place a great deal of fill. The historical record of erosion along this stretch of coastline in the past few years is startling, include the loss of homes along Esplanade Avenue nearby to the south and in Daly City nearby to the north. The Coastal Commission has had to deal with a seawall structure that was placed along Esplanade Avenue. There are project alternatives to move the structures to the eastern edge of the site and reduce exposure of structures to erosion in the future.

(F) The project not only adds to the severe traffic problems in the Palmetto/Manor/Oceana intersection with no resolution of the traffic problems in site due to lack of funding, it also violates Coastal Act policies and Pacific LUP Policy Number 25 by overloading nearby coastal recreation areas, particularly the dangerous cliffs area owned by G.G.N.R.A. because of a lack of adequate on-site recreation area for project residents. The City in their permit approvals did require an on-site lot lot, location undetermined? Curiously, the August 12, 2002 "City Council Agenda Summary Report, page 11, states that, "the site across the street from the project site is in private ownership. Therefore,

this site was not analyzed in the DEIR because any new resident playing in the dunes would be trespassing." (See Exhibit A) The "site across the street" is the G.G.N.P.A. dunes area, and even if the dunes were privately owned, which they are not, that would not realistically stop children from playing there. The Dunes area is already heavily used for hiking and exploring, dog walking, model airplane flying and other activities. Therefore, this project will greatly add to recreational use, including conflicting uses, of the eroding dunes and dangerous cliff area.

CONCLUSION:

I respectfully submit this appeal for the Commission's consideration. I have tried to honestly present my concerns about violations of the Coastal Act policies and Pacifica LUP policies. I believe that there are important coastal issues and that it is possible to have an alternative project that respects and protects coastal resources.



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November 23, 2005

To: Coastal Commissioners and Interested Parties

From: Peter Douglas, Executive Director
 Charles Lester, Deputy Director
 Chris Kern, District Manager

Subject: 2-02-02-EDD (North Pacifica LLC)

EXHIBIT NO.	8
APPLICATION NO.	A-2-PAC-05-018
NORTH PACIFICA, LLC	2-02-02-EDD
Adopted Findings	(Page 1 of 37)

Public hearing and Commission determination of appealability for purposes of applicable hearing and notice procedures, pursuant to California Code of Regulations, Title 14, Section 13569, for a 43-unit residential subdivision and development approved for the 4000 block of Palmetto Avenue, Pacifica (APNs 009-402-250 and -260).

STAFF NOTE

On August 12, 2002, the City of Pacifica approved a coastal development permit (CDP) application for a 43-unit residential subdivision and associated development known as the "Pacifica Bowl." The City staff determined that the action was not appealable, but the Executive Director disagreed, and scheduled a hearing to resolve the question of appealability pursuant to 14 California Code of Regulations Section 13569. On October 9, 2002, the applicant, North Pacifica LLC, filed a petition seeking a writ of mandate challenging the Commission's preliminary action. North Pacifica's petition was denied on October 31, 2002 for failure to exhaust administrative remedies. North Pacifica appealed. The court of appeal affirmed the trial court decision on December 22, 2004.

North Pacifica filed a second action on December 2, 2002, and obtained a stay of Commission administrative proceedings pending the outcome of North Pacifica's appeal in the first action. On October 18, 2005, the court entered judgment in the Commission's favor and lifted the stay on administrative proceedings, effective November 2, 2005.

Staff also notes that this dispute resolution proceeding involves, in part, development that has already been undertaken. Such development consists of the clearing and grubbing of major vegetation on the project site. In November 2003 the Commission sought a temporary restraining order after it learned that North Pacifica was about to obtain a clearing and grubbing permit from the City. The Court denied the TRO on November 3, 2003, and the clearing and grubbing proceeded.

1.0 Executive Summary

The City of Pacifica Local Coastal Program ("LCP") was certified on June 7, 1994. The City assumed primary authority over the issuance of coastal development permits on June 10, 1994. After certification of a Local Coastal Program, the Coastal Commission is authorized under 14

CCR Section 13569 to resolve disputes concerning whether development approved by the local government is categorically excluded, non-appealable, or appealable.

On August 12, 2002, on appeal from the Pacifica Planning Commission, the Pacifica City Council approved CDP-203-01 for a 43-unit subdivision and residential development including roadway and infrastructure improvements. The Commission received a Notice of Final Local Action ("FLAN") from the City on August 21, 2002. The City's FLAN designated the project as non-appealable (**Exhibit 3**).¹ The City Council's findings of approval, incorporating the Planning Commission's findings, found the project generally consistent with the LCP, but did not make specific findings with respect to the existence of wetlands within 100 feet of the approved development or whether the City approval was appealable to the Commission. Based on information received by Commission staff in connection with its review of the environmental impact report ("EIR") for the project, the Executive Director concluded that wetlands as defined under both 14 CCR Section 13577 and the certified LCP exist within 100 feet of the approved development. The information indicating the presence of wetlands principally includes the conclusions and facts stated in the draft and final EIRs, the wetland delineations performed in connection with CEQA review of the project, and the data sheets recording direct field observations by the applicant's biological consultant in connection with the wetland delineations. These items are discussed in detail below. The applicant denied the staff's request for a site visit by the Commission biologist in advance of this hearing (**Exhibit 30**).

By letter dated August 23, 2002, Commission staff informed the City and the applicant that pursuant to 14 CCR Section 13569 the Executive Director had determined that the project was appealable and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and Pacifica Zoning Code Section 9-4.4304(n) and requested that the City issue an accurate FLAN correctly describing the procedures for appeal (**Exhibit 4**). The August 23, 2002 letter also informed the City and applicant that pursuant to Section 13572 and Pacifica Zoning Code Section 9-4.4304(l), the CDP approved by the City (CDP-203-01) would remain suspended and would not become effective until a corrected notice had been issued and the ten-day appeal period to the Commission had elapsed. On September 5, 2002, the Commission received an appeal of the City's decision by John Curtis. This appellant is separately interested in the issue of appellate jurisdiction and has questioned City staff's opinions about appealability at various stages of the City's proceedings. The City informed Commission staff of its disagreement with the Executive Director's determination and contested the applicability of Section 13569 by letter dated September 11, 2002. The applicant has also taken issue with the Executive Director's determination and the Commission's authority to resolve questions of project appealability pursuant to Section 13569. The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Executive Director's determinations regarding the City's coastal development permit invalid and the CDP approved by the City to be immediately effective (**Exhibit 30**). On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate. On December 22, 2004, the court of appeal ruled in the Commission's favor and affirmed the trial court judgment.

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

Under Section 13569, when a local jurisdiction disagrees with the Executive Director's determination regarding whether a development is appealable, non-appealable or categorically excluded, the Commission is required to hold a hearing to determine the appropriate designation at the next Commission meeting "in the appropriate geographic region of the state" following the local government's request. By letter dated September 17, 2002, Commission staff informed the City that the December Commission meeting in San Francisco would be the first opportunity for a Section 13569 hearing in the appropriate geographic region of the state (**Exhibit 9**).

After the Executive Director agendaized the matter for its December 2002 hearing agenda, North Pacifica filed a second lawsuit in San Mateo County Superior Court and obtained a stay of the Commission's administrative proceedings pending the outcome of North Pacifica's appeal in the first lawsuit. Therefore, the Commission removed from its agenda the hearing on the dispute over the appealability of the local government's action. On October 18, 2005, the court entered judgment in the Commission's favor and lifted the stay on administrative proceedings, effective November 2, 2005.

2.0 Executive Director's Recommendation

The Executive Director recommends that the Commission adopt the findings and resolution provided below determining that the approved development is appealable to the Commission in accordance with: (1) Coastal Act Section 30603(a)(1) because the approved development is located seaward of the inland right of way of the first public road paralleling the sea, and (2) Coastal Act Section 30603(a)(2) because the approved development is located within 100 feet of wetlands.

Motion

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

Staff Recommendation

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

Resolution

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

3.0 Recommended Findings and Declarations

The Commission finds and declares as follows:

3.1 Project Description

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

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

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

3.2 Proximity of Development to Wetlands

As discussed further below, Wetland Area 1, the area south and immediately adjacent to Edgemar Road, is within 50 feet of Edgemar Road and within 100 feet of the project site. Wetland Area 2, the topographic depression on the parcel south of Edgemar Road, is 100 feet from Edgemar Road. The project site also includes Wetland Area 3, the ponded area in riparian scrub vegetation and Wetland Area 4, located on the western side of the site.

In addition to subdivision of the site, which is development within 100 feet of Areas 1, 3 and 4, the approved development includes clearing and grubbing of the entire site i.e. clearing of major vegetation within 100 feet of Areas 1, 3 and 4. (The applicant has already undertaken this development.) In addition, the development includes grading of the entire site, which is also development within 100 feet of Areas 1, 3 and 4. The development also includes construction of internal roads and other infrastructure and buildings within 100 feet of Wetland Areas 3 and 4 (and probably 1). Finally, the

approved development includes the reconstruction/improvement of Edgemar Road within 100 feet of Wetland Areas 1 and 2.

3.3 Project Background

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

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

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

In the FEIR the City's prior statements concerning appealability of the development to the Commission were replaced with the following statements that determination of appealability was outside of the scope of the City's CEQA determination:

The City of Pacifica does not determine the authority of the California Coastal Commission. The EIR has determined that the proposed project is consistent with the City's own adopted LCP and has determined that the proposed project will not adversely affect wetlands. The scope of California Coastal Commission appeal [jurisdiction] is not relevant to the City's CEQA process. (FEIR, I-3) [Emphasis added.]

The City has made no determination whether the Coastal Commission appeal jurisdiction applies to an excavated pit south of Edgemar road. (FEIR, III-3)

The FEIR also states in response to comments received from the applicant on the DEIR concerning Commission appeal jurisdiction:

[T]he commenter is correct as being within in stating that [sic] the City's Zoning Code does not consider this site to be within the Coastal Commission's Appeal Zone. (FEIR, III-18)

The August 12, 2002 City Council Agenda Summary Report states:

According to the map provided to the City of Pacifica by the Coastal Commission, the project site does not fall within the Coastal Commission Appeal Zone.

Pursuant to 14 CCR Section 13576(a), in conjunction with the certification of a local government's LCP, the Commission adopts a map or maps depicting the areas where the Commission retains permit and appeal jurisdiction pursuant to Coastal Act Sections 30603(a)(1) and (a)(2). Accordingly, the Commission adopted the City of Pacifica Post LCP Certification Permit and Appeal Jurisdiction Map on November 17, 1993 in conjunction with certification of the City's LCP.

As stated in the August 12, 2002 City Council Agenda Summary Report, the project site is not shown within the Commission's appeal jurisdiction on the adopted map. However, in accordance with 14 CCR Section 13576(a), the adopted map includes the following required disclaimer:

This map has been prepared to show where the California Coastal Commission retains permit and appeal jurisdiction pursuant to Public Resources Code Sections 30519(b), 30603(a)(1) and (a)(2) and 30600.5(d). In addition, development may also be appealable pursuant to Public Resources Code Sections 30603(a)(3), (a)(4), and (a)(5). If questions arise concerning the precise location of the boundary of any area defined in the above sections, the matter should be referred to the local government and/or the Executive Director of the Commission for clarification and information. This plat may be updated as appropriate and may not include all lands where permit and appeal jurisdiction is retained by the Commission. [Emphasis added.]

By letter dated August 23, 2002, Commission staff informed the City and the applicant that, pursuant to 14 CCR Section 13569, the Executive Director had determined that the development approved by the City was appealable to the Commission and that the FLAN was deficient because it did not meet the requirements of 14 CCR Section 13571 and the Pacifica Zoning Code Section 9-4.4304(n) and requested that the City re-notice the project as appealable (**Exhibit 4**). In the same letter, the Commission staff informed the City and the applicant that pursuant to Section 13572 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(l), CDP-203-01 would remain suspended and would not become effective until a corrected notice had been issued and the appeal period to the Commission had run. On September 5, 2002, the Commission received an appeal of the City's action on the development from John Curtis. By letter dated September 11, 2002, the City informed Commission staff of its disagreement with the Executive Director's determination of appealability and the applicability of Section 13569.

By letter to the City dated September 17, 2002, Commission staff indicated that since the City's determination concerning appealability of the approved development was not in accordance with the Executive Director's determination, the staff would schedule a Commission hearing to resolve this question pursuant to the provisions of 14 CCR Section 13569(d).

The applicant filed suit in San Mateo County Superior Court seeking a writ of mandate declaring the Executive Director's determinations regarding the City's CDP invalid and the CDP approved by the City to be immediately effective. On October 31, 2002, the Court found that the petitioner had failed to exhaust its administrative remedies before the Coastal Commission and denied the petition for peremptory writ of mandate. North Pacifica appealed. On December 22, 2004, the court of appeal affirmed the superior court decision. The court of appeal held that the

Commission has the authority to resolve the dispute regarding the appealability of the City's action and that the Commission properly suspended the coastal development permit approved by the City pending resolution of the dispute.

3.4 Authority for Commission Determination of Appeal Designation

Coastal Act Section 30603 defines the Commission's appellate jurisdiction over local government actions on CDPs. Section 30603(a) provides, in part, that:

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

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

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

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

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

as to the appropriate designation, the local government shall notify the Commission by telephone of the dispute/question and shall request an Executive Director's opinion;

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

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

The Coastal Act conveys to local governments with certified Local Coastal Programs the primary permitting authority over projects proposed within their jurisdiction in the Coastal Zone, but confers to the Commission appellate review authority over specified types of development. Under Section 13569, it is contemplated that a local government would make an initial determination of project appealability "at the time the application for development within the coastal zone is submitted." Under Sections 13565 and 13568 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(g), the City is required to provide Initial Notice to the Commission of coastal development permit review before the first public hearing, designating the project as appealable, non-appealable or categorically excluded.² In this case, the Commission never received an initial hearing notice of the City's coastal development permit

² § 13565. Notice of Appealable Developments.

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

§ 13568. Notice of Non-Appealable Developments.

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

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

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

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

review process as required by these regulations. The first notice that the Commission received from the City of the City's determination of project appealability in the context of the City's CDP review process for the project was the FLAN.³ This FLAN, which the Commission received from the City, was deficient because it did not describe the procedures for appeal of the local decisions as required by Section 13571 of the Commission's regulations and Pacifica Zoning Code Section 9-4.4304(n).

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

Where, as here, (1) a disagreement as to the appealability of development approved by a local government has arisen; (2) Commission hearing under Section 13569 is required to resolve the disagreement; (3) the City failed to provide the Commission with an initial hearing notice of its processing of the project as required by 14 CCR Section 13565 and Pacifica Zoning Code Section 9-4.4304(g); and (4) the FLAN did not describe the procedures for appeal of the local decision to the Commission as required by 14 CCR Section 13571(a) and Pacifica Zoning Code Section 9-4.4304(n), any CDP approved by the local government is suspended and cannot become effective under Section 13572 of the Commission regulations and Pacifica Zoning Code Section 9-4.4304(l), until either (1) the Commission determines that the project is not in fact appealable, or (2) the Commission determines that the appeal submitted by John Curtis and any other appeal(s) subsequently filed raise no substantial issue concerning conformity of the approved development to the standards set forth in the City of Pacifica certified LCP or the public access policies of the Coastal Act.

Section 13571(a) provides that:

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

³ The Initial Study and the DEIR prepared by the City originally stated that the project was in the Commission's appeal jurisdiction. The FEIR later disclaimed these earlier statements and expressly declined to make any assertion concerning Commission appellate jurisdiction in the context of CEQA review (FEIR I-4).

approval and written findings and the procedures for appeal of the local decision to the Coastal Commission. [Emphasis added.]

Section 13572 provides:

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

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

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

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

North Pacifica argues that the Commission's role in reviewing a local government's determination regarding appealability is limited to evaluating whether substantial evidence in the record considered by the local government supports the local government's determination. According to North Pacifica, where conflicting evidence exists in the record, the Commission may not substitute its own judgment for the local government's so long as the local government's is reasonable.

North Pacifica is incorrect both with respect to the evidence that the Commission may consider and the standard of review. Nothing in Section 13569 in any way limits the evidence that the Commission may consider. To the contrary, by allowing for site inspections and requiring the Commission to hold a public hearing, Section 13569 assumes that in many instances the Commission will consider evidence that was not considered by the local government. Similarly, Section 13569 does not require the Commission to defer to a local government's interpretation of evidence that it did consider. The regulation instead establishes a process where the Commission independently evaluates the interpretation advanced by the local government, the Executive Director, and any interested persons. Case law that North Pacifica cites regarding judicial review of public agency actions or appellate review of trial court decisions is inapplicable here.

Notwithstanding the Commission's ability to review evidence that was not considered by the local government, however, the evidence considered by the Commission for this determination is derived almost entirely from the record before the City of Pacifica. In addition, for the offsite wetland areas that are located within 100 feet of the proposed development, the dispute is a legal dispute about what kinds of physical features are considered wetlands for the purposes of determining appealability under the Coastal Act, not a factual dispute about what physical features are actually present.

North Pacifica argues in the alternative that the Commission should determine appealability on the basis of physical conditions that currently exist on the site, not on the basis of conditions that existed prior to November 2003 when North Pacifica cleared and grubbed the site. This is incorrect. The clearing and grubbing was the first stage of the physical development proposed by North Pacifica. Because the local CDP had been suspended, the clearing and grubbing was unpermitted development. Permit applicants may not defeat the Commission's appellate jurisdiction by engaging in unpermitted development that removes the physical features that establish the Commission's appellate jurisdiction. The Commission instead determines appealability as if the unpermitted development had not occurred.

If the Commission determines that the City's approval is not appealable, that determination would constitute final action by the Commission. If, in contrast, the Commission determines that the local action is appealable, that action would be only an initial step that would lead to a substantial issue hearing, and if the Commission finds a substantial issue, to a de novo hearing. The Commission's action becomes final after the last step of the process (finding of non-appealability, finding of no substantial issue, or vote after de novo hearing).

3.5 Analysis of Appeal Jurisdiction and Project Appealability

The following analysis of the development approved by the City that is the subject of this dispute discusses available evidence of the presence of wetlands on or near the property and concludes that the approved development is appealable to the Commission because it is located within 100 feet of wetlands as that term is defined in Section 13577, the Commission regulation used to determine whether a development is appealable to the Commission pursuant to Section 30603 of the Coastal Act.⁴

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

- (A) is lawfully open to uninterrupted public use and is suitable for such use;
- (B) is publicly maintained;
- (C) is an improved, all-weather road open to motor vehicle traffic in at least one direction;
- (D) is not subject to any restrictions on use by the public except when closed due to an emergency or when closed temporarily for military purposes; and

⁴ In so finding, the Commission notes that the Commission biologist was not able to visit the project site, since the applicant denied staff access the site prior to the Commission hearing.

- (E) does in fact connect with other public roads providing a continuous access system, and generally parallels and follows the shoreline of the sea so as to include all portions of the sea where the physical features such as bays, lagoons, estuaries, and wetlands cause the waters of the sea to extend landward of the generally continuous coastline.

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

Since a portion of the approved development is located seaward of the inland right-of-way of the first public road, such development occurs between the sea and the first public road and constitutes a separate basis for appeal jurisdiction under Coastal Act Section 30603(a)(1).

3.6 Development within 100 feet of a Wetland

In accordance with Coastal Act Section 30603(a)(2), development approved by a local government within 100 feet of any wetland is appealable to the Commission.

3.6.1 Wetland Definition for Purposes of Commission Appeal Jurisdiction

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

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

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

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

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

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

The LUP definition separately defines wetland as

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

The LCP wetland definition contained in Pacifica Zoning Code Section 9-4.4302(aw) is effectively the same as the Coastal Act Section 30121 definition of wetland, with the exception of the two, additional terms, "streams" and "creeks". The first sentence of the LUP definition similarly tracks the language of the Section 13577(a) wording. The balance of the LUP definition paraphrases Section 13577(a), clarifying how the special case of wetlands without either wetland vegetation or evidence of hydric soils can be identified. Since the LCP wetland definitions mirror the operative language of both Coastal Act Section 30121 and Section 13577(a), the scope of the wetland definition under the LCP is effectively identical to that contained in the Coastal Act and Commission regulations. More particularly, the broader Coastal Act and Pacifica Zoning Code definitions encompass and inform the definition contained in 14 CCR Section 13577(a) and the LUP. If the subject property contains wetlands that meet the standards of 14 CCR Section 13577(a), then the subject property also contains wetlands that meet the more general wetland definitions contained in both the Coastal Act and the certified

LCP. In any event, as described further below, for purposes of determining whether the development approved by the City is appealable to Commission, the development approved by the City is appealable to the Commission and includes development within 100 feet of wetlands as defined according to all of the above-referenced definitions.

3.6.2 Evidence Concerning Wetlands

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

- Thomas Reid Associates ("TRA") initial biological survey, dated April 1997 (**Exhibit 18**).
- Letter from Michael Josselyn, Wetland Research Associates ("WRA") to the Syndicor Real Estate Group, dated April 30, 1997 (**Exhibit 19**).
- WRA wetland delineation for the "Pacific Cove" Parcel, dated August 1999 (**Exhibit 20**).
- WRA revised jurisdictional wetlands map, dated November 30, 1999 (**Exhibit 21**).
- Letter from Thomas Fraser, WRA, to the City of Pacifica, dated December 27, 1999 (**Exhibit 22**).
- Army Corps letter to Tom Fraser, dated January 3, 2000 (**Exhibit 23**).
- Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000 (Peer review of the July 1999 WRA wetland delineation and the December 27, 1999 WRA LCP wetland delineation letter) (**Exhibit 24**).
- WRA wetland delineation for the "Edgemar Road Parcel," dated March 2000 (**Exhibit 25**).
- Army Corps letter to Tom Fraser, dated May 11, 2001 (**Exhibit 26**).
- Draft EIR, March 2002.
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated March 19, 2002 (**Exhibit 27**).
- Letter from Michael Josselyn, WRA, to the City of Pacifica, dated May 22, 2002 (**Exhibit 28**).
- FEIR, June 2002.
- Memorandum from Eben Polk, TRA, to Michael Josselyn, dated March 11, 2002 (**Exhibit 31**).

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

that a copy of this delineation is not in its administrative record (**Exhibit 30**). Thus, it is not clear that the July 1999 delineation was before the City when it took action.

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

3.6.3 Discussion of Potential Wetlands

Under the wetland definition stated in 14 CCR Section 13577(a)(1), the definition for purposes of determining Coastal Commission appeal jurisdiction, wetlands are defined as "land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes . . ." As this definition has consistently been applied by the Commission, the presence of any one of the three Army Corps wetland criteria, wetland hydrology, a predominance of wetland vegetation, or hydric soils, can be sufficient evidence to qualify an area as a wetland. For purposes of the Commission's appeal jurisdiction over development approved by local government jurisdictions under certified LCPs, any development located within 100 feet of an area meeting the definition in 14 CCR 13577 is appealable to the Commission.⁵

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

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

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

Wetland hydrology is demonstrated when field indicators of inundation or saturation are present. One "primary" or two "secondary" indicators are required to demonstrate hydrology. The best indicator is the observation of standing water or soil saturation, which is indicated by the accumulation of water in a soil pit. Other "primary" indicators are watermarks and drift lines, which are indicative of inundation and algal mats, which fall under the category "sediment deposits." Secondary indicators are the presence of oxidized rhizospheres (root channels) associated with living plant roots in the upper 12 inches of the soil, presence of waterstained

⁵ As discussed above, the Section 13577(a) wetland definition is effectively the same as the LUP wetland definition.

leaves, local soil survey hydrology data for identified soils, and the FAC-neutral test of the vegetation. The FAC-neutral test is the determination of predominance of wetland indicator species after excluding all FAC plants.

Available information, including the initial TRA site survey, the WRA wetland delineations and the various WRA correspondence, the TRA peer review, and the evidence and conclusions presented in the EIR, indicates that at least two areas within 100 feet of the approved development exhibit the presence of all three wetland criteria: (1) the area associated with what the applicant's biologist refers to as the unmaintained "drainage ditch" along Edgemar Road (Wetland Area 1) and (2) the excavated area on the parcel south of Edgemar Road adjacent to the project site (Wetland Area 2). In addition, two other areas on the project site appear to also qualify as wetlands: (1) what WRA's August 1999 delineation characterizes as "upland areas" dominated by arroyo willow that appear to carry winter surface flow and may contain a ponded area (Wetland Area 3) and (2) a wetlands area on the west side of the site (Wetland Area 4).

Discussion:

Following publication of the Commission staff's November 21, 2002 report, Commission staff received a copy of a memorandum from TRA to Michael Josselyn, dated March 11, 2002, summarizing and discussing field observations made by TRA staff during visits to the proposed project site and adjoining Edgemar parcel on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002. The memorandum referenced five photographs of the site, showing observations of very wet conditions, including flowing and standing water, and wetland vegetation (Exhibit 31). The TRA memorandum notes observations of "water at and above the surface of the Bowl site as well as the Fish parcel" during field visits and "evidence of potentially saturated soils, as suggested by surface water lingering for a stretch of multiple days" on sloped areas on days when it had not rained immediately prior to observation. The photos referenced in the memorandum, provided to Commission staff by TRA, show some of the inundated areas (Exhibit 31). The TRA memorandum also notes the presence of "multiple hydrophytic species (including FACW and OBL based on the USFWS plant list) in the area dominated by the arroyo willow, including rushes and California blackberry." The TRA memorandum concludes that, while these observations alone do not determine whether LCP wetlands are present, "the possibility for LCP wetlands [on the project site and adjoining Edgemar parcel] should be re-evaluated." Noting that the LCP wetland definition is broader than the Army Corps definition, TRA further concludes that, in the absence of analysis by a wetland delineator, the EIR "must assume that limited LCP wetlands may be present given [TRA's] recent observations."

The applicant has refused Commission staff's request to visit the project site. As a result, the Commission biologist has been unable to view any of the areas first-hand. Because the applicant has denied the Commission access to the project site, the Commission infers that evidence of Section 13577 wetlands may be present on the site because the applicant apparently believes a site visit would uncover evidence supporting the existence of wetlands. Even without drawing this inference from North Pacifica's reluctance to provide information about the property, the evidence supports a finding that wetlands are present on and adjacent to the project site. Nonetheless, the foregoing inference bolsters such a finding. In the absence of complete information, the Coastal Act requires the Commission to act in a manner protective of coastal

resources. *See, e.g.*, Public Resources Code § 30009 (the Coastal Act “shall be liberally construed to accomplish its purposes and objectives”).

As discussed below, WRA’s conclusion that the areas associated with what WRA refers to as the unmaintained “drainage ditch” are not LCP wetlands is based on an apparent misunderstanding or misapplication of the provisions of the Coastal Act and 14 CCR Section 13577(a). In determining whether a wetland is protected under the Coastal Act and a LCP, the quality of the wetland is legally irrelevant (Kirkorowicz v. California Coastal Commission, 83 Cal. App. 4th 980 (2000)). The Section 13577(a) wetland definition contains only one exception for man-made features, specifically for “wetland habitat created by the presence of and associated with agricultural ponds and reservoirs” under certain conditions. The fact that certain areas exhibiting wetland criteria may be the result of man-made conditions is not otherwise relevant in applying this definition.

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

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

The area that WRA refers to as a “drainage ditch” in its March 2000 delineation of the Edgemar Road Parcel qualifies as a wetland under 14 CCR Section 13577. The March 2000 WRA delineation found that all three wetland criteria were present in this area, but that the area was exempt as a drainage ditch excavated in uplands (**Exhibit 25**).⁶ The copy of the WRA March 2000 delineation provided to the Commission by the City is missing the wetland map on page 7 of the report. (The City has advised that it does not have a copy of the map.) However, based on the description of this area in the delineation and in WRA’s March 19, 2002 letter to the City of Pacifica, this area lies within the public right-of-way on the eastern edge of the approximately 50-foot wide Edgemar Road, which straddles the boundary of the Bowl and Edgemar parcels, and is located less than 100 feet from the approved development.

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

Wetland hydrology

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

⁶ The DEIR concluded based on this information that two, small areas south of Edgemar Road “meet Corps wetland criteria and are thus considered wetlands under the City of Pacifica’s [LCP] criteria” (DEIR, IV-B-2) and that these areas are “within 100 feet of the site” (DEIR, IV-B-13). In the FEIR the City’s prior statements concerning appealability of the development to the Commission were replaced with statements that determination of appealability was outside of the scope of the City’s CEQA determination (FEIR I-3 and III-3).

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

Therefore, the Commission finds that Wetland Area 1 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

TRA's March 11, 2002 memorandum notes field observations of water flowing across Edgemar Road made on March 27, 2001, January 23, 2002, and February 5, 2002 and of standing water on both sides of the paved portion of the road on February 5, 2002 (**Exhibit 31**). While the memorandum does not pinpoint the exact location of the water observed, the standing water observed "on both sides of the paved road" on February 5, 2002 indicates observations of standing water in Wetland Area 1, which is located immediately adjacent to Edgemar Road. Photo 4, in particular, referenced in the TRA memorandum, "shows ponding along Edgemar Road on the Fish parcel" that was also observed by TRA staff in March 2000 (**Exhibit 31**).

Wetland vegetation

The data sheet for Plot 2A attached to WRA's March 2000 delineation states that the "[s]ite is dominated by hydrophytic vegetation" and lists the dominant plant species as Arroyo willow (*salix lasiolepis*) (FACW) (**Exhibit 25**). Therefore, the Commission finds that the area adjacent to Edgemar Road is a wetland as defined by 14 CCR Section 13577 because the area supports the growth of hydrophytes.

Hydric soils

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

Conclusion

In June 1999, WRA conducted a wetland delineation of the Edgemar Road Parcel that was described in a March 2000 report. All three wetland criteria were found to be present in this area. Arroyo willow (FACW) made up 100% of the dominant species present, demonstrating a preponderance of hydrophytic vegetation. The soil was characterized as having low chroma colors and an aquic moisture regime (saturated and reduced soils) which are both demonstrative of hydric soils. Finally, wetland hydrology was apparent because the soil was covered with water and saturated in the upper 12 inches. Therefore, since wetland hydrology, wetland vegetation, and hydric soils were present, the Commission finds that this area is a wetland under 14 CCR Section 13577.

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

As noted above, WRA found that all three wetland criteria are present at Wetland Area 1, but concluded that the area is not a wetland. In its analysis, WRA erroneously concludes that man-made features, even if satisfying wetland criteria, are exempt from the Section 13577(a) definition.

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

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

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

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

Section 30620(a)(3) of the Coastal Act expressly states that the guidelines are designed to provide assistance in applying the policies of the Coastal Act prior to LCP certification. For purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, the 1981 Guidelines accordingly do not supersede, enlarge or diminish the Commission’s regulatory authority under the regulations, and in any case, are not applicable in evaluating the presence of wetlands under Section 13577(a). Moreover, Section 13577 of the Commission’s regulations was enacted *after* the 1981 guidelines, and although Section 13577 contains an express exclusion from the definition of wetlands for certain constructed agricultural ponds and reservoirs, it does not contain an exclusion for drainage ditches. To read an additional exception into the regulation would narrow the scope of the definition and contradict its plain wording.

Notably, the applicant’s biological consultant, while applying the 1981 Guidelines exception, himself acknowledges that due to lack of maintenance and siltation the area no longer effectively

functions as a drainage ditch. For example, as WRA notes in its March 19, 2002 letter, "Vegetation and silt has accumulated in the ditch and its drainage has been impaired. Following storm events, water flows over the paved portion of Edgemar Road towards the Bowl parcel downslope of Edgemar Road." WRA further notes that the area it refers to as the drainage ditch area "receives water from areas upslope of Edgemar Road including runoff from storm drains along the Pacific Coast Highway" and notes observations of ponding on Edgemar Road from water overflowing from the blocked ditch. These observations indicate that, even if the area in question was originally excavated as a drainage ditch, long neglect has caused it to lose its function as such. Therefore, even if the 1981 Guidelines were applicable in evaluating the presence of wetlands under Section 13577(a) for purposes of determining appeal jurisdiction over development approved by local governments under a certified LCP, it is highly questionable whether as a factual matter the exception referenced in the Guidelines would apply to the area in question because through long lack of maintenance and siltation the area's function as a drainage ditch has been compromised.

In correspondence to Commission staff, the applicant has also argued that the drainage ditch cannot qualify as a wetland under the holding of Beach Colony II v. California Coastal Commission, 151 Cal. App. 3d 1107 (1984). According to the applicant, this decision provides authority for the rule that wet areas that are the result of human activity or man-made structures do not qualify as wetlands under the Coastal Act. However, Beach Colony II addresses the relationship of the common law doctrine of avulsion to the Coastal Act and applies to the limited circumstance of land that becomes inundated as the result of a sudden, violent event. That decision is not applicable to the conditions on this project site. While the wetland characteristics of certain portions of the project site, including the area characterized by WRA as a drainage ditch, may be the direct or indirect result of human activities, these conditions did not come about as the result of a sudden, violent event and do not come within the sole exception for agriculturally-related constructed features specified in Section 13577(a)(2).

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

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

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

According to information provided by WRA, this second wetland area lies within 100 feet of Edgemar Road. The WRA May 22, 2002 letter attaches a figure showing the wetland area in relation to Edgemar Road and the graded portion of the site and acknowledges that a 100-foot distance, measured from the "center of this pit" (not the upland limit of wetland vegetation, the

criteria specified for purposes of determining the boundary of a wetland pursuant to 14 CCR Section 13577), intersects Edgemar Road (**Exhibit 28**).

The Edgemar Road right-of-way intersects with Palmetto Avenue and divides the two undeveloped "Fish" and "Bowl" sites. Presently, although some remnants of pavement remain within the right-of-way, Edgemar Road is essentially an unimproved public right-of-way and does not function as a travel way. The entire alignment of Edgemar Road would be improved as part of the development approved by the City on the Bowl site. Improvement of Edgemar Road is necessary to serve the approved development. At this time, no development has been approved on the "Fish" site. Thus, unless development on the "Fish" site is approved in the future, the sole function of Edgemar Road would be to serve the development that is the subject of this dispute.

The applicant argued in comments on the DEIR that the improvement of Edgemar Road was not part of the project. However, the FEIR responded that the proposed improvements to Edgemar Road by any entity, public or private, came within the CEQA Guidelines' definition of "project" (FEIR, III-17). Since the CDP approved by the City encompasses the proposed repair and re-grading of Edgemar Road, this work also forms part of the approved development for purposes of Coastal Commission review. Based on this information and the results of WRA's March 2000 delineation, the approved development is located within 100 feet of the boundaries of Wetland Area 2.

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

Wetland hydrology

The data sheet for Plot 1A attached to WRA's March 2000 delineation states that hydrologic indicators and algal mats are present, including sediment deposits as a primary indicator of wetland hydrology (**Exhibit 25**). Therefore, the Commission finds that Wetland Area 2 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

Wetland vegetation

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

Hydric soils

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

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

Conclusion

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

Because this area exhibits all 3 wetland criteria as documented in WRA’s March 2000 delineation, the Commission finds that it qualifies as a wetland within the meaning of 14 CCR Section 13577 and is located within 100 feet of the approved development and shown on the attachment to WRA’s May 22, 2002 comment letter.

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

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

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

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

The March 11, 2002 TRA memorandum includes extensive observations of wet conditions and wetland vegetation in Wetland Area 3 made by TRA staff during visits to the proposed project site on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002 (**Exhibit 31**). The TRA memorandum notes observations of "evidence of potentially saturated soils, as suggested by surface water lingering for a stretch of multiple days" on days when it had not rained immediately prior to observation in this area. Photographs of the site, referenced in the memorandum, show observations of very wet conditions, including flowing and standing water, and wetland vegetation (**Exhibit 31**). The TRA memorandum concludes that, while these observations alone do not determine whether LCP wetlands are present, "the possibility for LCP wetlands should be re-evaluated."

Wetland hydrology

As noted above, TRA's April 1997 initial biological survey recorded observations of at least "one small pool approximately 4 feet wide x 10 feet long x 1 foot deep" in the riparian scrub habitat on the project site, without specifying its exact location. The August 1999 WRA wetland delineation included no discussion of this area. The observations noted in TRA's initial survey indicate areas that were inundated or saturated for periods of long duration, which are primary indicators of wetland hydrology. The March 11, 2002 TRA memorandum includes extensive observations of wet conditions in Wetland Area 3 made by TRA staff during visits to the proposed project site on March 27, 2001, January 23, 2002, February 5, 2002, and March 8, 2002. This memorandum recounts that on March 27, 2001, the TRA field investigator "observed water seeping across the portion of Edgemar Road that winds into the willow/riparian area, and noted that water had pooled in small depressions in this sloped area. Photo 1 shows some dark streaks on Edgemar Road." On January 23, 2002, TRA staff "observed very wet conditions in

the riparian scrub area. Photo 2 shows sheet water flowing across Edgemar Road . . .” On February 5, 2002, TRA staff “observed wet conditions, including water flow across the same part of Edgemar Road, and standing water on both sides of the paved road. Photo 3 shows the same sheet flow as that observed on 1/23/02 . . . “ On March 8, 2002, TRA staff “noted saturation of soil on the up-slope side of arroyo willows on the Bowl site.” These observations that the area is subject to inundated or saturated for periods of long duration are primary indicators of wetland hydrology. Therefore, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because the area exhibits wetland hydrology.

Wetland vegetation

TRA’s April 1997 initial biological survey determined that wetland species including arroyo willow, twinberry, rushes, sedges, and English ivy were present in this area (**Exhibit 18**). In addition, WRA’s April 30, 1997 letter to the Syndicor Real Estate Group, documenting WRA’s April 28, 1997 site visit also notes areas of central coast riparian scrub habitat on the site that “are dominated by wetland plants . . .” (**Exhibit 19**). The TRA January 24, 2000 peer review notes that WRA’s December 27, 1999 LCP analysis found only the facultative species willow⁷ to be dominant in this area on the site, where the July 1999 WRA delineation had found several obligate and facultative plant species to be dominant. The Commission has been unable to obtain a copy of the referenced July 1999 WRA delineation.⁸ The March 11, 2002 TRA memorandum notes observations of wetland vegetation in Wetland Area 3 made by TRA staff during visits to the proposed project site in 2001 and 2002. The TRA memorandum notes the presence of “multiple hydrophytic species (including FACW and OBL based on the USFWS plant list) in the area dominated by the arroyo willow, including rushes and California blackberry.” On their March 5, 2002 site visit, TRA staff noted the obligate wetland species *Juncus effusus* “in areas just upslope as well as adjacent to the willows on the Bowl site.” Based on the available evidence, the Commission finds that Wetland Area 3 is a wetland as defined by 14 CCR Section 13577 because the area has a predominance of wetland vegetation.

Hydric soils

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

Conclusion

The available evidence weighs in favor of a finding that portions of the riparian scrub habitat on the site qualify as wetlands under 14 CCR Section 13577 because of the presence of wetland

⁷ Arroyo willow (*salix lasiolepis*) is classified as FACW not FAC.

⁸ The applicant has refused to allow its wetland consultants to provide the Commission with copies of the July 1999 delineation, and the City did not have a copy of this delineation in its files. The August 1999 delineation of the project site does not record any observations of obligate wetland species, and does not explain the reason for revisions deleting such observations contained in the earlier July 1999 delineation.

vegetation and wetland hydrology and the likely presence of hydric soils. As noted above, the fact that the Army Corps did not find wetlands on the project site that are subject to its jurisdiction under Section 404 of the Clean Water Act is not dispositive of the question, since the definition contained in 14 CCR Section 13577 is broader than the Corps' applicable Section 404 definition. The fact that the applicant has denied the Commission access to the project site further supports the Commission finding that evidence of Section 13577 wetlands exists on the site because the applicant apparently believes a site visit would provide additional evidence that wetlands are present on the site. In the absence of complete information, the Coastal Act requires the Commission to act in a manner protective of coastal resources.

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

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

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

However, when wetland delineators from the Army Corps of Engineers visited the site on November 29, 1999, they found no field evidence of any one of the standard wetland criteria. The Army Corps concluded, despite WRA's initial observations indicating the presence of all three wetland indicators, that this area did not qualify as a wetland for purposes of Army Corps jurisdiction (**Exhibit 23**). To resolve this discrepancy, the Commission Biologist discussed the matter with Dan Martel, a senior delineator for the Corps who was present on the November site visit. Mr. Martel found that the soil colors were higher in chroma than those characteristic of

hydric soils and that redoximorphic features were not present in the soils. Similarly, he could find no evidence of the hydrology indicators that had previously been reported, despite the fact that algal mats are persistent and relatively obvious features. Mr. Martel did find that twinberry was present, but that the community character of the vegetation was upland, although small patches may have been dominated by twinberry. The Commission Biologist concluded that the initial reporting of hydrology and hydric soil indicators was probably due to inexperience on the part of the delineator and was in error. Although small patches may be mostly twinberry, this indicator species is in the frequency class FAC, which means that it is expected to occur in uplands and wetlands with equal probability. Given the site characteristics described by Mr. Martel, the small depression appears to be upland and twinberry is apparently not acting as a hydrophyte in this situation.

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

Wetland hydrology

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

Wetland vegetation

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

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

Hydric soils

Field observations recorded in the August 1999 WRA wetland delineation state the presence of hydric soil indicators, including gleyed or low chroma colors, organic streaking in sandy soils, and common, faint mottles in 12-inch soil profiles (Plot 1A). As discussed above, the

Commission biologist's conversations with the Army Corps wetland specialist who visited the site call these observations into question.

Conclusion

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

3.6.4 Proximity of Development to Wetlands

As discussed above, the property contains wetlands that meet the definition of wetlands in the Coastal Act and Section 13577 of the Commission's regulations as well as the definition contained in the certified LCP.

Wetland Area 1, the area south and immediately adjacent to Edgemar Road, is within 50 feet of Edgemar Road and within 100 feet of the project site. Wetland Area 2, the topographic depression on the parcel south of Edgemar Road, is 100 feet from Edgemar Road. The project site also includes Wetland Area 3, the ponded area in riparian scrub vegetation and Wetland Area 4, located on the western side of the site.

In addition to subdivision of the site, which is development within 100 feet of Areas 1, 3 and 4, the approved development includes clearing and grubbing of the entire site i.e. clearing of major vegetation (development) within 100 feet of Areas 1, 3 and 4. In addition, the development includes grading of the entire site, which is also development within 100 feet of Areas 1, 3 and 4. The development also includes construction of internal roads and other infrastructure and buildings within 100 feet of Wetland Areas 3 and 4 (and probably 1). Finally, the approved development includes the reconstruction/improvement of Edgemar Road within 100 feet of Areas 1 and 2.

In addition to the physical development of the property, "development" approved by the City includes a subdivision of the entire property. Section 30106 of the Coastal Act defines development, in part, as:

"Development" means, on land, 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.

Similarly, Zoning Code Section 9-4.4302(z) of the City of Pacifica certified LCP defines development, in part, as:

"Development" shall mean on land, or in or under water within the Pacifica Coastal Zone, the following:

...

(4) A change in the density or intensity of use of land, including subdivisions and any other division of land, except where a division occurs as a result of a purchase by a public agency for public recreational use;

Thus, the definition of "development" contained in the Coastal Act and the Pacifica LCP includes more than just physical development such as residential construction; the definition also includes non-physical changes such as changes to the density and intensity of use of land.

The overall subdivision of the entire property approved by the City of Pacifica constitutes "development" under both the Coastal Act and the City of Pacifica certified LCP. The subdivision approved by the City of Pacifica will change the intensity and density of use of the entire property, including Wetland Area 1 and Wetland Area 2 that contain undisputed wetlands. In other words, as approved by the City, "development" within the meaning of the Coastal Act and LCP will occur on the entirety of this property. Therefore, the Commission finds that since the entire property, including both the wetland and non-wetland areas, is subject to subdivision, the approved development will occur within 100 feet of a wetland as required by Section 30603(a)(2) of the Coastal Act. Therefore, the City's action approving the coastal development permit is appealable to the Commission pursuant to Section 30603(a)(2) of the Coastal Act.

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

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

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

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

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

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

At the southern end of the bluff area west of Palmetto Avenue in the vicinity of the project site, there is a deep, vegetated gully that extends inland from the bluff at roughly a right angle to the general trend of the bluff line along the seaward face of the bluff. Applying the definition of "bluff line or edge" stated in Section 13577(h), the point reached by the angle bisecting the line coinciding with the general trend of the bluff line along the seaward face of the bluff and a line coinciding with the general trend of the bluff line along the gully would lie roughly along the general trend of the bluff line and greater than 300 feet from the project. For this reason, the City's action does not appear to be independently appealable on this ground.

3.8 Conclusion

The Commission finds that development approved by the City under CDP-203-01 is: (1) located between the sea and the first public road paralleling the sea and (2) within 100 feet of wetlands as defined in 14 CCR Section 13577. Therefore, the City's action approving CDP-203-01 is appealable to the Commission under Sections 30601(a)(1) and 30603(a)(2) of the Coastal Act.

The City's certified LCP provides that the decisions of the approving authority on an application for a development appealable to the Coastal Commission shall become final and effective only after the appeal period to the Commission has expired and no appeal has been filed. In addition, the City's certified LCP mirrors the requirements of Section 13572 of the Commission's regulations that if the notice of final action is defective and does not contain certain required information, the permit decision will be stayed and will not become effective. In the case of the City's approval, the City did not submit a valid notice of final local action. Therefore, pursuant to the Pacifica Zoning Code and section 13572 of the Commission's regulations, as the notice of final local action was defective with respect to the City's approval, the City's action to approve a permit authorizing such appealable development is not effective.

EXHIBITS

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

10. Letter to Keith Fromm, North Pacifica LLC, from Peter Imhof, dated September 17, 2002
11. Letter from Keith Fromm, North Pacifica, LLC, to Peter Douglas and Peter Imhof, dated September 23, 2002
12. Letter from Keith Fromm, North Pacifica, LLC, to Chris Kern, dated September 23, 2002
13. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 2, 2002
14. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 4, 2002
15. Letter from Keith Fromm, North Pacifica, LLC, to Peter Imhof, dated October 7, 2002
16. Commission staff comment letter on Notice of Preparation of EIR, dated October 4, 2001
17. Commission staff comment letter on draft EIR, dated May 3, 2002
18. TRA Initial Biological Survey, dated April 1997
19. Letter from WRA to the Syndicor Real Estate Group, dated April 30, 1997
20. WRA Wetland Delineation for the "Pacific Cove Parcel," dated August 1999
21. WRA revised jurisdictional wetlands map, dated November 30, 1999
22. Letter from WRA to the City of Pacifica, dated December 27, 1999
23. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated January 3, 2000
24. Memorandum from Taylor Peterson, TRA, to Allison Knapp, City of Pacifica, dated January 24, 2000
25. WRA Wetland Delineation for the "Edgemar Road Parcel," dated March 2000
26. Letter from C. Fong, ACOE, to T. Fraser, WRA, dated May 11, 2001
27. Letter from WRA to the City of Pacifica, dated March 19, 2002
28. Letter from WRA to the City of Pacifica, dated May 22, 2002
29. Memorandum from Commission Biologist John Dixon to Peter Imhof, et al., dated November 21, 2002
30. Letter from Robert J. Kalmbach, North Pacifica LLC to Peter Imhof, dated November 22, 2002
31. Memorandum from Eben Polk, TRA, to Michael Josselyn, dated March 22, 2002.

32. North Pacifica LLC Brief Number One
33. North Pacifica LLC Brief Number Two
34. North Pacifica Request for Subpoenas
35. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Request for Subpoenas
36. November 16, 2005 letter from Jaquelynn Pope to Joel Jacobs requesting Commission hearing procedures
37. November 17, 2005 letter from Jaquelynn Pope to Joel Jacobs requesting Commission hearing procedures
38. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Commission hearing procedures
39. November 17, 2005 letter from Jaquelynn Pope to Joel Jacobs regarding alleged misrepresentations
40. 2005 Supplemental Declaration of Keith Fromm (**REMOVED**)
41. December 22, 2004 Court of Appeal Decision North Pacifica LLC v. California Coastal Commission

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5260
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F 2.5a



December 2, 2005

To: Coastal Commissioners and Interested Persons

**From: Peter Douglas, Executive Director
Charles Lester, Deputy Director
Chris Kern, District Manager**

Subject: ADDENDUM to Staff Report for 2-02-02-EDD (North Pacifica LLC)

North Pacifica has asserted a number of procedural and legal objections to this dispute resolution proceeding in submittals received shortly before and after the finalization of the staff report. The staff report responds to some objections, such as North Pacifica's arguments regarding the standard of review that the Commission should apply and the evidence that the Commission may consider. This addendum responds to North Pacifica's other objections.

The Personal Involvement of Executive Director Peter Douglas and the Delegation of Executive Director Authority to Commission Staff

North Pacifica argues that because Section 13569 of the Commission's regulations refers to the "executive director" making determinations and conducting investigations, the Commission may not hold a dispute resolution hearing pursuant to Section 13569 unless the executive director has personally made those determinations and investigations. This is incorrect. Public Resources Code Section 30335 requires the Commission to prescribe the duties of the executive director. The Commission has done this through the promulgation of regulations, which establish numerous executive director responsibilities. The regulations, however, also expressly allow the executive director to delegate the performance of *any* executive director functions except as specifically provided by Commission resolution. 14 C.C.R. § 13032(b). The regulations do not require that the delegation of functions be done in a particular manner or reduced to writing. No Commission resolution specifically prohibits the executive director from delegating functions established in Section 13569.

Through long-established practice, the executive director has delegated most functions regarding Commission staff review of permit applications, permit appeals, and related procedures such as the resolution of disputes with local governments regarding the appealability of local coastal development permits. This includes review of local government notices regarding permit applications, final local actions on permit applications, and determinations by Commission staff regarding the appealability of local CDPs. The executive director, of course, retains responsibility for ensuring that delegated functions are properly executed. *See* 14 C.C.R. § 13032(b).

In this instance, Commission staff reviewed the final local action notice and documents in the Commission's possession regarding the presence of wetlands on or near the Pacifica Bowl site, as well as other information relevant to determining the appealability of the City's approval. Pursuant to longstanding practice, Commission staff notified the City of the deficiency in the final local action notice and subsequently of the determination regarding the appealability of the project. Executive Director Peter Douglas and Commission staff recall having discussed early in the process the dispute regarding the appealability of the North Pacifica project and the grounds for determining that the local approval of the project is appealable. Executive Director Douglas did in fact review the issues and agreed that the project is appealable and that the Commission should proceed with dispute resolution pursuant to Section 13569.

Because Commission staff acted pursuant to the delegated authority of the executive director, the requirements of Section 13569 regarding executive director investigations and determinations are satisfied. Moreover, Executive Director Douglas, in consultation with Commission staff, has in fact determined that the North Pacifica project is appealable.

Other Procedural and Jurisdictional Objections

North Pacifica also argues that the Executive Director did not have the authority to commence this dispute resolution proceeding absent a formal request from the applicant, the City, or another interested person; that the proceeding could not be commenced after the local government had already taken final action; that the Commission lost jurisdiction by not acting on the appeal submitted by John Curtis within 49 days; and that the Commission otherwise did not have the authority to conduct a dispute resolution proceeding regarding North Pacifica's project. The court of appeal rejected all of these arguments and held that the Commission is "empowered to hold an appealability hearing." *North Pacifica LLC v. California Coastal Commission*, California Court of Appeal, First Appellate District, Case No. A101434, slip op. at 7 (**Exhibit 41**).

North Pacifica further argues that the Coastal Commission's sole remedy was to file suit against the City, that the City's action is administrative res judicata because the Commission did not file a timely lawsuit against the City, and that the Commission is barred from challenging the City's action because the Commission did not file suit challenging findings in the Final Environmental Impact Report (FEIR) that North Pacifica contends establish that the project is not appealable. The court of appeal decision that the Commission has the authority to conduct an appealability hearing disposes of North Pacifica's argument that the Commission's sole remedy was to file suit against the City. In addition, as discussed in the staff report, the FEIR expressly declined to reach any conclusions regarding the appealability of the project.

North Pacifica also argues that it has not received adequate notice regarding the dispute resolution hearing. For hearings regarding permit applications and appeals, the Commission's regulations require the Commission to mail notice to all interested persons at least 10 days in advance of the hearing. 14 C.C.R. § 13063(a). The Commission mailed notice and a copy of the staff report to North Pacifica on November 29, 2005, substantially earlier than required by the Commission's regulations.

North Pacifica Allegations Regarding Commission Bias

North Pacifica makes a variety of claims in support of its argument that it cannot obtain a fair hearing in this matter because of Commission bias. As an initial matter, North Pacifica presented a number of bias arguments to the court of appeal, and to the trial court in the second action. Both courts rejected the bias arguments, and ruled in favor of the Commission. Nonetheless, North Pacifica is repeating many of those arguments here.

North Pacifica argues now that the manner in which the Commission has litigated the three lawsuits that North Pacifica has filed against the Commission and Commission employees demonstrates Commission bias regarding the appealability of North Pacifica's project. This is incorrect. The Commission's arguments in these lawsuits have been intended to protect the Commission's authority to conduct the dispute resolution hearing, not to determine what the outcome of the hearing should be. The Commission sought a temporary restraining order against North Pacifica in the fall of 2003 in order to prevent clearing and grubbing of the Pacifica Bowl site. The Commission argued that because the local coastal development permit was suspended pending resolution of the dispute regarding appealability, the clearing and grubbing activity would be unpermitted development in violation of the Coastal Act. The Commission also sought to preserve the status quo pending resolution of the litigation regarding the status of the local CDP. The superior court did not grant the Commission's request for a temporary restraining order (and the Commission dismissed the underlying complaint), but the court of appeal subsequently agreed with the Commission that the local CDP was suspended pending resolution of the dispute.

North Pacifica also argues that the Commission is biased because it has discussed North Pacifica's lawsuits against the Commission and Commission employees in closed session, has authorized the Attorney General's Office to represent the current and former Commission employees whom North Pacifica has sued, and would allegedly be liable for damages if the Commission decides the project is not appealable.

North Pacifica's arguments, if accepted, would allow any person to sue the Commission or its employees and then argue that the Commission may not act on the subject matter of the litigation if the Commission exercises its legal right and obligation to defend itself and its employees. In any event, the Commission is entitled to discuss pending litigation in closed session and is obligated to defend its employees against lawsuits challenging conduct within the scope of their employment. The right of the Commission to consult with its attorneys regarding pending litigation in no way establishes Commission bias regarding actions that it has not yet taken.

North Pacifica's allegations regarding the Commission's potential financial liability if it acts one way or another also fail to establish bias. As an initial matter, North Pacifica's contention that the Commission will be liable for damages caused by project delay if the Commission determines the project is not appealable lacks merit. Through its aggressive litigation strategy, North Pacifica is responsible for the delays in holding the dispute resolution hearing. Moreover, any delay caused by the dispute resolution procedure would not give rise to liability under California or federal law. In addition, it is not unusual for applicants or other interested persons to argue that the Commission's actions may expose itself to liability. The Commission

nonetheless acts on the basis of the law and the facts in the record before it. The threat of financial liability, therefore, does not establish Commission bias.

North Pacifica also argues that the Commission has improperly commingled its adjudicatory function with investigatory, advisory, and prosecutorial roles. This, too, is incorrect. Commission staff has engaged in investigations and made recommendations to the Commission regarding the appealability of the project. The Commission itself has not engaged in those roles. In the dispute resolution hearing, the Commission will adjudicate whether the project is appealable in light of the evidence and arguments put forward by Commission staff, North Pacifica, and other interested persons.

Finally, it is important to note that North Pacifica does not claim that any commissioners have a personal financial interest in the decision or that any commissioners have made any past statements or engaged in any other activity that creates the appearance of a conflict or bias.

North Pacifica Submittals That Disclose Attorney Work Product

As of the date of this addendum, North Pacifica has submitted three documents in connection with this proceeding – Brief 3, Brief 4, and a letter from Keith Fromm to Deputy Attorney General Joel Jacobs dated November 22, 2005 -- that disclose confidential attorney work product of the Commission's litigation counsel. North Pacifica obtained a copy of the attorney work product through discovery in litigation North Pacifica filed against the City of Pacifica relating to this project. In that litigation the court issued a protective order strictly limiting North Pacifica's use of the work product document. The Attorney General's Office and subsequently Commission staff counsel informed North Pacifica that documents that disclose confidential attorney work product that is the subject of the protective order would not be distributed to Commissioners or put in the administrative record (**Exhibits 48 and 49**). Both letters also informed North Pacifica that, if it submitted revised versions of the documents that do not disclose the attorney work product, the revised versions would be distributed to Commissioners and placed in the public record. To date, North Pacifica has not submitted revised versions of the documents.

The Commission has filed a motion for sanctions against North Pacifica for violations of the protective order. The hearing on the motion is scheduled for Wednesday, December 14, 2005. Once the court rules, staff will consider the matter further in light of the ruling.

The supplemental declaration of Keith Fromm that is listed as Exhibit 40 of the staff report was not attached to copies of the staff report that were distributed to members of the public because the declaration contained confidential communications among the City of Pacifica's attorneys (**Exhibit 45**). Shortly before the mailing of copies of the staff report to the public, the City of Pacifica objected to the distribution of the document, and so staff delayed mailing the document in order to consider the City's objection. Shortly thereafter, however, the City withdrew its objection to the declaration (**Exhibit 47**). Accordingly, the supplemental declaration, including all exhibits, is attached to the addendum.

North Pacifica Request for Discovery, Cross-Examination, and Voir Dire

North Pacifica has requested that the Commission issue subpoenas for documents relating to this matter and that it be given the opportunity to conduct depositions, cross-examine witnesses, and to question Commissioners regarding potential bias. The Commission's regulations do not provide for such procedures and the authorities cited by North Pacifica do not apply to the Commission. North Pacifica, however, has had multiple opportunities to inspect the Commission's file on this proceeding. In addition, in response to Public Records Act requests, the Commission allowed North Pacifica to inspect numerous documents, including the files for other Section 13569 dispute resolution proceedings (**Exhibit 42**).

EXHIBITS

[NOTE: Some of the pages from Exhibit Numbers 19, 20, and 25 were inadvertently left out of the November 23, 2005 Staff Report due to a reproduction error. As such, these exhibits are provided in their entirety with this addendum.]

19. Letter from WRA to Syndicor Real Estate Group, dated April 30, 1997
20. WRA Wetland Delineation for the "Pacific Cove Parcel," dated August 1999
25. WRA Wetland Delineation for the "Edgemar Road Parcel," dated March 2000
40. 2005 Supplemental Declaration of Keith Fromm including exhibits (removed from the November 23, 2005 staff report)
42. November 18, 2005 letter from Christopher Pederson to Jaquelynn Pope regarding Public Records Act requests
43. November 22, 2005 letter from Chris Kern to Keith Fromm regarding site visit
44. November 28, 2005 letter from Keith Fromm to Chris Kern regarding site visit
45. November 28, 2005 letter from Patrick McMahon to Chris Kern regarding objection to North Pacifica exhibit
46. November 29, 2005 letter from Jaquelynn Pope and Keith Fromm to Patrick McMahon regarding objection to North Pacifica exhibit
47. November 30, 2005 letter from Patrick McMahon to Chris Kern withdrawing objection to North Pacifica exhibit
48. November 18, 2005 letter from Joel Jacobs to Jacqueline Pope and Keith Fromm regarding attorney work product

49. December 1, 2005 letter from Christopher Pederson to Jaquelynn Pope and Keith Fromm regarding attorney work product
50. North Pacifica Supplemental Brief to Brief Number Two

EXHIBIT 6

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I. INTRODUCTION

In the afternoon of Thursday, January 5, 2006, North Pacifica LLC ("NP") received a notice entitled "*Important Public Hearing Notice, New Appeal*" ("Appeal Notice" herein). The Appeal Notice stated that the Hearing Date and Location would be Wednesday, January 11, 2006, at 10:00 A.M. in San Pedro, CA.

While the stated date on the appeal notice was December 30, 2005, the envelope in which the notice was delivered bears a postage meter stamp of January 3, 2006, establishing that the Notice could not possibly have been mailed prior to January 3, 2006, i.e. a mere 7 calendar days and a mere 5 business days prior to the date of the hearing. A true copy of the envelope, including the postage stamp, in which it arrived, is attached hereto as Exhibit A.

II. NOTICE OF THE HEARING IS DEFECTIVE, THE COMMISSION THUS LACKS JURISDICTION TO HOLD THE HEARING AS SCHEDULED AND, IN ANY EVENT, THE LACK OF SUFFICIENT NOTICE VIOLATES THE COMMISSION'S OWN REGULATIONS, IS INSUFFICIENT TO PERMIT NORTH PACIFICA LLC TO PREPARE ITS OPPOSITION, IS INSUFFICIENT FOR INTERESTED MEMBERS OF THE PUBLIC AND/OR AFFECTED GOVERNMENT AGENCIES TO LOBBY THE COMMISSIONERS AND CAUSES GREAT PREJUDICE BOTH TO NP AND INTERESTED MEMBERS OF THE PUBLIC

Coastal Commission Regulation § 13063 sets forth the requirement that distribution of a notice for a hearing, such as the instant one, in which a coastal development permit application will be heard must be made "*at least 10 calendar days prior to the date on which the application will be heard.*" The requirement is mandatory, as evidenced by the use, in Regulation §13063 of the word "*shall*" as opposed to "*may*". Thus, the Appeal Notice distributed both to NP and to the public is defective.

Regulation § 13063(a) reads as follows:
Distribution of Notice

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(a) At least 10 calendar days prior to the date on which the application will be heard by the commission, the executive director shall mail written notice to each applicant, to all affected cities and counties, to all public agencies which have jurisdiction, by law, with respect to a proposed development, to all persons who have requested it, and to all persons known by the executive director to have a particular interest in the application, including those specified in section 13054(a). The notice shall contain the following elements:

- (1) The number assigned to the application;
 - (2) A description of the development and its proposed location;
 - (3) The date, time and place at which the application will be heard by the commission;
 - (4) The general procedure of the commission concerning hearings and action on applications;
 - (5) The direction to persons wishing to participate in the public hearing that testimony should be related to the regional and statewide issues addressed by the Coastal Act; and
 - (6) A statement that staff reports will be distributed as set forth in section 13059.
- AUTHORITY:

Note: Authority cited: Section 30333, Public Resources Code. Reference: Sections 30006, 30620 and 30621, Public Resources Code.

As forcefully argued by the Coastal Commission (the "Commission") in *North Pacifica LLC v. California Coastal Commission*, First Appellate District, Division Four, Case No. A101434, (in respect to this very project) and adopted by the Court of Appeal therein:

"A defective notice is ineffective..."

Appellate Opinion, A101434, p. 8

Thus, the Appeal Notice is "*ineffective*" and this hearing may not lawfully take place on the scheduled date and may not take place at all without a proper notice to both NP and interested members of the public and all affected public agencies, as per the mandatory requirements of Reg. 13063.

NP, therefore, objects to the hearing on the basis that it lacks sufficient notice, that the Appeal Notice provided did not comply with Reg. 13063 and that the Commission lacks

1 jurisdiction to conduct the hearing. NP has not been afforded sufficient time to prepare for and
2 attend the hearing and thus will be unable to do so.

3 III. THE NOTICE WAS INSUFFICIENT TO ENABLE NP EITHER TO PREPARE ITS
4 OPPOSITION TO STAFF'S RECOMMENDATIONS OR TO APPEAR AT THE HEARING

5 As stated, the Appeal Notice provided NP with only 3 business days to prepare an
6 opposition to the lengthy and detailed Staff Report and to engage the necessary experts and
7 prepare the necessary experts' reports and/or obtain live expert testimony to refute the
8 conclusions contained in the Staff Report which recommends a complete denial of NP's project
9 permits.
10

11 By the Commission's own admission, as set forth in its Respondents' Brief to the Court
12 of Appeal in North Pacifica LLC v. California Coastal Commission A101434 the factual issues
13 in a *de novo* appeal under PRC § 30603 are complex and implicate specialized expertise:
14

15 "The factual issues raised by section 30603 not only are complex, but also could
16 implicate specialized administrative understanding. Mapping of wetlands, for
17 example, requires consideration of (1) whether the area is predominated by
18 hydrophytic (wetland) vegetation; (2) whether the area exhibits wetlands
19 (hydrology); or (3) whether the substrate of the area contains hydric (wetland)
20 soils. (See §13577; Kirkorowicz v. California Coastal Com. (2000) 83
21 Cal.App.4th 980, 988.)
22

23 Commission's Respondent's Brief, A101434, p. 23

24 The permits obtained by NP were obtained over an application process by the City of
25 Pacifica that spanned over three years, involved the review by the City of Pacifica ("City") of
26 tens of thousands of pages of documents, the preparation of dozens of maps and experts' reports,
27 including, but not limited to, many revised versions of the tract map, soils reports (including peer
28 review reports), toxics reports, biological reports (including peer review reports), archaeological

1 reports, drainage studies, storm water studies, traffic studies, architectural plans, a draft EIR and
2 a FEIR.

3 There were eight public hearings conducted by the City in connection with its ultimate
4 certification of the EIR and approval of the project, in respect to which dozens, if not hundreds
5 of witnesses gave live testimony and/or submitted written materials. The cost to NP of the
6 processing of these permits was in excess of \$2,000,000. The value of the permits is in excess of
7 \$10 million.
8

9 The appeal under PRC § 30603, that the Commission proposes to conduct on January 11,
10 2006 is a *de novo* review, which seeks to overturn the City's permits in their entirety and to
11 afford NP only 3 business days to cull through the many thousands of pages of evidence and
12 videotapes of the many public hearings (lodged in the City of Pacifica, the Coastal Commission
13 office in San Francisco or elsewhere), engage the necessary experts in the many fields including,
14 but not limited to, civil engineering, biological analysis, soils analysis, drainage analysis, storm
15 water analysis, have them prepare new reports in response to the Commission's staff report,
16 transport themselves to Los Angeles, lobby the Commissioners to persuade at least 3 of them to
17 open public discussion on the substantial issue question, and present those reports, in live
18 testimony, in a hearing over 300 miles away from the project and the project files, in order to
19 refute the Staff's recommendations that there is a substantial issue and that the project approval
20 should be overturned.
21

22 Because of the defective notice, all of this must be done in a total of 3 business days.

23 This is an impossible task, does not comport with the mandatory notice requirements of the
24 Commission's own regulations or the fundamental notice requirements of due process.
25

26 Moreover, it presents a logistical impossibility and/or undue hardship for any members of
27 the public or affected governmental agencies who may wish to challenge the Commission staff's
28 conclusion that the appeal presents a substantial issue or any legitimate grounds for appeal. The

1 effective notice to these members of the public was also only 3 business days (or 5 calendar
2 days). The files for the project, comprising thousands of pages, are in San Francisco in the
3 offices of the Coastal Commission and in the offices of the City of Pacifica, but the hearing is in
4 San Pedro, over 300 miles away.

5
6 The Commission's files for the project can only be viewed by members of the public
7 upon making an appointment with the Commission in San Francisco, for a time in advance. As
8 the files with the City and the Commission comprise many thousands of pages (or tens of
9 thousands of pages) of documents (and videotapes comprising hours of viewing time), there was
10 no meaningful opportunity for any member of the public and/or affected governmental agencies
11 to receive the Appeal Notice on Thursday afternoon January 5, 2006, make an appointment to
12 view the files at the Commission's offices in San Francisco and/or the City's files in Pacifica,
13 make any meaningful review of the files, including viewing of relevant videotapes and making
14 copies of pertinent documents, consult with and/or have them reviewed by any necessary
15 experts, synthesize the reviewed documents in consultation with experts into a meaningful
16 presentation, transport themselves down to Los Angeles, lobby Commissioners and present such
17 evidence and make a presentation before the Commission on Wednesday, January 11, 2006.
18 Moreover, there is no meaningful period of time in which the Commissioners themselves could
19 view the videotapes and digest the mass of evidence even if it could be produced instantly within
20 said 3 business day period, which it cannot.
21

22
23 The insufficiency of the legally deficient notice imposed an enormous and
24 insurmountable prejudice, both on NP and on any member of the public and/or affected
25 governmental agency who wished to challenge in time for the hearing on January 11, 2006, the
26 Staff's recommendation that a substantial issue exists.
27
28

1 IV. THE DEFECTIVE NOTICE CANNOT BE CURED BY A CONTINUANCE

2 The defective notice for the hearing cannot be cured by merely continuing or adjourning
3 it to a later date. Since one of the essential elements of the substantial issue hearing is that,
4 before the Commission renders its decision, interested members of the public and affected
5 governmental agencies must also receive notice and an opportunity to lobby the Commissioners
6 and contribute their input for the Commission's consideration of the substantial issue question
7 and/or substantive appeal, a mere adjournment or continuance of the hearing would be
8 insufficient as the interested members of the public and affected governmental agencies would
9 be unaware that the hearing was continued and/or to what date, time and location in California it
10 was continued to. Thus, the invalid notice cannot be cured for this scheduled hearing.

11
12 V. SPECIFIC EXAMPLES OF PREJUDICE RESULTING FROM THE INADEQUATE
13 AND DEFECTIVE NOTICE
14

15 There are numerous ways in which NP, interested members of the public and affected
16 government agencies are all prejudiced by the insufficiency and defectiveness of the notice
17 served by the Commission for this hearing.

18 Firstly, the required minimum notice period in the Commission Regulation is intended to
19 serve (at least) two functions:

20 1. To provide an adequate period of time to review Staff's recommended action, review
21 the administrative record and other available evidence and prepare a presentation in opposition
22 or support of Staff's recommended action; and,

23
24 2. To enable the applicant and members of the public and/or affected government
25 agencies sufficient time to plan and/or rearrange their schedules to enable them to lobby
26 Commissioners so as to persuade at least three of them to entertain public input on the question
27 of whether there is a substantial issue, attend the hearing and prepare a presentation either or
28

1 both orally and/or in writing to the Commission in time for the Commissioners to be able to
2 meaningfully hear and/or read such presentations.

3 Neither of these two functions has been served by a notice, as here, that comprises only 5
4 calendar days and only 3 business days.

5
6 (a) Inadequate Time to Lobby Commissioners For Discussion in Respect to Substantial Issue.

7 For example, the first portion of the hearing is earmarked for determining whether or not
8 there is a substantial issue. If and only if three Commissioners want to hear discussion on the
9 issue will it then be opened to public comment and input. The inadequate window of only 3
10 business days makes it, in practical terms, impossible for NP, members of the public or affected
11 governmental agencies to assemble relevant evidence, review same, consult with necessary
12 experts to interpret the evidence and make appointments to present that evidence to the
13 Commissioners to persuade them even to vote to hear public discussion on the issue, much less
14 to decide that there is no substantial issue to be considered in an appeal.

15
16 (b) Inadequate Time to Assemble Evidence to Refute Conclusions of Staff Report.

17 The Staff Report comprises 22 pages of dense and highly technical allegations, plus
18 approximately 50 more pages of dense and highly technical exhibits. It also refers to and
19 incorporates by reference many more exhibits. Amongst Staff's allegations upon which Staff
20 recommends that the Commission vote that there is a substantial issue are the following:

21 (1) the project would involve filling in LCP wetlands; (Staff Report p. 2)

22 (2) the project does not include feasible site design, source control, or treatment
23 control best management practices (BMP's) to reduce the volume or pollutant load of storm
24 water leaving the site. (Staff Report, p. 2, 3).

25 (3) the project's grading would directly impact coastal terrace prairie habitat on
26 the adjacent "Fish" parcel and damage ESHA. (Staff Report, p.3)

27
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1 All of these contentions are highly technical and require specialized expertise, were
2 comprehensively addressed in the City's consideration of the project, were the subject of
3 voluminous and highly technical experts' reports and a certified EIR in connection with the
4 City's approval of the project and require the interpretation and input from experts in the fields
5 of wetlands and ESHA biology, civil engineering and soils engineering, among others, to refute
6 them.
7

8 For example, a comprehensive "*Stormwater Management Report*" dated August 7, 2000
9 prepared by Brian Kangas Foulk, comprising 35 pages of highly technical expert information,
10 including charts and mathematical calculations, as to every aspect of stormwater control is
11 contained in the administrative record for NP's project.
12

13 However, in the deficient 3 business day notice period provided by the Commission there
14 is simply insufficient time for NP to engage its experts and lobby the Commissioners to
15 demonstrate that all of Staff's concerns regarding stormwater control were already adequately
16 covered and considered by the City in its approval of the project and that, therefore, there is no
17 substantial issue on the subject, or at least to persuade three Commissioners to vote to hear
18 public input on the question as to whether or not there is any substantial issue in respect to such
19 subject.
20

21 Likewise, in connection with wetlands and ESHA analysis, there are many highly
22 technical and detailed expert reports in the administrative record, prepared by expert biologists
23 such as Wetlands Research Associates, Inc., Thomas Reid Associates and the Army Corps. of
24 Engineers which supported the City's conclusion that no LCP wetlands would be filled in and
25 that no ESHA would be affected by the project. Such reports include, but were not limited to the
26 following (see EIR IV-B-1 et seq., see also Commission Staff Report dated November 23, 2005
27 p. 14):
28

- 1 (a) a formal "*Delineation of Potential Jurisdictional Wetlands*" dated August 1999
2 prepared by Wetlands Research Associates, Inc., including technical maps, photos, many tables
3 of calculations,
4
5 (b) a revised jurisdictional wetlands map, dated November 30, 1999 prepared by
6 Wetlands Research Associates;
7
8 (c) a report, including maps, dated December 27, 1999 prepared by Wetlands Research
9 Associates to the City of Pacifica;
10
11 (d) a biological review for wetlands by the Army Corps. of Engineers dated January 3,
12 2000;
13
14 (e) a peer review by Thomas Reid Associates (see EIR p. IV-B-2) and CA Department of
15 Fish and Game representative Jeanine Dewald.
16
17 (f) various peer review memoranda by Thomas Reid Associates dated January 24, 2000;
18
19 (g) a wetland delineation for the "Edgemar Road Parcel", dated March 2000;
20
21 (h) a biological review for wetlands by the Army Corps. of Engineers dated May 11,
22 2001;
23
24 (i) a mapping of vegetation communities by Thomas Reid Associates in April 2001;
25
26 (j) an additional site visit report by a Thomas Reid Associates biologist on January 23,
27 2002.
28
29 (k) a memorandum from Eben Polk of Thomas Reid Associates to Wetlands Research
30 Associates, dated March 11, 2002
31
32 (l) two letters dated March 19, 2002, from Wetlands Research Associates to the City of
33 Pacifica;
34
35 (m) a draft EIR dated March, 2002
36
37 (n) a report by Wetlands Research Associates to the City of Pacifica dated May 22, 2002

1 (o) a Final EIR, dated June 2002
2 (p) additional input by plant biologist Bruce Pavlik on assessment of plant vegetation;
3 (q) a videotape of the City's June, 2002 Planning Commission hearing in which NP's
4 EIR was certified and in which Thomas Reid, himself, the C.E.O. of Thomas Reid Associates,
5 gave a live presentation explaining exactly why there were no wetlands or ESHA affecting the
6 site and why his own earlier site reviews of April 1997 which suggested the existence of
7 "potential" wetlands and upon which Commission staff relied in the Reg. 13569 hearing for its
8 conclusion that there were wetlands on the subject site (see Staff Report dated November 23,
9 2005, p. 16), were proven unfounded by subsequent more definitive studies and a formal
10 wetlands delineation on the site.
11

12 (r) a videotape of the City's August 12, 2002 City Council meeting in which, *inter alia*,
13 the City's staff delivered its oral staff report and addressed the issues as to why no wetlands or
14 ESHA were affected by the project and why NP's permits should be approved. This videotape
15 was included by Appellant, John Curtis as part of his appeal when he submitted it to the
16 Commission on September 5, 2002, was within the Commission's files as of October, 2002, but
17 somehow was expurgated from the Commission's files and Curtis' appeal sometime between
18 October, 2002 and November 2003. The project file was, at all times, within the sole custody of
19 Commission staff. (See below in respect to NP's objection to unlawful despoliation of evidence).
20

21 Once again, there is simply no time in the 3 business days for the biological experts to be
22 convened, to review the staff report, to compare the Staff's allegations with the contents of the
23 numerous, voluminous and highly technical and detailed experts' reports in the administrative
24 record, assemble and review the videotapes, prepare and present a refutation of the
25 Commission's Staff Report, transport the experts and necessary representatives to Los Angeles
26 in time for the hearing, much less also to lobby the Commissioners and persuade them to even
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1 entertain public discussion on these issues and NP's position that there is no substantial issue
2 presented for this hearing.

3 Likewise, such short and deficient notice in violation of the Commission's own Reg.
4 13063 has rendered it impossible not only for NP to prepare an adequate opposition to Staff's
5 recommendation, but it has also rendered it impossible for any interested member of the public
6 or any affected governmental agency to do so either. This is a major prejudice both to NP and to
7 any interested member of the public or affected governmental agency.
8

9 (c) Inadequate Time Provided to Prepare Legal Briefs.

10 The Staff Report makes a number of allegations of law, which, on their face, appear to be
11 contrary to established law, but, in respect to which neither NP nor any interested member of the
12 public or affected governmental agency has been afforded adequate time to prepare sufficiently
13 authoritative legal briefs, and has thus been further prejudiced.
14

15 (i) Legal Definitions of Wetlands Under 14 CCR 13577(a)(1) as
16 Compared to City's LCP.

17 For example, the Staff Report alleges that the legal tests under 14 CCR 13577(a)(1) for
18 determining whether there are wetlands for the purposes of establishing appellate jurisdiction in
19 the Commission are sufficiently identical to establish the actual existence of wetlands under the
20 LCP for the City of Pacifica. This is, on its face, a false allegation but involves a detailed
21 comparative analysis of the exact wording of the LCP as compared to 14 CCR 13577(a)(1),
22 which wordings are significantly different, as well as an analysis of such cases as Kirkorowicz v.
23 the California Coastal Commission, 83 Cal.App.4th 980, a legal analysis for which insufficient
24 time has been allotted by the defective Appeal Notice.
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1 (ii) Legal Status of Drainage Ditches and Man-Made Structures As Being Exempt
2 From Classification As LCP Wetlands.

3 Likewise, the Staff Report makes allegations regarding the legal status of drainage
4 ditches as comprising LCP wetlands (see for example, Staff Report, p.19, 20), even though there
5 are established Commission guidelines and rulings that conclude otherwise. NP's attorneys have
6 not been afforded sufficient time to prepare an authoritative legal analysis to establish why
7 Staff's allegations are incorrect in this regard. The Staff Report (see p. 20) also seeks to provide
8 legal analysis of Beach Colony II v. California Coastal Commission, 151 Cal.App.3d 1107,
9 concerning the common law exemption of man-made structures as comprising LCP wetlands.
10 Neither NP, nor any interested member of the public or affected governmental entity, in the 3
11 business days notice provided, has sufficient time to authoritatively address this issue and the
12 other legal issues in the time allotted.
13

14
15 (iii) Legal Issue As to Whether the Commission Has the Power to Overturn a
16 Certified EIR Several Years After Its Certification Without Ever Having Judicially Challenged It
17 Within the Prescribed CEQA Statute of Limitations.

18 An additional legal contention in the Staff Report (see p. 22) is that, somehow, the
19 Commission can overturn the Certification of the EIR, more than three years after its
20 Certification by the City, without ever having challenged the sufficiency of the EIR in court, and
21 long after the expiration of the statute of limitations under CEQA for challenging the sufficiency
22 of the EIR by means of an administrative writ of mandate.
23

24 On its face, there would appear to be no legal authority for such proposition and much
25 existing authority to the contrary¹ but, in any event, neither NP nor any member of the public or
26

27
28 ¹e.g. "As early as 1944 the California Supreme Court articulated the rule that a party's failure to seek
judicial review of an administrative agency determination would prevent the party from later challenging
the merits of that determination in a collateral proceeding. (Stockton v. Department of Employment

1 affected governmental agency have been afforded a sufficient opportunity to provide an
2 authoritative brief on this and the other legal issues presented in the Staff Report.

3 (iv) Legal and Factual Issue As to Whether Denial of the Project Will Constitute a
4 Regulatory Taking.

5 Another critical legal issue presented in the Staff Report, for which neither NP nor any
6 interested member of the public or governmental agency have been given an adequate
7 opportunity to address, is whether or not a denial of the project, as recommended by the Staff
8 report, will result in a regulatory taking of NP's project which has been valued at, in excess of
9 \$11 million.
10

11
12
13 (1944) 25 Cal.2d 264, 267-268 [153 P.2d 741].) [2b] This principle has been repeatedly restated by both
14 the Supreme Court and the courts of appeal and applied in a variety of contexts, including cases
15 involving the Coastal Commission. (See, e.g., Monroe v. Trustees of the California State Colleges (1971)
16 6 Cal.3d 399, 405-406 [99 Cal.Rptr. 129, 491 P.2d 1105]; Knickerbocker v. City of Stockton (1988) 199
17 Cal.App.3d 235, 243-244 [244 Cal.Rptr. 764]; Walter H. Leimert Co. v. California Coastal Com. (1983)
18 149 Cal.App.3d 222, 233 [196 Cal.Rptr. 739]; Briggs v. State of California ex rel. Dept. Parks &
19 Recreation (1979) 98 Cal.App.3d 190, 196, fn. 3 [159 Cal.Rptr. 390] (also a Coastal Commission case);
20 DeCelle v. City of Alameda (1963) 221 Cal.App.2d 528, 535 [34 Cal.Rptr. 597]; see also Westlake
21 Community Hosp. v. Superior Court (1976) 17 Cal.3d 465, 484 [131 Cal.Rptr. 90, 551 P.2d 410].")

22 California Coastal Com. v. Superior Court (1989), 210 Cal.App.3d 1488, 1493

23 "If a tribunal has subject matter jurisdiction in the fundamental sense, its decision will be res
24 judicata notwithstanding that the decision is incorrect. "It is an established rule that where a
25 tribunal has jurisdiction of the parties and of the subject-matter it necessarily has the authority
26 and discretion to decide the questions submitted to it even though its determination is erroneous.
27 [Citation.] This rule applies to quasi-judicial tribunals as well as to courts." (Cullinan v. Superior
28 Court (1938) 24 Cal.App.2d 468, 471-472 [75 P.2d 518]; accord Hollywood Circle, supra, 55
Cal.2d at p. 731; Ang, supra, 97 Cal.App.3d at p. 678.) [14]."

Ibid, 1501

25 Whatever jurisdiction the Commission may claim over a development permit, it would appear the
26 Commission has no jurisdiction to overturn a certified EIR if it has not challenged it in the manner and
27 time limit prescribed by CEQA. As such did not occur it would appear, contrary to the Staff Report, that
28 the issue of the sufficiency of the EIR is clearly res judicata, but this issue, along with all other legal
issues, would need to be briefed authoritatively, for which the 4 business day notice period provided is
insufficient.

1 The Staff Report claims, somewhat cavalierly, in an offhand manner (see p. 20) that:

2 “Denial of the proposed permit will not eliminate all economically beneficial or
3 productive use of the applicant’s property or unreasonably limit the owner’s
4 reasonable investment backed expectations of the subject property.”

5 Staff Report, p. 20

6
7 To support such conclusion, the Staff Report concludes that NP could provide, on its 4.2
8 acre Bowl site (i.e. a site comprising approximately 183,000 square feet), a 100’ buffer around
9 all three alleged wetlands, including one alleged to cover an area of 1.1 acres (i.e. approximately
10 48,000 sq. ft.) and still build a project of the required density and within the height and other
11 criteria permitted under the Pacifica LCP. In the case at hand, NP’s project comprising 43
12 residential units is the minimum density permitted under Pacifica’s LCP.

13 Simple intuition and elementary mathematics would tend to establish that Staff’s
14 supposition is mathematically impossible. For example, assume the alleged 1.1 acre wetland
15 area (which is only one of three alleged wetlands in the Staff Report) comprised a rectangle
16 containing 48,000 sq. ft., e.g. having a width of 400’ and a depth of 120’. If a buffer of 100’
17 were added to each of its four sides, it would now comprise a rectangle of the dimensions 600’
18 by 320’, with an area of 192,000 sq. ft. an area greater than the entire area of NP’s project site,
19 leaving no residual site area whatsoever to build any units, much less 43 condominiums.

20
21 Likewise if the alleged 48,000 sq. ft. wetland comprised a square having dimensions of
22 approximately 219’ x 219’, with a 100’ buffer zone on each of the four sides, yielding an
23 enlarged square with the dimensions of 419’ x 419’ it would consume an area of 175,561 sq. ft.,
24 leaving a residual site area of less than 8,000 square feet to construct 43 units, a mathematical
25 impossibility under Pacifica’s LCP, including its height restrictions.
26
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1 Moreover, this analysis makes no provision for providing any additional buffer zones
2 around the two other alleged wetlands claimed in the Staff Report, which would more than
3 consume all residual building area.

4 The same can be said if the alleged wetland of 1.1 acres comprised a circle (i.e. the
5 configuration mathematically consuming the least area) with a 100' buffer zone around its
6 perimeter. In such case, the dimensions of the alleged wetland and the buffer zone would
7 comprise a circle with a diameter of approximately 347 feet and an area (π i.e. $3.14159265 \times$
8 Radius (173.5) Squared) of approximately 157,000 sq. ft., leaving a mere 26,000 square feet to
9 construct 43 units within the City's height restrictions. Once again, this analysis makes no
10 provision for providing any additional buffer zones around the two other alleged wetlands
11 claimed in the Staff Report, which would more than consume any residual building area.

12 In its 3 business days notice, NP has no time to engage an expert civil engineer to map
13 out and plot the dimensions of exactly where the Commission Staff thinks the alleged wetlands
14 are located, draw in a 100' buffer zone (or even a lesser buffer zone, such as 80') around all three
15 alleged wetlands and prove to the Commissioners that the Staff's suppositions are false that the
16 project could be redesigned to provide a 100' buffer zone (or even an 80' buffer zone) around all
17 alleged wetlands and still leave a residual area sufficient to build a 43 unit project in compliance
18 with Pacifica's LCP.

19 Moreover, the law regarding regulatory takings is complex and there is simply no time
20 for NP's attorneys to authoritatively brief this issue either.

21 The question, however, of whether or not NP could build a project of even the minimum
22 permitted density and still accommodate the buffer zones required in the Staff Report, or,
23 whether, as it appears based on the above elementary mathematical calculations, such an
24 alternative project would be a mathematical impossibility and result in a regulatory taking of
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1 NP's project, is a question both crucial to NP and the public, since a regulatory taking of an \$11
2 million plus project could be very costly to both NP and the State's taxpayers.

3 The lack of adequate notice to prepare an authoritative response, both from a legal and
4 engineering standpoint, to this issue is of great prejudice to both NP and potentially to the
5 taxpayers of the State of California who may have to pay for a regulatory taking, if, in fact, as it
6 appears at first blush, that the Staff Report's conclusions are incorrect on this issue and that
7 denial of the project will, indeed, result in a regulatory taking of the project.
8

9 (v) The Staff Report Claims That NP's Clearing and Grubbing of the Project Was Illegal and
10 Unpermitted. This Claim Is Untrue But the Insufficient Notice Has Deprived NP of the
11 Opportunity to Prove the Falseness of Such Allegation and Defend Itself Against The Claim
12 That It Has Committed An Illegal Act.

13 In November, 2003, the Commission filed suit against NP in San Mateo Superior Court
14 alleging that the clearing and grubbing by NP of its project, pursuant to a clearing and grubbing
15 permit issued by the City, would constitute an illegal and unpermitted development of the
16 project, just as Staff claims in the Staff Report (e.g. see p. 21, Section 2.2.5)

17 After presenting all of its evidence, however, the then Presiding Judge, Judge Forcum, on
18 November 3, 2003, found that the Commission's evidence was "speculative" and
19 "unpersuasive", and, in a transcribed written decision (which has been filed with the
20 Commission in connection with the Reg. 13569 hearing and thus is part of the administrative
21 record herein) found against the Commission. The Commission then dismissed its lawsuit.
22 Under the imprimatur of the San Mateo Superior Court's decision that NP could go forth and
23 clear and grub the property, NP then, quite legally, cleared and grubbed its property under the
24 clearing and grubbing permit that had been issued by the City of Pacifica. This subject is
25 discussed in NP's Brief No. 5 in respect to the Reg. 13569 hearing.
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1 Additionally, NP had two stays and two alternative writs in effect at the time of the
2 clearing and grubbing that prevented the Commission from suspending NP's permit. The legal
3 effect of one of those stays was never considered by the Appellate Court in Case A101434. The
4 legal and factual issues underlying the Staff's allegations and NP's opposition to such allegations
5 that NP's clearing and grubbing were unpermitted and against the law, are complex and require
6 the analysis of the legal interplay of the two stays, the two alternative writs and whether or not
7 Judge Forcum's ruling had a res judicata effect against the Commission. In the mere 3 business
8 days notice, NP has simply insufficient time to provide legal analysis and an authoritative
9 opposition to the Staff's contention that NP acted illegally in clearing and grubbing its property,
10 except to say that such contention is wrong. It is a severe prejudice for NP to be accused of an
11 illegal and punishable act without being afforded a sufficient time and opportunity to defend
12 itself against such allegation of illegality.
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16 VI. NP OBJECTS TO DISCLOSURE OF THE CONTENTS OF CONFIDENTIAL AND
17 PRIVILEGED SETTLEMENT COMMUNICATIONS AND DEMANDS THAT THE STAFF
18 REPORT BE RETRACTED AND DESTROYED AS BEING IN VIOLATION OF THE LAW

19 As the purported grounds for Staff's recommendation that NP's Coastal Development
20 Permit, and thus, its entire project, be denied, the Staff Report claims:

21 "Project revisions necessary to bring the development into conformity with the
22 certified LCP, while feasible, would involve substantial site design and
23 engineering work. Such fundamental project revisions are beyond the scope of
24 project changes typically achieved through Commission-imposed conditions of
25 approval on a permit application. Rather, it is the project applicant's responsibility
26 to revise the project plans to address the issues that the Commission has
27 identified. In this case, the applicant has indicated that it is unwilling to modify
28

1 *the project plans to conform to the requirements of the LCP. Therefore, the*
2 *staff has no choice other than to recommend denial of the permit."* p. 3
3

4 There is absolutely no evidence in the administrative record of this project to substantiate
5 this blatant falsehood.

6 Firstly, NP has always contended that the project plans *do conform to the requirements of*
7 *the LCP*, so, obviously, NP has never indicated that it is unwilling to modify the project plans to
8 conform to the requirements of the LCP, since, according to NP, such modification has never
9 been necessary.
10

11 Secondly, to the extent there was ever any communication, of any kind, with Commission
12 staff or its representatives concerning possible modification of the project plans, such
13 communication or communications took place solely in the context of absolutely privileged and
14 confidential settlement discussions within a Court ordered mediation before 9th Circuit, Federal
15 Court of Appeal, mediator, Roxanne Ashe, on July 29, 2005, attended by Coastal Commission
16 District Supervisor, Chris Kern and Deputy Attorney General, Joel Jacobs on behalf of the
17 Coastal Commission and Keith Fromm, Robert Kalmbach and Jaquelynn Pope, on behalf of
18 North Pacifica, LLC, and, following the December 16, 2005, 13569 hearing, attended by Joel
19 Jacobs, on behalf of the Coastal Commission and Keith Fromm, Robert Kalmbach and Jaquelynn
20 Pope, on behalf of North Pacifica.
21

22 To the extent that the cited statement in the staff report purports to refer, in any way, to
23 the contents of those two privileged and confidential settlement discussions, it is highly
24 improper, illegal and in the utmost bad faith to purport to disclose to the public and, even worse,
25 to base a denial of NP's multi-year, multi-million dollar project on "evidence" comprising the
26 contents of communications that were absolutely privileged and confidential and not, in any way,
27 to be used to the detriment of the participants in such privileged and confidential discussions.
28

1 To the extent the cited statement in the staff report purports to refer to any other
2 communications, no such communications ever took place and there is no evidence whatsoever,
3 either within the administrative record or anywhere else, that they did.

4 NP objects to any reference in the Staff Report to the contents of the privileged and
5 confidential settlement communications and demands that the Staff Report be retracted and
6 destroyed, and certainly not relied upon by the Commission, because, in violation of the law,
7 Commission staff purports to proffer to the Commissioners, in these proceedings, as substantial
8 evidence for findings by the Commissioners in favor of Staff's recommendations, absolutely
9 confidential and privileged settlement communications.
10

11 For the record, and without waiving the confidentiality of any settlement
12 communications, NP is and has always been prepared to modify the project plans if the effect of
13 doing so would lead to an expeditious and cost effective final unappealable approval of its
14 project.
15

16 VII. NP OBJECTS TO THE COMMISSION'S JURISDICTION TO CONDUCT A
17 SUBSTANTIAL ISSUE HEARING OR AN APPEAL BECAUSE THE REG. 13569 HEARING
18 WAS INVALID AND FOR THE REASONS PRESENTED BY NP IN CONNECTION WITH
19 SAID 13569 HEARING INCLUDING, BUT NOT LIMITED TO UNLAWFUL
20 DESPOLIATION OF EVIDENCE

21 On December 16, 2005, the Commission conducted a Reg. 13569 hearing in which it
22 concluded that NP's project was within the geographical boundaries of the Commission's
23 appeals jurisdiction. In connection with said Reg. 13569 hearing, NP submitted Briefs 1 through
24 5, plus 2 supplements to Brief No. 2, in which NP objected to the jurisdiction of the Commission
25 to conduct the Reg. 13569 hearing and the manner in which such hearing was conducted. NP
26 incorporates herein, by reference, all of its previous objections submitted in connection with said
27
28

1 Reg. 13569 hearing and all of the evidence and other materials NP submitted in connection
2 therewith.

3 Such briefs and other materials alleged, *inter alia*, that the jurisdictional pre-requisites to
4 a Reg. 13569 hearing were not satisfied (e.g. see Brief No. 2 and its two supplements), the
5 Commission employed the wrong standard of review and the wrong standard of proof (e.g. see
6 Brief No. 1), the Commission was biased, there was an unlawful commingling of adjudicative,
7 investigative, prosecutorial and advocacy functions involved in the Reg. 13569 hearing (e.g.
8 Briefs No. 3 and 4), Commission staff despoiled and/or unlawfully suppressed evidence (e.g.
9 Briefs No. 3 and 4), the Commission staff unlawfully censored NP's presentation before it
10 reached the Commissioners (e.g. Brief No. 4), the Commission denied NP due process, the
11 Commission had already sued NP on the very same issues (thus establishing bias and futility)
12 and the issues were already *res judicata*, because they had already been decided by Judge
13 Forcum of the San Mateo Superior Court in favor of North Pacifica LLC (e.g. see Brief No. 5).
14 NP hereby reiterates and incorporates, by reference, all of such previous objections and materials
15 in support thereof, because they are equally applicable in connection with the scheduled
16 substantial issue hearing and the appeal hearing and because they establish that the Reg. 13569
17 hearing, itself, was invalid, and, that, therefore, all findings by the Commission therein, were
18 invalid, and, thus, there is no jurisdiction to conduct this substantial issue hearing or appeal.
19

20
21 One particularly egregious violation of due process is the fact that the Commission's
22 Staff refused to permit the Commissioners to see over 200 pages of briefs, evidence and other
23 materials which had been submitted by North Pacifica for the Commissioners' review, several
24 weeks in advance of the hearing, in support of NP's opposition to the Staff's recommendations in
25 connection with the Reg. 13569 hearing.
26

27 As set forth in a letter from Christopher Pederson, Supervising Staff Counsel of the
28 Commission to NP's counsel, dated December 1, 2005 (a copy of which is attached as Exhibit B

1 hereto), Commission staff refused to submit NP's Brief 3, Brief 4 and its letter of November 22,
2 2005 on the alleged grounds that such documents disclosed or discussed attorney work-product
3 subject to a protective order in a Federal case, in Northern District Court No. C-01-4823.

4 In fact, even as of the date of such letter, not only was there *never* even any arguable
5 privilege attached to all but a few pages of such 200 pages of brief, evidence and other materials,
6 but (that, according to Magistrate Judge Chen who presided over said action C-01-4823) the
7 Commission had already waived any claim of privilege that might have existed in respect to *any*
8 such documents. The documents were simply wrongfully withheld from both the Commission
9 and the public so as to ensure that only the record supporting Staff's position, and, not opposing
10 it, was before the Commission, during the period of any meaningful deliberation.

11
12 It was not until the late afternoon of December 15, 2005, the day before the Reg. 13569
13 hearing on NP's project (which took place in the morning of December 16, 2005) and while the
14 Commissioners were engaged with other matters on their agenda, that the Commission staff
15 made copies of the wrongfully withheld several hundred pages of evidence, briefs and other
16 materials, and submitted them to the Commissioners, ensuring that the Commissioners had no
17 meaningful opportunity to review or digest the mass of materials or meaningfully consider NP's
18 opposition.

19 The materials had never been presented to the public at all at any time during the notice
20 period for the Reg. 13569 hearing even though NP had submitted the bulk of them in time for
21 and with the intention that they be distributed to the Commission and the public with the
22 Commission's staff report.

23 In this manner, Staff entirely perverted and by-passed the public policy set forth in the
24 Commission regulations of "*allowing adequate public dissemination of the information*
25 *contained in the application prior to the time of the hearing, and toward allowing public*
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1 participation and attendance at the hearing while affording applicants expeditious consideration
2 of their permit applications." (e.g. See Reg. 13062²).

3 Thus Commission staff's unlawful actions in withholding NP's opposition materials
4 deprived NP of any potential public support for NP's position that might have been derived from
5 public review of its withheld briefs, evidence and other materials and deprived the
6 Commissioners of any meaningful opportunity to review the hundreds of pages of NP's
7 materials, before the hearing early the very next morning.
8

9 VIII. NP OBJECTS TO THE FACT THAT IT DID NOT RECEIVE A COPY OF CURTIS'
10 APPEAL IN ACCORDANCE WITH THE REQUIREMENTS OF COASTAL COMMISSION
11 REGULATION § 13111 AND IN FACT HAS NEVER RECEIVED A TRUE AND
12 COMPLETE COPY OF CURTIS' APPEAL. THE COPY OF CURTIS' APPEAL THAT NP
13 RECEIVED ON JANUARY 4, 2006 WITH THE COMMISSION STAFF REPORT WAS
14 DOCTORED AND EVIDENCE FAVORABLE TO NP'S PERMIT APPROVAL WAS
15 PURGED AND DESPOILED THEREFROM.
16

17 Commission Staff's attempts to entirely "stack the deck" in favor of its own
18 recommendations by excluding evidence in the administrative record that supports NP's
19 opposition to Staff's position, were not limited to despoliation and/or unlawful suppression of
20 evidence in connection with the Reg. 13569 hearing.

21 Indeed, such actions have contaminated this purported substantial issue hearing and
22 appeal as well because even the appeal that Commission staff purports to present as Appellant,
23

24
25 ² § 13062. Scheduling

26 The executive director of the commission shall set each application filed for public hearing no later than
27 the 49th day following the date on which the application is filed. *All dates for public hearing shall be set
28 with a view toward allowing adequate public dissemination of the information contained in the
application prior to the time of the hearing, and toward allowing public participation and attendance at
the hearing while affording applicants expeditious consideration of their permit applications.*

1 John Curtis' appeal has been "pruned" and purged, by means of unlawful despoliation of certain
2 items of evidence that, if they had been left in the administrative record, would undermine
3 Staff's position and support the City's approval of NP's permit.

4 (i) The Appellant, Curtis, Never Delivered His Appeal to NP as Required by Commission
5
6 Reg. 13111

7 Firstly, at no time did Curtis *ever* deliver his appeal to NP as he was required to do under
8 Coastal Commission Regulation § 13111, even though he submitted it to the Commission, more
9 than three years ago, on September 5, 2002. This, in itself, is an "unwarranted failure to perform
10 such notification" under the regulation, and is a ground to dismiss the appeal which should be
11 applied in this case.

12 § 13111 (c) The appellant *shall* notify the applicant, any persons known to be
13 interested in the application, and the local government of the filing of the appeal.
14 Notification *shall* be by delivering a copy of the completed Notice of Appeal to
15 the domicile(s), office(s), or mailing address(es) of said parties. In any event, such
16 notification shall be by such means as may reasonably advise said parties of the
17 pendency of the appeal. Unwarranted failure to perform such notification may be
18 grounds for dismissal of the appeal by the Commission.

19 Indeed, NP, even to this very day, has *never* received a true and complete copy of Curtis'
20 appeal, because the only version thereof that NP, or the public, or the Commissioners, has ever
21 received is the one incorporated in Staff's Appeal Staff Report for this proceeding (which NP
22 only received on January 5, 2006), and, it, indisputably is missing evidentiary exhibits that were
23 incorporated in Curtis' original appeal and which tend to support the City's permit approval and
24 undermine the Staff's recommendations of a finding of a substantial issue and that the project
25 should be denied.
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1 On April 9, 2003, in connection with federal lawsuit C-01-4823 concerning this project,
2 the deposition of John Curtis was taken by NP's attorneys. In that deposition Curtis conceded
3 that he had never delivered a copy of his appeal to NP and also testified as to evidentiary
4 materials that he had submitted to the Commission as part of his appeal---evidentiary materials
5 which were neither included with the version of Curtis' appeal that was incorporated in the
6 Appeal Staff Report and which based upon certifications by Commission staff, are no longer in
7 the Commission's files for this project, though they were indisputably in those files as of
8 October, 2002.

10 The following is an excerpt from such Deposition, which NP previously lodged with the
11 Commission in connection with the Reg. 13569 hearing of December 16, 2005 and is part of the
12 administrative record for this project:

13
14 18 Q. Yes. What did you submit to the Coastal
15 19 Commission?

16 20 A. The appeal form, which was multiple page
17 21 attachments that are exhibits that responded to the
18 22 requirements as part of that appeal form, a statement
19 23 from me, and attachments to that that would be referred
20 24 to within the statement.

21 25 Q. Now, did these attachments include newspapers?
22

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24 (415) 362-6666 121

25 1 A. Yes.

26 2 Q. And do you recall what newspapers they
27 3 included?

28 4 A. Which paper or issues?

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5 Q. Issues.

6 A. Well, it's the Pacifica Tribune only and the
7 issues were in June, July and maybe August, certain
8 ones.

9 Q. Of 2002?

10 A. Of 2002.

11 Q. And where did you get those newspapers?

12 A. Where did I get them?

13 Q. Yes.

14 A. Probably at a newspaper stand. Oh, well, I
15 went up to the Tribune to get more copies.

16 Q. Do you recall how many copies you got?

17 A. I really don't.

18 Q. Do you recall what you did with the copies?

19 A. I have them.

20 Q. You have all the copies that you got?

21 A. No, unless I sent some to other people, you
22 know, who might be interested in the Bowl project.

23 *Q. Okay. Did your exhibits also include a*
24 *videotape of the meeting of August 12, 2002?*

25 *A. Was that the City Council meeting?*

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1 Q. Yes.

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2 A. *Yes, it did.*

3 Q. It did. And where did you get that tape?

4 A. From Channel 26, cable TV company.

5 Q. And you purchased that from Channel 26?

6 A. Um-hum, yes.

7 Q. How many copies did you purchase from them?

8 A. Two.

9 Q. And what became of the other copy?

10 A. One was submitted.

11 Q. Yes.

12 A. And my attorney has the other.

13 Q. Your attorney has the other one, okay.

14 When you submitted your appeal to the Coastal
15 Commission did they give you a receipt?

16 A. No.

17 Q. Did they give you anything to indicate that
18 your appeal had been filed or received?

19 A. No.

20 Q. Did they give you, for example, a stamped cover
21 page of what you had submitted?

22 A. I really don't remember.

23 Q. Now, did you serve copies of your appeal and
24 the materials that accompanied that appeal on any other
25 person or entity besides the Coastal Commission?

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1 A. "Serve copies"?

2 Q. Deliver. Let me rephrase that again. Did you
3 deliver copies of your appeal package -- and by "appeal
4 package," I'm referring to the appeal form, the
5 statement that you referred to and the exhibits,
6 including the newspapers and the videotape, to any other
7 person or entity besides the Coastal Commission?

8 A. No. But I don't want to mislead you. I
9 submitted a copy to City Hall, but they didn't get the
10 tape, they didn't get the newspapers and there were
11 certain exhibits, and I had them stamp it that day.

12 Q. Okay. And did you serve or deliver a package
13 on any other party or entity besides the City?

14 A. No.

15 Q. Okay. So you're quite clear you didn't serve
16 such a package on North Pacifica, LLC; isn't that
17 correct?

18 A. That's right...

25 Deposition of John Curtis, p.121-124

26 Conspicuously absent from the copy of Curtis' appeal reproduced on the Staff Report and
27 the version of the Curtis appeal that now exists in the Commission's files, is the videotape of the
28 August 12, 2002 City Council meeting in which the City Council approved NP's permit and

1 discussed the substantial evidence that supported its decision that the project was consistent with
2 the City's LCP and which refuted, most if not all of the conclusions reached by Commission
3 Staff in its Appeal Staff Report. Obviously, the videotape was purged from Curtis' appeal and
4 the Commission's files for that very reason. Thus, once again, the Commissioners have only one
5 side of the story in the record due to the unlawful despoliation of evidence by, presumably,
6 Commission staff, since such documents were at all time within Commission staff's exclusive
7 custody and control.

8
9 Thus, the Notice for this substantial issue hearing and appeal is defective for the
10 additional reason that NP has never been served with a true and complete copy of Curtis' appeal
11 as required by Reg. 13111 and, nor, for that matter have the Commissioners themselves. The
12 Appeal cannot be valid where the appeal itself has been doctored in some fashion, much less
13 doctored specifically so that evidence favorable to the permit holder has been expurgated from
14 the appeal and the administrative record so as not to be considered by the Commission or a
15 reviewing Court.³

17 CONCLUSIONS

18 For the reasons set forth above, the Appeal Notice of the substantial issue and appeal
19 hearing is in violation of the Commission's own Regs. 13063 and 13111, is defective and
20 ineffective, renders the Commission without jurisdiction to conduct such hearing as scheduled
21 and causes great prejudice to NP as well as any interested members of the public or affected
22

23
24 ³ NP did a review of the Commission's files in October, 2002 and the newspapers and the
25 videotape were in the file. That is how NP knew to ask Curtis those questions in his deposition
26 of April, 2003. In November, 2003, however, NP did another review of the file, which was
27 certified by Commission records custodian, Jeff Steben, as complete, and the videotape was no
28 longer in the file. If the appeal had been served upon NP as required by Reg. 13111 and the
Appeal Notice had been served in the time specified in Reg. 13063, NP would have been able to
produce for the Commissioners' review the various certified copies of the entire file to establish
that the referenced materials had been unlawfully expurgated from the Commission's files. This
is not possible due to the lack of time provided in the defective notice.

1 governmental agencies. Additionally, no true and complete copy of the Appellant's appeal has
2 ever been delivered to NP as required by Reg. 13111, and such appeal has been unlawfully
3 doctored and evidentiary portions of it have been unlawfully expurgated. NP cannot attend the
4 invalidly scheduled hearing nor adequately prepare for same or address the appeal on its merits
5 and, therefore, objects to the Commission conducting any such hearing on the basis of such
6 invalid notice and/or the unlawfully despoiled appeal documents.
7

8 Dated: January 10, 2006

9 Respectfully submitted,

10 North Pacifica LLC

11
12 By 

13 Member
14

15 P.S. NP has also prepared and submitted a Brief No. 2 containing other objections to this
16 hearing. Due to the extreme insufficiency of the time for NP to respond to the Appeal Notice,
17 NP has not had an opportunity to review and co-ordinate the two briefs, which, therefore, may
18 contain redundancies, for which NP apologizes. But in light of the extreme importance of
19 making an appropriate record of NP's objections, in an extremely short period of time, to save
20 NP's multi-million dollar, multi-year project from the total denial recommended by Commission
21 staff, it was deemed that it was a more reasonable risk to discuss an issue twice than not to
22 discuss it at all.
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EXHIBITS

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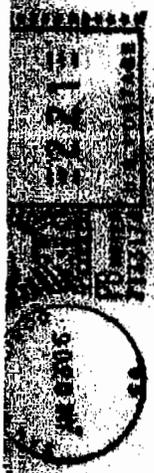
EXHIBIT A

True Copy of Envelope Metered and Postmarked January 3, 2006
In Which Appeal Notice Was Delivered to North Pacifica LLC

EXHIBIT B

True copy of letter dated December 1, 2005 from Christopher
Pederson, Supervising Staff
Counsel, to North Pacifica's Attorneys

EXHIBIT A



FIRST CLASS MAIL

13812 NCC A-2-PAC-03-16

KEITH FROMM
NORTH PACIFIC LLC
8114 LA SALLE AVE., STE 207
OAKLAND, CA 94611

San Francisco, CA 94105-2219

SAN FRANCISCO, CA 94105-2219

CA 94105

EXHIBIT B

CALIFORNIA COASTAL COMMISSION

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



December 1, 2005

Jacquelyn Pope
Warshaw & Pope
934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254

Keith Fromm
914 Westwood Blvd., Suite 500
Los Angeles, CA 90024

Re: Documents Submitted by North Pacifica that Disclose Attorney Work-Product,
2-02-02-EDD (Pacifica Bowl, Pacifica)

Dear Ms. Pope and Mr. Fromm:

North Pacifica has submitted three documents to the Coastal Commission -- Brief 3, Brief 4, and Keith Fromm's letter to Joel Jacobs dated November 22, 2005 -- that disclose or discuss attorney work-product that is subject to a protective order issued in *North Pacifica LLC v. City of Pacifica*, United States District Court, Northern District of California, Case No. C 01 4823 EMC. Those documents are the subject of a pending motion for sanctions. Consistent with the letter of Deputy Attorney General Joel Jacobs to you dated November 18, 2005, those documents, and any future documents that disclose or discuss communications subject to the protective order, will not be distributed to commissioners or the public unless the court rules that North Pacifica's disclosure was appropriate.

If North Pacifica submits revised versions of its submittals that do not disclose or discuss documents that are subject to the protective order, those submittals will be filed in the public record and distributed to commissioners.

Sincerely,


CHRISTOPHER PEDERSON
Supervising Staff Counsel

cc: Chris Kern, California Coastal Commission
Joel Jacobs, Deputy Attorney General

EXHIBIT 7

1 JAQUELYNN POPE SBN 78600
WARSHAW & POPE
2 934 Hermosa Ave., Suite 14
Hermosa Beach, CA 90254
3 Tel. (310) 379-3410
Fax (310) 376-6817
4

ITEM NO. W 16.5a

5 Attorneys for Permit-Holder, North Pacifica LLC

6
7 BEFORE THE CALIFORNIA COASTAL COMMISSION

8 NORTH PACIFICA'S
Permit Number: 2-PAC-02-196

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OBJECTIONS TO LACK OF NOTICE OF
SUBSTANTIAL ISSUE AND DE NOVO
HEARINGS SET FOR JANUARY 11,
2006; OBJECTIONS TO BREACH
OF CONFIDENTIALITY OF
SETTLEMENT NEGOTIATIONS;
OBJECTION TO APPELLANT'S
FAILURE TO SERVE NP WITH COPY
OF APPEAL

Hearing Date: January 11, 2006

INTRODUCTION

North Pacifica LLC, "NP", the permit-holder herein, submits these objections to the Commission's unlawful attempt to assert appeals jurisdiction over NP's CDP by scheduling a substantial issue hearing and a *de novo* hearing on the merits for January 11, 2006. In submitting these objections, NP does not waive any of its previously stated objections to the Commission's assertion of jurisdiction over NP's CDP, CDP -202-01. NP's CDP was validly issued to NP by the City of Pacifica on August 12, 2002. The City determined at the same time, as part of the City's three-year development permit application review process and EIR certification process, that NP's CDP is not appealable to the Commission.

On December 16, 2005, the Commission, over NP's objection, held a purported regulation 13569 hearing and erroneously overturned the City's determination that NP's CDP is not within the Commission's appeals jurisdiction and found that NP's CDP is within the appeals jurisdiction of the Commission. The Commission's December 16, 2005 decision is unsupported by the law and is also unsupported by the evidence, and was moreover, the result of a futile, and

1 unfair proceeding before a biased tribunal. NP has requested that the Commission prepare the
2 administrative record of the 13569 proceedings in order to allow NP to obtain judicial review of
3 the Commission's actions via a writ of administrative mandate.

4 NP's arguments and evidence as to why the Commission does not have appeals
5 jurisdiction over NP's CDP, and as to why the 13569 proceedings were futile, unfair and biased
6 are all part of the record of the 13569 proceedings. NP expressly reserves all of the objections to
7 the Commission's assertion of appeals jurisdiction over NP's CDP that were put forth in the
8 record and proceedings in the 13569 hearing, and the submission of these objections to the
9 Substantial Issue and De Novo hearing set for January 11, 2006 (Commission appeal no. A-2-
10 PAC-05-018) does not constitute a waiver of any of NP's objections to the Commission's
11 assertion of jurisdiction over NP's CDP. Further, NP hereby incorporates the record of the 13569
12 hearing as part of the record herein.

13 Based on its December 16, 2005 finding that NP's CDP is appealable, the Commission
14 has noticed a substantial issue hearing and a *de novo* hearing on the merits to be held in San
15 Pedro on January 11, 2006. The notice and the Staff Report list John Curtis as the appellant. The
16 Staff Report states that John Curtis submitted his appeal on September 5, 2002 and that the
17 appeal was filed on the first day of the appeal period, which commenced on December 19, 2005.
18 (As discussed *infra*, although a copy of the appeal is attached to the Staff Report, the appellant
19 Curtis has never served NP with a copy of his appeal, as is required by the regulations.) The
20 Commission's attempt to hold both a substantial issue hearing as to the appeal and a *de novo*
21 hearing on the merits of NP's CDP on January 11, 2006 is contrary to law because the
22 Commission has failed to give NP lawful notice of the hearing.

23 I. THE COMMISSION IS PROCEEDING UNLAWFULLY WITHOUT VALID
24 NOTICE TO NORTH PACIFICA

25 NP objects to the Commission holding any hearing regarding NP's CDP on January 11,
26 2006 because the Commission has not given NP valid notice thereof. The Commission's notice
27 of the hearing fails to comply with its regulation 13036(a), which requires that the Commission
28 mail notice of a hearing regarding permit applications and appeals at least ten days before the
hearing. Instead, the Commission did not mail the notice until January 3, 2006, eight days before
the hearing, and NP did not receive the notice until the afternoon of Thursday, January 5, 2006, a

1 mere six days before the hearing, and only four working days before the hearing. Further, the
2 notice requests that any written submissions to the Commission staff be received by the
3 Commission no later than three working days before the hearing in order to have Commission
4 staff distribute the materials to the Commission. Three working days prior to Wednesday,
5 January 11, 2006, is Friday, January 6, 2006, the day after NP received the notice of hearing.
6 Thus, the Commission has allowed NP (and any other interested members of the public) only one
7 day in which to prepare and submit materials to the Commission staff in order to have the staff
8 distribute the materials to the Commission.¹

9 This is contrary to law. The Commission's regulation 13063(a), (14 CCR 13063(a)),
10 requires the Commission to mail written notice of a hearing on a CDP at least ten days prior to
11 the hearing:

12 § 13063. Distribution of Notice

13 (a) At least 10 calendar days prior to the date on which the application will be heard by
14 the commission, the executive director shall mail written notice to each applicant, to all
15 affected cities and counties, to all public agencies which have jurisdiction, by law, with
16 respect to a proposed development, to all persons who have requested it, and to all
17 persons known by the executive director to have a particular interest in the application,
18 including those specified in section 13054(a).

19 14 CCR 13063(a).

20 The evidence is clear that the Commission did not mail the notice at least ten days prior
21 to January 11, 2006. As set forth in the Declaration of Jaquelynn Pope, submitted herewith, the
22 Commission sent copies of the Notice and Staff Report to NP's counsel, Jaquelynn Pope, and to
23 NP. Postage was had been placed on each of the envelopes by means of a postage-meter, and the
24 postage meter stamp bears the postmark date of January 3, 2006. Since the meter postage and
25 post-mark was affixed to the envelopes by the Commission staff itself, prior to depositing the
26 envelopes in the mail, it is obvious that the envelopes were not deposited in the mail prior to the
27 January 3, 2006 date on which the envelopes were run through the postage meter by the
28 Commission to the envelopes.

¹ NP was unable to prepare any materials in time to submit them on Friday, January 6, 2006. It has taken NP two working days, Friday, January 6, 2006 and Monday, January 9, 2006 to prepare the within objections in time that can be submitted on Tuesday, January 10, 2006, prior to the scheduled January 11, 2006 hearing.

1 Rather, it is apparent that the Commission staff weighed the envelopes and ran the
2 envelopes through the postage meter on January 3, 2006 and then placed them in the mail. (True
3 and correct copies of the envelopes with the postage-meter date of January 3, 2006 are attached
4 to the Declaration of Jaquelynn Pope, submitted herewith.)

5 This is a clear violation of the Commission's own regulations and must result in the
6 invalidity of the notice and any hearings held pursuant to the invalid notice. Therefore, the
7 Commission should not hold the hearings on January 11, 2006.

8 A. The Commission Cannot Hold a Valid Hearing if it Does Not Comply with the
9 Regulation 13063(a).

10 The Commission itself has previously acknowledged that it is required to mail notice of
11 such hearings at least ten days prior to the hearing. In the earlier proceeding regarding the
12 December 16, 2005 13569 hearing, NP protested that the Commission's notice of hearing did not
13 give it adequate time to prepare. The Commission itself asserted at that time it is required to
14 comply with the ten day mailing provisions of 14 CCR 13063(a):

15 North Pacifica also argues that it has not received adequate notice
16 regarding the dispute resolution hearing. For hearings regarding
17 permit application and appeals, the Commission's regulations require
18 the Commission to mail notice to all interested persons at least 10 days
19 in advance of the hearing. 14 C.C.R. § 13063(a). The Commission
20 mailed notice and a copy of the staff report to North Pacifica on
21 November 29, 2005, substantially earlier than required by the
22 Commission's regulations.

23 December 2, 2005 Addendum to Staff Report for 02-02-02-EDD (North Pacifica LLC), p.2

24 "Other Procedural and Jurisdictional Objections."

25 Here, the Commission's failure to comply with the mandatory requirements of its own
26 regulations must invalidate any hearing held pursuant to the invalid notice. NP strongly objects
27 to any Commission hearings held pursuant to the invalid notice mailed January 3, 2006, and will
28 protest any decision in such a hearing as being invalid.

B. NP Has Been Severely Prejudiced By The Untimely And Invalid Notice.

Notice is a key component of the Constitutional guarantee of due process:

Notice, the key to due process and the crux of the present appeal,
is required before property interests may be disturbed or penalties
assessed.

1 *Lambert v. California* (1957) 355 U.S. 225, 228.

2
3 Further, the California Administrative Adjudication Bill of Rights also requires that an
4 agency conducting an adjudicative proceeding must give the person to whom the agency action
5 is directed notice and an opportunity to be heard, including the opportunity to present and rebut
6 evidence. (California Government Code, § 11425.10(a)).

7 These requirements of the U.S. Constitution and the California Government Code are
8 independent of the Commission's regulations, and the ten-day mailing requirement of regulation
9 14 CCR 13063(a) does not necessarily, as a matter of law, satisfy due process requirements in all
10 situations. That is a matter that must be determined on a case-by-case basis.

11 However, here, where the Commission has failed to provide NP with even the minimum
12 ten-day mailing of notice required by its own regulation, it is unarguable that NP has been denied
13 due process. Further, NP has been actually prejudiced by the adumbrated notice and denial of
14 due process:

15 **1. NP Has Been Prejudiced by the Invalid Notice in Preparing for the
16 Substantial Issue Hearing:**

17 As set forth in the Staff Report, the Commission must consider an appeal unless it
18 determines that no substantial issue exists. The Staff Report lists five factors to be considered in
19 determining whether a substantial issue exists. These factors are all complex and NP has not had
20 sufficient notice to address them and /or present evidence. Specifically NP has been prejudiced
21 as follows:

22 (a) **NP Needs Three Votes From the Commissioners To Even Have a
23 Substantial Issue Hearing.**

24 As a matter of practice, the Commission does not actually hold a substantial issue hearing
25 unless three separate Commissioners vote to do so. If three Commissioners do not vote to hold a
26 substantial issue hearing, the appeal is automatically held to raise a substantial issue, and the
27 appeal goes forward. Generally, Commissioners vote to hold a substantial issue hearing because
28 they have been educated by lobbying prior to the hearing and have been persuaded that the issues
are important enough to merit a public hearing. In this case, NP has had only four working days
notice of the hearing, and has had only one day to provide materials to the Commissioners, in

1 order for them to receive it three working days prior to the hearing. It is thus impossible for NP
2 to have had time to read and digest the 22-page Staff Report regarding the issues, and then
3 prepare sufficient, appropriate and comprehensive materials in response to the merits of the
4 issues, and then bring the issues to the attention of the Commissioners and/or to retain a lobbyist
5 to educate the Commissioners on behalf of North Pacifica, in time to have any effect on the
6 Commission's decision as to whether or not to vote to hold a substantial issue hearing. NP has
7 had time since receipt of the Notice and Staff Report only to prepare the within Objections for
8 submittal on Tuesday, January 10, 2006, the day before the hearing.

9 (b) NP Has No Time to Obtain and Review the Evidence in the Commission's
10 SF Files.

11 The Staff Report recommends that the Commission find a substantial issue as to
12 Wetlands and Water Quality. NP has been unable to review the Commission's files regarding
13 these issues to determine what, if any, evidence is contained in the files. The Commission's files
14 regarding NP's project are located in its San Francisco office. The last time that NP examined
15 the Commission's files regarding its project, the files did not contain any evidence regarding the
16 Water Quality issues addressed in the Staff Report, and did not contain any evidence regarding
17 the wetlands issues other than a copy of the original December, 2002 Staff Report.
18 Regarding Water Quality, there are no exhibits to the Staff Report that support the detailed and
19 technical discussion regarding Water Quality that is contained in the Staff Report.

20 The Staff Report contains numerous statistics and technical propositions that are not
21 supported by citations to any authority. The invalid notice has deprived NP's attorneys, who are
22 located in Southern California, of time to review the files in San Francisco in order to determine
23 if there is any evidence in the Commission's files supporting the Commission's proposed
24 findings regarding the purported Wetlands and/or Water Quality. Even if the attorneys were
25 available to fly to San Francisco on such shortened notice, there would be no time left to review
26 the evidence, consult experts and obtain expert evidence and prepare a rebuttal on the merits in
27 time for it to be distributed and considered by the Commissioners prior to the January 11, 2006
28 date for the substantial issue hearing.

(c) NP Has No Time to Cannot Obtain Expert Evidence to Rebut the
Commission's Report Regarding alleged Wetlands.

1 The Commission has consistently taken the position that the determination of whether
2 wetlands exist is a highly technical and complex area that requires expertise. In its Respondent's
3 Brief before the First Appellate District Court, in North Pacifica v. California Coastal
4 Commission, A101434, the Commission stated:

5 The factual issues raised by section 30603 not only are complex, but also
6 could implicate specialized administrative understanding. Mapping of
7 wetlands, for example, requires consideration of (1) whether the area is
8 predominated by hydrophytic (wetland) vegetation; (2) whether the area
9 exhibits wetlands hydrology; or (3) whether the substrate of the area
10 contains hydric (wetland) soil (see section 13577; Kirkorowicz v.
California Coastal Com. (2000) 83 Cal.App. 4th 980, 988.)

11 Respondents Brief, A101434, p. 23.

12 Thus the mapping of wetlands requires consideration of three factors ("three
13 prongs"), and is a complex matter requiring expertise. Because the mapping of wetlands
14 is a complex matter, NP must rely on its wetlands expert, Mike Josselyn of Wetland
15 Research to respond to the Staff Report. In this case, the invalid notice that NP has
16 received does not allow its expert, Mike Josselyn, time to prepare even a preliminary
17 report to rebut the Staff Report. As set forth in the Declaration of Mike Josselyn,
18 submitted herewith, he believes that much of what is in the Staff Report has been
19 covered previously in studies that contradict the Staff's conclusion. For example, the
20 Staff contends that alleged wetland area number 3 is the most sensitive of the three
21 disputed wetland areas addressed in the wetland report. Mr. Josselyn however, states
22 that the vegetation areas defined by the Commission as wetland number 3 are not
23 wetlands at all. However, he does not have time to review the prior studies to provide
24 documentation for his position in time to prepare a report to submit to the Commission
25 prior to the January 11, 2006 hearing.

26 (d) NP Has No Time to Obtain Expert Testimony Rebutting the Staff Report's
27 Conclusion that the Regulation 13577(a) Definition of Wetlands is
28 "effectively identical" to the LCP Definition of Wetlands.

Section 30603 of the Coastal Act provides that, once a local LCP has been certified by
the Commission, the grounds for an appeal are limited:

The grounds for an appeal pursuant to subdivision (a) shall be limited

1 to an allegation that the development does not conform to the standards
2 set forth in the certified local coastal program or the public access
3 policies set forth in this division.

4 Public Resources Code, § 30603(b)(1).

5 As set forth above, there are three prongs that must be considered in mapping
6 wetlands. Under the LCP, two of the three prongs must be present for an area to be
7 considered an LCP wetland.. The Commission has acknowledged in this case that it
8 must apply the LCP definition of wetlands to determine compliance with the LCP.
9 However, the Commission has also taken the position that for purposes of determining
10 whether or not a project falls into the Commission's appellate jurisdiction, it may apply
11 the definition of wetlands found in its regulation 13577(a). Under the Commission's
12 interpretation of its own regulation, regulation 13577(a) requires a finding of only one
13 prong.

14 Now, however, in the Staff Report, which NP did not receive until the afternoon
15 of January 5, 2006, the Staff has taken the position that the LCP definition is "effectively
16 identical" to the regulation 13577(a) definition and that therefore the Commission's
17 findings that the disputed areas constitute wetlands under the regulation 13577(a)
18 definition also constitute a finding that the disputed areas are wetlands under the LCP
19 definition of wetland. (Staff Report pp. 7-8.)

20 This conclusory statement is unsupportable and contrary to law. The
21 Commission's interpretation of its own regulation 13577(a) is not "effectively identical"
22 to the clear meaning of the LCP definition of wetlands. The LCP definition of wetlands
23 simply cannot be interpreted to mean that a wetland can be defined as existing where
24 there is only one prong. However, since this is a technical area, NP needs expert
25 testimony to establish that the LCP definition clearly calls for two prongs. NP has not
26 had time to obtain this advice.

27 (e) NP Has No Time to Obtain Expert Evidence to Rebut the
28 Commission's Report Regarding alleged Water Quality Issues.

Prior to receiving the Notice of Hearings and Staff Report from the Commission
on January 5, 2006, the Commission had never informed NP, either formally or

1 informally, that it believed that NP's project was not in compliance with LCP Policy 12
2 regarding Water Quality. This issue was, however, addressed very thoroughly in the
3 City's EIR certification process and the development permit review process and was
4 effectively addressed by the conditions of approval imposed by the City on NP's CDP,
5 and other building permits.

6 Like wetland mapping, the Staff Report discussion of water quality is complex
7 and calls for expertise. As noted above, there is nothing in the Staff Report or exhibits
8 thereto that provides any authority for the statements and conclusions in the Staff Report.
9 As set forth in the Declaration of Dan Schafer, in 2000 BKF Engineers prepared a
10 detailed and thorough Storm Management Report for purposes of the development
11 permit application and the EIR. The 2000 Storm Management Report contains effective
12 procedures that would ensure that the Storm Management for the Bowl would be in
13 compliance with the policies of the LCP. However, the Staff Report ignores the BKF
14 Storm Management Report and seeks instead to impose 2005 and/or 2006 standards on
15 NP's project. NP contends that the Commission cannot find that NP's project is not in
16 compliance with the LCP if NP's project is in compliance with the LCP policies and
17 standards that were required for approval of the project by the City. However, as set
18 forth *infra*, NP has not had time to prepare a legal brief addressing this issue on the
19 merits.

20 However, as set forth in the Declaration of Dan Schafer, the 2000 Storm
21 Management Report ensured that the Bowl project was in compliance with the LCP
22 policies as they existed at the time. However, as set forth in the Declaration of Dan
23 Schafer, Mr. Schafer did not have time to prepare a report in support of this opinion,
24 since he would have needed to receive the Staff Report and the assignment from NP by
25 Wednesday morning, January 4, 2006, in order to prepare a Report for the Commission
26 in time for it to be submitted by January 10, 2006.

27 In fact, NP contends that there is no substantial issue regarding Storm Water
28 Management, but the Commission's failure to provide valid notice of the January 11,
2006 hearing has prevented NP from obtaining and presenting the evidence and law
necessary to prove this.

1 (f) NP's Attorneys Do Not Have Time to Prepare a Brief on the Legal
2 Issues Raised By the Staff Report.

3 As set forth in the Declaration of Jaquelynn Pope, NP's attorneys received the
4 Staff Report in the mail on the afternoon of Thursday, January 5, 2006, four working
5 days prior to the hearing. In fact, NP has had only two complete working days, Friday,
6 January 6, 2006 and Monday, January 9, 2006, to review the Staff Report, attempt to
7 contact and obtain expert advise, and prepare the within objections and Declarations, in
8 order to submit them on Tuesday, January 10, 2006, a day prior to the January 11, 2006
9 hearing.

10 In fact, in order to submit these objections and the accompanying declarations by
11 Tuesday, January 10, 2006, NP's attorneys have had to work full time on the above
12 tasks, and have had no time to devote to legal research regarding any substantive legal
13 issues raised by the Staff Report. NP objects to the invalid notice on the grounds that it
14 has prevented NP from being able to submit briefs on the merits of the legal issues raised
15 by the Staff Report.

16 (i) CEQA

17 As an example, in the Staff Report, the staff asserts that NP's project is not
18 consistent with the applicable requirements of CEQA, and purports to make a finding to
19 that effect.

20 The Commission finds that the proposed project cannot be found to be
21 consistent with the requirements of the Coastal Act and does not
22 conform to the requirements of CEQA.

23 Staff Report p. 22.

24 On the face of it, this finding appears clearly to be beyond the authority of the
25 Commission. The EIR on the Bowl project was prepared pursuant to the provisions of CEQA,
26 and was certified by the City in July, 2002. The 60-day limitation period for seeking to overturn
27 that certification ran in September, 2002. Since the Commission did not challenge the City's
28 quasi-judicial decision certifying the EIR within the statutory limitation period, that
determination is now final and *res judicata*, and the Commission has no jurisdiction to overturn
it.

1 If a tribunal has subject matter jurisdiction in the fundamental
2 sense, its decision will be res judicata notwithstanding that the
3 decision is incorrect. "It is an established rule that where a tribunal
4 has jurisdiction of the parties and of the subject-matter it necessarily
5 has the authority and discretion to decide the questions submitted to
6 it even though its determination is erroneous. [Citation.] This rule
7 applies to quasi-judicial tribunals as well as to courts." (Cullinan v.
8 Superior Court (1938) 24 Cal.App.2d 468, 471-472 [75 P.2d 518];
9 accord Hollywood Circle, supra, 55 Cal.2d at p. 731; Ang, supra, 97
10 Cal.App.3d at p. 678.) [14]

11 CCC v. Superior Court (1989) 210 Cal.App. 3d 1488, 1501.

12 NP objects to the Commission's findings regarding CEQA on the grounds that it is
13 outside of the Commission's jurisdiction and on the grounds that NP has been denied an
14 opportunity to file a legal brief on the merits of this issue. NP expressly reserves the right to brief
15 this issue in depth, on the merits, upon judicial review of the Commission's actions.

16 (ii) Water Quality Standards

17 Similarly, as set forth in the Declaration of Dan Schaefer, the Commission appears to
18 seek to impose current day Storm Water Management standards on NP's project, rather than the
19 governing standards that were in place when the project was approved, and when the City of
20 Pacifica specifically imposed conditions to meet then governing Storm Water Management
21 standards.

22 Therefore, NP contends that the Commission's belated attempt to impose 2005 and/or
23 2006 Storm Water Management Standards on NP's project is contrary to law. However, NP has
24 not had time to prepare a detailed brief in support of its position that the Commission cannot
25 impose 2005 and/or 2006 Storm Water Management Standards on NP's project., Therefore, NP
26 objects to the Commission's attempt to improperly impose 2005 and/or 2006 standards on NP's
27 project, and expressly reserves its right to brief this issue in depth upon judicial review of the
28 Commission's actions herein.

Further, it is obvious that in providing NP with such adumbrated notice, the Commission
has severely prejudiced NP and is hoping to prevent NP from having any time to address the
obvious flaws, inconsistencies and purposeful misrepresentation in the Staff Report. As
discussed *supra* in detail, the Staff Report addresses numerous issues that have not previously
been raised in the 13569 proceedings, and which thus have not been briefed by NP in

1 proceedings before the Commission. Nonetheless, every issue raised by the Appellant Curtis in
2 his appeal herein, was raised in his prior appeals to the City of Pacifica. However, the Staff
3 Report is entirely silent regarding the fact that the City already denied the Curtis appeal
4 regarding these issues and is equally silent as to the comprehensive record developed in the EIR
5 process and development review process by the City. NP cannot in the shortened period
6 available to it cite comprehensively to the voluminous record of the City's proceedings that,
7 should have been considered by the Commission herein. As noted, NP has not even had the
8 opportunity to review the Commission's files to determine if the Commission has reviewed the
9 City's files.

10 (g) The Invalid Notice Also Affects the Public

11 Additionally, the invalid notice also affects the rights of the public. In waiting until
12 January 3, 2006 to mail the Notice of Hearings and Staff Report, the Commission gave shortened
13 notice to the public as well as NP. Since the hearing is set to take place in San Pedro, in
14 Southern California, even though it concerns property in San Mateo County in Northern
15 California, attendance at the hearing may require advance travel plans for residents of the
16 community, and/or any other interested members of the public.

17 (h) NP's Attorneys Cannot Attend the January 11, 2006 Hearing

18 As set forth in the Declaration of Jaquelynn Pope, neither of NP's attorneys, Jaquelynn
19 Pope, or Keith Fromm are available to attend the January 11, 2006 hearing. Because of the very
20 short notice, both attorneys are unable to clear time for that hearing. If they were available, their
21 participation would be limited to making the objections set forth herein, because the invalid
22 notice has made it impossible to prepare for a hearing on the merits, either as to the substantial
23 issue hearing, or the *de novo* hearing. NP is clearly prejudiced by not being able to be
24 represented at the hearing, and by not having sufficient notice in any event to present evidence
25 on the merits of the issues to be heard.

26 **2. NP Has Been Prejudiced By The Invalid Notice In Preparing For**
27 **The De Novo Hearing.**

- 28 a. All of the Prejudice Incurred in Preparing for the Substantial Issue
Hearing also Applies to NP's Ability to Prepare for the De Novo Hearing.

1 NP has additionally been prejudiced by the invalid notice in that, for the same reasons
2 that it cannot make any presentation regarding the merits of the issues to be decided in the
3 substantial issue hearing, it cannot make any presentation regarding the merits of the issues to be
4 decided in the *de novo* hearing. All of the prejudice relating to the substantial issue hearing is
5 equally present as to NP's ability to prepare for *de novo* hearing, and NP incorporates those
6 reasons by reference herein.

7 b. ESHA

8 Similarly, NP had no prior notice of the ESHA issue until its receipt of the Staff Report.
9 This is the first notice the Commission has ever given NP that the Commission is asserting that
10 there is an ESHA issue. As set forth in the Declaration of Mike Josselyn, the issue of whether or
11 not there is any actual ESHA on the site cannot be determined without fieldwork, and the short
12 notice has not given NP anytime to have Mike Josselyn perform the field work. If NP had had
13 time to obtain a site visit from Mr. Josselyn now, his site visit could have confirmed Mr.
14 Josselyn's opinion that the field work necessary for the Commission to determine whether or not
15 the area qualifies as ESHA cannot be done at this time of year, and that the Staff Report's
16 conclusion that ESHA exists can therefore not be supported by the Commission. The invalid
17 notice has prevented NP from obtaining and presenting this evidence, which would rebut the
18 Commission's position that it can determine now that there is ESHA.

18 c. Wetlands

19 Further, as set forth in the Declaration of Mike Josselyn, the Commission's position is
20 inconsistent with any prior wetlands reports prepared by Mr. Josselyn or any other person, and
21 Mr. Josselyn has not been able to prepare a report setting forth the findings of the previous
22 reports and comparing them to the Staff Report in the time available. NP does not believe that
23 the Commission has prepared any new report because (1) there is no new wetland study attached
24 as an exhibit to the Staff Report and (2), as set forth in the Declaration of Mike Josselyn, in
25 would take a month to prepare a new wetland delineation report. NP has denied the Commission
26 permission to make the site visit that would be required for such a new report. Further, the Staff
27 Report on the Curtis Appeal is dated December 29, 2005, just ten days after the purported
28 December 19, 2005 filing date. Therefore the only evidence of wetlands must be contained in
the prior studies and reports referenced by Mr. Josselyn and, NP has been prejudiced by the

1 invalid notice which has prevented Mr. Josselyn from having time to prepare a report based on
2 the prior studies, which, in his opinion, would refute the Commission's findings regarding
3 wetlands.

4 d. Disclosure of Confidential Settlement Negotiations

5 Additionally, as discussed *infra* in detail, NP is prejudiced by the invalid notice for the *de*
6 *novo* hearing in that there is insufficient time to seek relief against the Staff for disclosing the
7 content of privileged and confidential settlement negotiations and actually using the content of
8 those confidential discussions against NP to justify denying the project. NP is further prejudiced
9 by the short time to respond in that the Staff has not only disclosed confidential settlement
10 discussions but done so in a selective manner so as to give a completely false impression on
11 NP's position regarding any modifications to its project.

12 e. Takings

13 Finally, NP is prejudiced by the invalid notice in that the Staff Report's assertion that
14 denial will not constitute a taking because of alleged alternative modifications that would not
15 eliminate all economically beneficial or productive use of the applicant's property is also
16 completely unsupported by the record. NP has been given insufficient time to respond to this
17 unsupported assertion and to produce evidence that in fact, it appears extremely likely that any
18 such modifications would eliminate all economically beneficial or productive use of the
19 applicant's property under the City's Municipal Code, and would further unreasonably limit the
20 owner's reasonable investment backed expectations of the subject property.

21 II. OBJECTION TO DISCLOSURE OF AND MISCHARACTERIZATION OF
22 PRIVILEGED SETTLEMENT NEGOTIATIONS

23 The Staff Report states that NP has "indicated that it is unwilling to modify the project
24 plans to conform to the requirements of the LCP. Therefore, the staff has no choice other than to
25 recommend denial of the permit." (p. 3) The Commission's reliance on this statement to justify
26 denial of NP's permit is a very serious breach of the confidentiality agreement that the parties
27 entered into for the purposes of mediation and settlement discussions.

28 The only times in which NP has discussed possible design changes to its project with the
Commission staff have been in two separate confidential and privileged settlement negotiations.

1 The staff's reference to this subject both mischaracterizes the fact and, more seriously
2 impermissibly discloses the content of the privileged settlement negotiations.

3 The first instance in which any discussion of possible design changes to NP's project
4 took place was before the Ninth Circuit mediator Roxanne Ashe, at the Ninth Circuit Federal
5 Courthouse in San Francisco, at the end of July, 2005. Chris Kern and Joel Jacobs participated
6 in that meeting on behalf of the Commission, and NP was represented by its attorney Jaquelynn
7 Pope, its attorney and principal Keith Fromm, and its principal Robert Kalmbach. At the
8 beginning of that meeting, the mediator, Roxanne Ashe expressly admonished the participants
9 that all discussions that day must be kept confidential. At that meeting the subject of possible
10 changes to NP's project was discussed.

11 The other occasion on which the possibility of changing NP's project was discussed was
12 in San Francisco on December 16, 2005, immediately after the regulation 13569 hearing. At that
13 time the deputy attorney general for the Commission, Joel Jacobs, approached NP's principals
14 and its attorneys in the lobby area outside of the meeting and asked if it would be a good time to
15 talk about settlement. Mr. Jacobs expressly stated that the discussion would be a confidential
16 settlement discussion. At that time the parties also discussed the possibility of changing the
17 design of the project to accommodate the disputed wetland areas.

18 As set forth in the Declaration of Jaquelynn Pope, there have been no other discussions
19 regarding changing or modifying NP's project, yet, in the Staff Report, the Staff states that NP
20 "has indicated that it is unwilling to modify the project plans to conform to the requirements of
21 the LCP." Since the only discussions of whether the project could be modified have been in
22 privileged settlement discussions, this statement is an impermissible disclosure of privileged
23 discussions. Further, it is a very serious breach. The reason for imposing confidentiality on
24 settlement negotiations and discussion is to ensure that the parties feel free to speak openly,
25 since, only in that way, is it ever possible to make progress towards finding common ground. To
26 turn around and use statements made in protected settlement discussions against the party that
27 made them in the very proceedings that were the subject of the negotiations, violates not only the
28 letter and the spirit of the confidentiality requirements, but basic notions of fair play. NP objects
to any decision of the Commission that is based on the content of confidential mediation and/or
settlement discussions.

1 III. OBJECTION TO MISREPRESENTATION RE TAKINGS

2 Finally, and as egregiously, the Staff Report not only wrongfully disclose and relies on
3 confidential settlement negotiations but completely misrepresents NP's position. As the staff is
4 well aware, the idea of modifying NP's projects raises many problems. There is no simply no
5 support for the Staff's assertion that such modifications could be made in a manner that would
6 not "eliminate all economically beneficial or productive use of the applicant's property or
7 unreasonably limit the owner's reasonable investment backed expectations of the subject
8 property."

9 The staff contends in support of its contention that a denial will not effect a taking,
10 because NP could change the design of its project to cluster the development in the northwestern
11 portion of the site and thus protect the alleged wetlands. However, staff cites to nothing in the
12 record, and there is nothing in the record, to support the conclusion that such a change would not
13 eliminate all economically beneficial or productive use of the property, or that it would not
14 constitute an unreasonable limitation on the owner's reasonable investment backed expectations.

15 NP has never rejected the possibility of amending its project, if in fact, such changes
16 could be made in an expedient and economically feasible manner, however, NP has made the
17 staff aware of the many reasons why this may not be possible. For one, the Commission seeks a
18 100-foot or 80-foot buffer around the alleged 1.1 acre of alleged wetland. However, the City's
19 General Plan requires that NP's project have 43 units in order to satisfy the minimum density
20 requirements. As set forth in the Declaration of Dan Schafer, it would simply be impossible to
21 build a 43 unit residential development on the 4.2 acre Bowl site if the Commission imposes a
22 100 or even 80 foot buffer zone around the alleged 1.1 acre area of wetland.

23 The Staff Report ignores all of the reasons why it may not be possible to amend NP'
24 project and instead selectively discloses portions of the contents of confidential settlement
25 negotiations so as to misstate NP's position and use that confidential information against NP.
26 The Staff Report is thus both fraudulent and unlawful, and NP demands that the sections of the
27 Staff Report stating that NP has indicated that it will not modify the project be stricken from the
28 Staff Report.

1 IV. OBJECTION TO APPELLANT'S FAILURE TO SERVE NP WITH
2 COPY OF APPEAL.

3 Regulation 13111(c) provides that an appellant must notify the applicant that he has filed
4 an appeal by serving a copy of the appeal on the applicant. Here, it is undisputed that John
5 Curtis submitted his appeal to the Commission on September 5, 2002. Although NP contends
6 that it was deemed filed five working days later, on September 12, 2002, the Commission
7 contends herein that the Curtis appeal was filed on December 19, 2005. Regardless of whether
8 the Appeal was filed in 2002 or 2005, it is also undisputed that Curtis never made any attempt to
9 serve a copy of the appeal on North Pacifica. As set forth in the Declaration of Jaquelynn Pope,
10 although the Commission provided NP with a copy of the first two pages of the Notice of
11 Appeal, NP was never served with the complete copy of the appeal that is attached as Exhibit 7
12 to the Staff Report. Furthermore, Curtis' original appeal included exhibits that have not been
13 provided to either NP or the Commission. Most importantly, Curtis included a videotape of the
14 August 12, 2002 meeting approving NP's project. As set forth in the Declaration of Jaquelynn
15 Pope, that tape has disappeared from the Commission's files, although Curtis himself has
16 confirmed that he did indeed file it as an exhibit. The Commission's failure to keep the
17 videotape as part of its files, whether intentional or not, constitutes destruction of evidence.

18 Moreover, Curtis' failure to serve NP with a copy of his appeal has resulted in a delay of
19 at least fifteen days in NP's ability to review the appeal, in that if Curtis had mailed the appeal on
20 the December 19, 2005, NP should have received it by December 21, 2005, instead of January 5,
21 2006. Since Curtis in fact submitted his appeal in September, 2002, he has had more than three
22 years to serve NP with a copy. His failure to do so is thus completely unwarranted.

23 Under regulation 13111(c), an appellant's unwarranted failure to serve a copy of the
24 appeal is grounds for dismissal of the appeal by the Commission.

25 Dated: January 10, 2006

26 Respectfully submitted,

27 

28 JAQUELYNN POPE

EXHIBIT 8

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7 Attorneys for Permit-holder, North Pacifica LLC

8
9
10 BEFORE THE CALIFORNIA COASTAL COMMISSION

11 NORTH PACIFICA'S
12 Permit Number: 2-PAC-02-196

13 DECLARATION OF JAQUELYNN
14 POPE

15
16
17 Hearing Date: January 11, 2006

18 I, Jaquelynn Pope, declare as follows:

- 19 1. I am an attorney duly licensed to practice and in good standing before all the Courts of
20 the State of California. I am the attorney for North Pacifica LLC, permit-holder herein.
- 21 2. On the afternoon of January 5, 2006, I received an envelope from the California Coastal
22 Commission in the mail. The envelope contained the Commission's Important Public Hearing
23 Notice – New Appeal. The Notice stated that there would be a hearing on Wednesday, January
24 11, 2006 in San Pedro, and that the hearing would begin at 10:00 a.m. The Notice gives no
25 further information as to the type of hearing that will be held. Also included in the envelope
26 was a copy of a 22 page document entitled "Staff Report – Appeal – Substantial Issue & De
27 Novo Review."
28
3. On examining the envelope from the Coastal Commission in which these documents
had been delivered I noticed that the envelope had been run through a postage meter by the
Coastal Commission, and that the postage meter date on the envelope was January 3, 2006.

1 Attached hereto is a true and correct copy of face of the envelope showing the postage meter
2 post mark of January 3, 2006.

3 4. I have since confirmed that the Coastal Commission also sent an envelope containing
4 the Notice and Staff Report to my client North Pacifica LLC, and that the envelope received by
5 North Pacifica LLC also had been run through a postage meter by the Coastal Commission, and
6 that the post-meter date was also January 3, 2006. A true and correct copy of the envelope
7 addressed to North Pacifica bearing the January 3, 2006 postage meter date is also attached
8 hereto.
9

10 5. At the end of July, 2005, I attended a mediation conference in San Francisco that was
11 sponsored by the Ninth Circuit Court of Appeal, which is the Federal Court of Appeals, in
12 which North Pacifica discussed settlement of its various cases against the Coastal Commission
13 and its Executive Director Peter Douglas, and its staff member Chris Kern, and former staff
14 member, Peter Imhof. The mediation took place in the Ninth Circuit Court House in San
15 Francisco. The participants in the mediation conference on behalf of the Commission were
16 Chris Kern and deputy Attorney General, Joel Jacobs. I attended the conference on behalf of
17 North Pacifica. Also attending on behalf of North Pacifica were Keith Fromm, its principal
18 and attorney, and Robert Kalmbach, its principal. Roxanne Ashe, the Ninth Circuit mediator,
19 acted as mediator. The mediation conference went on all day.
20

21 6. At the beginning of the conference, Roxanne Ashe expressly told the parties that the
22 discussions at the conference must be kept confidential, and could not be used in any other
23 proceeding against any party. All of the participants in the conference agreed.
24

25 7. At the conference the parties discussed the possibility of modifying NP's project by
26 removing or relocating some number of units in order to accommodate the disputed areas that
27 the Commission claims are wetlands. NP has always consistently contended that the evidence
28

1 does not support the Commission's claim that these areas are wetlands, and that in fact, there
2 are no wetlands on NP's property. However, NP participated in the discussion for the sake of
3 attempting to resolve all of the disputes between the parties. This discussion at the conference
4 regarding the possibility of modifying NP's project by removing or relocating units is the first
5 time that this issue was ever discussed between the parties. The parties to this confidential
6 discussion were prohibited from disclosing and/or using any information or statements in the
7 discussion against any participant in the discussions.
8

9 8. On December 16, 2005 NP participated in a regulation 13569 hearing before the
10 Commission in San Francisco at the Hyatt Regency Hotel. Immediately after the hearing, Joel
11 Jacobs, the deputy Attorney General, approached NP's principals, Keith Fromm and Robert
12 Kalmbach, and myself. Mr. Jacobs asked if it would be a good time to talk settlement. We
13 agreed to discuss settlement with Mr. Jacobs, and found some chairs in the corner of the lobby
14 immediately outside the large conference room where the Commission meeting was taking
15 place. Mr. Jacobs specifically stated that the settlement talks with him that day were
16 confidential and privileged settlement negotiations. The principals of North Pacifica agreed to
17 that, as did I. During the confidential settlement talks on December 16, 2005 with Mr. Jacobs,
18 Mr. Jacobs himself raised again the possibility of modifying NP's project by removing and/or
19 relocating some number of units.
20

21 9. The above two instances are the only times in which NP has ever discussed with any
22 representative or staff member of the Commission the possibility of removing or relocating
23 units on its project or modifying its project. In each instance the discussions of this subject
24 were part of confidential mediation and/or settlement discussions. The Commission's
25 disclosure of the content of the content of these confidential discussions, and worse, the
26 Commission's use of the content of these confidential discussion against NP violates the
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1 Federal Rules prohibiting such use of the content of confidential discussions, as well as the
2 express agreement of the parties.

3 10. The Staff Report assertion that NP has indicated that "it is unwilling to modify the
4 project plans to conform to the requirements of the LCP", is further a mischaracterization of
5 NP's position. NP has never stated that it would not consider modifying its project if it were
6 possible to do so in an expedient and economically feasible manner.
7

8 11. The appellant John Curtis has never served NP with a copy of his appeal. At some time
9 in September, 2002 the Commission provided NP with a copy of the first two pages of the
10 appeal, however, neither the Commission nor John Curtis has ever served NP with the
11 complete copy of the appeal that is attached as Exhibit 7 to the Staff Report. I had not received
12 a complete copy of the appeal to review until I received the Staff Report on the Appeal.
13

14 12 Further, in October, 2002, I examined the Commission file on North Pacifica at the
15 Commission offices in San Francisco California in the company of Keith Fromm and Robert
16 Kalmbach. At that time the file included various exhibits that Curtis had filed with his appeal,
17 including a copy of the August 12, 2002 City of Pacifica City Council meeting at which NP's
18 project was approved. In his April 9, 2003 deposition John Curtis acknowledged that he had
19 submitted a copy of that videotape to the Commission with his appeal. (A copy of the April 9,
20 2003 deposition of John Curtis has been lodged with the Commission, the testimony regarding
21 the videotape is found at pages 122-123.)
22

23 13. On my subsequent review, along with Robert Kalmbach, of the Commission files on or
24 about November 2003, we found that the copy of the August 12, 2002 videotape was not
25 included in the file. The videotape is not referenced in the Staff Report and has evidently been
26 lost or destroyed. Since it was a part of the Curtis appeal, NP is entitled to be served with a
27 copy of that videotape, and to have the Commission consider the contents of the tape as
28

1 evidence.

2 I declare under penalty of perjury that the foregoing is true and correct of my own knowledge,
3 and, if called upon to do so, I could and would testify competently thereto.

4 Executed this 10th day of January, 2006 at Hermosa Beach, California.

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JAQUELYNN POPE

EXHIBIT 9

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7 Attorneys for Permit-holder, North Pacifica LLC

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9
10 BEFORE THE CALIFORNIA COASTAL COMMISSION
11

12 NORTH PACIFICA'S
13 Permit Number: 2-PAC-02-196

14 DECLARATION OF EXPERT
15 MIKE JOSSELYN OF WETLAND
16 RESEARCH RE WETLANDS ISSUES

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Hearing Date: January 11, 2006

I, Mike Josselyn, declare as follows:

1. I am a certified Professional Wetland Scientist. I have 25 years experience as a wetland delineator and I am expert on the wetlands issues raised in the Commission's December 29, 2005 Staff Report. I am President of WRA Inc.
2. WRA (formerly Wetland Research Associates, Inc.) has been involved in the process of performing wetland delineation as to any possible wetland areas on the Bowl since at least 2000. I have prepared several analyses related to wetlands regarding the disputed areas on the Fish and the Bowl property. The reports that I have prepared have been reviewed and relied by Thomas Reid Associates in the preparation of the certified EIR for the Bowl property. Some of the reports that I have prepared have been cited in the Commission's November 23, 2005 Staff Report for the regulation 13569 hearing and the December 2, 2005 addendum thereto.
3. I have reviewed the December 29, 2005 Staff Report prepared by the Coastal Commission regarding Wetland issues and ESHA issue for the Bowl. Area 3 is reported to be a

1 wetland in the Staff Report; however, no previous reports prepared by me or any other
2 consultant agrees with this determination.

3
4 4. North Pacifica has advised me that they need to submit a report rebutting the
5 Commission's conclusions in the wetlands portion of the December 29, 2005 Staff Report by
6 Tuesday, January 10, 2006. I have advised North Pacifica that I cannot prepare a detailed
7 report, supported by detailed references to the wetland delineations that have already been done
8 as well as to the EIR certification process, by that time. I did not have any notice that the Staff
9 Report would be issued at this time, and based on my schedule and the time it would take to
10 prepare such a report, I would have needed to have received the report by the end of the day
11 Tuesday, January 3, 2006, in order to prepare such a report by Tuesday, January 10, 2006. I
12 believe that such a report should be considered by the Commission prior to the Commission
13 making a decision as to whether there is a substantial issue as to whether the Bowl project is in
14 compliance with the LCP, based upon the LCP definition of wetlands.

15
16
17 5. I have also advised North Pacifica that I believe that a new wetland delineation report
18 regarding areas 1,2 and 3, which incorporated both a review of the previous wetland
19 delineations and a new, on-site visit would take approximately a month. I believe that the
20 Commission would need to consider such a report in order to make an informed decision in a
21 *de novo* hearing on the merits as to whether any of the alleged wetlands in areas 1, 2 or 3
22 actually meet the LCP definition.

23
24 6. I have also reviewed the Staff Report regarding the alleged ESHA. In my opinion,
25 without having had the opportunity in this short time to do the field work required, the map
26 relied on by the Commission is not sufficient to determine that that there is Coastal Terrace
27 Prairie Habitat qualifies as ESHA. The map is very broad and the Commission does not appear
28 to have done the required fieldwork, but rather relies on the maps very broad characterizations.

1 My own previous fieldwork and studies of the area on the map have confirmed that many areas
2 shown on the map as Coastal Terrace Prairie habitat are, in fact, uplands, steep slopes, and/or
3 weedy areas, which are completely inconsistent with a designation of Coastal Terrace Prairie
4 habitat. Further, much of this area has been so disturbed by the construction of Highway One
5 that it is very unlikely that native Coastal Terrace Prairie could still exist as mapped.
6

7 I cannot determine for sure, and neither can the Commission staff, whether any of the
8 area represented as ESHA on the map is, in fact ESHA, except by fieldwork. In this case, it
9 will not be possible to tell until April whether the plants that would be indicative of ESHA are
10 indeed present anywhere on the site. I believe that it is impossible for this Commission to
11 consider all the evidence necessary to make a *de novo* determination as to whether ESHA is
12 present on the site until such fieldwork has been done. I do not believe that any decision on
13 this issue based on the information in the staff report can be supported by the current record.
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1 I declare under penalty of perjury that the foregoing is true and correct of my own knowledge.
 2 and, if called upon to do so, I could and would testify competently thereto.

3 Executed this 9th day of January, 2006 at San Rafael California.

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 6 MIKE JOSSELYN
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EXHIBIT 10.

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Attorneys for Permit-holder, North Pacifica LLC

7 BEFORE THE CALIFORNIA COASTAL COMMISSION

9 NORTH PACIFICA'S
10 Permit Number: 2-PAC-02-196

DECLARATION OF EXPERT
DAN SCHAEFER ON
WATER QUALITY ISSUES

12
13 Hearing Date: January 11, 2006

14 I, Dan Schaefer, declare as follows:

15 1. I am a Professional Engineer and I am the Principal/Vice President of BKF Engineers.
16 I have _____ years of experience as a Professional Engineer, and I am personally familiar
17 with the Bowl Project. I have reviewed the December 29, 2005 Staff Report prepared by the
18 Coastal Commission regarding the Bowl Project and I believe I have expertise as to the issues
19 raised regarding Storm Water Management therein.
20

21 2. BKF Engineers has been involved as Engineers in various aspects of the development
22 of the site located in Pacifica that is commonly known as the Bowl since on or about 1996.

23 3. In 2000, BKF Engineers prepared a 32 page report entitled "Storm Water Management
24 Report for Palmetto Avenue" regarding Storm Water Management for the Bowl project. The
25 report contains detailed studies and addresses issues of Storm Water Management for North
26 Pacifica's Bowl Project, and provides procedures for Storm Water Management for the Bowl
27
28

1 project that would ensure that the Storm Water Management for the Bowl was in compliance
2 with the LCP standards of the City of Pacifica.

3 4. In my opinion, the December 29, 2005 Staff Report prepared by the Commission seeks
4 to impose current standards of Storm Water Management on the Bowl project, rather than the
5 standards that were controlling when the project was processed by the City in accordance with
6 the LCP.
7

8 5. I have been advised by the attorney for North Pacifica that North Pacifica believes that
9 its Storm Water Management policies to be applied to its project must be those that existed at
10 the time that the development permit application was deemed complete, in June 2001 or at the
11 time that the project was approved in August, 2002, whichever standard is controlling.

12 6. NP has asked me to compare the Storm Management Report prepared by BKF and the
13 Staff Report and to prepare a report rebutting the Staff Report to the extent that it is inaccurate
14 and/or seeks to impose policies and/or standards that were not in use in 2001 and/or 2002.
15

16 7. In order to do this I will need to (1) review the Commission Staff Report to see if it is
17 accurate and to confirm whether it applies contemporary or current standards to the Bowl
18 project; (2) Review the 2000 BKF Storm Water Management Report; (3) Review the City's
19 LCP as it existed at the time the 2000 BKF Storm Water Management Report was prepared,
20 and also in 2001 and 2002, at the time that North Pacifica's development permit application
21 was deemed complete and at the time that the project was approved; (4) Meet with BKF's in-
22 house hydrology expert; and (5) prepare a report.
23

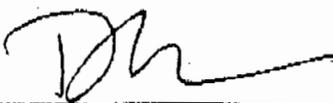
24 8. NP has informed me that such a report would need to be ready to be submitted to the
25 Commission by Tuesday, January 10, 2006 at the latest. I cannot prepare such a report by that
26 time. I estimate that it will take me three days to prepare the report, and up to a week if it were
27 necessary to recalculate the calculations in the original report. For this reason I would have
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1 had to receive a copy of the staff report and the assignment from North Pacifica by Wednesday
 2 afternoon, January 4, 2006, in order to submit a report to the Commission by Tuesday, January
 3 10, 2006.

4 9. North Pacifica has also asked me for my opinion regarding the possibility of
 5 modifying its 43 unit residential housing project to accommodate 100 foot buffers around each
 6 of the disputed areas that the Commission contends are wetlands. I have been informed that
 7 the Commission contends that there are 1.1 acres of wetlands located on the Bowl Property.
 8 The Bowl parcel is 4.2 acres. If a 100 foot buffer were to be placed around the 1.1 acre area
 9 that is alleged to be wetlands, then, in my opinion, it would not be possible to build a 43 unit
 10 residential housing development, which was in compliance with the local LCP, on the
 11 remaining area of the parcel.
 12

13 I declare under penalty of perjury under the laws of the State of California that the
 14 foregoing is true and correct of my own knowledge and, if called upon to do so, I would and
 15 could testify competently thereto.
 16

17 Executed this 9th day of January, 2006 at *walnut Creek* California.

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19 _____
 20 Dan Schaefer

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EXHIBIT 11

STATE OF CALIFORNIA--THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER GOVERNOR

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5260
FAX (415) 904-5400



January 12, 2006

Keith Fromm
North Pacifica LLC
914 Westwood Blvd., Suite 500
Los Angeles, CA 90024

SUBJECT: Coastal Development Permit Appeal A-2-PAC-05-018

Dear Mr. Fromm:

On January 11, 2006, the Coastal Commission determined that the above-referenced appeal of the coastal development permit approved by the City of Pacifica for the Pacifica Bowl development project raises a substantial issue of conformity with the City's Local Coastal Program and postponed the *de novo* portion of the appeal hearing. The Commission postponed the *de novo* hearing to provide you with additional time to respond to the staff recommendation for denial of the permit.

You have indicated that you require additional time to assemble evidence concerning wetlands, polluted runoff, and coastal terrace prairie habitat. Please indicate how much additional time you are requesting. If we do not receive your reply by January 31, 2006, we will reschedule the *de novo* hearing for the Commission's March 7-10, 2006 meeting in Monterey.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Kern".

Chris Kern
Coastal Program Manager
North Central Coast District

cc: Joel Jacobs, Deputy Attorney General
Michael Crabtree, City of Pacifica Planning Director
John Curtis, Appellant

EXHIBIT 12

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STATE OF CALIFORNIA
COASTAL COMMISSION

CERTIFIED COPY

NORTH PACIFICA, LLC)
COMMUNITY OF PACIFICA)
CITY OF SAN MATEO)

Appeal No. A-2-05-18

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Wednesday, January 11, 2006
Agenda Item No. 16.5.a.

Los Angeles Harbor Hotel
601 S. Palos Verdes St.
San Pedro, California

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A P P E A R A N C E S

COMMISSIONERS

Meg Caldwell, Chair
Patrick Kruer, Vice Chair
David Allgood, Alternate
William A. Burke
Steven Kram
Bonnie Neely
Trent Orr, Alternate
Dave Potter
Mike Reilly
Dan B. Secord
Mary Shallenberger
Sara Wan

STAFF

Peter Douglas, Executive Director
Ralph Faust, Chief Counsel
Jamee Jordan Patterson, Deputy Attorney General
Dan Olivas, Deputy Attorney General
Charles Lester, District Director

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

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STAFF

Page Nos.

District Director Lee.....	4
Chief Counsel Faust.....	9
Executive Director Douglas.....	13

COMMISSIONERS

Caldwell.....	13
Reilly.....	13, 14
Secord.....	13
Wan.....	14

ACTION

Substantial Issue Found...	13
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<u>CONCLUSION</u>	15
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California Coastal Commission
January 11, 2006
North Pacifica LLC -- Appeal No. A-2-05-18

* * * * *

10:20 p.m.

DISTRICT DIRECTOR LESTER: That brings us to Item 16.5.a. the North Pacifica item. This is an appeal by Mr. John Curtis -- who is still here tonight -- of a 43-unit residential subdivision in Pacifica that was approved by the City of Pacifica in 2002.

Last month the Commission found that the project was appealable, based on the project's proximity to wetlands, and its location in relation with the first public road. This project, as you know, has been highly contentious, and in addition to your staff report and a package of correspondence related to the project in the District Director's report, you should have received a set of materials consisting of 6 documents from the applicant: this includes 2 memorandums with exhibits for 1, and 3 declarations. I have extra copies with me, if you do not have yours.

~~Before getting to the substantial issue question~~
on the appeal, one of the threshold questions raised in the applicant's materials, that must be addressed by the Commission, is a claim that there was defective notice to them for this hearing, and that as a consequence they have

1 not had adequate time to prepare or respond to the staff
2 recommendation -- and, I don't believe they are here today.

3 First, in response to this claim, we have asked
4 the applicant, yesterday, whether they would like to request
5 postponement of the hearing, to provide them more time to
6 respond, but we have not heard back from them on that
7 request. In order to postpone, they would have to waive the
8 49-day hearing rule for an appeal, so lacking that
9 postponement request from the applicant, we are here today.

10 We have also examined the claim of defective
11 notice that they make, and while it is true that the paper
12 notice of this hearing was not timely mailed to the
13 applicant, we believe that the applicant, nonetheless, had
14 constructive notice of this hearing by other means, including
15 notification of the appeal was mailed to North Pacifica on
16 December 2005. That notice indicated that the appeal was
17 tentatively set for this date, January 11 through the 13.

18 Further, North Pacifica is aware of the 49-day
19 rule, as indicated by their previous litigation and arguments
20 and briefing of the 49-day rule. So, they could have
21 deduced, from the notice they received, that the hearing on
22 the appeal would have to be in January.

23 The hearing was also added to our online version
24 of the agenda on December 28, and again, we feel that North
25 Pacifica is demonstrably aware of the Commission's online

1 agenda, from the previous experience with the dispute
2 resolution hearing. And, finally, the staff report was added
3 to Commission's web site on December 30, and again North
4 Pacifica has indicated -- or appears to have been aware of
5 this practice of posting the staff reports.

6 In terms of the substance of the appeal, North
7 Pacifica has been aware of the issues in the appeal received
8 by the Commission in 2002 for years, and has twice inspected
9 the Commission's files on appeal in our offices. The
10 Commission's review of those issues is based almost entirely
11 on information included in the city's record, so North
12 Pacifica has had ample time, or significant time, to address
13 the issues.

14 In addition, you may recall the issues regarding
15 wetlands were squarely presented at the dispute resolution
16 hearing last month. North Pacifica spent the vast majority
17 of that hearing challenging the Commission's jurisdiction on
18 procedural grounds, rather than addressing the factual issue
19 related to the presence of wetlands on the site.

20 So, getting back to the question of substantial
21 ~~issue, based on our belief that the applicant had adequate~~
22 notice of this hearing, as well as time to address the
23 question of whether there are wetlands on the site, and that
24 they have not responded to our request to postpone the
25 substantial issue hearing, we are recommending that the

1 Commission consider the substantial issue question.

2 However, given the applicant's clear statements
3 about the need for more time to address the merits of the de
4 novo hearing, we would recommend that the Commission postpone
5 the de novo hearing to a later date to allow the applicant
6 sufficient time to prepare.

7 And, I would note that, if requested, the
8 applicants do have one right to a postponement under our
9 regulations.

10 With respect to the substantial issue question
11 then, the appellant has raised numerous issues concerning
12 wetlands, water quality, public access, visual resources,
13 geologic hazards, and traffic.

14 Staff is recommending that the appeal raises
15 substantial issues only with respect to the wetland and water
16 quality issues raised. This is due to the fact that the
17 project will fill wetlands, and result in development
18 adjacent to wetlands, and that the project, while it includes
19 a detention system, and there is a condition requiring trash
20 containers to be covered, in our view it appears to have
21 ~~inadequate mitigations at this point to address the 70~~
22 percent increase in off-site runoff, including no treatment
23 BMPs to address water quality impacts to ocean waters.

24 A couple of observations about the staff report,
25 quickly. The Commission made and adopted findings in the

1 December dispute resolution that, based on substantial
2 evidence in the record, that there are wetlands on and
3 adjacent to the project site that qualifies as wetlands under
4 the LCP. Those findings are attached to the staff report as
5 Exhibit 8 and are incorporated in full into the substantial
6 findings.

7 Second, the staff report notes that North Pacifica
8 was unwilling to redesign the project. This is based on
9 numerous public communications in which North Pacifica
10 indicated refusal to participate in the Commission's
11 administrative process, such as allowing staff to visit the
12 site. North Pacifica has asserted that inclusion of this
13 observation equates to inclusion of confidential
14 communications in the public record.

15 Although we do not agree with this interpretation,
16 given that the reference sentences in the staff report are
17 not important to the staff recommendations, we hereby modify
18 the staff report by deleting them. These are on pages 3 and
19 21, and in both places say, quote:

20 "In this case the applicant has indicated
21 ~~that it is unwilling to modify the project~~
22 plans to conform to the requirements of the
23 LCP, therefore the staff has no choice other
24 than to recommend denial of the permit."

25 We would delete that language.

1 I would note that to the extent that North
2 Pacifica is interested in working with staff to address
3 project inconsistencies with the LCP, we are available to do
4 this, and could do so prior to coming back to the Commission
5 with a de novo recommendation.

6 Finally, staff report does include the appeal
7 form, and Mr. John Curtis' handwritten explanation of the
8 grounds for appeal. The appeal did include voluminous
9 supporting documentation, all of which is in the record, but
10 was not reproduced as an exhibit to the staff report because
11 of its volume.

12 So, with all of the foregoing observations we
13 would now ask if three or more Commissioners would like to
14 hear the question of substantial issue, in which case, I
15 would give you a more detailed presentation of the wetland
16 and water quality issues.

17 As I mentioned the appellant is here today, and I
18 also believe that Mr. Faust has some comments to make.

19 CHAIR CALDWELL: Mr. Faust, did you want to
20 address us now?

21 ~~CHIEF COUNSEL FAUST: Yes, briefly, Madam Chair.~~

22 Dr. Lester has covered a number of the issues that
23 I think need to be covered in this respect, but I did want to
24 make a few comments regarding the Commission's legal options
25 in the present situation, and also to note that at this

1 point, unless the Commission should want to have a discussion
2 in closed session, I don't think that one is necessary. I
3 think we can discuss your options in a preliminary way in
4 open session.

5 The meeting notice to North Pacifica is,
6 apparently, defective because it does not appear to have been
7 mailed until January 3 of this year. Normally, staff would
8 have mailed the meeting notice and the staff report on the
9 previous Friday, on December 30, which is the same day that
10 the staff report was posted to the web site. This was a
11 3-day holiday weekend, as the Commission is aware, and I am
12 not aware of what happened. I don't know that Dr. Lester is,
13 either, but for whatever reason it didn't get mailed until
14 the Tuesday. So, there is a violation of the 10-day calendar
15 notice that should have been provided to North Pacifica.

16 North Pacifica objects to the Commission
17 proceeding in any way on this matter, either on substantial
18 issue or in a de novo, if substantial issue were to be found.
19 And, they are basing that argument on this failure of notice.
20 They are, basically, asserting that the Commission has lost
21 ~~jurisdiction over this matter because of the failure of~~
22 notice.

23 Although, the Commission staff did not provide
24 North Pacifica with the technical notice, the 10-day notice
25 that is required, it does appear, as Dr. Lester indicated in

1 his discussion, that North Pacifica did receive actual notice
2 of this matter, and that it would be heard at the January
3 meeting.

4 In addition to the reasons for that conclusion
5 that Dr. Lester articulated, one other one that I think is
6 significant is that North Pacifica filed -- and you all have
7 seen -- by yesterday, two briefs totaling almost 50 pages,
8 and an additional three declarations, totaling 12 pages on a
9 variety of procedural issues, and this does indicate that
10 they both had notice of this matter, and time to review and
11 prepare a response on the matter.

12 With all of this in mind, the Commission has three
13 options: you can either continue the entire matter to a
14 subsequent hearing, that, I think is what North Pacifica --
15 if they were here -- would say that you should do. The
16 disadvantage of that is that the significance of the 49-day
17 rule and the implications on that for this appeal might leave
18 you with no jurisdiction in the matter, if you don't take any
19 action today.

20 The second option is to find substantial issue and
21 then continue the matter, the de novo hearing, to a
22 subsequent meeting. That is the procedure that staff is
23 recommending in this instance.

24 The third is what staff originally recommended
25 its report, that you find substantial issue, and then

1 to the de novo hearing pursuant to the written staff
2 recommendation.

3 Of these, I would recommend -- your legal staff
4 recommends the second, that you find substantial issue and
5 then continue the de novo hearing to a future date.

6 We do not believe that the failure of notice
7 deprived North Pacifica of its opportunity to participate in
8 this matter, because all of the hearing on all of the
9 substance can be put off until a future day when you hear the
10 de novo matter.

11 The only argument remains is whether this action
12 deprived the Commission of jurisdiction. We don't think it
13 did. Rather, we think that if you find substantial issue,
14 you maintain the Commission's jurisdiction, but you
15 simultaneously put off until the subsequent hearing all of
16 the discussion of the substantive issues. They will all be
17 before you at that future date. North Pacifica will have the
18 opportunity to respond to the staff recommendation. They
19 will have the opportunity to appear before the Commission
20 with plenty of notice, and participate in the matter, and
21 ~~present their views in as complete a manner as they care to,~~
22 in response to the staff's recommendation.

23 So, with that, we would recommend that you find
24 substantial issue, that you continue the de novo hearing to a
25 future hearing, and I don't believe that this, in any way,

1 prejudices North Pacifica.

2 So, that concludes my comments.

3 CHAIR CALDWELL: Thank you, Mr. Faust.

4 COMMISSIONER SECORD: Ready for a motion?

5 CHAIR CALDWELL: Commissioner Orr.

6 COMMISSIONER ORR: Well, given what legal counsel
7 has advised, I would suggest we find substantial issue and
8 continue the de novo hearing until a later date.

9 COMMISSIONER REILLY: It is an automatic.

10 CHAIR CALDWELL: Yes, are there three or more
11 Commissioners who want to have a hearing on substantial
12 issue?

13 [No Response]

14 Seeing none, substantial issue is found.

15 COMMISSIONER REILLY: Madam Chair, move to trail
16 statewide. [Referring to upcoming Agenda items.]

17 CHAIR CALDWELL: Substantial issue is found on
18 this item, and the de novo hearing is postponed.

19 Thank you all for coming.

20 EXECUTIVE DIRECTOR DOUGLAS: Madam Chair.

21 CHAIR CALDWELL: I realize you have waited very,
22 very long.

UNIDENTIFIED SPEAKER: Three years.

CHAIR CALDWELL: Yes --

EXECUTIVE DIRECTOR DOUGLAS: Well, it just seemed

1 like three years.

2 CHAIR CALDWELL: -- today.

3 Commissioner Wan.

4 EXECUTIVE DIRECTOR DOUGLAS: Madam Chair.

5 CHAIR CALDWELL: Commissioner Wan wanted to say
6 something.

7 COMMISSIONER WAN: On this last issue, when it
8 does come back to us, I noticed a couple of things, and one
9 was that in November of 2003 the applicant went ahead and
10 cleared all of the vegetation at the site, and disturbed the
11 soil.

12 And, I understand we are not allowed on the site,
13 but there needs to somehow be included in the discussion some
14 kind of discussion about what Dr. Dixon thinks may have been
15 the condition of the habitat there prior to the clearance,
16 because I think that is going to be very important to us. I
17 am sure he has thought of that.

18 But, then, again the issue of the red-legged
19 frogs, if there has been a statement here that there aren't
20 any, we need to know what those protocols were that we used.

21 ~~COMMISSIONER REILLY: And, I think it is worth~~
22 noting, also, that by our own procedures on a recommendation
23 per staff for substantial issue, where the Commission agrees
24 and does not want to have a hearing on that -- as we did in
25 this case -- neither North Pacifica, nor the appellants have

1 an opportunity to make a presentation before this Commission
2 on that particular issue.

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5 [Whereupon the hearing concluded at 10:35 p.m..]

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