

## CALIFORNIA COASTAL COMMISSION

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

Th-9a



May 10, 2006

TO: Commissioners and Interested Parties

FROM: Peter Douglas, Executive Director  
Charles Lester, Deputy Director  
Chris Kern, North Central Coast District

SUBJECT: **Addendum to Staff Report for De Novo Hearing on Appeal No A-2-PAC-05-018 (North Pacifica, LLC)**  
**Item Th-9a**

**Add the following exhibits to the Staff Recommendation:**

- 22. Letter from Jaquelynn Pope to Meg Caldwell, dated May 8, 2006
- 23. Letter from Chris Kern to Keith Fromm, dated January 10, 2006
- 24. Letter from Chris Kern to Keith Fromm, dated January 12, 2006
- 25. Letter from Jaquelynn Pope to Chris Kern, dated February 13, 2006

**Insert the following at the beginning of Section 2.0 Findings and Declarations at Page 4 of the Staff Recommendation:**

**2.01 Response to Applicant's Contention that Commission Lack's Jurisdiction**

On May 9, 2006, Commission staff received correspondence from the applicant, North Pacifica, LLC (North Pacifica), consisting of a cover letter with two enclosures. Enclosure 1 is a copy of North Pacifica's March 10, 2006 Petition for Writ of Mandate in *North Pacifica v. California Coastal Commission*. A copy of this document will be available from Commission staff for review at the May 11, 2006 *de novo* hearing. Enclosure 2 is a May 8, 2006 letter from Jaquelynn Pope to the Commission contending that the Commission lacks jurisdiction to hear this appeal (Exhibit 22).

North Pacifica objects to the Commission holding the *de novo* hearing, or any further administrative proceedings regarding the proposed development, on the grounds that: (1) the formal notice of the January 11, 2006 substantial issue hearing was mailed to North Pacifica less than ten days prior to the hearing, and (2) the 49-day deadline for Commission hearing on the appeal expired on February 6, 2006. For the reasons discussed below, the Commission disagrees with North Pacifica's contentions.

The Commission substantially complied with the hearing notice requirements, because (1) North Pacifica had actual notice of the January 11, 2006 substantial issue hearing more than ten days prior to the hearing, and (2) any inconvenience to North Pacifica caused by the timing of the

hearing could have been addressed by a change in the date of the hearing, which the Commission offered but North Pacifica refused.

## **Background**

On August 12, 2002, the Pacifica City Council approved North Pacifica's coastal development permit application No. CDP-203-01 for the proposed 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 September 5, 2002, John Curtis appealed the City's approval of the permit to the Commission. The Commission held the appeal pending resolution of the question of appealability and, accordance with Section 13569 of its regulations, scheduled a hearing to resolve the dispute concerning appealability for December 2002. North Pacifica sued to prevent the Commission from holding the appealability hearing. On October 18, 2005, the court entered judgment in the Commission's favor, allowing the Commission to proceed with the appealability hearing.

On December 16, 2005, the Commission determined that the local approval is appealable to the Commission. Accordingly, the ten-working day appeal period commenced on December 19, 2002, which was the next working day following the Commission's determination of appealability. John Curtis' appeal, received on September 5, 2002, was filed on the first day of the appeal period. 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.

## **Notice**

Section 13063 of the Commission's regulations require notice to be provided ten days before any Commission hearing on permit applications and appeals. North Pacifica contends that the Commission has lost jurisdiction on the appeal of its permit because the formal notice of the January 11, 2006 substantial issue hearing was mailed to North Pacifica on January 3, 2006, eight calendar days before the hearing. The Commission disagrees with North Pacifica for the reasons discussed below because North Pacifica had actual notice of the appeal hearing more than ten days before the January 2006 meeting. As such, the Commission finds that North Pacifica was not prejudiced by the mailing of formal notice of the substantial issue hearing on January 3, 2006, rather than on the preceding business day, December 30, 2005.

On December 20, 2005, Commission staff mailed to North Pacifica and the City of Pacifica a "Commission Notification of Appeal" informing North Pacifica and the City that the permit had been appealed and that the Commission hearing date for the appeal had been tentatively set for January 11-13, 2006. Commission staff mailed the notification to the address on file for North Pacifica, which is the same address to which various previous documents, including both previous meeting notices, had been mailed. North Pacifica appears to have received all documents sent to that address, and has never asked Commission staff to use a different mailing address for North Pacifica. Thus, the Commission provided written notice to North Pacifica of

the January appeal hearing nearly one month in advance of the January meeting. On December 28, 2005, the agenda for the Commission's January meeting was posted on the Commission's website, listing the precise date of the appeal hearing, and on December 30, 2005, the staff report on the appeal was posted on the website. North Pacifica has demonstrated that it is aware of the Commission's practice of posting its agendas and staff reports on its website.

North Pacifica has argued in various lawsuits since 2002 that the Commission lost jurisdiction to hear the appeal because the Commission did not hold a hearing on the appeal within 49-days of receiving the appeal from John Curtis<sup>1</sup>. Thus, North Pacifica should have known the appeal hearing would be in January, given its familiarity with the 49-day deadline for appeal hearings.

### **Scheduling of the Appeal Hearing**

As stated above, the Commission finds that North Pacifica had actual notice more than ten calendar days before the January 11, 2006 hearing. However, even if North Pacifica had been unaware of the January hearing before the date that it received the formal hearing notice mailed on January 3, 2006, any inconvenience caused by the hearing date to North Pacifica could have been remedied by rescheduling the hearing.

On January 10, 2006, Commission staff received a brief from North Pacifica, in which North Pacifica indicated that it required additional time to respond to the staff recommendation concerning issues related to wetlands, water quality, and coastal terrace prairie ESHA. Accordingly, the Commission offered to postpone the January 11, 2006 hearing, and was prepared to postpone it either to a later day that week, or to a subsequent meeting, at North Pacifica's request (Exhibit 23). North Pacifica did not request postponement of the January 11, 2006 hearing. As such, the Commission proceeded with the substantial issue portion of the appeal on January 11, 2006. After finding substantial issue, the Commission postponed the *de novo* portion of the appeal hearing to provide North Pacifica with additional time to respond to the staff recommendation.

In a letter dated January 12, 2006, staff informed North Pacifica that unless North Pacifica requested otherwise, the *de novo* hearing would be scheduled for the Commission's March 2006 meeting (Exhibit 24). In response, North Pacifica requested that the *de novo* hearing be postponed until at least May 2006 (Exhibit 25). In compliance with this request, staff scheduled the *de novo* hearing for the Commission's May 2006 meeting. However, as of May 10, 2006, North Pacifica has not provided a response to the issues presented in the staff report concerning wetlands, water quality, or coastal terrace prairie ESHA.

The Commission notes that North Pacifica has been aware of the issues presented in the Curtis appeal since 2002. The Commission's review of those issues is based almost entirely on information included in the City's record, so North Pacifica has had ample time to address the issues presented in the appeal. The issues regarding wetlands were squarely presented at the dispute resolution hearing. Rather than address the issues raised in the appeal, North Pacifica has decided to challenge the Commission's jurisdiction on procedural grounds rather than

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<sup>1</sup> The court has rejected North Pacifica's argument on the grounds that the 49-day deadline for the appeal hearing was suspended pending resolution of the appealability dispute. As such, the Curtis appeal was filed on December 19, 2005, the first working day following the date of the Commission's December 16, 2005 determination of appealability, and the 49-day period for the appeal hearing ran until February 6, 2006.

addressing factual issues related to the consistency of the proposed development with the LCP policies concerning wetlands, water quality, and ESHA.

### **49-day Deadline**

North Pacifica contends that the Commission cannot hold the May 11, 2006 *de novo* hearing because the 49-day deadline has run. This argument is premised on North Pacifica's position that the January 11, 2006, Commission's action on substantial issue is void because the formal hearing notice was not mailed within ten calendar days of the hearing.

As stated above, North Pacifica had actual notice of the January 11, 2006 substantial issue hearing and North Pacifica neither requested postponement of the January 11 hearing nor agreed to waive the 49-day deadline. Thus, the Commission disagrees with North Pacifica's contention that the January 11, 2006 Commission action on substantial issue is void. Since the January appeal hearing was held within 49 days of the date that the appeal was filed, the Commission complied with the requirement of Coastal Act Section 30621 that a hearing on the appeal be set within 49 days of the date that the appeal was filed.

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,<br>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. 4<sup>th</sup> 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

## CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000  
SAN FRANCISCO, CA 94105-2219  
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January 10, 2006

Via Facsimile and First Class Mail

Keith M. Fromm  
North Pacifica LLC  
914 Westwood Blvd., Suite 500  
Los Angeles, CA 90024  
Facsimile (310) 476-6318

Re: Hearing on Coastal Development Permit Appeal No. A-2-PAC-05-018

Dear Mr. Fromm:

The Coastal Commission has received North Pacifica Brief No. 1 relating to the Coastal Commission's hearing on CDP Appeal No. A-2-PAC-05-018 that is scheduled to occur on January 11, 2006. Commission staff does not understand Brief No. 1 to be requesting postponement of the hearing until a later date. If North Pacifica does wish to postpone the hearing, please notify me immediately. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Kern".

Chris Kern  
North Central Coast District Manager

cc: Deputy Attorney General Joel Jacobs

## 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 dark 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

WARSHAW & POPE  
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Jaquelynn Pope  
Mark Warshaw

Tel. 310.379-3410  
Fax 310.376-6817

February 13, 2006

(.pdf copy via e-mail)  
Joel Jacobs  
Deputy Attorney General  
1515 Clay Street, Suite 2000  
Oakland, California 94612-0550

Via Facsimile (415) 904-5400  
Chris Kern  
Coastal Program Manager  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

Re: January 12, 2006 correspondence concerning de novo hearing  
Coastal Development Permit Appeal A-2-PAC-05-018.

Dear Joel and Chris:

This office has only now become aware of the January 12, 2006 letter that Chris Kern sent to North Pacifica regarding the Commission's actions at the January 11, 2006 hearing, in which he also requests that North Pacifica notify the Commission as to how much additional time North Pacifica requires to assemble evidence for the *de novo* hearing. Although you are both well aware that this office represents North Pacifica, I was not sent a copy of the letter, rather it was sent only to Keith Fromm. Evidently, the Commission sent two different letters with the same postmark date to Mr. Fromm, both of which arrived in Mr. Fromm's office together. At the time, they appeared to him to be two copies of the same letter that had already been faxed to him, and he did not look closely at either letter so he did not realize that one of them was, in fact, not another copy of the letter that had already been faxed to him, but, rather a notice of the Commission's actions at the January 11, 2006 hearing. Mr. Fromm only realized this error on the afternoon of Friday, February 10, 2006, and contacted me at that time. Please ensure in the future that this office is copied on all correspondence to North Pacifica LLC, and/or to Mr. Fromm and/or to Mr. Kalmbach.

Regarding the substance of the January 12, 2006 letter, as set forth below, NP believes that the actions taken at the January 11, 2006 meeting are void and that therefore the Commission has lost any appeals jurisdiction over NP's permit that it may arguably have had.

When NP notified the Commission that the notice for the January 11, 2006 hearing was legally defective and, therefore, that the hearing would be void, the Commission could have attempted to remedy the defect by taking the January 11, 2006 hearing off-calendar and re-noticing and rescheduling the hearing so that the new notice complied with the statutory requirements. Indeed, the Commission could simply have served a valid notice to begin with.

But the Commission elected not to do either of such proper alternatives, and, instead insisted on serving NP with an invalid and insufficient notice of the substantial issue hearing. Therefore, as of February 6, 2006 it is clear that the Commission lost any jurisdiction it may arguably have had to conduct the substantial issue hearing.

Regarding the date of the *de novo* hearing, if it is nevertheless the intention of the Commission to go forward and hold a *de novo* hearing, notwithstanding NP's objections that such a hearing will be void because the Commission lacks jurisdiction to conduct it, NP cannot, as set forth below, even under protest and full reservation of rights, adequately respond to the issues raised in the staff report until after April, 2006.

1. Determination of Substantial Issue:

The letter states: "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..."

As North Pacifica has already stated in its Objections that were filed with the Commission on January 10, 2006, North Pacifica did not receive valid notice of the substantial issue hearing. Under section 11125 of the Government Code (the Bagley-Keene Open Meeting Act) the Commission had a duty to give North Pacifica a minimum of at least 10 days notice of the meeting. The Commission's own regulation 13063(a) requires that the Commission mail the Notice at least ten calendar days prior to the meeting. Instead, as evidenced by the postage meter stamp dated January 3, 2006, on the Notice's envelope, the Commission did not mail and could not have mailed the Notice of the January 11, 2006 meeting until January 3, 2006, at the earliest, and NP did not receive it until the afternoon of Thursday, January 5, 2006. Thus NP had less than three complete business days to prepare a response to the staff report and file it with the Commission by Tuesday, January 10, 2006.

It is NP's contention that the invalid Notice violated the Bagley-Keene Act, the Coastal Act, and NP's constitutional right to due process and that any actions that the Commission took at the January 11, 2006 meeting are therefore void. (See, e.g., Gov.

Code, § 11130.3) Indeed, the intentional election of the Commissioners to nevertheless conduct the hearing after they were aware that the Notice was legally defective, itself constituted a violation of the Bagley-Keene Act and the commission of a misdemeanor by such Commissioners under the Bagley-Keene Act. (See Gov Code § 11130.7).

Further, because the Commission's action in determining that a substantial issue exists is void, the Commission has now lost jurisdiction over any appeal of NP's coastal development permit. Section 30621 of the Coastal Act requires that the Commission hold a hearing on the appeal with 49 days. California Courts have interpreted this provision to mean that the Commission must, at a minimum, determine, within the 49-day limitations period, whether there is a substantial issue (*Encinitas Country Day School v. California Coastal Commission* (2003) 108 Cal.App. 4th 575, 584-585.) The Commission has stated that the appeal of NP's permit was filed on December 19, 2005 and that the 49-day statutory limitation period expired on February 6, 2006. Because the Commission's purported January 11, 2006 action determining that a substantial issue exists is, in fact, void, the Commission did not comply with the 49 day limitation period of section 30621 of the Coastal Act. Therefore, pursuant to section 30625 of the Coastal Act, the City of Pacifica's approval of NP's CDP is now final and the Commission has no jurisdiction to proceed to hold a *de novo* hearing on the appeal.

For these reasons, NP demands that the Commission dismiss the appeal of NP's Coastal Development Permit immediately. In the event that the Commission refuses to dismiss the appeal, NP will be compelled to seek a judicial determination that the substantial issue hearing was invalid and void.

## 2. Time Required to Assemble Evidence for the De Novo Hearing

The Commission's letter of January 12, 2006 also informs NP that "The Commission postponed the *de novo* hearing to provide you with additional time to respond to the staff recommendation for denial of the permit" and requests that NP indicate to the Commission the amount of additional time that NP will require "to assemble evidence concerning wetlands, polluted runoff, and coastal terrace prairie habitat":

### A. Reservation of All Objections

As set forth above, the Commission's January 11, 2006 action in determining that a substantial issue exists is void, and the Commission has lost any appeals jurisdiction it may have had over NP's permit, and cannot hold a *de novo* hearing. However, in the event that the Commission will not comply with NP's demand that the Commission dismiss the appeal, and that a *de novo* hearing may be scheduled prior to NP obtaining a judicial determination of that issue, NP will respond hereinafter to the Commission's request for information as to the additional time required to respond to the staff report. In doing so NP expressly reserves any and all objections to the January 11, 2006 proceedings regarding NP's permit, including, but not limited to the Commission's failure to give valid notice of the hearing, and all objections set forth in the two briefs that

NP filed with the Commission on January 10, 2006: (1) "Brief No. 1, North Pacifica LLC's Objections to: Defective Notice; Lack of Jurisdiction Due to Defective Notice; Failure to Comply with Reg. 13063; Lack of Jurisdiction Due to Defective 13569 Hearing; Failure to comply with Reg. 13111; Unlawful Despoliation of Evidence Contained in Appeal; Various other Objections" and (2) "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."

B. Issues for *De Novo* Hearing are the Same as for the Substantial Issue Hearing

The January 12, 2006 letter states that the Commission postponed the *de novo* hearing in order to provide NP with additional time to respond to the staff recommendation for denial of the permit. It should be noted, however, that the staff recommendation for the *de novo* denial of the permit contained in the staff report for the January 11, 2006 hearing is based almost entirely on the staff recommendations that the Commission find that a substantial issue exists, which are set forth earlier in the staff report, and incorporated by reference. Even though NP notified the Commission in detail as to why it was impossible for NP to respond to the staff recommendation regarding the substantial issue hearing within the very limited time allowed by the defective Notice, the Commission nonetheless went ahead and held the substantial issue hearing on January 11, 2006. In acknowledging now that NP requires additional time to respond to these same issues for purposes of the *de novo* hearing, the Commission is implicitly acknowledging that NP was denied adequate time to respond to the issues when they were raised in the January 11, 2006 substantial issues hearing.

C. Date for *De Novo* Hearing

As set forth in the Declaration of NP's wetlands expert, Mike Josselyn, which was submitted to the Commission on January 10, 2006, there is nothing in the record to support the Commission's contention that the site contains any coastal terrace prairie habitat (ESHA). Mr. Josselyn further states that it is not possible to determine whether any of the area represented as ESHA on the map relied on by the Commission is, in fact ESHA, except by fieldwork and that, in this case, it will not be possible to tell until April whether the plants that would be indicative of ESHA are indeed present anywhere on the site. Therefore, NP cannot adequately assemble evidence for the Commission regarding ESHA until April, and any *de novo* hearing should therefore not take place before May, 2006, or some later date. It should be noted, of course, that since evidence concerning such alleged ESHA cannot be assembled by NP before April, it likewise could not have been assembled by the Commission staff who, by their own admission, never inspected the site and, indeed, were never given permission to do so. Thus, quite obviously for purposes of both the substantial issue hearing and the *de novo* hearing the Commission did not and could not have any evidence of any such ESHA on NP's property and, therefore, there was and is no substantial evidence to support such finding by the Commission in connection with its substantial issue hearing.

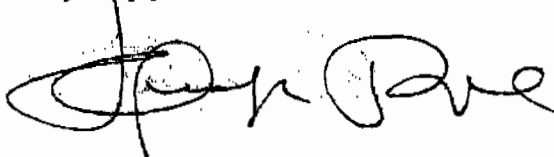


In addition to the ESHA issue, and as set forth in NP's objections, NP had no prior notice as to the staff report recommendations as to "water quality". The issues raised in the report regarding "water quality" are highly technical, and further, it appears that compliance with the staff recommendations would be very expensive. NP also requires the additional time to respond to these technical issues. And, as also set forth in the objections, NP requires additional time to respond to the wetlands issues as well.

#### Conclusion

Please advise this office at your earliest convenience as to the Commission's intentions regarding the appeal of NP's CDP, and whether the Commission will be dismissing that appeal, as required by law. In the event that it is the Commission's decision to proceed with the *de novo* hearing, and to force NP to obtain a judicial determination that the substantial issue hearing is void, please confirm that the *de novo* hearing will not be calendared for any meeting prior to May, 2006. Again, please ensure in the future that this office is copied on all correspondence and/or notices, etc., regarding NP's coastal development permit. Finally, please distribute copies of this letter to the Commissioners and ensure that it is placed in the administrative record.

Very truly yours,

A handwritten signature in black ink, appearing to read "Jaquelyn Pope", with a stylized, cursive script.

JAQUELYNN POPE

JCP/abs