

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

W 5b

Staff: Deanna Christensen
Staff Report: July 26, 2006
Hearing Date: August 9, 2006
Commission Action:

**STAFF REPORT: APPEALABILITY DETERMINATION****DISPUTE RESOLUTION**

NUMBER: 4-MAL-06-180

LOCAL CDP NUMBER: 05-099

LOCAL JURISDICTION: City of Malibu

APPLICANT: Edward Niles **OWNER:** Sonny Astani

PROJECT LOCATION: 5900 Bonsall Drive, City of Malibu, Los Angeles County
APNs 4467-023-006, -030, -032, -034, and -035

DESCRIPTION: Public hearing on appealability to Commission of the City of Malibu's approval of local Coastal Development Permit No. 05-099, which authorizes demolition of existing structure and construction of a new, two-story, 9,939 sq. ft. single family residence with attached garages, 360 sq. ft. detached stable, 5,326 sq. ft. trellis, access road, parking, turnaround, landscaping, hardscape, equestrian facilities, alternative onsite wastewater treatment system, pool, fences, gates, walls, and water well.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission find that the coastal development permit approved by the City for the above-referenced project is **appealable** to the Commission pursuant to the certified Local Coastal Program (LCP). The motion and resolution can be found on Page 2. The standard of review for the proposed development is the policies and provisions of the City of Malibu Local Coastal Program. After certification of a Local Coastal Program, the Coastal Commission is authorized under CCR Title 14, Section 13569 to resolve disputes between the Executive Director and local governments concerning whether a Coastal Development Permit is appealable.

On January 17, 2006, the City of Malibu Planning Commission approved Coastal Development Permit (CDP) No. 05-099 for a residence with various amenities on five adjoining parcels in a rural-residential area of Zuma Canyon. The CDP was identified as not appealable to the Coastal Commission. Members of the public appealed the

approval of the CDP to the City Council. During the local appeal process, one of several points of contention centered on whether an onsite drainage course that crosses the southeastern portion of the site constitutes a 'wetland' under the Coastal Act definition of wetlands. Members of the public claimed that there are wetlands that meet the Coastal Act definition and that the development would be within 100 feet of the wetlands. They asserted that the CDP should be appealable to the Coastal Commission. The City Council denied the appeal on June 26, 2006 and continued to identify the CDP as non-appealable. The Coastal Commission staff received a wetland delineation report and revised site plan on June 28, 2006 indicating the extent of the wetlands and the location of the development relative to the wetlands. The non-appealable Notice of Final Action was received by the Commission on June 29, 2006.

Although the City did not notify the Commission of the dispute over appealability as required by Title 14, Section 13569, members of the public notified Commission staff of the dispute and Commission staff conducted an investigation. On July 14, 2006 Commission staff concluded that the proposed development is within 100 feet of an onsite wetland and that the subject CDP is appealable. The Commission's Executive Director, through staff, informed the City of this conclusion in a letter dated July 14, 2006. The City expressed its disagreement with the Executive Director in a letter dated July 21, 2006. Under Section 13569, when the local jurisdiction does not agree with the Executive Director's determination regarding the appropriate designation of a coastal development permit, the Commission is required to hold a hearing on the issue at the next meeting in the appropriate geographic region of the state following the Executive Director's determination, which in this case is the August 2006 meeting in San Pedro.

I. STAFF RECOMMENDATION ON APPEALABILITY DETERMINATION

The Executive Director recommends that the Commission adopt the attached findings and resolution to uphold the Executive Director's determination that the project authorized by the City of Malibu constitutes an appealable Coastal Development Permit.

MOTION: *I move that the Commission reject the Executive Director's determination that the development authorized by the City of Malibu on June 26, 2006 constitutes a Coastal Development Permit that is appealable to the Coastal Commission.*

Staff Recommendation:

Staff recommends a **NO** vote. Passage of this motion will mean that City of Malibu Coastal Development Permit No. 05-099 is not appealable to the Coastal Commission. A majority of the Commissioners present is necessary to pass the motion. If the motion fails, as recommended by staff, the coastal development permit will be appealable on the grounds set forth in the findings.

Resolution to Uphold the Executive Director's Determination:

The Commission, by adoption of the attached findings, determines, pursuant to Section 13569 of Title 14 of the California Code of Regulations, that the appropriate designation for the development approved by the City of Malibu on June 26, 2006 is that it constitutes a Coastal Development Permit that is appealable to the Coastal Commission.

II. STANDARD OF REVIEW AND AUTHORITY FOR DETERMINATION

The standard of review for the proposed development are the policies and provisions of the City of Malibu's certified Local Coastal Program.

The authority for the Commission's determination stems from California Code of Regulations, Title 14, Section 13569 (Determination of Applicable Notice and Hearing Procedures) that states:

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

After the certification of a LCP, the Commission is authorized to determine the appropriate status of a development proposal (i.e., categorically excluded, non-

appealable, or appealable) when requested to do so. The purpose of the regulation is to provide for an administrative process for the resolution of disputes over the status of a particular project. The Coastal Act was set up to give certified local governments the primary permitting authority over projects proposed in the Coastal Zone, but to allow the Commission oversight authority over specified projects through the appeal process. Thus, the regulations anticipated that, from time to time, there may be disagreements regarding whether a particular project may be appealed to the Commission and an administrative dispute resolution process would be preferable (and quicker) than the alternative of litigation. The local government must initiate the process if its determination is challenged by an applicant or other interested party. The first step in this process is to request a determination from the Commission's Executive Director. 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.

In this case, project opponents, known as the "Concerned Citizens of Zuma Mesa", filed a local appeal on January 27, 2006 of the City's Planning Commission decision to approve the subject coastal development permit. One of the grounds of appeal concerned the presence and extent of wetland habitat and the proposed development's proximity to it. As defined in Chapter 2 of the Malibu LIP, coastal development permits for development that is within 100 feet of any wetland, estuary, or stream are appealable to the Commission. Between the time the local appeal was filed (January 27, 2006) and when the Malibu City Council acted on the appeal (June 26, 2006) there is evidence that a dispute existed between City staff and project opponents over the appealability of the permit to the Commission. Coastal Commission staff first learned of the dispute during the public comment period at the Coastal Commission's May 2006 meeting. Additionally, Commission staff received a letter from project opponents on May 19, 2006, that was carbon-copied to Ken Kearsley, the City of Malibu Mayor, contending that the proposed development of the subject permit is appealable to the Commission (**Exhibit 6**). In addition, a wetland delineation report and revised site plan that moved the proposed residence 100 feet away from the delineated wetland area were provided to Commission staff by the applicant's representative the day after the City Council's decision to deny the appeal. Given this evidence of interested party objections to the City's non-appealable determination, the City should have forwarded the request for a Commission determination at the time of objection and local appeal process as per CCR Title 14, Section 13569.

As such, the Executive Director is required to render an appealability determination (CCR Title 14, Section 13569 (c)) and, in the event the local government disagrees with the opinion, *"the Commission shall hold a hearing for purposes of determining the appropriate designation for the area "* (CCR, Title 14, Section 13569(d)). Commission staff notified the City, in a letter dated July 14, 2006, of our determination that the above referenced coastal development permit is appealable to the Coastal Commission, and as such the Notice of Final Local Action is deficient (**Exhibit 4**). The Malibu City Attorney responded in a letter dated July 21, 2006, stating that the Commission failed to determine that the Notice of Final Local Action for the permit was deficient within the

allotted jurisdictional time period and that the City does not agree that the subject permit is appealable. The City's letter asserts that no objections regarding its non-appealable determination were raised during the City's consideration of the permit, and as such, the City did not request an appealability determination from the Commission. Therefore, the City contends that the Commission lacks authority to schedule a hearing on the appealability of the permit (**Exhibit 5**).

However, in this case, the jurisdictional time period for Commission action has not yet been triggered. The Commission has not yet determined whether the City's notice under Section 13571 is deficient. Further, the Executive Director has made a determination that the above referenced coastal development permit is appealable to the Commission and the City has stated that they disagree, therefore, the matter will be heard by the Commission under Section 13569.

III. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Project History and Background

On January 17, 2006, the City of Malibu Planning Commission approved Coastal Development Permit (CDP) No. 05-099 for demolition of existing structure and construction of a new, two-story, 9,939 sq. ft. single family home with attached garages, 360 sq. ft. detached stable, 5,326 sq. ft. trellis, access road, parking, turnaround, landscaping, hardscape, equestrian facilities, alternative onsite wastewater treatment system, pool, fences, gates, walls, and water well at 5900 Bonsall Drive within the Zuma Canyon watershed (**Exhibits 1-3**). The project area is not designated as Environmentally Sensitive Habitat Area (ESHA) on LCP ESHA Overlay Maps.

All of the development, except the new access road, is proposed to be located on one of five adjoining parcels owned by the applicant (APN 4467-023-030) that is in a rural-residential area of Zuma Canyon. The parcel currently contains an existing horse corral (to remain) and structure (to be demolished). An existing unpaved access road that extends east from Bonsall Drive to the development site is proposed to be improved (**Exhibit 3**). The access road will cross the four other parcels owned by the applicant to the south and west of the development site (APNs 4467-023-006, -032, -034, and -035). Additionally, APN 4467-023-035 that is immediately south of the development parcel contains a second existing horse corral that is proposed to remain. Staff would note that the project initially considered by the Malibu Planning Commission comprised all five parcels owned by the applicant. The project was apparently later amended to be located only on APN 4467-023-030. Surrounding land use is predominantly single-family residential and equestrian facilities. Two Malibu Land Use Plan (LUP)-designated trails exist in the vicinity of the project area. The east-west running Coastal Slope Trail lies a significant distance to the north and the north-south running Zuma Ridge Trail follows Bonsall Drive to the west. The Zuma Ridge Trail runs from the Santa Monica Mountains National Recreation Area all the way to Zuma County Beach. A connector

trail, known as the Rosemary Thyme Trail and identified in the City of Malibu's Trail System maps, bisects the applicants properties and essentially connects Gayton Place road and Cavalleri Road to the east with the Zuma Ridge Trail and Zuma Canyon.

After the City's Planning Commission's approval of the CDP, the Concerned Citizens of Zuma Mesa filed a local appeal on January 27, 2006. The issues raised by the appellants related to a claim of a prescriptive easement to the Rosemary Thyme Trail that crosses the property, the development's lighting and glare impacts, biological resource impacts relating to proximity to wetland area, vegetation clearance, and night lighting, the development's view and neighborhood compatibility impacts, and lastly, compliance with the California Environmental Quality Act (CEQA).

One of the appellant's primary contentions centered on whether an onsite drainage course that crosses the southeastern portion of the site constitutes a 'wetland' for purposes of establishing the Commission's appeals jurisdiction and whether the City had authorized any development within 100 feet of the wetland. Although the subject property is not mapped as ESHA or adjacent to ESHA on the LCP ESHA Maps, the applicant had a biological inventory prepared by a qualified independent biologist of the subject property, which the City cites in their staff report. The biological inventory report by Rachel Tierney, dated May 7, 2005, indicates that the site is disturbed and "consists almost entirely of common weeds". A few native coastal sage scrub species were noted in areas between the graded flat areas. In addition, the biologist noted the presence of hydrophytic plant species in the area of a shallow, broad swale near the southeastern property boundary. However, the biologist goes on to state that concentrated runoff from a neighboring property was being artificially diverted into the swale feature and a build up of sediment created a dam large enough to pond the flow and create conditions for the emergence of wetland plants. The report concludes that the presence of wetland plants is the result of "leaky plumbing" and that the swale is not a natural wetland or in any way a remnant of a previous wetland resource, and in addition, the site does not contain significant amounts of native habitat and proposed development would not result in a significant loss of biological resources.

The City Biologist also reviewed the project and the applicant's Biological Inventory and determined the project consistent with the LCP. In addition, the City Biologist prepared a memorandum, dated March 13, 2006, which responds to the appellants' comments regarding biological resources. The City Biologist cites the findings of Rachel Tierney's Biological Inventory Report in concluding that the wetland-like feature does not qualify as a wetland.

On May 19, 2006 Commission staff received the project opponent's independent biological review report, prepared by Land Protection Partners and dated January 16, 2006, concerning the proposed project site. This report states that because the applicant's biologist found the presence of wetland indicator plants, a wetland delineation should have been completed to investigate the extent of hydrophytic vegetation and presence of hydric soils as per Malibu LIP Section 4.4.3(A). In addition, the report states that the source of water in the area of the swale is not "leaky plumbing", rather runoff from the hillside above drains to this area naturally. The report

also states that even if the inflow were artificial (which is not the case), the site is a functional wetland of habitat value.

Also on May 19, 2006, Commission staff received a letter from the project appellants' attorney, Corin Kahn, dated May 17, 2006, in which the City's Mayor, Ken Kearsley, was carbon-copied (**Exhibit 6**). The letter requests an appealability determination and contends the following:

- The project is appealable to the Coastal Commission because proposed development is located within 100 feet of a wetland.
- The explanation of the presence of wetland plants on the site provided by the applicant's biologist is not consistent with the facts.
- Unpermitted grading by the applicant has taken place on the site during the last 18 months, and before the applicant's biologist's field work, that altered the site's natural contours and changed baseline conditions.
- Project opponents have submitted to the City evidence of unpermitted grading, request for a wetland delineation, and the independent biological review by Land Protection Partners.

The City did not act upon this information. In addition, photographic evidence of the unpermitted grading, in addition to copies of City of Malibu Stop Work Notices for grading without permits or approvals on the property, were provided to Commission staff in June. The two Stop Work Notices provided were dated October 20, 2005 and December 15, 2005. The City did not consider the unpermitted grading or address how it potentially impacted the results of the biological inventory and wetland determination in the project's staff reports.

As stated previously, the Malibu City Council denied the appeal of the Planning Commission's action on June 26, 2006. On June 28, 2006 the applicant's representative provided Commission staff with a wetland delineation report, prepared by Glenn Lukos Associates and dated June 23, 2006, in addition to a revised site plan that moved the proposed residence northwest approximately 50 feet in order to provide a 100-foot setback from the delineated wetland per the wetland delineation report (**Exhibit 7**). The applicant indicated that the Malibu City Council approved the revised site plan. The Malibu City Council Resolution approving the project does not identify which site plan was approved, or indicate that the City Council considered the Wetland Delineation Report, prepared by Glenn Lukos Associates. As shown on the revised site plan provided by the applicant (**Exhibit 8**), the corner of the proposed residence is essentially at the 100-foot setback from the wetland boundary identified in the applicant's wetland delineation report.

The Commission's biologist, John Dixon, reviewed the wetland delineation report prepared by Glenn Lukos Associates and dated June 23, 2006. Dr. Dixon concluded that the wetland delineation appropriately followed the definition of wetlands in the Coastal Act and Commission's regulations and the methods appropriately followed the

standards in the 1987 ACOE Wetland Delineation Manual. Based on the vegetation identified on the site in the report, Dr. Dixon concluded that the wetland boundary was properly drawn. He did note that the delineators did not apply a 2 or 3 parameter test and that almost the entire delineated area was based only on vegetation.

The project appellants have stated that the site has been graded in the recent past and that the existing drainage and vegetation on the site was altered. They have indicated that the wetland area on the site should have been identified over a larger area. Photographs of the site and statements from neighbors have been provided regarding the past condition of the site. Past aerial photos of the site indicate that the area has been disturbed over the years, but that the drainage swale is clearly seen crossing the site (**Exhibit 9**). The historical extent of wetland on the site cannot be determined at this time based on the information available. Additional research of available information will be necessary for substantial issue review.

Nonetheless, the revised site plan indicates that based on the Glenn Lukos Associates' wetland delineation prepared using the recent field investigation, the structure would be located almost exactly 100 feet from the edge of the identified wetland. (If in fact the City did not approve the revised site plan, but approved the original plan, then clearly the structure is located within the area 100 feet from the delineated wetland.) Thus, the applicant by proposing to move the structure implicitly concedes that the original proposal was within 100 feet of a wetland. Although the applicant revised the project specifically to locate the structure itself outside of the 100-foot area from the wetland, development associated with the project will still occur within the 100-foot appeals area. For instance, it is clear that some site preparation, grading, excavation for foundations, and construction of foundations will, by necessity, occur within 100 feet of the delineated wetlands boundary. It is not feasible to construct the proposed structure exactly 100 feet from the wetland without any of the associated construction occurring within 100 feet. Further, fuel modification and landscaping of disturbed areas will be required within the 100-foot appeals area. Drainage improvements may be required in that area although it is not clear how drainage will be conveyed from the building site.

Based on the information described above, it is clear that the revised development, including grading, hardscape, landscaping, and fuel modification will occur within 100 feet of a wetland that is situated along the southeast portion of the property.

Conclusion

Public Resources Code Section 30603(a)(2) confers the Commission with appeal jurisdiction over development that is within 100-feet of any wetland. The Commission finds that the project area contains a wetland that must be used to identify the Commission's appeal jurisdiction. It is clear that approved development will occur within 100 feet of the wetland's outer extent. Thus, the approved project is appealable pursuant to Section 30603(a)(2) of the Coastal Act.

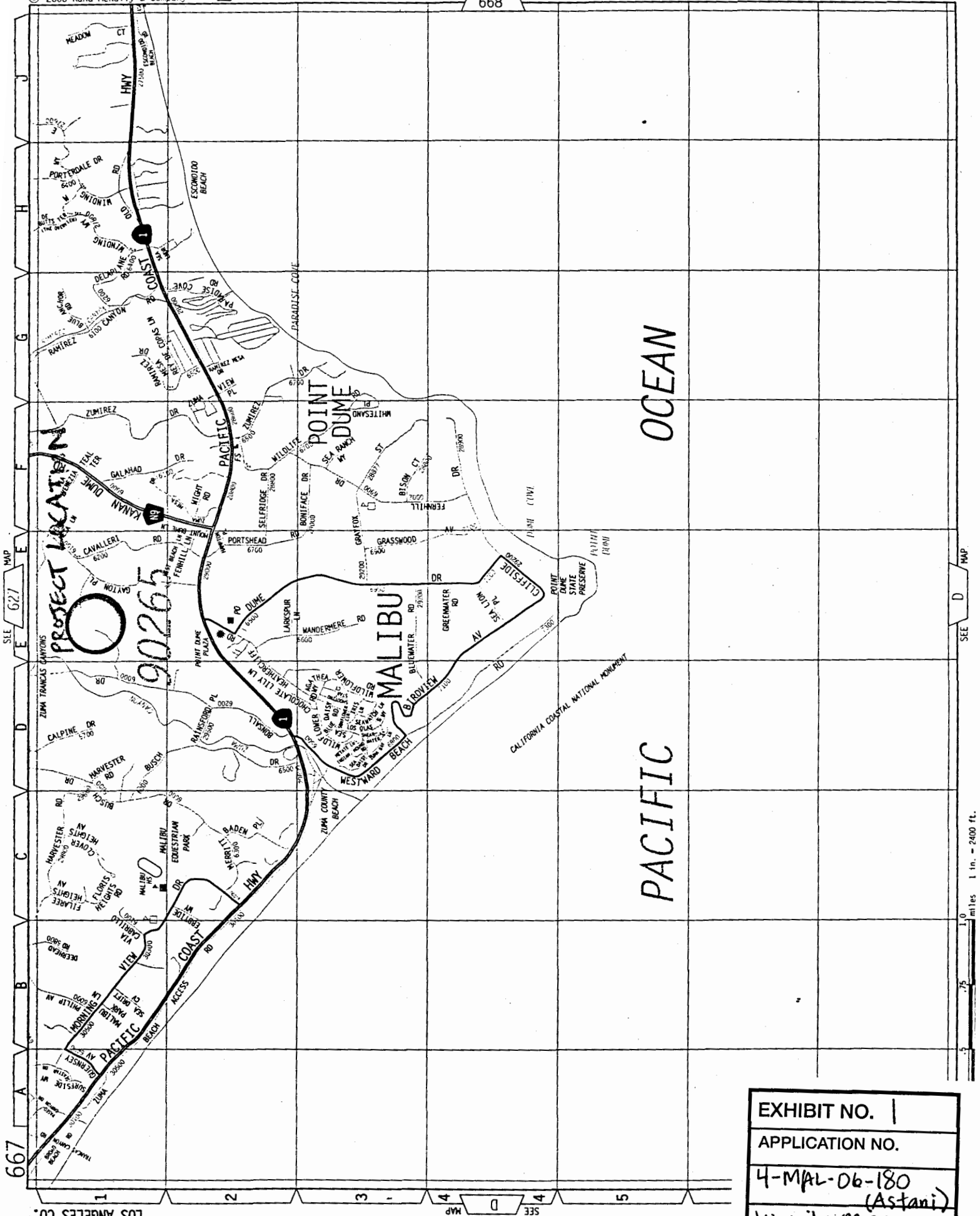


EXHIBIT NO.
APPLICATION NO.
4-MAL-06-180 (Astani)
Vicinity map

4467 23
SCALE 1" = 200'

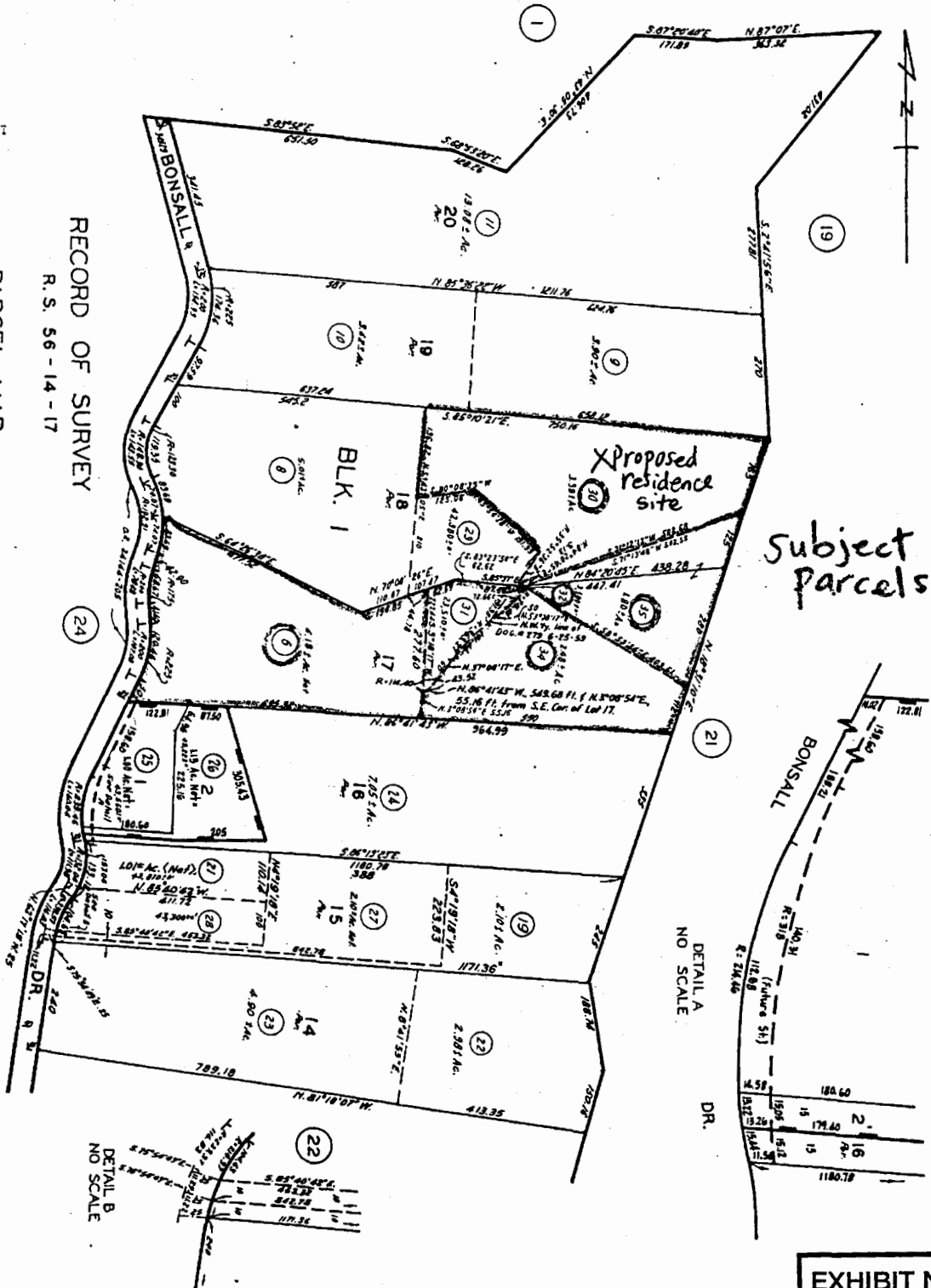
1992

FOR PREP. ASSM'T. SEE:
4467-23

CODE
10853

PARCEL MAP
P.M. 52-43

RECORD OF SURVEY
R.S. 56-14-17



Subject
Parcels

EXHIBIT NO. 2

APPLICATION NO.

4-MAL-06-180 (Astani)

Parcel Map

ASSESSOR'S MAP
COUNTY OF LOS ANGELES, CALIF.

[illegible]

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800



July 14, 2006

C.J. Amstrup
Planning Manager
City of Malibu
23815 Stuart Ranch Road
Malibu, CA 90265

Subject: CDP No. 05-099, VAR. Nos. 05-016 and 05-029, AP No. 06-002, for 5900
Bonsall Drive (Astani)

Dear Mr. Amstrup:

We have reviewed the Notice of Final Local Action for the subject coastal development permit, which we received on June 29, 2006. We have also reviewed information provided to our office by the applicant's representative Susan Hori, which we received on June 28, 2006. That submittal included Jurisdictional Wetland Status of the Astani Property Report, dated June 23, 2006, prepared by Glenn Lukos Associates, a conditional irrevocable offer to dedicate an access easement, and a copy of a revised site plan, all of which was apparently considered by the City Council during its hearing on the project on June 26, 2006.

The Notice of Final Local Action for the subject coastal development permit stated that the final action was not appealable to the California Coastal Commission. As detailed in Chapter 2 of the Malibu LIP, coastal development permits for the following types of development are appealable to the Commission:

1. Developments approved by the City between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.
2. Developments approved by the City 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.
3. Developments approved by the City not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.
4. Any development which constitutes a major public works project or a major energy facility as defined in this Chapter. The phrase "major public works" or a "major energy facility" as used in Public Resources Code Sec. 30603(a)(5) and in these regulations shall mean: any proposed public works project or energy facility, as defined by Section 13012 of the Coastal Commission Regulations and the Coastal Act

EXHIBIT NO. 4
APPLICATION NO.
4-MAL-06-180
CCC Appealability Determination Letter

Coastal Commission staff first learned of a dispute between the project opponents and the City over the appealability of the permit during the Coastal Commission's May 2006 meeting. Shortly thereafter, Commission staff obtained a copy of the applicant's first wetland delineation, titled Biological Inventory for Astani Residence, dated May 7, 2005, prepared by Rachel Tierney. Staff concluded that the Tierney delineation does not adequately identify the extent of wetlands on the project site. In response to this conclusion, the applicant obtained a second wetland delineation, which is the Glenn Lukos Associates report that we received from the applicant on June 28, 2006.

Based on our review of the Glenn Lukos Associates report, the City staff report, and the revised site plan, it appears that portions of the approved development, including site preparation, excavation, grading, required fuel modification, and landscaping, will be located within 100 feet of the identified wetland. Therefore, it is our determination that Coastal Development Permit No. 05-099 is appealable to the Coastal Commission. As such, the City should have considered and noticed the subject permit as an appealable coastal development permit, pursuant to Chapter 2 of the Malibu LIP.

Because the Notice of Final Local Action for the permit identifies the permit as non-appealable, the Notice of Final Local Action is deficient and does not meet the requirements of the Coastal Commission regulations at California Code of Regulations, title 14, section 13571. Accordingly, the effectiveness of the permit is suspended. We request that the City submit a new Notice of Final Local Action that identifies the permit as appealable.

If the City disagrees with the Coastal Commission staff's determination that the permit is appealable, Section 13569 of the California Code of Regulations requires the Commission to hold a hearing for the purposes of determining the designation of the coastal development permit as appealable or non-appealable. Should this be the case, our intention is to schedule a hearing on this matter for the Coastal Commission's August 2006 meeting in San Pedro, in order to resolve this matter in the most expeditious manner possible. To that end, we request that you please provide your response by July 21, 2006.

Thank you for your attention to this matter. If you have questions, please feel free to contact me.

Very Truly Yours,

Barbara J. Carey
Supervisor, Planning and Regulation

cc: Susan Hori, Manatt, Phelps, & Phillips

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July 21, 2006

Barbara J. Carey
Supervisor, Planning and Regulation
California Coastal Commission
South Central Coast Area
89 South California Street, Suite 200
Ventura, California 93001

Reference: Coastal Development Permit No. 05-099/Astani

Dear Ms. Carey:

The City received your letter dated July 14, 2006 regarding the above-referenced coastal development permit by which the City Council approved the development of a single family home on Bonsall Drive (the "Project"). Your July 14th letter states that the Notice of Final Local Action ("NOFA") issued for the CDP is deficient because it incorrectly states that the Project is *not* subject to appeal to the Coastal Commission. You state that it appears to Commission staff that the Project includes development within 100 feet of an identified wetland; and therefore, Commission staff determined that the permit may be appealed to the Commission pursuant to Chapter 2 of the City's Local Implementation Plan ("LIP"). As a result of this conclusion, you assert that the effectiveness of the CDP is suspended. Furthermore, if the City disagrees, you indicate that the Commission will schedule a hearing to determine the appealability of the CDP in the event that the City refuses to issue a revised NOFA. However, the premise that the Project is within 100 feet of an identified wetland directly contradicts the City's express finding that the project will not be developed within 100 feet of a wetland.

EXHIBIT NO. 5

APPLICATION NO.

4-MAL-06-180

City Appealability
Disagreement Letter

JENKINS & HOGIN, LLP

July 21, 2006

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After reviewing your July 14th letter, as well as the controlling statutes and regulations, it appears that the Commission cannot suspend the effectiveness of the CDP or hold an appealability hearing at this time. Allow me to explain how I reach these conclusions.

A. THE COMMISSION DID NOT RESPOND TO THE NOFA WITHIN THE REQUIRED 5-DAY PERIOD.

The July 14th letter states that the City's NOFA was deficient because it identified the CDP as non-appealable, and therefore the NOFA did not meet the requirements of Section 13571 of Title 14 of the California Code of Regulations. Assuming for a moment that the CDP is in fact appealable, and that the NOFA was deficient for failure to comply with the requirements of Section 13571, the Commission's own regulations expressly require it to notify the City of that deficiency *within 5 calendar days* of receiving the defective NOFA. See 14 CCR § 13572. The Commission – as you acknowledge – received the NOFA on June 29, 2006, but did not notify the City that the NOFA was allegedly flawed until July 14, 2006. By failing to apprise the City of the alleged deficiency within the prescribed time period, the Commission forfeited its right to challenge the propriety of the NOFA and to suspend the effectiveness of the CDP. See, e.g., *Encinitas Country Day School, Inc. v. California Coastal Com'n*, 108 Cal.App.4th 575, 587 (2003) (holding that the Coastal Commission lost its jurisdiction when it failed to comply with a 49-day jurisdictional time period). Accordingly, the Commission has not timely raised any objection to the NOFA and it is therefore valid.

B. THE COMMISSION CANNOT SCHEDULE AN APPEALABILITY HEARING AT THIS TIME.

In addition to the Commission's failure to provide a timely notice to the City as to the alleged deficiency in the NOFA, Section 13569 of Title 14 of the California Code of Regulations identifies conditions that must be satisfied before the Commission is authorized to schedule a hearing to determine the appealability of the CDP in any case.

Section 13569 requires the City to request a determination on appealability from the Commission, if during the City's administrative process, the City's determination as to the appealability of the CDP is challenged by either the applicant or an "interested person." This regulation further requires the executive director to issue a formal opinion on the appealability of the CDP in response to the City's request. The City did not request an appealability determination from the Commission in this case, nor were

JENKINS & HOGIN, LLP

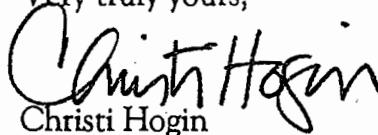
July 21, 2006

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objections lodged during the City's consideration of the CDP as to City's determination that the CDP is not appealable. Therefore, the Commission lacks any authority to schedule a hearing on the appealability of the CDP under Section 13569. Obviously, the Commission must follow its own rules and regulations. The City objects to the Commission's departure from its own regulations and its attempt to assert jurisdiction where none exists.

Furthermore, I want to emphasize that the City has already looked closely at the evidence and determined that the Project is not within 100 feet of a wetland. Indeed, as I understand it the Project has been designed specifically to be sited more than 100 feet from the wetland. Having said all this, if there are facts or regulations that you would like to bring to our attention that would lead to a different conclusion than the one set forth in this letter, please let us know.

Very truly yours,



Christi Hogin
City Attorney
City of Malibu

cc: CJ Amstrup, Planning Manager
Susan Hori, Manatt Phelps & Phillips, LLP

RECEIVED
MAY 19 2006

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CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

OUR FILE NUMBER:

May 17, 2006

Mr. Gary Timm
South Central District Manager
California Coastal Commission

**RE: CDP 05-099; VAR 05-016 & 05-029; MM 05-010; SPR 00-060 & 05-061/
APPLICATIONS TO DEVELOP PROPERTY AT 5900 BONSAI DRIVE**

Dear Mr. Timm:

This office represents the Concerned Citizens of Zuma Mesa ("CCZM") in opposition to the proposed development of the property presently described as 5900 Bonsai Drive and formerly known as 6317 Gayton Place, APN: 4467-023-030; 4467-023-032; 4467-023-034; 4467-023-035, and 4467-023-006 ("Subject Property").

The CCZM offers the following evidence and argument to support the contention that the above proposed development is appealable to the Commission on the grounds it is located within 100 feet of a site that was described as supporting obligate wetland plants. Based on undisputed and incontrovertible facts, a portion of the Subject Property proposed for development must be considered a wetland and/or stream course under the California Coastal Act.

The applicant's own biologist, Rachel Tierney, noted the presence of wetland plants, but attributed them to "leaky plumbing". This explanation is not consistent with the facts. The neighbors remember parts of the property as historically having "swampy" or "wetland" characteristics well before there were any immediate neighbors of the Subject Property. Historical photographs submitted into the record of review by the City that show the contours of the property have been changed during the last 18 months by non-permitted grading by the applicant. These historical photographs provide additional evidence that the Subject Property is located within an important drainage course.

CCZM submitted to the City, which is now part of the record of review of this development proposal, its own biological report from Land Protection Partners ("LPP") last January, titled "Biological Review of Proposed Astani Residence at 5900 Bonsai California)" and requesting a wetland delineation. Longcore's Report carefully

EXHIBIT NO. 6
APPLICATION NO.
4-MAL-06-180
Appellant's Letter

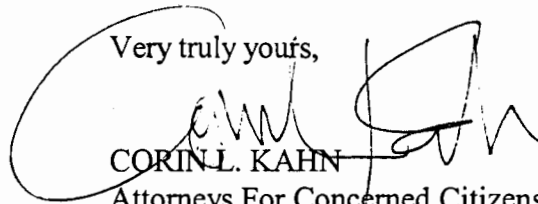
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significant evidence sufficient to require the undertaking of a wetland delineation prior to any permit issuance. The City of Malibu denied CCZM's request and did not ask the applicant to "delineate" the wetland (swale) area. Furthermore, the Applicant graded the project site without a permit removing the wetland plants some time after the field work for the Tierney report, thereby changing the baseline conditions for environmental analysis. The Longcore's Report (field work and analysis took place after the grading) notes the return of some plants (which were observed at some distance during a site visit to the adjacent property by Travis Longcore).

The consequences of the City's failure to act are:

- 1) there was no official wetland delineation even though the evidence is uncontroverted that there was a significant presence of wetland plants and at least some still remain today;
- 2) the CCZM and the public cannot conduct such delineation and must rely on the agencies responsible to enforce the law to discharge their duties;
- 3) if the City has failed to require the applicant to undertake the proper wetland delineation, then the public must depend on the Commission to oversee and/or enforce the exercise of this important function.

We ask that the Commission determine that this Project is appealable to the Coastal Commission based on the presence of obligate wetland plants within 100 feet of the proposed development as documented in the original Tierney report, regardless of the extent of the on-going presence of the size of the wetland area or as widely distributed following the applicant's non-permitted grading.

Very truly yours,

CORIN L. KAHN
Attorneys For Concerned Citizens of Zuma Mesa

Cc: Mr. Peter Douglas, Executive Director
Mr. Jack Ainsworth, South Central Coast Deputy Director
Hon. Ken Kearsley

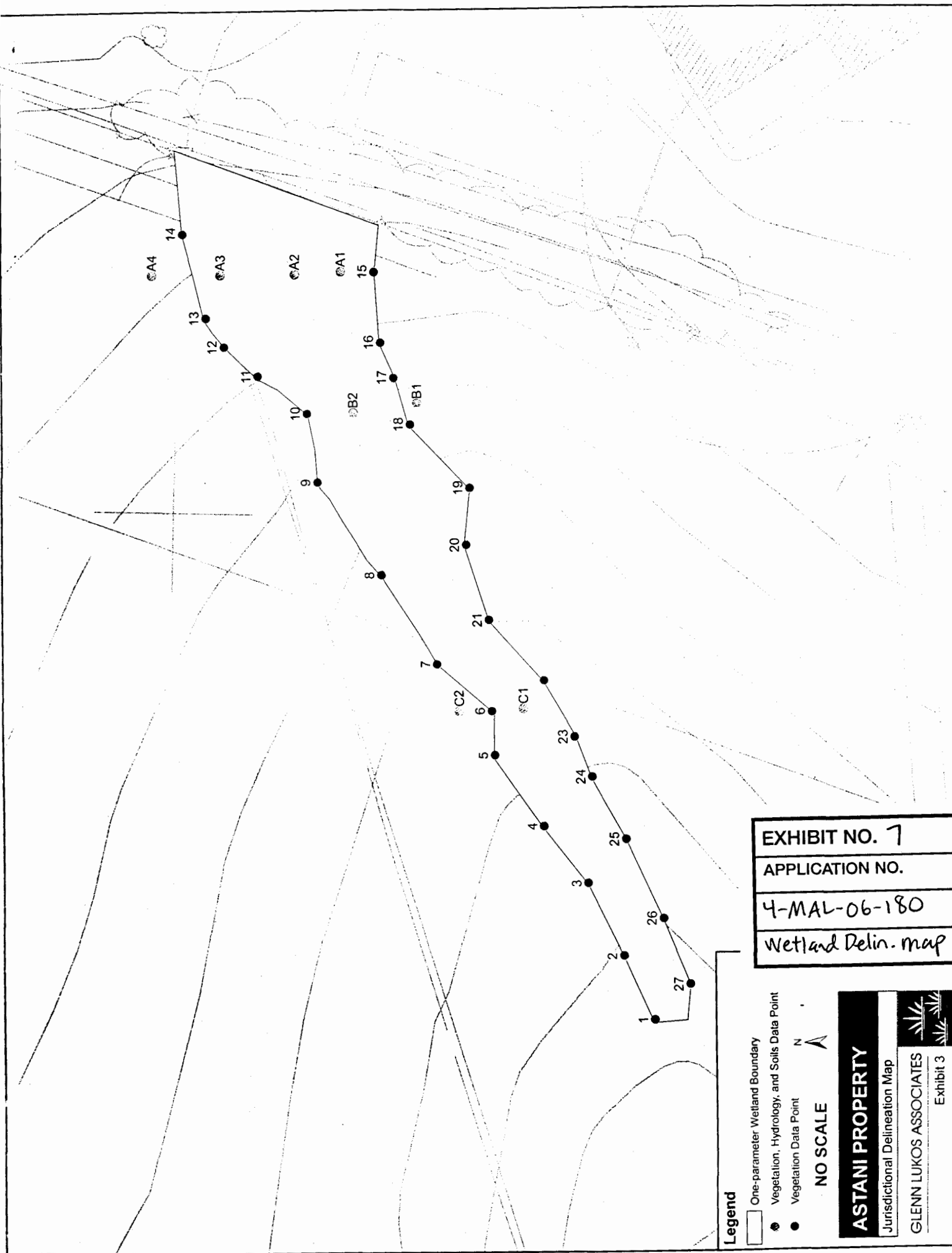


EXHIBIT NO. 7
APPLICATION NO.
4-MAL-06-180
Wetland Delin. map

Legend

- One-parameter Wetland Boundary
- Vegetation, Hydrology, and Soils Data Point
- Vegetation Data Point

NO SCALE

ASTANI PROPERTY

Jurisdictional Delineation Map

GLENN LUKOS ASSOCIATES

Exhibit 3

