

**CALIFORNIA COASTAL COMMISSION**

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

**W 15e**

Appeal Filed: 8/4/06  
49<sup>th</sup> Day: 9/22/06  
49<sup>th</sup> Day Waived: 8/29/06  
Substantial Issue: 11/16/06  
Staff: Deanna Christensen  
Staff Report: 4/19/07  
Hearing Date: 5/9/07



**STAFF REPORT: APPEAL**  
**DE NOVO REVIEW**

**APPEAL NO.:** A-4-MAL-06-096

**APPLICANT:** Arthur and Kimberly Silver

**APPELLANTS:** Ron Goldman; Patt Healy and Malibu Coalition for Slow Growth

**LOCAL GOVERNMENT/ LOCAL DECISION:** City of Malibu, Approval with Conditions

**PROJECT LOCATION:** 24950 Pacific Coast Highway, Malibu; Los Angeles County

**PROJECT DESCRIPTION:** Construction of an 11,158 sq. ft. single-family residence, with a 5,550 sq. ft. basement/garage, alternative onsite wastewater treatment system, and 3,124 cu. yds. of grading (2,132 cu. yds. cut and 992 cu. yds. fill) on a 5.24-acre blufftop lot.

**SUBSTANTIVE FILE DOCUMENTS:** City of Malibu Administrative CDP No. 05-144; "Hydrology, Control Structure, Detention System and Conveyance Study", dated September 25, 1999, prepared by Servtec Consultants Inc.; "Preliminary Geotechnical Engineering and Hydrogeologic Report", dated May 2, 2003, prepared by Earth Systems; "Update Geotechnical Engineering Report", dated July 27, 2005, prepared by Earth Systems; "Response to City of Malibu Review Letter Dated October 19, 2005" by Earth Systems, dated November 30, 2005; Court-approved Settlement Agreement between Kimberly and Arthur Silver and City of Malibu, dated January 20, 2005; Coastal Commission CDP No. 4-98-163 (Duggan & Levenson); "Archaeological Reconnaissance and Recommendations for Archaeological Evaluation", dated June 14, 1997, prepared by Dr. Chester King; "Research Design and Scope of Work for Phase II Test Excavations at 24920 PCH" by W&S Consultants, dated July 2, 1997; "Phase II (Test Phase) Report of Archaeological Site CA-LAN-19 at 24920 PCH" by E. Gary Stickel, PhD. of Environmental Research Archaeologists, dated December 1999; "Phase III (Mitigation) Report on Archaeological Site CA-LAN-19 at 24920 PCH" by E. Gary Stickel, PhD. of Environmental Research Archaeologists, dated July 2000; "Assessment of an Archaeological Site Capping Program" by David Stone, M.A., RPA, dated March 22, 2007; Landscape Planting Plan, dated March 22, 2007, prepared by Lane Goodkind.

## **SUMMARY OF STAFF RECOMMENDATION**

Staff recommends **Approval** of the proposed project with **Fourteen (14) Special Conditions** regarding geologic and engineering recommendations, assumption of risk, future improvements restriction, deed restriction, revised landscape plan, erosion control, drainage and polluted runoff control plans, disposal of excess excavated material, removal of natural vegetation, on-site wastewater treatment system, structural appearance, lighting restriction, archaeological resources, final grading plans, and indemnification. As conditioned, the proposed development will be consistent with all applicable policies and standards of the certified City of Malibu Local Coastal Program (LCP).

The Commission previously found that this appeal raised a substantial issue with respect to the project's consistency with the applicable visual resources policies and standards of the LCP. The standard of review for the de novo review of the project is whether the proposed development is in conformity with the certified City of Malibu Local Coastal Program. During the De Novo hearing, testimony may be taken from all interested persons.

## **I. STAFF RECOMMENDATION**

**MOTION:**     *I move that the Commission approve Coastal Development Permit No. A-4-MAL-06-096 pursuant to the staff recommendation.*

### **STAFF RECOMMENDATION OF APPROVAL:**

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

### **RESOLUTION TO APPROVE THE PERMIT:**

The Commission hereby approves a coastal development permit for the proposed development on the ground that the development is located within the Commission's appeal jurisdiction that extends 300 feet inland from the beach and will conform to the policies of the certified Local Coastal Program for the City of Malibu. Approval of the permit complies with the California Environmental Quality Act since feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment.

## **II. STANDARD CONDITIONS**

1. **Notice of Receipt and Acknowledgment.** These permits are not valid and development shall not commence until copies of the permits, signed by the permittee or authorized agent, acknowledging receipt of the permits and acceptance of the terms and conditions, are returned to the Commission office.

2. **Expiration.** If development has not commenced, the permits will expire two years from the date on which the Commission voted on the de novo appeal of the permits. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application(s) for extension of the permit(s) must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any term or condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permits may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permits.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject properties to the terms and conditions.

### **III. SPECIAL CONDITIONS**

#### **1. *Plans Conforming to Geotechnical Engineer's Recommendations***

By acceptance of this permit, the applicant agrees to comply with the recommendations contained in the submitted geotechnical reports ("Preliminary Geotechnical Engineering and Hydrogeologic Report", dated May 2, 2003, prepared by Earth Systems; "Update Geotechnical Engineering Report", dated July 27, 2005, prepared by Earth Systems; "Response to City of Malibu Review Letter Dated October 19, 2005" by Earth Systems, dated November 30, 2005). These recommendations, including recommendations concerning foundations, grading, and drainage, shall be incorporated into all final design and construction plans, which must be reviewed and approved by the consultant prior to commencement of development.

The final plans approved by the consultant shall be in substantial conformance with the plans approved by the Commission relative to construction, grading, and drainage. Any substantial changes in the proposed development approved by the Commission that may be required by the consultant shall require amendment(s) to the permit(s) or new Coastal Development Permit(s).

#### **2. *Assumption of Risk***

By acceptance of this permit, the applicants acknowledge and agree (i) that the site may be subject to hazards from landslide, erosion, bluff retreat, and wildfire; (ii) to assume the risks to the applicants and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

#### **3. *Future Development Restriction***

This permit is only for the development described in Coastal Development Permit No. A-4-MAL-06-096. Pursuant to Title 14 California Code of Regulations section 13250(b)(6), the exemptions otherwise provided in Public Resources Code section 30610(a) shall not apply to any future development on any portion of the parcel. Accordingly, any future improvements to any of the property, including but not limited to the single family residence, garage (including conversion of the structure to habitable space), driveway, turnaround, new or replacement landscaping, hardscape, and removal of vegetation or grading other than as provided for in the approved fuel modification/landscape plan prepared pursuant to Special Condition Five (5), shall require an amendment to Coastal Development Permit No. A-4-MAL-06-096 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

#### **4. Deed Restriction**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit to the Executive Director for review and approval documentation demonstrating that the applicants have executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

#### **5. Revised Landscaping Plan**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit two sets of a revised landscaping plan, prepared by a licensed landscape architect or a qualified resource specialist, for review and approval by the Executive Director. The revised plan shall identify the species, extent, and location of all plant materials and shall incorporate the criteria set forth below. The landscaping plan shall also identify proposed fencing and walls, and all necessary irrigation improvements. All development shall conform to the approved landscaping plan.

##### **A) Landscaping Plan**

- 1) All graded & disturbed areas on the subject site shall be planted and maintained for erosion control purposes within (60) days of receipt of the certificate of occupancy for the residence. To minimize the need for irrigation all landscaping shall consist of native/drought-tolerant plants as listed by the California Native Plant Society, Santa Monica Mountains Chapter, in their document entitled Recommended List of Plants for Landscaping in the Santa Monica Mountains, dated February 5, 1996. No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Exotic Pest Plant Council, or the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed'

by the State of California or the U.S. Federal Government shall be utilized or maintained within the property.

- 2) All cut and fill slopes shall be stabilized with planting at the completion of final grading. Planting should be of native plant species indigenous to the Santa Monica Mountains using accepted planting procedures, consistent with fire safety requirements. All native plant species shall be of local genetic stock. Such planting shall be adequate to provide 90 percent coverage within five (5) years, and this requirement shall apply to all disturbed soils.
- 3) Plantings will be maintained in good growing condition throughout the life of the project and, whenever necessary, shall be replaced with new plant materials to ensure continued compliance with applicable landscape requirements.
- 4) Permanent irrigation improvements shall be designed to minimize groundwater infiltration and shall be primarily limited to drip irrigation systems. No permanent irrigation shall be allowed within 50 ft. of the landward edge of the top of the bluff or on the bluff slope itself.
- 5) Vegetation on the subject site shall be limited to low-lying species that will not block or adversely impact public views of the ocean from the highway, and trees planted in the specific approved locations shown on Exhibit 13 and maximum heights detailed as follows. Vegetation located south of the Fire Department turnaround driveway segment (indicated as Zone D on Exhibit 13) shall be limited to no more than 18 ft. in height. Vegetation between the Fire Department turnaround driveway segment and a line 100 ft. south of the property line at Pacific Coast Highway (Zone C as shown on Exhibit 13) shall be limited to no more than 16 ft. in height. Vegetation between 100 ft. and 30 ft. south of the property line at Pacific Coast Highway (Zone B as shown on Exhibit 13) shall be limited to no more than 12 ft. in height. Vegetation within 30 ft. of the property line at Pacific Coast Highway (Zone A as shown on Exhibit 13) shall not exceed road grade, except ground-cover that is no higher than six inches may be planted immediately adjacent to the property line at Pacific Coast Highway. All vegetation must have a natural growth height range that does not exceed the specified maximum height at maturity, with the exception of appropriate above-ground containerized specimen trees that shall be maintained to not exceed the specified maximum height for each landscape zone.
- 6) Other landscape elements, such as fencing and walls, shall not block or adversely impact public views of the ocean from the highway. Fencing and walls shall not exceed the road grade of Pacific Coast Highway, at the southern edge of the highway adjacent to the property site.
- 7) Vegetation within 20 feet of the proposed house may be removed to mineral earth, vegetation within a 200-foot radius of the main structure may be selectively thinned in order to reduce fire hazard. However, such thinning shall only occur in accordance with an approved long-term fuel modification plan. The fuel modification plan shall include details regarding the types, sizes and location of plant materials to be removed, and how often thinning is to occur. In addition, the applicant shall submit evidence that the fuel modification plan has been reviewed and approved by the Forestry Department of Los Angeles County. Irrigated lawn, turf and ground cover planted within the twenty foot

radius of the proposed house shall be selected from the most drought tolerant species or subspecies, or varieties suited to the Mediterranean climate of the Santa Monica Mountains. In no case shall lawn or turf be planted within the required 100-foot bluff setback area.

- 8) Rodenticides containing any anticoagulant compounds (including, but not limited to, Warfarin, Brodifacoum, Bromadiolone or Diphacinone) shall not be used.

**B) Implementation**

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**C) Monitoring**

Five years from the date of the receipt of the Certificate of Occupancy for the residence the applicants shall submit for the review and approval of the Executive Director, a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies whether the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicants, or successors in interest, shall submit a revised or supplemental landscape plan for the review and approval of the Executive Director and, upon Executive Director approval, shall implement the approved version of that plan. The revised landscaping plan must be prepared by a licensed Landscape Architect or a qualified Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

**6. *Erosion Control, Drainage and Polluted Runoff Control Plans***

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit for the review and approval of the Executive Director: a) a ***Local Storm Water Pollution Prevention (SWPPP) Plan*** to control erosion and contain polluted runoff during the construction phase of the project; and b) a ***Stormwater Management Plan (SWMP)*** for the management and treatment of post-construction storm water and polluted runoff. The plans shall be certified by a California Registered Civil Engineer or Licensed Architect and approved by the City's Department of Public Works, and include the information and measures outlined below.

- a) ***Local Storm Water Pollution Prevention Plan (SWPPP)***, for the construction phase of the project, shall include at a minimum the following:

- Property limits, prior-to-grading contours, and details of terrain and area drainage

- Locations of any buildings or structures on the property where the work is to be performed and the location of any building or structures of adjacent owners that are within 15 ft of the property or that may be affected by the proposed grading operations
  - Locations and cross sections of all proposed temporary and permanent cut-and-fill slopes, retaining structures, buttresses, etc., that will result in an alteration to existing site topography (identify benches, surface/subsurface drainage, etc.)
  - Area (square feet) and volume (cubic yards) of all grading (identify cut, fill, import, export volumes separately), and the locations where sediment will be stockpiled or disposed
  - Elevation of finished contours to be achieved by the grading, proposed drainage channels, and related construction.
  - Details for the protection of existing vegetation from damage from construction equipment, for example: (a) grading areas should be minimized to protect vegetation; (b) areas with sensitive or endangered species should be demarcated and fenced off; and (c) native trees that are located close to the construction site should be protected by wrapping trunks with protective materials, avoiding placing fill of any type against the base of trunks, and avoiding an increase in soil depth at the feeding zone or drip line of the retained trees.
  - Information on potential flow paths where erosion may occur during construction
  - Proposed erosion and sediment prevention and control BMPs, both structural and non-structural, for implementation during construction, such as:
    - Stabilize disturbed areas with vegetation, mulch, geotextiles, or similar method.
    - Trap sediment on site using fiber rolls, silt fencing, sediment basin, or similar method.
    - Ensure vehicles on site are parked on areas free from mud; monitor site entrance for mud tracked off-site.
    - Prevent blowing dust from exposed soils.
  - Proposed BMPs to provide adequate sanitary and waste disposal facilities and prevent contamination of runoff by construction chemicals and materials, such as:
    - Control the storage, application and disposal of pesticides, petroleum and other construction and chemical materials.
    - Site washout areas more than fifty feet from a storm drain, open ditch or surface water and ensure that runoff flows from such activities do not enter receiving water bodies.
    - Provide sanitary facilities for construction workers.
    - Provide adequate disposal facilities for solid waste produced during construction and recycle where possible.
- b) **Storm Water Management Plan (SWMP)**, for the management of post construction storm water and polluted runoff shall at a minimum include the following:
- Site design and source control BMPs that will be implemented to minimize or prevent

post-construction polluted runoff (see 17.5.1 of the Malibu LIP)

- Drainage improvements (e.g., locations of diversions/conveyances for upstream runoff)
- Potential flow paths where erosion may occur after construction
- Methods to accommodate onsite percolation, revegetation of disturbed portions of the site, address onsite and/or offsite impacts and construction of any necessary improvements
- Storm drainage improvement measures to mitigate any offsite/downstream negative impacts due the proposed development, including, but not limited to:
  - Mitigating increased runoff rate due to new impervious surfaces through on-site detention such that peak runoff rate after development does not exceed the peak runoff of the site before development for the 100 year clear flow storm event (note; Q/100 is calculated using the Caltrans Nomograph for converting to any frequency, from the Caltrans "Hydraulic Design and Procedures Manual"). The detention basin/facility is to be designed to provide attenuation and released in stages through orifices for 2-year, 10-year and 100-year flow rates, and the required storage volume of the basin/facility is to be based upon 1-inch of rainfall over the proposed impervious surfaces plus 1/2-inch of rainfall over the permeable surfaces. All on-site drainage devices, including pipe, channel, and/or street & gutter, shall be sized to cumulatively convey a 100 year clear flow storm event to the detention facility, or;
  - Demonstrating by submission of hydrology/hydraulic report by a California Registered Civil Engineer that determines entire downstream storm drain conveyance devices (from project site to the ocean outlet) are adequate for 25-year storm event, or;
  - Constructing necessary off-site storm drain improvements to satisfy the above, or;
  - Other measures accomplishing the goal of mitigating all offsite/downstream impacts

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

## **7. Disposal of Excess Excavated Material**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall provide evidence to the Executive Director of the location of the disposal site for all excess excavated material from the site. If the disposal site is located in the Coastal Zone, the disposal site must have a valid coastal development permit for the disposal of fill material. If the disposal site does not have a coastal permit, such a permit will be required prior to the disposal of the material.

## **8. Removal of Natural Vegetation**

Removal of natural vegetation for the purpose of fuel modification within the 50 foot zone surrounding the proposed structure(s) shall not commence until the local government has issued a building or grading permit for the development approved pursuant to this permit. Vegetation thinning within the 50-200 foot fuel modification zone shall not occur until commencement of construction of the structure(s) approved pursuant to this permit

## **9. On-site Wastewater Treatment System**

Prior to the receipt of the Certificate of Occupancy for the residence, the applicants shall submit for the review and approval of the Executive Director verification that they have obtained a valid Standard Operating Permit from the City for the proposed OSTs. This permit shall comply with all of the operation, maintenance and monitoring provisions applicable to OSTs contained in policies 18.4 and 18.9 of the Malibu LIP.

## **10. Structural Appearance**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit for the review and approval of the Executive Director, a color palette and material specifications for the outer surface of all structures authorized by the approval of Coastal Development Permit No. A-4-MAL-06-096. The palette samples shall be presented in a format not to exceed 8½" x 11" x ½" in size. The palette shall include the colors proposed for the roof, trim, exterior surfaces, driveways, retaining walls, or other structures authorized by this permit. Acceptable colors shall be limited to colors compatible with the surrounding environment (earth tones) including shades of green, brown and gray with no white or light shades and no bright tones. All windows shall be comprised of non-glare glass.

The approved structures shall be colored with only the colors and window materials authorized pursuant to this special condition. Alternative colors or materials for future repainting or resurfacing or new windows may only be applied to the structures authorized by Coastal Development Permit No. A-4-MAL-06-096 if such changes are specifically authorized by the Executive Director as complying with this special condition.

## **11. Lighting Restriction**

By acceptance of this permit, the applicants acknowledge and agree that the only exterior, night lighting that is allowed on the site is the following:

- 1) The minimum necessary to light walkways used for entry and exit to the structures, including parking areas, on the site. This lighting shall be limited to fixtures that are directed downward and shall use bulbs that do not exceed 60 watts, or the equivalent, unless a higher wattage is authorized by the Executive Director.
- 2) Security lighting attached to the residence that is controlled by motion detectors and is limited to 60 watts, or the equivalent.
- 3) The minimum lighting necessary for safe vehicular use of the driveway. The lighting shall be limited to 60 watts, or the equivalent.

No light source will be directly visible from public viewing areas such as Pacific Coast Highway or the beach and ocean area, and no lighting around the perimeter of the site, the beach area or for aesthetic purposes shall be allowed.

## **12. Archaeological Resources**

By acceptance of this permit, the applicants agree to comply with all of the recommendations contained in the Phase III Mitigation Report by Dr. E. Gary Stickel (July 2000) for protection of archaeological resources on the subject property. Specifically, the applicants shall provide a protective cap over the portions of the property that were identified in the Phase III Mitigation Report prior to commencement of construction operations. The applicants shall also have a qualified archaeologist(s) and appropriate Native American consultant(s) present on-site during all grading, excavation, site preparation, installation of irrigation systems or landscaping features that involve any earth moving operations in order to monitor for the discovery of cultural resources. The number of monitors shall be adequate to observe the earth moving activities of each piece of active earth moving equipment. Specifically, the earth moving operations on the project site shall be controlled and monitored by the archaeologist(s) and Native American consultant(s) with the purpose of locating, recording and collecting any archaeological materials. In the event that any significant archaeological resources are discovered during operations, grading work in the area shall be halted and an appropriate data recovery strategy be developed, subject to review and approval of the Executive Director, by the applicant's archaeologist, and the native American consultant consistent with CEQA guidelines. The applicants shall provide evidence that any such recovery strategy has been reviewed by the City of Malibu Planning Manager, or evidence that no review is required. The applicants shall implement the approved data recovery strategy.

## **13. Final Grading Plans**

**PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicants shall submit, for the review and approval of the Executive Director, a final grading plan that includes detailed plans, including cross sections, of the capping work for protection of archaeological resources on-site, as required by Special Condition No. 12 above.

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

## **14. Indemnification by Applicant**

**Liability for Costs and Attorneys Fees:** By acceptance of this permit, the Applicants/Permittee agrees to reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys fees -- including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys fees that the Coastal Commission may be required by a court to pay -- that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Applicants/Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this permit.

The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.

## **IV. FINDINGS AND DECLARATIONS**

The Commission hereby finds and declares:

### **A. Project Description**

The applicant proposes to construct an 11,158 sq. ft., partial two-story, 18 to 22-foot high single-family residence, with a 5,550 sq. ft. basement/garage, alternative onsite wastewater treatment system, and 3,124 cu. yds. of grading (2,132 cu. yds. cut and 992 cu. yds. fill) on a 5.24-acre bluff-top parcel at 24950 Pacific Coast Highway (**Exhibits 2-8**).

### **B. Background**

#### **1. Local Government Action and Filing of Appeal**

On January 5, 2006, the City of Malibu Planning Manager approved Administrative Coastal Development Permit No. 05-144 for the proposed project. On January 17, 2006 the City Planning Manager reported the administrative CDP decision to the Planning Commission. At that time, the City determined that the project was not appealable to the Coastal Commission and indicated as much in the notice for the Planning Commission hearing. Ron Goldman filed a local appeal (Appeal 06-001) of the Planning Manager's action on January 17, 2006, within the City's appeal period. The City of Malibu Planning Commission denied Appeal 06-001 on March 20, 2006, upholding the Planning Manager's action. On March 29, 2006, Ron Goldman and Mark Zucker filed a local appeal (Appeal 06-007) of the Planning Commission's action. After submittal of this appeal to the Malibu City Council, and before the City Council's appeal hearing, City staff consulted with Coastal Commission staff to clarify the beginning point from which to measure to determine the appeal jurisdiction boundary (300 feet from the inland extent of the beach) in this case. Coastal Commission staff identified the seaward edge of Malibu Road, which was more conservative than the line the City had originally determined. Therefore, City staff found that proposed drainage devices would fall within the revised appeal jurisdiction boundary and the project would be appealable to the Coastal Commission. The City Council appeal hearing public notices indicated that the project was appealable to the Coastal Commission. The City Council denied Appeal 06-007 on July 10, 2006.

Commission staff received the City's Notice of Final Local Action for the project on July 21, 2006. A ten working day appeal period was set and notice provided beginning July 24, 2006, and extending to August 4, 2006. The Notice of Final Action identified the project as appealable to the Coastal Commission, since portions of the project (drainage features) are located within the Commission's appeal jurisdiction. Appeals of the City's action were filed by Ron Goldman and Mark Zucker (August 4, 2006), and Patt Healy and Malibu Coalition for Slow Growth (July 31, 2006), all during the appeal period. Commission staff notified the City, the applicant, and all interested parties that were listed on the appeals and requested that the City provide its administrative record for the permit. The administrative record was received on August 8, 2006. On August 29, 2006 the applicant waived the 49-day time limit for a hearing on the appeal.

The appeal was scheduled for a substantial issue determination at the Commission's November 2006 hearing. On November 16, 2006, the Commission found that Appeal No. A-4-MAL-06-096 presented a substantial issue with respect to the grounds on which the appeals were filed under §30603 of the Coastal Act regarding consistency with the scenic/visual resource policies of the certified Local Coastal Plan.

The appeal was continued for the de novo review of the project at the February 2007 Commission meeting. However, the hearing on the item was postponed and the applicant has since provided staff with a revised landscape plan in addition to a visual representation, in the form of story poles, of the proposed landscaping trees on the project site.

In response to the staff report, dated January 25, 2007, that was prepared for the de novo review of the project at the February 2007 Commission meeting, staff received correspondence from each of the appellants in this case, Ron Goldman and Patt Healy. These letters, attached as Exhibit 9, both contend that the trellis aspect of the proposed structure will intrude into the public viewshed and should be reduced or eliminated and that the height of future development should also be restricted by a condition of approval. These issues are addressed in the visual resource section of this staff report.

## **2. Project Site**

The proposed project site is located on a 5.24-acre vacant blufftop lot located on the ocean side of Pacific Coast Highway in the City of Malibu (**Exhibit 1**). The site is comprised of a gentle slope extending south from the highway to a bluff face that descends, at a gradient of approximately 1.5:1 to 2:1, down to Malibu Road and a row of beachfronting parcels that are developed with single family residences. No trails or access ways are located on or adjacent to the property. As such, the proposed project has no impact on public access, and is thus consistent with the public access and recreation policies of the Malibu LCP.

In 1998, the Commission approved CDP No. 4-98-163 (Duggan & Levenson) for the construction of a 9,398 sq. ft., 18-foot high, one-story single family residence with attached garage, tennis court, pool, spa, septic system, and grading on the subject parcel. Slope remediation work on the site's bluff face, consisting of drainage improvements and 1,800 cu. yds. of grading to remove landslide debris, cut benches in the underlying bedrock, and import fill material to be recompacted at a slope of 1.5:1, was also proposed on the subject property as the winter storms of 1998 resulted in a landslide on the bluff portion of the lot. Special conditions of CDP No. 4-98-163 related to assumption of risk, conformance with geologic recommendations, landscape, erosion control and drainage plans, view corridor, future improvements, and archaeology. The permit was issued in December 1998, and the proposed slope remediation and slope drainage work was completed thereafter. However, the residence was never built and the property transferred ownership.

In 2000, the new property owner (the applicant) requested Site Plan Review approval from the City of Malibu for a new development plan on the site. The local level permit and appeal process continued for several years, and in December 2002, the Malibu City Council adopted Resolution No. 02-38 conditionally approving the construction of a new, two-story residence on the property. The project then went into litigation and resulted in a Settlement Agreement between the City of Malibu and the applicants, dated January 20, 2005. The court-approved Settlement Agreement resulted in a revision of the landscaping and structure height conditions of Site Plan Review approval contained in the City's Resolution No. 02-38. Therefore, the City's 2002

approval, as amended by the terms of the court-approved Settlement Agreement, resulted in the revised development design that was considered and approved by the City of Malibu on July 10, 2006.

### **C. Hazards / Blufftop Development**

The proposed development is located on a bluff top lot in Malibu, an area generally considered to be subject to an unusually high amount of natural hazards. Geologic hazards common to the Malibu area include landslides, erosion, and flooding. In addition, fire is an inherent threat to the indigenous chaparral community of the coastal mountains. Wild fires often denude hillsides in the Santa Monica Mountains of all existing vegetation, thereby contributing to an increased potential for erosion and landslides on property.

The Malibu Local Coastal Program (LCP) contains the following development policies related to hazards and bluff top development that are applicable to the proposed development:

Section 30253 of the Coastal Act, which is incorporated as part of the Malibu LCP, states in pertinent part that new development shall:

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

In addition, the following LCP policies are applicable in this case:

- 3.119 New development that requires a grading permit or Local SWPPP shall include landscaping and re-vegetation of graded or disturbed areas, consistent with Policy 3.50. Any landscaping that is required to control erosion shall use native or drought-tolerant non-invasive plants to minimize the need for fertilizer, pesticides, herbicides, and excessive irrigation. Where irrigation is necessary, efficient irrigation practices shall be required.***
- 4.2 All new development shall be sized, designed and sited to minimize risks to life and property from geologic, flood, and fire hazard.***
- 4.4 On ancient landslides, unstable slopes and other geologic hazard areas, new development shall only be permitted where an adequate factor of safety can be provided, consistent with the applicable provisions of Chapter 9 of the certified Local Implementation Plan.***
- 4.5 Applications for new development, where applicable, shall include a geologic/soils/geotechnical study that identifies any geologic hazards affecting the proposed project site, any necessary mitigation measures, and contains a statement that the project site is suitable for the proposed development and that the development will be safe from geologic hazard. Such reports shall be signed by a licensed Certified Engineering Geologist (CEG) or Geotechnical Engineer (GE) and subject to review and approval by the City Geologist.***

- 4.10 New development shall provide adequate drainage and erosion control facilities that convey site drainage in a non-erosive manner in order to minimize hazards resulting from increased runoff, erosion and other hydrologic impacts to streams.**
- 4.27 All new development located on a blufftop shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion for a projected 100 year economic life of the structure plus an added geologic stability factor of 1.5. In no case shall the setback be less than 100 feet which may be reduced to 50 feet if recommended by the City geologist and the 100 year economic life with the geologic safety factor can be met. This requirement shall apply to the principle structure and accessory or ancillary structures such as guesthouses, pools, tennis courts, cabanas, and septic systems etc. Ancillary structures such as decks, patios and walkways that do not require structural foundations may extend into the setback area to a minimum distance of 15 feet from the bluff edge. Ancillary structures shall be removed or relocated landward when threatened by erosion. Slope stability analyses and erosion rate estimates shall be performed by a licensed Certified Engineering Geologist or Geotechnical Engineer.**
- 4.37 Shoreline and bluff protection structures shall not be permitted to protect new development, except when necessary to protect a new septic system and there is no feasible alternative that would allow residential development on the parcel. Septic systems shall be located as far landward as feasible. Shoreline and bluff protection structures may be permitted to protect existing structures that were legally constructed prior to the effective date of the Coastal Act, or that were permitted prior to certification of the LCP provided that the CDP did not contain a waiver of the right to a future shoreline or bluff protection structure and only when it can be demonstrated that said existing structures are at risk from identified hazards, that the proposed protective device is the least environmentally damaging alternative and is designed to eliminate or mitigate adverse impacts to local shoreline sand supply. Alternatives analysis shall include the relocation of existing development landward as well as the removal of portions of existing development. "Existing development" for purposes of this policy shall consist only of a principle structure, e.g. residential dwelling, required garage, or second residential unit, and shall not include accessory or ancillary structures such as decks, patios, pools, tennis courts, cabanas, stairs, landscaping etc.**
- 4.42 As a condition of approval of development on a beach or shoreline which is subject to wave action, erosion, flooding, landslides, or other hazards associated with development on a beach or bluff, the property owner shall be required to execute and record a deed restriction which acknowledges and assumes said risks and waives any future claims of damage or liability against the permitting agency and agrees to indemnify the permitting agency against any liability, claims, damages or expenses arising from any injury or damage due to such hazards.**
- 4.44 As a condition of approval of new development on a vacant beachfront or blufftop lot, or where demolition and rebuilding is proposed, where geologic or engineering evaluations conclude that the development can be sited and designed to not require a shoreline protection structure as part of the proposed development or at any time during the life of the development, the property owner shall be required to record a deed restriction against the property that**

***ensures that no shoreline protection structure shall be proposed or constructed to protect the development approved and which expressly waives any future right to construct such devices that may exist pursuant to Public Resources Code Section 30235.***

**4.45 *New development shall minimize risks to life and property from fire hazard through:***

- Assessing site-specific characteristics such as topography, slope, vegetation type, wind patterns etc.;***
- Siting and designing development to avoid hazardous locations;***
- Incorporation of fuel modification and brush clearance techniques in accordance with applicable fire safety requirements and carried out in a manner which reduces impacts to environmentally sensitive habitat to the maximum feasible extent;***
- Use of appropriate building materials and design features to insure the minimum amount of required fuel modification;***
- Use of fire-retardant, native plant species in landscaping.***

**4.49 *Applications for new development, which require fuel modification, shall include a fuel modification plan for the project, prepared by a landscape architect or resource specialist that incorporates measures to minimize removal of native vegetation and to minimize impacts to ESHA, while providing for fire safety, consistent with the requirements of the applicable fire safety regulations. Such plans shall be reviewed and approved by the Forestry Division.***

**6.29 *Cut and fill slopes and other areas disturbed by construction activities shall be landscaped or revegetated at the completion of grading. Landscape plans shall provide that:***

- Plantings shall be of native, drought-tolerant plant species, and blend with the existing natural vegetation and natural habitats on the site, except as noted below.***
- Invasive plant species that tend to supplant native species and natural habitats shall be prohibited.***
- Non-invasive ornamental plants and lawn may be permitted in combination with native, drought-tolerant species within the irrigated zone(s) required for fuel modification nearest approved residential structures.***
- Lawn shall not be located on any geologically sensitive area such as coastal blufftop.***
- Landscaping or revegetation shall provide 90 percent coverage within five years. Landscaping or revegetation that is located within any required fuel modification thinning zone (Zone C, if required by the Los Angeles County Fire Department) shall provide 60 percent coverage within five years.***

The LCP requires a 100 ft. setback from the bluff edge unless the geologist recommends a lesser setback with the assurance of a safety factor of 1.5 over an economic life of the structure for 100 years, in which case the required setback may be reduced to the required distance (based on the location of the 1.5 factor of safety line and the bluff retreat estimated for 100 years), but in no case less than 50 feet. The bluff development policies and provisions of the LCP require setbacks from the bluff edge to assure stability and structural integrity of new development for the anticipated life of the structures, as well as to prevent the future need for shoreline protective devices.

The proposed project site is located on a 5.24-acre bluff top lot located on the ocean side of Pacific Coast Highway. The site is comprised of a gentle slope extending south from the highway to a bluff face that descends, at a gradient of approximately 1.5:1 to 2:1, down to Malibu Road and a row of beachfronting parcels that are developed with single family residences.

The bluff face in the immediate area and surrounding vicinity of the subject parcel has experienced failures in the past. These failures have resulted in excessive material sloughing off onto Malibu Road and have required remedial action. In 1997, the Commission approved a coastal development permit (CDP No. 4-97-031) on the parcel adjacent to the subject property to the west that involved slope remediation work as a result of a failure. In 2000, the Commission approved CDP No. 4-98-142 on the parcel to the east that involved landslide slope remediation work as well. The winter storms of 1998 also resulted in a slope failure on the bluff portion of the subject property. Slope remediation and associated drainage, erosion control, and landscape plans were reviewed, approved, and implemented pursuant to CDP No. 4-98-163 (Duggan & Levenson), issued by the Commission in December 1998. Slope remediation work consisted of grading to remove the landslide debris, cutting benches in the underlying bedrock, and importing fill material for recompaction at a slope of 1.5:1. CDP No. 4-98-163 also authorized the construction of a residence on the property that adhered to a recommended geotechnical setback and was greater than 100 feet from the top of the bluff slope (the approved residence was never constructed).

The proposed project includes a residential structure and an ancillary structure (deck) that would be situated 180 feet and 140 feet, respectively, away from the edge of the coastal bluff. This is consistent with the bluff development provisions of the LCP. The proposed residence is in essentially the same footprint as the previous Commission-approved residence and maintains the same bluff setback, which is in excess of 100 feet. The project does not involve any modification to the site's existing slope remediation or drainage features that were previously approved, constructed, and vested pursuant to CDP No. 4-98-163. Commission staff has reviewed the project's geotechnical reports to confirm the results of the slope stability and recommended geologic setback analyses for the proposed project. The proposed development is adequately setback from the minimum required factor of safety lines for static and seismic conditions as determined by the project geotechnical consultant. The reports also provide comprehensive recommendations regarding stormwater detention and drainage for the site. Given the past failure of the bluff in the vicinity of the subject property, a state-of-the-art stormwater conveyance system has been recommended to collect, store, and control drainage flows from PCH and the development site in order to protect the bluff face and development below. In August 2005, groundwater levels were measured by the project geotechnical consultants from the 13 active groundwater monitoring wells on the site. When compared to the levels measured in January 2003 as part of the project's Preliminary Geotechnical Engineering Report, the groundwater data indicated that groundwater elevations have risen by an average of approximately 4 feet in most of the wells since 2003. Stability analyses were subsequently updated by the geotechnical consultant using the more recent groundwater levels and found to result in little or no change, as the increased groundwater levels are not large compared to the height of the slope.

The Malibu LCP requires that new development be sited and designed to minimize risks to life and property from geologic, flood, and fire hazard. In addition, the LCP requires a geologic/soils/geotechnical study that identifies any geologic hazards affecting the proposed

project site, any necessary mitigation measures, and contains a statement that the project site is suitable for the proposed development and that the development will be safe from geologic hazard. As described above, the project will provide a bluff setback adequate to ensure that the development will not be damaged by bluff erosion during the life of the project. As such, the Commission finds that the proposed project will serve to ensure general geologic and structural integrity on site. However, the Commission also finds that the submitted geotechnical and hydrogeologic reports ("Preliminary Geotechnical Engineering and Hydrogeologic Report" by Earth Systems, dated May 2, 2003; "Update Geotechnical Engineering Report" by Earth Systems, dated July 27, 2005; "Response to City of Malibu Review Letter dated 10/19/05" by Earth Systems, dated November 30, 2005) include a number of recommendations to ensure the geologic stability and geotechnical safety of the site. To ensure that the recommendations of the geologic and geotechnical engineering consultants are incorporated into all new development, the Commission finds it necessary to impose **Special Condition One (1)**, which requires the applicant to incorporate all geologic, hydrogeologic, and geotechnical recommendations of the consulting geologist and geotechnical engineer into the final project plans to ensure structural and site stability. The final plans approved by the consultants shall be in substantial conformance with the plans approved by the Commission relative to construction, foundations, grading, and drainage. Any substantial changes to the proposed development approved by the Commission that may be recommended by the consultants shall require an amendment to the permit or a new coastal permit.

As discussed above, the applicant's engineering consultants have indicated that the proposed development will serve to ensure relative geologic and structural stability on the subject site. However, the proposed development is located on a bluff top parcel that is subject to erosion. The Commission finds that because there remains some inherent risk in building on sites adjacent to a coastal bluff, such as the subject site, and due to the fact that the proposed project is located in an area subject to an extraordinary potential for damage or destruction from wild fire, the Commission can only approve the project if the applicant assumes the liability from the associated risks as required by **Special Condition Two (2)**. The assumption of risk will show that the applicant is aware of and appreciates the nature of the hazards that exist on the site and that may adversely affect the stability or safety of the proposed development. In addition, the Commission finds it necessary to impose **Special Condition Four (4)**, as required by Malibu LUP Policy 4.42. **Special Condition Four (4)** requires the applicant to record a deed restriction that imposes the terms and conditions of this permit as restrictions on use and enjoyment of the property and provides any prospective purchaser of the site with recorded notice that the restrictions are imposed on the subject property.

The Commission also finds that the minimization of site erosion will add to the stability of the site. In addition, the Malibu LCP requires that graded and disturbed areas be revegetated to minimize erosion. Erosion can best be minimized by requiring the applicant to landscape all disturbed and graded areas of the site with native plants compatible with the surrounding environment. Invasive and non-native plant species are typically characterized as having a shallow root structure in comparison with their high surface/foliage weight and/or require a greater amount of irrigation and maintenance than native vegetation. The Commission finds that non-native and invasive plant species with high surface/foliage weight and shallow root structures do not serve to stabilize bluff slopes and bluff top areas and that instead such vegetation adversely affects the geologic stability of the project site. In comparison, the Commission finds that native plant species are typically characterized not only by a well developed and extensive root structure in comparison to their surface/foliage weight, which helps to stabilize the soils, but also by their low irrigation and maintenance requirements. Malibu

LCP policy 3.119 requires that landscaping for erosion control purposes consist entirely of native or drought-tolerant non-invasive plants. Within Zone A, as designated on the fuel modification plan, non-invasive ornamental plants are acceptable. Typically, Zone A is a 20 foot irrigated zone immediately surrounding the structure. Therefore, in order to ensure the stability and geotechnical safety of the site, **Special Condition Five (5)** requires that all proposed disturbed and graded areas on subject site are stabilized with native and limited non-invasive ornamental vegetation. However, the Commission also notes that landscaping improvements which require intensive watering requirements, such as many lawn and turf species, will result in potential adverse effects to the stability of the bluff slope due to increased groundwater infiltration on the subject site. Therefore, in order to ensure stability of the bluff slope, Special Condition Five (5) also requires that permanent irrigation improvements, included as part of the landscaping plan for the subject site, shall be designed to minimize groundwater infiltration and shall be primarily limited to drip irrigation systems. No permanent irrigation shall be allowed within 50 ft. of the landward edge of the top of the bluff or on the bluff slope itself.

The project will increase the amount of impervious coverage on-site, which may increase both the quantity and velocity of stormwater runoff. If not controlled and conveyed off-site in a non-erosive manner, this runoff will result in increased erosion, adversely affect site stability, and degrade downslope water quality. The applicant's geologic / geotechnical consultant has recommended that site drainage be collected and distributed in a non-erosive manner. In addition, the Malibu LCP Policy 4.10 requires that "new development shall provide adequate drainage and erosion control facilities that convey site drainage in a non-erosive manner in order to minimize hazards resulting from increased runoff, erosion and other hydrologic impacts to streams". Therefore, to ensure that drainage is conveyed off site in a non-erosive manner, the Commission finds that it is necessary to require the applicant, as required by **Special Condition Six (6)**, to prepare and implement drainage and polluted runoff management plans for the construction and post-construction phases of development that are prepared by the consulting engineer.

Furthermore, to ensure that excess excavated material is moved off site so as not to contribute to unnecessary landform alteration and to minimize erosion and sedimentation from stockpiled excavated soil, the Commission finds it necessary to require the applicant to dispose of the material at an appropriate disposal site or to a site that has been approved to accept fill material, as specified in **Special Condition Seven (7)**. In order to ensure that vegetation clearance for fire protection purposes does not occur prior to commencement of grading or construction of the proposed structures, the Commission finds that it is necessary to impose a restriction on the removal of natural vegetation as specified in **Special Condition Eight (8)**. This restriction specifies that natural vegetation shall not be removed until grading or building permits have been secured and construction of the permitted structures has commenced. The limitation imposed by Special Condition Eight (8) avoids loss of natural vegetative coverage resulting in unnecessary erosion in the absence of adequately constructed drainage and run-off control devices and implementation of the landscape and interim erosion control plans.

In addition, in order to ensure that no additions or improvements are made to the property without due consideration of potential hazards, which would conflict with the requirement of Malibu LUP Policy 4.2 to minimize the risks associated with development, the Commission finds it necessary to require a future development restriction, which requires the applicant to obtain an amended or new coastal permit if additions or improvements to the site are proposed in the future, as detailed in **Special Condition Three (3)**.

Therefore, the Commission finds that the proposed project, as conditioned, is consistent with the applicable policies of Chapter 4 (Hazards and Shoreline/Bluff Development) of the Malibu LUP, including Section 30253 of the Coastal Act, which is incorporated as part of the LUP, and applicable standards of Chapter 9 (Hazards) and Chapter 10 (Shoreline and Bluff Development) of the Malibu LIP.

## **D. Visual Resources**

The Malibu LCP provides for the protection of scenic and visual resources, including views of the beach and ocean, views of mountains and canyons, and views of natural habitat areas. The LCP identifies Scenic Roads, which are those roads within the City that traverse or provide views of areas with outstanding scenic quality, or that contain striking views of natural vegetation, geology, and other unique natural features, including the beach and ocean. The LCP policies require that new development not be visible from scenic roads or public viewing areas. Where this is not feasible, new development must minimize impacts through siting and design measures. In addition, development is required to preserve bluewater ocean views by limiting the overall height and siting of structures where feasible to maintain ocean views over the structures. Where it is not feasible to maintain views over the structure through siting and design alternatives, view corridors must be provided in order to maintain an ocean view through the project site.

Section 30251 of the Coastal Act requires that visual qualities of coastal areas shall be considered and protected, landform alteration shall be minimized, and where feasible, degraded areas shall be enhanced and restored. Section 30251 of the Coastal Act, which is incorporated as part of the Malibu LCP, states that:

***The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinated to the character of its setting.***

In addition, the following LCP policies are applicable in this case:

- 6.1     *The Santa Monica Mountains, including the City, contain scenic areas of regional and national importance. The scenic and visual qualities of these areas shall be protected and, where feasible, enhanced.***
- 6.2     *Places on and along public roads, trails, parklands, and beaches that offer scenic vistas are considered public viewing areas. Existing public roads where there are views of the ocean and other scenic areas are considered Scenic Roads. Public parklands and riding and hiking trails which contain public viewing areas are shown on the LUP Park Map. The LUP Public Access Map shows public beach parks and other beach areas accessible to the public that serve as public viewing areas.***
- 6.3     *Roadways traversing or providing views of areas of outstanding scenic quality, containing striking views of natural vegetation, geology, and other unique***

*natural features, including the ocean shall be considered Scenic Roads. The following roads within the City are considered Scenic Roads:*

- *Pacific Coast Highway*
- *Decker Canyon Road*
- *Encinal Canyon Road*
- *Kanan Dume Road*
- *Latigo Canyon Road*
- *Corral Canyon Road*
- *Malibu Canyon Road*
- *Tuna Canyon Road*

- 6.4 *Places on, along, within, or visible from scenic roads, trails, beaches, parklands and state waters that offer scenic vistas of the beach and ocean, coastline, mountains, canyons and other unique natural features are considered Scenic Areas. Scenic Areas do not include inland areas that are largely developed or built out such as residential subdivisions along the coastal terrace, residential development inland of Birdview Avenue and Cliffside Drive on Point Dume, or existing commercial development within the Civic Center and along Pacific Coast Highway east of Malibu Canyon Road.*
- 6.5 *New development shall be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent. If there is no feasible building site location on the proposed project site where development would not be visible, then the development shall be sited and designed to minimize impacts on scenic areas visible from scenic highways or public viewing areas, through measures including, but not limited to, siting development in the least visible portion of the site, breaking up the mass of new structures, designing structures to blend into the natural hillside setting, restricting the building maximum size, reducing maximum height standards, clustering development, minimizing grading, incorporating landscape elements, and where appropriate, berming.*
- 6.6 *Avoidance of impacts to visual resources through site selection and design alternatives is the preferred method over landscape screening. Landscape screening, as mitigation of visual impacts shall not substitute for project alternatives including resiting, or reducing the height or bulk of structures.*
- 6.7 *The height of structures shall be limited to minimize impacts to visual resources. The maximum allowable height, except for beachfront lots, shall be 18 feet above existing or finished grade, whichever is lower. On beachfront lots, or where found appropriate through Site Plan Review, the maximum height shall be 24 feet (flat roofs) or 28 feet (pitched roofs) above existing or finished grade, whichever is lower. Chimneys and rooftop antennas may be permitted to extend above the permitted height of the structure.*
- 6.15 *Fences, walls, and landscaping shall not block views of scenic areas from scenic roads, parks, beaches, and other public viewing areas.*
- 6.18 *For parcels on the ocean side of and fronting Pacific Coast Highway, Malibu Road, Broad Beach Road, Birdview Avenue, or Cliffside Drive where it is not feasible to design a structure located below road grade, new development shall provide a view corridor on the project site, that meets the following criteria:*

- *Buildings shall not occupy more than 80 percent maximum of the lineal frontage of the site.*
- *The remaining 20 percent of lineal frontage shall be maintained as one contiguous view corridor.*
- *No portion of any structure shall extend into the view corridor.*
- *Any fencing across the view corridor shall be visually permeable and any landscaping in this area shall include only low-growing species that will not obscure or block bluewater views.*
- *In the case of development that is proposed to include two or more parcels, a structure may occupy up to 100 percent of the lineal frontage of any parcel(s) provided that the development does not occupy more than 70 percent maximum of the total lineal frontage of the overall project site and that the remaining 30 percent is maintained as one contiguous view corridor.*

**6.23** *Exterior lighting (except traffic lights, navigational lights, and other similar safety lighting) shall be minimized, restricted to low intensity fixtures, shielded, and concealed to the maximum feasible extent so that no light source is directly visible from public viewing areas. Night lighting for sports courts or other private recreational facilities in scenic areas designated for residential use shall be prohibited.*

In addition, the Malibu LIP contains several provisions regarding scenic and visual resources:

**6.5 (A) Development Siting**

- 1.** *New development shall be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent. If there is no feasible building site location on the proposed project site where development would not be visible, then the development shall be sited and designed to minimize impacts on scenic areas visible from scenic highways or public viewing areas, through measures including, but not limited to, siting development in the least visible portion of the site, breaking up the mass of new structures, designing structures to blend into the natural hillside setting, restricting the building maximum size, reducing maximum height standards, clustering development, minimizing grading, incorporating landscape elements, and where appropriate, berming.*
- 2.** *Where there is no feasible alternative that is not visible from scenic highways or public viewing areas, the development area shall be restricted to minimize adverse impacts on views from scenic highways or public viewing areas.*
- 3.** *Avoidance of impacts to visual resources through site selection and design alternatives is the preferred method over landscape screening. Landscape screening, as mitigation of visual impacts shall not substitute for project alternatives including resiting, or reducing the height or bulk of structures.*
- 4.** *New development, including a building pad, if provided, shall be sited on the flattest area of the project site, except where there is an alternative location that would be more protective of visual resources or ESHA.*

**6.5 (B) Development Design**

- 1.** *The height of structures shall be limited to minimize impacts to visual resources. The maximum allowable height, except for beachfront lots, shall be 18 feet above existing or finished grade, whichever is lower. On beachfront lots, or where found*

*appropriate through Site Plan Review, pursuant to Section 13.27 of the Malibu LIP the maximum height shall be 24 feet (flat roofs) or 28 feet (pitched roofs) above existing or finished grade, whichever is lower. Chimneys and rooftop antennas may be permitted to extend above the permitted height of the structure.*

- 2. The length of on-site roads or driveways shall be minimized, except where a longer road or driveway would allow for an alternative building site location that would be more protective of visual resources or ESHA. Driveway slopes shall be designed to follow the natural topography. Driveways that are visible from a scenic highway, a beach, a public viewing area, or public hiking trail shall be a neutral color that blends with the surrounding landforms and vegetation.*
- 3. Retaining walls visible from scenic highways, public viewing areas, trails, parks, and beaches should incorporate veneers, texturing and/or colors that blend with the surrounding earth materials or landscape.*
- 4. Fences, walls, and landscaping shall not block views of scenic areas from scenic roads, parks, beaches, and other public view areas.*
- 5. New development in scenic areas visible from scenic roads or public viewing areas shall incorporate colors and exterior materials that are compatible with the surrounding landscape.*

#### **6.5 (E) Ocean Views**

*New development on parcels located on the ocean side of public roads, including but not limited to, Pacific Coast Highway, Malibu Road, Broad Beach Road, Birdview Avenue, Cliffside Drive shall protect public ocean views.*

- 1. Where the topography of the project site descends from the roadway, new development shall be sited and designed to preserve bluewater ocean views over the approved structures by incorporating the following measures.*
  - a. Structures shall extend no higher than the road grade adjacent to the project site, where feasible.*
  - b. Structures shall not exceed one story in height, as necessary, to ensure bluewater views are maintained over the entire site.*
  - c. Fences shall be located away from the road edge and fences or walls shall be no higher than adjacent road grade, with the exception of fences that are composed of visually permeable design and materials.*
  - d. The project site shall be landscaped with native vegetation types that have a maximum growth height at maturity and are located such that landscaping will not extend above road grade.*

In this case, Pacific Coast Highway (PCH) lies adjacent to the subject bluff top lot and is recognized as a “scenic highway” in the Malibu LCP. Pacific Coast Highway is a major coastal access route, not only utilized by local residents, but also heavily used by tourists and visitors to access several public beaches located in the surrounding area which are only accessible from Pacific Coast Highway. Public views of the ocean and water from Pacific Coast Highway have been substantially reduced, or completely blocked, in many areas by the construction of single-family residences, privacy walls, fencing, landscaping, and other residential related development between Pacific Coast Highway and the ocean.

Given the topography and location of the project site, there is a potential for impacts to public views from PCH across the project site to the ocean. Section 6.5(B)(1) of the LIP specifies that the maximum allowable height of structures shall be 18 feet above existing or finished grade, whichever is lower. However, where found appropriate through Site Plan Review, the maximum height may be increased to 24 feet (flat roofs) or 28 feet (pitched roofs) above existing or finished grade, whichever is lower. Site Plan Review (pursuant to Section 13.27 of the LIP), provides for the consideration of one of seven specific deviations from development standards required by the LCP, so long as certain findings can be made. Thus, in this case, an increase in height over 18 feet may be approved if found appropriate through the Site Plan Review process and when considered concurrently with a coastal development permit application. Section 6.5(E)(1)(b) of the LIP specifies that where a project site on the ocean side of a public road such as PCH descends from the roadway, new structures shall not exceed one story in height, as necessary, to ensure bluewater views are maintained over the entire site.

The proposed residence is primarily one-story and 18 feet in height, however a portion of the residence is two-story and 22 feet in height (flat roof). Including all architectural projections, approximately 72 percent of the structure area is one-story and 18 feet in height, and approximately 28 percent of the structure area is two-story and exceeds 18 feet in height. The residence is situated about 320 feet away from PCH on a gently descending slope. The elevation of PCH at the development area is approximately 163 feet above sea level. The one-story portion of the structure is 18 feet above finished grade and the roofline is at an elevation that ranges between 142 and 146 feet. The highest roof elevation of the proposed residence (which is 22 feet above finished grade for the eastern, two-story portion of the structure) is at an elevation of approximately 147.5 feet. Therefore, the one-story portion of the proposed residence is 17 to 21 feet below road grade and the two-story portion is 16 feet below the road grade of PCH (**Exhibits 8, 10-11**).

Commission staff reviewed the project plans as well as story poles placed on the property to depict the height and location of the structure. Staff's review indicates that given that the top of the proposed development will be significantly below road grade (consistent with LIP Section 6.5(E)1.a), bluewater ocean views would be maintained over the entire site (consistent with LIP Section 6.5(E)). Further, the proposed development has been clustered in the center of the property, leaving corridors along both sides of the property that maximize bluewater views across the site. While a portion of the proposed residence exceeds one-story and 18 feet in height, this 22-foot high second story portion of the residence will be 16 feet below the road grade and will not significantly reduce or obstruct bluewater views as seen from PCH. The proposed wooden trellis attached to the west side of the residence is 18 feet high and 15 feet wide. The trellis does not exceed the height or elevation of the residence, nor pose a significant bluewater view obstruction. Additionally, review of approved residences on adjacent parcels indicates that the proposed residential project is similar in scale and height and conforms to the character of the neighborhood, as required by Public Resources Code Section 30251, which is incorporated into Chapter 6 of the Malibu LUP. Therefore, the residential structure has been sited and designed to avoid impacts to bluewater views to the maximum feasible extent, consistent with Malibu LUP Policy 6.5.

Section 6.5 (B) (5) of the Malibu LIP requires new development in scenic areas visible from scenic roads or public viewing areas to incorporate colors and exterior materials that are compatible with the surrounding landscape. The proposed project is located in a scenic area and will be visible from a scenic highway. Therefore, in order to ensure that the proposed project is consistent with the requirements of the Malibu LCP, the Commission requires the

applicant to use colors compatible with the surrounding environment and non-glare glass, consistent with Section 6.5 (B) (5) of the Malibu LIP, as detailed by **Special Condition Ten (10)**.

Section 13.6.4(D)(4) of the LIP requires that a coastal development permit application shall be accompanied by a site plan that shows major natural and man-made landscape features, including location, type, size, and quantification of acreage of any trees or other vegetation to be planted or removed by the proposed project. Section 6.5(B)(4) of the LIP specifies that fences, walls, and landscaping shall not block views of scenic areas from scenic roads, parks, beaches, and other public view areas. Additionally, Section 6.5(E)(1) of the LIP requires that the project site shall be landscaped with native vegetation types that have a maximum growth height at maturity and are located such that landscaping will not extend above road grade.

As discussed previously, a court-approved Settlement Agreement exists between the City of Malibu and the applicant that contains a specific landscaping condition for development on the subject property. The landscaping condition per the Settlement Agreement relied upon the landscape plan approved by the Coastal Commission in 1998 per CDP No. 4-98-163 as a basis for the approved tree locations on the site and the assigned height limits for the individual trees, as well as height parameters for all other landscape vegetation. The landscaping condition in the Settlement Agreement reads as follows:

***All landscaped areas shall be planted and maintained in accordance with Exhibit A, attached hereto and made a part hereof. Applicants are allowed to eliminate or reduce the size of the landscaping but not plant additional landscaping or trees in excess of specified heights. No landscaping which blocks bluewater ocean views shall be maintained in the view corridors depicted on Exhibit A, except for those 10-foot-high trees depicted in pink on Exhibit A. Consistent with CDP 4-98-163, except as otherwise provided herein, all landscaping outside the view corridors on site shall be limited to 18 feet in height or the centerline elevation of Pacific Coast Highway (elevation 163.28' by survey), whichever is lower. Vegetation within 15 feet of Pacific Coast Highway shall be limited to no more than 2 feet in height. Prior to the issuance of a building permit, final landscape plans shall be submitted for review and approval by the Planning Manager and/or City Biologist. Failure to comply with the landscaping conditions is a violation of these Conditions of Approval. Landscaping shall be used to soften views of the structure as seen from Pacific Coast Highway and surrounding properties. Plant species shall be approved by the City Biologist in advance and shall be ones that will not grow higher than the maximum height allowed in accordance with Exhibit A and the approved landscaping plan.***

Exhibit A referenced above is a plan view of the site that shows the trees that are allowed, their exact location, and the maximum height allowed for each. This exhibit had served as the applicant's landscape plan that was reviewed and conditionally approved by the City of Malibu on July 6, 2006. The Commission found at the substantial issue determination hearing on the subject appeal in November 2006 that project landscaping, as approved by the City and restricted per the Settlement Agreement, raised a substantial issue regarding conformance with the scenic/visual resource policies of the Malibu LCP.

On January 8, 2007, the applicant submitted to Commission staff a more detailed landscape planting plan for the proposed project site, prepared by a licensed landscape architect. The plan specified plant species, location, and maximum mature size for all landscaping proposed on the project site, consistent with the provisions of the City's Settlement Agreement landscape

condition. Several of the tree species proposed on the January 8, 2007 landscape plan had a maximum growth height at maturity that would exceed the maximum height allowed under the Settlement Agreement and would exceed the road grade at Pacific Coast Highway. Commission staff reviewed the January 8, 2007 landscaping planting plan and analyzed how the proposed landscaping would impact bluewater views across the site. The site descends seaward from PCH and review of cross-section drawings indicated that while the maximum height of all landscape plan trees are situated below road grade (by 3 feet at the closest point) at their maximum height allowed by the Settlement Agreement, the majority of the proposed trees would exceed the maximum elevation of the residence by up to 13 feet and would significantly reduce public views of the ocean from PCH. As mentioned previously, the de novo review of the project was originally scheduled for the February 2007 Commission meeting and staff had recommended that the Commission condition the project to require that the landscape plan be revised to reduce the height of vegetation on the site so as to not obstruct bluewater views. However, the hearing was postponed. The applicant wished to provide staff with a revised landscape plan in addition to a visual representation, in the form of story poles, of the proposed location and height of several representative landscaping trees on the project site.

The applicant submitted to Commission staff a revised landscape planting plan for the proposed project site on March 22, 2007 to address visual impact concerns raised by staff in February. While the locations of landscape planting remain the same, the revised landscape plan includes several changes regarding proposed tree species and size reduction of certain trees. The applicant proposes to further restrict ten of the previously proposed maximum 18-ft. tall trees that are located closest to Pacific Coast Highway to a maximum of 16-ft. tall. In addition, the revised landscape plan specifies tree and shrub species that have a natural growth height range that does not exceed the maximum height proposed, with the exception of six tree species proposed for the trees that would be a maximum of 18-ft. tall. The six tree species proposed may naturally surpass the maximum height proposed at maturity, but the applicant proposes to containerize these species in order to maintain the trees at the maximum height of 18 feet.

Commission staff reviewed the revised landscaping planting plan and analyzed how the proposed landscaping would impact bluewater views across the site. On March 20, 2007 Commission staff visited the project site to view story poles that were placed by the applicant's surveyor of a representative sample of proposed landscape trees on the site. The selected story pole trees are highlighted and numbered on the applicant's revised landscape plan, included as Exhibit 13. The story pole trees include two 18-ft. tall trees (# 3 and 4), located nearer the proposed residence, as well as five other trees (# 1, 2, 5-7), located closest to Pacific Coast Highway and spread out across the property, that are proposed to be no taller than 16-ft. in height. Photographs of the story poles are included as Exhibit 12.

As can be seen from the story pole photographs, the two story-poled 18-ft. high trees (# 3 and 4) appear to exceed the height of the 18-ft. tall portion of the proposed residence, yet remain in line with the 22-ft. tall portion of the residence. As such, additional bluewater views beyond that of a majority of the residential structure (18-ft. high) may be obstructed. However, the five other story-poled trees are 16-ft. in height and do not obstruct additional bluewater views beyond that of the residence. Since the site descends seaward from PCH, staff has found that 18-ft. tall vegetation nearest and at grade with the proposed residence would not exceed the height of the 18-ft. tall portion of the residence. All other vegetation upslope from the residence must progressively reduce in height as the site ascends from the residence towards Pacific Coast Highway in order to maintain an unobstructed cone of vision for public views of the ocean.

Section 6.5 (E) of the Malibu LIP requires that new development, including landscaping, be sited and designed to preserve bluewater ocean views. The design standard for landscaping that is included in this LIP section specifies that landscaping shall not extend above road grade at maximum growth height. It is important to note that this is the maximum standard, and in this case, that standard does not serve to preserve bluewater ocean views or minimize impacts to scenic resources in some areas of the site consistent with LIP Section 6.5 (E). In order to preserve bluewater views from PCH to the maximum extent feasible, the Commission finds that all site landscaping, including trees, fencing and walls, shall be limited in height and not block or adversely impact public views of the ocean from the highway, as detailed in **Special Condition Five (5)**. Special Condition Five (5) requires that vegetation located south of the Fire Department turnaround driveway segment (indicated as Zone D on Exhibit 13) shall be limited to no more than 18 ft. in height; vegetation between the Fire Department turnaround driveway segment and a line 100 ft. south of the property line at Pacific Coast Highway (Zone C as shown on Exhibit 13) shall be limited to no more than 16 ft. in height; vegetation between 100 ft. and 30 ft. south of the property line at Pacific Coast Highway (Zone B as shown on Exhibit 13) shall be limited to no more than 12 ft. in height; and vegetation within 30 ft. of the property line at Pacific Coast Highway (Zone A as shown on Exhibit 13) shall not exceed road grade, except that ground-cover that is no higher than six inches may be planted immediately adjacent to the property line at Pacific Coast Highway. Special Condition Five (5) requires the applicant to prepare and implement a revised detailed landscaping plan, for the review and approval by the Executive Director, that identifies the species, extent, and location of all plant materials and that incorporates the above-mentioned height criteria.

While most of the applicant's proposed tree species have a natural growth height range that does not exceed the maximum height allowed by the City's Settlement Agreement, six of them would require containerization to ensure that they do not exceed the maximum height of 18 feet. The applicant would like the option of using those species as well. While containerization may be suitable for species that have a natural height range that does not exceed the maximum allowable height, containerization can be problematic for species that naturally exceed the maximum height. Roots can either break free from the container and continue to grow in-ground, or encircle the soil ball when they reach the confines of the container, leading to eventual strangulation of the tree. However, above-ground containerization of appropriate tree species can be a suitable environment for plant growth and would not likely exceed their allowable height. Therefore, to ensure that landscape plant materials proposed for the subject property can adequately maintain their allowable height in order to preserve bluewater views, Special Condition Five (5) also specifies that all landscape vegetation must have a natural growth height range that does not exceed the specified maximum height at maturity, with the exception of appropriate containerized specimen trees that shall be above-ground and maintained to not exceed the specified maximum height for each landscape zone. To ensure that other landscape elements, such as fencing and walls, do not obstruct additional bluewater views, Special Condition 5 requires that fencing and walls be indicated on the revised, final landscape plan and shall not exceed road grade. As conditioned to prepare and implement a revised landscaping plan consistent with the provisions described above, the Commission finds that the landscaping of the site will maintain bluewater views, thereby minimizing impacts to visual resources from a scenic highway, consistent with the policies and provisions of the Malibu LCP.

In addition to impacts from structures and landscaping, the Commission has found that night lighting of areas in the Malibu / Santa Monica Mountains area creates a visual impact to nearby scenic beaches, scenic roads, parks, and trails. In addition, night lighting may alter or disrupt

feeding, nesting, and roosting activities of native wildlife species. Policy 6.23 of the Malibu LCP specifically restricts exterior lighting to be minimized and restricted to low intensity fixtures, shielded, and concealed to the maximum extent feasible so that no light source is directly visible from public viewing areas such as Pacific Coast Highway or the beach and ocean area in order to eliminate the adverse individual and cumulative visual impacts associated with the lighting of such areas visible from public areas. In order to mitigate any potential future visual and environmental impacts of the proposed project, and to be consistent with Malibu LCP Policy 6.23, the Commission finds it necessary to require that exterior lighting to be minimized and restricted to low intensity fixtures, shielded, and concealed to the maximum extent feasible so that no light source is directly visible from public viewing areas such as Pacific Coast Highway or the beach and ocean area, as specified in **Special Condition Eleven (11)**.

In addition, future construction on the property has the potential to negatively affect the visual character of the area as seen both from the beach and from Pacific Coast Highway. In order to ensure that no additions or improvements are made to the property without due consideration of the visual impacts, the Commission finds it necessary to require a future development restriction, which requires the applicant to obtain an amended or new coastal permit if additions or improvements to the site are proposed in the future, as detailed in **Special Condition Three (3)**. Finally, **Special Condition Four (4)** requires the applicant to record a deed restriction that imposes the terms and conditions of this permit as restrictions on use and enjoyment of the property and provides any prospective purchaser of the site with recorded notice that the restrictions are imposed on the subject property.

Therefore, the Commission finds that the proposed project, as conditioned, is consistent with the applicable policies of Chapter 6 (Scenic and Visual Resources) of the Malibu LUP, including Section 30251 of the Coastal Act, which is incorporated as part of the LUP, and applicable standards of Chapter 6 (Scenic, Visual, and Hillside Resources) of the Malibu LUP.

## **E. Water Quality**

The Commission recognizes that new development in Malibu and the Santa Monica Mountains has the potential to adversely impact coastal water quality through the removal of native vegetation, increase of impervious surfaces, increase of runoff, erosion, and sedimentation, introduction of pollutants such as petroleum, cleaning products, pesticides, and other pollutant sources, as well as effluent from septic systems.

The Malibu LCP incorporates Section 30231 of the Coastal Act, which states:

***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, minimizing alteration of natural streams.***

Further, the following LUP water quality policies are applicable:

- 3.100 *New development shall be sited and designed to minimize impacts to water quality from increased runoff volumes and nonpoint source pollution. All new development shall meet the requirements of the Los Angeles Regional Water Quality Control Board (RWQCB) in its the Standard Urban Storm Water Mitigation Plan For Los Angeles County And Cities In Los Angeles County (March 2000) (LA SUSMP) or subsequent versions of this plan.*
- 3.102 *Post-construction structural BMPs (or suites of BMPs) should be designed to treat, infiltrate, or filter the amount of stormwater runoff produced by all storms up to and including the 85<sup>th</sup> percentile, 24-hour storm event for volume-based BMPs and/or the 85<sup>th</sup> percentile, 1-hour storm event (with an appropriate safety factor, i.e. 2 or greater) for flow-based BMPs. This standard shall be consistent with the most recent Los Angeles Regional Water Quality Control Board municipal stormwater permit for the Malibu region or the most recent California Coastal Commission Plan for Controlling Polluted Runoff, whichever is more stringent.*
- 3.110 *New development shall include construction phase erosion control and polluted runoff control plans. These plans shall specify BMPs that will be implemented to minimize erosion and sedimentation, provide adequate sanitary and waste disposal facilities and prevent contamination of runoff by construction chemicals and materials.*
- 3.111 *New development shall include post-development phase drainage and polluted runoff control plans. These plans shall specify site design, source control and treatment control BMPs that will be implemented to minimize post-construction polluted runoff, and shall include the monitoring and maintenance plans for these BMPs.*
- 3.125 *Development involving onsite wastewater discharges shall be consistent with the rules and regulations of the L.A. Regional Water Quality Control Board, including Waste Discharge Requirements, revised waivers and other regulations that apply.*
- 3.126 *Wastewater discharges shall minimize adverse impacts to the biological productivity and quality of coastal streams, wetlands, estuaries, and the ocean. On-site treatment systems (OSTSs) shall be sited, designed, installed, operated, and maintained to avoid contributing nutrients and pathogens to groundwater and/or surface waters.*
- 3.127 *OSTSs shall be sited away from areas that have poorly or excessively drained soils, shallow water tables or high seasonal water tables that are within floodplains or where effluent cannot be adequately treated before it reaches streams or the ocean.*
- 3.128 *New development shall be sited and designed to provide an area for a backup soil absorption field in the event of failure of the first field.*
- 3.130 *Subsurface sewage effluent dispersal fields shall be designed, sited, installed, operated, and maintained in soils having acceptable absorption characteristics determined either by percolation testing, or by soils analysis, or by both. No subsurface sewage effluent disposal fields shall be allowed beneath nonporous paving or surface covering.*

- 3.131 New development shall include the installation of low-flow plumbing fixtures, including but not limited to flow-restricted showers and ultra-low flush toilets, and should avoid the use of garbage disposals to minimize hydraulic and/or organic overloading of the OSTs.**
- 3.132 New development may include a separate greywater dispersal system where approved by the Building Safety Department.**
- 3.133 The construction of private sewage treatment systems shall be permitted only in full compliance with the building and plumbing codes and the requirements of the LA RWQCB. A coastal development permit shall not be approved unless the private sewage treatment system for the project is sized and designed to serve the proposed development and will not result in adverse individual or cumulative impacts to water quality for the life of the project.**
- 3.138 New septic systems shall be sited and designed to ensure that impacts to ESHA, including those impacts from grading and site disturbance and the introduction of increased amounts of groundwater, are minimized. Adequate setbacks and/or buffers shall be required to protect ESHA and other surface waters from lateral seepage from the sewage effluent dispersal systems.**
- 3.141 Applications for a coastal development permit for OSTs installation and expansion, where groundwater, nearby surface drainages and slope stability are likely to be adversely impacted as a result of the projected effluent input to the subsurface, shall include a study prepared by a California Certified Engineering Geologist or Registered Geotechnical Engineer that analyzes the cumulative impact of the proposed OSTs on groundwater level, quality of nearby surface drainages, and slope stability. Where it is shown that the OSTs will negatively impact groundwater, nearby surface waters, or slope stability, the OSTs shall not be allowed.**

The project site is a vacant bluff top parcel located between Pacific Coast Highway and the Pacific Ocean. The proposed development will result in an increase in impervious surfaces, which in turn decreases the infiltrative function and capacity of existing permeable land on the project site. The reduction in permeable surface area therefore leads to an increase in the volume and velocity of stormwater runoff that can be expected to leave the site. The cumulative effect of increased impervious surface is that the peak water discharge is increased and the peak occurs much sooner after precipitation events. Additionally, grading, excavation and disturbance of the site from construction activities and runoff from impervious surfaces can result in increased erosion.

In addition, pollutants commonly found in runoff associated with new residential development 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 and organic matter; fertilizers, herbicides, and pesticides from household gardening; nutrients from wastewater discharge, and animal waste; and bacteria and pathogens from wastewater discharge and 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 provides food and cover for aquatic species; disruptions to

the reproductive cycle of aquatic species; acute and sublethal toxicity in marine organisms leading to adverse changes in reproduction and feeding behavior; and human diseases such as hepatitis and dysentery. 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.

The LCP water quality policies cited above are designed to protect water quality and prevent pollution of surface, ground, and ocean waters. The Malibu LCP requires the preparation of a Storm Water Management Plan (SWMP) for all projects that require a coastal development permit. A SWMP illustrates how the project will use appropriate site design and source control best management practices (BMPs) to minimize or prevent adverse effects of the project on water quality. Therefore, pursuant to the requirements of the Malibu LCP, and to ensure the proposed project will not adversely impact water quality or coastal resources, the Commission finds it necessary to require the preparation of a SWMP for the subject site, that utilizes site design, source control and treatment control BMPs, as specified in **Special Condition Six (6)**.

Furthermore, erosion control and storm water pollution prevention measures implemented during construction will serve to minimize the potential for adverse impacts to water quality resulting from runoff during construction. The Malibu LCP requires that a Local Storm Water Pollution Prevention Plan (SWPPP) be prepared for all development that requires a Coastal Development Permit and a grading or building permit, and it be applied to the construction phase of the project. The SWPPP includes measures and BMPs to prevent erosion, sedimentation and pollution of surface and ocean waters from construction and grading activities. In this case, the proposed project does involve grading and construction that requires grading and building permits. Therefore, pursuant to the Malibu LCP and to ensure the proposed development does not adversely impact water quality or coastal resources during the construction phase of the project, the Commission finds it necessary to require the applicant to submit a Local SWPPP for the subject site, consistent with the requirements specified in **Special Condition Six (6)**.

Finally, the proposed development includes the construction of a new alternative on-site wastewater treatment system (OSTS) to serve the residence. The Malibu LCP includes a number of policies and standards relative to the design, siting, installation, operation and maintenance of OSTs to ensure these systems do not adversely impact coastal waters. The proposed OSTs was previously reviewed and approved in concept by the City of Malibu Environmental Health Department, determining that the system meets the requirements of the plumbing code. The Commission has found that conformance with the provisions of the plumbing code is protective of resources.

In addition, in order to ensure the OSTs is maintained and monitored in the future to prevent system failures or inadequate system performance, the Malibu LCP includes policies and standards requiring the regular maintenance and monitoring of the OSTs. Therefore, the Commission finds that it is necessary to require the applicant to submit verification that they have obtained a monitoring, operation and maintenance permit from the City, as outlined in **Special Condition Nine (9)**.

Finally, the City of Malibu Environmental Health Department has given in-concept approval of the proposed septic system, determining that the system meets the requirements of the plumbing code. The Commission has found that conformance with the provisions of the plumbing code is protective of resources.

The Commission finds that based on the above findings, the proposed project, as conditioned, will not result in adverse impacts to water quality and is consistent with the applicable policies of the Malibu LCP. The Commission has found in past permit actions that conformance with the provisions of the plumbing, health, and safety codes is protective of resources and serves to minimize any potential for wastewater discharge that could adversely impact coastal waters. Therefore, the Commission finds that the proposed project, as conditioned to incorporate and maintain a drainage and polluted runoff control plan, is consistent with the applicable policies of Chapter 3 (Marine and Land Resources) of the Malibu LUP, including Section 30231 of the Coastal Act, which is incorporated as part of the LUP, and applicable standards of Chapter 17 (Water Quality Protection) and Chapter 18 (Onsite Wastewater Disposal System Standards) of the Malibu LUP.

## **F. Archaeological Resources**

LUP Policy 5.60 of the Malibu LCP states that:

***New development shall protect and preserve archaeological, historical and paleontological resources from destruction, and shall avoid and minimize impacts to such resources.***

In addition, LUP Policy 5.63 of the Malibu LCP states that:

***Coastal Development Permits for new development within archaeologically sensitive areas shall be conditioned upon the implementation of the appropriate mitigation measures.***

Archaeological resources are significant to an understanding of cultural, environmental, biological, and geological history. The proposed development is located in a region of the Santa Monica Mountains that contains one of the most significant concentrations of archaeological sites in southern California. The Malibu LCP requires the protection of such resources to reduce the potential adverse impacts through the use of reasonable mitigation measures.

Degradation of archaeological resources can occur if a project is not properly monitored and managed during earth moving activities and construction. Site preparation can disturb and/or obliterate archaeological materials to such an extent that the information that could have been derived would be permanently lost. In the past, numerous archaeological sites have been destroyed or damaged as a result of development. As a result, the remaining sites, even though often less rich in materials, have become increasingly valuable as a resource. Further, because archaeological sites, if studied collectively, may provide information on subsistence and settlement patterns, the loss of individual sites can reduce the scientific value of the sites which remain intact.

Cultural resources in the form of a pre-historic Native American site, listed as CA-LAN-19 with the State of California, has been identified on the subject parcel. The identification was made in a Phase I cultural study by Dr. Chester King, dated June 14, 1997, entitled "Archaeological Reconnaissance and Recommendations for Archaeological Evaluation at 24900, 24910, and 24920 Pacific Coast Highway". Following research of previous studies in the immediate area

and an inspection of the test pits used for geologic and geotechnical investigations, Dr. Chester King concludes:

*“A large portion of the site has not been disturbed within the project area. My observations and available information indicate that construction activities will disturb prehistoric sites deposits which are present in the project area.”*

A Phase II (Test Phase) archaeological study of the subject site was conducted in 1999, consisting of the archaeological excavation of 29 shovel test probes and five 1 x 1 meter test pits located on different areas of the subject site. The “Phase II (Test Phase) Report of Archaeological Site CA-LAN-19”, dated December 1999, by E. Gary Stickel, PhD. of Environmental Research Archaeologists, concludes that the portion of CA-LAN-19 that extends onto the subject parcel has evidence of a site potentially with some significance. A mitigation program for the site was recommended by the consultant and subsequently contained in a Phase III Mitigation Report, dated July 2000, prepared by E. Gary Stickel, PhD. of Environmental Research Archaeologists. The consultant recommends that: (1) the driveway be capped with protective fill prior to construction, and (2) grading and excavation work in the northeastern portion of the building pad be monitored by a qualified archaeologist and a qualified Native American monitor.

The Commission notes that archaeological artifacts have been found on the subject site and that the proposed project may result in potential adverse effects to archaeological resources from grading and construction activity. As such, the Commission also notes that potential adverse effects may occur to those resources as a result of the proposed development and that, therefore, reasonable mitigation measures should be required pursuant to LUP Policy 5.63 of the Malibu LCP.

As previously discussed, the archaeological consultant recommended capping the driveway with protective fill prior to construction as part of the Phase III Mitigation Program to avoid damage to important cultural resources on the site. In order to ensure that potential adverse impacts to on-site archaeological/cultural resources are avoided, **Special Condition No. Twelve (12)** requires that this recommendation be implemented prior to commencement of construction operations. To ensure that capping work is implemented in a manner consistent with the recommendations of the consulting archaeologist, **Special Condition No. Thirteen (13)** requires that the applicant submit a final grading plan that includes detailed plans, including cross sections, of the capping measures for the review and approval of the Executive Director. To ensure that adverse effects to archaeological resources are minimized during the construction of the proposed development (and as recommended by the archaeological consultant), **Special Condition No. Twelve (12)** also requires that the applicant have a qualified archaeologist(s) and appropriate Native American consultant(s) present on-site during all grading, excavation and site preparation in order to monitor all earth moving operations. In addition, if any significant archaeological resources are discovered during construction, work shall be stopped and an appropriate data recovery strategy shall be developed by the applicant’s archaeologist and Native American consultant consistent with California Environmental Quality Act (CEQA) guidelines. This plan should be reviewed by the City of Malibu, unless they determine no review is required.

To ensure that any future potential adverse effects to the archaeological resources on-site are minimized, **Special Condition No. Three (3)** provides that any future development of the site

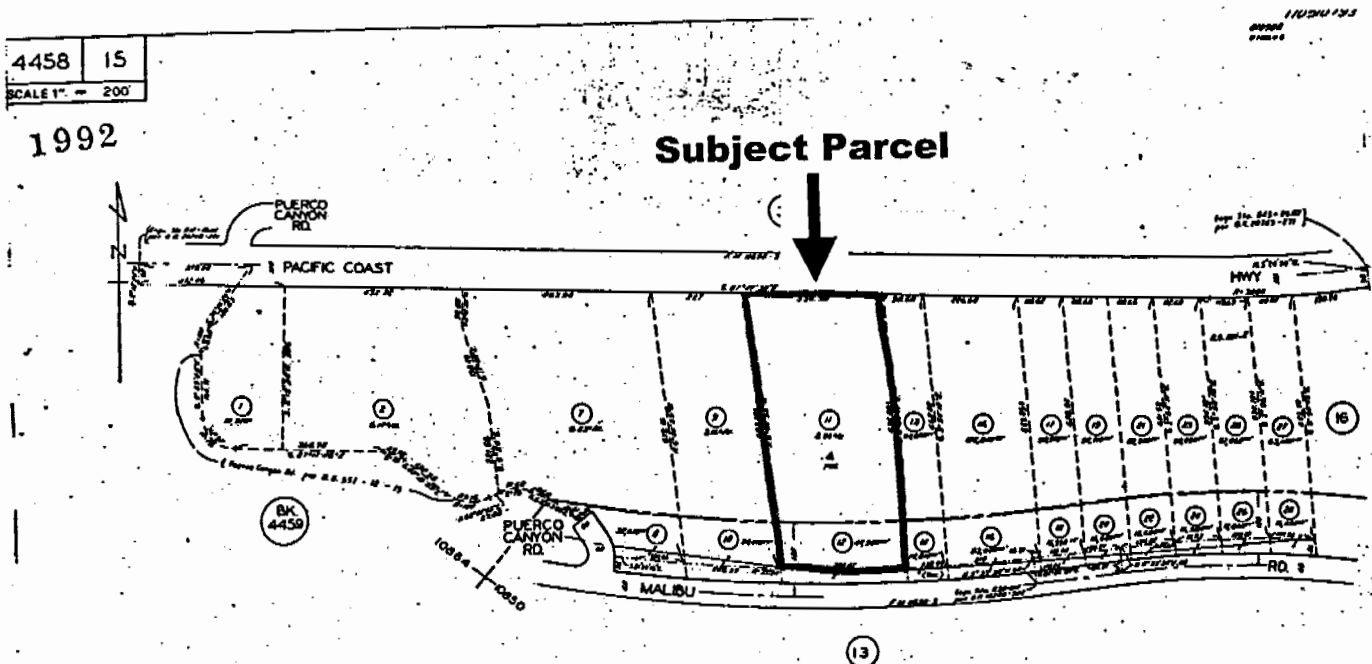
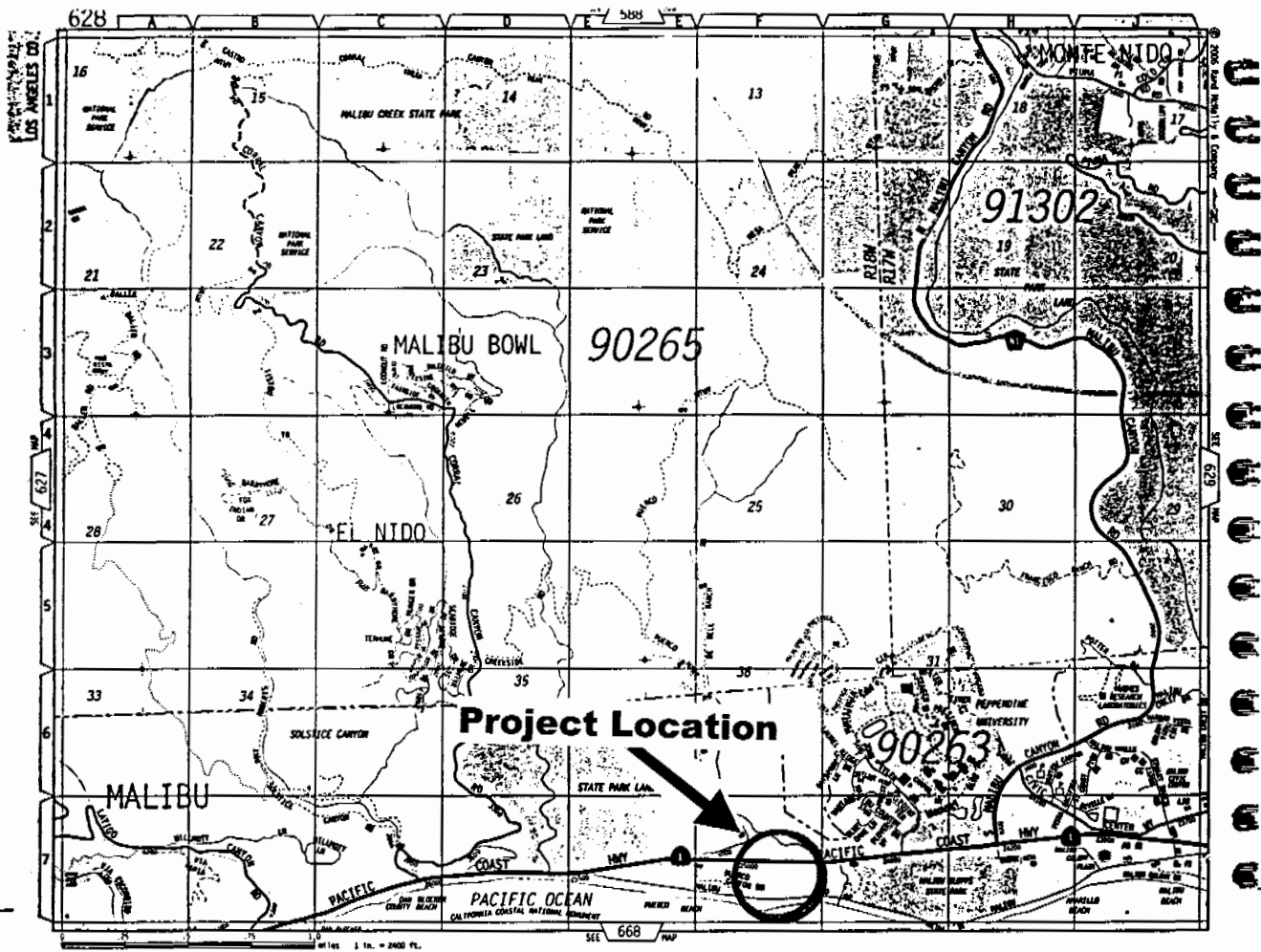
which might otherwise be exempt from permit requirements will require a coastal development permit.

Therefore, the Commission finds that the proposed development, as conditioned, is consistent with the archaeological/cultural resource policies of Chapter 5 of the Malibu LUP and the applicable development standards of Chapter 11 of the Malibu LIP.

## **G. California Environmental Quality Act**

Section 13096(a) of the Commission's administrative regulations requires Commission approval of a Coastal Development Permit application 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 which would substantially lessen any significant adverse effect that the activity may have on the environment.

The Commission incorporates its findings on Local Coastal Program consistency at this point as if set forth in full. These findings address and respond to all public comments regarding potential significant adverse environmental effects of the project that were received prior to preparation of the staff report. As discussed above, the proposed development, as conditioned, is consistent with the policies of the Certified Local Coastal Program. Feasible mitigation measures which will minimize all adverse environmental effects have been required as special conditions. As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, that would substantially lessen any significant adverse impact that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, can be found to be consistent with the requirements of the Coastal Act to conform to CEQA.

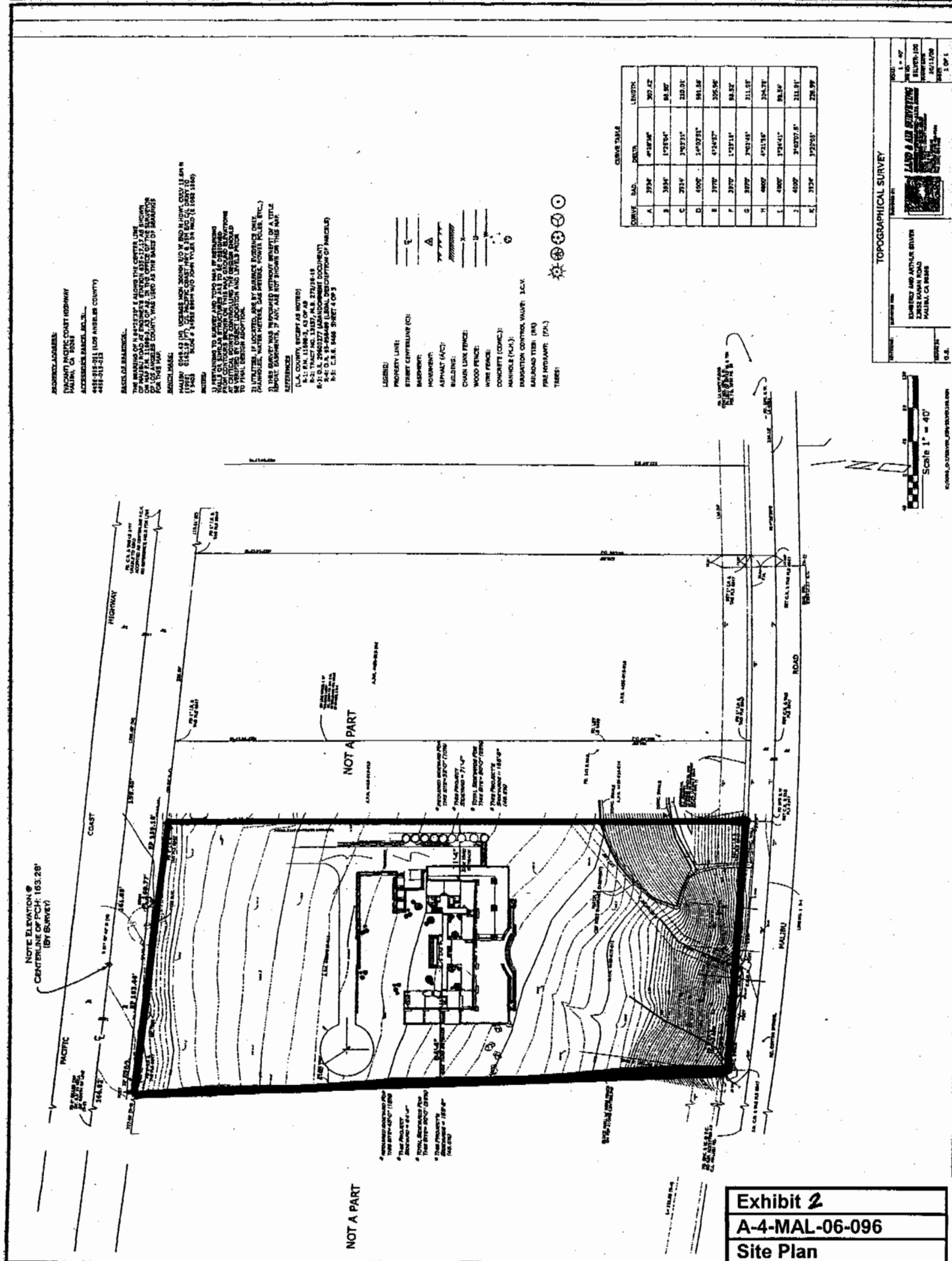


CODE  
10850  
10864

FOR PREV. ASSMT SEE:  
4454 - 15

LAND OF MATTHEW KELLER IN THE RANCHO  
TOPANGA MALIBU SEQUIT - R.F. 534

Exhibit 1  
A-4-MAL-06-096  
Vicinity and Parcel  
Map

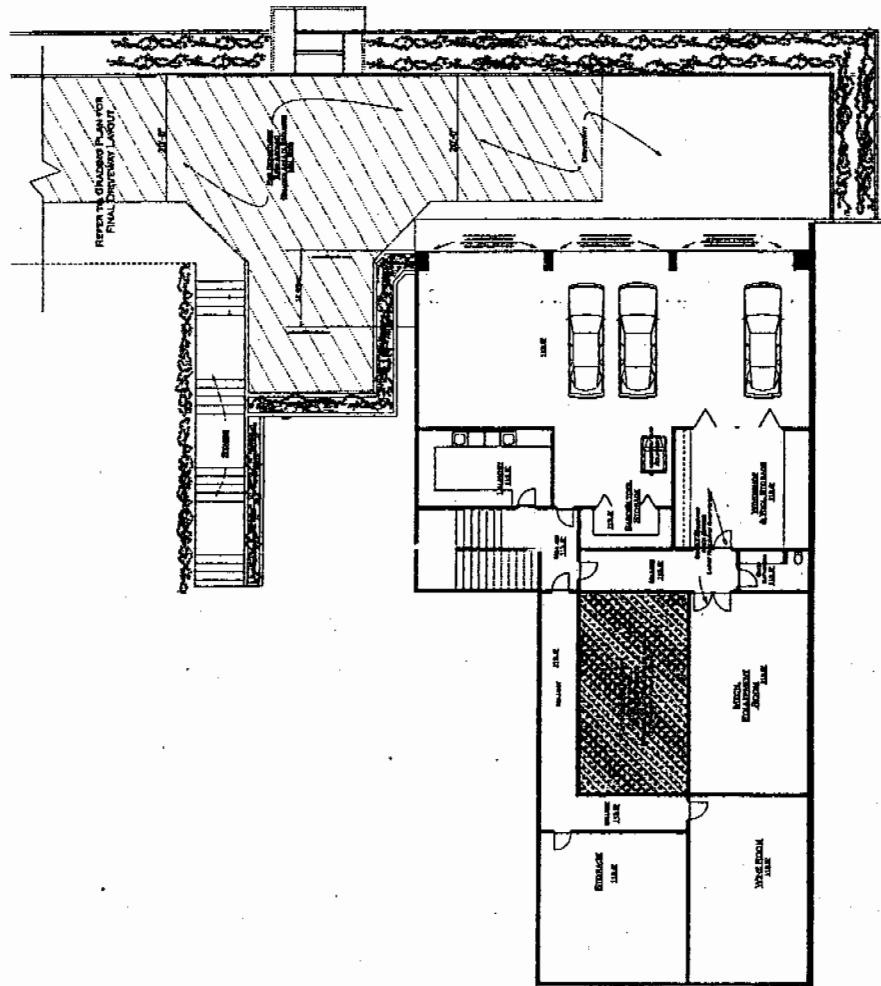


DATE	17/03/11
BY	20000
REVISION	
1	17/03/11
2	17/03/11
3	17/03/11
4	17/03/11
5	17/03/11
6	17/03/11
7	17/03/11
8	17/03/11
9	17/03/11
10	17/03/11
11	17/03/11
12	17/03/11
13	17/03/11
14	17/03/11
15	17/03/11
16	17/03/11
17	17/03/11
18	17/03/11
19	17/03/11
20	17/03/11
21	17/03/11
22	17/03/11
23	17/03/11
24	17/03/11
25	17/03/11
26	17/03/11
27	17/03/11
28	17/03/11
29	17/03/11
30	17/03/11
31	17/03/11
32	17/03/11
33	17/03/11
34	17/03/11
35	17/03/11
36	17/03/11
37	17/03/11
38	17/03/11
39	17/03/11
40	17/03/11
41	17/03/11
42	17/03/11
43	17/03/11
44	17/03/11
45	17/03/11
46	17/03/11
47	17/03/11
48	17/03/11
49	17/03/11
50	17/03/11
51	17/03/11
52	17/03/11
53	17/03/11
54	17/03/11
55	17/03/11
56	17/03/11
57	17/03/11
58	17/03/11
59	17/03/11
60	17/03/11
61	17/03/11
62	17/03/11
63	17/03/11
64	17/03/11
65	17/03/11
66	17/03/11
67	17/03/11
68	17/03/11
69	17/03/11
70	17/03/11
71	17/03/11
72	17/03/11
73	17/03/11
74	17/03/11
75	17/03/11
76	17/03/11
77	17/03/11
78	17/03/11
79	17/03/11
80	17/03/11
81	17/03/11
82	17/03/11
83	17/03/11
84	17/03/11
85	17/03/11
86	17/03/11
87	17/03/11
88	17/03/11
89	17/03/11
90	17/03/11
91	17/03/11
92	17/03/11
93	17/03/11
94	17/03/11
95	17/03/11
96	17/03/11
97	17/03/11
98	17/03/11
99	17/03/11
100	17/03/11

Lilichman, LLC  
24950 Pacific Coast Highway  
Malibu, CA 90265

Basement Floor Plan

A.3

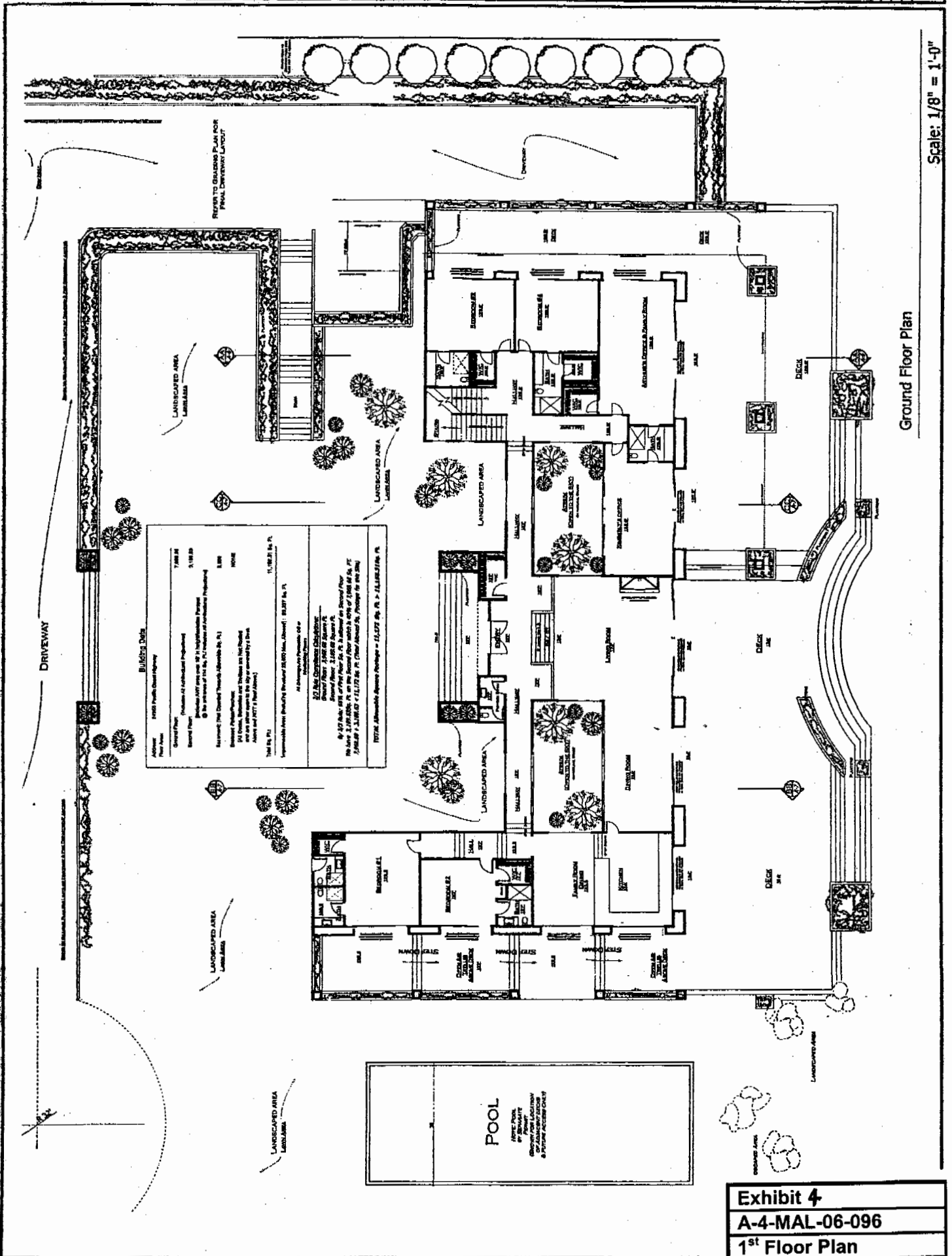


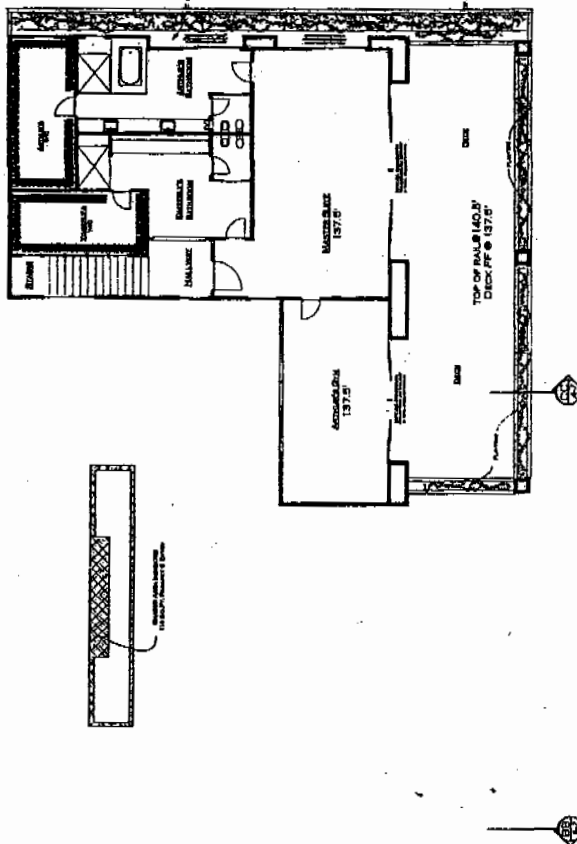
Basement Level Plan

Scale: 1/8" = 1'-0"

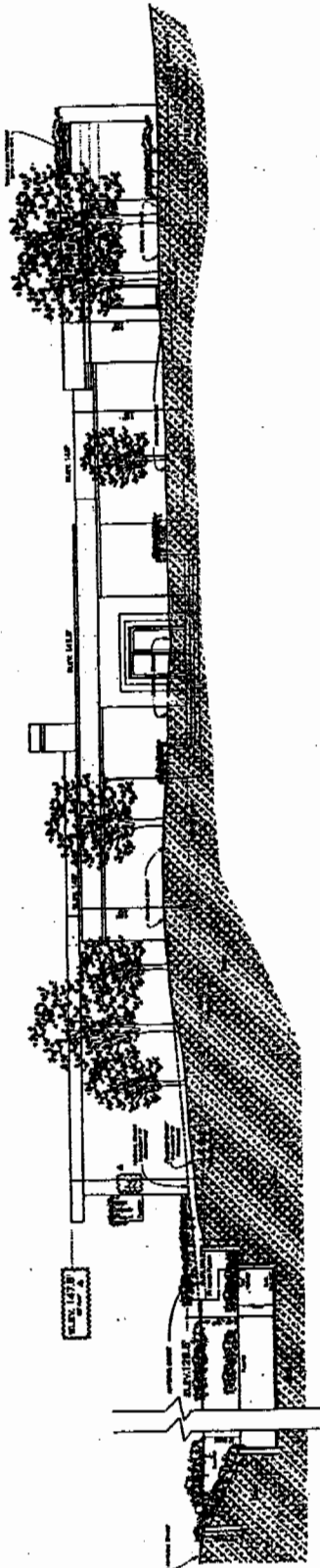
Exhibit 3
A-4-MAL-06-096
Basement Floor Plan

## Ground Floor Plan



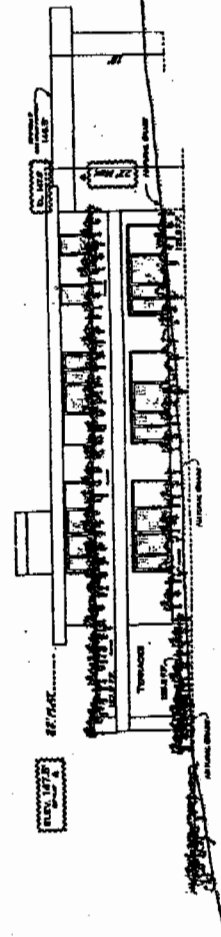


**Scale: 1/8" = 1'-0"**



**North Elevation**

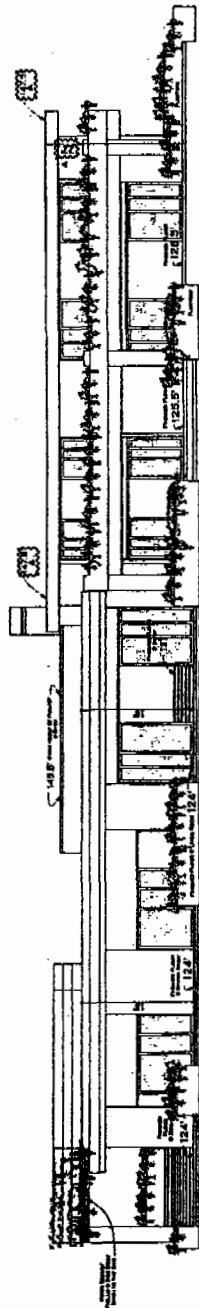
**Scale: 1/8" = 1'-0"**



**East Elevation**

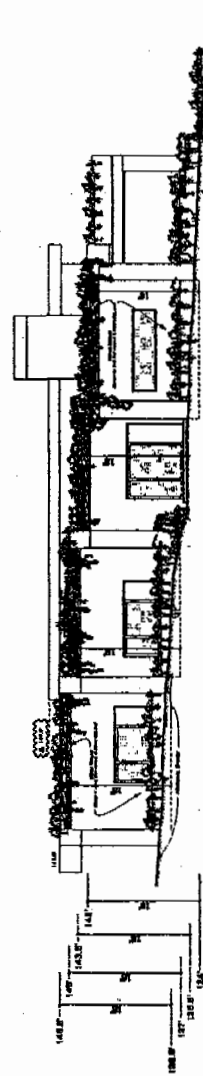
**Scale: 1/8" = 1'-0"**

Exhibit 6
A-4-MAL-06-096
North and East Elevations



South Elevation

Scale: 1/8" = 1'-0"

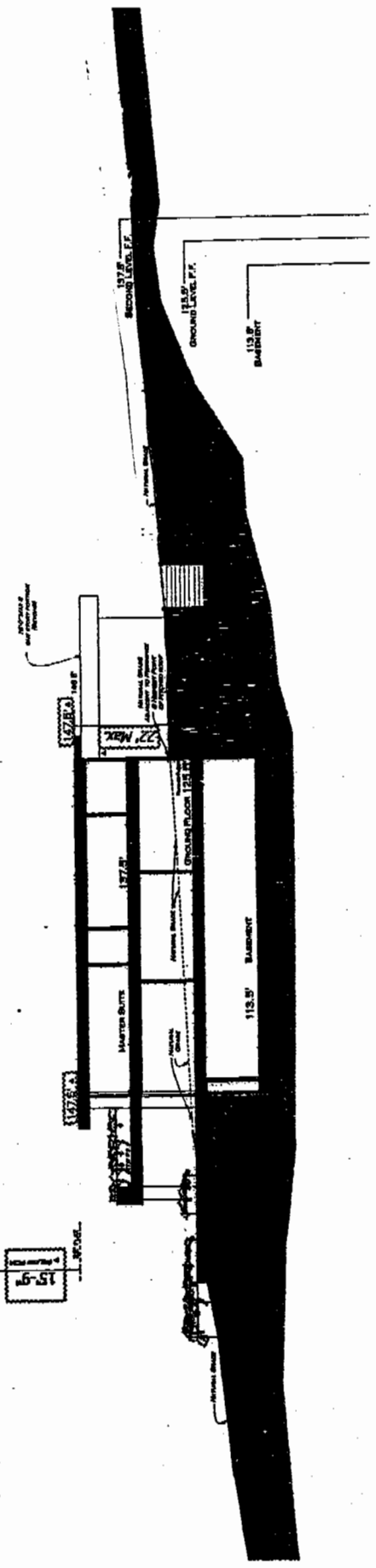


West Elevation

Scale: 1/8" = 1'-0"

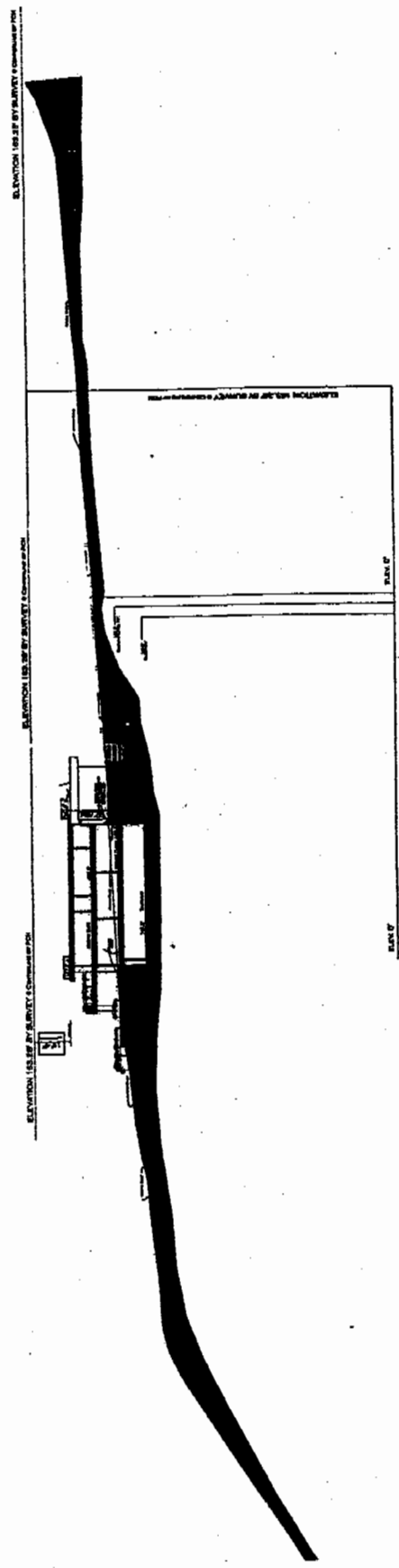
ELEVATION 163.28' BY SURVEY @ CENTERLINE OF PCH

ELEVATION 163.28' BY SURVEY @ CENTERLINE OF PCH



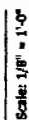
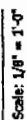
Section AA (thru East Side of Residence)

Scale: 1/8" = 1'-0"



Section AA (thru East Side of Residence)

Scale: 1" = 20'-0"



February 7, 2007

RECEIVED  
FEB 13 2007

CALIFORNIA  
COASTAL COMMISSION  
SOUTH CENTRAL COAST DISTRICT

Coastal Commission Members  
California Coastal Commission  
89 S. California St., 2<sup>nd</sup> Floor  
Ventura, CA 93001

Regarding: Appeal No. A-4-MAL-06-096 (Silver, City of Malibu)  
Item No. W 10e  
Applicants: Kimberly & Arthur Silver

Dear Commissioners,

I applaud staff for recognizing the potential to impact public views. The conditions included in staff's report maintain these views while still providing the house with maximum privacy. Any further tennis court fencing or other accessory structures should also have these same restrictions.

I would still hope that you reduce the massive sideyard trellis to maximum 12 inch members which would help open the sideyard view corridor substantially.

Thank you for your further consideration.

Sincerely,



Ron Goldman  
Fellow, American Institute of Architects

cc: Deanna Christianson, Coastal Analyst

Centura

To: Members of the Coastal Commission  
From: Patt Healy and /or Malibu Coalition for Slow Growth  
Re: Appeal by Patt Healy and /or Malibu Coalition for Slow Growth  
Date: Item W 10e, 2-14-07, Silver, Appeal A-4-MAL-0096 Memo

RECEIVED  
Date: 2-5-07  
FEB 13 2007

#### Staff Recommendation

Staff report Condition 5A 5, 5A6, 5A7 are excellent and necessary conditions which will help better public preserve blue water views over the project site as well as give the applicant its privacy. Staff is to be complimented.

With respect to 5A7, this extends only to landscape elements such as fencing and walls. To prevent future blue water view obstructions, we ask that the Commission consider adding an additional Condition 12 that states that any future development on the property, such as tennis court fencing, sheds etc, also not be allowed to exceed elevation 147.5.

#### Trellis

Since this is a de novo hearing, there is still for us one very disturbing aspect to this project that should be addressed. It is what the applicant calls a "trellis". This in our opinion doesn't meet the intended definition of a trellis under the LCP. We ask that it not be approved.

*Under the LCP a trellis is defined as "a frame supporting open latticework, typically used for training vines and other climbing plants".*

A trellis is not considered part of development square footage under the LCP and hence was not reflected by the story pcles.

This so called trellis feature is an add on to the western side of the proposed residence and in our opinion adds an unallowable intrusion into the public viewshed.

According to our measurements it adds more than another 1600 square feet (91.5ft.x18 ft = 1647sq ft., the equivalent of a small house) to the structure size. In reality, this is additional outdoor living area. Its many supporting columns are huge (four feet in diameter) and lattice roofing consists of overhead beams 4 feet in depth will further block blue water views. Its purpose is not to support vines and other plants. We believe this is a fiction.

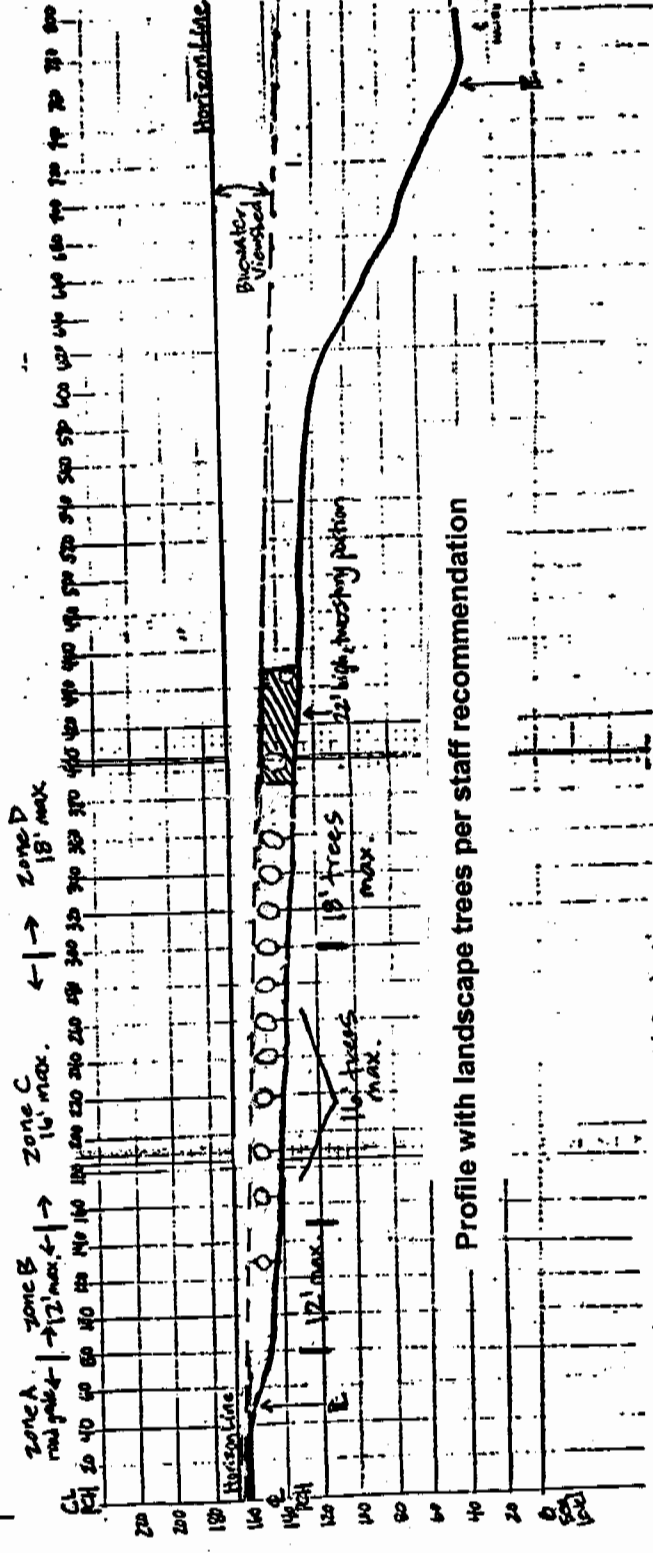
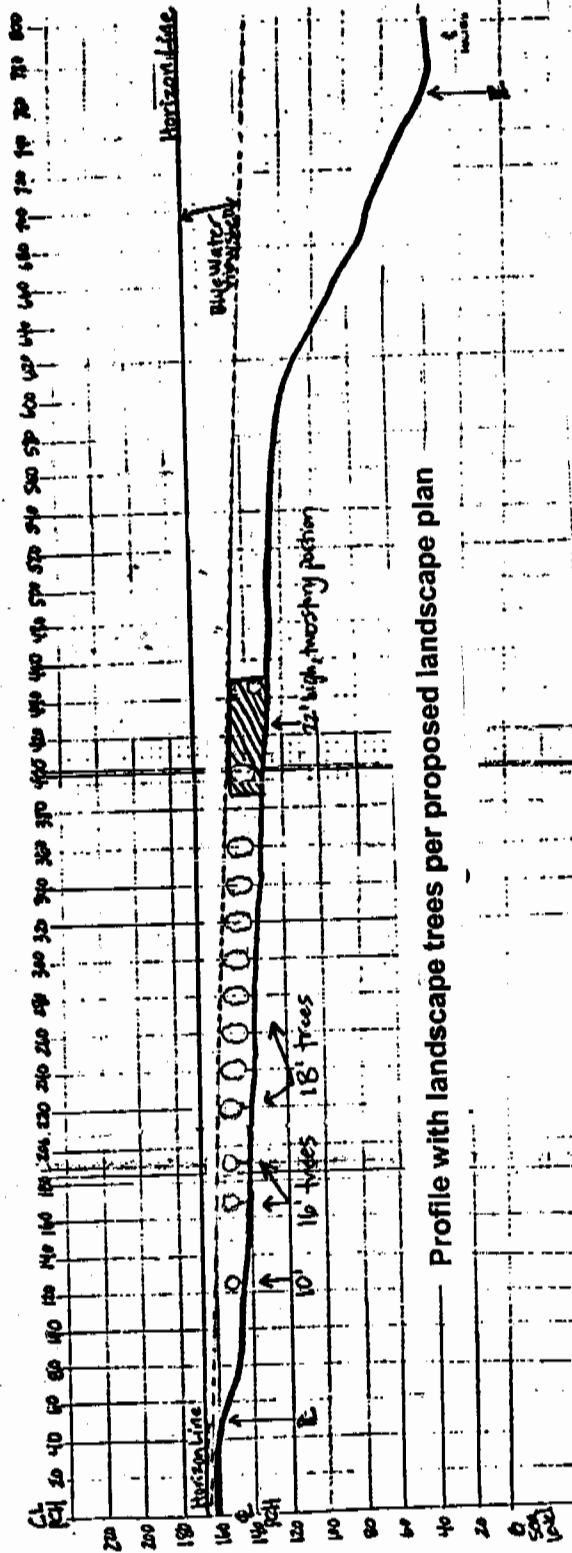
There are already huge decks associated with this structure for the homeowners outdoor enjoyment so we respectfully ask that this so called trellis area be deleted from the project and prohibited from being considered in a future coastal amendment to protect this side yard view corridor. (See attachment)

#### Conclusion.

With the above suggestions incorporated into the CDP we believe that the public blue water view will be protected. As always thank you for considering our comments.

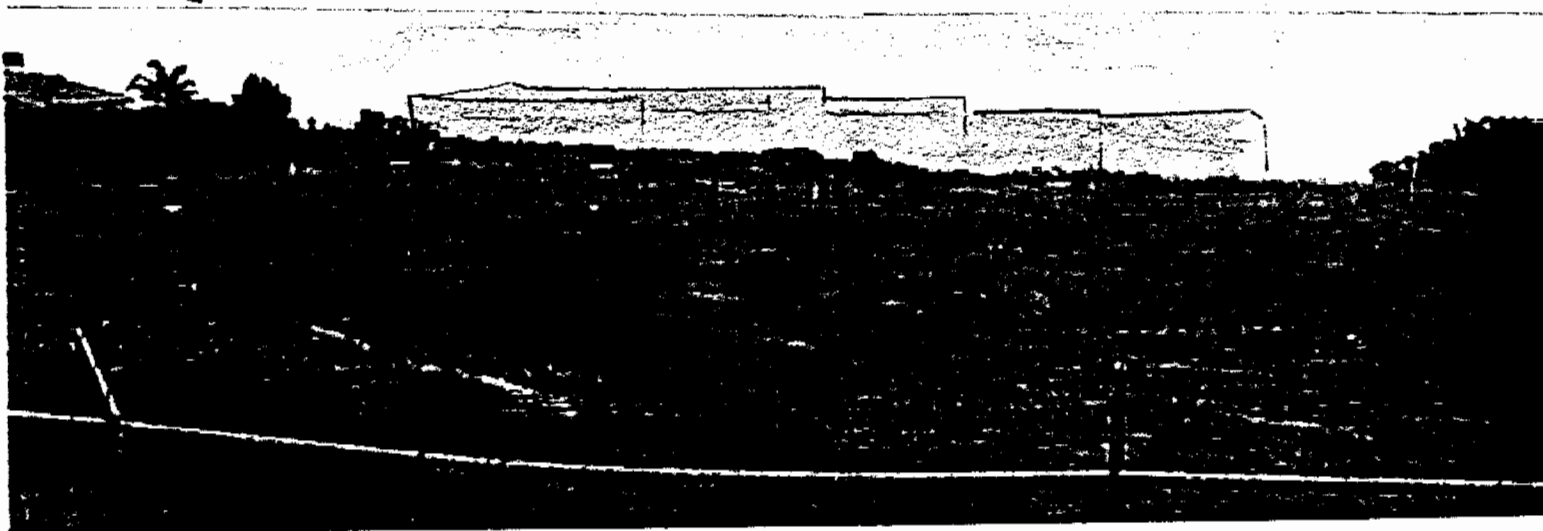


# Profile A (Eastside of Property)



Note: Horizon line approx. 4 feet above road grade.

horizonline  
↓



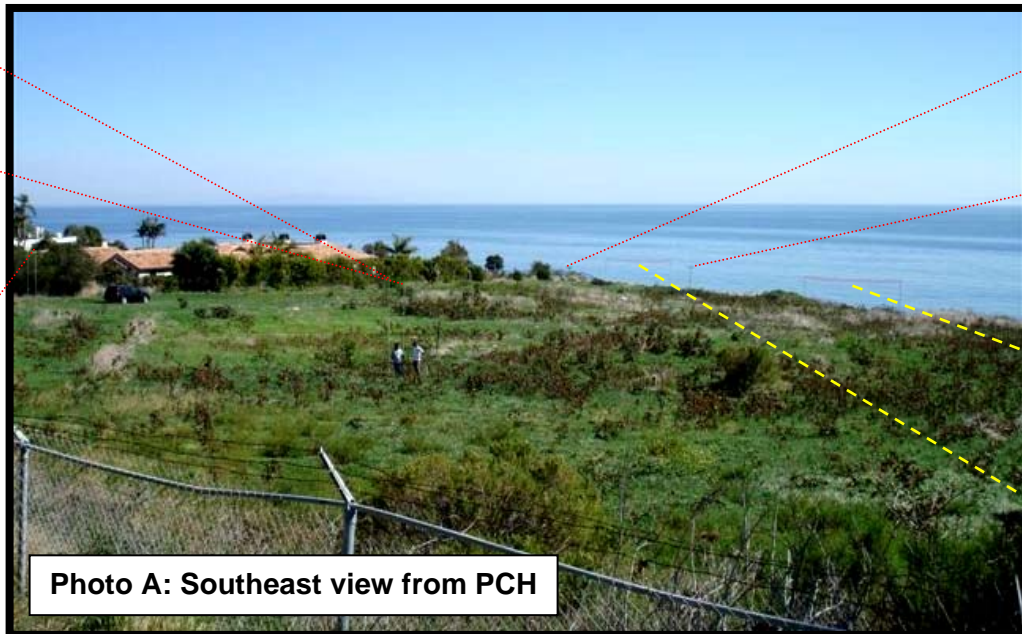
note: shading added for emphasis

Exhibit I
A-4-MAL-06-096
Story Poles
(as seen from PCH)

Tree Pole 2  
16'

Tree Pole 1  
16'

Tree Poles 5 & 6  
16'



Tree Pole 3  
18'

Tree Pole 4  
18'

18' tall  
portion of  
residence

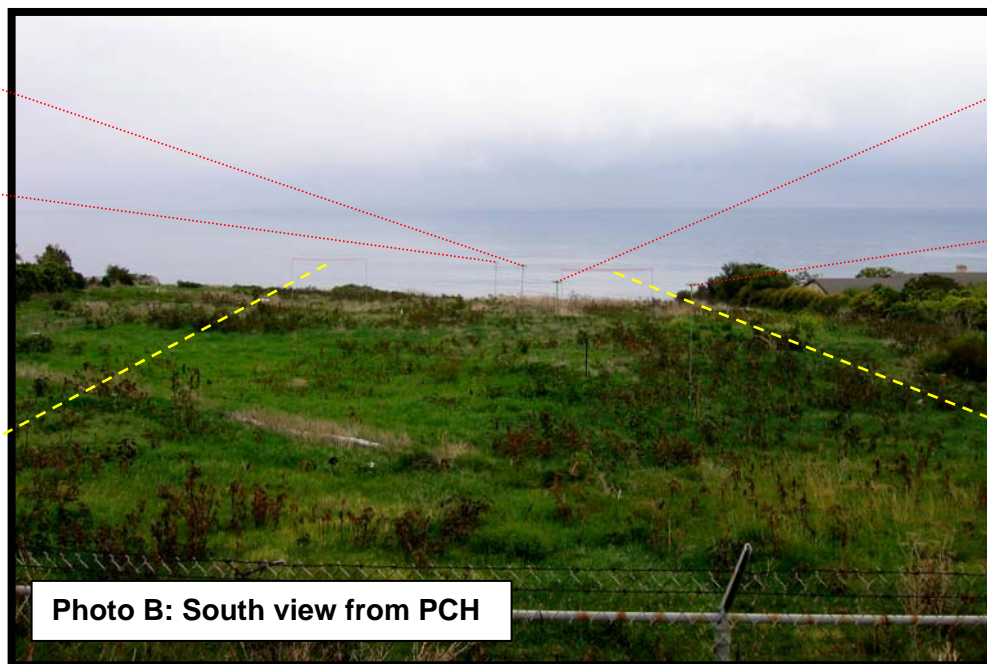
22' tall  
portion of  
residence

Photo A: Southeast view from PCH

Tree Pole 3  
18'

Tree Pole 4  
18'

22' tall  
portion of  
residence



Tree Pole 2  
16'

Tree Pole 1  
16'

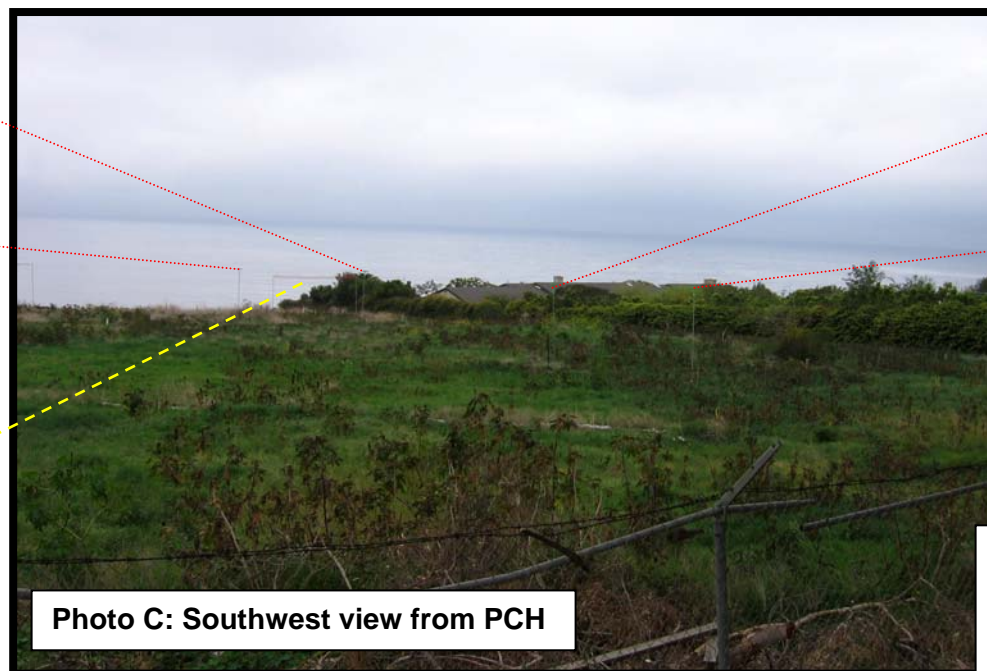
18' tall  
portion of  
residence

Photo B: South view from PCH

Tree Pole 3  
18'

Tree Pole 4  
18'

18' tall  
portion of  
residence

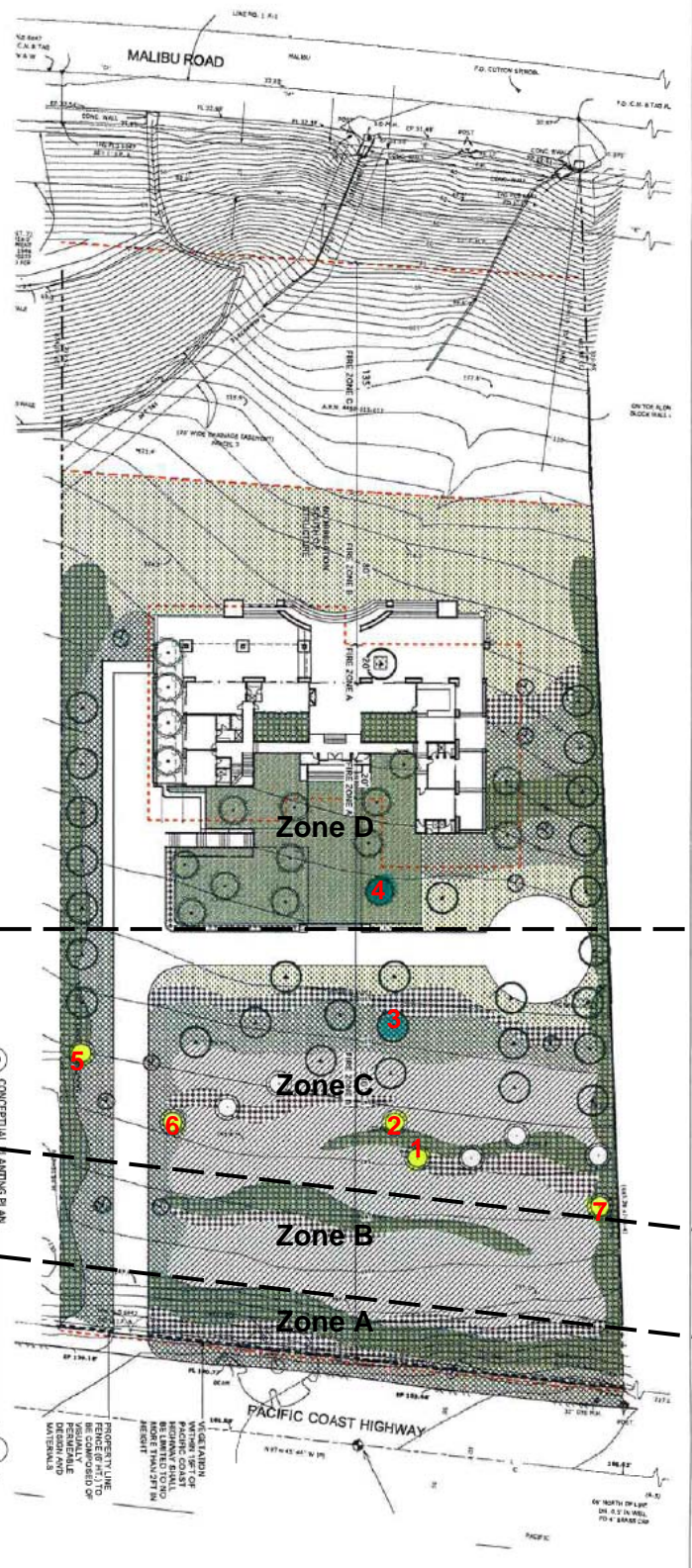


Tree Pole 2  
16'

Tree Pole 1  
16'

Photo C: Southwest view from PCH

Exhibit 12  
A-4-MAL-06-096  
Site photos w/  
story poles



**PROPOSED PLANTING LIST**

**Estimated Quantity**

Botanical Name	

*\*Emphasis (zones) added per staff recommendation.*

*Note: Colored trees were staked by the applicant's surveyor for Commission staff review and the numbers correspond to site photographs indicated on Exhibit 12. Blue trees were staked at 18' high and yellow trees were staked at 16' high.*

**Exhibit 13  
A-4-MAL-06-096  
Proposed  
Landscape Plan**

**CALIFORNIA COASTAL COMMISSION**

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



TO: Commissioners and Interested Parties

FROM: John Ainsworth, Deputy Director  
Ventura – South Central Coast District

SUBJECT: Addendum to Commission Meeting for May 9, 2007  
South Central Coast District

---

---

<u>AGENDA #</u>	<u>APPLICANT</u>	<u>DESCRIPTION</u>	<u>PAGE #</u>
<b><u>COASTAL PERMIT APPLICATIONS</u></b>			
Item W15e	Silver	Correspondence received from applicant and other interested parties in opposition to the Indemnification	1-18

## CALIFORNIA COASTAL COMMISSION

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



## ADDENDUM

**DATE:** May 7, 2007

**TO:** Commissioners and Interested Parties

**FROM:** South Central Coast District Staff

**SUBJECT:** Agenda Item 15e, Wednesday, May 9, 2007, Appeal No. A-4-MAL-06-096 (Silver)

The purpose of this addendum is to:

- 1) Attach the following correspondence received from the applicant and other interested parties in opposition to the Indemnification by Applicant special condition contained in the staff report (Special Condition No. 14):

- Letter from the applicant's representative, Steven Kaufman, dated May 3, 2007, and attached as Exhibit 14.
- Letter from an interested party, Dall & Associates, dated May 3, 2007 and attached as Exhibit 15.
- Letter from an interested party, 1000 Friends of the California Coast, dated May 5, 2007 and attached as Exhibit 16.

- 2) As concern has been expressed in the above-mentioned correspondence over the staff recommendation to include the Indemnification by Applicant special condition as a condition of permit approval, staff recommends the following findings be added to the staff report in order to clarify the Commission's legal authority for imposing this condition. The following findings shall be added on page 13, as Part 3 of Section VI.B, as follows (additions shown in underline):

**3. Indemnification Condition**

Coastal Act section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. See also 14 C.C.R. § 13055(e). Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application. Therefore, consistent with Section 30620(c), the Commission imposes Special Condition 14, requiring reimbursement of any costs and attorneys fees the Commission incurs "in connection with the defense of any action brought by a party other than the Applicant/Permittee ... challenging the approval or issuance of this permit.

- 3) Make the following modification to Special Condition No. 12 regarding archaeological resource protection, indicated on page 10 and 32 of the staff report (deletions shown in ~~strikethrough~~, additions shown in underline):

Page 10

**12. Archaeological Resources**

By acceptance of this permit, the applicants agree to comply with all of the recommendations contained in the Phase III Mitigation Report by Dr. E. Gary Stickel (July 2000) for protection of archaeological resources on the subject property. Specifically, the applicants shall provide a protective cap over the portions of the property that were identified in the Phase III Mitigation Report prior to commencement of construction operations. The applicants shall also have a qualified archaeologist(s) and appropriate Native American consultant(s) present on-site during all grading, excavation, site preparation, installation of irrigation systems or landscaping features that involve any earth moving operations in order to monitor for the discovery of cultural resources. The number of monitors shall be adequate to observe the earth moving activities of each piece of active earth moving equipment. Specifically, the earth moving operations on the project site shall be controlled and monitored by the archaeologist(s) and Native American consultant(s) with the purpose of locating, recording and collecting any archaeological materials. In the event that any significant archaeological resources are discovered during operations, the archaeologist shall make a determination as to the significance of the resources and report his/her analysis and conclusions to the Executive Director. If the archaeologist finds the resources to be significant, the permittee shall halt all grading work in the area shall be halted and an appropriate data recovery strategy be developed, subject to review and approval of the Executive Director, by the applicant's archaeologist, and the native American consultant consistent with CEQA guidelines. The applicants shall provide evidence that any such recovery strategy has been reviewed by the City of Malibu Planning Manager, or evidence that no review is required. The applicants shall implement the approved data recovery strategy.

*Page 32, paragraph 4*

To ensure that adverse effects to archaeological resources are minimized during the construction of the proposed development (and as recommended by the archaeological consultant), **Special Condition No. Twelve (12)** also requires that the applicant have a qualified archaeologist(s) and appropriate Native American consultant(s) present on-site during all grading, excavation and site preparation in order to monitor all earth moving operations. In addition, if any significant archaeological resources are discovered during construction, the archaeologist shall make a determination as to the significance of the resources and report his/her analysis and conclusions to the Executive Director. If the archaeologist finds the resources to be significant, work shall be stopped and an appropriate data recovery strategy shall be developed by the applicant's archaeologist and Native American consultant consistent with California Environmental Quality Act (CEQA) guidelines. This plan should be reviewed by the City of Malibu, unless they determine no review is required.

- 4) Attach Ex-Parte Communications for the subject appeal. Attached is one Ex-Parte Communication form received from Commissioner Blank, and two Ex-Parte Communication forms received from Commissioner Wan. These communications are attached as Exhibit 17.
- 5) Attach correspondence received from one of the appellants in this case, Patt Healy and Malibu Coalition for Slow Growth, dated May 7, 2007 and attached as Exhibit 18. Ms. Healy's letter indicates that the Malibu Coalition for Slow Growth is supportive of the staff recommendation if supplemental language is added to the landscaping special condition (Special Condition No. 5) to ensure protection of view corridors on the property. In response to the appellants concern, staff would like to note that Section 6.5 (E) (1) of the Malibu LIP requires that new development, including landscaping, be sited and designed to preserve bluewater ocean views over the approved structures where the topography of the project site descends from the roadway, which is the case on the subject site. View corridors are only required by the LCP where the topography of the project site does not permit the siting and design of a structure that is located below road grade, which is not the case here.



**RICHARDS | WATSON | GERSHON**  
ATTORNEYS AT LAW – A PROFESSIONAL CORPORATION

355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101  
Telephone 213.626.8484 Facsimile 213.626.0078

**RECEIVED**  
MAY 07 2007

CALIFORNIA  
COASTAL COMMISSION  
SOUTH CENTRAL COAST DISTRICT

**W 15e**

RICHARD RICHARDS  
(1916-1988)

GLENN R. WATSON  
(RETIRED)

HARRY L. GERSHON  
(RETIRED)

STEVEN L. DORSEY  
WILLIAM L. STRAUSS  
MITCHELL E. ABBOTT  
GREGORY W. STEPANICH  
ROCHELLE BROWNE  
WILLIAM B. RUDELL  
QUINN M. BARROW  
CAROL W. LYNCH  
GREGORY M. KUNERT  
THOMAS M. JIMBO  
ROBERT C. CECCON  
STEVEN H. KAUFMANN

KEVIN G. ENNIS  
ROBIN D. HARRIS  
MICHAEL ESTRADA  
LAURENCE S. WIENER  
STEVEN R. ORR  
B. TILDEN KIM

SASKIA T. ASAMURA  
KAYSER O. SUME  
PETER M. THORSON  
JAMES L. MARKMAN  
CRAIG A. STEELE  
T. PETER PIERCE  
TERENCE R. BOGA

LISA BOND  
JANET E. COLESON  
ROXANNE M. DIAZ  
JIM G. GRAYSON  
ROY A. CLARKE

WILLIAM P. CURLEY III  
MICHAEL F. YOSHIBA  
DEBRA H. DANNER  
PAULA GUTIERREZ BAEZA  
TERESA HO-URANO  
BRUCE W. GALLOWAY  
DIANA K. CHUANG

MARGUERITE P. BATTERSBY  
BILLY D. DUNSMORE  
AMY GREYSON  
DEBORAH R. HAKMAN  
D. CRAIG FOX

ROBERT H. PITTMAN  
ALEXANDER ABBE  
PATRICK K. BOBKO  
DAVID M. SNOW  
LOLLY A. ENRIQUEZ  
KIRSTEN R. BOWMAN  
G. INDER KHALSA  
GINETTA L. GIOVINCO

TRISHA ORTIZ  
CANDICE K. LEE  
DAVID G. ALDERSON  
MELISSA C. LAUZARDO  
MARICELA E. MARROQUIN

BRIAN D. MABEE  
GENA M. STINNETT  
JENNIFER PETRUSIS  
STEVEN L. FLOWER  
ROBERT C. HORTON  
MATTHEW E. COHEN  
ANDREW TAM  
DEBBIE Y. CHO  
GEOFFREY WARD  
ERIN L. POWERS

OF COUNSEL  
MARK L. IAMKEN  
SAYRE WEAVER  
WILLIAM K. KRAMER  
NORMAN A. DUPONT  
JIM R. KAPIAK

SAN FRANCISCO OFFICE  
TELEPHONE 415.421.8484

ORANGE COUNTY OFFICE  
TELEPHONE 714.990.0901

May 3, 2007

Mr. Patrick Kruer, Chairman  
Members of the Commission  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, California 94105

**Re: Appeal No. A-4-MAL-06-096  
(Arthur and Kimberly Silver)**

**Hearing Item: Wednesday, Item No. 15e**

Dear Chairman Kruer and Members of the Commission:

This firm, along with April Verbanac (Dudek & Associates) and Susan McCabe (McCabe and Company), represents the applicants, Arthur and Kimberly Silver, with respect to the above appeal from the City of Malibu's decision to approve their proposed single-family residence.

The Silvers have worked cooperatively and closely with Staff, and agree with the revised Staff Recommendation, with one exception. Specifically, they object to Special Condition No. 14 (Indemnification by Applicant). This is an unusual condition, and for that reason we have set out the numerous legal, factual, and policy reasons that the Commission should consider as the basis for not imposing the condition in this case.

**The Commission Lacks Authority to Impose the Condition**

Special Condition No. 14 would impose a burden on the applicant to reimburse the Commission "in full for all Coastal Commission costs and attorneys fees" that the Commission may incur for the defense of a lawsuit brought by a project opponent.

As you know, the Commission was created by statute and its authority to impose conditions of approval is also statutory and derives from Section 30607 of the Coastal Act, which provides:

EXHIBIT NO. 14
APPLICATION NO.
A-4-MAL-06-096
Silver
Applicants Attorney Letter

Mr. Patrick Krueger, Chairman  
May 3, 2007  
Page 2

"Any permit that is issued or any development or action approved on appeal, pursuant to this chapter, shall be subject to reasonable terms and conditions in order to ensure that such development or action will be in accordance with the provisions of this division." (Emphasis added.)

Section 30607 thus authorizes the Commission to impose "reasonable terms and conditions" to ensure that a development, such as that proposed by the Silvers, "will be in accordance with the provisions of" the Coastal Act. Clearly, the "provisions" of the Coastal Act with which the Silvers' project must comply are the Chapter 3 policies of the Act, and all other 13 Special Conditions recommended by Staff relate to conformity with those policies.

However, the "indemnity" condition is not necessary to ensure that the approval of the Silvers' residence will be "in accordance with the provisions of" the Coastal Act. That is why, for some 34 years, the Commission, with a few exceptions noted below, has not imposed such a condition, especially on the approval of a single-family residence.

The Coastal Act does provide that the Commission may "sue and be sued" and that the Attorney General will represent the Commission in any litigation. (Pub. Res. Code § 30334(b).) However, no "provision" of the Act authorizes the Commission to require an applicant to reimburse the Commission for its litigation expenses. Likewise, nothing in the Commission's regulations authorizes such a condition.

We understand that Staff indicates that its support for the special condition is found in Section 30620(c)(1) of the Coastal Act and Section 13055(e) of the Commission's regulations, although specific findings justifying the condition are not included in the staff report for this project. These provisions deal with administrative fees and costs, not with legal fees and costs which the Commission may incur in litigation. Section 30620(c)(1) states:

"The commission may require a reasonable filing fee and the reimbursement of expenses for the processing by the commission of any application for a coastal development permit under this division and, except for local coastal program submittals, for any other filing, including, but not limited to, a request for revocation, categorical exclusion, or boundary adjustment, submitted for review by the commission." (Emphasis added.)

Mr. Patrick Kruer, Chairman  
May 3, 2007  
Page 3

This provision deals with "filing" fees for the various types of application submitted to the Commission for review. The Commission pays no "filing" fees in litigation because it is a public entity. (Govt. Code § 6103.) Nothing in this provision relates to or encompasses attorneys' fees and costs of suit.

While Section 30620(c) permits the Commission to require "filing" fees, Section 13055 of the Commission's regulations implements this by setting forth the various fee amounts. Section 13055(e), apparently relied upon by Staff, additionally states:

"In addition to the above fees, the commission may require the applicant to reimburse it for any additional reasonable expenses incurred in its consideration of the permit application, including the costs of providing public notice." (Emphasis added.)

This provision permits the Commission to recover additional expenses it incurs "in its consideration of the permit application." Clearly, this applies to permit processing, not a subsequent lawsuit. This is reinforced by Section 13055(g), which requires that "the additional fee shall be paid before the permit application is scheduled for hearing by the commission." (Emphasis added.) Again, this pertains to processing fees – indeed, fees that the regulation requires be paid before this Commission even considers the application. It does not relate to litigation fees and costs.

Simply put, the Commission does not have the statutory authority to impose such a condition.

### **Cities and Counties are Different**

Those Commissioners who serve as local government officials know that, from time to time, cities and counties do impose "indemnity"-type conditions on the approval of projects. However, this is because the cities and counties are fundamentally different from this Commission. Unlike the Commission, which is a creature of statute, cities and counties derive their authority from the State Constitution.

"A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. art. XI, § 7.) This is often referred to as the "police power," and it is broad in scope. As explained by our State Supreme Court:

Mr. Patrick Krueger, Chairman  
May 3, 2007  
Page 4

“Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. Apart from this limitation, the police power of a county or city under this provision is as broad as the police exercisable by the legislature itself.” (Candid Enterprises, Inc. v. Grossmont Union High School District (1985) 29 Cal.3d 878, 885.)

Thus, cities and counties have constitutional police power authority to impose an “indemnity” requirement if they so choose. The Commission’s authority, by contrast, is limited by statute, as explained above.

**The Condition is Bad Policy and Would Have a “Chilling Effect” on Coastal Development and, Ultimately, on a Fair, Balanced, and Well Considered Coastal Program**

Section 30607 of the Coastal Act does not permit just any condition; a condition must be “reasonable.” That cannot be said of an “indemnity” requirement. The process of obtaining a Coastal Development Permit is complex and enormously costly. That is especially true for one who seeks merely to build a single-family residence. The Silvers, for instance, have spent 7 years before the City of Malibu and this Commission simply in an effort to obtain approval of a single-family residence.

This Commission regulates over 1000 miles of coastline. Not everyone who wishes to build a home on the California coast could economically withstand, in addition to the cost of pursuing approval through the administrative process, they need to pay for their own lawyer to defend a Commission approval and additionally for the State Attorney General.

An indemnity requirement would surely have a “chilling effect” on coastal development. Moreover, it would encourage the threat of litigation by project opponents in order to secure the imposition of the condition and to heap additional costs (and delay) on a project applicant in an effort to stop a project. Indeed, this condition could institutionalize the “threat” of litigation as a routine tactic for discouraging or opposing projects.

The condition is not reasonable within the meaning of Section 30607. It is not good policy. And, it is not fair, balanced, or at all well conceived.

Mr. Patrick Kruer, Chairman  
May 3, 2007  
Page 5

### **The Condition is Discriminatory**

For 34 years, the Commission, with limited exception, has never imposed this type of condition on the approval of a project, as here. It is our understanding that Staff has only very recently decided to recommend the imposition of this condition on any project where Staff perceives the threat of litigation.

What constitutes the “threat” of litigation? What level or type of opposition would generate this condition? What happens if the Commission or Staff “senses” the “threat” of litigation for the first time at the hearing on the application? What happens if, after recommending the condition, the Commission or Staff believes or concludes that no litigation is likely – does the condition come off? The inherently *ad hoc* nature of the determination required to decide whether to impose such a condition is simply not a reasonable or rational basis to single out an application that, for one reason or another, has an opponent or opponents. (Indeed, the Commission will see that except for another appeal involving applicant proposing a small home in Albion (Elliott, F-13c), whom we understand also objects to the condition, no other project on the May agenda has this recommended condition.) Coupled with the “chilling effect” noted above, the imposition of an “indemnity” condition would violate an applicant’s due process and equal protection rights. The condition would not only encourage the “threat” of litigation. It would unfairly skew the balance in favor of project opponents, while penalizing the applicant.

After all, the Commission is charged with the authority under the Coastal Act to approve or disapprove applications for permits, and it should be the Commission’s duty to defend that authority, not the applicant’s. (And, in this case, it is worth noting that the applicant did *not* apply to the Commission. Its local government approval was *appealed* to the Commission, presumably to address one issue – conformity of the project with the City’s certified LCP.)

Putting aside Staff’s recent recommendations to impose the condition, our research discloses only a handful of prior instances where the Commission has imposed this type of special condition. These include the following:

- E-96-28 (Windward Associates)
- E-99-009 (Unocal)
- E-99-011 (MFS Globenet Corp/MCI)
- E-00-008/CC-076-05 (Global West Network Inc.)
- E-05-007/CC-076-05 (Monterey Bay Aquarium Research Institute)

Mr. Patrick Krueger, Chairman  
May 3, 2007  
Page 6

E-01-032 (ExxonMobil Corporation)  
E-01-029/CC-111-01 (Tyco Networks, Inc.)  
E-04-010 (Atlantic Richfield ARCO)

Interestingly, the Commission did not adopt findings to support the condition on any of these projects – something that is equally true of Special Condition No. 14. However, in contrast to the residence proposed here, the above-noted projects each have one thing in common that might serve to justify an “indemnity” condition – they all involve some type of development on State lands or tidelands, and thus utilize a public resource. They also involve applicants who could readily shoulder the burden of paying the Commission’s legal fees.

Most recently, it appears that the Commission has wrestled with the question of whether to impose such a condition. At the February 2007 meeting, the Commission declined to impose this type of condition on the AVP Pro Beach Volleyball project (5-06-396). However, in March it imposed the condition on a single-family home in the Santa Monica Mountains, 4-06-094 (Barrett). In April it imposed the condition on a 3-unit apartment, 4-09-098-A2 (Coastline Views, LLC), and on a single-family home in Calabasas, 4-05-141 (Biebuyk). Currently, on the May agenda (F13c), there is only one other project on which staff has recommended the condition, a small single-family home proposed in Mendocino (Elliott). None of these have any findings to support such a condition.

The condition, thus, is discriminatory, especially in the case of the smaller projects proposed wholly on private property. It should not be imposed here.

**The Condition Would Constitute an Invalid “Underground Regulation,” in Violation of the Administrative Procedure Act**

The Commission certainly has the authority to adopt regulations, and, of course, it has done so. (Pub. Res. Code § 30333; Tit. 14, Cal. Code Regs., § 13000 et seq.) However, the decision at this point to impose an “indemnity” condition on every project the Commission or Staff perceives might possibly lead to litigation (or, for that matter, on every project) would constitute what some refer to as an “underground regulation,” which, to be valid, would require compliance with the requirements of the Administrative Procedure Act and review by the Office of Administrative Law (“OAL”).

Government Code Section 11342.600 defines “regulation” as every rule, regulation, order, or standard of general application or the amendment, supplement,

Mr. Patrick Kruer, Chairman  
May 3, 2007  
Page 7

or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." Government Code section 11340.5(a) further provides:

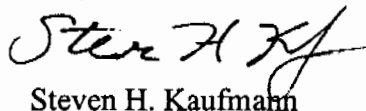
"No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter."

As you may know, the Commission would have to comply with detailed requirements prior to adoption of a regulation permitting the imposition of this type of condition. (Gov. Code §§ 11346.2-11346.8). Because there are serious legal problems associated with the imposition of such a condition, we suggest that OAL would likely not approve it if it had the opportunity to review a change in the Commission's regulations to permit the condition.

**Conclusion**

The Silvers sincerely appreciate the Staff's work on the appeal and agree with the Staff Recommendation, but respectfully ask that the Commission not impose Special Condition No. 14.

Very truly yours,

  
Steven H. Kaufmann

cc: Peter Douglas  
Jack Ainsworth  
Deanna Christensen  
Hope Schmeltzer, Esq.  
Jamee J. Patterson, Esq.  
J. Matthew Rodriguez, Esq.  
Arthur and Kimberly Silver  
April A. Verbanac  
Susan McCabe

969197v1

9.

**DALL & ASSOCIATES**

6700 FREEPORT BOULEVARD SUITE 206 SACRAMENTO, CALIFORNIA 95822 USA

Tel.: (Office Direct) ++916.392.0283

Fax: ++916.392.0462

Email: NDall49@earthlink.net

Email: SDall49@aol.com

By Facsimile and US Mail

W 15e

May 3, 2007

Mr. Jack Ainsworth  
Deputy Director  
California Coastal Commission  
South Central Coast District  
89 South California Street, Suite 200  
Ventura, California 93001  
Facsimile: 1.805.614.1732

SUBJECT: INDEMNIFICATION CONDITION 14, CDP A-4-MAL-06-096 (SILVER)

Dear Mr. Ainsworth:

This firm represents the Elliott Family, applicants in appealed CDP A-1-MEN-06-047, which is before the Commission for *de novo* hearing as Item 13(c) on Friday, May 11, 2007.

The purpose of this letter is to advise the Commission of a serious problem with Commission staff's recommendation to impose a litigation indemnification requirement (Special Condition 14) on CDP A-4-MAL-06-096 (Silver). That matter is scheduled for Commission *de novo* hearing and final action on Wednesday, May 9, 2007 (Item W15e), two days prior to our Client's item, and Commission's decision in Silver could serve as a criterion, direction, guidance, policy, or other generalized standard for its review and action on our Client's project.

Staff's recommended litigation indemnification condition, which is verbatim the same as proposed in Special Condition 6 for the Elliott project, would require each permittee to indemnify the Commission for all legal costs and attorney fees in the event of third party litigation by accepting the CDP, or else forego the benefits of it. Notably, both staff reports omit any citation whatsoever to statutory authority, relevant evidence, or analysis that would demonstrate that the permits could not be approved but for the imposition of this onerous condition.

The Elliotts therefore respectfully request the Commission to delete the subject litigation indemnification condition from its decision to approve these two CDP's, and any other similarly CDP decisions for the reasons summarized below.

EXHIBIT NO. 15
APPLICATION NO.
A-4-MAL-06-096 Silver
Dall & Assoc. Letter

1. There is No Basis for an Indemnification Condition. Pursuant to the Coastal Act and case law, the Commission may only impose or exact conditions of CDP approval to the extent that they are proportionate, related, carry out a valid governmental purpose, and would require denial of the project pursuant to the applicable standard of review if the conditions were not imposed. In Coastal Act construction, conditions of CDP approval have to be "reasonable" and "in accordance" with its provisions. (PRC §§30607.) Here, for both subject CDP's on appeal, the sole standard of review is conformity of the proposed development with the respective certified Local Coastal Program (LCP) and, to the extent applicable for Silver because of that project's location between the first continuous road and the sea, the public access and recreation policies of Coastal Act Chapter 3. (PRC §§30604(b), 30604(c).) Notably, neither the *de novo* hearing staff report for Silver nor for Elliott contains any reasons, findings, or conclusions whatsoever to support such a determination with respect to the litigation indemnification special condition, because none exist.

2. Commission Lacks Authority to Require Indemnification. Local government may apparently require litigation indemnification from applicants pursuant to the constitutionally granted police power and locally adopted ordinance. In contrast, such authority is not afforded by the Constitution or statute to the Commission, which thus not only lacks authorization to do so but has also made no attempt to adopt any regulations to facilitate such imposition under any, however creative, interpretation of its body of administrative rules at Title 14, California Code of Regulations (CCR), §13000 et seq.

3. Commission's Specified Filing Fee and Expense Reimbursement Authority Do Not Allow Recovery of Legal Costs or Attorneys Fees. The Commission's statutorily authorized power under the Coastal Act to require a reasonable filing fee or reimbursement of expenses extends only (a) to processing of CDP applications submitted to the Commission for review that are within its original (including pre-LCP certification) regulatory jurisdiction, (b) when the executive director has determined an appeal to be frivolous, and (c) in such matters as CDP amendments, revocation requests, categorical exclusions, or coastal zone boundary adjustments. (PRC §30020, emphasis added.) In enacting the Coastal Act, the legislature specifically rejected proposals to make filing and processing of CDP appeals subject to fees that would amount to "justice by tollgate," as the Sierra Club's legislative representative, John Zierold, so well stated it. Moreover, although the legislature subsequently amended the Coastal Act to provide for imposition of an appeal fee in identified limited frivolous cases, it has never granted the Commission the authority to impose other CDP appeal-related fees, including for recovery of legal costs and attorneys fees in third-party litigation over final Commission actions on appealed CDP's.

4. Commission's Own Fee Schedule Regulation Does Not Authorize It to Require Indemnification of Legal Costs and Attorneys Fees. The Commission is statutorily required, in relevant parts by the Coastal Act and the Administrative Procedures Act, to adopt administrative regulations that set forth its procedures for filing, reviewing, hearing, deciding, and issuing CDP's, including on appeal. The Commission's regulations at 14 CCR §13055 thus provide an adopted schedule of fees for filing and processing permit applications, which includes that "the commission may require the

applicant to reimburse it for any additional reasonable expenses incurred in its consideration of the permit application, including the cost of providing notice." (14 CCR §13055(e), emphasis added.) Such fee or additional fee "shall be paid before the permit application is scheduled for hearing by the commission" or, if not so paid, may be imposed as a special condition of CDP approval that requires payment prior to CDP issuance. (14 CCR §13055(g).) The regulations make no other provision for cost recovery, including for costs, expenses, or fees incurred after the Commission has taken its final action on, and completed its consideration of, the CDP application. The subsequent Commission staff processing to render the CDP decision effective through the procedures provided in Commission regulations at 14 CCR §13156 et seq. notably only comes after Commission's consideration of, and final action on (discretionary decision regarding), the CDP application has been completed. These regulations in Chapter 5, Subchapter 6 also do not in any manner authorize the Commission, or staff, to require an applicant on appeal to indemnify the Commission for any, or all, its legal costs and attorneys fees. Assuming for the sake of argument that the Commission were to have the statutory authority to require such litigation indemnification, it would still have to first promulgate appropriate regulations prior to any attempt, consistent with other requirements, to impose it as a condition of approval. The Commission, however, has clearly not elected to promulgate such regulations, and therefore cannot, on an ad hoc basis, conjure and enforce a subjective alternative scheme known only to itself, or its staff.

5. Commission's Indemnification Requirement is Arbitrary and Discriminatory. Perhaps not surprisingly in the absence of clear and statutorily authorized regulations, coastal program data show the Commission to have only rarely imposed litigation indemnification conditions. Despite approving thousands of coastal permits between 1977 and 2001, the Commission appears to have imposed such a litigation indemnification condition in only five (5) CDP's, all of which involved development on state tidelands or public trust lands. More recently, in February, 2007, the Commission reportedly declined to impose such a staff-recommended litigation indemnification condition on a beach volleyball tournament proposed to occur on public property. However, in the following month, but without receiving any new statutory authority, promulgating any regulations to amend its adopted fee schedule in 14 CCR §13055, or otherwise providing a basis for its actions, the Commission apparently began to impose the litigation indemnification condition on certain residential development in its permit jurisdiction, starting with a single family home (CDP 4-06-094) in March 2007, and again in April, 2007, on another single family home (CDP 4-05-141) and an amendment to a 3-unit apartment project (CDP Amendment 4-99-098-A2). Thus, over the past thirty years the Commission has, without any adopted or publicly identified basis for differentiation, imposed the litigation indemnification provision in only some eight out of more than 25,000 CDP decisions, including thousands in which third parties have actively appeared in opposition to the CDP. More than one-third of those cases where the Commission has apparently imposed the litigation indemnification condition have occurred in the past two months. With the imposition of the condition on Silver and Elliott, the number imposed in a three-month period in 2007 would equal the total imposed for the entire thirty preceding years that the Coastal Act has been in effect.

Moreover, it is worthy of note that the Silver and Elliott matters, unlike any of the other cases to date where the Commission has imposed the litigation indemnification requirement, are before the Commission on appeal and not subject to any established Commission fees under the sections on which Commission staff is apparently claiming statutory authority.

6. Summary and Request. In summary, the Commission lacks the statutory and regulatory authority to impose or exact indemnification for all, or any, legal costs and attorneys fees from applicants for CDP's that are before the Commission on appeal. While its previous administrative behavior has been inconsistent, arbitrary, and discriminatory in imposing such a special condition of approval on applications that were submitted directly to it for review and approval, those actions in no manner set the stage for the Commission to extend such a practice to CDP's before it on appeal. Moreover, the two present staff reports by which the Commission would effectuate such a special condition unsurprisingly lack any analysis whatsoever to bridge the gap between any evidence that, absent such a condition, the projects would otherwise be inconsistent with the applicable standard of review -- because none exists.

For these reasons, and the further requirement that any Commission condition of GDP approval be reasonable and in accord with the provisions of the Coastal Act, the Commission should delete the legal costs and attorneys fees indemnification condition from its action on Wednesday's Item 15(c) and Friday's Item 13(c). Thank you for your consideration.

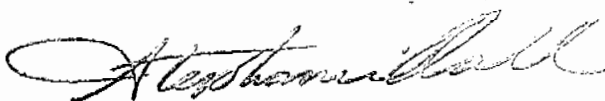
Sincerely yours,

DALL & ASSOCIATES

By:



Norbert H. Dall  
Authorized Representatives for the Elliott Family



Stephanie D. Dall

223:2703.030507.5

cc: Mr. Robert Elliott  
Mr. Robert Merrill, CCC-Eureka (By Facsimile)  
Ann Cheddar, Esq., CCC-San Francisco (By Facsimile)

1000 FRIENDS OF THE CALIFORNIA COAST

PO BOX 713

MENDOCINO, CALIFORNIA 95460

W156, F136

May 5, 2007

California Coastal Commission  
Mr. Robert Merrill  
District Manager, North Coast Area  
PO BOX 4908  
Eureka, CA 95502-4908  
Facsimile: (707) 445-7877

California Coastal Commission  
Mr. John Ainsworth  
Deputy Director, South Central Coast District  
89 South California Street, Suite 200  
Ventura, CA 93001  
Facsimile: (805) 641-1732

SUBJECT: OPPOSITION TO SPECIAL CONDITION REQUIRING "INDEMNIFICATION BY  
APPLICANT" - CDP A-4-MAL-06-096 (SILVER) & CDP A-1-MEN-06-047 (ELLIOTT)

Dear California Coastal Commissioners and Staff:

1000 Friends of the California Coast (in formation) has noted Commission staff's arbitrary selective recommendation to require the two above-referenced coastal permit applicants, who are before the Commission on appeal, to agree to indemnify the Commission for any and all of its legal costs as a condition of permit approval.

We request the Commission to approve these coastal permits *without* requiring indemnification, and to refrain from requiring indemnification from any other coastal permit applicant in the future.

The Commission clearly has no legal authority to impose requirements of this sort. There is no identified project impact requiring mitigation by such a condition, no analysis that addresses how the condition might reduce any such effects to below a level of significance, and simply no conceivably valid governmental purpose that imposition of such a condition might serve. Requiring a "legal costs and attorneys fees" indemnification condition is thus unreasonable and invalid under Coastal Act Section 30607.

Please provide us with a copy of Commission's final actions and official minutes that record the decisions in these two coastal permits as each becomes available. Please also notify us of any future items where the Commission proposes to impose such a condition. Thank you.

Sincerely yours,

<u>FREDERICK J KIKO</u>	<u>Frederick J Kiko</u>	<u>5/4/07</u>
<u>CARLSBAD CA 92008</u>	<u>[Signature]</u>	<u>5 May '07</u>
<u>Ben Booth</u>	<u>[Signature]</u>	
<u>FORT BRAGG, CA 95437</u>	<u>Paul Clark</u>	<u>5 May '07</u>
<u>PAUL CLARK</u>	<u>Paul Clark</u>	
<u>FORT BRAGG, CA 95437</u>	<u>Barbara Reed</u>	<u>5 May 07</u>
<u>BARBARA CLARK</u>	<u>Barbara Reed</u>	
<u>FORT BRAGG CA - 95437</u>		
<u>CAROLYN SAVAGE</u>	<u>Carolyn Savage</u>	
<u>FORT BRAGG CA 95437</u>	<u>Robert Savage</u>	
<u>ROBERT SAVAGE</u>	<u>Barbara Reed</u>	
<u>FORT BRAGG CA 95437</u>	<u>BARBARA REED</u>	
<u>Barbara Reed</u>		

EXHIBIT NO. 16
APPLICATION NO.
A-4-MAL-06-096
Silver
1000 Friends of Coast Letter

14.

**FORM FOR DISCLOSURE OF  
EX-PARTE COMMUNICATIONS**

Name or description of the project: A-4-MAL-06-096-Silver, Malibu

Time/Date of communication: 2 pm, March 26, 2007

Location of communication: 22350 Carbon Mesa Rd, Malibu

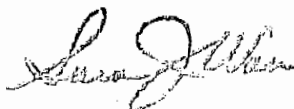
Person(s) initiating communication: Richard Scott

Person(s) receiving communication: Sara Wan

Type of communication: Phone call

Richard called to see if I had any questions about the project. He stated that the Silvers were agreeable with the conditions. I said that my recollection was that the issue revolved around the plantings and views, nothing else. He said that was correct. He also asked if I wanted to go out and see the site. I said I would think about it and let him know if I did.

Date: March 26, 2007



Sara Wan

EXHIBIT NO. 17
APPLICATION NO.
A-4-MAL-06-096 Silver
Ex-Parte Communications

15

SENT BY: #;  
TO: SO CENTRAL  
RECEIVED: 5/ 3/07 8:27AM; ->CALIFORNIA COASTAL COMMISSION; #228; PAGE 2

0 ;  
AT: 918056411732

MAY-2-07 1:31PM;

PAGE 1/1

5/3/2007 8:04 AM FROM: FAX TO: 1 415 357-3839 PAGE: 002 OF 002

**FORM FOR DISCLOSURE OF  
EX-PARTE COMMUNICATIONS**

Name or description of the project: A-4-MAL-06-096-Silver, Malibu

Time/Date of communication: 4:30pm, May 2, 2007

Location of communication: 22350 Carbon Mesa Rd, Malibu

Person(s) initiating communication: Donna Andrews, Steve Kaufman

Person(s) receiving communication: Sara Wan

Type of communication: meeting

Steve indicated that they objected to the condition requiring a waiver attorneys fees. Said that it was not fair to the individual homeowners. He understood using it for the Exxon's but not for single family homeowners and that other commissioners agreed with him. I said I did not.

Date: May 3, 2007



Sara Wan

## FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project, LPC, etc.: **Item W15e A-4-MAL-06-096**  
 Date and time of receipt of communication: **5/2/07 3:00 - 3:20**  
 Location of communication: **telephone**  
 Type of communication (letter, facsimile, etc.): **Oral**  
 Person(s) initiating communication: **Susan McCabe, April Verbanac**

Detailed substantive description of content of communication:  
 (Attach a copy of the complete text of any written material received.)

### History of the project, review of landscaping conditions and history, objection to Special Condition 14, Indemnification .

The permit was appealed by neighbors in August. Staff recommended NSI. Sara Wan raised numerous issues regarding the landscape plan and the CCC found SI. Although staff initially recommended NSI, they responded to Sara's criticism by even further restricting the landscaping condition.

The applicants are in agreement with the staff rec. with the exception of the indemnification condition.

Although the Silvers are reluctantly willing to accept Spec. Condition #5(A)6 requiring fencing be no higher than PCH (it's been 4 years and 23 public hearings and they're exhausted), we will raise this issue with you tomorrow (See staff report p. 22 LIP Policy 6.5(E)1.c that allow fences to be higher if visually permeable).

Wednesday, May 2, 2007

Date



Signature of Commissioner

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication.

To: Members of the Coastal Commission

From: Malibu Coalition for Slow Growth by Patt Healy Appellant

Agenda Item: W 15e Appeal May 9, 2007 A-4-MAL-06-096 Silver

RECEIVED  
MAY 07 2007

CALIFORNIA  
COASTAL COMMISSION  
SOUTH CENTRAL COAST DISTRICT

### Landscaping

Ideally, we would prefer the vegetation restrictions in the February 2007 staff report. In the current staff report, staff has done a good job in limiting our concerns about landscape view blockage by creating landscape zones with maximum vegetation heights in each zone. Staff is to be congratulated.

We support this staff recommendation with the following language added as the last sentence to Special Condition 5 A) 5. This addition is needed in order to:

1. to ensure required protection of the designated view corridors on the property;
2. to conform to the Applicant's Settlement Agreement (see staff report page 24) with the City of Malibu. ( This settlement was not recorded as a deed restriction so successors interest will be unaware of it overtime unless it is a condition of the Coastal Permit.)
3. so that it is clear in the future to the Commission Staffer reviewing the revised final Landscape Plan (yet to be submitted) that even though Zones B, C, and D allow for higher vegetation heights in the view corridors no vegetation can block existing ocean views except certain trees that can't be higher than 10 ft

The language to be added as the last sentence in Special Condition 5 A) 5 should read as follows:

"In lieu of the vegetation height limitations set forth in Zones B, C and D and to conform to the Settlement Agreement with the City of Malibu dated January 27, 2006, in the designated view corridors (as set forth in Settlement Agreement Ex A) no vegetation can block any ocean views except certain trees which can not exceed 10 ft in height. These 10 ft trees are indicated in the Landscape Plan in this staff report in Exhibit 13."

### Residence

In addition, to give a truly meaningful western view corridor we would ask the Commission to please eliminate from the proposed project the so called Trellis for the reasons stated in our Memo to the Commission dated 2-5-07 ( found in Exhibit 9 pages 2of 3 and 3of 3 of the current staff report) which we ask that you to please review.

Thank you for considering our comments

EXHIBIT NO. 18
APPLICATION NO.
A-4-MAL-06-096
Silver
Appellant Correspondence

18.