STATE OF CALIFORNIA—NATURAL RESOURCES AGENCY ARNOLD SCHWARZENNEGER, *GOVERNOR*

CALIFORNIA COASTAL COMMISSION

NORTH CENTRAL COAST DISTRICT
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W16

NORTH CENTRAL COAST DISTRICT (SAN FRANCISCO) DEPUTY DIRECTOR'S REPORT

For the

AUGUST Meeting of the California Coastal Commission

MEMORANDUM **August 12, 2009**

TO: Commissioners and Interested Parties
FROM: Charles Lester, Senior Deputy Director, North Central Coast District
SUBJECT: Deputy Director's Report

There were no waivers, emergency permits, immaterial amendments or extensions issued by the North Central Coast District Office for the August 12, 2009 Coastal Commission hearing.

This report contains additional correspondence and/or any additional staff memorandum concerning the items to be heard on today's agenda for the North Central Coast Area.

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Memorandum **August 11, 2009**

To: Commissioners and Interested Parties

FROM: Charles Lester, Deputy Director
North Central Coast District

Re: ***Additional Information for Commission Meeting Wednesday, August 12, 2009***

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NCC\ADDENDUM\2009\A-2-MAR-09-010 (Crosby)ltc:8/11/2009

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W19a

ADDENDUM

DATE: August 12, 2009

TO: Commissioners and Interested Parties

FROM: North Central Coast District Staff

SUBJECT: ADDENDUM to Agenda Item W19a, Wednesday, August 12, 2009, Coastal Development Permit Appeal No. A-2-MAR-09-010 (Crosby)

The purpose of this addendum is to: (a) revise the original Staff Report; (b) add findings to address issues related to the applicable standard of review that were raised by the appellants in their response to the original Staff Report; and (c) attach new materials provided to Commission Staff by both the applicant and the appellants.

A. Revisions to the Staff Report

1. Delete Footnote 2

Footnote 2 in the Staff Report is incorrect and is hereby deleted. The Appellants' photos filed with the appeal as Exhibit A and the Staff photos to be presented in a PowerPoint presentation at the hearing both show the story poles of the development as currently proposed.

The footnote (Page 2 of the staff report) should be modified as follows:

~~[2] Staff Note: The photographs included with the appellants submittal (Exhibit 2), show the story poles before the latest revisions to the design which lowered the western roof height.~~

2. Replace page 3 of the staff report with the following [Deletions are shown in ~~strikethrough~~ and additions are shown in <u>underline</u>.]:

Certified zoning section 22.56.130(O) "Visual Resources and Community Character" states:

3) The height, scale and design of new structures shall be compatible with the character of the surrounding natural or built environment. Structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views as seen from public viewing places."

The LCP therefore requires that approved development not obstruct significant views as seen from public viewing places and that it be compatible with the character of the surrounding environment. With regard to the obstruction of significant views, significant views shall not be obstructed from all public viewing places, regardless if the viewing area is a signed or designated viewing area.

In addition to staff's review of the local record, staff visited and photographed the site. The view that would be impacted by the approved addition to the existing single family residence is not significant~~, nor is it unique~~. (See staff slide presentation and photos attached to the staff report and its addendum.) This part of the street and pathway is relatively isolated, and very similar views can be seen nearby in areas that are more frequently used by the public, such as the official Muir Beach access stairway on Pacific Way to the south and the Muir Beach Overlook on Highway 1 to the north. ~~Further, the view from this particular location is intermittent at best, and the scale of the additions is modest.~~ Moreover, no significant view from either the street or the pathway would be completely obstructed. The County's approval noted that the additions would have minor visual impacts along Ahab Drive and the pathway with wooden stairs maintained by MBCSD but determined that these minor visual impacts are not significant in relation to the overall panoramic views available to the public from the street and trail. In addition, as proposed by the applicant, some of the landscaping that currently blocks the view from the pathway and the road will be removed. Regarding the approved addition's compatibility with the surrounding environment, the height of the approved addition would comply with the LCP 25-foot height limit and the size of the dwelling would be typical of a moderate to large residence in the Muir Beach community.

The approved addition is also compatible with the character of the surrounding environment as required by zoning code section 22.56.130(O)(3) because its size is within the range of existing houses in the area which range from 475 square feet to 5,562 square feet. The approved design also closely matches the original architecture and muted brown color scheme.

Further, the development has been conditioned to protect views along Ahab Drive and the pathway with wooden stairs maintained by MBCSD. The County's approval includes a condition requiring that prior to issuance of a building permit, the project be revised to delete the dormer window from the eastern addition and reduce the maximum height on the western addition by approximately 4 ½ feet.

A second condition requires the applicant to prepare a Landscape Plan for approval by Planning Division staff to preserve coastal views along Ahab Drive and the pathway with wooden stairs maintained by MBCSD and that there be no new landscaping, structures or fences on the property that would block public views. The County approval also requires that the Conditions be recorded on the title of the subject property to alert future owners of the conditions for preservation of public views.

Therefore, the Commission finds that: (1) the approved addition is compatible with the character of the surrounding environment; and (2) no significant LCP-protected public views would be obstructed by the approved development in contravention of zoning section 22.56.130(O).

Overall, the County has provided factual and legal support for its decision (Exhibit 1). As summarized above, the extent and scope of the approved addition to the existing single family residence ~~is modest,~~ does not raise significant concerns with respect to compatibility with the surrounding built environment, and would not completely obstruct significant views from either the street or the pathway with wooden stairs maintained by MBCSD.

No adverse precedent will be set for future interpretations of the LCP because the appeal is relevant to the particular views at issue and therefore does not raise issues of regional or statewide significance.

B. Add the following Section to Page 4 of the Staff Report To Address Issues related to the Applicable Standard of Review That Were Raised by the Appellants

In addition to the relevant zoning provision discussed above, the appellants reference three inaccurate standards of review: (1) *LTWR v. California Coastal Commission*; (2) an inapplicable LCP provision; and (3) a Community Plan provision that is not certified.

1. The case cited by the Appellants, *LT-WR, L.L.C. vs. California Coastal Commission,* is inapplicable to the subject appeal because it is a case wherein there was no certified LCP. The standard of review was Chapter 3 of the Coastal Act. In this instance, the LCP rather than the Coastal Act is the standard of review and the relevant provision of the certified zoning section requires that new development "not to obstruct significant views as seen from public viewing places." (See zoning section 22.56.130I(O)(3).) Therefore, significant views may not be obstructed as seen from public viewing areas, including public roads, beaches, trails and vista points, whether signed or unsigned.

2. The appellant also incorrectly identifies an additional LCP standard: LUP Policy 21. In comparison to zoning code section 22.56.130I(O)(3) which requires that no significant view be obstructed as seen from public viewing areas, LUP Policy 21 states that:

> *To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway.*

Policy 21, unlike zoning code section 22.56.130I(O)(3), has been interpreted by both the County and the Commission to regulate impacts to views from Highway 1 or Panoramic Highway. It does not, as the appellants assert, regulate the impairment of all existing views of the ocean.

That LUP Policy 21 only regulates existing views from Highway 1 or Panoramic Highway rather than all existing views of the ocean is supported by Section 22.56.130I(O)(2) which implements LUP Policy more specifically and states:

> *To the maximum extent feasible, new development shall be designed and sited as not to impair or obstruct existing coastal views from Highway 1 or Panoramic Highway.*

Page 1 of the certified LCP expressly states that implementing ordinances such as Section 22.56.139(O)(2) shall be used to provide clarification of policies as necessary.

The County and the Commission's interpretation of Policy 21 as only regulating existing views of the ocean from Highway 1 or Panoramic Highway rather than all existing views of the ocean is also supported by the preface to LUP Policy 21 which states that "the following explicit standards shall apply to selected areas and projects". Since all development seaward of Highway 1 could impair existing ocean views, it is reasonable for the County and the Commission to find that LUP Policy 21 only regulates impacts from Highway 1 or Panoramic Highway rather than all existing ocean views. Requiring that all development not impair ocean views would significantly restrict all development seaward of Highway 1. If that stringent a standard was intended by the County and the Commission, LUP Policy 21 would have so stated.

3. The Muir Beach Community Plan sited by the appellants is not part of the certified LCP and is not the relevant standard of review. Page 79 of the certified LCP expressly states that the Community Plans provided Policy background material in formulating the LCP Policies. Page 79 also indicates that modifications to the Plan policies and designations were made before submitting the proposed LCP policy language and that LCP policies controlled over conflicting plan policies.

Even if the Community Plan had been certified, for the reasons stated above, the approved addition to the existing single family residence is consistent with its provisions which state:

> *We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly enforced.*

SLIDE 1: A-2-MAR-09-010 (Crosby) - View From Ahab Drive Looking South-East

SLIDE 2: A-2-MAR-09-010 (Crosby) - View From Ahab Drive Near Top Of Stairs Looking South

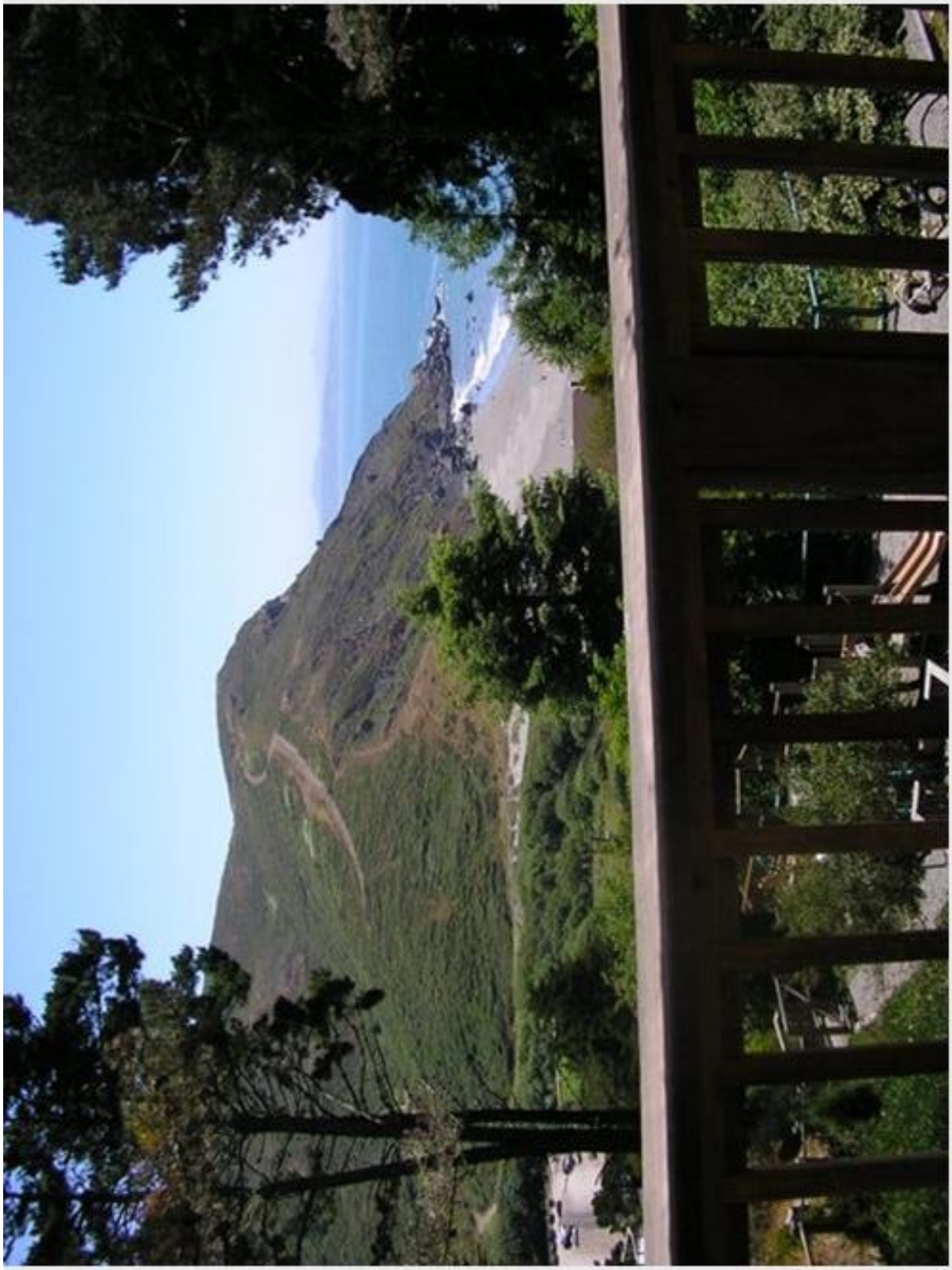
SLIDE 3: A-2-MAR-09-010 (Crosby) - View From Ahab Drive Near Top Of Stairs Looking South-East

SLIDE 4: A-2-MAR-09-010 (Crosby) - View From Top Of Stairs Looking South-East Towards Western Addition

SLIDE 5: A-2-MAR-09-010 (Crosby) - View From Top Of Stairs Looking South-East Towards Western Addition

SLIDE 6: A-2-MAR-09-010 (Crosby) - View From Top Of Stairs Looking South-East Towards Western Addition

SLIDE 7: A-2-MAR-09-010 (Crosby) - Looking South-East Towards Eastern Addition



SLIDE 8: A-2-MAR-09-010 (Crosby) - View From Muir Beach Community Center – Public Access Parking At Left

SLIDE 9: A-2-MAR-09-010 (Crosby) - View From Muir Beach Community Center - Public Access Parking At Left

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BEFORE THE CALIFORNIA COASTAL COMMISSION

Appeal from the Marin County Board of Supervisors' Decision re: Timothy Crosby Application for a Coastal Development Permit
Application No. CP09-3
Commission Appeal No. A-2-Mar-09-010

Argument on behalf of Appellants Richard and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald

INTRODUCTION

This appeal addresses two of the most important questions to arise under the Coastal Act since its inception in 1976: (1) whether the protections of the Act extend only to scenic views from designated and signed public viewing sites like overlooks and (2) what constitutes a *significant* impairment of a scenic view under the Act and the Local Community Plan Unit 1 (LCP) that implements it.

What is at stake in this particular case is a view of unparalled beauty of Muir Beach cove, Big Beach and the Pacific Ocean. (**EXH. A**) If permitted, the development will extinguish that view permanently, certainly until long after everyone connected with this controversy has passed on. But the ramifications go far beyond that one view. Any similar issue coming before the Marin County Planning Commission or the Board of Supervisors (BOS) will be judged by incorrect standards that were applied in this case, and, one by one, the coastal views from public-rights-of-way will vanish.

The Appellants contend that an impairment is significant if it blocks a scenic coastal viewshed from public rights-of-way such as public roads, beaches and trails, as well as designated vista points. The Planning Commission held that only views from a public vantage point, viewing platform or overlooks are protected. The Commission adopted a Resolution which states that views from public rights-of-way are only transitory and short term as a person proceeds to her ultimate destination and, therefore, are unworthy of protection. The Commission also held that a view is not significantly impaired if there are other panoramic viewsheds in the area. Two commissioners believe that only views of natural resources that have been specifically designated as scenic resources in the LCP are protected. The BOS rubber-stamped this decision, thereby perpetuating the Commission's mistakes. If these standards are not decisively repudiated, the Coastal Act and its purpose of protecting scenic coastal views will be utterly meaningless.

The Planning Commission applied the wrong legal standards and reached the wrong result. They went astray because there is a direct conflict between the Land Use Plan of the LCP and the

Interim Zoning Ordinance regarding visual resources, and they failed to heed the advice of their own staff, Tom Lai, that in the event of a conflict, the LCP governs. If the correct legal standards are applied, the Appellants will prevail and views of unique quality and character will be maintained. That would be good public policy because it will preserve the scenic coastal views for present and future generations of visitors to Muir Beach, as well as residents of the community. It will also ensure that future permit applications that interfere with coastal views in Marin County will be properly evaluated applying correct legal standards.

There are only three questions:

(1) Does the project impair the view from public streets or trails? Yes.
(2) Is the impairment substantial? Yes.
(3) Does the design, to the maximum extent feasible, preserve the view? No.

For the reasons stated herein, we respectfully urge the California Coastal Commission to deny the coastal permit for this development. The Applicant may then submit a new application, if he so desires, that is compatible with the Coastal Act and the LCP.

PROCEEDINGS BELOW

The Staff Report

This proposed development would add 1589 square feet of additional floor area to an existing 2058 square foot single family residence. The original staff report, written prior to the erection of story poles, stated that "The height of the residence would not block any public views of the Pacific Ocean or other significant viewsheds in, and around, Muir Beach." Once story poles were erected, it was obvious that the development would eclipse a stunning view of Muir Beach cove, beach, hillside and ocean from Ahab Drive and from the top of the public easement that parallels the Crosby lands and leads down to Big Beach.

The DZA Decision

The hearing before the Deputy Zoning Administrator (DZA) was not duly noticed. In addition, a request by the Kohn appellants for a continuance was denied in violation of the applicable regulations. At the hearing, which took place without the participation of the Kohns, the DZA ordered the Applicant to eliminate the clerestory windows on the western side thereby lowering the 33 foot roofline by 4 ½ feet. Based upon a representation by the Applicant's architect that this would necessitate redesigning an interior staircase, the DZA said that he would allow them 8 lineal feet at the higher elevation. Photographs taken after the erection of new story poles revealed that the public view from Ahab Drive and the top of the public easement continued to be substantially impaired. Appellants appealed to the Planning Commission.

The Planning Commission Decision

All of the Commissioners who visited the site agreed that the view of Muir Beach cove and environs would be impaired by the development. But they did not agree that the impairment of the view was a significant one. They adopted the following standard:

> "The development project would be consistent with the policies and goals in the Local Coastal Program Unit 1 because the additions would not substantially impair coastal views from public vantage points. The additions would have minor visual effects along a small view window along Ahab Drive and along the public trail. However, the visual effects are not considered substantial because the effects are relatively small in relationship to the overall panoramic views available to the public from the street and trail. The public vantage points are from public rights-of-way where people are typically in motion to reach a destination, and consequently the proposed additions would only temporarily affect views. The view impacts would be fleeting and soon disappear as a person moves further along the public way to reach their destination. The transitory and short-term visual effect is acceptable within the residential community of the Seacape Subdivision, and not considered to be a substantial view impact."

In spite of this, the Planning Commission granted the appeal in part. It imposed new conditions on the permit. The Commission ordered that the dormer window on the east side be eliminated. With respect to the need for additional height on the west side, after reviewing the plans and hearing from the Applicant's architect, Chairman Dickenson stated that he was "absolutely convinced" that the clerestories were not necessary. However, the Applicant was given permission to submit revised design plans. The issue of the west side clerestory windows was delegated to staff. Appellants have been advised by Planner Neal Osborne that, even though drawings have been submitted, these are not the formal revised plans necessary to support a decision by the planning staff. The Commission rejected the Appellants' request that the permit be denied and refused to consider Appellants' procedural objections on the ground that their review was *de novo*.

The Board of Supervisors' Decision

The BOS rubber-stamped the Planning Commission's decision. Of the four members participating, two (Arnold and McGlashan) did not utter a single word about the merits. Two others, Kinsey and Adams, said that they were not willing to second-guess the Planning Commissioners (even though *de novo* review means taking a fresh look at the law and the facts). Even though Supervisor Kinsey stated that he personally rejected the notion that the Coastal Act only protects views from designated viewing platforms, like the others he voted to adopt the Resolution prepared by the planning commission staff containing the identical language adopted by the Planning Commission, including the phrase "the additions would not substantially impair coastal views from public vantage points." Resolution Sec. XIII A. He fully endorsed the theory

that there is no significant impairment if there are other panoramic views in the area. In the final analysis, the Resolution adopted by the BOS ratified the decision by the Planning Commission and made no changes.

ISSUES PRESENTED

1. Even after modifications imposed by the DZA and the Planning Commission, the development still significantly and permanently impairs the view of Muir Beach cove, the beach, the hillside and the Pacific Ocean from Ahab Drive and the top of the public easement leading to the Pacific Ocean.

2. The Resolutions adopted by the BOS and the Planning Commission apply improper standards for determining significant adverse impairment that thwart, rather than further, the purposes and objectives of the Coastal Act and the LCP. These improper considerations are found in Section VIII C of the Planning Commission Resolution and Section XIII A of the BOS Resolution and in statements made by the planning commissioners during the hearing on Feb. 9, 2009 and by Supervisor Kinsey on March 31, 2009.

3. The Planning Commission improperly determined that interim zoning regulations take precedence over the Coastal Act and the LCP insofar as the zoning regulation provides that coastal views are protected from development only when viewed from "public viewing places", which the Planning Commission interpreted as signed vista points, viewing platforms or overlooks. This was ratified by the BOS.

4. The Planning Commission improperly interpreted the phrase "public viewing places" to mean signed vista points, viewing platforms and overlooks as opposed to being a shorthand phrase for "public roads, beaches, trails and vista points" as provided in the LCP. This was ratified by the BOS.

5. The Planning Commission improperly ruled that the Muir Beach Community Plan (MBCP) was not incorporated into the LCP and ordered all references to the MBCP stricken from the Resolution which it adopted. The BOS ratified that decision. The MBCP adds additional authority for denying the Crosby CDP.

6. The landscape plan ordered by the BOS and Planning Commission does not undo the irreparable damage to the coastal views caused by the development.

7. There are feasible alternatives that, if implemented, would not have a significant adverse impact on the views.

8. Procedural violations at the hearing before the DZA render the initial granting of the coastal permit void ab initio or require that the entire process be invalidated as violating due process of law.

9. The Planning Department violated elementary principles of administrative procedure by forwarding only an abbreviated version of the administrative record to the BOS. This was prejudicial to the Appellants.

PERTINENT STATUTES AND OTHER AUTHORITY

Section 22.56.0951 of the Marin County Code states that "A coastal project permit shall be approved only upon findings of fact establishing that the project conforms to the requirements and objectives of the local coastal program."

The "Local Coastal Program" (LCP) is a "local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions which, when taken together, meet the requirements of, and implement the provisions and policies" of [the Coastal Act] at the local level."

The Introduction to the Marin County LCP Unit 1 provides, in relevant part:

> "This document is the Land Use Plan for the Local Coastal Program (LCP) for Unit 1 of the Coastal Zone of Marin County....."
>
> **********
>
> "The purpose of the Local Coastal Program is to ensure that the Local government's development plans, policies, *and ordinances* conform to the policies of the Coastal Act of 1976. The Act's goals are to protect and conserve the State's coastal resources and to maximize public use and enjoyment of them. The policies of the Coastal Act, Chapter 3, have formed the basis for the policies contained within this document. Where any question is raised concerning the interpretation of policies within the LCP, Chapter 3 of the Coastal Act may be used to provide clarification of LCP policies. In preparing the ordinances that will implement this LCP, *minor* modification to a small number of policies has been made. The implementing ordinances shall be used to provide clarification of policies as necessary."

LCP p.1 (emphasis added).

The Section of the LCP captioned <u>Visual Resources,</u> states:

> Coastal Act policies on visual quality, found in Section 30251, require the protection of scenic and visual resources of coastal areas. Visual resources, including beaches, wetlands, and other natural as well as manmade features, are vulnerable to degradation through improper location of development, blockage of coastal views, ...*The primary concern of the Coastal Act is to*

protect views to scenic resources from public roads, beaches, trails and vista points..

LCP. p.56 (emphasis added)

Section 30343 of the Coastal Act states, in part:

> "The Legislature hereby finds and declares that *the coastal zone is one of its most precious natural resources,* rich in diversity of living and nonliving resources and in the wide range of opportunities it provides for the use and conservation by the people of this state and nation....." (Emphasis added)

Section 30001 of the California Coastal Act states, in part:

> "The Legislature hereby finds and declares:
>
> (a) That the California coastal zone is a distinct and valuable natural source of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
>
> (b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation."

Section 30251 of the California Coastal Act, cited by the LCP, states, in part:

> "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 subordinate to the character of its setting."

The LCP further provides,

> "21. Existing development standards and the design review ordinance (Chapter 22.82) shall continue to be enforced. The following explicit standards shall apply to selected areas and projects:

* * * * * * * *

> To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway."

LCP p.65.

Title 22.56.130I(O) of the Interim Zoning Ordinance is entitled "Visual Resources and Community Character." Paragraphs 2 and 3 state:

> "2. To the maximum extent feasible, new development shall be designed and sited so as not to impair or obstruct existing coastal views from Highway 1 or Panoramic Highway."
>
> "3. The height, scale and design of new structures shall be compatible with the character of the surrounding natural or built environment. Structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views as seen *from public viewing places."* (Emphasis added)

The Muir Beach Community Plan states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP. P.12.

ARGUMENT

I. The development, even as modified by the Planning Commission, would significantly impair stunning views of the coast

(A) No one disputes that the view of the cove, beach, ocean and hillside is impaired

Because the BOS abdicated to the Planning Commission, we begin with the Planning Commission's analysis. Virtually all of the Commissioners agreed that the proposed development would impair the view of Muir Beach cove, the beach, the ocean and the hillside. Appellants contend that no reasonable person could conclude otherwise. The photographs of the western side

demonstrate this clearly and we sincerely hope that Coastal Commission staff will visit the site to see for themselves. Even though, for reasons to be discussed below, the Planning Commissioners did not believe that the Coastal Act required that the permit be denied, several were effusive in describing the view in question.

Commissioner Theran said: "I stood at the top of those stairs. And, you know, you can't see it from the street. You walk down four or five steps and you get to the stairway and you say 'WOW.' And go down four steps and it's gone. But I've never been down those steps before and I wouldn't have walked right by because the view is there. I haven't completely thought through this...I wonder if we have the opportunity to mitigate the view loss."

Commissioner Holland said: "There's no question in my mind that a view is obstructed. Anybody who stands at the top of the steps... I walked all the way down....It was a marvelous thing to do. And there is that view there and it's undeniable and it's a wonderful view down to big beach, the hillside and the waves and the ant-like people walking down on the strand below. I loved it."

Commissioner Greenberg said: "I don't like the size of the house. In my view, it's clearly inconsistent-it will set a new standard and next time we have an application, a problem, an appeal here we'll be told the one down the street is this big...This one is out of character. So the question is if this was consistent with neighborhood standards would there be a view impact? There is a view impact."

Commissioner Lubamersky said: "It's a hard call. I think what it comes down to is the 'maximum extent feasible' in that I think significant views are being lost. I never walked down the streets before in Muir Beach. And, really, it is stunning. I'm reluctant to rely on landscaping cause trees grow. With a coastal view once it's gone with the building you don't get it back. So, I don't want to redesign the house. I don't think that's our job. But I do think there are other ways this can be addressed that would reasonably keep that valuable view out there because once it's gone you don't get it back."

Commissioner Crecelius said: "There is an impact and everyone agrees to that."

Despite these sentiments, the Commissioners went astray in applying the governing law when determining whether the view was protected or whether the impairment was significant or not. If you apply the wrong legal principles, you are bound to reach a wrong result. That is what happened here.

(B) The Planning Commission erroneously applied the Interim Zoning Ordinance which conflicts with the LCP

The Commissioners made two fundamental errors in applying the governing law. The first was that the Coastal Act and the LCP only provide protection from designated viewing platforms such as the Muir Beach Overlook. They fell into this error because they did not follow the advice of their own staff, Deputy Director of Planning Services Tom Lai. The Commissioners believed that

the Visual Resources and Community Character section of the Interim Zoning Ordinance was controlling instead of the LCP, with which it is in conflict. In an extended colloquy with Commissioner Holland, Mr. Lai explained that where there is a conflict, the zoning regulation is subordinate to the LCP.

A preliminary issue arose because Title 22.56.130I(O)(2) of the Interim Zoning Ordinance states: "To the maximum extent feasible, new development shall be designed and sited so as not to impair or obstruct existing coastal views *from Highway 1 or Panoramic Highway.*" This is clearly in conflict with the LCP, which states:

> "To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, *or the national or State parklands from Highway 1 or Panoramic Highway.*"

LCP, p.65. The zoning ordinance changes the meaning of this provision by making the phrase "from Highway 1 or Panoramic Highway" modify all "existing coastal views" instead of being limited to views from "national or State parklands." It appears that, following a colloquy with Deputy Director Lai, the Commission understood that the zoning ordinance had varied the meaning of the LCP. In any event, even the Commission did not try to limit the protection of coastal views to those visible from Highway 1 or Panoramic Highway.

Inexplicably, the Commission took a different approach with respect to Title 22.56.130I(0)(3) of the Zoning Ordinance, which is similarly inconsistent with the LCP. The LCP clearly states: "The primary concern of the Coastal Act is to protect views to scenic resources from *public roads, beaches, trails and vista points.*" The Interim Zoning Ordinance states that "Structures should be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views *as seen from public viewing places.*" Even after Mr. Lai advised them that in the event of a conflict between the LCP and the zoning regulation the LCP controls, the Commissioners persisted in applying the more confining language of the zoning ordinance. Thus, Commissioner Holland said: "It seems to me that the standard we have to apply here today is the second one; the one that 'structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views from public viewing places.'"

Applying the zoning ordinance instead of the LCP would effectively eviscerate the Coastal Act in Marin County. Doing so would declare open season on coastal development. Nevertheless, the Commissioners seemed oblivious to the implications of what they were saying. Commissioner Holland said: "The real question is whether we are dealing with obstruction of significant views from public viewing places." As an example, he cited the Muir Beach Overlook which he considered "very definitely a public viewing place." He said: "There are directional signs out on Highway 1, it's on tourist maps, it's in guidebooks, there's a big parking lot, there's a restroom...but that's a public viewing place." Commissioner Holland observed none of these at the top of the public easement, which led him to conclude that it was "not built with the idea of public viewing." He said, "I don't think the top of the stairs was built with the idea of viewing, it was built with the idea that the top of the stairs goes down to the next street. There's no signings

that says that it's even a walkway much less a public viewing place. I haven't seen any hiking maps or guidebooks or community resource guides that list this as a public viewing place. So, that's a fuzzy point for me. I'd like to see this house designed so it doesn't interfere with this view. But the problem is, he's completely in compliance with the zoning regulations."

Commissioner Ginalski voiced his opinion that the easement, like the "secret" trails he was used to traversing near his home in Tiburon, are "in my mind not meant to be used as observation decks." He reminisced about driving back from Massachusetts. He said: "What you find is that no matter where you are in this country and perhaps all over the world is that there are beautiful, beautiful vistas and sites–doesn't have to be oceans, it could be mountains or anything–and driving down the freeway you come across language that says "scenic overlook a mile ahead-pull off." To him "Scenic areas are designated as scenic overlooks."

Vice Chair Crecelius stated: "I would not define the top of this path as a significant viewing place. I think that if it were a significant viewing place that would require a property owner to design around it, then there should have been some designation of it, somehow. I don't think we can consider every public right of way as a significant viewing platform."

The Introduction to the LCP states:

> The policies of the Coastal Act, Chapter 3, have formed the basis for the policies contained within this document. Where any question is raised concerning the interpretation of policies within the LCP, Chapter 3 of the Coastal Act, may be used to provide clarification of LCP policies. In preparing the ordinances that will implement this LCP, minor modification to a small number of policies has been made. The implementing ordinances shall be used to provide clarification of policies as necessary.

The discrepancy between the LCP and the zoning regulation with regard to visual resources is not "minor." It is vast. Essentially, the Planning Commission read the words "public roads, beaches, trails" out of the LCP and left in "vista points!" The assertion that the California Coastal Act only protects scenic views from designated viewing platforms, overlooks or signed vantage points would eviscerate the Act and is completely spurious. Pursuant to Sec. 30009 of the Coastal Act, it "shall be liberally construed to accomplish its purposes and objectives." If you accept the Commissioners' reasoning, you might as well scrap the Coastal Act.

(C) It is possible to harmonize the LCP and the Zoning Ordinance

The perceived conflict between the zoning regulation and the LCP may be a false conflict. It is elementary that similar provisions should be harmonized if possible. Here, both the LCP and the zoning ordinance address visual resources. The phrase "public viewing places" in the zoning ordinance could have been read to be a shorthand expression to include "public roads, beaches, trails and vista points." Unless the LCP and the zoning regulation are harmonized in this fashion, then for the reasons described above, the broader language of the LCP must govern, as the

Appellants contend.

(D) The proposed development would significantly impair the view

The second fundamental error made by the Planning Commission was its definition of what constitutes a *significant* impairment. The Planning Commission contends that even though the development does impair the view, the impairment is not *significant* because the visual effects would be fleeting as a person moves along to her destination and that the effects are relatively small in relationship to overall panoramic views. These tests are illegitimate and legally irrelevant under the Coastal Act and LCP. Nevertheless, they were adopted verbatim by the BOS.

First, the premise is false. The view of the Muir Beach Cove, Big Beach and Pacific Ocean from Ahab Drive and the top of the public easement is one in a million. As you go down the public easement towards the beach there is a steep grade. The view from the top is not visible as you descend the steps. Even if there were any credence to the "fleeting moment" theory, this particular viewshed cannot be recaptured as you move further along to your destination. There is no other view like it from Ahab Drive. It cannot even be seen from the Muir Beach Overlook. If this development is allowed to proceed, that unique view will be gone forever.

Second, if the Coastal Commission were to accept the "fleeting moment" theory, the Coastal Act would be meaningless: Any development, no matter how destructive of a viewshed, could always be justified on the basis that people are always on their way somewhere. By this theory, a development permit would always be granted, even though it has a significant impact on a particular view, no matter how spectacular. Similarly, a property owner can always say that there is another panoramic view in the area. The whole point of having a separate LCP for the Coastal Zone, defined by the Legislature to be "one of its most precious natural resources," is to protect public coastal views from being extinguished by uncontrolled development. Views, such as the one from the top of the public easement, are not fungible. Marin County is justly famous for its coastal views. Under the Coastal Act, you can't trade off an irreplaceable view because there may be other ocean views along the same road or from a nearby overlook.

Furthermore, we have no idea what the Planning Commission meant when it says in Section VIII C of the Resolution (repeated in Sec. XIII A of the BOS Resolution): "The transitory and short term visual effect is acceptable within the residential community of the Seacape Subdivision, and not considered to be a substantial view impact." First, 9 Ahab Drive is not within the Seacape Subdivision and never was. Second, "acceptable" to whom exactly? There are 150 or so dwellings in Muir Beach of which those in the Seacape Development represent a small fraction.

The Planning Commission and the BOS took a simple concept and made it complicated: "significant" simply means "substantial." A picture is worth a thousand words. **(Exh. A)**. The Planning Commission's definition of "significant", set forth in sec. VIII C of the Resolution should be rejected because it is utterly incompatible with the purposes and objectives of the Coastal Act and the LCP.

Another argument advanced by the Applicant (but not by the staff or Planning Commission), is that the public easement is not used very much. The Legislature has made a judgement that scenic views from public rights-of-way are to be protected, and has made a reasonable assumption that these are used by the public. Gordon Bennett of the Sierra Club testified before the DZA that its members use the easement. Members of the public have filed letters in support of the appellants showing that the public easement is used by non-Muir Beach residents. A member of the public, Hank Gehman, spoke eloquently before the Planning Commission about his love for that spot. A recent article in the Beachcomer, the Muir Beach community's neighborhood newspaper, describes the many public easements in Muir Beach and encourages everyone to get out and use them. **EXH. B.** The applicant's assertion is unproven and untrue.

The only legitimate issue in determining whether an impairment is significant is whether the visual coastal resource sought to be protected from the blight of development is visible from public rights-of-way, not whether there are other comparable viewsheds in the vicinity. *LT-WR L.L.C. v. California Coastal Commission,* 60 Cal. Rptr. 3d 417, 438 (Cal. App.2d Dist. 2007)(**EXH. C, excerpts from decision**).

(1) The LT-WR case provides a roadmap to the correct decision in this case

In the *LT-WR* case, like Muir Beach, the project site was located in a highly scenic area, the Castro Peak ridgeline. The ridgeline was visible from public viewing areas such as parklands and hiking trails. The Coastal Commission found that the project would have a significant adverse visual effect from public viewing areas. Whether the visual impact would be transitory or short term as hikers proceeded to their destinations, or the existence of other panoramic views, or how many hikers used the trails, formed no part of the Commission's analysis. The only issue was that the site proposed for development was between the trails and the ridgeline and defiled the view.

The public easement is a dedicated public trail owned and maintained by the Muir Beach Community Service District and has been used for over forty years. No one who has stood at the top of the public easement on Ahab Drive could describe the view, or the impact of the proposed development as shown by the story poles, as *de minimis*. Not only is Big Beach a jewel of the Golden Gate National Recreation Area, but also, out of tens of thousands of possible locations, it was selected for the opening scenes of the movie "Memoirs of a Geisha!" Obviously, there is something special about the Muir Beach Cove to the broader public as well as Muir Beach residents and guests. The photographs that we have submitted demonstrate that the Crosby development would wipe out the view of the Muir Beach cove, the beach and ocean from public roads and trails. The development meets the correct legal standard of a significant impairment.

(2) Attempts to distinguish the LT-WR case are without merit

At the hearing before the Planning Commission several attempts were made to distinguish the *LT-WR* case. None are valid.

First, a public speaker by the name of Dave Gilbert, who identified himself as a "real estate agent, a lawyer and a friend of Tim Crosby," sought to distinguish the case on the basis that the developer had done some work without a permit. While true, this fact is completely immaterial. Nothing in the Court's decision suggests that its analysis of what constitutes a "significant impairment" had anything to do with the fact that the permit application followed some unpermitted development of the site.

Second, Chairman Dickenson and Commissioner Ginalski felt that *LT-WR* was not a comparable situation because the ridgeline was described as being one of the highest and most visible landmarks in the Santa Monica mountains and had been officially recognized in the local plan as a "Significant Ridgeline." The fact that the Castro Peak ridgeline is a commanding visual feature in no way diminishes the beauty of Muir Beach cove as seen from Ahab Drive and the top of the public easement. It would be absurd to conclude that Muir Beach cove is not entitled to protection as a magnificent coastal view. The Castro Peak ridgeline does not set a standard against which every other scenic view must be measured in order to be protected.

The fact that the Castro Peak ridgeline was officially recognized in the local plan does not mean that such recognition is a minimum requirement. Sec. 30251 of the Coastal Act protects scenic resources, not "scenic resources which have been officially designated in the LCP." Neither the Coastal Act nor the LCP requires that a visual coastal resource be officially designated by the LCP before it can be deserving of protection. If that were a condition, it would eviscerate the Coastal Act because there are probably few such designations.

These attempts to distinguish the *LT-WR* case are without merit.

It should also be noted that the Coastal Act contained a provision in 1976 which provided the Coastal Commission a brief period–two years-to designate "sensitive coastal resource areas" California Coastal Act Sec. 30502, 30116. This authority expired in 1978. (There is no indication that the Castro Peak ridgeline was one of these). SCRA's were subject to "other implementing actions" in addition to the normal protections. California Coastal Act Sec. 30108.6. However, it is equally clear that the protections of the Coastal Act are not limited to SCRAs. California Coastal Act Sec.30251. If the Coastal Act only protected SCRAs, it would have said so. The Act must be liberally interpreted to achieve its purposes and objectives. Calif. Coastal Act Sec. 30009. Limiting the Act to SCRAs–the last of which would have been designated some thirty years ago-would thwart, rather than promote, the objectives of the Act.

Likewise, insofar as Sec. 30251 of the Coastal Act provides that "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 local government shall be subordinate to the character of its setting", it in no way detracts from the requirements that "permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas" and "be visually compatible with the character of surrounding areas."
In applying the Coastal Act, it is not whether the viewshed has been designated as "scenic': the only thing that counts is whether it *is* scenic.

(E) The landscaping plan will not solve the problem

Several Commissioners believed that the damage to the view could be mitigated through landscaping. Because the plan that was presented for the first time at the hearing was deemed unacceptable, this issue was delegated to staff. According to Neal Osborne, a revised formal landscaping plan that meets the requirements of the Planning Department has yet to be submitted by the Applicant. In any event, landscaping might hide the house, and removal of some trees might even open up some views, but such modifications cannot restore the unique view of the Muir Beach Cove, Big Beach and Pacific Ocean that would be lost through this development. The reason for this is the steep dropoff from the top of the easement as you descend to the beach. Unless you pause at the top, as letters in the record attest that people do, the view is lost. Views are not fungible. This problem cannot be solved by eliminating some trees on the property.

Because the Applicant asserts that landscaping is the solution, he should bear the burden of proof that it will restore the view in question. As anyone can see from a visit to the site, this is an impossible burden for him to meet.

II. There are feasible alternatives which, if implemented, could be found consistent with the policies of the Coastal Act and the LCP

Once it is determined that visual coastal resources are significantly impaired, the remaining question is whether there are feasible alternatives. The LCP provides: "to the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway." LCP p. 65. As Deputy Director Lai explained, the phrase "to the maximum extent feasible" simply means that, in designing the project, every effort must be made to avoid the destructive effect to viewsheds. This project does not satisfy that standard.

There are feasible alternatives. The 1600 square foot addition is the size of many houses. There are countless designs for houses. There is nothing sacrosanct about this design. We do not maintain that Mr. Crosby cannot expand his house; only that he must design it so that it does not destroy a treasured public view. If this house were being built in San Anselmo on a similar size lot, there probably would be no problem. But this development is taking place in the coastal zone.

We are gratified that the Planning Commission ordered Mr. Crosby to delete the clerestory windows on both the east and west sides. As noted on page 3, the Commission gave the Applicant an opportunity to submit a revised plan to staff demonstrating the need for additional roof height on the west side. Appellants have been advised by Neal Osborne that drawings submitted by the Applicant's architect are not the formal revision to the plans that would be necessary to enable the planning staff to make a decision. Therefore the issue remains unresolved. Of course, eliminating

the clerestories would help a little. But lowering the roofline by four and a half feet will not solve the problem, especially on the western side. If, however, the western side were to be reduced by one story, i.e., bedroom No. 3, it would eliminate 12 to 15 feet from the height and thereby preserve the cove view. Because the so-called "music room" with its attached full bathroom could just as easily have been labeled a bedroom, you could still end up with a three bedroom, four bathroom house for a 52 year old single male. The Applicant could construct a great house without destroying the public views. With so much interior space to work with, clearly a solution is achievable. This ill-conceived and enormous development project could, and should, be re-designed so that the primary concern of the Coastal Act and the LCP, to protect scenic resources, is vindicated. The piecemeal approach of tinkering with the roofline is ineffectual.

Commissioner Ginalski stated that the challenge in this case was to "balance the needs of the private property owner to be able to... develop and build their property and share it with the public right to view and enjoy nature." Assuming, for the sake of argument, that this is the appropriate way to approach this case, the result is clear. On one side of the scale is the permanent loss of a spectacular view. On the other is the homeowner who has many options in designing his house to preserve existing viewsheds. Nature cannot redesign the view of Muir Beach cove from Ahab Drive or the top of the public easement.

In this connection, Section 30251 of the Coastal Act requires that permitted development must be "compatible with the character of the surrounding area." Likewise, Title 22.56.1301(O)(3) of the Interim Zoning Ordinance provides in part: "The height, scale and design of the new structure shall be compatible with the character of the surrounding natural or built environment." (Unlike the next sentence of this section that contains the "public viewing places" language discussed above, there is no conflict with the LCP) Commissioner Greenberg felt that the house is too big, is out of character with the neighborhood standard and would create a precedent for other development that may come before the Commission. She was "reluctant to send the Applicant back and make a smaller house although that's what I think should be done." We urge the Coastal Commission to do what should have been done: deny the permit application outright.

In *LT-WR L.L.C. v. California Coastal Commission,* 60 Cal. Rptr. 3d at 440, the Court of Appeals stated: "The Commission is not required to redesign the applicant's project to make it acceptable." Id. 440. The court went on to state, "The denial of the application does not bar the applicant from submitting a new and different proposal." The same is true here.

In addition, there is no emergency about building this project. On July 24, 2008, the Applicant submitted a statement to the Community Development Agency in which he made some statements that are disingenuous at best. **EXH. D.** For example, the Applicant states: "Added bedrooms provide for an elderly parent as well as young children." This statement is disingenuous because it creates the impression that there is an immediate need for housing for an extended family. The truth is that the Applicant's mother owns her own house in Marin County and the Applicant has no children. This statement does not reflect current reality but, rather, is speculation about what the future may hold. Also, the Applicant himself is domiciled in Florida, where he spends much of his time. The Applicant also states that the original house was "built for a single woman," as though

it is too tiny for a single man! Many families live in far less space than 2058 square feet.

No one denies that the Applicant has the right to expand his living space. However, the Coastal Commission should not be influenced by any misapprehension that there is some dire need to proceed with *this* design.

III. The Muir Beach Community Plan provides additional authority for the Appellants' arguments

A. The MBCP was incorporated into the LCP in 1980

Before the Planning Commission, the Appellants argued that, in addition to violating the Coastal Act and the LCP, the proposed development violates the Muir Beach Community Plan (MBCP) which states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP p. 12. On the Friday before the hearing before the Planning Commission, Neal Osborne sent a memorandum to the Commission stating that the MBCP was not applicable because it was not incorporated into the LCP when it was certified by the California Coastal Commission in 1980. Acting on this memorandum, the Planning Commission deleted all references to the MBCP from the Resolution that was adopted by the Commission on March 9, 2009. Appellants raised the issue before the BOS by a supplemental argument filed on March 30, 2009. **EXH. E**

The position that the MBCP was not incorporated into the LCP is incorrect. The LCP, that was certified by the Coastal Commission on April 1, 1980, does incorporate the MBCP and discusses it on page 79. It is particularly difficult to understand the Planning Department's position in light of the fact that in another recent case from Muir Beach that came before the Coastal Commission, the MBCP was central to the case and no one ever suggested that it had not been certified or adopted by the Coastal Commission. See *Beverly Biondi,* Application No.2 Mar 8-066, Local Permit CPO7-34, CPO8-24.

At the BOS hearing, Deputy County Counsel David Zaltsman and Deputy Director of Planning Services Tom Lai attempted to explain the basis for the Planning Department's position. Essentially, they argued that, unlike this case, the Biondi case involved a design review as well as a coastal permit application. They believe that the MBCP was incorporated "but not in full." They also argued that of all the other community plans in the coastal zone, very few were actually incorporated by the Coastal Commission into the LCP.

The arguments made at the hearing are unpersuasive. With two exceptions noted on p. 79 of the LCP, the MBCP was incorporated. The *post hoc* contention that design reviews were included but applications for coastal permits were not is simply unsupported by the LCP itself. Whether the LCP incorporated other communities' land use plans is immaterial: the only question is whether the MBCP is in or out and the clear intention of the LCP document itself is that, except as specifically noted, it is in.

It is extraordinary that after twenty-nine years have passed, the Planning Department has discovered for the first time that the MBCP was not fully incorporated into the LCP. A decision of such consequence should be the subject of a formal written opinion by County Counsel and not decided based upon the superficial reasoning and vague generalities such as those tendered by Deputy Director Lai and Deputy County Counsel Zaltsman at the hearing. Because the Appellants found these arguments to be incomprehensible, we requested David Zaltsman to put the County's analysis of the issue in writing. **EXH. F.** He has not done so.

B. The Crosby project violates the MBCP

Concerning the Crosby project, there can be no more apt example of the concern expressed in the MBCP over "the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community."The MBCP complements the Appellants' arguments that the Crosby project conflicts with Sec. 30251 of the Coastal Act insofar as it requires that permitted development must be "compatible with the character of the surrounding area" and with Title 22.56.130I(0)(3) of the Interim Zoning Ordinance insofar as it provides that "The height, *scale* and design of the new structure shall be compatible with the character of the surrounding natural or built environment." (Emphasis added) We share the view expressed by Commissioner Greenberg at the February 9 hearing before the Planning Commission that the proposed addition is too big and is out of character with the community. In this connection, Deputy County Counsel Zaltsman admitted at the BOS hearing that homes within 600 feet of the Crosby property range in size from 475 sq. feet to 5562 sq. feet; the average is 1768 sq. feet; the median is 1791 sq. feet; and only 9 (12 per cent) of the lots have homes exceeding 3000 sq. feet. These statistics support the Appellants, not the Applicant. At 3647 sq. feet, the Crosby project would be larger than 88 per cent of the neighboring dwellings.

IV. The Coastal Commission should eschew the many Irrelevant issues that have been interjected by the BOS and the Applicant

A. Legally irrelevant considerations result in arbitrary and capricious decision-making

In addition to ratifying the incorrect criteria adopted by the Planning Commission, the BOS applied improper and legally irrelevant considerations.

For example, Supervisor Kinsey voiced his concern that the Applicant should not be held accountable even though his architect, Richard Beckman, had "missed an opportunity to protect this jewel of a view" and that a "sensitive architect should have done that." First of all, the record does not reflect who is at fault: it may be that the Applicant's architect(s) advised him that the project would run afoul of the Coastal Act and he chose to ignore that advice. So, Supervisor Kinsey was making an assumption. Second, assuming the architects were at fault, the fact that the Applicant might have legal recourse against them has absolutely nothing to do with whether the project violates the Coastal Act and the LCP. Potential liability would be an issue for the architect's malpractice carrier and the courts to determine. It was not the BOS's job to resolve issues of liability between Mr. Crosby and his architects or to insulate Mr. Crosby from the consequences of bad advice. There are other remedies for that.

Supervisor Kinsey thought it significant that other projects in Muir Beach, cited by the Applicant, had been approved in recent years. In fact, none of these projects eclipsed a stunning view of the coast, as the Crosby project does. In any event, this highlights why it is important that the Crosby permit be denied: if it is allowed, in future years developers will be citing the Crosby project as the benchmark. The Coastal Act would be eviscerated. The root of the problem is that Supervisor Kinsey believes that decisions such as this one should be decided by the Muir Beach community in the context of its Community Plan (which the BOS erroneously thinks was never incorporated into the LCP), totally ignoring the fact that the Coastal Act has declared the preservation of California's scenic coastal resources to be a matter of statewide and nationwide concern. Calif. Coastal Act Sec. 30001(b). Allowing such factors to influence the outcome constitutes arbitrary and capricious decision-making at its worst.

More disturbing is Supervisor Kinsey's belief, not stated at the hearing but subsequently published, that neither the Coastal Act nor the LCP protects what he termed 'micro' views. Or so he told the West Marin Citizen in an interview about this case a few days after the BOS decision. In a revealing statement, published by the Citizen on April 9, 2009, Supervisor Kinsey stated that "[t]he language of the law did not provide for the protection of 'micro' views." **EXH. G.** What is the legal authority for this astonishing statement? Neither the Coastal Act nor the LCP distinguish between 'micro' views and 'macro' views: they protect all views to scenic resources within the coastal zone.

B. The Applicants' *ad hominem* attacks should be ignored

There is an adage in the legal profession that "if the law is against you argue the facts; if the facts are against you argue the law; and if both the law and the facts are against you put your adversary on trial." Because both the law and the facts are against the Applicant, regrettably he has resorted to arguments of a personal nature designed to divert attention away from the issues raised by this appeal.

The Applicant's argument before the BOS was punctuated by irrelevant and *ad hominem* attacks on the Appellants. These include his belief that the Appellants are not "entitled to a life free of any change." Applicant Crosby's Statement Before the BOS, March 24, 2009. In addition to accusing the Appellants of various transgressions, he argued that the fact that the Appellants have not

opposed many other projects in Muir Beach is evidence that we are motivated by private interest rather than the public interest, which we purport to serve.

Putting aside the obvious fact that opposing a development permit requires an enormous investment of time and money, even if we were the worst people in the world acting out of the basest of motives, that would not change the fact that the Crosby project violates the Coastal Act and the LCP. This is a topic which the Applicant scrupulously avoided discussing in his own presentation: he believes that compliance with the technical zoning standards is all that is required. We do not expect a medal for representing the public interest in this case but we do ask that our arguments be evaluated on the merits. We cannot stop the Applicant from attacking our motives or our character but we do ask that the Coastal Commission keep its eye on the ball and not be distracted from the important issues raised by this appeal by irrelevant personal attacks.

V. The role of letters and testimony

For the following reasons, letters and public testimony submitted by the Applicant should be approached with caution. The Applicant submitted twelve letters and one postcard by Muir Beach residents on his behalf. Of these, two were submitted by persons employed by the Applicant: Gail Falls, who is his "field architect" and Brad Eigsti, who he hired to do a landscape plan. We also submit that it is superficial to tally up letters pro and con without considering their content. Most of the letters which the Applicant submitted are of the "I do not oppose" variety mostly using the same format. On the other hand, the letters submitted on behalf of the Appellant, many of them from visitors to Muir Beach who spoke eloquently about their feelings concerning the view that would be eliminated by the development project.

The Commission should also be wary of public testimony. For example, one Bill Shideler spoke on Mr. Crosby's behalf before the BOS. He neglected to disclose the fact that he is a contractor hired by Mr. Crosby to erect story poles on the premises. The Appellants only learned that Mr. Shideler had a direct financial interest in the project after the hearing was over. The supervisors never knew about the connection because neither Mr. Shideler not Mr. Crosby thought it relevant to provide that information.

Letters and testimony may provide the deciders with some insight but they cannot negate the law. In addition, when participants fail to disclose that they have a direct financial interest in the project it obviously poisons the process.

Finally, if you add up the letters and the public speakers, and omit the the parties and the Applicant's known employees, the total is virtually a tie: Applicant 13; Appellants 12.

VI. Preservation of Procedural Issues

A. Procedural errors before the DZA render the entire proceedings void

The Appellants contend that procedural errors made in noticing the permit application and in failing

to grant the Kohn Appellants' request for a continuance when the matter was before the Deputy Zoning Administrator renders the entire process void. The Planning Commission refused to consider these arguments on the ground that it's jurisdiction was *de novo*, and that everything that occurred previously was wiped away. As Commissioner Holland said:

> "The other one is about this whole business of whether or not any possible errors were made at the DZA prejudiced things before us. This is called a de novo hearing here which means we start from scratch. Everything that went before us is gone. In a sense you've gotten what you wanted in asking for a start over because we look at the entire project as though no one has done it before."

The Appellants disagree. Each successive appeal is like fruit of the poisonous tree–the whole process has been fatally infected by the procedural errors. It is elementary that an administrative agency must follow its own regulations, which was not done in this case.

In this connection, at the suggestion of Tom Lai, Appellants contacted Deputy County Counsel David Zaltsman. In an e-mail dated March 3, 2009, he states, in part:

> "Since the general rule in all areas of the law I am familiar with is that appeals are de novo unless there is case law or statutory basis to the contrary. *I would be more concerned if someone suggested to you that you were somehow limited in the issues you could raise at either the Planning Commission or Board of Supervisors."* ***EXH. H***

Just because an appellate body takes a fresh view of the law and facts (i.e. *de novo* review) does not erase everything that preceded it. Otherwise, fundamental errors would be completely insulated from review. The BOS did not address the procedural violations at the hearing. Nor, except in the most cursory fashion in Sec. XIII G, did Resolution No. 2009-26 adopted by the BOS address the procedural arguments raised by the Appellants. We are aware that the jurisdiction of the Coastal Commission is limited. It is our intention to preserve the issues for eventual judicial review if resort to the courts becomes necessary. To avoid repeating those arguments (which would run the risk of detracting from the important substantive issues raised above), we attach the brief we submitted to the Planning Commission as **EXH. I**, expressly incorporate the procedural arguments as though fully set forth herein, and respectfully request the Coastal Commission to address those arguments if you believe that it is within your purview to do so.

B. The failure of the Planning Department to provide the BOS with the complete administrative record violates elementary principles of administrative law

The Planning Department violated fundamental principles of administrative procedure by failing to

provide the BOS with the entire administrative record. This was prejudicial to the Appellants. For example, several letters submitted in support of the Appellants were never seen by the BOS. This is significant because Supervisor Kinsey appeared to be influenced by the mere number of letters submitted on behalf of the Applicant. This is but one of many procedural violations that have tainted this case from its inception.

CONCLUSION

One of the purposes of the Coastal Act is to prevent private property owners from commandeering public views so that only the property owners receive the exclusive benefit of nature's wonders to the exclusion of the public. That is what is happening here. Mr. Crosby admitted as much in his Final Planning Statement attached to his Zoning/Development Application dated July 24, 2008, where he states: "The 1600 +/- square foot addition is designed to take full advantage of the spectacular ocean view,..." **EXH. D.** If the Crosby development is permitted, a unique and beautiful view will be irretrievably lost to this and future generations to satisfy the self-interest of one person. That would be a tragedy.

Those of us who are fortunate enough to live in Muir Beach must look beyond self indulgence and consider the greater good. We are stewards of a precious trust–this unique, special and historic site. We are here for only a short period of time, but the beauty of the coast is eternal. Because the California Coastal Commission has the power to enforce the Coastal Act and the LCP, you share in that responsibility to ensure that structures created by man do not endanger that trust, as this project does.

While we had hoped to reach a negotiated settlement of this controversy, that has proven to be impossible. Therefore, we urge the Coastal Commission to determine that this appeal raises substantial issues, take jurisdiction and, after due consideration, deny the permit application as being incompatible with applicable law.

Respectfully submitted,

Signature on File | **Signature on File**

Richard and Brenda Kohn | Dr. Edward Hyman and Dr. Deborah McDonald

Dated: May 5, 2009

BEFORE THE CALIFORNIA COASTAL COMMISSION

Appeal from the Marin County Board of Supervisors'
Decision re: Timothy Crosby Application for a
Coastal Development Permit
Application No. CP09-3
Commission Appeal No. A-2-MAR-09-010

EXHIBITS IN SUPPORT OF APPELLANTS' ARGUMENT

LIST OF EXHIBITS

A. Photographs of Muir Beach Cove from Public Easement and Ahab Drive

B. Beachcomber, Issue 245, May 2009

C. *LT-WR, L.L.C. v. California Coastal Commission,* 60 Cal.Rptr.3d 417, 437-440 Cal.App.2 Dist. 2007)(excerpts)

D. Crosby Final Statement. doc July 24, 2008 (3 pages)

E. Supplemental Argument on Behalf of Appellants before the Marin County Board of Supervisors, March 28, 2009 with Muir Beach Community Plan p. 12, memorandum from Neal Osborne dated February 6, 2009 and Marin County LCP (Unit 1) p. 79.

F. E-mail to Deputy County Counsel David Zaltsman from Brenda Kohn dated April 17, 2009

G. West Marin Citizen April 9, 2009

H. E-mail to Neal Osborne from Brenda Kohn dated March 2, 2009 and reply from David Zaltsman dated March 3, 2009

I. Argument on Behalf of Appellants Richard S. Kohn and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald before Marin County Planning Commission dated Jan. 25, 2009, containing procedural objections to the DZA proceedings, incorporated by reference in the Appellants' Argument to the California Coastal Commission

Taken from the top of the public easement

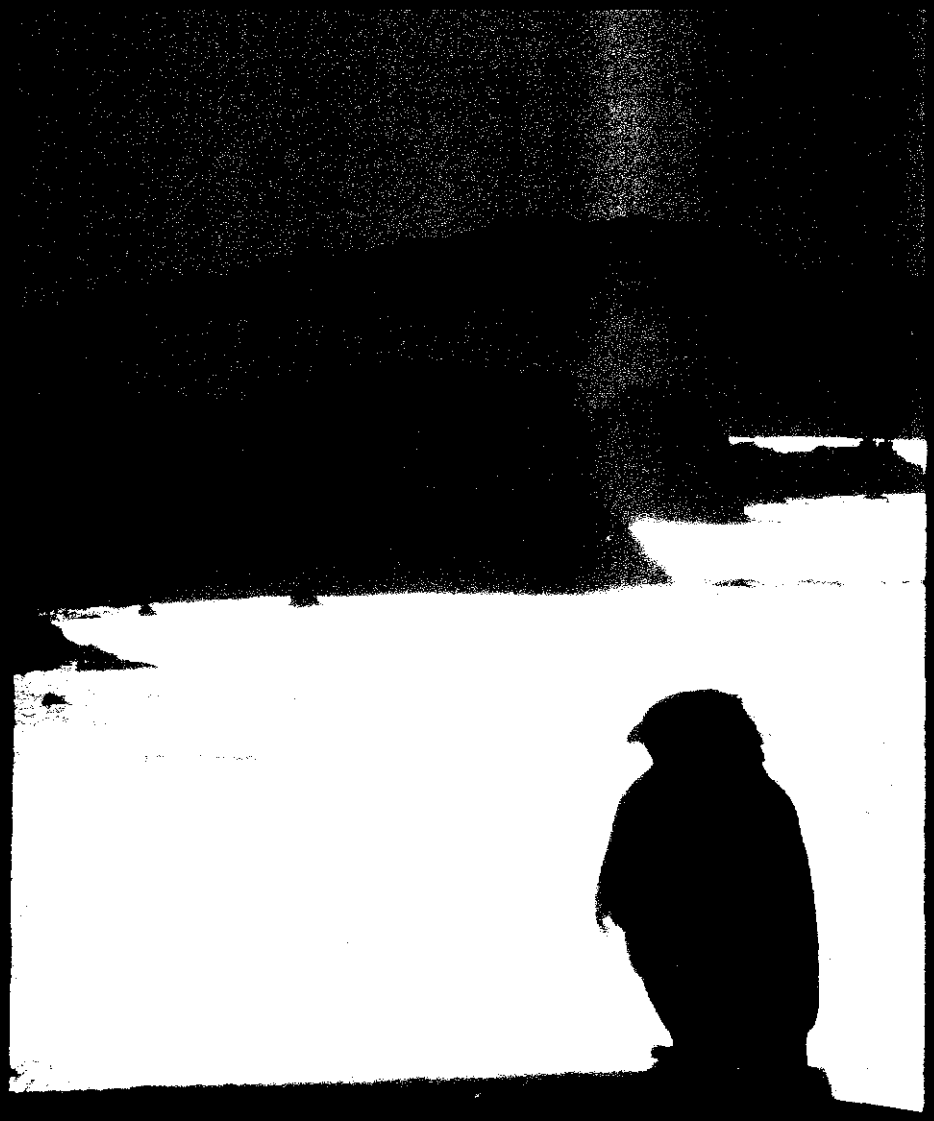
Taken from Ahab Drive

EXH. A

BEACHCOMBER

Muir Beach Neighborhood News

Issue 245 May 2009



EXH. B

District Manager's Report March 2009

By Maury Ostroff

One of the advantages of living in Muir Beach is our proximity to so many great hiking trails that wind their way through the surrounding hills of the Golden Gate National Recreational Area and Mt. Tamalpais State Park. But of more immediate interest is the pedestrian easements and pathways within the residential areas of Muir Beach that are owned and maintained by the Muir Beach CSD.

Most of the easements and parkland are well known and used often by Muir Beach residents and visitors who are hiking through. Others are less well known and used. For the record, the following lists the CSD owned trails in Muir Beach:

- Ahab Drive to Sunset Way, continuing across Sunset Way down to Little Beach.
- Seacape Drive to Muir Beach Overlook.
- Corner of Seacape Drive and Starbuck all the way down to Seacape across from the Community Center.
- Community Center down to Sunset Way, continuing across Sunset Way down to Pacific Way.
- Sunset Way (east) to Pacific Way.
- Sunset Way (west) to Little Beach.

The CSD strives to maintain these trails in working order and in character with their surroundings. Where needed and appropriate, we have installed steps and handrails. Sometimes there are real staircases, other times there are just old railroad ties staked into the ground, and mostly it's just a well-worn dirt path. But we do go through the easements on a periodic basis with a weed whacker and keep the trails passable. Obviously, some trails are in better condition than others, and hopefully by the time this article appears in print we will have fixed some of the loose steps and done other trail restoration.

The most frequently used path is the one that starts on Pacific Way through a driveway and then up the steps to Sunset Way. The notable feature here is the wooden flume on the side that carries storm drainage water. Most visitors to Muir Beach take this path to start their hike up to the Muir Beach Overlook (or beyond.)

The path continues directly on the other side of Sunset Way and heads straight up to the Community Center. About halfway up is a bench with a plaque in memory of Lawrence and Janet Stump; a great place to catch your breath and look back on the view.

Continuing on up the path you come to the Community Center. A new landmark on the east side is our new Storage Shed, and a set of new stone walls, and a new stone bench set in the wall next to the shed, which offers yet another spectacular view of the beach and the coastline to the south. The trail continues along the ramp and up the stone steps to Seacape Drive, where you will end up by the wooden sign and bulletin board in front of the Community Center.

Directly across Seacape drive and the Community Center the path picks up again, winding up a hill to the Lower Starbuck extension. You can see the Lower Water Tank on the east side, which provides water to the "lower zone" of houses primarily along Sunset and Pacific Way. There is a set of stairs that lead to the Lower Starbuck extension road, but the main path continues on up the hill. After a few switchbacks and a few hundred yards, you will come to another stone bench with a plaque in memory of the Clark family, which provides yet another increasingly spectacular view of the coastline and surrounding hills to the south. By now you have climbed enough in elevation to see into the valley and fields of Green Gulch Farm.

The path continues on up the hill running between houses facing Seacape Drive to the southwest and Starbuck Drive to the northeast. Currently at the top of the hill things are in a bit of flux due to the construction of two new houses on Seacape. There is a road used by the construction crews that goes straight down to Starbuck Drive just before Seacape, but there is also a path that

View from the new stonewall at the Community Center to Sunset Way. Note that the path continues down across Sunset Way to Pacific Way and to the Muir Beach Parking Lot.

View to the southeast along the Seacape/Starbuck Parkland Trail as it goes past the Clark Family Bench.

leads to a set of stairs that ends right at the corner of Seacape and Starbuck. At this point you can see Mt. Tamalpais to the north.

To get to the Muir Beach Overlook, the best way is to continue walking up Seacape Drive, past the Upper Water Tank, and on to the entrance to the Overlook parking lot, which is owned and maintained by the National Park Service. There is an easement from Seacape that leads to the back portion of the Overlook which the CSD keeps clear and open, but it dead-ends into a thicket of scrub and poison oak when it reaches NPS property.

Now that we've hiked up in elevation about 400 feet from the beach to the Overlook, this is as good a time as any to talk about some of the issues regarding the public trails and easements. In general, we want to keep the trails open not only to all residents but to the general public as well. However, there are certain trails that are in close proximity of private residences to areas that are easily accessible by car and/or the general public. To be frank, as a measure of concern for security and privacy, it is not advisable for us to open the trail to the Overlook, and accordingly we have not asked the Park Service to clear the brush on Federal land.

Once at the Muir Beach Overlook, you can continue your hike down to Slide Ranch along the Owl Trail, or cross to the east side of Highway One and take the Coast View Trail all the way to Pantoll. One of my favorite hikes is the Heather Cutoff Trail with its numerous switchbacks that takes you back down to Santos Meadow where the annual Fire Department BBQ is held. The top of the Heather Cutoff Trail can be found a few hundred yards past the Muir Beach Overlook, where there is a sign on the Coastal View Road indicating Pantoll straight ahead, and Heather Cutoff to the right.

The path I just described starting at Pacific Way is the path used by thru-hikers who either start at the Muir Beach parking lot, or who have come from further south along the Coastal Trail. The fact is that the only connection to the Coast View Trail to the north and to the south of Muir Beach goes through the CSD easements. I can also recommend the Coastal View Trail to the south that leads to "Pirate's Cove" and continues on to Tennessee Cove, or you can take the Coastal Fire Road, then either Green Gulch or Middle Green Gulch Trail that goes down to the Zen Center.

Getting back to Muir Beach, another path starts at Ahab Drive where there is a set of wooden steps at the top. Halfway down the trail you can see the infamous "Bello-Seacape" drainage ditch on the right. This ditch carries storm water from Ahab and Seacape drives and runs between Ahab and Sunset Way, and eventually empties into the Cove Lane seasonal creek. Continue down the path and there is another set of steps that leads down onto Sunset Way. The easement continues in a straight line to a set of relatively steep steps that end at the bottom of Cove Lane and the path to Little Beach. The 1.5" water line that serves some houses at the bottom of Cove Lane runs down along this path and ends at the Fire Hydrant at the bottom, but the small size of the pipe is not enough to make that hydrant useful in a fire.

There is another path that starts at Little Beach and goes up to the end of Sunset Way. The CSD is about to start another phase of our Water Capital Improvements Plan and add a new 6" water line that will replace the other water line. We will relocate the Fire Hydrant and make it operational. At that time, the trail will be rerouted to be further away from the eroding cliff and we will make other repairs to make the trail safer and more usable. However, just like the situation at the Overlook, we don't want to make this trail too inviting (or visible) to the general public at Little Beach.

There is another, seldom used path that runs down from the very beginning of Sunset Way to Pacific Way. The actual path has fallen into disuse and has become overgrown, and at some point in the future we hope to restore this trail. However, there is another trail that has been established by the horses that goes from Sunset Way down to Pacific Way near the Terwilliger Butterfly Grove in the same general area.

If you want to get in shape and see the great outdoors, sell the treadmill and the Stairmaster and get out and hike the trail up to the Overlook, down to the beach and back once a day. In no time at all you'll be ready to run the Dipsea. Or maybe just take your time and take a casual walk on the weekend and see some of your neighbors. These pedestrian easements were set aside for our enjoyment so get out and use them!

Photographs by Maury Ostroff

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We conclude that the denial of the motion for expert witness fees was error. Our conclusion does not compel the conclusion that the Housing Authority is entitled to recover its expert witness fees, but only that the trial court on remand must exercise its discretion under Code of Civil Procedure, section 998, subdivision (c)(1) in deciding whether to award the fees.

DISPOSITION

The judgment is affirmed as to the denial of relief to Fassberg on the complaint. The judgment is reversed as to the cross-complaint by the Housing Authority with directions to the superior court to (1) conduct a new trial on the cross-complaint limited to determining the number of false claims, if any, the amount of damages resulting from false claims and from any false records or statements in connection with false claims, and the appropriate civil penalty; (2) determine whether the election of remedies doctrine precludes the Housing Authority from seeking to recover in the new trial compensatory and punitive damages for misrepresentation and, if the Housing Authority is not precluded, conduct a new trial on those issues; (3) include in the judgment on the cross-complaint to be entered at the conclusion of the proceedings on remand a reduced award of damages to the Housing Authority for breach of contract in the amount of $701,282.05 ($1,104,000—$402,717.95 = $701,282.05), and an award to Fassberg of $1,310,036.47 as the full amount of the retention proceeds; (4) reconsider its determination that the Housing Authority is the prevailing party for purposes of an attorney fee award under Public Contract Code section 7107, subdivision (f); and (5) reconsider the issue of the Housing Authority's right to recover expert witness fees under Code of Civil Procedure, section 998, subdivision (c)(1). The order denying Fassberg's motion for partial judgment notwithstanding the verdict is affirmed. Each party shall bear its own costs on appeal.

KLEIN, P.J., and ALDRICH, J., concur.

151 Cal.App.4th 427

LT-WR, L.L.C., Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION et al., Defendants and Appellants.

No. B187666.

Court of Appeal, Second District, Division 3.

May 25, 2007.

As Modified June 21, 2007.

Background: Landowner petitioned for writ of administrative mandate, seeking to overturn a decision by the California Coastal Commission denying landowner's application for a coastal development permit (CDP). The Superior Court, Los Angeles County, No. BS088933, Dzintra Janavs, J., granted the petition in part and denied the petition in part. Landowner appealed, and Commission cross-appealed.

Holdings: The Court of Appeal, Klein, P.J., held that:

(1) landowner waived its claim of vested right;

(2) Commission's failure to hold timely public hearing did not divest it of jurisdiction;

EXH. C

2

With respect to LT-WR's application to place a mobile home structure on the parcel as a caretaker's residence, the Commission noted: "The development is proposed to be located on an unpermitted pad area that was graded after the effective date of the Coastal Act (January 1, 1977).... [T]his area of the site has been altered without a coastal development permit since 1977. Approximately 9,360 sq. ft of chaparral vegetation was removed adjacent to the intersection of the two existing firebreaks on the site. [¶] Additionally, a pad of approximately 16,000 sq. ft and road were graded both within the existing fire-break and the area where vegetation was removed after 1977. Staff would note that the applicant is not requesting after-the-fact approval for this pad or for the vegetation removal associated with it. *Nonetheless, staff has considered the application as though the unpermitted development has not already occurred.* The applicant is proposing to place the caretaker's residence and storage trailer on the pad, so the impacts of developing the pad must be considered along with those of the structures." (Italics added.)

[16] In order to enable the Commission to protect coastal resources, and to avoid condoning unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred. Therefore, we reject LT-WR's contention it was merely seeking a "*de minimis*" relocation of existing structures "to areas which had previously been cleared."

7. *Substantial evidence supports Commission's determination the development would have an adverse impact on visual resources.*

a. *The pertinent statute.*

[17] Public Resources Code section 30251 states: "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 subordinate to the character of its setting."

b. *The Commission's determination the proposed development would have an adverse impact on visual resources.*

The Commission found: "The proposed project site is located in a highly scenic area. Castro Peak ridgeline is one of the highest and most visible landmarks in the Santa Monica Mountains. The LUP designates Castro Peak as a Significant Ridgeline.... [¶] ... [¶] ... The ridgeline is visible from a very large area, including parklands and trails. The site is visible, in particular, from the National Parks Services lands in Solstice Canyon, Malibu Creek State Park, and the Backbone Trail. [¶] ... [¶] The grading of the pad in the proposed location on a steep slope on a highly scenic ridgeline would have individual significant adverse impacts on visual resources from public areas. Chaparral habitat was removed and an undetermined amount of grading and landform alteration was carried out for the construction of the pad. The existing access road was constructed with an undetermined amount of grading and the removal of approximately

540 sq. ft. of vegetation. Further improvements, including 700 cu. yds. of grading would be necessary to extend the road 600 feet from the property line to the pad and improve it to the required standard as well as to pave it. Further, the cumulative impacts of the pad in conjunction with the other development on the site would have significant effects on visual resources.... [T]here is approximately 81,000 sq. ft. of area on the ridge, within the large fire-break, that has already been denuded of vegetation, graded, or otherwise developed. As such, there is already a large area of the site that has been altered. Finally, the placement of the caretaker's residence in the proposed location would also require the removal, irrigation and/or thinning of chaparral on a steep slope as a result of fuel modification for fire protection purposes. The areas that are subject to fuel modification, particularly in the square pattern that the applicant has proposed, will read differently (areas where all vegetation is removed will be the color of the bare dirt while areas that are thinned will be a different color) than the surrounding natural vegetation and given the prominence of the ridge will be visible from a great distance. Therefore, the proposed project will not minimize grading and landform alteration on a prominent ridgeline, and is therefore not consistent with the requirements of [Public Resources Code] Section 30251 of the Coastal Act or the visual resource policies of the [LUP]."

c. *Trial court's ruling.*

With respect to visual resources, the statement of decision provides: "The LUP designates Castro Peak as a Significant Ridgeline, which is *highly scenic* and is one of the highest and *most visible* landmarks in the Santa Monica Mountains. Castro Peak is visible from public parklands and trails including the National Park Service lands in Solstice Canyon, Malibu Creek State Park, and the Backbone Trail. [¶] Substantial evidence supports the Commission's decision to deny the proposed development ... because it is inconsistent with the Coastal Act and LUP visual resource policies in that the proposed development will not minimize highly visible grading and vegetation removal on a prominent ridgeline."

d. *LT-WR's arguments relating to visual resources are meritless.*

LT-WR asserts the Commission "presented no evidence to show that the CDP, if granted, would be inconsistent with the Coastal Act and LUP visual and scenic resource policies." LT-WR attacks the Commission for beginning its analysis with the artificial premise that none of the items applied for in LT-WR's application existed, despite their having been there for decades. LT-WR contends the Commission's finding the placement of the caretaker's residence and fuel modification area would be visible from a great distance was unsupported by any photographic or scientific evidence. LT-WR asserts the property is already dominated by communication towers that are 150 to 300 feet high. Further, LT-WR attacks the Commission's reliance on aerial photographs to show the property is highly visible from trails in the Santa Monica Mountains because aerial photographs only show that the property is visible from the air, not from surrounding trails or properties.

In essence, LT-WR is asking this court to reweigh the evidence which the Commission considered. We decline to do so. The aerial photographs cited by the Commission reasonably support the inference the subject property is visible from hiking trails in the Santa Monica Mountains and that the development would have significant adverse impacts on visual resources

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from public viewing areas. On this record, we conclude substantial evidence supports the Commission's determination the project would have an adverse impact on visual resources.

8. *Substantial evidence supports the Commission's determination with respect to feasible design alternatives.*

a. *The Commission's decision.*

With respect to alternatives to the project, the Commission's decision states: "There are siting and design alternatives to the proposed project which, if implemented, could be found consistent with the policies of the Coastal Act and the LUP. The proposed caretaker's residence could be resited to the center area of the site.... There are several potential sites where the residence could be placed within this area.... Resiting the caretaker's residence, with the associated changes in the project would significantly reduce impacts to ESHA. First, the amount of chaparral ESHA removed, irrigated, or otherwise altered to provide fuel modification would be significantly reduced. Additionally, the proposed portion of the road that extends to the pad could be eliminated. The grading and vegetation removal to create the pad would not be necessary. As part of this alternative, the proposed storage trailer and horse stables could be included on the upper area of the site (within the larger fire-break), assuming that these structures could be constructed of inflammable materials and would not require fuel modification....

"[LT-WR's] agent has stated that resiting the proposed residence may present conflicts regarding proximity of a residential use to the telecommunications towers. As noted above, staff requested information on standards for separation between such towers and residential uses. The only information that [LT-WR's] agent provided was a letter ... stating that local and state governments are precluded from applying regulations or restriction based on concerns related to the potential harmful health effects of possible exposure to radiofrequency radiation. While staff does not agree that [LT-WR] adequately addressed this issue, no other information was provided by [LT-WR's] agent regarding necessary separation between the various types of uses existing and proposed on the project site. If [LT-WR] later determine[s], based on additional information, that there is a conflict between the placement of the caretaker's residence in the alternative area and the maintenance of the communications facilities, it may be necessary to either relocate the communications facilities or to eliminate the proposed residence. Other security measures could certainly be employed if necessary, such as fencing, security cameras, and security patrol. Other existing communications facilities, such as those just to the west on Castro Peak, and others on Saddlepeak do not employ personnel that live on-site.

"Other alternatives that could be employed to minimize impacts to ESHA include the construction of the proposed septic system in a different location.... This alternative location for the septic system would minimize impacts to chaparral ESHA by eliminating the removal of vegetation on the steep slope to run lines down to seepage pits in Newton Canyon Motorway.

"Finally, there is an alternative to the proposed second parallel roadway along the northern property line.... [A]n available alternative to constructing a second, parallel roadway would be [to] utilize the existing roadway. This alternative would eliminate the proposed grading and removal of chaparral vegetation. Therefore, the

Commission finds that there are feasible alternative to the proposed project that would not result in significant adverse effects on the environment and would be consistent with . . . the Coastal Act."

b. *Trial court's ruling.*

The trial court found "there are feasible siting and design alternatives to the proposed project that would not result in significant adverse effects on the environment and would be consistent with the Coastal Act and LUP policies, i.e., clustering development within the already developed 80,000 square feet and using the existing road. There are several alternative sites in the center area of site, north of the proposed location where the mobile home, septic system, water well, storage trailer, and horse stables could be relocated."

c. *No merit to LT–WR's contentions in this regard.*

[18] LT–WR contends the relocation of caretaker's residence and appurtenant structures to the alternative sites suggested by the Commission would be infeasible because the County Fire Department has already approved the fuel modification plan for the proposed project. The argument is patently without merit. The mere fact that fire officials have approved a brush clearance plan in connection with a particular proposal does not make pursuit of an alternative proposal infeasible.

LT–WR also contends the suggested relocation of the caretaker's residence to a site beneath the telecommunications towers is infeasible because such a move is within the exclusive jurisdiction of the Federal Communications Commission.

However, as the Commission noted in its decision, its staff requested information from LT–WR regarding standards for separation between such towers and residential uses, and the only information that LT–WR provided was a letter discussing federal preemption of local and state regulations relating to the potential harmful health effects of exposure to radiofrequency radiation. Thus, LT–WR did not adequately address this issue with the Commission.

Curiously, LT–WR contends the Commission's design alternatives are infeasible, but at the same time, it faults the Commission for denying the CDP application without giving LT–WR an opportunity to implement the suggested alternatives. Thus, LT–WR implicitly concedes the design alternatives are in fact feasible.

[19] LT–WR also asserts that rather than denying the application, the Commission should have approved the application, subject to appropriate conditions of approval. However, the Commission is not required to redesign an applicant's project to make it acceptable. (*Bel Mar Estates v. California Coastal Com.* (1981) 115 Cal. App.3d 936, 942, 171 Cal.Rptr. 773.) The denial of the instant proposal does not bar LT–WR from submitting a new and different proposal. (*Ibid.*) All that is involved here is an administrative decision, supported by the record, denying the application which LT–WR submitted.

9. *Trial court properly dismissed the third through sixth causes of action.*

a. *Third cause of action: the taking claim is not ripe for decision.*

In the third cause of action, LT–WR alleged the Commission's denial of its permit application resulted in a taking of its property without just compensation and was an undue interference with LT–WR's reasonable investment backed expectations upon which LT–WR acted in acquiring the property. The trial court, after largely upholding the Commission's decision, dismissed the taking claim as moot.

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County of Marin Community Development

MARIN COUNTY
COMMUNITY DEVELOPMENT AGENCY
ALEX HINDS, DIRECTOR

ZONING/DEVELOPMENT APPLICATION

TYPE OF APPLICATION:

- ☐ MASTER PLAN
- ☐ PRECISE DEVELOPMENT PLAN
- ☒ COASTAL PERMIT
- ☐ FLOATING HOME ADJUSTMENT*
- ☐ FLOATING HOME ARCHITECTURAL DEVIATION
- ☐ GENERAL/COMMUNITY PLAN AMENDMENT
- ☐ REZONING
- ☐ SECOND UNIT PERMIT
- ☐ DESIGN REVIEW
- ☐ MINOR DESIGN REVIEW
- ☐ DESIGN REVIEW CLEARANCE
- ☐ SIGN PERMIT/REVIEW*
- ☐ USE PERMIT
- ☐ VARIANCE*
- ☐ TIDELANDS PERMIT
- ☐ TREE REMOVAL PERMIT

***Requires Supplemental Application/Information**

TO BE COMPLETED BY PLANNING DEPARTMENT STAFF:

Date Received: 7/24/08
Receipt No: 2009-0043
Received By: CH
Planner Assigned:

FEES: $1655 a
Permit:
Permit:
Cat. Exempt: $360
Initial Study:

Concurrent Application:
Reviewing Authority:

Other:
TOTAL: $2015

(*Make checks payable to:* **Marin County Planning Department**)

Hearing: ☒ Non-Hearing: ☐ *Note: Fees may not be refunded in full if the application is withdrawn.*
Assessor's Parcel No.(s) 199-283-09 Application No.(s): CP 09-3

TO BE COMPLETED BY APPLICANT: (Please type or print legibly) (C)

1. Assessor's Parcel No(s): 199-283-09 Zoning: CRA B4
2. Project Address: 9 AHAB DRIVE City/Zip: MUIR BEACH 94965
3. Property Owner: TIM CROSBY Phone: 561.309.5845
4. Owner's Address: AS ABOVE City/Zip: AS ABOVE
5. Applicant: OWNER Phone: " "
6. Applicant's Address: " City/Zip: " "
7. All correspondence will be sent to the applicant. Please indicate any others to receive correspondence:

Name: RICHARD BECKMAN Address: 15006 Kenedal RD NE ~~BAINBRIDGE ISL. WA 98110~~
Gail Falks 33 AHAB DRIVE MUIR BEACH, CA 94965
(206) 792-7665 cell
cell = 686-3614
(415) 388-8189

EXH. D

Crosby final planning statement.doc

The original house at 9 Ahab of approximately 2000 square feet was designed and built as a solar heated and passively cooled house for a single woman over thirty years ago. The new owner, Tim Crosby, was desirous of maintaining the design integrity and character of the existing while carrying out updating and the necessary age-related repairs and adapting the house to accommodate a multi-generational family and his own lifestyle and interests.

To that end he retained the original architect, now a retired Professor of Architecture who, while living at Muir Beach, had also designed a number of other houses and the community center thus helping to define the design vocabulary that is seen today at Muir Beach.

The 1600+/- square foot addition is designed to take full advantage of the spectacular coastal view; to connect the house more closely to the down-slope portion of the site by stepping down to the grade at the west; to provide accessibility from the parking level, via elevator, to the main living levels; to provide more space for friends and family; and to be environmentally responsible. Added bedrooms provide for an elderly parent as well as young children.

The addition takes its clues from the existing house by reinforcing the strong design elements; adding additional bays, offsets, multiple roof levels and decks to break down the exterior mass into smaller elements. Exterior and interior finishes and materials will be maintained and compatible with the quality and character of the existing house and its neighbors. To take advantage of the often pleasant but sometimes wet climate portions of the extensive decks are protected with a green house roof that does not block the sun, providing an option missing in the original.

Passive solar gain and natural cooling strategies with highly efficient windows, blown-in soy insulation, added thermal mass, large mechanically shaded view windows, strategically placed operable windows and skylights for maximum cross-ventilation combined with a ground source geo-thermal heat pump system and roof mounted solar voltaics reduces the carbon foot point well beyond that of a Green Building ordinance platinum rating.

The parking area is being expanded to comply with new County codes. A new on-site drip sewage disposal system will be installed to replace the existing that has functioned very well for over 30 years.

Once construction is completed the site will be returned to the existing grades and native grasses and wild flowers that have thrived on the site without irrigation will be re-introduced. The existing Pines along Ahab will effectively screen the addition just as they do the existing.

The new work will not alter the relationship that exists between the property and will not effect or cause any diking, filling, or dredging of open coastal waters, wetlands, estuary systems, or lakes; nor does it extend onto or adjoin any beach tidelands, submerged lands or public trust lands.

BEFORE THE MARIN COUNTY BOARD OF SUPERVISORS

Appeal from the Planning Commission's Decision re: Timothy Crosby Application for a Coastal Development Permit Application No. CP09-3

Hearing Date: March 31, 2009

Supplemental Argument on behalf of Appellants

Before the Planning Commission the Appellants argued that, in addition to violating the Coastal Act and the Marin County Local Coastal Program Unit 1 (LCP), the proposed development violates the Muir Beach Community Plan (MBCP) which states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP p. 12 **(EXH. A)**. With respect to the Crosby project, Appellants argued that there "could be no more apt example of the concern expressed in the MBCP over "the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community." See Argument on Behalf of Appellants before the Planning Commission, January 25, 2009, at pp. 9-10.

On the Friday before the February 9 hearing before the Planning Commission, Neal Osborne sent a memorandum to the Commission stating that the MBCP was not applicable. It said:

> "Please delete Finding VII from the proposed Resolution for this project. Upon detailed review of the applicability of the Muir Beach Community Plan for a project only subject to a Coastal Permit, and following consultation with County Counsel, staff determined that the Muir Beach Community Plan does not apply to this project because:
>
> 1. The Muir Beach Community Plan was adopted in 1978 and was not incorporated into the Local Coastal Program Unit 1 when it was certified by the California Coastal Commission in 1980.
>
> 2. The project is only subject to a discretionary Coastal Permit, and no other discretionary permit is required that would mandate consistency

EXH. E

Findings regarding Community Plan and Countywide Plan policies.

3. The Muir Beach Community Plan consistency findings should be deleted from the proposed Planning Commission Resolution for the same reason that the Deputy Zoning Administrator deleted the Countywide plan consistency findings from the DZA Resolution."

See Memorandum dated Feb. 6, 2009. **(EXH. B)**. Acting on the memorandum, the Planning Commission deleted all references to the MBCP from the Resolution that was adopted by the Commission on March 9, 2009.

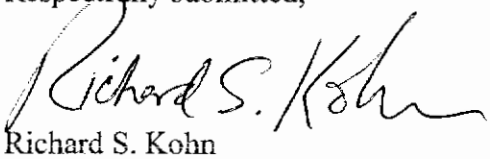
The statement in Paragraph 1 of the memorandum that the MBCP was not incorporated into the LCP is incorrect. The LCP, that was certified by the Coastal Commission on April 1, 1980, does incorporate the MBCP and discusses it on p. 79. **(EXH. C)** If we understand paragraphs 2 and 3 of the memorandum, which is not easy to do, it appears that they are derivative of paragraph 1.

It is particularly difficult to understand the Planning Department's position in light of the fact that in another recent case from Muir Beach, the MBCP was central to the case and no one ever suggested that it had not been certified or adopted by the Coastal Commission. See *Beverly Biondi*, Application No. 2 Mar 8-066, Local Permit CP07-34, CP08-24,.

In our written submission to the Board of Supervisors, we have argued that the project conflicts with Sec. 30251 of the Coastal Act insofar as it requires that permitted development must be "compatible with the character of the surrounding area" and with Title 22.56.130I(O)(3) of the Interim Zoning Ordinance insofar as it provides that "The height, scale and design of the new structure shall be compatible with the character of the surrounding natural or built environment." Appellants' Argument p. 14. For the reasons stated above, we request that the Board of Supervisors also consider whether the project would violate the MBCP. We share the view expressed by Commissioner Greenberg at the February 9 hearing that the proposed addition is too big and is out of character with the community. For this additional reason, the coastal development permit should be denied.

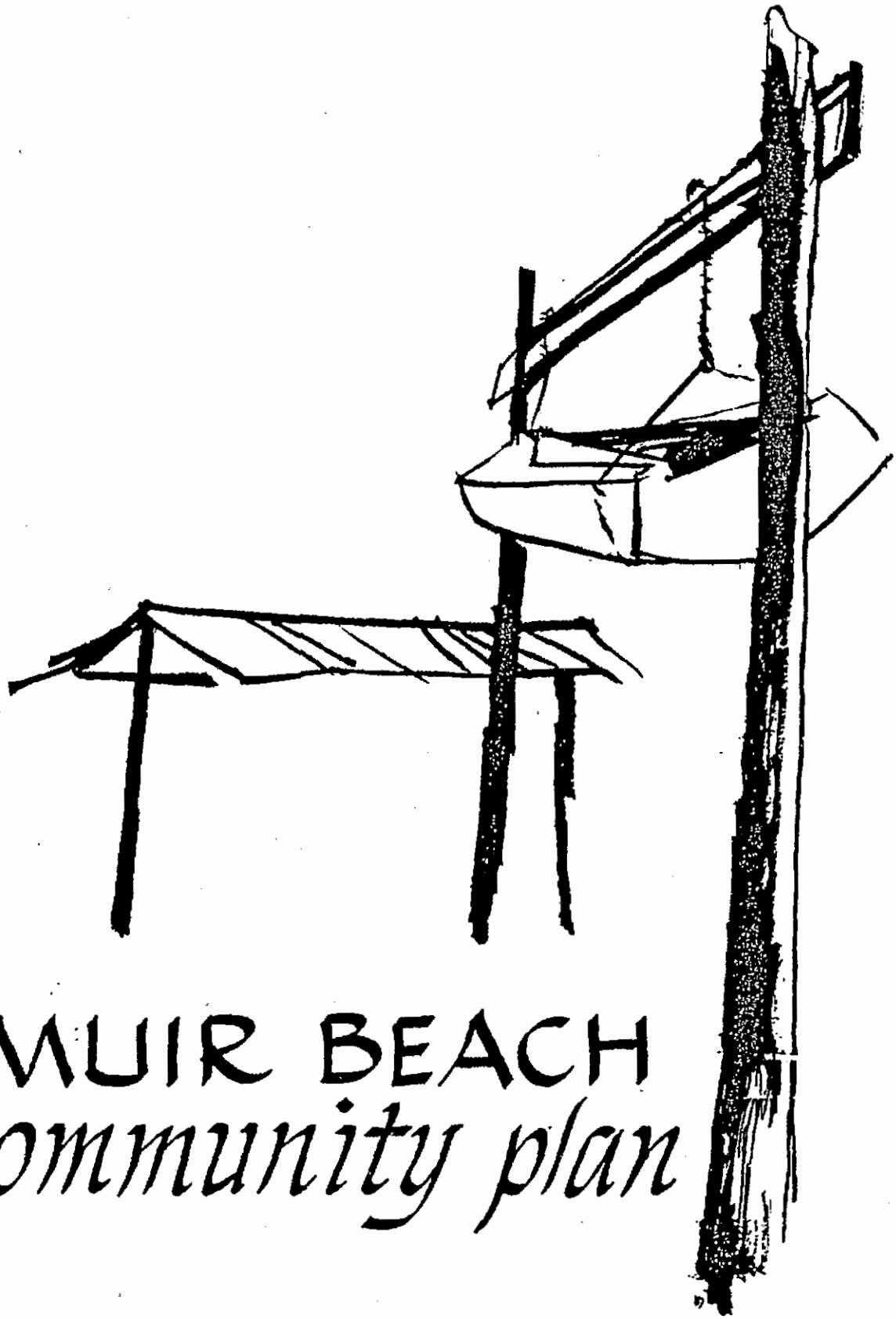
Dated : March 28, 2009

Respectfully submitted,



Richard S. Kohn

On behalf of all the Appellants



MUIR BEACH
community plan

EXH. A.

The Elizabeth Terwilliger Butterfly Trees are located at Pacific Way and Lagoon Drive. This land, now owned by the Audubon Canyon Ranch, should be included in the Golden Gate National Recreation Area.

The Monterey pines on both sides of Pacific Way are one of the few local resting places for Monarch butterflies on their yearly migration. Property owners in that area are charged with protecting these trees and keeping them free from insecticides. The Muir Beach Community Services District has the same responsiblity where these trees are on their easements.

The Circus House is located along Pacific Way on land owned by the Audubon Canyon Ranch. This land contains the portion of Redwood Creek bounded by Pacific Way, the Zen Center, and the Golden Gate National Recreation Area. It should be included in the Golden Gate National Recreation Area, with a lease-back of Circus House to the present tenants for their lifetimes.

MUIR BEACH COMMUNITY: RESIDENTIAL-AGRICULTURAL ZONING

There are 314 people now living at Muir Beach in 129 single-family homes. When the remaining 44 building sites are filled, there will be 173 homes.

The size of lots in Muir Beach ranges from 3,000 square feet to about ten acres. The present County zoning requires lots of a minimum size of 10,000 square feet in old Muir Beach and one acre in Seacape. Some parcels adjoining Seacape require a minimum of two acres per lot. Many undersized lots in both areas are legal but non-conforming building sites. This community plan adopts the county regulations governing lot size and setbacks now in effect.

We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly enforced.

A combined agricultural and residential land use has always existed at Muir Beach. An important aspect of Muir Beach diversity is the use of land for gardening, full and part-time farming, horse maintenance, and small animal husbandry. Other home occupations include those of professtionals and artisans. These activities should be protected as many people have settled here expecting this kind of use. A distinction must be made between the above-mentioned activities, and commercial use, i.e., that which depends on the presence of more than two people at a time, where money or gifts are received from them. Problems of density, water supply, sewage, and traffic, as well as the necessity to preserve the rural character of Muir Beach, preclude commercial use.

MEMORANDUM

TO: Planning Commission
FROM: Neal Osborne, Planner
RE: Kohn, Hyman, and McDonald Appeal of the Crosby Coastal Permit (CP 09-3)
February 9, 2009 Planning Commission Item 4
DATE: February 6, 2009

Please delete Finding VII from the proposed Resolution for this project. Upon detailed review of the applicability of the Muir Beach Community Plan for a project only subject to a Coastal Permit, and following consultation with County Counsel, staff determined that the Muir Beach Community Plan does not apply to this project because:

1 The Muir Beach Community Plan was adopted in 1978 and was not incorporated into the Local Coastal Program Unit I when it was certified by the California Coastal Commission in 1980.
2 The project is only subject to a discretionary Coastal Permit, and no other discretionary permit is required that would mandate consistency findings regarding Community Plan and Countywide Plan policies.
3 The Muir Beach Community Plan consistency findings should be deleted from the proposed Planning Commission Resolution for the same reason that the Deputy Zoning Administrator deleted the Countywide Plan consistency findings from the DZA Resolution.

Please review the attached Excel spreadsheet indicating building and lot sizes of the surrounding properties within 600 feet of the Crosby property based on the County Assessor's records. The median total building size on each lot in the neighborhood (75 properties) is 1,791 square feet. The range is 475 square feet to 5,562 square feet with 12% of the properties (9 lots) having total building areas of more than 3,000 square feet. Additionally, staff received the attached letters and e-mails from neighbors (1 opposed and 13 in support), after preparation of the staff report. The comments are from:

1 Richard Kohn (appellant) with excerpts from *LT-WR, LLC v. California Coastal Commission, 60 Cal.Rptr.3d 417 (Cal. App. 2 Dist. 2007).*
2 Gay Friedman and Patricia McCall
3 Gail Falls
4 Brad and Lisa Eigsti
5 Rene Boche and Bob Bowyer
6 Harold Pearlman
7 Lynda Grose Silva and Matthew Silva
8 Robert Wynn
9 Michael Moore
10 Marilyn Laatsch
11 Dan Fitzpatrick
12 Linda Hulley and Stephen Hulley
13 Elizabeth Benedict
14 Pam Barlow and Bruce Barlow

ATTACHMENTS: 1) Property Characteristics Table; 2) Public Correspondence
I\Cur\NO\memo\PC\Kohn Hyman McDonald Appeal of Crosby 2.6.09_final

EXH. B

M A R I N C O U N T Y

L O C A L C O A S T A L P R O G R A M

U N I T I

ADOPTED BY MARIN COUNTY BOARD OF SUPERVISORS

August 21, 1979

CERTIFIED BY STATE COASTAL COMMISSION

April 1, 1980

EXH. C

LCP POLICIES ON LOCATION AND DENSITY OF NEW DEVELOPMENT

This Section contains the land use/zoning proposals for Unit I and represents the basic element of the LCP. These proposals are based upon the County-wide Plan (1973), as supplemented by the three Community Plans adopted since 1975. Many of the LCP policies have been referenced to the appropriate sections of the Countywide and Community Plans to provide policy background material. The proposals contained herein use, for the most part, the land use policies of these Community Plans; therefore, the Community Plans are used as descriptive base references in describing the LCP policies. It should be clear, however, that based upon Coastal Act requirements, selected modifications to the land use policies and designations in the Community Plans are being proposed by the LCP. Where plans and policies of the local coastal program conflict with policies of local plans, the policies of the LCP shall govern. Maps showing the LCP land use designations are on file with the Marin County Planning Department.

Muir Beach

The Muir Beach LCP land use designations shall follow the Community Plan land use designations with the following modifications:

27. Redesignate residential lot size of parcels along Redwood Creek from 10,000 square feet to 1 acre minimum lot size. (See also Policy II-8).

28. Make no LCP recommendation for agricultural lands of over 60 acres. (See also Policy II - 29).

Stinson Beach (excluding Seadrift)

The Stinson Beach LCP land use designations are those identified in the adopted Community Plan except as modified below:

29. The existing R-2 zoning designation in Stinson Beach shall be retained in order to protect and maintain the existing character of the community, provided, however, that no development other than single-family residences shall be permitted on any parcel of less than 7,500 square feet in area in order to minimize septic tank problems and the cumulative impacts of such development on public access along Calle del Arroyo. All development within these zones shall conform with LCP policies on septic systems and housing. Repair or replacement of existing duplex residential use on a parcel of less than 7,500 square feet damaged or destroyed by natural disaster shall be permitted.

30. The properties presently zoned R-3 along Shoreline Highway shall be rezoned to R-2 in order to minimize flood hazards and the adverse impacts on Easkoot Creek which would result from such development (Easkoot Creek runs across the subject properties). Redesignation of the R-3 properties to R-2 will also assure development consistent

Subj: **Tim Crosby CDP**
Date: 4/17/2009 9:15:22 AM Pacific Daylight Time
From: BrendaKohn
To: DZaltsman@co.marin.ca.us
CC: TLai@co.marin.ca.us, nosborne@co.marin.ca.us

Dear Mr. Zaltsman,

In connection with the Timothy Crosby Coastal Permit Application, I would appreciate it if you would send me a detailed written explanation of the County's position as to why the Muir Beach Community Plan was not incorporated into the LCP. Frankly, I found the explanation offered by you and Tom Lai at the March 31 hearing before the Board of Supervisors incomprehensible. Perhaps if I see it in writing it will make more sense to me. I look forward to receiving your response. Thank you in advance for your prompt response to this request. Please respond to the above e-mail address.

Very truly yours,

Richard S. Kohn

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EXH. F

News

MUIR BEACH

Neighbors see larger issue in lost appeal

By John Tornes

County supervisors last week upheld the planning department's approval of a 1,589-square-foot addition to a 2,058-square-foot home on an acre lot overlooking Muir Beach, and the neighbors are none too happy about it.

"The issue in the Crosby appeal is not a dispute among neighbors," Crosby's neighbor at 39 Seascape, Dr. Edward Hyman said. "Tim Crosby is a fine neighbor. The issue is the maintenance of public viewsheds in the coastal region and the stewardship both of the very unique area of Muir beach cove and of West Marin in general."

In December county planners approved the project at 9 Ahab Drive with the caveat that the new roofline be lowered by four feet, a reduction that the home owner, Tim Crosby, described as punitive due to the costs and delays the change would effect. Neighbor Richard S. Kohn said while the change was helpful, it did not entirely address his concern that the house would block views.

The roofline change was not enough for Hyman and Deborah McDonald, who said that even at the lowered height, the house would still block their primary view of the beach. More important, they argued, the house would block public views of the beach from both Ahab Drive as well as from a public access trail.

Hyman and McDonald, as well as neighbors Brenda and Richard Kohn, have made this point at three county hearings on the house, and have indicated they may do so again at the state level. The neighbors made their case initially to county planning staff when they first considered the permit in December. The county deputy zoning administrator upheld that decision, so the neighbors appealed to the county planning commission in February, and took the appeal to county supervisors last week.

County planner Jeremy Tjerian, who as the deputy zoning administrator upheld county planner Neal Osborne's initial approval of the project, maintains that the house construction would not degrade important public views of the beach.

"When Neal Osborne recommended approval, after reviewing the plan and site I thought there would be a marginal impact to public views and [so I] made a modest change to the [addition's] roof lines. The planning commission accepted and furthered this modification I approved and added [a requirement of tree] trimming to open up more views. They appealed to the board [of supervisors,] which made a unanimous decision in support of it."

Crosby's neighbors were particularly critical of Steve Kinsey, the supervisor representing West Marin, in their comments after the board voted.

"This was a defining moment for Supervisor Kinsey," Kohn said after the hearing on Tuesday. "This is a critically important case under the Coastal Act. He had the opportunity to step up to the plate and defend the Act. In choosing not to do so he showed his true colors. It is hard to square his action with the fact that he recently sought a seat on the Coastal Commission and that; (as reported in the Citizen), in congratulating Supervisor Mirkarimi on his appointment, he said he was sure that Mirkarimi would protect the coast. By his action, Supervisor Kinsey has forfeited the support of anyone who cares about our beautiful coastal views or the environment."

"I've long been a strong supporter of Steve Kinsey but I believe he and the other supervisors dropped the ball on West Marin, on our environment and on Muir Beach," Hyman said. "Their vote, if followed in the Crosby matter, would eviscerate the Coastal Act in its entirety. The story poles are up - if you [look at] what this guy wants to eliminate, you'd understand the significance of this decision."

"I thought long and hard about this decision," Kinsey said. "This is about the character of the villages of West Marin. I see a slow evolution to larger homes that are not sensitive to the landscape. At the same time, the zoning did not require design review, just a coastal permit. The language of the law did not provide for the protection of 'micro' views. Also, planning commission approved the project in a seven to zero vote."

"I see this as a shot across the bow for Muir Beach and similar villages to use the Local Coastal Plan update process to make clear with the county what it is they want to define, whether it is the size of houses or the protection of views," Kinsey continued. "I appreciate the interest in protecting the character of Muir Beach."

Kinsey mentioned that there were numerous letters in support of the house as well, designed by an architect who had worked in the community before.

Crosby's neighbors have one final opportunity to stop the construction by filing an appeal with the California Coastal Commission, but have not said for certain whether or not they would be doing so.

EXH. G

Subj: **RE: (no subject)**
Date: 3/3/2009 9:58:12 AM Pacific Standard Time
From: DZaltsman@co.marin.ca.us
To: TLai@co.marin.ca.us, BrendaKohn@aol.com
CC: NOsborne@co.marin.ca.us

Dear Mr. Kohn:

Tom Lai forwarded the e-mail below to me. I don't recall getting a voice mail from you, but I generally can't have verbal conversations with members of the public for fear of being misquoted and/or misunderstood in future proceedings that could convert me into a witness in matter where I am representing the County as its attorney. However, I am happy to e-mail.

In any event, I am not sure I understand your question. Since the general rule in all areas of the law I am familiar with is that appeals are de novo unless there is case law or statutory basis to the contrary, I would be more concerned if someone suggested to you that you were somehow limited in the issues you could raise at either the Planning Commission or Board of Supervisors. To the best of my knowledge, all CDA staff understand the all substantive appeals from either staff decisions, dza and/or pc are de novo at the next level above with the exception of permit streamlining appeals.

Dave Zaltsman

From: Lai, Thomas
Sent: Monday, March 02, 2009 8:47 AM
To: Zaltsman, David
Cc: Osborne, Neal
Subject: FW: (no subject)

David,

Please help by getting back to Richard on this. Thanks!

With Regards,
-Tom Lai
(415) 499-6292

From: BrendaKohn@aol.com [mailto:BrendaKohn@aol.com]
Sent: Monday, March 02, 2009 8:41 AM
To: Osborne, Neal
Cc: Lai, Thomas
Subject: (no subject)

Dear Neal,

I am writing to seek clarification concerning the disposition of the appellants' procedural arguments. At the hearing, Commissioner Crecelius asked Tom Lai about the notice issue and the continuance issue, to which Tom responded in perfunctory fashion. Then Commissioner Holland stated that because the jurisdiction of the Planning Commission is de novo, they start from scratch and everything that went before is gone. Sec. VIII (H) of the Resolution addresses some of the notice issues but is silent as to others and as to the continuance issue.

I have not found any authority for the proposition that the Commission's review is de novo. Tom Lai had given me the name of Tom Saltzman (?) at the county counsel's office and suggested I call him. I called and left a message for him regarding the de novo issue but he never gave me the courtesy of returning my call.

In any event, if the Planning Commission adopted Commissioner Holland's view that it lacks jurisdiction to address the procedural issues we raised, I would appreciate it if a statement to that effect be included in the Resolution with a citation to the appropriate authority. We would like a clear record on this.

Also, I note that the newspaper notice that was published on Nov. 26 was not included in the package of materials distributed to the commissioners. I would appreciate it if you would include it in the package that goes to the supervisors.

Many thanks.

Richard S. Kohn

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JAN 26 2009 PM 1:30 Planning

BEFORE THE MARIN COUNTY PLANNING COMMISSION

Appeal from the Deputy Zoning Administrator's Decision re: Timothy Crosby Application for a Coastal Development Permit Application No. CP09-3

Hearing Date: February 9, 2009

Argument on behalf of Appellants Richard and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald

Introduction

The crux of this appeal is whether self interest trumps the public interest when it comes to preserving the scenic coastal views for present and future generations of visitors to Muir Beach, as well as residents of the community.

In Mr. Crosby's Final Planning Statement attached to his Zoning/Development Application dated July 24, 2008, he states: "The 1600 +/– square foot addition is designed to take full advantage of the spectacular coastal view;..." That is very nice for Mr. Crosby. But maximizing Mr. Crosby's views will be at the expense of the public, because his development will permanently block public views from Ahab Drive on both the east and the west sides of the project and, saliently, from the top of the public easement on the west side. Even after modifications ordered by the Deputy Zoning Administrator (DZA), the views of the ocean, beach and other viewsheds in and around Muir Beach will be impaired. This violates the environment and is bad public policy.

This case will set a precedent. If the proposed project is permitted to proceed, it is difficult to see how any future construction in Muir Beach that blocks the historic and scenic viewsheds could be prevented. Our goal is to preserve those viewsheds while allowing the applicant reasonable development of his property. His large lot potentially provides for both, but his current proposal permanently eliminates historic Muir Beach viewsheds.

Our objections are both procedural and substantive in nature. Procedurally, we shall show that the Community Development Agency (CDA) failed to properly apply its governing regulations in processing the application. These deficiencies render the action approving the application void. Substantively, photographs taken after the DZA's decision show that the limited changes that he ordered have not solved the problem, which the DZA himself defined as the public's right to the viewsheds of the Muir Beach cove.

For the reasons stated herein, which amplify and provide authority for the discussion in the appellants' Appendix to our Notice of Appeal, we respectfully urge the Planning Commission to

EXH. I

deny the coastal permit for this development.

Statement of Facts

On Nov. 26, 2008, the Kohn appellants received a Notice of Public Hearing concerning the Crosby Coastal Permit Application. The Kohns live at 5 Ahab Drive, adjacent to 9 Ahab Drive. Despite the fact that the staff report represents that notice was mailed to all property owners within 600 feet of 9 Ahab Drive, the Hyman-McDonald appellants never received such a notice–they learned about it from the Kohns. The Notice informed the Kohns of their right to submit comments and suggested that any comments be submitted two weeks before the hearing date of Dec.11 in order to ensure timely consideration by the DZA. Coincidentally, on the same day that the Kohns received notice, i.e., Nov. 26, story poles and ribbons were erected that, for the first time, showed the outline of the proposed additions to 9 Ahab Drive. Until the story poles were constructed, the impact of the project was unknown to appellants or staff.

The Kohns had a prepaid and nonrefundable vacation that required them to be out of state from Dec. 8 through Dec.18. Because they would not be able to attend the Dec.11 hearing, by letter dated Nov. 28, they requested a postponement of the hearing. Due to the Thanksgiving holiday, the first day the CDA was open was Dec.1. The Kohns hand delivered a request for postponement on that day. By then the staff report had already been completed, erroneously concluding that the proposed development had no visual impact on the public views of the Pacific Ocean or other viewsheds in and around Muir Beach. On Dec. 5, the Kohns filed objections to the permit supported by photographs.

On Friday, Dec.5, the Planner, Mr. Osborne, visited Muir Beach and viewed the story poles. (By then the ribbons that marked the contours of the additions had come down). Fortunately, appellants had taken photographs showing that the proposed additions clearly obstructed public views of the ocean, beach and other viewsheds. On that day, Mr. Osborne advised Brenda Kohn that a postponement was unlikely to be granted.

By letter dated December 7, the Hyman-McDonald appellants submitted objections and photographs objecting to the project.

On Dec. 8, as they were boarding a plane, the Kohns left a telephone message for Mr. Osborne. They stated that in a case where the photographic evidence clearly showed that the staff report's conclusion was erroneous, the appropriate thing to do would be to remand the matter back to the staff to revisit the issues and continue the hearing so that the Kohns could participate.

The hearing took place on Dec.11 as scheduled without the participation of the Kohns. Drs. Hyman and McDonald attended and participated, their request for a postponement having been denied. At the hearing, the DZA asked Mr. Crosby whether he would agree to continue the

hearing. Mr. Crosby refused to consent so no continuance was granted. In response to the objections that had been raised concerning impairment of views, the DZA ordered a reduction of the western roofline by 4 1/2 feet for 33 linear feet. When Mr. Crosby's architect said that they needed the extra height for a staircase, the DZA modified his decision to allow approximately 8 feet at the higher elevation. This was the only physical modification to the development ordered by the DZA. The DZA made a final decision, immediately approving the Coastal Development Permit (CDP) as modified.

Following the decision, by long distance the Kohns insisted that new story poles be erected showing the modification so that the impact could be assessed. As a result, this was done. Photographs taken after the new story poles were erected, show that even with the modification, the proposed development still has an adverse impact on the public views.

A timely Notice of Appeal was filed on Dec. 18.

ARGUMENT

I. PROCEDURAL VIOLATIONS

Chapter 22.110, entitled "Administrative Responsibility", describes the authority and responsibilities of county staff and officials in the administration of the Development Code. Section 22.110.060 states: "Any action by the Agency that is in conflict with any provision of this Development Code shall be void." The many procedural irregularities by the Agency have tainted these proceedings and render the granting of the CDP void.

A. Violations of the public notice provisions render the decision void

Resolution 08-154 approving the Crosby Coastal Permit erroneously states that the DZA held a "duly noticed public hearing on December 11, 2008,..." Sec. I(II). There are two sets of regulations governing notice, 22.118.020 of the Development Code and 22.56.0651 of the Interim Zoning Code.

(1) Chapter 22.118 notice was not properly given

Chapter 22.118.020 implements the notice requirements of the Government Code. Among other things, Chapter 22.118 provides procedures for the scheduling and noticing of public hearings before the Zoning Administrator. Section 118.020 sets forth the contents that must be included in this notice (hereinafter "Notice of Pending Permit" or the "Yellow Notice.") A Yellow Notice dated August 15, 2008 containing the four required disclosures was posted "on or adjacent to the property that is the subject of the permit." 22.118.020(B)(4). Significantly, this notice did not establish a date for a hearing but stated only that the hearing would not take place prior to Oct. 30.

Section 22.118.020(B) requires that at least ten days prior to the decision, this notice be

published in the newspaper or posted in at least three public places in the area of the subject property and that the notice be mailed or delivered to property owners within 300 or 600 feet depending on certain facts. None of this was done at the time the Yellow Notice was posted. If the CDA intended to satisfy the notice requisites under the Ch.22.561 procedures, as discussed below, they failed to do so.

(2) Chapter 22.561 Notice of Public Hearing was not properly given

Additional notice requirements are prescribed in Chapter 22.561 (Interim Zoning Act). The content of this notice, the Notice of Public Hearing, differs from the contents of the "Yellow Notice." For example, the notice must announce the date of the hearing and notify the public of their right to submit comments. The six requirements are set forth in 22.56.0651C.

Pursuant to Sec.22.56.0651(A), these notices must be mailed to "all property owners within 300 feet of the project boundary." The Hyman-McDonald appellants never received written notice under this section. As the aerial photographs submitted by Mr. Crosby's architect show, the Hyman-McDonald property is within 300 feet of 9 Ahab Drive. Thus, the notice requirement was not met.

In addition, the same provision states: "*Additionally, the site of the proposed project shall be posted with a copy of the notice at least ten working days prior to the date of the hearing.*" This was not done. Appellants are submitting photographs showing the "Yellow Notice" posted at the site. This was the only notice that was ever posted at 9 Ahab Drive. As noted above, the Yellow Notice does not contain a hearing date or other important information.

Moreover, any fair minded person would shake her head in disbelief at how notice was handled in this case. It is almost as though the CDA made a calculated effort to follow the form and defeat the whole point of notice. If one deliberately set out to ensure that the public would *not* get meaningful notice, the CDA could not have done a better job.

The CDA chose November 26--the day before the four day Thanksgiving holiday-- to publish a notice in the newspaper. The Kohns also received a copy in the mail on November 26. This was a time when most people would be away or otherwise preoccupied with family. The Notice of Public Hearing (but not the newspaper notice) advised people to get their comments in two weeks before the hearing, a practical impossibility. It was also impossible to submit comments in time to be considered by the staff because, as the Kohns learned on Dec.1, the staff report had already been written. The staff report then had the audacity to state that no public comments had been received! This procedure made a mockery of the regulatory intent that the public have a meaningful opportunity to make informed comment.

The statements that the hearing was "duly noticed" are not true and, therefore, the approval of the CDP is void. Furthermore, the procedures described above resulted in a deprivation of due process pursuant to Calif. Const. Art.1 Sec. 7.

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BEFORE THE CALIFORNIA COASTAL COMMISSION

Appeal from the Marin County Board of Supervisors' Decision re: Timothy Crosby Application for a Coastal Development Permit
Application No. CP09-3
Commission Appeal No. A-2-Mar-09-010

Argument on behalf of Appellants Richard and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald

INTRODUCTION

This appeal addresses two of the most important questions to arise under the Coastal Act since its inception in 1976: (1) whether the protections of the Act extend only to scenic views from designated and signed public viewing sites like overlooks and (2) what constitutes a *significant* impairment of a scenic view under the Act and the Local Community Plan Unit 1 (LCP) that implements it.

What is at stake in this particular case is a view of unparalled beauty of Muir Beach cove, Big Beach and the Pacific Ocean. (**EXH. A**) If permitted, the development will extinguish that view permanently, certainly until long after everyone connected with this controversy has passed on. But the ramifications go far beyond that one view. Any similar issue coming before the Marin County Planning Commission or the Board of Supervisors (BOS) will be judged by incorrect standards that were applied in this case, and, one by one, the coastal views from public-rights-of-way will vanish.

The Appellants contend that an impairment is significant if it blocks a scenic coastal viewshed from public rights-of-way such as public roads, beaches and trails, as well as designated vista points. The Planning Commission held that only views from a public vantage point, viewing platform or overlooks are protected. The Commission adopted a Resolution which states that views from public rights-of-way are only transitory and short term as a person proceeds to her ultimate destination and, therefore, are unworthy of protection. The Commission also held that a view is not significantly impaired if there are other panoramic viewsheds in the area. Two commissioners believe that only views of natural resources that have been specifically designated as scenic resources in the LCP are protected. The BOS rubber-stamped this decision, thereby perpetuating the Commission's mistakes. If these standards are not decisively repudiated, the Coastal Act and its purpose of protecting scenic coastal views will be utterly meaningless.

The Planning Commission applied the wrong legal standards and reached the wrong result. They went astray because there is a direct conflict between the Land Use Plan of the LCP and the

Interim Zoning Ordinance regarding visual resources, and they failed to heed the advice of their own staff, Tom Lai, that in the event of a conflict, the LCP governs. If the correct legal standards are applied, the Appellants will prevail and views of unique quality and character will be maintained. That would be good public policy because it will preserve the scenic coastal views for present and future generations of visitors to Muir Beach, as well as residents of the community. It will also ensure that future permit applications that interfere with coastal views in Marin County will be properly evaluated applying correct legal standards.

There are only three questions:

(1) Does the project impair the view from public streets or trails? Yes.
(2) Is the impairment substantial? Yes.
(3) Does the design, to the maximum extent feasible, preserve the view? No.

For the reasons stated herein, we respectfully urge the California Coastal Commission to deny the coastal permit for this development. The Applicant may then submit a new application, if he so desires, that is compatible with the Coastal Act and the LCP.

PROCEEDINGS BELOW

The Staff Report

This proposed development would add 1589 square feet of additional floor area to an existing 2058 square foot single family residence. The original staff report, written prior to the erection of story poles, stated that "The height of the residence would not block any public views of the Pacific Ocean or other significant viewsheds in, and around, Muir Beach." Once story poles were erected, it was obvious that the development would eclipse a stunning view of Muir Beach cove, beach, hillside and ocean from Ahab Drive and from the top of the public easement that parallels the Crosby lands and leads down to Big Beach.

The DZA Decision

The hearing before the Deputy Zoning Administrator (DZA) was not duly noticed. In addition, a request by the Kohn appellants for a continuance was denied in violation of the applicable regulations. At the hearing, which took place without the participation of the Kohns, the DZA ordered the Applicant to eliminate the clerestory windows on the western side thereby lowering the 33 foot roofline by 4 ½ feet. Based upon a representation by the Applicant's architect that this would necessitate redesigning an interior staircase, the DZA said that he would allow them 8 lineal feet at the higher elevation. Photographs taken after the erection of new story poles revealed that the public view from Ahab Drive and the top of the public easement continued to be substantially impaired. Appellants appealed to the Planning Commission.

The Planning Commission Decision

All of the Commissioners who visited the site agreed that the view of Muir Beach cove and environs would be impaired by the development. But they did not agree that the impairment of the view was a significant one. They adopted the following standard:

> "The development project would be consistent with the policies and goals in the Local Coastal Program Unit 1 because the additions would not substantially impair coastal views from public vantage points. The additions would have minor visual effects along a small view window along Ahab Drive and along the public trail. However, the visual effects are not considered substantial because the effects are relatively small in relationship to the overall panoramic views available to the public from the street and trail. The public vantage points are from public rights-of-way where people are typically in motion to reach a destination, and consequently the proposed additions would only temporarily affect views. The view impacts would be fleeting and soon disappear as a person moves further along the public way to reach their destination. The transitory and short-term visual effect is acceptable within the residential community of the Seacape Subdivision, and not considered to be a substantial view impact."

In spite of this, the Planning Commission granted the appeal in part. It imposed new conditions on the permit. The Commission ordered that the dormer window on the east side be eliminated. With respect to the need for additional height on the west side, after reviewing the plans and hearing from the Applicant's architect, Chairman Dickenson stated that he was "absolutely convinced" that the clerestories were not necessary. However, the Applicant was given permission to submit revised design plans. The issue of the west side clerestory windows was delegated to staff. Appellants have been advised by Planner Neal Osborne that, even though drawings have been submitted, these are not the formal revised plans necessary to support a decision by the planning staff. The Commission rejected the Appellants' request that the permit be denied and refused to consider Appellants' procedural objections on the ground that their review was *de novo*.

The Board of Supervisors' Decision

The BOS rubber-stamped the Planning Commission's decision. Of the four members participating, two (Arnold and McGlashan) did not utter a single word about the merits. Two others, Kinsey and Adams, said that they were not willing to second-guess the Planning Commissioners (even though *de novo* review means taking a fresh look at the law and the facts). Even though Supervisor Kinsey stated that he personally rejected the notion that the Coastal Act only protects views from designated viewing platforms, like the others he voted to adopt the Resolution prepared by the planning commission staff containing the identical language adopted by the Planning Commission, including the phrase "the additions would not substantially impair coastal views from public vantage points." Resolution Sec. XIII A. He fully endorsed the theory

that there is no significant impairment if there are other panoramic views in the area. In the final analysis, the Resolution adopted by the BOS ratified the decision by the Planning Commission and made no changes.

ISSUES PRESENTED

1. Even after modifications imposed by the DZA and the Planning Commission, the development still significantly and permanently impairs the view of Muir Beach cove, the beach, the hillside and the Pacific Ocean from Ahab Drive and the top of the public easement leading to the Pacific Ocean.

2. The Resolutions adopted by the BOS and the Planning Commission apply improper standards for determining significant adverse impairment that thwart, rather than further, the purposes and objectives of the Coastal Act and the LCP. These improper considerations are found in Section VIII C of the Planning Commission Resolution and Section XIII A of the BOS Resolution and in statements made by the planning commissioners during the hearing on Feb. 9, 2009 and by Supervisor Kinsey on March 31, 2009.

3. The Planning Commission improperly determined that interim zoning regulations take precedence over the Coastal Act and the LCP insofar as the zoning regulation provides that coastal views are protected from development only when viewed from "public viewing places", which the Planning Commission interpreted as signed vista points, viewing platforms or overlooks. This was ratified by the BOS.

4. The Planning Commission improperly interpreted the phrase "public viewing places" to mean signed vista points, viewing platforms and overlooks as opposed to being a shorthand phrase for "public roads, beaches, trails and vista points" as provided in the LCP. This was ratified by the BOS.

5. The Planning Commission improperly ruled that the Muir Beach Community Plan (MBCP) was not incorporated into the LCP and ordered all references to the MBCP stricken from the Resolution which it adopted. The BOS ratified that decision. The MBCP adds additional authority for denying the Crosby CDP.

6. The landscape plan ordered by the BOS and Planning Commission does not undo the irreparable damage to the coastal views caused by the development.

7. There are feasible alternatives that, if implemented, would not have a significant adverse impact on the views.

8. Procedural violations at the hearing before the DZA render the initial granting of the coastal permit void ab initio or require that the entire process be invalidated as violating due process of law.

9. The Planning Department violated elementary principles of administrative procedure by forwarding only an abbreviated version of the administrative record to the BOS. This was prejudicial to the Appellants.

PERTINENT STATUTES AND OTHER AUTHORITY

Section 22.56.0951 of the Marin County Code states that "A coastal project permit shall be approved only upon findings of fact establishing that the project conforms to the requirements and objectives of the local coastal program."

The "Local Coastal Program" (LCP) is a "local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions which, when taken together, meet the requirements of, and implement the provisions and policies" of [the Coastal Act] at the local level."

The Introduction to the Marin County LCP Unit 1 provides, in relevant part:

> "This document is the Land Use Plan for the Local Coastal Program (LCP) for Unit 1 of the Coastal Zone of Marin County....."
>
> **********
>
> "The purpose of the Local Coastal Program is to ensure that the Local government's development plans, policies, *and ordinances* conform to the policies of the Coastal Act of 1976. The Act's goals are to protect and conserve the State's coastal resources and to maximize public use and enjoyment of them. The policies of the Coastal Act, Chapter 3, have formed the basis for the policies contained within this document. Where any question is raised concerning the interpretation of policies within the LCP, Chapter 3 of the Coastal Act may be used to provide clarification of LCP policies. In preparing the ordinances that will implement this LCP, *minor* modification to a small number of policies has been made. The implementing ordinances shall be used to provide clarification of policies as necessary."

LCP p.1 (emphasis added).

The Section of the LCP captioned <u>Visual Resources,</u> states:

> Coastal Act policies on visual quality, found in Section 30251, require the protection of scenic and visual resources of coastal areas. Visual resources, including beaches, wetlands, and other natural as well as manmade features, are vulnerable to degradation through improper location of development, blockage of coastal views, ...*The primary concern of the Coastal Act is to*

protect views to scenic resources from public roads, beaches, trails and vista points..

LCP. p.56 (emphasis added)

Section 30343 of the Coastal Act states, in part:

> "The Legislature hereby finds and declares that *the coastal zone is one of its most precious natural resources,* rich in diversity of living and nonliving resources and in the wide range of opportunities it provides for the use and conservation by the people of this state and nation....." (Emphasis added)

Section 30001 of the California Coastal Act states, in part:

> "The Legislature hereby finds and declares:
>
> (a) That the California coastal zone is a distinct and valuable natural source of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
>
> (b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation."

Section 30251 of the California Coastal Act, cited by the LCP, states, in part:

> "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 subordinate to the character of its setting."

The LCP further provides,

> "21. Existing development standards and the design review ordinance (Chapter 22.82) shall continue to be enforced. The following explicit standards shall apply to selected areas and projects:

* * * * * * * *

> To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway."

LCP p.65.

Title 22.56.130I(O) of the Interim Zoning Ordinance is entitled "Visual Resources and Community Character." Paragraphs 2 and 3 state:

> "2. To the maximum extent feasible, new development shall be designed and sited so as not to impair or obstruct existing coastal views from Highway 1 or Panoramic Highway."
>
> "3. The height, scale and design of new structures shall be compatible with the character of the surrounding natural or built environment. Structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views as seen *from public viewing places."* (Emphasis added)

The Muir Beach Community Plan states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP. P.12.

ARGUMENT

I. The development, even as modified by the Planning Commission, would significantly impair stunning views of the coast

(A) No one disputes that the view of the cove, beach, ocean and hillside is impaired

Because the BOS abdicated to the Planning Commission, we begin with the Planning Commission's analysis. Virtually all of the Commissioners agreed that the proposed development would impair the view of Muir Beach cove, the beach, the ocean and the hillside. Appellants contend that no reasonable person could conclude otherwise. The photographs of the western side

demonstrate this clearly and we sincerely hope that Coastal Commission staff will visit the site to see for themselves. Even though, for reasons to be discussed below, the Planning Commissioners did not believe that the Coastal Act required that the permit be denied, several were effusive in describing the view in question.

Commissioner Theran said: "I stood at the top of those stairs. And, you know, you can't see it from the street. You walk down four or five steps and you get to the stairway and you say 'WOW.' And go down four steps and it's gone. But I've never been down those steps before and I wouldn't have walked right by because the view is there. I haven't completely thought through this...I wonder if we have the opportunity to mitigate the view loss."

Commissioner Holland said: "There's no question in my mind that a view is obstructed. Anybody who stands at the top of the steps... I walked all the way down....It was a marvelous thing to do. And there is that view there and it's undeniable and it's a wonderful view down to big beach, the hillside and the waves and the ant-like people walking down on the strand below. I loved it."

Commissioner Greenberg said: "I don't like the size of the house. In my view, it's clearly inconsistent-it will set a new standard and next time we have an application, a problem, an appeal here we'll be told the one down the street is this big...This one is out of character. So the question is if this was consistent with neighborhood standards would there be a view impact? There is a view impact."

Commissioner Lubamersky said: "It's a hard call. I think what it comes down to is the 'maximum extent feasible' in that I think significant views are being lost. I never walked down the streets before in Muir Beach. And, really, it is stunning. I'm reluctant to rely on landscaping cause trees grow. With a coastal view once it's gone with the building you don't get it back. So, I don't want to redesign the house. I don't think that's our job. But I do think there are other ways this can be addressed that would reasonably keep that valuable view out there because once it's gone you don't get it back."

Commissioner Crecelius said: "There is an impact and everyone agrees to that."

Despite these sentiments, the Commissioners went astray in applying the governing law when determining whether the view was protected or whether the impairment was significant or not. If you apply the wrong legal principles, you are bound to reach a wrong result. That is what happened here.

(B) The Planning Commission erroneously applied the Interim Zoning Ordinance which conflicts with the LCP

The Commissioners made two fundamental errors in applying the governing law. The first was that the Coastal Act and the LCP only provide protection from designated viewing platforms such as the Muir Beach Overlook. They fell into this error because they did not follow the advice of their own staff, Deputy Director of Planning Services Tom Lai. The Commissioners believed that

the Visual Resources and Community Character section of the Interim Zoning Ordinance was controlling instead of the LCP, with which it is in conflict. In an extended colloquy with Commissioner Holland, Mr. Lai explained that where there is a conflict, the zoning regulation is subordinate to the LCP.

A preliminary issue arose because Title 22.56.130I(O)(2) of the Interim Zoning Ordinance states: "To the maximum extent feasible, new development shall be designed and sited so as not to impair or obstruct existing coastal views *from Highway 1 or Panoramic Highway.*" This is clearly in conflict with the LCP, which states:

> "To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, *or the national or State parklands from Highway 1 or Panoramic Highway.*"

LCP, p.65. The zoning ordinance changes the meaning of this provision by making the phrase "from Highway 1 or Panoramic Highway" modify all "existing coastal views" instead of being limited to views from "national or State parklands." It appears that, following a colloquy with Deputy Director Lai, the Commission understood that the zoning ordinance had varied the meaning of the LCP. In any event, even the Commission did not try to limit the protection of coastal views to those visible from Highway 1 or Panoramic Highway.

Inexplicably, the Commission took a different approach with respect to Title 22.56.130I(0)(3) of the Zoning Ordinance, which is similarly inconsistent with the LCP. The LCP clearly states: "The primary concern of the Coastal Act is to protect views to scenic resources from *public roads, beaches, trails and vista points.*" The Interim Zoning Ordinance states that "Structures should be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views *as seen from public viewing places.*" Even after Mr. Lai advised them that in the event of a conflict between the LCP and the zoning regulation the LCP controls, the Commissioners persisted in applying the more confining language of the zoning ordinance. Thus, Commissioner Holland said: "It seems to me that the standard we have to apply here today is the second one; the one that 'structures shall be designed to follow the natural contours of the landscape and sited so as not to obstruct significant views from public viewing places.'"

Applying the zoning ordinance instead of the LCP would effectively eviscerate the Coastal Act in Marin County. Doing so would declare open season on coastal development. Nevertheless, the Commissioners seemed oblivious to the implications of what they were saying. Commissioner Holland said: "The real question is whether we are dealing with obstruction of significant views from public viewing places." As an example, he cited the Muir Beach Overlook which he considered "very definitely a public viewing place." He said: "There are directional signs out on Highway 1, it's on tourist maps, it's in guidebooks, there's a big parking lot, there's a restroom...but that's a public viewing place." Commissioner Holland observed none of these at the top of the public easement, which led him to conclude that it was "not built with the idea of public viewing." He said, "I don't think the top of the stairs was built with the idea of viewing, it was built with the idea that the top of the stairs goes down to the next street. There's no signings

that says that it's even a walkway much less a public viewing place. I haven't seen any hiking maps or guidebooks or community resource guides that list this as a public viewing place. So, that's a fuzzy point for me. I'd like to see this house designed so it doesn't interfere with this view. But the problem is, he's completely in compliance with the zoning regulations."

Commissioner Ginalski voiced his opinion that the easement, like the "secret" trails he was used to traversing near his home in Tiburon, are "in my mind not meant to be used as observation decks." He reminisced about driving back from Massachusetts. He said: "What you find is that no matter where you are in this country and perhaps all over the world is that there are beautiful, beautiful vistas and sites–doesn't have to be oceans, it could be mountains or anything–and driving down the freeway you come across language that says "scenic overlook a mile ahead-pull off." To him "Scenic areas are designated as scenic overlooks."

Vice Chair Crecelius stated: "I would not define the top of this path as a significant viewing place. I think that if it were a significant viewing place that would require a property owner to design around it, then there should have been some designation of it, somehow. I don't think we can consider every public right of way as a significant viewing platform."

The Introduction to the LCP states:

> The policies of the Coastal Act, Chapter 3, have formed the basis for the policies contained within this document. Where any question is raised concerning the interpretation of policies within the LCP, Chapter 3 of the Coastal Act, may be used to provide clarification of LCP policies. In preparing the ordinances that will implement this LCP, minor modification to a small number of policies has been made. The implementing ordinances shall be used to provide clarification of policies as necessary.

The discrepancy between the LCP and the zoning regulation with regard to visual resources is not "minor." It is vast. Essentially, the Planning Commission read the words "public roads, beaches, trails" out of the LCP and left in "vista points!" The assertion that the California Coastal Act only protects scenic views from designated viewing platforms, overlooks or signed vantage points would eviscerate the Act and is completely spurious. Pursuant to Sec. 30009 of the Coastal Act, it "shall be liberally construed to accomplish its purposes and objectives." If you accept the Commissioners' reasoning, you might as well scrap the Coastal Act.

(C) It is possible to harmonize the LCP and the Zoning Ordinance

The perceived conflict between the zoning regulation and the LCP may be a false conflict. It is elementary that similar provisions should be harmonized if possible. Here, both the LCP and the zoning ordinance address visual resources. The phrase "public viewing places" in the zoning ordinance could have been read to be a shorthand expression to include "public roads, beaches, trails and vista points." Unless the LCP and the zoning regulation are harmonized in this fashion, then for the reasons described above, the broader language of the LCP must govern, as the

Appellants contend.

(D) The proposed development would significantly impair the view

The second fundamental error made by the Planning Commission was its definition of what constitutes a *significant* impairment. The Planning Commission contends that even though the development does impair the view, the impairment is not *significant* because the visual effects would be fleeting as a person moves along to her destination and that the effects are relatively small in relationship to overall panoramic views. These tests are illegitimate and legally irrelevant under the Coastal Act and LCP. Nevertheless, they were adopted verbatim by the BOS.

First, the premise is false. The view of the Muir Beach Cove, Big Beach and Pacific Ocean from Ahab Drive and the top of the public easement is one in a million. As you go down the public easement towards the beach there is a steep grade. The view from the top is not visible as you descend the steps. Even if there were any credence to the "fleeting moment" theory, this particular viewshed cannot be recaptured as you move further along to your destination. There is no other view like it from Ahab Drive. It cannot even be seen from the Muir Beach Overlook. If this development is allowed to proceed, that unique view will be gone forever.

Second, if the Coastal Commission were to accept the "fleeting moment" theory, the Coastal Act would be meaningless: Any development, no matter how destructive of a viewshed, could always be justified on the basis that people are always on their way somewhere. By this theory, a development permit would always be granted, even though it has a significant impact on a particular view, no matter how spectacular. Similarly, a property owner can always say that there is another panoramic view in the area. The whole point of having a separate LCP for the Coastal Zone, defined by the Legislature to be "one of its most precious natural resources," is to protect public coastal views from being extinguished by uncontrolled development. Views, such as the one from the top of the public easement, are not fungible. Marin County is justly famous for its coastal views. Under the Coastal Act, you can't trade off an irreplaceable view because there may be other ocean views along the same road or from a nearby overlook.

Furthermore, we have no idea what the Planning Commission meant when it says in Section VIII C of the Resolution (repeated in Sec. XIII A of the BOS Resolution): "The transitory and short term visual effect is acceptable within the residential community of the Seacape Subdivision, and not considered to be a substantial view impact." First, 9 Ahab Drive is not within the Seacape Subdivision and never was. Second, "acceptable" to whom exactly? There are 150 or so dwellings in Muir Beach of which those in the Seacape Development represent a small fraction.

The Planning Commission and the BOS took a simple concept and made it complicated: "significant" simply means "substantial." A picture is worth a thousand words. **(Exh. A)**. The Planning Commission's definition of "significant", set forth in sec. VIII C of the Resolution should be rejected because it is utterly incompatible with the purposes and objectives of the Coastal Act and the LCP.

Another argument advanced by the Applicant (but not by the staff or Planning Commission), is that the public easement is not used very much. The Legislature has made a judgement that scenic views from public rights-of-way are to be protected, and has made a reasonable assumption that these are used by the public. Gordon Bennett of the Sierra Club testified before the DZA that its members use the easement. Members of the public have filed letters in support of the appellants showing that the public easement is used by non-Muir Beach residents. A member of the public, Hank Gehman, spoke eloquently before the Planning Commission about his love for that spot. A recent article in the Beachcomer, the Muir Beach community's neighborhood newspaper, describes the many public easements in Muir Beach and encourages everyone to get out and use them. **EXH. B.** The applicant's assertion is unproven and untrue.

The only legitimate issue in determining whether an impairment is significant is whether the visual coastal resource sought to be protected from the blight of development is visible from public rights-of-way, not whether there are other comparable viewsheds in the vicinity. *LT-WR L.L.C. v. California Coastal Commission,* 60 Cal. Rptr. 3d 417, 438 (Cal. App.2d Dist. 2007)(**EXH. C, excerpts from decision**).

(1) The LT-WR case provides a roadmap to the correct decision in this case

In the *LT-WR* case, like Muir Beach, the project site was located in a highly scenic area, the Castro Peak ridgeline. The ridgeline was visible from public viewing areas such as parklands and hiking trails. The Coastal Commission found that the project would have a significant adverse visual effect from public viewing areas. Whether the visual impact would be transitory or short term as hikers proceeded to their destinations, or the existence of other panoramic views, or how many hikers used the trails, formed no part of the Commission's analysis. The only issue was that the site proposed for development was between the trails and the ridgeline and defiled the view.

The public easement is a dedicated public trail owned and maintained by the Muir Beach Community Service District and has been used for over forty years. No one who has stood at the top of the public easement on Ahab Drive could describe the view, or the impact of the proposed development as shown by the story poles, as *de minimis*. Not only is Big Beach a jewel of the Golden Gate National Recreation Area, but also, out of tens of thousands of possible locations, it was selected for the opening scenes of the movie "Memoirs of a Geisha!" Obviously, there is something special about the Muir Beach Cove to the broader public as well as Muir Beach residents and guests. The photographs that we have submitted demonstrate that the Crosby development would wipe out the view of the Muir Beach cove, the beach and ocean from public roads and trails. The development meets the correct legal standard of a significant impairment.

(2) Attempts to distinguish the LT-WR case are without merit

At the hearing before the Planning Commission several attempts were made to distinguish the *LT-WR* case. None are valid.

First, a public speaker by the name of Dave Gilbert, who identified himself as a "real estate agent, a lawyer and a friend of Tim Crosby," sought to distinguish the case on the basis that the developer had done some work without a permit. While true, this fact is completely immaterial. Nothing in the Court's decision suggests that its analysis of what constitutes a "significant impairment" had anything to do with the fact that the permit application followed some unpermitted development of the site.

Second, Chairman Dickenson and Commissioner Ginalski felt that *LT-WR* was not a comparable situation because the ridgeline was described as being one of the highest and most visible landmarks in the Santa Monica mountains and had been officially recognized in the local plan as a "Significant Ridgeline." The fact that the Castro Peak ridgeline is a commanding visual feature in no way diminishes the beauty of Muir Beach cove as seen from Ahab Drive and the top of the public easement. It would be absurd to conclude that Muir Beach cove is not entitled to protection as a magnificent coastal view. The Castro Peak ridgeline does not set a standard against which every other scenic view must be measured in order to be protected.

The fact that the Castro Peak ridgeline was officially recognized in the local plan does not mean that such recognition is a minimum requirement. Sec. 30251 of the Coastal Act protects scenic resources, not "scenic resources which have been officially designated in the LCP." Neither the Coastal Act nor the LCP requires that a visual coastal resource be officially designated by the LCP before it can be deserving of protection. If that were a condition, it would eviscerate the Coastal Act because there are probably few such designations.

These attempts to distinguish the *LT-WR* case are without merit.

It should also be noted that the Coastal Act contained a provision in 1976 which provided the Coastal Commission a brief period–two years-to designate "sensitive coastal resource areas" California Coastal Act Sec. 30502, 30116. This authority expired in 1978. (There is no indication that the Castro Peak ridgeline was one of these). SCRA's were subject to "other implementing actions" in addition to the normal protections. California Coastal Act Sec. 30108.6. However, it is equally clear that the protections of the Coastal Act are not limited to SCRAs. California Coastal Act Sec.30251. If the Coastal Act only protected SCRAs, it would have said so. The Act must be liberally interpreted to achieve its purposes and objectives. Calif. Coastal Act Sec. 30009. Limiting the Act to SCRAs–the last of which would have been designated some thirty years ago-would thwart, rather than promote, the objectives of the Act.

Likewise, insofar as Sec. 30251 of the Coastal Act provides that "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 local government shall be subordinate to the character of its setting", it in no way detracts from the requirements that "permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas" and "be visually compatible with the character of surrounding areas."
In applying the Coastal Act, it is not whether the viewshed has been designated as "scenic': the only thing that counts is whether it *is* scenic.

(E) The landscaping plan will not solve the problem

Several Commissioners believed that the damage to the view could be mitigated through landscaping. Because the plan that was presented for the first time at the hearing was deemed unacceptable, this issue was delegated to staff. According to Neal Osborne, a revised formal landscaping plan that meets the requirements of the Planning Department has yet to be submitted by the Applicant. In any event, landscaping might hide the house, and removal of some trees might even open up some views, but such modifications cannot restore the unique view of the Muir Beach Cove, Big Beach and Pacific Ocean that would be lost through this development. The reason for this is the steep dropoff from the top of the easement as you descend to the beach. Unless you pause at the top, as letters in the record attest that people do, the view is lost. Views are not fungible. This problem cannot be solved by eliminating some trees on the property.

Because the Applicant asserts that landscaping is the solution, he should bear the burden of proof that it will restore the view in question. As anyone can see from a visit to the site, this is an impossible burden for him to meet.

II. There are feasible alternatives which, if implemented, could be found consistent with the policies of the Coastal Act and the LCP

Once it is determined that visual coastal resources are significantly impaired, the remaining question is whether there are feasible alternatives. The LCP provides: "to the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon, or the national or State parklands from Highway 1 or Panoramic Highway." LCP p. 65. As Deputy Director Lai explained, the phrase "to the maximum extent feasible" simply means that, in designing the project, every effort must be made to avoid the destructive effect to viewsheds. This project does not satisfy that standard.

There are feasible alternatives. The 1600 square foot addition is the size of many houses. There are countless designs for houses. There is nothing sacrosanct about this design. We do not maintain that Mr. Crosby cannot expand his house; only that he must design it so that it does not destroy a treasured public view. If this house were being built in San Anselmo on a similar size lot, there probably would be no problem. But this development is taking place in the coastal zone.

We are gratified that the Planning Commission ordered Mr. Crosby to delete the clerestory windows on both the east and west sides. As noted on page 3, the Commission gave the Applicant an opportunity to submit a revised plan to staff demonstrating the need for additional roof height on the west side. Appellants have been advised by Neal Osborne that drawings submitted by the Applicant's architect are not the formal revision to the plans that would be necessary to enable the planning staff to make a decision. Therefore the issue remains unresolved. Of course, eliminating

the clerestories would help a little. But lowering the roofline by four and a half feet will not solve the problem, especially on the western side. If, however, the western side were to be reduced by one story, i.e., bedroom No. 3, it would eliminate 12 to 15 feet from the height and thereby preserve the cove view. Because the so-called "music room" with its attached full bathroom could just as easily have been labeled a bedroom, you could still end up with a three bedroom, four bathroom house for a 52 year old single male. The Applicant could construct a great house without destroying the public views. With so much interior space to work with, clearly a solution is achievable. This ill-conceived and enormous development project could, and should, be re-designed so that the primary concern of the Coastal Act and the LCP, to protect scenic resources, is vindicated. The piecemeal approach of tinkering with the roofline is ineffectual.

Commissioner Ginalski stated that the challenge in this case was to "balance the needs of the private property owner to be able to... develop and build their property and share it with the public right to view and enjoy nature." Assuming, for the sake of argument, that this is the appropriate way to approach this case, the result is clear. On one side of the scale is the permanent loss of a spectacular view. On the other is the homeowner who has many options in designing his house to preserve existing viewsheds. Nature cannot redesign the view of Muir Beach cove from Ahab Drive or the top of the public easement.

In this connection, Section 30251 of the Coastal Act requires that permitted development must be "compatible with the character of the surrounding area." Likewise, Title 22.56.1301(O)(3) of the Interim Zoning Ordinance provides in part: "The height, scale and design of the new structure shall be compatible with the character of the surrounding natural or built environment." (Unlike the next sentence of this section that contains the "public viewing places" language discussed above, there is no conflict with the LCP) Commissioner Greenberg felt that the house is too big, is out of character with the neighborhood standard and would create a precedent for other development that may come before the Commission. She was "reluctant to send the Applicant back and make a smaller house although that's what I think should be done." We urge the Coastal Commission to do what should have been done: deny the permit application outright.

In *LT-WR L.L.C. v. California Coastal Commission,* 60 Cal. Rptr. 3d at 440, the Court of Appeals stated: "The Commission is not required to redesign the applicant's project to make it acceptable." Id. 440. The court went on to state, "The denial of the application does not bar the applicant from submitting a new and different proposal." The same is true here.

In addition, there is no emergency about building this project. On July 24, 2008, the Applicant submitted a statement to the Community Development Agency in which he made some statements that are disingenuous at best. **EXH. D.** For example, the Applicant states: "Added bedrooms provide for an elderly parent as well as young children." This statement is disingenuous because it creates the impression that there is an immediate need for housing for an extended family. The truth is that the Applicant's mother owns her own house in Marin County and the Applicant has no children. This statement does not reflect current reality but, rather, is speculation about what the future may hold. Also, the Applicant himself is domiciled in Florida, where he spends much of his time. The Applicant also states that the original house was "built for a single woman," as though

it is too tiny for a single man! Many families live in far less space than 2058 square feet.

No one denies that the Applicant has the right to expand his living space. However, the Coastal Commission should not be influenced by any misapprehension that there is some dire need to proceed with *this* design.

III. The Muir Beach Community Plan provides additional authority for the Appellants' arguments

A. The MBCP was incorporated into the LCP in 1980

Before the Planning Commission, the Appellants argued that, in addition to violating the Coastal Act and the LCP, the proposed development violates the Muir Beach Community Plan (MBCP) which states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP p. 12. On the Friday before the hearing before the Planning Commission, Neal Osborne sent a memorandum to the Commission stating that the MBCP was not applicable because it was not incorporated into the LCP when it was certified by the California Coastal Commission in 1980. Acting on this memorandum, the Planning Commission deleted all references to the MBCP from the Resolution that was adopted by the Commission on March 9, 2009. Appellants raised the issue before the BOS by a supplemental argument filed on March 30, 2009. **EXH. E**

The position that the MBCP was not incorporated into the LCP is incorrect. The LCP, that was certified by the Coastal Commission on April 1, 1980, does incorporate the MBCP and discusses it on page 79. It is particularly difficult to understand the Planning Department's position in light of the fact that in another recent case from Muir Beach that came before the Coastal Commission, the MBCP was central to the case and no one ever suggested that it had not been certified or adopted by the Coastal Commission. See *Beverly Biondi,* Application No.2 Mar 8-066, Local Permit CPO7-34, CPO8-24.

At the BOS hearing, Deputy County Counsel David Zaltsman and Deputy Director of Planning Services Tom Lai attempted to explain the basis for the Planning Department's position. Essentially, they argued that, unlike this case, the Biondi case involved a design review as well as a coastal permit application. They believe that the MBCP was incorporated "but not in full." They also argued that of all the other community plans in the coastal zone, very few were actually incorporated by the Coastal Commission into the LCP.

The arguments made at the hearing are unpersuasive. With two exceptions noted on p. 79 of the LCP, the MBCP was incorporated. The *post hoc* contention that design reviews were included but applications for coastal permits were not is simply unsupported by the LCP itself. Whether the LCP incorporated other communities' land use plans is immaterial: the only question is whether the MBCP is in or out and the clear intention of the LCP document itself is that, except as specifically noted, it is in.

It is extraordinary that after twenty-nine years have passed, the Planning Department has discovered for the first time that the MBCP was not fully incorporated into the LCP. A decision of such consequence should be the subject of a formal written opinion by County Counsel and not decided based upon the superficial reasoning and vague generalities such as those tendered by Deputy Director Lai and Deputy County Counsel Zaltsman at the hearing. Because the Appellants found these arguments to be incomprehensible, we requested David Zaltsman to put the County's analysis of the issue in writing. **EXH. F.** He has not done so.

B. The Crosby project violates the MBCP

Concerning the Crosby project, there can be no more apt example of the concern expressed in the MBCP over "the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community."The MBCP complements the Appellants' arguments that the Crosby project conflicts with Sec. 30251 of the Coastal Act insofar as it requires that permitted development must be "compatible with the character of the surrounding area" and with Title 22.56.130I(0)(3) of the Interim Zoning Ordinance insofar as it provides that "The height, *scale* and design of the new structure shall be compatible with the character of the surrounding natural or built environment." (Emphasis added) We share the view expressed by Commissioner Greenberg at the February 9 hearing before the Planning Commission that the proposed addition is too big and is out of character with the community. In this connection, Deputy County Counsel Zaltsman admitted at the BOS hearing that homes within 600 feet of the Crosby property range in size from 475 sq. feet to 5562 sq. feet; the average is 1768 sq. feet; the median is 1791 sq. feet; and only 9 (12 per cent) of the lots have homes exceeding 3000 sq. feet. These statistics support the Appellants, not the Applicant. At 3647 sq. feet, the Crosby project would be larger than 88 per cent of the neighboring dwellings.

IV. The Coastal Commission should eschew the many Irrelevant issues that have been interjected by the BOS and the Applicant

A. Legally irrelevant considerations result in arbitrary and capricious decision-making

In addition to ratifying the incorrect criteria adopted by the Planning Commission, the BOS applied improper and legally irrelevant considerations.

For example, Supervisor Kinsey voiced his concern that the Applicant should not be held accountable even though his architect, Richard Beckman, had "missed an opportunity to protect this jewel of a view" and that a "sensitive architect should have done that." First of all, the record does not reflect who is at fault: it may be that the Applicant's architect(s) advised him that the project would run afoul of the Coastal Act and he chose to ignore that advice. So, Supervisor Kinsey was making an assumption. Second, assuming the architects were at fault, the fact that the Applicant might have legal recourse against them has absolutely nothing to do with whether the project violates the Coastal Act and the LCP. Potential liability would be an issue for the architect's malpractice carrier and the courts to determine. It was not the BOS's job to resolve issues of liability between Mr. Crosby and his architects or to insulate Mr. Crosby from the consequences of bad advice. There are other remedies for that.

Supervisor Kinsey thought it significant that other projects in Muir Beach, cited by the Applicant, had been approved in recent years. In fact, none of these projects eclipsed a stunning view of the coast, as the Crosby project does. In any event, this highlights why it is important that the Crosby permit be denied: if it is allowed, in future years developers will be citing the Crosby project as the benchmark. The Coastal Act would be eviscerated. The root of the problem is that Supervisor Kinsey believes that decisions such as this one should be decided by the Muir Beach community in the context of its Community Plan (which the BOS erroneously thinks was never incorporated into the LCP), totally ignoring the fact that the Coastal Act has declared the preservation of California's scenic coastal resources to be a matter of statewide and nationwide concern. Calif. Coastal Act Sec. 30001(b). Allowing such factors to influence the outcome constitutes arbitrary and capricious decision-making at its worst.

More disturbing is Supervisor Kinsey's belief, not stated at the hearing but subsequently published, that neither the Coastal Act nor the LCP protects what he termed 'micro' views. Or so he told the West Marin Citizen in an interview about this case a few days after the BOS decision. In a revealing statement, published by the Citizen on April 9, 2009, Supervisor Kinsey stated that "[t]he language of the law did not provide for the protection of 'micro' views." **EXH. G.** What is the legal authority for this astonishing statement? Neither the Coastal Act nor the LCP distinguish between 'micro' views and 'macro' views: they protect all views to scenic resources within the coastal zone.

B. The Applicants' *ad hominem* attacks should be ignored

There is an adage in the legal profession that "if the law is against you argue the facts; if the facts are against you argue the law; and if both the law and the facts are against you put your adversary on trial." Because both the law and the facts are against the Applicant, regrettably he has resorted to arguments of a personal nature designed to divert attention away from the issues raised by this appeal.

The Applicant's argument before the BOS was punctuated by irrelevant and *ad hominem* attacks on the Appellants. These include his belief that the Appellants are not "entitled to a life free of any change." Applicant Crosby's Statement Before the BOS, March 24, 2009. In addition to accusing the Appellants of various transgressions, he argued that the fact that the Appellants have not

opposed many other projects in Muir Beach is evidence that we are motivated by private interest rather than the public interest, which we purport to serve.

Putting aside the obvious fact that opposing a development permit requires an enormous investment of time and money, even if we were the worst people in the world acting out of the basest of motives, that would not change the fact that the Crosby project violates the Coastal Act and the LCP. This is a topic which the Applicant scrupulously avoided discussing in his own presentation: he believes that compliance with the technical zoning standards is all that is required. We do not expect a medal for representing the public interest in this case but we do ask that our arguments be evaluated on the merits. We cannot stop the Applicant from attacking our motives or our character but we do ask that the Coastal Commission keep its eye on the ball and not be distracted from the important issues raised by this appeal by irrelevant personal attacks.

V. The role of letters and testimony

For the following reasons, letters and public testimony submitted by the Applicant should be approached with caution. The Applicant submitted twelve letters and one postcard by Muir Beach residents on his behalf. Of these, two were submitted by persons employed by the Applicant: Gail Falls, who is his "field architect" and Brad Eigsti, who he hired to do a landscape plan. We also submit that it is superficial to tally up letters pro and con without considering their content. Most of the letters which the Applicant submitted are of the "I do not oppose" variety mostly using the same format. On the other hand, the letters submitted on behalf of the Appellant, many of them from visitors to Muir Beach who spoke eloquently about their feelings concerning the view that would be eliminated by the development project.

The Commission should also be wary of public testimony. For example, one Bill Shideler spoke on Mr. Crosby's behalf before the BOS. He neglected to disclose the fact that he is a contractor hired by Mr. Crosby to erect story poles on the premises. The Appellants only learned that Mr. Shideler had a direct financial interest in the project after the hearing was over. The supervisors never knew about the connection because neither Mr. Shideler not Mr. Crosby thought it relevant to provide that information.

Letters and testimony may provide the deciders with some insight but they cannot negate the law. In addition, when participants fail to disclose that they have a direct financial interest in the project it obviously poisons the process.

Finally, if you add up the letters and the public speakers, and omit the the parties and the Applicant's known employees, the total is virtually a tie: Applicant 13; Appellants 12.

VI. Preservation of Procedural Issues

A. Procedural errors before the DZA render the entire proceedings void

The Appellants contend that procedural errors made in noticing the permit application and in failing

to grant the Kohn Appellants' request for a continuance when the matter was before the Deputy Zoning Administrator renders the entire process void. The Planning Commission refused to consider these arguments on the ground that it's jurisdiction was *de novo*, and that everything that occurred previously was wiped away. As Commissioner Holland said:

> "The other one is about this whole business of whether or not any possible errors were made at the DZA prejudiced things before us. This is called a de novo hearing here which means we start from scratch. Everything that went before us is gone. In a sense you've gotten what you wanted in asking for a start over because we look at the entire project as though no one has done it before."

The Appellants disagree. Each successive appeal is like fruit of the poisonous tree–the whole process has been fatally infected by the procedural errors. It is elementary that an administrative agency must follow its own regulations, which was not done in this case.

In this connection, at the suggestion of Tom Lai, Appellants contacted Deputy County Counsel David Zaltsman. In an e-mail dated March 3, 2009, he states, in part:

> "Since the general rule in all areas of the law I am familiar with is that appeals are de novo unless there is case law or statutory basis to the contrary. *I would be more concerned if someone suggested to you that you were somehow limited in the issues you could raise at either the Planning Commission or Board of Supervisors."* ***EXH. H***

Just because an appellate body takes a fresh view of the law and facts (i.e. *de novo* review) does not erase everything that preceded it. Otherwise, fundamental errors would be completely insulated from review. The BOS did not address the procedural violations at the hearing. Nor, except in the most cursory fashion in Sec. XIII G, did Resolution No. 2009-26 adopted by the BOS address the procedural arguments raised by the Appellants. We are aware that the jurisdiction of the Coastal Commission is limited. It is our intention to preserve the issues for eventual judicial review if resort to the courts becomes necessary. To avoid repeating those arguments (which would run the risk of detracting from the important substantive issues raised above), we attach the brief we submitted to the Planning Commission as **EXH. I**, expressly incorporate the procedural arguments as though fully set forth herein, and respectfully request the Coastal Commission to address those arguments if you believe that it is within your purview to do so.

B. The failure of the Planning Department to provide the BOS with the complete administrative record violates elementary principles of administrative law

The Planning Department violated fundamental principles of administrative procedure by failing to

provide the BOS with the entire administrative record. This was prejudicial to the Appellants. For example, several letters submitted in support of the Appellants were never seen by the BOS. This is significant because Supervisor Kinsey appeared to be influenced by the mere number of letters submitted on behalf of the Applicant. This is but one of many procedural violations that have tainted this case from its inception.

CONCLUSION

One of the purposes of the Coastal Act is to prevent private property owners from commandeering public views so that only the property owners receive the exclusive benefit of nature's wonders to the exclusion of the public. That is what is happening here. Mr. Crosby admitted as much in his Final Planning Statement attached to his Zoning/Development Application dated July 24, 2008, where he states: "The 1600 +/- square foot addition is designed to take full advantage of the spectacular ocean view,..." **EXH. D.** If the Crosby development is permitted, a unique and beautiful view will be irretrievably lost to this and future generations to satisfy the self-interest of one person. That would be a tragedy.

Those of us who are fortunate enough to live in Muir Beach must look beyond self indulgence and consider the greater good. We are stewards of a precious trust–this unique, special and historic site. We are here for only a short period of time, but the beauty of the coast is eternal. Because the California Coastal Commission has the power to enforce the Coastal Act and the LCP, you share in that responsibility to ensure that structures created by man do not endanger that trust, as this project does.

While we had hoped to reach a negotiated settlement of this controversy, that has proven to be impossible. Therefore, we urge the Coastal Commission to determine that this appeal raises substantial issues, take jurisdiction and, after due consideration, deny the permit application as being incompatible with applicable law.

Respectfully submitted,

Signature on File | **Signature on File**

Richard and Brenda Kohn | Dr. Edward Hyman and Dr. Deborah McDonald

Dated: May 5, 2009

BEFORE THE CALIFORNIA COASTAL COMMISSION

Appeal from the Marin County Board of Supervisors'
Decision re: Timothy Crosby Application for a
Coastal Development Permit
Application No. CP09-3
Commission Appeal No. A-2-MAR-09-010

EXHIBITS IN SUPPORT OF APPELLANTS' ARGUMENT

LIST OF EXHIBITS

A. Photographs of Muir Beach Cove from Public Easement and Ahab Drive

B. Beachcomber, Issue 245, May 2009

C. *LT-WR, L.L.C. v. California Coastal Commission,* 60 Cal.Rptr.3d 417, 437-440 Cal.App.2 Dist. 2007)(excerpts)

D. Crosby Final Statement. doc July 24, 2008 (3 pages)

E. Supplemental Argument on Behalf of Appellants before the Marin County Board of Supervisors, March 28, 2009 with Muir Beach Community Plan p. 12, memorandum from Neal Osborne dated February 6, 2009 and Marin County LCP (Unit 1) p. 79.

F. E-mail to Deputy County Counsel David Zaltsman from Brenda Kohn dated April 17, 2009

G. West Marin Citizen April 9, 2009

H. E-mail to Neal Osborne from Brenda Kohn dated March 2, 2009 and reply from David Zaltsman dated March 3, 2009

I. Argument on Behalf of Appellants Richard S. Kohn and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald before Marin County Planning Commission dated Jan. 25, 2009, containing procedural objections to the DZA proceedings, incorporated by reference in the Appellants' Argument to the California Coastal Commission

Taken from the top of the public easement

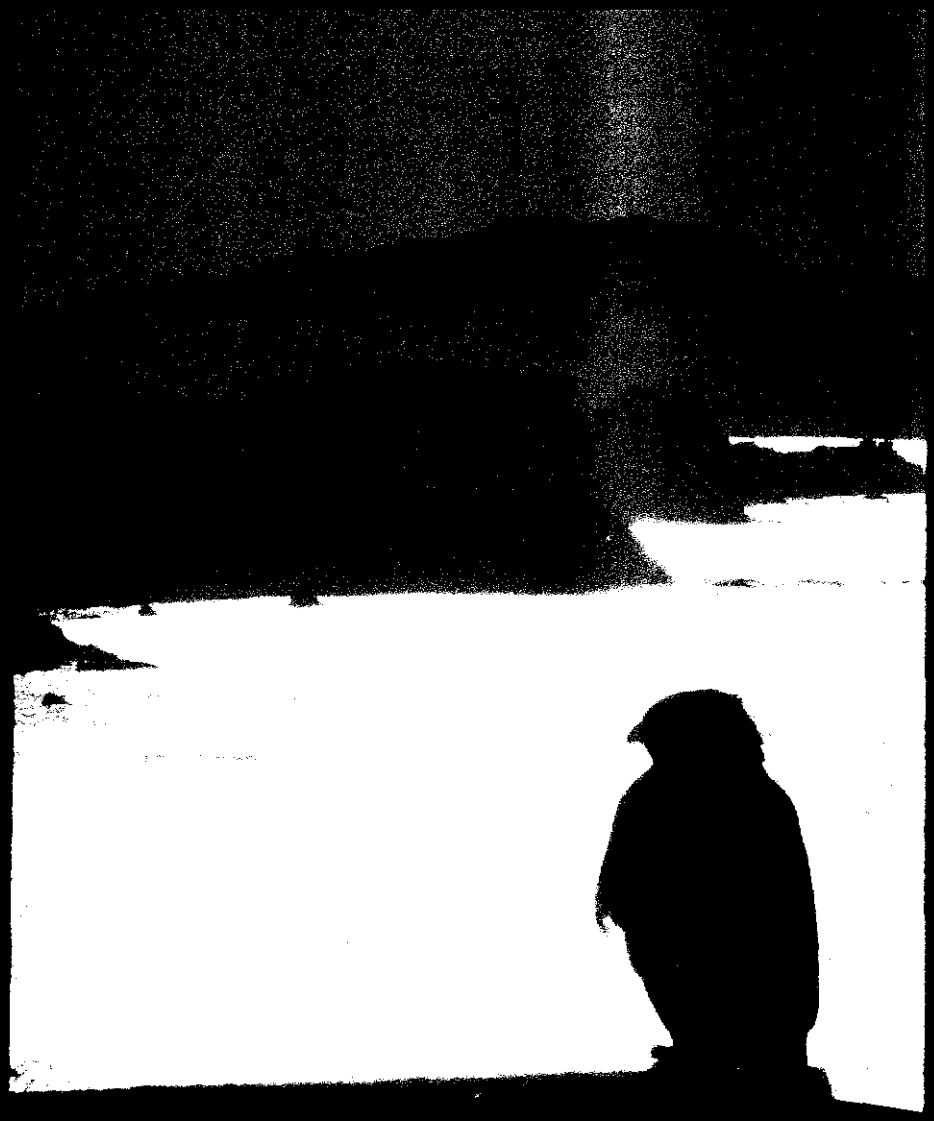
Taken from Ahab Drive

EXH. A

BEACHCOMBER

Muir Beach Neighborhood News

Issue 245 May 2009



EXH. B

District Manager's Report March 2009

By Maury Ostroff

One of the advantages of living in Muir Beach is our proximity to so many great hiking trails that wind their way through the surrounding hills of the Golden Gate National Recreational Area and Mt. Tamalpais State Park. But of more immediate interest is the pedestrian easements and pathways within the residential areas of Muir Beach that are owned and maintained by the Muir Beach CSD.

Most of the easements and parkland are well known and used often by Muir Beach residents and visitors who are hiking through. Others are less well known and used. For the record, the following lists the CSD owned trails in Muir Beach:

- Ahab Drive to Sunset Way, continuing across Sunset Way down to Little Beach.
- Seacape Drive to Muir Beach Overlook.
- Corner of Seacape Drive and Starbuck all the way down to Seacape across from the Community Center.
- Community Center down to Sunset Way, continuing across Sunset Way down to Pacific Way.
- Sunset Way (east) to Pacific Way.
- Sunset Way (west) to Little Beach.

The CSD strives to maintain these trails in working order and in character with their surroundings. Where needed and appropriate, we have installed steps and handrails. Sometimes there are real staircases, other times there are just old railroad ties staked into the ground, and mostly it's just a well-worn dirt path. But we do go through the easements on a periodic basis with a weed whacker and keep the trails passable. Obviously, some trails are in better condition than others, and hopefully by the time this article appears in print we will have fixed some of the loose steps and done other trail restoration.

The most frequently used path is the one that starts on Pacific Way through a driveway and then up the steps to Sunset Way. The notable feature here is the wooden flume on the side that carries storm drainage water. Most visitors to Muir Beach take this path to start their hike up to the Muir Beach Overlook (or beyond.)

The path continues directly on the other side of Sunset Way and heads straight up to the Community Center. About halfway up is a bench with a plaque in memory of Lawrence and Janet Stump; a great place to catch your breath and look back on the view.

Continuing on up the path you come to the Community Center. A new landmark on the east side is our new Storage Shed, and a set of new stone walls, and a new stone bench set in the wall next to the shed, which offers yet another spectacular view of the beach and the coastline to the south. The trail continues along the ramp and up the stone steps to Seacape Drive, where you will end up by the wooden sign and bulletin board in front of the Community Center.

Directly across Seacape drive and the Community Center the path picks up again, winding up a hill to the Lower Starbuck extension. You can see the Lower Water Tank on the east side, which provides water to the "lower zone" of houses primarily along Sunset and Pacific Way. There is a set of stairs that lead to the Lower Starbuck extension road, but the main path continues on up the hill. After a few switchbacks and a few hundred yards, you will come to another stone bench with a plaque in memory of the Clark family, which provides yet another increasingly spectacular view of the coastline and surrounding hills to the south. By now you have climbed enough in elevation to see into the valley and fields of Green Gulch Farm.

The path continues on up the hill running between houses facing Seacape Drive to the southwest and Starbuck Drive to the northeast. Currently at the top of the hill things are in a bit of flux due to the construction of two new houses on Seacape. There is a road used by the construction crews that goes straight down to Starbuck Drive just before Seacape, but there is also a path that

View from the new stonewall at the Community Center to Sunset Way. Note that the path continues down across Sunset Way to Pacific Way and to the Muir Beach Parking Lot.

View to the southeast along the Seacape/Starbuck Parkland Trail as it goes past the Clark Family Bench.

leads to a set of stairs that ends right at the corner of Seacape and Starbuck. At this point you can see Mt. Tamalpais to the north.

To get to the Muir Beach Overlook, the best way is to continue walking up Seacape Drive, past the Upper Water Tank, and on to the entrance to the Overlook parking lot, which is owned and maintained by the National Park Service. There is an easement from Seacape that leads to the back portion of the Overlook which the CSD keeps clear and open, but it dead-ends into a thicket of scrub and poison oak when it reaches NPS property.

Now that we've hiked up in elevation about 400 feet from the beach to the Overlook, this is as good a time as any to talk about some of the issues regarding the public trails and easements. In general, we want to keep the trails open not only to all residents but to the general public as well. However, there are certain trails that are in close proximity of private residences to areas that are easily accessible by car and/or the general public. To be frank, as a measure of concern for security and privacy, it is not advisable for us to open the trail to the Overlook, and accordingly we have not asked the Park Service to clear the brush on Federal land.

Once at the Muir Beach Overlook, you can continue your hike down to Slide Ranch along the Owl Trail, or cross to the east side of Highway One and take the Coast View Trail all the way to Pantoll. One of my favorite hikes is the Heather Cutoff Trail with its numerous switchbacks that takes you back down to Santos Meadow where the annual Fire Department BBQ is held. The top of the Heather Cutoff Trail can be found a few hundred yards past the Muir Beach Overlook, where there is a sign on the Coastal View Road indicating Pantoll straight ahead, and Heather Cutoff to the right.

The path I just described starting at Pacific Way is the path used by thru-hikers who either start at the Muir Beach parking lot, or who have come from further south along the Coastal Trail. The fact is that the only connection to the Coast View Trail to the north and to the south of Muir Beach goes through the CSD easements. I can also recommend the Coastal View Trail to the south that leads to "Pirate's Cove" and continues on to Tennessee Cove, or you can take the Coastal Fire Road, then either Green Gulch or Middle Green Gulch Trail that goes down to the Zen Center.

Getting back to Muir Beach, another path starts at Ahab Drive where there is a set of wooden steps at the top. Halfway down the trail you can see the infamous "Bello-Seacape" drainage ditch on the right. This ditch carries storm water from Ahab and Seacape drives and runs between Ahab and Sunset Way, and eventually empties into the Cove Lane seasonal creek. Continue down the path and there is another set of steps that leads down onto Sunset Way. The easement continues in a straight line to a set of relatively steep steps that end at the bottom of Cove Lane and the path to Little Beach. The 1.5" water line that serves some houses at the bottom of Cove Lane runs down along this path and ends at the Fire Hydrant at the bottom, but the small size of the pipe is not enough to make that hydrant useful in a fire.

There is another path that starts at Little Beach and goes up to the end of Sunset Way. The CSD is about to start another phase of our Water Capital Improvements Plan and add a new 6" water line that will replace the other water line. We will relocate the Fire Hydrant and make it operational. At that time, the trail will be rerouted to be further away from the eroding cliff and we will make other repairs to make the trail safer and more usable. However, just like the situation at the Overlook, we don't want to make this trail too inviting (or visible) to the general public at Little Beach.

There is another, seldom used path that runs down from the very beginning of Sunset Way to Pacific Way. The actual path has fallen into disuse and has become overgrown, and at some point in the future we hope to restore this trail. However, there is another trail that has been established by the horses that goes from Sunset Way down to Pacific Way near the Terwilliger Butterfly Grove in the same general area.

If you want to get in shape and see the great outdoors, sell the treadmill and the Stairmaster and get out and hike the trail up to the Overlook, down to the beach and back once a day. In no time at all you'll be ready to run the Dipsea. Or maybe just take your time and take a casual walk on the weekend and see some of your neighbors. These pedestrian easements were set aside for our enjoyment so get out and use them!

Photographs by Maury Ostroff

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We conclude that the denial of the motion for expert witness fees was error. Our conclusion does not compel the conclusion that the Housing Authority is entitled to recover its expert witness fees, but only that the trial court on remand must exercise its discretion under Code of Civil Procedure, section 998, subdivision (c)(1) in deciding whether to award the fees.

DISPOSITION

The judgment is affirmed as to the denial of relief to Fassberg on the complaint. The judgment is reversed as to the cross-complaint by the Housing Authority with directions to the superior court to (1) conduct a new trial on the cross-complaint limited to determining the number of false claims, if any, the amount of damages resulting from false claims and from any false records or statements in connection with false claims, and the appropriate civil penalty; (2) determine whether the election of remedies doctrine precludes the Housing Authority from seeking to recover in the new trial compensatory and punitive damages for misrepresentation and, if the Housing Authority is not precluded, conduct a new trial on those issues; (3) include in the judgment on the cross-complaint to be entered at the conclusion of the proceedings on remand a reduced award of damages to the Housing Authority for breach of contract in the amount of $701,282.05 ($1,104,000—$402,717.95 = $701,282.05), and an award to Fassberg of $1,310,036.47 as the full amount of the retention proceeds; (4) reconsider its determination that the Housing Authority is the prevailing party for purposes of an attorney fee award under Public Contract Code section 7107, subdivision (f); and (5) reconsider the issue of the Housing Authority's right to recover expert witness fees under Code of Civil Procedure, section 998, subdivision (c)(1). The order denying Fassberg's motion for partial judgment notwithstanding the verdict is affirmed. Each party shall bear its own costs on appeal.

KLEIN, P.J., and ALDRICH, J., concur.

151 Cal.App.4th 427

LT-WR, L.L.C., Plaintiff and Appellant,

v.

CALIFORNIA COASTAL COMMISSION et al., Defendants and Appellants.

No. B187666.

Court of Appeal, Second District, Division 3.

May 25, 2007.

As Modified June 21, 2007.

Background: Landowner petitioned for writ of administrative mandate, seeking to overturn a decision by the California Coastal Commission denying landowner's application for a coastal development permit (CDP). The Superior Court, Los Angeles County, No. BS088933, Dzintra Janavs, J., granted the petition in part and denied the petition in part. Landowner appealed, and Commission cross-appealed.

Holdings: The Court of Appeal, Klein, P.J., held that:

(1) landowner waived its claim of vested right;

(2) Commission's failure to hold timely public hearing did not divest it of jurisdiction;

EXH. C

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With respect to LT-WR's application to place a mobile home structure on the parcel as a caretaker's residence, the Commission noted: "The development is proposed to be located on an unpermitted pad area that was graded after the effective date of the Coastal Act (January 1, 1977).... [T]his area of the site has been altered without a coastal development permit since 1977. Approximately 9,360 sq. ft of chaparral vegetation was removed adjacent to the intersection of the two existing firebreaks on the site. [¶] Additionally, a pad of approximately 16,000 sq. ft and road were graded both within the existing fire-break and the area where vegetation was removed after 1977. Staff would note that the applicant is not requesting after-the-fact approval for this pad or for the vegetation removal associated with it. *Nonetheless, staff has considered the application as though the unpermitted development has not already occurred.* The applicant is proposing to place the caretaker's residence and storage trailer on the pad, so the impacts of developing the pad must be considered along with those of the structures." (Italics added.)

[16] In order to enable the Commission to protect coastal resources, and to avoid condoning unpermitted development, the Commission properly reviewed the application as though the unpermitted development had not occurred. Therefore, we reject LT-WR's contention it was merely seeking a "*de minimis*" relocation of existing structures "to areas which had previously been cleared."

7. *Substantial evidence supports Commission's determination the development would have an adverse impact on visual resources.*

a. *The pertinent statute.*

[17] Public Resources Code section 30251 states: "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 subordinate to the character of its setting."

b. *The Commission's determination the proposed development would have an adverse impact on visual resources.*

The Commission found: "The proposed project site is located in a highly scenic area. Castro Peak ridgeline is one of the highest and most visible landmarks in the Santa Monica Mountains. The LUP designates Castro Peak as a Significant Ridgeline.... [¶] ... [¶] ... The ridgeline is visible from a very large area, including parklands and trails. The site is visible, in particular, from the National Parks Services lands in Solstice Canyon, Malibu Creek State Park, and the Backbone Trail. [¶] ... [¶] The grading of the pad in the proposed location on a steep slope on a highly scenic ridgeline would have individual significant adverse impacts on visual resources from public areas. Chaparral habitat was removed and an undetermined amount of grading and landform alteration was carried out for the construction of the pad. The existing access road was constructed with an undetermined amount of grading and the removal of approximately

540 sq. ft. of vegetation. Further improvements, including 700 cu. yds. of grading would be necessary to extend the road 600 feet from the property line to the pad and improve it to the required standard as well as to pave it. Further, the cumulative impacts of the pad in conjunction with the other development on the site would have significant effects on visual resources.... [T]here is approximately 81,000 sq. ft. of area on the ridge, within the large fire-break, that has already been denuded of vegetation, graded, or otherwise developed. As such, there is already a large area of the site that has been altered. Finally, the placement of the caretaker's residence in the proposed location would also require the removal, irrigation and/or thinning of chaparral on a steep slope as a result of fuel modification for fire protection purposes. The areas that are subject to fuel modification, particularly in the square pattern that the applicant has proposed, will read differently (areas where all vegetation is removed will be the color of the bare dirt while areas that are thinned will be a different color) than the surrounding natural vegetation and given the prominence of the ridge will be visible from a great distance. Therefore, the proposed project will not minimize grading and landform alteration on a prominent ridgeline, and is therefore not consistent with the requirements of [Public Resources Code] Section 30251 of the Coastal Act or the visual resource policies of the [LUP]."

c. *Trial court's ruling.*

With respect to visual resources, the statement of decision provides: "The LUP designates Castro Peak as a Significant Ridgeline, which is *highly scenic* and is one of the highest and *most visible* landmarks in the Santa Monica Mountains. Castro Peak is visible from public parklands and trails including the National Park Service lands in Solstice Canyon, Malibu Creek State Park, and the Backbone Trail. [¶] Substantial evidence supports the Commission's decision to deny the proposed development ... because it is inconsistent with the Coastal Act and LUP visual resource policies in that the proposed development will not minimize highly visible grading and vegetation removal on a prominent ridgeline."

d. *LT-WR's arguments relating to visual resources are meritless.*

LT-WR asserts the Commission "presented no evidence to show that the CDP, if granted, would be inconsistent with the Coastal Act and LUP visual and scenic resource policies." LT-WR attacks the Commission for beginning its analysis with the artificial premise that none of the items applied for in LT-WR's application existed, despite their having been there for decades. LT-WR contends the Commission's finding the placement of the caretaker's residence and fuel modification area would be visible from a great distance was unsupported by any photographic or scientific evidence. LT-WR asserts the property is already dominated by communication towers that are 150 to 300 feet high. Further, LT-WR attacks the Commission's reliance on aerial photographs to show the property is highly visible from trails in the Santa Monica Mountains because aerial photographs only show that the property is visible from the air, not from surrounding trails or properties.

In essence, LT-WR is asking this court to reweigh the evidence which the Commission considered. We decline to do so. The aerial photographs cited by the Commission reasonably support the inference the subject property is visible from hiking trails in the Santa Monica Mountains and that the development would have significant adverse impacts on visual resources

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8. *Substantial evidence supports the Commission's determination with respect to feasible design alternatives.*

a. *The Commission's decision.*

With respect to alternatives to the project, the Commission's decision states: "There are siting and design alternatives to the proposed project which, if implemented, could be found consistent with the policies of the Coastal Act and the LUP. The proposed caretaker's residence could be resited to the center area of the site.... There are several potential sites where the residence could be placed within this area.... Resiting the caretaker's residence, with the associated changes in the project would significantly reduce impacts to ESHA. First, the amount of chaparral ESHA removed, irrigated, or otherwise altered to provide fuel modification would be significantly reduced. Additionally, the proposed portion of the road that extends to the pad could be eliminated. The grading and vegetation removal to create the pad would not be necessary. As part of this alternative, the proposed storage trailer and horse stables could be included on the upper area of the site (within the larger fire-break), assuming that these structures could be constructed of inflammable materials and would not require fuel modification....

"[LT-WR's] agent has stated that resiting the proposed residence may present conflicts regarding proximity of a residential use to the telecommunications towers. As noted above, staff requested information on standards for separation between such towers and residential uses. The only information that [LT-WR's] agent provided was a letter ... stating that local and state governments are precluded from applying regulations or restriction based on concerns related to the potential harmful health effects of possible exposure to radiofrequency radiation. While staff does not agree that [LT-WR] adequately addressed this issue, no other information was provided by [LT-WR's] agent regarding necessary separation between the various types of uses existing and proposed on the project site. If [LT-WR] later determine[s], based on additional information, that there is a conflict between the placement of the caretaker's residence in the alternative area and the maintenance of the communications facilities, it may be necessary to either relocate the communications facilities or to eliminate the proposed residence. Other security measures could certainly be employed if necessary, such as fencing, security cameras, and security patrol. Other existing communications facilities, such as those just to the west on Castro Peak, and others on Saddlepeak do not employ personnel that live on-site.

"Other alternatives that could be employed to minimize impacts to ESHA include the construction of the proposed septic system in a different location.... This alternative location for the septic system would minimize impacts to chaparral ESHA by eliminating the removal of vegetation on the steep slope to run lines down to seepage pits in Newton Canyon Motorway.

"Finally, there is an alternative to the proposed second parallel roadway along the northern property line.... [A]n available alternative to constructing a second, parallel roadway would be [to] utilize the existing roadway. This alternative would eliminate the proposed grading and removal of chaparral vegetation. Therefore, the

Commission finds that there are feasible alternative to the proposed project that would not result in significant adverse effects on the environment and would be consistent with . . . the Coastal Act."

b. *Trial court's ruling.*

The trial court found "there are feasible siting and design alternatives to the proposed project that would not result in significant adverse effects on the environment and would be consistent with the Coastal Act and LUP policies, i.e., clustering development within the already developed 80,000 square feet and using the existing road. There are several alternative sites in the center area of site, north of the proposed location where the mobile home, septic system, water well, storage trailer, and horse stables could be relocated."

c. *No merit to LT–WR's contentions in this regard.*

[18] LT–WR contends the relocation of caretaker's residence and appurtenant structures to the alternative sites suggested by the Commission would be infeasible because the County Fire Department has already approved the fuel modification plan for the proposed project. The argument is patently without merit. The mere fact that fire officials have approved a brush clearance plan in connection with a particular proposal does not make pursuit of an alternative proposal infeasible.

LT–WR also contends the suggested relocation of the caretaker's residence to a site beneath the telecommunications towers is infeasible because such a move is within the exclusive jurisdiction of the Federal Communications Commission.

However, as the Commission noted in its decision, its staff requested information from LT–WR regarding standards for separation between such towers and residential uses, and the only information that LT–WR provided was a letter discussing federal preemption of local and state regulations relating to the potential harmful health effects of exposure to radiofrequency radiation. Thus, LT–WR did not adequately address this issue with the Commission.

Curiously, LT–WR contends the Commission's design alternatives are infeasible, but at the same time, it faults the Commission for denying the CDP application without giving LT–WR an opportunity to implement the suggested alternatives. Thus, LT–WR implicitly concedes the design alternatives are in fact feasible.

[19] LT–WR also asserts that rather than denying the application, the Commission should have approved the application, subject to appropriate conditions of approval. However, the Commission is not required to redesign an applicant's project to make it acceptable. (*Bel Mar Estates v. California Coastal Com.* (1981) 115 Cal. App.3d 936, 942, 171 Cal.Rptr. 773.) The denial of the instant proposal does not bar LT–WR from submitting a new and different proposal. (*Ibid.*) All that is involved here is an administrative decision, supported by the record, denying the application which LT–WR submitted.

9. *Trial court properly dismissed the third through sixth causes of action.*

a. *Third cause of action: the taking claim is not ripe for decision.*

In the third cause of action, LT–WR alleged the Commission's denial of its permit application resulted in a taking of its property without just compensation and was an undue interference with LT–WR's reasonable investment backed expectations upon which LT–WR acted in acquiring the property. The trial court, after largely upholding the Commission's decision, dismissed the taking claim as moot.

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County of Marin Community Development

MARIN COUNTY
COMMUNITY DEVELOPMENT AGENCY
ALEX HINDS, DIRECTOR

ZONING/DEVELOPMENT APPLICATION

TYPE OF APPLICATION:

- ☐ MASTER PLAN
- ☐ PRECISE DEVELOPMENT PLAN
- ☒ COASTAL PERMIT
- ☐ FLOATING HOME ADJUSTMENT*
- ☐ FLOATING HOME ARCHITECTURAL DEVIATION
- ☐ GENERAL/COMMUNITY PLAN AMENDMENT
- ☐ REZONING
- ☐ SECOND UNIT PERMIT
- ☐ DESIGN REVIEW
- ☐ MINOR DESIGN REVIEW
- ☐ DESIGN REVIEW CLEARANCE
- ☐ SIGN PERMIT/REVIEW*
- ☐ USE PERMIT
- ☐ VARIANCE*
- ☐ TIDELANDS PERMIT
- ☐ TREE REMOVAL PERMIT

***Requires Supplemental Application/Information**

TO BE COMPLETED BY PLANNING DEPARTMENT STAFF:

Date Received: 7/24/08
Receipt No: 2009-0043
Received By: CH
Planner Assigned:

FEES: $1655 a
Permit:
Permit:
Cat. Exempt: $360
Initial Study:

Concurrent Application:
Reviewing Authority:

Other:
TOTAL: $2015

(*Make checks payable to:* **Marin County Planning Department**)

Hearing: ☒ Non-Hearing: ☐ *Note: Fees may not be refunded in full if the application is withdrawn.*
Assessor's Parcel No.(s) 199-283-09 Application No.(s): CP 09-3

TO BE COMPLETED BY APPLICANT: (Please type or print legibly) (C)

1. Assessor's Parcel No(s): 199-283-09 Zoning: CRA B4
2. Project Address: 9 AHAB DRIVE City/Zip: MUIR BEACH 94965
3. Property Owner: TIM CROSBY Phone: 561.309.5845
4. Owner's Address: AS ABOVE City/Zip: AS ABOVE
5. Applicant: OWNER Phone: " "
6. Applicant's Address: " City/Zip: " "
7. All correspondence will be sent to the applicant. Please indicate any others to receive correspondence:

Name: RICHARD BECKMAN Address: 15006 Kenedal RD NE ~~BAINBRIDGE ISL. WA 98110~~
Gail Falks 33 AHAB DRIVE MUIR BEACH, CA 94965
(206) 792-7665 cell
cell = 686-3614
(415) 388-8189

EXH. D

Crosby final planning statement.doc

The original house at 9 Ahab of approximately 2000 square feet was designed and built as a solar heated and passively cooled house for a single woman over thirty years ago. The new owner, Tim Crosby, was desirous of maintaining the design integrity and character of the existing while carrying out updating and the necessary age-related repairs and adapting the house to accommodate a multi-generational family and his own lifestyle and interests.

To that end he retained the original architect, now a retired Professor of Architecture who, while living at Muir Beach, had also designed a number of other houses and the community center thus helping to define the design vocabulary that is seen today at Muir Beach.

The 1600+/- square foot addition is designed to take full advantage of the spectacular coastal view; to connect the house more closely to the down-slope portion of the site by stepping down to the grade at the west; to provide accessibility from the parking level, via elevator, to the main living levels; to provide more space for friends and family; and to be environmentally responsible. Added bedrooms provide for an elderly parent as well as young children.

The addition takes its clues from the existing house by reinforcing the strong design elements; adding additional bays, offsets, multiple roof levels and decks to break down the exterior mass into smaller elements. Exterior and interior finishes and materials will be maintained and compatible with the quality and character of the existing house and its neighbors. To take advantage of the often pleasant but sometimes wet climate portions of the extensive decks are protected with a green house roof that does not block the sun, providing an option missing in the original.

Passive solar gain and natural cooling strategies with highly efficient windows, blown-in soy insulation, added thermal mass, large mechanically shaded view windows, strategically placed operable windows and skylights for maximum cross-ventilation combined with a ground source geo-thermal heat pump system and roof mounted solar voltaics reduces the carbon foot point well beyond that of a Green Building ordinance platinum rating.

The parking area is being expanded to comply with new County codes. A new on-site drip sewage disposal system will be installed to replace the existing that has functioned very well for over 30 years.

Once construction is completed the site will be returned to the existing grades and native grasses and wild flowers that have thrived on the site without irrigation will be re-introduced. The existing Pines along Ahab will effectively screen the addition just as they do the existing.

The new work will not alter the relationship that exists between the property and will not effect or cause any diking, filling, or dredging of open coastal waters, wetlands, estuary systems, or lakes; nor does it extend onto or adjoin any beach tidelands, submerged lands or public trust lands.

BEFORE THE MARIN COUNTY BOARD OF SUPERVISORS

Appeal from the Planning Commission's Decision re: Timothy Crosby Application for a Coastal Development Permit Application No. CP09-3

Hearing Date: March 31, 2009

Supplemental Argument on behalf of Appellants

Before the Planning Commission the Appellants argued that, in addition to violating the Coastal Act and the Marin County Local Coastal Program Unit 1 (LCP), the proposed development violates the Muir Beach Community Plan (MBCP) which states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly construed."

MBCP p. 12 **(EXH. A)**. With respect to the Crosby project, Appellants argued that there "could be no more apt example of the concern expressed in the MBCP over "the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community." See Argument on Behalf of Appellants before the Planning Commission, January 25, 2009, at pp. 9-10.

On the Friday before the February 9 hearing before the Planning Commission, Neal Osborne sent a memorandum to the Commission stating that the MBCP was not applicable. It said:

> "Please delete Finding VII from the proposed Resolution for this project. Upon detailed review of the applicability of the Muir Beach Community Plan for a project only subject to a Coastal Permit, and following consultation with County Counsel, staff determined that the Muir Beach Community Plan does not apply to this project because:
>
> 1. The Muir Beach Community Plan was adopted in 1978 and was not incorporated into the Local Coastal Program Unit 1 when it was certified by the California Coastal Commission in 1980.
>
> 2. The project is only subject to a discretionary Coastal Permit, and no other discretionary permit is required that would mandate consistency

EXH. E

Findings regarding Community Plan and Countywide Plan policies.

3. The Muir Beach Community Plan consistency findings should be deleted from the proposed Planning Commission Resolution for the same reason that the Deputy Zoning Administrator deleted the Countywide plan consistency findings from the DZA Resolution."

See Memorandum dated Feb. 6, 2009. **(EXH. B)**. Acting on the memorandum, the Planning Commission deleted all references to the MBCP from the Resolution that was adopted by the Commission on March 9, 2009.

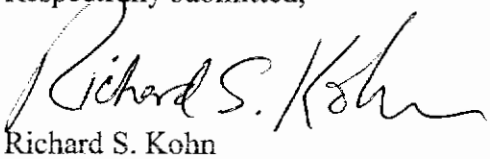
The statement in Paragraph 1 of the memorandum that the MBCP was not incorporated into the LCP is incorrect. The LCP, that was certified by the Coastal Commission on April 1, 1980, does incorporate the MBCP and discusses it on p. 79. **(EXH. C)** If we understand paragraphs 2 and 3 of the memorandum, which is not easy to do, it appears that they are derivative of paragraph 1.

It is particularly difficult to understand the Planning Department's position in light of the fact that in another recent case from Muir Beach, the MBCP was central to the case and no one ever suggested that it had not been certified or adopted by the Coastal Commission. See *Beverly Biondi*, Application No. 2 Mar 8-066, Local Permit CP07-34, CP08-24,.

In our written submission to the Board of Supervisors, we have argued that the project conflicts with Sec. 30251 of the Coastal Act insofar as it requires that permitted development must be "compatible with the character of the surrounding area" and with Title 22.56.130I(O)(3) of the Interim Zoning Ordinance insofar as it provides that "The height, scale and design of the new structure shall be compatible with the character of the surrounding natural or built environment." Appellants' Argument p. 14. For the reasons stated above, we request that the Board of Supervisors also consider whether the project would violate the MBCP. We share the view expressed by Commissioner Greenberg at the February 9 hearing that the proposed addition is too big and is out of character with the community. For this additional reason, the coastal development permit should be denied.

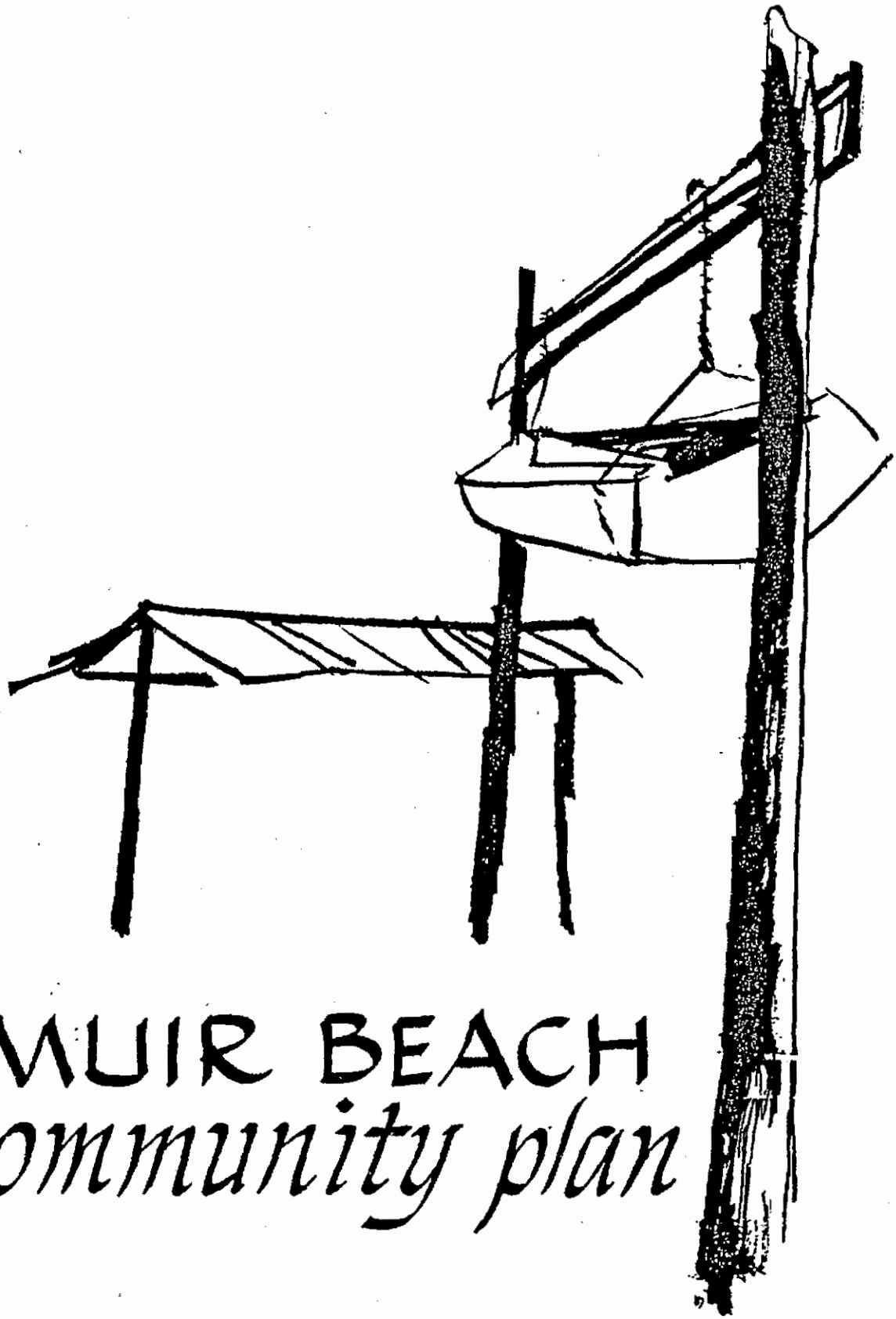
Dated : March 28, 2009

Respectfully submitted,



Richard S. Kohn

On behalf of all the Appellants



MUIR BEACH
community plan

EXH. A.

The Elizabeth Terwilliger Butterfly Trees are located at Pacific Way and Lagoon Drive. This land, now owned by the Audubon Canyon Ranch, should be included in the Golden Gate National Recreation Area.

The Monterey pines on both sides of Pacific Way are one of the few local resting places for Monarch butterflies on their yearly migration. Property owners in that area are charged with protecting these trees and keeping them free from insecticides. The Muir Beach Community Services District has the same responsiblity where these trees are on their easements.

The Circus House is located along Pacific Way on land owned by the Audubon Canyon Ranch. This land contains the portion of Redwood Creek bounded by Pacific Way, the Zen Center, and the Golden Gate National Recreation Area. It should be included in the Golden Gate National Recreation Area, with a lease-back of Circus House to the present tenants for their lifetimes.

MUIR BEACH COMMUNITY: RESIDENTIAL-AGRICULTURAL ZONING

There are 314 people now living at Muir Beach in 129 single-family homes. When the remaining 44 building sites are filled, there will be 173 homes.

The size of lots in Muir Beach ranges from 3,000 square feet to about ten acres. The present County zoning requires lots of a minimum size of 10,000 square feet in old Muir Beach and one acre in Seacape. Some parcels adjoining Seacape require a minimum of two acres per lot. Many undersized lots in both areas are legal but non-conforming building sites. This community plan adopts the county regulations governing lot size and setbacks now in effect.

We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly enforced.

A combined agricultural and residential land use has always existed at Muir Beach. An important aspect of Muir Beach diversity is the use of land for gardening, full and part-time farming, horse maintenance, and small animal husbandry. Other home occupations include those of professtionals and artisans. These activities should be protected as many people have settled here expecting this kind of use. A distinction must be made between the above-mentioned activities, and commercial use, i.e., that which depends on the presence of more than two people at a time, where money or gifts are received from them. Problems of density, water supply, sewage, and traffic, as well as the necessity to preserve the rural character of Muir Beach, preclude commercial use.

MEMORANDUM

TO: Planning Commission
FROM: Neal Osborne, Planner
RE: Kohn, Hyman, and McDonald Appeal of the Crosby Coastal Permit (CP 09-3)
February 9, 2009 Planning Commission Item 4
DATE: February 6, 2009

Please delete Finding VII from the proposed Resolution for this project. Upon detailed review of the applicability of the Muir Beach Community Plan for a project only subject to a Coastal Permit, and following consultation with County Counsel, staff determined that the Muir Beach Community Plan does not apply to this project because:

1 The Muir Beach Community Plan was adopted in 1978 and was not incorporated into the Local Coastal Program Unit I when it was certified by the California Coastal Commission in 1980.
2 The project is only subject to a discretionary Coastal Permit, and no other discretionary permit is required that would mandate consistency findings regarding Community Plan and Countywide Plan policies.
3 The Muir Beach Community Plan consistency findings should be deleted from the proposed Planning Commission Resolution for the same reason that the Deputy Zoning Administrator deleted the Countywide Plan consistency findings from the DZA Resolution.

Please review the attached Excel spreadsheet indicating building and lot sizes of the surrounding properties within 600 feet of the Crosby property based on the County Assessor's records. The median total building size on each lot in the neighborhood (75 properties) is 1,791 square feet. The range is 475 square feet to 5,562 square feet with 12% of the properties (9 lots) having total building areas of more than 3,000 square feet. Additionally, staff received the attached letters and e-mails from neighbors (1 opposed and 13 in support), after preparation of the staff report. The comments are from:

1 Richard Kohn (appellant) with excerpts from *LT-WR, LLC v. California Coastal Commission, 60 Cal.Rptr.3d 417 (Cal. App. 2 Dist. 2007).*
2 Gay Friedman and Patricia McCall
3 Gail Falls
4 Brad and Lisa Eigsti
5 Rene Boche and Bob Bowyer
6 Harold Pearlman
7 Lynda Grose Silva and Matthew Silva
8 Robert Wynn
9 Michael Moore
10 Marilyn Laatsch
11 Dan Fitzpatrick
12 Linda Hulley and Stephen Hulley
13 Elizabeth Benedict
14 Pam Barlow and Bruce Barlow

ATTACHMENTS: 1) Property Characteristics Table; 2) Public Correspondence
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EXH. B

M A R I N C O U N T Y

L O C A L C O A S T A L P R O G R A M

U N I T I

ADOPTED BY MARIN COUNTY BOARD OF SUPERVISORS

August 21, 1979

CERTIFIED BY STATE COASTAL COMMISSION

April 1, 1980

EXH. C

LCP POLICIES ON LOCATION AND DENSITY OF NEW DEVELOPMENT

This Section contains the land use/zoning proposals for Unit I and represents the basic element of the LCP. These proposals are based upon the County-wide Plan (1973), as supplemented by the three Community Plans adopted since 1975. Many of the LCP policies have been referenced to the appropriate sections of the Countywide and Community Plans to provide policy background material. The proposals contained herein use, for the most part, the land use policies of these Community Plans; therefore, the Community Plans are used as descriptive base references in describing the LCP policies. It should be clear, however, that based upon Coastal Act requirements, selected modifications to the land use policies and designations in the Community Plans are being proposed by the LCP. Where plans and policies of the local coastal program conflict with policies of local plans, the policies of the LCP shall govern. Maps showing the LCP land use designations are on file with the Marin County Planning Department.

Muir Beach

The Muir Beach LCP land use designations shall follow the Community Plan land use designations with the following modifications:

27. Redesignate residential lot size of parcels along Redwood Creek from 10,000 square feet to 1 acre minimum lot size. (See also Policy II-8).

28. Make no LCP recommendation for agricultural lands of over 60 acres. (See also Policy II - 29).

Stinson Beach (excluding Seadrift)

The Stinson Beach LCP land use designations are those identified in the adopted Community Plan except as modified below:

29. The existing R-2 zoning designation in Stinson Beach shall be retained in order to protect and maintain the existing character of the community, provided, however, that no development other than single-family residences shall be permitted on any parcel of less than 7,500 square feet in area in order to minimize septic tank problems and the cumulative impacts of such development on public access along Calle del Arroyo. All development within these zones shall conform with LCP policies on septic systems and housing. Repair or replacement of existing duplex residential use on a parcel of less than 7,500 square feet damaged or destroyed by natural disaster shall be permitted.

30. The properties presently zoned R-3 along Shoreline Highway shall be rezoned to R-2 in order to minimize flood hazards and the adverse impacts on Easkoot Creek which would result from such development (Easkoot Creek runs across the subject properties). Redesignation of the R-3 properties to R-2 will also assure development consistent

Subj: **Tim Crosby CDP**
Date: 4/17/2009 9:15:22 AM Pacific Daylight Time
From: BrendaKohn
To: DZaltsman@co.marin.ca.us
CC: TLai@co.marin.ca.us, nosborne@co.marin.ca.us

Dear Mr. Zaltsman,

In connection with the Timothy Crosby Coastal Permit Application, I would appreciate it if you would send me a detailed written explanation of the County's position as to why the Muir Beach Community Plan was not incorporated into the LCP. Frankly, I found the explanation offered by you and Tom Lai at the March 31 hearing before the Board of Supervisors incomprehensible. Perhaps if I see it in writing it will make more sense to me. I look forward to receiving your response. Thank you in advance for your prompt response to this request. Please respond to the above e-mail address.

Very truly yours,

Richard S. Kohn

Access 350+ FREE radio stations anytime from anywhere on the web. Get the Radio Toolbar!

EXH. F

News

MUIR BEACH

Neighbors see larger issue in lost appeal

By John Tornes

County supervisors last week upheld the planning department's approval of a 1,589-square-foot addition to a 2,058-square-foot home on an acre lot overlooking Muir Beach, and the neighbors are none too happy about it.

"The issue in the Crosby appeal is not a dispute among neighbors," Crosby's neighbor at 39 Seascape, Dr. Edward Hyman said. "Tim Crosby is a fine neighbor. The issue is the maintenance of public viewsheds in the coastal region and the stewardship both of the very unique area of Muir beach cove and of West Marin in general."

In December county planners approved the project at 9 Ahab Drive with the caveat that the new roofline be lowered by four feet, a reduction that the home owner, Tim Crosby, described as punitive due to the costs and delays the change would effect. Neighbor Richard S. Kohn said while the change was helpful, it did not entirely address his concern that the house would block views.

The roofline change was not enough for Hyman and Deborah McDonald, who said that even at the lowered height, the house would still block their primary view of the beach. More important, they argued, the house would block public views of the beach from both Ahab Drive as well as from a public access trail.

Hyman and McDonald, as well as neighbors Brenda and Richard Kohn, have made this point at three county hearings on the house, and have indicated they may do so again at the state level. The neighbors made their case initially to county planning staff when they first considered the permit in December. The county deputy zoning administrator upheld that decision, so the neighbors appealed to the county planning commission in February, and took the appeal to county supervisors last week.

County planner Jeremy Tjerian, who as the deputy zoning administrator upheld county planner Neal Osborne's initial approval of the project, maintains that the house construction would not degrade important public views of the beach.

"When Neal Osborne recommended approval, after reviewing the plan and site I thought there would be a marginal impact to public views and [so I] made a modest change to the [addition's] roof lines. The planning commission accepted and furthered this modification I approved and added [a requirement of tree] trimming to open up more views. They appealed to the board [of supervisors,] which made a unanimous decision in support of it."

Crosby's neighbors were particularly critical of Steve Kinsey, the supervisor representing West Marin, in their comments after the board voted.

"This was a defining moment for Supervisor Kinsey," Kohn said after the hearing on Tuesday. "This is a critically important case under the Coastal Act. He had the opportunity to step up to the plate and defend the Act. In choosing not to do so he showed his true colors. It is hard to square his action with the fact that he recently sought a seat on the Coastal Commission and that; (as reported in the Citizen), in congratulating Supervisor Mirkarimi on his appointment, he said he was sure that Mirkarimi would protect the coast. By his action, Supervisor Kinsey has forfeited the support of anyone who cares about our beautiful coastal views or the environment."

"I've long been a strong supporter of Steve Kinsey but I believe he and the other supervisors dropped the ball on West Marin, on our environment and on Muir Beach," Hyman said. "Their vote, if followed in the Crosby matter, would eviscerate the Coastal Act in its entirety. The story poles are up - if you [look at] what this guy wants to eliminate, you'd understand the significance of this decision."

"I thought long and hard about this decision," Kinsey said. "This is about the character of the villages of West Marin. I see a slow evolution to larger homes that are not sensitive to the landscape. At the same time, the zoning did not require design review, just a coastal permit. The language of the law did not provide for the protection of 'micro' views. Also, planning commission approved the project in a seven to zero vote."

"I see this as a shot across the bow for Muir Beach and similar villages to use the Local Coastal Plan update process to make clear with the county what it is they want to define, whether it is the size of houses or the protection of views," Kinsey continued. "I appreciate the interest in protecting the character of Muir Beach."

Kinsey mentioned that there were numerous letters in support of the house as well, designed by an architect who had worked in the community before.

Crosby's neighbors have one final opportunity to stop the construction by filing an appeal with the California Coastal Commission, but have not said for certain whether or not they would be doing so.

EXH. G

Subj: **RE: (no subject)**
Date: 3/3/2009 9:58:12 AM Pacific Standard Time
From: DZaltsman@co.marin.ca.us
To: TLai@co.marin.ca.us, BrendaKohn@aol.com
CC: NOsborne@co.marin.ca.us

Dear Mr. Kohn:

Tom Lai forwarded the e-mail below to me. I don't recall getting a voice mail from you, but I generally can't have verbal conversations with members of the public for fear of being misquoted and/or misunderstood in future proceedings that could convert me into a witness in matter where I am representing the County as its attorney. However, I am happy to e-mail.

In any event, I am not sure I understand your question. Since the general rule in all areas of the law I am familiar with is that appeals are de novo unless there is case law or statutory basis to the contrary, I would be more concerned if someone suggested to you that you were somehow limited in the issues you could raise at either the Planning Commission or Board of Supervisors. To the best of my knowledge, all CDA staff understand the all substantive appeals from either staff decisions, dza and/or pc are de novo at the next level above with the exception of permit streamlining appeals.

Dave Zaltsman

From: Lai, Thomas
Sent: Monday, March 02, 2009 8:47 AM
To: Zaltsman, David
Cc: Osborne, Neal
Subject: FW: (no subject)

David,

Please help by getting back to Richard on this. Thanks!

With Regards,
-Tom Lai
(415) 499-6292

From: BrendaKohn@aol.com [mailto:BrendaKohn@aol.com]
Sent: Monday, March 02, 2009 8:41 AM
To: Osborne, Neal
Cc: Lai, Thomas
Subject: (no subject)

Dear Neal,

I am writing to seek clarification concerning the disposition of the appellants' procedural arguments. At the hearing, Commissioner Crecelius asked Tom Lai about the notice issue and the continuance issue, to which Tom responded in perfunctory fashion. Then Commissioner Holland stated that because the jurisdiction of the Planning Commission is de novo, they start from scratch and everything that went before is gone. Sec. VIII (H) of the Resolution addresses some of the notice issues but is silent as to others and as to the continuance issue.

I have not found any authority for the proposition that the Commission's review is de novo. Tom Lai had given me the name of Tom Saltzman (?) at the county counsel's office and suggested I call him. I called and left a message for him regarding the de novo issue but he never gave me the courtesy of returning my call.

In any event, if the Planning Commission adopted Commissioner Holland's view that it lacks jurisdiction to address the procedural issues we raised, I would appreciate it if a statement to that effect be included in the Resolution with a citation to the appropriate authority. We would like a clear record on this.

Also, I note that the newspaper notice that was published on Nov. 26 was not included in the package of materials distributed to the commissioners. I would appreciate it if you would include it in the package that goes to the supervisors.

Many thanks.

Richard S. Kohn

A Good Credit Score is 700 or Above. See yours in just 2 easy steps!

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JAN 26 2009 PM 1:30 Planning

BEFORE THE MARIN COUNTY PLANNING COMMISSION

Appeal from the Deputy Zoning Administrator's Decision re: Timothy Crosby Application for a Coastal Development Permit Application No. CP09-3

Hearing Date: February 9, 2009

Argument on behalf of Appellants Richard and Brenda Kohn, Dr. Edward Hyman and Dr. Deborah McDonald

Introduction

The crux of this appeal is whether self interest trumps the public interest when it comes to preserving the scenic coastal views for present and future generations of visitors to Muir Beach, as well as residents of the community.

In Mr. Crosby's Final Planning Statement attached to his Zoning/Development Application dated July 24, 2008, he states: "The 1600 +/– square foot addition is designed to take full advantage of the spectacular coastal view;..." That is very nice for Mr. Crosby. But maximizing Mr. Crosby's views will be at the expense of the public, because his development will permanently block public views from Ahab Drive on both the east and the west sides of the project and, saliently, from the top of the public easement on the west side. Even after modifications ordered by the Deputy Zoning Administrator (DZA), the views of the ocean, beach and other viewsheds in and around Muir Beach will be impaired. This violates the environment and is bad public policy.

This case will set a precedent. If the proposed project is permitted to proceed, it is difficult to see how any future construction in Muir Beach that blocks the historic and scenic viewsheds could be prevented. Our goal is to preserve those viewsheds while allowing the applicant reasonable development of his property. His large lot potentially provides for both, but his current proposal permanently eliminates historic Muir Beach viewsheds.

Our objections are both procedural and substantive in nature. Procedurally, we shall show that the Community Development Agency (CDA) failed to properly apply its governing regulations in processing the application. These deficiencies render the action approving the application void. Substantively, photographs taken after the DZA's decision show that the limited changes that he ordered have not solved the problem, which the DZA himself defined as the public's right to the viewsheds of the Muir Beach cove.

For the reasons stated herein, which amplify and provide authority for the discussion in the appellants' Appendix to our Notice of Appeal, we respectfully urge the Planning Commission to

EXH. I

deny the coastal permit for this development.

Statement of Facts

On Nov. 26, 2008, the Kohn appellants received a Notice of Public Hearing concerning the Crosby Coastal Permit Application. The Kohns live at 5 Ahab Drive, adjacent to 9 Ahab Drive. Despite the fact that the staff report represents that notice was mailed to all property owners within 600 feet of 9 Ahab Drive, the Hyman-McDonald appellants never received such a notice–they learned about it from the Kohns. The Notice informed the Kohns of their right to submit comments and suggested that any comments be submitted two weeks before the hearing date of Dec.11 in order to ensure timely consideration by the DZA. Coincidentally, on the same day that the Kohns received notice, i.e., Nov. 26, story poles and ribbons were erected that, for the first time, showed the outline of the proposed additions to 9 Ahab Drive. Until the story poles were constructed, the impact of the project was unknown to appellants or staff.

The Kohns had a prepaid and nonrefundable vacation that required them to be out of state from Dec. 8 through Dec.18. Because they would not be able to attend the Dec.11 hearing, by letter dated Nov. 28, they requested a postponement of the hearing. Due to the Thanksgiving holiday, the first day the CDA was open was Dec.1. The Kohns hand delivered a request for postponement on that day. By then the staff report had already been completed, erroneously concluding that the proposed development had no visual impact on the public views of the Pacific Ocean or other viewsheds in and around Muir Beach. On Dec. 5, the Kohns filed objections to the permit supported by photographs.

On Friday, Dec.5, the Planner, Mr. Osborne, visited Muir Beach and viewed the story poles. (By then the ribbons that marked the contours of the additions had come down). Fortunately, appellants had taken photographs showing that the proposed additions clearly obstructed public views of the ocean, beach and other viewsheds. On that day, Mr. Osborne advised Brenda Kohn that a postponement was unlikely to be granted.

By letter dated December 7, the Hyman-McDonald appellants submitted objections and photographs objecting to the project.

On Dec. 8, as they were boarding a plane, the Kohns left a telephone message for Mr. Osborne. They stated that in a case where the photographic evidence clearly showed that the staff report's conclusion was erroneous, the appropriate thing to do would be to remand the matter back to the staff to revisit the issues and continue the hearing so that the Kohns could participate.

The hearing took place on Dec.11 as scheduled without the participation of the Kohns. Drs. Hyman and McDonald attended and participated, their request for a postponement having been denied. At the hearing, the DZA asked Mr. Crosby whether he would agree to continue the

hearing. Mr. Crosby refused to consent so no continuance was granted. In response to the objections that had been raised concerning impairment of views, the DZA ordered a reduction of the western roofline by 4 1/2 feet for 33 linear feet. When Mr. Crosby's architect said that they needed the extra height for a staircase, the DZA modified his decision to allow approximately 8 feet at the higher elevation. This was the only physical modification to the development ordered by the DZA. The DZA made a final decision, immediately approving the Coastal Development Permit (CDP) as modified.

Following the decision, by long distance the Kohns insisted that new story poles be erected showing the modification so that the impact could be assessed. As a result, this was done. Photographs taken after the new story poles were erected, show that even with the modification, the proposed development still has an adverse impact on the public views.

A timely Notice of Appeal was filed on Dec. 18.

ARGUMENT

I. PROCEDURAL VIOLATIONS

Chapter 22.110, entitled "Administrative Responsibility", describes the authority and responsibilities of county staff and officials in the administration of the Development Code. Section 22.110.060 states: "Any action by the Agency that is in conflict with any provision of this Development Code shall be void." The many procedural irregularities by the Agency have tainted these proceedings and render the granting of the CDP void.

A. Violations of the public notice provisions render the decision void

Resolution 08-154 approving the Crosby Coastal Permit erroneously states that the DZA held a "duly noticed public hearing on December 11, 2008,..." Sec. I(II). There are two sets of regulations governing notice, 22.118.020 of the Development Code and 22.56.0651 of the Interim Zoning Code.

(1) Chapter 22.118 notice was not properly given

Chapter 22.118.020 implements the notice requirements of the Government Code. Among other things, Chapter 22.118 provides procedures for the scheduling and noticing of public hearings before the Zoning Administrator. Section 118.020 sets forth the contents that must be included in this notice (hereinafter "Notice of Pending Permit" or the "Yellow Notice.") A Yellow Notice dated August 15, 2008 containing the four required disclosures was posted "on or adjacent to the property that is the subject of the permit." 22.118.020(B)(4). Significantly, this notice did not establish a date for a hearing but stated only that the hearing would not take place prior to Oct. 30.

Section 22.118.020(B) requires that at least ten days prior to the decision, this notice be

published in the newspaper or posted in at least three public places in the area of the subject property and that the notice be mailed or delivered to property owners within 300 or 600 feet depending on certain facts. None of this was done at the time the Yellow Notice was posted. If the CDA intended to satisfy the notice requisites under the Ch.22.561 procedures, as discussed below, they failed to do so.

(2) Chapter 22.561 Notice of Public Hearing was not properly given

Additional notice requirements are prescribed in Chapter 22.561 (Interim Zoning Act). The content of this notice, the Notice of Public Hearing, differs from the contents of the "Yellow Notice." For example, the notice must announce the date of the hearing and notify the public of their right to submit comments. The six requirements are set forth in 22.56.0651C.

Pursuant to Sec.22.56.0651(A), these notices must be mailed to "all property owners within 300 feet of the project boundary." The Hyman-McDonald appellants never received written notice under this section. As the aerial photographs submitted by Mr. Crosby's architect show, the Hyman-McDonald property is within 300 feet of 9 Ahab Drive. Thus, the notice requirement was not met.

In addition, the same provision states: "*Additionally, the site of the proposed project shall be posted with a copy of the notice at least ten working days prior to the date of the hearing.*" This was not done. Appellants are submitting photographs showing the "Yellow Notice" posted at the site. This was the only notice that was ever posted at 9 Ahab Drive. As noted above, the Yellow Notice does not contain a hearing date or other important information.

Moreover, any fair minded person would shake her head in disbelief at how notice was handled in this case. It is almost as though the CDA made a calculated effort to follow the form and defeat the whole point of notice. If one deliberately set out to ensure that the public would *not* get meaningful notice, the CDA could not have done a better job.

The CDA chose November 26--the day before the four day Thanksgiving holiday-- to publish a notice in the newspaper. The Kohns also received a copy in the mail on November 26. This was a time when most people would be away or otherwise preoccupied with family. The Notice of Public Hearing (but not the newspaper notice) advised people to get their comments in two weeks before the hearing, a practical impossibility. It was also impossible to submit comments in time to be considered by the staff because, as the Kohns learned on Dec.1, the staff report had already been written. The staff report then had the audacity to state that no public comments had been received! This procedure made a mockery of the regulatory intent that the public have a meaningful opportunity to make informed comment.

The statements that the hearing was "duly noticed" are not true and, therefore, the approval of the CDP is void. Furthermore, the procedures described above resulted in a deprivation of due process pursuant to Calif. Const. Art.1 Sec. 7.

B. The denial of the Kohn's request for a continuance violated applicable regulations and due process of law

(1) The denial violated Sec. 22.118.030

The Kohn appellants timely sought a continuance of the hearing because they had longstanding nonrefundable plans to be in Hawaii between December 8 and December 18. This made it impossible for them to attend the hearing scheduled for December 11. The DZA held that no continuance could be granted without the applicant's consent. Notice of Decision, DZA Minutes, C1 p. 4. Mr. Crosby refused to consent, so the request was denied.

Section 22.118.030 of the Development Code provides:

> The Zoning Administrator, Commission, and Board as applicable may continue any public hearing to a future specific date at the hearing body's discretion, except that continuances *beyond the prescribed final date for action* may only be granted with the agreement of the applicant and/or appellant,..." (Emphasis added)

The DZA erroneously applied this regulation to allow Mr. Crosby to veto a continuance because, in fact, there was no "prescribed final date for action."

Section 22.118.020(A) states:

> "**Content of Notice.** Notices of a public hearing or administrative action shall include the following: 1. The date, time and place of the *hearing or action* (or date before which a hearing or action will not be taken);..." (Emphasis added)

Instead of prescribing a final date for action, the Agency opted for the parenthetical alternative: The "Yellow Notice" posted on Mr. Crosby's property, contains the following statement:

> "A decision on this application is expected to be made by the Deputy Zoning Administrator in a public hearing no earlier than October 30, 2008 in Room 328 of the Marin County Civic Center, San Rafael."

This notice does not prescribe a final date for action. It states only that a hearing would not be held prior to October 30, 2008. Nor did the Notice of Public Hearing under Sec.22.56.0651 that the Kohn appellants received on November 26 contain a final date for action. It simply prescribes December 11 as the hearing date. So neither of the official notices of the permit application contains a final date for action. Nor does the notice published in the newspaper on Nov. 26.

In this connection, Section 22.118.040 of the Development Code provides:

> "The Zoning Administrator may announce and issue the decision at the conclusion of a scheduled public hearing, refer the matter to the Commission for determination, or defer action and take specified items under advisement and announce and issue the decision at a later date."

So, in other words, it was not a foregone conclusion that the final action would be taken on December 11.

We understand that neither the staff nor the DZA were opposed to a continuance. But, the DZA erroneously believed that he needed the applicant's permission to continue the hearing. This was based upon a misreading of Section 22.118.030 of the Development Code and constituted an abuse of discretion. The appellants have been prejudiced by this improper application of the regulation because we have had to bear the substantial cost of prosecuting an appeal to the Planning Commission. If a continuance had been granted, the Kohns would have had the opportunity to present their other procedural and substantive arguments to the DZA.

For some reason, this permit application has been handled in a way that prevents the deliberate consideration of the public policy issues that the application requires. This goes beyond the continuance issue. It includes the facts that: (1) given the Thanksgiving holiday, it was impossible for the appellants to submit comments for consideration by the staff before the staff report was written; (2) the story poles were not erected until Nov.26, which made it impossible to assess the impact of the development on critical views; (3) the CDA failed to comply with notice requirements; and (4) it was impossible to address the sufficiency of the modification ordered by the DZA except by taking this appeal.

What is perplexing is that this is not a case where the applicant lacks a roof over his head. The applicant is domiciled in Florida where he spends much of his time. And he himself described the Muir Beach property as a "retreat home" at the hearing. There was no need for a rush to judgement.

> **(2). Assuming that the DZA properly applied Sec.22.118.030, then that regulation lacks any statutory support and violates the due process clause of Cal. Const. Art. 1 Sec.7.**

Assuming, for the sake of argument, that somehow it could be concluded that the notices prescribed a "final date for action", this provision would be invalid because it is not sanctioned by any California statute and would violate fundamental principles of due process.

The minutes to the Notice of Decision states: "State law (Permit Streamlining Act) and County Code in Title 22 (Interim) require that a decision be made today unless the applicant asks for a

continuance." This is using the Permit Streamlining Act for a purpose never intended by the Legislature.

The Permit Streamlining Act, Gov't Code Sec. 659020, which sets out various timelines within which administrative decisions must be made, does provide that when one of those timelines is due to expire, it can be extended one time upon mutual agreement of the project applicant and the public agency. Gov't Code Sec. 65957. That makes sense because the timelines are for the applicant's benefit. But there is nothing in the Permit Streamlining Act that even remotely suggests, let alone requires, that continuances such as the one requested in this case, can only be granted with the applicant's permission. Most likely, the only time the Agency would put a date for final action in the notice is when the timeline for deciding a permit application is about to expire. Neither the Agency nor the DZA has ever stated that that was about to happen.

As applied by the DZA, the regulation would violate due process. Sec. 22.118.030 begins by saying that the DZA has discretion over whether to grant a continuance. The exercise of discretion by a governmental officer is reviewable for abuse of discretion. So, for example, if the DZA were to deny a continuance because the requester is African-American, or Chinese, or has green eyes, that decision could be reviewed. Taking discretion away from the DZA , and reposing it in the applicant, would insulate such a decision from any review.

Furthermore, why should the applicant have a veto power over this decision simply to gain a tactical advantage? Giving any party to a controversy absolute veto power over a reasonable request for a continuance by the other side (even where the DZA would be inclined to grant the request) is arbitrary and capricious and clearly unconstitutional.

Because statutes and regulations should be construed in favor of their constitutionality, the Planning Commission should harmonize the statute and the regulation and adopt the common sense and proper interpretation of the regulation set forth above.

C. These procedural violations render the action below void

Section 22.110.060 provides:"Any action by the Agency that is in conflict with any provision of this Development Code shall be void." Either singly or taken in combination, the procedural violations render the action granting the permit null and void. The coastal permit should be denied on this ground.

II. SUBSTANTIVE ARGUMENTS

A. The development, even as modified by the DZA, would adversely affect visual resources

(1) Pertinent statutes and governing authority

Sec. 22.56.0951 states that "A coastal project permit shall be approved only upon findings of fact establishing that the project conforms to the requirements and objectives of the local coastal program." The DZA ruled that the governing standards are found in the Marin County Local Coastal Program (LCP) and the Muir Beach Community Plan (MBCP).

The LCP provides, in relevant part:

> Visual Resources.
>
> Coastal Act policies on visual quality, found in Section 30251, require the protection of scenic and visual resources of coastal areas. Visual resources, including beaches, wetlands, and other natural as well as manmade features, are vulnerable to degradation through improper location of development, blockage of coastal views, ...The primary concern of the Coastal Act is to protect views to scenic resources from public roads, beaches, trails, and vista points.

LCP. p.56.

Section 30251 of the California Coastal Act, cited by the LCP, states, in part:

> "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,..."

The LCP further provides,

> "21. Existing development standards and the design review ordinance (Chapter 22.82) shall continue to be enforced. The following explicit standards shall apply to selected areas and projects:
>
> * * * * * * * *

> To the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, ..."

LCP p.65.

The Muir Beach Community Plan states:

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community. Future construction and remodeling should be consistent with surrounding residences and show consideration for neighboring views and privacy. Existing ordinances must be strictly enforced."

MBCP p. 12.

(2). The staff Report

The staff report inexplicably stated that "The height of the residence would not block any public views of the Pacific Ocean or other significant viewsheds in, and around, Muir Beach. Item. No, C1 p.3. This statement was clearly erroneous. Once story poles were erected on Nov. 26, it was obvious that the development would have a significant adverse impact on visual resources from Ahab Drive and the top of the public easement that parallels the Crosby lands. These visual impairments of the beach, the ocean and other viewsheds are graphically shown in photographs submitted by the appellants.

(3). The DZA decision

The DZA ordered the applicant to eliminate the clerestory windows on the western side thereby lowering the roofline by 4 1/2 feet. Initially, he ordered this for the entire length of the roof addition of 33 feet. When the applicant's architect said that this would necessitate redesigning an interior stairway, without any independent analysis by staff, the DZA said that he would allow them 8 lineal feet at the higher elevation. However, the minutes to the Notice of Decision state that this was only an "estimated" figure. So, the decision is entirely open ended.

Acting on a request conveyed by the Kohns to the planner, the DZA ordered that new story poles be erected showing the effect of this change. Photographs taken subsequently and submitted with our Notice of Appeal show that public views from Ahab Drive and from the public easement continue to be obstructed. The DZA ordered no changes to the roofline on the east side of the development. Even after the action by the DZA, the development fails to comply with the legal standards set forth above.

B. There are feasible alternatives which, if implemented, could be found consistent with the policies of the Coastal Act, the LCP and the MBCP

There are feasible alternatives. For example, the entire western addition could be set lower into the ground. Or the western addition could be reduced to one story, which would require eliminating or redesigning the huge "music room." Since the DZA ordered the roofline on the western side to be lowered, it is not clear why he did not order a similar reduction on the east side, which also blocks views of the beach and ocean. This oversight is also inexplicable since the DZA expressed his concern that the original design called for a continuous roofline of 100 feet. Eliminating 11 feet on the east side would have addressed this issue as well. In this connection, the room on the east side appears to have 12 or 12 1/2 foot ceilings so this change would not seem to present a problem with minimum height requirements. Also, the enormous master bedroom could be reduced in size.

Furthermore, the DZA acted arbitrarily when he agreed on the spot to change his order regarding the height of the western addition roof, based upon a representation by the applicant's architect that otherwise they would have to redesign the stairway. Not only was this rushed decision making, but also (as shown by the minutes) the 8 feet he gave them was only an approximate figure. Where coastal views are compromised, no such open ended decision should have been made without an independent review.

We do not wish to be understood as conceding that if the modifications suggested above were made, we would be satisfied. This ill-conceived and enormous development project could and should be re-designed so that the primary concern of the Coastal Act, the LCP and the MBCP to protect scenic resources is vindicated. Also, there could be no more apt example of the concern expressed in the MBCP over "the often destructive effects of new construction and remodeling of homes which are not consistent with the small-scale residential character of the old community." MBCP p.12.

In *LT-WR L.L.C. v. California Coastal Commission*, 60 Cal. Rptr. 3d 417 (Cal. App.2 Dist. 2007), a case upholding a decision by the Coastal Commission that a development project violated Sec. 30251 of the Coastal Act, the Court of Appeals stated: "The Commission is not required to redesign the applicant's project to make it acceptable." Id. 440. The court went on to state, "The denial of the application does not bar the applicant from submitting a new and different proposal." The same is true here.

C. Rebuttal to the Applicant's Arguments

At the Dec.11 hearing, the applicant submitted six arguments in writing. None of them are meritorious. To avoid having to restate them, we have attached the applicant's submission as Exh. A. Our responses are as follows:

1. The applicant states, in conclusory fashion, that the project complies with all "the planning and coastal regulations." That is the very question to be decided. For the reasons set forth above, the appellants believe that it does not.

2. The fact that the existing house and development are located on a downslope is beside the point. The issues are (1) whether the development impairs scenic coastal views and (2) whether there are feasible alternatives. *See, LT-WR L.L.C. v. California Coastal Commission, supra.* The car argument is silly. The Kohns do not park four cars along the road. Even if they did, cars do not block views; permanent development does.

3. Whether other buildings and plantings along the length of Ahab Drive intermittently block views is immaterial. Nothing in the applicable statutes and regulations would make it a defense that this development is only one of a number of other houses or plantings that block views. In fact, if there are other obstructions of views, that makes it even more important that this one be disapproved. There is a serious cumulative effect to violations of scenic coastal viewsheds.

Similarly, it is immaterial that the development "constitutes a very insignificant percentage of the public view along Ahab." It is not a defense that the public can go somewhere else to see coastal views. If it were, the Coastal Act and the LCP would be meaningless. Moreover, the development obscures, in its entirety, the views of the Muir Beach cove from Ahab Drive and from the public access viewshed.

4. This is a version of "but officer, other people were speeding" defense strategy. Even if it were true, it is no answer that houses built in the 1970's or 1980's may block views. The applicant must show that *his* project complies with the law.

5. The applicant seeks to justify the enormous proportions of the development by citing the Green Building Design Guidelines. Obviously, one cannot invoke the Green Building Design Guidelines to justify violating the Coastal Act. Also, the applicant's future plans apparently include a sale of his property, for which he hopes to attract a wider range of buyers. Further, there is no evidence that any of the other future plans the applicant discusses are going to materialize in the foreseeable future, or that all of the rooms and bathrooms are ever going to be used by more than one or two people, or that an elevator will ever be necessary. All of his arguments are sheer speculation.

6. The appellants had nothing to do with removing any branches from the applicant's property.

CONCLUSION

Those of us who are fortunate enough to live in Muir Beach must look beyond self indulgence and consider the greater good. We are stewards of a precious trust–this unique, special and historic site. We are here for only a short period of time, but the beauty of the coast is eternal. Because the

Planning Commission has the power to influence events, you share in that responsibility to ensure that structures created by man do not endanger that trust, as this project does.

While we had hoped to reach a negotiated settlement of this controversy, Mr. Crosby has advised that he is not interested in a joint meeting with the appellants. Therefore, we urge the Planning Commission to determine that the action below granting a coastal permit is void due to procedural violations or to deny the permit application as being incompatible with applicable law.

Respectfully submitted,

Richard S. Kohn Brenda F. Kohn

Richard and Brenda Kohn

Deborah A. McDonald

Dr. Edward Hyman and Dr. Deborah McDonald

Dated: Jan.25, 2009

NOTICE OF PENDING PERMIT

A PERMIT APPLICATION FOR DEVELOPMENT ON THIS SITE IS PENDING BEFORE THE MARIN COUNTY COMMUNITY DEVELOPMENT AGENCY PLANNING DIVISION.

PROPOSED DEVELOPMENT: The project is a proposal to construct 1,589 square foot addition to an existing 2,058 square foot single-family residence. The residence would have a maximum height of 25 feet above average finish grade and the following property line setbacks: 30 feet front (north), 20 feet side (east), 20 feet side (west), and 138 feet rear (south). The proposal includes roof-mounted solar panels, a geothermal heat pump system, expanded parking area, and a new septic system with a drip system.

PROJECT LOCATION: 9 Ahab Drive, Muir Beach

ASSESSOR'S PARCEL: 199-283-09

APPLICANT: [illegible] Crosby (tel. [561] 309-5845)

APPLICATION NUMBERS: Coastal Permit (CP 09-3)

DATE NOTICE POSTED: August 15, 2009

A DECISION ON THIS APPLICATION IS EXPECTED TO BE MADE BY THE **DEPUTY ZONING ADMINISTRATOR** IN A PUBLIC HEARING NO EARLIER THAN **OCTOBER 30, 2009** IN **ROOM 328 OF THE MARIN CIVIC CENTER, SAN RAFAEL.**

FOR ADDITIONAL INFORMATION, PLEASE E-MAIL, TELEPHONE, OR WRITE **NEAL OSBORNE** AT THE OFFICE LISTED BELOW BETWEEN 8 A.M. AND 4 P.M. WEEKDAYS.

Neal Osborne, Planner
COMMUNITY DEVELOPMENT AGENCY
CIVIC CENTER DRIVE, SUITE 308
SAN RAFAEL, CA 94903-4157
415/499-7173
nosborne@co.marin.ca.us

PLEASE DO NOT DISTURB RESIDENTS

RECEIVED

DEC 1 1 2008

COUNTY OF MARIN
COMMUNITY DEVELOPMENT AGENCY
PLANNING DIVISION

December 10, 2008

Regarding: Crosby Coastal Permit #CP 09-3 9 Ahab Drive, Muir Beach, Assessors Parcel #199-283-09

1). The project, as stated in the staff report is in full compliance with all the requirements of the planning and coastal regulations.

2). The existing house and the easterly and westerly additions are situated on a down slope lot with a roof ridge line less than five feet above the grade along Ahab Drive, approximately the height of a parked car. (The neighbor to the east (5 Ahab) always parks their 4 cars along the road). As is currently the case, there are panoramic views above the roof ridge line. The addition will not alter this in any way.

3) As stated in the email of December 10, 2008 to Neal Osborne, the views along the 1800 feet or so of the length of Ahab are intermittently blocked and open by constructs and plantings. The 33 foot addition to the West and 11 foot addition to the east, which extends the existing ridge line that lies less than five feet above the road constitute a very insignificant percentage of the public view along Ahab.

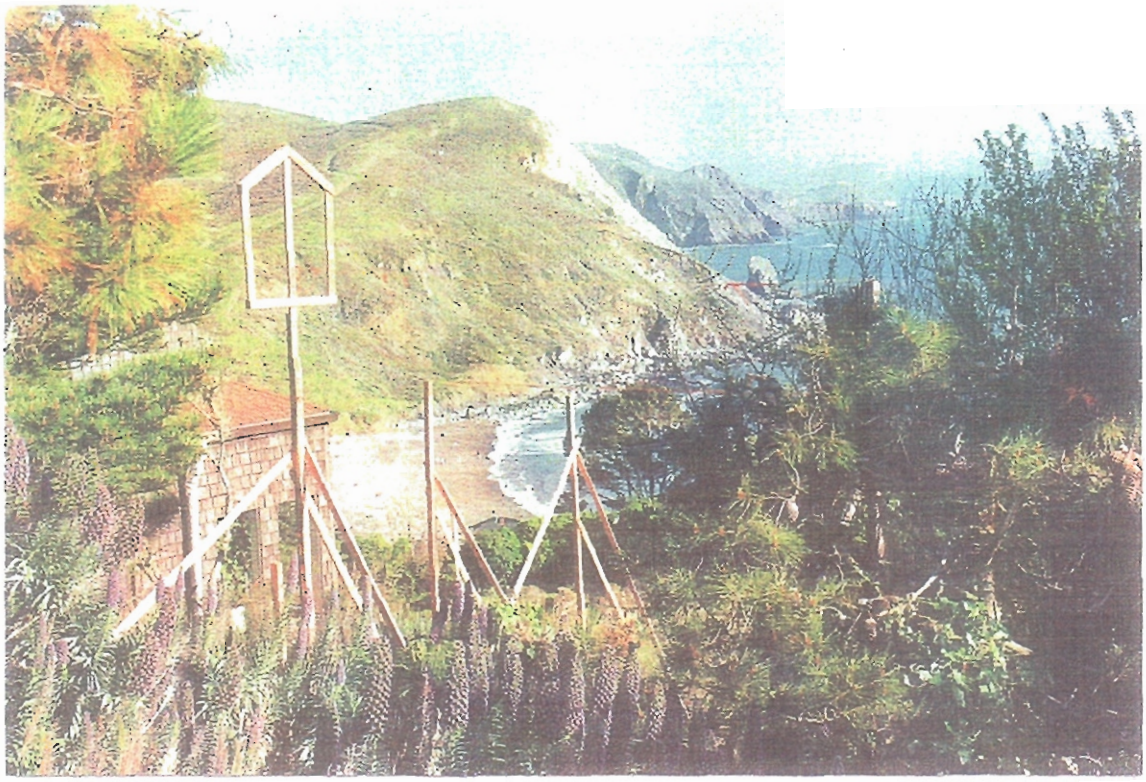
(4) The houses, with expansive ocean views at 5 Ahab and 35 Seacape rise well above the road completely blocking ocean views from the public way as do the very heavy vertical plantings that block the public views along 80% of the property at 39 Seacape.

5) The Kohn letter refers to being excessive for no more than two occupants. While such assertions are totally

Exh. H

irrelevant to the issues, it completely ignores Mr. Crosby's future plans and is designed to comply with section P 4 of the Green Building Design Guidelines to: "Design for diverse family types to offer a wider range for buyers." The addition of the elevator will provide for a diverse and multi-generational family that would include Mr. Crosby's elderly mother as well as for handicapped access, unlike the present house that was designed for a single woman.

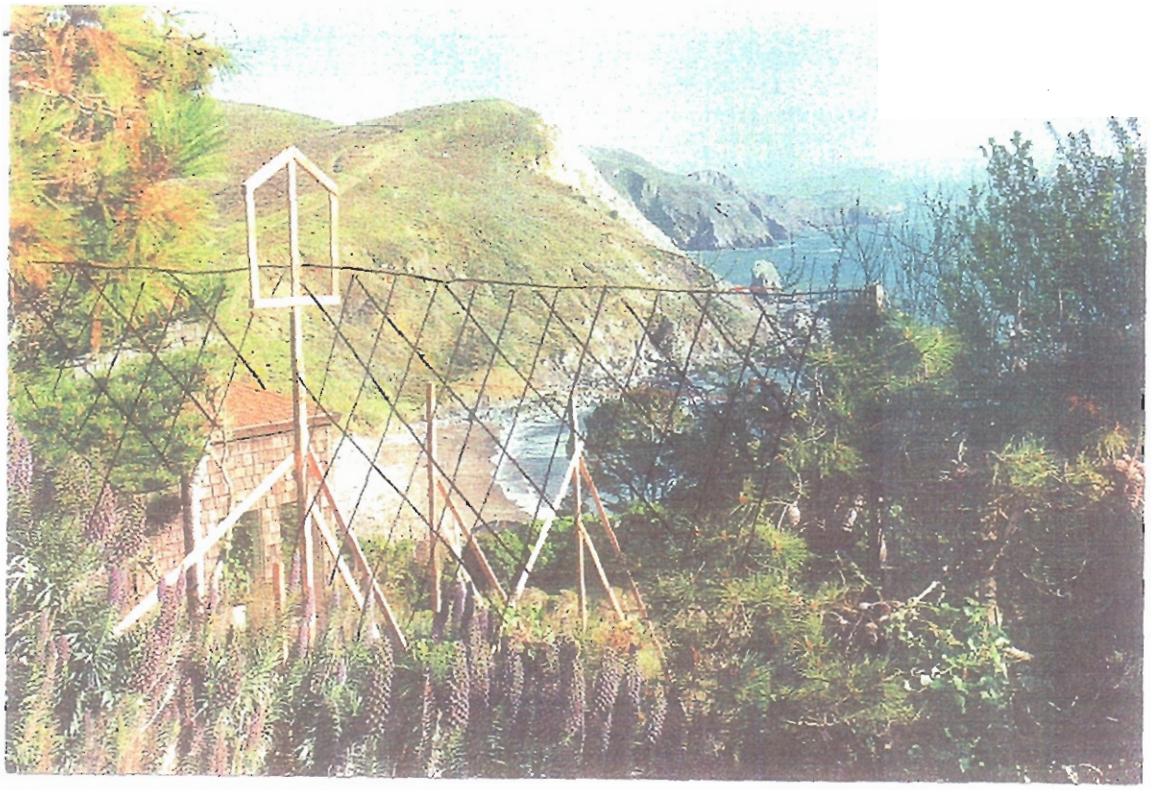
6) Sometime after the 4th and 5th of December 2008 when a series of photos were taken along Ahab, someone trespassed on the Crosby property and cut and removed a number of branches that might have partially obscured the view of the addition from the west.



MUIR BEACH COVE FROM THE TOP OF THE EASEMENT

MUIR BEACH COVE FROM Shoreline DRIVE

EXH. A-1



EXH. A-2

RECEIVED

JUL 29 2009

CALIFORNIA
COASTAL COMMISSION

July 29, 2009

5 Ahab Drive
Muir Beach, CA 94965

To: All Commissioners, Alternates
and non-voting members of the
California Coastal Commission

Re: Timothy Crosby CDP,
Appeal No. A-2-MAR-09-010

Dear Commissioners,

We are the Appellants in the Crosby appeal which is on the Commission's agenda for August 12 to consider whether the appeal raises a substantial question. We herewith submit a brief summation of our issues.

The issues presented by our appeal clearly satisfy the criteria for determining whether a question is "substantial" as summarized by the Commission in *Adams and Boland Mini Storage and Car Wash,* Appeal No. A-3-SLO-09-022, p.2, as follows:

> "The term 'substantial issue' is not defined in the Coastal Act or its implementing regulations. In previous decisions on appeals, the Commission has generally been guided by the following factors in making substantial issue determinations: the degree of factual and legal support for the local government's decision; the extent and scope of the development as approved or denied by the local government; the significance of the coastal resources affected by the decision; the precedential value of the local government's decision for future interpretations of the LCP; and, whether the appeal raises only local issues as opposed to those of regional or statewide significance."

I. Neither the facts nor the law support the local government's decision

This appeal raises two of the most important questions to be adjudicated under the Coastal Act since its inception in 1976:(1) whether the protections of the Act extend only to scenic views from designated and signed public viewing sites like overlooks and (2) what constitutes a *significant* impairment of a scenic view under the Act and Local Community Plan Unit 1 (LCP) that implements it.

What is at stake in the Crosby case is a view of unparalleled beauty of Muir Beach cove, Big

Beach and the Pacific Ocean. (**EXH.A**). If permitted, the development will permanently eliminate that view. The ramifications, however, go far beyond that one view. Were Crosby's application for a permit to be approved, any similar issue coming before the Marin County Planning Commission (PC) or the Board of Supervisors (BOS) will be judged by the incorrect standards that were applied in this case, and, incrementally, the coastal views from public rights-of-way will vanish.

There are only three questions to be answered:

(1) Does the project impair the view from public streets or trails?
(2) Is the impairment significant?
(3) Does the design, to the maximum extent feasible, preserve the view?

No one disputes that the Crosby project would impair the view. The appellants contend that an impairment is *significant* if it blocks a scenic coastal viewshed from public rights-of-way such as public roads, beaches and trails, as well as from designated vista points. The PC held that only views from public vantage points, viewing platforms or overlooks are protected. The PC adopted a Resolution which states that views from public-rights-of-way are only transitory and short term as a person proceeds to her ultimate destination and, therefore, are unworthy of protection. The PC also held that a view is not significantly impaired if there are other panoramic viewsheds in the area. Two Commissioners believe that only views of natural resources that have been specifically designated as scenic resources in the LCP are protected. The BOS endorsed this decision, thereby institutionalizing the PC's mistakes. If these standards are not decisively repudiated, the Coastal Act and its purpose of protecting scenic coastal views will be rendered utterly meaningless.

The analysis advocated by your Appellants is the same correct approach that was applied by the Coastal Commission and upheld by the Court of Appeals in *LT-WR, Ltd. v. California Coastal Commission,* 60 Cal. Rptr. 3d 417, 437-440 (Cal. App.2d Dist. 2007). The PC and the BOS applied the wrong legal standards and, therefore, inevitably reached the wrong result.

Section 30625(c) of the California Coastal Act, governing appeals, states: "*Decisions of the Commission, where applicable, shall guide local governments or port governing bodies in their future actions under this division.*" If the correct legal standards were to be applied, the Appellants would prevail and views of unique quality and character will be maintained, producing good public policy that will preserve the scenic coastal views for present and future generations of visitors to and residents of Muir Beach. It will also ensure that future permit applications that interfere with coastal views in Marin County will be properly evaluated applying correct legal standards consistent with prior Commission action.

II. The project as approved is vast in scale

The proposed development would add 1589 square feet of additional floor area to an existing 2058 square foot single family residence. At the hearing before the BOS, Deputy County Counsel David Zaltsman admitted that homes within 600 feet of the Crosby property range in size from 475 sq. feet to 5562 sq. feet; the average is 1768 sq. feet; the median is 1791 sq. feet; and only 9 (12 per cent) of the lots have homes exceeding 3000 sq. feet. Thus, the Crosby project would be larger than 88 per cent of the neighboring dwellings. As recognized by Commissioner Greenberg at the Feb.9 hearing before the PC, the proposed addition is too big and is out of character with the community.

III. The development would wipe out a view of singular beauty from public roads and trails

In addition to its outsized proportions, the Crosby project would completely block a stunning view of Muir Beach cove, Big Beach, the Pacific Ocean and most of the hillside visible from Ahab Drive and the public easement adjacent to the Crosby lands. The view from the top of the easement is one in a million. Indeed, in the very first hearing, the Deputy Zoning Administrator commented on how unique the view was; an opinion shared at all levels of the hearing and review process.

As you go down the easement towards the beach, there is a steep grade. The view from the top is not visible as you descend the steps. Even if there were any credence to the "fleeting moment" theory, this particular viewshed cannot be recaptured as a person moves further along to her destination. There is no other view like it from Ahab Drive. Nor can it be seen from the Muir Beach overlook. One picture is worth a thousand words. (**EXH. A**). If this development is allowed to proceed, that unique view will forever be gone.

IV. The consequence of allowing this project to proceed is effectively to repeal the Coastal Act and LCP Unit 1 in Marin County

This appeal will determine whether the Coastal Act and the LCP which implements it have effectively been repealed in Marin County. Directly at stake in this case is whether a spectacular coastal view of Muir Beach cove, Big Beach, the Pacific Ocean and adjacent viewsheds visible from public roads and trails will be destroyed forever by the Crosby project. But the crucial underlying issue in this case is what standard of review is required by the Coastal Act and the LCP.

The only legitimate issue in determining whether an impairment is significant is whether the visual coastal resource sought to be protected from the blight of development is visible from public rights-of-way, not whether there are other impressive viewsheds in the vicinity or whether the obstruction is only fleeting in the totality of one's journey. *LT-WR, Ltd. v. California Coastal Commission,* 60 Cal.Rptr. 3d 417, 438 (Cal. App.2d Dist. 2007). If the same outcome-determinative standards that were adopted by the PC and BOS had been applied by the Coastal

Commission in the *LT-WR* case, the landowner would necessarily have prevailed.

The Marin County Planning Staff invented, out of thin air, illegal and outcome-determinative criteria that thwart, rather than advance, the objectives of the Coastal Act. These standards, adopted by the PC, were then ratified by the BOS. If the correct and lawful criteria are applied, the Crosby permit should be denied because the project has a significant adverse impact on a spectacular view from public roads and trails and because the project has not, to the maximum extent feasible, sought to preserve that view. If the permit is granted, the Coastal Act and the LCP would be toothless and no coastal permit could ever be denied, no matter how destructive of coastal views. This is a landmark case with serious implications for the future of the Coastal Act.

V. The appeal raises issues of statewide concern

The ramifications of this appeal go beyond Marin County because acceptance of the improper standards applied below will become a statewide precedent. A developer can always argue that an obstructed view is only fleeting as one proceeds to one's ultimate destination, or that there are other wonderful views along the California coast. Under this interpretation, the Coastal Act and the LCP will become a dead letter.

Conclusion

Those of us who are fortunate enough to live in Muir Beach must look beyond self-indulgence and consider the greater good. We are stewards of a precious trust, a unique, special and historic site. We are here for only a short period of time, but the beauty of the coast is eternal. Because the California Coastal Commission has the power to enforce the Coastal Act and the LCP, you share in that responsibility to ensure that structures created by man do not endanger that trust, as the Crosby project does. We urge the Commission to find that this appeal raises substantial issues.

This summary, by necessity, cannot cover all of the issues, facts and arguments raised by our appeal. On May 6, 2009, we submitted a twenty-one page brief containing a comprehensive discussion of the issues raised by the appeal with additional exhibits. We would, of course, be happy to provide the May 6 brief to any Commissioner who should request it. Contact: BrendaKohn@AOL.com. Or, it may be obtained from the Commission Staff.

Thank you for your consideration.

Very truly yours,

Richard S. Kohn, Brenda F. Kohn, Dr. Edward J. Hyman, Dr. Deborah A. McDonald,
Appellants

Signature on File

By, _____
Richard S. Kohn

Taken from the top of the public easement

Taken from Ahab Drive

RECEIVED
AUG 03 2009
CALIFORNIA
COASTAL COMMISSION

Aug. 3, 2009

5 Ahab Drive
Muir Beach, CA 94965

To all Commissioners, Alternates,
and non-voting members of the
California Coastal Commission

Re: Timothy Crosby CDP
Appeal No. A-2-MAR-09-010

Dear Commissioners,

On July 30, the Staff Recommendation was posted on the internet. Mr. Macmillan has invited us to submit any additional comments which we may have to the Commissioners. We are writing to urge you to reject the staff recommendation that this appeal does not raise substantial issues. It is important to recognize that *"The Coastal Act presumes that an appeal raises a substantial issue."* California Coastal Commission publication "Frequently Asked Questions: The Coastal Commission Permit Appeal Process", p.3. This means that the burden is on the Applicant to overcome that presumption with concrete evidence or legal authority. The Staff Recommendation contains many conclusions but few verifiable facts or analysis.

The Recommendation is fundamentally flawed in three respects:

First, Staff Note 2 that states "The photographs included with the appellants submittal (Exhibit 2), shows the story poles *before the latest revisions to the design which lowered the western roof height"* is wrong and undermines the entire validity of the Recommendation. Exhibit 2, the same photograph that we provided as an exhibit to our July 29 letter and as Exhibit A to this letter, accurately shows the roofline in black ink.

Originally, the diamond shaped structure (depicting clerestory windows) was all the way out at the end and the roofline was 4 ½ *higher* than shown in the photographs. The DZA ordered a reduction of 4 ½ feet but allowed the Applicant to have 8 feet at the higher elevation based upon a representation that they needed that clearance for a stairway. The Applicant re-erected the story poles to reflect the DZA's decision and they have remained that way except as noted below. The Planning Commission affirmed the DZA decision lowering the roofline but put the burden on the Applicant to justify how much space at the higher elevation would be needed for the staircase. That issue has never been decided. So, the black line on our photographs shows the roofline according to the latest revisions. The only thing that has changed is that very recently the diamond shaped structures disappeared. The height of the roofline as shown in our photographs

has not changed and the adverse impact of the proposed development is exactly as shown in the photographs.

The Staff apparently did not understand this and never met with the Appellants. Staff Note 2 is incorrect and must be deleted. Unless rectified, this error creates the impression that the Appellants are trying to mislead the Commissioners. The Staff owes it to the Commissioners and to the Appellants to clear up this misconception prior to the August 12 meeting because otherwise the Commission will be proceeding on a critical misapprehension of a material fact.

Second, the assertion that the view in question is not significant or unique is demonstrably wrong. The photograph attached to Appellants' July 29 letter (and again as **EXH. A** hereto) is proof to the contrary. (We have no idea what the Recommendation means when it says that 'the view from this location is intermittent at best.") Even the Marin County Planning Commissioners were effusive in describing the singular beauty of the view. (**EXH.B**) Supervisor Kinsey referred to it as a "jewel of a view." (**EXH.C**) Mr. Crosby has himself stated that "The 1600+/-square foot addition is designed to take full advantage of the spectacular coastal view;" Final Planning Statement, 7/24/08. Members of the public agree. **(EXH. D).***This is the first time that anyone has denied that the view in question is special and spectacular.* What basis is there for the Staff to disagree with Planning Commission members Theran, Holland, Greenberg, Lubamersky and Crecelius, Supervisor Kinsey, Mr. Crosby, members of the public and the photographic evidence on this point?

Third, the statement that "no significant view from either the pathway or the street would be completely obstructed" is baffling. As shown by the photograph, the project wipes out the view of the cove, Big Beach, and much of the adjacent hillside. It is perfectly clear that there is a *significant* impairment of this view. The test which the Coastal Commission should apply, as set forth in *LT-WR, Ltd. v. California Coastal Commission,* 60 Cal.Rptr. 3d 417, 437-440 (Cal. App.2d Dist.2007), is (1) Is the view impaired?, (2) Is the impairment significant?, and (3) does the design, to the maximum extent feasible, preserve the view? Based upon the plain photographic evidence, the Recommendation is wrong.

In this connection, why is there no mention of the *LT-WR* case, an important recent precedent applying the visual coastal resource provisions of the Coastal Act, in the Recommendation? The inconvenient truth is that it cannot be squared with the Recommendation, so better to ignore it.

If the Coastal Commission were to adopt the Recommendation, it would create a disastrous precedent, both on a regional and statewide basis. If the Coastal Act and the LCP do not protect a visual coastal resource of this quality, what is the point of having a Coastal Act? What coastal view could ever qualify as unique and how would that be determined? Acceptance of the Recommendation would mean open season on coastal development This raises a substantial issue.

The Recommendation is otherwise flawed in its conclusions. Chief among them are the

following:

1. The possibility that there may be other "overall panoramic views visible from the street or trail" is not a legitimate consideration. First, there are no views on Ahab Drive or the public easement that match the unique view that will be destroyed if the project is allowed to proceed. Moreover, Marin County is justly famous for its coastal views. A developer can always claim that there are other panoramic views in the vicinity. The Coastal Act must be interpreted in a manner to further, not to thwart, its objectives. Accepting this argument would make the Coastal Act meaningless. The only legitimate question is whether the view in question is significantly impaired and, if so, can the design be changed to avoid the adverse impact. This raises a substantial issue.

2. The reliance on Zoning Section 22.56.130(o)(3) is improper because it directly conflicts with the visual resource provision in the LCP, p.56. The improper application of this section led the Planning Commission to hold erroneously that only views from designated viewing places like overlooks are protected by the Coastal Act. The Recommendation states that the public easement is not identified by signs, therefore perpetuating the erroneous belief that only designated viewing areas are protected by the Coastal Act. Not only is this wrong as a matter of law but it would remove most visual coastal resources from the protection of the Coastal Act. This issue was thoroughly addressed in the Appellants' May 6 brief, pp. 8-11, and raises a substantial issue.

3. Neither of the two conditions imposed on the project are adequate to ameliorate the destructive effect of the project on the view of Muir Beach cove. Lowering the roofline by 4 1/2 feet does not appreciably reduce the adverse impact on the view, as can be seen from the photograph. And, no amount of landscaping can recapture the view from Ahab Drive and the top of the public easement. As we pointed out in our July 29 letter, that is because of the steep dropoff from the top of the public easement as you descend to Muir Beach. This statement is supported by Planning Commissioner Theran, who stated: "You walk down four or five steps and you get to the stairway and you say "WOW." And go down four steps and its gone."**(EXH. B)**

4.. The conclusory statement that the project is "modest" and "does not raise significant concerns with respect to compatibility with the surrounding built environment" is in direct conflict with the statistics offered by the Deputy County Counsel at the BOS hearing showing that the completed structure would be larger than 88 per cent of the surrounding structures. This evidence, which the Recommendation ignores, raises a substantial question.

5. The Recommendation's repeated references to "wooden stairs" or "pathway"when describing the public easement adjacent to the Crosby lands minimizes the fact that the it is a dedicated public easement that has been in use for about forty years. The Coastal Act and LCP protect visual scenic resources visible from "public roads, trails, beaches and vista points." LCP p.56. The Legislature has made a judgement that views from such trails are to be protected. In any event, the same view, which would be lost if the project is approved, is visible from Ahab Drive, a public road.

6. The Recommendation states that the rejection of this appeal will not create an adverse precedent and "does not raise issues of regional or statewide significance." As noted above, if this view is not considered significant or unique enough to be deserving of the protections of the Coastal Act, it is hard to imagine what coastal view would be protected. If adopted, the Recommendation will create a precedent that a unique and spectacular view of the coast may be completely eclipsed by development if there are other panoramic views in the area. This would render the Coastal Act and LCP meaningless in a county like Marin that is famous for its coastal views.

It is noteworthy that the Recommendation is silent with respect to the "fleeting moment" theory that was central to the decisions by the Marin County Planning Commission and the BOS. Does this mean that the Commission is being asked to disavow this theory? As we pointed out in our July 29 letter, one of the statutory roles of the Coastal Commission is to give guidance to local governments concerning implementation of the Coastal Act and the LCP. The Commission should make a clear decision concerning the validity of that theory, otherwise how are the local governments to know that it is an inappropriate standard? This raises a substantial issue.

Also, the Recommendation makes only passing reference to the issue of whether the Coastal Act and the LCP only protect views from "designating viewing platforms" such as overlooks. It states that "The stairway path is not designated by signs." Rec. P.2. This was also central to the Planning Commission's decision ratified by the BOS. Both the "fleeting moment" theory and the "designated viewing platform" theories, if not clearly repudiated, presumably will continue to be applied by the Planning Commission and the BOS.

7. Without any analysis, the Recommendation states that the Muir Beach Community Plan (MBCP) is not part of the LCP. This is inconsistent with the fact that in another case from Muir Beach, *Beverly Biondi*, Application No.2-MAR 8-066, Local Permit CPO7-34, CPO8-24, the MBCP was central to the case and no one suggested that it was not applicable. At the BOS hearing, Deputy County Counsel David Zaltsman asserted that the MBCP was incorporated in the LCP but only for design review. Whatever the answer, the bald statement in the Recommendation is completely unsatisfactory.

8. Finally, the photographs submitted by the Staff do not accurately reflect the view from Ahab Drive and the top of the trail. We refer you to the accurate photographs that we have submitted.

Conclusion

The Recommendation does not overcome the presumption that this appeal raises a substantial issue. Mr. Macmillan graciously has proposed to make a copy of the Appellants' May 6 brief submitted in opposition to the project available to all the Commissioners on a disk. We

respectfully request that you take the time to read our brief and form your own opinion as to whether this appeal raises a substantial issue.

Thank you for your consideration.

Richard S. Kohn, Brenda F. Kohn, Dr. Edward J. Hyman, Dr. Deborah A. McDonald, Appellants

Signature on File

By, _____
Richard S. Kohn

LIST OF EXHIBITS

EXH. A. **Photograph of Muir Beach Cove from Public Easement and Ahab Drive**

EXH. B. **Page 8 of Appellants' May 6 Brief to the California Coastal Commission**

EXH.C. **Page 18 of Appellants' May 6 Brief to the California Coastal Commission**

EXH. D. **Letters in Opposition to the Crosby project submitted by James A. Auchincloss, Jeffrey Roven and Iosif Caza**

Taken from the top of the public easement

Taken from Ahab Drive

EXH. A

demonstrate this clearly and we sincerely hope that Coastal Commission staff will visit the site to see for themselves. Even though, for reasons to be discussed below, the Planning Commissioners did not believe that the Coastal Act required that the permit be denied, several were effusive in describing the view in question.

Commissioner Theran said: "I stood at the top of those stairs. And, you know, you can't see it from the street. You walk down four or five steps and you get to the stairway and you say 'WOW.' And go down four steps and it's gone. But I've never been down those steps before and I wouldn't have walked right by because the view is there. I haven't completely thought through this...I wonder if we have the opportunity to mitigate the view loss."

Commissioner Holland said: "There's no question in my mind that a view is obstructed. Anybody who stands at the top of the steps... I walked all the way down....It was a marvelous thing to do. And there is that view there and it's undeniable and it's a wonderful view down to big beach, the hillside and the waves and the ant-like people walking down on the strand below. I loved it."

Commissioner Greenberg said: "I don't like the size of the house. In my view, it's clearly inconsistent-it will set a new standard and next time we have an application, a problem, an appeal here we'll be told the one down the street is this big...This one is out of character. So the question is if this was consistent with neighborhood standards would there be a view impact? There is a view impact."

Commissioner Lubamersky said: "It's a hard call. I think what it comes down to is the 'maximum extent feasible' in that I think significant views are being lost. I never walked down the streets before in Muir Beach. And, really, it is stunning. I'm reluctant to rely on landscaping cause trees grow. With a coastal view once it's gone with the building you don't get it back. So, I don't want to redesign the house. I don't think that's our job. But I do think there are other ways this can be addressed that would reasonably keep that valuable view out there because once it's gone you don't get it back."

Commissioner Crecelius said: "There is an impact and everyone agrees to that."

Despite these sentiments, the Commissioners went astray in applying the governing law when determining whether the view was protected or whether the impairment was significant or not. If you apply the wrong legal principles, you are bound to reach a wrong result. That is what happened here.

(B) The Planning Commission erroneously applied the Interim Zoning Ordinance which conflicts with the LCP

The Commissioners made two fundamental errors in applying the governing law. The first was that the Coastal Act and the LCP only provide protection from designated viewing platforms such as the Muir Beach Overlook. They fell into this error because they did not follow the advice of their own staff, Deputy Director of Planning Services Tom Lai. The Commissioners believed that

Exh. B

For example, Supervisor Kinsey voiced his concern that the Applicant should not be held accountable even though his architect, Richard Beckman, had "missed an opportunity to protect this jewel of a view" and that a "sensitive architect should have done that." First of all, the record does not reflect who is at fault: it may be that the Applicant's architect(s) advised him that the project would run afoul of the Coastal Act and he chose to ignore that advice. So, Supervisor Kinsey was making an assumption. Second, assuming the architects were at fault, the fact that the Applicant might have legal recourse against them has absolutely nothing to do with whether the project violates the Coastal Act and the LCP. Potential liability would be an issue for the architect's malpractice carrier and the courts to determine. It was not the BOS's job to resolve issues of liability between Mr. Crosby and his architects or to insulate Mr. Crosby from the consequences of bad advice. There are other remedies for that.

Supervisor Kinsey thought it significant that other projects in Muir Beach, cited by the Applicant, had been approved in recent years. In fact, none of these projects eclipsed a stunning view of the coast, as the Crosby project does. In any event, this highlights why it is important that the Crosby permit be denied: if it is allowed, in future years developers will be citing the Crosby project as the benchmark. The Coastal Act would be eviscerated. The root of the problem is that Supervisor Kinsey believes that decisions such as this one should be decided by the Muir Beach community in the context of its Community Plan (which the BOS erroneously thinks was never incorporated into the LCP), totally ignoring the fact that the Coastal Act has declared the preservation of California's scenic coastal resources to be a matter of statewide and nationwide concern. Calif. Coastal Act Sec. 30001(b). Allowing such factors to influence the outcome constitutes arbitrary and capricious decision-making at its worst.

More disturbing is Supervisor Kinsey's belief, not stated at the hearing but subsequently published, that neither the Coastal Act nor the LCP protects what he termed 'micro' views. Or so he told the West Marin Citizen in an interview about this case a few days after the BOS decision. In a revealing statement, published by the Citizen on April 9, 2009, Supervisor Kinsey stated that "[t]he language of the law did not provide for the protection of 'micro' views." **EXH. G.** What is the legal authority for this astonishing statement? Neither the Coastal Act nor the LCP distinguish between 'micro' views and 'macro' views: they protect all views to scenic resources within the coastal zone.

B. The Applicants' *ad hominem* attacks should be ignored

There is an adage in the legal profession that "if the law is against you argue the facts; if the facts are against you argue the law; and if both the law and the facts are against you put your adversary on trial." Because both the law and the facts are against the Applicant, regrettably he has resorted to arguments of a personal nature designed to divert attention away from the issues raised by this appeal.

The Applicant's argument before the BOS was punctuated by irrelevant and *ad hominem* attacks on the Appellants. These include his belief that the Appellants are not "entitled to a life free of any change." Applicant Crosby's Statement Before the BOS, March 24, 2009. In addition to accusing the Appellants of various transgressions, he argued that the fact that the Appellants have not

Exh. C

JAN 29 2009 PM12:30 Planning

707 Benjamin Court
Ashland, OR 95720-1699
January 21, 2009

Marin County Planning Commission
MARIN COUNTY CIVIC CENTER
3501 Civic Center Drive, Room 308
San Rafael, CA 94901

Re: Crosby Application Coastal Development Permit CP09-3

Dear Sirs and Madams:

As a member of the public, I need to share with the Commission my strongest opposition to the Crosby proposal.

A resident of Oregon, I have stayed at Muir Beach once or twice a year for most years since I relocated to the Pacific Coast from Washington, D.C. a decade and a half ago.

As a member of the public, I value maintenance of the special and quite striking views at Muir Beach. When at Muir Beach, I stay with friends on Seacape Drive, and go to Muir Beach by the public access from Ahab Drive to the ocean. I was shocked to learn that the Crosby project would block forever the remarkable views of the Muir Beach cove from the top of the public access at Ahab Drive.

When I moved to Ashland, I built my home. I appreciate the difficulties someone applying for a permit must confront, but I also understand that I and other applicants must learn to conform to community standards providing for the needs of others as well as our own narrowly defined needs.

To live responsibly in society, none of us can so impose ourselves on the rights of others that we leave them permanently impaired. The Crosby project would eliminate any view of the Muir Beach cove for the public.

This project is narrowly conceived to prosper the rights of Mr. Crosby over those of the public in a Coastal Region dedicated to the public by nature, history, public law and by the public will. This application is wrong-headed.

Exh. D

Having grown up and spent most of my life in Washington, D.C. I try to comprehend public policy. Approval of this project in its current form, without substantial revision, would be irresponsible and malfeasant, and would constitute poor public policy.

I urge your rejection of this project.

Respectfully yours,

James L. Auchincloss

James L. Auchincloss

P.S. Please just do the right thing ... do good.

Jeffrey Roven
780 Crystal Lane
Santa Cruz, CA 95062

JAN 29 2009 PM12:31 Planning

Marin County Planning Commission
Marin County Civic Center
3501 Civic Center Drive, Room 308
San Rafael, CA 94901

January 23, 2009

Re: Appeal from DZA's Decision
on Timothy Crosby Application
for a Coastal Development Permit
Application # CP09-3

Dear Commissioners:

I am writing to express my strongest opposition to the Crosby project.

I've spent the last four decades as a real estate developer in California and New York, and am currently retired to Santa Cruz. However, I frequently visit West Marin, because of my many friends residing there and due to the pristine beauty of the natural environs and my lengthy attachment to it, and particularly to Muir Beach, for which I have a love dating back to my early years in the East Bay.

Scrutinizing the proposal of the applicant, I am reviled as a member of the public who often seeks the solitude and beauty of Muir Beach.

When I journey to Muir Beach, I park on Ahab Drive and spend time there appreciating the Muir Beach cove. Older and disabled, I can no longer walk down to Muir Beach itself, nor can I view the Muir Beach cove from the Muir Beach overlook, as its promontory too is not accessible to the handicapped. Hence, I frequent the area at the top of the public access pathway at its intersection with Ahab Dr.

I was appalled two weeks ago, after walking with my cane from my car to the landing at the top of the public access path stairs, to view the Crosby storey poles revealing that the proposed project would forever preclude me and other handicapped individuals from viewing the Muir Beach Cove.

Mr. Crosby's proposal would block the views both from the top of the path.

As a developer who has stood before many Planning Commissions advocating project after project, I view this project as abusive of the common legal guidelines we all employ in development in the coastal region. The Crosby proposal undermines the public's right to visual and physical access to the Pacific coast. This project entirely precludes visual access of Muir Beach cove for the disabled population visiting the Seacape subdivision.

This project expresses a blatant disregard for the public and its access to a viewshed that I, as someone who has lived in Europe and Africa as well as my native U.S., believe is particularly worthy of your protection. This is a world-class natural phenomenon, a distinctive and exceptionally important viewshed that beckons your proper protection, which can be accomplished only by your rejection of this project.

I thank you for your consideration of my letter and my heart-felt love for Muir Beach, which would be unalterably undermined for eternity if this project were to be approved.

Thank you again -

Jeffrey Roven

FEB 23 2009 PM 1:26 Planning

January 26, 2009

Marin County Planning Commission
3504 Civic Center Drive, Room 308
San Rafael, CA 94901

Re: Crosby Coastal Development Permit CPO9-3

Dear Commission Members:

I come before you as a public citizen. As a developer who has become wealthy from appropriate development, I oppose the Crosby Coastal Development permit.

My wife and I came to the United States from Romania several decades ago, have raised a family in this remarkable country, and am president of the largest organization of Romanians who have immigrated to this country. Coming from the former Soviet Union block, Romania, where public policy created the Chernobyl disaster and perpetuated similar violations of the rights of nature and of the average citizen, I value the experience I and other members of the public have when visiting Muir Beach, as I have three times in the last year.

I am entranced by Muir Beach, and most often have brought four or five friends with me to visit the area. When there, I hike on Mt. Tamalpais and descend to Muir Beach.

Imagine how aghast I was last week when I found that my favorite route to Muir Beach from Mt. Tamalpais, down Seacape Drive to Ahab Drive, and then down the path to the ocean would be obstructed by Mr. Crosby project.

A developer, I understand the need for development, but this development proposal does not adequately balance the needs of the public with Mr. Crosby's.

Having traveled the world, I consider incomparable the view of the cove at Muir Beach from the top of the public path. Please protect it and reject the Crosby proposal.

Your servant,

JC:nm

Iosif Caza
President, Organization of Romanian Americans

Address: 1767 Tribute Road, Suite F
Sacramento, CA, 95815
Phone: (916) 541 - 3751
Email: ora.rous@yahoo.com
Website: www.oranow.com

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Agenda # W19e
Application # A-2-MAR-09-010
Jeffrey Roven
OPPOSE

California Coastal Commission
North Central Coast District Office
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
By Facsimile (415)904-5400

August 5, 2009

Dear Commissioners:

I am a frequent visitor to Muir Beach and have been for several decades. Now disabled, I can no longer go down to the beach, but spend endless hours pickinicking and enjoying the view of Muir Beach cove in the area where I used to park before going down to the beach, Ahab Drive. The view of Muir Beach from there is nearly spectacular enough to compensate for my inability to reach the seacoast itself.

I have been tracking this matter since I first sent a letter to the Marin Planning Commission staff last year, and must admit I was astounded to read in the Coastal Commission staff report that only a few Muir Beachers use the trail. It is used by those of us who can no longer reach the beach, as well as by dozens of people from all over the world who go down it every day that the weather is decent, and even on some days when it is more inclement.

I am a developer, and have been so all my adult life. I am not opposed to sensible development. As a matter of fact, I have made a living and brought up my children by developing California property. However, the Crosby project as currently conceived is not appropriate to this coastal location, and should be rejected by the Commission and re-designed. Mr. Crosby can have a magnificent home on this location without disturbing, much less destroying, this unique view.

I was further aghast to read in the Commission staff recommendation that staff believe the view of the Muir Beach cove at the trailhead would not obscured thoroughly. If Crosby's project as currently designed were affirmed, the view would be eternally obliterated.

This is a particularly unique view, one that has brought me time and again to Muir Beach, one that the Commission must preserve.

I ask that the Commission reject the Crosby project and allow the Applicant to redesign it to preserve this view. I have reviewed the plans and site, and such changes that would preserve the view can readily be accomplished architecturally and geotechnically.

Respectfully,

Signature on File

Jeffrey Roven

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Agenda #W19a
Application # A-2-Mar-09-010
Hank Gehman
OPPOSE

California Coastal Commission
North Central Coast District Office
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

To Whom It May Concern:

I don't live at Muir Beach so I don't have any neighbor axe to grind. I come regularly from the East Bay to go to the "Little Beach" at Muir Beach. Like others who drive to Muir Beach, I park on Ahab Dr and take the steps down to "Little Beach". It is truly one of the most beautiful hiking trails that I have ever been on (and I have been on many).

The highlight of the walk is right at the top of the stairs on Ahab Dr. The view from there is, in my opinion, the single most beautiful view of Muir Beach. I always stop there and just marvel at the totality of the view. My eye goes down the hill, struck by the magical integration of man's impact with the natural setting, on to the beach and the surf and continues up to the hills beyond. It's not just the various elements of the view that strikes me and the people that I bring with me, but how these parts are woven together by God and man into this perfect, painterly composition.

I was so disheartened when, one day, I saw the story poles marking out the new building being proposed by Mr. Crosby. Maybe as much as one half of that perfect picture would be blocked. That view soars in the heart because so much is brought together at once. How can the view survive if a large part is obstructed? It can't. It will be forever gone with no hope ever being enjoyed again.

That is, enjoyed by me and others from the public. Mr. Crosby could have expanded his house by building down the hill where he has a lot of land. But Mr. Crosby said that he preferred to extend his house across the top of the hillcrest because he wanted to maximize his view. He knows how special that view is.

So, at the end of the day, Mr. Crosby is asking the Coastal Commission for the right to privatize a view that until now had been preserved for the public at large to enjoy. But isn't the fundamental goal of the Coastal Act to resist this privatization of the natural beauty of our California coast?

I also believe that this application for development should be denied because it will open the floodgates to further encroachments to the public appreciation of the beauty and uniqueness of Muir Beach. A Marin County Supervisor himself said at the end of their hearing that the Muir Beach community would have to quickly get together and tighten their restrictions on development because without those restrictions the approval of this project would unleash a wave of development that would destroy the unique beauty of Muir Beach.

I ask the Commission to step forward, deny this application and defend everyone's right to enjoy our coastal beauty.

Thank you for your consideration.

Sincerely,

Signature on File

Hank Gehman
5 Canyon Rd
Berkeley, Ca 94704

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Appeal # A-2-MAR-09-010
Agenda #W19a

Applicant Crosby's Statement Before the California Coastal Commission In Support of Local Decision by Marin County Board of Supervisors Sustaining Coastal Permit #CP 09-3 with Conditions

I
Procedural Background

On December 11, 2008, Marin County Deputy Zoning Administrator, following a duly noticed public hearing, adopted a resolution approving, Applicant's Coastal Permit Application for an residential addition with conditions to protect views from the neighborhood access path adjoining the West end of the subject property.

On December 17, 2008 Richard Kohn, Brenda Kohn, Edward Hyman and Deborah McDonald-Hyman ("Appellants") filed their petition for Appeal of the Zoning Administrator's approval.

On February 9, 2009, the Marin County Planning Commissioners following a thorough and careful review of the Application and the Appeal that included site inspections voted unanimously (7-0) to deny Appellants appeal to overturn the Deputy Zoning Administrator's decision and to grant the permit with conditions.

On March 31, 2009, the Marin County Board of Supervisors voted unanimously (4-0) to deny the appeal of Appellants and, thereby, sustained the Planning Commission's grant of the subject permit with conditions.

This matter is the Appellants appeal to overturn the final local decision of the Marin County Board of Supervisors denying their appeal.

II
Points in Opposition to Appeal

Applicant respectfully agrees with all of the Recommendations and Findings of the August 12, 2009 Staff Report with respect to the pending Appeal and respectfully requests the Coastal Commissioners adopt the Staff Report as submitted. Applicant submits the following additional comments and observations in response to the within Appeal.

The speciousness of their appeal is evidenced by Appellant's quoting from the Local Coastal Plan (LCP) page 65 (21.) that "...to the maximum extent feasible, new development shall not impair or obstruct an existing view of the ocean, Bolinas Lagoon or the National or State parklands from Highway 1 or Panoramic Highway. The record is clear that no part of the subject property, the proposed addition or, in fact, Ahab Drive is viewable from or connected to Highway 1 or from Panoramic Highway. Ahab Drive is not a through street, but dead-ends to a cul-de-sac. Moreover, there are no designated public viewing sites or provisions for general public parking.

The subject property and proposed alternations are more than 300 feet from the ocean bluff (actually measuring approximately 550 feet form the bluff at their closest point).

The majority of the proposed alterations are, in fact, below the elevation of Ahab Drive, and every element of the existing house and proposed alterations are less than five feet above the elevation of Ahab Drive. The house and proposed alterations are located in the middle of an established, hillside residential development of approximately one hundred and fifty five existing homes.

Appellants reference to the LCP page 56 Visual Resources that "...the primary concern of the Coastal Act is to protect views to scenic resources form public roads, beaches, trails and vista points" is misplaced and has no relevance to the proposed addition. This is so as the "substantial view impairment" Appellants complain of is with reference to a view from the top of the neighborhood right of way stairs shown in the Photo Exhibit A. Any

view impairment, at this location is *de minimis*, and fleeting in nature as shown in the Photo Exhibit B. Exhibit B confirms that as a person ascends or descends the right of way path, any slight view impairment occurs only for an estimated distance of eleven feet (between the two white poles) running from a point past the top of the stairs down to the point where the view is completely obscured by existing vegetation and trees.

The stairs are 45 feet in length and the entire length of the neighbor hood path exceeds 400 feet along which vistas of the ocean and coast line come in and out of view through and between residences and trees as one proceeds down the path.

The top of the right of way stairs measures only 3 feet by 4 feet 2 inches and in no way can be considered a viewing platform (See: Exhibit B page 1). The stairs have no signs identifying the stairs as for public use. Indeed is doubtful that any non residents are aware of the stairs which were constructed for residents' use and not for the general public. The stairs remain in some disrepair with missing steps and railings. Finally the right of way path is maintained by the Muir Beach Community Services, not by National or State Park services or the County of Marin. (See: Exhibit C from Maury Ostroff, MBCS Manager)

Upon implementation of the landscape planning conditions imposed by the County of Marin, the removal of specified trees and shrubs will open up new views of the coast line and beach. (See: Photo Exhibit D)

The Appellants argue that the proposed development violates the Muir Beach Community Plan that states on page 12 paragraph 6 stating

> "We are concerned with the often destructive effects of new construction and remodeling of homes which are not consistent With the small scale residential character of the old community."

However, the proposed project is an addition of only 1,559 sq/ft to an existing 2,058 sq/ft house on a large lot just over one acre in size. This is hardly destructive and does not violate the Muir Beach Community Plan in

any way. There are at least 5 other homes as large or larger in the community including Appellant Hyman's home at 39 Seascape Drive.

The Muir Beach Community Plan was written from September 1971 to June 1972 and submitted to the County in March 1973 before many of the larger newer homes were built in the community.

The Muir Beach Community Plan states on page 12 paragraph 5:

> "The size of the lots in Muir Beach ranges from 3,000 sq. ft. to about 10 acres. The present Marin County zoning requires lots to be a minimum of 10,000 square feet in Old Muir Beach and one acre in Seascape. Some parcels adjoining Seascape require a minimum of two acres per lot. Many undersized lots in both areas are legal but non- conforming building sites. This community plan adopts the County regulations governing lot size and setbacks now in effect."

While the proposed project is not technically located in the Seascape subdivision it has more in common with Seascape than it does with "Old Muir Beach" where most of the homes are located on lots of 10,000 sq. ft., some are on smaller lots (those homes located on Sunset Way, Pacific Way and Cove Lane etc.). Of the seven homes located on Ahab Drive, four are on lots of over 1 acre and the other three are on lots of nearly ½ acre.

Most importantly, the proposed project meets all of the County of Marin's regulations regarding lot size and setbacks now in effect. Because the Muir Beach Community plan adopted the Marin County regulations governing lot size and setbacks, the project meets the requirements of the Muir Beach Community Plan and is not in violation of it as the Appellants contend.

For the foregoing reasons it is requested that the California Coastal Commission adopt the finding s and recommendations of the Staff Report dated August 12, 2009, reject Appellants' appeal, uphold the Local Decision of the Marin County Board of Supervisors to grant my Coastal Permit.

Respectfully submitted,

Signature on File

Timothy Crosby, Applicant

Attachments:
EXHIBITS A, B , C & D

EXHIBIT A - page 1 of 1
Photo taken from top of right of way stairs showing end of railing for reference.

EXHIBIT B - page 1 of 2

Photo shows start of "view"as a person passes white pole on left. View completely screened out by trees when past the right pole located downstairs.

EXHIBIT B - page 2 of 2
Photo shows location of "View Window" between the poles. The poles are approx. 11 ft. apart.

SmartZone Communications Center Collaboration Suite timlcrosby@comcast.net

Re: Tim Crosby Permit - Coastal Commission Appeal

May 27, 2009 6:43:19 PM EDT

From: maury.ostroff@gmail.com

To: timlcrosby@comcast.net

The Muir Beach Community Services District maintains all pedestrian easements and pathways within the residential portion of Muir Beach. In most cases these pathways are on land actually owned by the CSD, in some cases they are easements granted for public traffic on privately owned land.

The path that runs from the west of your house from Ahab Drive down to Sunset Way is definitely maintained by the Muir Beach CSD. But, I am not exactly sure in this case who owns the underlying land. In the case of the path that runs between Starbuck and Seacape, there is a definite area of parkland about 50 feet wide that is clearly owned by the CSD and is shown clearly on parcel maps. However, on the assessor maps the county maintains on their web site it does not show a separate lot or area for the Ahab to Sunset path. In any event, ownership of the land is moot because the path has been used as a public path for so many years that it is in effect a public easement, (again, an easement/path that the MBCSD maintains.)

I gave a qualified answer as to the "residential" portion of Muir Beach because there are numerous trails on the beach itself and up at the Muir Beach Overlook that are part of the Golden Gate National Recreation Area and are maintained by the National Park Service.

Marin County only maintains the roads, and in our case only three roads: Ahab Drive, Seacape Drive, and Starbuck Drive.

On Wed, May 27, 2009 at 3:10 PM, <timlcrosby@comcast.net> wrote:

Hi Maury, as you know my permit is being appealed to the California Coastal Commission. Doug Macmillan who works for the Commission and is handling my appeal wanted to know who maintains the neighborhood pathways at Muir Beach. Mr. Macmillan at first thought it was the County of Marin. I told him I was quite certain that it was the Muir Beach Community Services District that maintains them, (cutting the grass on the paths/stairs trim branches etc.). Given that you are the District Manager of MBCSD I thought I'd ask you or someone there at MBCSD to verify whether or not this is the case.

If you or someone could respond to this e-mail that would be great.

Thanks,

EXHIBIT C – page 1 of 1
Muary Ostroff, MBCS Manager, statement

EXHIBIT D – page 1 of 5
Photo shows location of "New View" that will open up with removal of trees under landscape plan. Starting at white pole down stairs past end of railing is 22 ft.

EXHIBIT D – page 2 of 5
Photo shows location of "New View" upon removal of trees & shrubs under landscape plan.

EXHIBIT D – page 3 of 5

Photo shows location of "New View" of coast line behind trees and shrubs.

EXHIBIT D –page 4 of 5
Photo shows view of coast line and hill above Muir Beach through the tree branches. Muir Beach Cove is located behind branches in lower left of photo.

EXHIBIT D – page 5 of 5
Photo shows location of coast line view behind tree near bottom of stairs

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Agenda # W19a
Application # A-2-MAR-09-010
Barbara Britz
7573 Terrace Drive
El Cerrito, CA 94530
415-577-2140
OPPOSE

California Coastal Commission
North Central Coast District Office
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219
By Facsimile (415) 904-5400

August 5, 2009

Dear Commissioners:

I frequently visit Muir Beach and have done so for several years. I love the view of Muir Beach cove from the top of the trial at Ahab Drive. The view of Muir Beach cove from there is majestic and beneficial to everyone's psychological health. Everyone deserves that view, not only those who are lucky and wealthy enough to live there.

I was extremely dismayed to read in the Coastal Commission staff recommendation a statement that only a few Muir Beach denizens use the trail. I am one of many, many non-residents who use this beautiful route regularly to go down to the beach. I'm sure it is even benefits our aerobic and cardiovascular health.

As a San Francisco public servant, I understand the need for reasonable development. Doesn't reasonable development include the idea of preserving what makes West Marin one of the most beautiful and treasured places in the entire world? The Crosby project is simply not reasonable. It unnecessarily destroys an invaluable public vista, one that is that is without parallel anywhere. I believe guarding our coastal region's integrity dictates that the Commission should compel Mr. Crosby to redesign his plans to preserve the Muir Beach cove view, allowing him to enjoy the view along with the public.

I was further astonished to read in the Commission staff recommendation that the view of Muir Beach cove from the top of the trail would not be completely blocked by Mr. Crosby's project – to the contrary, that is precisely what his project would do, unless drastically redesigned.

The view of Muir Beach cove is precious. Its destruction by Mr. Crosby would be nothing short of outrageous. Please reject the Crosby application and ask him to redesign his project. Revising the plans in order to preserve the view could be done quite easily on this site. I ask your assistance in saving this world-class view of Muir Beach cove.

Respectfully,
Signature on File
Barbara Britz

Hazel L. Williams
3525 Maybelle Avenue Apt. F
Oakland, Ca. 94619
(510) 393-9577

RECEIVED
AUG 06 2009
CALIFORNIA
COASTAL COMMISSION

August 6, 2009

California Costal Commission
North Central Coast District Office
45 Fremont Street, Suite 2000
San Francisco, Ca. 94105-2219

RE: Agenda #W19a
Application # A-2-MAR-09-010
Hazel L. Williams
OPPOSE

Dear Commissioners:

Over the last year I've come to frequent Muir Beach. I particularly appreciate the view of Muir Beach Cove. I go to the beach and park on Ahab Drive. The view of Muir Beach at the top of the stairs is gorgeous and irreplaceable.

I read in the Costal Commission staff recommendations that only a few Muir Beach residents use that trail. Those of us who go to the beach, and by people from everywhere who love Muir Beach use it.

This project is not right for this costal location. The commission should reject Mr. Crosby's current design.

I reject the commission staff's recommendation arguing that the view of the Muir Beach Cove at the top of the trail would not be completely viewed.

Mr. Crosby's current project would permanently end this marvelous view.

Please keep it for me and my daughter's generations and my grandchildren.

Please reject this project.

Respectfully,

Signature on File

Hazel L. Williams

Agenda # W19a
Application # A-2-MAR-09-010
Lonna Richmond
OPPOSE

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COASTAL COMMISSION

California Coastal Commission
North Central Coast District Office
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

To Whom it May Concern:

First of all I'd like to state that I have nothing personal against Mr. Timothy Crosby. He seems to be a fine person and a very nice member of our community of Muir Beach. But, I do oppose his construction plans for his residence on Ahab Drive.

I have lived here for 15 years and love this community. I walk around the neighborhood every day and appreciate the beautiful ocean views that Muir Beach offers. That is what makes Muir Beach the special place that it is. Years ago I spent some time in the city of Malibu and remember thinking that you would never know there was an ocean behind all the houses and fences and walls. If everyone built what Mr. Crosby proposes, it would look just like that-houses and fences and walls. The reason people move to Muir Beach is because it is more than that and we must protect those views that make this community different from Malibu and other coastal communities.

Thank you for your consideration and I hope you will deny this permit.

Sincerely,

Signature on File

Lonna Richmond
45 Sunset Way
Muir Beach, CA 94965