

CALIFORNIA COASTAL COMMISSION

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Th 8c

ADDENDUM

DATE: November 17, 2010
TO: Commissioners and Interested Parties
FROM: South Central Coast District Staff
SUBJECT: Agenda Item 8c, Application No. A-4-MAL-09-070 (Drane) Malibu, Los Angeles County, Thursday, November 17, 2010

Note: ~~Strikethrough~~ indicates text to be deleted from the October 29, 2008 staff report and underline indicates text to be added to the October 29, 2008 staff report.

1) Staff recommends the following minor change to the findings (1st paragraph on page 34):

The 1986 aerial photograph depicts the same. Therefore, between 1979 (possibly earlier) and the present time, it appears that no private staircase has existed within the Applicant's easement. Moreover, neither the Commission nor the City of Malibu ever approved a permit for a staircase within the Applicant's easement. Thus, there could not have been a legal stairway in the easement over the past 30 or more years.

2) The Applicant submitted a written response to the October 27, 2010 Staff Report. The response is attached.

3) Staff recommends that the following language be added to the Commission's findings in the staff report in response to the Applicant's written response to the October 27, 2010 Staff Report:

(1) The Applicant's representatives at the firm of Loeb & Loeb submitted a lengthy comment letter dated November 15, 2010, in response to Commission staff's October 27, 2010 staff report ("Original Staff Report") proposing findings in support of a Commission denial of the instant application ("Loeb & Loeb letter"). Most of the arguments in the Loeb & Loeb letter ultimately rely on the premise that the stairs the Applicant seeks to replace (which they refer to as the "Lower Stairs") remained in place until 2002 in a good enough state that they could simply have been repaired or maintained. Consequently, the Loeb & Loeb letter argues that the stairs constitute a legal non-conforming use subject to the provisions of Malibu LIP Section 13.5.

However, the provisions of Malibu LIP Section 13.5 are of expressly limited application, applying only to “any existing and lawfully established or lawfully authorized use of land or to any existing and lawfully established or lawfully authorized buildings and other structures that do not conform to the policies and development standards of the certified LCP...”(as defined in LIP Section 13.5(A)). There is currently no existing structure within the Applicant’s 5 ft. easement on the bluff face, nor was there one at the time staff received this appeal. Moreover, although the Loeb & Loeb letter argues that the Lower Stairs were present until 2002, when the Applicant began to seek entitlements to repair them, as indicated on page 34 of the Original Staff Report, based on the aerial photographs and the photograph presented in connection with the Loeb & Loeb letter, it appears that there was no actual stairway in the subject location for many years prior to that. Furthermore, as also indicated on page 34 of the Original Staff Report, it is the Commission’s conclusion that there was certainly no legal stair there for at least 23 years *prior to* when the Applicant initially sought authorization for the new Lower Stairs in 2002, because the aerials show nothing from 1977 on, and there was no permit approved during that period. No additional evidence has been presented to staff that clearly proves the existence of stairs after 1977. The letter from the City dated December 18, 2002, was subsequently retracted by the City as having been issued in error, as the City, after surveying the site, specifically concluded that there was *not* an existing stairway at the subject location. The only evidence the Loeb & Loeb letter presents is the affidavit of Clark Drane, which, in light of all the other evidence, is not sufficient to convince the Commission of the existence of a stairway at the subject location.

(2) Malibu LIP Section 13.5(C) states the following:

Non-conforming structures as defined by 13.5(A) of the Malibu LIP may be repaired and maintained if it does not result in enlargement or expansion of the structure. However, demolition and/or reconstruction that results in replacement of more than 50 percent of non-conforming structures, including all demolition and/or reconstruction that was undertaken after certification of the LCP, is not permitted unless such structures are brought into conformance with the policies and standards of the LCP.

Replacement of more than 50 percent of non-conforming structures is not permitted. To meet the 50 percent threshold, the Applicant claims that the entire 300-ft easement is a single structure, and that replacement of the private stairway would only account for approximately 36 percent of the entire 300 ft. structure. What the Loeb & Loeb letter awkwardly refers to as a “300-foot pathway structure” is actually comprised of 7 distinct elements, including a concrete driveway, a concrete walkway, the existing blufftop stairs, a terraced pad, a dirt trail and the bluff face portion where the proposed private stairway would be located. It is the Commission’s conclusion that the Lower Stairs should be treated as a separate structure due to Applicant’s admission of a large gap (almost 30 feet) between the proposed project site and the upper stairs, including the distinct land uses in that gap. The 110 feet that make up the Lower Stairs is the subject of the Commission’s review as a distinct structure. And as a result, even if those Lower Stairs could be treated as existing and lawfully established at the time the Applicant began seeking entitlements in 2002, and even if the Commission were to agree that that should be enough for the Commission to treat them as existing

for purposes of the *current review*, the current proposal would still involve replacement of more than 50 percent. Therefore, under LIP Section 13.5(C), it would not be permitted.

(3) Malibu LIP Section 13.5(G) states the following:

If any non conforming use as defined by 13.5 (A) of the Malibu LIP is abandoned for a continuous period of not less than 6 months, any subsequent use of such land or the structure in which the use was located shall be in conformity with the regulations specified by the LCP for the district in which such land is located.

There is no evidence of any attempt to replace the stairs (through the seeking of entitlements at the local or Commission level) at any time from 1979 to 2002 (a period of more than 20 years). The Commission finds this to be persuasive evidence of abandonment of the stairway and thus concludes that section G applies.

(4) The Applicant argues that the coastal resource protection value of the Commission's denial would be "virtually nil" because the drain pipe is already there and already has an impact on the ESHA and the view of the hillside. The Applicant states that the pipe is a legal non-conforming structure, however the Commission has no evidence showing when the pipe was originally placed within easement. The pipe is approximately 50 feet long and approximately 7-10 inches wide. The proposed stairs would be 110-feet long and 5 feet wide. The stairs would impose a more significant impact on the habitat of the bluff face as well as impact the visual resources. Assuming the pipe remains, vegetation could grow up around it, hiding it from view and retaining the habitat value of the area.



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November 15, 2010

VIA MESSENGER

**Item Th8c
Applicant Clark Drane**

Bonnie Neely, Chair
California Coastal Commission
89 South California Street, Suite 200
Ventura, CA 93001-2801

**Re: 7271 and 7273-77 Birdview Avenue, City of Malibu
Los Angeles County (APN: 4468-020-021 & 4468-020-022)
Item No. Th 8c, Appeal No. A-4-MAL-09-070
Hearing Date: November 18, 2010**

Dear Chair Neely:

Introduction and Background

We represent Mr. Clark Drane ("Mr. Drane" or the "Applicant") in his request for a Coastal Development Permit (CDP) No. A-4-MAL-09-070 to replace the lower 110 feet of stairs (the "Lower Stairs") of an existing 300-foot pathway structure extending from Mr. Drane's property located at 7273 Birdview Avenue, Malibu, California (the "Dominant Tenement") across an easement on 7271 Birdview Avenue, Malibu, California (the "Servient Property") and down the bluff face to Westward Beach near Point Dume.

In 1960, the owners of the Servient Property, Arthur B. Clenard and Eileen P. Clenard (the "Clenard Family") constructed on the Servient Property a 300-foot pathway structure, included a concrete walkway, upper stairs, terraced land, a dirt path and the Lower Stairs to provide access across the bluff face to Point Dume State Park and Westward Beach (See Exhibit "A", Eileen P. Clenard Affidavit). The Lower Stairs are evident in a photograph taken by the Clenard Family c.1963 and included as an attachment to the Eileen P. Clenard Affidavit (the "Clenard Affidavit") (See Exhibit "B", Photograph of Lower Stairs, c.1963)

In August 1962, the Clenard Family, obtained a building permit to construct a separate multifamily residence (the "Triplex") on a portion of their property. After construction and occupancy the tenants of the Triplex, along with the Clenard Family, were afforded unfettered access across the Servient Property to Point Dume State Park and Westward Beach.¹ In August 1974, the Clenard Family sold the Dominant Tenement for valuable consideration to William A. and Carol Schultz ("Schultzes") and Clark and Mildred Drane ("Dranes"), each couple possessing an undivided one-half interest as tenants in common (See Exhibit "C" 1974 Grant Deed). As a part of the Escrow Instructions to the 1974 purchase and sale agreement, a lot split was required, thereby creating a separate tax parcel (APN. 4468-020-022), the Dominant Tenement. (See Exhibit "D", Escrow Instructions, Contingency No. 3). The legal description from the 1974 Grant Deed included "an exclusive easement for pedestrian walking purposes only over a strip of land five feet wide..." The Clenard Affidavit declares that the easement was

¹ Affidavit of Eileen Clenard, Paragraph No. 4

developed with the 300-foot pathway structure, including the Lower Stairs depicted in Exhibit B.² As further evidence of the existence of the 300' pathway structure, the Applicant has submitted an Affidavit declaring the existence of the pathway structure at the time of purchase in 1974 (See Exhibit "E", Affidavit of Clark Drane). In March 1977 the Schultzes sold their one-half interest in the Dominant Tenement to the Dranes (See Exhibit "F", 1977 Grant Deed). The record before you regarding this proposed project, as compiled by Commission Staff, is incomplete and therefore inaccurately characterizes the project that is before the Commission. It describes this project as "construction of a new 110-foot long, three-foot wide private staircase on a bluff face" (emphasis added), an area of the bluff face that is described as undisturbed ESHA.³

In fact, this project is not a "new" structure, but a replacement of the Lower Stairs which is a portion of the 300-foot pathway structure constructed in 1960 and which was in continuous use until at least 2002 when it required repairs. It was then that Mr. Drane initially applied for permission to repair only the Lower Stairs. This matter has been ongoing since then. Because the 300-foot pathway structure, including the Lower Stairs, were built before the passage of the Coastal Act, it is a non-conforming use under the Malibu Local Coastal Plan ("LCP") and Mr. Drane has a vested right to rebuild the Lower Stairs. As a result, denial of permission to replace the Lower Stairs would constitute a taking of Mr. Drane's property.

As the Affidavit of Eileen P. Clenard states, the Lower Stairs were built in 1960, and they continued to exist until the Servient Property was sold in 1999.⁴ In 2002, Mr. Drane applied to the City for Planning Division review of his plans to repair the Lower Stairs ("2002 Application"). City of Malibu Staff visited the property and in response a letter from Mr. Drane on December 9, 2002, the City Staff confirmed the existence of the Lower Stairs and acknowledged that this structure was a non-conforming use under their Municipal Code in a letter dated December 18, 2002 (See Exhibit "G", Letter from City of Malibu to Clark Drane with attachments). In the photographs submitted with the 2002 Application, the western banister and footings (at grade) are clearly visible as is the drain pipe also installed by the Clenard Family prior to the effective date of the Coastal Act (See Exhibit "H", Photographs 1-5 of Remnant Lower Stairs, c.2002). From 2002 to 2006, while the Applicant grappled with the City's moratorium on issuing building permits, the new owner of the Servient Property and the City's request to submit an application for a Planning Review, the Lower Stairs deteriorated significantly. Then in June 2006, Mr. Drane was allowed to submit an application for a Coastal Act Exemption, Over the Counter, Level I Planning Review on June 18, 2006 to repair/replace the Lower Stairs. The City granted a CDP Exemption (CDPE 06-060) and stamped the plans approved on June 23, 2006 (See Exhibit "I", 2006 Planning Division-Uniform Application). In the fall of 2006, however, the City Staff revoked the CDP Exemption after viewing aerial photographs and determining that the state of the deterioration of the Lower Stairs made it impossible to qualify for a CDP Exemption thus prohibiting Mr. Drane from proceeding with construction of the Lower Stairs. As a result, the City instructed Mr. Drane to apply for a CDP to replace the Lower Stairs. Mr. Drane immediately applied for the CDP as recommended by the City. It is an important fact that the upper stairs, as well as the other elements of the 300-foot pathway structure, have been safely maintained and have been in continuous use since 1960. As such, the request before you for a CDP and Variances only represents 36.67 percent of the pre-Coastal Act 300-foot pathway structure.

² Clenard Affidavit, Paragraph No. 2

³ "Coastal Commission Staff Report: Appeal De Novo Review," Appeal Number A-4-MAL-09-070, 2010, Page 4, Project Description and Background.

⁴ Clenard Affidavit, Paragraph Nos. 1 and 5

Further, the coastal bluff face upon which the 300-foot pathway structure is built is not an undisturbed ESHA. First, a drain pipe, which has existed since at least 1962, runs down the steepest portion of the bluff face within the easement area. Despite Commission Staff's attempt to explain away its existence, the City of Malibu (the "City"), in its October 21, 2008 Staff Report conceded the existence of the drain pipe (p. 3 of 12). (See Exhibit "J", Planning Commission Staff Report, October 21, 2008). Commission Staff even acknowledges that this easement has been, and continues to be used as a large drainage structure in the form of a pipe, "taking up approximately 50 percent of the bluff-face area within the easement."⁵ Second, another staircase sits just to the northwest of the property. Third, a network of paths used by hundreds of patrons to Point Dume State Park every weekend exists just southeast of the proposed project site. In addition, no less than 12 other homes on the same bluff face have private stairs to Westward Beach (See Exhibit "K", Aerial Photograph of Point Dume Private Stairs. As such, this bluff face cannot credibly be characterized as an undisturbed ESHA.

The Biological Assessment prepared by Forde Biological Consultants in July 2007 ("Forde Report") shows that no riparian disturbance would be created by the replacement of the Lower Stairs. In addition, a minimal amount of vegetation would have to be removed by the construction of the replacement stairs over the existing drain pipe. Also, as recommended in the Forde Report, by conducting a nesting survey and adherence to scheduling construction outside of documented nesting season, impacts can be mitigated (See Exhibit "L", Forde Biological Assessment).

Besides the drain pipe, other facts weigh against an ESHA designation. We uncovered evidence that this alleged ESHA due to its topography as a bluff face has been the site of industrial development that predates the residential use, in the form of the Hueneme, Malibu and Port Los Angeles Railway track (the "Railway") that descended the bluff and crossed the subject easement below the top of the bluff circa 1890-1930.⁶ In photographs from 1924, the Hueneme, Malibu and Port Los Angeles Railway can be seen making an arc on Point Dume and descending the bluff face adjacent to the client's property (See Exhibit "M", Photographs of Railway on Point Dume) What is visible today is apparently the remnants of the old roadbed of the Railway, built prior to 1908.⁷ In addition, the Applicant commissioned a Site Survey and it was determined that at approximately 45 feet in elevation there is a grade bench that runs along the bluff face beginning at the easement area and running southeast. This grade bench was discovered during survey of the topography of the site (See Exhibit "N", Grimes Survey & Mapping Site Survey). This grade bench appears to be either fill placed there from the work performed in the 1890s to create the Railway or moved there to create the Westward Beach parking lot.

As to the 300-foot pathway structure, Commission Staff admits that aerial photos from 1972 and 1975 both show that the subject easement contains a staircase, which descends along the northern side of the easement down the bluff.⁸ (See Exhibit "O", 1972 Photograph of Point Dume Bluff Face). Staff further admits that the aerial photographs it consulted from 1977, 1979 and 1986 show a "linear feature" at the location where the 1972 and 1975 photos show the Lower Stairs. In fact, Exhibit 4f, of the Commission Staff Report, and the current photo [No.

⁵ Staff Report, Page 4.

⁶ 1924 aerial photo of Point Dume, California labeled "E-17178," Spence Aerial Surveys, Los Angeles, at the UCLA Geography Department Collection.

⁷ Thomas W. Doyle, "The History of Malibu," Chapter 4,

<http://www.ci.malibu.ca.us/index.cfm/fuseaction/detail/navid/9/cid/428/> . See also the 1924 aerial photo, above.

⁸ Staff Report, Page 5

200801900] available for viewing on the California Coastal Records Project,⁹ clearly shows the remaining portion of the 300-foot pathway structure, consisting of a concrete driveway and walkway, upper stairs, terraced land and a dirt pathway. Despite these facts, Staff continues to state that there “is no evidence to suggest that a private staircase existed within the easement when [Mr. Drane] purchased the subject property in 1974.”¹⁰ This is both incorrect and disingenuous. A photograph from 1979 also depicts the Lower Stairs as further evidence of its continued existence (See Exhibit “P”, 1979 Photograph of Point Dume Bluff Face).

Commission Staff does not offer any proof that the pre-1976 staircase was improperly removed by Mr. Drane. Commission Staff also does not cite any Coastal Act provision, other law, regulation or court case that eviscerates the vested rights due to a structure’s nonconforming use status because such a structure was either temporarily removed for repairs or had fallen into a dilapidated condition.

In sum, in reality, this is not an application for a new structure. Rather, it is a request to replace that portion of a pre-existing 300-foot pathway structure, the Lower Stairs, that fell into disrepair years after it was completed in the 1960s and which is located on an underlying beach access easement purchased for valuable consideration in 1974 by Mr. Drane. Because of its procedural history at the City, however, this case before your Commission and is framed as an appeal of a Coastal Development Permit issued by the City for construction of a new staircase. As referenced above and further discussed above, that history shows that Mr. Drane has been trying to obtain permission to replace the Lower Stairs since 2002. As Commission Staff states, his original request to repair the then-40-year-old structure was approved in 2006 by the City in the form of a CDP Exemption and Mr. Drane was advised that he could repair the Lower Stairs and restore the property for which he paid valuable consideration to its intended and legal use. The City, however, in late 2006 after the City rescinded its determination that the repair was exempt from a CDP requirement, they told the applicant to apply for a CDP as if this was new construction. This reversal of the City’s Exemption determination was made despite the fact that in 2002 a City planner’s visit to the site in December of that year qualified the site as a legal, non-conforming use and structure.¹¹ However, in 2006 City Planning Staff viewed photographs and apparently discovered a large stairway on the property immediately west of the easement, but no stairway at the lower portion of the instant easement. It appears that during the period between 2002 when the Applicant originally applied, and 2006, the Lower Stairs had deteriorated and would have to be removed. Those developments apparently led the City to its incorrect assertion that replacing the staircase would be new construction. Despite protests that this project was a repair of an existing structure, and not new construction, [and without a written denial, required under §13328.6 of Administrative Regulations for the Coastal Commission], Mr. Drane complied with the City’s request submitting the instant request in 2007 for a CDP even though he had the right to rebuild the Lower Stairs as a pre-existing and non-conforming use.

The Malibu City Council, after hearing Mr. Drane’s arguments, ruled it did not have sufficient basis to reject the requested CDP and Variances and so the City Council approved a Resolution granting the entitlements (See Exhibit “Q” City Council Resolution No. 09-52). The City correctly noted that the easement was created and purchased lawfully in 1974, essentially validating it as a non-conforming use and that the easement was not created as a way to simply circumvent the Coastal Act. The City Council also acknowledged that denying Mr. Drane the

⁹ California Coastal Records Project, Photograph No. 200801900, Copyright © 2002-2010 Kenneth & Gabrielle Adelman.

¹⁰ Staff Report, Page 5.

¹¹ Letter from the City of Malibu to Clark Drane, December 18, 2002, Page 1

ability to rebuild the Lower Stairs would constitute a regulatory taking of the easement's economic benefit because the purpose of the easement to allow access to Point Dume State Park and Westward Beach cannot be accomplished without replacement of the Lower Stairs.

Supporting Evidence for the Proposed Project

Site Survey of 300-foot Pathway Structure across the Easement Area

In an effort to provide further evidence of the extent and location of the 300'-foot pathway structure described above, Mr. Drane commissioned Grimes Surveying and Mapping, Inc. to prepare an architectural design survey map (see Exhibit "___"). The survey map details the location of each element of the existing 300-foot pathway structure beginning at the boundary between 7273 and 7271 Birdview Avenue and continuing down to the bluff face, and down it to Westward Beach. The elements of the 300-foot pathway structure consists of a concrete driveway (75 linear feet) sloping toward the bluff; a 5-foot wide concrete walkway (63.4 linear feet) sloping toward the bluff; the upper stairs (15.9 linear feet) on the bluff face; a terraced pad (16.4 linear feet) on the bluff face; a dirt trail (12.2 linear feet) on the bluff face; the lower stairs (110 linear feet) on the bluff face and the remaining natural trail across the sand to Westward Beach.

As defined in the Malibu LCP Local Implementation Plan (the "Malibu LIP"), a structure is "anything construed or erected which requires a fixed location on the ground, or is attached to a building or other structure having a fixed location on the ground." A terrace is defined in the Malibu LIP as, "an earthen embankment, a channel, or a combination ridge and channel constructed across the slope. While the 300-foot pathway is one structure, it is comprised of the seven elements listed above. The subject of this application is for a CDP and Variances and is only related to the lower 110' of stairs, which based on the length of each element is approximately 36 percent of the total 300' pathway structure.

Biological Assessment

On July 31, 2007, the Forde Biological Consultants submitted their Biological Assessment ("Forde Report"). In the Forde Report, they indicated that the dominant plant species found in the easement area is Coastal bluff scrub, particularly in the western portion of the easement, however it is patchy. The only species observed within the easement during the site visit were Anna's hummingbird, house finch, northern mockingbird, and side-blotched lizard. Other than these species, the only other wildlife expected to occur are common urban adapted species. According to the Environmentally Sensitive Habitat Area ("ESHA") and Marine Resources Map for Zuma Beach to Escondido Beach, there are no ESHA's on the property. However, the Malibu LCP considers all coastal bluffs as ESHA regardless of condition or past use. As mentioned above, the easement area also contains a drain pipe directly under the Lower Stairs. As a result, the construction of the replacement stairs would require a minimal amount of vegetation to be removed to accommodate the proposed project. In keeping with requirements of the Malibu LUP to protect ESHA, but to do so in a manner that does not constitute a taking of private property, the use of a portion of the easement area on the bluff face for the replacement of the lower stairs is appropriate and in conformance with Policy 3.10 of the Malibu LUP.

- Nest Survey: If approved for a CDP and Variances, Mr. Drane will volunteer to schedule construction to occur outside of the recognized breeding season and outside the breeding season of the species cited in the Forde Report. If the construction scheduling cannot be done

outside of the recognized breeding season, Mr. Drane also agrees to conduct a nest survey within and immediately adjacent to the easement area before construction begins and before the removal of any vegetation. If the biologist determines that there are no active nest, construction activities and vegetation removal can proceed. If active nests are found, Mr. Drane agrees to proceed in accordance with the mitigation suggested in the Forde Report.

- Removal of non-native Vegetation: If vegetation must be removed, irregardless of the fact that it is non-native, the mitigation suggested in the Forde Report will be followed to ensure that active nests are not disturbed until they become inactive.

- Removal of minimal native species for construction of lower stairs; As was stated above and is evident from photographic evidence, prior development of the bluff face for vested uses has created an area directly adjacent to the proposed location for the replacement stairs that would allow minimal disturbance of Coastal bluff scrub. Again, any vegetation removal shall proceed in accordance with the prescribed mitigation measures contained in the Forde Report.

- Re-vegetation of disturbed areas: Mr. Drane further agrees to work with the City of Malibu Biologist and other experts to develop a plan to ensure that areas not directly under the lower stairs and drain pipe, where feasible can be re-vegetated with native species after construction is completed.

Geologic Report

Mr. Drane commissioned GeoConcepts, Inc. to prepare a limited Geologic Opinion Report (the "Geologic Report") for the proposed project. The Geologic Report concluded that the bluff slope is "geologically favorable" and that the proposed replacement stairs from 7273 Birdview Avenue to Westward Beach "should be supported by the bedrock. Based on the conclusions in the Geologic Report, the City Geologist stated that the project is geologically feasible and can proceed through the planning process.

- Prior review: In the Geologic Report, GeoConcepts found that there were no geology and/or geotechnical reports covering original grading or development of the subject site were found in the City of Malibu. However the Geologic Report cited other geologic reports conducted for neighboring properties indicating that the bluff slope is supported by favorable orientated bedrock and that terrace deposits lie above the bedrock. One geologic report from 1965 (Michael and Associates) concluded that the terraced deposits were estimated to be approximately 20 feet in thickness. This previous analysis supports the conclusions of GeoConcepts, Inc. in their Geologic Report.

- Geology and Soils Engineering Investigation: The proposal for the replacement of the lower 110' of stairs includes no footings, as such, the Applicant has not proposed conducting additional geologic investigation. However, the Applicant recognizes that once the construction drawings are prepared and submitted to the Environmental and Building Safety Division, additional geologic information maybe required, including a detailed geology and soils engineering investigation, or a subsurface exploration.

Building Plans

If the CDP and Variances are approved, Mr. Drane will prepare and submit a Site Plan and Elevation drawings as well as a detailed site survey with the proposed replacement stairs plotted by a Civil Engineer. Of course, any other required reports, drawings or calculations required by the Environmental and Building Safety Division will also be prepared in keeping with their requirements.

Coastal Development Permit and Variances Analysis

Mr. Drane is requesting to replace the Lower Stairs that comprise approximately 36 percent of the entire 300-foot pathway structure developed in the easement area. The Lower Stairs would be located entirely within the 5 feet-wide easement area as shown in the Architectural Site Survey Map. As shown in Exhibit ___, the Lower Stairs would be constructed over the steepest portion of the bluff face between an elevation of approximately 44.7 feet and 101.3 feet. This vertical elevation will result in the Lower Stairs being constructed over approximately 57 linear feet.

Evidence has been presented elsewhere in this letter, documenting the length of the entire pathway structure as well as the various elements that were developed prior to the Coastal Act above the Lower Stairs and which remain in use even today. Further, Mr. Drane asserts that his request to replace the Lower Stairs, as an integral element of the 300' pathway structure is made to the Commission through the CDP and Variances before this body. Mr. Drane also asserts that its intention is to replace a portion of the 300' pathway structure that is a non-conforming structure under §13.5.C. of the Malibu LIP, and that the reconstruction of the Lower Stairs is a use that is treated differently in the Malibu LIP and LUP and includes the right to receive the approval of the Coastal Commission, to avoid a taking of the property, as per Policy 3.10 of the Malibu LUP.

Environmentally Sensitive Habitat Use (ESHA)

Notwithstanding the requirements of Public Resources Code §30230 and 30240, the Coastal Commission is further obligated to address requirements of §30010 the legislative declaration that nothing in this division is intended or construed to authorize the Commission, acting pursuant to this division to exercise their power to deny a permit in a manner which will take or damage private property for public use without the payment of just compensation. Substantially, Mr. Drane asserts that under Policy 3.10, the strict application of the policies and standards, namely the Malibu LUP Policies 3.1, 3.8, 3.23, 3.26 and the Malibu LIP Policies 4.5.3 and 4.6.1 would likely constitute a taking of private property and therefore the proposed replacement of the Lower Stairs, even if it is not consistent with the ESHA Policy provisions listed above, shall be allowed on the property, especially in light of the fact that the provisions within Malibu LUP Policies 3.11, 3.14, 3.58, 3.77 and 3.95 and the Malibu LIP Policy 4.7 can be satisfactorily addressed by the proposed replacement of the Lower Stairs.

Malibu LUP Policies.

With the application of Policy 3.10 to the proposed project, the requirement to document the extent of the ESHA (Policy 3.11) has been addressed by the biological assessment discussed about and by virtue of the fact that project site is designated as ESHA because it is a coastal bluff, despite the fact that the proposed location does not meet the test of possessing "...native habitats, which contribute to the viability of species protected by the State and Federal endangered species acts or those that are fully protected or recognized as species of special concern to the State." Neither does the project site demonstrate "any habitats with plant species on list 1B or list 2 of the California Native Plant Society's Inventory of Rare and Endangered Plants or habitats that are rare or valuable from a local, regional, or statewide basis including wetlands and streams..."

While the replacement of the Lower Stairs is not considered "new development" as described in Policy 3.14, nevertheless, compliance with this policy is achieved as a result of the fact that the

proposed use is allowed under Policy 3.10 and thus the siting of the replacement stairs above the drain pipe on the bluff face is the alternative that results in the fewest or least significant impacts. Further, implementation of the recommendations contained in the Forde Report described above, ensure that mitigation of impacts will be achieved on-site. Also, no off-site mitigation is proposed, nor is there a substitution issue based on the application of Policy 3.10.

The evidence provided above demonstrates: that the proposed use is the replacement of the Lower Stairs; and that the use existed prior to the effective date of the Coastal Act; and that such use is approximately 36 percent of the existing 300-foot pathway structure. Therefore, the proposed project is defined as replacement of an existing use, not a "new use". Under Policy 3.58, the existing Lower Stairs, which existed prior to the effective date of the Coastal Act, when replaced will address the objective of this policy to protect seabird-nesting areas by prohibiting pedestrian access to the steepest portion of the bluff face with the stairs, thereby affording the wildlife and the native vegetation the greatest protection possible given the existing use.

In an effort to prevent impacts that could significantly degrade the ESHA, the replacement of the Lower Stairs is proposed to be sited directly over the area of the easement that is disturbed due to the existence of the drain pipe. In addition, Mr. Drane commissioned a Site Survey from Grimes Survey and Mapping, Inc. (2010 Site Survey") and found that the Lower Stairs could be reduced in length from the requested 110 feet to approximately 57 feet.¹² This reduction in length is possible because the Site Survey shows that the steepest portion of the bluff face is approximately 55 feet in length and therefore a dirt path below the lower 57 feet of stairs can be used to allow access to Westward Beach from Mr. Drane's property. As such, this reduction in the length of the lower stairs from 110 feet to approximately 57 feet¹³ creates less impact to the bluff face and allows the Applicant to use the natural trails below the replacement stairs, avoiding the removal or disturbance of vegetation on the remaining easement area below. Therefore, the alternative length can accomplish the objectives of Policy 3.77.

The objectives of Policy 3.95 can also be met in that the proposed project does not impact water quality as there are no water resources on the project site.

Malibu LIP Policies

As was previously stated above, the proposed project is considered an ESHA by both the City of Malibu and the Coastal Commission Staff; by virtue of the fact that it is located on a coastal bluff [Malibu LUP, Policy 3.1]. However, under the Malibu LIP, Section 4.3.C., any area where the "site-specific biological study" does not contain habitat that meets the definition of "...environmentally sensitive area", the City [through its Biologist] shall determine the physical extent of habitat that does not meet the definition of 'environmentally sensitive area' on the project site." Also, under Section 4.3.D., the City must make findings "...as to the physical extent of habitat meeting the definition of environmentally sensitive habitat on the project site, based on the applicant's site specific biological study, available independent evidence, and review by the City biologist and the Environmental Review Board.

¹² Grimes Survey and Mapping, Inc, Site Survey of 7271 Birdview Avenue, November 2010

¹³ The final length of the lower stairs will be subject to compliance with the California Building Code as enforced by the Malibu Environmental and Building Safety Division

In this instance, both the City and the Coastal Commission have erred in their application of the requirements of Section 4.3.C. and 4.3.D. In response to the site-specific biological assessment, the City Biologist concluded, that the application, "Cannot Be Approved As Submitted", as the project, "...may have the potential to impact the following resources, either individually or cumulatively: Sensitive Species or Habitat, Watersheds, and/or Shoreline Resources."¹⁴ This conclusion was made despite the analysis contained in the Forde Report, indicating that the disturbance to native plant species was minimal and that there were no Special Status Species observed. With regard to the findings required under Section 4.3.D., the City Biologist also erred, in that the basis for the project not being approved was based on the definition of the project as a "new structure", which we have shown through the evidence presented, that the proposed project is the replacement of the Lower Stairs which is a portion of the 300-foot pathway structure that was in existence prior to the enactment of the Coastal Act. In addition, while the Malibu LIP, Chapter 4, generally requires that "...Only uses dependent on the environmentally sensitive habitat areas and which do not result in significant disruption of habitat values shall be permitted in the ESHA overlay zone", such a requirement was never meant to apply if "environmentally sensitive habitat" does not exist in the proposed project area, as is evidenced in the Forde Report.¹⁵ Further, in Policy 3.10 of the Malibu LUP, constraining a proposed use to a resource-dependent use cannot be imposed in the result of that action is a taking of private property.

The list of permitted uses contained in Section 4.5.3 are examples of resource dependent uses which again cannot be imposed on the proposed project since the application of such uses would result in a taking of private property and therefore, violation of Policy 3.10 of the Malibu LUP.

With regard to Section 4.6.1 of the Malibu LIP, the requirement for a 100-foot buffer from the bluff edge is not applicable since the replacement of the Lower Stairs is not new development. Further, no buffer has existed on the coastal bluff face and all development which existed prior to the effective date of the Coastal Act occurred at the edge of the bluff face, and on the bluff face.

Section 4.7 of the Malibu LIP does not apply to the proposed project, due to the fact that application is to receive approval for the replacement of the Lower Stairs, which is a portion of the 300-foot pathway structure, a use which pre-dated the effective date of the Coastal Act. Even if the application of this section were to be expanded to non-residence uses, the proposal to reduce the replacement of the Lower Stairs from 110 feet to approximately 57 feet, satisfies the requirement to limit, restrict and minimize impacts to ESHA on and adjacent to the property to the maximum extent feasible.

Rebuttal of Staff Analysis on ESHA

While the Applicant acknowledges that Coastal bluff scrub is present on the easement area, the conclusions of the Forde Report do not comport with the conclusions of the Commission Staff that this vegetation is rare and threatened. Certainly the level of industrial and residential development on the bluff face northwest of Point Dume changed the habitat, but a 5-foot wide easement area is not going to change the increase or decrease in the rarity of the species. In

¹⁴ City of Malibu, Biology Review Referral Sheet, October 18, 2007

¹⁵ Forde Report, p. 5

addition, by following the mitigation recommended in the Forde Report, impacts will be even less. Such a condition, is in keeping with the objectives of Malibu LUP Policy 3.10, among others. Once Commission Staff recognize that the 300' pathway structure, of which the Lower Stairs are a portion of, and that such use existed long before the effective date of the Coastal Act it becomes clear that this request is not for new development, nor does the Commission have the authority to extinguish the private property right of the Applicant to access Westward Beach. In addition, the Commission Staff erred in their assertion that the drain pipe was constructed without a coastal development permit. Once again the drain pipe is also a structure that was installed and has been maintained continuously since the time of the construction of the Lower Stairs in 1960. To pretend that this structure needs a CDP to be considered a part of the existing conditions, ignores the fact that it also is a legal, non-conforming structure. Also, through the 2010 Site Survey, the Applicant has determined that an environmentally improved alternative is available to further reduce any negative impacts to plant or animals on the bluff face. This alternative would preserve some of the vegetation that has reclaimed the lower easement area below the grade bench, while not preventing the Applicant from continuing the beneficial use of the easement and the structure at issue in this request.

As was stated above, the construction of the replacement stairs would only proceed once the recommended biological assessment work was completed and the appropriate structural and civil engineering analysis to ensure that the replacement stairs comply with the CA Building Code and the requirements of the Malibu LCP for mitigation of construction impacts.

Variance Request

At issue with the Variance request to eliminate the requirement for a 100' buffer with the proposed project, is first whether a variance can be granted for such a request and secondarily can the ten (10) required findings be made to justify the request.

In keeping with the requirement to avoid an abuse of discretion, Malibu LUP Policy 3.10 allows for limited use where the extinguishing of such use would lead to a taking of private property. As such, the use of the variance process outlined in Section 13.26 of the Malibu LIP to enable the replacement of the Lower Stairs is consistent with the intent of Section 3.10 in that a variance provides a mechanism to vary from standards or requirements if the requisite findings can be made. The variance from the requirement for a 100' buffer is acceptable in that without such a variance, the replacement of the Lower Stairs would not be allowed and no CDP could be granted.

Special Circumstances [13.26.5.A.] - the Applicant possesses a vested right that is recognized by the Malibu LIP as a non-conforming use. It is a right enjoyed by many other property owners in the vicinity who have similar non-conforming private stairs on the bluff face providing access to and from Westward Beach. The Applicant throughout this letter has demonstrated that the Commission Staff erred in their conclusion that no structure existed prior to the enactment of the Coastal Act and that the Applicant only possesses an easement on paper. Rather such a structure not only existed, but with the exception of the Lower Stairs is still used today. The fact that the 300' pathway structure, existed prior to the effective date of the Coastal Act as well as the fact that all but a portion (less than 37%) is beneficially used presents very special circumstances.

Granting will not be detrimental to the public interest [13.26.5.B.] – The public interest, safety, health and welfare are preserved by granting the variance. The replacement of the private

stairs, especially if the reduced length alternative is accepted is a better option than installing the full 110' replacement. This option will also minimize impacts to the habitat for plants and animals. In addition, the existing conditions are unsafe as the slope is not covered with vegetation. Once the replacement stairs are rebuilt at the reduced length, the remaining area can be revegetated.

Granting will not constitute a special privilege [13.26.5.C.] – Because the proposed use is a continuation of a non-conforming use, there is no special privilege granted by approving the variance. Only other property owners who have similar non-conforming uses or structures would qualify for such a variance.

Granting will not be contrary to or conflict with the general purposes and intent of this Chapter [13.26.5.D.] – As discussed earlier, to prevent a taking, the Applicant must be given the opportunity to rebuild a non-resource dependent use, so long as there is a right to such use (legal, non conforming) that existed prior to the Coastal Act.

In ESHA, there is no other feasible alternative and the proposed development does not exceed the limits allowed under Section 4.7 [13.26.5.E.] – There is no other feasible alternative for siting the structure and the flexibility in application of the standards and requirements for ESHA, but allow the least impactful development to proceed to avoid a taking.

For Stringline variances, maximum feasible protection [13.26.5.F.] – not applicable

Consistent with zoning [13.26.5.G.] – the zoning for the site allows for residential development and other accessory uses including stairways and with regard the Malibu LUP, Policy 3.10, the standards and requirements of the Malibu LCP cannot result in a taking.

Physically suitable for the proposed variance [13.26.5.H.] – The existence of a 300' pathway structure on the site as well as the neighboring similar non-conforming structures on the bluff face.

Complies with all state and local laws [13.26.5.I.] – As stated above in addition to compliance with recommended mitigation for the protection of biological resources, the Applicant will comply with all CA Building Code requirements and other applicable state and local laws.

Variance cannot allow the reduction or elimination of public parking for access to the beach, public trails or parklands [13.26.5.J.] – Not applicable.

Bluff Development

In considering this project as the replacement of a portion of a 300' pathway structure that was constructed in 1960 and in continuous use until 2002 when the Applicant submitted a request to the City to repair the Lower Stairs. We must evaluate the scope of the proposed project based on the capacity to be maintained and/or repaired such that the construction does not increase the extent of the nonconformity of the structure. As originally proposed in 2007 application for a CDP, and the subsequent addition of the variances in 2008 was for the replacement of the 110' of stairs on the bluff face to nearly the boundary of the parking lot at Westward Beach.

Of the course of period of review by the City of Malibu and now this De Novo Review by the Coastal Commission, the Applicant has had an opportunity to gather additional evidence and evaluate any opportunities lessen the project's impacts. While it is not possible to construct an alternative that could satisfy the provisions of the Malibu LUP, particularly, Policy 4.27 of the Malibu LUP or Section 10.4 of the Malibu LIP, we nevertheless believe that to avoid a taking of private property and in conformance with Policy 3.10 of the Malibu LUP, an alternative that allows for the minimal amount replacement should be approved.

In presenting the reduced length of approximately 57 linear feet for the lower stairs, the Commission has the opportunity to avoid the taking and approve only the minimum amount necessary.

With regard to the Variance to allow a reduction of the required 100-foot setback and to allow construction on slopes 1.5:1 or less, the Commission staff presents an analysis of the Findings required for such a variance. In rebuttal, we direct the Commissioners to the basic facts: the Applicant has a vested right for a 300' pathway structure, of which 110' are in need of replacement, and that such a right is a nonconforming use and structure under Section 13.5.C. of the Malibu LIP and which must be allowed to develop some replacement to avoid a taking of private property.

In support of these facts, we present the following analysis of the required findings.

Special Circumstances [13.26.5.A.] - the Applicant possesses a vested right that is recognized by the Malibu LIP as a non-conforming use. It is a right enjoyed by many other property owners in the vicinity who have similar non-conforming private stairs on the bluff face providing access to and from Westward Beach. The Applicant throughout this letter has demonstrated that the Commission Staff erred in their conclusion that no structure existed prior to the enactment of the Coastal Act and that the Applicant only possesses an easement on paper. Rather such a structure not only existed, but with the exception of the Lower Stairs is still used today. The fact that the 300' pathway structure, existed prior to the effective date of the Coastal Act as well as the fact that all but a portion (less than 37%) is beneficially used presents very special circumstances.

Granting will not be detrimental to the public interest [13.26.5.B.] – The public interest, safety, health and welfare are preserved by granting the variance. The replacement of the private stairs, especially if the reduced length alternative of approximately 57 linear feet is accepted is a better option than installing the full 110' replacement. This option will also minimize impacts to the habitat for plants and animals. In addition, the existing conditions are unsafe as the slope is not covered with vegetation. Once the replacement stairs are rebuilt at the reduced length, the remaining area can be revegetated.

Granting will not constitute a special privilege [13.26.5.C.] – Because the proposed use is a continuation of a non-conforming use, there is no special privilege granted by approving the variance. Only other property owners who have similar non-conforming uses or structures would qualify for such a variance.

Granting will not be contrary to or conflict with the general purposes and intent of this Chapter [13.26.5.D.] – As discussed earlier, to prevent a taking, the Applicant must be given the opportunity to rebuild a non-resource dependent use, so long as there is a right to such use (legal, non conforming) that existed prior to the Coastal Act.

In ESHA, there is no other feasible alternative and the proposed development does not exceed the limits allowed under Section 4.7 [13.26.5.E.] – There is no other feasible alternative for siting the structure and the flexibility in application of the standards and requirements for ESHA, but allow the least impactful development to proceed to avoid a taking.

For Stringline variances, maximum feasible protection [13.26.5.F.] – not applicable

Consistent with zoning [13.26.5.G.] – the zoning for the site allows for residential development and other accessory uses including stairways and with regard the Malibu LUP, Policy 3.10, the standards and requirements of the Malibu LCP cannot result in a taking.

Physically suitable for the proposed variance [13.26.5.H.] – The existence of a 300' pathway structure on the site as well as the neighboring similar non-conforming structures on the bluff face.

Complies with all state and local laws [13.26.5.I.] – As stated above in addition to compliance with recommended mitigation for the protection of biological resources, the Applicant will comply with all CA Building Code requirements and other applicable state and local laws.

Variance cannot allow the reduction or elimination of public parking for access to the beach, public trails or parklands [13.26.5.J.] – Not applicable.

Scenic and Visual Resources

The proposed project is the replacement of the lower stairs of a 300' pathway that existed since 1960 and has continued to be maintained until the lower stairs needed repairs in 2002. The remaining portions of the 300' pathway structure remain in use even today, but provide no feasible way to reach Westward Beach without the replacement of the lower stairs. As such, under Policy 3.10 of the Malibu LUP, some form of replacement must be approved to avoid a taking of private property. For this analysis it is not correct to characterize this project as new development on the bluff face, but rather the repair of a non-conforming use that was in existence prior to the effective date of the Coastal Act.

While we assert that the client has the right to replace all 110' of the lower stairs, since such a replacement is less than 50 percent of the 300' pathway structure, however, we have discussed above the opportunity to replace the lower stairs with a reduced length of approximately 57 feet as a means to only allow the minimum replacement necessary to avoid a taking of private property by not allowing the Applicant to use the easement and the 300' pathway structure to the beach.

Public Access and Recreation

The 2010 Site Survey included with this Rebuttal Letter plots the location of each element of the 300' pathway structure. With regard to the potential impact to public access and recreation, we assert the same analysis as what was put forward in the Scenic and Visual Resources section asserting the Applicant's right to replace the lower stairs since the replacement is less than 50 percent of the 300' pathway structure. We also reiterate that the proposed project is not a new structure and provided evidence for the record to prove that fact.

Rebuttal of Commission Staff's Taking Analysis

Coastal Act Section 30010, consistent with the 5th and 14th Amendments of the United States Constitutions and Article 1, section 19 of the California Constitution, provides that:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor.

As Commission staff notes in its Report:

the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid that possibility. . . . If the Commission concludes that its action might constitute a taking, then Section 30010 (and Malibu LUP section 3.10) requires the Commission to approve some level of development, even if the development is otherwise inconsistent with Malibu LCP Policies.

Commission staff has already determined that “there is no feasible alternative for siting a stairway down the bluff face that would not be located within the EHSA.”¹⁶ Contrary to the staff’s characterization of the project as a new 110-foot staircase, evidence presented above demonstrates that those stairs are actually the lower 110 feet of stairs of a 300-foot pathway structure defined as a structure in the Malibu Local Coastal Program, Local Implementation Plan. Evidence also shows that this 300-foot structure was in existence since 1960, well before the effective date of the Coastal Act and continued to be in use at least until Mr. Drane applied to the City of Malibu for its repair in 2002. Therefore, if the action may constitute a taking, the Commission must approve the replacement of the 110-foot lower stairs (“Lower Stairs”). As set forth below, a decision by the Commission to deny the proposed project will constitute a taking. Therefore, the Commission must approve the project.

1. Because the Lower Stairs Constitutes a Pre-Existing Non-Conforming Use, Denial of the Right to Repair this portion of the 300-foot Structure Would Constitute a Taking

Under the Coastal Act, any existing and lawfully established use, building or other structure that was in existence prior to the effective date of the Coastal Act, February 1, 1973, for areas subject to the California Coastal Zone Conservation Act, is considered a non-conforming use or structure. See *San Diego Coast Regional Com. v. See the Sea, Limited* 9 Cal. 3d 888 (1973) (persons who had performed substantial lawful construction on their projects prior to February 1, 1973 were exempt from the permit requirements of the 1972 Act). See also Malibu Local Coastal Program (“Malibu LCP”) §13.5(A) which provides that a “non-conforming use or structure” is “any existing and lawfully established or lawfully authorized . . . structure that [does] not conform to the policies and development standards of the certified Malibu LCP.”

The Commission Staff also acknowledges that the Lower Stairs existed prior to February 1, 1973. At page 5, it states that:

In the 1972 photograph, as a reference point, one can clearly identify the Applicant’s neighbor’s private bluff face staircase (*which is a non-conforming structure erected prior to the passage of the Coastal Act*) on a property immediately upcoast of the subject easement area. *The subject easement also contains a staircase, which descends along the northern side of the easement down the bluff.* It is smaller than the neighbor’s staircase to the left, but it is nonetheless identifiable as a staircase.

(Emphasis added).

Under the Malibu LCP, Local Implementation Plan (“Malibu LIP”) a structure, such as this 300-foot pathway structure, including the Lower Stairs, which existed prior to the Coastal Act, “may be repaired and maintained if it does not result in enlargement or expansion of the structure” and as of the date that a building permit was sought, did not require “replacement of

¹⁶ California Coastal Commission Staff Report: De Novo Review, p.15.

more than 50% of non-conforming structure . . .” §13.5(C).¹⁷ As demonstrated above, Mr. Drane applied for the building permit in 2002 for the repair of the Lower Stairs, at which time it did not require replacement of more than 50% of the non-conforming 300-foot structure.¹⁸ Therefore, it was clearly a non-conforming use and Mr. Drane is permitted to repair the Lower Stairs.

The Fifth Amendment provides that private property may not be taken for public use, without just compensation. The California Constitution also requires just compensation when private property is “taken or damaged for a public use.” Cal. Const., art. I, § 19; *Herzberg v. County of Plumas* (2005) 133 Cal.App.4th 1, 13). By including damage to property as well as its taking, the California Constitution “protects a somewhat broader range of property values’ than does the corresponding federal provision.” *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664; *Herzberg*, at p. 13.)

If Mr. Drane is not permitted to repair the Lower Stairs, this will constitute a taking. It is well established that the government may not abolish a non-conforming use without paying just compensation. Long ago, in *Jones v. City of Los Angeles* 211 Cal. 304 (1930), the Court held that “if the city desires to abolish a nonconforming use, this may be a legitimate object of the police power, but the means of its exercise must not include the destruction of the property interest without just compensation.” In *Trans-Oceanic Oil Corp. v. City of Santa Barbara*, 85 Cal.App.2d 776, 789 (1948), the Court held that “the owner of a property right to drill for and extract oil in a proven field acquired under a permit, may not constitutionally be deprived thereof without payment of just compensation except upon a showing that its exercise constitutes a nuisance.” In *Calvert v. County of Yuba*, 145 Cal.App.4th 613, 623 (2006), the Court held:

There is one more legal principle that plays a pivotal role in our analysis: the principle of vested rights. In light of the state and federal constitutional taking clauses, when zoning ordinances or similar land use regulations are enacted, *they customarily exempt existing land uses (or amortize them over time) to avoid questions as to the constitutionality of their application to those uses.* (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 551-552, 48 Cal.Rptr.2d 778, 907 P.2d 1324 (*Hansen*).) Such exempted uses are known as nonconforming uses and provide the basis for vested rights as to such uses. (*Ibid.*)

(Emphasis Added). See also *Avco Community Developers, Inc. v. South Coast Regional Com.* 17 Cal.3d 785, 791 (1976) (“Once a landowner has secured a vested right the

¹⁷ Moreover, one can argue that no Coastal Development Permit (“CDP”) is required. See §§13.4.2 and 13.5 of the Malibu LIP. Rather an administrative permit, in the form of an Application for a Building Permit is provided for in the Malibu LIP.

¹⁸ The Malibu LIP provides that if the non-conforming use is abandoned for a continuous period of not less than six months, any subsequent use shall be in conformity with the regulations specified by the LCP. However, as demonstrated above, the staircase was in continuous use at least until 2002, when the Applicant applied for a permit to repair it. Moreover, “abandonment of a nonconforming use involves both *an intent to abandon* and ‘an overt act, or failure to act which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use.’” (*Hansen v. Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal. 4th 533, 569 . . .). Mere cessation of use alone is not enough.” *Pallco Enterprises, Inc. v. Beam* 132 Cal. App. 4th 1482, 1498 (2005). Here, it is absolutely clear that the Applicant never manifested any intent to abandon the use. To the contrary, the applicant has been persistently attempting to obtain the permit to repair the lower 110’ of stairs.

government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.”¹⁹

Here, it is undisputed that the 300-foot structure, including the Lower Stairs, was in place prior to the passage of the Coastal Act. Therefore, it is a prior non-conforming use and denying Mr. Drane the right to replace the Lower Stairs, would constitute a taking for which just compensation would be required.

2. Denying the Application Would Constitute a Taking of the Easement

Mr. Drane owns the fee upon which the triplex is constructed at 7273 Birdview. He also owns an easement over the adjacent parcel for the specific purpose of accessing the beach via the 300-foot pathway structure, and more specifically the Lower Stairs in question. Denying Mr. Drane the right to maintain the Lower Stairs nullifies the intent of the easement and denies him the beneficial use of the 300-foot pathway structure from their 7273 Birdview Avenue property to Westward Beach. The Coastal Act, Section 30010 declares that the Commission is not authorized to “exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor,” Public Resources Code, § 30011. Further, the Malibu LCP, Land Use Plan (“Malibu LUP”) under Policy 3.10 allows for use of property where the minimum amount of development is necessary to avoid a taking based on the application of restrictions to ESHA of only resource-dependent use, where the proposed use is not consistent with the Environmentally Sensitive Habitat Area (ESHA) provisions of the Malibu LCP.

It is well established that where an easement is taken or damaged it constitutes a taking. Thus, in *City of Los Angeles v. Wright*, 107 Cal. App. 235 (1951) the court held that “an easement over land is real property and the holder of such easement is entitled to recover damages when such easement is taken or damaged for public use.” See also *George Bacich v. Board of Control of the State of California*, 23 Cal. 2d 343 (1943) (Taking of easement constitutes compensable taking). Therefore, denying the right to construct the Lower Stairs constitutes a taking of the entire easement.

Commission staff asserts that the easement was only for “pedestrian walking purposes” or for “pedestrian purposes” and did not include a right to any physical development. Therefore, it asserts that “if the Commission denies the permit to build the stairs, it has not taken away any rights even *purportedly* granted by their easement, and thus the Commission has not reduced the value of those easement . . . nor has it rendered them useless . . .” This completely ignores the circumstances pursuant to which the easement was issued as well as the existence of a structure on the easement, the 300-foot pathway structure, which included the Lower Stairs. As Commission Staff note, 7271 Birdview (the “Servient Property”) and 7273 Birdview (the “Dominant Tenement”) were originally on one parcel under one owner, Arthur B. Clenard and Eileen P. Clenard (the “Clenard Owners”). The Clenard Owners, of course, did not need to

¹⁹ In the Coastal Commission Staff Report, it asserts that “to the extent the Applicant claims he has the right to construct a staircase because one existed when he bought the property, he has failed to exhaust administrative remedies because he did not apply to the Commission for a vested rights determination. However, the Malibu LCP delegates authority to implement the Coastal Act to the City of Malibu and §13.5 of the LCP, which provides for non-conforming structures, does not require a party to seek a vested rights determination. In any event, the Applicant did apply for a building permit in 2002 to repair the Lower Stairs included in the 300-foot pathway structure from 7273 Birdview Avenue to Westward Beach.

create an easement on their own property for the 300-foot pathway structure to Westward Beach which they constructed in 196_ (see Exhibit "A", Affidavit of Eileen Clenard). However, when the Clenard Owners sold 7273 Birdview to the Dranes and the Schultzes in 1974, the Clenard Owners secured a lot split as a condition of escrow and included in the legal description the easement area, thus allowing the Applicant and their 1974 co-owner, the right to access Westward Beach through the easement to assure that he had continued use of the 300-foot pathway, including the Lower Stairs located on Servient Property [7271 Birdview Avenue]. That was the clear intent of granting the easement. (Clenard Affidavit, ¶ 5)²⁰ No one ever contemplated that the purpose of the 300-foot pathway structure, including the upper and Lower Stairs, terraced pad, dirt trail and concrete walkway was for walking apart from the improvements that make up the structure. (Clenard Affidavit, ¶ 7). This is particularly true because, at the time of the purchase of 7273 Birdview Avenue, Mr. Drane considered the easement and the 300-foot pathway structure to Westward Beach as a significant enhancement of the value of the Property. Indeed, because the easement runs down the bluff to Westward Beach and it is virtually impossible to walk down the bluff, both the upper and Lower Stairs are necessary to utilize the easement. (See Exhibit "E", Affidavit of Clark Drane). Commission Staff essentially admits this, arguing that "one feasible alternative project would be the placement of a non-structural pathway within the Applicant's easement area from the Applicant's triplex to no closer than 15 [feet] from the bluff edge." The irony of this assertion, is the fact that photographic evidence²¹ shows that the 300-foot pathway structure begins on the bluff face well above the Lower Stairs.

Commission staff also assert that the property owners can only convey rights that they possess and that in 1974 and 1999, when the easements were executed, the grantor did not have the absolute right to build stairs and, therefore, did not have a right to convey this right so that the easement is not enforceable. This argument is unbelievable and again ignores the plan facts. The 300-foot pathway structure already existed, including the Lower Stairs in 1974 and 1999 when the easements were executed and, as noted above, this was a pre-existing non-conforming use. Therefore, the grantor did have the right to convey an easement so that Mr. Drane could use and maintain the 300-foot pathway structure, including the Lower Stairs on the grantor's property.

Commission staff further assert that "the applicant remains free to use the property as he has since he purchased it." Again, this is simply wrong. The property, in this case is the easement and was only used for the 300-foot pathway structure from the Applicant's property to Westward Beach and, unless the Commission allows Mr. Drane to rebuild the Lower Stairs, he cannot possibly use it as he has since he purchased it. Perhaps, Staff expects that the 89-year-old Mr. Drane, or anyone else seeking to use the easement, will rappel himself down the bluff to access the beach.

Commission staff also argues that an easement is simply an interest in land and is not a "parcel" for purposes of a takings analysis. However, as noted above, the Supreme Court held in *U.S. v. Welch*, 217 U.S. 333, 339 (1910) that "a private right of way is an easement and is

²⁰ It is established that if the extent of the easement is in question, courts can infer intent from the "actual uses being made at the time of the grant [and] ... such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance." *Neff v. Ernst*, 48 Cal.2d 628, 635-636 (1957)

²¹ Commission Staff Report, Exhibit 4f, 2008 Aerial Photograph, Copyright © 2002-2009 Kenneth & Gabrielle Adelman, California Coastal Records Project

land. We perceive no reason why it should not be held to be acquired by the United States as incident to the fee for which it admits that it must pay. But if it were only destroyed and ended, a destruction for public purposes may as well be a taking as would be an appropriation for the same end." And, in *United States v. Grizard*, 219 U.S. 180, 182, the Supreme Court held that the elimination of an easement is a "physical taking."

The Commission staff relies heavily on *Lucas v. South Carolina Coastal Council* 505 U.S. 1003, 1014 (1992) to support their claim that denying the right to rebuild the Lower Stairs does not constitute a taking. It argues that under *Lucas*, there are only two categories of regulatory takings, a "categorical" taking, where a regulation denies all economically viable use of property" and a taking which is evaluated under the three part, ad-hoc test identified in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978). The Commission staff then asserts that because the regulation did not deny all economic value and does not fail the test set forth in *Penn Central*, there is not a taking here.

However, these cases are totally inapposite because they did not involve vested rights that had already been exercised by the party whose property was allegedly taken. Rather, they involved situations where regulations or actions were taken before the property owner had exercised its rights. In those situations, the Courts held that the property owner could have expected some restrictions going forward and therefore, there was only a taking if the tests in those cases were met. Here, however, as discussed above, the Lower Stairs had already been constructed within the easement as part of the 300-foot pathway structure from 7273 Birdview Avenue to Westward Beach. The right to construct the 300-foot pathway structure, including the Lower Stairs within the easement constituted a vested right and, as noted above, once that right to construct had vested, the State could not take that right without it constituting a taking. See cases cited above. See also *In re The Park Beyond The Park* 1995 WL 218524, 2 (C.A.9) (C.A.9,1995) ("California recognizes vested rights to particular land uses created by estoppel when landowners rely to their detriment on validly issued permits for a particular land use, see *Avco Community Developers v. South Coast Regional Comm'n*, 553 P.2d 546, 550 (Cal.1976), cert. denied, 429 U.S. 1083 (1977); *Blue Chip Properties v. Permanent Rent Control Bd.*, 216 Cal.Rptr. 492, 498 (Ct.App.1985).

Even if *Lucas* and *Penn Central* did apply, the denial of the right to replace the Lower Stairs would constitute a taking of the easement. As noted above, the purpose of the easement was to allow the use and maintenance of the 300-foot pathway structure, including the Lower Stairs. Denying the right to construct the replacement of the Lower Stairs denies Mr. Drane the entire value of the easement whose purpose was to allow the Applicant the right to use the 300-foot pathway structure, including the Lower Stairs to access Westward Beach.

In addition, even if it were to be found that the denial did not constitute a taking under *Lucas* because it was determined that the easement still had value, the denial of the Application would still constitute a taking under *Penn Central*. Under *Penn Central*, to determine whether there was a compensable taking when the property has not been deprived of all economically viable uses, the court will conduct an "essentially ad hoc, factual inquir[y]" focused on three factors: (1) the character of the governmental action, (2) the degree of interference with the reasonable, investment-backed expectations of the property owner, and (3) the economic impact of the action. See *Penn Central*, 438 U.S. at 124-28, 98 S.Ct. 2646; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 325-328, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); *Palazzolo*, 533 U.S. at 634, 121 S.Ct. 2448 (O'Connor, J.,

concurring).²² Essentially, one needs to weigh the economic harm against the regulatory benefits of the regulatory activity.

With regard to the reasonable investment backed expectations, the Commission staff argue that when Mr. Drane purchased the property and the easement in 1974, the precursor to the Coastal Act was already in effect so that the Applicant could have had no reasonable expectation of being able to rebuild the Lower Stairs if it were torn down. This, as already demonstrated, is simply wrong. First, as the Commission staff admit, the Lower Stairs were in place before the Coastal Act. Also, the evidence demonstrates that the Lower Stairs is and was a portion of the 300-foot pathway structure. Therefore, it was a pre-existing non-conforming use and Mr. Drane had every right to expect that the right to use and maintain the 300-foot pathway structure, including the Lower Stairs, would not be taken. With regard to the assertion that the Lower Stairs have deteriorated beyond recognition, this is also wrong. Again, as demonstrated above, the Lower Stairs remained in place until at least 2002 when Mr. Drane sought permission to repair them. Mr. Drane only needs to replace them because it took so long to process the permit due to the City's permit moratorium.

Commission staff also assert that there is insufficient evidence to show that Mr. Drane had any investment backed expectations. The Commission is well aware that properties along beach bluffs have significant value and that properties with beach access have significantly higher values. As noted in the April 4, 2007 letter from Richard Scott to the City of Malibu, "the easement from the parcel upon which the triplex is located to the beach is of course a valuable asset. Access to the beach is a significant enhancement to the lives of the tenants and owner of the property." See Exhibit "E", Affidavit of Clark Drane. It is clear that Mr. Drane valued the 300-foot pathway structure because he obtained the easement when he purchased the property in 1974, re-affirmed the right to the easement in 1999 and has undertaken significant efforts since that time to obtain use "approval" or "permits" to originally repair and now replace the Lower Stairs. Similarly, Commission staff assert that Mr. Drane presented no evidence that the Commission's actions would have any economic impact on the value of the properties. As noted above, it would deprive the easement itself of all of its value since its value was to use and maintain the 300-foot pathway structure, including the Lower Stairs. Second, it would deprive the Dominant Tenement of significant value because as already noted, it is well recognized that properties with beach access are worth significantly more than properties without beach access.

That leaves the third prong, the value of regulatory action. Here, the value is virtually nil because there is already a drainage pipe that occupies the same area that was, and would be, occupied by the replacement of the Lower Stairs. This has already had an impact on the alleged ESHA including native and non-native vegetation on the bluff face and already impacts the view and hillside resources. The replacement of the Lower Stairs will not have any additional negative impact. To the contrary, it will likely enhance the view. (Clark Drane Affidavit, ¶18) The Forde Report discussed above indicates that the location of the replacement Lower Stairs directly above the existing drain pipe, "...will require a minimal amount of vegetation to be removed to accommodate the proposed project."²³ Given the impact that denying the request will have on the value of the property, and the fact that it will have virtually

²² Again, here, however, the Commission would be denying the Applicant the entire use of the easement rather than only a part of it.

²³ Forde Biological Consultants, Biological Assessment, July 31, 2007, p. 5.



no negative impact on the environment or the view, the failure to approve the action would constitute a taking. See e.g. *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (1999) (Holding that where benefits of regulations were outweighed by economic impact, there was a taking which entitled the party to compensation. In short, under either a *Lucas* or *Penn Central* analysis, there will be a taking here if the CDP is denied.

CEQA Analysis

The Applicant concurs with the City of Malibu's CEQA Analysis. We believe that the proposed project is listed among the classes of projects, which have been determined not to have a significant effect on the environment, and therefore, is categorically exempt from the provisions of CEQA, pursuant to California Code of Regulations Section 15303(e).

Also, under New Construction or Conversion of Small Structures of the Malibu LIP, an exemption is allowed for "construction and location of limited numbers of new, small facilities or structures ... accessory (appurtenant) structures including garages, carports, patios, swimming pools and fences." The construction proposed is for the replacement of stairs and therefore falls under the provisions of this section .. We also agree that none of the six exceptions to the use of a categorical exemption applies to this project (CEQA Guidelines Section 15300.2).

Rebuttal of Coastal Commission Analysis

The Commission Staff Report relies on the information on the Application, as such they are assuming that the project is a new 110' stairs and that the proposed use is not a vested right. As such all of their analysis, including the CEQA analysis is not applicable, to the actual project, nor did staff have the opportunity to evaluate the alternative length for the Lower Stairs discussed above, which in terms of CEQA, would be considered an alternative to substantially lessen any adverse impacts. Further, the Applicant has offered to follow the suggested mitigation in the Forde Report to minimize any impact to nesting birds and to comply with all applicable CA Building Code requirements for structural, civic and geologic engineering as part of the building permit process for the construction of the replacement stairs.

Conclusion

We appreciate the opportunity to share our comments, concerns and objections to the Commission Staff Report. While we appreciate the thoughtful and detailed analysis present in their report, we restate our opinion that the analysis is both inaccurate and incomplete. We have attempted to present as much evidence as possible to address the record on this application so that the Commission will have a complete picture of the request. In addition, we have also analyzed each applicable provision of the Malibu LCP, LIP and LUP to support the different conclusion that should be made upon examination of the evidence presented here in our rebuttal in support of an approval of the CDP and Variances.

Finally, we urge each Commissioner to closely examine the section of our Rebuttal Letter that addresses the Takings issue. It is the foundation of our analysis and if found to have merit by the Commission would necessitate approval of the CDP and Variances to avoid an taking of



private property, but properly conditioned to lessen any significant adverse impacts to ESHA, Bluff Development, Scenic and Visual Resources and Public Access and Recreation.

Very truly yours,

A handwritten signature in blue ink that reads 'Linda A. Bernhardt'.

Linda A. Bernhardt

Enclosures

cc: Vice Chair Mary K. Shallenberger
Commission Members
Nicholas Dreher

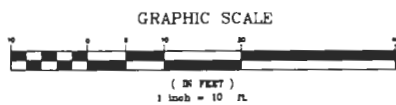


EXHIBIT A

**AFFIDAVIT OF EILEEN P. CLENARD REGARDING CREATION AND USE OF PATHWAY
FOR INGRESS AND EGRESS PRIOR TO THE EFFECTIVE DATE OF THE COASTAL ACT**

The undersigned, Eileen P. Clenard, an individual, hereby certifies that:

1. Along with my husband Arthur B. Clenard, I was the record and beneficial owner of 7271 Birdview Avenue, Malibu, California (the "Servient Property") from 1953 to 1999. The Servient Property was designated in the records of Los Angeles County as tax parcel APN 4468-020-021.

2. In 1960 there was constructed on the Servient Property a pathway, consisting of terraced land, trail and stairs for ingress and egress (the 1960 pathway). That pathway comprised a 300' by 5' bluff development running along the western edge of the Servient Property from Birdview Avenue to Westward Beach (Sealion Place).

3. Although I no longer have records pertaining to the construction of the 1960 pathway, I have included with this affidavit photographs taken during the 1960's which depict the 1960 pathway.

4. On or about August 1962, I obtained a building permit for the construction of a separate residence on a portion of the Servient Tenement that would later be subdivided to create a separate tax parcel APN 4468-020-022 ("the Dominant Tenement"). The Dominant Tenement's street address is 7273 Birdview Avenue, Malibu, California.

5. The 1960 pathway was continuously enjoyed by me and my family, guests and tenants from 1960 until the subdivision and sale of the Dominant Tenement in August 1974 to William A. Schultz and Carol Schultz, husband and wife, and Clark Drane and Mildred Drane, husband and wife, each couple possessing an undivided one-half interest, as tenants in common.

6. The sale of the Dominant Tenement in 1974 is evidenced by a grant deed dated August 21, 1974. A true and correct copy of that grant deed is attached hereto as Exhibit "A" and is incorporated herein by this reference. As reflected in that grant deed, the property conveyed includes, among other interests, "an exclusive easement for pedestrian walking purposes only over a strip of land five (5) feet wide" across the Servient Property for the benefit of the Dominant Property and legally described in the same (the recorded easement). The legal description of the recorded easement corresponds to the location of the 1960 pathway. The purpose of the easement was to provide access to Westward Beach via the 1960 pathway including the lower stairs.

7. In the sale of the Dominant Tenement in 1974 the easement conveying rights in and to the 1960 pathway, which included the two staircases, providing the new owners with private access via the 1960 pathway including, the lower stairs, to and from Westward Beach.

8. I make this Affidavit for the purpose of confirming the historical fact that the 1960 pathway was constructed, and continuously maintained for the beneficial use of the owners, prior to the effective date of the Coastal Act.

9. The undersigned declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10. Signed and dated November 11, 2010 at Rochester Hills, Michigan.
~~California.~~

Eileen P. Clenard POA
Eileen P. Clenard

Michigan
STATE OF CALIFORNIA)
Oakland) ss.
COUNTY OF LOS ANGELES)

On November 12, 2009, before me, Wes McWethy, the undersigned Notary Public, personally appeared Eileen P. Cleward, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity(ies) upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

WES MCWETHY
NOTARY PUBLIC, OAKLAND COUNTY, MI
MY COMMISSION EXPIRES JUNE 21, 2014

Wes McWethy
Signature

[Seal]

**EXHIBIT A TO
EILEEN CLENARD
AFFIDAVIT**

7271 Birdview Avenue

Lower Stairs, c. 1963



Order No. LA 748391
Escrow No. 582-3216
Loan No.

2506

06388920

WHEN RECORDED MAIL TO:

Mr. William A. Schultz, et al
c/o Bank of America NT&SA
Malibu Office #582
23676 W. Malibu Road
Malibu, Calif. 90265
(Escrow No. 3216)

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA
27 MIN. 11 A.M. AUG 21 1974
Recorder's Office

FEE
\$4.20

MAIL TAX STATEMENTS TO:

SAME AS ABOVE

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DOCUMENTARY TRANSFER TAX \$ 108.35

...X. Computed on the consideration or value of property conveyed; OR
..... Computed on the consideration or value less liens or encumbrances
remaining at the date of sale.

Shirley L. Adams
Signature of Declarant or Agent determined by the
BANK OF AMERICA
MALIBU, CALIFORNIA 90265

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged;

Arthur B. Glenard and Eileen P. Glenard, husband and wife

hereby GRANT(S) to

William A. Schultz and Carol E. Schultz, husband and wife, as to an undivided one-half
interest, and Clark Drane and Mildred Drane, husband and wife, as to an undivided one-
half interest, as tenants in common
the real property in the ~~City of~~ unincorporated area of the
County of Los Angeles

per legal description more particularly described in Exhibit "A" attached hereto and made
a part hereof consisting of one page:

Dated August 15, 1974

STATE OF CALIFORNIA
COUNTY OF
Los Angeles

Arthur B. Glenard
Arthur B. Glenard

Eileen P. Glenard
Eileen P. Glenard

On August 16, 1974

before me, the undersigned, a Notary Public in and for said
State, personally appeared Arthur B. Glenard and
Eileen P. Glenard

known to me to be the person(s) whose name(s) are
subscribed to the within instrument and acknowledged that
they executed the same.
WITNESS my hand and official seal.

Signature *Betty L. Adams*



(This area for official notarial seal)

MAIL TAX STATEMENTS AS DIRECTED ABOVE

1002 (10/69)

748391

PARCEL 1:

A parcel of land, as confirmed to Matthew Keller by the Patent recorded in Book 1 Pages 407 et seq., of Patents, in the office of the County Recorder of said County, more particularly described as follows:

Beginning at the intersection of the center line of Road Easement No. 1 (Birdview Avenue) with the center line of Road Easement No. 3 (Sealion Place) as said road easements are described in the Declaration of Easement filed for record August 21, 1946 in Book 23683 Page 17, Official Records of said County; thence along said center line of Road Easement No. 1 South $33^{\circ} 49' 01''$ East 69 feet thence South $56^{\circ} 10' 59''$ West 130.00 feet thence North $33^{\circ} 49' 01''$ West 110.00 feet thence North $56^{\circ} 10' 59''$ East 130 feet to said center line of Road Easement No. 1 thence along said last mentioned center line, South $33^{\circ} 49' 01''$ East 41.00 feet to the point of beginning.

The above described land being a portion of Parcel 25, in said County and State, as shown on map filed in Book 57 Page 41 of Record of Surveys, in the office of the County Recorder of said County.

Reserving onto the grantors, their successors and assigns an easement for ingress and egress, public utilities and incidental purposes over the Northeasterly 15 feet of said land.

EXCEPT therefor all minerals, oil, petroleum, asphaltum, gas, coal and other hydro-carbon substances in, on, within and under said lands and every part thereof, but without right of entry, as reserved by Marblehead Land Company, in deed recorded October 31, 1946 in Book 23928 Page 5, Official Records.

PARCEL 2:

An exclusive easement for pedestrian walking purposes only over a strip of land five (5) feet wide described as follows:

The Northeasterly five (5) feet of a parcel of land situated in the County of Los Angeles, State of California, being a portion of the Rancho Topanga Malibu Sequit as confirmed to Matthew Keller by Patent recorded in Book 1, Pages 407 et seq. of Patents Records of said County, said parcel of land described as follows:

Beginning at a point in the center line of Road Easement No. 1 (Birdview Avenue) described in the Declaration of Easement filed for record August 21, 1946 as Instrument No. 3439, said point of beginning being South $33^{\circ} 49' 01''$ East 908.91 feet from the Northwestern extremity of that certain centerline course described in said Easement No. 1 as South $33^{\circ} 49' 01''$ East 949.91 feet; thence from said point of beginning South $33^{\circ} 49' 01''$ East 41.00 feet along centerline to the point of intersection of the centerline of Easement No. 1 (Birdview Avenue) and Easement No. 3 (Sealion Place); thence continuing along said centerline of Easement No. 1 South $33^{\circ} 49' 01''$ East 69.00 feet; thence South $56^{\circ} 10' 59''$ West 130.00 feet; thence North $33^{\circ} 49' 01''$ West 110.00 feet; thence North $56^{\circ} 10' 59''$ East 130.00 feet to the point of beginning.

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EXHIBIT B

7271 Birdview Avenue

Lower Stairs, c. 1963

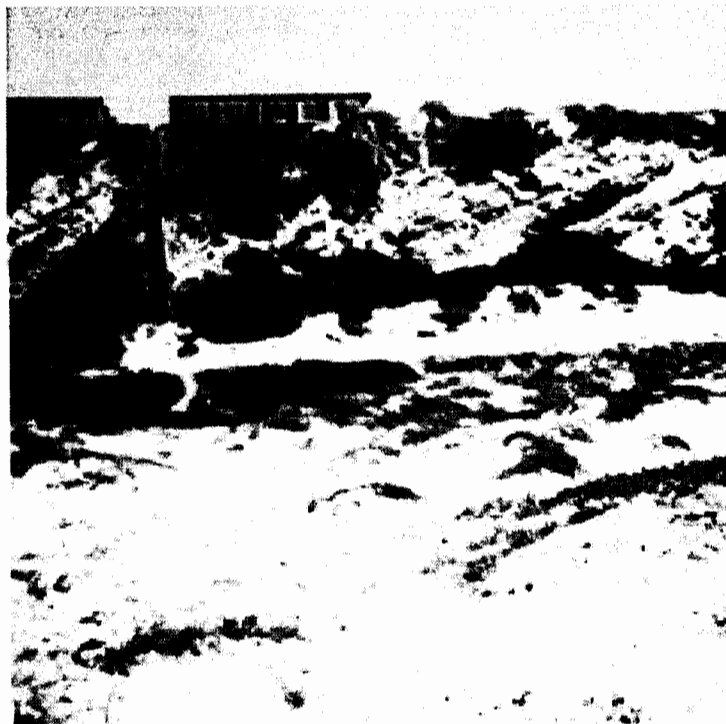


EXHIBIT C

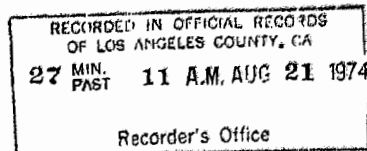
Order No. LA 748391
Escrow No. 582-3216
Loan No.

2506

BN 06388-920

WHEN RECORDED MAIL TO:

Mr. William A. Schultz, et al
c/o Bank of America NT&SA
Malibu Office #582
23676 W. Malibu Road
Malibu, Calif. 90265
(Escrow No. 3216)



FEE
\$4
20

MAIL TAX STATEMENTS TO:

SAME AS ABOVE

DOCUMENTARY TRANSFER TAX \$ 108.35
X Computed on the consideration or value of property conveyed; OR
..... Computed on the consideration or value less liens or encumbrances
remaining at time of sale.

Shirley L. Adams
Signature of Declarant or Agent determined by
BANK OF AMERICA
MALIBU, CALIFORNIA 90265

GRANT DEED

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
Arthur B. Glenard and Eileen P. Glenard, husband and wife

hereby GRANT(S) to

William A. Schultz and Carol E. Schultz, husband and wife, as to an undivided one-half
interest, and Clark Drane and Mildred Drane, husband and wife, as to an undivided one-
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the real property in the ~~City of~~ unincorporated area of the
County of Los Angeles

State of California, described as

per legal description more particularly described in Exhibit "A" attached hereto and made
a part hereof consisting of one page:

Dated August 15, 1974

STATE OF CALIFORNIA
COUNTY OF
Los Angeles

ss.

On August 16, 1974

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State, personally appeared Arthur B. Glenard and
Eileen P. Glenard

known to me to be the person(s) whose name(s) are
subscribed to the within instrument and acknowledged that
they executed the same.

WITNESS my hand and official seal.

Signature *Betty L. Adams*

Arthur B. Glenard
Arthur B. Glenard

Eileen P. Glenard
Eileen P. Glenard



(This area for official notarial seal)

MAIL TAX STATEMENTS AS DIRECTED ABOVE

1002 (10/69)

748391-5

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Reserving onto the grantors, their successors and assigns an easement for ingress and egress, public utilities and incidental purposes over the Northeasterly 15 feet of said land.

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EXHIBIT D

ESCROW INSTRUCTIONS
(REAL ESTATE TRANSACTION)

To: **Bank of America**
NATIONAL TRUST ASSOCIATION

Malibu # 582 Branch
Malibu Calif.

MEMO	
PAID OUTSIDE OF ESCROW \$	
CASH THROUGH ESCROW \$	20,000.00
UNPAID BALANCE OF ENCUMBRANCES OF RECORD	
P/M NEW ENCUMBRANCES \$	78,500.00
TOTAL CONSIDERATION \$	98,500.00

582-3216

Escrow No.

7273-7275-7277 Birdview Avenue
Street Address of Property

Malibu, California, 90265
City State Zip

☐ Vacant Lot ☐ Farmland ☐ Unimproved Acreage
(If Applicable)

Sheila Lennen

Escrow Officer

July 26, 1974

In consideration of your acting as escrow holder herein, it is agreed that you shall in no case or event be liable for forgeries or false personations in connection with these instructions, instruments of record, or those handled in this escrow.

It is further agreed that if any controversy arises between the parties hereto or with any third person, you shall not be required to determine the same or take any action in the premises, but you may await the settlement of any such controversy by final appropriate legal proceedings or otherwise as you may require, notwithstanding anything in the following instructions to the contrary, and in such event you shall not be liable for interest or damage. In the event of such controversy, you shall be entitled to reasonable compensation for all services performed by you and to costs and reasonable attorney's fees if you intervene in or are made a party to any litigation, the undersigned jointly and severally agreeing to pay the same, and you shall further be entitled to hold documents and monies deposited herein pending payment thereof.

I - - - hand you herewith through the broker, Coastal Realty, the sum of \$ 500.00 and will further hand you the additional sum of \$ 19,500.00

and will deliver to you any notes, instruments and additional funds required from me to enable you to comply with these instructions, all of which you are authorized and instructed to use and deliver provided instruments have been filed for record entitling you to procure assurance of title in the usual form of a Standard Joint Protection Policy of Title Insurance, issued by Los Angeles with a liability of \$ 98,500.00 covering property in the County of Los Angeles State of California described as follows:
as per legal description more particularly described in Exhibit "A" attached hereto and made a part hereof consisting of one page:

As per map recorded in Book _____ Page _____ of _____ Records of said County showing title vested in: William A. Schultz and Carol E. Schultz, husband and wife, as to an undivided one-half interest and Clark Drane and Mildred Drane, husband and wife, as to an undivided one-half interest, as tenants in common All General and Special taxes for the fiscal year 19 74 1975, a lien not yet subject to: (1) INCLUDING ANY SPECIAL DISTRICT LEVIES, PAYMENTS FOR WHICH ARE INCLUDED THEREIN AND COLLECTED PAYABLE THEREWITH, AND PERSONAL PROPERTY TAXES, IF ANY, ASSESSED AGAINST ANY FORMER OWNER.

(2) Assessments and Bonds, presently of record, having a present unpaid balance of none

(3) Any covenants, conditions, restrictions, reservations, rights, rights of way and easements of record

(4) Deed of Trust securing an indebtedness of \$ none, as per its terms, now of record, unpaid balance of principal \$ none Any difference in unpaid balance as disclosed by beneficiary statement will be adjusted through escrow so that the total consideration remains unchanged.

Purchase money and so it shall recite:

(5) Deed of Trust on Bank of America N.T. & S.A. form, executed by William A. Schultz and Carol E. Schultz, husband and wife, and Clark Drane and Mildred Drane, husband and wife securing a Note for \$ 78,500.00 in favor of Arthur B. Clenard and Bileen P. Clenard, husband and wife, as joint tenants dated during escrow with interest at 9.5 per cent per annum, from close of escrow payable monthly at Malibu, California

principal and interest due and payable in instalments of \$ 666.08 ~~OR MORE~~ each on the same day of every calendar month, beginning 30 days after close of escrow and continuing until the same day of December, 1974; thereafter principal and interest payable in instalments of \$666.08 OR MORE, beginning January, 1975 and continuing monthly thereafter until five years from close of escrow on which date the entire unpaid balance of principal and interest shall be due and payable. At close of escrow insert dates on note.

THIS ESCROW IS CONTINGENT UPON THE FOLLOWING:

- 1: Buyers' approval of preliminary title report and covenants, conditions and restrictions within 5 days of receipt of same from escrow. In the event that you receive no written disapproval within said 5 day period you shall deem them approved.
 - 2: Buyers' approval of the location of the septic system for purposes of clean-out, buyers will hand you their written approval of this item 2.
 - 3: Seller furnishing buyer with confirmation of "Legal" lot split.
- As a matter of record only with which you as escrow holder are not to be concerned: Purchase price includes carpets, drapes, built-ins, freezer, washer and dryer.

As of close of escrow the following adjustments and prorations only are required in this escrow: taxes. Fire insurance premiums at buyers' option, buyers have option of assuming existing policy or obtaining new coverage. Interest on note, item 5 above, by endorsement on the reverse.

Unless otherwise provided make all prorations and adjustments on basis of 30 day month; real property taxes and assessments or bonds on figures provided by Title Report, excluding taxes on Personal Property not being conveyed through this escrow; rents on basis of statement approved by me; principal and interest on encumbrances of record based on statements by Beneficiary or holders of notes for collection; and interest on new encumbrances by endorsements on notes.

Seller represents and you are to assume that the premium on any insurance policy which seller hands to you or causes to be handed to you in this escrow, or which is revealed to be in the possession of a beneficiary, has been paid in full and that such policy has not been hypothecated. Forward such policies and/or endorsement forms to be attached thereto, if any, after close of escrow to the agent with a request that the insurer consent to the transfer thereof and/or the attachment of loss-payable endorsement or mortgagee's clause or other additions or corrections as required, and that the agent thereafter forward such policies and/or the endorsements thereto to the parties entitled thereto. Seller will pay prior to delinquency all taxes on real and personal property not being sold herein, which tax is a lien on the herein described real property. You are not to be concerned with same.

It is agreed by the parties hereto that so far as your rights and liabilities are concerned, this transaction is an escrow and not any other legal relation and you are an escrow holder only.

The expression "close of escrow" if written in these instructions shall mean the date instruments are filed for record.

It is understood that all disbursements shall be made to parties in interest, by your remittance and that remittance and instruments will be mailed to one of the parties entitled thereto, if more than one, to address given below. Instruct County Recorder to mail instruments in the same manner.

Deliver Title Policy to beneficiary of purchase money deed of trust and copy to new owners

I will pay, on demand, regardless of the consummation of this escrow, all charges incurred by you for me, including your usual escrow fee and usual charges, unless otherwise provided.

The seller agrees to furnish, at his expense, a report by a licensed structural pest control operator to the effect that the premises located at 7273-7275-7277 Birdview Ave., Malibu, Calif. are free from visible evidence in accessible areas of infestation by termites, dry rot or fungi. Charge the account of the seller with the cost of corrective work; preventative work, if any, shall be done at buyers' option and expense.

You are to obtain copy of fire insurance policy for sellers, showing them as 1st Mortgagees.

IF YOU ARE UNABLE TO COMPLY WITH THESE INSTRUCTIONS ON OR PRIOR TO August 15, 1974 YOU WILL COMPLY AS SOON THEREAFTER AS POSSIBLE UNLESS A WRITTEN DEMAND FOR RETURN OF MONEY OR INSTRUMENTS BY A PARTY TO THIS ESCROW IS RECEIVED BY YOU SUBSEQUENT TO SUCH DATE AND PRIOR TO THE RECORDING OF ANY INSTRUMENT PROVIDED FOR HEREIN.

Signature <u>William A. Schulte</u>	Signature <u>Clark Brane</u>
Address <u>Box 90715</u>	Address <u>C.P.</u>
Telephone <u>7273-75-77</u>	Telephone <u></u>

THE FOREGOING INSTRUCTIONS AND CONDITIONS ARE HEREBY APPROVED AND ACCEPTED IN THEIR ENTIRETY AND CONCURRED IN BY ME. I will supply you with funds, notes and instruments required from me to enable you to comply with these instructions, which you are authorized to use and deliver provided you hold for my account any instruments accruing to me and the sum of \$ 20,000.00 When property being conveyed is held in joint tenancy any cash derived therefrom in this escrow shall be joint tenancy funds.

Order search of title at once. Deduct all my expenses from funds accruing to me. I will pay on demand, regardless of the consummation of this escrow, all charges incurred by you for me (except those other party has agreed to pay), including title charge, fee for preparing instruments I execute, your usual escrow fee and usual charges, unless otherwise provided.

~~NOTES~~ ~~STAMPS~~ Stamps are to be affixed to Deed I execute in the amount of \$ 100.35

Make following disposition of proceeds due me:

1. Credit Com'l account of at your Branch.
2. Mail Check to me at address given below unless otherwise advised

Signature <u>Arthur S. Glonard</u>	Signature <u>Bileen P. Glonard</u>
Address <u>7271 Birdview Avenue</u>	Address <u>same</u>
Telephone <u>Malibu, Calif. 90265</u>	Telephone <u>same</u>

EXHIBIT E

AFFIDAVIT OF CLARK DRANE

I, Clark Drane, declare as follows:

1. I have personal knowledge of the facts set forth in this Affidavit and, if called as a witness, could and would testify competently to such facts under oath.

2. I reside at 6914 Grenoble Street, Tujunga, California 91042. I am currently 89 years old.

3. I purchased the residence located at 7273 Birdview Avenue, Malibu, California (APN 4468-020-022) in 1974 ("7273 Birdview" or the "Property"). At the time I acquired the Property there was a 300' pathway structure which consisted of terraced land, a dirt trail, a concrete walkway, concrete driveway and stairs (upper and lower) that extended from the Property across the neighboring property, 7271 Birdview Avenue, Malibu, California, down to Westward Beach. I considered the 300' pathway structure a significant enhancement to the value of the Property. Therefore, I required, as a condition of the sale, that we be granted an easement to use the 300' pathway structure and I paid considerably more for the Property than I would have paid without the easement and the 300' pathway structure. All parties understood at the time that the purpose of the easement was to allow the owner of the Property use of the 300' pathway structure in perpetuity, including the lower stairs to provide access to Westward Beach from the Property.

4. The pathway structure was approximately 300' long. It included approximately 138.4 linear feet of concrete driveway and walkway, 15.9 linear feet of stairs (upper), 16.4 linear feet of terraced pad, 12.2 linear feet of dirt trail and 110 feet of stairs (lower) that extended from the Property to Westward Beach. Without the lower stairs, it would be virtually impossible to gain access to Westward Beach from the Property.

1 5. It is my understanding that the lower stairs, as part of the 300' pathway
2 structure, was constructed in 1960. Therefore, it was in existence prior to the passage of
3 the Coastal Act. The lower 110' of stairs existed when I purchased the Property in 1974
4 and were used continuously until at least 2002. At no time did I ever abandon the
5 entitlement to the 300' pathway structure, including the lower 110' of stairs.

6
7 6. By 2002, portions of the lower 110' of stairs were in need of repair. At the
8 time, the lower stairs were still in use. Therefore, I applied to the City of Malibu for a permit
9 to repair the lower stairs. I have been attempting to obtain permission to repair the lower
10 110' of stairs ever since.

11
12 7. The City of Malibu confirmed the existence of the lower stairs in a letter
13 dated, December 18, 2002, and attached hereto as Exhibit "A". The City also advised me
14 that the lower 110' of stairs were a non-conforming structure and use" pursuant to Section
15 17.60.020 of the Malibu Municipal Code.

16
17 8. After the moratorium on the issuance of planning permits was lifted in 2006, I
18 subsequently applied for a Planning Department, Over the Counter, Level I Review for a
19 Coastal Act Exemption on June 18, 2006 to repair the lower 110' of stairs to Westward
20 Beach under the Planning Division – Uniform Application File No. OC 06-060. The
21 Application for a CDP Exemption was approved and the plans stamped on June 23, 2006 as
22 CDPE 06-060.

23
24 9. Shortly thereafter, City Planning Staff informed me that after visiting the
25 project site that the amount of deterioration of the lower stairs disqualified my application
26 from being eligible for a CDP Exemption.

27
28

1 10. As a result, the City of Malibu stated to me that I needed to apply for a
2 Coastal Development Permit ("CDP") to permit the replacement of the lower 110' of stairs.

3
4 11. I immediately applied for the CDP as recommended by the City of Malibu,
5 although it now appears that the City's recommendation was in error because the lower 110'
6 of stairs had, in fact, been there when we applied for the original permit in 2002.

7
8 12. Unfortunately from 2002 to 2006, this portion of the 300' pathway structure
9 had become severely deteriorated. Then, upon visiting the project site in the fall of 2006,
10 City staff observed that the state of deterioration of the lower 110' of stairs made it
11 impossible to qualify for a CDP Exemption. This was an error because the severe
12 deterioration occurred as a result of the City's delay in approving the permit to repair.
13 Further, the City Staff also was in error in their evaluation of the project size, not
14 recognizing that the pathway structure was in fact 300 feet in length, whereby even the
15 replacement of the lower 110' of stairs still was below the 50% threshold in the Malibu LCP.

16
17 13. On May 19, 2009, the City of Malibu Planning Commission denied the CDP
18 and Variances. I then appealed this decision to the City Council.

19
20 14. September 21, 2009, the Malibu City Council approved the CDP and
21 Variances. The City Council's approval was appealed to the Coastal Commission.

22
23 15. On November 11, 2009, the Coastal Commission found that the appeal raised
24 a substantial issue in terms of the proposed project's conformance with the Malibu LCP.

25
26 16. To my knowledge, the easement has only been used to maintain the 1960_
27 300' pathway structure from my Property to Westward Beach, including the concrete
28 driveway and walkway, upper stairs, terraced pad, dirt trail and lower stairs.

17. If I am denied the right to replace the lower 110' of stairs, I will be denied a vested right which existed when I purchased the Property in 1974. In addition, I will be denied all of the value of the easement whose sole purpose was to allow the use and maintenance of the 300' pathway structure which includes the lower 110' of stairs.

18. There is an existing drain pipe that is anchored to the bluff face. This drain pipe existed when I purchased the Property in 1974 and its location was directly below the lower 110' of stairs. The location of the replacement stairs would again be above the drain pipe and occupy the same space. Therefore, I believe it would not damage the views, but would rather enhance the view. As such, the replacement of the lower 110' of stairs would not cause any additional harm to the environment.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 4 day of November, 2010, at Wilmington, California.

Clark Drane

EXHIBIT A
TO CLARK
DRANE
AFFIDAVIT



City of Malibu

23815 Stuart Ranch Road • Malibu, California • 90265-4816
(310) 456-2489 • fax (310) 456-7650

www.cityofmalibu.org

December 18, 2002

Clark Drane
C/O Mary Matza
26729 Latigo Shore Drive
Malibu, CA, 90265

Reference: **Inquiry regarding repair of stairs in beach access easement. 7273 - 75 - 77 Birdview Avenue**

Dear Mr. Drane:

On December 9, 2002, the City Planning Department received your inquiry regarding permitting requirements for a set of stairs located within a beach access easement fronting your triplex property. According to information you have provided, the access easement runs across your neighbor's property and is recorded as part of your property's deed instrument. The stairs in that beach access easement are deteriorated and are in need of repair. You have submitted photos of the stairs substantiating their existence. In addition, on December 2, 2002, staff visited Westward Beach on Point Dume and confirmed the existence of the subject stairs. You have verbally stated that the stairs in question are more than 30 years old.

Pursuant to 17.60.020 of the Malibu Municipal Code, the staircase in question is a non-conforming structure and use. As such, although the stairs do not comply with present design and development standards the staircase can be treated as a legal non-conforming structure. It is staff's understanding that you are requesting to repair and maintain the staircase. The scope of proposed work is restricted to repairing the stairway in its presently existing design and configuration. The staircase presently rests on the surface of the slope. There is no pouring or placement of foundation, no earthmoving, grading or fill activity associated with the proposed repair work to the stairs.

Given the above information it is planning staff's opinion that the work you have proposed constitutes repair to an already existing non-conforming structure. Thus, if no changes are made to the existing configuration and design as a result of the repair work, planning approval could be received by presenting the Planning Department with the following pieces of information for administrative review:

- ☐ Plan and elevation views of the staircase showing dimensions of the structure and detailing construction.
- ☐ Proof of the existence of a legal access easement across your neighbor's property.

December 18, 2002

This determination is based upon interpretation of the zoning ordinance and general plan in effect at time of correspondence. The determination is also based upon the information you have provided at the time of inquiry, if additional information modifying the subject proposed work becomes available, the terms of the determination could be subject to change.

I hope this letter answers your inquiry. If you have any further questions regarding this matter please contact me at 310 456-7650 ext. 339 or by email at malkire@ci.malibu.ca.us.

Sincerely,

Masa Alkire
Assistant Planner

December 9, 2002

City of Malibu
Masa Alkire, Assistant Planner
23815 Stuart Ranch Road
Malibu, California 90265-4861

Subject: Easement at 7273, 75, 77 Birdview, Malibu

Dear Masa,

Thank you for your time on researching the repair of our easement stairs. We would like to get something for our files stating the progress we have made at this time. As we proceed to the next step we do not want to lose the step we have made through the City of Malibu. If you were to leave or move to another department we do not want to start all over. Therefore, we would appreciate it if you could write a letter stating the information you have given us at this time.

As per our conversations we understand the following. The ordinance states that Malibu has the option to require a permit or not. Due to the fact that this is a repair and will be put back the same way it was originally built, Malibu will not require a new permit. The stairs will be in the same location, material and size as they exist now. You reminded us that we could not go more than 30 inches above ground.

You have stated that our next step would be a rough drawing of the stairs. We have already submitted photos, which you have reviewed with your department. At this time we are working on the drawing and will proceed to make a request to the coastal commission.

We appreciate your assistance on this matter. Please send your letter to the addresses listed below not the address on Birdview as we do not live at that address.

Thank you,

Clark Drane

Addresses:

Mimie27@charter.net

Clark Drane

C/o Mary Matza

26729 Latigo Shore Drive

Malibu, California 90265

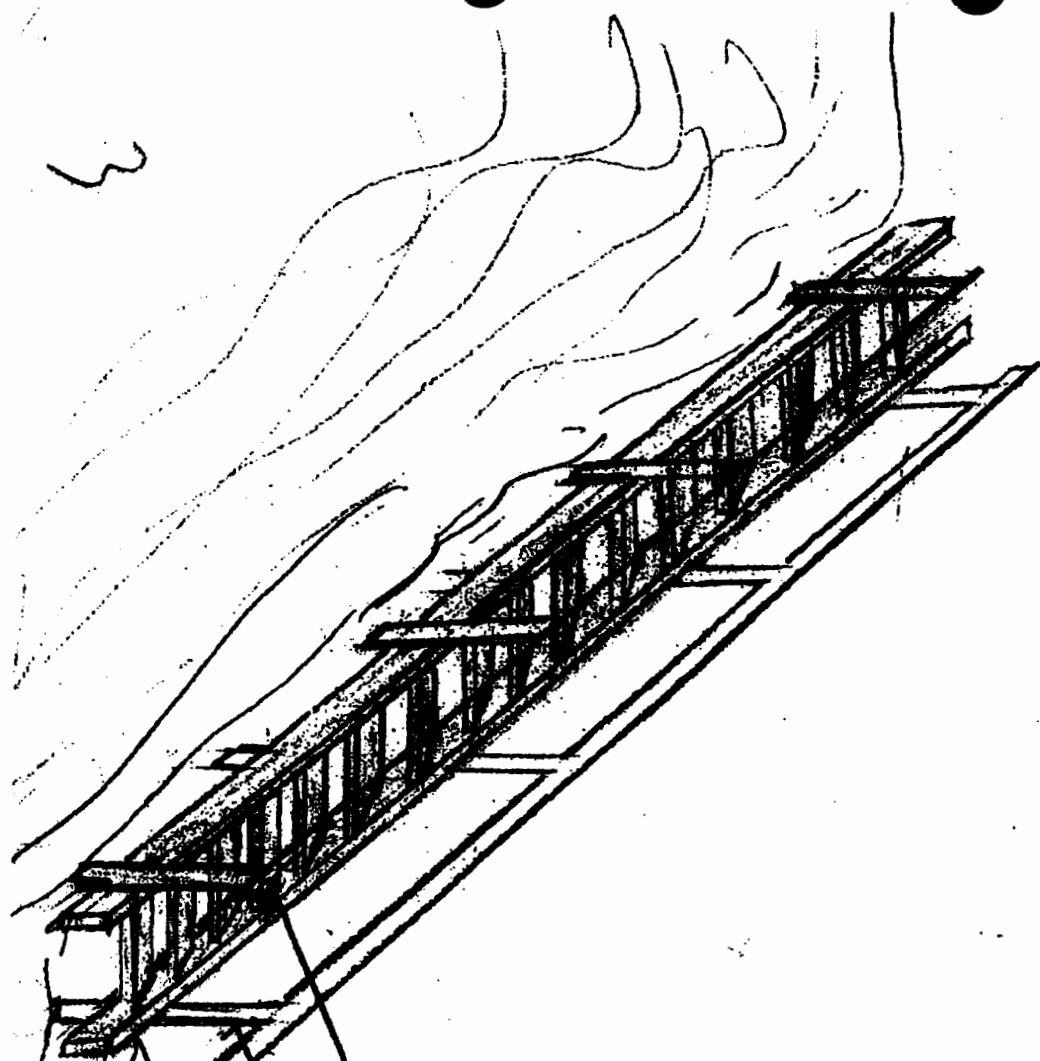
1-818-352-2509 or 310-457-3106

2002

Max Metzger
487.3106

Note: stairs start at edge
of bluff approx, 110'
At 45° angle down
to beach

Note: All wood to be
Pressure treated
and installed on
grade



Date:

EXHIBIT

F

First American
RECORDING REQUESTED BY

325106

Mr. Clark Drane
C/O Clark Drane Signs
7469 Foothill Boulevard
Tujunga, Ca. 91042

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA.
MAR 27 11 AM 1977
Recorder's Office

FEE
\$4
21

SPACE ABOVE THIS LINE FOR RECORDER'S USE

GRANT DEED

THE UNDERSIGNED GRANTOR(S) DECLARE(S)
DOCUMENTARY TRANSFER TAX IS \$ 104.50 (BASED ON 1/2 INTEREST)
X computed on full value of property conveyed, or
computed on full value less value of liens or encumbrances remaining at time of sale and

FOR A VALUABLE CONSIDERATION receipt of which is hereby acknowledged

WILLIAM A. SCHULTZ and CAROL E. SCHULTZ

hereby GRANT(S) to

CLARK DRANE and MILDRED DRANE, husband and wife, as community property

the following described real property in the

UNINCORPORATED
AREA

County of Los Angeles

State of California

(as more particularly described on "Exhibit A" attached hereto and made a part hereof)

Dated ²⁸ February 18, 1977

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

On February 28, 1977 before me the undersigned a Notary Public in and for said State personally appeared

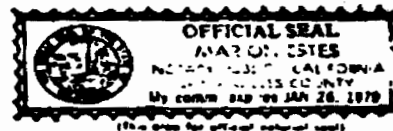
William A. Schultz and Carol E. Schultz

known to me to be the person(s) whose name(s) are subscribed to the within instrument and acknowledged that they executed the same

Witness my hand and official seal

William A. Schultz
William A. Schultz

Carol E. Schultz
Carol E. Schultz



MAIL TAX STATEMENTS AS DIRECTED ABOVE.

7701378-10

EXHIBIT A

DESCRIPTION: COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

PARCEL 1:

A parcel of land as confirmed to Matthew Keller by the Patent recorded in Book 1 Pages 407 et seq., of Patents, in the office of the county recorder of said county, more particularly described as follows:

Beginning at the intersection of the center line of Road Easement No. 1 (Birdview Avenue) with the center line of Road Easement No. 3 (Sealion Place) as said road easements are described in the Declaration of Easement filed for record August 21, 1946 in Book 23683 Page 17, Official Records of said county; thence along said center line of Road Easement No. 1 South 33° 49' 01" East 69 feet thence South 56° 10' 59" West 130.00 feet thence North 33° 49' 01" West 110.00 feet thence North 56° 10' 59" East 130 feet to said center line of Road Easement No. 1 thence along said last mentioned center line, South 33° 49' 01" East 41.00 feet to the point of beginning.

The above described land being a portion of Parcel 25 in said county and State as shown on map filed in Book 57 Page 41 of Records of surveys in the office of the county recorder of said county.

EXCEPT therefor all minerals, oil, petroleum, asphaltum, gas, coal and other hydrocarbon substances in, on, within and under said lands and every part thereof, but without right of entry, as reserved by Marblehead Land Company, in deed recorded October 31, 1946 in Book 23928 Page 5, Official Records.

PARCEL 2:

An exclusive easement for pedestrian walking purposes only over a strip of land 5 feet wide described as follows:

The Northeastly 5 feet of a parcel of land, being a portion of the Rancho Topanga Malibu Sequit as confirmed to Matthew Keller by Patent recorded in Book 1 Pages 407 et seq. of Patents, records of said county, said parcel of land described as follows:

Beginning at a point in the center line of Road Easement No. 1 (Birdview Avenue) described in the Declaration of Easement filed for record August 21, 1946 as Instrument No. 3439, said point of beginning being South 33° 49' 01" East 908.91 feet from the Northwestly extremity of that certain centerline course described in said Easement No. 1 as South 33° 49' 01" East 949.91 feet; thence from said point of beginning South 33° 49' 01" East 41.00 feet along centerline to the point of intersection of the centerline of Easement No. 1 (Birdview Avenue) and Easement No. 3 (Sealion Place); thence continuing along said center line of Easement No. 1 South 33° 49' 01" East 69.00 feet; thence South 56° 10' 59" West 430.00 feet; thence North 33° 49' 01" West 110.00 feet; thence North 56° 10' 59" East 430.00 feet to the point of beginning.

EXCEPT therefrom that portion described as follows:

Beginning at the intersection of the center line of Road Easement No. 1 (Birdview Avenue) with the centerline of Road Easement No. 3 (Sealion Place) as said road easement are described in the Declaration of Easement filed for record August 21, 1946 in Book 23683 Page 17, Official Records of said county; thence along said center line of Road Easement No. 1 South 33° 49' 01" East 69 feet; thence South 56° 10' 59" West 130.00 feet; thence North 33° 49' 01" West 110.00 feet; thence North 56° 10' 59" East 130 feet to said centerline of Road Easement No. 1; thence along said last mentioned center line, South 33° 49' 01" East 41.00 feet to the point of beginning.

77- 325106

END OF RECORDED DOCUMENT

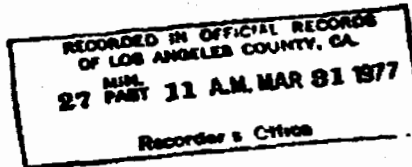
First American Title

7- 325107

RECORDING REQUESTED BY

AS WHEN RECEIVED MAIL THIS OFFICE AND UNLESS OTHERWISE ORDERED MAIL TAX STATEMENTS TO

Mr. Clark Drane
C/O Clark Drane Signs
7469 Foothill Boulevard
Tujunga, California



TIME OF FILING

Ex. No. 16912-H

SPACE ABOVE THIS LINE FOR RECORDER'S USE

FEE
\$4
27

GRANT DEED

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX is \$ NONE DUE

☐ computed on full value of property conveyed, or

☐ computed on full value less value of liens or encumbrances remaining at time of sale, and

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged.

Clark Drane and Mildred Drane, as Trustees of the
CLARK DRANE FAMILY REVOCABLE TRUST, established December 22, 1975

hereby GRANT(S) to

CLARK DRANE and MILDRED DRANE, husband and wife, as community property

the following described real property in the

UNINCORPORATED
AREA

County of Los Angeles

State of California.

(as more particularly described on "Exhibit A" attached hereto and made
a part hereof)

Dated February 18, 1977

STATE OF CALIFORNIA

COUNTY OF Los Angeles

On February 23, 1977

before me the undersigned, a Notary Public in and for said State, personally appeared

Clark Drane and Mildred Drane

CLARK DRANE FAMILY REVOCABLE TRUST

BY: Clark Drane

BY: Mildred Drane
Mildred Drane

I, Notary Public, do hereby certify that I am known to me
to be the person(s) whose name(s) are subscribed to the within
instrument and acknowledged that they executed the same
Witness my hand and official seal

Signature

Verda J. Harris



(This space for official notary seal)

PS 5-177

MAIL TAX STATEMENTS AS DIRECTED ABOVE.

7701378-10

EXHIBIT A

DESCRIPTION: COUNTY OF LOS ANGELES, STATE OF CALIFORNIA.

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EXCEPT therefor all minerals, oil, petroleum, asphaltum, gas, coal and other hydrocarbon substances in, on, within and under said lands and every part thereof, but without right of entry, as reserved by Marblehead Land Company, in deed recorded October 31, 1946 in Book 21928 Page 5, Official Records.

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7- 325107

END OF RECORDED DOCUMENT

EXHIBIT G



City of Malibu

23815 Stuart Ranch Road • Malibu, California • 90265-4816

(310) 456-2489 • fax (310) 456-7650

www.cityofmalibu.org

December 18, 2002

Clark Drane
C/O Mary Matza
26729 Latigo Shore Drive
Malibu, CA, 90265

Reference: Inquiry regarding repair of stairs in beach access
easement. 7273 - 75 - 77 Birdview Avenue

Dear Mr. Drane:

On December 9, 2002, the City Planning Department received your inquiry regarding permitting requirements for a set of stairs located within a beach access easement fronting your triplex property. According to information you have provided, the access easement runs across your neighbor's property and is recorded as part of your property's deed instrument. The stairs in that beach access easement are deteriorated and are in need of repair. You have submitted photos of the stairs substantiating their existence. In addition, on December 2, 2002, staff visited Westward Beach on Point Dume and confirmed the existence of the subject stairs. You have verbally stated that the stairs in question are more than 30 years old.

Pursuant to 17.60.020 of the Malibu Municipal Code, the staircase in question is a non-conforming structure and use. As such, although the stairs do not comply with present design and development standards the staircase can be treated as a legal non-conforming structure. It is staff's understanding that you are requesting to repair and maintain the staircase. The scope of proposed work is restricted to repairing the stairway in its presently existing design and configuration. The staircase presently rests on the surface of the slope. There is no pouring or placement of foundation, no earthmoving, grading or fill activity associated with the proposed repair work to the stairs.

Given the above information it is planning staff's opinion that the work you have proposed constitutes repair to an already existing non-conforming structure. Thus, if no changes are made to the existing configuration and design as a result of the repair work, planning approval could be received by presenting the Planning Department with the following pieces of information for administrative review:

- ☐ Plan and elevation views of the staircase showing dimensions of the structure and detailing construction.
- ☐ Proof of the existence of a legal access easement across your neighbor's property.

December 18, 2002

This determination is based upon interpretation of the zoning ordinance and general plan in effect at time of correspondence. The determination is also based upon the information you have provided at the time of inquiry, if additional information modifying the subject proposed work becomes available, the terms of the determination could be subject to change.

I hope this letter answers your inquiry. If you have any further questions regarding this matter please contact me at 310 456-7650 ext. 339 or by email at malkire@ci.malibu.ca.us.

Sincerely,

Masa Alkire
Assistant Planner

December 9, 2002

City of Malibu
Masa Alkire, Assistant Planner
23815 Stuart Ranch Road
Malibu, California 90265-4861

Subject: Easement at 7273, 75, 77 Birdview, Malibu

Dear Masa,

Thank you for your time on researching the repair of our easement stairs. We would like to get something for our files stating the progress we have made at this time. As we proceed to the next step we do not want to lose the step we have made through the City of Malibu. If you were to leave or move to another department we do not want to start all over. Therefore, we would appreciate it if you could write a letter stating the information you have given us at this time.

As per our conversations we understand the following. The ordinance states that Malibu has the option to require a permit or not. Due to the fact that this is a repair and will be put back the same way it was originally built, Malibu will not require a new permit. The stairs will be in the same location, material and size as they exist now. You reminded us that we could not go more than 30 inches above ground.

You have stated that our next step would be a rough drawing of the stairs. We have already submitted photos, which you have reviewed with your department. At this time we are working on the drawing and will proceed to make a request to the coastal commission.

We appreciate your assistance on this matter. Please send your letter to the addresses listed below not the address on Birdview as we do not live at that address.

Thank you,

Clark Drane

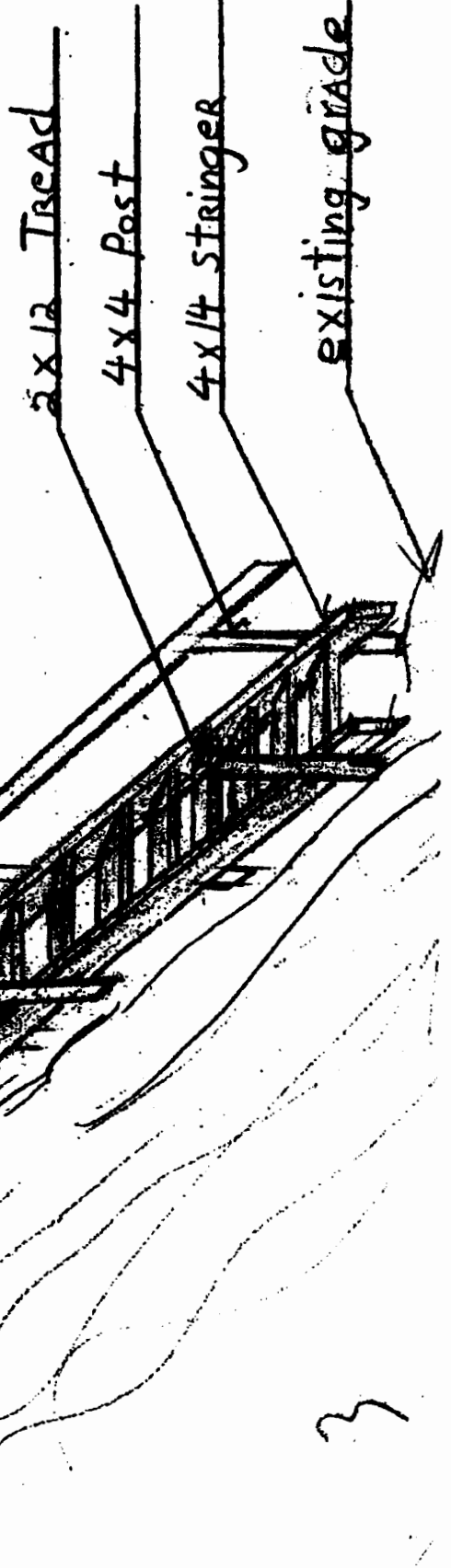
Addresses:
Mimie27@charter.net
Clark Drane
C/o Mary Matza
26729 Latigo Shore Drive
Malibu, California 90265
1-818-352-2509 or 310-457-3106

2002

max maza
457.3106

Note: STAIRS start at edge
of bluff approx, 110',
At 45° angle down
to beach

Note: All wood to be
Pressure Treated
AND installed on
grade



Date:

EXHIBIT

H



Lower Stairs
c.2002
Photograph 1



Lower Stairs, western banister, footings
c.2002
Photograph 2



Lower Stairs, fallen footing
c.2002
Photograph 3



Lower Stairs, Close-up of footings and drain
Pipe,
c.2002
Photograph 4



Lower Stairs, view from Westward Beach
c.200
Photograph 5

EXHIBIT I



City of Malibu

23815 Stuart Ranch Rd, Malibu, California 90265-4861
(310) 456-2489 FAX (310) 456-7650
www.ci.malibu.ca.us

PLANNING DIVISION - UNIFORM APPLICATION

GENERAL INFORMATION

PROJECT ADDRESS: 7273 - 75 - 77 Birdview Avenue
A.P.N.: 4468-020-022 ZONING: OVERLAY DIST.: ARCHAEOLOGY REVIEW:
PROPERTY OWNER: CLARK DRAKE / Mary Matzo
OWNER ADDRESS: 26729 LOTICO SHORE DRIVE, MALIBU
OWNER PHONE #: 310-457-3106 OWNER FAX #: 310-457-3865
APPLICANT / CONTACT: Mary Matzo JAMES CUNNINGHAM
APPLICANT ADDRESS: Same 7273 BIRDVIEW AVE
APPLICANT PHONE #: 310-633-1254 APPLICANT FAX #: 818-597-0626
APPLICANT E-MAIL: mimie27@charter.net

REVIEW REQUESTED (Check All Applicable Boxes)

Fee will be filled in by staff

- ☐ Admin. Plan Review - Residential
- ☐ Admin. Plan Review - Commercial
- ☐ Amendments
 - ☐ General Plan Amendment
 - ☐ General Plan Map Amendment
 - ☐ Zoning Text Amendment
 - ☐ Zoning Map Amendment
- ☐ Appeal
- ☐ Archeology Review (Phase)
- ☐ Categorical Exemption
- ☒ Coastal Development Permit
 - ☐ with ESHA ☐ without ESHA
- ☒ Coastal Act Exemption
- ☐ Conditional Use Permit
 - ☐ Major ☐ Minor
- ☐ Demolition Permit
- ☐ Determination of Use
- ☐ Lot Line Adjustment
- ☐ Neighborhood Standards
- ☒ Over the Counter
 - ☒ Level I ☐ Level II
- ☐ Pre-Application
- ☐ Sign Permit
 - ☐ Individual ☐ Master ☐ Temp
- ☐ Site Plan Review
- ☐ Stringline Determination
- ☐ Stringline Modification
- ☐ Temporary Use Permit
- ☐ Tentative Parcel Map

- ☐ Tentative Tract Map
- ☐ Time Extension
- ☐ Variance
- ☐ Zone Text Interpretation
- ☐ Zoning Verification
- ☐ Other

Planning Fee Total

Referral fees

- Geology
 - ☐ \$625 ☐ \$1250
- Coastal Engineering - \$625
- Environmental Health
 - ☐ \$127 ☐ \$312.50 ☐ \$625
- Public Works - \$1576
 - ☐ \$1576 ☐ \$156/hour

Credit card fee (3.25%)

Total Fees

Payment method:

- ☐ cash
- ☒ check #
- ☐ credit card (auth#)

Received by: M. Pagan

DETAILED PROJECT DESCRIPTION (Attach Additional Sheets if Necessary)

Repair stairs to westward beach
Stairs existed in 1972 per image No 7234101 (1972)
of the California Coastal Records Project
No new footings or expansion. Repair only

STAFF USE

FILE # CC 06-060 ADDITIONAL FILE #s
DATE RECEIVED: 5/18/06 RECEIVED BY: M. Pagan
PREVIOUS FILE #s

PLANNING DIVISION - UNIFORM APPLICATION
PAGE 2 OF 2

Gross Lot Area (Square Footage or Acreage) _____

Adjusted Lot Area (Gross Lot Area Excluding Street Rights Of Way and Slopes Equal To or Greater Than 1:1) _____

Total Grading (Cubic Yards) Cut _____ Import _____ Fill _____ Export _____

EXISTING		PROPOSED	
1 st Floor Square Footage	_____	1 st Floor Square Footage	_____
2 nd Floor Square Footage	_____	2 nd Floor Square Footage	_____
Basement Square Footage	_____	Basement Square Footage	_____
Accessory (1 st Floor) Structure Sq. Ft.	_____	Accessory (1 st Floor) Structure Sq. Ft.	_____
Accessory (2 nd Floor) Structure Sq. Ft.	_____	Accessory (2 nd Floor) Structure Sq. Ft.	_____
Maximum Structure Height	_____	Maximum Structure Height	_____
Impermeable Lot Coverage	_____	Impermeable Lot Coverage	_____
Setbacks: Front _____ Rear _____		Setbacks: Front _____ Rear _____	
Side _____ Side _____		Side _____ Side _____	

COMMERCIAL PROJECT SUMMARY

EXISTING		PROPOSED	
Total Development Square Footage	_____	Total Development Square Footage	_____
Floor Area Ratio	_____	Floor Area Ratio	_____
Percentage of Landscaping	_____	Percentage of Landscaping	_____
Percentage of Open Space	_____	Percentage of Open Space	_____
Parking (calculate each use separately, attach additional sheets as necessary)			
Type of Use		# of Spaces	
1. _____		_____	
2. _____		_____	
3. _____		_____	
Maximum Structure Height	_____	Maximum Structure Height	_____
Impermeable Lot Coverage	_____	Impermeable Lot Coverage	_____
Setbacks: Front _____ Rear _____		Setbacks: Front _____ Rear _____	
Side _____ Side _____		Side _____ Side _____	

SIGN PERMITS

Type of Signs: Temporary _____ Window _____ Wall _____
Monument _____ Canopy _____ Uniform Sign Program _____

	LENGTH	WIDTH	HEIGHT	SQUARE FOOTAGE
1.	_____	_____	_____	_____
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____

Temporary Sign Installation Date _____ Temporary Sign Expiration Date _____

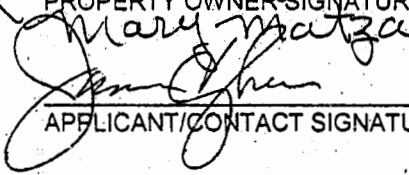
OWNER AND APPLICANT CERTIFICATIONS

I certify that I am presently the legal owner of the above-described property. Further, I acknowledge the filing of this application and certify that all of the information on Part One and Part Two of the application is true and correct. I grant permission to the City to conduct site visits necessary to investigate the proposed project. (If the undersigned is different from the legal property owner, then a letter of authorization must accompany this form.)


PROPERTY OWNER SIGNATURE

Clark Drane
PROPERTY OWNER NAME (PRINT)

5-18-06
DATE


APPLICANT/CONTACT SIGNATURE

JAMES CUNNINGHAM
APPLICANT/CONTACT NAME (PRINT)

5-18-06
DATE

REPAIR & REPAIR

457-3106

CLARK DRANE
7279 BIRDVIEW AVE
MALIBU CA 90265
MARY MATZA 457-3106

CONTRACTOR
BICK/CUNNINGHAM
310-633-1254

Note: stairs start
of bluff approx
at 45° angle
to beach

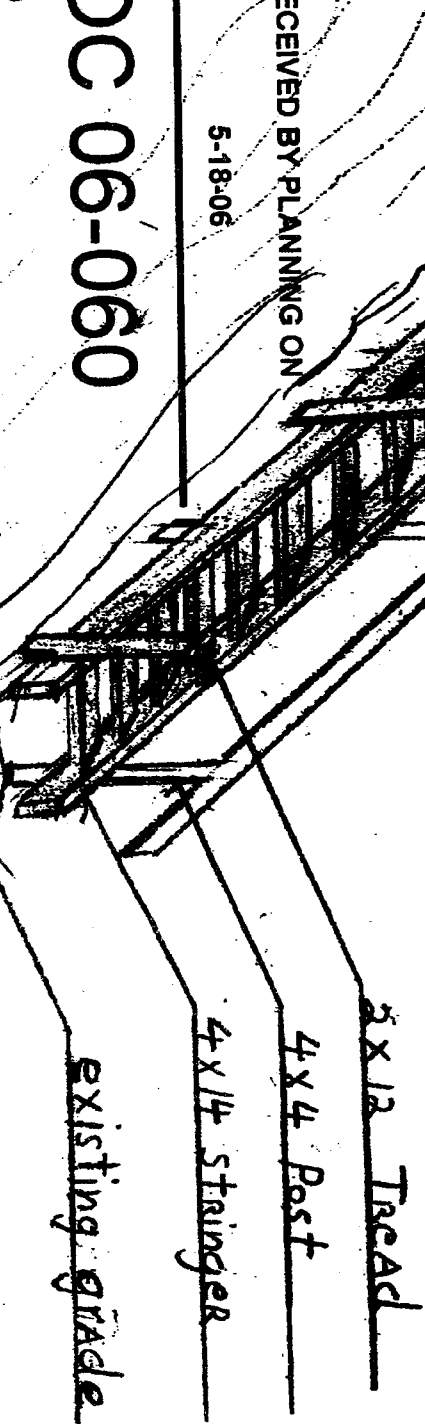
Note: All wood to be
pressure treated
and installed on
grade

CITY OF MALIBU PLANNING DIVISION	
THESE PLANS HAVE BEEN REVIEWED AND ARE IN CONFORMANCE WITH THE PLANS APPROVED ON: _____	
DATE	5/23/06
PLANNING REVIEW NO.	CC 06-060
SIGNATURE	COTE 06-060
PREP NAME	S. Edmunds

CC 06-060

RECEIVED BY PLANNING ON

5-18-06



Date:

• •

EXHIBIT

J



Planning Commission
Meeting
10-21-08

**Item
6.B.**

Commission Agenda Report

To: Chair House and Members of the Planning Commission

Prepared by: Stephanie Danner, Senior Planner *SD*

Reviewed by: Stacey Rice, Ph.D., AICP, Planning Manager *SR*

Approved by: Victor Peterson, Community Development Director *VP*

Date prepared: September 22, 2008 Meeting date: October 21, 2008

Subject: Coastal Development Permit No. 07-106 and Variance Nos. 07-052 and 08-057– An application to allow for the construction of a new staircase along a bluff face, accessory to an existing, residential triplex, providing access from the triplex to the public parking lot adjacent to Westward Beach Road, including a variance to reduce the required 50 foot setback from the bluff edge and a variance for construction on slopes in excess of 2½ to 1

Applicant: Richard N. Scott
Owner: Clark Drane
Location: 7273, 7275 and 7277 Birdview Avenue,
within the coastal zone
APN: 4468-020-022
Zoning: Rural Residential – One Acre (RR-1)
Application Filing Date: August 23, 2007

RECOMMENDED ACTION: Adopt Planning Commission Resolution No. 08-21 (Attachment 1), denying, without prejudice, Coastal Development Permit (CDP) No. 07-106 and Variance (VAR) Nos. 07-052 and 08-057 for the construction of a new staircase within a five-foot wide pedestrian easement along a bluff face, accessory to an existing, two-story residential triplex.

DISCUSSION: The issue before the Planning Commission is whether to adopt Planning Commission Resolution No. 08-21 denying CDP No. 07-106 and VAR Nos. 07-052 and 08-057. While this project warrants careful review and consideration, staff has determined the required findings for the coastal development permit and variances cannot be made.

Table 2 – Property Data	
Lot Shape	Square
Lot Depth	100 feet
Lot Width	110 feet
Gross Lot Area	10,890 square feet (0.25 acre)

The subject property lies within the appealable jurisdiction as depicted on the LCP Certification Permit and Appeal Jurisdiction Map. While the LCP Environmentally Sensitive Habitat Area (ESHA) Overlay Map does not depict the subject parcel as containing ESHA, Land Use Plan (LUP) Chapter 3(A)(2) designates that all coastal dunes and bluff face areas are designated as ESHA (Attachment 3).

Existing development on the subject property includes a two-story, multi-family residence that contains three separate units, perimeter fencing, an entrance driveway off of Birdview Avenue and mature landscaping.

The subject property borders a five-foot wide easement that begins at the southwest corner of the property, runs across the adjacent property at 7271 Birdview Avenue, down the bluff face, and terminates at the Westward Beach parking lot. The easement is for pedestrian purposes (Attachment 4). A drainage pipe is the only development within the easement. Historic photographs of the site, as provided by the California Coastal Records Project, do not reveal a staircase within the easement. The drainage pipe can be seen as early as 1972.

Project Description – CDP No. 07-106

The project scope includes the following:

- Construction of a new staircase which will lie entirely within a five-foot wide easement and will extend from the subject property down to Westward Beach road.
- VAR No. 07-052
A variance is included to allow for the construction of a staircase less than 50 feet from the face of a bluff. The required findings cannot be made and the reasons why are discussed later in this report.
- VAR No. 08-057
A variance is included to allow for the construction of a staircase on slopes in excess of 2½ to 1. The required findings cannot be made and the reasons why are discussed later in this report.

Analysis

LCP CONSISTENCY:

A. The following LUP policies prohibit the construction of structures on the face of a bluff:

LUP Policy No. 2.23 "No new structures or reconstruction shall be permitted on a bluff face, except for stairways or accessways to provide public access to the shoreline or beach or routine repair and maintenance or to replace a structure destroyed by natural disaster."

LUP Policy No. 3.58 "To protect seabird-nesting areas, no pedestrian access shall be provided on bluff faces except along existing, formal trails or stairways. New structures shall be prohibited on bluff faces, except for stairs or accessways to provide public beach access."

LUP Policy No. 4.29 "No permanent structures shall be permitted on a bluff face, except for engineered stairways or accessways to provide public beach access. Such structures shall be constructed and designed to not contribute to further erosion of the bluff face and to be visually compatible with the surrounding area to the maximum extent feasible."

The three policies listed above prohibit staircases on bluff faces, except those which provide public beach access. The proposed project is for a private staircase to link an existing triplex with Westward Beach Road to the southwest. As such, the project, as proposed, violates LUP Policy Nos. 2.23, 3.58 and 4.29.

LUP Policy No. 3.77 "Development on beach or ocean bluff areas adjacent to marine and beach habitats shall be sited and designed to prevent impacts that could significantly degrade the Environmentally Sensitive Habitats Areas. All uses shall be compatible with the maintenance of the biological productivity of such areas."

The City Biologist has reviewed the subject application for conformance with the LCP. In the review, dated October 28, 2007, the City Biologist determined that the project cannot be approved as submitted. The proposed staircase will not be compatible with the maintenance of the biological productivity of the bluff area.

LUP Policy No. 4.27 "All new development located on a blufftop shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion for a projected 100 year economic life of the structure plus an added geologic stability factor of 1.5. In no case shall the setback be less than 100 feet which may be reduced to 50 feet if recommended by the City geologist and the 100 year economic life with the

permitted on a bluff face, except for engineered stairways or accessways to provide public beach access where no feasible alternative means of public access exists.”

The proposed staircase does not maintain a 100 foot or even a 50 foot setback from the bluff top, as required by LIP Section 10.4(D). Furthermore, the staircase is for private use; and therefore, is prohibited by LIP Section 10.4(F).

Because the project does not conform to the development standards set forth in LIP Section 10.4, the applicant has requested a variance to the required 100-foot bluff setback. Staff has analyzed the proposal using the assumption that a variance may be granted if the evidence supports each of the required findings. Staff cannot substantiate the findings for a variance, as outlined below in D. Variance Findings.

Findings

The required findings necessary to approve the proposed staircase cannot be supported, as detailed below. Staff cannot substantiate the findings to grant a coastal development permit.

A. General Coastal Development Permit (LIP Chapter 13)

Pursuant to LIP Section 13.9, the following finding must be made for all coastal development permits.

Finding A. That the project as described in the application and accompanying materials, as modified by any conditions of approval, conforms with the certified City of Malibu Local Coastal Program.

The proposed project does not comply with LIP Chapters 4 and 10, as indicated above. Therefore, the project does not conform to the City of Malibu LCP and this finding cannot be made.

B. Environmentally Sensitive Habitat Area (LIP Chapter 4)

Any area not designated on the ESHA Overlay Map that meets the “environmentally sensitive area” definition (Chapter 2 of the Malibu LIP) is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The City Biologist has identified the physical extent of habitat meeting the definition of “environmentally sensitive area” on the project site, based on LUP Policy 3.77, available independent evidence and the applicant’s site-specific biological assessment prepared by Forde Biological Consultants on July 31, 2007 (Attachment 6).

that strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under the identical zoning classification.

There are no special circumstances or exceptional characteristics applicable to the subject property, including size, shape, topography, location, or surroundings such that strict application of the zoning ordinance would deprive the owner of privileges enjoyed by other properties in the vicinity and under the identical zoning classification. Indeed, the granting of a variance to allow construction of a private staircase down the face of a bluff would confer a special privilege not enjoyed by other properties. Strict application of the development restrictions set forth in LIP Chapters 4 and 10 would also not deprive the owner of privileges enjoyed by other properties in the vicinity under identical zoning classification. The parcel is currently developed with a multi-family residence, which constitutes reasonable, economically viable use of the property. Construction of a private staircase on the bluff face would confer a special privilege to the property owner.

Finding 2. The granting of such variance will not be detrimental to the public interest, safety, health or welfare, and will not be detrimental or injurious to the property or improvements in the same vicinity and zone(s) in which the property is located.

The granting of this variance would be detrimental to the public interest in that it would mar the natural beauty of the bluff face and could threaten a sensitive environmental area. It would also confer a special privilege to the owner of this property that is not enjoyed by owners of similar size properties with similar zoning and topography. While other properties in the immediate vicinity already have staircases that extend down the bluff face and terminate at Westward Beach, these staircases were constructed prior to the LCP and are presumably legal non-conforming structures. All new development applications for staircases down bluff faces are required to comply with all regulations set forth in the LCP.

Finding 3. The granting of the variance will not constitute a special privilege to the applicant or property owner.

The variance would constitute a special privilege to the property owner as other properties must comply with LCP development requirements and there is nothing distinguishing about this parcel that justifies a different application of development standards. The property is currently developed with a multi-family residence and the property owner has been provided reasonable use of the property. The easement does not confer a right to construct the bluff staircase and the private accessway is not a legally recognized "use" of the property.

Finding 4. The granting of such variance will not be contrary to or in conflict with the general purposes and intent of this Chapter, nor to the goals, objectives and policies of the LCP.

The granting of this variance would be detrimental to the public interest in that it would visually impact the natural beauty of the bluff face and could threaten a sensitive environmental area. It would also confer a special privilege to the owner of this property that is not enjoyed by owners of similar size properties with similar zoning and topography. While other properties in the immediate vicinity already have staircases that extend down the bluff face and terminate at Westward Beach, these staircases were constructed prior to the LCP and are presumably legal non-conforming structures. All new development applications for staircases down bluff faces are required to comply with all regulations set forth in the LCP.

Finding 3. The granting of the variance will not constitute a special privilege to the applicant or property owner.

The variance would constitute a special privilege to the property owner as other properties must comply with LCP development requirements and there is nothing distinguishing about this parcel that justifies a different application of development standards. The property is currently developed with a multi-family residence and the property owner has been provided reasonable use of the property. The easement does not confer a right to construct the bluff staircase and the private accessway is not a legally recognized "use" of the property.

Finding 4. The granting of such variance will not be contrary to or in conflict with the general purposes and intent of this Chapter, nor to the goals, objectives and policies of the LCP.

This variance request is contrary to the LCP in that it would confer a special privilege to the owner of this property that is not available to other owners of similar size properties with similar zoning and topography.

Finding 5. The variance complies with all requirements of State and local law.

The variance request does not comply with all requirements of State and local law. In particular, the request is inconsistent with the LCP. Specifically, there are no special circumstances warranting relief from the development requirements prohibiting the construction of new structures on slopes in excess of 2½ to 1.

ENVIRONMENTAL REVIEW: Pursuant to Section 15270 of the CEQA Guidelines, CEQA does not apply to projects which a public agency rejects or disapproves.

CORRESPONDENCE: To date, no correspondence has been received regarding the proposed project.

EXHIBIT K

ADDRESSES WITH STAIRS
AS OF
NOVEMBER 2010
12 OUT 36 HOMES



EXHIBIT

L

Biological Assessment

For an easement, which provides beach access for 7273, 7275, and 7277
Birdview Avenue, City of Malibu, Los Angeles County, California

RECEIVED
AUG 23 2007
PLANNING DEPT

Prepared by:



Prepared for:

RICHARD N. SCOTT, INC.
24955 Pacific Coast Highway, Suite C-202
Malibu, California 90265

July 31, 2007

This report is a true and accurate statement of the existing conditions of the easement, which provides beach access for 7273, 7275, and 7277 Birdview Avenue, City of Malibu, Los Angeles County, California and complies with the requirements of Chapter 4.4.2 of the City of Malibu Local Coastal Program, Local Implementation Plan (2002).

Signature

Date

TABLE OF CONTENTS

INTRODUCTION	1
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NATIVE TREE PROTECTION ORDINANCE	2
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NESTING BIRDS	3
ENVIRONMENTALLY SENSITIVE HABITAT AREAS.....	4
IMPACT ANALYSIS.....	4

Exhibits

Exhibit A: 1972 Aerial Photograph

Exhibit B: Photographs Depicting Remnant Staircase

Exhibit C: Photograph Depicting Existing Conditions

Exhibit D: Vegetation Map

Introduction

On June 22, 2007, Andrew McGinn Forde of Forde Biological Consultants (FBC) visited an easement, which provides beach access for 7273, 7275, and 7277 Birdview Avenue in the City of Malibu. The property is located in the Point Dume area approximately 1 mile south of Pacific Coast Highway. The easement is located between 7257 and 7271 Birdview Avenue and terminates at Westward Beach Road. A staircase previously occupied the easement. The staircase is evident in the 1972 aerial photograph included in Exhibit A. The staircase or parts thereof are also evident in the 2002 photographs included in Exhibit B. The City of Malibu previously approved construction of a replacement staircase; however, the project was stopped after the removal of the old staircase due to concerns raised by a neighbor. Photographs depicting existing conditions are included in Exhibit C.

This report documents dominant plant and wildlife species observed within the easement. These include species protected by the State Endangered Species Act,¹ the Federal Endangered Species Act,² and California fully protected species.³ The report also documents CDFG species of special concern and plant species on list 1B and list 2 of the California Native Plant Society's (CNPS) Inventory of Rare and Endangered Plants observed or expected to occur within the easement. For the purposes of this report, species protected by the above laws, species of special concern, and those plants listed by the CNPS are "special-status species." This report also documents the presence or absence of sensitive plant communities and protected trees, the potential for birds to nest at the property and the occurrence of wetland and streams under the jurisdiction of the City of Malibu Local Coastal Plan (City of Malibu LCP), California Department of Fish and Game (CDFG), the U.S. Army Corp of Engineers (USACE), and the Regional Water Quality Control Board (RWQCB).

¹ CAL. Fish & Game Code §§ 2050-2097

² 16 U.S.C. §§ 1531-1544

Vegetation

Non-native landscape plants and trees dominate the eastern portion of the easement. Native coastal bluff scrub dominates the western portion. Native species observed by FBC within the easement include California brickellbush (*Brickellia californica*), cliff aster (*Malacothrix saxatilis*), coastal prickly pear (*Opuntia littoralis*), giant coreopsis (*Coreopsis gigantea*), and lemonadeberry (*Rhus integrifolia*). Non-native iceplant is also present. Vegetation distribution is depicted in Exhibit D.

Native Tree Protection Ordinance

The Native Tree Protection Ordinance protects native trees including alder (*Alnus rhombifolia*), California walnut (*Juglans californica*), oak (*Quercus* sp.), toyon (*Heteromeles arbutifolia*), and western sycamore (*Platanus racemosa*). The purpose of the ordinance is to create favorable conditions for the preservation and propagation of native trees for the benefit of current and future residents of the City of Malibu. Trees protected by the ordinance must have at least one trunk with a diameter measuring 6 inches or more or a combination of two trunks with diameters totaling 8 inches or more as measured 4 ½ feet above the natural grade.⁴ FBC determined that there are no protected trees located within the easement.

Common Wildlife

The only species observed within the easement during the site visit were Anna's hummingbird (*Calypte anna*), house finch (*Carpodacus mexicanus*), northern mockingbird (*Mimus polyglottos*), and side-blotched lizard (*Uta stansburiana hesperis*). The only other wildlife expected to occur are common urban adapted species.

³ CAL. Fish & Game Code §§ 3511, 4700, 5050, & 5515

Special-Status Species

As defined by the City of Malibu LCP, special-status species include those that are protected by the State Endangered Species Act⁵ and the Federal Endangered Species Act.⁶ Special-status species also include California fully protected species,⁷ species recognized by the CDFG as species of special concern, and plant species on list 1B and list 2 of the CNPS Inventory of Rare and Endangered Plants. The City of Malibu LCP relies on the "Fully Protected Animals" list, the "State and Federally Endangered and Threatened Animals of California" list, and the "Special Animal's" list produced by the CDFG and on the "Proposed and Candidate Species" list produced by the Sacramento Fish and Wildlife Office for special-status species determinations.⁸ Due to the fact that the easement has been previously altered, FBC does not expect special-status species to occur.

Nesting Birds

The Migratory Bird Treaty Act protects the majority of migratory birds breeding in the US regardless of their official status. The Act specifically states that it is illegal "... for anyone to take ... any migratory bird ... nests, or eggs."⁹ "Take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.¹⁰ The California Fish & Game Code protects the nest or eggs of all birds and specifically states, "that it is unlawful to take, possess, or needlessly destroy the nest or eggs of any bird."¹¹ The Code defines "take" as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill."¹²

4 City of Malibu Local Coastal Plan, Local Implementation Plan, Chapter 5

5 CAL. Fish & Game Code §§ 2050-2097

6 16 U.S.C. §§ 1531-1544

7 CAL. Fish & Game Code §§ 3511, 4700, 5050, & 5515

8 CAL. Fish & Game, Fully Protected Animals, May 2003. CAL. Fish & Game, Special Animals, February 2006. CAL. Fish & Game, State & Federally Endangered & Threatened Species of California, October 2006. Sacramento Fish & Wildlife Office, Proposed & Candidate Species, Threatened & Endangered Species System, July 2007

9 16 U.S.C. §§ 703-712, Migratory Bird Treaty Act of 1918 as amended 1936, 1960, 1968, 1969, 1974, 1978, 1986 and 1989

10 50 C.F.R. § 10.12

11 CAL. Fish & Game Code § 3503

12 CAL. Fish & Game Code § 86

The coastal bluff scrub provides suitable nest sites for the common urban adapted species observed and for others that may occur. The CDFG recognizes the breeding season in Southern California as occurring between March 1 and September 1.¹³ However, Anna's hummingbird and northern mockingbird can nest outside this timeframe. In general, Anna's hummingbird nests from mid-December to mid-August and northern mockingbird nests from mid-February until late September.

Environmentally Sensitive Habitat Areas

The City of Malibu LCP defines ESHA as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem." ESHA include native habitats, which contribute to the viability of species protected by the State and Federal endangered species acts or those that are "fully protected" or recognized as "species of special concern" by the State. Any habitats with plant species on list 1B or list 2 of the California Native Plant Society's Inventory of Rare and Endangered Plants or habitats that are rare or valuable from a local, regional, or statewide basis including wetlands and streams are ESHA.¹⁴

According to the ESHA and Marine Resources Map, Zuma Beach to Escondido Beach, there are no Environmentally Sensitive Habitat Area's (ESHA) on the property.¹⁵ However, the City of Malibu in implementing the City of Malibu LCP considers all coastal bluffs as ESHA regardless of condition or past use. There are no streams or wetlands located on the property.

Impact Analysis

The proposed project includes construction of a new staircase, which replaces a previously existing staircase constructed during or before 1972. Coastal bluff scrub ESHA dominates the western portion of the easement; however, it is patchy. A drainage pipe currently occupies this area. The staircase would be

¹³ CAL. Fish & Game, Personal Communication, 2007

¹⁴ City of Malibu Local Coastal Plan, Local Implementation Plan, Chapter 4.1; City of Malibu Local Coastal Plan, Land Use Plan, Chapter 3.1

¹⁵ City of Malibu Local Coastal Plan, Local Implementation Plan, ESHA Overlay Map

constructed directly above this pipe, which would require a minimal amount of vegetation to be removed to accommodate the proposed project. All though minimal, vegetation removal may affect bird nests during construction.

As previously discussed, the Migratory Bird Treaty Act and the California Fish and Game Code protect bird nests. FBC recommends that the property owner schedule construction to occur outside the recognized breeding season and outside the breeding season of the species cited in this report. If this is not possible, a qualified biologist should conduct a nest survey within and immediately adjacent to the easement before construction begins and before the removal of any vegetation. If the biologist determines that there are no active nests, construction activities and vegetation can proceed. Construction activities and vegetation removal should occur within 5 days of the biologist completing the nest survey. If the biologist determines that active nests are located within or immediately adjacent to the easement, the biologist will establish an appropriate buffer for each active nest. No work will occur inside the buffer of an active nest until the fledglings are no longer dependent on the nest or until the biologist otherwise determines the nest is inactive.

Exhibit A

1972 Aerial Photograph



Staircase

Exhibit B

Remnant Staircase



Exhibit C



7273, 7275, and 7277 Birdview Avenue Easement



7273, 7275, and 7277 Birdview Avenue Easement

Exhibit D

Vegetation Distribution: 7273, 7275, and 7277 Birdview Avenue Easement

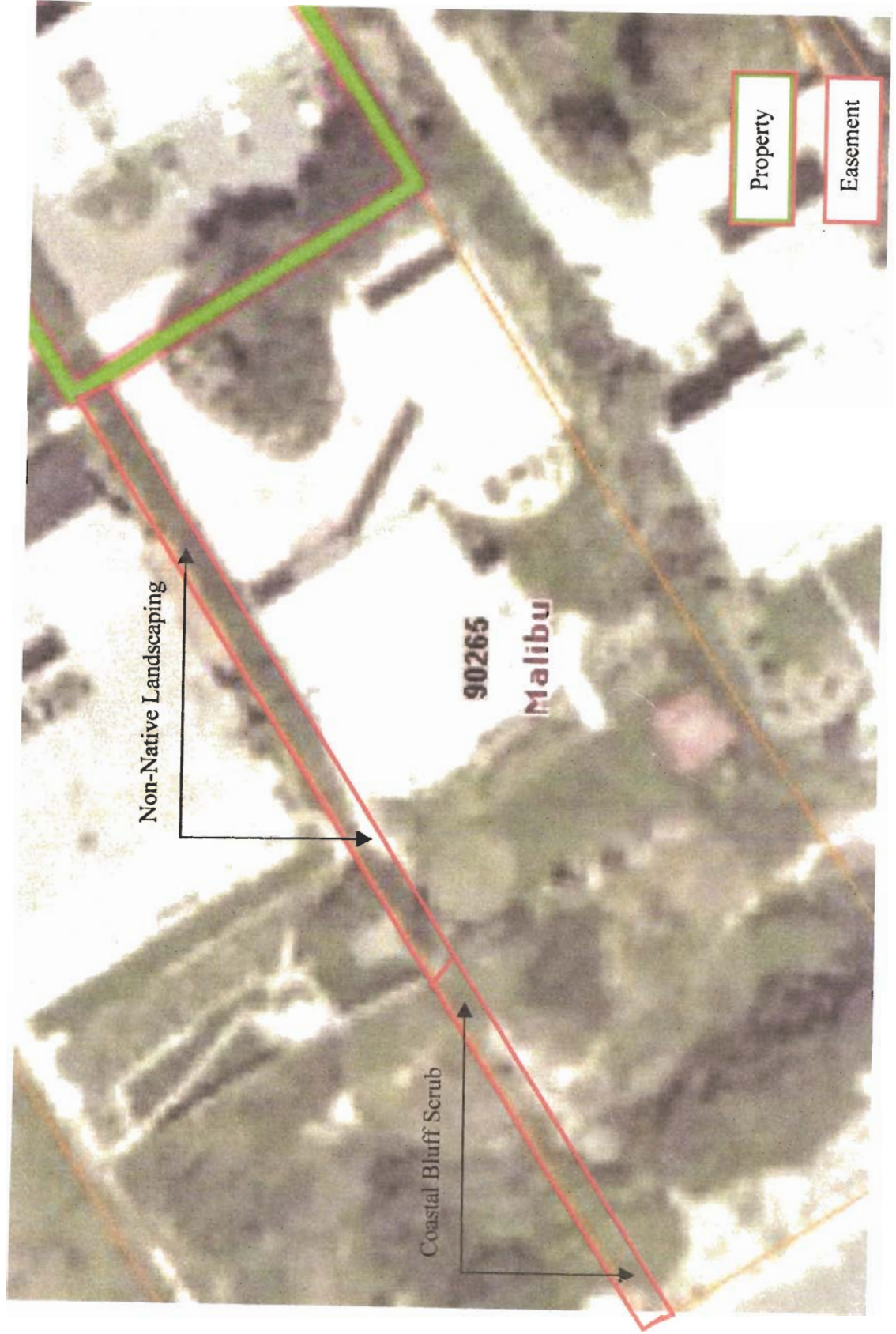


EXHIBIT M

hans laetz

zuma impact environmental analysis and reporting

6402 surfside way / malibu ca 90265
office / cell / home (424) 442-9862
hanslaetz@gmail.com

To whom it may concern,

31 October, 2010

My name is Hans Laetz, and I work as an environmental analyst and reporter in Malibu, California. I have over 30 years' experience as a fulltime journalist, and spent over two decades assigning journalists, and dispatching airborne TV news crews, around and over Southern California. I am a photojournalist carrying credentials from the Los Angeles Police Department and Los Angeles County Sheriff's Office. I am a member of the Los Angeles Radio Television News Association. I have a bachelor's degree in Journalism from the University of Arizona, a master's degree in Mass Communications-Journalism from California State University-Northridge, and a Juris Doctorate from the Santa Barbara-Ventura Colleges of Law. I graduated from law school in 2009 and have been working as an environmental impact report consultant and as a journalist since then.

I hereby attest that the photo I have labeled "1924 Drane aerial" is a digital copy of a photo labeled "E-17178", which was notated that it was taken at an altitude of 1,500 feet above Point Dume on 2 February 1924 by Spence Aerial Surveys of Los Angeles, a photo that is now a part of the UCLA Geography Department Collection.

I hereby attest that, as defined by California Evidence Code section 643, the photo I have labeled "Drane 1924 aerial" is an authenticated record as it "affect(s) an interest in real or personal property (and) is presumed to be authentic (as) it: (a) Is at least 30 years old; (b) Is in such condition as to create no suspicion concerning its authenticity; (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and (d) Has been generally acted upon as authentic by persons having an interest in the matter."

Under possible penalty of perjury, I hereby attest that the above is true, on this date, October 31, 2010, at Malibu, California.

Hans Laetz
Environmental Consultant,
Zuma Impact LLC
Malibu CA



1924 Drane
Point Dume railway

hans laetz

zuma impact environmental analysis and reporting
6402 surfside way / malibu ca 90265
office / cell / home (424) 442-9862
hanslaetz@gmail.com

To whom it may concern,

11 November, 2010

My name is Hans Laetz, and I work as an environmental analyst and reporter in Malibu, California. I have over 30 years' experience as a fulltime journalist, and spent over two decades assigning journalists, and dispatching airborne TV news crews, around and over Southern California. I am a photojournalist carrying credentials from the Los Angeles Police Department and Los Angeles County Sheriff's Office. I am a member of the Los Angeles Radio Television News Association. I have a bachelor's degree in Journalism from the University of Arizona, a master's degree in Mass Communications-Journalism from California State University-Northridge, and a Juris Doctorate from the Santa Barbara-Ventura Colleges of Law. I graduated from law school in 2009 and have been working as an environmental impact report consultant and as a journalist since then.

I hereby attest that the photo I have labeled "1924 Drane east of Point Dume" is a digital copy of a photo labeled which was notated that it was taken at an altitude of 1,500 feet above Point Dume on 2 February 1924 by Spence Aerial Surveys of Los Angeles, a photo that is now a part of the UCLA Geography Department Collection.

This photo depicts the Hueneme, Malibu and Port Los Angeles Railway roadbed as it crosses a trestle at the right edge of the photo, over Ramirez Canyon, and curves south down the central highland of Point Dume, diverging from the county road at a spot near the intersection of present-day Pacific Coast Highway at Zumirez Drive, over a trestle at what is now Wildlife Drive, and crosses the current-day campus of Point Dume elementary school on a southward trajectory, towards the point itself and the downgrade carved along the coastal cliffs west of the point.

I hereby attest that, as defined by California Evidence Code section 643, the photo I have labeled "1924 Drane east of Point Dume" is an authenticated record as it "affect(s) an interest in real or personal property (and) is presumed to be authentic (as) it: (a) Is at least 30 years old; (b) Is in such condition as to create no suspicion concerning its authenticity; (c) Was kept, or if found was found, in a place where such writing, if authentic, would be likely to be kept or found; and (d) Has been generally acted upon as authentic by persons having an interest in the matter."

Under possible penalty of perjury, I hereby attest that the above is true, on this date, November 11, 2010, at Malibu, California.

Hans Laetz
Environmental Consultant,
Zuma Impact LLC
Malibu CA



1924 Drane
East of Point Dume



EXHIBIT N

PARKING LOT

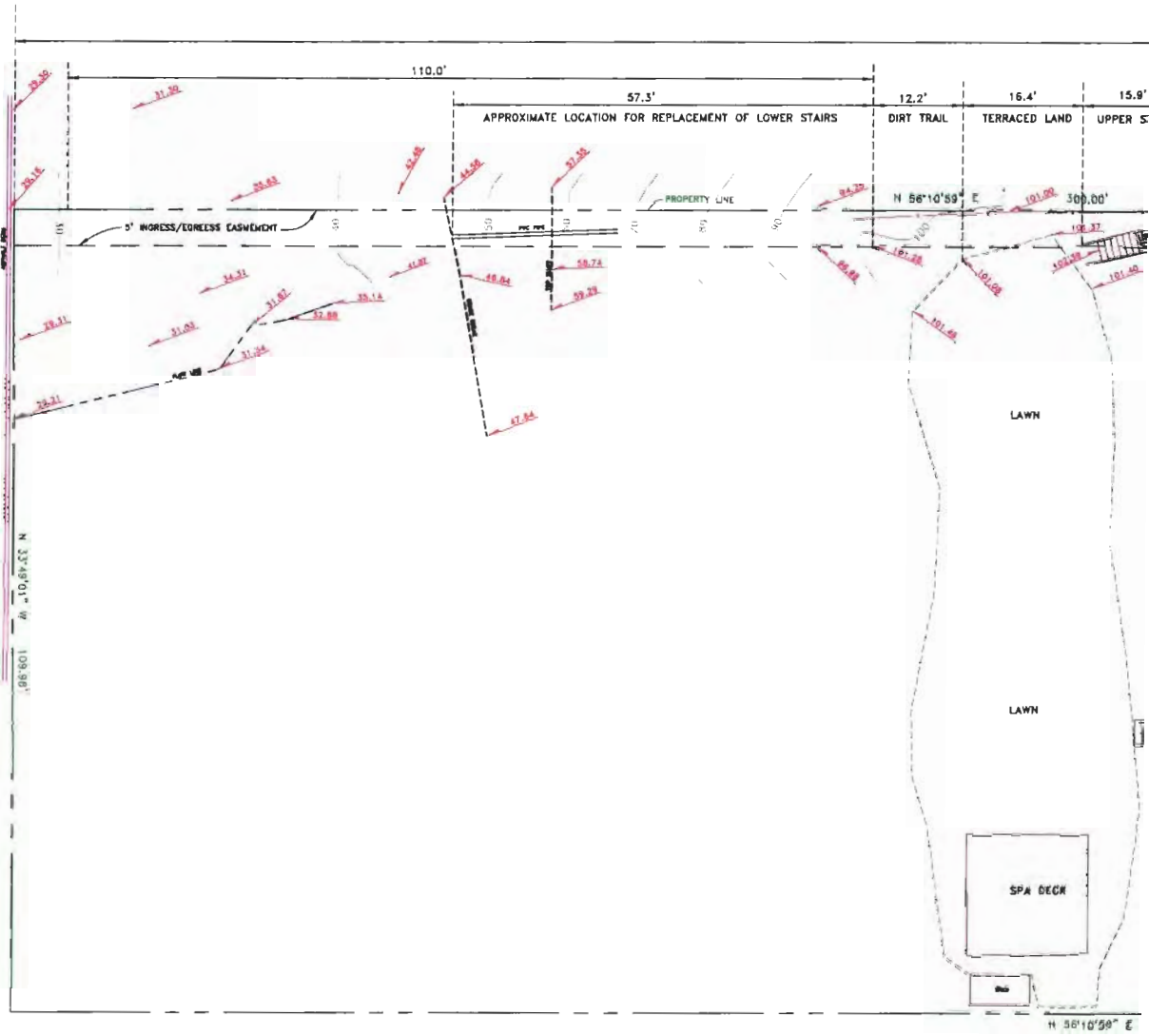


EXHIBIT O



EXHIBIT P



EXHIBIT Q

RESOLUTION NO. 09-52

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MALIBU UPHOLDING APPEAL NO. 09-003 AND APPROVING COASTAL DEVELOPMENT PERMIT NO. 07-106 AND VARIANCE NOS. 07-052, 08-057 AND 09-012 FOR THE CONSTRUCTION OF A NEW 110 FOOT LONG, THREE FOOT WIDE STAIRCASE WITHIN A FIVE FOOT WIDE PEDESTRIAN EASEMENT ALONG A BLUFF FACE AT 7271 BIRDVIEW AVENUE, AS ACCESSORY TO AN EXISTING, RESIDENTIAL TRIPLEX ON THE ADJACENT LOT, 7273 BIRDVIEW AVENUE (DRANE)

THE CITY COUNCIL OF THE CITY OF MALIBU DOES HEREBY FIND, ORDER AND RESOLVE AS FOLLOWS:

Section 1. Recitals.

A. On August 23, 2007, an application for Coastal Development Permit (CDP) No. 07-106 was submitted by Richard Scott, on behalf of property owner Clark Drane, to the Planning Division for processing. The subject application was routed to the City Biologist and City Geologist for conformance review.

B. On November 9, 2007, a Notice of Application for a new coastal development permit was posted on the subject property.

C. On December 13, 2007, the application was deemed complete for processing.

D. On March 5, 2008, the applicant submitted an application for Local Coastal Program Amendment (LCPA) No. 08-001. The LCPA proposed allowing staircases to be constructed in existing access easements along bluff-faces. The applicant requested that staff place the CDP application on hold and bring both the CDP and LCPA projects together at the same Planning Commission meeting.

E. On October 9, 2008, a Notice of Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property.

F. On October 21, 2008, the Planning Commission held a duly noticed public hearing, reviewed and considered the staff report (which included a recommendation of denial), reviewed and considered written reports, public testimony and related information. At the conclusion of the hearing the Planning Commission directed staff to prepare the appropriate findings required to approve CDP No. 07-106 and Variance (VAR) Nos. 07-052, 08-057 and 09-012.

G. On March 20, 2009, VAR No. 09-012 was added to the project scope for the reduction of the required setback from coastal scrub Environmentally Sensitive Habitat Area (ESHA).

EXHIBIT 7

A-4-MAL-09-070 (Drane)

City Council Findings—September 14, 2009

H. On April 9, 2009, a Notice of Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property.

I. At the April 21, 2009 Planning Commission meeting, the Commission continued the hearing to the May 19, 2009 meeting due to a procedural error.

J. On May 7, 2009, a Notice of Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property.

K. On May 19, 2009, the Planning Commission held a duly noticed public hearing on the subject application, reviewed and considered the Agenda Report, public testimony and all related information. At the conclusion of the hearing the Planning Commission adopted findings to deny CDP No. 07-106.

L. On May 27, 2009, Appeal No. 09-003 was filed by Richard Scott on behalf of the property owner, Clark Drane.

M. On June 1, 2009, the appeal was deemed complete by staff.

N. On September 3, 2009, a Notice of City Council Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property.

O. On September 14, 2009, the City Council held a duly noticed public hearing on the subject appeal, reviewed and considered the agenda report, public testimony and all related information.

Section 2. Environmental Review.

Pursuant to the authority and criteria contained in the California Environmental Quality Act (CEQA), the City Council has analyzed the proposal as described above, and has found that this project is listed among the classes of projects, which have been determined not to have a significant effect on the environment, and therefore, is categorically exempt from the provisions of CEQA, pursuant to California Code of Regulations Section 15303(e) – New Construction or Conversion of Small Structures. This section allows an exemption for “construction and location of limited numbers of new, small facilities or structures...accessory (appurtenant) structures including garages, carports, patios, swimming pools and fences.” The construction proposed is for a staircase and therefore falls under the provisions of this section. The City Council has further determined that none of the six exceptions to the use of a categorical exemption applies to this project (CEQA Guidelines Section 15300.2).

Section 3. Coastal Development Permit Findings.

Based on substantial evidence contained within the record and pursuant to Local Coastal Program (LCP) Local Implementation Plan (LIP) Sections 13.7(B) and 13.9, the City Council adopts the findings in the staff report, the findings of fact below, and approves CDP No. 07-106 and VAR Nos. 07-052, 08-057 and 09-012 for the construction of a new 110 foot long, three foot wide staircase along a bluff face, accessory to an existing, residential triplex and providing access from the triplex to the public parking lot landward of Westward Beach.

A. General Coastal Development Permit (LIP Chapter 13)

LIP Section 13.9 requires that the following four findings be made for all coastal development permits.

Finding A1. That the project as described in the application and accompanying materials, as modified by any conditions of approval, conforms with the certified City of Malibu Local Coastal Program.

The proposed private staircase is located within an area on the property addressed as 7271 Birdview Avenue (APN 4468-020-021). The legal description calls the area "an easement for pedestrian purposes over the northwesterly five feet, measured at right angles" of the aforementioned property. The location of the easement is along a bluff-face which is dominated by approximately 45 degree (or 1 to 1) slopes. The easement descends from the subject property, 7273 Birdview Avenue, across 7271 Birdview Avenue, and down to the Westward Beach public parking lot at the toe of the bluff.

The project has been reviewed for conformance with the LCP. As discussed herein, the project, as proposed and/or conditioned, conforms to the certified City of Malibu LCP. The required findings for the variance requests can be made.

Finding A2. The project is located between the first public road and the sea. The project conforms to the public access and recreation policies of Chapter 3 of the Coastal Act of 1976 (commencing with Sections 30200 of the Public Resources Code).

The project is located between the first public road and the sea but will not impact public access or recreation as the development is located on a bluff-top parcel. The Westward Beach parking lot is located between the parcel and the ocean, and the project site does not currently provide public access to the beach. The project site is accessible by way of a private driveway and is not accessible to the public; therefore, vertical access at the project site is not feasible. Additionally, access to nearby public coastal tidelands may be obtained via nearby Point Dume Headlands Park and Westward Beach Road. The project will not result in significant impacts on public access or recreation. The project conforms to the public access and recreation policies of the Coastal Act of 1976.

Finding A3. The project is the least environmentally damaging alternative.

Pursuant to CEQA, this project is listed among the classes of projects that have been determined not to have a significant adverse effect on the environment and is therefore categorically exempt. The proposed project would not result in significant adverse effects on the environment, within the meaning of CEQA,

and that there are no further feasible alternatives that would reduce impacts on the environment. The project complies with the development requirements of the LCP. The proposed staircase accessory to the triplex is consistent with the rural residential-one acre (RR-1) zoning classification of the subject property.

The project will not result in any potentially significant impacts because there are no further feasible conditions or alternatives that would substantially lessen any adverse effects of the development on the environment. The following alternatives were considered.

1. No Project – The no project alternative would avoid any change to the project site, and hence, any change to natural resources. The project site contains an easement of which its sole use is for pedestrian access. The “no project” alternative would not allow the construction of a staircase within the easement, which is proposed to provide safe access between Westward Beach and the property at 7273 Birdview Avenue. The slope within the easement is at such an angle that the easement could not safely be used without improving it, which in this case requires a staircase. Without the project, there would be no way to safely use the pedestrian easement.
2. Smaller Project – The proposed staircase measures three feet in width and is approximately 110 feet long. The staircase fits entirely within the existing pedestrian access easement. A smaller staircase length-wise is not feasible because it would stop mid-bluff and not span the distance between the triplex and the Westward Beach parking lot. A smaller staircase width-wise is not feasible because the project, as designed, meets the minimum standard for staircase width set forth in the Uniform Building Code.
3. Alternative Location – An alternative location is not possible due to fact that the location of the pedestrian access easement is fixed onsite. This is not a feasible alternative.
4. Proposed Location - The selected location for the staircase is on geologically stable land and is sited entirely within the pedestrian access easement. There is no other feasible way in which to utilize the easement safely, without first installing an access staircase, due to the slope present along the bluff-face.

Based on the site reconnaissance, photographs, review of the plans, and the nature of the surrounding area, the City Council determined that the proposed project will have no significant adverse scenic or visual impacts on public views due to project design, location on the site or other reasons. The project consists of construction of a new private exterior staircase within an existing easement. The project is the least environmentally damaging alternative.

Finding A4. If the project is located in or adjacent to an environmentally sensitive habitat area pursuant to Chapter 4 of the Malibu LIP (ESHA Overlay), that the project conforms with the recommendations of the Environmental Review Board, or if it does not conform with the recommendations, findings explaining why it is not feasible to take the recommended action.

It has been determined that the property contains ESHA via a site specific Biological Assessment completed by Forde Biological Consultants dated July 31, 2007. Additionally, LCP Land Use Plan (LUP) Policy 3.77 designates that all beach or ocean bluff areas adjacent to marine and beach habitats are to be considered ESHA. However, pursuant to LIP Section 4.4.4(C), the proposed project is exempt from

review by the Environmental Review Board (ERB) because the project includes the development of new structure in the same location as an existing structure, where no additional fuel modification is required.

B. Variance for the Reduction of the Required Bluff Setback (LIP Section 13.26.5)

A variance is requested for the construction of a staircase which descends a bluff-face. This variance is necessary because the area of the pedestrian access easement is along a bluff. Due to the fixed location of the easement, there is no other alternative location for the access staircase. Pursuant to LIP Section 13.26.5, the City Council may approve and/or modify an application for a variance in whole or in part, with or without conditions, provided that it makes 10 findings of fact. Based on the foregoing evidence contained within the record, the City Council approves VAR No. 07-052.

Finding B1. There are special circumstances or exceptional characteristics applicable to the subject property, including size, shape, topography, location, or surroundings such that strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under the identical zoning classification.

The project site is a five foot wide easement to be used solely for ingress and egress over a property contiguous to a fee parcel owned by the applicant. The sole purpose of the easement is for ingress and egress and the easement leads from the triplex property to the parking lot adjacent to Westward Beach. The entirety of the proposed staircase is located on the face of a bluff. Strict application of the zoning ordinance would deprive the owner of the use of the property and privileges enjoyed by other properties in the vicinity and under the identical zoning classification. Neighboring properties both to the east and to the west include private staircases to the beach.

Development regulations requiring at least a 50 foot setback from the edge of a bluff are written on a citywide basis and cannot take into account the individual and unique characteristics a property may exhibit. In this instance, the strict application of the ordinance would preclude the development of a safe way in which to utilize the pedestrian access easement which descends down the bluff from the triplex on Birdview Avenue. Without granting this variance for construction of the staircase within the easement, the easement holder would not be able to access the easement safely. Denial of the variance would deprive the property owner of developing his property for its intended use as a pedestrian accessway.

Finding B2. The granting of such variance will not be detrimental to the public interest, safety, health or welfare, and will not be detrimental or injurious to the property or improvements in the same vicinity and zone(s) in which the property is located.

The granting of the variance will allow the construction of a private staircase, which will not be detrimental to the public's interest, safety, health or welfare. Furthermore, the staircase will not be detrimental or injurious to the property or improvements in the same vicinity and zone as the subject property.

Finding B3. The granting of the variance will not constitute a special privilege to the applicant or property owner.

The granting of the variance will not constitute a special privilege to the applicant or property owner in that the sole purpose of the subject easement is for ingress and egress to the beach and no other use of the property may be made. The proposed project is located in the vicinity of other private bluff staircases to both the east and the west and is consistent with the surrounding neighborhood.

Finding B4. The granting of such variance will not be contrary to or in conflict with the general purposes and intent of this Chapter, nor to the goals, objectives and policies of the LCP.

The granting of the variance for the reduction of the required bluff setback will not be contrary to or in conflict with the general purposes and intent of the zoning provisions nor contrary to or in conflict with the goals, objectives and policies of the LCP. As stated previously, granting the requested variance will allow the subject property to be developed in a similar manner to abutting properties and no alternatives exist that would eliminate the need for the requested variance. The proposed project has been reviewed for conformance with the LCP and applicable City goals and policies by the City Biologist and City Geologist.

Finding B5. For variances to environmentally sensitive habitat area buffer standards or other environmentally sensitive habitat area protection standards, that there is no other feasible alternative for siting the structure and that the development does not exceed the limits on allowable development area set forth in Section 4.7 of the Malibu LIP.

The subject parcel contains ESHA and ESHA buffer. The granting of this variance will allow for a three foot wide, 110 foot long staircase to be constructed entirely within a five foot wide access easement. There is no other feasible alternative location possible due to the fixed location on the parcel.

Finding B6. For variances to stringline standards, that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.

The requested variance is not associated with stringline standards; therefore, this finding is not applicable.

Finding B7. The variance request is consistent with the purpose and intent of the zone(s) in which the site is located. A variance shall not be granted for a use or activity, which is not otherwise expressly authorized by the zone regulation governing the parcel of property.

The requested variance is for relief from a specific development standard and does not authorize a use not otherwise permitted in the RR-1 zoning district. The proposed project is for the construction of a new staircase accessory to an existing triplex, which is permitted in the zone.

Finding B8. The subject site is physically suitable for the proposed variance.

The site of the proposed staircase has been determined to be stable by a site specific geology report (GeoConcepts, Inc., 2007) and the City Geologist has approved the proposed project. Furthermore, the bluff, due to its location landward of the Westward Beach parking lot and approximately 350 feet from the shore, is not subject to wave action or continual erosion that could affect site stability. Prior to the issuance of a building permit, the project will be reviewed and approved for structural integrity and

stability. All final recommendations of the applicant's consulting geologist and structural engineer, as well as those recommendations of the Environmental and Building Safety Division and the City Geotechnical staff, will be incorporated into the final project design. As such, the subject was determined to be physically suitable for the proposed variance.

Finding B9. The variance complies with all requirements of State and local law.

The variance complies with all requirements of State and local law. Construction of the proposed improvement will comply with all building code requirements and will incorporate all recommendations from applicable City agencies.

Finding B10. A variance shall not be granted that would allow reduction or elimination of public parking for access to the beach, public trails or parklands.

The requested variance is for relief from a specific development standard and does not involve the reduction or elimination of public parking. Therefore, this finding is not applicable.

C. Variance for Construction on Slopes in Excess of 2½ to 1 (LIP Section 13.26.5)

A variance is requested for the construction of a staircase on slopes in excess of 2½ to 1. This variance is necessary because steep slopes dominate the entire area of the pedestrian access easement. There is no other alternative location for the access staircase. Pursuant to LIP Section 13.26.5, the City Council may approve and/or modify an application for a variance in whole or in part, with or without conditions, provided that it makes 10 findings of fact. Based on the foregoing evidence contained within the record, the City Council approves VAR No. 08-057.

Finding C1. There are special circumstances or exceptional characteristics applicable to the subject property, including size, shape, topography, location, or surroundings such that strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under the identical zoning classification.

The subject property is a five foot wide easement to be used solely for ingress and egress over a property contiguous to a fee parcel owned by the applicant. The sole purpose of the easement is for ingress and egress and the easement leads from the triplex property to the parking lot adjacent to Westward Beach. Strict application of the zoning ordinance would deprive the owner of the use of the property and privileges enjoyed by other properties in the vicinity and under the identical zoning classification. Neighboring properties both to the east and to the west include private staircases to the beach.

Development regulations limiting construction on slopes are written on a citywide basis and cannot take into account the individual and unique characteristics a property may exhibit. In this instance, the strict application of the ordinance would preclude the development of a safe way in which to utilize the pedestrian access easement which descends down the bluff from the triplex on Birdview Avenue. Without granting this variance for construction of the staircase within the easement, the easement holder would not be able to access the easement safely. Denial of the variance would deprive the property owner of developing his property for its intended use.

Finding C2. The granting of such variance will not be detrimental to the public interest, safety, health or welfare, and will not be detrimental or injurious to the property or improvements in the same vicinity and zone(s) in which the property is located.

The granting of the variance will allow the construction of a private staircase, which will not be detrimental to the public's interest, safety, health or welfare. Furthermore, the staircase will not be detrimental or injurious to the property or improvements in the same vicinity and zone as the subject property.

Finding C3. The granting of the variance will not constitute a special privilege to the applicant or property owner.

The granting of the variance will not constitute a special privilege to the applicant or property owner in that the sole purpose of the subject easement is for ingress and egress to the beach and no other use of the property may be made. The proposed project is located in the vicinity of other private bluff staircases to both the east and the west and is consistent with the surrounding neighborhood.

Finding C4. The granting of such variance will not be contrary to or in conflict with the general purposes and intent of this Chapter, nor to the goals, objectives and policies of the LCP.

The granting of the variance for construction on slopes in excess of 2½ to 1 will not be contrary to or in conflict with the general purposes and intent of the zoning provisions nor contrary to or in conflict with the goals, objectives and policies of the LCP. As stated previously, granting the requested variance will allow the subject property to be developed in a similar manner to abutting properties and no alternatives exist that would eliminate the need for the requested variance. The proposed project has been reviewed for conformance with the LCP and applicable City goals and policies by the City Biologist and City Geologist.

Finding C5. For variances to environmentally sensitive habitat area buffer standards or other environmentally sensitive habitat area protection standards, that there is no other feasible alternative for siting the structure and that the development does not exceed the limits on allowable development area set forth in Section 4.7 of the Malibu LIP.

The subject parcel contains ESHA and ESHA buffer. The granting of this variance will allow for a three foot wide, 110 foot long staircase to be constructed entirely within a five foot wide access easement. There is no other feasible alternative location possible due to the fixed location on the parcel.

Finding C6. For variances to stringline standards, that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.

The requested variance is not associated with stringline standards; therefore, this finding is not applicable.

Finding C7. The variance request is consistent with the purpose and intent of the zone(s) in which the site is located. A variance shall not be granted for a use or activity, which is not otherwise expressly authorized by the zone regulation governing the parcel of property.

The requested variance is for relief from a specific development standard and does not authorize a use not otherwise permitted in the RR-1 zoning district. The proposed project is for the construction of a new staircase accessory to an existing triplex, which is permitted in the zone.

Finding C8. The subject site is physically suitable for the proposed variance.

The site of the proposed staircase has been determined to be stable by a site specific geology report (GeoConcepts, Inc., 2007) and the City Geologist has approved the proposed project. Furthermore, the bluff is not subject to wave action or continual erosion that could affect site stability. Prior to the issuance of a building permit, the project will be reviewed and approved for structural integrity and stability. All final recommendations of the applicant's consulting geologist and structural engineer, as well as those recommendations of the Environmental and Building Safety Division and the City Geotechnical staff, will be incorporated into the final project design. As such, the subject was determined to be physically suitable for the proposed variance.

Finding C9. The variance complies with all requirements of State and local law.

The variance complies with all requirements of State and local law. Construction of the proposed improvement will comply with all building code requirements and will incorporate all recommendations from applicable City agencies.

Finding C10. A variance shall not be granted that would allow reduction or elimination of public parking for access to the beach, public trails or parklands.

The requested variance is for relief from a specific development standard and does not involve the reduction or elimination of public parking. Therefore, this finding is not applicable.

D. Variance for Reduction of ESHA Setback (LIP Section 13.26.5)

A variance from the ESHA setback requirement is requested for the construction of a private access staircase. This variance is necessary because the project is proposed on a coastal bluff and LUP Policy No. 3.77 designates all coastal bluffs within the City to be ESHA, regardless of site conditions or past use. The site specific biological assessment (Forde, 2007) has determined that the upper portion of the easement contains non-native vegetation, while the lower portion of the easement contains coastal bluff scrub ESHA.

Pursuant to LIP Section 13.26.5, the City Council may approve and/or modify an application for a variance in whole or in part, with or without conditions, provided that it makes 10 findings of fact. Based on the foregoing evidence contained within the record, the City Council approves VAR No. 09-012.

Finding D1. There are special circumstances or exceptional characteristics applicable to the subject property, including size, shape, topography, location, or surroundings such that strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under the identical zoning classification.

The site conditions on subject property are such that the strict application of the zoning ordinance deprives the subject property owner of privileges enjoyed by other properties in the vicinity and under the identical zoning classification. The subject variance will allow the subject easement to be developed in a similar manner to abutting properties and because the entire easement is within coastal bluff ESHA (as denoted by the LUP). Without granting this variance for the reduction in the required 100 foot coastal bluff ESHA setback, there would be no way to construct the staircase which is necessary to safely utilize the existing pedestrian easement. Neighboring properties along Birdview Avenue and Cliffside Drive have private bluff staircases within on-site ESHA and denial of the variance would deprive the property owner of developing his property in a similar manner with respect to required coastal bluff ESHA setbacks.

Finding D2. The granting of such variance will not be detrimental to the public interest, safety, health or welfare, and will not be detrimental or injurious to the property or improvements in the same vicinity and zone(s) in which the property is located.

The project will meet all applicable building and engineering safety codes and will not be detrimental to other adjacent properties or improvements. The proposed variance will allow the construction of an access staircase within a five foot wide pedestrian access easement and will not be detrimental to the public's interest, safety, health or welfare. As stated previously, the proposed project has been reviewed and approved by the City Geologist. The project, as proposed or conditioned, was found to be consistent with applicable City goals and policies.

Finding D3. The granting of the variance will not constitute a special privilege to the applicant or property owner.

Granting of the variance will not constitute a special privilege to the applicant or property owner because there is no other feasible and safe use for the pedestrian access easement and, additionally, other properties in the immediate vicinity also have private access staircases which descend down the bluff to the beach below. Since the applicant is constructing a staircase within an existing access easement, granting the variance does not constitute a special privilege to the property owner.

Finding D4. The granting of such variance will not be contrary to or in conflict with the general purposes and intent of this Chapter, nor to the goals, objectives and policies of the LCP.

The granting of the variance for the reduction in the required coastal bluff ESHA setback will not be contrary to or in conflict with the general purposes and intent of the zoning provisions nor contrary to or in conflict with the goals, objectives and policies of the LCP. As stated earlier, granting the requested variance will allow the subject easement to be developed in a similar manner to abutting properties and because the entire easement is within coastal bluff ESHA (as denoted by the LUP), no alternatives exist that would eliminate the need for the requested variance. The proposed project has been reviewed and approved for conformance with the LCP by the City Geologist.

Finding D5. For variances to environmentally sensitive habitat area buffer standards or other environmentally sensitive habitat area protection standards, that there is no other feasible alternative for

siting the structure and that the development does not exceed the limits on allowable development area set forth in Section 4.7 of the Malibu LIP.

The easement area is comprised of coastal bluff ESHA. The granting of this variance will allow for a private staircase to be constructed entirely within a five foot wide pedestrian access easement. Due to the fixed nature of the access easement, there is no other feasible alternative location on which to place the staircase. Because there is already an existing drainage pipe within the easement which has precluded a large amount of vegetation, the installation of a staircase immediately on top of the pipe will have little impact on sensitive habitat. Additionally, the proposed development is within the 10,000 square foot development envelope required by LIP Section 4.7.1, which includes the existing triplex on the parcel and the proposed staircase.

Finding D6. For variances to stringline standards, that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.

The requested variance is not associated with stringline standards; therefore, this finding is not applicable.

Finding D7. The variance request is consistent with the purpose and intent of the zone(s) in which the site is located. A variance shall not be granted for a use or activity, which is not otherwise expressly authorized by the zone regulation governing the parcel of property.

The requested variance is for relief from a specific development standard and does not authorize a use not otherwise permitted in the RR-1 zoning district. The proposed project is for the construction of a new staircase accessory to an existing triplex, which is permitted in the zone.

Finding D8. The subject site is physically suitable for the proposed variance.

The granting of the variance will allow construction of a residence that is compatible with the surrounding built environment. With the implementation of specific geotechnical standards, the subject site is physically suitable for the proposed variance. The topography and presence of ESHA on the site physically constrains proposed development, but it does not prevent development given certain locally-common engineering measures. The subject site is physically suitable for the proposed variance in that there is no alternate building site or configuration, which would eliminate the need for the variance request because the entire easement area is comprised of ESHA and ESHA buffer.

Finding D9. The variance complies with all requirements of State and local law.

The variance complies with all requirements of State and local law. Construction of the proposed accessory structure will comply with all building code requirements and will incorporate all recommendations from applicable City agencies.

Finding D10. A variance shall not be granted that would allow reduction or elimination of public parking for access to the beach, public trails or parklands.

The requested variance is for relief from a specific development standard and does not involve the reduction or elimination of public parking. Therefore, this finding is not applicable.

E. Environmentally Sensitive Habitat Area (LIP Chapter 4)

The project site is not designated as ESHA on the LCP ESHA Overlay Map. However, LUP Policy No. 3.77 designates all coastal bluffs within the City to be ESHA, regardless of site conditions or past use.

The 2007 Biological Assessment completed for the project identifies that the five foot wide easement area contains a pre-existing drainage pipe and that since the staircase would be constructed directly above this pipe, it would require a minimal amount of vegetation to be removed. The biological assessment has recommended that any removal of vegetation will require a nesting bird survey should construction take place during breeding season.

Pursuant to LIP Section 4.7.6, residential development within an ESHA may be approved or conditionally approved only if the City Council makes the following supplemental findings:

Finding E1. Application of the ESHA overlay chapter would not allow construction of a residence on an undeveloped parcel.

Without granting the variance, the applicant would be denied from making beneficial use of the parcel in question, the easement area.

Finding E2. The project is consistent with all provisions of the certified LCP with the exception of the ESHA overlay chapter and it complies with the provisions of Section 4.7 of the Malibu LIP.

LIP Section 4.7 discusses the economically viable use of a property. This section provides development standards for new construction that encroaches into ESHA or ESHA buffer area where no less environmentally damaging alternatives are available. The proposed project is consistent with all provisions of the certified LCP, with the inclusion of the three variances.

F. Native Tree Protection (LIP Chapter 5)

The provisions of the Native Tree Protection Chapter only apply to those areas containing one or more native Oak, California Walnut, Western Sycamore, Alder or Toyon trees that have at least one trunk measuring six inches or more in diameter, or a combination of any two trunks measuring a total of eight inches or more in diameter, four and one half feet from the ground. The areas to be disturbed by the project do not accommodate any trees. Accordingly, the findings in the Native Tree Protection Chapter are not applicable.

G. Scenic, Visual and Hillside Resource Protection (LIP Chapter 6)

The Scenic, Visual and Hillside Resource Protection Chapter governs those CDP applications concerning any parcel of land that is located along, within, provides views to or is visible from any scenic area, scenic road, or public viewing area. The proposed project is visible from Westward Beach, a designated scenic area. Therefore, LIP Chapter 6 applies and the five findings set forth in LIP Section 6.4 are made as follows.

Finding G1. The project, as proposed, will have no significant adverse scenic or visual impacts due to project design, location on the site or other reasons.

Due to fixed location of the pedestrian access easement, no feasible alternative building site location exists where the staircase would not be visible from Westward Beach. The proposed staircase has been designed to emulate the existing nearby staircases and will have no significant adverse scenic or visual impacts due to project design, location on the site or other reasons.

Finding G2. The project, as conditioned, will not have significant adverse scenic or visual impacts due to required project modifications, landscaping or other conditions.

The project has been designed to avoid any adverse or scenic impacts. The proposed staircase has been conditioned to utilize colors and materials that will be compatible with the surrounding natural environment and the staircase will be compatible with the other existing staircases in the surrounding neighborhood.

Finding G3. The project, as proposed or as conditioned, is the least environmentally damaging alternative.

As discussed in Finding A3, the project as proposed or conditioned is the least environmentally damaging alternative.

Finding G4. There are no feasible alternatives to development that would avoid or substantially lessen any significant adverse impacts on scenic and visual resources.

The pedestrian access easement is within a fixed location on the subject property. There are no alternative locations for the proposed project that would avoid or substantially lessen any significant adverse impacts on scenic and visual resources.

Finding G5. Development in a specific location on the site may have adverse scenic and visual impacts but will eliminate, minimize or otherwise contribute to conformance to sensitive resource protection policies contained in the certified LCP.

The proposed staircase will be visible from Westward Beach, an identified scenic area. However, due to the fixed nature of the access easement, there is no other feasible location for the construction of the staircase.

H. Transfer Development Credit (LIP Chapter 7)

Pursuant to LIP Section 7.2 the regulations requiring a transfer of development credit apply to any action to authorize a coastal development permit for a land division or multi-family development. This CDP does not involve a land division or multi-family development and is located within an easement which is vacant; therefore, LIP Chapter 7 does not apply.

I. Grading (LIP Chapter 8)

There is no grading associated with the proposed project. Therefore, the project conforms to the grading requirements as set forth under LIP Section 8.3, which ensures that new development minimizes the visual and resource impacts of grading and landform alteration by restricting the amount of non-exempt grading to a maximum of 1,000 cubic yards for a residential parcel.

J. Hazards (LIP Chapter 9)

Pursuant to LIP Section 9.3, written findings of fact, analysis and conclusions addressing geologic, flood and fire hazards, structural integrity or other potential hazard must be included in support of all approvals, denials or conditional approvals of development located on a site or in an area where it is determined that the proposed project causes the potential to create adverse impacts upon site stability or structural integrity. The project was analyzed for the hazards listed in LIP Section 9.2(A)(1-7).

Finding JI. The project, as proposed, will neither be subject to nor increase instability of the site or structural integrity from geologic, flood, or fire hazards due to project design, location on the site or other reasons.

Analysis of the project for hazards included review of the following documents/data, which are available on file with the City: 1) existing City geologic data maintained by the City; and 2) Preliminary Geologic Opinion Report prepared by GeoConcepts, Inc. dated June 18, 2007.

Based on staff's review of the above referenced information, it has been determined that:

1. The project site could be subject to hazards from seismically-induced landslide.
2. The project site is in the vicinity of extreme fire hazard areas.

The City Geologist has reviewed the project and found that there were no substantial risks to life and property related to any of the above hazards provided his recommendations and those contained in the associated geotechnical reports are incorporated into the project design.

Landslide Hazard

The June 2007 GeoConcepts report states that "the bluff portion of the site is located within landslide zone on the State of California Seismic Hazard Map (Plate 3). Ancient or recent bedrock landslides were not observed on the property. Geologic maps...do not depict landslides in the local area that could adversely affect the subject property from a geologic viewpoint."

Based on the findings of the June 2007 report, "the orientation the bedrock structure for the bluff slope is geologically favorable. Therefore, the proposed stairway from the mesa to the beach should be supported by the bedrock." Nonetheless, the property owner will be required to record an "Assumption of Risk and Release" for landslide hazard prior to permit issuance. This requirement is included as a condition of approval in Section 4 of this resolution.

Fire Hazard

The entire city limits of Malibu are located within the fire hazard zone, so no other alternatives were considered. As such, the proposed project as conditioned will not be subject to nor increase the instability of the site or structural integrity involving wildfire hazards. However, a condition of approval has been included in Section 4 of this resolution which requires that the property owner indemnify and hold harmless the City, its officers, agents, and employees against any and all claims, demands, damages, costs, and expenses of liability arising out of the acquisition, design, construction, operation, maintenance, existence, or failure of the permitted project in an area where an extraordinary potential for damage or destruction from wildfire exists as an inherent risk to life and property.

The project will incorporate all recommendations contained in the cited geotechnical report; as such, the proposed project will not increase instability of the site or structural integrity from geologic, flood or any other hazards.

Finding J2. The project, as conditioned, will not have significant adverse impacts on site stability or structural integrity from geologic, flood or fire hazards due to required project modifications, landscaping or other conditions.

As discussed previously, the project, as conditioned, will not be adversely affected relative to potential geotechnical impacts. The project will neither be subject to nor increase instability of the site or structural integrity from geologic, flood, or fire hazards, location on the site, or other reasons.

Finding J3. The project, as proposed, is the least environmentally damaging alternative relative to hazards.

As discussed previously, the project will not result in potentially significant impacts on the physical environment. The proposed project is the least environmentally damaging alternative relative to hazards.

Finding J4. There are no alternatives to development that would avoid or substantially lessen impacts on site stability or structural integrity.

As discussed previously, there are no alternatives to development that would avoid or substantially lessen impacts on site stability or structural integrity.

Finding J5. Development in a specific location on the site may have adverse impacts but will eliminate, minimize or otherwise contribute to conformance to sensitive resource protection policies contained in the certified Malibu LCP.

The City's review did not identify any unavoidable hazards or subsequent mitigation related to the development, provided that standard engineering techniques are followed. Therefore, no adverse impacts are anticipated to hazards or to sensitive resource protection policies contained in the LCP.

K. Shoreline and Bluff Development (LIP Chapter 10)

LIP Section 10.3 requires that shoreline and bluff development findings be made if the project is anticipated to result in potentially significant adverse impacts on coastal resources, including public access and shoreline sand supply. The project is not anticipated to result in such impacts. The proposed staircase is designed to minimize risks and assure stability and structural integrity while neither creating nor contributing significantly to erosion or adverse impacts on public access. The project site is not subject to wave uprush and will not impact shoreline sand supply processes; therefore, the project was not referred to the City Coastal Engineer. The required findings in LIP Section 10.3 are made as follows.

Finding K1. The project, as proposed, will have no significant adverse impacts on public access, shoreline sand supply or other resources due to project design, location on the site or other reasons.

The project is located on the seaward side of Birdview Avenue, but it does not touch the sand. The project site does not currently offer public access and will not impede public access once constructed. The Westward Beach parking lot is sited between the bluff and the sand. Therefore, the project will not adversely affect shoreline sand supply or other resources due to project design, location on the site or for other reasons.

Finding K2. The project, as conditioned, will not have significant adverse impacts on public access, shoreline sand supply or other resources due to required project modifications or other conditions.

As discussed previously, the project, as designed, conditioned and approved by the City Geologist, will not have any significant adverse impacts on public access, shoreline sand supply or other resources.

Finding K3. The project, as proposed or as conditioned, is the least environmentally damaging alternative.

As discussed in Finding A3, the proposed project, as conditioned, is the least environmentally damaging alternative.

Finding K4. There are no alternatives to the proposed development that would avoid or substantially lessen impacts on public access, shoreline sand supply or other resources.

As discussed in Finding K2, the project, as designed or conditioned, will not have any significant adverse impacts on public access, shoreline sand supply or other resources.

Finding K5. In addition, if the development includes a shoreline protective device, that it is designed or conditioned to be sited as far landward as feasible, to eliminate or mitigate to the maximum feasible extent adverse impacts on local shoreline sand supply and public access, that there are no alternatives that would avoid or lessen impacts on shoreline sand supply, public access or coastal resources and that it is the least environmentally damaging alternative.

The project does not include a shoreline protective device; therefore, this finding does not apply.

L. Archaeology (LIP Chapter 11)

LIP Chapter 11 requires certain procedures be followed to determine potential impacts on archaeological resources. According to the City of Malibu Cultural Resources Map, the subject site has an intermediate potential to contain sensitive resources. However, since no grading is associated with the subject project, no further study is required at this time. Nonetheless, standard conditions of approval have been included in Section 4 of this resolution which pertain to the protection of cultural resources. Should any potentially important cultural resources be found in the course of geologic testing or during construction, work shall immediately cease until a qualified archaeologist can provide an evaluation of the nature and significance of the resources and until the Planning Manager can review this information.

M. Public Access (LIP Chapter 12)

No issue of public prescriptive rights has been raised.

Lateral Access- Although the project site is located on the ocean side of Birdview Avenue, the Westward Beach Parking Lot separates the easement from the beach. The project site does not have potential to dedicate lateral access.

Bluff-Top Access- The project site is a bluff-top parcel; however, no potential project-related or cumulative impact on bluff-top access is anticipated because the site does not have potential to offer bluff-top access. The project site is accessible by way of a private driveway and is not accessible to the public. Due to the topography of the project site, public safety concerns may arise if bluff-top access was provided.

Trail Access- No mapped trails are located on or adjacent to the subject property; however California State Parks identifies two trails which are located at the nearby Point Dume Headlands Park and provide public access to the beach. The proposed project will not impede the existing trails; therefore, no conditions or findings for trail access are required.

Recreational Access- The project site does not include nor have any public accessways to existing or planned public recreational areas. The proposed project will not impact any existing recreational access; therefore, no conditions or findings for recreational access are required.

Vertical Access- The project site is accessible by way of a private driveway and is not accessible to the public; therefore, vertical access at the project site is not feasible. Additionally, access to nearby public coastal tidelands is available at the Point Dume Headlands Park (approximately 760 feet to the southeast) and Westward Beach Road located approximately 2,900 feet to the west. The project, as proposed, does not block or impede access to the ocean. The project site is located on the top of a bluff and does not affect the public's ability to access the beach. Consistent with LIP Section 12.6, due to the ability of the public, through other reasonable means, to reach nearby coastal resources, an exception for public vertical access has been determined to be appropriate for the project and no condition for vertical access has been required. The following findings and analysis were conducted in accordance with LIP Section 12.7.3 regarding vertical access. Due to these findings, LIP Section 12.7.1 is not applicable.

Finding M1. The type of access potentially applicable to the site involved (vertical, lateral, blufftop, etc.) and its location in relation to the fragile coastal resource to be protected, the public safety concern, or the military facility which is the basis for the exception, as applicable.

As discussed previously, the project site is accessible by way of a private driveway and vertical public access at the project site is not feasible. Vertical access would not impact fragile coastal resources or have any impact on a military facility. The basis for the exception to the requirement for vertical access is associated with the availability of access adjacent to the project site and a mile west of the project site.

Finding M2. Unavailability of any mitigating measures to manage the type, character, intensity, hours, season or location of such use so that fragile coastal resources, public safety, or military security, as applicable, are protected.

Vertical access would not impact fragile coastal resources or have any impact on a military facility. The basis for the exception to the requirement for vertical access is associated with the availability of access nearby as described previously.

Finding M3. Ability of the public, through another reasonable means, to reach the same area of public tidelands as would be made accessible by an access way on the subject land.

The project as proposed does not block or impede access to the ocean. No legitimate governmental or public interest would be furthered by requiring access at the project site because: a) existing access to coastal resources is adequate; and b) the proposed project will not impact the public's ability to access the shoreline or other coastal resources.

N. Land Division (LIP Chapter 15)

This project does not involve a division of land as defined in LIP Section 15.1. Therefore, LIP Chapter 15 does not apply.

O. Onsite Wastewater Treatment System (LIP Chapter 18)

LIP Chapter 18 addresses OWTS. The proposed project does not include an OWTS; therefore, this chapter does not apply.

Section 4. Conditions of Approval

Based on the foregoing findings and evidence contained within the record, the City Council hereby approves Coastal Development Permit No. 07-106 and Variance Nos. 07-052, 08-057 and 09-012, subject to the following conditions.

Standard Conditions

1. The applicants and property owners, and their successors in interest, shall indemnify and defend the City of Malibu and its officers, employees and agents from and against all liability and costs

relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project. The City shall have the sole right to choose its counsel and property owners shall reimburse the City's expenses incurred in its defense of any lawsuit challenging the City's actions concerning this project.

2. Approval of this application allows the construction of a 110 foot long, three foot wide private staircase entirely within the five foot wide pedestrian access easement that runs over the property addressed as 7271 Birdview Avenue. The staircase will connect the existing triplex at 7273 Birdview Avenue to the Westward Beach parking lot.
3. This permit shall be valid for two years from the effective date of this approval, September 14, 2009, and shall automatically expire unless extended in accordance with the LCP. An extension to the permit may be granted by the approving authority for due cause. Extensions shall be requested in writing by the applicant or authorized agent at least two weeks prior to expiration of the two-year period and shall set forth the reasons for the request.
4. Pursuant to LIP Section 13.18.2, this permit and rights conferred in this approval shall not be effective until all permittees or authorized agent(s) signs, notarizes and returns the Acceptance of Conditions Affidavit accepting the conditions set forth herein. The applicant shall file this form with the Planning Division within 10 working days of this decision.
5. This resolution (including signed and notarized Acceptance of Conditions Affidavit and Department Review Sheets) shall be copied in its entirety and placed directly onto a separate plan sheet(s) behind the cover sheet of the construction plans submitted to the City of Malibu Environmental and Building Safety Division for plan check.
6. The applicant shall submit three full sets of plans, including the pages described in Condition No. 5, to the Planning Division prior to entering building plan check.
7. Questions of intent or interpretation of any condition of approval will be resolved by the Planning Manager upon written request of such interpretation.
8. Minor changes to the approved plans or the conditions of approval may be approved by the Planning Manager, provided such changes achieve substantially the same results and the project is still in compliance with the M.M.C. and the LCP. An application with all required materials and fees may be required.
9. All structures shall conform to the City of Malibu Environmental and Building Safety Division and City Geologist requirements. Notwithstanding this review, all required permits shall be secured.
10. The applicant shall request a final planning inspection prior to final inspection by the Building Division.

11. If potentially important cultural resources are found in the course of geologic testing or during construction, work shall immediately cease until a qualified archaeologist can provide an evaluation of the nature and significance of the resources and until the Planning Manager can review this information. Where, as a result of this evaluation, the Planning Manager determines that the project may have an adverse impact on cultural resources; a Phase II Evaluation of cultural resources shall be required pursuant to LIP Chapter 11.3(F).
12. If human bone is discovered during geologic testing or during construction, work shall immediately cease and the procedures described in Section 7050.5 of the California Health and Safety Code shall be followed. Section 7050.5 requires notification of the coroner. If the coroner determines that the remains are those of a Native American, the applicant shall notify the Native American Heritage Commission by phone within 24 hours. Following notification of the Native American Heritage Commission, the procedures described in Section 5097.94 and Section 5097.98 of the California Public Resources Code shall be followed.
13. Pursuant to LIP Section 13.20, development pursuant to an approved coastal development permit shall not commence until the coastal development permit is effective. The coastal development permit is not effective until all appeals, including those to the California Coastal Commission, have been exhausted. In the event that the California Coastal Commission denies the permit or issues the permit on appeal, the coastal development permit approved by the City is void.
14. This coastal development permit runs with the land and binds all future owners of the property.
15. Violation of any of the conditions of this approval may be cause for revocation of this permit and termination of all rights granted there under.

Construction Phase

16. Construction hours shall be limited to Monday through Friday from 7:00 a.m. to 7:00 p.m. and Saturdays from 8:00 a.m. to 5:00 p.m. No construction activities shall be permitted on Sundays and City-designated holidays.
17. Construction management techniques, including minimizing the amount of equipment used simultaneously and increasing the distance between emission sources, will be employed as feasible and appropriate. All trucks leaving the construction site shall adhere to the California Vehicle Code. In addition, construction vehicles shall be covered when necessary; and their tires will be rinsed off prior to leaving the property.

Colors and Materials

18. New development in scenic areas visible from scenic roads or public viewing areas shall incorporate colors and exterior materials that are compatible with the surrounding landscape. Colors shall be compatible with the surrounding environment (earth tones) including shades of green, brown and gray, with no white or light shades and no bright tones.

19. The use of highly reflective materials shall be prohibited.
20. The colors and materials proposed shall be clearly indicated on all building plans and shall be reviewed and approved by the Planning Division prior to building plan check.

Geology

21. All recommendations of the consulting Certified Engineering Geologist or Geotechnical Engineer and/or the City Geologist shall be incorporated into all final design and construction, including foundations. Final plans shall be reviewed and approved by the City Geologist prior to the issuance of a building permit.

Biology

22. To avoid impacts to nesting birds, any vegetation removal scheduled between February 15 and August 30 will require nesting bird surveys by a qualified biologist prior to initiation of such activities. Should active nests be identified, a buffer area no less than 150 feet (300 feet for raptors) shall be fenced off until it is determined by a qualified biologist that the nest is no longer active. A report discussing the results of nesting bird surveys shall be submitted to the City Biologist prior to ANY vegetation removal on site.
23. No new landscaping is proposed with this project; therefore, none is approved. Should the applicant intend to plant any new vegetation, a detailed landscape plan shall be submitted for review and approval prior to any planting.

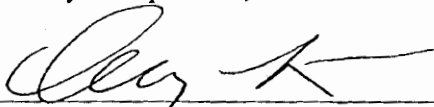
Deed Restriction

24. The property owner is required to acknowledge, by recordation of a deed restriction, that the property is subject to hazards associated with development on a bluff, and that the property owner assumes said risks and waives any future claims of damage or liability against the City of Malibu and agrees to indemnify the City of Malibu against any liability, claims, damages or expenses arising from any injury or damage due to such hazards. The property owner shall provide a copy of the recorded document to Planning Division staff prior to final planning approval.
25. The property owner is required to execute and record a deed restriction which shall indemnify and hold harmless the City, its officers, agents, and employees against any and all claims, demands, damages, costs and expenses of liability arising out of the acquisition, design, construction, operation, maintenance, existence or failure of the permitted project in an area where an extraordinary potential for damage or destruction from wildfire exists as an inherent risk to life and property. The property owner shall provide a copy of the recorded document to Planning Division staff prior to final planning approval.

Section 5. Certification.

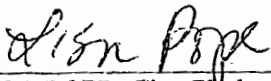
The City Clerk shall certify the adoption of this Resolution.

PASSED, APPROVED AND ADOPTED this 14th day of September, 2009.



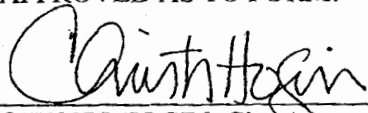
ANDY STERN, Mayor

ATTEST:



LISA POPE, City Clerk
(seal)

APPROVED AS TO FORM:

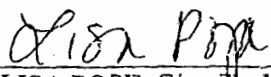


CHRISTI HOGIN, City Attorney

Any action challenging the final decision of the City made as a result of the public hearing on this application must be filed within the time limits set forth in Section 1.12.010 of the Malibu Municipal Code and Code of Civil Procedure.

I CERTIFY THAT THE FOREGOING RESOLUTION NO. 09-52 was passed and adopted by the City Council of the City of Malibu at the regular meeting thereof held on the 14th day of September, 2009, by the following vote:

AYES:	3	Councilmembers:	Sibert, Barovsky, Stern
NOES:	2	Councilmembers:	Conley Ulich, Wagner
ABSTAIN:	0		
ABSENT:	0		



LISA POPE, City Clerk
(seal)