

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
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Th11b

Appeal Filed: 9/28/09
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Substantial Issue
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Staff: Nicholas Dreher
Staff Report: 5/26/10
Hearing Date: 6/10/10



STAFF REPORT: APPEAL DE NOVO REVIEW

LOCAL GOVERNMENT: City of Malibu

LOCAL DECISION: Approval with Conditions

APPEAL NO.: A-4-MAL-09-070

APPLICANT: Clark Drane

AGENT: Richard Scott (of Richard N. Scott, Inc., A Professional Law Corporation)

APPELLANTS: Commissioners Mary Shallenberger and Sara Wan

PROJECT LOCATION: 7271 & 7273 Birdview Avenue, City of Malibu, Los Angeles County (APN: 4468-020-021 & 4468-020-022)

PROJECT DESCRIPTION: Construction of a new 110-foot long, three-foot wide private staircase on a bluff face. The staircase would be located within a pedestrian easement held by the Applicant that extends across the servient property (developed with a single family residence) adjacent to the residential triplex parcel owned by the Applicant. The project includes three associated requests for the development to vary from the required standards of the Malibu LIP to allow for: 1) a reduction of the required bluff setback; 2) construction on slopes in excess of 2 ½ to 1; and 3) a reduction of the required 100-foot ESHA buffer.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends **DENIAL** of the proposed project on the basis that the project does not conform to the applicable Environmentally Sensitive Habitat Area, bluff top development or visual resource protection policies and provisions contained in the certified Local Coastal Program. The standard of review for consideration of this de novo CDP is the policies and provisions of the City of Malibu Local Coastal Program.

SUBSTANTIVE FILE DOCUMENTS: City of Malibu certified Land Use Plan; City of Malibu certified Implementation Plan; Appeal No. A-4-MAL-09-070 (Drane); *Minutes* from the October 21, 2008 Malibu Planning Commission Regular Meeting; *Minutes* from the May 19, 2009 Malibu Planning Commission Regular Meeting; *Minutes* from the September 14, 2009 Malibu City Council Appeal Hearing; *Biological Assessment for an easement, which provides beach access for 7273, 7275, and 7277 Birdview Avenue, City of Malibu, Los Angeles County, California* dated July 31, 2007 by Forde Biological Consultants; *Limited Geologic Opinion Report, 7273 Birdview Avenue, Malibu, California* dated June 18, 2007 by GeoConcepts, Inc.; Coastal Development Permit Nos. 5-89-1045 (Campa), 5-90-572 (Miller), 4-97-023 (Elkins), 4-92-083 (Roth), 4-96-030 (Golod) and 5-91-434 (Campa); November 3, 2009 Letter from Richard Scott, on behalf of Applicant Clark Drane.

EXHIBITS

Exhibit 1. Vicinity Map

Exhibit 2. Parcel Map

Exhibit 3. Project Plans

Exhibit 4. Aerial Photographs (1972, 1975, 1977, 1986, 2008)

Exhibit 5. Deeds (1974, 1977, 1999)

Exhibit 6. Commission Staff Report for November 5, 2009 Substantial Issue Hearing (excluding Attachments due to length)

Exhibit 7. November 3, 2009 Letter from Richard Scott on behalf of Applicant Clark Drane

I. STAFF RECOMMENDATION

MOTION: *I move that the Commission approve Coastal Development Permit No. A-4-MAL-09-070 for the development proposed by the applicant.*

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE PERMIT:

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not conform with the policies of the certified Local Coastal Program for the City of Malibu or the public access and

public recreation policies of Chapter 3 of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. PROCEDURAL HISTORY

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 Malibu Planning Division for processing. The subject application was routed to the City Biologist and City Geologist for conformance review.

On October 21, 2008, the Planning Commission held a duly noticed public hearing, reviewed and considered the staff report (which included a staff 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 and 08-057. 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).

On May 19, 2009, the City of Malibu Planning Commission adopted findings to deny a coastal development permit (CDP No. 07-106) and three variance requests (VAR Nos. 07-052, 08-057 and 09-012). On May 27, 2009, the Applicant filed an appeal of the Planning Commission decision. On September 14, 2009, the Malibu City Council upheld the Applicant's appeal, overturned the Planning Commission's action and approved CDP No. 07-106 with VAR Nos. 07-052, 08-057 and 09-012.

On September 21, 2009, Coastal Commission staff received the City's complete Notice of Final Action. The Commission's ten-working day appeal period for this action began on September 22, 2009 and concluded at 5:00 pm on October 5, 2009. On September 28, 2009, Commissioners Mary Shallenberger and Sara Wan filed the only appeal. The appellants contended that the development approved in CDP 07-106 is not consistent with the policies and provisions of the LCP with regard to environmentally sensitive habitat areas (ESHA), bluff development and visual resources. The appeal also stated that three variances from the standard of the LIP are not justified.

On November 11, 2009, the Commission found that the appeal raised a substantial issue in terms of the project's conformance with the City of Malibu's certified LCP regarding ESHA, visual resources and blufftop development, and accepted jurisdiction over the coastal development permit for the project. At that time, the Commission continued the de novo portion of the appeal hearing to a later date.

III. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Project Description and Background

The proposed project consists of the construction of a new 110-foot long, three-foot wide private staircase on a bluff face within a five-foot wide pedestrian easement held by the Applicant, owner of 7273 Birdview Avenue, in Malibu, extending over the upcoast strip of the adjacent property owner's parcel at 7271 Birdview Avenue, Malibu (**Exhibits 1, 2, 3, 4f**). The project includes three associated requests for the development to vary from the required standards of the Malibu LIP to allow for: 1) a reduction of the required bluff setback; 2) construction on slopes in excess of 2 ½ to 1; and 3) a reduction of the required 100-foot ESHA buffer.

In 1974, the owners of 7271 Birdview Avenue sold the adjacent, landward parcel (7273 Birdview Avenue) to two couples (the Dranes and the Schultzes), each couple as to an undivided one-half interest as tenants in common. (**Exhibit 5a**). The deed also conveyed "an exclusive easement for pedestrian walking purposes only" to the buyers of 7273 Birdview Avenue. On February 28, 1977, the Applicant purchased the Schultzes' one-half interest in 7273 Birdview Avenue. (**Exhibit 5b**). In July 1999, the owner of 7271 Birdview Avenue re-affirmed the easement and fixed some errors in the legal description through execution of a quitclaim deed to the Dranes, which deed expressly states that it was designed "to correct a previously incorrectly recorded easement." (**Exhibit 5c**). The quitclaim deed also used a slightly different legal description of the right conveyed by the easement deed (describing it as an "easement for pedestrian purposes").

The easement descends from the subject property, 7273 Birdview Avenue, across the northwesterly edge of the property at 7271 Birdview Avenue, and down the bluff face to the Westward State Beach public parking lot at the toe of the bluff. The proposed private staircase site is situated at the southwestern, seaward end of the easement. Currently the bluff is heavily vegetated, with a drainage pipe segment on the middle of the bluff face, taking up approximately 50% of the bluff-face area within the easement. The bluff itself sits at a ½ -1:1 slope.

The Applicant did not provide a site plan, foundation plan, or details regarding how the proposed staircase would be constructed, the overall area of construction disturbance, or if a staging area would be needed. Information was provided that indicates no grading would be required for the construction, but no information was given on how footings would be installed or if excavation would be necessary for the footings. The only plan provided is a hand-drawn sketch of the proposed staircase (**Exhibit 3**). These are the only identifiable plans for the proposed project. There is no indication of scale and it is unclear how the staircase, as drawn, would be affixed to the bluff face.

Photographic Evidence

Aside from a narrow line of disturbance down the entire bluff face along the easement, there is currently no indication that a stairway previously existed. The Applicant has provided no evidence to suggest a private staircase existed within the easement when he purchased the subject property in 1974. The Commission cannot approve a CDP based upon the Applicant's unsubstantiated claims alone.

Commission staff reviewed a series of Point Dume area aerial photographs dated 1972, 1975, 1977, 1979 and 1986, in order to evaluate whether there was a staircase within this easement, to determine approximately when it was constructed and when it was later removed.

In the 1972 photograph (**Exhibit 4a**), 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.

In the 1975 photograph (**Exhibit 4b**), one can clearly identify a staircase within the Applicant's easement.

The 1977 photograph (**Exhibit 4c**), is taken from a considerably higher distance. The only thing that is visible within the easement area in this photograph is a linear feature where there is no vegetation. In the 1979 photograph (**Exhibit 4d**), the disturbed line along the bluff is apparent, but there is no indication that a staircase exists or ever existed. In the 1986 photograph (**Exhibit 4e**), the disturbed line along the bluff is apparent, but there is no indication that a staircase exists or ever existed.

Past Commission Actions on the Project Site

The Commission has not previously approved coastal development permit applications for development associated with the subject parcel. However, there have been numerous applications for bluff development on Birdview Avenue in Malibu, between 1989 and 1997, before the enactment of the Malibu LCP. The Commission uniformly denied applications for bluff face staircases (see Coastal Development Permit Nos. 5-89-1045 (Campa) and 5-90-572 (Miller)), except for one, which involved violations (Coastal Development Permit No. 4-97-023 (Elkins)), and routinely required removal of bluff face staircases (Coastal Development Permit Nos. 4-92-083 (Roth), 4-96-030 (Golod) and 5-91-434 (Campa)).

City of Malibu Approval of the Proposed Project

From the outset, the proposed private staircase, located on a bluff face within an easement held by the Applicant, raised concerns regarding Environmentally Sensitive

Habitat Areas (such as bluffs), bluff development and visual resources. At both the Planning Commission and City Council review levels, it was undisputed that the proposed private staircase on the bluff face violated the ESHA, bluff development and visual resources policies and provisions of Malibu's LCP. However, over the course of the Applicant's exhaustion of his various administrative remedies, the focus shifted from LCP conformity to whether or not denial of the permit would result in the regulatory taking of the Applicant's property. In support of his position, the Applicant submitted no definitive proof that any right to a staircase exists now or whether a staircase existed at the time he purchased the property in 1974. Given very little to work with, the Planning Commission and City Council both expressed concern over litigation, resulting in eventual approval of a project acknowledged to be wholly violative of the policies and provisions of the Malibu LCP.

During the Planning Commission's October 21, 2008 hearing, Commissioner Mazza stated that:

The General Plan mapped bluffs as Environmentally Sensitive Habitat Area (ESHA)...The LCP clearly stated no staircases were permitted on bluffs unless they were for public access.

At the October 21, 2008 hearing, the Planning Commission directed planning staff to develop additional findings necessary to approve the proposed development and related variances. The Malibu planning staff brought the new report, with additional findings, to the Planning Commission on May 19, 2009. However, during the May 19, 2009 hearing, the Planning Commissioners focused on the Applicant's potential takings claim and the possibility of litigation. Several Commissioners expressed concerns that the Planning Commission was not the appropriate administrative body to be deciding this matter. Commissioner Jennings stated that he preferred the California Coastal Commission be the defendant in litigation rather than the City of Malibu. Accordingly, the Planning Commission adopted a resolution denying the CDP and detailed the conflict between the proposed development and the LCP policies and provisions prohibiting private bluff development. In turn, the Applicant appealed this decision to the Malibu City Council.

The City Council also recognized the conflict between the proposed private staircase and the LCP policies and provisions. On September 14, 2009, Councilmember Conley Ulich, after reading a portion of the Local Implementation plan (LIP) regarding replacement of structures stated that: "allowing the structure would violate the LIP Section 12.9." However, the discussion at the City Council hearing focused more on the Applicant's potential takings claim than whether the private staircase is actually permissible under the LCP policies and provisions.

In recommending denial of the proposed private staircase, the Malibu planning staff addressed the Applicant's takings claim, stating the following in the appeal staff report:

Both the Applicant's parcel and the parcel on which the easement lies are developed with residential uses and denial of the requested variances does not in any way interfere

with the continuation of those primary uses...Denial of the application to construct a private staircase on a bluff face does not in any way interfere with the existing uses on the subject properties.

However, in the course of upholding the Applicant's appeal and approving the proposed private staircase, the City Council showed reluctance to enforce the policies and provisions of the Malibu LCP for fear that such actions would constitute a regulatory taking of the Applicant's property. The official City Council minutes for the September 14, 2009 Appeal Hearing state the following:

...

Mayor Pro Tem Barovsky stated...there was an argument of fairness if someone bought the property for a specific purpose.

Councilmember Sibert asked if there was previously a stairway on the easement. He stated maybe the property owner was cheated when he purchased the property.

...

Mayor Stem expressed concern about a potential taking. He stated he would not support the motion [to deny the appeal and the CDP].

...

Mayor Pro Tem Barovsky stated she usually supported staff but there was a possible taking and fairness issue....

After raising numerous concerns about litigation and the merits of the Applicant's takings claim, the City Council approved the CDP (No. 07-106) and related variances (VAR Nos. 07-052, 08-057 and 09-012).

B. Consistency with Local Coastal Program Policies – Standard of Review

After the Commission has certified a Local Coastal Program (LCP), Section 30603 of the Coastal Act provides for appeals to the Coastal Commission of the certified local government's actions on certain types of development applications (including those proposing development between the sea and the first public road paralleling the sea and development within 300 feet of the top of the seaward face of any coastal bluff). In this case, the City Council's approval was appealed to the Commission in September of last year, and the Commission opened a public hearing on November 5, 2009, and found that the appeal raised a substantial issue.

In its "de novo" review of this application, the Commission's standard of review for the proposed development is whether it would conform with the policies and provisions of the City of Malibu Local Coastal Program (LCP), which was certified by the Commission on September 13, 2002, and the public access and recreation policies of the Coastal

Act. The LCP consistency issues raised by the proposed development are discussed in the following sections.

1. ESHA

The following policies of Chapter Three of the Coastal Act are incorporated as part of the City of Malibu LUP:

Section 30230

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30240

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

Certified Land Use Plan Policies

In addition, the City of Malibu certified LUP contains policies that protect the environmentally sensitive habitat areas.

The LUP Environmentally Sensitive Habitat Areas (ESHA) Map shows the areas that are designated ESHA. Bluff face areas, although not depicted on the ESHA maps (due to the small scale of the maps), are designated as ESHA by the policies of the LUP. Habitat found to meet the definition of ESHA shall be accorded all protection provided for ESHA by the LUP. ESHA shall be protected against significant disruption of habitat values and only resource dependent uses may be permitted within ESHA.

The LUP policies establish the protection of areas adjacent to ESHA through the provision of buffers. Natural vegetation buffer areas must be provided around ESHA that are of sufficient size to prevent impacts that would significantly degrade these areas. Development, including fuel modification, shall not be permitted within required buffer areas.

Policy 3.1 states that:

Areas 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 and which could be easily disturbed or degraded by human activities and developments are Environmentally Sensitive Habitat Areas (ESHAs) and are generally shown on the LUP ESHA Map. The ESHAs in the City of Malibu are riparian areas, streams, native woodlands, native grasslands/savannas, chaparral, coastal sage scrub, dunes, **bluffs**, and wetlands, unless there is site-specific evidence that establishes that a habitat area is not especially valuable because of its special nature or role in the ecosystem. Regardless of whether streams and wetlands are designated as ESHA, the policies and standards in the LCP applicable to streams and wetlands shall apply. Existing, legally established agricultural uses, confined animal facilities, and fuel modification areas required by the Los Angeles County Fire Department for existing, legal structures do not meet the definition of ESHA. (Emphasis Added)

Policy 3.8 states that Environmentally Sensitive Habitat Areas (ESHAs) shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

Policy 3.10 states the following:

If the application of the policies and standards contained in this LCP regarding use of the property designated as Environmentally Sensitive Habitat Area, including the restriction of ESHA to only resource-dependent use, would likely constitute a taking of private property, then a use that is not consistent with the Environmentally Sensitive Habitat Area provisions of the LCP shall be allowed on the property, provided such use is consistent with all other applicable policies and is the minimum amount of development necessary to avoid a taking.

Policy 3.11 states the following:

Applications for development of a non-resource dependent use within ESHA or for development that is not consistent with all ESHA policies and standards of the LCP shall demonstrate the extent of ESHA on the property.

Policy 3.14 states the following:

New development shall be sited and designed to avoid impacts to ESHA. If there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected. Impacts to ESHA that cannot be avoided through the implementation of siting and design alternatives shall be fully mitigated, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site or where off-site mitigation is more protective in the context of a Natural Community Conservation Plan that is certified by the Commission as an amendment to the LCP. Mitigation shall not substitute for implementation of the project alternative that would avoid impacts to ESHA.

Policy 3.23 states the following:

Development adjacent to ESHAs shall minimize impacts to habitat values or sensitive species to the maximum extent feasible. Native vegetation buffer areas shall be provided around ESHAs to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect. All buffers shall be a minimum of 100 feet in width, except for the case addressed in policy 3.27.

Policy 3.26 states the following (in part):

Required buffer areas shall extend from the following points:

...

c. The top of bluff for coastal bluff ESHA.

Policy 3.58 states the following:

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.

Policy 3.77 states the following:

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.

Further, the following water quality policy requires that natural drainage features and vegetation are protected and that adequate buffers are provided in order to minimize erosive impacts to the bluff face.

Policy 3.95

New development shall be sited and designed to protect water quality and minimize impacts to coastal waters by incorporating measures designed to ensure the following:

...

Limiting land disturbance activities such as clearing and grading, and cut-and-fill to reduce erosion and sediment loss.

Limiting disturbance of natural drainage features and vegetation.

Certified Local Implementation Plan Provisions

The certified Local Implementation Plan (LIP) contains standards to implement the Land Use Plan. Chapter 4 of the LIP specifically addresses environmentally sensitive habitat areas (ESHA). The ESHA overlay provisions apply to those areas designated ESHA on the Malibu LIP ESHA overlay map and those areas within 200 feet of designated ESHA. Additionally, those areas not mapped as ESHA, but found to be ESHA under the provisions of Section 4.3 of the Malibu LIP, are also subject to these provisions. The purpose of the ESHA overlay zone is to protect and preserve areas 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 and which could easily be disturbed or degraded by human activities and development. The environmentally sensitive habitat overlay zone not only extends over an ESHA area itself but also includes buffers necessary to ensure continued protection of habitat areas. Only uses dependent on the environmentally sensitive habitat areas and which do not result in significant disruption of habitat values are permitted in the ESHA overlay zone.

4.5 PERMITTED USES

Development in the following habitats is limited to the uses listed below.

...

4.5.3. Other types of environmentally sensitive habitat

- A. Public accessways and trails, including directional signs
- B. Interpretive signage designed to provide information about the value and protection of the resources
- C. Restoration projects where the primary purpose is restoration of the habitat.
- D. Invasive plant eradication projects if they are designed to protect and enhance habitat values.

Section 4.6.1 of the Malibu LIP states, in part, the following with regard to buffers:

4.6.1 Buffers

New development adjacent to the following habitats shall provide native vegetation buffer areas to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Vegetation removal, vegetation thinning, or planting of non-native or invasive vegetation shall not be permitted within buffers except as provided in Section 4.6.1 (E) or (F) of the Malibu LIP. The following buffer standards shall apply:

...

D. Coastal Bluff ESHA

New development shall provide a buffer of no less than 100 feet from the bluff edge

4.7 ECONOMICALLY VIABLE USE

Any coastal development permit application for a use other than one permitted in the ESHA overlay district, in which the uses permitted in this district would preclude construction of a residence on an undeveloped legal parcel, shall be subject to the provisions of this section. The uses of the property and the siting, design, and size of any development approved in ESHA or ESHA buffer, shall be limited, restricted, and/or conditioned to minimize impacts to ESHA on and adjacent to the property, to the maximum extent feasible. Where all feasible building sites are ESHA or ESHA buffer, the City may only permit development as specified below in sections 4.7.1 through 4.7.4 of the Malibu LIP in order to provide the owner with an economically viable use of the property. In no case shall the approved development exceed the following maximum standards.

Analysis

The policies and provisions of the LCP provide for the protection of ESHA, including bluff habitat. Bluff ESHA is not mapped on the LCP ESHA maps for the simple reason that the bluffs are a linear feature that cannot be easily shown at the scale of the maps. However, it is clear from the LCP that bluff habitat is designated as ESHA.

Coastal bluff scrub is a rare and threatened plant community. Such communities have been displaced by physical structures along the coast and displaced by ornamental and invasive plant species used for landscaping. Given the pattern of development on bluff-top properties, bluff habitat is increasingly rare.

New development on bluffs can result in individual and cumulative adverse effects to marine and bluff habitat, including coastal bluff ESHA. Impacts include the direct removal of bluff vegetation for the construction of structures such as stairways, as well as other potential impacts resulting from increased erosion and increased human activity. Any development on the bluff face that removes vegetation may simultaneously be removing nesting, feeding, and shelter habitat for shoreline birds or animals which would result in a loss or change in the number and distribution of species. Further, the cumulative effect of additional structures on the bluff will be to separate and isolate the areas of the bluff habitat that remains between such structures, reducing the habitat values of the whole area.

The bluff ESHA policies are included in the Malibu LCP in order to ensure that impacts to sensitive coastal bluff habitats are avoided. To protect bluff ESHA against any significant disruption of habitat values, the LCP policies and provisions prohibit the construction of structures within the ESHA. Private access stairs or paths, drainage facilities, and shoreline protection devices are not uses dependent on the resource to function, and so the LCP prohibits them within ESHA. The only exceptions provided are: 1) stairs or paths that provide public access where there is no other feasible method to obtain such access, and 2) repair or maintenance of lawfully non-conforming structures.

With regard to areas adjacent to bluff ESHA, the LCP requires that new development be sited and designed to prevent impacts which would significantly degrade those areas. The LCP policies and provisions require that an adequate buffer is provided between the outer edge of bluff ESHA and development to minimize adverse impacts to these habitats. Providing a significant distance between new development and bluff faces minimizes the exacerbation of erosion and maintains the aesthetic qualities of the shoreline. Additionally, the transitional “ecotones” between different habitat types are particularly valuable areas with a higher diversity of plants and animals. The provision of adequate buffers around coastal bluffs protects the ecotone. Natural vegetation buffers protect bluff habitats by providing area for infiltration of runoff and minimizing erosion. Finally, buffers minimize the spread of invasive exotic vegetation that tend to supplant native species. Disturbed areas, impacted by development on the bluff face, are especially susceptible to invasion by non-native species that can in many instances out-compete native plants. Invasive plant species do not provide the same habitat values as natural areas.

LUP Policy 3.58 states that new structures on bluff faces are prohibited for the specific purpose of “[protecting] seabird-nesting areas.” LUP Policy 3.77 requires that any 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 [and that] all uses shall be compatible with the maintenance of the biological productivity of such areas.” In order to carry out these LUP policies, the related LIP provision 4.6.1(D) protects coastal bluff ESHA by requiring “a buffer of no less than 100 feet from the bluff edge” for new development.

Analysis of Proposed Project

The proposed project consists of the construction of a new 110-foot long, 3-foot wide private staircase on a bluff face, within a 5-foot wide easement held by the Applicant, which connects 7273 Birdview Avenue (developed with a triplex rental property) to the public Westward Beach. The easement runs along the northern edge of the servient 7271 Birdview Avenue parcel, which is developed with a single family residence. The Applicant did not provide a site plan, foundation plan, or details regarding how the proposed staircase would be constructed, the overall area of construction disturbance, or if a staging area would be needed. The Applicant has indicated that no grading would be required for the construction, but no information was given on whether the stairs would be placed directly on grade, or if they would be founded on footings. Furthermore, no information was provided about how footings, if any, would be installed or if excavation would be necessary for the footings. The only plan provided is a hand-drawn sketch (not to scale) of the proposed staircase. **(Exhibit 3)**. While it is assumed that the stairs would extend from the top of the bluff to the bottom, (approximately 15 feet away from the public parking lot), this is not clearly detailed in the sketch. No information was provided about the amount of vegetation removal that would be necessary for the construction of the proposed project. At a minimum, the stairs would

occupy an area that is at least three feet wide and 110 feet long, but additional area would likely be removed or disturbed in order to carry out the construction.

Staff visited the proposed project site on April 7, 2010 and confirmed that no staircase currently exists on the bluff face within the easement. There were no remnants of stairs or any other indication that a staircase had previously existed. The proposed site currently contains coastal bluff scrub vegetation and an approximately 20-foot long white PVC drainage pipe (for which there is no coastal development permit).

A July 31, 2007 Biological Assessment was prepared by Forde Biological Consultants for the proposed project site. The biological assessment found that notwithstanding the presence of a drainage pipe, there is native vegetation typically found in coastal bluff scrub located on the bluff face, with more non-native species closer to the top of the bluff. This report indicates that native coastal bluff scrub dominates the western portion of the easement (the proposed development site). Native species included "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 present on the site as well. Observed wildlife included "Anna's hummingbird (*Calypte anna*), house finch (*Carpodacus mexicanus*), northern mockingbird (*Mimus polyglottos*), and side-blotched lizard (*Uta stansburiana hesperis*)." The biological assessment recommended that a qualified biologist conduct a nest survey to determine the right time of year to construct the staircase. There is no indication in the Applicant's application materials that such a survey was ever conducted. The assessment discussed environmentally sensitive habitat areas, stating that Malibu "considers all coastal bluffs as ESHA regardless of condition or past use." The 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.

Based on the information provided by the Applicant's biological assessment, the Commission concludes that the proposed project site contains native bluff scrub habitat that meets the LCP definition of ESHA, notwithstanding the past disturbance on the bluff face and introduction of non-native species in the upper areas. The proposed project would include the construction of a stairway within ESHA, on the bluff face. While there is a drainage pipe existing within the easement area, there is no evidence that the placement of the pipe was approved in a coastal development permit. As such, the placement of the pipe and any associated vegetation removal is considered to be unpermitted. Therefore, the condition of the bluff ESHA within the easement area must be evaluated in its pre-pipe undisturbed condition.

The proposed project would then result in the removal of all ESHA vegetation within a three-foot wide, 110-foot long area on the bluff face, with additional vegetation removal and/or disturbance along each side resulting from its construction. The project does not include any re-vegetation of disturbed slopes. The removal of vegetation, particularly on steep slopes, will allow for increased erosion on the bluff face, which is itself an

erosional feature. Additionally, focused runoff from the staircase structure itself has the potential to undercut and erode the bluff beneath it. Further, the proposed project will contribute to the cumulative effect of separating and isolating the undisturbed areas of the bluff habitat that remain between structures, reducing the habitat values of the bluff ESHA. The structure proposed is not a resource dependent use that can be allowed within ESHA. Therefore, the proposed development, located within coastal bluff ESHA, will result in significant impacts to ESHA and is inconsistent with Sections 30230 and 30240 of the Coastal Act (as incorporated as policies of the LUP), and is inconsistent with LUP Policies 3.8, 3.14, 3.77, and LIP Section 4.5.3. Further, because the proposed stairs would be located within ESHA, it obviously would not provide any ESHA buffer, let alone the required 100-foot buffer. Therefore, the proposed project is not consistent with LUP policies 3.23, 3.26, and LIP Section 4.6.1.

Given its inconsistency with the ESHA policies and provisions of the LCP, the proposed bluff stairway must be denied. The Commission can identify no feasible project alternative that can provide private beach access within the Applicant's easement without construction within coastal bluff ESHA. However, 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 from the bluff edge. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

The LCP does provide for the approval of limited development that is otherwise inconsistent with the ESHA policies and provisions, where it is determined that development must be allowed in order to avoid a regulatory taking. While there is no feasible alternative for siting a stairway down the bluff face that would not be located within ESHA, as described in this report, denial of the proposal would not constitute a taking. As such, development that may be permitted under the provisions of LIP Section 4.7 in order to avoid a taking is not relevant in this case.

Variance Request

The Applicant requests a variance to eliminate the required 100-foot ESHA buffer setback. In a letter dated August 21, 2007, the Applicant's representative stated that the "sole purpose of the easement is for ingress and egress to the beach" and that they accordingly had "unique circumstances." LUP Policy 3.28 states that "variances or modifications to buffers or other ESHA protection standards shall not be granted, except where there is no other feasible alternative for siting the development..." In a different letter dated August 21, 2007, the Applicant's representative stated that "there are no feasible alternatives to access the beach because there is no alternative location or different configuration which would accommodate a stairway on this parcel of property." LIP Section 13.26.5 details the findings that must be made in order to approve a variance. Under the standards of the LIP the Planning Commission "may approve and/or modify an application for a variance in whole or in part, with or without conditions, only if it makes all [ten] findings of fact supported by substantial evidence."

Standing in the place of the Malibu Planning Commission during this De Novo hearing, the Coastal Commission must make all ten findings of fact (A-J), otherwise, the Commission will not be able to grant the requested variance.

It should be noted that the proposed variance is not appropriate because it is not actually a request to reduce a development standard of the LIP in order to accommodate an otherwise approvable development because there is something unique about the property. For instance, the Applicant is not requesting to provide an ESHA buffer that is something less than the full required 100 feet. Rather, this request is to eliminate the buffer requirement altogether and to go beyond that to allow development to be located within ESHA. Even though such a request is not properly a variance, the Commission has analyzed the proposed request with regard to the variance requirements of LIP Section 13.26.5.

The first finding would allow for a variance where there are “special circumstances or exceptional characteristics applicable to the subject property...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.” These characteristics include “size, shape, topography, location, or surroundings.” As stated above, the Applicant contends that the easement, upon which the proposed private staircase would be located, presents some unique circumstances that require this Commission to allow private development on coastal bluff ESHA. According to the original 1974 deed and subsequent 1977 deed, the sole purpose of the easement was “pedestrian walking purposes only.” (**Exhibits 5a, 5b**). In 1999, the Clenards (the owners of the servient 7271 Birdview Avenue property at that time) re-granted the easement to the Applicant, by quitclaim deed, wherein the sole purpose of the easement was for “pedestrian purposes.” (**Exhibit 5c**).

While some neighboring property owners enjoy similar developments as that proposed by the Applicant, the mere fact that other paths and staircases exist does not justify a variance of this magnitude. The neighbor to the north of Applicant’s property has a staircase that was constructed prior to the Coastal Act (and prior to Proposition 20) and is now considered a non-conforming but nonetheless legal structure under the Malibu LCP. Several nearby property owners have built paths, walkways and staircases along the bluff face, apparently without the required coastal development permit. Under the Malibu LCP, these developments are unpermitted. Applicant’s ownership of an easement (an agreement between private parties) alone does not warrant the label of an exceptional circumstance for purposes of this finding. The coastal policy precedent set by such a variance would be incredibly damaging to the coastal bluff ESHA resources currently protected under the Malibu LCP. Had the Applicant maintained the original private staircase (last thought to have existed around 1975) instead of allowing it to deteriorate and cease to exist around 30 years ago, occasional minor repair or maintenance would be allowable (consider the existence of the neighbor’s non-conforming staircase). Since this first finding of fact has not been met, the Commission cannot allow the requested variance. While the analysis could end here, the other

variances mentioned below will benefit from the analysis of the remaining nine factual findings.

The second finding would allow a variance as long as it “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 Malibu LCP aims to protect certain coastal resources that have been determined by the public to be worthy of protection and vital to the State of California. Therefore, allowing this variance for purposes of disregarding any coastal bluff ESHA setback would be detrimental to the public interest, because it would set a precedent for similar future development allowances that could detrimentally alter the coastal landscape.

The third finding allows a variance unless it will “constitute a special privilege to the Applicant or property owner.” Since its inception, the Malibu LCP has not allowed private bluff face development of a stairway. At this point, the requested variance would constitute a special privilege, because other such staircases are either non-conforming or wholly illegal under the LCP. Assuming this variance was granted, landowners all over Malibu could enter into private easement agreements and manipulate easement interests (via threatened takings claims) in order to avoid compliance with the Malibu LCP.

The fourth finding would allow a variance as long as it “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.” As stated several times above, the Malibu LCP expressly prohibits private development in bluff ESHA, including staircases. So, granting this variance would clearly be contrary to the goals of the LCP.

The fifth finding concerns “variances to environmentally sensitive habitat area buffer standards or other environmentally sensitive habitat area protection standards.” This finding requires the following two determinations: “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.” While there is no feasible alternative for siting a stairway down the bluff face that would not be located within ESHA, as described in this report, denial of the proposed project would not constitute a taking. As such, development that may be permitted under the provisions of LIP Section 4.7 in order to avoid a taking is not relevant in this case.

The sixth finding concerns “variances to stringline standards.” This finding requires “that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.” The subject variance request is not to vary stringline standards, so this finding is not applicable.

The seventh finding requires the variance to be “consistent with the purpose and intent of the zone(s) in which the site is located.” Furthermore, “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.” In this case, this finding cannot be made because the policies and provisions of the LCP unambiguously prohibit new private bluff staircases as a use in any zone.

The eighth finding requires the subject site to be “physically suitable for the proposed variance.” The proposed site is not physically suitable for the proposed variance, because the proposed staircase would be constructed on a bluff face, which is an inherently unstable landform that is also within ESHA. Such a location is not a suitable site for the construction of a structure.

The ninth finding requires the variance to “[comply] with all requirements of state and local law.” The variance would allow the Applicant’s proposed staircase to be placed on coastal bluff ESHA, which is not consistent with the protection of ESHA required by the Coastal Act. Additionally, it is unlikely that the Applicant’s submitted drawing and application materials provide sufficient detail to assure compliance with the applicable local laws concerning building and safety codes.

The tenth finding states that “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 proposed variance would not have an impact on public parking. Therefore, this finding is inapplicable to the variance at hand.

The Applicant’s variance request, requesting reduction of the coastal bluff ESHA setback to zero feet, is not supported by all ten findings of fact. Therefore, the Commission finds that the proposed variance must be denied.

Conclusion

The Commission concludes that, for the reasons discussed above, the proposed project is not consistent with the applicable ESHA policies and provisions of the certified Local Coastal Program and must be denied. As described in detail above, the site contains native bluff scrub habitat that meets the LCP definition of ESHA, notwithstanding the past disturbance on the bluff face and introduction of non-native species in the upper areas. The proposed project would include the construction of a stairway within ESHA, on the bluff face. The structure proposed is not resource dependent. Therefore, the proposed development, located within coastal bluff ESHA, will result in significant impacts to ESHA and is inconsistent with the policies and provisions of the LCP that prohibit development that is not resource dependent within ESHA. Further, because the proposed stairs would be located within ESHA, it obviously would not provide any ESHA buffer, let alone the required 100 foot buffer. Therefore, the proposed project is not consistent with the LCP policies and provisions that require development to provide adequate buffers to protect ESHA.

The Commission can identify no feasible project alternative that can provide private beach access within the Applicant’s easement without construction within coastal bluff ESHA. However, 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. This would afford the Applicant the ability to walk within and view the ocean from a portion of the pedestrian easement. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

The LCP does provide for the approval of limited development that is otherwise inconsistent with the ESHA policies and provisions, where it is determined that development must be allowed in order to avoid a regulatory taking. While there is no feasible alternative for siting a stairway down the bluff face that would not be located within ESHA, as described in this report, denial of the proposal would not constitute a taking. As such, development that may be permitted under the provisions of the LCP in order to avoid a taking is not relevant in this case.

2. Bluff Development

The following policies of Chapter Three of the Coastal Act are incorporated as part of the City of Malibu LUP:

Section 30253 (in part)

New development shall:

...

(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

Certified Land Use Plan Policies

In addition, the City of Malibu certified LUP contains policies that limit bluff development.

Policy 4.8 states the following:

Grading and/or development-related vegetation clearance shall be prohibited where the slope exceeds 40 percent (2.5:1), except that driveways and/or utilities may be located on such slopes, where there is no less environmentally damaging feasible alternative means of providing access to a building site, provided that the building site is determined to be the preferred alternative and consistent with all other policies of the LCP.

Policy 4.15 states the following:

Existing, lawfully established structures, which do not conform to the provisions of the LCP, may be maintained and/or repaired provided that such repair and maintenance do not increase the extent of nonconformity of the structure. Except as provided below, additions and improvements to such structures may be permitted provided that such additions or improvements comply with the current standards and policies of the LCP and do not increase the extent of nonconformity of the structure. Substantial additions, demolition and reconstruction, that result in demolition and/or replacement of more than 50% of the exterior walls shall not be permitted unless such structures are brought into conformance with the policies and standards of the LCP.

Policy 4.27 states the following:

All new development located on a blufftop shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion for a projected 100 year economic life of the structure plus an added geologic stability factor of 1.5. In no case shall the setback be less than 100 feet which may be reduced to 50 feet if recommended by the City geologist and the 100 year economic life with the geologic safety factor can be met. This requirement shall apply to the principal structure and accessory or ancillary structures such as guesthouses, pools, tennis courts, cabanas, and septic systems etc. Ancillary structures such as decks, patios and walkways that do not require structural foundations may extend into setback area to a minimum distance of 15 feet from the bluff edge. Ancillary structures shall be removed or relocated landward when threatened by erosion. Slope stability analyses and erosion rate estimates shall be performed by a licensed Certified Engineering Geologist or Geotechnical Engineer.

Policy 4.29 states the following:

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.

Certified Local Implementation Plan Policies

The certified Local Implementation Plan (LIP) contains standards and policies to implement the Land Use Plan.

10.4 Development Standards

D. All new development located on a bluff top shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion or threatened by slope

instability for a projected 100 year economic life of the structure. In no case shall development be set back less than 100 feet. This distance may be reduced to 50 feet if the City geotechnical staff determines that either of the conditions below can be met with a lesser setback. This requirement shall apply to the principal structure and accessory or ancillary structures such as guesthouses, pools, tennis courts, cabanas, and septic systems etc. Ancillary structures such as decks, patios and walkways that do not require structural foundations may extend into the setback area but in no case shall be sited closer than 15 feet from the bluff edge. Ancillary structures shall be removed or relocated landward when threatened by erosion. Slope stability analyses and erosion rate estimates shall be performed by a licensed Certified Engineering Geologist and/or Geotechnical Engineer, or a Registered Civil Engineer with experience in soil engineering. Generally, one of two conditions will exist:

1. Factor of safety less than 1.5

If the bluff exhibits a factor of safety of less than 1.5 for either gross or surficial landsliding, then the location on the bluff top at which a 1.5 factor of safety exists shall be determined. Development shall be set back a minimum distance equal to the distance from the bluff edge to the 1.5 factor-of-safety-line, plus the distance that the bluff edge might reasonably be expected to erode over 100 years. These determinations, to be made by a state-licensed Certified Engineer Geologist, Registered Civil Engineer, or Geotechnical Engineer, shall be based on a sit-specific evaluation of the long-term bluff retreat rate at this site and shall include an allowance for possible acceleration of historic bluff retreat rates due to sea level rise.

...

2. Factor of safety greater than 1.5

If the bluff exhibits both a gross and surficial factor of safety against landsliding of greater than 1.5, then the development shall be set back a minimum distance equal to the distance that the bluff might reasonably be expected to erode over 100 years plus a ten foot buffer to ensure that foundation elements are not actually undermined at the end of this period. The determination of the distance that the bluff might be expected to erode over 100 years is to be made by a state-licensed Certified Engineer Geologist, Registered Civil Engineer, or Geotechnical Engineer, and shall be based on a site-specific evaluation of the long-term bluff retreat rate at the site and shall include an allowance for possible acceleration of historic bluff retreat rates due to sea level rise.

...

F. No permanent structures shall be 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. Drainage devices constructed to conform to applicable Best Management Practices shall be installed in such cases. 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 policies and provisions of the Malibu LCP require that new development be sited and designed to minimize risks to life and property from geologic hazards and to assure structural stability over the life of structures. Bluffs are unique coastal landforms that are inherently unstable due to steep slopes, groundwater seepage and surface runoff. By nature, coastal bluffs are subject to erosion from sheet flow across the top of the bluff and can be subject to wave action at the base, although this is not the case on the subject site. Further, due to geologic structure and soil composition, bluffs are often susceptible to surficial failure, especially with excessive water infiltration. Any development or disturbance on such a steeply sloping unstable landform will only serve to accelerate erosional processes. Rain water running off such structures over time tend to undercut and erode the area of the bluff immediately behind the structure. Additionally, the loss of vegetation through the altering of the natural landforms increases the erosion potential.

Even if structures proposed to be located on a bluff slope may presently be feasible from a geologic point of view, in order to maintain these structures, due to the dynamic system of bluffs, further improvements such as concrete block walls and/or other protective structures may be necessary to ensure slope stability in the future. Retaining walls or other supporting measures could result in further adverse impacts to natural landform alteration and visual resources from the public areas to and along the coast.

LUP Policy 4.27 and LIP Section 10.4 require that new development on a blufftop be set back from the bluff edge a sufficient distance to ensure that it will not be endangered or threatened by erosion or slope instability for a 100-year projected life of the development, and in no case less than 100 feet. The setback can be reduced to no less than 50 feet if certain bluff stability criteria are met. Ancillary structures that do not require structural foundations may extend into the setback area so long as they are no closer than 15 feet from the bluff edge. LUP Policy 4.29 and LIP Section 10.4(F) prohibit the construction of permanent structures on the bluff face except for public access stairways or accessways where no other feasible alternative means of public access exists.

Analysis of Proposed Project

As discussed in the previous ESHA analysis, the proposed project site is a coastal bluff face. The Applicant has indicated that no grading would be required for the construction, but no information was given on whether the stairs would be placed directly on grade, or if they would be founded on footings. Furthermore, no information was provided about how footings, if any, would be installed or if excavation would be necessary for the footings.

The Applicant provided a "Limited Geologic Opinion Report" dated June 18, 2007, and prepared by GeoConcepts, Inc. In preparation of the report, GeoConcepts staff performed a visual walkover at the site on June 11, 2007. The consulting geologists did not carry out any subsurface investigation of the site. Rather, their opinions in the report

are “based upon the limited data obtained from visual observations on the subject site, geologic research, specific information as described and past experience with hillside properties.” The descending bluff face slopes displayed a “general gradient of 1.5:1 or less.” The visual walkover showed light to moderate vegetation “consisting of grasses, ground cover, native brush, shrubs, trees and chaparral indigenous to the surrounding area.” The report concludes that “the orientation of the bedrock structure for the bluff slope is geologically favorable” but that “a detailed geology and soils engineering investigation with subsurface exploration should be anticipated prior to development of the stairway.” The report goes on to state that:

A detailed engineering geology and soils engineering investigation including surface mapping, subsurface exploration and laboratory testing of earth materials could result in different conclusions and recommendations described herein. No detailed surface mapping, subsurface exploration, or laboratory testing were performed for this limited opinion report. To determine the subsurface conditions, subsurface explorations would be required.

The Applicant’s geologic consultants did not provide any information regarding the factor of safety or bluff retreat rate for the subject site. As such, it has not been demonstrated that the site meets the requirements for reducing the bluff edge setback from 100 feet to 50 feet. Therefore, the 100-foot setback is the minimum required for any new development on the site. The proposed structure does not provide the required 100-foot structural setback from the bluff edge. Not only does the proposed project not provide any bluff setback, it would be located on the bluff face itself. The proposed project is not consistent with the requirements of LUP Policy 4.27 and LIP Section 10.4 in that it is not set back sufficiently from the edge of the bluff to assure structural stability for the life of the structure.

While it is true that the foot of the bluff is not subject to wave action at this time, that is not the only mechanism resulting in bluff erosion. The proposed project would result in the removal of all vegetation within a three-foot wide, 110-foot long area on the bluff face, with additional vegetation removal and/or disturbance along each side resulting from its construction. The proposed project does not include any re-vegetation of disturbed slopes. The removal of any vegetation, particularly on the steeper portions of the bluff face, will allow for increased erosion. Additionally, focused runoff from the staircase structure itself has the potential to undercut and erode the underlying bluff. LUP policies concerning both the prohibition against private new development on bluff faces and the restriction against developing on slopes steeper than 2.5:1 are designed not only to assure structural stability for new development, but to prevent development on bluffs will result in increased or accelerated erosion of these features. The proposed project does not conform to LUP Policy 4.29 or LIP Section 10.4(F).

Given its inconsistency with the bluff development policies and provisions of the LCP, the proposed bluff stairway must be denied. The Commission can identify no feasible project alternative that can provide private beach access within the Applicant’s easement without construction on the bluff face. However, 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 from the bluff edge. Such a path could be used for pedestrian access to the blufftop for ocean viewing. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

Variance Request

The Applicant requests a variance in order to allow for a reduction of the required 100-foot bluff setback and to allow construction on slopes in excess of 2.5:1. LUP Policy 4.8 prohibits grading and/or development-related vegetation clearance where the slope exceeds 40 percent (2.5:1), except for certain driveways and utilities. The geological report stated that the proposed site has a slope of "1.5:1 or less" or roughly 67 percent. Pursuant to LIP Section 13.26.5 and as discussed above with regard to Applicant's requested ESHA buffer variance, the Commission must determine whether this variance satisfies all ten required findings of fact.

It should be noted that the proposed bluff setback variance is not appropriate because it is not actually a request to reduce a development standard of the LIP in order to accommodate an otherwise approvable development because there is something unique about the property. For instance, the Applicant is not requesting to provide something less than the full 100-foot bluff setback. Rather, this request is to eliminate the bluff setback requirement altogether and to go beyond that to allow development to be located on the bluff face itself. Furthermore, the LCP is very specific in providing for a reduction of the 100-foot setback to no less than a 50-foot setback (if certain geologic stability criteria are met). So, this standard can not be reduced to less than 50 feet, even if variance findings could be met. Even though such a request is not properly a variance, the Commission has analyzed this proposed request along with the request to vary the standard prohibiting construction on slopes greater than 2.5 to 1, with regard to the requirements of LIP Section 13.26.5.

The first finding would allow for a variance where there are "special circumstances or exceptional characteristics applicable to the subject property...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." These characteristics include "size, shape, topography, location, or surroundings." As stated above, the Applicant contends that the easement, upon which the proposed private staircase would be located, presents some unique circumstances that require this Commission to allow private development on coastal bluff ESHA.

While some neighboring property owners enjoy similar developments as that proposed by the Applicant, the mere fact that other paths and staircases exist does not justify a variance of this magnitude. The neighbor to the north of Applicant's property, for instance, has a staircase that was constructed prior to the Coastal Act (and prior to Proposition 20) and is now considered a non-conforming but nonetheless legal structure under the Malibu LCP. Several nearby property owners have built paths, walkways and

staircases along the bluff face without a coastal development permit. Under the Malibu LCP, these developments are unpermitted. The Applicant's ownership of an easement (an agreement between private parties) alone does not warrant the label of an exceptional circumstance for purposes of this finding. The coastal policy precedent set by such a variance would be incredibly damaging to the coastal bluff ESHA resources currently protected under the Malibu LCP. Had the Applicant maintained the original private staircase (last thought to have existed around 1975) instead of allowing it to deteriorate and cease to exist around 30 years ago, occasional minor repair or maintenance would be allowable (consider the existence of the neighbor's non-conforming staircase). Since this first finding of fact has not been met, the Commission cannot allow the requested variance. While the analysis could end here, the other variances mentioned later will benefit from the analysis of the remaining nine factual findings.

The second finding would allow a variance as long as it "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 Malibu LCP aims to protect certain coastal resources that have been determined by the public to be worthy of protection and vital to the State of California. The bluff setback and steep slope policies of the LCP set minimum standards to ensure that risks to life and property are minimized. Therefore, allowing this variance for purposes of disregarding any coastal bluff development standards would be detrimental to the public interest, safety and welfare, because it would allow development that would contribute to bluff erosion and would not assure structural stability.

The third finding allows a variance unless it will "constitute a special privilege to the Applicant or property owner." Since its inception, the Malibu LCP has not allowed private bluff face development of a stairway. At this point, the requested variance would constitute a special privilege, because other such staircases are either non-conforming or wholly illegal under the LCP. Assuming this variance was granted, landowners all over Malibu could enter into private easement agreements and manipulate easement interests (via threatened takings claims) in order to avoid compliance with the Malibu LCP.

The fourth finding would allow a variance as long as it "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 will be contrary to the above listed LCP policies and provisions. The Malibu LCP expressly prohibits private development on bluff faces, including staircases. So, granting this variance would clearly be contrary to the goals of the LCP.

The fifth finding concerns "variances to environmentally sensitive habitat area buffer standards or other environmentally sensitive habitat area protection standards." This issue was addressed in the previous section under the ESHA analysis. This finding is not applicable to the requested bluff setback or slope variance.

The sixth finding concerns “variances to stringline standards.” This finding requires “that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.” This finding is not applicable to the requested bluff setback or slope variances, because the subject variance requests are not to vary stringline standards.

The seventh finding requires the variance to be “consistent with the purpose and intent of the zone(s) in which the site is located.” Furthermore, “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.” In this case, this finding cannot be made because the policies and provisions of the LCP unambiguously prohibit new private bluff staircases as a use in any zone.

The eighth finding requires the subject site to be “physically suitable for the proposed variance.” The Applicant wants to build on a bluff face that is a 1.5:1 (or steeper) slope, even though the LUP prohibits development on slopes steeper than 2.5:1 (40 percent). The proposed site is not physically suitable for the proposed variance, because the proposed staircase would be constructed on a bluff face, which is an inherently unstable landform that is also within ESHA. Such a location is not a suitable site for the construction of a structure.

The ninth finding requires the variance to “[comply] with all requirements of state and local law.” The variance would allow the Applicant’s proposed staircase to be placed on the bluff face, which is not consistent with the minimization of risks from geologic hazard and the avoidance of bluff protective devices as required by the Coastal Act. Additionally, it is unlikely that the Applicant’s submitted drawing and application materials provide sufficient detail to assure compliance with the applicable local laws concerning building and safety codes.

The tenth finding states that “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 proposed variance would not have an impact on public parking. Therefore, this finding is inapplicable to the variance at hand.

Having examined the findings of fact pursuant to LIP Section 13.26.5, the Commission finds that the Applicant’s variance request, requesting reduction of the bluff setback to zero feet and eliminating the prohibition of development on steep slopes, is not supported by all ten findings of fact. Therefore, the Commission finds that the proposed variance must be denied.

Conclusion

The Commission concludes that, for the reasons discussed above, the proposed project is not consistent with the applicable bluff development policies and provisions of the certified Local Coastal Program and must be denied. The proposed project is not consistent with the requirements of LUP Policy 4.27 and LIP Section 10.4 in that it is not

set back sufficiently from the edge of the bluff to assure structural stability for the life of the structure. Not only does the proposed project not provide an adequate setback, it would be located **on** the bluff face, which is not consistent with LUP Policy 4.29 or LIP Section 10.4(F). Such a location would require the removal of vegetation, exposing the bluff to increased and focused erosion, potentially impacting the stability of the bluff.

Given its inconsistency with the bluff development policies and provisions of the LCP, the proposed bluff stairway must be denied. The Commission can identify no feasible project alternative that can provide private beach access within the Applicant's easement without construction on the bluff face. However, 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. Such a path could be used for pedestrian access to the blufftop for ocean viewing. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

3. Scenic and Visual Resources

The following policies of Chapter Three of the Coastal Act are incorporated as part of the City of Malibu LUP:

Section 30251

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

Certified Land Use Plan Policies

In addition, the City of Malibu certified LUP contains policies that protect scenic and visual resources.

Policy 6.16 states the following:

Blufftop development shall incorporate a setback from the edge of the bluff that avoids and minimizes visual impacts from the beach and ocean below. The blufftop setback necessary to protect visual resources may be in excess of the setback necessary to

ensure that risk from geologic hazards are minimized for the life of the structure, as detailed in Policy 4.27.

Certified Local Implementation Plan Policies

The certified Local Implementation Plan (LIP) contains standards and policies to implement the Land Use Plan.

6.5(D)(2) Development Standards

No permanent structures shall be permitted on a bluff face, except for engineered stairways to accessways to provide public beach access. Such structures shall be designed and constructed 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 policies and provisions of the LCP require scenic and visual qualities of coastal areas to be considered and protected as a resource of public importance. Visual resource provisions include prohibiting new development on bluff faces in order to avoid the alteration of the natural bluff landform as well as the individual and cumulative impacts to the unique scenic and visual quality of bluffs, particularly those seen from public viewing areas. The significant adverse impacts to views from public areas (in this case, Westward Beach) of staircases and other development on the bluff face or near the bluff edge are cumulative. The more that such development is constructed, the less the bluff appears to be a natural geologic feature and habitat area.

LUP Policy 6.16 requires that bluff top development “incorporate a setback from the edge of the bluff that avoids and minimizes visual impacts from the beach and ocean below.” This policy recognizes that the setback required to protect visual resources may be greater than the setback required to assure structural stability that is required pursuant to LUP Policy 4.27. Although Policy 6.16 does not directly state that bluff face development is prohibited, it is clear that the intent of requiring a setback from the bluff edge to minimize visual impacts would preclude development that is actually on the bluff face.

Furthermore, much like the LIP provisions concerning ESHA and bluff development, LIP Provision 6.5(D)(2) states that “no permanent structures shall be permitted on a bluff face, except for engineered stairways to accessways to provide public beach access.” This provision only allows public stairways that are “designed and constructed to not contribute to further erosion of the bluff face and to be visually compatible with the surrounding area to the maximum extent feasible.”

Analysis of Proposed Project

As previously discussed, the proposed project is a private stairway on a bluff face. The proposed project is located along a bluff face immediately above and adjacent to Westward State Beach. The site is highly visible from the sandy beach and public parking lot. The pattern of development along this segment of Birdview Avenue is such that structures are sited at the top of the bluff, while the bluff face remains largely undisturbed and vegetated, except for numerous stairways and dirt tracks/paths that descend the bluff face. Although several lots have stairways traversing the bluff face and some have non-conforming and unpermitted development on the bluff face, the overall appearance of the bluff in this area is natural and undeveloped.

The Applicant's proposed private staircase is inconsistent with LUP Policy 6.16 as well as LIP provision 6.5 (D)(2), because any private development on a bluff face does not benefit the public and actually detracts from the visual aesthetic qualities of the coastline. The proposed staircase would be visible from the public beach below and would contribute to the cumulative visual impacts of replacing the natural landform and habitat area of the bluff with structures. To approve the proposed private staircase upon the coastal bluff face would result in significant adverse impacts to coastal resources. As such, the Commission concludes that the proposed project is not consistent with the visual resource provisions of the certified LCP and must be denied.

The Commission can identify no feasible project alternative that can provide private beach access within the Applicant's easement without construction on the bluff face. However, 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. Such a path could be used for pedestrian access to the blufftop for ocean viewing. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

4. Public Access and Recreation

The subject project site is located between the first public road and the sea. Therefore, the standard of review is the policies and provisions of the certified Malibu LCP as well as the access and recreation policies of the Coastal Act.

The following policies of Chapter Three of the Coastal Act are incorporated as part of the City of Malibu LUP:

Section 30210 states that:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Section 30211 states that:

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212 states, in part, that:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:

- (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
- (2) adequate access exists nearby, or,
- (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

Certified Land Use Plan Policies

In addition, the City of Malibu certified LUP contains policies that protect public access:

Policy 2.23 states the following:

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.

Certified Local Implementation Plan Policies

The certified Local Implementation Plan (LIP) contains standards and policies to implement the Land Use Plan.

12.9 CDP Permitting and Application

F. No new structures or reconstruction, except for routine repair and maintenance or to replace a structure destroyed by natural disaster in accordance with PRC section 30610(d) and (g), shall be permitted on a bluff face, except for engineered staircases or accessways to provide public shoreline access where no feasible alternative means of public access exists.

The access and recreation policies of the Coastal Act and the LCP require the provision of maximum public access in new development projects and the protection of existing public access. The only exceptions are in extremely limited circumstances where public access would be inconsistent with public safety, or the protection of fragile coastal resources.

One of the instances where public access would not typically be required in order to protect coastal resources would be on coastal bluffs. It is recognized that bluffs both contain increasingly rare habitat that is sensitive to disturbance, and are inherently unstable landforms given to erosion. The LCP does not allow the construction of access structures across private parcels where such access would cross a bluff face. The only exceptions provided are 1) the case of stairways or accessways where there is no other feasible means of providing public access to the shoreline, or 2) routine repair and maintenance, or disaster replacement of lawfully established non-conforming structures.

Analysis of Proposed Project

As described above, the proposed project is a private stairway on a bluff face in the Point Dume area. While it is assumed that the stairs would extend from the top of the bluff to the bottom, (approximately 15 feet away from the public parking lot), this is not clearly detailed in the sketch submitted by the Applicant. At the base of the bluff, there is a public parking lot and road for Westward County Beach. Seaward of the parking lot is the public beach.

The proposed stairway would be located landward of the existing public parking lot and public beach. As such, this structure would not directly interfere with or impact the existing public access in the area. So, while not providing additional public access, the project would not significantly impact existing access, consistent with the public access and recreation policies of the Coastal Act.

However, the project is not consistent with LUP Policy 2.23 or LIP Section 12.9 in that it is a new structure on a bluff face which is prohibited. The proposed stairway is designed to provide private access to the beach, so it cannot be considered for the exception provided for public accessways. There is no existing stairway, so the project cannot be considered to be repair and maintenance. Further, while another exception under this policy allows development in order "to replace a structure destroyed by natural disaster," nothing in the application or public record suggests the original staircase, in

existence during the mid-1970s, was destroyed by a natural disaster. Staff research shows that the last known record of the staircase's existence was a 1975 aerial photograph. Finally, for reasons previously discussed, the proposed project is not consistent with the ESHA, bluff development, or visual resource policies and provisions of the LCP and must be denied.

The Commission can identify no feasible project alternative that can provide private beach access within the Applicant's easement without construction on the bluff face. However, 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. This would afford the Applicant the ability to walk within and view the ocean from a portion of the pedestrian easement. Such a path could be used for pedestrian access to the blufftop for ocean viewing. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative.

5. CDP Determination Conclusion - Denial

As discussed in the above findings, the proposed project is inconsistent with the policies of the Malibu LCP, which is the standard for review in this de novo portion of this appeal hearing. When the Commission reviews a proposed project that is inconsistent with the Malibu LCP, there are several options available to the Commission. In many cases, the Commission will approve the project but impose reasonable terms and conditions to bring the project into conformance with the Malibu LCP. In other cases, the range of possible changes is so significant as to make conditioned approval infeasible. In this situation, the Commission will deny the project and provide guidance to the Applicant on the type of development changes that must be made for Malibu LCP conformance. These denials are without prejudice inasmuch as Applicants are given direction on what they need to do to propose an alternative project that can meet Malibu LCP policies. In rare cases, there are no feasible conditions that could bring the project into conformance with the Malibu LCP, and there are no obvious feasible alternatives consistent with the Malibu LCP that the Commission might suggest to an Applicant. When this happens, the Commission will deny the project without further guidance to the Applicant.

In this case, the fundamental basis of the proposed project is significantly out of conformance with the Malibu LCP because the entire project site is located on a coastal bluff within coastal bluff ESHA. As a result, the proposed project must be denied. As discussed above, the Commission has identified two feasible project alternatives that could be implemented (non-structural walkway on the blufftop and the no-project alternative). However, the Commission is unaware of any modifications to the project that would provide private beach access within the Applicant's easement without construction on the bluff face or within ESHA in order to make it consistent with the Malibu LCP.

C. Takings

When the Commission denies a project, a question may arise whether the denial results in an unconstitutional “taking” of the Applicant’s property without payment of just compensation under the 5th and 14th Amendments to the United States Constitution and the Article 1, section 19 of the California Constitution. Coastal Act Section 30010 addresses takings and states as follows:

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. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, 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 does not constitute a taking, then it may deny the project, as proposed, with the assurance that its actions are consistent with both the Constitutional prohibitions and Section 30010. 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. In this latter situation, the Commission will propose modifications to the development to minimize its Malibu LCP inconsistencies while still allowing some reasonable amount of development.¹

In the remainder of this section, the Commission considers whether, for purposes of compliance with Section 30010 and the relevant constitutional provisions, its denial of the project would constitute a taking. The Commission finds that, under any of the prevailing takings tests, the denial of the project, as proposed, would not constitute a taking.

Applicant’s Position

In 1974, through a single grant deed, the Applicant purchased an undivided one-half interest in 7273 Birdview Avenue, a roadside bluff top parcel developed with a triplex, and an “exclusive easement” over 7271 Birdview Avenue (which separated 7273 Birdview from the beach) “for pedestrian walking purposes only.” At the time of purchase, aerial photographs from the time of purchase indicated that a private staircase existed within the easement, which descended the bluff face to the public beach. In 1979, the aerial photograph shows no private staircase in the easement.

¹ For example, in CDP A-3-SCO-00-033 (Hinman), the Commission in 2000 approved residential development on a site that was entirely ESHA even though it was not resource dependent development and thus was inconsistent with the LCP (which was the standard of review in that case).

The 1986 aerial photograph depicts the same. Therefore, between 1979 (possibly earlier) and the present time, no private staircase has existed within the Applicant's easement. There could not have been a *legal* stairway in the easement over the past 30 or more years.

However, the Applicant contends that he owns two separate parcels. "A fee parcel of the Triplex Property and an easement over the Easement Property." (**Exhibit 7**). The Applicant further contends that because he has two distinct parcels, "the failure to grant a permit to construct the stairs over the easement parcel would make the entire easement parcel useless as it is only five feet wide." (**Exhibit 7**). Accordingly, the Applicant maintains that rendering the "easement parcel" useless amounts to a regulatory taking, for which the payment of just compensation is required. In support of his position, the Applicant cites *City of Los Angeles v. Wright*, (1951) 107 Cal. App. 235 and *Bacich v. Board of Control*, (1943) 23 Cal. 2d 343.

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not "be taken for public use, without just compensation."² Article 1, section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner."

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass'n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission's actions here would be evaluated under the standards for a regulatory taking.

The Supreme Court itself has recognized that case law offers little insight into when, and under what circumstances, a given regulation may be seen as going "too far" (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014). The Court has identified two circumstances in which an agency might have acted in a manner that constituted a regulatory taking. The first is the "categorical" formulation identified in *Lucas, supra*. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking regardless of the outcome of any "case specific" inquiry into the public interest involved (*Id.* at p. 1014). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only "in the extraordinary

² The Fifth Amendment was made applicable to the States by the Fourteenth Amendment (see *Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226).

circumstance when *no* productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless” (*Id.* at pp. 1016-1017 [emphasis in original]) (see *United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126 [regulatory takings occur only under “extreme circumstances”]).³ Since the Applicant argues that a permit denial “would make the entire easement parcel useless,” he appears to be asserting such a categorical taking.

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained value following regulation but remanding for further consideration under *Penn Central*]).

The Commission’s Action Would Not Constitute a Taking

As a threshold matter, before a taking claim can be analyzed it is necessary to define the property interest against which the taking claim will be measured. In most cases, this is not an issue because there is a single, readily identifiable parcel of property on which development is proposed. Here, it is less clear; because the proposed development would place a private staircase on a bluff face within an easement over 7271 Birdview Avenue. Although the Applicant argues that his easement is a separate parcel, it is not. An easement is a distinct interest in land, but it is not a separate parcel. An easement grants a right to use property for a specific purpose(s), as opposed to the entire bundle of rights that attend fee title interest in property.

Moreover, the nature of the easement(s) at issue is limited. Even if the Commission treated the Applicant as holding two easements (from 1974 and from 1999), the very terms of the easements provide that one is “for pedestrian walking purposes only” and the other is for “pedestrian purposes”. Neither easement provides any rights to perform any physical development. Accordingly, if the Commission denies the permit to build the stairs, it has not taken away any rights even *purportedly* granted by their easements, and thus, the Commission has not reduced the value of those easements or the dominant tenements to which the easements provide some benefit. Nor has it rendered them useless, as the Applicant maintains the right to use the property as provided in the easement.

³ Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

Finally, property owners can only convey rights that they possess. In 1974 and 1999, when the easements were executed, the grantor did not have the absolute right to build stairs, and therefore the grantor did not have that right available to convey. The easement is not enforceable, based on *Baccouche v. Blakenship* (2007) 154 Cal.App.4th 1551.

In an abundance of caution, the remainder of the Commission's takings analysis will, at times, treat the easement(s) as purporting to grant the easement holders the right to construct structures necessary to cross over the easement area on foot, even though there is nothing in the documents to suggest conveyance of such a right, in order to demonstrate that even if the easements purported to convey such rights, a regulatory denial of that right would not constitute a taking.

Easements and Takings

"An appurtenant easement is one which is impressed upon the servient tenement for the use and benefit of other property called the dominant tenement." *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1278. The Applicant enjoys an easement appurtenant beginning at 7273 Birdview Avenue (dominant parcel) and running across 7271 Birdview Avenue (servient parcel) for "pedestrian [walking] purposes". However, given the Applicant's contention that he owns two separate parcels, the following analyses will examine the validity of a takings claim under the following two alternative approaches: 1) treating the interest at issue as the appurtenant easement as it relates to the dominant parcel and 2) treating the interest at issue as the easement property, as a distinct property interest in and of itself.

With respect to the latter approach, it is important to note that an easement is an interest in land, but it is not a "parcel", which is the unit of analysis used for purposes of most "takings" determinations. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1481, 1483-84 (2002). Nonetheless, in *County of Los Angeles v. Wright* (1951) 107 Cal.App.2d 235, 241, the California court held that the holder of an easement over land "is entitled to recover damages when such easement is taken or damaged for public use." However, the *Wright* case involved a condemnation action against the holder of an easement, whereas here, the public is not acquiring any right to use the Applicant's easement. Rather, the Commission is simply denying the Applicant's request to construct a staircase on the site. The applicant remains free to use the property as he has since he purchased it.

The Denial of the Project Would Not Constitute a Categorical Taking

As discussed, the first test is whether there has been a categorical taking of property under the *Lucas* standards. To constitute a categorical taking, the regulation must deny all economically viable use of property; in other words, it must render the property "valueless" (*Lucas, supra*, 505 U.S. at p. 1012). If the property retains any value following the Government's action, the *Lucas* categorical taking formulation is unavailable and the property owner must establish a taking under the three-part Penn Central test (see *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency* (2002) 535 U.S. 302, 330; *Palazollo, supra*, 533 U.S. at pp. 630-632). Because permit

decisions rarely render property “valueless,” courts seldom find that permit decisions constitute takings under the *Lucas* standard.

In this case, even if the easement(s) did purport to convey a right to construct a stairway, which they did not, and the grantor had the legal ability to convey such a right, which they did not, the regulatory prohibition on doing so would not be a taking. The relevant 300 ft. by 5 ft. property (an easement “for pedestrian purposes” over 7271 Birdview Avenue) is currently undeveloped, except for an unpermitted white drainage pipe. If we treat the relevant property interest as an interest in the dominant property, it has clearly not been rendered valueless, as it retains a single-family residence on it. Accordingly, the denial of this project will not render the property “valueless” and thus there is no categorical taking.

Even if only the easement were considered in and of itself as the relevant parcel for takings purposes, there is no categorical taking. The Supreme Court in *Tahoe Regional Planning Agency*, defined the relevant property for takings purposes as the parcel as a whole, and the Commission is aware of no case treating an easement as a distinct parcel subject to a *Lucas* categorical analysis. In fact, to do so would undermine all land use regulation, as it would allow a property owner to sell another party an easement for a purpose that is prohibited under existing regulation, and then the buyer could argue that enforcing the existing regulations would constitute a *Lucas* categorical taking. In addition, even if the easement were treated as subject to a takings analysis on its own, after the Commission’s denial, the Applicant can still use the easement as a vista point or as a pedestrian walking path down to the beach. These uses have economic value to the Applicant, either alone or in conjunction with his enjoyment of the existing structure on his adjacent lot.

Therefore, the Commission’s denial of an ancillary private staircase structure leaves the Applicant with some uses of both the dominant property and the easement area itself, all of which have economic value to the Applicant. Moreover, as will be addressed further, the Commission’s denial did not significantly diminish the value of the easement over 7271 Birdview Avenue, which had little fair market value even before the Applicant acquired it. In these circumstances, the Commission’s denial did not render the easement over 7271 Birdview Avenue valueless and does not constitute a categorical taking under *Lucas*.

The Denial of the Permit is Not a Taking Under the Ad Hoc *Penn Central* Test

If a regulatory decision does not constitute a taking under *Lucas*, a court may consider whether the permit decision would constitute a taking under the ad hoc inquiry stated in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 123-125. This ad hoc inquiry generally requires an examination into factors such as the character of the government action, its economic impact, and its interference with reasonable, investment-backed expectations. The Applicant did not argue that the Commission’s denial would constitute such a partial diminution in value, did not cite *Penn Central* or any of the cases in the *Penn Central* line, and did not provide any of the data that the Commission would need to conduct a fact-intensive, *ad hoc* analysis under the *Penn Central* approach. Nevertheless, considering the *Penn Central* factors with the

available information demonstrates that the Commission's denial would not be a taking under this analysis either.

Reasonable Investment-Backed Expectations. This absence of reasonable investment-backed expectations is usually dispositive of a taking claim under the *Penn Central* standards (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005, 1008-1009). When the Applicant purchased 7273 Birdview Avenue and the easement over 7271 Birdview Avenue in 1974, California's Proposition 20 (the precursor to the Coastal Act) was already in effect (as of February 1973). Given that existing regulatory regime, the Applicant could have had no reasonable expectation of being able to completely rebuild the stairway if it were torn down, particularly not 30 years after being torn down.

In order to determine whether any expectation the Applicant did have was sufficiently investment-backed, it is necessary to assess what the Applicant invested when he purchased the property. However, the Applicants have provided no evidence of the purchase price for either their lot at 7273 Birdview Avenue or their easement over 7271 Birdview Avenue.⁴ In 1999, when the easement was re-granted by the owners of 7271 Birdview Avenue to the Applicant, the quitclaim deed valued the transaction under \$100. At that time, no staircase existed within the easement.

In summary, the evidence supports neither that the Applicant had a reasonable expectation that he would be able to construct a new staircase nearly 30 years after any staircase apparently ceased to exist on site nor that he had a sufficient investment-backed expectation. Thus, the Applicant lacked the reasonable, investment-backed expectation necessary to make a *Penn Central* claim.

Economic Impact. The second prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the Applicant's property. The landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., supra*, [citing *William C. Haas v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 [applying *Penn Central*, court finds that diminution of property's value by 91% not a taking]). In this case, the Applicant has presented no evidence to demonstrate that the Commission's action would have any impact, much less a substantial impact, on the value of the Applicant's property.

Character of the Commission's Action. The final prong of the *Penn Central* test requires a consideration of the character or nature of the regulatory action. A regulatory action that is an exercise of the police power designed to protect the public's health, safety and welfare is much less likely to effect a taking (*Keystone Bituminous Coal Ass'n, supra*, 480 U.S. at pp. 488-490]; *Penn Central, supra*, 438 U.S. at p. 127), than, for example, a government action that is more like a physical appropriation of property

⁴ At the time of the purchase the County Assessor's office required a documentary transfer tax of \$108.35. The tax rate in was \$1.10 per \$1,000. Accordingly, the purchase price should have been \$98,000. However, the sale did not ascribe individual prices to the easement over 7271 Birdview Avenue versus the fee title to 7273 Birdview Avenue.

(see *Loretto, supra*, 458 U.S. 419).

In this case, the Commission's denial of the Applicant's proposal promotes important policies that protect the public's health, safety and welfare. Detailed earlier in this report, these policies include the fostering of public safety from geologic and physical hazards, the preservation of scenic resources and community character, and the protection of marine resources and habitat. All of these policies are the type of exercises of the police power that have long been thought to promote important governmental interests (e.g., *Agins, supra*). At the same time, the Commission's action involves no physical occupation or exactions of property interests and allows the Applicant to engage in the same pedestrian uses to which the easement over 7271 Birdview Avenue is currently put. Consequently, application of the third prong of *Penn Central* strongly weighs against a finding that the denial of this project constitutes a taking.

For all of these reasons, the Commission's denial of this project would not constitute a taking under the ad hoc *Penn Central* standards.

Vested Rights

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 available administrative remedies. Under the Coastal Act, a property owner must first apply to the Commission for a vested rights determination; the property owner cannot raise the claim of vested right in a permit proceeding. (*LT-WR, LLC v. California Coastal Commission* (2007) 152 Cal.App.4th 770.) The Applicant's claims regarding the existence of a staircase at some point in the past are irrelevant to these proceedings.

Conclusion

For all of the above reasons, the Commission concludes that its denial of the Applicant's proposal would not constitute a taking and therefore is consistent with Coastal Act Section 30010.

D. CEQA

Section 13096(a) of the Commission's administrative regulations requires Commission approval of a Coastal Development Permit application to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

The Commission incorporates its findings on Local Coastal Program consistency at this point as if set forth in full. These findings address and respond to all public comments

regarding potential significant adverse environmental effects of the project that were received prior to preparation of the staff report. As discussed above, the proposed development is **not** consistent with the policies of the Certified Local Coastal Program and would result in significant adverse impacts to ESHA and visual resources, and would not minimize risks to life and property from geologic instability or assure structural stability. As discussed in great detail in these findings, there are feasible alternatives or feasible mitigation measures available, which would substantially lessen any significant adverse impact that the activity may have on the environment. The Commission can identify no feasible project alternative that can provide private beach access within the Applicant's easement without construction on the bluff face and within coastal bluff ESHA. However, 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 from the bluff edge. This would afford the Applicant the ability to walk within and view the ocean from a portion of the pedestrian easement. Additionally, the "No Project" alternative whereby the existing, legally established, development is retained on the project site and no additional development is constructed, is a feasible project alternative. Therefore, the Commission finds that the proposed project cannot be found to be consistent with the requirements of the Coastal Act to conform to CEQA.

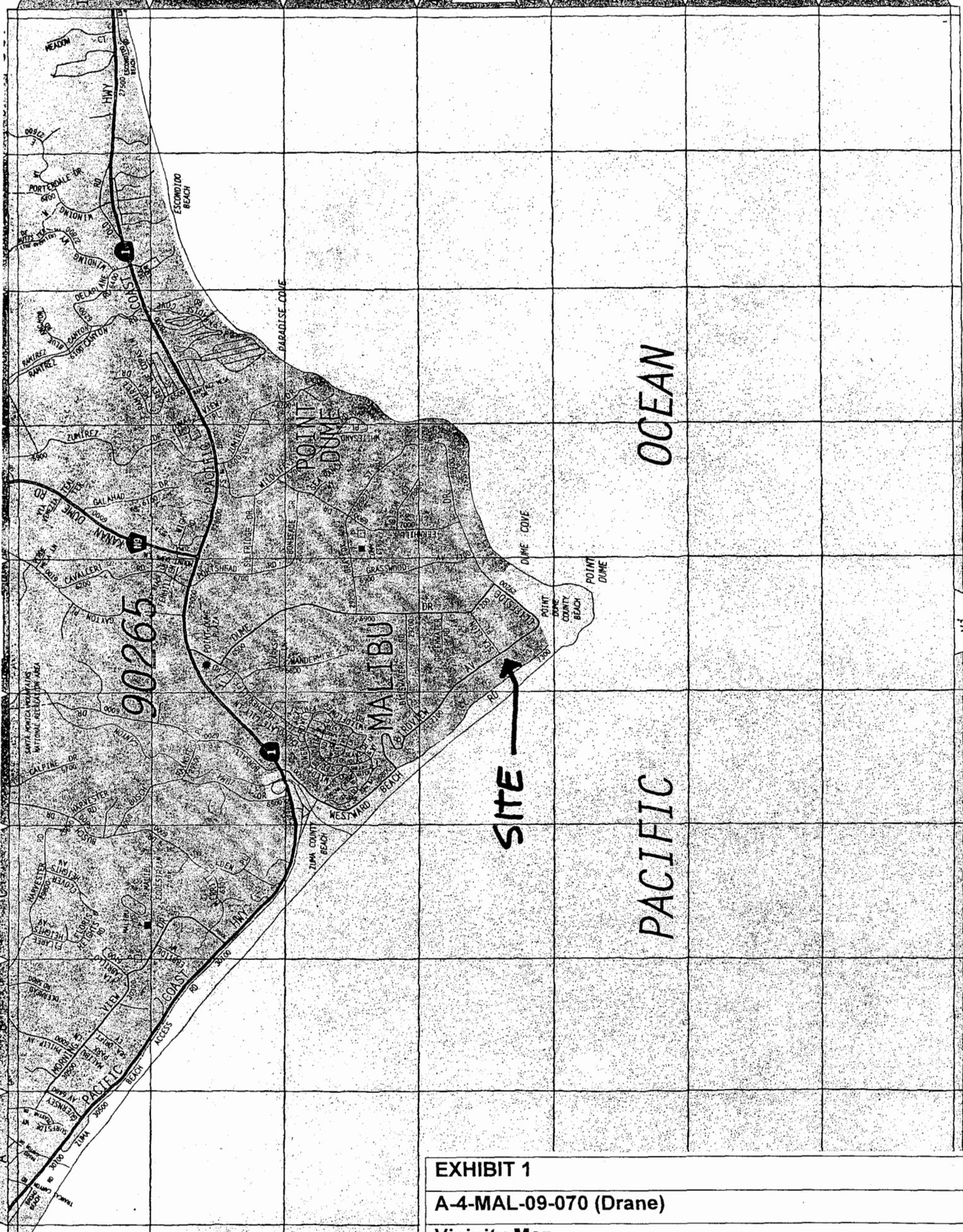
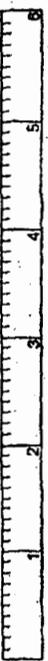


EXHIBIT 1
 A-4-MAL-09-070 (Drane)
 Vicinity Map

REVISED
 7-1-61
 11-13-61
 10-16-62
 11-5-62
 11-30-63
 9-8-64
 600206610
 681119
 -891015
 720113
 660704045
 660704045
 710806
 710806
 351208
 351208

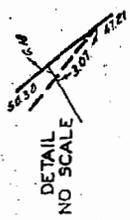
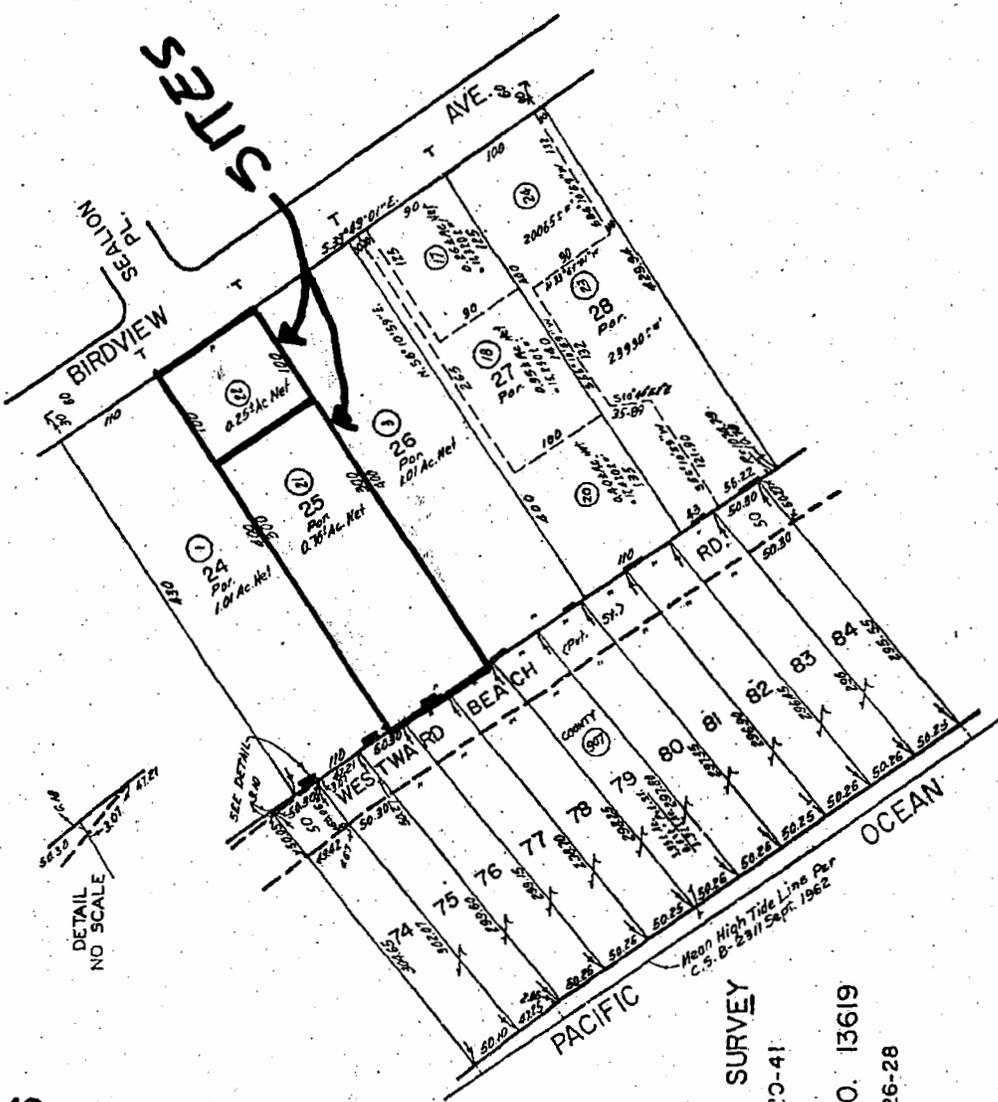
SCALE IN 1/10 OF AN INCH



1-800-345-7334

1996

4468 20
 SCALE 1" = 100'



RECORD OF SURVEY
 R.S. 57-03-41
 TRACT NO. 13619
 M.B. 282-26-28

CDE 860

OR PREV. ASSMT. SEE: 482-3106333

DEC 22 1995

ASSESSOR'S MAP
 COUNTY OF LOS ANGELES, CALIF.

EXHIBIT 2
A-4-MAL-09-070 (Drane)
Parcel Map

RECEIVED
AUG 23 2007
PLANNING DEPT.

TRIPLEX KNOWN
AS 7273-7277
BIRDVIEW AVE

PARCEL 1 PER
DOC. NO. 94-186682
AND R.S. 198-36.



FD NAIL TIN & TAG
IN SEAWARD SIDE OF
PDV. POLE PER
R.S. 198-36.

FD NAIL & TAG

MARKED BLACK CROSS
IN TOP OF BRICK
PLANTER.

PURPOSES

MARKED BLACK CROSS
IN CONC WALK AT GATE

FOR PEDESTRIAN
No. 99-1339203.

LEGEND

□ INDICATES A SET 1" X 2" WOOD STAKE
WITH TAG L.S. 5009, FLUSH W/ GROUND.

MARKED BLACK CROSS
IN CONC LANDING ABOVE STAIRS

*Proposed
Stairway*

SCALE 1" = 50'

N 56°10'59"E 300'

PARCEL 24, R.S. 57, 40-41.

PARCEL 25, R.S. 57, 40-41.

5' WIDE EASEMENT
PER D.R. DOC.

MAP SHOWING SURVEY OF A
PORTION OF THE NW'LY LINE OF
PARCEL 25, PER R.S. 57, 40-41,
BEING ALSO THE NW'LY LINE OF A
5' WIDE PED. E'SMNT PER D.R. DOC.
No. 99-1339203,
IN THE CITY OF MALIBU
COUNTY OF LOS ANGELES, CA

SURVEYED IN JUNE, 2006
AT REQUEST OF MR. CLARK DRANE

BY: QUIROS SURVEYING
22249 PCH MALIBU CA 90265
310 456-8022

PT ON PARCEL LINE PRODUCED:
SET NAIL, TIN & TAG L.S. 5009
IN TOP OF ASPHALT CURB,
0.8' SEAWARD OF TRUE CORNER.

WESTWARD BEACH

PARKING LOT

PT ON PARCEL LINE PRODUCED:

FILE 662-2-A

EXHIBIT 3
A-4-MAL-09-070 (Drane)
Project Plans (2 pages)

REPAIR & REPLACE

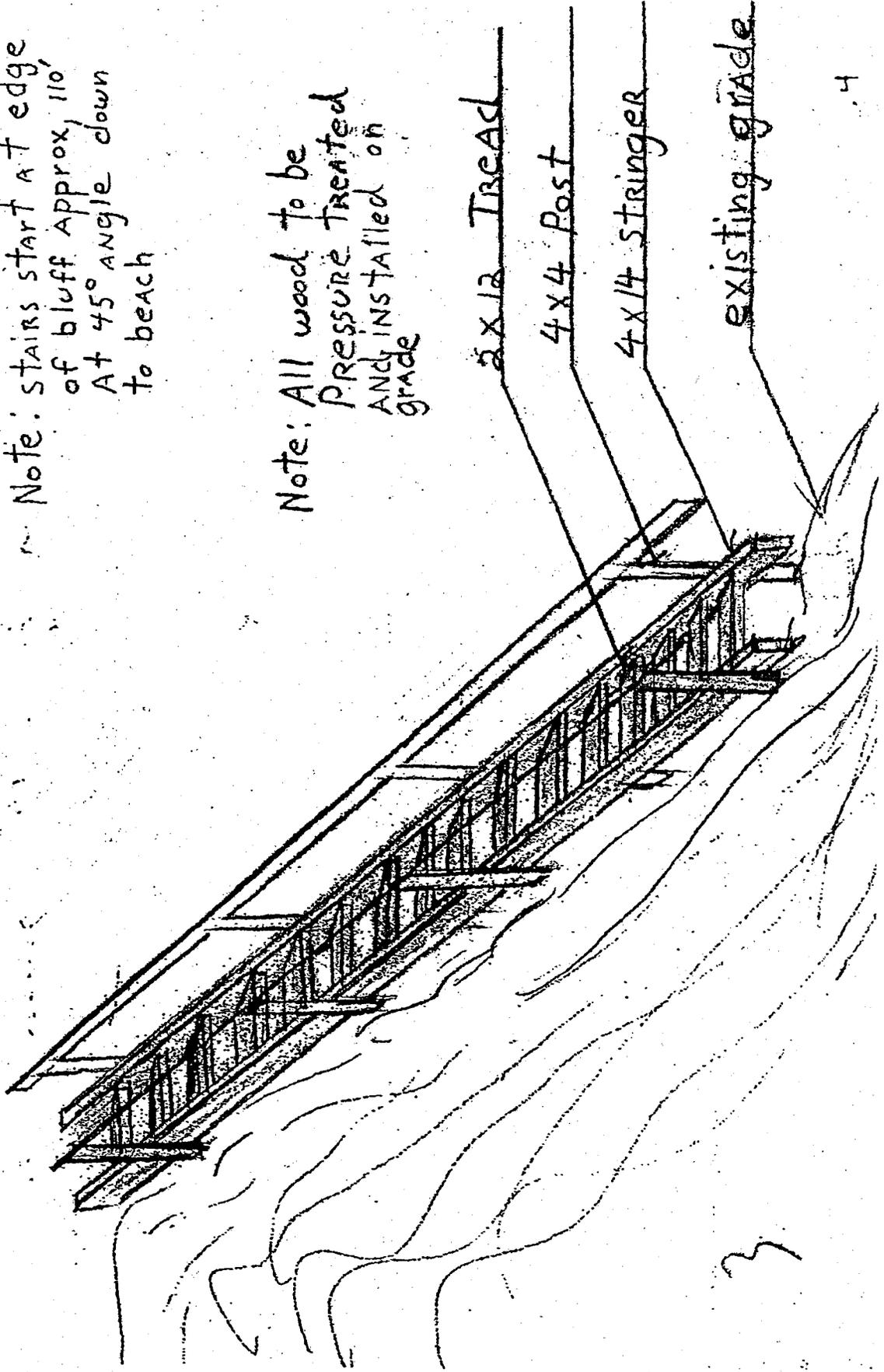
CLARK DRANE
727 BIRDAVIEW AVE
MALIBU CA 90265
MARY MATZA 457-3106

CONTRACTOR
BICK/CUNNINGHAM
310-633-1254

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:

3

4



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EXHIBIT 4a
A-4-MAL-09-070 (Drane)
1972 Aerial Photograph

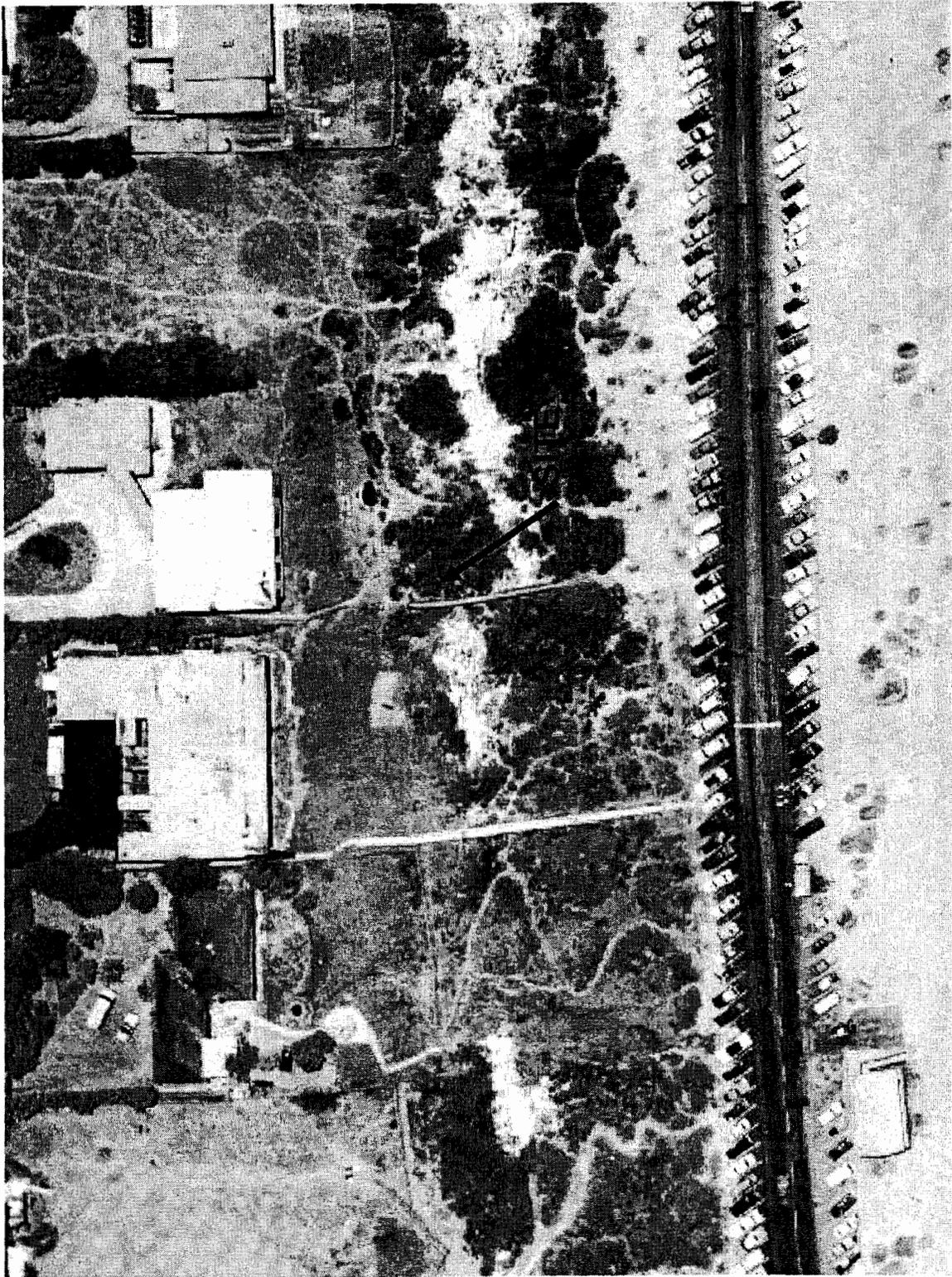


EXHIBIT 4b

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

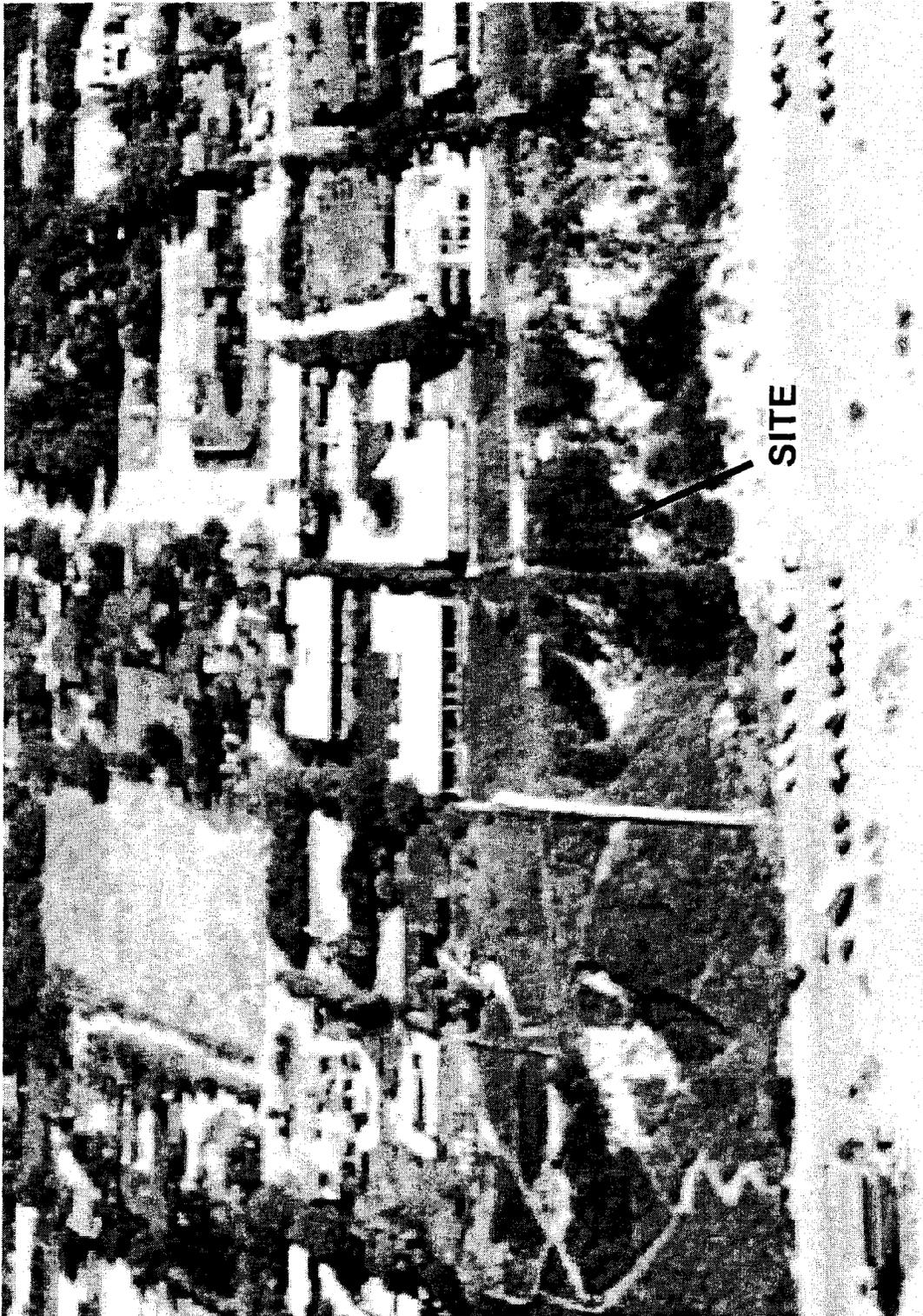
1975 Aerial Photograph



EXHIBIT 4c

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

1977 Aerial Photograph



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EXHIBIT 4d

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

1979 Aerial Photograph

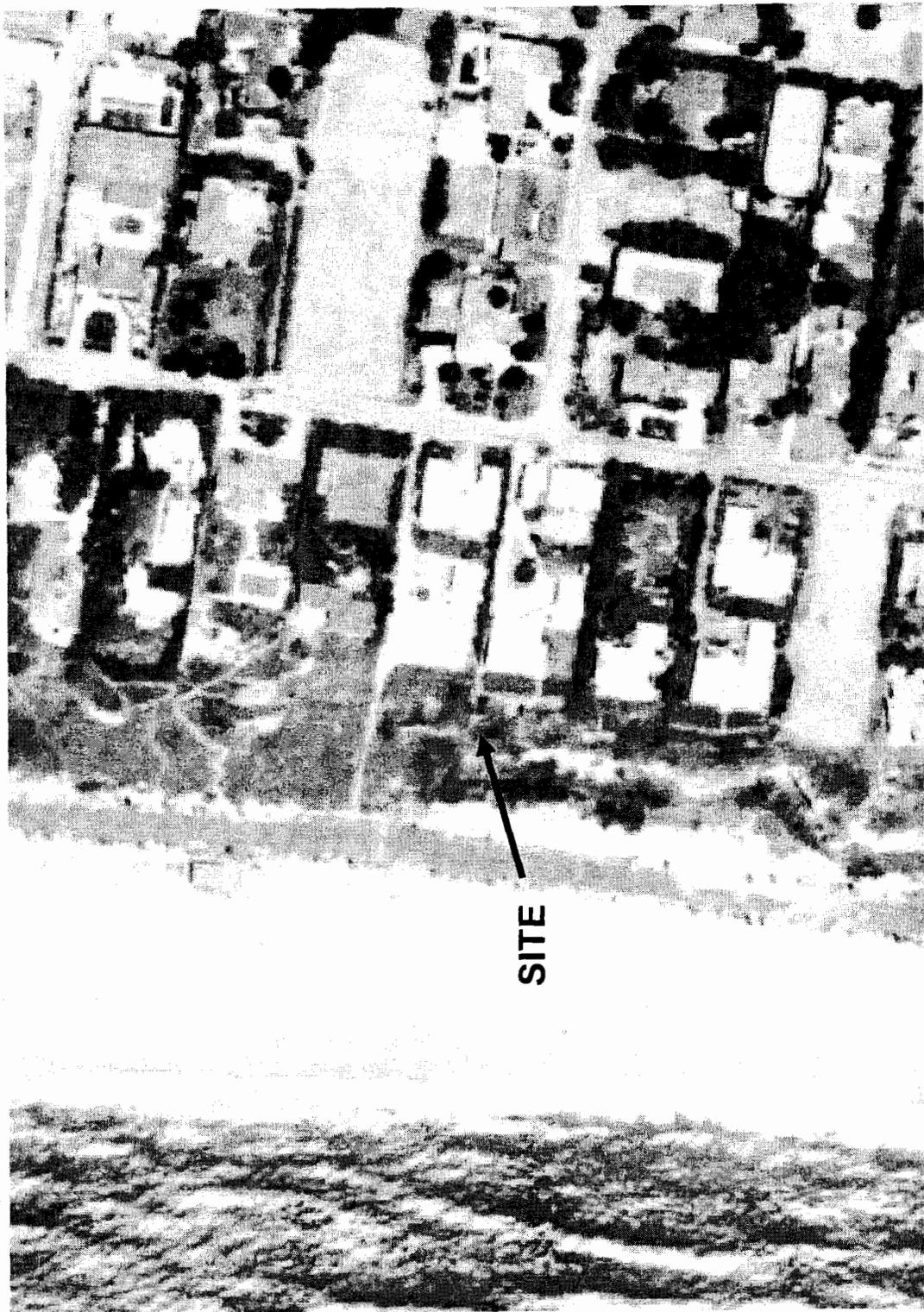
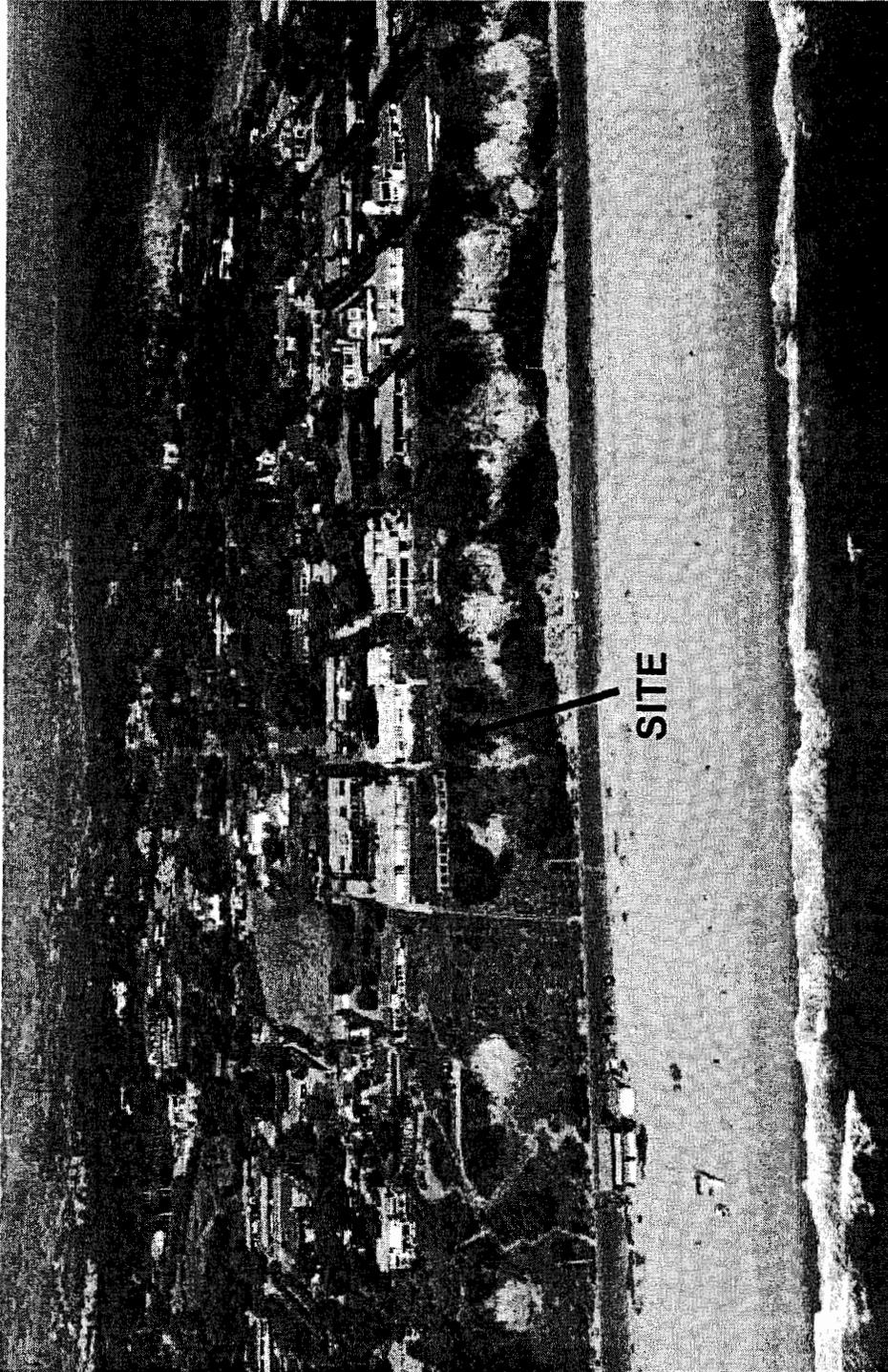


EXHIBIT 4e

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

1986 Aerial Photograph



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EXHIBIT 4f

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

2008 Aerial Photograph

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

2506

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)

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

FEE
\$4
20

SPACE ABOVE THIS LINE FOR RECORDER'S USE

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 the time of sale.
Arthur B. Glenard
Signature of Declarant/Agent determined by MALIBU ROAD
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 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

Arthur B. Glenard
Arthur B. Glenard

STATE OF CALIFORNIA
COUNTY OF
Los Angeles

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*

EXHIBIT 5a
A-4-MAL-09-070 (Drane)
1974 Grant Deed (2 pages)

MAIL TAX STAT

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 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 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 Northwesterly 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.

EXCEPT therefrom that portion 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.

First American
RECORDING REQUESTED BY

77- 325106

AND SIGNED BY THE MAIL THIS DEED AND OTHER DOCUMENTS IN ACCORDANCE WITH THE STATUTES OF THE STATE OF CALIFORNIA

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

RECORDED BY OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA
MAIL
27 FEB 11 AM MAR 31 1977
Recorder's Office

FEE
\$4
27

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 HILDEP 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 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 without any fraud and off their own

Signature *William A. Schultz*

William A. Schultz
William A. Schultz

Carol E. Schultz
Carol E. Schultz



MAIL TAX STATEMENTS AS DIRECTED ABOVE.

7701378-10

EXHIBIT 5b
A-4-MAL-09-070 (Drane)
1977 Grant Deed (4 pages)

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 Northeasterly 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 Northwesterly 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 DEED AND UNLESS OTHERWISE ORDERED MAIL TAX STATEMENTS TO

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

RECORDED IN OFFICIAL RECORDS
OF LOS ANGELES COUNTY, CA.
MIM.
27 PART 11 A.M. MAR 31 1977
Recorder's Office

ST. 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 1975 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 the said State, personally appeared Clark Drane and Mildred Drane

CLARK DRANE FAMILY REVOCABLE 1975 TRUST

BY: [Signature]
Clark Drane

BY: [Signature]
Mildred Drane

known to me to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged that they executed the same
Signature Verda J. Harris



(This area for official notarial seal)

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 21928 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 Northeasterly 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 Northwesterly 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- 325107

END OF RECORDED DOCUMENT

RECORDING REQUESTED BY
North American Title
AND WHEN RECORDED MAIL TO

99 1339203

2

- CLARK DRANE
- 6914 GRENOBLE ST.
TUJUNGA CA 91042

FEE \$19	M
DAF \$2	
C-20	5

THIS SPACE FOR COURIER'S USE ONLY

**EASEMENT
QUITCLAIM DEED**

THE UNDERSIGNED GRANTOR(S) DECLARE(S)

DOCUMENTARY TRANSFER TAX is \$NONE

- computed on full value of property conveyed or
- computed on full value less value of liens or encumbrances remaining at time of sale
- Unincorporated area City of Malibu AND

FOR A VALUABLE CONSIDERATION receipt of which is hereby acknowledged,

Eileen P. Cienard Trustee of the Cienard Family Trust dated 9/19/89

do(es) hereby REMISE RELEASE AND FOREVER QUITCLAIM to

Clark Drane and Mildred Drane as Trustees of the Clark Drane Family Revocable 1976 Trust Established 12/22/76

An Easement for pedestrian purposes over

the real property in the City of Malibu County of Los Angeles State of California described as

Complete legal description attached hereto marked Exhibit A and by this reference incorporated herein

A P #

"This is a conveyance of an easement and the consideration and value is less than \$100, R & T 11911"

"This is a conveyance of an easement (Exhibit "A") and the consideration and value is less than \$199 R & T 11911 This Deed is recorded to confirm the easement described therein to correct a previous incorrectly recorded legal description "

DATED June 25 1999

STATE OF CALIFORNIA

COUNTY OF Los Angeles

On July 13th, 1999

before me JENINA ATKINSON

a Notary Public in and for said State personally appeared

Eileen P. Cienard
Eileen P. Cienard, Trustee of the Cienard Family Trust dated 9/19/89

* Eileen P. Cienard *

personally known to me (or 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 upon behalf of which the person(s) acted executed the instrument
WITNESS my hand and official seal



Signature

Mildred Drane

(This area for official notarial seal)

Mail tax statements to

EXHIBIT 5c

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

1999 Quitclaim Deed (5 pages)

Exhibit "A"
"LEGAL DESCRIPTION"

3

AN EASEMENT FOR PEDESTRIAN PURPOSES OVER THE NORTHWESTERLY FIVE FEET (5'), MEASURED AT RIGHT ANGLES, OF THE FOLLOWING DESCRIBED PROPERTY

A PARCEL OF LAND IN THE CITY OF MALIBU, 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, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, MORE PARTICULARLY DESCRIBED AS FOLLOWS

COMMENCING 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 AS INSTRUMENT NO 3439 IN BOOK 23683, PAGE 17 OF OFFICIAL RECORDS OF SAID COUNTY, THENCE, ALONG SAID CENTER LINE OF ROAD EASEMENT NO 1, SOUTH 33° 49' 01" EAST 69 00 FEET, THENCE SOUTH 56° 10' 59" WEST 130 00 FEET TO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION, THENCE CONTINUING SOUTH 56° 10' 59" WEST 300 00 FEET, THENCE NORTH 33° 49' 01" WEST 110 00 FEET, THENCE NORTH 56° 10' 59" EAST 300 00 FEET TO A LINE THAT BEARS NORTH 33° 49' 01" WEST FROM SAID TRUE POINT OF BEGINNING, THENCE SOUTH 33° 49' 01" EAST 110 00 FEET TO THE TRUE POINT OF BEGINNING, AND AS SHOWN ON EXHIBIT MAP ATTACHED

THE ABOVE DESCRIBED LAND BEING A PORTION OF PARCEL 25, IN SAID CITY, COUNTY AND STATE, AS SHOWN ON MAP FILED IN BOOK 57, PAGES 40-41, OF RECORD OF SURVEYS, IN SAID OFFICE OF THE COUNTY RECORDER

99 1339203

Exhibit "A"
"LEGAL DESCRIPTION"

4

AN EASEMENT FOR PEDESTRIAN PURPOSES OVER THE NORTHWESTERLY FIVE FEET (5'), MEASURED AT RIGHT ANGLES, OF THE FOLLOWING DESCRIBED PROPERTY

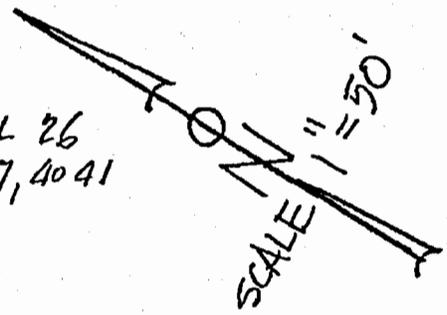
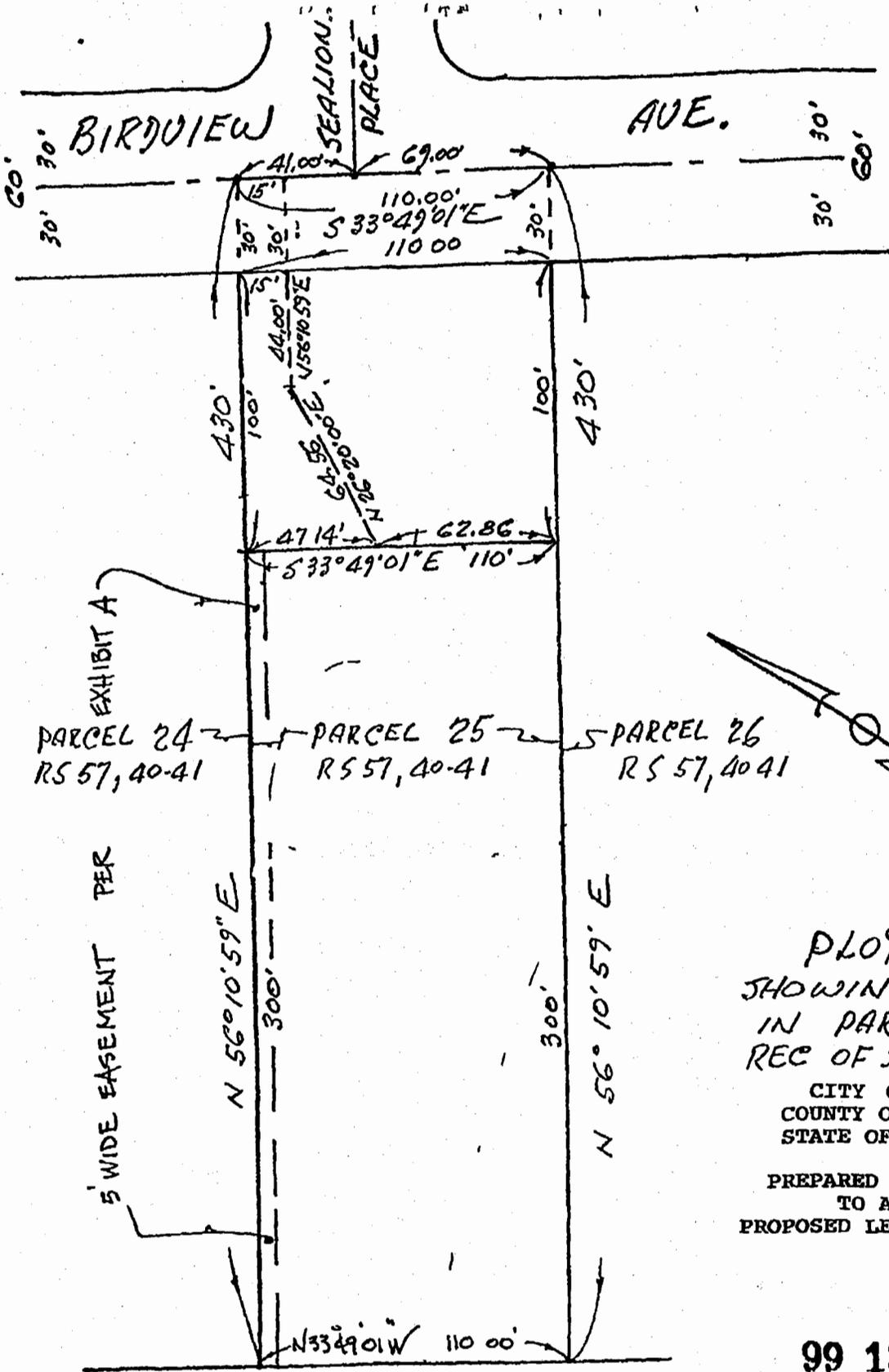
A PARCEL OF LAND IN THE CITY OF MALIBU, COUNTY OF LOS ANGELES, STATE OF CALIFORNIA, BEING A PORTION OF THE RANCHO TOPANGA MALIBU SEQUIT, AS CONFIRMED TO MATTHEW KELLER BY PATENT RECORDED IN BOOK 1, PAGES 407, ET SEQ, OF PATENTS, IN THE OFFICE OF THE COUNTY RECORDER OF SAID COUNTY, MORE PARTICULARLY DESCRIBED AS FOLLOWS

COMMENCING 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 AS INSTRUMENT NO 3439 IN BOOK 23683, PAGE 17 OF OFFICIAL RECORDS OF SAID COUNTY, THENCE, ALONG SAID CENTER LINE OF ROAD EASEMENT NO 1, SOUTH 33° 49' 01" EAST 69 00 FEET, THENCE SOUTH 56° 10' 59" WEST 130 00 FEET TO THE TRUE POINT OF BEGINNING OF THIS DESCRIPTION, THENCE CONTINUING SOUTH 56° 10' 59" WEST 300 00 FEET, THENCE NORTH 33° 49' 01" WEST 110 00 FEET, THENCE NORTH 56° 10' 59" EAST 300 00 FEET TO A LINE THAT BEARS NORTH 33° 49' 01" WEST FROM SAID TRUE POINT OF BEGINNING, THENCE SOUTH 33° 49' 01" EAST 110 00 FEET TO THE TRUE POINT OF BEGINNING, AND AS SHOWN ON EXHIBIT MAP ATTACHED

THE ABOVE DESCRIBED LAND BEING A PORTION OF PARCEL 25, IN SAID CITY, COUNTY AND STATE, AS SHOWN ON MAP FILED IN BOOK 57, PAGES 40-41, OF RECORD OF SURVEYS, IN SAID OFFICE OF THE COUNTY RECORDER

99 1339203

5



PLOT PLAN
 SHOWING PARCELS
 IN PARCEL 25
 REC OF SURVEY 57, 40-4
 CITY OF MALIBU
 COUNTY OF LOS ANGELES
 STATE OF CALIFORNIA

PREPARED IN JUNE, 1999
 TO ACCOMPANY
 PROPOSED LEGAL DESCRIPTIONS

99 1339203

NOTE. This is not a map of a survey

662-3-A

6

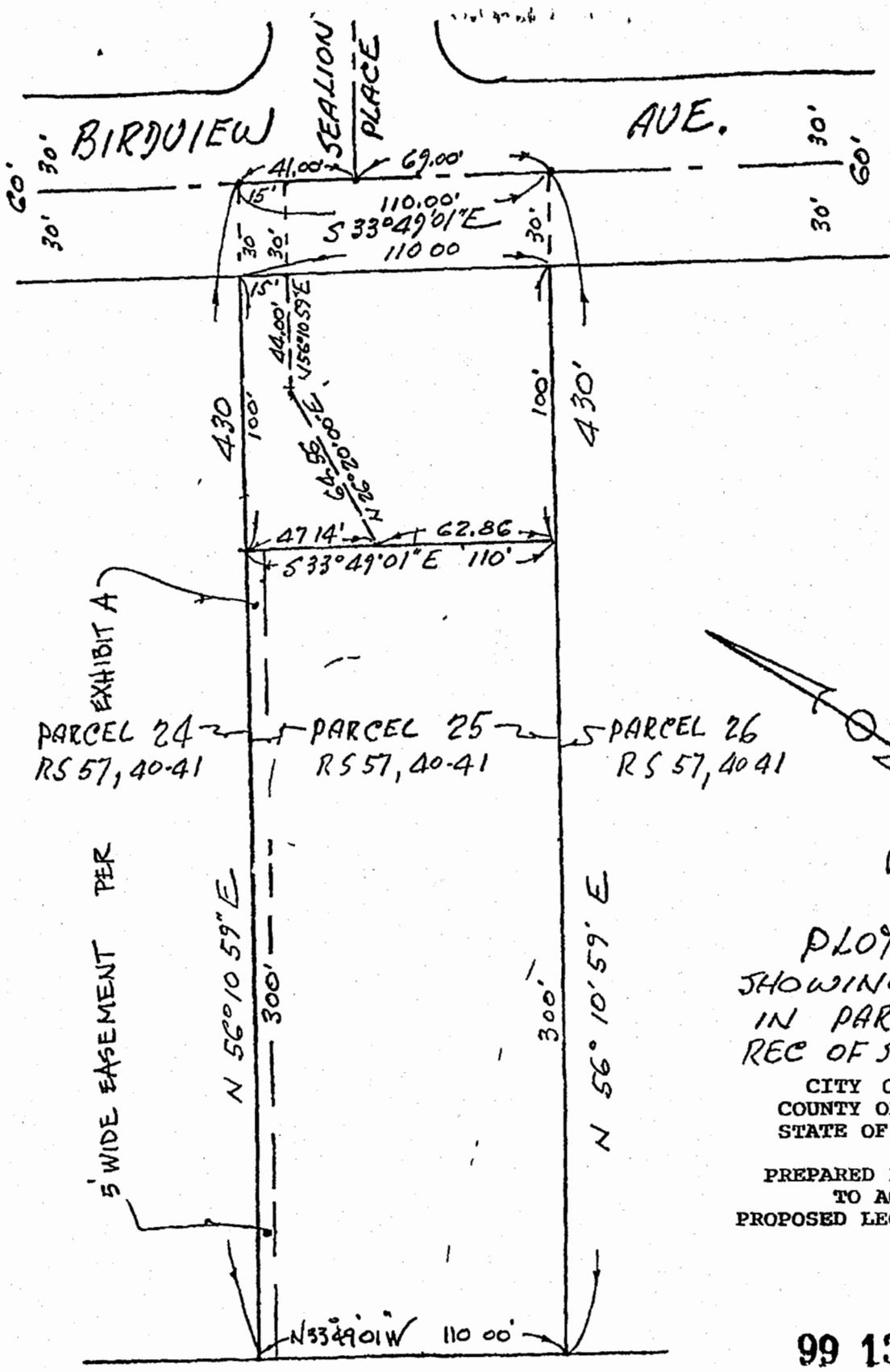


EXHIBIT A

PARCEL 24
RS 57, 40-41

PARCEL 25
RS 57, 40-41

PARCEL 26
RS 57, 40-41

5' WIDE EASEMENT PER

N 56° 10' 59" E

N 56° 10' 59" E

PLOT PLAN SHOWING PARCELS IN PARCEL 25 REC OF SURVEY 57, 40-4

CITY OF MALIBU
COUNTY OF LOS ANGELES
STATE OF CALIFORNIA

PREPARED IN JUNE, 1999
TO ACCOMPANY
PROPOSED LEGAL DESCRIPTIONS

99 1339203

NOTE: This is not a map of a survey

662-3-A

CALIFORNIA COASTAL COMMISSION

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

ITEM TH 12a

Filed: 9/28/09
49th Day: 11/16/09
Staff: Barbara Carey
Staff Report: 10/22/09
Hearing Date: 11/5/09



STAFF REPORT: APPEAL
SUBSTANTIAL ISSUE DETERMINATION

LOCAL GOVERNMENT: City of Malibu
LOCAL DECISION: Approval with Conditions
APPEAL NO.: A-4-MAL-09-070
APPLICANT: Clark Drane
AGENT: Richard Scott (of Richard N. Scott, Inc., A Professional Law Corporation)
APPELLANTS: Commissioners Mary Shallenberger and Sara Wan
PROJECT LOCATION: 7271 & 7273 Birdview Avenue, City of Malibu, Los Angeles County (APN: 4468-020-021 & 4468-020-022)

PROJECT DESCRIPTION: Construction of a new 110-foot long, three-foot wide private staircase on the bluff face. The staircase would be located within a pedestrian easement held by the applicant that extends across the property (developed with a single family residence) adjacent to the residential triplex parcel owned by the applicant.

SUMMARY OF STAFF RECOMMENDATION: SUBSTANTIAL ISSUE EXISTS

Staff recommends that the Commission determine that a **substantial issue** exists with respect to the grounds on which the appeal has been filed relative to the approved project's conformity to the policies and provisions of the certified City of Malibu Local Coastal Program. The **motion** and **resolution** for a "substantial issue" finding are found on **page 5**. The appellants contend that the development approved in CDP 07-106 is not consistent with the policies and provisions of the LCP with regard to environmentally sensitive habitat areas, visual resources, and blufftop development. The appeal also asserts that three variances from the standards of the LIP are not justified. The standard of review at this stage of an appeal requires the Commission to determine whether the appeal, raises a substantial issue with respect to the grounds stated in the appeal relative to the conformity of the approved development to the standards set forth in the certified Local Coastal Program or the public access policies of the Coastal Act.

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. Commission staff is recommending that the Commission find that a substantial issue exists with respect to the grounds of the subject appeal. As such, substantial issue will be deemed to exist unless three or more Commissioners wish to hear arguments and vote on the substantial issue question. If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three (3) minutes per side to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission at the substantial issue stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in

EXHIBIT 6

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

**Commission Staff Report for November 5, 2009
Substantial Issue Hearing**

writing. It takes a majority of Commissioners present to find that substantial issue is raised by the appeal.

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EXHIBITS

- Exhibit 1. Vicinity Map
- Exhibit 2. Parcel Map
- Exhibit 3. 2008 Photograph
- Exhibit 4. Project Plans
- Exhibit 5. Pedestrian Easement Document 1999
- Exhibit 6. Appeal
- Exhibit 7. City Council Findings—September 14, 2009
- Exhibit 8. City Staff Report for September 14, 2009 hearing (with Attachments A-H only due to length)

I. APPEAL PROCEDURES

A. APPEAL JURISDICTION

Under Section 30603 of the Coastal Act, local government approvals of coastal development permits may be appealed to the Commission if the development authorized would be located within the appealable areas, such as the area between the sea and the first public road paralleling the sea, within 300 feet of the inland extent of any beach or of the mean high-tide line of the sea where there is no beach, whichever is greater, on state tidelands, or along or within 100 feet of any wetland, estuary, or stream and lands within 300 feet of the top of the seaward face of a coastal bluff.. Further, any development approved by a coastal county that is not designated as the principal permitted use within a zoning district may also be appealed to the Commission, irrespective of its geographic location within the coastal zone. Finally, any local government action on a proposal for development that constitutes major public works or major energy facilities may also be appealed to the Commission.

In this case, the City of Malibu's final local action is appealable to the Commission pursuant to Section 30603(a)(1). The project is located on a coastal bluff and the site is between the sea and the first public road (Birdview Avenue) paralleling the sea, as shown on the City of Malibu Post Certification Map.

B. APPEAL PROCEDURES

The Coastal Act provides that after certification of Local Coastal Programs, a local government's actions on Coastal Development Permits in certain areas and for certain types of development may be appealed to the Coastal Commission. Local governments must provide notice to the Commission of their coastal permit actions. During a period of 10 working days following Commission receipt of a notice of local permit action for an appealable development, an appeal of the action may be filed with the Commission.

1. Grounds for Appeal

Pursuant to Section 30603(b)(1) of the Coastal Act, the grounds for appeal of development approved by the local government and subject to appeal to the Commission are limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in the Coastal Act (Sections 30210-30214 of the Public Resources Code).

2. Substantial Issue Determination

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends a finding that a substantial issue exists with respect to the grounds of the appeal, a substantial issue is deemed to exist unless three or more Commissioners wish to hear arguments and vote on the substantial issue question. If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three (3) minutes per side to address whether the appeal raises a substantial issue. The only

persons qualified to testify before the Commission at the substantial issue stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. It takes a majority of Commissioners present to find that substantial issue is raised by the appeal.

3. De Novo Review Stage of the Hearing

If a substantial issue is found to exist, the Commission will consider the application de novo. The applicable test for the Commission to consider in a de novo review of the project is whether the proposed development is in conformity with the certified Local Coastal Program and the public access policies of the Coastal Act. If the Commission proceeds to conduct a de novo review as part of the appeal hearing, testimony may be taken from all interested persons.

In this case, if the Commission finds a substantial issue raised, staff anticipates continuing the de novo permit consideration portion of the appeal hearing by the Commission at a future Commission meeting.

C. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

Coastal Development Permit (CDP) application No. 07-106 and associated variance requests Nos. 07-052 and 08-057 were considered by the City of Malibu Planning Commission on October 21, 2008. City staff recommended denial of the CDP and the variances. The Planning Commission continued CDP No. 07-106 and directed staff to bring back a resolution and findings for approval of the CDP and associated variances.

On May 19, 2009, the Planning Commission considered the CDP again, as well as the resolution and findings in support of approval of the application. However, the Planning Commission voted to deny the CDP and the variance requests. On May 27, 2009, the applicant filed an appeal of the Planning Commission decision. On September 14, 2009, the Malibu City Council considered the appeal of the Planning Commission action on CDP No. 07-106. The City Council upheld the applicant's appeal, overturning the Planning Commission's action and approving with conditions CDP No. 07-106 and VAR Nos. 07-052 and 8-057.

The Notice of Final Local Action for CDP No. 07-106 and associated variances was received in the South Central Coast District Office on September 21, 2009. The ten-day Commission appeal period extended from September 22, 2009 to October 5, 2009. One appeal of the City of Malibu's action was filed by Commissioners Sara Wan and Mary Shallenberger during the appeal period, on September 28, 2009. Commission staff notified the City of Malibu and the applicant of the pending appeal.

II. STAFF RECOMMENDATION FOR SUBSTANTIAL ISSUE

A. MOTION AND RESOLUTION FOR SUBSTANTIAL ISSUE

MOTION: *I move that the Commission determine that Appeal No. A-4-MAL-09-070 raises NO substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Following the staff recommendation will result in de novo review of the application, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-4-MAL-09-070 presents a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified LCP.

III. FINDINGS AND DECLARATIONS FOR FINDING SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND BACKGROUND

The project approved by the City of Malibu includes the construction of a new 110 foot long, three-foot wide private staircase on the bluff face. The applicant owns a residential triplex directly adjacent to the street at 7271 Birdview Avenue (APN 4468-020-022). He also holds a five-foot wide easement for pedestrian purposes across the adjacent property (which is developed with a single family residence) at 7273 Birdview Avenue (APN 4468-020-021). **Exhibit 2** shows the subject parcels. The staircase would be located within the pedestrian easement located on the adjacent property. **Exhibit 3** is a photo of the area showing the bluffs above Westward Beach Road. The land seaward of the bluff is a public beach owned by Los Angeles County. There is a road and public parking in the most landward portion of the beach park, with sandy beach beyond.

The applicant did not provide a site plan, foundation plan, or details regarding how the proposed staircase would be constructed, the overall area of construction disturbance, or if a staging area would be needed. Information was provided that indicates no grading would be required for the construction, but no information was given on how

footings would be installed or if excavation would be necessary for the footings. The only plan provided is the sketch shown in **Exhibit 4**.

B. LOCAL PERMIT HISTORY

Following is the City of Malibu permitting history for the subject sites, as provided in the City staff reports for the subject CDP. The staff reports state that:

The existing triplex was constructed in 1964. On May 18, 2006, the former property owner submitted Over-the-Counter (OC) No. 06-060 for the repair and maintenance of existing stairs leading to Westward Beach. The application was approved on May 23, 2006. Then on November 15, 2006, the approval was rescinded by the Planning Division as staff determined that photographs of the damaged staircase were actually on the adjacent parcel and no staircase existed linking 7273 Birdview Avenue to Westward Beach.

The applicant submitted the subject CDP application No. 07-106 to the City of Malibu for the construction of a 110-foot long, 3-foot wide private staircase on the bluff face on August 23, 2007. The application included two associated variances (VAR Nos. 07-052 and 8-057) to allow for reduction of the required bluff setback and for construction on slopes in excess of 2 ½ to 1, respectively. The application was deemed complete on December 13, 2007. On March 5, 2008, the applicant submitted an application for an amendment to the City's certified LCP (LCPA No. 08-001) to allow staircases to be constructed within existing access easements along bluff faces.

The subject CDP application and LCPA No. 08-001 were both scheduled for hearing before the City of Malibu Planning Commission on October 21, 2008. City staff recommended denial of both the CDP and the LCPA. The Planning Commission continued CDP No. 07-106 and directed staff to bring back a resolution and findings for approval of the CDP and associated variances. The Planning Commission acted to recommend that the City Council deny the LCPA.

On March 20, 2009, a third variance request (VAR No. 09-012) was added to the project to allow for a reduction of the required 100-foot ESHA buffer. On May 19, 2009, the Planning Commission considered the CDP and variances again, as well as the resolution and findings in support of approval of the application. However, the Planning Commission voted to deny the CDP and the variance requests. On May 27, 2009, the applicant filed an appeal of the Planning Commission decision.

On September 14, 2009, the Malibu City Council considered the appeal of the Planning Commission action on CDP No. 07-106. The City Council upheld the applicant's appeal, overturning the Planning Commission's action and approving with conditions CDP No. 07-106 and VAR Nos. 07-052 and 8-057.

On September 14, 2009, the Malibu City Council considered the appeal of the Planning Commission action on CDP No. 07-106. The City Council upheld the applicant's appeal, overturning the Planning Commission's action and approving with conditions CDP No. 07-106 and VAR Nos. 07-052 and 8-057.

C. APPELLANTS' CONTENTIONS

The appeal filed on September 28, 2009 by Commissioner Sara Wan and Commissioner Mary Shallenberger is attached as **Exhibit 6**. The appellants contend that the development approved in CDP 07-106 is not consistent with the policies and provisions of the LCP with regard to environmentally sensitive habitat areas, visual resources, and blufftop development. The appeal also asserts that three variances from the standards of the LIP are not justified.

The appeal cites a lack of consistency with LUP policy 3.58 and LIP Section 4.6.1 and states that:

The Malibu LUP mandates that environmentally sensitive habitat areas (ESHA) shall be protected and that development within or adjacent to such areas must be designed to prevent impacts which could degrade those resources. Bluff face areas are designated ESHA in the LCP and new development must provide a buffer of no less than 100 feet from a bluff edge. The LCP also specifically prohibits new development on bluff faces, except for engineered stairways or accessways to provide *public* beach access where no feasible alternative means of public access exists. Private accessways are certainly not a permitted use in coastal bluff ESHA. Even if the approved staircase were to be dedicated for public use, the finding could not be made that no feasible alternative means of public access exists because Point Dume State Beach and Westward Beach Road exist nearby and provide for public shoreline access.

With regard to blufftop development, the appeal cites LUP policies 4.27 and 4.29 and LIP Sections 10.4(D) and (F), 12.9(F) and states the following:

...the shoreline and bluff development provisions of the LCP require that new development be setback from a bluff edge a sufficient distance to ensure it will not be threatened by erosion for a projected 100 year economic life of the structure, which is in no case less than 100 feet. This setback can be reduced to 50 feet only if certain geologic and engineering factors can be met with a 50 foot setback. The City's findings do not address whether conditions to reduce the setback to 50 feet were even met. There is no provision for reducing the bluff setback to zero feet.

With regard to visual resources, the appeal states the following:

...the visual resource provisions of the LCP (LUP Policy 6.16 and LIP Section 6.5 (D)(2)) require that bluff development provide a setback from the edge of the bluff that avoids and minimizes visual impacts from the beach and ocean below. The LCP states that the setback necessary to protect visual resources may be excess of, but not less than the setback necessary to minimize geologic hazards. No setback from the bluff edge was required and no variance from the standards of LIP Section 6.5 (D)(2) was granted by the City.

Finally, the appeal states the following regarding the City's granting of three variances from the required standards of the LCP:

Variations were approved to eliminate the required setbacks from the bluff edge and coastal bluff ESHA, and for construction on slopes in excess of 2.5:1. In approving the subject CDP and three associated variations, the City found that denial of the variations would deprive the property owner of developing his property (easement) for its intended use as a private pedestrian accessway. Issue is raised with this finding because the subject properties (7271 and 7273 Birdview) each contain a residential development and have already been provided an economically viable use. The proposed staircase, an accessory structure, does not trigger application of the LCP's "taking" provisions.

The appeal also includes the actual text of all the above cited applicable LCP policies and provisions. Rather than include them here, they are quoted in the applicable subsection of Section D below.

D. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for this stage of the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellants relative to the project's conformity to the policies contained in the certified LCP.

Based on the findings presented below, the Commission finds that a substantial issue exists with respect to the grounds on which the appeal has been filed. The approved project is not consistent with the policies of the City of Malibu certified LCP for the specific reasons discussed below.

The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question" (Cal. Code Regs., title 14, section 13115(b)).

In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the following factors:

- (1) The degree of factual and legal support for the local government's decision that the development is consistent with the certified LCP;
- (2) The extent and scope of the development as approved by the local government;
- (3) The significance of coastal resources affected by the decision;
- (4) The precedential value of the local government's decision for future interpretation of its LCP; and
- (5) Whether the appeal raises only local issues, or those of regional or statewide significance.

In this case, for the reasons discussed further below, the Commission exercises its discretion and determines that the development approved by the County raises a substantial issue with regard to the appellants' contentions.

Each issue and LCP Policy raised by the appellants is outlined below. Each issue is then discussed in relation to the degree of factual and legal support provided by the City to support its conclusion that the approved development is consistent with the certified City of Malibu LCP. Finally, after the discussion of the factual and legal support for the City's conclusions regarding the issues raised by the appellant, the other four factors used to determine whether a substantial issue exists will be discussed relating to the project as a whole, including the scope of the development, the resources on the site, the precedential value for interpretation of the City's LCP policies, and the applicability of the issues beyond the local area.

1. Variances granted are not justified

The appeal addresses the inconsistencies of the approved project with regard to the ESHA, bluff development, and visual resource policies and provisions of the LCP. In addition, the appeal raises issue with regard to an overarching issue that relates to each of the other three issue areas. This issue is whether the three variances granted from the LCP provisions regarding bluff setback, ESHA setback, and development on slopes greater than 2:1 are consistent with the variance provisions of the certified LCP. LIP Section 13.26.5 details the following findings that must be made in order to approve a variance:

13.26.5 Findings

Following a public hearing, the Planning Commission shall record the decision in writing. The Commission may approve and/or modify an application for a variance in whole or in part, with or without conditions, only if it makes all of the following findings of fact supported by substantial evidence that:

- A. 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.
- B. 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.
- C. The granting of the variance will not constitute a special privilege to the applicant or property owner.
- D. 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.
- E. 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.
- F. For variances to stringline standards, that the project provides maximum feasible protection to public access as required by Chapter 2 of the Malibu LIP.

- G. 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
- H. The subject site is physically suitable for the proposed variance.
- I. The variance complies with all requirements of state and local law.
- J. A variance shall not be granted that would allow reduction or elimination of public parking for access to the beach, public trails or parklands.

In the course of considering the subject CDP, the City considered the issue of whether denial of the variances (and by extension, denial of the project), as required by the policies and provisions of the LCP, would result in a "taking" of the applicant's property. As part of the initial application, the applicant's agent submitted a written statement in support of the variance requests, which asserts that:

The City's Local Coastal Program ("LCP") prohibits stairways on bluff locations such as that applied for. However, the subject parcel of property is a 5 foot wide easement area extending from a triplex owned by the owner of the 5 foot parcel to the north. The triplex is on a separate parcel of real property. The sole purpose of the easement is for ingress and egress to the beach. Accordingly, we have **unique** circumstances involved in the application. A denial of the requested variance would prohibit the sole purpose of the use of the land i.e. ingress and egress to the beach. There are no other uses for this parcel of property.

In response to the City Staff's initial recommendation of denial of the CDP and variance requests (Planning Commission hearing of October 21, 2008), the applicant's agent asserted that the easement is a separate parcel that was obtained by the applicant solely for the development of an access stairway, that no other use of the "property" is feasible, and that denial of the request would deprive the applicant of all economic viability of the easement "parcel". The applicant's agent submitted a letter dated October 14, 2008 to the Malibu Planning Commission in support of the application for CDP 07-106 and associated variances. This letter states the following regarding the City staff recommendation:

Staff indicates that the subject property has economic viability because it is developed as a triplex. This is a misstatement of fact. The subject property is an easement parcel separately acquired by the property owner who owns the triplex... The easement parcel is a separate property interest which was obtained solely for the purpose of accessing the beach. Accordingly, it is the applicant's position that denial of the application (or in the alternative amending the LCP to permit stairs under certain circumstances) would deprive the property owner of all economic viability of the easement parcel.

However, the applicant did not provide any substantiation of these claims or even provide any rationale for reaching the conclusions that the easement constitutes a separate parcel and that denial of the staircase would result in depriving the applicant of all economic viability. Perhaps most significantly, the applicant did not explain why he concludes that the easement should be considered a legal parcel. An easement is an

interest in land, but it is not a "parcel," which is the unit of analysis used for purposes of "takings" determinations. Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002). The applicant's agent stated during the City Council hearing that: "the law is clear that easements may be the subject of a regulatory taking by the government," but he provided no citation or other reference to any case law to support this claim. If this unsubstantiated assertion were correct, one could evade all land use regulation simply by purchasing easements designated for precise purposes that are prohibited by existing land use regulations and then claim that the regulations are inapplicable because they would effect an unconstitutional taking of the easement interest.

The applicant did not provide any information about his investment backed expectations regarding the easement either, No information was provided regarding the purchase price of the easement or the basis for the applicant's expectation that the construction of a stairway would be allowable at the time the easement was recorded. The applicant's agent verbally stated during the October 21, 2008 Planning Commission hearing both that the easement was acquired approximately 30 years ago and that the easement had been granted prior to the certification of the LCP and prior to the effective date of the Coastal Act. However, there is no evidence in the record that bears out this assertion. The only evidence in the City record concerning the easement is the quitclaim deed recorded in 1999 granting to the applicant an easement over an area of the adjacent parcel for pedestrian purposes. At the City Council hearing on September 14, 2009, the applicant's agent stated that the applicant had bought the easement at a different time (1999) than he purchased the residential property.

As described above, the subject project was considered at several hearings before the Malibu Planning Commission and City Council. City staff recommended that the Planning Commission deny the CDP and associated variance requests on the basis that the required findings for approval could not be made. According to the minutes of the Planning Commission hearing (October 21, 2008), the Assistant City Attorney verbally informed the commissioners that he disagreed with the applicant's agent that the applicant would be deprived of all economic use. He also stated that the easement held by the applicant is not a parcel. After discussion by the commissioners, the October 2008 hearing was continued with direction for staff to return to the Planning Commission with findings to approve the CDP with variances.

The CDP application was again considered by the Planning Commission on May 19, 2009. At that hearing, the commissioners voted to deny the CDP application. According to the minutes of the hearing, there was no discussion at the hearing regarding the issue of whether denying the variances would result in depriving the applicant of all reasonable economic use of the easement. Rather, one planning commissioner stated his preference for the Coastal Commission to be the defendant in litigation over the matter instead of the City. Other planning commissioners stated that they preferred the matter to be finally decided by the City Council. The findings adopted in support of the denial state that there are no special circumstances or exceptional characteristics applicable to the property that would deprive the owner of privileges enjoyed by other properties. The findings state that, to the contrary, the granting of the variance would confer a privilege to the applicant in that other similar properties would not be allowed a bluff staircase under the provisions of the LCP. Finally, the findings state that the parcel

is currently developed with a multi-family residence, which constitutes reasonable economically viable use of the property.

On September 14, 2009, the Malibu City Council considered the applicant's appeal of the Planning Commission's denial action on the CDP and upheld the appeal, overturning the Planning Commission's action and approving the CDP and associated variances with conditions. Although the minutes of the City Council hearing have not yet been adopted, the hearing video is available on the City's website. The council members did not discuss whether they agreed with the applicant's assertion that the easement constituted a separate parcel. Several council members did make statements regarding the applicant's arguments that denial of the CDP and variances would constitute a taking. One of the council members stated that: "The Coastal Commission was very clear that we should interpret the LCP as we see fit to interpret it and they would probably appeal if they didn't like our decision" and that: "I have an increasing allergy when someone makes a credible argument of a taking". Another council member asserted: "Let's put it back to the Coastal Commission because it will be appealed". A different council member added: "Then let them get sued". After discussion, the City Council voted 3-2 to uphold the applicant's appeal and to adopt approval findings that were previously prepared by staff for consideration by the Planning Commission.

The City Council findings (**Exhibit 7**) approving the CDP (and associated variances) do not include any analysis of the applicant's takings assertion, nor do they make any conclusion that the project would be approved in order to avoid depriving the applicant of all economic use of the easement. Rather, the findings for the three approved variances more generally state that: "Denial of the variance would deprive the property owner of developing his property for its intended use as a pedestrian accessway".

The findings are similarly vague on the question of whether the easement area is a "parcel" or "property" for the purposes of determining if there are special circumstances or exceptional characteristics that would justify the variances. As such, the City did not adequately establish any basis for finding that there are special circumstances or exceptional characteristics applicable to the property that would deprive the owner of privileges enjoyed by other properties in the area that are within the same zoning category. Absent an affirmative finding with substantiation that the applicant's easement constitutes a "parcel", it must be assumed that the parcel or property in question is the parcel underlying the easement (APN 4468-020-022). That parcel is a rectangular lot that is comprised of a flat, blufftop portion and a steep, bluff face portion. The parcel is developed with an existing single-family residence. There is nothing different about the configuration or topography of this parcel such that strict application of the zoning ordinance deprives such property of privileges enjoyed by the other parcels in the area.

Further, the City found that the variances would not constitute a special privilege to the applicant as there are other private bluff staircases both to the west and the east of project site. This is not entirely accurate however. There is a stairway on the adjacent parcel to the west (upcoast), but this stairway is a legally non-conforming structure that has existed on the site since before the effective date of the California Coastal Zone Conservation Act of 1972 (as evidenced by aerial photographs). There are no bluff stairways in the immediate vicinity to the east (downcoast).

The City also found that the granting of the three variances will not be contrary to or in conflict with the goals, objectives, and policies of the LCP. As described in more detail below, the variances are in fact in direct conflict with the ESHA, blufftop development, and visual resource goals, objectives, and policies of the LCP. Finally, the City found that the variance requests are consistent with the purpose and intent of the zone in which the site is located. The findings state that: "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". However, this finding ignores the fact that the policies and provisions of the LCP unambiguously prohibit new private bluff staircases as a use in any zone.

In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the degree of factual and legal support for the local government's decision that the development is consistent with the certified LCP. Here, the City has not provided a high degree of factual or legal support for its decision that the required findings of fact for each of the three variances granted are justified.

2. Project is Inconsistent with the ESHA policies and provisions of the LCP

The policies and provisions of the LCP provide for the protection of ESHA, including bluff habitat. Bluff ESHA is not mapped on the LCP ESHA maps for the simple reason that the bluffs are a linear feature that cannot be easily shown at the scale of the maps. However, it is clear from the LCP that bluff habitat is designated as ESHA. Given the pattern of development on bluff-top properties, bluff habitat is increasingly rare. The following policies and provisions apply to bluff ESHA and were cited by the appellants:

LUP Policy 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.

LIP Section 4.6.1 (in part)

Buffers

...

D. Coastal Bluff ESHA

New development shall provide a buffer of no less than 100 feet from the bluff edge.

These bluff ESHA policies are included in the Malibu LCP in order to ensure that impacts to sensitive coastal bluff habitats are avoided. This is not only to avoid direct removal of bluff vegetation for the construction of structures, but also to avoid other potential impacts resulting from increased erosion and increased human activity. Further, the cumulative effect of additional structures on the bluff will be to separate and isolate the areas of the bluff habitat between such structures, reducing the habitat values of the whole area. The appeal asserts that the approved CDP is not consistent

with these ESHA policies of the LCP and that a private bluff staircase is not a use allowed in bluff ESHA.

As discussed above, the City approved a variance to reduce the ESHA buffer standard required by LIP Section 4.6.1 from 100 feet to zero feet. Not only does the approved project not provide for any buffer from coastal bluff ESHA, it is located within the habitat itself. The City's findings state the following:

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.

The biological assessment found that notwithstanding the presence of the drainage pipe, there is native vegetation typically found in coastal bluff scrub located on the bluff face, with more non-native species closer to the top of the bluff. The findings do not discuss whether there is evidence that the existing drainage pipe was permitted (or existed prior to the effective date of the California Coastal Zone Conservation Act) on the bluff face, or if it is an unpermitted structure. Without this information, it is not possible to assess if the claim that a minimal amount of vegetation removal would be required to construct the bluff staircase.

Additionally, the applicant did not provide a site plan, foundation plan, or details regarding how the proposed staircase would be constructed, the overall area of construction disturbance, or if a staging area would be needed. Information was provided that indicates no grading would be required for the construction, but no information was given on how footings would be installed or if excavation would be necessary for the footings. Furthermore, the project does not include any re-vegetation of disturbed slopes. The removal of vegetation, particularly on steep slopes, will allow for increased erosion on the bluff face, which is itself an erosional feature. Additionally, focused runoff from the staircase structure itself has the potential to undercut and erode the bluff beneath it. Given that issues were not addressed, it is not known if the City has accurately assessed the actual impact to bluff ESHA that would result from the project.

The City's findings also discuss the provisions of LIP Section 4.7 Economically Viable Use. This section provides standards for the approval of a use not otherwise allowed by the standards of the ESHA overlay district in order to provide an economically viable use on an undeveloped legal parcel. The City found that the proposed development is consistent with the provisions of Section 4.7. However, the provisions of this LIP section are not applicable in this case. The approved private stairway is located within an easement area that is located within a parcel that is already developed with a single family residence, providing the owner with an economically viable use. As such, the provisions of LIP Section 4.7 do not allow for the approval of the staircase within bluff ESHA.

The project, as approved, is not consistent with the cited ESHA policies and provisions of the LCP. As discussed above, the variance to the ESHA buffer standard is not

justified. In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the degree of factual and legal support for the local government's decision that the development is consistent with the certified LCP. Here, the City has not provided a high degree of support for its decision that the private bluff staircase will avoid impacts to ESHA, consistent with the policies and provisions of the LCP.

3. The project is inconsistent with the bluff development policies and provisions of the LCP

The Malibu LCP requires that new development on blufftop parcels maintain a setback from the bluff edge that is sufficient to ensure structural stability for the development itself for the economic life of the structure. The bluff edge setback is also required in order to avoid the need for shoreline protective devices or bluff reconstruction in the future. The following LCP policies and provisions were cited by the appellants:

LUP Policy 4.27

All new development located on a blufftop shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion for a projected 100 year economic life of the structure plus an added geologic stability factor of 1.5. In no case shall the setback be less than 100 feet which may be reduced to 50 feet if recommended by the City geologist and the 100 year economic life with the geologic safety factor can be met. This requirement shall apply to the principle structure and accessory or ancillary structures such as guesthouses, pools, tennis courts, cabanas, and septic systems etc. Ancillary structures such as decks, patios and walkways that do not require structural foundations may extend into the setback area to a minimum distance of 15 feet from the bluff edge. Ancillary structures shall be removed or relocated landward when threatened by erosion. Slope stability analyses and erosion rate estimates shall be performed by a licensed Certified Engineering Geologist or Geotechnical Engineer.

LUP Policy 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.

LIP Section 10.4(D) (in part)

All new development located on a bluff top shall be setback from the bluff edge a sufficient distance to ensure that it will not be endangered by erosion or threatened by slope instability for a projected 100 year economic life of the structure. In no case shall development be set back less than 100 feet. This distance may be reduced to 50 feet if the City geotechnical staff determines that either of the conditions below can be met with a lesser setback. This requirement shall apply to the principle structure and accessory or ancillary structures such as guesthouses, pools, tennis courts, cabanas, and septic systems etc. Ancillary structures such as decks, patios and walkways that do not require structural foundations may extend into the setback area but in no case shall be sited closer than 15 feet from the bluff edge. Ancillary structures shall be removed or

relocated landward when threatened by erosion. Slope stability analyses and erosion rate estimates shall be performed by a licensed Certified Engineering Geologist and/or Geotechnical Engineer, or a Registered Civil Engineer with experience in soil engineering.

LIP Section 10.4 (F)

No permanent structures shall be 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. Drainage devices constructed to conform to applicable Best Management Practices shall be installed in such cases. 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.

Section 10.4 D of the Malibu LIP provides the setback requirements that new development on bluffs must meet. The required standard for bluff development is a minimum of 100 feet. This setback may be reduced to no less than 50 feet if one of two conditions can be met with a bluff setback that is less than 100 feet. The two cases are as follows:

1. Factor of Safety less than 1.5

Section 10.4 D1 provides for the condition where the bluff exhibits a factor of safety less than 1.5 for either gross or surficial landsliding. In that case, the location on the bluff top at which a 1.5 factor of safety exists must be determined. The required bluff setback would be the 1.5 factor of safety line plus the distance that the bluff might be expected to erode over 100 years (based on the bluff retreat rate).

2. Factor of Safety Greater than 1.5

Section 10.4 D2 provides for a different condition where the bluff exhibits a gross and surficial factor of safety greater than 1.5. In this case, the bluff setback would be the distance that the bluff might be expected to erode over 100 years (based on the bluff retreat rate) plus ten feet.

One of the grounds stated in the appeal is that the approved CDP is not consistent with the blufftop development policies and provisions of the LCP. There is **no** provision for reducing the bluff setback to anything less than 50 feet, let alone zero feet or allowing development on the bluff face, in any case. With regard to the subject project, there is no evidence in the City's administrative record regarding whether the project site could even meet the standards to allow a reduction in the bluff setback to 50 feet and the City findings provide no analysis of this provision. The record contains one geologic report regarding the subject project site. The Limited Geologic Opinion Report, prepared by GeoConcepts, Inc., dated June 18, 2007 relates information based on the geologist's visual observations on the site, and review of other geology reports for nearby properties. The report concludes that: "the orientation of the bedrock structure for the bluff slope is geologically favorable" but that: "A detailed geology and soils engineering investigation with subsurface exploration should be anticipated prior to development of the stairway". The report goes on to state that:

A detailed engineering geology and soils engineering investigation including surface mapping, subsurface exploration and laboratory testing of earth materials could result in different conclusions and recommendations described herein. No detailed surface mapping,

subsurface exploration, or laboratory testing were performed for this limited opinion report. To determine the subsurface conditions, subsurface explorations would be required.

There was no information provided on the factor of safety or bluff retreat rate for the subject site. The City did not evaluate whether the site meets the requirements for reducing the bluff edge setback from 100 feet to 50 feet. Nonetheless, the City's variance states that it is for a reduction in the bluff edge setback from 50 feet to zero feet. The City found in approving a variance that:

The site of the proposed staircase has been determined to be stable by a site specific geology report (GeoConcepts, 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 for structural integrity and stability.

However, as stated in the GeoConcepts report, the conclusions are not based on any actual geologic exploration of the site aside from surface observation and review of geology reports prepared for properties in the area (the report does not discuss whether the other geology reports are themselves based on subsurface exploration). This review alone does not provide much evidence upon which to base the conclusion that structural stability is ensured. The City's findings do not reveal the substance of the City Geologist's additional review of the project.

Further, while it is true that the foot of the bluff is not, in this case, subject to wave action, that is not the only mechanism resulting in bluff erosion. The approved project does not include any re-vegetation of disturbed slopes. The removal of vegetation, particularly on the steep bluff face, will allow for increased erosion. Additionally, focused runoff from the staircase structure itself has the potential to undercut and erode the bluff beneath it. The required bluff setbacks are designed not only to assure structural stability for new development, but to also prevent development on bluffs that will result in increased or accelerated erosion of these features.

The project, as approved, is not consistent with the cited bluff development policies of the LCP. As discussed above, the variance to the bluff setback standard is not justified. In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the degree of factual and legal support for the local government's decision that the development is consistent with the certified LCP. Here, the City has not provided a high degree of support for its decision that the bluff staircase is consistent with the policies and provisions of the LCP.

4. The project is inconsistent with the visual resource protection policies and provisions of the LCP

In addition to the bluff setbacks required to protect ESHA and to ensure structural stability, the LCP requires bluff development setbacks in order to protect visual resources. The following LCP policies and provisions are cited in the appeal:

LUP Policy 6.16

Blufftop development shall incorporate a setback from the edge of the bluff that avoids and minimizes visual impacts from the beach and ocean below. The blufftop setback necessary to protect visual resources may be in excess of the setback necessary to ensure that risk from geologic hazards are minimized for the life of the structure, as detailed in Policy 4.27.

LIP Section 6.5 D

Bluff Development

1. In addition to the blufftop development setback requirements necessary to ensure geologic stability contained in Chapter 10 of the certified Malibu LCP, new development proposed on blufftops shall incorporate a setback from the edge of the bluff that avoids and minimizes visual impacts from the beach and ocean below. The blufftop setback necessary to protect visual resources may be in excess of, but no less than, the setback necessary to ensure that risk from geologic hazards are minimized for the life of the structure.
2. No permanent structures shall be permitted on a bluff face, except for engineered stairways to accessways to provide public beach access. Such structures shall be designed and constructed to not contribute to further erosion of the bluff face and to be visually compatible with the surrounding area to the maximum extent feasible.

These provisions are necessary in order to avoid the alteration of the natural bluff landform as well as the individual and cumulative impacts to the unique scenic and visual quality of the Point Dume area. One of the grounds of the appeal is that no setback from the bluff edge was required and that no variance from the standards of LIP Section 6.5 (D) (2) was granted by the City. As discussed above, there is substantial issue raised by the lack of sufficient justification for the three variances (from ESHA buffer, blufftop development setback, and slope development standards) that were granted. However, in the case of the visual resource policies and provisions requiring development setbacks from the bluff edge, the City did not approve any variance. The standard was simply not met. The City's findings regarding visual resources do not address LUP Policy 6.16 or LIP Section 6.5 D. The findings state that:

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.

The findings also state that the staircase has been conditioned to utilize colors that will be compatible with the surrounding natural environment and that the staircase will be compatible with other existing staircases in the neighborhood.

However, what is not discussed in the City's findings is the fact that most, if not all, of such existing bluff stairways are non-conforming structures (Some, like the staircase on the adjacent lot, are legally non-conforming in that they have existed continually since

prior to the effective date of California Coastal Zone Conservation Act of 1972. Some are likely unpermitted structures.) The fact that the private staircase would be similar in design to other stairways in the area does not minimize its impact to visual resources. The impact to views from public areas (in this case, Westward Beach) of staircases and other development on the bluff face or near the bluff edge is cumulative. The more that such development is constructed, the less the bluff appears to be a natural geologic feature and habitat area.

The project, as approved, is not consistent with the cited visual resource policies or provisions of the Malibu LCP. In evaluating the issue of whether the appeal raises a substantial issue, the Commission considers the degree of factual and legal support for the local government's decision that the development is consistent with the certified LCP. Here, the City has not provided any legal support for its decision that the private bluff staircase is consistent with the cited visual resource policies and provisions of the LCP.

5. Additional Factors to Determine Whether the Appeal Raises a Substantial Issue

In evaluating the issue of whether the appeal raises a substantial issue with respect to the project's consistency with the provisions and requirements of the certified Land Use Plan and Local Implementation Program requirements regarding environmentally sensitive habitat areas, blufftop development, and visual resources, the Commission regularly considers other factors in addition to the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP. For the reasons discussed above, the Commission finds that the City did not have strong factual or legal support for its decision that the development is consistent with the certified LCP. The Commission also considers the extent and scope of the development approved by the City, the significance of coastal resources affected by the decision, the precedential value of the local government's decision for future interpretation of its LCP, and whether the appeal raises only local issues, or those of regional or statewide significance.

First, the extent and scope of the development approved by the City is not particularly significant because the project consists of a three-foot wide stairway. This project will not cover a very large area. However, as discussed above, the potential impact of this project is not just individual, but a cumulative one that must be considered in context of other existing non-conforming stairways and other bluff face structures. Taken cumulatively, the impact of structures on the bluff face, including the isolation of ESHA and the alteration of the natural bluff landform is extensive. Next, the Commission considers the significance of any coastal resources that are affected by the decision. Here, the sensitive habitat resources that will be impacted is coastal bluff scrub, which owing to its increasing rarity and its sensitivity to disturbance, is designated ESHA.

Additionally, the Commission looks at the precedential value of the local government's decision for future interpretation of its LCP. The subject CDP is the first project that includes development on a bluff face that has been considered by the City pursuant to the certified LCP. This decision approving a development that is not consistent with several unambiguous ESHA, blufftop development, and visual resource policies and

standards and includes several variances not just to reduce required setbacks and buffers but to eliminate them completely will set an adverse precedent for the way the City will interpret its LCP in the future.

Finally, the last factor the Commission considers to determine whether the appeal raises a substantial issue, is whether the appeal raises only local issues, or those of regional or statewide significance. Here, the project involves development on a bluff face. The Commission considers a variety of development proposals and LCP planning issues involving coastal bluffs in many coastal cities and counties across the state. The Commission commonly considers issues similar to those involved in this case, including the protection of coastal bluff ESHA, the assurance of structural stability for blufftop development, and the protection of visual resources. So, it is clear that the issues involved in the subject appeal are of statewide significance. In sum, the Commission finds that each of the factors listed above, used to evaluate whether a substantial issue exists, are satisfied in this case.

E. CONCLUSIONS REGARDING SUBSTANTIAL ISSUE ANALYSIS

For the reasons discussed in detail above, the appeal raises substantial issue with respect to the consistency of the approved development with the policies and provisions of the City of Malibu's certified LCP regarding environmentally sensitive habitat areas, bluff development, and visual resources. In evaluating the whether the subject appeal raises substantial issue, the Commission has explicitly addressed several factors that play a part in identifying if the issues raised in an appeal are "significant". The Commission finds that there is not adequate factual and legal support for the City's position that the proposed project complies with LCP policies. The project will have both an individual and cumulative adverse effect on significant coastal resources, namely coastal bluff ESHA and visual resources. Further, because the County has not ensured that the project conforms to the existing policies and provisions of the LCP and has not provided sufficient evidence to support its decision, the project will have adverse precedential value regarding interpretation of the City's LCP for future projects. Finally, the issues involved affect similar bluff development statewide. Therefore, the Commission finds that a substantial issue exists with respect to the grounds raised by Commissioners Sara Wan and Mary Shallenberger in Appeal No. A-4-MAL-09-070, relative to the approved project's conformity to the policies and provisions of the certified City of Malibu Local Coastal Program.

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November 3, 2009

CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

California Coastal Commission
89 South California Street, Suite 200
Ventura, CA 93001

VIA FACSIMILE (805)
641-1732 AND FEDERAL
EXPRESS

Re: Permit No. A-4-MAL-09-070, 7271 & 7273 Birdview Avenue

Dear Honorable Chairman and Members of the Coastal Commission:

This office represents Mr. Clark Drane (the "Owner"), the owner of property commonly known as 7273, 7275 and 7277 Birdview Avenue, Malibu, California (the "Triplex Property"). The Owner also has an easement for pedestrian ingress and egress over 7271 Birdview Avenue (the "Easement Property"). This correspondence is to correct a position the undersigned took at a meeting of the City Council of Malibu regarding the date of acquisition of the easement and address certain points made in the Staff Report to the Commission dated October 22, 2009.

At the Malibu City Council meeting which approved the construction of a new 110 foot long, three foot wide private stair case on the bluff face of the Easement Property I misspoke and indicated that the easement was acquired by the Owner in 1999. In fact, the easement was acquired by the Owner in 1974. A copy of that Deed is enclosed herewith. My reference to the 1999 deed involved a correction of the legal description of the easement area.

The Commission staff argues in part that the easement parcel described in the 1974 deed acquired by the Owner does not constitute a parcel as defined in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S. Ct. 1465 (2002) (the "Tahoe Case"). That case is inapposite. In the Tahoe Case, the plaintiff's argued that substantially all of the property owned by the plaintiff's were temporarily taken as a result of the Tahoe Regional Planning Agency's moratorium. The Supreme Court indicated that the entirety of the parcel had to be deemed useless in order for a taking to apply.

In this case, the Owner owns two parcels. A fee parcel consisting of the Triplex Property and an easement parcel over the Easement Property, which is not owned by the Owner. Accordingly, the Owner has two parcels, and the failure to grant a permit to construct the stairs over the easement parcel would make the entire easement parcel useless as it is only five feet wide.

EXHIBIT 7

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

November 3, 2009 Letter from Richard Scott on behalf
of Applicant Clark Drane

The staff also argues that there was no citation or authority for the statement made by the undersigned that "the law is clear that easements may be the subject of a regulatory taking by the government". To address that issue, the Commission Staff is directed to City of Los Angeles v. Wright (1951) 107 Cal App. 2d 235, 236 p. 2d 892, California Constitution Article I § 14 and Bacich v. Board of Control, 23 Cal. 2d. 343 144 p. 2d 818.

Without prejudice to further rights of the Owner, the foregoing is respectfully submitted and we request that the appeal be withdrawn and the approval granted by the City of Malibu left to stand.

Yours very truly,

RICHARD N. SCOTT, INC.



By:

RICHARD N. SCOTT
President

RNS:sd

Encl.

C: Mr. Clark Drane