CALIFORNIA COASTAL COMMISSION
NORTH CENTRAL COAST DISTRICT OFFICE
45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885

F6a,F7a&7b

Filed:	January 6, 2011
49th Day:	February 24, 2011
Staff:	Nicholas B. Dreher
Staff Report:	January 21, 2011
Hearing Date:	February 11, 2011
Commission Action:	

STAFF REPORT
DISPUTE RESOLUTION AND APPEAL (SUBSTANTIAL ISSUE AND DE NOVO) OF CATEGORICAL EXCLUSION CLAIMING EXEMPTION FROM COASTAL PERMIT REQUIREMENTS

Dispute Resolution Number:	2-11-004-EDD;
Appeal Number:	A-2-SMC-11-001 & A-2-SMC-11-003;
Applicant:	Thomas Mahon
Appellants:	Committee For Green Foothills, Montara Neighbors For Responsible Building, Tom Judge, Sally Lehrman, Tom Ballantyne, Kathryn Slater-Carter, Jim Rudolph, Ken Muller, Hilary Srere, and William F. Kehoe.
Local Government:	San Mateo County
Project Location:	284 & 286 Second Street, Montara, San Mateo County (APNs 036-014-200 and -210)
Project Description:	Categorical Exclusions exempting from Coastal Development Permit (CDP) requirements the construction of two single family residences on certain property, specifically a new 2,571 sq. ft. single-family residence with an approximately 400 sq. ft. garage and a new 2,745.5 sq. ft. single-family residence with an approximately 440 sq. ft. garage
Staff Recommendation:	(1) Determination that the Approved Development, including any necessary land division or other change in intensity of use occurring after February 1, 1973, requires a CDP and is Appealable to the California Coastal Commission; (2) Determination of Substantial Issue on Appeal of Categorical Exclusion Claiming Exemption from CDP Requirements; and (3) Denial of Categorical Exclusion Claiming Exemption from CDP Requirements

SUMMARY OF STAFF RECOMMENDATION

On January 7, 2011, Commission staff informed County Planning staff of the appellants' assertions that two residential developments were not exempt from CDP requirements and that County approval of the developments would be appealable to the Commission. (**Exhibit 5**) Staff also informed the County of the administrative procedures provided by the Commission's regulations for resolution of disagreements concerning whether a development is categorically excluded, non-appealable, or appealable for purposes of notice, hearing and appeals procedures (14 CCR §13569). The Commission's regulations specify that the Commission must resolve a dispute between any interested person and a local government over whether a specific development is categorically excluded, appealable or non-appealable. Accordingly, staff recommends that the Commission make a determination as to the appropriate hearing and notice procedures for the proposed development. Staff specifically recommends that the Commission determine that **THE PROPOSED DEVELOPMENT IS NOT EXEMPT FROM CDP REQUIREMENTS AND THAT THE REQUIRED CDP IS APPEALABLE TO THE COMMISSION.**

This matter also involves an appeal of the County's decision not to require a coastal development permit for two single-family residences. The County's decision is based on a claim that development at this site is exempt from coastal development permitting requirements because the development is not appealable to the Commission. The appellants contend that: (1) the proposed homes would constitute nonexempt "development" as defined in both the County's certified Local Coastal Program (LCP) and the Coastal Act; (2) the development would take place on an illegal lot; (3) any subdivision or development of current property with two residences would not be a principally permitted use; and (4) the property is within 100 feet of a wetland. Sections 30603 and 30625 of the Coastal Act allow an appeal of a claim of exemption by a local government as well as an appeal of any local action approving either development that is not the principally permitted use in the County or development within 100 ft. of wetlands. Pursuant to Coastal Act Section 30603(b) the grounds upon which an appeal can be filed 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.

Commission staff agrees that the appeals raise a substantial issue. In particular, because: (1) the property is currently not recognized as two legal parcels; (2) the zoning district's principally permitted uses do not allow for two residences on a single-legal parcel; and (3) the approved development appears to be located within 100 ft. of a wetland, the development does not qualify for exclusion and is therefore subject to the Coastal Act's permitting requirements. Therefore, Commission staff recommends that the Commission determine that a **SUBSTANTIAL ISSUE** exists with respect to the grounds on which the appeals have been filed. In addition, Commission staff recommends that the Commission **DENY THE CLAIM OF EXEMPTION** and find that all proposed development at this site first requires a coastal development permit, approved by the County and appealable to the Commission. The **motions** to carry out the staff recommendation are on **pages 3 and 4**.

LIST OF EXHIBITS

1. Vicinity Map
2. Parcel Map
3. Final Local Action Notices, dated December 22, 2010
4. Letter from Coastal Commission Staff to San Mateo County, dated January 7, 2011
5. Appeals
6. County Counsel Letter, dated May 15, 2009
7. County Memorandum, dated January 8, 2010
8. Appellant's list of evident wetland vegetation
9. County Counsel Letter dated June 16, 2009
10. Zumbrun Letter dated May 7, 2009

1. STAFF RECOMMENDATION ON DISPUTE RESOLUTION, SUBSTANTIAL ISSUE & DE NOVO

MOTION #1 FOR DISPUTE RESOLUTION ON TWO CATEGORICAL EXCLUSIONS GRANTING EXEMPTIONS FROM PERMIT REQUIREMENTS:

> *I move that the Commission reject the Executive Director's determination that the single-family residences approved by San Mateo County in PLN 1999-00215/2-SMC-00-320 and PLN 1999-00015/2-SMC-04-208 require a coastal development permit, and that any action by the County authorizing the single-family residences is appealable to the Coastal Commission.*

STAFF RECOMMENDATION FOR DISPUTE RESOLUTION:

Staff recommends a NO vote. Failure of this motion will result in: (1) the Commission upholding the Executive Director's determination that the single-family residences approved by San Mateo County in PLN 1999-00215/2-SMC-00-320 and PLN 1999-00015/2-SMC-04-208 are subject to the coastal development permit requirements of the Coastal Act and that any action by San Mateo County authorizing the single-family residences is appealable to the Coastal Commission; and (2) the adoption of the following resolution and findings. A majority vote of the Commissioners present is required to pass the motion.

RESOLUTION FOR DISPUTE RESOLUTION:

The Commission, by adoption of the attached findings, determines consistent with Section 13569 of Title 14 of the California Code of Regulations, that the single-family residences approved by San Mateo County in PLN 1999-00215/2-SMC-00-320 and PLN 1999-00015/2-SMC-04-208 require a coastal development permit, and that any action by the County authorizing the single-family residences is appealable to the Coastal Commission.

MOTION #2: MOTION FOR SUBSTANTIAL ISSUE ON TWO CLAIMS OF EXEMPTION FROM PERMIT REQUIREMENTS:

I move that the Commission determine that Appeal No. A-2-SMC-11-001 and A-2-SMC-11-003 raise NO substantial issue with respect to the grounds on which the appeal have been filed under Section 30603 and 30625 of the Coastal Act.

STAFF RECOMMENDATION OF SUBSTANTIAL ISSUE:

Staff recommends a **NO** vote. Following the staff recommendation by voting no will result in the Commission conducting a *de novo* review of the application, and adoption of the following findings. Passage of this motion via a yes vote, thereby rejecting the staff recommendation, 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 of the majority of the appointed Commissioners.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that both Appeal No. **A-2-SMC-11-001** and Appeal No. **A-2-SMC-11-003** present a substantial issue with respect to the grounds on which the appeal have been filed under Section 30603 and 30625 of the Coastal Act regarding the Claim of Exemption.

MOTION #3: MOTION FOR DENIAL OF TWO CLAIMS OF EXEMPTION FROM PERMIT REQUIREMENTS

I move that the Commission approve Claim of Exemption No. A-2-SMC-11-001 and A-2-SMC-11-003 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 claim of exemption 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 CLAIM OF EXEMPTION:

The Commission hereby denies the claim of exemption for the proposed development on the ground that the development is not exempt from the permitting requirements of the Coastal Act and certified LCP.

2. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

2.1 Background

In 1988, the Applicant purchased four contiguous 2,500 square foot lots which were identified on a subdivision map filed in 1908, in accordance with the 1907 Subdivision Map Act. The

underlying zoning for this property allows a minimum parcel size of 5,000 square feet. In 1999, the Applicant sought to develop what he believed to be two 5,000 square foot lots. Under the rules then in effect, the San Mateo County Planning Division required the four 2,500 square foot parcels depicted on the 1908 map be merged into two, contiguous 5,000 square foot lots in order to conform to the LCP zoning regulations. The merger process under the County's subdivision regulations requires filing notices of merger and the Applicant filed these notices in 2000. Initial attempts by the Applicant to develop his property were denied due to inadequate notice given to the neighbors.

In 2000, having resubmitted the plans for development and after giving appropriate notice to the surrounding property owners, San Mateo County Design Review Committee approved design review permits for two single-family residences. This decision was appealed by neighbors to the County Planning Commission. In January 2001, the Planning Commission granted the appeal and denied the design review approval. The Applicant appealed this decision to the County Board of Supervisors, who required the Planning Department to review and redesign the project. In 2004, after the Applicant redesigned the project, the County Planning Administrator approved the design review applications. This decision was appealed to the Planning Commission, which again granted the appeals and denied the design review permits. In 2005, the Applicant again appealed to the Board of Supervisors. The Board of Supervisors denied the design review permits based on February 8, 2005. Shortly thereafter, litigation ensued.

On September 28, 2010, the Honorable Marie S. Weiner, sitting for the San Mateo County Superior Court of California, commanded San Mateo County "to decide the appeal of the Planning Commission's denial of [Mahon's] design review permits, and specifically to decide [Mahon's] design review permit applications, namely PLN 1999-00215 and PLN 1999-00015, *on the merits* of the proposed design plans…[and that]…Any decision to approve the design review permits may be subject to appropriate conditions prior to the *issuance* of the design review permits and/or issuance of building permits." During her later opinion issued September 14, 2010, Judge Weiner stated that "although a permit might not be able to be *issued* prior to determination of the number of lots, there is no impediment to *approval* of the design and approval of the permits, issuance of which would be subject to conditions such as determination of the number of lots." In this same opinion, Judge Weiner ordered the County Board of Supervisors to decide on the merits the design review permits for the proposed developments before determining the lot legality issue.

The trial court decision did not address coastal development permit requirements for either the approved residences or any necessary land division occurring after February 1, 1973, the effective date of the Coastal Act's predecessor statute.

On January 5, 2011, the Commission was forwarded, by a third party, two separate final notices of local action for the County's December 21, 2010 approval of two Coastside Design Review Permits for two single family residences: (1) a new 2,745.5 sq. ft. single-family residence with an approximately 440 sq. ft. garage on a 5,000 sq. ft. parcel; and (2) a new 2,571 sq. ft. single-family residence with an approximately 400 sq. ft. garage on a second 5,000 sq. ft. parcel. The County's notice states that the developments are categorically excluded from coastal development permitting requirements, based on Categorical Exclusion Order E-81-1, which

excludes certain single-family residential developments according to enumerated criteria. Additionally, the notices state the approved residences are not appealable to the Commission and do not provide the procedures for appeal of local decisions.

Consistent with Title 14, CCR section 13569, and based on assertions made by the Appellants, the Executive Director sent a letter to the County, the Applicant and other interested parties, contesting both the County's decision to categorically exclude the proposed development from CDP requirements and the County's determination that this project not be appealable to the Coastal Commission (**Exhibit 4**). The Commission's ten working-day appeal period began on January 6, 2011 and concluded at 5pm on January 20, 2011.

On January 6, 2011, the appellants filed an appeal of the County's actions with the Commission, appealing the decision of the San Mateo County Board of Supervisors to Categorically Exclude the proposed developments from CDP requirements.

In addition to the dispute over coastal development permit requirements, the most significant issue raised by the dispute between the parties from the Coastal Commission's perspective is whether the two contiguous 5,000 sq. ft. parcels for which Mr. Mahon is seeking design review approval are, in fact, two separate legal parcels (each of which could have a residential structure placed on it), or only one legal parcel of 10,000 sq. ft. upon which only one residential structure could be placed under current zoning regulations.

The appellants contends that Mr. Mahon never owned more than one large lot because the ten-thousand square foot tract of land that he purchased had not ever been effectively divided by the subdivision map recorded in 1908. By this analysis, Mr. Mahon is presently the owner of a *single* 10,000 square foot lot rather than the owner of *two* adjacent 5,000 square foot lots. If this is correct, current zoning would allow only one house on the entire property, rather than two. (See Zoning Regulations sections 6105.0 and 6105.4(b).)

The County has also expressly opined that *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42 clearly establishes that mere reference to a subdivision map filed in compliance with the 1907 subdivision map law, without more, does not conclusively establish its legal separation from adjacent lands in common ownership. Thus, something in addition to the filing of a subdivision map in 1908 is needed in order to establish that the two Mahon parcels were ever legally divided from each other.

2.2 Dispute Resolution Determination

Title 14, Section 13569 of the California Code of Regulations states:

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

> *is submitted. This determination shall be made with reference to the certified Local Coastal Program, including any maps, categorical exclusions, land use designations and zoning ordinances which are adopted as part of the Local Coastal Program. Where an applicant, interested person, or a local government has a question as to the appropriate designation for the development, the following procedures shall establish whether a development is categorically excluded, non-appealable or appealable:*
>
> *(d) Where, after the executive director's investigation, the executive director's determination is not in accordance with the local government determination, the Commission shall hold a hearing for purposes of determining the appropriate designation for the area. The Commission shall schedule the hearing on the determination for the next Commission meeting (in the appropriate geographic region of the state) following the local government request. [Emphasis added.]*

After the certification of a LCP, the Commission is authorized to resolve disputes regarding the appropriate status of a development proposal (i.e., categorically excluded, non-appealable, or appealable). The purpose of the dispute resolution regulation is to provide for an administrative process for the resolution of disputes over the status of a particular project. Such a process is important when two agencies, here San Mateo County and the Commission, each have either original or appellate jurisdiction over a given project. The Coastal Act was set up to give certified local governments the primary permitting authority over projects proposed in the Coastal Zone but to allow the Commission oversight authority over specified projects through the appeal process. Thus, the regulations anticipated that, from time to time, there may be disagreements regarding the status of a particular project and an administrative dispute resolution process would be preferable (and quicker) than the immediate alternative of litigation. If the Executive Director and the local government are in disagreement over the appropriate processing status, as is the situation here, the Commission is charged with making the final determination.

Similarly, Section 6328.16 of the County's zoning regulations expressly provide that appeals of County actions on CDPs shall be processed in accordance with "the Commission's regulations."

Local Government Action

As stated above, on December 21, 2010, the San Mateo County Board of Supervisors approved two Coastside Design Review Permits for two single-family residences on Assessor Parcel Numbers 036-014-200 and -210 (**Exhibit 3**). The County did not require a coastal development permit for the developments, citing Categorical Exclusion E-81-1.

The County did not send the Commission a notice of final local action, as required under CCR Section 13571. Instead, a third party appellant notified the Commission of these local actions.

By letter dated January 7, 2011, Commission staff informed the County that the Notice of Final Local Decision described above was erroneous because an appealable coastal development permit is required for any development on the subject property because: (1) the property's legality has not been established; (2) neither land divisions nor two residences on a single lot are the principally permitted use for the parcel; and (3) the approved residences appear to be located

within the Commission's physical appeal jurisdiction (within 100 feet of a wetland) as detailed below (**Exhibits 4 and 8**).

Commission Determination

The matter before the Commission does not involve the approvability of the two residences approved by the County in their action on the design review permits or the approvability of any necessary land division or other change of intensity of use occurring after February 1, 1973 because the County has failed to process a CDP for any of these developments. Accordingly, the issues before the Commission at this time are:

- Is a CDP required for development of the subject property; and

- Is approval by the County of any development on the subject property appealable to the Coastal Commission?

Coastal Development Permit Requirement

Coastal Act Section 30600 states in relevant part:

> *(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit. [Emphasis added.]*

After Local Coastal program (LCP) certification, the Commission is responsible for resolving disagreements between the certified local governments and the Commission's Executive Director regarding the noticing and hearing requirements applicable to coastal development proposals (i.e., whether they are categorically excluded from coastal development permit (CDP) requirements, non-appealable, or appealable), pursuant to Section 13569 of the Commission's Regulations (California Code of Regulations (CCR), Title 14).

In this case, San Mateo County disagrees with the Executive Director's determinations that (1) based on the property (located at the corner of Second Street and Farrallone Avenue in the Community of Montara in San Mateo County) upon which development is proposed to occur, any development of this site is appealable and (2) that the County improperly categorically excluded certain development in Montara from Coastal Development Permit requirements. The County asserts that this property is not appealable and therefore categorically excluded from CDP requirements, under San Mateo County Categorical Exclusion Order E-81-1.

San Mateo County Categorical Exclusion Order E-81-1

Categorical Exclusion E-81-1 excludes from coastal development permitting requirements certain categories of development located in specified geographical areas of the County subject to a number of conditions and limitations. Categorical Exclusion E-81-1 includes exclusions for

single-family residences that conform to zoning district regulations. Single-family residences are excluded from coastal development permitting requirements under Categorical Exclusion E-81-1 if they meet the following criteria:

> *On lots conforming to zoning district regulations, the construction, reconstruction, demolition, repair, maintenance, alteration or addition to any single-family dwelling or accessory building which does not require a variance after: (1) applying Design Review (DR) District regulations and (2) reviewing and approving required geologic reports in hazardous areas as defined in Policy 9.10 of the Local Coastal Program. All development must conform to the following criteria:…*
>
> *7. Area is <u>not</u> within appeal jurisdiction of the Coastal Commission…*

The two residences in question are not categorically excluded, inconsistent with Categorical Exclusion E-81-1, for the following three independent reasons.

<u>Lot Legality</u>

First, the notices for the two design review approvals did not include information as to the parcels' conformance with zoning district regulations. With regard to categorically excluded single-family residences, Categorical Exclusion E-81-1 requires first and foremost a finding that development would take place "on lots conforming to zoning district regulations." County certified zoning regulation section 6105.0 states that "no permit for development shall be issued for any lot which is not a legal lot."[1] The County did not establish that the developments would be located "on lots conforming to zoning district regulations", including the requirement that the lot be legally cognizable. In fact, Special Condition #3 of each approval requires subsequent evidence of lot legality and the County Counsel has previously opined that the owner of the subject property must demonstrate he has two legal parcels by virtue of some legally cognizable action other than the filing of a 1908 subdivision map.

More Specifically, the County has expressly opined that *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42 clearly establishes that mere reference to a subdivision map filed in compliance with the 1907 subdivision map law, without more, does not conclusively establish its legal separation from adjacent lands in common ownership. Thus, something in addition to the filing of a subdivision map in 1908 is needed in order to establish that the two Mahon parcels were ever legally divided from each other. The County Counsel also dismissed other potential bases proffered by the Applicant for considering the 10,000 square foot parcel as two separate legal parcels. (**Exhibits 6 and 10**). Excerpts of the County Counsel Memo appear

[1] The Coastal Act expressly requires any person who proposes to divide land to obtain a permit from the Commission or the local government where such local government has obtained approval of a certified LCP. The obligations of a developer under the Coastal Act are distinct and independent from the obligations of a developer under the Subdivision Map Act. The Subdivision Map Act expressly authorizes a local government to condition or deny a permit approval, extension or entitlement in order to comply with the Coastal Act. (Gov. Code Section 66498.1(c) and 66498.6.) A subdivision approval from a local government does not excuse a project from compliance with state law requirements such as the Coastal Act.

below.

a. ***Notices of Merger as Constituting Certificates of Compliance Under Government Code section 66499.35(d).*** *We have concluded that the Notices of Merger do not constitute certificates of compliance. The code section Mr. Mahon has cited refers to various kinds of "maps" and "certificates of exemption." Notices of merger referenced in section 7123 of the County Subdivision Regulations have never been interpreted to be either "maps" or "certificates of exemption" within the meaning of section 66499.35 of the Government Code. Nor has Mr. Mahon cited any legal authority that supports adopting such an interpretation in this case. In fact, "certificate of exception" is defined by Cal. Gov't Code § 66422 to mean "a valid authorization to subdivide land, issued by the County of Los Angeles pursuant to an ordinance thereof, adopted between September 22, 1967, and March 4, 1972, and which at the time of issuance did not conflict with this division or any statutory predecessor thereof."*

b. ***Notices of Merger as Constituting Merger and Resubdivision into Two Parcels Under Government code section 66499.20½.*** *Mahon's second argument relies on a code section providing that "subdivided lands" can be merged and re-subdivided according to any process allowed by the local land use authority – in this case, the recording of two Notices of Merger pursuant to our Subdivision Regulations. In order to constitute a merger and legal subdivision, however, the merger must be between "subdivided lands," i.e. lands that are already in a subdivided state. See Cal. Gov't Code § 66499.20½. Under Witt and Abernathy, the purported merger of the four original 2,500 square foot lots into two contiguous 5,000 square foot lots was not a merger of "subdivided lands" because, pursuant to those cases, those lands had never been legally divided from each other in the first place.*

c. ***The County as the Subdivider of the Land by Virtue of Recording the Notices of Merger.*** *The ministerial act of recording a document upon request is not the kind of activity that constitutes a subdivision within the definition of Cal. Gov't Code § 66424. Mr. Mahon points to no authority that would have permitted the County Recorder to refuse the ministerial recording of these documents. The Subdivision Map Act sets for the roles played by various parties, and under these facts, Mr. Mahon is the subdivider within the meaning of Cal. Gov't Code § 66423, and the County is the "local agency" pursuant to Cal. Gov't Code § 66420. In short, no act by the County can create a subdivision other than through the subdivision process provided by law.*

d. ***The County Having Treated These Parcels as Two Parcels With Separate APNs for Nine Years While Expressing No Concern Over Their Legality.*** *It is true that he County's position, before the Witt and Abernathy decisions were issued, was that two legal 5,000 square foot parcels existed by virtue of the 1908 subdivision and the subsequent 2000 mergers. However, the County's past legal interpretations cannot, in themselves, serve as an estoppel or bind the County to a course of action subsequently determined to be inconsistent with law. Further, the fact that a parcel*

has been "treated" as separate by the County for any purposes other than the administration of the Subdivision Map Act or the actual issuance of development permits, is irrelevant to its entitlement to legal status. The existence of separate APNs is completely irrelevant to whether a parcel is legal pursuant to the Subdivision Map At. See 62 Ops. Cal. Atty. Gen. 147 (1979). This argument also provides no support to finding of parcel legality.

e. *Neither of the Mahon parcels have been approved for development within the meaning of Gov't Code section 66499.35(c), and thus do not qualify on this basis. In the future, any undeveloped parcels proposed for development in the Midcoast area will be reviewed for compliance with Witt and Abernathy.*

Commission staff independently reviewed the legal status of the subject property. Based on a search of RealQuest and the San Mateo County Recorder's Office online Grantor/Grantee Index, (RealQuest has document information for San Mateo County since December 30, 1959) the only records of this property are two conveyances on the same date, March 24, 1988, wherein the property was (1) transferred from Omo Grimwood as an individual to the Omo D. Grimwood Trust and then (2) transferred from the Omo D. Grimwood Trust to Thomas I. Mahon and Alice Mahon. Both of these transfers had the same legal description: "Lots 1, 2, 3 and 4 in Block 7…"There is no evidence of any conveyance of less than all four lots. Further, the San Mateo County Assessor Map for this property is dated November 15, 1976 and shows a single APN for the property, and the only notation for this property is to the 1908 Map referenced in the property's legal description. Therefore, the available evidence indicates that the parcels were never legally divided from each other.

Instead, all available evidence indicates that these developments are outside of the scope of Categorical Exclusion E-81-1 since the single-family residences do not conform to zoning district regulations because they do not comprise development on a legal lot. Moreover, the County's own policy memos state that on lots within historical subdivisions anywhere in unincorporated County areas (including even those in the Mid-Coast where said lot(s) are located in the mapped "Single-Family Residential Categorical Exclusion Area"), parcel legality must be confirmed and a [Certificate of Compliance] (be it a Type A or B) recorded prior to the issuance of a Coastal Development Exclusion (CDX) for a domestic or agricultural well or any other new development. See **Exhibit 7,** page 2. Since lot legality has not been established, the approved residences do not qualify as categorically excluded development.

Principally Permitted Uses

Second, the developments are not categorically excluded because they are not the principally permitted uses for the zoning district. The zoning district (R-1/S-17/DR/CD) allows one dwelling per 5,000 sq. ft. legal lot. Unless the property owner is able to establish that he owns two separate lots under both the Subdivision Map Act and the Coastal Act, the developments in question would be located on a single 10,000 sq. ft. lot. Under pertinent zoning regulations section 6161, the principally permitted uses do not include subdivision or development of two homes on a single lot. These developments fall outside of the principally permitted uses for this zoning district and therefore any County approval of a CDP for either a land division or 2 homes

on a single 10,000 square foot lot would be appealable to the Coastal Commission pursuant to Coastal Act section 30603(a)(4). This is reaffirmed in section 6328.3(s)(3) of the County's certified zoning regulations. Therefore these developments are not categorically excluded as they are inconsistent with part (7) of the single-family residence requirements of Categorical Exclusion E-81-1, because they comprise development appealable to the Commission.

Proximity to Wetlands

Third, the proposed developments are not categorically excluded based on evidence that has been submitted in support of the appellants' assertion that the developments are located within the Coastal Commission's physical appeal jurisdiction. (**Exhibits 5 and 8**). Coastal Act Section 30603 states, in part, that "(2) Developments approved by the local government…within 100 feet of any wetland, estuary, or stream…" are appealable to the Coastal Commission. This is reaffirmed in section 6328.3(s)(2) of the County's certified zoning regulations. According to an appeal of the County's action received on January 6, 2011, the approved development sites are within 100 feet of a wetland, located across 2nd street on the northwest quadrant of its intersection with Farallone (APN 036-110-020). The Appellant's assertion is based on the observance of vegetation indicative of wetlands**.**

Under San Mateo County certified LCP zoning regulation Section 6328.3(h), "development" includes the change in density or intensity of use of land, subdivision of land and "any other division of land including lot splits." Section 6328.3(r) defines "project" as "any development (as defined in Section 6328.3(h)) as well as any other permits or approvals required before a development may proceed…[including]…any land division requiring County approval." Section 6328.16(b) states that "Action by the Board of Supervisors to approve a Coastal Development Permit for projects defined in Section 6328.3(r) may be appealed to the Coastal Commission in accordance with the Coastal Commission regulations." Accordingly, the Commission will rely on the Commission's regulations to determine the existence of a wetland for purposes of establishing the physical appeal jurisdiction.

On January 17, 2011, an Appellant and a botanist went to the alleged wetland site to identify the vegetation present. They sent a list and two photographs of the vegetation present to Commission staff (**Exhibit 8**). The Commission's staff biologist concluded that:

> The plant list provided for the ditches on the site is made up of species that tend to grow at the wet end of the moisture gradient. Watercress in particular is typically an aquatic or semi-aquatic species with adaptations, such as floating stems, for life in standing water. If the plant community in the ditches is well represented by the species lists provided, then those ditches would definitely be "wetland" according to the definitions in the Coastal Act and the Commission's Regulations. The photograph of the ditch also suggests that it is wetland habitat.

Therefore, the area in question is considered to be a wetland for purposes of Coastal Regulation Section 13577(b). Accordingly, to the extent the proposed development is within 100 feet of a wetland, it is also appealable to the Commission on this ground.

Such appealable developments are not categorically excluded from CDP requirements as they are inconsistent with part (7) of the single-family residence requirements of Categorical Exclusion E-81-1 because they comprise development appealable to the Commission. Therefore, the authorizations granted are outside the scope of the stipulated criteria for exclusion of single family residences from CDP requirements in Categorical Exclusion Order E-81-1, and appealable CDPs are required.

2.3 Appeal Substantial Issue Determination

2.3.1 Appeal Procedures

Coastal Act Section 30603 provides for the appeal to the Coastal Commission of certain CDP decisions in jurisdictions with certified LCPs. The following categories of local CDP decisions are appealable: (a) approval of CDPs for development that is located (1) between the sea and the first public road paralleling the sea or within 300 feet of the inland extend of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance, (2) on tidelands, submerged lands, public trust lands, within 100 feet of any wetland , estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff, and (3) in a sensitive coastal resource area; or (b) for counties, approval of CDPs for development that is not designated as the principal permitted use under the LCP. Section 30625 of the Coastal Act also provides that any "claim of exemption from coastal development permit requirements" may be appealed to the Coastal Commission. The subject County decisions to grant categorical exclusions for the two single family residences are appealable because the categorical exclusions constitute claims of exemption for developments that: (1) appear to be within 100 feet of a wetland or stream; and (2) in any case, are not the principal permitted uses under the San Mateo County LCP, as described in Section 6161 above.

Section 30625(b) requires the Commission to conduct a de novo CDP hearing on the appealed project unless a majority of the Commission finds that "no substantial issue" is raised by such allegations. The Coastal Act presumes that an appeal raises a substantial issue of conformity of the approved project with the certified LCP, unless the Commission decides to take public testimony and vote on the question of substantial issue**.**

Since the staff is recommending substantial issue, unless three Commissioners object, it is presumed that the appeal raises a substantial issue and the Commission may proceed to its de novo review at the same or subsequent meeting. The Commission will not take public testimony during this phase of the appeal hearing unless three Commissioners request it.

IMPORTANT NOTE:
THE COMMISSION WILL NOT TAKE PUBLIC TESTIMONY DURING THE SUBSTANTIAL ISSUE PHASE OF THE APPEAL HEARING UNLESS THREE COMMISSIONERS REQUEST IT.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have three minutes per side to address whether the appeal raises a substantial issue. The only persons qualified to testify before the Commission on the substantial issue question are the applicants, the appellant and persons who made their views known to the local government (or their representatives). Testimony from other persons regarding substantial issue must be submitted in writing. It takes a majority of Commissioners present to find that no substantial issue is raised.

Unless it is determined that there is no substantial issue, the Commission will proceed to the de novo portion of the appeal hearing and review the merits of the proposed project. Oral and written public testimony will be taken during this de novo review which may occur at the same or subsequent meeting.

Section 30625 allows an applicant, any aggrieved person or any two members of the Commission to appeal such actions. The only persons qualified to testify before the Commission on the substantial issue question are the applicant, persons who made their views known before the local government (or their representatives), and the local government. Testimony from other persons regarding substantial issue must be submitted in writing. Any person may testify during the de novo stage of an appeal hearing.

2.3.2. Summary of Appeal Contentions

The County's determination that the proposed developments are categorically excluded from CDP requirements was appealed by the Committee for Green Foothills, Montara Neighbors for Responsible Building, Tom Judge, Sally Lehrman, Tom Ballantyne, Kathryn Slater-Carter, Jim Rudolph, Ken Muller, Hilary Srere, & William F. Kehoe. The Appellants contend that the developments are not categorically excluded from CDP requirements and therefore require an appealable CDP for the following three reasons (**Exhibit 5**):

1. Lot Legality

Appellants contend that the San Mateo County Board of Supervisors improperly considered the Coastside Design Review Permits for two houses on a single parcel before determining parcel legality. With regard to categorically excluded single-family residences, Categorical Exclusion E-81-1 requires first and foremost a finding that development would take place "on lots conforming to zoning district regulations." County zoning regulation section 6105.0 states that "no permit for development shall be issued for any lot which is not a legal lot." The Appellants contend that the County did not establish that the developments would be located "on lots conforming to zoning district regulations," and therefore the developments require appealable CDPs.

2. Principally Permitted Uses

The Appellants contend that the approved developments are not within the principally permitted uses for the zoning district. The zoning district (R-1/S-17/DR/CD) allows one dwelling per

5,000 sq. ft. legal lot. The Appellants contend that the property owner has not established that he owns two separate lots under both the Subdivision Map Act and the Coastal Act and therefore, arguably, the developments in question would be located on a single 10,000 sq. ft. lot. Under pertinent zoning regulations Section 6161, the principally permitted uses do not include subdivision or development of two homes on a single lot. Therefore, the Appellants contend that the development is appealable and therefore was erroneously categorically excluded from CDP requirements.

3. Proximity to Wetlands

The Appellants contend that the approved developments are within 100 feet of a wetland, and are accordingly appealable to the Commission and therefore do not qualify for Categorical Exclusion under Categorical Exclusion Order E-81-1. (**See Exhibits 5 and 8**)

2.3.3. Applicable Policies

Categorical Exclusion Order No. E-81-1states in applicable part:

…

On lots conforming to zoning district regulations, the construction, reconstruction, demolition, repair, maintenance, alteration or addition to any single-family dwelling or accessory building which does not require a variance after: (1) applying Design Review (DR) District regulations and (2) reviewing and approving required geologic reports in hazardous areas as defined in Policy 9.10 of the Local Coastal Program. All development must conform to the following criteria:
1. Area is within urban boundary of the Local Coastal Program (LCP).

2. Area was designated as Medium Density or Medium Low Density Residential in the Local Coastal Program.

3. Area is zoned either R-1/S-17 or R-1-1/S-9.

4. Area is not between first public through road and the sea.

5. Area is not in an existing or proposed Geologic Hazards (GH) Overlay Zone.

6. Area is not within a 100-year floodplain.

7. Area is not within appeal jurisdiction of the Coastal Commission.

8. Approval of any development in this category will not exceed the total number of residential building permits yearly authorized by the Board of Supervisors according to Policy 1.19 of the Local Coastal Program.

Coastal Act Section 30625 states in part:

(a) Except as otherwise specifically provided in subdivision (a) of Section 30602, any appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body may be appealed to the

commission by an applicant, any aggrieved person, or any two members of the commission. The commission may approve, modify, or deny such proposed development, and if no action is taken within the time limit specified in Sections 30621 and 30622, the decision of the local government or port governing body, as the case may be, shall become final, unless the time limit in Section 30621 or 30622 is waived by the applicant.

Coastal Act Section 30603(a) states in relevant part:

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

…

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.

…

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section 30500). [Emphasis added.]

Coastal Act Section 30106 and San Mateo County certified LUP Policy 1.2 states in relevant part:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511). [Emphasis added.]

Coastal Regulations Section 13577(b) states in relevant part:

> *For purposes of Public Resources Code Sections 30519, 30600.5, 30601, 30603, and all other applicable provisions of the Coastal Act of 1976, the precise boundaries of the jurisdictional areas described therein shall be determined using the following criteria:*
>
> *(a) …*
>
> *(b) Wetlands.*
>
> > *(1) Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.*

San Mateo County certified LUP Policy 1.27 states in relevant part:

> *Require a Coastal Development Permit when issuing a Certificate of Compliance to confirm the legal existence of parcels as addressed in Section 66499.35(a) of the California Government Code (e.g., lots which predated or met Subdivision Map Act and local government requirements at the time they were created), only if: (1) the land division occurred after the effective date of coastal permit requirements for such division of land (i.e., either under Proposition 20 or the Coastal Act of 1976), and (2) a coastal permit has not previously been issued for such division of land. [Emphasis added]*

San Mateo County certified LUP Policy 1.28 states:

> *Legalizing Parcels*
>
> *Require a Coastal Development Permit when issuing a Certificate of Compliance to legalize parcels under Section 66499.35(b) of the California Government Code (i.e., parcels that were illegally created without benefit of government review and approval).*

San Mateo County certified Zoning Regulation Section 6105 states in relevant part:

> *LEGAL LOT REQUIREMENT. No permit for development shall be issued for any lot which is not a legal lot.* [Emphasis added.]

San Mateo County certified Zoning Regulation Section 6105.1 states in relevant part:

ZONING AND BUILDING VIOLATION. Except as provided in Sections 6105.2 and 6105.3 below, no permit for development shall be issued for any lot that has an existing zoning or building violation.

San Mateo County certified Zoning Regulation Section 6132 states in relevant part:

8. Legal Parcel. A parcel created by (1) a subdivision approved by the County, (2) a land division which was exempt from subdivision regulations, (3) a land division predating the County's authority over subdivision, July 20, 1945, provided the parcel in question has subsequently remained intact, (4) recording of a Certificate of Compliance or a Conditional Certificate of Compliance, or (5) other means but subsequently developed with a building or structure to serve the principal use of the parcel, for which a valid building permit was issued.

San Mateo County certified Zoning Regulation Section 6161 states in relevant part:

USES PERMITTED [for "R-1" Districts]
(a) <u>One-family dwellings.</u>

…[Emphasis added.]

San Mateo County certified Zoning Regulation Section 6300.2 states in relevant part:

REGULATIONS FOR "S-17" COMBINING DISTRICT (MIDCOAST. The following regulations shall apply in any single-family residential district with which the "S-17" District is combined.

1. Building Site Width. The minimum building site width shall be an average of 50 feet.
2. Building Site Area. The minimum building site area shall be 5,000 sq. ft.

San Mateo County certified Zoning Regulation Section 6328.3 states in relevant part:

…

(q) "Principal permitted use" means any use representative of the basic zone district allowed without a use permit in that underlying district.

(s) <u>"Project appealable to the Coastal Commission"</u> if approved by the Board of Supervisors means:

(1) Projects between the sea and the first through public road paralleling the sea or 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 the greater distance.

(2) Projects in County jurisdiction located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Any project involving development which is not a principal permitted use in the underlying zone, as defined in Section 6328.3(p).

2.3.4. Discussion

The County's actions are appealable to the Commission because they categorically exclude development that requires a CDP appealable to the Commission. Commission staff has analyzed the County's Final Local Action Notices for the approved residences (**Exhibit 3**), appellant's claims (**Exhibit 5**), the relevant requirements of the LCP, and County Counsel and County policy staff memos (**Exhibits 6 and 9**). The Commission finds that the County's categorical exclusion of the approved developments from Coastal Development Permit requirements raises a substantial issue of conformance with the San Mateo County certified LCP and Categorical Exclusion Order E-81-1.

The Commission hereby incorporates by reference in full the findings for dispute resolution in Section 2.2. As discussed in Section 2.2, a significant issue raised by the appellants is whether the two contiguous 5,000 sq. ft. parcels for which Mr. Mahon is seeking design review approval are, in fact, two separate legal parcels (each of which could have a residential structure placed on it), or only one legal parcel of 10,000 sq. ft. upon which only one residential structure could be placed under current zoning regulations.

The appellant cites two recent cases of the California Court of Appeal[2] for the proposition that the two 5,000 sq. ft. parcels on which two homes are now proposed were never legally divided from each other. The appellant contends that Mr. Mahon never owned more than one large lot because the ten-thousand square foot tract of land that he purchased had not ever been effectively divided by the subdivision map recorded in 1908. By this analysis, Mr. Mahon is presently the owner of a *single* 10,000 square foot lot rather than the owner of *two* adjacent 5,000 square foot lots. If this is correct, current zoning would allow only one house on the entire property, rather than two. (See Zoning Regulations sections 6105.0 and 6105.4(b).)

The holdings in the recently decided *Witt* and *Abernathy* cases settle the question of whether as a matter of law, the 1908 subdivision map legally created the parcels as shown on that map: the filing of this map alone did not create separate, legal parcels. Further, the applicant has not established the separate legal status of the two 5,000 square foot parcels proposed for design review and categorical exclusion approval.

Moreover, the County's own policy memos state that on lots within such historical subdivisions anywhere in unincorporated County areas (including even those in the Mid-Coast where said lot(s) are located in the mapped "Single-Family Residential Categorical Exclusion Area"), parcel legality must be confirmed and a [Certificate of Compliance] (be it a Type A or B) recorded prior to the issuance of a Coastal Development Exclusion (CDX) for a domestic or agricultural well or any other new development. See **Exhibit 7**, page 2.

[2] *Witt Home Ranch, Inc. v. County of Sonoma* (2008 165 Cal.App.4th 543 and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42.

Due to the numerous LCP provisions expressing the importance of lot legality and the very specific criteria listed under Categorical Exclusion order E-81-1, the Commission finds that the appeal raises a substantial issue of conformance with the LCP. In addition, these developments fall outside of the principally permitted uses for this zoning district and therefore any County approval of a CDP for the homes are appealable to the Coastal Commission pursuant to Coastal Act section 30603(a)(4). This is reaffirmed in section 6328.3(s)(3) of the County's certified zoning regulations. Therefore, the Commission finds that because the applicants have not established the separate legal status of the two 5,000 square foot parcels proposed for design review and categorical exclusion approval, any development of the site (two homes on one 10,000 sq. ft. lot or one home in each illegal 5,000 sq. ft. lot) is appealable to the Commission. Therefore, the Commission finds that the appeal raises a substantial issue of conformance with policies 1.27, 1.28, zoning regulations Sections 6105, 6105.1, 6132, 6161, 6300.2 and Categorical Exclusion Order E-81-1.

Appellants also contend that the proposed development, categorically excluded by the County, is located within 100 feet of a wetland. (**Exhibits 5 and 8**) Such proximity to the wetland would result means the developments are located within the Coastal Commission's physical appeal jurisdiction. Coastal Act Section 30603 states, in part, that "(2) Developments approved by the local government…within 100 feet of any wetland, estuary, or stream…" are appealable to the Coastal Commission. This is reaffirmed in section 6328.3(s)(2) of the County's certified zoning regulations.

Under San Mateo County certified LCP zoning regulation Section 6328.3(h), "development" includes the change in density or intensity of use of land, subdivision of land and "any other division of land including lot splits." Section 6328.3(r) defines "project" as "any development (as defined in Section 6328.3(h)) as well as any other permits or approvals required before a development may proceed…[including]…any land division requiring County approval." Section 6328.16(b) states that "Action by the Board of Supervisors to approve a Coastal Development Permit for projects defined in Section 6328.3(r) may be appealed to the Coastal Commission in accordance with the Coastal Commission regulations." Accordingly, the Commission will rely on the Commission's regulations to determine the existence of a wetland for purposes of establishing the physical appeal jurisdiction. Coastal Regulation Section 13577 states the following:

> *For purposes of Public Resources Code Sections 30519, 30600.5, 30601, 30603, and all other applicable provisions of the Coastal Act of 1976, the precise boundaries of the jurisdictional areas described therein shall be determined using the following criteria:*
>
> *(a) …*
>
> *(b) Wetlands.*
>
> *(1) Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly*

> *developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.*

We also note that Section 6328.16 of the County's certified Local Coastal Program specifies that actions by the County "may be appealed to the Coastal Commission in accordance with Coastal Commission regulations." Therefore, and as discussed further below, the County's action is appealable to the Coastal Commission pursuant to both the Commission's regulations and Section 6328.16 of the County's LCP.

According to an appeal of the County's action received on January 6, 2011, the approved development sites are within 100 feet of a delineated wetland, located across Second Street on the northwest quadrant of its intersection with Farallone Avenue (APN 036-110-020). (**Exhibit 8**) The appellant's assertion is based on the observance of vegetation indicative of wetlands. (**Exhibit 8**) On January 17, 2011, an Appellant and a botanist went to the alleged wetland site to identify the vegetation present. They sent a list and two photographs of the vegetation present to Commission staff (**Exhibit 8**). The Commission's staff biologist concluded that:

> The plant list provided for the ditches on the site is made up of species that tend to grow at the wet end of the moisture gradient. Watercress in particular is typically an aquatic or semi-aquatic species with adaptations, such as floating stems, for life in standing water. If the plant community in the ditches is well represented by the species lists provided, then those ditches would definitely be "wetland" according to the definitions in the Coastal Act and the Commission's Regulations. The photograph of the ditch also suggests that it is wetland habitat.

Therefore, the Commission finds that the appeal raises a substantial issue of conformance with Categorical Exclusion Order E-81-1, because evidence suggests a wetland exists within 100 feet of the proposed developments.

Conclusion

In making the substantial issue assessment, the Commission typically considers whether the appellants' contentions regarding the inconsistency of the local government action with the certified LCP or the Coastal Act raise significant issues in terms of the extent and scope of the approved development, the support for the local action, the precedential nature of the project, whether a significant coastal resource would be affected, and whether the appeal has statewide significance.

With regard to the degree of factual and legal support for the local government's decision – the County has provided little factual support for the approval of a categorical exclusion for two single-family residences on property appealable to the Commission for which lot legality has not been established.

The extent and scope of the development and the coastal resources affected by the County's actions are significant raising significant questions about the protection of coastal wetlands and the establishment of new precedents with regard to future interpretations of the LCP. The division of land presents issues related to fairly allocating an area's limited service and environmental carrying capacity. Large portions of the coastal zone have limited public services, high natural hazards, sensitive and special coastal resources and great significance as a recreational or agricultural resource. This limited capacity is already strained by current residential and recreational uses; yet the demand for both is increasing. The Coastal Act provides a priority for certain types of development and land uses (e.g., coastal dependent and visitor serving and uses, vital services and industries of regional importance, agriculture, etc.). Such uses cannot be precluded by other overly-intense development. The potential for intensification of residential development has two aspects: buildout of existing parcels and creation of new building sites by land division. Lots created without all necessary governmental approvals merge those two aspects. If the Commission were to merely acknowledge all existing illegal lots through the permit process but without substantive review the present owners of those lots could receive a substantial benefit to the detriment of the public. There would not be a fair allocation of resources.

Due to the reasons described above, the Commission hereby finds that the appeal of the claim of exemption raises a substantial issue of conformance with the LCP and Categorical Exclusion Order E-81-1. Accordingly, the Commission will conduct a de novo hearing to determine whether to approve the categorical exclusions.

2.4 De Novo Review of Categorical Exclusion

2.4.1 Project Description and Location

The project description and location is hereby incorporated by reference from Section 2.1 of this staff report on pages 4-6. The findings of both the Dispute Resolution Determination and the Substantial Issue Determination are hereby incorporated by reference from Sections 2.2 and 2.3.4 of this staff report on pages 6-13 and 19-22, respectively. Certified zoning regulation Section 6105 states that "no permit for development shall be issued for any lot which is not a legal lot."

2.4.2 Coastal Development Permit Required

The scope of review before the Commission at this time does not include the design of the proposed single family residences. Rather, the Commission is here tasked with determining whether to categorically exclude from CDP requirements the proposed developments. For the following reasons, the Commission determines that the proposed developments are not categorically excluded from Coastal Development Permit requirements. Further, any development on the site will first require a CDP, appealable to the Commission, which addresses lot legality. If the applicant cannot establish the existence of two legal parcels under both the Coastal Act and the Subdivision Map Act, the Applicant must then pursue a CDP, appealable to

the Commission, for any land division on the site occurring on or after February 1, 1973, the effective date of the Coastal Act's predecessor statute.

Lot Legality

The proposed developments would take place on property which has not been established as two separate legal parcels, as described in Sections 2.2 and 2.3.4 of the Dispute Resolution and Substantial Issue findings.

Two recent cases, *Witt Home Ranch, Inc. v. County of* Sonoma (2008) 165 Cal.App.4th 543 and *Abernathy Valley, Inc. v. County of* Solano (2009) 173 Cal.App.4th 42, hold that mere reference to a subdivision map filed in compliance with the 1907 state subdivision map law, without more, does not conclusively establish the legality of parcels described on the filed map. For our purposes, the *Witt* (2008) and *Abernathy* (2009) decisions established that the Applicant never had four 2,500 square foot parcels even though he bought this property with reference to four lot descriptions on the 1908 map; instead, he had a single 10,000 square foot legal parcel, because the only valid land division was the taking of the four parcels together in ownership separate from the surrounding parcels bought by others.

San Mateo County Counsel explained in a May 15, 2009 letter that "while the Applicant (and, in fact, the County itself) may have believed for many years that the legality of his parcel was well-established by the 1908 subdivision map and subsequent 2000 mergers, it is the proposal for future action on the parcel that triggers a need to determine the parcel's legality under *Witt* and *Abernathy*. (**Exhibit 6**). Further, LUP Policy 1.27 expressly requires a CDP when issuing a certificate of compliance to confirm the legal existence of parcels.

Moreover, regardless of whether the parcels are legal under the 1907 Map Act, the Coastal Development Permit process is an independent permitting process required in addition to the Map Act's requirements. The Coastal Act expressly requires a subdivider who proposes to subdivide land after the effective date of the Coastal Act or its predecessor statute to obtain a permit from the Commission or the local government where such local government has obtained approval of a certified LCP. A Subdivision Map Act approval from local government does not excuse a project from compliance with the state law requirements such as the Coastal Act.[3] Any person proposing to subdivide pursuant to the Map Act is required to obtain a CDP prior to submitting a final map for recordation. In fact, Section 66498.6 of the Map Act specifically provides that no provision of the Map Act "removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or

[3] Although the SMA is a comprehensive system for regulating land divisions and provides for the issuance of C of Cs in order to provide certainty regarding the legality of parcels of land, even if Certificates of Compliance are issued for the subject property, the certificate of compliance process is intended to give property owners a means to obtain a determination as to whether the property at issue complies with "the provisions of this division [the SMA] and of local ordinances enacted pursuant to this division." It is *not* intended to resolve questions regarding potential violations of *other* state laws such as the Coastal Act that may be involved in the creation of a parcel. *See* Gov't Code § 66499.35(a).

federal laws, regulations or polices."[4] Accordingly, the Map Act must be implemented in addition to (not in circumvention of) the Coastal Act, because they are separate and independent statutory schemes. Therefore, if a CDP is necessary but has not been obtained at the time of Subdivision Map Act approval, one is still necessary since a CDP is required for a land division that occurred after the effective date of the Coastal Act's predecessor statute (February 1, 1973).

The Categorical Exclusion Order excludes certain single-family residential development from Coastal Development Permit requirements. The exclusion is predicated on finding that the subject lots conform to zoning district regulations. As discussed, the Applicant has not established that he owns two separate 5,000 lots that have been legally divided under the Subdivision Map Act or the Coastal Act. The approval of two residences on property for which the applicant has only demonstrated the existence of one legal parcel constitutes development under the Coastal Act and the County's local coastal program ("LCP") and require a coastal development permit. In order to exclude the two residences, the Applicant must first successfully subdivide the subject property into two conforming 5,000 square foot lots under both the Subdivision Map Act and the Coastal Act. Therefore, in order to legally subdivide the subject property consistent with the Coastal Act and LCP, the Applicant must apply for a CDP to subdivide the land into two 5,000 square foot lots.

Therefore, for the reasons described above, the County's determination that no coastal development permit is required to legalize the two single-family residences on property for which the applicant has demonstrated only one legal lot is not consistent with the certified LCP provisions and thus the Commission finds the County's claim of exemption is erroneous, and that a coastal development permit appealable to the Commission is required.

Therefore, the proposed categorical exclusion must be denied. The proposed development of this property (i.e. two homes on one 10,000 sq. ft. lot or one home on each illegal 5,000 sq. ft. lot) requires a CDP, appealable to the Coastal Commission.

Principally Permitted Uses

As discussed directly above, the proposed developments would be placed on lots that have not been determined to be legal under either the Coastal Act or the Subdivision Map Act. The developments are therefore not included within the enumerated principally permitted uses for the zoning district as described in Sections 2.2 and 2.3.4 of the Dispute Resolution and Substantial Issue findings. The zoning district (R-1/S-17/DR/CD) allows one dwelling per 5,000 sq. ft. legal lot. The property owner has not established that he owns two separate lots under both the Subdivision Map Act and the Coastal Act and therefore, the developments in question would be

[4] The Map Act provides for two circumstances in which the local government may impose additional conditions or deny any permit, approval, extension or entitlement. (Gov. Code Section 66498.1(c).) The local government may impose additional conditions to avoid creating a condition dangerous to the health and/or safety of the residents of the subdivision or to comply with state or federal law. Finally, Section 66498.6 of the Map Act specifically provides that no provision of the Map Act "removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or federal laws, regulations or policies." (Section 66498.6.)

located on a single 10,000 sq. ft. lot. Under pertinent zoning regulations Section 6161, the principally permitted uses do not include subdivision or development of two homes on a single lot. Therefore any approval of the homes must arise through Coastal Development Permit review, appealable to the Coastal Commission pursuant to Coastal Act section 30603(a)(4). This is reaffirmed in section 6328.3(s)(3) of the County's certified zoning regulations. Accordingly, the proposed developments does not meet all requirements for Categorical Exclusion from CDP requirements, including sub-part 7, which extends categorical exclusion only to developments "not within appeal jurisdiction of the Coastal Commission." Therefore, the Commission finds that the proposed categorical exclusions must be denied. Any such development of the site (i.e. two homes on one 10,000 sq. ft. lot or one home in each illegal 5,000 sq. ft. lot) is appealable to the Commission.

Proximity to Wetlands

The proposed developments are within 100 feet of a wetland, are accordingly appealable to the Commission and therefore do not qualify for Categorical Exclusion under Categorical Exclusion Order E-81-1 as described in Sections 2.2 and 2.3.4 of the Dispute Resolution and Substantial Issue findings.

Section 13577(b):

> For purposes of Public Resources Code Sections 30519, 30600.5, 30601, 30603, and all other applicable provisions of the Coastal Act of 1976, the precise boundaries of the jurisdictional areas described therein shall be determined using the following criteria:
>
> (a) …..
>
> (b) Wetlands.
>
> (1) Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats.

Under San Mateo County certified LCP zoning regulation Section 6328.3(h), "development" includes the change in density or intensity of use of land, subdivision of land and "any other division of land including lot splits." Section 6328.3(r) defines "project" as "any development (as defined in Section 6328.3(h)) as well as any other permits or approvals required before a development may proceed…[including]…any land division requiring County approval." Section 6328.16(b) states that "Action by the Board of Supervisors to approve a Coastal Development Permit for projects defined in Section 6328.3(r) may be appealed to the Coastal Commission in

accordance with the Coastal Commission regulations." Accordingly, the Commission will rely on the Commission's regulations to determine the existence of a wetland for purposes of establishing the physical appeal jurisdiction.

Appellants contend that the area is in fact a wetland. On January 17, 2011, an Appellant and a botanist went to the alleged wetland site to identify the vegetation present. They sent a list and two photographs of the vegetation present to Commission staff. (**Exhibit 8**). The list includes The Commission's staff biologist concluded that:

> The plant list provided for the ditches on the site is made up of species that tend to grow at the wet end of the moisture gradient. Watercress in particular is typically an aquatic or semi-aquatic species with adaptations, such as floating stems, for life in standing water. If the plant community in the ditches is well represented by the species lists provided, then those ditches would definitely be "wetland" according to the definitions in the Coastal Act and the Commission's Regulations. The photograph of the ditch also suggests that it is wetland habitat.

Therefore, the area in question is considered to be a wetland under the Coastal Act and its governing regulations. Accordingly, to the extent the proposed development is within 100 feet of a wetland, it is also appealable to the Commission on this ground. (**Exhibits 5 and 8**). Therefore, the categorical exclusion of the proposed development must be denied.

Conclusion

The approval of two residences on property for which the applicant has demonstrated the existence of one legal parcel constitutes appealable development under the Coastal Act and the County's local coastal program ("LCP") and requires a coastal development permit appealable to the Commission. In addition, the area in question is considered to be a wetland under the Coastal Act and its governing regulations.

Therefore, for the reasons described above, the County's determination that no coastal development permit is required to legalize two single-family residences located on property within 100 feet of wetlands and for which the applicant has demonstrated only one legal lot is not consistent with the certified LCP provisions. Thus, the Commission finds the County's claim of exemption is erroneous, and that a coastal development permit appealable to the Commission is required.

For all the reasons described above, the Commission finds that the proposed categorical exclusion of the two residences is inconsistent with Categorical Exclusion Order No. E-81-1 and must be denied.

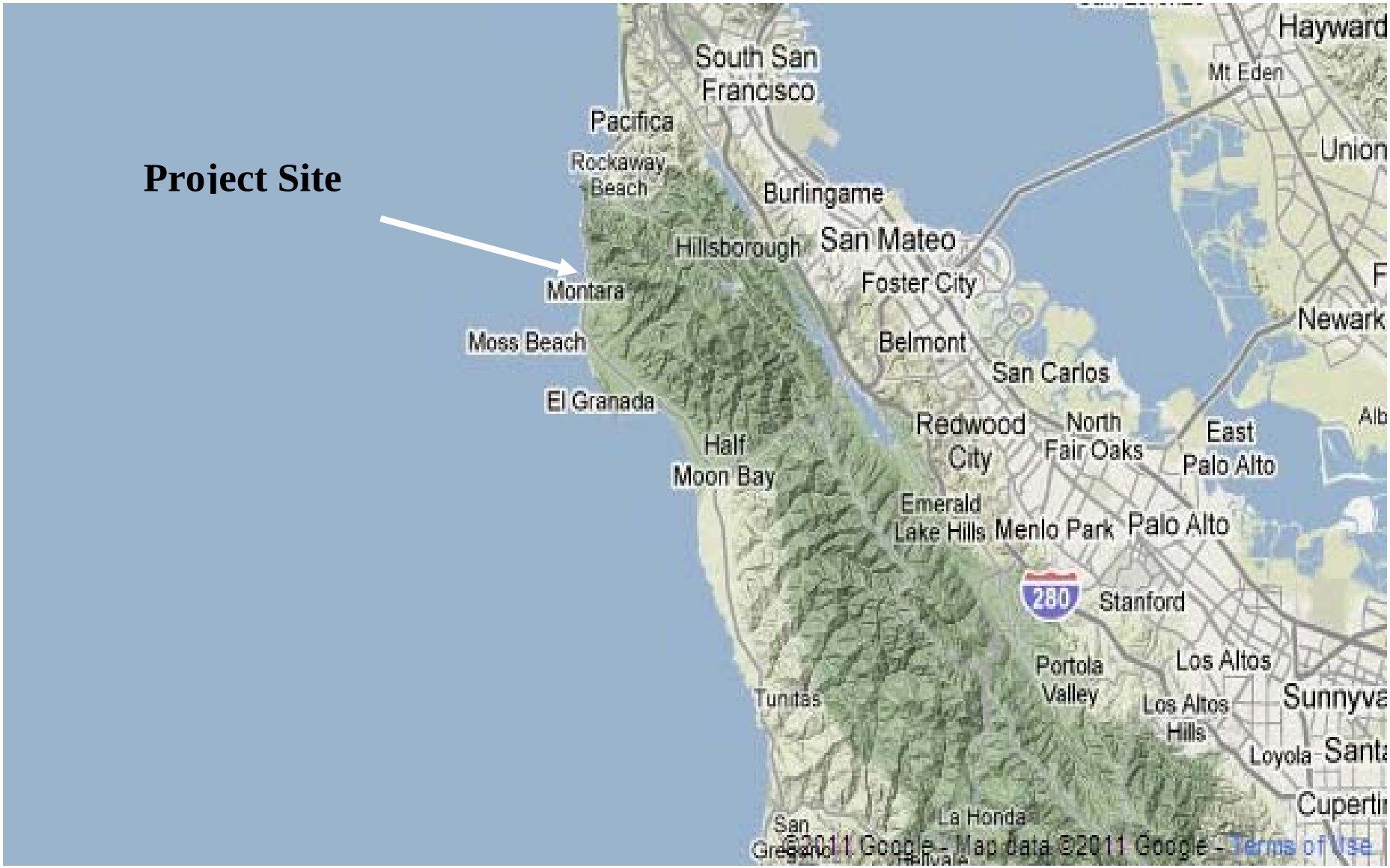

Exhibit No. 1
A-2-SMC-11-001, A-2-SMC-11-003 & 2-11-004-EDD - THOMAS MAHON
Vicinity Map
Page 1 of 1

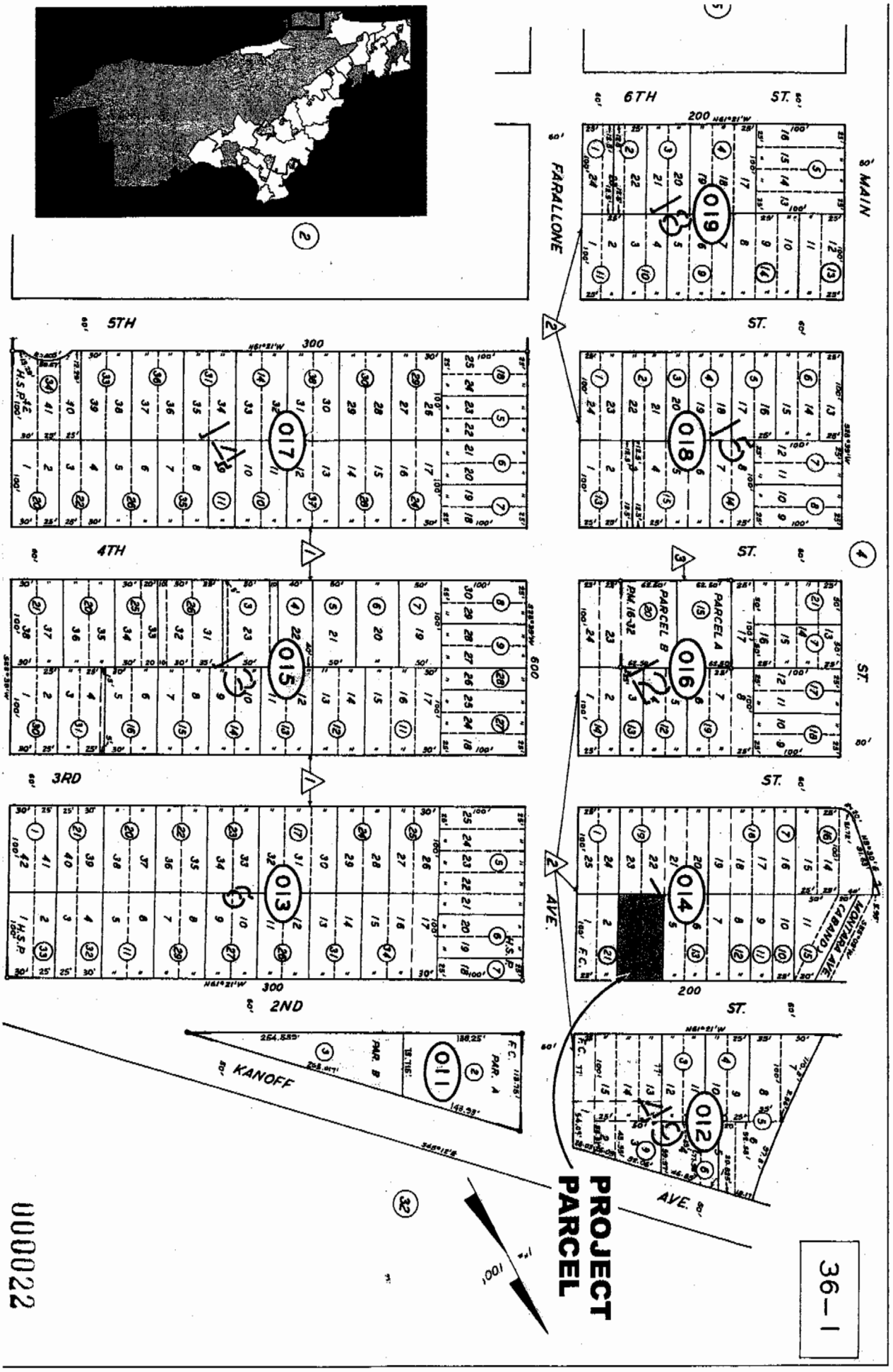

Exhibit No. 2
A-2-SMC-11-001, A-2-SMC-11-003 & 2-11-004-EDD - THOMAS MAHON
Parcel Map
Page 1 of 1

County of San Mateo
Planning & Building Department
455 County Center, 2nd Floor
Redwood City, California 94063
650/363-4161 Fax: 650/363-4849
Mail Drop PLN122
plngbldg@co.sanmateo.ca.us
www.co.sanmateo.ca.us/planning

December 22, 2010

Mr. Thomas Mahon
202 – 11th Street
Montara, CA 94037

Final Notice of Local Decision

Subject:	Coastside Design Review Permit
County File No.:	PLN1999-00215
Location:	284 Second Street, Montara, CA
APN Number:	036-014-200

Dear Mr. Mahon:

On December 21, 2010, the San Mateo County Board of Supervisors considered a Coastside Design Review Permit, pursuant to Sections 6565.4 (Coastal) and 6328.5 of the County Zoning Regulations as they existed in 1999, to construct a new 2,571 sq. ft. single-family residence and an approximately 400 sq. ft. garage on a 5,000 sq. ft. parcel located at 284 Second Street, in the unincorporated Montara area of the County. (Appeal from decision of the Planning Commission denying the Design Review Permit.)

Based on information provided by staff and evidence presented at the hearing, the Board of Supervisors approved the project (3-1), subject to the revised findings and conditions of approval in Attachment A. This project is not appealable to the California Coastal Commission.

If you have questions regarding this matter, please contact Angela Chavez at 650/599-7217.

Sincerely,

pp. Rosario Fernandez
Planning Commission Secretary
Bosdec1221U_vd_Mahon215

Attachment

cc: Johnathan Wittwer, Michael Vierbus, Lennie Roberts, David Beaumont, Kathryn Slater-Carter Bill Kehoe, Ronald Zumbrun, Art Hofmayer, Ann Alice Mahon, Tim Fox

Mr. Thomas Mahon December 22, 2010

Attachment A

COUNTY OF SAN MATEO
PLANNING AND BUILDING DEPARTMENT

FINDINGS AND CONDITIONS OF APPROVAL

Permit File Number: PLN 1999-00215 Board Meeting Date: December 21, 2010

Prepared By: Angela Chavez, Project Planner Adoption By: Board of Supervisors

FINDINGS

For the Environmental Review, Found:

1. That this project is exempt from environmental review pursuant to the California Environmental Quality Act (CEQA), Section 15303, Class 3, relating to new construction of small structures. A Notice of Exemption will be filed with the County Clerk's Office and posted as required by CEQA.

For the Coastside Design Review, Found:

2. That this project has been reviewed under and found to be in compliance with the Standards of Review Criteria as stipulated in Chapter 28.1 of the San Mateo County Zoning Regulations, except insofar as they may relate to parcel legality.

For the Coastal Development Permit Exemption, Found:

3. That the proposed residence conforms to Section 6328.5.e of the County Zoning Regulations and is located within the area designated as a Categorical Exclusion Area, except insofar as they may relate to parcel legality.

CONDITIONS OF APPROVAL

1. This approval applies only to the proposal described in this report and approved by the Board of Supervisors at its December 7, 2010 and December 21, 2010 public hearings. These plans supersede all previously submitted and reviewed plans. The Community Development Director may approve minor adjustments to the project if they are consistent with the intent of and in substantial conformance with this approval.

2. This permit shall be valid for one year from the date of final approval, or one year from the finality of any judgment in Mahon v. County of San Mateo, San Mateo County Superior Court Case No. CIV 446698, whichever is later, by which time a building permit shall have been issued. Any extension of this permit shall require

submittal of a request in writing, including reasons for the extension and payment of applicable fees for permit extension 30 days prior to expiration.

3. Applicant shall either (1) demonstrate that the parcel configuration depicted on the submittal plans was the result of land division in compliance with County regulations and the Subdivision Map Act in a manner supporting the issuance of a Certificate of Compliance pursuant to Cal. Gov't Code § 66499.35 or a Conditional Certificate of Compliance under that section; or (2) shall apply for and receive approval of a subdivision pursuant to any applicable laws and regulations that establishes the parcel configuration depicted on the approved submittal plans.

4. The applicant shall obtain a building permit and develop in accordance with the approved plans and conditions of approval.

5. No site disturbance shall occur, including any grading or tree removal, until a valid building permit has been issued.

6. This permit allows for the removal of one Monterey pine tree (depicted as Tree #1 in the arborist report dated July 5, 2001). The applicant shall obtain from the County Department of Public Works the appropriate permit(s) for the removal of the pine. The applicant shall submit to the Planning Counter a copy of the permit from Public Works prior to the issuance of the building permit. Removal of any tree with a diameter greater than 12 inches as measured 4.5 feet above the ground shall require a separate tree removal permit. The other two trees recommended for removal by the arborist (Trees #2 and #3) shall be saved unless an arborist report is submitted to indicate that more than 25 percent of the root system of the tree is going to be impacted by development of the approved structure and driveway. If the two trees require removal, a separate tree removal permit will be required prior to removal. If the trees are to be saved, the applicant shall submit a tree preservation plan, prepared by a certified arborist, for review and approval prior to issuance of a building permit. The approved tree protection measures shall be implemented prior to the start of any grading or construction activity on the site.

7. Depict all the trees along the County's right-of-way and the 36-inch pine within the front yard on the site plan. Submit the revised plans to Planning for review and approval prior to Planning approval of the associated building permit.

8. The applicant shall submit exterior color samples (no larger than approximately 4 square inches) for walls and trim to the Planning Counter for review and approval by the Community Development Director prior to Planning approval of the associated building permit. The applicant shall include the file/case number with all color samples. Color verification by a building inspector shall occur in the field after the applicant has painted the structure an approved color, but before the applicant schedules a final inspection.

9. The applicant shall submit a material sample of the proposed roof material for review and approval of the color and material prior to Planning approval of the associated building permit. Roof material verification by a building inspector shall occur in the field after the applicant has installed the approved material, but before the applicant schedules a final inspection.

10. The applicant shall submit a landscape plan (may be shown on the site plan of the submitted building permit application) depicting the location, type, and size of trees and shrubs for review and approval by the Planning Department. The landscaped areas shall be designed to reduce excess irrigation runoff and require minimal and appropriate use of fertilizers, herbicides and pesticides. The goal of the required landscape plan is to soften the building elevations and to increase surface filtration. The plan shall include a minimum of two (2) trees (minimum 5 gallons) in the front of the residence, one (1) tree (minimum 36-inch box) in the front of the residence, a minimum of three (3) trees (minimum 5 gallons) in the rear of the residence and a minimum of twenty (20) shrubs (minimum 1 gallon) shall be included in the design. Areas in the front and rear of the property that do not contain trees or shrubs shall be covered with a combination of turf or groundcover and/or a minimum of 2 inches of mulch on all exposed soil areas to minimize erosion.

11. The applicant shall submit an erosion control plan (including sections depicting method of installation), prior to Planning approval of the associated building permit, to mitigate any erosion resulting from project-related grading activities.

12. Submit an on-site drainage plan, as prepared by a civil engineer, showing all permanent, post-construction stormwater controls and drainage mechanisms. The required drainage plan shall show the necessary mechanisms to contain all water runoff generated by on-site impervious surfaces and shall include facilities to capture and retain all stormwater runoff through on-site percolation facilities. The drainage plan shall be submitted to the Planning Department for review and approval by the Community Development Director prior to Planning approval of the associated building permit. The plan shall be included as part of the project's final building permit application and construction plans. The County Building Inspection Section and Department of Public Works shall ensure that the approved plan is implemented prior to the project's final building inspection and occupancy approval.

13. During project construction, the applicant shall, pursuant to Section 5022 of the San Mateo County Ordinance Code, minimize the transport and discharge of stormwater runoff from the construction site into storm drain systems by:

    a. Stabilizing all denuded areas and maintaining erosion control measures continuously between October 1 and May 1.

b. Removing spoils promptly, and avoiding stockpiling of fill materials when rain is forecast. If rain threatens, stockpiled soils and other materials shall be covered with a tarp or other waterproof material.

c. Storing, handling, and disposing of construction materials and wastes so as to avoid their entry into the storm drain system or water body.

d. Using filtration or other measures to remove sediment from dewatering effluent.

e. Avoid cleaning, fueling, or maintaining vehicles on-site, except in an area designated to contain and treat runoff.

f. Limiting and timing application of pesticides and fertilizer to avoid polluting runoff.

14. If the total land area disturbed by the project exceeds 5,000 sq. ft., the applicant shall, pursuant to Section 5023 of the San Mateo County Code, submit a construction site stormwater management plan to the Planning Counter, for review and approval by the Community Development Director. This plan must be approved by the Community Development Director before the issuance of any permit including, but not limited to, a grading permit, or a building permit. The plan shall illustrate and describe appropriate methods, chosen by the applicant from the California Stormwater Best Management Practices Handbook, to control stormwater runoff from the project site during construction and from land use activities on the site once the project is completed.

15. The applicant is responsible for ensuring that all contractors are aware of all stormwater quality measures and implement such measures. Please refer to the attached handout, which details the BMPs. Failure to comply with the construction BMPs will result in the issuance of the correction notices, citations or a project stop order.

a. All landscaping shall be properly maintained and shall be designed with efficient irrigation practices to reduce runoff, promote surface filtration and minimize the use of fertilizers, herbicides and pesticides that can contribute to runoff pollution.

b. Where subsurface conditions allow, the roof downspout systems from all structures shall be designed to drain into a designated, effective infiltration area or structure (refer to BMPs Handbook for infiltration system designs and requirements).

16. Noise levels produced by the proposed construction activity shall not exceed 80-dBA level at any one moment. Construction activities shall be limited to the hours from 7:00 a.m. to 6:00 p.m., Monday through Friday, and 9:00 a.m. to 5:00

p.m. on Saturday. Construction operations shall be prohibited on Sunday and any national holiday.

17. No grading shall be allowed during the winter season (October 1 to May 1) to avoid potential soil erosion unless approved, in writing, by the Community Development Director. The applicant shall submit a letter to the Planning Department at least two weeks prior to the commencement of grading stating when grading will begin.

18. To ensure the height of the structure and/or structures do not exceed the maximum height permitted, staff requires the applicant to adhere to the height verification procedure during the building permit process. The applicant shall provide "finished floor elevation verification" to certify that the structure is actually constructed at the height shown on the submitted plans. The applicant shall have a licensed land surveyor or engineer establish a baseline elevation datum point in the vicinity of the construction site. The applicant shall maintain the datum point so that it will not be disturbed by the proposed construction activities until final approval of the building permit.

    a. The datum point and its elevation shall be shown on the submitted site plan. This datum point shall be used during construction to verify the elevation of the finished floors relative to the existing natural or to the grade of the site (finished grade).

    b. Prior to Planning approval of the building permit application, the applicant shall also have the licensed land surveyor or engineer indicate on the construction plans: (1) the natural grade elevations at the significant corners (at least four) of the footprint of the proposed structure on the submitted site plan, and (2) the elevations of proposed finished grades.

    c. In addition, (1) the natural grade elevations at the significant corners of the proposed structure, (2) the finished floor elevations, (3) the topmost elevation of the roof and (4) garage slab elevation, must be shown on the plan, elevations, and cross-section (if one is provided).

    d. Once the building is under construction, prior to the below floor framing inspection or the pouring of the concrete slab (as the case may be) for the lowest floor(s), the applicant shall provide to the Building Inspection Section a letter from the licensed land surveyor or engineer certifying that the lowest floor height–as constructed–is equal to the elevation specified for that floor in the approved plans. Similarly, certifications on the garage slab and the topmost elevation of the roof are required.

    e. If the actual floor height, garage slab, or roof height–as constructed–is different than the elevation specified in the plans, then the applicant shall cease all construction and no additional inspections shall be approved until a

revised set of plans is submitted to and subsequently approved by both the Building Official and Community Development Director.

19. The plans submitted at the building permit stage shall clearly show the location of the existing well and that the proposed development complies with the required Environmental Health setbacks from that well.

20. All new power and telephone utility lines from the street or nearest existing utility pole to the main dwelling and/or any other structure on the property shall be placed underground.

Jkeu0881_wru(Mahon215)

County of San Mateo

Planning & Building Department

455 County Center, 2nd Floor
Redwood City, California 94063
650/363-4161 Fax: 650/363-4849

Mail Drop PLN122
plngbldg@co.sanmateo.ca.us
www.co.sanmateo.ca.us/planning

December 22, 2010

Mr. Thomas Mahon
202 – 11th Street
Montara, CA 94037

Final Notice of Local Decision

Subject:	Coastside Design Review Permit
County File No.:	PLN1999-00015
Location:	286 Second Street, Montara, CA
APN Number:	036-014-210

Dear Mr. Mahon:

On December 21, 2010, the San Mateo County Board of Supervisors considered a Coastside Design Review Permit, pursuant to Sections 6565.4 (Coastal) and 6328.5 of the County Zoning Regulations as they existed in 1999, to construct a new 2,745.5 sq. ft. single-family residence plus an approximately 440 sq. ft. garage on a 5,000 sq. ft. parcel located at 286 Second Street, in the unincorporated Montara area of the County. (Appeal from decision of the Planning Commission denying the Design Review Permit.)

Based on information provided by staff and evidence presented at the hearing, the Board of Supervisors approved the project (3-1), subject to the revised findings and conditions of approval in Attachment A. This project is not appealable to the California Coastal Commission.

If you have questions regarding this matter, please contact Angela Chavez at 650/599-7217.

Sincerely,

pp Rosario Fernandez
Planning Commission Secretary
Bosdec1221U_vd_Mahon015

Attachment

cc: Johnathan Wittwer, Michael Vierhus, Lennie Roberts, David Beaumont, Kathryn Slater-Carter Bill Kehoe, Ronald Zumbrun, Art Hofmayer, Ann Alice Mahon, Tim Fox

Mr. Thomas Mahon

December 22, 2010

Attachment A

COUNTY OF SAN MATEO
PLANNING AND BUILDING DEPARTMENT

FINDINGS AND CONDITIONS OF APPROVAL

Permit File Number: PLN 1999-00015 Board Meeting Date: December 21, 2010

Prepared By: Angela Chavez, Project Planner Adoption By: Board of Supervisors

FINDINGS

For the Environmental Review, Found:

1. That this project is exempt from environmental review pursuant to the California Environmental Quality Act (CEQA), Section 15303, Class 3, relating to new construction of small structures. A Notice of Exemption will be filed with the County Clerk's Office and posted as required by CEQA.

For the Coastside Design Review, Found:

2. That this project has been reviewed under and found to be in compliance with the Standards of Review Criteria as stipulated in Chapter 28.1 of the San Mateo County Zoning Regulations, except insofar as they may relate to parcel legality.

For the Coastal Development Permit Exemption, Found:

3. That the proposed residence conforms to Section 6328.5.e of the County Zoning Regulations and is located within the area designated as a Categorical Exclusion Area, except insofar as they may relate to parcel legality.

CONDITIONS OF APPROVAL

1. This approval applies only to the proposal described in this report and indicated in materials formally submitted for consideration by the Board of Supervisors at its December 7, 2010 and December 21, 2010 public hearings. These plans supersede all previously submitted and reviewed plans. The Community Development Director may approve minor adjustments to the project if they are consistent with the intent of and in substantial conformance with this approval.

2. This permit shall be valid for one year from the date of final approval, or one year from the finality of any judgment in Mahon v. County of San Mateo, San Mateo County Superior Court Case No. CIV 446698, whichever is later, by which time a building permit shall have been issued. Any extension of this permit shall require submittal of a request in writing, including reasons for the extension and payment of applicable fees for permit extension 30 days prior to expiration.

3. Applicant shall either (1) demonstrate that the parcel configuration depicted on the submittal plans was the result of land division in compliance with County regulations and the Subdivision Map Act in a manner supporting the issuance of a Certificate of Compliance pursuant to Cal. Gov't Code § 66499.35 or a Conditional Certificate of Compliance under that section; or (2) shall apply for and receive approval of a subdivision pursuant to any applicable laws and regulations that establishes the parcel configuration depicted on the approved submittal plans.

4. The applicant shall submit exterior color samples (no larger than approximately 4 square inches) for roof, walls and trim to the Planning Counter for review and approval by the Community Development Director prior to planning approval of the associated building permit. The colors and materials used shall be in keeping with the surrounding neighborhood. The applicant shall include the file/case number with all color samples. Color verification by a building inspector shall occur in the field after the applicant has painted the structure an approved color but before the applicant schedules a final inspection.

5. The applicant shall submit a landscape plan (may be shown on the site plan of the submitted building permit application) depicting the location, type, and size of trees and shrubs for review and approval by the Planning Department. The landscaped areas shall be designed to reduce excess irrigation runoff and require minimal and appropriate use of fertilizers, herbicides and pesticides. The goal of the required landscape plan is to soften the building elevations and to increase surface filtration. The plan shall include a minimum of two (2) trees (minimum 5 gallons) in the front of the residence, one (1) tree (minimum 36-inch box) in the front of the residence, a minimum of three (3) trees (minimum 5 gallons) in the rear of the residence and a minimum of twenty (20) shrubs (minimum 1 gallon) shall be included in the design. Areas in the front and rear of the property that do not contain trees or shrubs shall be covered with a combination of turf or groundcover and/or a minimum of 2 inches of mulch on all exposed soil areas to minimize erosion.

6. Prior to the issuance of a building permit, the applicant shall provide an erosion and sediment control plan, which demonstrates how erosion will be mitigated during the construction of the new addition subject to the review and approval of the Community Development Director. This mitigation will be in place for the life of the construction project.

7. The applicant is responsible for ensuring that all contractors minimize the transport and discharge of pollutants from the project site into local drainage systems and water systems by adhering to the San Mateo Countywide Stormwater Pollution Prevention Program "General Construction and Site Supervision Guidelines" including:

   a. Stabilizing all denuded areas and maintaining erosion control measures continuously between October 15 and April 15.

   b. Removing spoils promptly and avoiding stockpiling of fill materials when rain is forecast. If rain threatens, stockpiled soils and other materials shall be covered with a tarp or other waterproof material.

   c. Storing, handling and disposing of construction materials and wastes so as to avoid their entry to a local storm drain system or water body.

   d. Avoiding cleaning, fueling or maintaining vehicles on site, except in an area designated to contain and treat runoff.

8. The applicant is responsible for ensuring that all contractors are aware of all stormwater quality measures and implement such measures. Failure to comply with the construction BMPs will result in the issuance of the correction notices, citations or a project stop order.

   a. All landscaping shall be properly maintained and shall be designed with efficient irrigation practices to reduce runoff, promote surface filtration and minimize the use of fertilizers, herbicides and pesticides that can contribute to runoff pollution.

   b. Where subsurface conditions allow, the roof downspout systems from all structures shall be designed to drain to a designated, effective infiltration area or structure (refer to BMPs Handbook for infiltration system designs and requirements).

9. The submitted plans do not indicate any trees to be removed. Prior to the issuance of a building permit, the applicant shall submit a plan showing the location of all existing trees on the property. The applicant shall submit a tree protection plan for the tree located towards the rear of the parcel, near Farallone Avenue. Such measures shall be identified on the building permit site plan and shall be implemented prior to the start of any construction or grading activities on the site. Removal of any additional trees with a diameter equal to or greater than 12 inches as measured 4.5 feet above the ground shall require a separate tree removal permit.

10. The noise from construction activity shall not exceed that as indicated in the County Noise Ordinance.

11. To ensure the height of the structure and/or structures do not exceed the maximum height permitted, staff requires the applicant to adhere to the height verification procedure during the building permit process. The applicant shall provide "finished floor elevation verification" to certify that the structure is actually constructed at the height shown on the submitted plans. The applicant shall have a licensed land surveyor or engineer establish a baseline elevation datum point in the vicinity of the construction site. The applicant shall maintain the datum point so that it will not be disturbed by the proposed construction activities until final approval of the building permit.

    a. The datum point and its elevation shall be shown on the submitted site plan. This datum point shall be used during construction to verify the elevation of the finished floors relative to the existing natural or to the grade of the site (finished grade).

    b. Prior to planning approval of the building permit application, the applicant shall also have the licensed land surveyor or engineer indicate on the construction plans: (1) the natural grade elevations at the significant corners (at least four) of the footprint of the proposed structure on the submitted site plan, and (2) the elevations of proposed finished grades.

    c. In addition, (1) the natural grade elevations at the significant corners of the proposed structure, (2) the finished floor elevations, (3) the topmost elevation of the roof and (4) garage slab elevation must be shown on the plan, elevations, and cross-section (if one is provided).

    d. Once the building is under construction, prior to the below floor framing inspection or the pouring of the concrete slab (as the case may be) for the lowest floor(s), the applicant shall provide to the Building Inspection Section a letter from the licensed land surveyor or engineer certifying that the lowest floor height--as constructed--is equal to the elevation specified for that floor in the approved plans. Similarly, certifications on the garage slab and the topmost elevation of the roof are required.

    e. If the actual floor height, garage slab, or roof height--as constructed--is different than the elevation specified in the plans, then the applicant shall cease all construction and no additional inspections shall be approved until a revised set of plans is submitted to and subsequently approved by both the Building Official and Community Development Director.

12. The plans submitted at the building permit stage shall clearly show the location of the existing well and that the proposed development complies with the required Environmental Health setbacks from that well.

13. All new power and telephone utility lines from the street or nearest existing utility pole to the main dwelling and/or any other structure on the property shall be placed underground.

14. The applicant shall, pursuant to Section 5023 of the San Mateo County Code, submit a stormwater control/drainage plan, prepared by their civil engineer or erosion control consultant. The plan shall be included as part of the project's building permit application and construction plans. The County Building Inspection Section and County Planning Department shall ensure that the approved plan is implemented prior to the issuance of a building permit. The required drainage plan shall show the necessary mechanisms to contain all water runoff generated by on-site impervious surfaces and shall include facilities to minimize the amount and pollutants of stormwater runoff through on-site percolation and filtering facilities to control stormwater runoff from the project site once the project is completed. In addition, the plan shall indicate that:

    a. All landscaping will be properly maintained and shall be designed with efficient irrigation practices to reduce runoff, promote surface filtration, and minimize the use of fertilizers, herbicides and pesticides.

    b. Where subsurface conditions allow, all building roof downspout systems shall be designed to drain into a designated, effective infiltration or structure (refer to BMPs Handbook for infiltration system designs and requirements).

Jkeu0880_wru(Mahon015)

CALIFORNIA COASTAL COMMISSION
NORTH CENTRAL COAST DISTRICT OFFICE
45 FREMONT ST, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260
FAX (415) 904-5400
TDD (415) 597-5885

January 7, 2011

Jim Eggemeyer, Director
San Mateo County Planning and Building Department
455 County Center, 2nd Floor
Redwood City, CA 94063

SUBJECT: Deficient Local Government Notice
PLN 1999-00215/2-SMC-00-320 (Mahon, 284 Second Street, Montara, APN 036-014-200)
PLN 1999-00015/2-SMC-04-208 (Mahon, 286 Second Street, Montara, APN 036-014-210)

Dear Mr. Eggemeyer:

On January 5, 2011, Coastal Commission staff was forwarded two separate notices of County approval of two projects, PLN 1999-00015 and PLN 1999-00215. The notice of approval for PLN 1999-00015, dated December 22, 2010, provides design review approval for the construction of a new 2,745.5 sq.ft. single-family residence plus an approximately 440 sq.ft. garage on a 5,000 sq.ft. parcel on the above-referenced property. The notice of approval for PLN 1999-00215, dated December 22, 2010 provides design review approval for the construction of a new 2,571 sq.ft. single-family residence and an approximately 400 sq.ft. garage on a 5,000 sq. ft. parcel on the above-referenced property. On January 6, 2011, a third party appellant filed an appeal of the County's actions with the Commission.

The notices of County action received by the Commission on January 5, 2011, were not provided by the County to the Commission. Instead, the Commission learned of these final actions on January 5, 2011 through the correspondence of a third party. Additionally, the notices do not describe either approved residence as requiring a CDP appealable to the Commission and do not provide the procedures for appeal of local decisions approving development appealable to the Commission. Instead, the County's notice states that the developments are categorically excluded from coastal development permitting requirements. For the reasons described below, we request that you rescind both deficient final notices of County approval and process appealable coastal development permits for the approval of the two residences and any associated division of land or change in intensity of use occurring after the effective date of the Coastal Act or its predecessor statute.[1]

[1] The Coastal Act requires that a CDP must be obtained before development is undertaken in the coastal zone. (Public Resources Code Section 30600(a).) The permit requirement is set forth in Section 30600(a) of the Coastal Act which requires in relevant part that "in addition to any other permit required by law … any person wishing to perform or undertake any development in the coastal zone … shall obtain a coastal development permit." (Id.) "Development" is defined in Public Resources Code Section 30106 to expressly include divisions of land. That statute provides in relevant part that development includes:

> … change in the density or intensity of use of land, including, but not limited to subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits … (Section 30106.)

Categorical Exclusion E-81-1 excludes from coastal development permitting requirements certain categories of development located in specified geographical areas of the County subject to a number of conditions and limitations. Categorical Exclusion E-81-1 includes exclusions for single-family residences that conform to zoning district regulations. Single-family residences are excluded from coastal development permitting requirements under Categorical Exclusion E-81-1 if they meet the following criteria:

> On lots conforming to zoning district regulations, the construction, reconstruction, demolition, repair, maintenance, alteration or addition to any single-family dwelling or accessory building which does not require a variance after: (1) applying Design Review (DR) District regulations and (2) reviewing and approving required geologic reports in hazardous areas as defined in Policy 9.10 of the Local Coastal Program. All development must conform to the following criteria:...
>
> 7. Area is <u>not</u> within appeal jurisdiction of the Coastal Commission...

The two residences in question are not categorically excluded, consistent with Categorical Exclusion E-81-1, for the following three independent reasons:

1) First, the notices for PLN 1999-00015 and PLN 1999-00215 did not include information as to the parcels' conformance with zoning district regulations. With regard to categorically excluded single-family residences, Categorical Exclusion E-81-1 requires first and foremost a finding that development would take place "on lots conforming to zoning district regulations." County zoning regulation section 6105.0 states that "no permit for development shall be issued for any lot which is not a legal lot." The County did not establish that the developments would be located "on lots conforming to zoning district regulations." In fact, Special Condition #3 of each approval requires subsequent evidence of lot legality and the County Counsel has previously opined that the owner of the subject must demonstrate he has two legal parcels by virtue of some legally cognizable action other than the filing of a 1908 subdivision map.[2] Therefore, these developments are outside of the scope of Categorical Exclusion E-81-1.

2) Second, the developments are not within the principally permitted uses for the zoning district. The zoning district (R-1/S-17/DR/CD) allows one dwelling per 5,000 sq. ft. legal lot. Unless the property owner is able to establish that he owns two separate lots under both the Subdivision Map Act and the Coastal Act, the developments in question would be located on a single 10,000 sq. ft. lot. Under pertinent zoning regulations section 6161, the principally permitted uses do not include subdivision or development of two homes on a single lot. These developments fall outside of the principally permitted uses for this zoning district and therefore any County approval of a CDP for the homes would be appealable to the Coastal Commission pursuant to Coastal Act section 30603(a)(4). This is reaffirmed in section 6328.3(s)(3) of the County's

[2] The Coastal Act expressly requires any person who proposes to divide land to obtain a permit from the Commission or the local government where such local government has obtained approval of a certified LCP. The obligations of a developer under the Coastal Act are distinct and independent from the obligations of a developer under the Coastal Act. The Subdivision Map Act expressly authorizes a local government to condition or deny a permit approval, extension or entitlement in order to comply with the Coastal Act. (Gov. Code Section 66498.1(c) and 66498.6.) A subdivision approval from a local government does not excuse a project from compliance with state law requirements such as the Coastal Act.

certified zoning regulations. Therefore these developments are not categorically excluded as they are inconsistent with part (7) of the single-family residence requirements of Categorical Exclusion E-81-1, because they comprise development appealable to the Commission.

Third, the developments appear to be located within the Coastal Commission's physical appeal jurisdiction. Coastal Act Section 30603 states, in part, that "(2) Developments approved by the local government...within 100 feet of any wetland, estuary, or stream..." are appealable to the Coastal Commission. This is reaffirmed in section 6328.3(s)(2) of the County's certified zoning regulations. According to an appeal of the County's action received on January 6, 2011, the approved development sites are within 100 feet of a delineated wetland, located across 2nd street on the northwest quadrant of its intersection with Farallone (APN 036-110-020). The appellant's assertion is based on the observance of vegetation indicative of wetlands. Such appealable developments are not categorically excluded from CDP requirements as they are inconsistent with part (7) of the single-family residence requirements of Categorical Exclusion E-81-1.

The County's actions have triggered three Coastal Commission procedures. First, the authorizations granted by PLN 1999-00015 and PLN 1999-00215 are outside the scope of the stipulated criteria for exclusion of single family residences from CDP requirements in Categorical Exclusion Order E-81-1, and the County actions categorically excluding the residences constitute claims of exemption appealable to the Coastal Commission pursuant to 30625 and 30603 of the Coastal Act.

Second, the notices of County action fail to describe both approved developments as appealable and do not provide the procedures for appeal of local decisions to the Commission as required by Title 14, Section 13571(a) of the Commission's regulations and Sections 6328.11.1 and 6328.16 of the County's certified zoning regulations. Therefore, consistent with Title 14 CCR section 13571 and 13572 of the Commission's regulations and sections 6328.11.1 and 6328.16 of the County's zoning ordinance, the final notices for PLN 1999-00015 and PLN 1999-00215 are deficient and therefore the effective dates of these local government actions are suspended.

Third, to the extent the County continues to maintain that the two single family residences' are categorically excluded, Section 13569 of the Commission regulations provides for review by the Commission of local government determinations of whether a development is categorically excluded, appealable, or non-appealable.

Unless the County rescinds PLN 1999-00015 and PLN 1999-00215, and processes appealable CDPs for the residences and any associated division of land or change in intensity of use occurring after the effective date of the Coastal Act or its predecessor statute, a Commission hearing will be scheduled during the Commission's February meeting to take action on the appeal of the County's claim of exemption from permit requirements pursuant to 30625 of the Coastal Act as well as resolve the dispute regarding whether the SFRs require a CDP appealable to the Commission in accordance with Section 13569(d) of the Commission's regulations.

Please contact me at (415) 904-5251 or ndreher@coastal.ca.gov if you have any questions or wish to discuss the details of this letter.

Sincerely,

Nicholas Dreher
Coastal Program Analyst
North Central Coast District

cc: Angela Chavez, San Mateo County Planning and Building
Thomas and Ann Alice Mahon
Lennie Roberts, Committee for Green Foothills

CALIFORNIA COASTAL COMMISSION
NORTH CENTRAL COAST DISTRICT OFFICE
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260 FAX (415) 904-5400

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Committee for Green Foothills c/o Lennie Roberts (see also attached list of other Appellants)

Mailing Address: 339 La Cuesta

City: Portola Valley CA Zip Code: 94028 Phone: 650-854-0449

SECTION II. Decision Being Appealed

1. Name of local/port government: County of San Mateo

2. Brief description of development being appealed: Design Review Permit for one of two single family residences on one 10,000 sq. ft. legal parcel

3. Development's location (street address, assessor's parcel no., cross street, etc.):
286 Second Street
Montara, CA
APN 036-014-210

4. Description of decision being appealed (check one.):

- ☐ Approval; no special conditions
- ☒ Approval with special conditions:
- ☐ Denial

RECEIVED
JAN 07 2011
CALIFORNIA COASTAL COMMISSION

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: _____

DATE FILED: _____

DISTRICT: _____

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)

5. Decision being appealed was made by (check one):

☐ Planning Director/Zoning Administrator

☒ ~~City Council~~/Board of Supervisors

☐ Planning Commission

☐ Other

6. Date of local government's decision: December 21, 2010

7. Local government's file number (if any): PLN 1999-00015

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

Thomas Mahon
See County File for mailing address

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) See County File

(2)

(3)

(4)

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 3)

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal**. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)
- This need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

Please see attached.

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Lennie Roberts

Signature of Appellant(s) or Authorized Agent

Date: 1/6/11

Note: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby
authorize _____
to act as my/our representative and to bind me/us in all matters concerning this appeal.

_____

Signature of Appellant(s)

Date: _____

Additional Appellants of PLN 1999-00015 and PLN 1999-00215 (Mahon)

Montara Neighbors for Responsible Building
c/o Arthur Hofmayer
P.O. Box 826
Montara, CA 94037

Tom Judge
P.O. Box 466
Montara, CA 94037

Sally Lehrman and
Tom Ballantyne
P.O. Box 738
Montara, CA 94037

Kathryn Slater-Carter
P.O. Box 321
Montara, CA 94037

Jim Rudolph
P.O. Box 664
Moss Beach, CA 94038

Ken Muller
P.O. Box 467
Montara CA 94037

Hilary Srere
P.O. Box 610
Montara, CA 94037

William F. Kehoe
891 Kelmore St.
Moss Beach, CA 94038

CALIFORNIA COASTAL COMMISSION
NORTH CENTRAL COAST DISTRICT OFFICE
45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5260 FAX (415) 904-5400

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Committee for Green Foothills c/o Lennie Roberts — See also attached list of other Appellants

Mailing Address: 339 La Cuesta

City: Portola Valley CA Zip Code: 94028 Phone: 650-854-0449

SECTION II. Decision Being Appealed

1. Name of local/port government: County of San Mateo

2. Brief description of development being appealed: Design Review Permit for one of two single family residences on one 10,000 sq ft. legal parcel

3. Development's location (street address, assessor's parcel no., cross street, etc.):
284 Second Street
Montara, CA
APN 036-014-200

RECEIVED
JAN 07 2011
COASTAL COMMISSION
NORTH CENTRAL COAST

4. Description of decision being appealed (check one.):

☐ Approval; no special conditions

☒ Approval with special conditions:

☐ Denial

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: _____

DATE FILED: _____

DISTRICT: _____

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)

5. Decision being appealed was made by (check one):

☐ Planning Director/Zoning Administrator

☒ ~~City Council~~/Board of Supervisors

☐ Planning Commission

☐ Other

6. Date of local government's decision: December 21, 2010

7. Local government's file number (if any): PLN 1999-00215

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

Thomas Mahon
See County File for mailing address

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) See County File

(2)

(3)

(4)

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 3)

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal.** Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)
- This need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

Please see attached.

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Lennie Roberts

Signature of Appellant(s) or Authorized Agent

Date: 1/6/11

Note: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby
authorize _____
to act as my/our representative and to bind me/us in all matters concerning this appeal.

_____

Signature of Appellant(s)

Date: _____

Additional Appellants of PLN 1999-00015 and PLN 1999-00215 (Mahon)

Montara Neighbors for Responsible Building
c/o Arthur Hofmayer
P.O. Box 826
Montara, CA 94037

Tom Judge
P.O. Box 466
Montara, CA 94037

Sally Lehrman and
Tom Ballantyne
P.O. Box 738
Montara, CA 94037

Kathryn Slater-Carter
P.O. Box 321
Montara, CA 94037

Jim Rudolph
P.O. Box 664
Moss Beach, CA 94038

Ken Muller
P.O. Box 467
Montara CA 94037

Hilary Srere
P.O. Box 610
Montara, CA 94037

William F. Kehoe
891 Kelmore St.
Moss Beach, CA 94038

Reasons Supporting the Appeals of PLN 1999-00015 and PLN 1999-00215
Applicant: Thomas Mahon

On December 21, 2010, the San Mateo County Board of Supervisors approved (on a 3-1 vote) two Appeals of Coastside Design Review Permits for two houses on one legal 10,000 sq. ft. parcel on Second Street in Montara, in unincorporated San Mateo County.

The County Board of Supervisors put "the cart before the horse" in considering the Design Review Permits for two houses on a single parcel before determining parcel legality. Although the County included a Condition of Approval (#3) that requires the Applicant to either (1) demonstrate parcel legality for each of two lots through issuance of a Certificate of Compliance or a Conditional Certificate of Compliance, per Government Code Section 66499.35, or (2) apply for and receive approval of a subdivision of the 10,000 sq. ft. parcel, approval of a Design Review Permit can not precede the determination of parcel legality, per San Mateo County Zoning Regulations, Section 6105, which states in relevant part: ***"No permit for development shall be issued for any lot which is not a legal lot...."***

Moreover, Condition #3 does not specify when parcel legality must be demonstrated – i.e., prior to issuance of the Design Review Permit, or prior to issuance of the Building Permit; this vagueness raises potential timing and enforcement issues. It also leaves unclear how and when any parcel legality determination can be appealed to the Coastal Commission. Appellants submit that the property consists of a single legal parcel for planning and land use purposes, and that any approval authorizing more than a single parcel on the subject property would constitute "development" under the Coastal Act and LCP and would require a CDP. However, based on the irregular administrative procedural posture of this application, there does not appear to be a clear route for appellants to challenge any such determination to the Commission. Appellants further believe that it is both appropriate and most efficient for the Commission to review both the Design Review Permit approvals and parcel legality issue (i.e., the "project") as a whole, and therefore request that the Commission take jurisdiction of both issues through this appeal.

The County Board of Supervisors erroneously determined that approval of two houses on one legal parcel is exempt from a Coastal Development Permit under Section 6328.5.e. of the County Zoning Regulations. The zoning district (R-1/S-17/DR/CD) allows only one single family dwelling per lot. Therefore the project approvals cannot be found to be in conformity with the applicable LCP zoning standards. The proposed project (two houses) is not the principal permitted use in this zoning district. Instead, the proposed project would either double the allowable density of use, or would require a subdivision and Coastal Development Permit approval, which would be appealable to the Coastal Commission under the LCP.

While the parcel is located in the area of Montara that is included within the Categorical Exclusion Area per Categorical Exclusion Order E-81-1, such exclusion only applies to construction of a single-family residence on one parcel, subject to

certain qualifications. The approval of two houses on one legal parcel is inconsistent with the zoning, and would require a variance absent determination of parcel legality. Thus, the approval of two houses on one parcel would require a Coastal Development Permit (CDP). Additionally, the proposed development is located within 100 feet of a wetland, which is across 2nd street on the northwest quadrant of its intersection with Farallone (APN 036-110-020). Therefore, the CDP is appealable to the Coastal Commission per exception (7) to the Single Family Residential Categorical Exclusion, which specifies that the "area is not within appeal jurisdiction of the Coastal Commission". As such, the approval of even one single-family residence on this parcel would not qualify for a Categorical Exclusion from the Coastal Development Permit requirement.

The County Board of Supervisors erroneously found that the proposed two houses on one legal parcel were in compliance with the 1999 Design Review Standards. The houses, as approved, would not be in harmony with the shape, size, and scale of adjacent buildings in the community. Specifically, according to the County's December 22, 1010 Letters of Approval, the subject two houses would be 3,185.5 sq. ft. for PLN 1999-00015 and 2971 sq. ft. for PLN 1999-00215 respectively. In contrast, 80% of the houses within a 300-foot radius are less than 2,000 sq. ft. This disharmony of the two proposed houses with the size and scale of adjacent buildings is even greater when the size of parcels is considered. Many, if not most of these houses are on parcels greater than 10,000 sq. ft., whereas the subject houses would be on 5,000 sq. ft. parcels (if the Applicant demonstrates parcel legality). Neither the Applicant nor the County has done an adequate comparative analysis of the shape, size, and scale of adjacent buildings in relation to their parcel size and landforms.

Appellants are concerned that the County's consideration of the Design Review Permits did not include adequate or accurate information in order to determine compliance with the 1999 Design Review Standards, including but not limited to: a site plan showing all property lines, existing and proposed ground contours, easements and utility lines, proposed buildings, all proposed improvements, including paving, fences, etc., all existing trees and size, trees to be removed (as required by the Community Design Manual), plus a cross section showing the extent to which the structures follow the grade of the existing landforms, a floor plan which shows all floor elevations and a cross-section which shows ceiling heights, and a grading plan showing the location and height of all site retaining walls in relation to the existing landforms.

There are inconsistencies and omissions in the Conditions of Approval of the Design Review Permits. For example PLN 1999-00015 requires that colors and materials shall be in keeping with the surrounding neighborhood (Condition #4) whereas there is no equivalent condition for PLN 1999-00215. PLN 1999-00215 requires a sample of roof material to be submitted for approval (Condition # 9) whereas PLN 1999-00015 has no similar requirement. PLN 1999-00215 prohibits any site disturbance, including any grading or tree removal, until a valid Building Permit has

been issued (Condition #5) whereas PLN 1999-00015 has no similar requirement. PLN 1999-00215 has not included or evaluated the impact of the proposed driveway on a 12-16 inch culvert that carries stormwater runoff from the front of the parcel underground to the other side of the street.

COUNTY OF SAN MATEO

INTERDEPARTMENTAL CORRESPONDENCE

To: Honorable Board of Supervisors

From: Michael P. Murphy, County Counsel MPM

Subject: Executive Summary: Review of Legal Issues Raised by Montara Neighbors for Responsible Building re Mahon Design Review Application Appeals (Agenda Items 12 and 13)

Date: May 15, 2009

On April 28, 2009, the Board continued the hearings on two Design Review permit appeals for property owned by Thomas Mahon to give this office the opportunity to review two letters dated April 27, 2009 from the law firm of Wittwer & Parkin LLP, written on behalf of Montara Neighbors for Responsible Building ("MNRB") in opposition to the Mahon Design Review permits. On April 7, 2009, a letter was submitted by the Zumbrun Law Firm on behalf of Mr. Mahon responding to the issues raised by MNRB. MNRB asserted procedural errors and failure to comply with CEQA. MNRB also claims that, based on two recently issued Court of Appeal decisions, Mr. Mahon only has one legal parcel of 10,000 square feet.

In summary, our conclusions are as follows:

1. Alleged notice, procedural and Brown Act errors. Our conclusion is that any such errors, if they occurred, are cured by the decision of the Board to continue the hearing to the May 19th Board meeting, and to take public testimony on the proposed design changes.

2. Alleged CEQA errors. Our conclusion is that, by virtue of a categorical exclusion from CEQA review for single family residences, there was no requirement to do any additional environmental review.

3. Assertion that Mr. Mahon has only one legal parcel of 10,000 square feet instead of two contiguous parcels of 5,000 square feet in size. We have concluded that this assertion has merit, by virtue of two recent decisions of the Court of Appeal: *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42. These cases stand for the proposition that the mere filing of a subdivision map in 1908, under the subdivision map act adopted in 1907, did not create separate legal parcels. We have also concluded that the various arguments raised by counsel for Mr. Mahon do not establish an exception to *Witt* and *Abernathy*.

Finally we have concluded that other considerations (i.e., the County's historic treatment of the Mahon properties as two parcels, the pending Superior Court case, and the history of development and development policies in the Midcoast) do not justify departure from the holdings in *Witt* and *Abernathy*.

For the reasons set forth above, it is our conclusion that, under the holdings of *Witt* and *Abernathy*, Mr. Mahon has shown the legal existence of only one legal parcel of 10,000 square feet in size. Under the prevailing zoning regulations, two 5,000 square foot lots could be legally established through the subdivision and coastal development permit process. As for the pending design review applications, and recognizing that these applications are being heard in the context of an ongoing Superior Court case, the Board would have the following options:

1. If, at the conclusion of the hearing on this matter, the Board determines that Mr. Mahon has two separate 5,000 square foot legal parcels, the Board may either approve or deny the applications on their substantive merits.

2. If, at the conclusion of the hearing in this matter, the Board determines that Mr. Mahon has only one 10,000 square foot legal parcel, the Board may either:

   a. Deny each of the design review applications on the ground that only one legal parcel of 10,000 square feet in size has been established, without addressing the merits of the design review application; or

   b. Approve one or both of the design review applications subject to a condition that the approval or approvals are only valid if a subdivision approval and other required permits are obtained to create two separate, legal parcels conforming to the parcel configurations set forth in the design review applications, or alternatively, if Mr. Mahon demonstrates that he has two legal parcels by virtue of some legally cognizable action other than the filing of the 1908 subdivision map.

While alternative 2(b) is not an action normally considered, the unusual circumstances here (i.e., that the Board is acting pursuant to a court order directing the Board to reconsider these applications) dictate consideration of this alternative.

cc: David Boesch, County Manager

MPM:tjf:sl
L:\LITIGATE\M_CASES\Mahon 2\Board Staff Reports\Exec Summary--Mahon.doc

COUNTY OF SAN MATEO

INTERDEPARTMENTAL CORRESPONDENCE

To: Honorable Board of Supervisors

From: Michael P. Murphy, County Counsel MPM

Subject: Review of Legal Issues Raised by Montara Neighbors for Responsible Building re Mahon Design Review Application Appeals (Agenda Items 12 and 13)

Date: May 15, 2009

On April 28, 2009, the Board continued the hearings on two Design Review permit appeals for property owned by Thomas Mahon to give this office the opportunity to review two letters dated April 27, 2009 from the law firm of Wittwer & Parkin LLP. (The April 28, 2009 hearing had been continued from March 31, 2009.) These letters were submitted on behalf of the Montara Neighbors for Responsible Building ("MNRB") in opposition to the Mahon Design Review permits. Copies of the MNRB letters were also provided to Mr. Mahon for his review and comments. On April 7, 2009, the Zumbrun Law Firm submitted a letter on behalf of Mr. Mahon responding to the issues raised by MNRB. This memorandum provides our analysis of the issues raised by counsel for MNRB and responded to by counsel for Mr. Mahon.

In summary, we conclude that any alleged errors related to notice and testimony will be cured by the continued hearing on May 19th, and that prejudice has not been shown in any event. With regard to alleged non-compliance with CEQA, we believe that the consideration of each of these design review applications is categorically exempt and that additional CEQA review is not required. The remaining, and overarching, issue concerns whether, under the holdings in two recent California Court of Appeal decisions, Mr. Mahon is entitled to recognition of only one legal parcel of 10,000 square feet in size, instead of two 5,000 square foot parcels.

Following is our detailed analysis of the issues raised by MNRB and the response by Mr. Mahon.

A. Public Notice

The first objection by MNRB alleges that failure to mail notice to neighbors ten days or more in advance of the original March 31, 2009 hearing on the permits constitutes a due process violation. (It appears from the record that the notice was mailed nine days prior to the March 31st hearing.) MNRB contends that neighbors may have been discouraged from attending due to their late receipt of mailed notice.

Mr. Mahon's response is that any technical defect in the mailed notice has been cured by the proper notice of the May 19, 2009 continued hearing on the matter.

We believe that the failure to provide ten days notice, under the particular circumstances of these appeals, does not preclude the Board from taking action on these applications. Written mailed notice to nearby property owners is required by the County's own local regulations, specifically, sections 6565.11(A) and 6565.9(A) of the Zoning Regulations. Mailed notice was one of several measures taken to inform the public of the prior hearing. Case law holds that a failure to provide a period of notice mandated by statute or regulation is only a due process violation if it prejudices the neighbors in the consideration of the permit's merits. Thus, here the complaining parties would need to show prejudice (i.e., a materially different outcome) before they could obtain writ relief for this alleged procedural error. In this context, the continuation of the hearing to May 19, 2009 is an adequate cure to the defect alleged by MNRB, and we advise that the Board may take action following the May 19th hearing.

B. Brown Act Compliance

MNRB contends that the public notice for the April 28, 2009 hearing improperly discouraged members of the public from making further comment on the proposed permit issuance. It contends that the failure to provide for public comment on the item constituted a violation of the Ralph M. Brown Act providing for open meetings of public agencies.

Mr. Mahon responds that the continuation of the meeting to May 19, 2009 cured this alleged defect because the Board informed the public that comment would be received at that time. Moreover, Mr. Mahon contends that the Brown Act does not require a mandatory public comment opportunity at every instance of evaluating plan revisions.

We believe that the Brown Act does not preclude the Board from acting on these permit applications at the May 19th meeting, if the public is allowed to comment on changes made in response to Board direction given at the March 31st meeting, as the Board indicated would be the case. Members of the public have been provided with agenda notice of the May 19th hearing. Affected neighbors have been provided both agenda and mailed notice of the same hearing. Neither of these notices forecloses public comment, and we recommend that public comment be allowed at the May 19th meeting prior to any action being taken on the appeals.

C. CEQA Compliance

The next objection by MNRB alleges that the two projects have been illegally piecemealed and are not categorically exempt from the California Environmental Quality Act ("CEQA"). MNRB cites section 15303 of the CEQA Guidelines as permitting exemption only for "one single family residence" or "up to three single family residences" in the urbanized area.

Mr. Mahon contends that the projects are individual and have not been "segmented" within the meaning of CEQA. He also contends that Montara is within the urbanized area as defined under the County's General Plan and is therefore entitled to the categorical exemption for up to three residences in the urbanized area.

We conclude that the two projects are exempt from higher levels of environmental review under CEQA for slightly different reasons than those asserted by Mr. Mahon. The CEQA guideline itself says "The numbers of structures described in this section are the maximum allowable *on any legal parcel.*" 14 Cal. Code Regs. § 15303 (emphasis added). Putting aside the issue of parcel legality discussed below, we read this to mean that if one residence is proposed on one parcel, and another is proposed on a different parcel, each would be entitled to use the exemption if that number of houses was permitted ("allowable") by the underlying zoning. This is bolstered by the fact that two Design Review permits are being sought, not one, and the Board could take different actions as to each. Since each project has "independent utility" (that is, one house could be built without the need for the other to be built in order to be socially useful), their separate consideration is appropriate. It is therefore unnecessary to reach the related question raised by MNRB as to whether Montara is within an urbanized area within the meaning of Section 15303.

D. Parcel Legality

As noted, the most significant issue raised by MNRB is whether the two contiguous 5,000 sq.ft. parcels for which Mr. Mahon is seeking design review approval are, in fact, two separate legal parcels (each of which could have a residential structure placed on it), or only one legal parcel of 10,000 sq.ft. upon which only one residential structure could be placed under current zoning regulations.

MNRB cites two recent cases of the California Court of Appeal[1] for the proposition that the two 5,000 sq. ft. parcels on which two homes are now proposed were never legally divided from each other. MNRB contends that Mr. Mahon never owned more than one large lot because the ten-thousand square foot tract of land that he purchased had not ever been effectively divided by the subdivision map recorded in 1908. By this analysis, Mr. Mahon is presently the owner of a *single* 10,000 square foot lot rather than the owner of *two* adjacent 5,000 square foot lots. If this is correct, current zoning would allow only one house on the entire property, rather than two. (See Zoning Regulations sections 6105.0 and 6105.4(b).)

For his part, Mr. Mahon contends (1) that the Notices of Merger recorded on the properties in 2000 constituted certificates of compliance with the Subdivision Map Act pursuant to Cal. Gov't Code § 66499.35(d); (2) that the Notices of Merger recorded in 2000 constitute legal merger and resubdivision of the land pursuant to Cal. Gov't Code § 66499.20½; (3) that the County was effectively the subdivider of the land when it recorded the Notices of Merger in

[1] *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543 and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42.

2000; (4) that the County has treated these lots as separate for nine years, which means they are presumed legal; (5) that there are other substandard lots in the neighborhood with separate issued Assessor's Parcel Numbers ("APNs"), which bolsters the view that the County has deemed them as legal parcels; and (6) that any claim by the MNRB that the parcels are illegal is untimely.

We agree with MNRB that *Abernathy Valley, Inc. v. County of Solano*, 173 Cal. App. 4th 42 (2009) clearly establishes that mere reference to a subdivision map filed in compliance with the 1907 subdivision map law, without more, does not conclusively establish its legal separation from adjacent lands in common ownership. Thus, something more than the filing of a subdivision map in 1908 is needed in order to establish that the two Mahon parcels were ever legally divided from each other. We now address Mr. Mahon's specific arguments as to why, notwithstanding *Witt* and *Abernathy*, both parcels should be recognized as legal.

1. Notices of Merger as Constituting Certificates of Compliance Under Gov't Code section 66499.35(d). We have concluded that the Notices of Merger do not constitute certificates of compliance. The code section Mr. Mahon has cited refers to various kinds of "maps" and "certificates of exemption." Notices of merger referenced in section 7123 of the County Subdivision Regulations have never been interpreted to be either "maps" or "certificates of exemption" within the meaning of section 66499.35 of the Government Code. Nor has Mr. Mahon cited any legal authority that supports adopting such an interpretation in this case. In fact, "certificate of exception" is defined by Cal. Gov't Code § 66422 to mean "a valid authorization to subdivide land, *issued by the County of Los Angeles* pursuant to an ordinance thereof, adopted between September 22, 1967, and March 4, 1972, and which at the time of issuance did not conflict with this division or any statutory predecessor thereof." (Emphasis added.)

2. Notices of Merger as Constituting Merger and Resubdivision into Two Parcels Under Gov't. Code section 66499.20 ½. Mahon's second argument relies on a code section providing that "subdivided lands" can be merged and re-subdivided according to any process allowed by the local land use authority — in this case, the recording of two Notices of Merger pursuant to our Subdivision Regulations. In order to constitute a merger and legal subdivision, however, the merger must be between "subdivided lands," i.e. lands that are already in a subdivided state. *See* Cal. Gov't Code § 66499.20½. Under *Witt* and *Abernathy*, the purported merger of the four original 2,500 square foot lots into two contiguous 5,000 square foot lots was not a merger of "subdivided lands" because, pursuant to those cases, those lands had never been legally divided from each other in the first place. We note that there is some authority to support the idea that the merger provisions of the Subdivision Map Act allow merger of illegally created lots. For example, the separate procedures for involuntary merger of parcels under state law allow such land to be merged on the express basis that "[w]ith respect to any affected parcel . . . [it w]as not created in compliance with applicable laws and ordinances in effect at the time of its creation." Cal. Gov't Code § 66451.11(b)(2). In other words, the Board is permitted to adopt an involuntary merger ordinance that *requires* the merger of adjacent lands wherever they were illegally divided from each other. In this case, however, because the holdings in *Witt* and

Abernathy stand for the proposition that land was never divided in the first place, the scenario of merger of separate illegal parcels does not come into play.

3. The County as the Subdivider of the Land by Virtue of Recording the Notices of Merger. The ministerial act of recording a document upon request is not the kind of activity that constitutes a subdivision within the definition of Cal. Gov't Code § 66424. Mr. Mahon points to no authority that would have permitted the County Recorder to refuse the ministerial recording of these documents. The Subdivision Map Act sets forth the roles played by various parties, and under these facts, Mr. Mahon is the subdivider within the meaning of Cal. Gov't Code § 66423, and the County is the "local agency" pursuant to Cal. Gov't Code § 66420. In short, no act by the County can create a subdivision other than through the subdivision process provided by law.

4. The County Having Treated These Parcels as Two Parcels With Separate APNs for Nine Years While Expressing No Concern Over Their Legality. It is true that the County's position, before the *Witt* and *Abernathy* decisions were issued, was that two legal 5,000 square foot parcels existed by virtue of the 1908 subdivision and the subsequent 2000 mergers. However, the County's past legal interpretations cannot, in themselves, serve as an estoppel or bind the County to a course of action subsequently determined to be inconsistent with law. Further, the fact that a parcel has been "treated" as separate by the County for any purposes other than the administration of the Subdivision Map Act or the actual issuance of development permits, is irrelevant to its entitlement to legal status. The existence of separate APNs is completely irrelevant to whether a parcel is legal pursuant to the Subdivision Map Act. *See* 62 Ops. Cal. Atty. Gen. 147 (1979). This argument also provides no support to a finding of parcel legality.

5. The Existence of Adjacent Substandard Parcels With Separate Assessors Parcel Numbers. The fact that adjacent parcels have APN numbers for substandard lots does not affect the question of whether a land division has ever occurred in this case. It is true that other parcels were approved for development in the past based on the County's prior legal interpretations. Once development has been approved for a parcel (e.g., a building permit has been issued and a home constructed) a parcel is entitled to a certificate of compliance. (Gov't Code section 66499.35(c).) Neither of the Mahon parcels have been approved for development within the meaning of Gov't Code section 66499.35(c), and thus do not qualify on this basis. In the future, any undeveloped parcels proposed for development in the Midcoast area will be reviewed for compliance with *Witt* and *Abernathy*.

6. Untimeliness of MRNB's Claim. Mr. Mahon's sixth argument regarding the timeliness of asserting parcel illegality is not relevant to the County's exercise of its police powers under the facts presented in this case. The recent ruling in the *Abernathy Valley* case makes clear that, while Mr. Mahon (and, in fact, the County itself) may have believed for many years that the legality of his parcel was well-established by the 1908 subdivision map and subsequent 2000 mergers, it is the proposal for *future* action on the parcel that triggers a need to determine the parcel's legality under *Witt* and *Abernathy*. The issues of parcel legality raised by

MNRB are relevant to the decision now before the Board, and should be considered. We do not recommend disregarding the merits of MNRB's argument solely on the basis of the timeliness with which it might have been raised.

E. Other Relevant Considerations

As noted above, the holdings in the recently decided *Witt* and *Abernathy* cases settle the question of whether as a matter of law, the 1908 subdivision map legally created the parcels as shown on that map: the filing of this map alone did not create separate, legal parcels. Further, the various provisions and other theories advanced by Mr. Mahon in response to the matters raised by MNRB do not serve to establish the separate legal status of the two 5,000 square foot parcels proposed for design review approval.

What remains for consideration is (1) whether the County's historical treatment of the two Mahon properties as separate parcels, under a legal theory that was ultimately rejected by the Court of Appeal, should result in recognition of these parcels; (2) whether the fact that this matter is being heard pursuant to a writ issued by the Superior Court should result in recognition of these parcels; or (3) whether the history of development of much of the Midcoast communities in conformance with the plan of development shown on the original subdivision maps, combined with the development policies by the County based on these plans of development, should result in recognition of these parcels.

1. The County's historical treatment of the Mahon properties. Until the *Witt* and *Abernathy* decisions, there had been state-wide disagreement over whether maps recorded under early versions of the subdivision map actually created legal parcels. While many counties concerned about ancient "paper subdivisions" took the position that they did not (including Sonoma and Solano Counties), this County took the position that they did, based largely on the fact that the unincorporated communities of El Granada, Montara, and Moss Beach had built out to a significant extent consistent with development plans represented on subdivision maps filed in the early 20th century. The *Witt* and *Abernathy* decisions, however, have now settled the question, and the holdings of these cases are now binding on the County, notwithstanding its prior legal position.

2. The impact of the current Superior Court case. As the Board is aware, the current permit appeals are being heard pursuant to a writ issued by the trial court, which vacated the original Board decisions to deny the applications. It is true that the Board is hearing the matter under the design review standards in effect in 1999. With regard to the rules which govern parcel legality, however, the *Abernathy* case makes clear that the Court of Appeal was not making "new law," but instead stating what the law governing parcel legality has been, at least since 1975 (the year the current Subdivision Map Act became effective). Thus, notwithstanding the trial court's writ, the Board is obliged to follow the law as stated by the Court of Appeals. For this reason, the existence of the trial court case does not provide a basis for concluding that there are two legal parcels.

3. The history of development in the Midcoast. The question here is whether the specific history of development in the Midcoast, and related development policies and regulations which guide development in the Midcoast, are sufficiently distinguishable from the situations in *Witt* and *Abernathy* (which both apparently dealt with "paper subdivisions") that it may fairly be said that those decisions should not control. Among the factors which might be said to support a different outcome are the following:

- The development of roads and other subdivision amenities that make the 1908 subdivision distinguishable from a mere paper map such as the one at issue in *Abernathy Valley*;
- The development of adjacent properties under rules which, when in effect, allowed the development;
- The existence of underlying zoning regulations that encourage development on 5,000 square foot lots as being consistent with the character of the neighborhood;
- The existence of other 5,000 square foot lots as a typical ownership configuration of the neighborhood;
- The certification of a Local Coastal Program that designates this neighborhood as being appropriate for residential in-fill development such as the type proposed;
- The historical approach that the County has taken to in-fill development in Montara as ordinarily allowing such development without the need to issue a certificate of compliance prior to the publication of *Abernathy Valley*;
- The processing of Design Review permits since 1999 for two separate residences proposed on two separate parcels without requiring parcel legality beyond reference to the 1908 map; and
- The likelihood that a single residence proposed to be built on a 10,000 square foot lot in this neighborhood would, as evaluated under the present-day Design Review regulations, allow a relatively large house that would potentially be difficult to align to other patterns of development in the immediate vicinity.

In sum, the combination of development patterns and policies which recognize the Montara area as an urban area which has built out largely in conformance with the original subdivision maps may be fairly said to make this a different *factual* case than that presented in *Witt* and *Abernathy*. Despite the starkly different factual situations, however, the *legal* principles in *Witt* and *Abernathy* do not appear to turn on historical buildout patterns. In other words, the fact that development may have been planned and approved in the past based on an assumption that the 1908 map created individual legal parcels does not relieve the County from following *Witt* and *Abernathy* in the future. In this regard, it is important to point out that neither *Witt* nor *Abernathy* prevent development in accordance with the Local Coastal Program and zoning regulations applicable to the Midcoast--Mr. Mahon may still establish two 5,000 square foot lots through the subdivision process (in this case, through a parcel map and coastal development permit). Further, Mr. Mahon would not be precluded from demonstrating that the two 5,000 square foot lots are currently legal by virtue of some other event, other than the 1908 map, that established the lots as separate legal parcels (e.g., that they were conveyed into separate ownership at a time when compliance with subdivision approval was not required).

F. **Conclusions and Recommendations**

For the reasons set forth above, it is our conclusion that, under the holdings of *Witt* and *Abernathy*, Mr. Mahon has shown the legal existence of only one legal parcel of 10,000 square feet in size. Under the prevailing zoning regulations, two 5,000 square foot lots could be legally established through the subdivision and coastal development permit process. As for the pending design review applications, and recognizing that these applications are being heard in the context of an ongoing Superior Court case, the Board would have the following options:

1. If, at the conclusion of the hearing on this matter, the Board determines that Mr. Mahon has two separate 5,000 square foot legal parcels, the Board may either approve or deny the applications on their substantive merits.

2. If, at the conclusion of the hearing in this matter, the Board determines that Mr. Mahon has only one 10,000 square foot legal parcel, the Board may either:

   a. Deny each of the design review applications on the ground that only one legal parcel of 10,000 square feet in size has been established, without addressing the merits of the design review application; or

   b. Approve one or both of the design review applications subject to a condition that the approval or approvals are only valid if a subdivision approval and other required permits are obtained to create two separate, legal parcels conforming to the parcel configurations set forth in the design review applications, or alternatively, if Mr. Mahon demonstrates that he has two legal parcels by virtue of some legally cognizable action other than the filing of the 1908 subdivision map.

While alternative 2(b) is not an action normally considered, the unusual circumstances here (i.e., that the Board is acting pursuant to a court order directing the Board to reconsider these applications) dictate consideration of this alternative.

cc: David Boesch, County Manager
Lisa Grote, Planning Director
Jonathan Wittwer, Esq. and Gary Patton, Esq.
Ronald Zumbrun, Esq.

MPM:tjf:sl
L:\LITIGATE\M_CASES\Mahon 2\Board Staff Reports\Memo to Board re MNRB objections (rev)2.doc

MEMORANDUM

COUNTY OF SAN MATEO
PLANNING AND BUILDING DEPARTMENT

DATE: January 8, 2010

TO: Development Review Center Staff and Public

FROM: Lisa Grote, Community Development Director

SUBJECT: Revised Criteria for Legalization of Parcels Included Within Historic Recorded Subdivisions

Two recent appellate court cases - *Abernathy Valley, Inc. v. County of Solano* (2009; 173 Cal. App. 4th 42) and *Witt Home Ranch, Inc. v. County of Sonoma* (2008; 165 Cal. App. 4th 543) have significantly affected the previously presumed legal status of lots of record of recorded historic subdivisions prior to 1937.

Background

These two court decisions established that the recordation of such subdivision maps prior to 1915 (but not past 1937) did not mandate that the lots (where undeveloped) within such subdivisions constituted separate legal parcels for land use and planning purposes. These decisions concluded that one or more contiguously owned lots of such a subdivision could only be considered separately legal if it/they had been transferred, separately or together, by deed apart from any surrounding or contiguous lots. Upon submittal of a chain of title describing the chronological progression of deed transfer of the subject and surrounding lots (submitted together with all referenced deed documents) from the subdivision's initial recordation up through the present day, a Certificate of Compliance (CoC) – be it a Type A or Type B (see below) - would then be necessary to record, pursuant to the provisions of the County Subdivision Regulations, Section 7134.

These court decisions supercede the County's previous policies and procedures stipulating that such lots, where they were part of a recorded subdivision predating the County's first adopted Subdivision Ordinance on July 20, 1945, were considered legal, and thus, required no additional research or legality procedures. While previously recorded merged parcels, if undeveloped, are not exempt from the lot legality requirements mandated by the cited court cases, lots already developed with a principally permitted use are exempt from such requirements. Likewise, where a house previously constructed on a parcel is to be demolished and replaced with a new house, such parcel(s) (and the original lot(s) that comprise it) are also not subject to any additional legalization process since it has already been previously developed.

However, any undeveloped parcel – even where a Planning application has been applied for but has not yet been approved – is subject to these requirements. Only where a building permit has already been issued (even if not yet finaled) would the parcel not be subject to these requirements.

Need to Confirm Parcel Legality Prior to Development

Aside from the need to legalize the lots, the requirement to confirm parcel legality is mandated pursuant to:

1. The County Zoning Regulations, Section 6105 (first sentence), which states:

   "No permit for development shall be issued for any lot which is not a legal lot. For purposes of this ordinance, development does not include non-structural uses of property including, but not limited to, fences or water wells" **[See *NOTE below regarding road and water wells]**; and

2 The County Subdivision Regulations, Section 7133.2, which states:

   "Compliance of any parcel with the State Map Act and the County Subdivision Regulations shall be verified by the Planning Director prior to the issuance of any permit or grant of approval to develop a previously undeveloped parcel."

   ***NOTE: Section 6105, as it refers to roads and water wells being exempted, is superceded if any such affected parcel is located anywhere in the Coastal Zone (CZ). All development in the CZ is regulated by the County Local Coastal Program, whose definition of development <u>includes</u> roads and water wells. Thus, in the CZ – as opposed to such parcels outside the CZ – the construction of a road or drilling of a well <u>does</u> trigger the need to confirm the subject parcel's legal status as stipulated in this policy.**

On lots within such historical subdivisions anywhere in unincorporated County areas (including even those in the Mid-Coast where said lot(s) are located in the mapped "Single-Family Residential Categorical Exclusion Area"), parcel legality must be confirmed and CoC (be it a Type A or B) recorded prior to the issuance of a Coastal Development Exclusion (CDX) for a domestic or agricultural well or any other new development.

<u>Required Process to Confirm Parcel Legality</u>

Section 7134 cites the necessary criteria for determining whether a CoC Type A or Type B is required. In addition to the information required under Section 7134.1.b. (*Land Division History*), which is applicable for <u>both</u> Type A and B CoC, it is also critical that a Chain of Title be prepared and submitted that traces, chronologically, the deed conveyance of the subject parcel (comprised of the original lot(s) of record) as well as all contiguous parcels or lots around it (excluding lots located across a public or private roadway) starting from when the subject subdivision was first recorded up through the present day. A colored map may also be required to clarify and reference the deed conveyances relative to the subject and surrounding lots. The chain of title, organized chronologically, must be clear and include the name(s) of the grantors and grantees, the date, book and page (or other official County Recorder document number), along with attached exhibit copies (legible) of each referenced deed conveyance.

The chain of title for all surrounding, contiguous parcels (as cited above) can exclude any such parcels that are already developed.

Criteria that Qualifies a Parcel for a CoC (Type A)

If the conveyance of the subject parcel (e.g. its comprised lots) can be proven by such chain of title to have been conveyed separately from any of the lots around it prior to the County's first subdivision Ordinance (Ordinance # 595; effective July 20, 1945), then the parcel will likely qualify for a CoC (Type A). In such cases, the CoC application includes an application form, applicable CoC fees paid and the recordation (by Planning staff) of the CoC (Type A) document. Depending on the order in which the lots (comprising the subject parcel) were conveyed, it may be necessary to record a CoC (Type A) on each of the lots, to be followed with a recorded Merger, consolidating them altogether. The applicant will receive a copy of that document when staff receives its copy from Recorder's Office and the parcel's legal status will be marked in our Counter Zoning Maps for future reference. The applicant may include the CoC (Type A) application – so as to be processed concurrently with any other planning applications necessary. In such cases, the applicable fee cap may apply.

Criteria that Qualifies a Parcel for a CoC (Type B)

Upon review of the submitted chain of title as described above, if it's determined that any of the lots that comprise the subject parcel were not conveyed separately from the lots around it until after July 20, 1945, a CoC (Type B) will be required. In this case, as stipulated in the County Subdivision Ordinance (Section 7134.2), the application must also include a survey map of the subject parcel. Otherwise, assuming confirmation of the CoC (Type B), a similar document as with the Type A will need to be recorded as discussed above, also possibly including a Merger of the lots if necessary.

Subdivision Applications

Parcels being subdivided do not need to go through a parcel legalization process prior to consideration of the subdivision itself because the legality of the lot being subdivided will be verified as part of the subdivision process.

Project Decision Status and Need to Legalize Parcels

Any planning case for any parcel under the cited circumstances, that has not yet resulted in a building permit being issued, will not qualify for a final decision for any development until the applicable documents to ensure parcel legality have been approved and recorded.

Such cases that have already been agendized for consideration by a decision maker may proceed, but the final decision shall be stayed until such time that the parcel's legal status has been confirmed as described above. To clarify this point, the "decision" letter will include the caveat that the Community Development Director is authorized to approve the project only after parcel legality is verified through the appropriate Certificate of Compliance process cited above. Once that occurs, a final decision letter will be issued with the approval conditions and initiation of the decision's appeal period.

Such cases - and their respective parcels - that have already received "final" decisions but where associated building (or well drilling) permits have either not yet been applied for or have been applied for and not yet issued, shall be "tagged" to ensure that such parcel legality is confirmed before such building or well drilling permits can be issued.

LG:DH:pac – DJHT1042_WPO.DOC

Wetland plant species identified by botanist Toni Corelli and Lennie Roberts on January 17, 2010 in vicinity of 2 proposed single-family residences at 284 Second Street (PLN 1999-00215) and at 286 Second Street (corner of Second Street and Farallone) (PLN 1999-00015) Applicant: Thomas Mahon

#1: Ditch along east side of Farallone Street directly across from subject property:

Scientific Name	Common Name	California Wetland?
* Ranunculus occidentalis	buttercup	FACW
* Nasturtium officinale	watercress	OBL
* Picris echioides	bristly oxtongue	FAC*
* Epilobium ciliatum	fringed willowherb	FACW
* Cyperus sp.	sedge	OBL/FACW
* Salix lasiolepis	arroyo willow	FACW
* Zantedeschia aethiopica	calla lily	OBL
* Lythrum sp.	loosestrife	OBL/FACW

#2: Ditch along west side of Farallone Street adjacent to subject property:

* Oenathera elata	Hooker's evening primrose	FACW

#3: Ditch along northern side of Second Street directly across from subject property:

* Zantedeschia aethiopica	calla lily	OBL
* Nasturtiium officinale	watercress	OBL
* Cyperus sp.	sedge	OBL/FACW

Note: At the northeast corner of Second and Farallone, kitty corner from the subject property, and extending along Second Street, there is a dense stand of Salix lasiolepis (arroyo willow), Rubus ursinus (California blackberry), Senecio mikanioides (cape ivy), and Vinca major (greater periwinkle). This area may be more appropriately described as riparian.

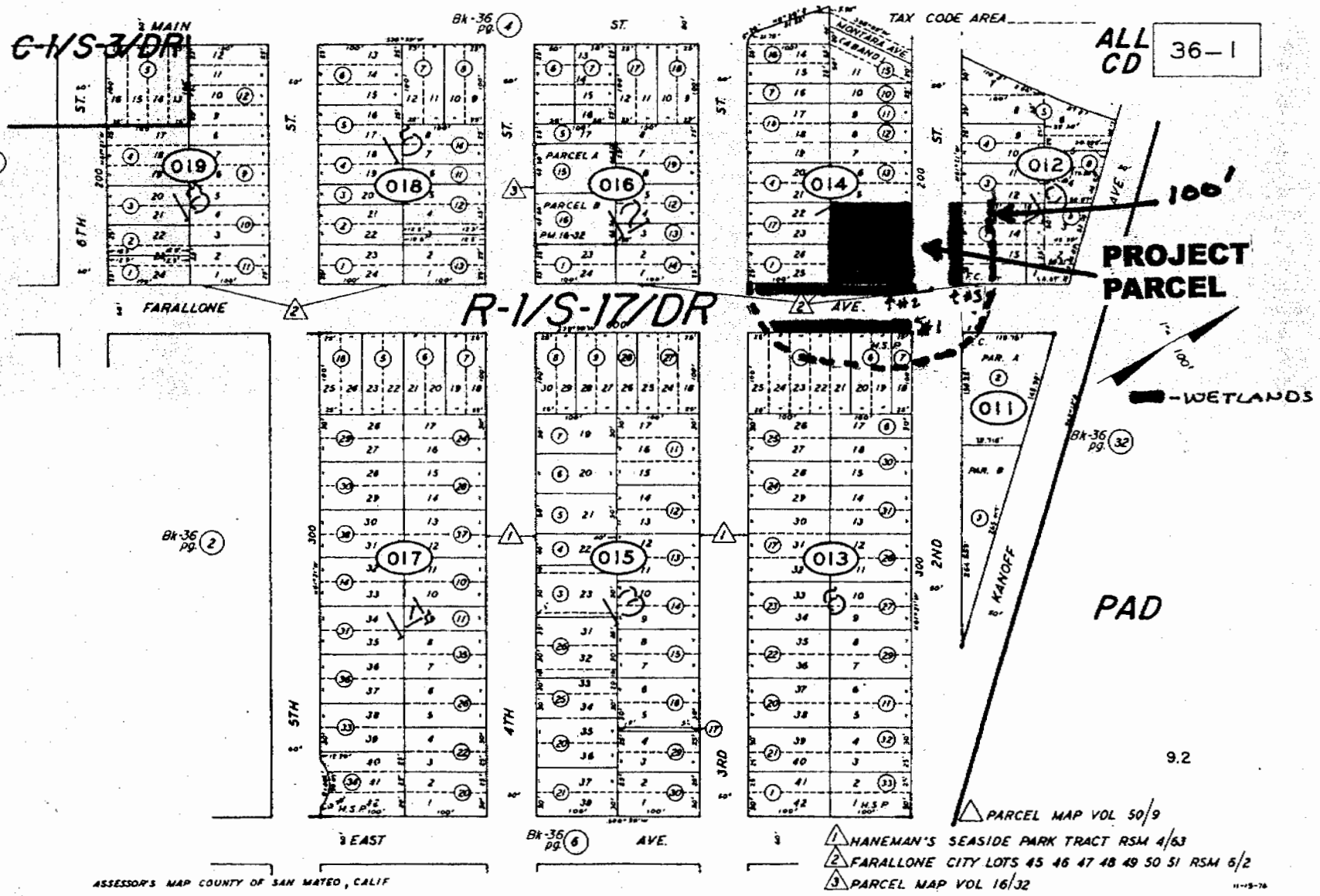

Exhibit No. 8
A-2-SMC-11-001, A-2-SMC-11-003 & 2-11-004-EDD - THOMAS MAHON
Appellant list and map of evident wetland vegetation
Page 2 of 2

COUNTY OF SAN MATEO

INTERDEPARTMENTAL CORRESPONDENCE

To: Honorable Board of Supervisors

From: Michael P. Murphy, County Counsel MPM

Subject: Impact on Local Coastal Program Amendments of Recent Court Decisions in *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543 and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42. (Agenda Item 10)

Date: June 16, 2009

On May 19, 2009, in conjunction with Board hearings on two design review permit appeals, we advised the Board that two recent California Court of Appeal decisions have resulted in a potential impact of some significance on the legal status of privately owned property in the urban Midcoast. These two cases, *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543 and *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42, hold that mere reference to a subdivision map filed in compliance with the any state subdivision map law in effect before 1915, without more, does not conclusively establish the legality of parcels described on the filed map. Because the Midcoast urban communities have largely developed in accordance with the subdivision plans shown on maps filed during the period from 1900 to 1915, and because the Local Coastal Program (LCP) was developed assuming those general plans of development, the question arises as to what effect, if any, the holdings in these cases have on the current package of LCP amendments being considered by the Board and the Coastal Commission.

The short answer to the question is that there should be little or no effect on the build-out assumptions underlying the LCP as a result of *Witt* and *Abernathy*, since these assumptions are based on maximizing conformance with underlying zoning (meaning lots of either 5,000 square feet or 10,000 square feet). What will be affected in a substantial way is the *manner in which* conforming lots will be "created": rather than merging substandard lots described on an ancient subdivision map, as is currently the process, a parcel described in a deed would have to be either merged or subdivided (as appropriate) to result in lots that conform to current zoning regulations. This will result in a more involved process in order to create a legal lot conforming to the minimum parcel size, with the possibility that owners will choose not to subdivide. This could result in fewer, larger lots than would have been the case before the *Witt* and *Abernathy* decisions.

The recent design review applications provide a "text book" example of how the approach to commonly-held contiguous properties will be treated in the future. The property owner held title to four contiguous 2,500 square foot lots which were identified on a subdivision

map filed in 1908, in accordance with the 1907 subdivision map act. The underlying zoning for this property allows a minimum parcel size of 5,000 square feet. Therefore, under the rules then in effect, the Planning Division required that the four 2,500 square foot parcels depicted on the 1908 map be merged into two, contiguous 5,000 square foot lots in order to conform to zoning. The merger process under our Subdivision Regulations is very straightforward, requiring simply the filing of notices of merger, which the owner did at Planning's direction. The *Witt* and *Abernathy* decisions later established that the property owner never had four 2,500 square foot parcels even though he bought this property with reference to four lot descriptions on the 1908 map; instead he had a single, 10,000 square foot legal parcel, because the only valid land division was the taking of the four parcels together in ownership separate from the surrounding parcels bought by others. Thus, in order to establish the same two 5,000 square foot parcels noted above, the property owner would start with a single 10,000 square foot parcel and would be subject to a coastal development permit for a subdivision. The subdivision process is much more involved than the merger process, and because the decision is discretionary, could result in a decision to deny the subdivision.

The ultimate impact of these decisions, in terms of the number of parcels affected, is difficult to assess at this time. In conjunction with the current LCP the Planning Division compiled data indicating the estimate of substandard lots in the Midcoast that could be affected, as follows:

1. Undeveloped Substandard Lots (1,605 total)

   217 lots non-contiguous to another lot in common ownership
   944 two contiguous lots in common ownership
   354 three contiguous lots in common ownership
    36 four contiguous lots in common ownership

2. Developed Substandard Lots (3,294 total)

   197 developed on one stand-alone lot
 2,262 developed on two underlying lots
   803 developed on three underlying lots
    28 developed on four underlying lots

While the developed parcels, by and large, will not be impacted by the *Witt* and *Abernathy* decisions, how the decisions impact many of the undeveloped parcels will be dictated by individual circumstances underlying that ownership. As one example, a stand-alone undeveloped lot, even though shown on a map filed in the early 1900s, may still need a conditional certificate of compliance to establish its legality if it cannot be shown that the lot was separately created by deed prior to August 1946, which was the year of our first subdivision regulations regulating divisions of four or fewer lots. As another example, an owner similarly

situated to the property owner described above might instead have acquired four 2,500 square foot properties that were each "legal" by virtue of the fact that they were each conveyed into separate ownership by deed before the August 1946 date. That owner could proceed with a merger of the four lots into two contiguous lots without the need to process a subdivision, because his parcels' histories allow them to be recognized as separate. Thus, the ownership history of a particular parcel (its "chain of title") can often be dispositive of whether it was the result of a legal land division and is entitled to legal recognition. In short, a determination as to whether a subdivision might be required to achieve 5,000 or 10,000 square foot lots is fact-specific and can occur only when an individual property owner applies for a development approval or a certificate of compliance, at which time a chain of title will be analyzed, but the parcel history only determines *how* the property owner will proceed to development, not *whether* the owner may proceed.

In summary, *Witt* and *Abernathy* should not significantly affect build-out assumptions. While the precise impact of *Witt* and *Abernathy* can only be determined as property owners apply for development approvals and establish the legality of their lots, the ultimate result can only be a reduction in build-out from that which would have occurred absent *Witt* and *Abernathy*.

cc: David Boesch, County Manager
Lisa Grote, Planning Director

MPM:mpm

\\cco-fp\Shared\CLIENT\P_DEPTS\PLANNING\2009\Memo to Board re Effect of Witt and Abernathy on LCP.doc

THE ZUMBRUN LAW FIRM

A Professional Corporation

May 7, 2009

Mr. Michael P. Murphy
Chief County Counsel
County of San Mateo
Hall of Justice & Records
400 County Center
Redwood City, CA 94063-1662

VIA FACSIMILE
(650) 363-4034

Dear Mr. Murphy:

Re: Thomas I. Mahon; PLN 1999-00215; PLN 1999-00015; April 27, 2009 Letters from Wittwer & Parkin, LLP, on behalf of the Montara Neighbors for Responsible Building

This letter serves to address the merits of two letters recently submitted by the Montara Neighbors for Responsible Building (MNRB) with regard to PLN1999-00215 and PLN1999-00015. (Letter of the MNRB to the Board of Supervisors, County of San Mateo, April 27, 2009 (Board Letter); Letter of the MNRB to Lisa Grote, Community Development Director, Planning and Building Department, April 27, 2009 (Grote Letter).) These letters concerned the construction of single-family dwellings on the two parcels located at Second Street and Farallone Avenue in Montara.

Procedural due process is a fundamental and a constitutional right. Mr. Mahon is very desirous that his neighbors in Montara receive every due process consideration, including proper notice, to which they are entitled. Should there have been any deficiencies in the recent process they have been cured by the proper notice of the May 19, 2009 meeting and opportunity to comment. Nonetheless, the two "new" issues thereafter addressed by the MNRB in its April 27, 2009 letters could have been raised at any time in the past 10 years. This renders the MNRB's alleged injuries rather exaggerated.

3800 Watt Avenue
Suite 101
Sacramento, CA 95821

Tel 916-486-5900
Fax 916-486-5959

The MNRB has never before challenged the County's determinations of exemption from CEQA or the Coastal Act, though it could have done so *at any time*. The MNRB has also never before challenged the legality of the two parcels. Even without recent case law, the MNRB could have raised this issue *at any time* in the past 10 years. The MNRB's concern regarding compliance with the 1999 regulations has been an ongoing discussion in which the MNRB *has* participated and the MNRB may still comment before a final decision is announced.

Thus, the recent alleged due process deficiencies could not have caused any actual prejudice to the MNRB's opportunity to address the issues outlined in its April 27, 2009 letters. Notwithstanding, the MNRB's claims are also meritless and untimely.

Due Process

The requirement of 10-days notice, pursuant to section 6565.9 of the San Mateo County Zoning Regulations Code, has been met as to the next hearing on May 19, 2009. The MNRB will have the opportunity to comment. This is likely to be the last hearing necessary on Mr. Mahon's permit applications. The public has been ensured adequate opportunity to comment on the final plans.

We do not believe that any member of the public has been *incurably* damaged by the less than 10-days notice of the March 31, 2009 hearing or the County's closing of the April 28, 2009 hearing to public comment before the hearing. The approval of the plans is not final yet. The interested parties obviously did have notice of the April 28, 2009 hearing (Board Letter, Exhs. 1-2), now have notice of the May 19, 2009 hearing, and *will* have sufficient opportunity to comment before a final approval is made. Additionally, from the County's point of view, the imposition of a mandatory public comment opportunity at *every* instance of evaluating plan *revisions* would be overly burdensome. Due process here does not demand as much as the MNRB contends.

The revisions proposed at the April 28, 2009 hearing "are part of the public file ... available at the Planning and Building Counter on the second floor at 455 County Center in Redwood City." (Board Letter at Exh. 2, e-mail from Lisa Grote to Dan Moss at p. 2.) Thus, they can be examined by anyone at any time. Since the final hearing on May 19, 2009 has been properly noticed and is open to public comment, the due process rights of the MNRB and the public as a whole have been completely secured.

The Legality of the Two Parcels

The MNRB makes a meritless and untimely claim that Mr. Mahon's parcels (APN 036-014-200 & APN 036-014-210) are illegal, thus invalidating all efforts of the County and Mr. Mahon over the past 10 years to arrive at appropriate plans for the single-family dwellings. For the following reasons, the MNRB's claim must be disregarded:

1. The Notices of Merger recorded by the County on October 17, 2000 constitute certificates of compliance pursuant to Government Code section 66499.35(d) and the parcels may thus "be sold, leased, or financed without further compliance with the Subdivision Map Act or any local ordinance enacted pursuant thereto." (Gov. Code, § 66499.35(f)(1)(E).)

2. The Notices of Merger recorded by the County on October 17, 2000 constitute legal merger and resubdivision under Government Code section 66499.20 ½.

3. A government agency can itself act as a subdivider of land. (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 984.) *The County*, in fact, required the merger of the four 2,500 square-foot parcels into two 5,000 square-foot parcels owned by Mr. Mahon, prior to allowing development to proceed. Then, by recording the Notices of Merger on October 17, 2000, the County served as a subdivider of land, legally establishing the two parcels with parcel numbers 036-014-200 and 036-014-210.

4. The County has treated these parcels as two parcels with two APNs for nine years now and had no concern over the legality of the lot lines prior thereto. Generally, local government action is presumed valid. It is incumbent on the challenger to demonstrate impropriety. The MNRB itself states that the County "was made aware of this [alleged] problem in an October 27, 1999 letter from a member of the public" (Board Letter at p. 7), and yet the County gave this assertion no credence. Rather, it recorded the Notices of Merger on October 17, 2000, establishing two 5,000 square-foot parcels pursuant to its own requirement of Mr. Mahon. Whether interpreted under the authority of Government Code section 66499.35(d), Government Code section 66499.20 ½, or the authority of the County as a subdivider of land pursuant to *Gomes v. County of Mendocino, supra*, 37 Cal.App.4th at p. 984, the County has clearly created two legal lots.

The MNRB attempts to shift a burden to Mr. Mahon to show that somewhere in the chains of title, the lots were legalized. (Board Letter at p. 7; Grote Letter at p. 3.) The burden is on the MNRB to show that the lots are *not* legal. The MNRB has not met that burden.

5. There are several APNs in Block 7 on lots of 2,500 square feet. (Lots 8-10, APNs 036-014-120, 036-014-110, 036-014-100, and also Lot 11, APN 036-014-150, with slightly more than 2,500 square feet due to inclusion of 20 adjacent feet.) The MNRB's logic would render these parcels illegal as well. Mr. Mahon and the owner(s) of these lots, however, do not need to apply for certificates of compliance as the MNRB erroneously presumes in its letters. The excitement incited by the recent decision in *Abernathy Valley, Inc. v. County of Solano*, 2009 WL 1027185, is misplaced because the legality of these parcels has not been resting idle from 1908 until just the present day. The County has already established them as legal parcels.

6. In addition to all of the above, the MNRB's claim is extremely untimely. The Notices of Merger were recorded on October 17, 2000, establishing two 5,000 square-foot parcels with two APNs. Though two recent cases have addressed issues related to lots documented on turn-of-the-century maps, prior cases had also done so and established a

foundation.[1] The MNRB has waited nine years to make the argument that the parcels recorded by the County in the year 2000 were illegal. Even assuming the MNRB needed the *Gardner* decision to make that argument, it has waited six years.

Exemption from CEQA Review

The MNRB also makes an untimely and meritless claim that Mr. Mahon's applications are not exempt from CEQA as determined by the County.

First, the MNRB has admittedly acquiesced in the County's determination of exemption from CEQA review and waived any right to make that challenge. (See Board Letter at p. 5 ["[T]he project has ***from its inception*** included development of two single family residences on property owned by the same party"], emphasis added.)

A. No "Segmenting"

In any event, there are two legal parcels with one single-family dwelling to be constructed on each. That each dwelling has a different application number is not a matter of mere convenience:

- Each proposed dwelling was individually designed in different months, inclusive of separate & distinct access, site, & utilities planning & design.
- Each proposed dwelling had permits applied for, documents submitted, and paid for in different months.
- Each proposed dwelling is upon separate and discrete legal parcels.

Clearly, these are two individual projects with no "segmenting" to justify application of CEQA.

---

[1] See *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 761-762 [The California Supreme Court held that the Subdivision Map Act and its merger provisions apply to all parcels regardless of the time they were created: "Accordingly, we hold that the Act's merger provisions apply to parcels created before the effective date of any applicable law regulating the division of land."]; see also *Lakeview Meadows Ranch v. County of Santa Clara* (1994) 27 Cal.App.4th 593; see also *Gardner v. County of Sonoma* (2003) 29 Cal.4th 990 [establishing the emphasis on the "design and improvement" clause of the grandfather provision of Government Code section 66499.30(d): "Consistent with the Map Act's salutary purposes to facilitate local regulation of the design and improvement of subdivisions so as to encourage orderly community development [internal citation], we hold that antiquated subdivision maps, recorded in the absence of an applicable subdivision statute, ordinance, or regulation, did not in themselves establish subdivisions or create legal parcels ...."]

B. No Resources Within a State Scenic Highway

Further, the properties have no resources "***within*** a highway officially designated as a state scenic highway." (Board Letter at p. 6, emphasis added; see Cal. Code Regs., tit. 14, § 15300.2.) The trees on the Mahon properties are not "within" Highway One. Rather, the parcels are located over 500 feet away from Highway One. "Visibility" from Highway One (which is arguable here to boot, as the parcels are separated by *several* intervening two-story buildings, in addition to two intervening city blocks) is no part of section 15300.2's classification of scenic resources. The idea that because Mr. Mahon's parcels are allegedly visible from Highway One the trees on the property are "scenic resources" is an erroneous interpretive extension by the MNRB.

C. Urban Area Established

Finally, the area in question is an urbanized area for purposes of CEQA.

California law designates the county as "lead agency" for formulating its own General Plan, with the State of California acting as certifier upon approval.

San Mateo County General Plan Policy 8.8 specifically designates Montara as an ***existing*** urban community, recognizing the long-standing existence of a developed, mostly built-out, medium-high density area.

Policy 7.16 furthermore specifically defines the ***objectives*** for urban unincorporated areas as being one of "*maximiz[ing] efficiency of public facilities, services and utilities*" and "*discourag[ing] urban sprawl.*"

In the instant case, sewers, paved streets, electricity, telecommunications, fire hydrants, urban bus service and other municipal-type services—all of which ***already*** exist in Montara—are the very reason for the CEQA exemption provided for infill locations. It serves as a method of incentivizing use of existing urban services and infrastructure and as a disincentive to sprawl.

Policy 8.29 goes even further in regards to promoting infill development: "*encourag[ing] the infilling of urban areas where infrastructure and services are available.*" Each of the previously identified services and infrastructure are available not only in Montara generally, but also ***on the very block*** in which the Mahon parcels exist.

Exemption from the Coastal Act and the Request for Coastal Commission Review of Jurisdiction Pursuant to 14 California Code of Regulations section 13569(b-c)

The County has also determined that the applications are not subject to appeal to the Coastal Commission.

If the MNRB believed as long ago as 1999-2000 that the land was one parcel with two projects (Grote Letter at p. 3; Board Letter at pp. 1, 4-5, 7), and that a County Coastal Development Permit would therefore be necessary upon the Notices of Merger of October 17, 2000 establishing (however contrary to MNRB's belief) two 5,000 square-foot parcels, why did the MNRB wait nearly 10 years to request a determination of jurisdiction by the Commission? The MNRB has acquiesced in the County's exclusive authority and thereby waived any right to request a determination from the Commission.

In any event, there are two legal parcels, with one single-family dwelling to be constructed on each. Thus, the County has properly found these projects exempt from the Coastal Act. (See Coastal Commission Categorical Exclusion Order E-81-1; San Mateo County Zoning Regulations § 6328.5(c); Pub. Resources Code, § 30610.1(c).)

Compliance with the 1999 Zoning Regulations

Members of the public may continue to comment on the design review of the permit applications. Nonetheless, the Honorable Judge Marie S. Weiner found that the proposed plans were in conformity with the design review laws in effect at the time. (Statement of Decision on Petition for Writ of Mandate as to First Cause of Action, March 17, 2008, Civil No. 446698, at p. 6.) On review of the revised plans, the County is now also recommending approval pursuant to its April 28, 2009 staff reports. Thus, it is not a "fact" at all that "the proposed single family dwellings continue to violate the 1999 County Zoning Regulations as previously determined by the County Planning Commission and your Board." (Board Letter at p. 8.) According to Judge Weiner, the plans never did violate the design review laws, and in any event, the County has been satisfied by the revised plans submitted on April 16, 2009 "which incorporate essentially all of the recommended design changes. ... The revisions result in a project that now complies with the 1999 Design Review standards ...." (Staff Reports re PLN 1999-00015 & 1999-00215 (Mahon), April 20, 2009, for Board Hearing April 28, 2009, at p. 2.)

The County's recommendation of approval of Mr. Mahon's revised plans does not open the door to arguments against the County's determinations lawfully made 10 years ago. Moreover, the MNRB's arguments are inaccurate. Though the untimely arguments need not be heard at all, they have been briefly addressed above for the sake of repose. We look forward to the County's continued support and anticipated approval of Mr. Mahon's revised plans at the hearing on May 19, 2009.

Sincerely,

Ronald A. Zumbrun

RONALD A. ZUMBRUN
Managing Attorney