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

TH 20a

ADDENDUM

Click here to go to the staff report.

DATE: April 6, 2012

TO: Commissioners and Interested Parties

FROM: South Central Coast District Staff

SUBJECT: Agenda Item 20a, Thursday, April 12, 2012
Appeal No. A-4-MAL-10-008 (Malibu Bay Company)

Since publication of the staff report, Commission staff has received the attached letter from the applicant, Malibu Bay Company, expressing support for the staff recommendation to find No Substantial Issue with respect to the appellants' assertions in the subject appeal.

Received
MAR 28 2012
California Coastal Commission
South Central Coast District

MALIBU BAY COMPANY

March 28, 2012

TH Item 20a

Chair Mary Schallenberger and Fellow Commissioners
California Coastal Commission
45 Fremont Street
Suite 2000
San Francisco, CA 94105-2219

RE: Appeal No. A-4-MAL-10-008, Malibu Bay Company

Dear Madam Chair, Members of the Commission:

Malibu Bay Company, applicant and property owner in the above-referenced matter, has carefully reviewed the Coastal Commission Staff Report dated 3/22/2012 and is in complete agreement with the analysis and conclusion.

The City's Coastal Development Permit approval is in exact conformity with Malibu LCP Amendment 1-07, which the Coastal Commission approved in June, 2008. Although the Coastal Commission's approval of the LCP Amendment was challenged in court, the Coastal Commission prevailed at the Court of Appeal, and review sought by the current Appellant, Deane Earl Ross, at the California Supreme Court was denied. The relevant issues raised by Appellant are exactly the same issues resolved by the Court of Appeal in favor of the Commission. For the Commission's convenience, Attachment A documents the fact that the Appellant's relevant claims have already been addressed by the court.

Malibu Bay Company respectfully requests that the Coastal Commission support the No Substantial Issue finding in the Coastal Commission Staff Report.

Sincerely,

David Reznick
Malibu Bay Company
Attachments – Attachment A

23705 West Malibu Road, Suite D-2, Malibu, CA 90265
Telephone 310-456-6555 Facsimile 310-456-9462

ISSUES RAISED BY ROSS/APPELLANT	COURT OF APPEAL DECISION
1. Ross/Appellant contends that project is not consistent with Land Use Plan Policy 3.23 because the project does not provide for a 100-foot buffer.	"The city's Land Use Plan Policy 3.23, with its 100-foot buffer requirement, cannot be considered in isolation. Rather, as we will explain, the city's Land Use Plan Policy 3.23 must be considered in conjunction with its Local Implementation Plan section 4.6.1.G. The city's Local Implementation Plan section 4.6.1G, which applies to dune environmentally sensitive habitat areas, as is present here, does not in all cases require a 100-foot buffer. . . . The city's Land Use Plan Policy 3.23 and Local Implementation Plan section 4.6.1G, which were simultaneously certified by the commission on September 13, 2002, should be interpreted together to give effect to all provisions of the local coastal program. . . . Plaintiffs [Ross/Appellant] argue we should apply the 100-foot buffer in the city's Land Use Plan Policy 3.23 to all environmentally sensitive habitat areas. This application, plaintiffs [Ross/Appellant] argue, must be made without regard to those specified in the city's Local Implementation Plan section 4.6.1. Such an interpretation would render the city's Local Implementation Plan section 4.6.1 superfluous and inoperable. Moreover, the city's Local Implementation Plan section 4.6.1 with its differing treatment of various environmental conditions is more specific than the broad 100-foot requirement in the city's Land Use Plan Policy 3.23. Further, in the case of environmentally sensitive habitat areas other than "stream/riparian, wetlands, woodland, coastal bluff, coastal sage scrub, and chaparral" environments, Local Implementation Plan section 4.6.1.G provides a specified case-by-case method for determining the appropriate buffer. . . . [W]e grant broad deference to the commission's interpretation of the local coastal program it prepared." (Decision, pp. 29-31.)
2. Ross/Appellant contends that the project is not consistent with Land Use Plan Policy 5.35 which does not allow the created parcels to be "smaller than the average size of the surrounding parcels."	"Plaintiffs [Ross/Appellant] argue the local coastal program amendment does not conform with the city's Land Use Plan Policy 5.35. They reason the 45-foot wide lots permitted under the local coastal program amendment would be smaller than the average size of the surrounding parcels. The surrounding parcels [Broad Beach] average 48 feet. Plaintiffs [Ross/Appellant] contend the "size" of a lot necessarily includes its width; thus, it was error to conclude size means only "area." Plaintiffs' arguments are unpersuasive. . . . Here, the developers propose to divide the subject property into four parcels. The subject property is slightly more than 0.5 acre in size with a lot width ranging from 48 to 50 feet. The 4 proposed lots would be larger than the adjacent lot to the west which is 0.24 acres in size, and that to the east which consists of 0.38 acre. Thus, the commission could properly find that the proposed project was consistent with the city's Land Use Plan Policy 5.35 requirement that new subdivisions not be

	smaller than the average size of surrounding parcels." (Decision, pp. 37-38.)
3. Ross/Appellant contends that the project is inconsistent with Policies 6.5 and 6.18 by not providing one contiguous view corridor.	'The addendum also addressed comments regarding view resources by recommending the revision of the city's Local Implementation Plan section 6.5. The commission staff recommended amending the city's Local Implementation Plan section 6.5 which is labeled, "Development Standards" to include a new provision mandating broader view corridors. The new Local Implementation Plan section 6.5(E)(6) provides: "New subdivisions of beachfront residential parcels, where structures cannot be sited or designed below road grade, shall ensure no less than 20% of the lineal frontage of each newly created parcel shall be maintained as one contiguous public view corridor (even if the resultant lots are 50 feet or less in width). The view corridors of the newly created parcels shall be contiguous to the maximum extent feasible in order to minimize impacts to public views of the ocean. This requirement shall be a condition of permit approval for the subdivision of a beachfront property." This proposed revision guaranteed 20 percent of the lineal frontage of each newly created parcel would be maintained as one contiguous public view corridor even if the resultant lots were 50 feet or less in width. . . ." (Decision, p. 13-14.)

TH 20a

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

Appeal Filed:	2/1/10
49th Day:	Waived
Staff:	D. Christensen
Staff Report:	3/22/12
Hearing Date:	4/12/12

STAFF REPORT: APPEAL
SUBSTANTIAL ISSUE

LOCAL GOVERNMENT: City of Malibu

LOCAL DECISION: Approval with Conditions

APPEAL NO.: A-4-MAL-10-008

APPLICANT: Malibu Bay Company

APPELLANTS: Deane Earl Ross, c/o John M. Bowman, Esq.

PROJECT LOCATION: 30732 Pacific Coast Highway, Malibu, Los Angeles County

PROJECT DESCRIPTION: Subdivision of a vacant 2.08 acre beachfront parcel into four new parcels.

SUMMARY OF STAFF RECOMMENDATION: NO SUBSTANTIAL ISSUE EXISTS

The approved project consists of subdivision of a 2.08-acre vacant beachfront parcel at the eastern end of Broad Beach (30732 Pacific Coast Highway) into four parcels. The subject beachfront parcel is an infill parcel that is adjacent to existing beachfront residences on both sides. The parcel also consists of a coastal dune environment that is part of a larger coastal dune ecosystem at Broad Beach. Coastal dunes are considered environmentally sensitive habitat areas (ESHA) in the Malibu LCP.

The City's action on the subject CDP was facilitated by Malibu LCP Amendment No. 1-07 that had reduced the minimum lot width standard from 80 feet to 45 feet for beachfront lots in the Single Family-Medium (SF-M) Zoning District, where the subject property is located. The Commission's approval of LCP Amendment 1-07 included creation of an Overlay District for the subject property in the City's Implementation Plan with specific development standards and conditions under which the subject property could be subdivided and developed to ensure protection of dune habitat, shoreline processes, and visual resources.

Staff recommends that the Commission determine that **no substantial issue exists** with respect to the appellant's assertion that the approved project is not consistent with the ESHA, subdivision, and visual resource policies and provisions of Malibu's certified Local Coastal Program (LCP). The project, as approved by the City of Malibu, conforms to the LCP, as amended pursuant to Malibu LCP Amendment 1-07, which was certified by the Commission on January 7, 2009. The Commission's action on LCP Amendment 1-07 was legally challenged by

the appellant. Although the Superior Court found that the Commission did not comply with CEQA requirements regarding public review of staff reports, the Court of Appeal subsequently found that the Commission's action on the LCP Amendment was entirely consistent with the LCP, the Coastal Act, and CEQA, and denied the petition for writ of mandate in its entirety. The appellant sought review in the California Supreme Court, which was denied. The Court of Appeal decision is now final. This appeal challenges the conformity of the CDP as approved by the City with the terms of the LCP, as amended by LCP Amendment 1-07. The appellant's contentions in this appeal are some of the very same contentions litigated and resolved with the Court of Appeal decision.

In conclusion, the project, as approved by the City of Malibu, conforms to the ESHA, subdivision, and visual resource policies and standards of the Malibu LCP. As such, the Commission finds that the appellant's contentions raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP. The motion and resolution can be found on Page 5.

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LIST OF EXHIBITS

Exhibit 1. City of Malibu Resolution No. 09-68

Exhibit 2. Deane Earl Ross Appeal

Exhibit 3. Court of Appeal Decision *Deane Earl Ross v. California Coastal Commission (2011)*

Exhibit 4. Location Map

Exhibit 5. Subdivision Plan

Exhibit 6. Aerial View

Exhibit 7. ESHA Delineation Map

I. APPEAL PROCEDURES

A. APPEAL JURISDICTION

The project site is located at 30732 Pacific Coast Highway in the City of Malibu (**Exhibits 4-6**). The Post LCP Certification Permit and Appeal Jurisdiction map certified for the City of Malibu (Adopted September 13, 2002) indicates that this property falls within the appeal jurisdiction of the Commission due to its location on the beachfront between the first public road and the sea. As such, the City's approval of a coastal development permit for the subject project is appealable to the Commission.

B. APPEAL PROCEDURES

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

1. Appeal Areas

Developments approved by cities or counties may be appealed if they are located within the appealable areas, such as those located between the sea and the first public road paralleling the sea, within 300 feet of the inland extent of any beach or of the mean high-tide line of the sea where there is no beach, whichever is greater, on state tidelands, or along or within 100 feet of natural watercourses and lands within 300 feet of the top of the seaward face of a coastal bluff. (Coastal Act Section 30603[a]). Any development approved by a County that is not designated as a principal permitted use within a zoning district may also be appealed to the Commission irrespective of its geographic location within the Coastal Zone. (Coastal Act Section

30603[a][4]). Finally, developments which constitute major public works or major energy facilities may be appealed to the Commission. (Coastal Act Section 30603[a][5]).

2. Grounds for Appeal

The grounds for appeal for development approved by the local government and subject to appeal to the Commission shall be 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 Division 20 of the Public Resources Code. (Coastal Act Section 30603[a][4])

3. Substantial Issue Determination

Section 30625(b) of the Coastal Act requires the Commission to hear an appeal unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal was filed. When Commission staff recommends that no substantial issue exists with respect to the grounds of the appeal, the Commission will hear arguments and vote on substantial issue. A majority vote of the members of the Commission present at the hearing is required to determine that the Commission will not hear an appeal. If the Commission determines that no substantial issue exists, then the local government's coastal development permit action will be considered final.

4. De Novo Permit Hearing

Should the Commission determine that a substantial issue does exist, the Commission will consider the CDP application de novo. The applicable test for the Commission to consider in a de novo review of the project is whether the entire proposed development is in conformity with the certified Local Coastal Program and with the public access and public recreation policies of the Coastal Act. Thus, the Commission's review at the de novo hearing is *not* limited to the appealable development as defined in the first paragraph of this Section I. If a de novo hearing is held, testimony may be taken from all interested persons.

C. LOCAL GOVERNMENT ACTION AND FILING OF APPEAL

On December 14, 2009, the Malibu City Council approved Coastal Development Permit No. 05-136 for Vesting Tentative Parcel Map 99-002 for subdivision of the subject parcel into four residential lots (**Exhibit 1**). The Notice of Final Action for the project was received by Commission staff on January 19, 2010. Notice was provided of the ten working day appeal period, which extended to February 2, 2010.

The subject appeal was filed by Deane Earl Ross on February 1, 2010, during the appeal period (**Exhibit 2**). Commission staff notified the City, the applicant, and all interested parties that were listed on the appeal. All relevant materials associated with this permit were made available by the City to Commission staff on February 17, 2010. Since there was litigation still pending at the

time of the appeal, the applicant/property owner provided a waiver of the time limits for Commission action on the appeal. Now that the litigation has been resolved, Commission staff is bringing the appeal forward for Commission action.

II. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE

MOTION: ***I move that the Commission determine that Appeal No. A-4-MAL-10-008 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.***

STAFF RECOMMENDATION:

Staff recommends a **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds **No Substantial Issue**, the Commission will not hear the application de novo and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

RESOLUTION TO FIND NO SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. A-4-MAL-10-008 raises **No Substantial Issue** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified LCP and/or the public access and recreation policies of the Coastal Act.

III. FINDINGS AND DECLARATIONS FOR NO SUBSTANTIAL ISSUE

The Commission hereby finds and declares:

A. PROJECT DESCRIPTION AND BACKGROUND

The subject 2.08-acre vacant beachfront parcel (30732 Pacific Coast Highway/APN 4469-026-005) is located at the eastern end of Broad Beach, between Pacific Coast Highway and the ocean (**Exhibits 4 and 6**). The property is zoned Single Family-Medium Density (one unit per 0.25 acre) in the Malibu LCP. The area of the subject property (Broad Beach) is characterized as a built-out portion of Malibu consisting of residential development. The subject beachfront parcel is an infill parcel that is adjacent to existing beachfront residences on both sides. The parcel also consists of a coastal dune environment that is part of a larger coastal dune ecosystem at Broad Beach. Coastal dunes are considered environmentally sensitive habitat areas (ESHA) in the Malibu LCP.

The approved project consists of subdivision of the subject parcel into four parcels. Each of the four parcels would be at least 0.5-acre in size and at least 45 feet wide, which complies with the minimum lot width standard of 45 feet and allowable density standard of four lots per acre within the Single Family-Medium Zone District. Although no physical development was proposed or approved as part of the subject CDP, potential building sites were identified on each of the proposed parcels to demonstrate that future residential development on each created parcel would be consistent with the applicable policies of the LCP (**Exhibit 5**).

The City's action on the subject CDP was facilitated by Malibu LCP Amendment No. 1-07, which was approved by the Commission on June 11, 2008 with suggested modifications, and effectively certified on January 7, 2009. The City Council then approved the subject CDP (No. 05-136) on December 14, 2009 to allow for the subdivision of the subject property into four lots, consistent with the City's LCP, as amended by LCP Amendment 1-07.

The subject parcel at 30732 Pacific Coast Highway is 2.08 acres in size, approximately 500 feet deep, and approximately 200 feet wide. However, the parcel is slightly pie shaped, so while the parcel's roadside frontage is 200 feet wide, the rear property line (ocean side) is only 186 feet wide. A subdivision of the property into four lots would accommodate 50 foot frontages, but only 46.5 foot rear lot widths. LCP Amendment No. 1-07 had reduced the minimum lot width standard from 80 feet to 45 feet for beachfront lots in the Single Family-Medium (SF-M) Zoning District, where the subject property is located. The average lot width among the SF-M-zoned beachfront parcels in the City is 50 feet. At Broad Beach in particular, the majority of parcels are between 40 and 50 feet in width, with a few lots less than 40 feet and a few parcels that are wide (50 feet to 100 feet maximum). In its action on LCP Amendment 1-07, the Commission found that reducing the minimum lot width standard from 80 feet to 45 feet for beachfront lots in the SF-M zone would not create additional parcels significantly smaller than the average size of surrounding parcels. A 45 foot minimum width is substantially similar to the existing pattern of development along Broad Beach. In addition, the Commission found that the subject infill parcel was able to accommodate an increased density of new residential development. The Commission's approval included creation of an Overlay District for the subject property in the City's Implementation Plan with specific development standards and conditions under which the subject property could be subdivided and developed to ensure protection of dune habitat, shoreline processes, and visual resources.

In response to the Commission's approval of the LCP amendment, the neighboring property owner, Deane Earl Ross, filed litigation against the Coastal Commission in the Superior Court of Los Angeles County on February 6, 2009. On February 2, 2010, the Superior Court issued its statement of decision for the Deane Earl Ross litigation, which was subsequently modified by the granting of Malibu Bay Company's Motion for New Trial. The Superior Court denied all of the appellant's Coastal Act claims, determining that the Commission had complied with the policies of the LCP and Coastal Act, and denied most of the appellant's other claims regarding CEQA. The Superior Court, however, did rule that the Commission did not comply with CEQA requirements regarding public review of CEQA documents.

On July 12, 2010, the appellant filed an appeal of the Superior Court's decision, and the City, Commission and Malibu Bay Company filed a cross appeal. On September 9, 2011, the Court of

Appeal reversed, in part, and upheld, in part, the Superior Court's decision. The Court of Appeal found that the Commission's June 11, 2008 action was entirely consistent with the LCP, the Coastal Act, and CEQA, and denied the petition for writ of mandate in its entirety. The Court of Appeal held that the Commission had provided adequate opportunity for public review of the staff report. The appellant sought review in the California Supreme Court, which was denied. The Court of Appeal decision is now final (**Exhibit 3**).

The appellant's contentions, analyzed below, are some of the very same contentions litigated and resolved with the Court of Appeal decision. Regardless, the Commission must consider whether substantial issue exists with respect to the grounds of the appeal.

B. APPELLANTS' CONTENTIONS

The appeal filed by Deane Earl Ross is attached as **Exhibit 2**. The appeal outlines four claims in support of the appeal. The four stated appeal grounds are summarized below.

a. **Environmentally Sensitive Habitat Areas (ESHA)**. The appellant contends that the project is not consistent with the Land Use Plan Policy 3.23 in that the project does not provide for a 100-foot buffer from ESHA.

b. **Subdivisions**. The appellant contends that the project is not consistent with Land Use Plan Policy 5.35 in that new lots would be created that would be smaller in width than the average lot width of existing lots along Broad Beach and of existing beachfront lots in the Single-Family Medium (SF-M) Zone District.

c. **Visual Resources**. The appellant contends that the project is not consistent with Land Use Plan Policy 6.5 in that the project does not provide for one contiguous view corridor of at least 40 feet in width, and that it is feasible for a two-lot subdivision to provide for two 20 foot wide view corridors that are contiguous .

d. **California Environmental Quality Act (CEQA)**. The appellant contends that an Environmental Impact Report (EIR) for the project should have been prepared and certified by the City pursuant to CEQA.

C. ANALYSIS OF SUBSTANTIAL ISSUE

Pursuant to Sections 30603 and 30625 of the Coastal Act, the appropriate standard of review for the subject appeal is whether a substantial issue exists with respect to the grounds raised by the appellant relative to the locally-approved project's conformity to the standards contained in the certified LCP or the public access policies of the Coastal Act. In this case, the appellant does not cite the public access policies of the Coastal Act as a ground for appeal or raised any public access-related issues. However, because the property lies between the first public road and the sea, the Commission must also find that there is no significant question regarding public access pursuant to the Coastal Act, even if this issue is not raised by the appellant (Cal. Code of Regs. Sec. 13115 (b).

The term "substantial issue" is not defined in the Coastal Act. The Commission's regulations indicate simply that the Commission will hear an appeal unless it "finds that the appeal raises no significant question." (Cal. Code Regs., Title 14, Section 13115(b).) In previous decisions on appeals, the Commission has been guided by the following factors:

- The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP and with the public access policies of the Coastal Act;
- The extent and scope of the development as approved or denied by the local government;
- The significance of the coastal resources affected by the decision;
- The precedential value of the local government's decision for future interpretations of its LCP; and
- Whether the appeal raises only local issues, or those of regional or statewide significance.

(*See Hines v. California Coastal Com.* (2010) 186 Cal.App.4th 830, 849.) Pursuant to Coastal Act Section 30603(b)(1), the grounds for an appeal of a local government approval of a CDP shall be limited to an allegation that the appealable development is not consistent with the standards in the certified LCP or the public access policies of the Coastal Act. In this case, three of the appellant's appeal grounds (Nos. 1-3 in Section IV.B above) cite specific standards in the certified LCP that the approved project is alleged to be inconsistent with. However, the appellant's fourth appeal ground (No. 4 in Section IV.B above) regarding CEQA is an issue that is not addressed by the City's LCP and, therefore, is not a valid appeal ground. (*Hines,* 186 Cal.App.4th at 852.) As such, only the appellant's appeal grounds relating to ESHA, subdivisions, and visual resources are analyzed further below. The appeal raises no substantial issue with regard to the grounds on which the appeal has been filed, as discussed below.

1. Environmentally Sensitive Habitat Areas (ESHA)

The appeal filed by Deane Earl Ross contends that the approved project does not provide for a 100-foot buffer from ESHA, inconsistent with Policy 3.23 of the City's Land Use Plan. The appeal also asserts that Policy 3.23 of the Land Use Plan takes precedence over Section 4.6.1(G) of the Implementation Plan regarding ESHA buffers because Land Use Plan Policy 5.6 states that the "protection of ESHA and public access shall take priority over other development standards and where there is any conflict between general development standards and ESHA and/or public access protection, the standards that are most protective of ESHA and public access shall have precedence."

Policy 3.23 of the Malibu Land Use Plan states the following:

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

Policy 3.27 of the Malibu Land Use Plan states:

> *Buffers shall be provided from coastal sage scrub and chaparral ESHA that are of sufficient width to ensure that no required fuel modification (Zones A, B, or C, if required) will extend into the ESHA and that no structures will be within 100 feet of the outer edge of the plants that comprise the habitat.*

However, the more specific provisions with regard to ESHA buffers are found in the Implementation Plan portion of the City's LCP. Specifically, Section 4.6.1 of the Malibu Implementation Plan states, in part, the following with regard to buffers:

> *4.6.1. Buffers*
>
> *New development adjacent to the following habitats shall provide native vegetation buffer areas to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Vegetation removal, vegetation thinning, or planting of non-native or invasive vegetation shall not be permitted within buffers except as provided in Section 4.6.1 (E) or (F) of the Malibu LIP. The following buffer standards shall apply:*
>
> *A. Stream/Riparian*
>
> *New development shall provide a buffer of no less than 100 feet in width from the outer edge of the canopy of riparian vegetation. Where riparian vegetation is not present, the buffer shall be measured from the outer edge of the bank of the subject stream. However, in the Point Dume area, new development shall be designed to avoid encroachment on slopes of 25 percent grade or steeper.*
>
> *B. Wetlands*
>
> *New development shall provide a buffer of no less than 100 feet in width from the upland limit of the wetland.*
>
> *C. Woodland ESHA*
>
> *New development shall provide a buffer of no less than 100 feet in width from the outer edge of the tree canopy for oak or other native woodland.*
>
> *D. Coastal Bluff ESHA*
>
> *New development shall provide a buffer of no less than 100 feet from the bluff edge.*
>
> *E. Coastal Sage Scrub ESHA*
>
> *New development shall provide a buffer of sufficient width to ensure that no required fuel modification area (Zones A, B, and C, if required) will extend into the ESHA and that no structures will be within 100 feet of the outer edge of the plants that comprise the coastal sage scrub plant community.*
>
> *F. Chaparral ESHA*
>
> *New development shall provide a buffer of sufficient width to ensure that no required fuel modification area (Zones A, B, and C, if required) will extend into the ESHA and that no structures will be within 100 feet of the outer edge of the plants that comprise the chaparral plant community.*
>
> *G. Other ESHA*

For other ESHA areas not listed above, the buffer recommended by the Environmental Review Board or City biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the ESHA shall be required.

Section 4.6.1 of the Implementation Plan contains more specific buffer standards for different habitat types, such as riparian, wetland, and chaparral. Although coastal dune ESHA is not specified, Section 4.6.1.G of the Implementation Plan states that for all *other* ESHA areas, the buffer recommended by the Environmental Review Board or City Biologist, in consultation with the California Department of Fish & Game, as necessary to avoid adverse impacts to the ESHA shall be required. Coastal dunes are among the habitat types where the City may, on a case-by-case basis, determine the appropriate buffer.

The extent of coastal dune ESHA and the appropriate buffer that new development must provide from coastal dune ESHA in the case of the subject property on Broad Beach was dealt with and extensively analyzed in the Commission's action on LCP Amendment 1-07. Several independent biological assessments had been conducted, including focused surveys and a geomorphologic evaluation. In its action on LCP Amendment 1-07, the Commission found that although the southern foredune habitat on the property, as generally shown on **Exhibit 7**, meets the Malibu LCP definition of ESHA, it is possible to site future development for four separate parcels without building in ESHA and that a five foot buffer from the designated ESHA areas in this case would be protective of the biological integrity of the on-site dune ESHA. The Commission certified development standards in the City's Implementation Plan that are only applicable to the subject property, including a provision requiring that the rear yard (seaward) setback shall be determined by either a stringline or a five foot minimum buffer between new development and the landwardmost limit of dune ESHA, whichever is more landward, as follows:

3.4.2 Overlay Districts Specific to Future Developments

…

A. Malibu Bay Company Overlay District (30732 Pacific Coast Highway/APN 4469-026-005)

The Residential Property Development and Design Standards contained in Section 3.6 of the Malibu LIP, as well as all other applicable LCP provisions, shall apply, unless specifically modified by standards detailed in this Section (3.4.2.A). In addition, the following special site-specific regulations shall apply to the subject property.

…

5. Rear Setback

The following standard shall replace the rear setback standards for beachfront parcels in Malibu LIP Sections 3.6 (G3) and 3.6 (G4):

Rear Setback

New development, including dwellings, decks, patios, etc. shall provide a rear setback that is the most landward of either: 1) the appropriate structure or deck stringline; or 2) no less than 5 feet landward of the landwardmost limit of dune ESHA, which is shown on Exhibit 17.

…

In its action on the subject CDP, the City found that the site-specific ESHA delineation and ESHA buffer requirement included in the Implementation Plan, as amended by LCP Amendment 1-07, was appropriate and the proposed subdivision would avoid adverse impacts to ESHA. Policy 3.44 of the Land Use Plan requires that land divisions for property which includes area within or adjacent to an ESHA shall only be permitted if each new parcel being created could be developed (including construction of any necessary access road), without building in ESHA or ESHA buffer. In its action on the subject CDP, the City found that the proposed subdivision would not encroach into ESHA or the ESHA buffer that was determined to be necessary by the Commission and the City in LCP Amendment 1-07 to avoid adverse impacts to ESHA. The City's action on the CDP is consistent with the ESHA protection provisions of the LCP pertaining to buffers.

The appeal also contends that the policies of the Land Use Plan regarding ESHA buffers takes precedence over provisions of the Implementation Plan because Land Use Plan Policy 5.6 states that the "protection of ESHA and public access shall take priority over other development standards and where there is any conflict between general development standards and ESHA and/or public access protection, the standards that are most protective of ESHA and public access shall have precedence." However, in this case, there is no conflict between general development standards and ESHA protection standards of the LCP. The Court of Appeal determined in *Deane Earl Ross v. California Coastal Commission,* 199 Cal. App. 4th 900 (2011) that specific coastal dune ESHA buffer provisions of Malibu's Implementation Plan, where applicable, control over the more general ESHA buffer policy contained in the Land Use Plan.

The appellant also asserts that the June 9, 2008 biological opinion memorandum by Commission Staff Ecologist, Dr. Jonna Engel, recommending a 25-foot buffer from ESHA on the subject property should be followed. The Commission considered Dr. Engel's biological opinion in its action on LCP Amendment 1-07 and found that, in this case, a 5-foot minimum buffer between new development and the landwardmost limit of dune ESHA would serve to preserve the biological integrity of the ESHA. The site has undergone varying degrees of disturbance over time, beginning with the construction of Pacific Coast Highway, then use as a boat storage and launching site, and use as a construction staging ground. The site is also bound on either side by residential development. As part of its approval of LCP Amendment 1-07, the Commission required that any CDP approved by the City for subdivision of the subject property must include implementation of a comprehensive Dune Restoration Plan. In addition, the Commission required recordation of an Open Space Conservation Easement between the landwardmost limit of ESHA to the ambulatory seawardmost limit of dune vegetation prior to issuance of a CDP for subdivision of the subject property. Each of these requirements were included as part of the City's approval of the CDP.

The appellant asserts that its consulting biologist, Dr. Duane Vander Pluym of Rincon Consultants Inc., believes that a 5-foot ESHA buffer is insufficient and that the 25-foot buffer that had been recommended by Dr. Engel is more reasonable to protect sensitive resources. Dr. Vander Pluym also believes that the subject property is federally-designated critical habitat for the western snowy plover. However, as discussed above, the Commission considered considerable evidence regarding the width of ESHA buffer that is necessary to adequately protect the sensitive dune habitat at issue. The Commission determined that the five foot buffer is

adequate and that buffer width is the standard of review in the certified Malibu LCP. The Court of Appeal upheld this determination. Additionally, there is no merit to the appellants' biological consultant's claims regarding the western snowy plover. The analysis of ESHA resources on the property had been conducted to a great level of specificity during the Commission's consideration of the related LCP Amendment. No western snowy plovers have been observed in the vicinity of the project site, and in a letter dated February 13, 2007, the U.S. Fish & Wildlife Service concurred that the proposed subdivision would not impact the western snowy plover because they are not known at present to nest at Broad Beach or occur in the area of the proposed project.

The appellant also argues that the City did not consult with the California Department of Fish and Game (CDFG), as specified in Section 4.6.1.G of the Implementation Plan. The City did consult with the CDFG by submitting both of its Mitigated Negative Declarations to the agency for comment and paying a De Minimis Finding fee to offset the cost of consultation on the issue. The Court of Appeal found that this process was adequate for consultation on the buffer issue.

In conclusion, the project, as approved by the City of Malibu, conforms to the ESHA protection policies and standards of the Malibu LCP. There is substantial factual and legal support in the record for the City's action approving the project and finding the development consistent with the LCP. The appeal raises only local issues, not those of regional or statewide significance. The project is relatively small in scale and as conditioned by the City, has avoided and/or mitigated significant adverse impacts to environmentally sensitive habitat areas and other coastal resources. Thus, the precedential value of the local government's decision for future interpretations of its LCP is insignificant.

As such, the Commission finds that the appellant's contentions regarding development adjacent to ESHA raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP.

2. <u>New Development and Subdivisions</u>

The appellant contends that the approved subdivision would result in four parcels with lot widths of 47, 48, 48, and 51 feet, and that these lot widths would be less than the average lot width at Broad Beach and/or the City's SF-M zone district. The appellant asserts that the proposed lot widths conflict with Policy 5.35 of the Land Use Plan.

Policy 5.35 of the Land Use Plan states:

> *The minimum lot size in all land use designations shall not allow land divisions, except mergers and lot line adjustments, where the created parcels would be smaller than the average size of surrounding parcels.*

Policy 5.35 requires that parcels created by subdivision shall be no smaller than the average size of the surrounding parcels. This is another issue that was extensively analyzed in the City's action on the CDP and in the Commission's consideration and approval of LCP Amendment 1-07 to reduce the minimum lot width standard for beachfront parcels in the SF-M zone district.

The approved project consists of subdivision of the subject parcel into four parcels with dimensions and sizes as follows:

Lot 1	*48 ft. wide*	*470 ft. deep*	*0.52 acre lot area*
Lot 2	*48 ft. wide*	*468 ft. deep*	*0.52 acre lot area*
Lot 3	*51 ft. wide*	*465 ft. deep*	*0.51 acre lot area*
Lot 4	*47 ft. wide*	*464 ft. deep*	*0.51 acre lot area*

The approved lots comply with the minimum lot width standard of 45 feet, minimum lot depth standard of 120 feet, and the minimum lot area standard of 1 unit per 0.25-acre ((four lots per acre) within the SF-M zone district. Further, the created parcels are not smaller than the average size of the surrounding parcels. There are 733 SF-M zoned beachfront parcels in the City and the majority of them are between 37 and 56 feet wide. The average lot width among the SF-M-zoned beachfront parcels in the City is 50 feet. At Broad Beach in particular, the majority of lots are between 40 and 50 feet in width. In addition, the adjacent lots along Broad Beach average approximately 0.4 acre in size. The approved lots are consistent with the established beachfront lot dimensions and sizes in the City's SF-M zone and along Broad Beach.

As such, the project, as approved by the City of Malibu, conforms to the new development and subdivision standards of the certified LCP. The Court of Appeal upheld those standards. There is substantial factual and legal support in the record for the City's action approving the project and finding the development consistent with the subdivision policies of the certified LCP. In addition, the appeal raises only local issues, not those of regional or statewide significance. The project is relatively small in scale and has avoided adverse impacts to any significant coastal resources. Thus, the precedential value of the local government's decision for future interpretations of its LCP is insignificant. Therefore, the Commission finds that the appellant's contentions raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP.

3. Visual Resources

The appellant contends that the CDP is inconsistent with Policies 6.5 and 6.18 of the Land Use Plan by not providing for one contiguous view corridor so as to minimize impacts to scenic resources to the maximum extent feasible. The appellant also argues that a two lot subdivision would be more protective of public views because it would allow for two contiguous 20 foot wide view corridors, as opposed to two non-contiguous view corridors that would be provided by the subject four lot subdivision.

Policy 6.5 of the Land Use Plan states:

> *New development shall be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent. If there is no feasible building site location on the proposed project site where development would not be visible, then the development shall be sited and designed to minimize impacts on scenic areas visible from scenic highways or public viewing areas, through measures including, but not limited to, siting development in the least visible portion of the site, breaking up the mass of new structures, designing structures to blend into the natural hillside setting, restricting the building maximum*

size, reducing maximum height standards, clustering development, minimizing grading, incorporating landscape elements, and where appropriate berming.

Policy 6.18 of the Land Use Plan states:

Where the topography of the project site does not permit the siting or design of a structure that is located below road grade, new development shall provide an ocean view corridor on the project site by incorporating the following measures:

- *Buildings shall not occupy more than 80 percent maximum of the lineal frontage of the site.*
- *The remaining 20 percent of lineal frontage shall be maintained as one contiguous view corridor, except on lots with a width of 50 feet or less. Lots with a lineal frontage of 50 feet or less shall provide 20% of the lot width as view corridor; however, the view corridor may be split to provide a contiguous view corridor of not less than 10% of the lot width on each side. For lots greater than 50 feet in width, the view corridor may be split to provide a contiguous view corridor of not less than 10% of the lot width on each side, provided that each foot of lot width greater than 50 feet is added to the view corridor. On irregularly shaped lots, the Planning Manager shall determine which side yards shall constitute the view corridor in order to maximize public views. Sites shall not be designed so as to provide for parking within these designated view corridors.*
- *No portion of any structure shall extend into the view corridor above the elevation of the adjacent street.*
- *Any fencing across the view corridor shall be visually permeable and any landscaping in this area shall include only low-growing species that will not obscure or block bluewater views.*
- *In the case of development that is proposed to include two or more parcels, a structure may occupy up to 100 percent of the lineal frontage of any parcel(s) provided that the development does not occupy more than 80 percent maximum of the total lineal frontage of the overall project site and that the remaining 20 percent is maintained as one contiguous view corridor.*

The Malibu LCP contains provisions for protection of views to the ocean that apply to beachfront development along several public roads. The LCP policies and LIP standards require that new development provide for ocean views over the top of structures, where the topography of the site descends from the road. Where the topography of the site does not allow for views to be maintained over the top of structures, such as the subject property, the LCP requires that new development provide a view corridor from the road to the ocean. Pacific Coast Highway is a designated scenic highway in the Malibu LCP. The intent of the LCP's view corridor provision is to break up the "solid wall" of development along the beachfront in portions of Malibu which prevents any view of the ocean as seen from public roads and highways. The LCP view corridor provision requires that buildings occupy a maximum of 80 percent of a site's lineal frontage, while the remaining 20 percent of the lineal frontage is maintained as a contiguous view corridor, except on lots 50 feet or less in width, in which case the view corridor may be split into two 10 percent view corridors on either side of the residence.

Any beachfront subdivision would essentially increase the number of smaller-sized lots and each would be associated with a smaller view corridor. The scenic impact of a future subdivision of the subject property was extensively analyzed in the Commission's action on LCP Amendment 1-07. In its action on LCP Amendment 1-07, the Commission required a specific view corridor configuration for any future subdivision of the subject property that would retain a contiguous 20 percent (10 foot wide) view corridor on each of the four newly created parcels and situate each view corridor such that it is contiguous with one other view corridor. The result would be two 20 foot wide view corridors across the entire 200 foot wide property, instead of several 10 foot wide corridors. The Commission certified the following view corridor development standard language in the City's Implementation Plan that is only applicable to the subject property:

> ***3.4.2 Overlay Districts Specific to Future Developments***
>
> …
>
> ***A. Malibu Bay Company Overlay District (30732 Pacific Coast Highway/APN 4469-026-005)***
>
> *The Residential Property Development and Design Standards contained in Section 3.6 of the Malibu LIP, as well as all other applicable LCP provisions, shall apply, unless specifically modified by standards detailed in this Section (3.4.2.A). In addition, the following special site-specific regulations shall apply to the subject property.*
>
> *1. Public View Corridors*
>
> *As a condition of approval of, and prior to issuance of a coastal development permit for, subdivision of the subject property, the following restrictions shall be imposed, and the applicant shall be required to demonstrate that the land owner has executed and recorded a deed restriction that reflects the following restrictions:*
>
> *(a) No less than 20% of the lineal frontage of each created parcel of the subdivision shall be maintained as one contiguous public view corridor in the location shown on Exhibit 16. The view corridor may not be split or reconfigured.*
> *(b) No portion of any structure shall extend into the view corridor above the elevation of Pacific Coast Highway.*
> *(c) Any fencing across the view corridor shall be visually permeable, and any landscaping within the view corridor shall include only low-growing species that will not block or obscure bluewater views.*
> *(d) Vegetation between Pacific Coast Highway and the on-site access road that is within the public view corridors shall include only low-growing species that will not block or obscure bluewater views.*
>
> *2. View Corridor*
>
> *As a condition of approval of, and prior to issuance of a coastal development permit for, subdivision of the subject property, the applicant shall be required to remove all existing obstructions between Pacific Coast Highway and the on-site access road that are within the required public view corridors, including vegetation that is over two feet in height above the elevation of Pacific Coast Highway and any fencing or gates that are not visually permeable.*
> …

In its action on LCP Amendment 1-07, the Commission found that the view corridor configuration on the subject property, as described above, protects public views and is consistent with the visual resource policies of the Coastal Act and Malibu Land Use Plan. The Superior Court upheld this view corridor provision and the appellant did not appeal that aspect of the Superior Court's decision. The City of Malibu imposed the above view corridor restrictions as conditions of approval in its action on the subject CDP. The appellant's claim that an alternative land division and view corridor would be more protective of public views has no merit because the City's action on the CDP is consistent with the visual resource policies and provisions of the LCP. There is substantial factual and legal support in the record for the City's action approving the project and finding the development consistent with the visual resource policies of the certified LCP. In addition, the appeal raises only local issues, not those of regional or statewide significance. The project is relatively small in scale and has avoided adverse impacts to any significant coastal resources. Thus, the precedential value of the local government's decision for future interpretations of its LCP is insignificant. In conclusion, the project, as approved by the City of Malibu, conforms to the visual resource policies and standards of the Malibu LCP. As such, the Commission finds that the appellant's contentions raise no substantial issue with regard to consistency with the policies and provisions of the certified LCP.

4. Public Access Policies of the Coastal Act

When an appeal alleges that proposed development is inconsistent with the public access policies of the Coastal Act, the Commission must also determine whether those allegations raise a substantial issue. (Title 14, Cal. Code Regs., § 13115(b).) Here, the appeal does not allege that the proposed development is inconsistent with the Coastal Act's public access policies. It therefore does not raise a substantial issue in this regard.

The public access policies of the Coastal Act (Sections 30210, 30211, and 30212), which are incorporated into the Malibu LCP as policies, mandate that maximum public access and recreational opportunities be provided, including use of dry sand and rocky coastal beaches, and that development not interfere with the public's right to access the coast. Likewise, the Coastal Act requires that adequate public access to the sea be provided except where it would be inconsistent with public safety, military security needs, protection of fragile coastal resources and agriculture, or where adequate access exists nearby.

The approved project is located on Broad Beach, between Pacific Coast Highway and the ocean. Members of the public who access the beach via the public vertical accessways from Broad Beach Road often walk along the shoreline, including the southern beachfront portion of the subject site, up and down the coast between Lechuza Point and the public recreation areas such as Zuma Beach County Park and Point Dume. Although no physical development was proposed or approved as part of the CDP, the property owner proposed, as part of the project, to offer-to-dedicate lateral public access as part of the project to minimize any adverse effects to public access along the beach. In order to effectuate the applicant's offer, the City imposed a condition as part of the approved CDP requiring recordation of a lateral public access easement across the entirety of the subject property. As such, the project, as approved by the City of Malibu, conforms to the public access policies and standards of the Coastal Act and Malibu LCP.

D. CONCLUSION

For the reasons discussed above, no substantial issue is raised with respect to the consistency of the approved development with the policies of the City's certified LCP regarding ESHA, subdivisions, visual resources, or public access. Therefore, the Commission finds that the appeal does not raise a substantial issue as to the City's application of the policies of the LCP in approving the proposed development.

APPENDIX A

SUBSTANTIVE FILE DOCUMENTS

City of Malibu certified LCP; Administrative Record for City of Malibu LCP Amendment 1-07; City of Malibu Resolution No. 09-68 approving Revised Mitigated Negative Declaration 06-004, CDP No. 05-136, and Vesting Tentative Parcel Map 99-002; Administrative Record for CDP No. 05-136.

RESOLUTION NO. 09-68

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MALIBU ADOPTING REVISED MITIGATED NEGATIVE DECLARATION NO. 06-004 AND APPROVING COASTAL DEVELOPMENT PERMIT NO. 05-136 FOR VESTING TENTATIVE PARCEL MAP NO. 99-002 (COUNTY REFERENCE: TPM NO. 24070) TO SUBDIVIDE THE SUBJECT PROPERTY AT 30732 PACIFIC COAST HIGHWAY INTO FOUR 47 TO 51 FOOT LOTS (MALIBU BAY COMPANY)

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

Section 1. Recitals.

A. On March 15, 1999, the Malibu Bay Company (MBC) submitted an application for a zoning text amendment (ZTA No. 98-014) and tentative parcel map (TPM No. 99-002) to the Planning Division for processing. The application was eventually combined with several other MBC applications as part of the MBC Development Agreement. The TPM was reviewed by the Environmental Review Board (ERB) in conjunction with the environmental review for the development agreement and its associated environmental impact report. The MBC Development Agreement ultimately became the subject of a voter referendum which failed in the November 4, 2003 election.

B. On July 29, 2005, MBC submitted an application for Coastal Development Permit (CDP) No. 05-136 and Local Coastal Program Amendment (LCPA) No. 05-002 to subdivide a 2.08 acre parcel into four lots located at 30732 Pacific Coast Highway.

C. On April 20, 2006, the application was deemed complete for processing.

D. On May 24, 2006, the application was reviewed by the Subdivision Review Committee (SRC) as a subset of the ERB. The SRC supported the proposed Tentative Parcel Map as being consistent with existing lot size in the Trancas/Broad Beach neighborhood.

E. On June 8, 2006, a Notice of Intent to Adopt Mitigated Negative Declaration (MND) No. 06-004 was published in a newspaper of general circulation within the City of Malibu. In addition, on June 30, 2006, Initial Study No. 06-002 and Mitigated Negative Declaration No. 06-004 were routed to all of the applicable agencies and interested parties.

F. On June 27, 2006, the application was reviewed by the Zoning Ordinance Revisions and Code Enforcement Subcommittee (ZORACES). In particular, discussions centered on the proposed zoning text amendment (ZTA) amending the Malibu Municipal Code (M.M.C.) and proposed Local Coastal Program Amendment (LCPA). ZORACES recommended minor changes to the proposed language which have been incorporated into the proposed amendments.

G. On September 5, 2006, the Planning Commission held a duly noticed public hearing and adopted Planning Commission Resolution No. 06-71, adopting MND No. 06-004, IS No. 06-002, conditionally approving CDP No. 05-136 and Tentative Parcel Map (TPM) No. 99-002 (County

Exhibit 1
Appeal A-4-MAL-10-008
City of Malibu Resolution No. 09-68 Approving CDP 05-136

Reference: TPM No. 24070), to subdivide the subject property into four 47 to 51 foot parcels, and recommending approval of Zoning Text Amendment (ZTA) No. 05-001, General Plan Amendment (GPA) No. 05-001 and LCPA No. 05-002 for the applicant requested creation of a new land use designation zoning district of Single family Beachfront (SFBF).

H. On September 15, 2006, Ellia Thompson, on behalf of the Ross Family Trust and other nearby property owners, filed a timely appeal of the Planning Commission's adoption of MND No. 06-004 and IS No. 06-002 and the conditional approval of CDP No. 05-136 and TPM No. 99-002.

I. On November 8, 2006, a Notice of Intent to Adopt Revised MND No. 06-004 was published in a newspaper of general circulation within the City of Malibu. In addition, on November 8, 2006, IS No. 06-002 and MND No. 06-004 were routed to all applicable agencies and interested parties.

J. On December 11, 2006, the item was continued at the applicant's request in order to allow time to respond to comments received on the Revised MND.

K. On January 22, 2007, the City Council held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record. The City Council adopted Resolution No. 07-07, denying Appeal No. 06-013, approving MND No. 06-004, conditionally approving CDP No. 05-136 and TPM No. 99-002 and approving LCPA No. 05-002. The City Council directed staff to submit the LCPA to the California Coastal Commission (CCC) for certification and introduced on first reading Ordinance No. 304 approving an amendment to the Local Coastal Program Local Implementation Plan, which was subsequently adopted on February 12, 2007.

L. On March 6, 2007, the LCPA was submitted to the CCC. On March 20, 2007, the submittal, identified by the CCC as LCPA 1-07, was reviewed by CCC staff and determined to be complete.

M. At the June 14, 2007 CCC hearing, the deadline to act on LCPA 1-07 was extended for a period of one year.

N. On June 11, 2008, the CCC conditionally certified LCPA No. 05-002 subject to certain terms and modifications as set forth in the Resolution of Certification adopted by the CCC on June 11, 2008.

O. On August 19, 2008, the City received said Resolution of Certification.

P. On October 2, 2008, a Notice of City Council Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property, and to responsible agencies, and interested parties.

Q. On October 27, 2008, the City Council held a duly noticed public hearing and adopted Resolution No. 08-59 acknowledging receipt of the CCC resolution of certification with suggested modifications to LCPA No. 05-002. The City Council also introduced on first reading Ordinance No. 331 adopting revised LCPA No. 05-002 amending the single family medium zoning district to

include a 45 foot minimum lot standard for beachfront lots and incorporating the CCC suggested modifications for a Malibu Bay Company Overlay District. On November 10, 2008, the Council adopted Ordinance No. 331 on second reading.

R. On January 7, 2009, the Executive Director of the CCC determined that the action taken by the City acknowledging receipt and acceptance of, and agreement with the Commission's certification of the LCP amendment with suggested modifications was legally adequate and reported the determination to the CCC. The CCC concurred with the determination and with this final action, the LCP amendment was certified.

S. On April 9, 2009, a Notice of Intent to Adopt Revised MND No. 06-004 was published in a newspaper of general circulation and routed to all of the applicable agencies and interested parties.

T. Between April 9, 2009 and May 11, 2009, the Revised MND was made available to the public for the required 30 day circulation period. Three comments were received on the project and were addressed in Attachment 7 of the September 15, 2009 Planning Commission Agenda Report.

U. On August 20, 2009, a Notice of Planning Commission Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property, and to responsible agencies, and interested parties.

V. On September 15, 2009, the Planning Commission held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record. The Planning Commission recommended that the City Council approve conforming amendments to the certified LCPA No. 05-002, ZTA Nos. 05-004 and 09-002, and Zoning Map Amendment No. 05-001, adding a beachfront lot standard and the Malibu Bay Company Overlay District and recommending adoption of Revised MND No. 06-004 and approval of CDP No. 05-013 for Vesting Tentative Parcel Map No. 99-002 to subdivide the property addressed as 30732 PCH into four 47 to 51 foot lots.

W. On November 23, 2009, at the request of City staff, the City Council continued the public hearing to the Regular City Council meeting of December 14, 2009.

X. On December 14, 2009, the City Council held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record.

Section 2. Environmental Review and Revised Mitigated Negative Declaration.

In accordance with the California Environmental Quality Act (CEQA), Section 21080.9, approval by a local agency as necessary for the preparation and adoption of a Local Coastal Program is statutorily exempt from the requirements of CEQA. Nevertheless, and without waiving the applicable statutory exemption, staff prepared an MND in connection with the project which includes an analysis of LCPA 05-002. On January 22, 2007, the City Council adopted Resolution No. 07-07, adopting

ex. 1

Revised Mitigated Negative Declaration (MND) No. 06-004.

In order to inform the public of the changes since the 2007 approval, the City elected to revise and recirculate the MND for the project (MND No. 06-004) to supplement the environmental review already undertaken and completed by the CCC in its review of the LCPA (including the amendments to the LIP). Revised MND No. 06-004 builds on prior CEQA work by the CCC prepared in connection with the drafting and certification of the Malibu LCP. The CCC fulfills its CEQA responsibilities through its certified regulatory program, and the LCP findings are the functional equivalent of an EIR for the LCP. As such, the City is entitled to rely on the CEQA compliance of the CCC pursuant to Cal. Pub. Res. Code Section 21166. As such, the City is authorized to act as a responsible agency for CEQA purposes and is required to use the EIR substitute analysis already prepared by the CCC through its regulatory program (14 Cal. Code Regs. § 15251-15253).

The CCC's review (which culminated in the addition of new Suggested Modifications to further mitigate and reduce potential environmental impacts associated with this project) already encompassed an evaluation of the potential environmental effects of the scope of development authorized in LCPA No. 05-002 and Suggested Modifications (including the reduction in minimum lot width from 80 feet to 45 feet, as well as the imposition of the new Malibu Bay Company Overlay District). Accordingly, an effective EIR substitute that fully analyzed potential impacts from that scope of development has already been prepared and approved by the CCC as part of its process in implementing its certified regulatory program.

Revised MND No. 06-004 is based on and incorporates, both explicitly and by reference, the CCC's CEQA compliance through its review process pursuant to its certified regulatory program, the conclusions and findings reached by the CCC as well as the entire record on which the CCC's decision was based. The Revised MND therefore, focuses on those areas which present new or different information than the information considered by the City Council in 2007. The Revised MND also proposes revised mitigation measures to conform to the Suggested Modifications of the CCC.

Section 3. Coastal Development Permit Approval and Findings.

Based on substantial evidence contained within the record and pursuant to LCP Local Implementation Plan (LIP) Sections 13.7(B) and 13.9, the City Council adopts the findings of fact below, and approves Coastal Development Permit No. 05-136 for vesting Tentative Parcel Map No. 99-002 (County Reference: TPM No. 24070) for the subdivision of the subject property.

The proposed project has been reviewed by the City Public Works Department, City Geologist, City Environmental Health Administrator, City Biologist and the Los Angeles County Fire Department (LACFD). The proposed project is consistent with the LCP's zoning, grading and water quality requirements. The project has been determined to be consistent with all applicable LCP codes, standards, goals and policies. Additionally, the TPM has been reviewed for conformance with M.M.C. Title 16 (Subdivisions). The required findings are made as follows.

A. General Coastal Development Permit (LIP Chapter 13)

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

The project conforms to the certified LCP and meets the required lot size standards of the SFM zoning district and land use designation.

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

The project is located between the first public road, Pacific Coast Highway, and the sea. However, the proposed TPM and potential residential development is not anticipated to interfere with the public's right to access the coast as the site offers no direct or indirect beach access. There is existing vertical public access approximately 300-feet to the east at the Zuma Beach County Park. In addition, the applicant has offered to provide lateral access easements across each parcel; therefore, the project conforms to the public access and recreation policies.

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

Pursuant to the authority and criteria contained in CEQA, an initial study to determine whether the proposed project may have a significant effect on the environment was prepared for the project. The initial study determined that the proposed project will not have a potentially significant effect on the environment, and MND No. 06-004 was prepared and certified by the City Council. In order to inform the public of the changes since the 2007 approval, the City elected to revise and re-circulate MND No. 06-004 to supplement the environmental review already undertaken and completed by the CCC in its review of the LCPA (including the amendments to the LIP) as discussed in Section 2 Environmental Review of this resolution. Therefore, the proposed project is determined to be consistent with CEQA and the policies of the Coastal Act.

There are three alternatives considered in the analysis of the least environmentally damaging alternative.

1. No Project – The no project alternative would avoid any change in the project site, and hence, any change in visual resources. However, the project site is residentially zoned and could potentially be developed with LCP beachfront development standards (no limit on total development square footage) with a 38,750 square foot single family residence, (a 200-foot lot, minus a 40-foot view corridor, minus a 5-foot side yard setback, with a 125-feet length to the rear yard setback, amounts to 155 square feet of frontage by 125-feet of length, which equals 19,375 square feet for the first floor and 19,375 square feet for the second floor, for a total of 38,750 square feet). Therefore, the no project alternative (no parcel map) could potentially result in the construction of a significantly larger structure than four structures permitted under the proposed new lot width development standard or Malibu Bay Company

ex. 1

Overlay District development standards. This is not the least environmentally damaging alternative.

2. Larger Project – The applicant could have requested to subdivide the subject 2.0 acre-parcel into eight lots, which would be consistent with the General Plan land use designation of two to four lots per acre. The lot width of each of the eight parcels would be 25-feet in width. While this is similar in size to the parcel immediately west, which is 28-feet in width, it would not be consistent with the majority of single family beachfront development. This is not the least damaging alternative.

3. Proposed Project - The proposed project consists of a TPM subdividing one legal parcel into four legal parcels. The subject parcel is addressed as 30732 Pacific Coast Highway and is zoned SFM. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels with identified building sites. The identified building sites do not encroach on or into ESHA or ESHA buffer area. The four parcels are consistent with the General Plan land use designation which allows the creation of up to four lots per acre. This application is for two lots per acre. The lot widths average 48.5 feet and are consistent citywide with established beachfront lot sizes in the SFM zoning district and the LCP certified SFM beachfront lot width standard.

   The proposed TPM is consistent with the SFM zoning density and General Plan land use density. The project will not result in potentially significant impacts on the physical environment. Therefore, the proposed project is the least environmentally damaging alternative.

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

The project was reviewed by the Environmental Review Board (ERB) and Subdivision Review Committee (SRC), a subset of the ERB. The ERB originally reviewed the TPM as a five-lot subdivision request as part of the MBC Development Agreement application. The ERB and SRC reviewed the project a second time as part of the current proposal of a four-lot subdivision and supported the proposed TPM as being consistent with existing lot size in the Trancas / Broad Beach neighborhood.

B. Environmentally Sensitive Habitat Area (LIP Chapter 4)

According to LCP Environmentally Sensitive Habitat (ESHA) Overlay Map No. 1, the project site for the proposed TPM is not located in an ESHA. Although not depicted on the LCP ESHA Overlay Map, the project site contains coastal dunes, which is considered ESHA. In addition, the LIP does not have established setbacks from coastal dune ESHA.

Pursuant to LIP 4.3.A, any area not designated on the ESHA Overlay map that meets the "environmentally sensitive area" definition (LIP Chapter 2) is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The City shall determine the physical extent of habitat meeting the definition of "environmentally sensitive area" on the project site, based on the applicant's site-specific biological study, as well as available independent evidence. The extent of ESHA onsite has been extensively studied by the City Biologist, CCC's Biologist, California Department of Fish and Game, independent biologists and coastal geomorphologists. This is discussed in depth in the Biological Resources Section (pages 22 through 29) of Revised Mitigated Negative Declaration No. 06-004.

Based on the substantial biological studies completed for the site, it was determined by the CCC that a rear yard / front dune ESHA buffer of at least five feet would serve as adequate space to construct and maintain a residence without encroaching into the ESHA and restoration area. Therefore, a five foot buffer from the designated ESHA areas is required as the rear yard setback in the Malibu Bay Company Overlay District development standards.

The subject TPM and potential development, subject to the Malibu Bay Company Overlay District, will result in less than significant impacts to sensitive resources, significant loss of vegetation or wildlife, or encroachments into ESHA. Nevertheless, pursuant to LIP Section 4.7.6, the supplemental ESHA findings are made as follows:

Finding B1. Application of the ESHA overlay ordinance would not allow construction of a residence on an undeveloped parcel.

The proposed TPM will create four undeveloped parcels all of which have identifiable building sites which do not encroach into ESHA or ESHA buffer.

Finding B2. The project is consistent with all provisions of the certified LCP with the exception of the ESHA overlay ordinance and it complies with the provisions of Section 4.7 of the Malibu LIP.

As stated in Section A. General Coastal Development Permit, Finding A1, the proposed project conforms to the certified LCP. The proposed TPM and identified building sites are in compliance with ESHA development standards and the Malibu Bay Company Overlay. In addition, the project includes a dune restoration plan for the site which will enhance the existing coastal dune habitat.

C. Native Tree Protection (LIP Chapter 5)

No native trees are proposed for removal as part of this application. Therefore, the findings for LIP Chapter 5 do not apply.

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

The Scenic, Visual and Hillside Resource Protection Chapter governs those Coastal Development Permit applications concerning any parcel of land that is located along, within, provides views to or is visible from any scenic area, scenic road, or public viewing area. This project is visible from a scenic

road (Pacific Coast Highway); therefore, the Scenic, Visual and Hillside Resource Protection applies and the five findings set forth in LIP Section 6.4 are hereby made as follows:

Finding D1. The project, as proposed, will have no significant adverse scenic or visual impacts due to project design, location on the site or other reasons.

The proposed TPM will create four parcels on Pacific Coast Highway which is a designated scenic highway. These parcels would each be developed with a single family residence at a future date. The LIP policies require that new development not be visible from scenic roads or public viewing areas. Where this is not feasible, new development must minimize impacts through siting and by incorporating design measures to limit the appearance of bulk, ensuring visual compatibility with the character of surrounding areas, and by using colors and materials that are similar and blend in with the natural materials on the site. Walls and landscaping must not block public viewing areas.

Development is required to preserve bluewater ocean views by limiting the overall height and siting of structures where feasible to maintain ocean views over the structure. Where it is not feasible to maintain views over the structure through siting and design alternatives, view corridors must be provided in order to maintain an ocean view through the project site. The existing lot is 200 feet in width. The proposed project includes division of the lot to four 47 to 51 foot wide lots. The lot is legally developable whether it is divided or not.

The aesthetics analysis of the Environmental Impact Report (EIR) by Envicom Corporation, entitled, "Malibu Bay Company Development Agreement Project Final Impact Report" dated July 2003 page 5.1-22, describes the site as follows:

> "The Broad Beach site consists of 2.0-acre, 200 foot wide beachfront site located along Pacific Coast Highway opposite the Trancas Commercial site immediately east of the intersection with Trancas Canyon Road. The site abuts several other lots with single family residences to the east and a single family residence is under construction on the adjoining lot to the west. The presence of the 200-foot frontage of the subject property along Pacific Coast Highway is noticeable primarily as a gap in the row of 2-story beachfront homes behind a roadside view-blocking fence constructed along Broad Beach. Views of the property vary according to direction and speed of travel on Pacific Coast Highway. An existing 6.0 foot high shade-covered fence and a border of 8.0 to 10.0 foot high mature landscaping shrubs and small trees combine to block views of the coastal site from Pacific Coast Highway. The fence and landscaping is continuous along the entire frontage of the site except for an entry drive and shaded gate at the western side of the property frontage. Views of the site from the westbound lanes of Pacific Coast Highway the beachfront site is most noticeable as a brief gap in the row of primarily 2-story beachfront homes. Views of the shoreline and sandy beach are scarcely discernable through the fence and landscaping. As eastbound traffic approaches the driveway gate, the undeveloped beachfront lot constitutes the visual break between residences that line the beach. The gap provides a viewing angle across the site that may permit a glimpse of ocean from passing vehicles. The duration of any potential view may be short depending on the rate of traffic speed through the

nearby intersection."

Further, the visual resource analysis in the EIR (page 5.1-45) states the following:

> "The subject beach lot constitutes a brief visual gap in the rooflines of existing residences lining the ocean side of the Pacific Coast Highway. The immediate roadside frontage of the residential strip is characterized by shaded fencing and landscaping that all but eliminates ocean or beach views from Pacific Coast Highway. The elevation along the centerline of Pacific Coast Highway in front of the beach lot is 16.5 feet and the pads for the proposed residences would be graded at 13.5 feet. The slightly higher elevation of Pacific Coast Highway is not enough to allow significant ocean, shoreline, or beach views across through the roadside bordering fence and landscaping buffer. At the 50 mph speed limit posted for this segment of Pacific Coast Highway motorists would pass by the beach lots in approximately 2.7 seconds.
>
> The addition of five single family residences [*previous proposal*] on adjacent beachfront lots would result in a continuation of beach front residential land uses and would not significantly impact visual resources in the project vicinity."

The proposed TPM creating four parcels will still be required to provide the required view corridor. Rather than providing one view corridor of 40-feet in length on the 200-foot long lot, there will now be several opportunities for visual relief as the view corridors on each parcel would still be required to be 20 percent of the lineal frontage an maintain side yard setbacks as required by the Malibu Bay Company Overlay District, public view development standard. The visual analysis found in Attachment 9 of the January 22, 2007 City Council Agenda Report, as well as Exhibit A to Ordinance No. 344 shows the proposed view corridors.

The proposed project may have an impact on the existing visual character of the site because eventually construction of four single family residences will occur on the newly created vacant lots and be visible from Pacific Coast Highway. However, there are properties in the vicinity that are currently improved with single family residences similar in size and bulk to what could be proposed on the newly created lots. The development would not be inconsistent with the adjacent properties and would have a less than significant impact on visual resources.

Land Use Objective 2.3, Development of Appropriate Scale and Context, from the City of Malibu General Plan states the following policies:

- Land Use Policy 2.3.2: The City shall discourage "mansionization" by establishing limits on height, bulk, and square footage for all new and remodel single family residences; and

- Land Use Policy 2.3.1: The City shall protect and preserve the unique character of Malibu's many distinct neighborhoods.

The construction of four smaller residences, in lieu of one large building, would be more consistent with the established scale and context of the neighborhood.

In addition, LIP policies require that the design of land divisions ensure that the building sites are clustered, that the length of the driveways are minimized, that shared driveways are provided, that grading is minimized, and that all graded slopes are revegetated. Any proposed residences would be required to be clustered to minimize visual impact and public view corridors would be required for each lot. Vehicular access would be taken via a shared driveway similar to other properties in the area that share a driveway accessing from Broad Beach Road in lieu of Pacific Coast Highway; thus, eliminating the need to have individual driveways accessing onto Pacific Coast Highway. In addition, a dune restoration plan is proposed to restore the existing dune area outside of the development envelopes in order to enhance the natural character of the site.

Furthermore, in accordance with LIP Section 6.5, which is included as a standard condition of approval, any proposed residences, driveways, and associated development would be limited to colors compatible with the surrounding environment (earth tones). White, light shades and bright tones are prohibited. Reflective, glossy, polished and/or roll-formed type metal siding except for solar energy panels or cells would be prohibited. Use of non-glare glass for windows shall be required. The exterior siding of the residences would be limited to brick, wood, stucco, metal, concrete or other similar materials. Lighting for walkways would be limited to fixtures that do not exceed two feet in height that are directed downward, and use bulbs that do not exceed 60 watts or the equivalent. Security lighting controlled by motion detectors may be attached to the residences provided that the lighting is directed downward and is limited to 60 watts or the equivalent. Driveway lighting shall be limited to the minimum lighting necessary for vehicular use. The lighting would be limited to 60 watts or the equivalent. Lights at entrances in accordance with building codes would be permitted provided that such lighting does not exceed 60 watts or the equivalent. Site perimeter lighting would be prohibited. Outdoor decorative lighting for aesthetic purposes is prohibited. Night lighting for sports courts or other private recreational facilities is also prohibited.

All development projects in the City of Malibu must conform to the City's standard conditions of approval and the LCP provisions detailed herein. Therefore, the project as proposed (including a lighting deed restriction at the time of permit approvals for the single family residences), will result in a less than significant impact in terms of aesthetics.

Finding D2. The project, as conditioned, will not have significant adverse scenic or visual impacts due to required project modifications, landscaping or other conditions.

As stated previously in Finding D1, any subsequent development applications will require the submittal of a coastal development permit. The applications if approved will be subject to conditions which would minimize any potential visual impacts.

Finding D3. The project, as proposed or as conditioned, is the least environmentally damaging alternative.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned, is the least environmentally damaging alternative.

Finding D4. There are no feasible alternatives to development that would avoid or substantially lessen any significant adverse impacts on scenic and visual resources.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned will result in no significant impacts on scenic and visual resources.

Finding D5. Development in a specific location on the site may have adverse scenic and visual impacts but will eliminate, minimize or otherwise contribute to conformance to sensitive resource protection policies contained in the certified LCP.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned will have no significant scenic and visual impacts.

E. Transfer Development Credits (LIP Chapter 7)

LIP Chapter 7 applies to land division and/or multi-family residential development in the Multiple Family (MF) or Multi-Family Beachfront (MFBF) zoning districts. The subject application is for a land division; therefore, the Transfer of Development Credit (TDC) requirement must be met. The intent of this Chapter is to ensure that density increased through new land divisions and new multi-family unit development in the City, excluding affordable housing units, will not be approved unless Transfer of Development Credits are purchased to retire development rights on existing donor lots in the Santa Monica Mountains Area. A lot from which development rights have been transferred is "retired", and loses its building potential through recordation of a permanent open space easement. TDC Credit may be obtained through purchase of development rights on donor sites throughout the Santa Monica Mountains Area coastal zone, as defined in the LIP, from private property owners. The responsibility for initiation of a transfer of a development credit is placed on the applicant and the project will be conditioned that the TDC take place prior to final map recordation.

The proposed project is subject to the TDC requirements of Chapter 7 and the three findings set forth in LIP Section 7.9 are hereby made as follows:

Finding E1. The requirements for Transfer of Development Credits is necessary to avoid cumulative impacts and find the project consistent with the policies of the certified Malibu LCP.

As stated previously, the TDC requirement is necessary as the proposed subdivision creates three additional legal parcels and pursuant to LIP Section 7.8.1(a), the applicant shall be required to retire sufficient donor lots to provide one (1) TDC credit for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.

Finding E2. The new residential building sites and/or units made possible by the purchase of TDC can be developed consistent with the policies of the certified Malibu LCP without the need for a variance or other modifications to LCP standards.

The proposed TPM has been conditioned and deed restrictions have been recorded which prohibit further subdivision of the subject parcels, modifications to or variance from the City of Malibu

Zoning and Development Standards in effect at the time of final map recordation.

Finding E3. Open Space easements executed will assure that lot(s) to be retired will remain 7in permanent open space and that no development will occur on these sites.

The TDC candidate sites selected to be retired shall be reviewed by City staff in conjunction with a Subdivision Review Committee representative. This review shall ensure that the site selected for retirement meets the criteria desired for permanent open space. In addition, the three parcels selected to be retired shall be deed restricted prohibiting development into perpetuity. The TDC requirements must be met prior to final map recordation.

F. Hazards (LIP Chapter 9)

The project was analyzed by staff for the hazards listed in the LIP Section 9.2.A.1-7. Review of the project by staff showed that there were no substantial risks to life and property with the proposed TPM as there is no proposed landform alteration. LIP Section 9.4.N. requires that land divisions and lot line adjustments demonstrate that a safe, legal, all weather access road can be constructed in conformance with applicable policies of the LCP and that all parcels and access roads comply with all applicable fire safety regulations. The County of Los Angeles Fire Department Land Development Unit reviewed and approved the proposed project and existing access way.

G. Shoreline and Bluff Development (LIP Chapter 10)

The project does include development of a parcel located on or along the shoreline, a coastal bluff or bluff top fronting the shoreline as defined by the Malibu Local Coastal Program. Therefore, in accordance with Section 10.2 of the Local Implementation Plan, the requirements of Chapter 10 of the LIP are applicable to the project and the required findings made below.

Finding G1. The project, as proposed, will have no significant adverse impacts on public access, shoreline sand supply or other resources due to project design, location on the site or other reasons.

The project is located between the first public road and the sea. However, the proposed TPM and potential residential development is not anticipated to interfere with the public's right to access the coast as the site offers no direct or indirect beach access. There is existing vertical public access approximately 300 feet to the east at the Zuma Beach County Park. In addition, the applicant has offered to provide lateral access easements across each parcel; therefore, the proposed project will have no significant adverse impacts on public access.

The Wave Uprush Studies by Pacific Engineering Group dated 1996 and May 22, 2003, state:

> "Any proposed residential development should be setback approximately 174 feet from the highest (most landward) mean high tide line and have a finished floor elevation of at least 13.5 feet. Conversely, the maximum wave uprush at the subject site will occur approximately 155 feet seaward of the Pacific Coast Highway right-of-line (125 feet seaward of the 30 foot wide private access road) at an elevation of +8.7

mean sea level-North American Vertical Datum (MSL-NGVD). Since, the 100-year flood zone only affects from Trancas Canyon up to an elevation of about 10 feet, no significant impacts involving flood hazards are expected as a result of the project.

Any future residential development would involve the use of private septic systems (alternative onsite wastewater tertiary treatment) and should be located no further than 140 feet seaward from the Pacific Coast Highway right-of-way line (no more than 100 feet seaward of the private access road setback line). A septic system located within 140 feet from the Pacific Coast Highway right-of-way line will be located a minimum 15 feet landward of the wave uprush limit and would not require a protective bulkhead (Pacific Engineering Group, May 22, 2003)."

Therefore, it is anticipated that shoreline sand supply or other resources will not be impacted by the proposed project.

Finding G2. The project, as conditioned, will not have significant adverse impacts on public access, shoreline sand supply or other resources due to required project modifications or other conditions.

As stated in G. Shoreline and Bluff Development Finding G1, as designed, conditioned, and approved by the City Geologist and City Coastal Engineer, the project will not have any significant adverse impacts on public access or shoreline sand supply or other resources.

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

As discussed previously, the project will not result in potentially significant impacts because: 1) feasible mitigation measures and / or alternatives have been incorporated to substantially lessen any potentially significant adverse effects of the development on the environment; or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment. The project is the least environmentally damaging alternative.

Finding G4. There are not alternatives to the proposed development that would avoid or substantially lessen impacts on public access, shoreline sand supply or other resources.

As stated in G. Shoreline and Bluff Development Finding G1, as designed, conditioned, and approved by the City Geologist and City Coastal Engineer, the project will not have any significant adverse impacts on public access or shoreline sand supply or other resources.

Finding G5. In addition, if the development includes a shoreline protective device, that it is designed or conditioned to be sited as far landward as feasible, to eliminate or mitigate to the maximum extent feasible extent adverse impacts on local shoreline sand supply and public access, there are no alternatives that would avoid or lessen impacts on shoreline sand supply, public access or coastal resources and is the least environmentally damaging alternative.

As stated in G. Shoreline and Bluff Development Finding G1 above, the proposed TPM and potential residential development will not require a shoreline protective device and is the least environmentally damaging alternative.

However, as a condition of approval, new development of a vacant beachfront or bluff-top lot, or where demolition and rebuilding is proposed, where geologic or engineering evaluations conclude that the development can be sited and designed so as to not require a shoreline protection structure as part of the proposed development or at anytime during the life of development, the property owner shall be required to record a deed restriction against the property that ensures that no shoreline protection structure shall be proposed or constructed to protect the development approved and which expressly waives any future right to construct such devices that may exist pursuant to Public Resources Code Section 30232.

H. Public Access (LIP Chapter 12)

The subject site is located between the first public road and the sea, on the ocean-side of Pacific Coast Highway at Trancas / Broad Beach. The project involves subdivision into four parcels with future development potential of four single family residences. No onsite vertical or lateral access is currently provided on the subject parcel.

The project does not meet the definition of exceptions to public access requirements identified in LIP Section 12.5(A). However, LIP Section 12.5(B) states that public access is not required when adequate access exists nearby and the findings addressing LIP Sections 12.7.1 and 12.7.3 can be made. The following findings satisfy this requirement. Analyses required in LIP Section 12.7.2 are provided herein. Bluff top and recreational accesses are not applicable. No issue of public prescriptive rights has been raised.

Trail Access
The project site does not include, or have any LCP mapped access ways to existing or planned public trail areas; therefore, no condition for trail access is required by the Local Coastal Program. However, an Offer to Dedicate (OTD) lateral access across each parcel has been made which adds to the planned California Coastal Trail along the coastline.

Lateral Access
A lateral public access easement provides public access and use along or parallel to the sea or shoreline. The applicant has agreed to provide an offer to dedicate lateral access easements along each parcel subject to project approval. Such OTD shall include a site map that shows all easements, deed restrictions, or OTD and/or other dedications to public access and open space and provide documentation for said easement or dedication.

Vertical Access.
As indicated above, the project is located along the shoreline; however, adequate public access is available nearby at Zuma County Beach Park approximately 300-feet to the east. Consistent with LIP Section 12.5(B), due to the ability of the public, through other reasonable means to reach nearby coastal resources, an exception for public lateral access and vertical access has been determined to be

appropriate for the project and no conditions for access have been required. However, the following findings and analysis were conducted in accordance with LIP Section 12.7.3 regarding access. Due to these findings, LIP Section 12.7.1 is not applicable.

Finding H1. The type of access potentially applicable to the site involved (vertical, lateral, blufftop, etc.) and its location in relation to the fragile coastal resource to be protected, the public safety concern, or the military facility which is the basis for the exception, as applicable.

Vertical access could impact fragile coastal resources (coastal dune ESHA) as it is situated along the width of the property and could be easily damaged by excessive foot traffic. There is no issue of a public safety concern nor a military facility located nearby. The basis for the exception to the requirement for vertical access is associated with the availability of access nearby as described above.

Finding H2. Unavailability of any mitigating measures to manage the type, character, intensity, hours, season or location of such use so that fragile coastal resources, public safety, or military security, as applicable, are protected.

As stated in Finding H1, vertical access across the site could impact fragile coastal resources. Per the Restoration Plan for Coastal Foredunes, prepared by Dr. Edith Read, dated December 1, 2005, the coastal foredunes are in a degraded form and the practical success of restoration and enhancement of the sand dunes will require that beach access from the potential single family dwellings via small trails skirting the sand dunes to the extent possible. The dune ESHA is further protected by the Malibu Bay Company Overlay District's development standard requiring a conservation easement across the coastal foredunes.

There is no issue of a public safety concern nor a military facility located nearby. The basis for the exception to the requirement for vertical access is associated with the availability of access nearby as described above.

Finding H3. Ability of the public, through another reasonable means, to reach the same area of public tidelands as would be made accessible by an access way on the subject land.

The project, as proposed, does not block or impede access to the ocean. The project site is not located on a public beach nor accessed via a public road. Adequate public access is available nearby at Zuma Beach County Park. No legitimate governmental or public interest would be furthered by requiring access at the project site because: 1) existing access to coastal resources is adequate; 2) the proposed project will not impact the public's ability to access the shoreline or other coastal resources; and 3) the project site is not within the vicinity of a public beach.

I. Land Division (LIP Chapter 15)

Pursuant to LIP Section 15.2, the City Council may approve or conditionally approve a land division application only if the City Council affirmatively finds that the proposal meets all of the following:

Finding I1. Does not create any parcels that do not contain an identified building site that: a. Could be developed consistent with all policies and standards of the LCP; b. Is safe from flooding, erosion, geologic and extreme fire hazards; c. Is not located on slopes over 30% and will not result in grading on slopes over 30%. All required approvals certifying that these conditions are met shall be obtained.

The TPM indicates identified building sites which could be developed consistent with all policies and standards of the LCP would be safe from flooding, erosion, geologic and extreme fire hazards if constructed per the recommendations and requirements of the City Geologist, City Coastal Engineer, City Public Works Department and LACFD; and are not on slopes over 30 percent.

Finding I2. Is designed to cluster development, including building pads, if any, to maximize open space and minimize site disturbance, erosion, sedimentation and required fuel modification.

The proposed TPM clusters development to the front and landward portion of the parcel in order to minimize site disturbance and impacts to ESHA. The ESHA restoration areas identified by Dr. Read are well seaward of any proposed development. The Malibu Bay Company Overlay District adds specific development standards to ensure that development is clustered, that open space is maximized, and site disturbance is minimized. The majority of the site is held in a conservation easement and precludes development, thereby minimizing the potential for erosion and sedimentation. In addition, there are no fuel modification requirements for the subject site.

Finding I3. Does not create any parcels where a safe, all-weather access road and driveway cannot be constructed that complies with all applicable policies of the LCP and all applicable fire safety regulations; is not located on slopes over 30% and does not result in grading on slopes over 30%. All required approvals certifying that these conditions are met shall be obtained.

Access to all four parcels of the proposed TPM has already been constructed and approved by the LACFD during development of the homes to the east. Access way improvements were approved via a Coastal Development Permit Waiver-De Minimis No. 4-95-100.

Finding I4. Does not create any parcels without the legal rights that are necessary to use, improve, and/or construct an all-weather access road to the parcel from an existing, improved public road.

As stated in Finding I3, the access way has been previously approved and constructed.

Finding I5. Is designed to minimize impacts to visual resources by complying with the following: a. Clustering the building sites to minimize site disturbance and maximize open space; b. Prohibiting building sites on ridgelines; c. Minimizing the length of access roads and driveways; d. Using shared driveways to access development on adjacent lots; e. Reducing the maximum allowable density in steeply sloping and visually sensitive areas; f. Minimizing grading and alteration of natural landforms, consistent with Chapter 8 of the Malibu LIP; g. Landscaping or revegetating all cut and fill slopes and other disturbed areas at the completion of grading, consistent with Section 3.10 of the Malibu LIP; h. Incorporating interim seeding of graded building pad areas, if any, with native plants unless construction of approved structures commences within 30 days of the completion of grading.

As stated in Finding I1, the building sites have been clustered in order to minimize site disturbance and impacts to sensitive resources. Any other form of clustering would require unavoidable impacts to the onsite ESHA. The site does not contain ridgelines. Access for all four proposed parcels is a shared existing private drive which does not require lengthening. There are no slopes to be graded on the site. The alteration of natural landforms does not extend outside the proposed building site development envelope (those areas do not contain any identified coastal dune habitat) other than the proposed improvement of the degraded coastal dune habitat via the restoration plan.

Finding I6. Avoids or minimizes impacts to visual resources, consistent with all scenic and visual resources policies of the LCP.

As discussed in D. Scenic Visual and Hillside Resource Protection Ordinance, Finding D1, the proposed TPM is consistent with all scenic and visual resource policies of the LCP.

Finding I7. Does not create any additional parcels in an area where adequate public services are not available and will not have significant effects, either individually or cumulatively, on coastal resources.

The proposed land division application was routed to all applicable public agencies and no issue relative to public services was noted. The land division will not have an effect on coastal resources either individually or cumulatively as the subject site has a land use designation of SFM which allow up to four single family homes per acre (1 residence per .25 acre), the applicant has requested a TPM of four parcels on two acres instead of the eight allowed by the land use designation. The residential use of the site was anticipated by its zoning designation and will not result in impacts individually or cumulatively on coastal resources.

Finding I8. Does not create any parcels without the appropriate conditions for a properly functioning septic system or without an adequate water supply for domestic use. All required approvals certifying that these requirements are met must be obtained.

The proposed land division application was reviewed and approved by the City's Environmental Health Administrator and onsite wastewater treatment systems (tertiary) will be required for any future development on the site. In addition, the application was reviewed by the Los Angeles County Waterworks District No. 29 and the applicant received the required "will serve" letters which indicate the adequate water supply exists to serve the parcels.

Finding I9. Is consistent with the maximum density designated for the property by the Land Use Plan map and the slope density criteria (pursuant to Section 15.6 of the Malibu LIP).

The subject site has a land use designation of SFM, which allows up to four single family homes per acre (1 residence per .25 acre). The applicant has requested a TPM of four parcels on two acres instead of the eight allowed by the land use designation.

The slope density criteria are not applicable as it only applies to parcels zoned Rural Residential.

Finding I10. Does not create any parcels that are smaller than the average size of surrounding parcels.

As indicated in the Citywide Lot Width Analysis Table in the September 5, 2006 Planning Commission Agenda Report, the TPM requested lot size is consistent with not only the surrounding parcels but is the average parcel size for all beachfront zoned SFM parcels citywide. The proposed TPM does not create any parcels smaller than the average size of surrounding parcels.

Finding I11. Does not subdivide a parcel that consists entirely of ESHA and/or ESHA buffer or create a new parcel that consists entirely of ESHA and/or ESHA buffer.

The subject parcel does contain coastal dune ESHA which has been delineated in biological inventories and the dune restoration plan by Dr. Edith Read. The parcel does not consist entirely of ESHA or ESHA buffer. Section 4.6.1 of the LIP, Buffers, lists the types of ESHA and its respective buffer standards. There is no specific listing for coastal dune ESHA. Under Section 4.6.1.G (Other ESHA) it states "For other ESHA not listed above, the buffer recommended by the Environmental Review Board or City Biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the ESHA shall be required." The ESHA buffer for this specific site is the rear yard setback and conservation easement in the Malibu Bay Company Overlay District. Therefore, the proposed TPM does not create lots that consist entirely of ESHA or ESHA buffer.

Finding I12. Does not create any new parcels without an identified, feasible building site that is located outside of EHSA and the ESHA buffer required in the LCP and that would not require vegetation removal or thinning for fuel modification in ESHA and/or the ESHA buffer.

The proposed TPM identifies feasible building sites which are located outside of the ESHA area and are consistent with the Malibu Bay Company Overlay District development standards. No vegetation removal for fuel modification is proposed for the site. A coastal dune restoration plan is proposed for the site.

Finding I13. Does not result in construction of roads and/or driveways in ESHA, ESHA buffer, on a coastal bluff or on a beach.

Access to the site was previously permitted and constructed and is not located in ESHA, ESHA buffer, on a coastal bluff or on a beach.

Finding I14. Does not create any parcel where a shoreline protection structure or bluff stabilization structure would be necessary to protect development on the parcel from wave action, erosion or other hazards at any time during the full 100 year life of such development.

No new parcels are being created that would require future development of a shoreline protection structure. Per the Wave Uprush Study conducted by Pacific Engineering Group dated March 22, 2003, "A septic system located within 140 feet from the Pacific Coast Highway right-of-way line will be located a minimum of 15 feet landward of the wave uprush limit and would not require a

protective bulkhead."

Finding I15. If located on a beachfront parcel, only creates parcels that contain sufficient area to site a dwelling or other principal structure, on-site sewage disposal system, if necessary, and any other necessary facilities without development on sandy beaches or bluffs.

The proposed TPM creates four beachfront parcels with sufficient area to site a dwelling and onsite wastewater treatment systems and will not require development on sandy beaches or bluffs. According to the Preliminary Soils and Engineering Geologic Investigation by GeoSystems, Environmental and Geotechnical Consultants, dated August 9, 1994, "A wedge of artificial fill is present along the northern portion of the site. This material is associated with the construction of Pacific Coast Highway." The identified building sites are located along the northern edge of the parcel.

Finding I16. Includes the requirement to acquire transfer of development credits in compliance with the provisions of the LCP, when those credits are required by the Land Use Plan policies of the LCP.

The applicant shall comply with the requirements of Chapter 7 of the LIP which requires the retirement of one lot (in designated donor areas) per lot created. Therefore, the applicant must retire three lots prior to final map recordation.

J. Land Division (M.M.C. 16.12.130 Tentative Parcel Map)

Finding J1. The proposed subdivision map is consistent with Malibu's General Plan.

Per the City's General Plan Land Use Designation definitions:

> Single family Residential (SF): This land use designation includes all remaining single family residential areas. It is intended to enhance the rural characteristics of the community by maintaining low-density single family residential development on lots ranging from .25 to 1 acre in size in a manner, which respects surrounding property owners and the natural environment. Single family Low (SFL) allows for the creation of up to two lots per acre with a minimum lot size of .5 acre. Single family Medium (SFM) allows for the creation of up to four lots with a minimum lot size of .25 acre.

The project is consistent with the adopted General Plan and does not adversely affect neighborhood character, in that the permitted land use and density of the single family General Plan land use designation and that the lot-size and density are consistent with similar single family parcels in the vicinity of the project site. The proposed map is consistent with the policies, goals and objectives set forth in the Land Use Element of the General Plan.

Finding J2. The design and improvements of the proposed subdivision map is consistent with Malibu's General Plan.

The design of the proposed subdivision map is consistent with the General Plan in that the City's

General Plan designation for the subject site is SFM and allows for the creation of up to four lots per acre with a minimum lot size of .25 acre. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels, which are consistent with this General Pan land use designation. The project would also be consistent with the proposed General Plan land use designation of SFM.

Finding J3. The site is physically suitable for the type of development proposed.

The subject site is physically suitable for the type of future development anticipated (single family residences) in that each of the new parcels is of sufficient size and level topography to support a single family home consistent with General Plan, City of Malibu M.M.C. Zoning and Residential Development Standards and LCP LIP Residential Development Standards. In addition, the TPM shall be subject to conditions which will be recorded on the final parcel map, which limit development to current zoning standards and prohibit the granting of any variances or modifications for future development. The proposed subdivision will also be conditioned so that any required street improvements are made prior to final certificate of occupancy on any future residential development.

Finding J4. The site is suitable for the proposed density of development.

The site is suitable for the proposed density of development in that each of the new parcels will eventually contain one single family residence. The General Plan land use designation and zoning designation for the subject site is SFM which allows for the creation of up to four lots per acre with a minimum lot size of .25 acre. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels, which exceeds the minimum lot size standard. The newly created half acre lots would be suitable for the proposed density and are consistent with zoning and General Plan land use designations.

Finding J5. The design of the development and the proposed improvements are not likely to cause substantial environmental damage or substantially injure fish or wildlife or their habitat.

The design of the subdivision and the proposed improvements are not likely to cause substantial environmental damage or substantially injure fish or wildlife or their habitat because the development will not encroach into the environmentally sensitive, coastal dune habitat areas on the site. Future development on the site is prescribed by the Malibu Bay Company Overlay District development standards which specifically protect the onsite coastal dune ESHA by creating a buffer of an additional setback and conservation easement. Further, the TPM shall be subject to conditions which will be recorded on the final parcel map, which limit development to current zoning standards and prohibit the granting of any variances (including stringline) or modifications for future development.

Finding J6. The design of the development and the type of improvement are not likely to cause serious public health hazards.

The design of the development and the type of improvements are not likely to cause serious public health hazards since the project consists of a residential subdivision in an existing residential area and has no associated public health hazards.

Finding J7. The design of the development and the type of improvements will not conflict with any public easements.

The design of the development and the type of improvements will not conflict with any public easements in that there are no public easements associated with the proposed tentative parcel map. Utility easements and private access easements will be maintained and recorded on the final parcel map.

K. Onsite Wastewater Treatment System (LIP Chapter 18)

LIP Chapter 18 addresses Onsite Wastewater Treatment Systems (OWTS). LIP Section 18.7 includes specific siting, design and performance requirements. The project has been reviewed by the City Environmental Health Administrator and will be conditioned to meet the requirements of the Malibu Plumbing Code, the M.M.C. and the LCP.

Section 3. City Council Action.

Based on the foregoing findings and substantial evidence contained within the record, including the analysis contained in the associated Agenda Report, the City Council adopts Revised MND No. 06-004, and approves CDP No. 05-136 for Vesting TPM No. 99-002 (County Reference: TPM No. 24070) subject to the conditions listed below.

Conditions of Approval

1. The applicant and property owner, and their successors in interest, shall indemnify and defend the City of Malibu and its officers, employees and agents from and against all liability and costs relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project. The City shall have the sole right to choose its counsel and property owners shall reimburse the City's expenses incurred in its defense of any lawsuit challenging the City's actions concerning this project.

2. Approval of this application is to allow a tentative parcel map to subdivide one approximately 2.08 acre parcel into two .52 acre parcels and two .51 acres. Future development on any of these parcels shall be limited to the Malibu Bay Company Overlay District development standards. No variances or modifications to development standards shall be granted for future development on the subject parcels.

3. Pursuant to LIP Section 13.18.2, this permit and rights conferred in this approval shall not be effective until the property owner signs and returns the Acceptance of Conditions Affidavit accepting the conditions set forth herein. The applicant shall file this form with the Planning Division within 10 days of this decision and prior to issuance of any development permits.

4. The CDP shall be null and void if the project has not commenced within two (2) years after issuance of the permit. Extension to the permit may be granted by the approving authority for due cause. Extensions shall be requested in writing by the applicant or authorized agent at least two weeks prior to expiration of the two-year period and shall set forth the reasons for the request.

5. Any questions of intent or interpretation of any condition of approval will be resolved by the Planning Manager upon written request of such interpretation. Minor changes to the approved plans or the conditions of approval may be approved by the Planning Manager, provided such changes achieve substantially the same results and the project is still in compliance with the Malibu Municipal Code and the Local Coastal Program. An application with all required materials and fees shall be required.

6. The vesting tentative parcel map shall conform to the requirements of the City of Malibu Environmental and Building Safety Division, and to all City Geologist, City Environmental Health Administrator, City Biologist, City Public Works and Los Angeles County Fire Department requirements, as applicable and conditioned in the department review sheets found in Attachment 6 of the September 5, 2006 Planning Commission Agenda Report. Notwithstanding this review, all required permits shall be secured.

7. All conditions required for the Tentative Parcel Map approval TPM No. 99-002 (Los Angeles County Map No. 24070) shall remain in effect.

8. Pursuant to LIP Section 13.20, development pursuant to an approved coastal development permit shall not commence until the coastal development permit is effective. The coastal development permit is not effective until all appeal, including those to the California Coastal Commission, have been exhausted. In the event that the California Coastal Commission denies the permit or issues the permit on appeal, the coastal development permit approved by the City is void.

9. Transfer of Development Credit Requirements

   a. The applicant shall be required to retire sufficient donor lots to provide one (1) Transfer of Development Credit (TDC) for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.
   b. The applicant shall be required to retire sufficient donor lots to provide one (1) TDC for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.
   c. TDC candidate sites selected to be retired shall be reviewed by the Planning Manager in conjunction with a Subdivision Review Committee representative. This review shall ensure that the site selected for retirement meets the criteria desired for permanent open space.
   d. Evidence of the purchase of developments rights on a donor site and recordation of a dedication to the City of Malibu of a permanent, irrevocable open space easement in favor of the City on the retired lots that conveys an interest in the lots that insures that future development on the lots is prohibited and that restrictions can be enforced, the text of which has been approved pursuant to procedures in Section 13.19 of the Malibu LIP

(recorded legal documents).

e. Evidence of the voluntary merger or of a recorded deed restriction reflecting that the retired lots used to generate the credits are combined with one or more adjacent, unrestricted lot(s) through a process outlined in LIP Section 7.8.4. The three parcels selected to be retired shall be deed restricted prohibiting development into perpetuity.
f. The applicant shall supply proof that the recorded deed restriction was provided to the Los Angeles County Assessor's Office.
g. The TDC requirements must be met prior to final map recordation.

10. As a condition of approval of new development on a vacant beachfront or bluff-top lot, or where demolition and rebuilding is proposed, where geologic or engineering evaluations conclude that the development can be sited and designed so as to not require a shoreline protection structure as part of the proposed development or at anytime during the life of development, the property owner shall be required to record a deed restriction against the property that ensures that no shoreline protection structure shall be proposed or constructed to protect the development approved and which expressly waives any future right to construct such devices that my exist pursuant to Public Resources Code Section 30232.

11. In order to effectuate the property owner's offer to dedicate lateral access, prior to the issuance of the CDP for subdivision of the subject property, the property owner shall execute and record a document in a form and content acceptable to the Coastal Commission, an irrevocable offer to dedicate (or grant an easement) free of prior liens and any other encumbrances that may affect the interest being conveyed, an easement to a public agency or private agency association approved by the Coastal Commission, granting the public the permanent right of lateral public the permanent right of lateral public access and passive recreation. The easement shall extend along the entire width of the property from the mean high tide line landward to the ambulatory seawardmost limit of dune vegetation. The recorded document shall include legal descriptions and a map drawn to scale of both the subject parcel and the easement area. The offer to dedicate or grant of easement shall run with the land in favor of the People of the State of California, binding all successors and assignees and the offer shall be irrevocable for a period of 21 years, from the date of recordation. The property owner shall provide a copy of the recorded document to Planning Division staff prior to final Planning approval.

12. Public View Corridors – Deed Restriction Requirement

Prior to issuance of a coastal development permit for subdivision of the subject property, the following restrictions shall be imposed, and the applicant shall be required to demonstrate that the land owner has executed and recorded a deed restriction that reflects the following restrictions:

a. No less than 20 percent of the lineal frontage of each created parcel of the subdivision shall be maintained as one contiguous public view corridor in the location shown on Exhibit A. The view corridor may not be split or reconfigured.
b. No portion of any structure shall extend into the view corridor above the elevation of Pacific Coast Highway.
c. Any fencing across the view corridor shall be visually permeable, and any landscaping within the view corridor shall include only low-growing species that will not block or

obscure bluewater views.

d. Vegetation between Pacific Coast Highway and the onsite access road that is within the public view corridors shall include only low-growing species that will not block or obscure bluewater views.

13. View Corridor – Removal of Obstructions

Prior to issuance of a coastal development permit for subdivision of the subject property, the applicant shall be required to remove all existing obstructions between Pacific Coast Highway and the onsite access road that are within the required public view corridors, including vegetation that is over two feet in height above the elevation of Pacific Coast Highway and any fencing or gates that are not visually permeable.

14. Biological Resources – Mitigation Monitoring Program

BIO-1 Incorporation of the Malibu Bay Company Overlay District into the M.M.C. to ensure consistency with the LCP and continued protection of the onsite coastal dune ESHA. This mitigation measure shall be implemented upon adoption of Ordinance No. 344.

BIO-2 The Dune Restoration Plan (part of the Malibu Bay Company Overlay District) is required to be finalized prior to the final map recordation and shall be implemented immediately upon approval of the approval of the coastal development permit for the subdivision.

15. Revised Dune Habitat Restoration Plan

Prior to submittal of the Acceptance of Conditions Affidavit and issuance a coastal development permit for subdivision of the subject property, the applicant shall be required to submit, for review and approval by the City Biologist, a revised "Restoration Plan for Coastal Foredunes, 30732 Pacific Coast Highway" (Read, 2005), that incorporates the following changes and additions:

a. All restoration plants and seeds shall consist of local genotypes. Propagules shall be collected on the project site or from elsewhere along the coast of northern Los Angeles County or southern Ventura County, as close as feasible to the project site.
b. The use of a temporary irrigation line system shall be omitted. Rather, restoration seeds/plants shall be planted during the rainy season. If rainfall is not sufficient and additional irrigation is determined necessary for successful plant establishment, only hand watering may be conducted.
c. The planting plan shall be revised to include all disturbed dune habitat areas as identified in the dune habitat delineation contained in the "Biological Resources Assessment," by Hamilton et al., dated March 6, 2008.
d. A maximum of two (2), three-foot wide pathways through the dunes may be established within the dune restoration area, and may only be sited in the area of the existing paths per Figure 2 of the Restoration Plan.
e. Symbolic fencing (post and rope) along the two allowed pathways within the restoration area shall be installed to clearly delineate pathways from restoration areas.

f. The root barrier element of the Restoration Plan shall be omitted.
g. Rear yard fencing shall be installed to delineate developed/setback areas from ESHA/restoration areas.

16. Dune Habitat Restoration Plan Implementation

The application shall be required to implement the Revised Dune Habitat Restoration Plan required pursuant to Condition No. 15 above. Restoration shall commence immediately after issuance of the coastal development permit. If permit issuance does not correspond with the rainy season, restoration shall commence during the next rainy season following coastal development permit issuance.

17. Open Space Conservation Easement – Deed Restriction

Prior to issuance of a coastal development permit for subdivision of the subject property, the applicant shall be required to demonstrate that the land owner has executed and recorded a document in a form and content acceptable to the Coastal Commission, irrevocably offering to dedicate (or grant an easement) to a public agency or private association approved by the Coastal Commission, an open space conservation easement over the area described in the prior paragraph ("open space conservation easement area"), for the purpose of habitat protection. The recorded easement document shall include a formal legal description of the entire property; and a metes and bounds legal description and graphic depiction, prepared by a licensed surveyor, of the open space conservation easement area, as generally shown on Exhibit B of Ordinance No. 344. The recorded document shall reflect that no development shall occur within the open space easement area except as otherwise set forth in this permit condition. The offer shall be recorded free of prior liens and encumbrances which the Coastal Commission determines may affect the interest being conveyed.

18. Air Quality – Mitigation Monitoring Program

The mitigations prescribed by the South Coast Air Quality Management District shall be required on any future development applications on any / all of the four lots.

AQ-1 An operational water truck should be onsite at all times. Apply water to control dust as needed to prevent dust impacts offsite.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-2 Fugitive dust will be mitigated by applying water at all active construction sites (including graded areas, storage piles, excavated trenches, and backfilled trenches) at least twice daily. All unpaved driving and staging areas will be watered at least three times daily.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-3 All disturbed areas, including storage piles, which are not actively utilized for construction purposes, shall be effectively stabilized of dust emissions using water, covered with tarp, the use of non-toxic soil stabilizers, or other suitable cover or vegetative ground cover quickly.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-4 After clearing, grading, earth moving, or excavation is completed; the entire area of disturbed soil will be treated. Treatment, which will also occur during non-work days if necessary, will include watering, revegetation, or spreading non-toxic soil binders to prevent wind pick-up of the soil until the area is paved or otherwise developed.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-5 The primary contractor shall be responsible to ensure that all construction equipment is properly tuned and maintained.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-6 All on and off road construction vehicles shall adhere to the following criteria:
a. Use aqueous diesel fuel
b. Be equipped with a diesel particulate filter
c. Use cooled exhaust gas recirculation (EGR)
d. Shall maintain a reduce speed less than 15 miles per hour on unpaved roads

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-7 Develop a traffic plan to minimize traffic flow interference from construction activities. The plan should include the following:

a. Advance public notice of routing
b. Use of public transportation
c. Satellite parking areas with a shuttle service
d. Schedule operations affecting traffic for off-peak hours
e. Minimize obstruction of through-traffic lanes
f. Provide a flag person to guide traffic properly and ensure safety at construction sites.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-8 Minimize idling time to 10 minutes – saves fuel and reduces emissions.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-9 Construction management techniques, including minimizing the amount of equipment used simultaneously and increasing the distance between emission sources, will be employed as feasible and appropriate. All trucks leaving the construction site will adhere to the California Vehicle Code. In addition, they will be covered when necessary; and their tires will be rinsed off prior to leaving the property.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

19. The Coastal Development Permit runs with the land and binds all future owners of the property.

20. Violation of any of the conditions of this approval shall be cause for revocation and termination of all rights thereunder.

ex. 1

Section 4. Certification.

The City Council shall certify the adoption of this Resolution.

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

SHARON BAROVSKY, Mayor

ATTEST:

LISA POPE, City clerk
(seal)

APPROVED AS TO FORM:

CHRISTI HOGIN, City Attorney

COASTAL COMMISSION APPEAL – An aggrieved person may appeal the City Council decision to the Coastal Commission within 10 working days of the issuance of the City's Notice of Final Action. Appeal forms may be found online at www.coastal.ca.gov or in person at the Coastal Commission South Central Coast District office located at 89 South California Street in Ventura, or by calling (805) 585-1800. Such an appeal must be filed with the Coastal Commission, not the City.

I CERTIFY THAT THE FOREGOING RESOLUTION NO. 09-68 was passed and adopted by the City Council of the City of Malibu at the regular meeting thereof held on the 14th day of December, 2009, by the following vote:

AYES:	5	Councilmembers:	Conley Ulich, Sibert, Stern, Wagner, Barovsky
NOES:	0		
ABSTAIN:	0		
ABSENT:	0		

LISA POPE, City Clerk
(seal)

ex. 1

STATE OF CALIFORNIA -- THE RESOURCES AGENCY

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST DISTRICT OFFICE
89 SOUTH CALIFORNIA STRET, SUITE 200
VENTURA, CA 93001-4508
VOICE (805) 585-1800 FAX (805) 641-1732

RECEIVED
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CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

ARNOLD SCHWARZENEGGER, *Governor*

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

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

SECTION I. Appellant(s)

Name: Deane Earl Ross

Mailing Address: c/o John M. Bowman, Esq., 1900 Avenue of the Stars, 7th floor

City: Los Angeles, CA Zip Code: 90067 Phone: (310) 203-8080

SECTION II. Decision Being Appealed

1. Name of local/port government:

City of Malibu

2. Brief description of development being appealed:

Coastal Development Permit No. 05-136 for Vesting Tentative Parcel Map No. 99-002 to subdivide the subject property at 30732 Pacific Coast Highway into four 47- to 51-foot lots.

3. Development's location (street address, assessor's parcel no., cross street, etc.):

30732 Pacific Coast Highway, Malibu, CA, APN 4469-026-005

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: A-4-MAL-10-008

DATE FILED: 2/1/10

DISTRICT: So. Central Coast

Exhibit 2
Appeal A-4-MAL-10-008
Deane Earl Ross Appeal

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: 12/14/09 and 1/11/10

7. Local government's file number (if any): CDP 05-136, VTPM 99-002

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:

Malibu Bay Company
c/o David Reznick
23705 W. Malibu Road
Malibu, CA 90265

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) Patricia Healy, Malibu Coalition for Slow Growth, 403 San Vicente Boulevard, Santa Monica, CA 90402

(2)

(3)

(4)

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

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

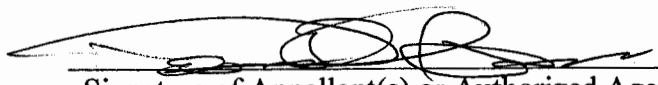
- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal**. Include a summary description of Local 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.

See attached Addendum.

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.



Signature of Appellant(s) or Authorized Agent

Date: 1/28/10

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

Section VI. Agent Authorization

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

Signature of Appellant(s)

Date:

ex. 2

ADDENDUM TO APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT, SECTION IV - REASONS SUPPORTING THIS APPEAL

I. BACKGROUND

A. The Coastal Permit Decision and Notice of Final Local Action

On December 14, 2009, the City Council of the City of Malibu adopted Resolution No. 09-68, A Resolution of the City Council of the City of Malibu Adopting Revised Mitigated Negative Declaration No. 06-004 and Approving Coastal Development Permit No. 05-136 For Vesting Tentative Parcel Map No. 99-002 (County Reference: TPM No. 24070) to Subdivide the Subject Property at 30732 Pacific Coast Highway Into Four 47 to 51 Foot Lots (Malibu Bay Company). A copy of Resolution No. 09-68 is attached as **Exhibit "A."**

The City of Malibu (the "City") issued a Notice of Final Local Action ("NFLA") concerning Coastal Development Permit No. 05-136 (the "CDP") on or about January 12, 2010. A copy of the NFLA is attached as **Exhibit "B."** The Appellant's representative has been informed by both City and Coastal Commission staff that the 10-working day appeal period in this matter expires on February 2, 2010.

B. The Subject Property

The subject property is a 2.08-acre beachfront parcel located at the eastern end of Broad Beach, between Pacific Coast Highway and the ocean, in the City of Malibu (hereinafter the "Subject Property"). The Subject Property is approximately 200 feet wide at its northern boundary along Pacific Coast Highway, and narrows to approximately 186 feet at its southern boundary along the beach. With the exception of a narrow access driveway and unapproved gates and fencing at the northern end of the Subject Property, the Subject Property is undeveloped.

The Subject Property includes environmentally-sensitive dune habitat that supports a number of rare and endangered plant and animal species. Among other things, the Subject Property is located within federally-designated critical habitat for the threatened western snowy plover (a small shorebird) and includes habitat occupied by globose dune beetles, a "special status" species. In a report dated May 15, 2008, Jonna D. Engel, Ph.D., the Coastal Commission's staff biologist, noted that the "dunes on the [Subject Property] are some of the most pristine dunes along this stretch of coast." See **Exhibit "C,"** p. 2.

C. The Appellant

Deane Earl Ross (the "Appellant") is the co-trustee of the Ross Family Trust. The Ross Family Trust is the owner of property located at 30724 Pacific Coast Highway, which adjoins the Subject Property along its southeastern boundary. The Appellant participated in the City's administrative proceedings concerning the CDP and raised various objections thereto.

II. THE COASTAL DEVELOPMENT PERMIT DOES NOT CONFORM TO VARIOUS POLICIES OF THE CERTIFIED LAND USE PLAN FOR THE CITY OF MALIBU

The CDP does not conform to various policies of the Land Use Plan ("LUP") of the City of Malibu Local Coastal Program ("LCP"), including but not limited to the LUP policies discussed below.

A. LUP Policies Regarding ESHA

The CDP fails to conform to a number of LUP policies designed to protect Environmentally Significant Habitat Areas ("ESHA"). For example, the CDP violates LUP Policy 3.23, which provides in relevant part as follows:

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

The CDP does not provide a buffer with a minimum width of 100 feet as required by LUP Policy 3.23. Rather, the CDP provides only for a 5-foot "maintenance" buffer, which is really no buffer at all because (1) it does not provide for "native vegetation," and (2) is intended to allow for human intrusion for ordinary home maintenance.

The City and the project applicant, Malibu Bay Company ("MBC" or "Applicant"), contend that the 100-foot minimum buffer requirement of LUP Policy 3.23 does not apply based on the language of Section 4.6.1.G of the City's Local Implementation Plan ("LIP"). LIP Section 4.6.1.G provides, among other things, that for ESHA areas not listed in Section 4.6.1, "the buffer recommended by the Environmental Review Board or City biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the ESHA shall be required." However, Section 4.6.1.G does not apply in this case for at least two reasons. First, to the extent that it allows for a buffer of less than 100 feet for the dune ESHA on the Subject Property, it is in direct conflict with LUP Policy 3.23. As such, the plain language of LUP Policy 3.23 takes "precedence" over Section 4.6.1.G of the City's LIP. See LUP, Chapter 1, Section D - General Goals and Objectives ("Where conflicts occur between the policies of the City's General Plan, zoning or any other ordinance, the policies of the Land Use Plan shall take precedence"). See also LUP Policy 5.6 (the "[p]rotection of ESHA ... shall take priority over other development standards and where there is any conflict ... the standards that are most protective of ESHA ... shall have precedence." Second, there is no indication that the City Biologist ever "consulted" with the California Department of Fish and Game with respect to buffer standards for dune ESHA.

The CDP also conflicts with LUP Policy 3.23 because the minimal 5-foot maintenance buffer required under the CDP will not be of "sufficient size to ensure the biological integrity and preservation of the ESHA" on the Subject Property. This conclusion is supported by the expert opinion of the Coastal Commission's own biologist, Dr. Engel. Specifically, in her May 15,

2008 memorandum to the Coastal Commission, Dr. Engel recommended a *minimum* buffer of 25 feet between any new development and the edge of the dune ESHA on the Subject Property. See Exhibit "D," p. 8. Dr. Engel reaffirmed this opinion in a memorandum to the Coastal Commission dated June 9, 2008. See **Exhibit "D,"** p. 4.

The conclusion that a 5-foot maintenance buffer would *not* ensure the biological integrity and preservation of the ESHA on the Subject Property as required by LUP Policy 3.23 is further supported by the expert opinions of Dr. Duane Vander Pluym, Vice President and Principal Biologist for Rincon Consultants, Inc. Dr. Vander Pluym evaluated the biological resources on the Subject Property and, in a report dated December 6, 2006, confirmed that the Subject Property includes habitat for various rare and threatened species of plant and animal life and should therefore be considered ESHA. More recently, Dr. Vander Pluym reviewed Dr. Engel's memoranda and other biological studies provided to the Coastal Commission and, in a letter report dated October 12, 2009, concluded as follows: "Based on the discussion provided above with respect to sensitive plants, sensitive animals, and the coastal strand community as a whole, it is my opinion that the five-foot buffer from this ESHA is insufficient and that the 25-foot setback distance from the edge of this ESHA as recommended by Dr. Engel is reasonable and prudent to provide adequate protection for the known sensitive coastal resources at this location." See **Exhibit "E,"** p. 8. Dr. Vander Pluym also noted that the Subject Property is within the federally designated critical habitat for the western snowy plover, and opined that since "the western snowy plover would use the area both in front of and behind the initial foredune ridge, the appropriate setback area for this species use of the ESHA would be similar to that recommended for the [Globuse Dune Beetle], namely 65-100 feet from suitable habitat." See Exhibit "F," pp. 7-8.

LUP Policy 3.23 further provides that development adjacent to ESHA shall "minimize impacts to habitat values or sensitive species to the maximum extent feasible." This policy is also reflected in LUP Policy 3.14, which provides in relevant part as follows:

> New development shall be sited and designed to avoid impacts to ESHA. If there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected ... (emphasis added).

See also LUP Policy 3.28 ("Variances or modifications to buffers or other ESHA protection standards shall not be granted, except where there is no other feasible alternative for siting the development....") and LUP Policy 3.44 ("Land divisions for property which includes area within or adjacent to an ESHA or parklands shall only be permitted if each new parcel being created could be developed ... without building in ESHA or ESHA buffer...."). Here, there is no evidence whatsoever to support a conclusion that it would be infeasible for the Applicant to comply with the 25-foot ESHA buffer recommended by Dr. Engel or the 100-foot ESHA buffer required by LUP Policy 3.23.

B. LUP Policies Regarding Subdivisions

LUP Policy 5.35 requires that "[t]he minimum lot size in all land use designations shall not allow land divisions, except merger and lot line adjustments, where the created parcels would be

smaller than the average size of surrounding parcels." According to an analysis prepared by City staff, the average lot width for the 733 beachfront lots in the City's SF-M zoned beachfront parcels is 50 feet, and the average lot width at Broad Beach is 48 feet. The CDP would allow the subdivision of the Subject Property into four lots with widths of 47, 48, 48 and 51 feet. Because one of the lots would be less than the average lot width at Broad Beach, and three of the lots would be less than the average lot width for beachfront lots in the City's SF-M zone, the CDP conflicts with LUP Policy 5.35.

The City and the Applicant contend that the word "size" refers only to the area of a lot and not its dimensions (*e.g.*, width). However, there is no basis for this extremely narrow interpretation of the word "size." On the contrary, the word "size" is commonly understood to include the dimensions of an object. See Webster's Unabridged Dictionary, Random House (New York 1996), page 1789 (defining the word "size" to mean "the special dimensions, proportions, magnitude, or bulk of anything ...").

C. LUP Policies Regarding Visual Resources

LUP Policy 6.5 provides that new developments "shall be sited and designed to minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent." This general policy is expanded in LUP Policy 6.18, which provides in pertinent part as follows:

> For parcels on the ocean side of and fronting Pacific Coast Highway, Malibu Road, Broad Beach Road ... new development shall provide a view corridor on the project site, that meets the following criteria:
>
> a. Buildings shall not occupy more than 80 percent maximum of the lineal frontage of the site.
>
> b. The remaining 20 percent of lineal frontage shall be maintained as one contiguous view corridor...."

Here, the Subject Property has 200 feet of frontage along Pacific Coast Highway. As such, LUP Policy 6.5 requires that for any new development on the Property, "one contiguous view corridor" of at least 40 feet in width (20 percent of 200 feet) must be provided. The CDP in this case would allow the subdivision of the Subject Property into four lots, with two, non-contiguous, 20-foot-wide view corridors, in direct contravention of LUP Policy 6.5.

Furthermore, it cannot be reasonably disputed that a two-lot subdivision of the Subject Property with separate but contiguous 20-foot-wide view corridors (*i.e.*, a single, 40-foot-wide view corridor) would provide greater view opportunities than the two 20-foot-wide view corridors that would be provided under the CDP, and would "minimize adverse impacts on scenic areas visible from scenic roads or public viewing areas to the maximum feasible extent" as required by LUP Policy 6.5. There is no evidence in the record to support a conclusion that such a two-lot subdivision of the Property would be infeasible.

III. THE POTENTIAL ENVIRONMENTAL IMPACTS OF THE CDP HAVE NOT BEEN PROPERLY OR ADEQUATELY EVALUATED UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

The City approved the CDP on the basis of Initial Study No. 06-004 and Revised Mitigated Negative Declaration No. 06-004 (the "Revised MND"). For the reasons set forth in a letter from Appellant's representative to the Malibu City Council dated December 10, 2009 (see **Exhibit "F"**), the City's decision to adopt the Revised MND was procedurally improper and violated the California Environmental Quality Act ("CEQA"), Public Resources Code sections 21000 *et seq.* The CDP may not be approved unless and until (1) an environmental impact report ("EIR") is prepared for the project and certified by the City as required by CEQA, or (2) the project has been evaluated by the Coastal Commission based on a "functional equivalent" EIR document that meets the requirements of Public Resources Code section 21080.5 and other applicable provisions of CEQA.

Exhibit A

ex. 2

RESOLUTION NO. 09-68

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MALIBU ADOPTING REVISED MITIGATED NEGATIVE DECLARATION NO. 06-004 AND APPROVING COASTAL DEVELOPMENT PERMIT NO. 05-136 FOR VESTING TENTATIVE PARCEL MAP NO. 99-002 (COUNTY REFERENCE: TPM NO. 24070) TO SUBDIVIDE THE SUBJECT PROPERTY AT 30732 PACIFIC COAST HIGHWAY INTO FOUR 47 TO 51 FOOT LOTS (MALIBU BAY COMPANY)

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

Section 1. Recitals.

A. On March 15, 1999, the Malibu Bay Company (MBC) submitted an application for a zoning text amendment (ZTA No. 98-014) and tentative parcel map (TPM No. 99-002) to the Planning Division for processing. The application was eventually combined with several other MBC applications as part of the MBC Development Agreement. The TPM was reviewed by the Environmental Review Board (ERB) in conjunction with the environmental review for the development agreement and its associated environmental impact report. The MBC Development Agreement ultimately became the subject of a voter referendum which failed in the November 4, 2003 election.

B. On July 29, 2005, MBC submitted an application for Coastal Development Permit (CDP) No. 05-136 and Local Coastal Program Amendment (LCPA) No. 05-002 to subdivide a 2.08 acre parcel into four lots located at 30732 Pacific Coast Highway.

C. On April 20, 2006, the application was deemed complete for processing.

D. On May 24, 2006, the application was reviewed by the Subdivision Review Committee (SRC) as a subset of the ERB. The SRC supported the proposed Tentative Parcel Map as being consistent with existing lot size in the Trancas/Broad Beach neighborhood.

E. On June 8, 2006, a Notice of Intent to Adopt Mitigated Negative Declaration (MND) No. 06-004 was published in a newspaper of general circulation within the City of Malibu. In addition, on June 30, 2006, Initial Study No. 06-002 and Mitigated Negative Declaration No. 06-004 were routed to all of the applicable agencies and interested parties.

F. On June 27, 2006, the application was reviewed by the Zoning Ordinance Revisions and Code Enforcement Subcommittee (ZORACES). In particular, discussions centered on the proposed zoning text amendment (ZTA) amending the Malibu Municipal Code (M.M.C.) and proposed Local Coastal Program Amendment (LCPA). ZORACES recommended minor changes to the proposed language which have been incorporated into the proposed amendments.

G. On September 5, 2006, the Planning Commission held a duly noticed public hearing and adopted Planning Commission Resolution No. 06-71, adopting MND No. 06-004, IS No. 06-002, conditionally approving CDP No. 05-136 and Tentative Parcel Map (TPM) No. 99-002 (County

Reference: TPM No. 24070), to subdivide the subject property into four 47 to 51 foot parcels, and recommending approval of Zoning Text Amendment (ZTA) No. 05-001, General Plan Amendment (GPA) No. 05-001 and LCPA No. 05-002 for the applicant requested creation of a new land use designation zoning district of Single family Beachfront (SFBF).

H. On September 15, 2006, Ellia Thompson, on behalf of the Ross Family Trust and other nearby property owners, filed a timely appeal of the Planning Commission's adoption of MND No. 06-004 and IS No. 06-002 and the conditional approval of CDP No. 05-136 and TPM No. 99-002.

I. On November 8, 2006, a Notice of Intent to Adopt Revised MND No. 06-004 was published in a newspaper of general circulation within the City of Malibu. In addition, on November 8, 2006, IS No. 06-002 and MND No. 06-004 were routed to all applicable agencies and interested parties.

J. On December 11, 2006, the item was continued at the applicant's request in order to allow time to respond to comments received on the Revised MND.

K. On January 22, 2007, the City Council held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record. The City Council adopted Resolution No. 07-07, denying Appeal No. 06-013, approving MND No. 06-004, conditionally approving CDP No. 05-136 and TPM No. 99-002 and approving LCPA No. 05-002. The City Council directed staff to submit the LCPA to the California Coastal Commission (CCC) for certification and introduced on first reading Ordinance No. 304 approving an amendment to the Local Coastal Program Local Implementation Plan, which was subsequently adopted on February 12, 2007.

L. On March 6, 2007, the LCPA was submitted to the CCC. On March 20, 2007, the submittal, identified by the CCC as LCPA 1-07, was reviewed by CCC staff and determined to be complete.

M. At the June 14, 2007 CCC hearing, the deadline to act on LCPA 1-07 was extended for a period of one year.

N. On June 11, 2008, the CCC conditionally certified LCPA No. 05-002 subject to certain terms and modifications as set forth in the Resolution of Certification adopted by the CCC on June 11, 2008.

O. On August 19, 2008, the City received said Resolution of Certification.

P. On October 2, 2008, a Notice of City Council Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property, and to responsible agencies, and interested parties.

Q. On October 27, 2008, the City Council held a duly noticed public hearing and adopted Resolution No. 08-59 acknowledging receipt of the CCC resolution of certification with suggested modifications to LCPA No. 05-002. The City Council also introduced on first reading Ordinance No. 331 adopting revised LCPA No. 05-002 amending the single family medium zoning district to

include a 45 foot minimum lot standard for beachfront lots and incorporating the CCC suggested modifications for a Malibu Bay Company Overlay District. On November 10, 2008, the Council adopted Ordinance No. 331 on second reading.

R. On January 7, 2009, the Executive Director of the CCC determined that the action taken by the City acknowledging receipt and acceptance of, and agreement with the Commission's certification of the LCP amendment with suggested modifications was legally adequate and reported the determination to the CCC. The CCC concurred with the determination and with this final action, the LCP amendment was certified.

S. On April 9, 2009, a Notice of Intent to Adopt Revised MND No. 06-004 was published in a newspaper of general circulation and routed to all of the applicable agencies and interested parties.

T. Between April 9, 2009 and May 11, 2009, the Revised MND was made available to the public for the required 30 day circulation period. Three comments were received on the project and were addressed in Attachment 7 of the September 15, 2009 Planning Commission Agenda Report.

U. On August 20, 2009, a Notice of Planning Commission Public Hearing was published in a newspaper of general circulation within the City of Malibu and was mailed to all property owners and occupants within a 500 foot radius of the subject property, and to responsible agencies, and interested parties.

V. On September 15, 2009, the Planning Commission held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record. The Planning Commission recommended that the City Council approve conforming amendments to the certified LCPA No. 05-002, ZTA Nos. 05-004 and 09-002, and Zoning Map Amendment No. 05-001, adding a beachfront lot standard and the Malibu Bay Company Overlay District and recommending adoption of Revised MND No. 06-004 and approval of CDP No. 05-013 for Vesting Tentative Parcel Map No. 99-002 to subdivide the property addressed as 30732 PCH into four 47 to 51 foot lots.

W. On November 23, 2009, at the request of City staff, the City Council continued the public hearing to the Regular City Council meeting of December 14, 2009.

X. On December 14, 2009, the City Council held a duly noticed public hearing on the subject application, reviewed and considered the staff report, reviewed and considered written reports, public testimony, and other information in the record.

Section 2. Environmental Review and Revised Mitigated Negative Declaration.

In accordance with the California Environmental Quality Act (CEQA), Section 21080.9, approval by a local agency as necessary for the preparation and adoption of a Local Coastal Program is statutorily exempt from the requirements of CEQA. Nevertheless, and without waiving the applicable statutory exemption, staff prepared an MND in connection with the project which includes an analysis of LCPA 05-002. On January 22, 2007, the City Council adopted Resolution No. 07-07, adopting

Revised Mitigated Negative Declaration (MND) No. 06-004.

In order to inform the public of the changes since the 2007 approval, the City elected to revise and recirculate the MND for the project (MND No. 06-004) to supplement the environmental review already undertaken and completed by the CCC in its review of the LCPA (including the amendments to the LIP). Revised MND No. 06-004 builds on prior CEQA work by the CCC prepared in connection with the drafting and certification of the Malibu LCP. The CCC fulfills its CEQA responsibilities through its certified regulatory program, and the LCP findings are the functional equivalent of an EIR for the LCP. As such, the City is entitled to rely on the CEQA compliance of the CCC pursuant to Cal. Pub. Res. Code Section 21166. As such, the City is authorized to act as a responsible agency for CEQA purposes and is required to use the EIR substitute analysis already prepared by the CCC through its regulatory program (14 Cal. Code Regs. § 15251-15253).

The CCC's review (which culminated in the addition of new Suggested Modifications to further mitigate and reduce potential environmental impacts associated with this project) already encompassed an evaluation of the potential environmental effects of the scope of development authorized in LCPA No. 05-002 and Suggested Modifications (including the reduction in minimum lot width from 80 feet to 45 feet, as well as the imposition of the new Malibu Bay Company Overlay District). Accordingly, an effective EIR substitute that fully analyzed potential impacts from that scope of development has already been prepared and approved by the CCC as part of its process in implementing its certified regulatory program.

Revised MND No. 06-004 is based on and incorporates, both explicitly and by reference, the CCC's CEQA compliance through its review process pursuant to its certified regulatory program, the conclusions and findings reached by the CCC as well as the entire record on which the CCC's decision was based. The Revised MND therefore, focuses on those areas which present new or different information than the information considered by the City Council in 2007. The Revised MND also proposes revised mitigation measures to conform to the Suggested Modifications of the CCC.

Section 3. Coastal Development Permit Approval and Findings.

Based on substantial evidence contained within the record and pursuant to LCP Local Implementation Plan (LIP) Sections 13.7(B) and 13.9, the City Council adopts the findings of fact below, and approves Coastal Development Permit No. 05-136 for vesting Tentative Parcel Map No. 99-002 (County Reference: TPM No. 24070) for the subdivision of the subject property.

The proposed project has been reviewed by the City Public Works Department, City Geologist, City Environmental Health Administrator, City Biologist and the Los Angeles County Fire Department (LACFD). The proposed project is consistent with the LCP's zoning, grading and water quality requirements. The project has been determined to be consistent with all applicable LCP codes, standards, goals and policies. Additionally, the TPM has been reviewed for conformance with M.M.C. Title 16 (Subdivisions). The required findings are made as follows.

A. General Coastal Development Permit (LIP Chapter 13)

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

The project conforms to the certified LCP and meets the required lot size standards of the SFM zoning district and land use designation.

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

The project is located between the first public road, Pacific Coast Highway, and the sea. However, the proposed TPM and potential residential development is not anticipated to interfere with the public's right to access the coast as the site offers no direct or indirect beach access. There is existing vertical public access approximately 300-feet to the east at the Zuma Beach County Park. In addition, the applicant has offered to provide lateral access easements across each parcel; therefore, the project conforms to the public access and recreation policies.

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

Pursuant to the authority and criteria contained in CEQA, an initial study to determine whether the proposed project may have a significant effect on the environment was prepared for the project. The initial study determined that the proposed project will not have a potentially significant effect on the environment, and MND No. 06-004 was prepared and certified by the City Council. In order to inform the public of the changes since the 2007 approval, the City elected to revise and re-circulate MND No. 06-004 to supplement the environmental review already undertaken and completed by the CCC in its review of the LCPA (including the amendments to the LIP) as discussed in Section 2 Environmental Review of this resolution. Therefore, the proposed project is determined to be consistent with CEQA and the policies of the Coastal Act.

There are three alternatives considered in the analysis of the least environmentally damaging alternative.

1. No Project – The no project alternative would avoid any change in the project site, and hence, any change in visual resources. However, the project site is residentially zoned and could potentially be developed with LCP beachfront development standards (no limit on total development square footage) with a 38,750 square foot single family residence, (a 200-foot lot, minus a 40-foot view corridor, minus a 5-foot side yard setback, with a 125-feet length to the rear yard setback, amounts to 155 square feet of frontage by 125-feet of length, which equals 19,375 square feet for the first floor and 19,375 square feet for the second floor, for a total of 38,750 square feet). Therefore, the no project alternative (no parcel map) could potentially result in the construction of a significantly larger structure than four structures permitted under the proposed new lot width development standard or Malibu Bay Company

Overlay District development standards. This is not the least environmentally damaging alternative.

2. Larger Project – The applicant could have requested to subdivide the subject 2.0 acre-parcel into eight lots, which would be consistent with the General Plan land use designation of two to four lots per acre. The lot width of each of the eight parcels would be 25-feet in width. While this is similar in size to the parcel immediately west, which is 28-feet in width, it would not be consistent with the majority of single family beachfront development. This is not the least damaging alternative.

3. Proposed Project - The proposed project consists of a TPM subdividing one legal parcel into four legal parcels. The subject parcel is addressed as 30732 Pacific Coast Highway and is zoned SFM. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels with identified building sites. The identified building sites do not encroach on or into ESHA or ESHA buffer area. The four parcels are consistent with the General Plan land use designation which allows the creation of up to four lots per acre. This application is for two lots per acre. The lot widths average 48.5 feet and are consistent citywide with established beachfront lot sizes in the SFM zoning district and the LCP certified SFM beachfront lot width standard.

   The proposed TPM is consistent with the SFM zoning density and General Plan land use density. The project will not result in potentially significant impacts on the physical environment. Therefore, the proposed project is the least environmentally damaging alternative.

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

The project was reviewed by the Environmental Review Board (ERB) and Subdivision Review Committee (SRC), a subset of the ERB. The ERB originally reviewed the TPM as a five-lot subdivision request as part of the MBC Development Agreement application. The ERB and SRC reviewed the project a second time as part of the current proposal of a four-lot subdivision and supported the proposed TPM as being consistent with existing lot size in the Trancas / Broad Beach neighborhood.

B. Environmentally Sensitive Habitat Area (LIP Chapter 4)

According to LCP Environmentally Sensitive Habitat (ESHA) Overlay Map No. 1, the project site for the proposed TPM is not located in an ESHA. Although not depicted on the LCP ESHA Overlay Map, the project site contains coastal dunes, which is considered ESHA. In addition, the LIP does not have established setbacks from coastal dune ESHA.

Pursuant to LIP 4.3.A, any area not designated on the ESHA Overlay map that meets the "environmentally sensitive area" definition (LIP Chapter 2) is ESHA and shall be accorded all the protection provided for ESHA in the LCP. The City shall determine the physical extent of habitat meeting the definition of "environmentally sensitive area" on the project site, based on the applicant's site-specific biological study, as well as available independent evidence. The extent of ESHA onsite has been extensively studied by the City Biologist, CCC's Biologist, California Department of Fish and Game, independent biologists and coastal geomorphologists. This is discussed in depth in the Biological Resources Section (pages 22 through 29) of Revised Mitigated Negative Declaration No. 06-004.

Based on the substantial biological studies completed for the site, it was determined by the CCC that a rear yard / front dune ESHA buffer of at least five feet would serve as adequate space to construct and maintain a residence without encroaching into the ESHA and restoration area. Therefore, a five foot buffer from the designated ESHA areas is required as the rear yard setback in the Malibu Bay Company Overlay District development standards.

The subject TPM and potential development, subject to the Malibu Bay Company Overlay District, will result in less than significant impacts to sensitive resources, significant loss of vegetation or wildlife, or encroachments into ESHA. Nevertheless, pursuant to LIP Section 4.7.6, the supplemental ESHA findings are made as follows:

Finding B1. Application of the ESHA overlay ordinance would not allow construction of a residence on an undeveloped parcel.

The proposed TPM will create four undeveloped parcels all of which have identifiable building sites which do not encroach into ESHA or ESHA buffer.

Finding B2. The project is consistent with all provisions of the certified LCP with the exception of the ESHA overlay ordinance and it complies with the provisions of Section 4.7 of the Malibu LIP.

As stated in Section A. General Coastal Development Permit, Finding A1, the proposed project conforms to the certified LCP. The proposed TPM and identified building sites are in compliance with ESHA development standards and the Malibu Bay Company Overlay. In addition, the project includes a dune restoration plan for the site which will enhance the existing coastal dune habitat.

C. Native Tree Protection (LIP Chapter 5)

No native trees are proposed for removal as part of this application. Therefore, the findings for LIP Chapter 5 do not apply.

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

The Scenic, Visual and Hillside Resource Protection Chapter governs those Coastal Development Permit applications concerning any parcel of land that is located along, within, provides views to or is visible from any scenic area, scenic road, or public viewing area. This project is visible from a scenic

road (Pacific Coast Highway); therefore, the Scenic, Visual and Hillside Resource Protection applies and the five findings set forth in LIP Section 6.4 are hereby made as follows:

Finding D1. The project, as proposed, will have no significant adverse scenic or visual impacts due to project design, location on the site or other reasons.

The proposed TPM will create four parcels on Pacific Coast Highway which is a designated scenic highway. These parcels would each be developed with a single family residence at a future date. The LIP policies require that new development not be visible from scenic roads or public viewing areas. Where this is not feasible, new development must minimize impacts through siting and by incorporating design measures to limit the appearance of bulk, ensuring visual compatibility with the character of surrounding areas, and by using colors and materials that are similar and blend in with the natural materials on the site. Walls and landscaping must not block public viewing areas.

Development is required to preserve bluewater ocean views by limiting the overall height and siting of structures where feasible to maintain ocean views over the structure. Where it is not feasible to maintain views over the structure through siting and design alternatives, view corridors must be provided in order to maintain an ocean view through the project site. The existing lot is 200 feet in width. The proposed project includes division of the lot to four 47 to 51 foot wide lots. The lot is legally developable whether it is divided or not.

The aesthetics analysis of the Environmental Impact Report (EIR) by Envicom Corporation, entitled, "Malibu Bay Company Development Agreement Project Final Impact Report" dated July 2003 page 5.1-22, describes the site as follows:

> "The Broad Beach site consists of 2.0-acre, 200 foot wide beachfront site located along Pacific Coast Highway opposite the Trancas Commercial site immediately east of the intersection with Trancas Canyon Road. The site abuts several other lots with single family residences to the east and a single family residence is under construction on the adjoining lot to the west. The presence of the 200-foot frontage of the subject property along Pacific Coast Highway is noticeable primarily as a gap in the row of 2-story beachfront homes behind a roadside view-blocking fence constructed along Broad Beach. Views of the property vary according to direction and speed of travel on Pacific Coast Highway. An existing 6.0 foot high shade-covered fence and a border of 8.0 to 10.0 foot high mature landscaping shrubs and small trees combine to block views of the coastal site from Pacific Coast Highway. The fence and landscaping is continuous along the entire frontage of the site except for an entry drive and shaded gate at the western side of the property frontage. Views of the site from the westbound lanes of Pacific Coast Highway the beachfront site is most noticeable as a brief gap in the row of primarily 2-story beachfront homes. Views of the shoreline and sandy beach are scarcely discernable through the fence and landscaping. As eastbound traffic approaches the driveway gate, the undeveloped beachfront lot constitutes the visual break between residences that line the beach. The gap provides a viewing angle across the site that may permit a glimpse of ocean from passing vehicles. The duration of any potential view may be short depending on the rate of traffic speed through the

nearby intersection."

Further, the visual resource analysis in the EIR (page 5.1-45) states the following:

> "The subject beach lot constitutes a brief visual gap in the rooflines of existing residences lining the ocean side of the Pacific Coast Highway. The immediate roadside frontage of the residential strip is characterized by shaded fencing and landscaping that all but eliminates ocean or beach views from Pacific Coast Highway. The elevation along the centerline of Pacific Coast Highway in front of the beach lot is 16.5 feet and the pads for the proposed residences would be graded at 13.5 feet. The slightly higher elevation of Pacific Coast Highway is not enough to allow significant ocean, shoreline, or beach views across through the roadside bordering fence and landscaping buffer. At the 50 mph speed limit posted for this segment of Pacific Coast Highway motorists would pass by the beach lots in approximately 2.7 seconds.
>
> The addition of five single family residences [*previous proposal*] on adjacent beachfront lots would result in a continuation of beach front residential land uses and would not significantly impact visual resources in the project vicinity."

The proposed TPM creating four parcels will still be required to provide the required view corridor. Rather than providing one view corridor of 40-feet in length on the 200-foot long lot, there will now be several opportunities for visual relief as the view corridors on each parcel would still be required to be 20 percent of the lineal frontage an maintain side yard setbacks as required by the Malibu Bay Company Overlay District, public view development standard. The visual analysis found in Attachment 9 of the January 22, 2007 City Council Agenda Report, as well as Exhibit A to Ordinance No. 344 shows the proposed view corridors.

The proposed project may have an impact on the existing visual character of the site because eventually construction of four single family residences will occur on the newly created vacant lots and be visible from Pacific Coast Highway. However, there are properties in the vicinity that are currently improved with single family residences similar in size and bulk to what could be proposed on the newly created lots. The development would not be inconsistent with the adjacent properties and would have a less than significant impact on visual resources.

Land Use Objective 2.3, Development of Appropriate Scale and Context, from the City of Malibu General Plan states the following policies:

- Land Use Policy 2.3.2: The City shall discourage "mansionization" by establishing limits on height, bulk, and square footage for all new and remodel single family residences; and

- Land Use Policy 2.3.1: The City shall protect and preserve the unique character of Malibu's many distinct neighborhoods.

The construction of four smaller residences, in lieu of one large building, would be more consistent with the established scale and context of the neighborhood.

In addition, LIP policies require that the design of land divisions ensure that the building sites are clustered, that the length of the driveways are minimized, that shared driveways are provided, that grading is minimized, and that all graded slopes are revegetated. Any proposed residences would be required to be clustered to minimize visual impact and public view corridors would be required for each lot. Vehicular access would be taken via a shared driveway similar to other properties in the area that share a driveway accessing from Broad Beach Road in lieu of Pacific Coast Highway; thus, eliminating the need to have individual driveways accessing onto Pacific Coast Highway. In addition, a dune restoration plan is proposed to restore the existing dune area outside of the development envelopes in order to enhance the natural character of the site.

Furthermore, in accordance with LIP Section 6.5, which is included as a standard condition of approval, any proposed residences, driveways, and associated development would be limited to colors compatible with the surrounding environment (earth tones). White, light shades and bright tones are prohibited. Reflective, glossy, polished and/or roll-formed type metal siding except for solar energy panels or cells would be prohibited. Use of non-glare glass for windows shall be required. The exterior siding of the residences would be limited to brick, wood, stucco, metal, concrete or other similar materials. Lighting for walkways would be limited to fixtures that do not exceed two feet in height that are directed downward, and use bulbs that do not exceed 60 watts or the equivalent. Security lighting controlled by motion detectors may be attached to the residences provided that the lighting is directed downward and is limited to 60 watts or the equivalent. Driveway lighting shall be limited to the minimum lighting necessary for vehicular use. The lighting would be limited to 60 watts or the equivalent. Lights at entrances in accordance with building codes would be permitted provided that such lighting does not exceed 60 watts or the equivalent. Site perimeter lighting would be prohibited. Outdoor decorative lighting for aesthetic purposes is prohibited. Night lighting for sports courts or other private recreational facilities is also prohibited.

All development projects in the City of Malibu must conform to the City's standard conditions of approval and the LCP provisions detailed herein. Therefore, the project as proposed (including a lighting deed restriction at the time of permit approvals for the single family residences), will result in a less than significant impact in terms of aesthetics.

Finding D2. The project, as conditioned, will not have significant adverse scenic or visual impacts due to required project modifications, landscaping or other conditions.

As stated previously in Finding D1, any subsequent development applications will require the submittal of a coastal development permit. The applications if approved will be subject to conditions which would minimize any potential visual impacts.

Finding D3. The project, as proposed or as conditioned, is the least environmentally damaging alternative.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned, is the least environmentally damaging alternative.

Finding D4. There are no feasible alternatives to development that would avoid or substantially lessen any significant adverse impacts on scenic and visual resources.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned will result in no significant impacts on scenic and visual resources.

Finding D5. Development in a specific location on the site may have adverse scenic and visual impacts but will eliminate, minimize or otherwise contribute to conformance to sensitive resource protection policies contained in the certified LCP.

As discussed in A. General Coastal Development Permit, Finding A3, the project as conditioned will have no significant scenic and visual impacts.

E. Transfer Development Credits (LIP Chapter 7)

LIP Chapter 7 applies to land division and/or multi-family residential development in the Multiple Family (MF) or Multi-Family Beachfront (MFBF) zoning districts. The subject application is for a land division; therefore, the Transfer of Development Credit (TDC) requirement must be met. The intent of this Chapter is to ensure that density increased through new land divisions and new multi-family unit development in the City, excluding affordable housing units, will not be approved unless Transfer of Development Credits are purchased to retire development rights on existing donor lots in the Santa Monica Mountains Area. A lot from which development rights have been transferred is "retired", and loses its building potential through recordation of a permanent open space easement. TDC Credit may be obtained through purchase of development rights on donor sites throughout the Santa Monica Mountains Area coastal zone, as defined in the LIP, from private property owners. The responsibility for initiation of a transfer of a development credit is placed on the applicant and the project will be conditioned that the TDC take place prior to final map recordation.

The proposed project is subject to the TDC requirements of Chapter 7 and the three findings set forth in LIP Section 7.9 are hereby made as follows:

Finding E1. The requirements for Transfer of Development Credits is necessary to avoid cumulative impacts and find the project consistent with the policies of the certified Malibu LCP.

As stated previously, the TDC requirement is necessary as the proposed subdivision creates three additional legal parcels and pursuant to LIP Section 7.8.1(a), the applicant shall be required to retire sufficient donor lots to provide one (1) TDC credit for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.

Finding E2. The new residential building sites and/or units made possible by the purchase of TDC can be developed consistent with the policies of the certified Malibu LCP without the need for a variance or other modifications to LCP standards.

The proposed TPM has been conditioned and deed restrictions have been recorded which prohibit further subdivision of the subject parcels, modifications to or variance from the City of Malibu

Zoning and Development Standards in effect at the time of final map recordation.

Finding E3. Open Space easements executed will assure that lot(s) to be retired will remain 7in permanent open space and that no development will occur on these sites.

The TDC candidate sites selected to be retired shall be reviewed by City staff in conjunction with a Subdivision Review Committee representative. This review shall ensure that the site selected for retirement meets the criteria desired for permanent open space. In addition, the three parcels selected to be retired shall be deed restricted prohibiting development into perpetuity. The TDC requirements must be met prior to final map recordation.

F. Hazards (LIP Chapter 9)

The project was analyzed by staff for the hazards listed in the LIP Section 9.2.A.1-7. Review of the project by staff showed that there were no substantial risks to life and property with the proposed TPM as there is no proposed landform alteration. LIP Section 9.4.N. requires that land divisions and lot line adjustments demonstrate that a safe, legal, all weather access road can be constructed in conformance with applicable policies of the LCP and that all parcels and access roads comply with all applicable fire safety regulations. The County of Los Angeles Fire Department Land Development Unit reviewed and approved the proposed project and existing access way.

G. Shoreline and Bluff Development (LIP Chapter 10)

The project does include development of a parcel located on or along the shoreline, a coastal bluff or bluff top fronting the shoreline as defined by the Malibu Local Coastal Program. Therefore, in accordance with Section 10.2 of the Local Implementation Plan, the requirements of Chapter 10 of the LIP are applicable to the project and the required findings made below.

Finding G1. The project, as proposed, will have no significant adverse impacts on public access, shoreline sand supply or other resources due to project design, location on the site or other reasons.

The project is located between the first public road and the sea. However, the proposed TPM and potential residential development is not anticipated to interfere with the public's right to access the coast as the site offers no direct or indirect beach access. There is existing vertical public access approximately 300 feet to the east at the Zuma Beach County Park. In addition, the applicant has offered to provide lateral access easements across each parcel; therefore, the proposed project will have no significant adverse impacts on public access.

The Wave Uprush Studies by Pacific Engineering Group dated 1996 and May 22, 2003, state:

> "Any proposed residential development should be setback approximately 174 feet from the highest (most landward) mean high tide line and have a finished floor elevation of at least 13.5 feet. Conversely, the maximum wave uprush at the subject site will occur approximately 155 feet seaward of the Pacific Coast Highway right-of-line (125 feet seaward of the 30 foot wide private access road) at an elevation of +8.7

mean sea level-North American Vertical Datum (MSL-NGVD). Since, the 100-year flood zone only affects from Trancas Canyon up to an elevation of about 10 feet, no significant impacts involving flood hazards are expected as a result of the project.

Any future residential development would involve the use of private septic systems (alternative onsite wastewater tertiary treatment) and should be located no further than 140 feet seaward from the Pacific Coast Highway right-of-way line (no more than 100 feet seaward of the private access road setback line). A septic system located within 140 feet from the Pacific Coast Highway right-of-way line will be located a minimum 15 feet landward of the wave uprush limit and would not require a protective bulkhead (Pacific Engineering Group, May 22, 2003)."

Therefore, it is anticipated that shoreline sand supply or other resources will not be impacted by the proposed project.

Finding G2. The project, as conditioned, will not have significant adverse impacts on public access, shoreline sand supply or other resources due to required project modifications or other conditions.

As stated in G. Shoreline and Bluff Development Finding G1, as designed, conditioned, and approved by the City Geologist and City Coastal Engineer, the project will not have any significant adverse impacts on public access or shoreline sand supply or other resources.

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

As discussed previously, the project will not result in potentially significant impacts because: 1) feasible mitigation measures and / or alternatives have been incorporated to substantially lessen any potentially significant adverse effects of the development on the environment; or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment. The project is the least environmentally damaging alternative.

Finding G4. There are not alternatives to the proposed development that would avoid or substantially lessen impacts on public access, shoreline sand supply or other resources.

As stated in G. Shoreline and Bluff Development Finding G1, as designed, conditioned, and approved by the City Geologist and City Coastal Engineer, the project will not have any significant adverse impacts on public access or shoreline sand supply or other resources.

Finding G5. In addition, if the development includes a shoreline protective device, that it is designed or conditioned to be sited as far landward as feasible, to eliminate or mitigate to the maximum extent feasible extent adverse impacts on local shoreline sand supply and public access, there are no alternatives that would avoid or lessen impacts on shoreline sand supply, public access or coastal resources and is the least environmentally damaging alternative.

As stated in G. Shoreline and Bluff Development Finding G1 above, the proposed TPM and potential residential development will not require a shoreline protective device and is the least environmentally damaging alternative.

However, as a condition of approval, new development of a vacant beachfront or bluff-top lot, or where demolition and rebuilding is proposed, where geologic or engineering evaluations conclude that the development can be sited and designed so as to not require a shoreline protection structure as part of the proposed development or at anytime during the life of development, the property owner shall be required to record a deed restriction against the property that ensures that no shoreline protection structure shall be proposed or constructed to protect the development approved and which expressly waives any future right to construct such devices that may exist pursuant to Public Resources Code Section 30232.

H. Public Access (LIP Chapter 12)

The subject site is located between the first public road and the sea, on the ocean-side of Pacific Coast Highway at Trancas / Broad Beach. The project involves subdivision into four parcels with future development potential of four single family residences. No onsite vertical or lateral access is currently provided on the subject parcel.

The project does not meet the definition of exceptions to public access requirements identified in LIP Section 12.5(A). However, LIP Section 12.5(B) states that public access is not required when adequate access exists nearby and the findings addressing LIP Sections 12.7.1 and 12.7.3 can be made. The following findings satisfy this requirement. Analyses required in LIP Section 12.7.2 are provided herein. Bluff top and recreational accesses are not applicable. No issue of public prescriptive rights has been raised.

Trail Access
The project site does not include, or have any LCP mapped access ways to existing or planned public trail areas; therefore, no condition for trail access is required by the Local Coastal Program. However, an Offer to Dedicate (OTD) lateral access across each parcel has been made which adds to the planned California Coastal Trail along the coastline.

Lateral Access
A lateral public access easement provides public access and use along or parallel to the sea or shoreline. The applicant has agreed to provide an offer to dedicate lateral access easements along each parcel subject to project approval. Such OTD shall include a site map that shows all easements, deed restrictions, or OTD and/or other dedications to public access and open space and provide documentation for said easement or dedication.

Vertical Access.
As indicated above, the project is located along the shoreline; however, adequate public access is available nearby at Zuma County Beach Park approximately 300-feet to the east. Consistent with LIP Section 12.5(B), due to the ability of the public, through other reasonable means to reach nearby coastal resources, an exception for public lateral access and vertical access has been determined to be

appropriate for the project and no conditions for access have been required. However, the following findings and analysis were conducted in accordance with LIP Section 12.7.3 regarding access. Due to these findings, LIP Section 12.7.1 is not applicable.

Finding H1. The type of access potentially applicable to the site involved (vertical, lateral, blufftop, etc.) and its location in relation to the fragile coastal resource to be protected, the public safety concern, or the military facility which is the basis for the exception, as applicable.

Vertical access could impact fragile coastal resources (coastal dune ESHA) as it is situated along the width of the property and could be easily damaged by excessive foot traffic. There is no issue of a public safety concern nor a military facility located nearby. The basis for the exception to the requirement for vertical access is associated with the availability of access nearby as described above.

Finding H2. Unavailability of any mitigating measures to manage the type, character, intensity, hours, season or location of such use so that fragile coastal resources, public safety, or military security, as applicable, are protected.

As stated in Finding H1, vertical access across the site could impact fragile coastal resources. Per the Restoration Plan for Coastal Foredunes, prepared by Dr. Edith Read, dated December 1, 2005, the coastal foredunes are in a degraded form and the practical success of restoration and enhancement of the sand dunes will require that beach access from the potential single family dwellings via small trails skirting the sand dunes to the extent possible. The dune ESHA is further protected by the Malibu Bay Company Overlay District's development standard requiring a conservation easement across the coastal foredunes.

There is no issue of a public safety concern nor a military facility located nearby. The basis for the exception to the requirement for vertical access is associated with the availability of access nearby as described above.

Finding H3. Ability of the public, through another reasonable means, to reach the same area of public tidelands as would be made accessible by an access way on the subject land.

The project, as proposed, does not block or impede access to the ocean. The project site is not located on a public beach nor accessed via a public road. Adequate public access is available nearby at Zuma Beach County Park. No legitimate governmental or public interest would be furthered by requiring access at the project site because: 1) existing access to coastal resources is adequate; 2) the proposed project will not impact the public's ability to access the shoreline or other coastal resources; and 3) the project site is not within the vicinity of a public beach.

I. Land Division (LIP Chapter 15)

Pursuant to LIP Section 15.2, the City Council may approve or conditionally approve a land division application only if the City Council affirmatively finds that the proposal meets all of the following:

Finding I1. Does not create any parcels that do not contain an identified building site that: a. Could be developed consistent with all policies and standards of the LCP; b. Is safe from flooding, erosion, geologic and extreme fire hazards; c. Is not located on slopes over 30% and will not result in grading on slopes over 30%. All required approvals certifying that these conditions are met shall be obtained.

The TPM indicates identified building sites which could be developed consistent with all policies and standards of the LCP would be safe from flooding, erosion, geologic and extreme fire hazards if constructed per the recommendations and requirements of the City Geologist, City Coastal Engineer, City Public Works Department and LACFD; and are not on slopes over 30 percent.

Finding I2. Is designed to cluster development, including building pads, if any, to maximize open space and minimize site disturbance, erosion, sedimentation and required fuel modification.

The proposed TPM clusters development to the front and landward portion of the parcel in order to minimize site disturbance and impacts to ESHA. The ESHA restoration areas identified by Dr. Read are well seaward of any proposed development. The Malibu Bay Company Overlay District adds specific development standards to ensure that development is clustered, that open space is maximized, and site disturbance is minimized. The majority of the site is held in a conservation easement and precludes development, thereby minimizing the potential for erosion and sedimentation. In addition, there are no fuel modification requirements for the subject site.

Finding I3. Does not create any parcels where a safe, all-weather access road and driveway cannot be constructed that complies with all applicable policies of the LCP and all applicable fire safety regulations; is not located on slopes over 30% and does not result in grading on slopes over 30%. All required approvals certifying that these conditions are met shall be obtained.

Access to all four parcels of the proposed TPM has already been constructed and approved by the LACFD during development of the homes to the east. Access way improvements were approved via a Coastal Development Permit Waiver-De Minimis No. 4-95-100.

Finding I4. Does not create any parcels without the legal rights that are necessary to use, improve, and/or construct an all-weather access road to the parcel from an existing, improved public road.

As stated in Finding I3, the access way has been previously approved and constructed.

Finding I5. Is designed to minimize impacts to visual resources by complying with the following: a. Clustering the building sites to minimize site disturbance and maximize open space; b. Prohibiting building sites on ridgelines; c. Minimizing the length of access roads and driveways; d. Using shared driveways to access development on adjacent lots; e. Reducing the maximum allowable density in steeply sloping and visually sensitive areas; f. Minimizing grading and alteration of natural landforms, consistent with Chapter 8 of the Malibu LIP; g. Landscaping or revegetating all cut and fill slopes and other disturbed areas at the completion of grading, consistent with Section 3.10 of the Malibu LIP; h. Incorporating interim seeding of graded building pad areas, if any, with native plants unless construction of approved structures commences within 30 days of the completion of grading.

As stated in Finding I1, the building sites have been clustered in order to minimize site disturbance and impacts to sensitive resources. Any other form of clustering would require unavoidable impacts to the onsite ESHA. The site does not contain ridgelines. Access for all four proposed parcels is a shared existing private drive which does not require lengthening. There are no slopes to be graded on the site. The alteration of natural landforms does not extend outside the proposed building site development envelope (those areas do not contain any identified coastal dune habitat) other than the proposed improvement of the degraded coastal dune habitat via the restoration plan.

Finding I6. Avoids or minimizes impacts to visual resources, consistent with all scenic and visual resources policies of the LCP.

As discussed in D. Scenic Visual and Hillside Resource Protection Ordinance, Finding D1, the proposed TPM is consistent with all scenic and visual resource policies of the LCP.

Finding I7. Does not create any additional parcels in an area where adequate public services are not available and will not have significant effects, either individually or cumulatively, on coastal resources.

The proposed land division application was routed to all applicable public agencies and no issue relative to public services was noted. The land division will not have an effect on coastal resources either individually or cumulatively as the subject site has a land use designation of SFM which allow up to four single family homes per acre (1 residence per .25 acre), the applicant has requested a TPM of four parcels on two acres instead of the eight allowed by the land use designation. The residential use of the site was anticipated by its zoning designation and will not result in impacts individually or cumulatively on coastal resources.

Finding I8. Does not create any parcels without the appropriate conditions for a properly functioning septic system or without an adequate water supply for domestic use. All required approvals certifying that these requirements are met must be obtained.

The proposed land division application was reviewed and approved by the City's Environmental Health Administrator and onsite wastewater treatment systems (tertiary) will be required for any future development on the site. In addition, the application was reviewed by the Los Angeles County Waterworks District No. 29 and the applicant received the required "will serve" letters which indicate the adequate water supply exists to serve the parcels.

Finding I9. Is consistent with the maximum density designated for the property by the Land Use Plan map and the slope density criteria (pursuant to Section 15.6 of the Malibu LIP).

The subject site has a land use designation of SFM, which allows up to four single family homes per acre (1 residence per .25 acre). The applicant has requested a TPM of four parcels on two acres instead of the eight allowed by the land use designation.

The slope density criteria are not applicable as it only applies to parcels zoned Rural Residential.

Finding I10. Does not create any parcels that are smaller than the average size of surrounding parcels.

As indicated in the Citywide Lot Width Analysis Table in the September 5, 2006 Planning Commission Agenda Report, the TPM requested lot size is consistent with not only the surrounding parcels but is the average parcel size for all beachfront zoned SFM parcels citywide. The proposed TPM does not create any parcels smaller than the average size of surrounding parcels.

Finding I11. Does not subdivide a parcel that consists entirely of ESHA and/or ESHA buffer or create a new parcel that consists entirely of ESHA and/or ESHA buffer.

The subject parcel does contain coastal dune ESHA which has been delineated in biological inventories and the dune restoration plan by Dr. Edith Read. The parcel does not consist entirely of ESHA or ESHA buffer. Section 4.6.1 of the LIP, Buffers, lists the types of ESHA and its respective buffer standards. There is no specific listing for coastal dune ESHA. Under Section 4.6.1.G (Other ESHA) it states "For other ESHA not listed above, the buffer recommended by the Environmental Review Board or City Biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the ESHA shall be required." The ESHA buffer for this specific site is the rear yard setback and conservation easement in the Malibu Bay Company Overlay District. Therefore, the proposed TPM does not create lots that consist entirely of ESHA or ESHA buffer.

Finding I12. Does not create any new parcels without an identified, feasible building site that is located outside of EHSA and the ESHA buffer required in the LCP and that would not require vegetation removal or thinning for fuel modification in ESHA and/or the ESHA buffer.

The proposed TPM identifies feasible building sites which are located outside of the ESHA area and are consistent with the Malibu Bay Company Overlay District development standards. No vegetation removal for fuel modification is proposed for the site. A coastal dune restoration plan is proposed for the site.

Finding I13. Does not result in construction of roads and/or driveways in ESHA, ESHA buffer, on a coastal bluff or on a beach.

Access to the site was previously permitted and constructed and is not located in ESHA, ESHA buffer, on a coastal bluff or on a beach.

Finding I14. Does not create any parcel where a shoreline protection structure or bluff stabilization structure would be necessary to protect development on the parcel from wave action, erosion or other hazards at any time during the full 100 year life of such development.

No new parcels are being created that would require future development of a shoreline protection structure. Per the Wave Uprush Study conducted by Pacific Engineering Group dated March 22, 2003, "A septic system located within 140 feet from the Pacific Coast Highway right-of-way line will be located a minimum of 15 feet landward of the wave uprush limit and would not require a

protective bulkhead."

Finding I15. If located on a beachfront parcel, only creates parcels that contain sufficient area to site a dwelling or other principal structure, on-site sewage disposal system, if necessary, and any other necessary facilities without development on sandy beaches or bluffs.

The proposed TPM creates four beachfront parcels with sufficient area to site a dwelling and onsite wastewater treatment systems and will not require development on sandy beaches or bluffs. According to the Preliminary Soils and Engineering Geologic Investigation by GeoSystems, Environmental and Geotechnical Consultants, dated August 9, 1994, "A wedge of artificial fill is present along the northern portion of the site. This material is associated with the construction of Pacific Coast Highway." The identified building sites are located along the northern edge of the parcel.

Finding I16. Includes the requirement to acquire transfer of development credits in compliance with the provisions of the LCP, when those credits are required by the Land Use Plan policies of the LCP.

The applicant shall comply with the requirements of Chapter 7 of the LIP which requires the retirement of one lot (in designated donor areas) per lot created. Therefore, the applicant must retire three lots prior to final map recordation.

J. Land Division (M.M.C. 16.12.130 Tentative Parcel Map)

Finding J1. The proposed subdivision map is consistent with Malibu's General Plan.

Per the City's General Plan Land Use Designation definitions:

> Single family Residential (SF): This land use designation includes all remaining single family residential areas. It is intended to enhance the rural characteristics of the community by maintaining low-density single family residential development on lots ranging from .25 to 1 acre in size in a manner, which respects surrounding property owners and the natural environment. Single family Low (SFL) allows for the creation of up to two lots per acre with a minimum lot size of .5 acre. Single family Medium (SFM) allows for the creation of up to four lots with a minimum lot size of .25 acre.

The project is consistent with the adopted General Plan and does not adversely affect neighborhood character, in that the permitted land use and density of the single family General Plan land use designation and that the lot-size and density are consistent with similar single family parcels in the vicinity of the project site. The proposed map is consistent with the policies, goals and objectives set forth in the Land Use Element of the General Plan.

Finding J2. The design and improvements of the proposed subdivision map is consistent with Malibu's General Plan.

The design of the proposed subdivision map is consistent with the General Plan in that the City's

General Plan designation for the subject site is SFM and allows for the creation of up to four lots per acre with a minimum lot size of .25 acre. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels, which are consistent with this General Pan land use designation. The project would also be consistent with the proposed General Plan land use designation of SFM.

Finding J3. The site is physically suitable for the type of development proposed.

The subject site is physically suitable for the type of future development anticipated (single family residences) in that each of the new parcels is of sufficient size and level topography to support a single family home consistent with General Plan, City of Malibu M.M.C. Zoning and Residential Development Standards and LCP LIP Residential Development Standards. In addition, the TPM shall be subject to conditions which will be recorded on the final parcel map, which limit development to current zoning standards and prohibit the granting of any variances or modifications for future development. The proposed subdivision will also be conditioned so that any required street improvements are made prior to final certificate of occupancy on any future residential development.

Finding J4. The site is suitable for the proposed density of development.

The site is suitable for the proposed density of development in that each of the new parcels will eventually contain one single family residence. The General Plan land use designation and zoning designation for the subject site is SFM which allows for the creation of up to four lots per acre with a minimum lot size of .25 acre. The proposed tentative parcel map consists of two .52 acre parcels and two .51 acre parcels, which exceeds the minimum lot size standard. The newly created half acre lots would be suitable for the proposed density and are consistent with zoning and General Plan land use designations.

Finding J5. The design of the development and the proposed improvements are not likely to cause substantial environmental damage or substantially injure fish or wildlife or their habitat.

The design of the subdivision and the proposed improvements are not likely to cause substantial environmental damage or substantially injure fish or wildlife or their habitat because the development will not encroach into the environmentally sensitive, coastal dune habitat areas on the site. Future development on the site is prescribed by the Malibu Bay Company Overlay District development standards which specifically protect the onsite coastal dune ESHA by creating a buffer of an additional setback and conservation easement. Further, the TPM shall be subject to conditions which will be recorded on the final parcel map, which limit development to current zoning standards and prohibit the granting of any variances (including stringline) or modifications for future development.

Finding J6. The design of the development and the type of improvement are not likely to cause serious public health hazards.

The design of the development and the type of improvements are not likely to cause serious public health hazards since the project consists of a residential subdivision in an existing residential area and has no associated public health hazards.

Finding J7. The design of the development and the type of improvements will not conflict with any public easements.

The design of the development and the type of improvements will not conflict with any public easements in that there are no public easements associated with the proposed tentative parcel map. Utility easements and private access easements will be maintained and recorded on the final parcel map.

K. Onsite Wastewater Treatment System (LIP Chapter 18)

LIP Chapter 18 addresses Onsite Wastewater Treatment Systems (OWTS). LIP Section 18.7 includes specific siting, design and performance requirements. The project has been reviewed by the City Environmental Health Administrator and will be conditioned to meet the requirements of the Malibu Plumbing Code, the M.M.C. and the LCP.

Section 3. City Council Action.

Based on the foregoing findings and substantial evidence contained within the record, including the analysis contained in the associated Agenda Report, the City Council adopts Revised MND No. 06-004, and approves CDP No. 05-136 for Vesting TPM No. 99-002 (County Reference: TPM No. 24070) subject to the conditions listed below.

Conditions of Approval

1. The applicant and property owner, and their successors in interest, shall indemnify and defend the City of Malibu and its officers, employees and agents from and against all liability and costs relating to the City's actions concerning this project, including (without limitation) any award of litigation expenses in favor of any person or entity who seeks to challenge the validity of any of the City's actions or decisions in connection with this project. The City shall have the sole right to choose its counsel and property owners shall reimburse the City's expenses incurred in its defense of any lawsuit challenging the City's actions concerning this project.

2. Approval of this application is to allow a tentative parcel map to subdivide one approximately 2.08 acre parcel into two .52 acre parcels and two .51 acres. Future development on any of these parcels shall be limited to the Malibu Bay Company Overlay District development standards. No variances or modifications to development standards shall be granted for future development on the subject parcels.

3. Pursuant to LIP Section 13.18.2, this permit and rights conferred in this approval shall not be effective until the property owner signs and returns the Acceptance of Conditions Affidavit accepting the conditions set forth herein. The applicant shall file this form with the Planning Division within 10 days of this decision and prior to issuance of any development permits.

4. The CDP shall be null and void if the project has not commenced within two (2) years after issuance of the permit. Extension to the permit may be granted by the approving authority for due cause. Extensions shall be requested in writing by the applicant or authorized agent at least two weeks prior to expiration of the two-year period and shall set forth the reasons for the request.

5. Any questions of intent or interpretation of any condition of approval will be resolved by the Planning Manager upon written request of such interpretation. Minor changes to the approved plans or the conditions of approval may be approved by the Planning Manager, provided such changes achieve substantially the same results and the project is still in compliance with the Malibu Municipal Code and the Local Coastal Program. An application with all required materials and fees shall be required.

6. The vesting tentative parcel map shall conform to the requirements of the City of Malibu Environmental and Building Safety Division, and to all City Geologist, City Environmental Health Administrator, City Biologist, City Public Works and Los Angeles County Fire Department requirements, as applicable and conditioned in the department review sheets found in Attachment 6 of the September 5, 2006 Planning Commission Agenda Report. Notwithstanding this review, all required permits shall be secured.

7. All conditions required for the Tentative Parcel Map approval TPM No. 99-002 (Los Angeles County Map No. 24070) shall remain in effect.

8. Pursuant to LIP Section 13.20, development pursuant to an approved coastal development permit shall not commence until the coastal development permit is effective. The coastal development permit is not effective until all appeal, including those to the California Coastal Commission, have been exhausted. In the event that the California Coastal Commission denies the permit or issues the permit on appeal, the coastal development permit approved by the City is void.

9. Transfer of Development Credit Requirements

   a. The applicant shall be required to retire sufficient donor lots to provide one (1) Transfer of Development Credit (TDC) for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.
   b. The applicant shall be required to retire sufficient donor lots to provide one (1) TDC for each newly created lot authorized. Therefore, the TDC requirement for the proposed project is three (3) TDC credits.
   c. TDC candidate sites selected to be retired shall be reviewed by the Planning Manager in conjunction with a Subdivision Review Committee representative. This review shall ensure that the site selected for retirement meets the criteria desired for permanent open space.
   d. Evidence of the purchase of developments rights on a donor site and recordation of a dedication to the City of Malibu of a permanent, irrevocable open space easement in favor of the City on the retired lots that conveys an interest in the lots that insures that future development on the lots is prohibited and that restrictions can be enforced, the text of which has been approved pursuant to procedures in Section 13.19 of the Malibu LIP

(recorded legal documents).

e. Evidence of the voluntary merger or of a recorded deed restriction reflecting that the retired lots used to generate the credits are combined with one or more adjacent, unrestricted lot(s) through a process outlined in LIP Section 7.8.4.. The three parcels selected to be retired shall be deed restricted prohibiting development into perpetuity.
f. The applicant shall supply proof that the recorded deed restriction was provided to the Los Angeles County Assessor's Office.
g. The TDC requirements must be met prior to final map recordation.

10. As a condition of approval of new development on a vacant beachfront or bluff-top lot, or where demolition and rebuilding is proposed, where geologic or engineering evaluations conclude that the development can be sited and designed so as to not require a shoreline protection structure as part of the proposed development or at anytime during the life of development, the property owner shall be required to record a deed restriction against the property that ensures that no shoreline protection structure shall be proposed or constructed to protect the development approved and which expressly waives any future right to construct such devices that my exist pursuant to Public Resources Code Section 30232.

11. In order to effectuate the property owner's offer to dedicate lateral access, prior to the issuance of the CDP for subdivision of the subject property, the property owner shall execute and record a document in a form and content acceptable to the Coastal Commission, an irrevocable offer to dedicate (or grant an easement) free of prior liens and any other encumbrances that may affect the interest being conveyed, an easement to a public agency or private agency association approved by the Coastal Commission, granting the public the permanent right of lateral public the permanent right of lateral public access and passive recreation. The easement shall extend along the entire width of the property from the mean high tide line landward to the ambulatory seawardmost limit of dune vegetation. The recorded document shall include legal descriptions and a map drawn to scale of both the subject parcel and the easement area. The offer to dedicate or grant of easement shall run with the land in favor of the People of the State of California, binding all successors and assignees and the offer shall be irrevocable for a period of 21 years, from the date of recordation. The property owner shall provide a copy of the recorded document to Planning Division staff prior to final Planning approval.

12. Public View Corridors – Deed Restriction Requirement

Prior to issuance of a coastal development permit for subdivision of the subject property, the following restrictions shall be imposed, and the applicant shall be required to demonstrate that the land owner has executed and recorded a deed restriction that reflects the following restrictions:

a. No less than 20 percent of the lineal frontage of each created parcel of the subdivision shall be maintained as one contiguous public view corridor in the location shown on Exhibit A. The view corridor may not be split or reconfigured.
b. No portion of any structure shall extend into the view corridor above the elevation of Pacific Coast Highway.
c. Any fencing across the view corridor shall be visually permeable, and any landscaping within the view corridor shall include only low-growing species that will not block or

obscure bluewater views.

d. Vegetation between Pacific Coast Highway and the onsite access road that is within the public view corridors shall include only low-growing species that will not block or obscure bluewater views.

13. View Corridor – Removal of Obstructions

Prior to issuance of a coastal development permit for subdivision of the subject property, the applicant shall be required to remove all existing obstructions between Pacific Coast Highway and the onsite access road that are within the required public view corridors, including vegetation that is over two feet in height above the elevation of Pacific Coast Highway and any fencing or gates that are not visually permeable.

14. Biological Resources – Mitigation Monitoring Program

BIO-1 Incorporation of the Malibu Bay Company Overlay District into the M.M.C. to ensure consistency with the LCP and continued protection of the onsite coastal dune ESHA. This mitigation measure shall be implemented upon adoption of Ordinance No. 344.

BIO-2 The Dune Restoration Plan (part of the Malibu Bay Company Overlay District) is required to be finalized prior to the final map recordation and shall be implemented immediately upon approval of the approval of the coastal development permit for the subdivision.

15. Revised Dune Habitat Restoration Plan

Prior to submittal of the Acceptance of Conditions Affidavit and issuance a coastal development permit for subdivision of the subject property, the applicant shall be required to submit, for review and approval by the City Biologist, a revised "Restoration Plan for Coastal Foredunes, 30732 Pacific Coast Highway" (Read, 2005), that incorporates the following changes and additions:

a. All restoration plants and seeds shall consist of local genotypes. Propagules shall be collected on the project site or from elsewhere along the coast of northern Los Angeles County or southern Ventura County, as close as feasible to the project site.
b. The use of a temporary irrigation line system shall be omitted. Rather, restoration seeds/plants shall be planted during the rainy season. If rainfall is not sufficient and additional irrigation is determined necessary for successful plant establishment, only hand watering may be conducted.
c. The planting plan shall be revised to include all disturbed dune habitat areas as identified in the dune habitat delineation contained in the "Biological Resources Assessment," by Hamilton et al., dated March 6, 2008.
d. A maximum of two (2), three-foot wide pathways through the dunes may be established within the dune restoration area, and may only be sited in the area of the existing paths per Figure 2 of the Restoration Plan.
e. Symbolic fencing (post and rope) along the two allowed pathways within the restoration area shall be installed to clearly delineate pathways from restoration areas.

f. The root barrier element of the Restoration Plan shall be omitted.
g. Rear yard fencing shall be installed to delineate developed/setback areas from ESHA/restoration areas.

16. Dune Habitat Restoration Plan Implementation

The application shall be required to implement the Revised Dune Habitat Restoration Plan required pursuant to Condition No. 15 above. Restoration shall commence immediately after issuance of the coastal development permit. If permit issuance does not correspond with the rainy season, restoration shall commence during the next rainy season following coastal development permit issuance.

17. Open Space Conservation Easement – Deed Restriction

Prior to issuance of a coastal development permit for subdivision of the subject property, the applicant shall be required to demonstrate that the land owner has executed and recorded a document in a form and content acceptable to the Coastal Commission, irrevocably offering to dedicate (or grant an easement) to a public agency or private association approved by the Coastal Commission, an open space conservation easement over the area described in the prior paragraph ("open space conservation easement area"), for the purpose of habitat protection. The recorded easement document shall include a formal legal description of the entire property; and a metes and bounds legal description and graphic depiction, prepared by a licensed surveyor, of the open space conservation easement area, as generally shown on Exhibit B of Ordinance No. 344. The recorded document shall reflect that no development shall occur within the open space easement area except as otherwise set forth in this permit condition. The offer shall be recorded free of prior liens and encumbrances which the Coastal Commission determines may affect the interest being conveyed.

18. Air Quality – Mitigation Monitoring Program

The mitigations prescribed by the South Coast Air Quality Management District shall be required on any future development applications on any / all of the four lots.

AQ-1 An operational water truck should be onsite at all times. Apply water to control dust as needed to prevent dust impacts offsite.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-2 Fugitive dust will be mitigated by applying water at all active construction sites (including graded areas, storage piles, excavated trenches, and backfilled trenches) at least twice daily. All unpaved driving and staging areas will be watered at least three times daily.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-3 All disturbed areas, including storage piles, which are not actively utilized for construction purposes, shall be effectively stabilized of dust emissions using water, covered with tarp, the use of non-toxic soil stabilizers, or other suitable cover or vegetative ground cover quickly.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-4 After clearing, grading, earth moving, or excavation is completed; the entire area of disturbed soil will be treated. Treatment, which will also occur during non-work days if necessary, will include watering, revegetation, or spreading non-toxic soil binders to prevent wind pick-up of the soil until the area is paved or otherwise developed.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-5 The primary contractor shall be responsible to ensure that all construction equipment is properly tuned and maintained.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-6 All on and off road construction vehicles shall adhere to the following criteria:
a. Use aqueous diesel fuel
b. Be equipped with a diesel particulate filter
c. Use cooled exhaust gas recirculation (EGR)
d. Shall maintain a reduce speed less than 15 miles per hour on unpaved roads

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-7 Develop a traffic plan to minimize traffic flow interference from construction activities. The plan should include the following:

a. Advance public notice of routing
b. Use of public transportation
c. Satellite parking areas with a shuttle service
d. Schedule operations affecting traffic for off-peak hours
e. Minimize obstruction of through-traffic lanes
f. Provide a flag person to guide traffic properly and ensure safety at construction sites.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-8 Minimize idling time to 10 minutes – saves fuel and reduces emissions.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

AQ-9 Construction management techniques, including minimizing the amount of equipment used simultaneously and increasing the distance between emission sources, will be employed as feasible and appropriate. All trucks leaving the construction site will adhere to the California Vehicle Code. In addition, they will be covered when necessary; and their tires will be rinsed off prior to leaving the property.

Implementation Phase: During Grading and Construction Activities
Monitoring Phase: During Grading and Construction Activities
Enforcement Agency: City of Malibu Department of Environmental and Community Development

19. The Coastal Development Permit runs with the land and binds all future owners of the property.

20. Violation of any of the conditions of this approval shall be cause for revocation and termination of all rights thereunder.

Section 4. Certification.

The City Council shall certify the adoption of this Resolution.

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

SHARON BAROVSKY, Mayor

ATTEST:

LISA POPE, City clerk
(seal)

APPROVED AS TO FORM:

CHRISTI HOGIN, City Attorney

COASTAL COMMISSION APPEAL – An aggrieved person may appeal the City Council decision to the Coastal Commission within 10 working days of the issuance of the City's Notice of Final Action. Appeal forms may be found online at www.coastal.ca.gov or in person at the Coastal Commission South Central Coast District office located at 89 South California Street in Ventura, or by calling (805) 585-1800. Such an appeal must be filed with the Coastal Commission, not the City.

I CERTIFY THAT THE FOREGOING RESOLUTION NO. 09-68 was passed and adopted by the City Council of the City of Malibu at the regular meeting thereof held on the 14th day of December, 2009, by the following vote:

AYES:	5	Councilmembers:	Conley Ulich, Sibert, Stern, Wagner, Barovsky
NOES:	0		
ABSTAIN:	0		
ABSENT:	0		

LISA POPE, City Clerk
(seal)

ex. 2

Exhibit B
of Appeal

NOTICE OF FINAL LOCAL ACTION ON COASTAL PERMIT

FILE

Date of Notice: January 12, 2010

Notice Sent to (US. Certified Priority Mail):
California Coastal Commission
South Central Coast District Office
89 South California Street, Suite 200
Ventura, CA 93001

Contact:
Stefanie Edmondson
Principal Planner
City of Malibu
23815 Stuart Ranch Road
Malibu, CA 90265
(310) 456-2489, ext. 233

Please note the following **Final City of Malibu Action** on a coastal development permit application (all local appeals have been exhausted for this matter):

Project Information

Coastal Development Permit No. 05-136 for Vesting Tentative Parcel Map No. 99-002, Initial Study No. 06-002, and Revised Mitigated Negative Declaration No. 06-004 – Adopting Revised Mitigated Negative Declaration No. 06-004 to subdivide the subject property at 30732 Pacific Coast Highway into four 47 to 51 foot lots

Application Filing Date:	March 17, 1999
Applicant:	Andi Culbertson / CAA California LLC
Owner:	Malibu Bay Company / David Reznick
Location:	30732 Pacific Coast Highway
APN:	4469-026-005

Final Action Information

Final Local Action: ☐ Approved ☑ Approved with Conditions ☐ Denied
Final Action Body: Approved by the City Council on December 14, 2009; Second reading of Ordinance No. 344 on January 11, 2010

Required Materials Supporting the Final Action	Enclosed	Previously Sent (date)
Adopted Staff Report: January 11, 2010 Item 3.A.1. Amended City Council Agenda Report January 11, 2010 Item 3.A.1. City Council Agenda Report December 14, 2009 Item 4.A. Amended City Council Agenda Report December 14, 2009 Item 4.A. City Council Agenda Report September 15, 2009 Item 6.B. Planning Commission Agenda Report		 January 7, 2010 December 23, 2009 December 11, 2009 December 3, 2009 September 3, 2009
Adopted Findings and Conditions: ~~Planning Commission~~ Resolution No. 09-68	X	
Site Plans and Elevations		December 3, 2009

California Coastal Commission Appeal Information

This Final Action is:

☐ **NOT appealable** to the California Coastal Commission (CCC). The Final City of Malibu Action is now effective.

☑ **Appealable** to the California Coastal Commission. The Coastal Commission's 10-working day appeal period begins the first working day after the Coastal Commission receives adequate notice of this final action. The final action is not effective until after the Coastal Commission's appeal period has expired and no appeal has been filed. Any such appeal must be made directly to the California Coastal Commission South Central Coast District Office in Ventura, California; there is no fee for such an appeal. Should you have any questions regarding the California Coastal Commission appeal period or process, please contact the CCC South Central Coast District Office at 89 South California Street, Suite 200, Ventura, California, 93001 or by calling (805) 585-1800.

Copies of this notice have also been sent via first-class mail to:

- Property Owner/Applicant

Prepared by: Ryan Scates, Office Assistant

ex. 2

Exhibit C
of Appeal

STATE OF CALIFORNIA – THE RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, *Governor*

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

MEMORANDUM

FROM: Jonna D. Engel, Ph.D.
Ecologist

TO: Deanna Christensen
Coastal Analyst

SUBJECT: Southern Foredune Community at 30732 Pacific Coast Highway

DATE: May 15, 2008

Documents reviewed:

Sandoval, C.P. May 5, 2008. Survey of Globose Dune Beetles at 30732 Pacific Coast Highway Malibu, CA, comparing distribution in dunes with or without houses. Prepared for Malibu Bay Company, Malibu, CA

City of Malibu. April 10, 2008. Letter from Dave Crawford and Vic Peterson to Mr. Ainsworth regarding 30732 Coast Highway.

Hamilton, R.A., D.S. Cooper, W.R. Ferren and C. P. Sandoval. March 6, 2008. Biological Resources Assessment, 30732 Pacific Coast Highway, Malibu, California. Prepared For: David Reznick, Malibu Bay Company, 23705 West Malibu Road, Suite D-2 Malibu, CA 90265

Bomkamp, T. (Glenn Lukos Associates). December 12, 2007. Jurisdictional Determination for Four Lots, Broad Beach, 30732 Pacific Coast Highway, Malibu, California. Prepared for: Robert A. Hamilton, Consulting Biologist.

Psuty, Norbert P. November 22, 2007. Final Report, Coastal Dunes, Broad Beach, Malibu, including site visit, October 30, 2007 and evaluation of other documents. Prepared for: Robert A. Hamilton, Consulting Biologist.

Read, E. July 30, 2007. Assessment of the Extent of Coastal Foredunes at 30732 Pacific Coast Highway (Broad Beach): A Review of the Science. Prepared for David Reznick, Malibu Bay Company.

USFWS. April 18, 2007. Letter from Steve Henry of the USFWS Ventura Field Office to M. Andriette Culbertson clarifying that the proposed project would include a 25-foot buffer from newly restored dunes instead of the 100-foot buffer referenced in the 13 February 2007.

Exhibit 15
Malibu LCPA 1-07
Dr. Jonna Engel's 5/15/08 Memo

ex. 2

USFWS. February 13, 2007. Letter from Chris Dellith of the USFWS Ventura Field Office to M. Andriette Culbertson concurring that the proposed MBC project would not result in take of western snowy plovers and that development would be more than 100 feet from the dunes.

Read, E. December 18, 2006. Memorandum to David Reznick, Malibu Bay Company. Subject: Rincon Consultants' Biological Constraints Discussion of MBC Property at 30732 Pacific Coast Highway

Read, E. October 23, 2006. Assessment of Historic and Current Biological Resources, 30732 Pacific Coast Highway (Broad Beach). Prepared for Malibu Bay Company.

Rincon Consultants, Inc. December 6, 2006. Subject: Biological Resources Constraints Discussion, 30732 Pacific Coast Highway (Broad Beach), City of Malibu, Los Angeles County, California.

Forde Biological Consultants. November 15, 2005. Biological Inventory 30732 Pacific Coast Highway (APN: 4469-026-005) in the City of Malibu.

Read, E. July 19, 1999. Vegetation and sensitive resource evaluation, Tentative Parcel Map No. 24070 (Trancas Canyon/Broad Beach Property), Malibu Bay Company.

Longcore, T. and C. Rich. November 8, 2002. Review of Biological Resources Analysis in Malibu Bay Company Development Agreement Draft EIR.

Rich, C. and T. Longcore. 1991. Ecological consequences of artificial night lighting. Island Press, Washington, DC. 483 pp.

The Malibu Bay Company (MBC) owns a 2.08 acre beachfront parcel at 30732 Pacific Coast Highway. MBC is proposing to subdivide this lot into four parcels and has prepared several biological and physical studies as part of their Local Coastal Plan (LCP) amendment application. MBC's parcel consists of a ruderal area adjacent to Pacific Coast Highway and a southern foredune community between the ruderal area and the sandy beach (see Figure 8, Hamilton, Cooper, Ferren, & Sandoval 2008). South of the parcel are four beachfront homes with restored dunes between the homes and the beach. Just beyond the most southern home is Trancas Creek and Zuma Beach. North of the parcel are hundreds of beachfront homes along Broad Beach. Dunes ranging from lightly to heavily impacted and invaded by non-native plants occur between the beach and most of these homes. The dunes on the MBC property are some of the most pristine dunes along this stretch of coast.

The dunes at Broad Beach are foreshortened due to development and only exhibit the nearshore dune zone. The dune community fronting homes along Broad Beach are southern foredunes, a habitat type identified as rare by the California Natural Diversity Data Base (CNNDB) and the California Native Plant Society (CNPS) and identified as ESHA under the Malibu City LCP. While the Malibu City LCP designates dunes as ESHA, it does not contain a policy with a specific buffer size for protecting dunes. The

ex. 2

purpose of my memorandum is to review the status and biology of dunes in California, describe and delineate the dune community on the MBC parcel, and recommend a biologically sound buffer (set-back) dimension between dune ESHA and development. In order to accomplish this I have studied peer reviewed and gray literature, reviewed all the property biological survey reports and letters, and visited the MBC site.

California dune ecosystems have suffered a disproportionately high amount of human impact because the coast is a highly desirable area for residential settlements, industry, tourism, and recreation[1]. Often the victim of these competing interests, undisturbed coastal dunes are becoming rarer and rarer in California. Statewide, coastal dunes have been reduced to less than 25% of the area they originally occupied[2]. South of Point Conception there was once an estimated 5,100 acres of coastal dunes. Mattoni found that in 1990, less than 1,000 acres or 19%, were still recognizable as dunes[3]. The dunes that remain tend to reflect development impacts including non-native species invasion, erosion due to off-road vehicles and trampling, pollution, and loss of natural morphology due to destruction of vegetation. In spite of these impacts, many remaining dune communities continue to support an array of native plants and animals uniquely adapted to this transition zone between land and sea.

Dunes are a component of beach ecosystems and are typically described as having a number of zones: nearshore dunes, moving dunes, and backdunes[4]. Sandy beach lies between nearshore dunes and the ocean. The amount of sand between the ocean and dunes varies and depends on several factors including sand supply, coast exposure and topography, wind and wave patterns, and presence of artificial features such as jetties and seawalls.

In addition to their habitat and aesthetic values, dune ecosystems are recognized for providing important protection during storm events. Dunes provide a physical barrier against storm waves, reducing the risk of flooding for the natural and anthropogenic features behind them. Dunes are a dynamic buffer; eroding or growing as they are shaped by the seasonal dynamics of storms, wind, and wave action. Sand dunes are essential sand reserves for maintaining natural beach morphology. Dunes are sand reservoirs for the beach and beaches are buffers for dunes. The destruction of sand dunes and the placement of artificial shoreline protection structures have created sand depletion problems in California[5,6,7]. Nordstom and Psuty state that "Coastal foredunes have been recognized as a valuable form of natural protection to shorefront

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[1] Pickart, A.J. and J.O. Sawyer. 1998. Ecology and restoration of northern California coastal dunes. California Native Plant Society, Sacramento, CA. 152 pp.

[2] Mattoni, R.H.T. 1990. Species diversity and habitat evaluation across the El Segundo Sand Dunes at LAX. Prepared by: Mattoni, R.H.T., Agresearch, Inc. Prepared for: Te Board of Airport Commissioners, One World Way West, Los Angeles, California 90009

[3] Mattoni. 1990. Op cit.

[4] Barbour, M.G. T.Keeler-Wolf and A.A. Schoenherr. 2007. Terrestrial Vegetation of California. University of California Press, Berkeley, CA. 712 pp.

[5] California Department of Boating and Waterways and State Coastal Conservancy. January 2002. California Beach Restoration Study.

[6] Patsch, K. & G. Griggs. October 2006. Littoral Cells, Sand Budgets, and Beaches: Understanding California's Shoreline. Institute of Marine Sciences, UCSB; California Department of Boating and Waterways; California Coastal Sediment Management Workgroup.

[7] Everts Coastal. June 2002. Impact of Sand Retention Structures on Southern and Central California Beaches. Prepared for the California Coastal Conservancy.

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Ex. 2

properties...Dunes provide a barrier against storm wave overwash and flooding and a reservoir of sand for replenishment of losses to the beach during erosional events." They go on to say "Coastal dunes are rarely found in areas heavily impacted by coastal development. It is in these areas where they are most valuable as a form of protection"[8].

The dune community on the MBC property has been subject to a number of disturbances including the creation of the Pacific Coast Highway. Read (Oct. 2006) reviewed the historical record in order to document the historical uses and natural resources on the MBC parcel through time. She concluded that historical photographs...

> "...indicate that the dune features currently on the property derive from a combination of indigenous and artificial processes. An extensive coastal dune system was likely present historically across Broad Beach and the mouth of Trancas Creek, but by 1950 most of the historical dune system appears to have been eliminated by construction of PCH and early development of Broad Beach. The Broad Beach dune system was not reported as a major dune locality by the time Cooper published his review of California coastal dune communities in 1967. From 1972 into the 1990's, members of the Malibu Yacht Club who used the property recall moving boat trailers between "sand mounds" to the surf line for launching, a statement which suggests the dune features on the property remained relatively intact during that period despite intense use of the site."

Hamilton et al. (2008) state that "Coastal dunes are present on the project site, and they form part of a larger coastal dune ecosystem at Broad Beach."

Coastal dunes, once extending well into the present ruderal area (see Figures 3-8, Read Oct. 2006; Figures 3 & 5, Hamilton et al. 2008), have persisted on the MBC parcel in spite of intensive disturbance. Since the 1950's use of the site has been characterized by periods of intensive use and disturbance interspersed by spans of time when the site sat vacant. Examples of disturbance include construction staging, boating club activities and development, and beach access. The most recent use of the site has been as a staging area for adjacent construction projects and as an access way for beach goers.

On May 10, 2007, I visited the MBC parcel. The portion of the parcel landward of a "stringline" between the seaward edge of the adjacent houses is clearly ruderal in character and dominated by native and non-native weedy and invasive species such as telegraph weed, *Heterotheca grandiflora*, coastal goldenbush, *Isocoma menziesii*, European grasses such as as Italian ryegrass, *Lolium multiflorum*, and ripgut brome, *Bromus diandrus*, highway iceplant, *Carpobrotus edulis*, and Australian saltbush, *Atriplex semibaccata*. Hamilton et al. (2008) describe the ruderal portion of the site as "an area that appears to have been filled with imported soil and gravel material at an unknown date, covers approximately 0.61 acre at the site's northern end (0.57 acre north of the stringline, 0.04 acre south of it)."

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[8] Nordstrom, K.F. and N.P. Psuty. 1983. The value of coastal dunes as a form of shore protection in California, USA. Proceedings of the Third Symposium on Coastal and Ocean Management. Coastal Zone '83.

ex. 2

Just seaward of the stringline is a backdune area behind remarkably intact foredunes which together form a nearshore southern foredune community. The backdune (also referred to as a deflation plain) consists of sand sheets or washover areas interspersed by dune mounds and hummocks and both native and non-native vegetation. The native plants are classic southern foredune species including beach evening primrose, *Chamissonia cheiranthifolia,* succulent lupine, *Lupinus succulentus,* and several individuals of the special status sand verbena, *Ambronia maritima*. Amongst the adult natives were hundreds of small recruits. Several non-native species occurred in this area including sea rocket, *Cakile maritime,* highway iceplant, Australian saltbush, and European grasses.

The adjacent foredunes exhibit characteristic dune morphology and are covered principally in native dune plants with a significant amount of the invasive highway iceplant. The dominant natives are the special status sand verbena and beach bursage, *Ambrosia chamissonis*, both consisting of large, robust patches. Other natives inhabiting the foredunes are saltbush, *Atriplex leucophylla*, beach evening primrose, and succulent lupine. In addition to the invasive iceplant, the non-native plant sea rocket also inhabits the foredunes. In early May Sandoval (2008) conducted a study; "Survey of Globose Dune Beetles at 30732 Pacific Coast Highway Malibu, CA, comparing distribution in dunes with or without houses"; and found globose dune beetles, *Coelus globosus*, a special status species, occupying the foredune habitat. She also found the ciliate dune beetle, *Coelus ciliatus*, in the foredunes.

In Figure 8, Hamilton et al. (2008) denote the stringline and delineate habitat boundaries. Hamilton et al. (2008) find that the stringline itself marks the break between the ruderal and backdune areas save two small exceptions where a rudural area in the center of the site extends southward and where a backdune area on the eastern side of the property extends northward. Hamilton et al. (2008) single out a small section of the backdune area as a "primrose/lupine" area, but consider it disturbed and not maintained by natural processes. Psuty (2008) also characterizes this area as disturbed. I am in agreement with the habitat boundary determinations of both Hamilton et al. (2008) and Psuty (2008) except for the suggestion that the "primrose/lupine" area is not part of the nearshore dune system.

Hamilton et al. (2008) consider the primrose/lupine area as distinct from the dune habitat using the following logic;

> "The area designated as primrose/lupine covers approximately 0.10 acre. This area's mixed substrate includes sand, coarser sand, silt, and some gravel. The area is dominated by the native, sand-dependent species, Beach Primrose (*Camissonia cheiranthifolia ssp. suffruticosa*) and the native Succulent Lupine (*Lupinus succulentus*) along with various introduced weedy species. The sand in this area is darker and coarser than the white, eolian sand of the foredunes, and is mixed with imported material as an apparent result of past site disturbance. It appears that this area historically was part of the broad foredune system; as reviewed in the previous section, white sand evident in this part of the site as of August 1976 had been removed by July 1977 as a result of activities associated with operation of the Malibu Yacht Club. Degradation resulting from human activities during that period, including the apparent importation of silt and gravel

ex. 2

into this area, as well as blockage of substantial sand transport into this part of the site (see Figure 10), stripped this area of most of its dune processes and features. Consistent with this interpretation, coastal geomorphologist Norbert Psuty (2007:12) did not classify this area among the site's dunal formations:

> Related to form and function, these stabilized hummocks are not part of the normal foredune system and they were created by an unusual and presumably temporary condition from offsite [i.e., the chain-link fence erected by the nearby swim club].

Psuty incorporated these stabilized hummocks into the generalized area that he mapped as "disturbed," but we have called it out separately based on differences in soils and vegetation between this area and the ruderal zone to the north. Features that differentiate this area from the ruderal zone are sandy soils (but little or no wind-blown sand) and the prevalence of Beach Primrose, a native species that requires well-drained soils and that frequently occurs on coastal dunes. The presence of Beach Primrose does not, by itself, serve to delineate a dune ecosystem. For example, Ferren has recorded Beach Primrose on a coastal mesa in Santa Barbara County 100 feet above sea level. The primrose/lupine area appears, in some respects, like a "backdune" area, but we believe that this term is best restricted to an ecological community formed and maintained by natural processes. In light of these factors, we have classified this disturbed area according to its dominant native plant species."

I disagree with Hamilton et al.'s (2008) logic regarding the primrose/lupine patch and think that this area should be included within the environmentally sensitive disturbed southern foredune habitat area, i.e. EHSA, for the following four reasons:

1) As Hamilton et al. (2008) acknowledge, the area was historically part of the dune system on the site. There is no obstruction between the foredunes and this adjacent backdune area. Sand continues to be in a dynamic state in this area, moving to and from the foredunes due to wind, storms, and seasonal changes.

2) The primary substrate characterizing this patch is sand.

3) In spite of the intensive disturbance history of the site, dune hummocks and mounds, dominated by native foredune plant species, continue to persist in this area. Dune hummock and mound persistence through time is evident in the historical photographic record presented in both Read (Oct. 2006) and Hamilton et al. (2008) (see Figures 2-8 and Figures 2-8 & 13, respectively). Based on the photographs documenting mounds and hummocks in this area and the connection of this backdune area to the foredunes and beach, I do not agree that the contemporary dune topography found in this patch is an artificial creation resulting from sand build-up along the chain link fence west of the property.

4) Given the rarity of dune habitats across the state and the ease with which they are degraded by human activities, dune features that support native vegetation meet the definition of environmentally sensitive habitat area under the Coastal Act. In past actions, the Commission has considered coastal dunes, even those that are significantly degraded, to meet the definition of ESHA.

ex. 5
ex. 2

Generally, the Commission protects environmentally sensitive habitat, such as southern foredunes, with buffers or set-backs. Set-backs are necessary to insure that development will not significantly degrade the ESHA. Habitat buffers provide many functions, including keeping disturbance (noise, night lighting, domestic animals) at a distance, reducing the hazards of herbicides, pesticides and other pollutants, preventing or reducing shading, and reducing the effects of landscaping activities. Buffers also protect against invasive plant and animal species that are often associated with humans and development. Such invasive species arrive on car tires (both during and after construction), fill soils, construction materials, and in myriad other ways throughout the life of the development. Buffers may enable invasive species detection and eradication before they invade sensitive habitats. Critical to buffer function is the fact that a buffer area is not itself a part of the ESHA, but a "buffer" or "screen" that protects the habitat area from adverse impacts.

Sandoval's (2008) globose dune beetle study findings provide evidence supporting the use of a buffer between southern foredunes and development at the MBC property. Sandoval (2008) found a negative correlation between globose dune beetle abundance and irrigation; globose dune beetle abundance was lowest in front of homes with irrigation compared to homes without irrigation. Furthermore, globose dune beetles were distributed significantly further inland on the undeveloped project site compared to the developed adjacent sites. And Sandoval (2008) found that globose dune beetles were less abundant in the presence of invasive highway iceplant "both at the project site and at the lots with existing residences."

Hamilton et al. (2008) state in their summary, "We are not aware of any biological evidence that would require the establishment of an undeveloped buffer north of the stringline, but we will conduct supplemental beetle and legless-lizard surveys in order to reach a scientifically justified opinion in this regard.", implying that a buffer determination rests solely on the biology of special status animals. However, CNNDB and CNPS both recognize southern foredunes as a rare community or habitat type and the Malibu LCP recognizes dunes as ESHA, such that the entire dune habitat and associated organisms are what constitute the ESHA to be protected.

Hamilton et al. (2008) report that:

> "A correlation exists between the land-use history of residential parcels along Broad Beach and the general decline of habitat value of the dunes for coastal-dependent special interest plants and animals. Widespread human-related disturbances, loss of habitat, and the ongoing spread of Highway Iceplant and other destructive exotic plant species are products of this land-use history. Measures likely to reverse this tendency toward habitat degradation consist of Construction Best Management Practices with any additional development, eradication of Highway Iceplant as part of a well-considered dune habitat restoration program, lighting restrictions, and focused human access through establishment of formal trails and interpretive signage. These measures are anticipated to result in overall enhancement of the existing conditions of the foredune system with or without the addition of a formal buffer area."

ex. 2

Although the use of Best Management Practices would be beneficial even in the absence of a buffer, the documented correlation between land-use history and decline of dune habitat is clear evidence of biological impacts warranting a buffer. Furthermore, the results from Sandoval's (2008) study on globose dune beetles demonstrate that development, irrigation, and invasive species all negatively impact the abundance and distribution of this special status species.

Dunes are dynamic systems that fluctuate between periods of sand accretion and sand depletion. A buffer zone between the dune ecosystem and development allows for the entire dune system to shift between these depositional and erosional phases. On top of this background dynamic, sea level rise is occurring and is predicted to continue. The Intergovernmental Panel on Climate Change predicts an increase of between 35 and 75 centimeters[9] in the next century while a new model by Svetlana Jevrejeva[10], of the Proudman Oceanographic Laboratory in Britain, predicts a 1.5 meter or 4.5 foot sea level rise by 2100. The buffer zone, combined with the dune ecosystem itself, provides additional protection from the predicted rise in future sea level.

For all the reasons cited above, a buffer (development set-back) is necessary to protect the functioning of the southern foredune ESHA at 30732 Pacific Coast Highway in Malibu California. To protect this ESHA I recommend a minimum 25 foot buffer between the dune ESHA and development. This distance is consistent with other Commission dune buffer determinations[11] and with the United States Fish and Wildlife Service's recommendation for this site documented in their April 18, 2007 letter as well as in person (pers. comm. Chris Dellith, USFWS Acting Assistant Field Supervisor, May 9, 2008). In conclusion, I recommend that the "primrose/lupine" area be included as ESHA in the southern foredune community delineation and that a minimum 25 foot buffer from ESHA be applied to this project.

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[9] Intergovernmental Panel on Climate Change. April 2007. The IPCC Special Report on Emission Scenarios.

[10] Jevrejeva, S., A. Grinsted, J. C. Moore & S. Holgate. 2006. Nonlinear trends and multi-year cycle in sea level records. Journal of Geophysical Research, v. 111.

[11] Coastal Commission Permit # A-3-SLO-04-061, May 25, 2005. Oceano Pavillions 16 unit hotel and manager's unit.

ex. 2

Exhibit D
of Appeal

STATE OF CALIFORNIA – THE RESOURCES AGENCY ARNOLD SCHWARZENEGGER, *Governor*

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

MEMORANDUM

FROM: Jonna D. Engel, Ph.D.
Ecologist

TO: Deanna Christensen
Coastal Analyst

SUBJECT: Clarifications regarding my May 15, 2008 "Southern Foredune Community at 30732 Pacific Coast Highway" memorandum

DATE: June 9, 2008

Documents reviewed:

Hamilton, R.A. May 27, 2008. Letter to David Reznick, Malibu Bay Company; Subject: Botanical Evaluation of Primrose/Lupine Area 30732 Pacific Coast Highway, Malibu, California

Hamilton, R.A., D.S. Cooper, & W.R. Ferrin. May 27, 2008. Letter to David Reznick, Malibu Bay Company; Subject: Review of Memorandum Dated 15 May 2008 from Jonna D. Engel to Deanna Christensen Regarding Dune and ESHA Issues, 30732 Pacific Coast Highway, Malibu, California

Sandoval, C. P. May 23, 2008. Response to memo by Dr. Engel. Prepared for Malibu Bay Company

Psuty, Norbert P. May 16, 2008. Review of Memorandum from Jonna D. Engel to Deanna Christensen concerning southern foredune community at 30732 PCH Dated May 15, 2008. Prepared for: Robert A. Hamilton, Consulting Biologist.

Glen Lukos Associates. February 15, 2008. Letter to David Reznick, Malibu Bay Company. SUBJECT: Results of Focused Surveys for the Silvery Legless Lizard (*Anniella pulchrapulchra*) for the 2.08-Acre Broad Beach Property, Malibu, Los Angeles County, California.

Malibu Bay Company has commissioned an excellent series of studies describing the the natural resources on their property at 30732 Pacific Coast Highway. The quantitative data appear to have been collected with rigor and accuracy and effectively document on the ground conditions. The two areas where I disagree with the conclusions of MBC's consultants are the ESHA status of the primrose/lupine area and the need for an ESHA buffer.

ex. 2

The reasons for this memorandum are to clarify:

1. My use of dune landscape terminology
2. The definition of ESHA in the Coastal Act
3. My reasons for including the "primrose/lupine" area as a component of the overall dune ESHA and,
4. The factors contributing to my buffer determination.

Dune Terminology

In an effort to communicate as clearly as possible, I will briefly discuss dune landscape terminology, a topic where I have found little consensus among scientists. In my May 15th memorandum I summarized the components of California dune ecosystems as follows: "Dunes are a component of beach ecosystems and are typically described as having a number of zones: nearshore dunes, moving dunes, and backdunes[1]." I went on to say that the dunes on Broad Beach exhibit only the nearshore dune complex. I did not go deeper into this description but will do so now. I consider "nearshore dune complex" and the term "foredune system", which Psuty uses, to be synonymous. The nearshore dune complex or foredune system itself consists of several distinct zones, each with a number of common names. The first zone beyond the sandy beach is known as the coastal strand or embryo dune zone. This zone did not exist at Broad Beach when I visited in May 2007 but may be ephemerally present during certain seasons or years. The next zone is the dune ridge, dune crest, or foredune area. Behind this area is the dune swale, dune deflation plain, backdunes, dune hummock and mound zone, or secondary dunes. Psuty uses broken foredune ridge and secondary coastal dunes comprised of mobile and stable hummocks to geomorphologically describe the Broad Beach system whereas I referred to his secondary coastal dunes as backdunes or a deflation plain. Here I revise my terminology to align with Psuty's and describe the southern foredune system on the MBC property as a broken foredune ridge seaward of a zone of secondary dunes consisting of mobile and stable hummocks.

Definition of ESHA

Another area that warrants clarification is the environmentally sensitive habitat or ESHA definition I have applied compared to the approach to defining the dune ESHA that MBC has pursued. This is crucial to understanding where we part ways. The approach I have applied is that the southern foredune system is a rare habitat type in and of itself, as defined by the California Natural Diversity Data Base (CNDDB) and the California Native Plant Society (CNPS). CNDDB and CNPS identify southern foredunes as a rare habitat type defined by geographic location, substrate, and specific native plants and animals. The Malibu Local Coastal Plan more broadly identifies "dunes" as ESHA. The Commission recognizes as ESHA, habitats identified as rare by CNDDB and CNPS. The Commission includes rare habitats that have been disturbed and degraded in ESHA determinations. The Commission views the overall habitat or community, including abiotic and biotic features, as rare and ESHA, rather than focusing on the presence of active physical processes or individual rare component species. MBC, on the other hand, have based their dune delineation and ESHA determination on

[1] Barbour, M.G. T.Keeler-Wolf and A.A. Schoenherr. 2007. Terrestrial Vegetation of California. University of California Press, Berkeley, CA. 712 pp.

ex. 2

geomorphological features, as identified by Psuty, who stated in his May 16, 2008 letter: "I am attempting to describe the coastal foredune conditions in geomorphological terms as they relate to the interaction of coastal dune processes and the coastal landforms that are created".

In Hamilton's May 27, 2008 letter to David Reznick, he states;

> "Hamilton et al. (2008) explicitly followed the lead of Psuty (2007) in delineating the "primrose/lupine" area as lying outside of the dune complex in the existing condition." In the same letter -responding to my statement where I disagree with the primrose/lupine area being excluded from the overall ESHA - Hamilton states; "In our opinion, the existing dune ecosystem does not include the primrose/lupine area because this area lacks identifiable dune geomorphology and evidence of ongoing dune creating processes (e.g., build-ups of wind-blown sand) in the existing condition."

So, whereas Psuty and Hamilton et al. define the primrose/lupine area principally based on abiotic factors or geomorphologically, I assessed both the abiotic (substrate) and biotic (plants and animals) components of the area and applied an ecological approach in concluding that the primrose/lupine area should be included in the overall dune ESHA.

Much like a wetland delineation, the Commission considers the weight of all the evidence in making an ESHA determination: Is the geographic location right? Is the substrate right? Does the area support the plants or animals that are characteristic of the rare community type?

Primrose/Lupine Area
I based my inclusion of the primrose/lupine area with the overall dune ESHA for the following reasons:

1. The area is characterized by sandy substrate.

2. The area is inhabited by several native southern foredune species including beach evening primrose, *Chamissonia cheiranthifolia,* red sand verbena, *Ambronia maritima,* (CNPS List 4.2) and succulent lupine, *Lupinus succulentus.* It also supports sea rocket, *Cakile maritima,* a non-native species restricted to nearshore dunes.

3. The area is not isolated - it is connected and adjacent to the secondary dunes and broken foredune ridge recognized as ESHA by Hamilton et al., Psuty, and myself.

4. In spite of a long disturbance history that includes clearing, development, artificial soil deposition and introduction of invasive species, the area is characterized by sandy substrate and supports southern foredune vegetation. Recognizing the degraded nature of this area, I describe the primrose/lupine area as disturbed and degraded southern foredune ESHA.

Hamilton (May 27, 2008) states that "Page 6 of Dr. Engel's memorandum states, 'In spite of the intensive disturbance history of the site, dune hummocks and mounds,

ex 2

dominated by native foredune plant species, continue to persist in this area.' The photographic evidence in this report does not support this statement with respect to the persistence of hummocks and mounds. The photos show an area with sandy soils, but also the presence of an obvious soil crust and no accumulations of wind-blown sand." However, Psuty (Nov. 22, 2007) himself describes the primrose/lupine area as "an area of small stable sand hummocks near the western margin of the property within the topography described as "disturbed" on Figure 1." And Hamilton et al. (March 6, 2008) state that "Psuty incorporated these stabilized hummocks into the generalized area [primrose/lupine] that he mapped as "disturbed," but we have called it out separately based on differences in soils and vegetation between this area and the ruderal zone to the north." More to the point, however, is the fact that whether or not the primrose/lupine area supports dune morphology, the area consists of sandy substrate inhabited by southern foredune associated plants and is biologically connected to the broken foredune ridge and secondary dune system with no barriers to species movement, seed exchange, and sharing of root systems and rhizomes between the primrose/lupine area and the secondary dunes. My recommended ESHA determination for the area rests on these points.

Southern Foredune ESHA Buffer
As I stated in my May 15, 2008 memorandum:

> "Habitat buffers provide many functions, including keeping disturbance (noise, night lighting, domestic animals) at a distance, reducing the hazards of herbicides, pesticides and other pollutants, preventing or reducing shading, and reducing the effects of landscaping activities. Buffers also protect against invasive plant and animal species that are often associated with humans and development."

In my memorandum, I was wrong to include generic "development" as a factor determining the location of globose dune beetles. The factors that do correlate are irrigation and the invasive highway iceplant, both of which can be managed. However, buffers are designed to protect the whole community, not just special status species.

The Commission generally protects environmentally sensitive habitat, such as southern foredunes, with buffers or set-backs. MBC proposes to restore the disturbed southern foredune ESHA and has incorporated a number of best management practices into their design. Although these are important measures that will help maintain the ecological functions of the southern foredune community, they do not vitiate the need to set back development from the very edge of the ESHA and I believe that a 25-foot setback is appropriate at this site.

ex. 2

Exhibit E of Appeal

rincon

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October 12, 2009
Project Number: 09-94870

Ms. Ellia Thompson
Jeffer, Mangels, Butler & Marmaro, LLP
1900 Avenue of the Stars, 7th Floor
Los Angeles, CA 90067
Via Email: EThompson@JMBM.com

Subject: **Environmentally Sensitive Habitat Discussion, 30732 Pacific Coast Highway (Broad Beach), City of Malibu, Los Angeles County, California**

Dear Ms. Thompson:

At your request, this letter summarizes our review of documents concerning the finding of Environmentally Sensitive Habitat Area (ESHA) of the subject property located at 30732 Pacific Coast Highway (Broad Beach) City of Malibu, California, near the intersection of Trancas Canyon Road and Pacific Coast Highway. We received authorization to proceed on September 23, 2009, with the focus of our review on the discussion of ESHA for the site in documents provided to the California Coastal Commission [CCC], in particular those provided by Coastal Commission staff member Dr. Jonna Engel discussing the need to preserve the ESHA and her recommendation to provide a 25-foot buffer from the designated ESHA boundary. It is our understanding that the CCC approved the project, but required only a 5-foot setback from the ESHA boundary.

By way of introduction, Rincon Consultants, Inc. prepared on December 6, 2006, a memorandum letter to Jeffer, Mangels, Butler & Marmaro, LLP, with respect to this site that determined that the biological resources at the subject site should be considered ESHA per the City of Malibu's Local Coastal Program. As Principal Biologist at Rincon and having performed professional biological services within the coastal zone for more than 30 years, I am familiar with the issues present at the subject site. Particular documents reviewed with respect to this letter include:

- California Coastal Commission Staff Report, March 29, 2008. *City of Malibu Local Coastal Program Amendment 1-07 for Public Hearing and Commission Action at the June 11, 2008 Commission Meeting in Santa Rosa. Agenda Item 16a.*
- California Coastal Commission South Central Coast District Staff, June 9, 2008. *Addendum to Agenda Item 16a.*
- Hamilton, R.A., May 27, 2008. *Review of Memorandum Dated 15 May 2008 from Jonna D. Engel to Deanna Christensen Regarding Dune and ESHA Issues, 20732 Pacific Coast Highway, Malibu, California*

- Psuty, N.P., November 22, 2007. *Final Report, Coastal Dunes, Broad Beach, Malibu.* Letter to Robert Hamilton.
- Sandoval, C., May 5, 2008. *Survey of Globose Dune Beetles at 30732 Pacific Coast Highway Malibu, CA, Comparing Distribution in Dunes With or Without Houses.*
- Glenn Lukos Associates, February 15, 2008. *Results of Focused Surveys for the Silvery Legless Lizard (Anniella pulchra pulchra) for the 2.08 Acre Broad Beach Property, Malibu, Los Angeles County, California*

It is our understanding that the principal issues at this time are the designation of the "primrose/lupine" area as ESHA and the appropriate setback distance from the ESHA boundary. The Coastal Act provides that an "environmentally sensitive area" is: "Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments" (Section 30107.5). As was discussed in our letter of December 6, 2006, Rincon determined that those areas mapped as sand-verbena beach bursage community (coastal foredunes) onsite should be considered ESHA under the City's Local Coastal Plan.

A portion of the dispute with respect to this property is an area on the western side that has been described as "primrose/lupine" habitat. This area was determined to not be part of the active dunes from a geomorphological basis by Dr. Psuty (2007), but from a biological perspective, it is not particularly relevant where the sand that forms the "primrose/lupine" area came from. What is important is that sand substrate forms a critical element for the coastal strand community and for the survival of two sensitive species known to occur at this site, namely globose dune beetle and red sand verbena. Hamilton's follow up survey (May 27, 2008) shows that while the area is disturbed in terms of the amount of iceplant present, this is true throughout the local coastal area, including those areas onsite that are agreed to being ESHA. Of more importance is the fact that beach evening primrose is found throughout this habitat patch, indicative of its suitability to provide habitat for coastal strand vegetation. It is the suitability of the habitat to meet the definition of ESHA not just the absolute location of particular plants and animals that determines where the ESHA boundary is, just as it is for the other ESHA types defined in the City's LCP. This is essentially the rationale presented by Dr. Engel as indicated in the memorandum of June 28, 2008, to the CCC staff analyst, Deanna Christensen. Dr. Engel also notes the need for the dunes to act as sand reservoirs for beach replenishment; this serves equally for the "primrose/lupine" area as it does for the stabilized dune hummocks.

An important issue is to not only protect the residual populations of rare plants and animals, but to also provide sufficient suitable habitat for them to continue to survive in the future. To meet this need, sufficient room for long term survival should be protected within viable habitat that is present as ESHA. As was stated by Dr. Engel, it is known that coastal strand communities are dynamic communities, constantly in a state of flux as changes occur due to the action of wind and wave. If insufficient habitat is available that can either hold a relict population or serve as temporary shelter, for instance due to high erosion events that remove the existing foredunes, then the sensitive

resources could become extirpated at this location. Dr. Engel postulates that rising sea levels may cause just this type of event. The ability of a particular plant or animal to repopulate a locale where that organism has been extirpated is dependent on the specific dispersal capacity of the particular organism. In the case of many rare species, dispersal capacity tends to be limited. In addition, plant and animal populations vary not only over time, but also spatially within any particular suitable habitat patch. This is particularly true of rarer organisms which may not occupy all suitable habitat in a given locale at any particular time. Therefore, it is important to retain reserve areas of suitable habitat into which populations can move and survive, if only temporarily, as would be the case with the "primrose/lupine" area. Therefore, given the several reasons elucidated above, it is our opinion that Dr. Engel is correct in determining that the "primrose/lupine" area is part of the coastal strand ("dune") vegetation ESHA.

Given the designation of the coastal strand habitat as ESHA, a critical question becomes what is a sufficient buffer for setback from an ESHA boundary. Buffers are intended to reduce the indirect effects of human habitations on the adjacent conserved areas. Buffers are also used to provide sufficient space to allow the reduction of energy and nutrient transport from human development to the resource of concern, such as the reduction of nitrogen input provided by buffers to riparian systems (Mayer, et al, October 2005). Hamilton (June 2008) provides an opinion that his team found no biological evidence for the need for a buffer landward of the stringline, but does not appear to apply a methodology or reference as to how that finding was made, nor does he provide scientific evidence that aids in supporting that opinion.

Similarly, the City of Malibu has indicated that the stringline method accompanied by dune revegetation was developed to provide sufficient setbacks from the residual coastal strand vegetation, especially given the substantial amount of disturbance to which this habitat has been subjected within the City limits. While this is a useful tool, it does not have a specific biological basis since it is essentially based on how far other structures have already intruded into sensitive dune habitat. Where disturbance and non-native habitat is consistent with the stringline and adjoining properties, it is a reasonable and efficient approach. But where habitats are less disturbed and/or may exceed the landward edge of the stringline, it does not provide an adequate biological based setback (buffer) distance.

A buffer is an intrusion zone in which inputs from human habitation, including water over-spray, pesticide and herbicide drift, invasive landscaping (trailing vines for instance), fertilizer, noise, light, heat, pet depredation, exotic pests (Argentine ant, house mice, cockroach, etc.), vegetation management for fire control, and human recreational use occur. Various habitat types will differ in the extent to which they can accept these inputs while still providing the basic habitat functions that characterizes that specific habitat. Buffers and setbacks are intended to allow these inputs to occur while isolating the sensitive habitat from most of the detrimental effects of such inputs. The appropriate size of the buffer is in part determined by the extent to which the inputs are capable of intruding into the sensitive habitat area and the level of such effects. For example, high sound levels are a measurable disturbance that diminishes with distance and can affect wildlife, but such

distance is not relevant unless the high sound level specifically disturbs an important biological element (such as disrupting a sensitive bird nesting habitat). When considering buffers, it is also the physical characteristics of the buffer - slope, soils, and vegetation as well as width – that in part determines how well the buffer reduces the adverse impacts of human development and provides the habitat needed by wildlife species that use the adjacent sensitive habitat. Granger, et al (April 2005) synthesized the literature on the effectiveness of wetland buffer widths for the Washington State Department of Ecology and recommended buffers between 25 and 75 feet for wetlands with minimal wildlife habitat functions and adjacent low-intensity land uses; 50 to 150 feet for wetlands with moderate habitat functions or adjacent high-intensity land uses; and 150 to 300 feet for wetlands with high habitat functions. While the ESHA of concern at this subject site is not a wetland, this nonetheless provides some insight into nominal widths that are considered reasonable for a sensitive habitat.

Specific sensitive plants and animals will differ with respect to the appropriate buffer width and need to be addressed on an individual organism basis. With respect to plants, the Conservation Biology Institute (CBI) in its review of potential edge effects on the San Fernando Valley spineflower (SFVS), an endangered plant, identified risk factors that may adversely affect that species' occurrences within community open space once adjacent development has occurred (CBI, 2000). Risk factors at the urban-wildland boundary as identified by CBI that may affect rare plant persistence include:

- Non-native, invasive plant and animal species;
- Vegetation clearing for fuel management or creation of trails;
- Trampling;
- Increased water supply due to suburban irrigation and runoff;
- Chemicals (e.g., herbicides, pesticides, fertilizers); and
- Increased fire frequency.

CBI concluded that SFVS preserves would require 200-foot setbacks with minimal maintenance or management activities to minimize edge effects on the SFVS occurrences. CBI also stated that 80-100 foot setbacks with an active maintenance and management program would be sufficient to manage the SFVS occurrences protected within community open space. The lower setback distance (80-100 feet) was largely determined by the extent to which fire management activities and invasive plants could affect the occupied habitat.

Red sand verbena is a sensitive plant species associated with semi-stabilized dunes, and serves as one of the pioneering species that aid in the stabilization of foredunes. Indirect impacts to red sand verbena associated with the future site residences could include invasive weedy plant species or aggressive landscaping plants, trampling and soil compaction associated with human activities, increases in seed predators, and introduction of excess irrigation water and pesticides. On review of the listed risk factors, invasion of habitat by non-native plants, vegetation clearing and trampling are the primary causative agents to its decline in coastal areas throughout its range. The project

proposes to conduct a natural revegetation of the conserved area seaward of the proposed homes. Given the successful restoration of red sand verbena in various locales (Jack Demster Marine Reserve in Long Beach for example), it appears that this could be successfully accomplished. Because a primary limiting agent is trampling and vegetation removal, access control to its population will be the critical factor in maintaining it. Invasive plant control will also be a key component. Since iceplant and other typical invasive weeds are already present and in abundance throughout the coastal zone, the primary purpose of a buffer at this location would be its effectiveness at reducing landscape escapees utilizing fertilizer and water inputs as a means to invade the ESHA. Such plants have a more limited ability to extend into natural areas, more on the scale of 5 – 30 feet, than the larger distance (100 – 200 feet) needed for non-native weedy species. Therefore, a reasonable setback from the ESHA to be conserved (which includes that area inhabited or potentially restorable and inhabited by red sand verbena) would be on the order of 5 – 30 feet from the edge of in use outdoor space adjacent to the proposed residences. Assuming a minimum width of 5 feet for the outdoor space adjacent to the proposed residences, the edge of structures should be 10-35 feet from the ESHA boundary. Of this range, the smaller setback would be associated with long term funded efforts to manage and conserve the open space areas, while the larger setback would be appropriate in the absence of long term management.

The second sensitive species known to occur at the site and of concern with respect to the mapped ESHA is the globose dune beetle [GDB]. Per the site study for GDB (Sandoval, May 2008), the GDB was located only on the front and top of the first foredune for those transects adjacent to residences, while it extended further into the project site where residences were lacking. While Sandoval (2008) concludes that irrigation is a primary factor in the distribution of the GDB, this appears to be somewhat inconsistent in that even on non-irrigated residential locales, no GDBs were found beyond the top of the first foredune per Figure 6 of the Sandoval report. Rather it was the density (number of) beetles that were different between irrigated locales and non-irrigated locales near the residences. While we agree that moisture and lack of appropriate food (namely, displacement of native plants by iceplant) are significant limiting factors on the GDB, we postulate that another factor (or factors) related to the location of residences is also important.

A variety of causative agents that limit the population of GDB are possible, including pesticide applications, fertilizer use in the irrigated areas, the possible interaction of pets with GDB (including predation and soil disturbance), and increased surface temperatures associated with reflected solar insolation due to large numbers of windows. However, we postulate that a major edge effect is the Argentine ant (*Linepithema humile*, formerly *Iridomyrmex humilis*). This exotic ant is known to have negatively impacted populations of many native arthropod species (Holway 1998; Ward 1987), including specifically affecting the threatened valley elderberry longhorn beetle (Huxel, 2000). Argentine ant colonies are associated with higher moisture locals such as are provided by human development and are also supported by food associated with humans. Predation on eggs, larvae, and pupae are the most likely potential effects these ants may have on the GDB.

Assuming that the Argentine ant is a causative agent in the lack of GDB closer to the existing residences, the extent to which this ant can permeate into the adjoining habitat is important. Holway (2005) determined that in a natural setting, Argentine ants had a depressive effect on native ants for a distance of at least 164 feet. From the perspective of determining a buffer width, it is noted that the number of Argentine ant workers in Holway's study was substantially less at 82 feet from the edge of the infested riparian area, though they nonetheless had a significant effect on decreasing native ant populations at that distance. Since it is anticipated that salt spray may have a limiting effect on this ant in this particular habitat, an appropriate buffer distance from the existing GDB populations would possibly be on the order of 80-100 feet.

Provision of adequate space for the GDB is an important function of the local ESHA designation. The GDB preferred habitat is in the foredunes that are subject to periodic destruction from high wave conditions. Consequentially, a portion of any local population would need to be conserved in suitable habitat behind these initial dunes, as is present within the subject property. In contrast, Sandoval's study shows that they are found only on the immediate seaward slope and top of the foredunes located in front of residences. During high wave conditions, animals located in this area would be lost, with no survivors remaining to repopulate the area. Therefore, it is critical to the local population to have a suitable distance from residences to maintain that portion of the population on the more landward side of the dunes. The exact locations of the GDBs are unknown as it is not provided in Sandoval's report, rather the sampling was based on the location of suitable habitat containing native vegetation and wind-blown sand. Presumably the furthest inland location based on the "bubbles" in Figure 4 is along Transect 11. Hamilton (May 2008) states that the nearest GDB are approximately 45 feet seaward of the "stringline." The question becomes, is this an adequate buffer to maintain the GDB when human habitation is located on the landward side. Using an aerial map and the transect locations shown on Figure 4 of Sandoval's report, the nearest GDB locations are estimated to be about 85 feet from the existing residence that borders the east side of the property and about 65 feet from its backyard disturbance area (Transect 8), about 75 feet from the edge of outdoor disturbance associated with Transects 1 and 2, and about 110 feet from the disturbance area on the west side of the property and 125 feet from the edge of the structure on the west property line. Without reference to the causative agent of this edge effect, it appears that a distance of at least 65 feet from the edge of the nearest known location of GDB to the edge of outdoor disturbance associated with human habitation would be the minimal distance (85 feet from structure).

The discussion above provides two possible methods of estimating an appropriate buffer distance for the GDB populations. Based on the assumption that Argentine ant is having a depressive effect outside of the residences, a distance of 80 – 100 feet from the edge of disturbance and/or structures may be appropriate, which is similar to that observed in the field. Without consideration of a specific causative agent, a minimum of 65 feet may be appropriate, again based on the assumed distance from the nearest GDB and a residence's outdoor living space. Since so little is known about this sensitive species, erring on the conservative side at a locale where they are known to be present

is reasonable. Assuming that 65 feet is the minimum distance to reduce most of the impacts of human outdoor space usage to GDB, then a setback of at least 20 feet landward of the stringline would be appropriate. Assuming as above a minimal outdoor space of 5 feet, then the setback from the ESHA boundary to the building should be at a minimum 25 feet.

As shown by the effects of other residences on GDB, a larger setback of 75-100 feet from the GDB population may be warranted. The purpose of the setback would be to not only provide for protection for the sensitive species that are known to be present, but to also allow sufficient room for the abiotic processes that are associated with this community to occur. This includes continuous sand drift and occasional destabilization of the dunes during high storm periods, followed by rapid sand movement shoreward. Dr. Engel discussed this issue in June 2008 in noting that buffers are intended to protect the community as a whole, not just the individual species within that community.

We note again that this site is within the federally designated critical habitat for the western snowy plover as part of the Zuma Beach Subunit (CA-20) [Federal Register, Vol. 20, No. 188, September 29, 2005]. This designation extends from the tideline landward to about Pacific Coast Highway, and also north of PCH to include the lower reaches of Trancas Creek. Per the critical habitat designation:

> "..This unit is an important wintering location for the plover, with 130 birds surveyed in January, 2004 (Page *in litt.* 2004). It includes the following essential features: Areas of sandy beach above and below the high tide line with occasional surf-cast wrack supporting small invertebrates (for foraging) and generally barren to sparsely vegetated terrain (for foraging and predator avoidance)."

The latter portion of the discussion of essential features is inclusive of most of the property, though foraging and predator avoidance would be best served by the ESHA area as discussed in this letter. With respect to setback distances, per the Recovery Plan for the western snowy plover (US Fish and Wildlife Service, 2007):

> "Lafferty (2001) observed western snowy plovers' response to people, pet dogs, equestrians, crows and other birds. Observations were made at Devereux Slough in Santa Barbara County, Santa Rosa Island, San Nicolas Island, and Naval Base Ventura County (Point Mugu). This study found that western snowy plover are most frequently disturbed when approached closely (within 30 meters) by people and animals. The most intense disturbance (causing the western snowy plover to fly away) were in response to crows, followed by horses, dogs, humans, and other birds. Lafferty (2001) created a management model based on his findings and estimated flight response disturbances under different scenarios. The model predicted a reduced disturbance response for buffer zones of 20 to 30 meters."

Since the western snowy plover would use the area both in front of and behind the initial foredune ridge, the appropriate setback area for this species use of the ESHA would be similar to that

recommended for the GDB, namely 65 – 100 feet from suitable habitat. Based on the discussion provided above with respect to sensitive plants, sensitive animals, and the coastal strand community as a whole, it is my opinion that the five-foot buffer from this ESHA is insufficient and that the 25-foot setback distance from the edge of this ESHA as recommended by Dr. Engel is reasonable and prudent to provide adequate protection for the known sensitive coastal resources at this location.

If you have any questions with respect to this review, please contact the undersigned.

Sincerely,
Rincon Consultants, Inc.

Duane Vander Pluym, D.Env.
Vice-President, Principal Biologist

REFERENCES

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ex. 2

Appeal
Exhibit F

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Ref: 66159-0007

December 10, 2009

VIA MESSENGER

Sharon Barovsky, Mayor
Jefferson Wagner, Mayor Pro Tem
Andy Stern
John Sibert
Pamela Conley Ulich
Malibu City Council
23815 Stuart Ranch Road
Malibu, CA 90265

Re: **Zoning Text Amendment No. 05-004; Zoning Text Amendment No. 09-002; Zoning Map Amendment No. 05-001; Coastal Development Permit No. 05-136 for Vesting Tentative Parcel Map No. 99-002; Initial Study No. 06-002; and Revised Mitigated Negative Declaration No. 06-004**

Subject Property: 30732 Pacific Coast Highway
Meeting Date: December 14, 2009
Agenda Item No. 4-A

Dear Mayor Barovsky and Members of the Malibu City Council:

The firm of Jeffer, Mangels, Butler & Marmaro LLP represents Deane Earl Ross and the Ross Family Trust. The Ross Family Trust owns property that adjoins the undeveloped beachfront property located at 30732 Pacific Coast Highway ("Subject Property") along its southeastern boundary. On behalf of our clients, we respectfully submit the following comments regarding the above-referenced zoning amendments, Coastal Development Permit and Vesting Tentative Parcel Map ("Proposed Entitlements") and the associated environmental review of the proposed subdivision of the Subject Property.

The Proposed Entitlements would facilitate the development of four homes on the 2.08-acre Subject Property (the "Project"), which is twice the number of homes that would be permitted under the current zoning regulations. The Subject Property includes environmentally-sensitive dune habitat that supports a number of rare and endangered plant and animal species. In fact, in a report to the California Coastal Commission ("CCC") dated May 15, 2008, Dr. Jonna

D. Engel, Ph.D, the CCC's biologist, noted that the dunes on the Subject Property "are some of the most pristine dunes along this stretch of coast."[1]

As explained below, the potential impacts of the Project on the environment (including the sensitive dune habitat on the Subject Property) have not been adequately or property evaluated under the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 *et seq*. Furthermore, the Proposed Entitlements conflict with numerous policies of the City's Local Coastal Program ("LCP"), and many of the findings contained in the Staff Report are not supported by substantial evidence.

On behalf of our clients, we urge the City Council to disapprove the Proposed Entitlements or, in the alternative, reject Revised Mitigated Negative Declaration No. 06-004 and direct staff to prepare an Environmental Impact Report ("EIR") for the Project.

The City's Use of the California Coastal Commission's Environmental Analysis Document Is Procedurally Improper

The City, acting as the "lead agency" for the Project, adopted Mitigated Negative Declaration No. 06-004 on January 22, 2007 (the "2007 MND").[2] The CCC subsequently certified Local Coastal Program Amendment No. 05-002 (the "LCPA") on the basis of a staff report to the CCC dated March 29, 2008 (the "CCC Staff Report"), which the CCC apparently treated as the "functional equivalent" of an EIR under the CCC's certified regulatory program. The City then elected to "revise and recirculate" the mitigated negative declaration for the Project in 2009 (the "2009 MND") in order to "supplement the environmental review already undertaken and completed by the CCC in its review of the LCPA …."[3]

According to the Staff Report, the 2009 MND "builds on prior CEQA work by the CCC prepared in connection with the drafting and certification" of the LCPA.[4] The purported legal basis for the City's approach is described in the Staff Report as follows:

> The CCC fulfills its CEQA responsibilities through its certified regulatory program, and the LCP findings are the functional equivalent of an EIR for the LCP. As such, the City is entitled to rely on the CEQA compliance of the CCC pursuant to Pub. Res. Code Section 21166. As such, the City is authorized to act as a responsible agency for CEQA purposes and is required to use the EIR substitute analysis already prepared by the CCC through its regulatory program (14 Cal. Code Regs. § 15251-15253).[5]

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[1] Council Agenda Report dated November 25, 2009 (the "Staff Report"), p. 218.
[2] Staff Report, pp. 9-10.
[3] *Ibid.* The City's responses to comments on the 2009 MND state that "the 2009 MND is intended to replace the 2007 Mitigated Negative Declaration" for the Project. Staff Report, p. 170.
[4] Staff Report, p. 10.
[5] *Ibid.*

The City's unilateral attempt to shift the "lead agency" designation to the CCC in this case, and its reliance upon on the "EIR substitute analysis" prepared by the CCC for the LCPA, are procedurally improper, for at least two reasons.

First, when it adopted the 2007 MND, the City assumed the role of lead agency for the Project and identified the CCC as the "responsible agency" under CEQA.[6] This determination was consistent with Section 15051(b) of the State CEQA Guidelines ("Guidelines"), which provides that the lead agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose.[7] Under Section 15052 of the Guidelines, a responsible agency may "assume the role of the lead agency" under specified circumstances. However, there is no legal authority for an agency, after assuming the role of "lead agency" for a Project, to later declare itself to be a "responsible agency."

Second, the requirements of Section 15253 of the Guidelines have not been met in this case. Section 15253 clearly states that an environmental analysis prepared for a project by a state agency under a certified regulatory program may be used by another agency granting an approval for the same project only "where the conditions in subdivision (b) have been met."[8] If the conditions in subdivision (b) are not met, the "substitute document prepared by the agency shall *not* be used by other permitting agencies in the place of an EIR or negative declaration."[9]

The first condition listed in subdivision (b) of Section 15253 is that "the certified [state] agency is the first agency to grant a discretionary approval for the project."[10] In this case, the certified agency (the CCC) was *not* the first agency to grant a discretionary approval for the Project. Rather, the City granted the first discretionary approval for the Project when it approved the LCPA and conditionally approved Tentative Parcel Map No. 99-002 ("TPM") and Coastal Development Permit No. 05-136 ("CDP") on January 22, 2007.

Another condition listed in subdivision (b) of Section 15253 is that the "certified [state] agency exercised the powers of a lead agency by considering all the significant environmental effects of the project and making a finding under Section 15091 for each significant effect."[11] In this case, there is no indication in the CCC's determination on the LCPA that the CCC was exercising the powers of a lead agency, or that it had considered all of the

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[6] A "responsible agency" is a public agency which "proposes to carry out or approve a project, for which a lead agency is preparing or has prepared an EIR or negative declaration." Guidelines, § 15381. A responsible agency is generally required to rely upon an EIR or negative declaration certified or approved by a lead agency. Guidelines, § 15096.

[7] *See also* Section 15051(c) of the Guidelines, which provides that where more than one public agency meets the criteria for identifying the lead agency, the agency that will act first on the project in question shall be the lead agency. In this case, the City was the first agency to act on the Project and was therefore the appropriate lead agency.

[8] Guidelines, § 15253(a).

[9] Guidelines, § 15253(c)(1) (emphasis added).

[10] Guidelines, § 15253(b)(1).

[11] Guidelines, § 15253(b)(6).

significant environmental effects of the Project. Rather, the CCC's environmental analysis was limited to the LCPA, which was the only matter that was pending before the CCC at the time.[12] *See Miller v. City of Hermosa Beach*, 13 Cal. App. 4th 1118, 1142 (1993) (in rejecting the city's contention that the CCC's review of a hotel project constituted the "functional equivalent" of an EIR, the court noted that the "record does not clearly establish the nature of the Coastal Commission's review," and that "the record appears to demonstrate that the Coastal Commission performed no EIR-type analysis ..."). Furthermore, the CCC did not make any findings pursuant to Section 15091 for each significant effect of the Project, and the City staff has not remotely demonstrated otherwise.[13]

Because at least two of the conditions listed in Section 15253(b) of the Guidelines have not been met, the "substitute document" prepared by the CCC in this case may not be used by the City in the place of an EIR or negative declaration. Instead, the City must "comply with CEQA in the normal manner," and must "act as a lead agency and prepare an EIR or a negative declaration."[14]

Furthermore, the City reliance upon Public Resources Code Section 21166 is misplaced. Section 21166 provides that "*when an environmental impact report has been prepared* for a project pursuant to this division, no subsequent or supplemental environmental report shall be required by the lead agency or by any responsible agency..." (emphasis added). At no time, however, has an EIR been prepared for the Project. While the environmental review completed by the CCC was apparently intended to function as the "equivalent" of an EIR for purposes of the CCC's decision on the LCPA, the CCC's review does not, in fact or law, constitute an EIR. Thus, Public Resources Code Section 21166 does not apply.

For all of these reasons, the City must prepare and circulate a new environmental document for public comment. Unless and until the City does so, the City Council may not approve the Proposed Entitlements.

Fair Argument Standard

As explained above, the City may not "tier off" the environmental analysis prepared by the CCC in connection with its certification of the LCPA, and must instead "comply with CEQA in the normal manner," and must "act as a lead agency and prepare an EIR or a negative declaration."[15]

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[12] While a responsible agency has a duty to mitigate or avoid only the direct or indirect environmental effects of those parts of the project that it decides to approve, a lead agency must consider the "whole of the action." See Guidelines, §§ 15096(g)(1) and 15003(h) ("The lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect"). Here, the "whole of the action" includes certain approvals (*e.g.*, the TPM and the CDP) that were not considered by the CCC.

[13] See Staff Report, pp. 201, 172-173.

[14] Guidelines, § 15253(c)(2).

[15] Guidelines, § 15253(c)(2).

Under CEQA, an EIR is required whenever substantial evidence supports a "fair argument" that a proposed Project may have a significant effect on the environment, even where other evidence supports a contrary conclusion. *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 74 (1974); *Brentwood Assn for No Drilling, Inc. v. City of Los Angeles*, 134 Cal. App. 3d 491, 504 (1982). This "fair argument" standard creates a "low threshold" for requiring the preparation of an EIR. *Citizens Action to Serve All Students v. Thornley*, 222 Cal. App.3d 748, 754 (1990). Thus, a project need not have an "important or momentous effect of semi-permanent duration" to require an EIR. *No Oil, Inc. v. City of Los Angeles*, 13 Cal.3d 68, 87 (1974). Rather, an agency must prepare an EIR "whenever it perceives some substantial evidence that a project may have a significant effect environmentally." *Id.* at 85. Conversely, a mitigated negative declaration is proper *only if* project revisions "would avoid the effects or mitigate the effects to a point where *clearly no significant effect* on the environment would occur, and ... there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment."[16]

An agency will not be allowed to hide behind its own failure to gather relevant data. Specifically, "deficiencies in the record [such as a deficient initial study] may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 311 (1988). For example, in *Sundstrom* the court held that the absence of information explaining why no alternative sludge disposal site is available "permits the reasonable inference that sludge disposal presents a material environmental impact." *Ibid.* In addition, the court stated that "the sparseness of the record concerning potential vegetative change also suggests significant issues." *Ibid.*

Substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."[17] The Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached."[18] Substantial evidence may also include a "factual dispute" or "controversy" as to whether a project may have significant environmental impacts, even if uncertain.[19]

In this case, an EIR is required for the Project because there is substantial evidence to support a fair argument that the Project may have a significant impact on the environment. Specifically, as discussed in our comments on the 2009 MND, there is substantial evidence to support a conclusion that the Project may have a significant impact in the areas of aesthetics, biological resources, land use and planning, hydrology and water quality, traffic and

[16] Pub. Res. Code § 21064.5 (emphasis added); accord § 21080(c)(2).
[17] Pub. Res. Code § 21080(e).
[18] Guidelines, § 15384.
[19] *See e.g., No Oil, supra*, 13 Cal.3d at 85 (holding that the existence of a factual dispute as to whether a drilling project may cause landslides or blowouts, even if uncertain, underscores the need for an EIR).

parking, fire hazards, and air quality.[20] A more detailed discussion of the Project's potential impact on biological resources and water quality is presented below.

Substantial Evidence Supports a Fair Argument that the Project May Have a Significant Impact on Biological Resources

The 2009 MND acknowledges that the Subject Property contains coastal dunes which constitute Environmentally Sensitive Habitat ("ESHA").[21] The 2009 MND also recognizes that a buffer is needed between the ESHA and the proposed development in order to protect the EHSA, "which could easily be disturbed or degraded by human activities and development."[22] Nonetheless, under the Proposed Entitlements, a setback of only five (5) feet is required between the future residences and the ESHA on the Subject Property. In this regard, the Staff Report states as follows:

> Based on the substantial biological studies completed for the site, it was determined by the CCC that a rear yard / front dune ESHA buffer of at least five feet would serve as *adequate space to construct and maintain a residence* without encroaching into the ESHA and restoration area. Therefore, a five foot buffer from the designated ESHA areas is required as the rear yard setback in the Malibu Bay Company Overlay District development standards.[23]

As indicated in this and other statements in the record, the purpose of the 5-foot setback requirement is to allow for the construction and maintenance of the proposed future residences. By definition, this 5-foot setback would allow for the intrusion of "human activities" right up to the ESHA boundary and, for this reason, is really no "buffer" at all.

Furthermore, contrary to the assertion that the 5-foot setback requirement is supported by "substantial biological studies," the 5-foot setback requirement was imposed by the CCC on the basis of *equitable*, rather than scientific, considerations. Specifically, the CCC Staff Report included a memorandum dated May 15, 2008 from the Commission's staff biologist, Dr. Engel, that discussed the need to provide an adequate buffer between the proposed residences and ESHA. In this regard, Dr. Engel wrote:

> Generally, the Commission protects environmentally sensitive habitat, such as southern foredunes, with buffers or set-backs. *Set-backs are necessary to insure that development will not significantly degrade the ESHA*. Habitat buffers provide many functions, including keeping disturbance (noise, night lighting,

[20] Staff Report, pp. 203-215.
[21] Staff Report, p. 127.
[22] *Id.*
[23] Staff Report, p. 14 (emphasis added).

> domestic animals) at a distance, reducing the hazards of herbicides, pesticides and other pollutants, preventing or reducing shading, and reducing the effects of landscaping activities. Buffers also protect against invasive plant and animal species that are often associated with humans and development.[24]

Following an extensive analysis of the nature and location of the ESHA on the Property and the sensitive plant and animal species that depend upon this ESHA, Dr. Engel recommended that the Commission impose a minimum 25-foot buffer between any new development and the ESHA, stating as follows:

> [A] buffer (development setback) is *necessary* to protect the functioning of the southern foredune ESHA at 30732 Pacific Coast Highway in Malibu California. To protect this ESHA I recommend a *minimum* 25 foot buffer between the dune ESHA and development. This distance is consistent with other Commission dune buffer determinations and with the United States Fish and Wildlife Service's recommendation for this site documented in their April 18, 2007 letter as well as in person.[25]

In her May 15, 2008 memorandum, Dr. Engel also disagreed with the suggestion made in reports prepared by the Applicant's biologist that the "primrose/lupine" area be excluded from ESHA, citing, among other things, "the rarity of dune habitats across the state and the ease with which they are degraded by human activities...." Dr. Engel concluded as follows:

> In conclusion, I recommend that the "primrose/lupine" area be included as ESHA in the southern foredune community delineation and that a *minimum* 25 foot buffer from ESHA be applied to this project.[26]

Notwithstanding Dr. Engel's well-reasoned recommendation that a minimum 25-foot ESHA buffer be provided, the CCC Staff Report proposed only a five-foot rear "setback." Without expressly disagreeing with any of Dr. Engel's conclusions, the CCC Staff Report explained its recommendation for a 5-foot setback (as opposed to a 25-foot buffer) as follows:

> [A]ssuming a 25 foot buffer is applied, it is possible to site future development for four separate parcels without building in ESHA or ESHA buffer.... However, because dune ESHA is situated essentially up to the "stringline" across about three quarters of the property, *a 25 foot buffer would significantly reduce the amount of buildable area for most of the newly created parcels*. The Commission recognizes that the subdivision will accommodate infill development and *it is important to consider what would be*

[24] Staff Report, p. 223 (emphasis added).
[25] Staff Report, p. 224 (emphasis added).
[26] *Ibid* (emphasis added).

> *both equitable and most protective of coastal resources.* If ESHA and a 25 foot ESHA buffer were strictly delineated for siting future development of the newly created parcels, *the result would be a much smaller available development area* than is allowed by the existing development pattern along this densely developed stretch of Broad Beach.... Construction, maintenance, and use of single family residences inevitably involve activities that extend beyond the footprint of the structure.... In this case, the rear yards front dune ESHA and a maintenance buffer of at least five feet would serve as adequate space to construct and maintain a residence without encroaching into the ESHA and restoration area. *Therefore, the Commission finds that a five foot buffer from the designated ESHA areas in this case would be both equitable and protective of the biological integrity of the on site dune ESHA....* [27]

Thus, despite the fact that its own biologist recommended 25-foot buffer in order to protect the fragile habitat on the Subject Property, the CCC imposed a 5-foot setback requirement based on so-called "equitable" considerations. The CCC Staff Report did not explain how the recommended five-foot "maintenance" buffer would be "protective of the biological integrity" of the ESHA on the Property.

It is undisputed that Dr. Engel qualifies as an expert.[28] Dr. Engel's opinion that a minimum 25-foot buffer is needed to protect the ESHA on the Subject Property clearly constitutes substantial evidence in support of a fair argument that the 5-foot setback required under the Proposed Entitlements will be insufficient to protect the ESHA, and that, for this reason, the Project may have a significant impact on biological resources. See Pub. Res. Code § 21080(e) (Substantial evidence includes "expert opinion supported by fact.").

A "fair argument" that the Project may have a significant impact on ESHA is also supported by the expert opinions of Dr. Duane Vander Pluym, Vice President and Principal Biologist for Rincon Consultants. Dr. Vander Pluym had previously evaluated the biological resources on the Subject Property and, in a report dated December 6, 2006, confirmed that the Subject Property includes habitat for various rare and threatened species of plant and animal life and should therefore be considered ESHA. More recently, Dr. Vander Pluym reviewed Dr. Engel's memoranda and other biological studies provided to the CCC and, in a letter report dated October 12, 2009, concluded as follows: "Based on the discussion provided above with respect to sensitive plant species, sensitive animals, and the coastal strand community as a whole, it is my opinion that the five-foot buffer from this ESHA is insufficient and that the 25-foot setback distance from the edge of this ESHA as recommended by Dr. Engel is reasonable and prudent to provide adequate protection for the known sensitive coastal resources at this location."[29] Dr. Vander Pluym also noted that the Subject Property is within the federally designated critical

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[27] CCC Staff Report, p. 28 (emphasis added). A copy of the CCC Staff Report (without exhibits) is attached hereto as Exhibit "A."

[28] Dr. Engel's qualifications are attached as Exhibit "B."

[29] Letter dated October 12, 2009 from Rincon Consultants, Inc. ("Rincon Letter"), p. 8. A copy of the Rincon Letter is attached hereto as Exhibit "C." A copy of Dr. Vander Pluym's qualifications is attached hereto as Exhibit "D."

habitat for the western snowy plover, and opined that since "the western snowy plover would use the area both in front of and behind the initial foredune ridge, the appropriate setback area for this species' use of the ESHA would be similar to that recommended for the [Globuse Dune Beetle], namely 65-100 feet from suitable habitat."[30]

A reviewing court will invalidate an agency's decision to prepare an MND if the court finds any substantial evidence that a significant impact might result from the project, even if the agency can point to other substantial evidence supporting its determination that no significant impact will occur.[31] Thus, given the expert opinions expressed by Dr. Engel and Dr. Vander Pluym, the fact that the record may include contrary opinions from other experts would not support the adoption of an MND in this case. Indeed, the Guidelines provide that, in marginal cases, if there is disagreement among experts regarding the significance of a potential effect on the environment, the agency "shall treat the effect as significant and shall prepare an EIR."[32]

Sensitive Habitat

In addition to the expert opinions of Dr. Engel and Dr. Vander Pluym regarding the ESHA buffer issue, the record includes other substantial evidence in support of a fair argument that the Project may have a significant impact on biological resources. For example, studies conducted by Glenn Lukos Associates confirmed that the Subject Property contains suitable habitat for the Silvery Legless Lizard, a California Department of Fish and Game "species of concern."[33] In addition, the Subject Property lies within designated critical habitat for the federally threatened Western Snowy Plover.[34] Other evidence in the record shows that the Subject Property is occupied by the Globose Dune Beetle, a California "special animal" and federal "species of concern."[35] Clearly, the construction and occupancy of four homes on the Subject Property has the potential to significantly affect these rare and endangered species. *See Mejia v. City of Los Angeles*, 130 Cal.App.4th 322, 340 (2005) (in setting aside an MND for a proposed residential subdivision, the court found that the presence of certain bird species on the site, and the potential presence of other species of concern on the site, constitutes substantial evidence in support of a fair argument that the project may have a significant effect on animal life because, among other things, the initial study did not preclude the reasonable possibility that development of the site may have a significant impact on wildlife).

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[30] Rincon Report, October 12, 2009, p. 7-8.
[31] *See Sundstrum, supra*, 202 Cal.App.3d at 310. *See also Architectural Heritage Ass'n v. County of Monterey*, 122 Cal.App.4th 1095 (2004); *Friends of "B" Street v. City of Hayward*, 106 Cal.App.3d 988 (1980).
[32] Guidelines, § 15064(g).
[33] Revised MND, p. 24.
[34] *Id.* See also Biological Resources Complaints Discussion, 30732 Pacific Coast Highway (Broad Beach), City of Malibu, Los Angeles County, California, prepared by Rincon Consultants, Inc., dated November 2006, pp. 6-7 (A copy of this report was previously submitted to the City as part of Ross' comments on MND 06-004).
[35] Revised MND, p. 24.

In its responses to comments on the 2009 MND, the City states that surveys were performed for the Western Snowy Plover and "none were observed."[36] However, the City overlooks the fact that the Subject Property is part of the designated critical habitat for the Snowy Plover.[37] The loss or modification of any portion of this habitat would potentially have a significant impact on this species of concern. See Guidelines, Appendix G, Section IV(a).

The Guidelines also indicate that a project that conflicts with any local policies or ordinances concerning the protection of biological resources should be deemed to have a potential impact on such resources.[38] Here, the 2009 MND states that the Project will not conflict with any local policies or ordinances protecting biological resources, but fails to provide any meaningful analysis or cite any evidence in support of this "bare-bones" conclusion.[39]

Substantial Evidence Supports Fair Argument that the Project May Have a Significant Impact on Water Quality

On November 5, 2009, the California Regional Water Quality Control Board ("Water Board") adopted a resolution to prohibit on-site wastewater disposal systems ("OWDSs") in the Malibu Civic Center area. The prohibition applies to all dischargers in the Civic Center area, including commercial and industrial facilities, public facilities, and residences. New septic discharges are no longer allowed and existing residences must cease discharge by November 2019.

While the Project is not located within the Malibu Civic Center area, Water Board staff recognized that "[i]n several areas of the City, high flows of wastewaters coupled with unfavorable hydrogeologic conditions have raised concerns about reliance on the on-site disposal systems to discharge sewage to the subsurface and underlying groundwater."[40] The Malibu Civic Center area is but one of these problematic areas.[41] In 1994, the Water Board formally designated beneficial uses for the water resources in the area and established water quality objectives to protect the identified beneficial uses.[42]

On June 28, 2007, the United State Environmental Protection Agency ("US EPA") identified impairments to beneficial uses as follows:

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[36] Staff Report, p. 178.
[37] See Rincon Letter, p. 7.
[38] Guidelines, Exhibit G, Section IV.
[39] *See Sundstrom, supra*, 202 Cal.App.3d at 296 (in setting aside a negative declaration for a sewage treatment plant, the court held that the county's bare-bones environmental checklist did not satisfy CEQA's requirements for an adequate initial study.)
[40] Final Technical Staff Report dated November 5, 2009 ("Water Board Staff Report"), p. 1. A copy of the Water Board Staff Report is attached hereto as Exhibit "E."
[41] *Ibid.*
[42] See Water Quality Control Plan for the Coastal Watersheds of Ventura and Los Angeles Counties, adopted by the Water Board on June 13, 1994, and as subsequently amended ("Basin Plan"), Chapters 1 - 3. A copy of the Basin Plan is attached hereto as Exhibit "F."

Malibu Lagoon: impaired by Coliform Bacteria, Eutrophication.
Malibu Creek: impaired by Coliform Bacteria, Nutrients (Algae).
Malibu Beach: impaired by Indicator Bacteria.
Malibu Lagoon Beach (Surfrider Beach): impaired by Coliform Bacteria.
Carbon Beach: impaired by Indicator Bacteria.[43]

The Water Board specified numeric targets, based on the single sample and geometric mean bacteria water quality objectives in the Basin Plan to protect the water contact recreation use for beaches along the Santa Monica Bay.[44] The Project is located within the Santa Monica Bay area and must abide by the imposed total maximum daily loads to restore water quality and impaired beneficial uses.

Water Board staff relied on five technical memoranda to conclude that discharges of OWDSs in the Malibu Civic Center area will result in violation of water quality objectives, impair present or future beneficial uses of water, cause pollution, nuisance, or contamination, or unreasonably degrade the quality of any water of the state.[45] Here, the 2009 MND failed to analyze the water quality impacts posed by the Project, thereby "enlarging the scope of fair argument by lending a logical plausibility to a wider range of inferences." *See Sundstrom, supra*, 202 Cal.App.3d at 311. The Water Board's recent conclusions concerning the potential impacts of OWDSs on water quality, coupled with the sparseness of record concerning the OWDSs that will be utilized by the Project in this case, support a fair argument that adding four additional OWDSs on a 2.08-acre beachfront lot previously zoned for two homes may cause significant adverse impacts on existing water quality that have not been mitigated.

The Project Description in the 2009 MND is Misleading

Pursuant to Section 15378(a) of the Guidelines, the term "project" is defined to mean the "whole of the action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ...." Clearly, the "whole of the action" in this case includes the building of four homes on the Subject Property.

By describing the Project only in terms of the proposed amendments to the City's municipal code and the division of the Subject Property into four lots, and by failing to identify the physical development of four homes on the Subject Property as a part of the Project, the 2009 MND has described the Project in an impermissibly narrow and highly misleading fashion. *See County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 198 (1977) ("A curtailed, enigmatic or unstable project description draws a red herring across the path of public input.").

[43] Water Board Staff Report, p. 5.
[44] Water Board Staff Report, p. 6.
[45] *Ibid.*

Improper Deferral of Mitigation

The 2009 MND acknowledges that the entire City is located within an area described by the Los Angeles County Fire Department as a Very High Fire Hazard Severity Zone.[46] Despite these inherent risks, the 2009 MND concludes that the potential fire hazards associated with the Project will be less than significant "with the incorporation of the LACFD conditions of approval on any future residential development."[47] However, the 2009 MND does not describe these "conditions of approval," or make any attempt to evaluate their efficacy in mitigating the potential fire hazards associated with the Project. As such, the 2009 MND has improperly deferred the formulation and evaluation of mitigation measures.[48] The 2009 MND also fails to address the potential constraints on the ability of fire department personnel and equipment to gain access to the Subject Property and other properties along Broad Beach Lane in the event of a major fire.

In a letter to the City dated June 11, 2009, the Los Angeles County Fire Department ("LACFD") states that the "[c]onditions [on the Project] will be set once official plans have been submitted for review."[49] Under the heading "Forestry Division - Other Environmental Concerns," the letter from LACFD further states as follows:

> The statutory responsibilities of the County of Los Angeles Fire Department, Forestry Division include erosion control, watershed management, rare and endangered species, vegetation, fuel modification for Very High Fire Hazard Severity Zones or Fire Zone 4, archeological and cultural resources, and the County Oak Tree Ordinance. *Potential impacts in these areas should be addressed in the Final Environmental Impact Document.*[50]

Thus, as acknowledged by the LACFD, evaluation of the potential impacts of the Project on Fire Safety have been improperly deferred to an unspecified future environmental document. This is in direct violation of CEQA as determined by the courts. "By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process." *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296, 307 (1988).

The City Failed to Provide Meaningful Responses to Comments

In our comment letter dated May 11, 2009, we raised the issues summarized above, and presented numerous other concerns regarding the Project's potential to cause significant environmental impacts. The City has yet provide complete or meaningful responses

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[46] Staff Report, p. 138.
[47] *Ibid.*
[48] *See* Guidelines, § 15126.4(a)(1)(B). *See also Sundstrum, supra*, 202 Cal.App.3d at 248 (1988).
[49] Staff Report, p. 238-239.
[50] Staff Report, p. 239.

to any of these comments. By this reference, we incorporate and preserve all of the issues raised in our May 11, 2009 letter, which is contained in the Staff Report on pp. 199-237.

CDP and TPM Findings

Many of the proposed findings in support of the CDP and TPM are not supported by substantial evidence and/or do not support the action recommend in the Staff Report. A few of the more glaring examples are summarized below:

- Finding A3 - *The project is the least environmentally damaging alternative.* In this finding, the City only addresses two other scenarios -- neither of which are realistic nor allowed under the current City Municipal Code. The first alternative is described as "No Project." Under this scenario, the owner of the Subject Property would be allowed to develop one, monolithic structure that would contain up to 38,750 square feet of floor area. However, this is a sham alternative, since there are additional restrictions under the City's Municipal Code and LCP that would preclude such development. Under the second alternative, the owner of the Subject Property would divide the lot into eight lots and build eight homes on the property. However, this scenario would not be allowed under the current zoning regulations or the Proposed Entitlements, and could not possibly lessen or avoid any of the potential environmental impacts of the four lots/residences under the proposed Project. As such, this alternative is nothing more than a "straw man" alternative that is designed to make the proposed Project appear to be environmentally superior. Finally, this finding is inadequate and incomplete because it fails to address a two-lot alternative (as permitted under the current zoning regulations) or a three-lot alternative, either one of which would likely be less environmentally damaging than the proposed Project.

- Finding I8 - *The subdivision does not create any parcels without the appropriate conditions for a properly functioning septic system; all required approvals certifying that these requirements are met must be obtained.* No conditions for a properly-functioning septic system on the Subject Property have been identified or established, and none of the required approvals for the proposed OWDS have been obtained.

- Finding I10 - *The subdivision does not create any parcels that are smaller than the average size of the surrounding parcels.* This finding is directly contradicted by the evidence in the record and is simply untrue. According to the Staff Report, one of the proposed lots will have a lot width of 47 feet, which is smaller than the average beachfront SFM-zoned lot in the City (50 feet in width) and smaller than the average lot in the Broad Beach area (48 feet in width).[51]

- Finding I12 - *The subdivision does not create any new parcels without an identified, feasible building site that is located outside of ESHA and the ESHA buffer required in the*

[51] Staff Report, pp. 8, 180.

LCP. Policy 3.23 of the Land Use Plan of the certified LCP requires that buffer areas be provided "of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect," and that *all* buffers be a minimum of 100 feet in width. Here, the proposed building sites are obviously located within 100 feet of ESHA. Moreover, the record includes expert opinion that a *minimum* buffer of 25 feet is needed to ensure the biological integrity and preservation of the ESHA on the Subject Property. Again, the Project includes proposed building sites that are located within 25 feet of the ESHA.

- Finding J5 - *The design of the development and the proposed improvements are not likely to cause substantial environmental damage or substantially injure fish or wildlife or their habitat*. As discussed above, the proposed five-foot setback between the ESHA and the future residences on the Subject Property will not be sufficient to protect the biological integrity of the ESHA. Moreover, by allowing four homes on an lot that is currently zoned for only two homes will increase the foot traffic, noise, dust and other pollution associated with the increased human activity in the area. For these reasons, the Project *is* likely to cause significant impact and injury to wildlife and its habitat.

Conclusion

The Proposed Entitlements would allow for a 100 percent increase in the permitted density on the Subject Property for the sole benefit of the Project applicant. Because the Project would have potential adverse impacts on the surrounding community and the environment, and because these potential impacts have not been adequately evaluated, the City Council should disapprove the Proposed Entitlements or, in the alternative, direct staff to prepare an EIR for the Project.

Thank you for your consideration.

Very truly yours,

JOHN BOWMAN of
Jeffer, Mangels, Butler & Marmaro LLP

JMB:dg
Exhibits

cc (via e-mail, w/o exhibits): Stefanie Edmondson, AICP, Acting Planning Manager
Christi Hogin, City Attorney

2 of 2 DOCUMENTS

DEANE EARL ROSS, as Cotrustee, etc., et al., Plaintiffs and Appellants, v. CALIFORNIA COASTAL COMMISSION et al., Defendants and Appellants; MALIBU BAY COMPANY, Real Party in Interest and Appellant.

B225796

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FIVE

199 Cal. App. 4th 900*; *133 Cal. Rptr. 3d 107*; *2011 Cal. App. LEXIS 1286*; *41 ELR 20283

September 9, 2011, Filed

NOTICE:

As modified Oct. 11, 2011. CERTIFIED FOR PARTIAL PUBLICATION*

* Pursuant to *California Rules of Court, rules 8.1100* and *8.1110*, this opinion is certified for publication with the exception of part III.E. to H.

SUBSEQUENT HISTORY: Time for Granting or Denying Review Extended *Ross (Dean Earl) v. California Coastal Commission (Malibu Bay Company), 2011 Cal. LEXIS 12953 (Cal., Dec. 13, 2011)*
Review denied by *Ross v. Cal. Coastal Comm'n, 2012 Cal. LEXIS 66 (Cal., Jan. 4, 2012)*

PRIOR-HISTORY:
APPEAL from a judgment of the Superior Court of Los Angeles County, No. BS118974, James C. Chalfant, Judge.
Ross v. California Coastal Com., 198 Cal. App. 4th 1573, 130 Cal. Rptr. 3d 777, 2011 Cal. App. LEXIS 1176 (Cal. App. 2d Dist., 2011)

COUNSEL: Elkins Kalt Weintraub Reuben Gartside and John M. Bowman for Plaintiffs and Appellants.

Edmund G. Brown, Jr., and Kamala D. Harris, Attorneys General, John A. Saurenman, Assistant Attorney General, Christina Bull Arndt and Wyatt E. Sloan-Tribe, Deputy Attorneys General, for Defendant and Appellant California Coastal Commission.

Christi Hogin, City Attorney; Jenkins & Hogin and John C. Cotti for Defendant and Appellant City of Malibu.

Alston & Bird, Nicki Carlsen and Rebecca S. Harrington for Real Party in Interest and Appellant.

JUDGES: Opinion by Turner, P. J., with Kriegler, J., and Kumar, J., concurring.

OPINION BY: Turner

OPINION

TURNER, P. J.--

I. INTRODUCTION

A governmental entity with beachfront property within its borders must adopt a local coastal program. A local coastal program or any amendments thereto are subject to approval by the California Coastal Commission (the commission). *Public Resources Code section 21080.5, subdivision (a)*, which is part of the California Environmental Quality Act (*Pub. Resources Code, § 21000 et seq.*), permits the Secretary of the Resources Agency (the secretary) to certify an administrative agency's regulatory program. The secretary's certification extends to the preparation of written documentation supporting an environmental decision. *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *California Code of Regulations, title 14, section 15252, subdivision (a)* of the Guidelines for Implementation of the California Environmental Quality Act (Guide-

lines) specify certain procedural substantive requirements for a certified program's environmental documentation with reference to a local coastal program as well as other planning decisions. Once the secretary certifies a local coastal program, written documentation supporting the commission's approval may be used in lieu of an environmental impact report. The secretary has certified the commission's review process for approving a local coastal program amendment.

The only undeveloped beachfront property (the subject property) in the City of Malibu (the city) on Broad Beach is owned by Malibu Bay Company (the developer). In order to facilitate the subdivision of the subject property, the city, among other things, adopted an amendment to its local coastal program. The commission, relying on a written staff report and testimony, certified the amendment to the city's local coastal program, albeit only after increasing the view corridors from Pacific Coast Highway to the beach. No environmental impact report was prepared.

In response, plaintiffs, Deane Earl Ross and the Ross Family Trust, filed a mandate petition challenging the commission's certification, with the aforementioned view corridor modification, of the city's local coastal program amendment. The trial court granted plaintiffs' mandate petition, in part, finding noncompliance with the procedural and substantive requirements imposed for environmental impact reports by the California Environmental Quality Act. The commission, the city and the developer appeal from that portion of the judgment partially granting plaintiffs' mandate petition. As to that portion of the judgment denying their mandate petition, plaintiffs have appealed.

In the published portion of this opinion, we conclude the commission reasonably resolved conflicting city development standards concerning buffers in environmentally sensitive habitat areas. Further, largely applying *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252*, we resolve questions about the adequacy of the commission's review, approval and modification of the amendment to the city's local coastal program. We conclude the commission complied with *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)*. Thus, the mandate petition should have been denied in its entirety.

II. BACKGROUND

A. The Subject Property

The administrative record reveals that the developer owns a 2.08-acre beachfront parcel in the city, located at the eastern end of Broad Beach between Pacific Coast Highway and the ocean. The subject property is approximately 200 feet wide at its northern boundary along Pacific Coast Highway and narrows to approximately 186 feet at its southern border along the beach. The property is the last undeveloped parcel on Broad Beach in a developed residential area. There are beachfront residences on both sides of Broad Beach Road. The subject property is undeveloped except for a narrow access driveway, landscaping, and gated fencing at the northern end of the property. The subject property is zoned for single-family medium density (one unit per 0.25 acre) in the city's local coastal program. The "Local Implementation Plan," part of the city's local coastal program, required that all new lots in the single-family medium-density zoning district have a minimum size of 0.25 acre and a minimum lot width of 80 feet. (We will discuss later the roles of a local implementation plan and local coastal program as part of the planning process under the California Coastal Act of 1976 (*Pub. Resources Code, § 30000 et seq.*; Coastal Act).)

The subject property is part of a larger coastal dune ecosystem at Broad Beach. The coastal dune community fronting homes along Broad Beach is part of the southern foredunes, which are considered environmentally sensitive habitat areas in the city's local coastal program. (We will later clarify the concept of an environmentally sensitive habitat area.) Dunes range from lightly to heavily impacted with nonnative plants between the beach and most of the homes. The subject property has been disturbed over time: beginning with the construction of Pacific Coast Highway; its use as a boat storage and launching site; and then its use as a construction staging ground.

B. The City Proceedings

On July 29, 2005, the developer applied for issuance of a coastal development permit, tentative parcel map, general plan amendment, and zoning text amendment. The developer sought to subdivide the 2.08-acre, 200-foot-wide beachfront property into four separate lots. Each proposed lot was more than 0.50 acre with a lot width ranging from 48 to 50 feet. The four proposed lots did not meet the local coastal program's minimum lot width requirement of 80 feet for the single-family medium-density zoning district. The developer also requested the Local Implementation Plan portion of the local coastal program be amended so as to create a new zoning district allowing for a lot width of 45 feet.

The city staff reviewed the developer's application and prepared a draft mitigated negative declaration to satisfy California Environmental Quality Act requirements. On June 8, 2006, the city published a notice of intent to adopt the draft mitigated negative declaration for the project. Plaintiffs, who own a parcel next to the

subject property, and other residents objected to the project and the draft mitigated negative declaration. Plaintiffs argued that the proposed amendment to the local coastal program would constitute illegal "spot" zoning. They also argued that the project violated the local coastal program and land use plan regulations relating to the protection of environmentally sensitive habitat areas.

On September 5, 2006, the city planning commission conditionally approved a coastal development permit, proposed tentative parcel map and draft mitigated negative declaration. The planning commission recommended the city council approve the local coastal program, zoning text and map, and general plan map amendments. Plaintiffs appealed the city planning commission's decision to the city council arguing in part that the amendment constituted illegal "spot" zoning. In response, the city staff developed an alternative proposal to amend the Local Implementation Plan portion of the local coastal program to reduce the minimum lot width standard from 80 feet to 45 feet for *all* of the 733 beachfront parcels. The lots were all within the city's single-family medium-density zoning district.

The city staff analyzed the single-family medium-density zoned beachfront properties to determine if the new lot width standard would allow for an increase in development density. The city staff found of the 733 single-family medium-density zoned beachfront parcels within its boundaries, the majority were nonconforming, with an average lot width of 50 feet. At Broad Beach, the average lot width was only 48 feet.

The city staff found only five parcels meeting both the lot size and width minimum requirement which could be subdivided under the new proposed lot width standard; one of which was the subject property. The other four parcels were already developed with single-family homes. Two of the four developed parcels were created by lot mergers or ties of three and four lots and could not be further subdivided under the local coastal program. The city staff determined only two developed parcels could potentially use the draft local coastal program amendment to create an additional lot each, if demolition of the existing homes and subdivision were requested. To subdivide, the owners of these two developed parcels would be required to apply for a coastal development permit and the city would need to conduct environmental review under the California Environmental Quality Act on those lots. The city staff determined the draft local coastal program amendment would have negligible direct and cumulative impacts on aesthetics, biological resources and land use and planning.

As part of the draft mitigated negative declaration, the city staff evaluated potential impacts to environmentally sensitive habitat areas. Dune environmentally sensitive habitat areas are not designated on the land use plan environmentally sensitive habitat areas overlay map. Thus, the city staff is required to conduct a site-specific biological study to determine the extent of dune environmentally sensitive habitat areas and their buffers on the property pursuant to Local Implementation Plan sections 4.3.A and 4.6.1.G. The developer submitted a dune environmentally sensitive habitat areas restoration plan for the subject property by its biologist, Edith Read. The restoration plan would restore the dune features to within 20 feet of the stringline. The plan recommended a 10-foot seaward buffer from the stringline. The restoration plan specified removal of nonnative plants; planting of native dune plants; monitoring; and the designation of one dune access path for each of the proposed four newly created parcels.

In response to plaintiffs' contention the least damaging alternative would be to allow the site to be developed under existing zoning regulations that would allow for two (rather than four) buildable lots, the city staff conducted an alternatives analysis. The city staff compared view corridors and development footprints for one, two, three and four lots on the subject property. The city staff concluded that four lots resulted in the greatest viewing area, the smallest development footprint and the least environmentally damaging option.

On December 8, 2006, plaintiffs submitted additional comments and documents to the city including a report prepared by Rincon Consultants on the biological constraints to development of the subject property. The Rincon Consultants report found the property contained environmentally sensitive habitat areas. The Rincon Consultants report concluded development could adversely affect habitat for certain rare, threatened and endangered species, including the western snowy plover, a bird, and the globose dune beetle.

On January 22, 2007, the city council adopted an ordinance approving the local coastal program amendment conditioned on the commission's certification. The city council also adopted a resolution denying plaintiffs' appeal; adopted a revised mitigated negative declaration; and conditionally approved the tentative parcel map and the coastal development permit for the subject property. On March 6, 2007, the city submitted the proposed local coastal program amendment and related documents to the commission for certification of the local coastal program amendment.

C. The Commission Proceedings

1. The commission staff report

On May 29, 2008, the commission staff issued a report. The report recommended the commission approve

the city's proposed local coastal program amendment with suggested modifications. The report also recommended that the commission adopt a modified version of the local coastal program amendment which would add a new "Malibu Bay Company Overlay District" to the Local Implementation Plan. The new overlay district would include conditions for view corridors, dune restoration, rear setback and an open space conservation easement.

The commission staff report discussed the city staff's review of the 733 single-family medium-density zoned beachfront lots. The commission staff noted besides the subject property, only two other lots could feasibly be subdivided to create one additional parcel each, if demolition of the existing homes and subdivision were requested. The commission staff report stated that subdivision of the subject property as a result of the local coastal program amendment would not create additional lots significantly smaller than the average size of surrounding parcels. The commission staff report concluded reducing the minimum lot width standard in the single-family medium-density beachfront zone to facilitate a future residential subdivision on the subject property would not conflict with *Public Resources Code section 30250, subdivision (a)*[1] as incorporated into the city's land use plan with the following qualification. That qualification is that the anticipated future development would comply with *Public Resources Code section 30250, subdivision (a)* so long as it did not have significant individual or cumulative adverse impacts on coastal resources.

> 1 *Public Resources Code section 30250, subdivision (a)*, which is part of the Coastal Act, states: "New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels."

The staff report analyzed the impact of the proposed development on the ocean views from the public roadways. The commission staff report noted, "[The local coastal program] view corridor provision requires that buildings occupy a maximum of 80 percent of a site's lineal frontage, while the remaining 20 percent of the lineal frontage is maintained as a contiguous view corridor, except on lots 50 feet or less in width, in which case the view corridor may be split into two 10 percent view corridors on either side of the residence." Thus, reducing the minimum lot width standard proposed in the city's local coastal program amendment would increase the number of smaller sized parcels which in turn would create smaller view corridors. The commission staff report proposed that "[n]o less than 20 percent of the linear frontage of each created parcel of the subdivision" be maintained as one contiguous public view corridor. In addition, the commission staff report proposed mitigation measures including removal of fencing that is not visually permeable; vegetation over two feet in height; and existing obstructions between Pacific Coast Highway and the onsite access road.

The commission staff report also analyzed impacts to biological resources on the subject property, including dune environmentally sensitive habitat areas. The commission staff report reviewed various biological reports of the onsite dune community submitted by the developer's consultants, surveys of special status species on the subject property and a May 15, 2008 memorandum from the commission staff biologist, Dr. Jonna Engel. Dr. Engel disagreed with the developer's two consultants who both stated that a portion of the dunes on the subject property, referred to as the primrose/lupine area, was previously disturbed and should not be considered as an environmentally sensitive habitat area. (Primrose and lupine are wildflower species.) Dr. Engel concluded the primrose/lupine area should be included as a dune environmentally sensitive habitat area. She explained dune hummocks and mounds dominated by native vegetation continue to persist in the area despite the intensive disturbance history of the site. Dr. Engel believed the primrose/lupine area should be considered an environmentally sensitive habitat area under the Coastal Act given the rarity of dune habitats across the state and the ease with which they are degraded by human activity. Based on the reports of the developer's consultants and Dr. Engel's memorandum, the commission staff report concluded the southern foredune community, including the lupine/primrose area on the subject property, met the Coastal Act definition of an environmentally sensitive habitat area.

The commission staff report also reviewed the biologists' opinions on the necessity of a buffer between the environmentally sensitive habitat areas and any development on the subject property. In an April 10, 2008 letter to the commission, the city's biologist, Dave Crawford, concurred with the conclusions of the dune habitat assessment by one of the developer's biologists. Mr. Crawford stated that he and the city's environmental review board have established a standard buffer policy for dune habitat on beachfront property. The standard buffer

policy requires development go no further seaward than the stringline in conjunction with a dune restoration plan. This was because the remnant dunes in Malibu are highly disturbed and have limited function and value. This policy has been in effect for numerous projects along Broad Beach Road. According to Mr. Crawford, "The majority of the dunes remaining in Malibu support predominately non-native and invasive ice plant, that not only outcompetes (and often eliminates) the native dune vegetation, but over-stabilizes the dunes, thus resulting in an unnatural condition that prevents the natural 'movement' of the dunes and reduces their value as native habitat." By allowing development consistent with the stringline standard, Mr. Crawford explained the city can require projects to incorporate dune restoration plans that over time will improve the remnant dune biological functions and values.

Dr. Engel disagreed with the opinion of the developer's consultants and Mr. Crawford that no buffer was necessary inland from the stringline. She noted: "Generally, the [c]ommission protects environmentally sensitive habitat, such as southern foredunes, with buffers or setbacks. Set-backs are necessary to insure that development will not significantly degrade the [environmentally sensitive habitat areas]." Dr. Engel recommended a 25-foot minimum buffer between the dune environmentally sensitive habitat areas and development. She stated, "This distance is consistent with other [c]ommission dune buffer determinations and with the United States Department of the Interior, Fish and Wildlife Service's recommendation for this site documented in their April 18, 2007 letter as well as in person ... ." (Fn. omitted.) In the same letter, the United States Department of the Interior, Fish and Wildlife Service staff concurred with the developer that development on the subject property "would not result in the take of the federally threatened" western snowy plover.

The commission staff report rejected the no buffer recommendation made by the city's biologist, Mr. Crawford, and the developer's consultants. But, the commission staff report also did not accept Dr. Engel's 25-foot buffer recommendation. The commission staff report found that a five-foot buffer from designated environmentally sensitive habitat areas "would be both equitable and protective of the biological integrity of the on site dune [environmentally sensitive habitat areas]" especially after implementation of the dune restoration plan. The commission staff report explained: "Given the proximity of dune [environmentally sensitive habitat areas] on the property and assuming a [25-foot] buffer is applied, it is possible to site future development for four separate parcels without building in [environmentally sensitive habitat areas] or [the environmentally sensitive habitat areas] buffer. This is consistent with the land division and [environmentally sensitive habitat area] policies of the Malibu [land use plan]. However, because dune [environmentally sensitive habitat areas are] situated essentially up to the 'stringline' across about three quarters of the property, a [25-foot] buffer would significantly reduce the amount of buildable area for most of the newly created parcels. The [c]ommission recognizes that the subdivision will accommodate infill development and it is important to consider what would be both equitable and most protective of coastal resources. If [environmentally sensitive habitat areas] and a [25-foot environmentally sensitive habitat areas] buffer were strictly delineated for siting future development of newly created parcels, the result would be much smaller available development area than is allowed by the existing development pattern along this densely developed stretch of Broad Beach. However, providing no buffer in exchange for restoration (as was determined sufficient by the [c]ity and the applicant's biological consultants) is inconsistent with [land use plan] section 3.23, which requires buffer areas around [environmentally sensitive habitat areas] to serve as transitional habitat and provide distance and physical barriers to human intrusion in order to preserve the biological integrity of the [environmentally sensitive habitat areas]."

The commission staff report also analyzed view corridor and development alternatives with 50-, 100- and 200-foot lot widths. The commission staff report stated: "Future subdivision of the subject property as a result of the [local coastal program amendment] request will result in four approximately [50-foot-]wide parcels with only a [five-foot] view corridor on either side of each parcel. Compared to two [100-foot-]wide lots with [20-foot] view corridors each, or one [200-foot-]wide lot with a [40-foot] view corridor that is currently allowed under the [local coastal program], reducing the minimum lot width standard to accommodate the subdivision will adversely impact views of the beach and ocean from Pacific Coast Highway." The developer proposed, and the commission staff report accepted, a contiguous 20 percent (10-foot-wide) view corridor on each side of the four newly created parcels. Each view corridor would be contiguous with one other view corridor. This would result in two 20-foot-wide view corridors across the entire 200-foot-wide property. This arrangement would replace several 10-foot-wide corridors. The commission staff report found the developer's proposal would provide maximum protection of visual resources while still accommodating subdivision of the subject property.

2. The 13-day public notice and comment

On May 29, 2008, the commission issued a public notice of a June 11, 2008 public hearing in Santa Rosa to all relevant parties. The public notice stated that commis-

sion staff recommended the approval of the city's local coastal program amendment with modifications. The staff report and notice were posted on the commission's Web site the same day. Plaintiffs obtained a copy of the staff report from the commission's Web site on May 30, 2008. On June 6, 2008, plaintiffs submitted written comments on the local coastal program amendment.

3. The commission staff report addendum

On June 9, 2008, the commission staff issued an addendum to the May 29, 2008 staff report. The addendum made minor changes to the prior commission staff report and responded to public comments including those of plaintiffs. The addendum noted, "The proposed [45-foot] width will result in lots that are substantially similar to the existing pattern of development along Broad Beach." Although the 45-foot width standard would apply to all beachfront parcels zoned single-family medium density, the subject property was the only vacant site that would be affected by the proposed modification of the lot width standard. Two other properties could be affected by the new 45-foot width standard only if the existing development were to be demolished. The June 9, 2008 addendum further stated, "The overlay district for [the subject property] reflects the landowner's agreement to incorporate more strict development standards regarding view corridors, habitat restoration and open space easements than required by the Malibu [local coastal program]." The addendum responded to comments relating to the environmentally sensitive habitat areas and the potential environmental impacts of the project. The addendum stated that the review of the environmentally sensitive habitat areas had been conducted to a level of specificity that would normally be carried out at a coastal development permit juncture, rather than a local coastal program approval stage.

The addendum also addressed comments regarding view resources by recommending the revision of the city's Local Implementation Plan section 6.5. The commission staff recommended amending the city's Local Implementation Plan section 6.5 which is labeled, "Development Standards" to include a new provision mandating broader view corridors. The proposed Local Implementation Plan section 6.5.E.6 provides: "New subdivisions of beachfront residential parcels, where structures cannot be sited or designed below road grade, shall ensure no less than 20% of the lineal frontage of each newly created parcel shall be maintained as one contiguous public view corridor (even if the resultant lots are 50 feet or less in width). The view corridors of the newly created parcels shall be contiguous to the maximum extent feasible in order to minimize impacts to public views of the ocean. This requirement shall be a condition of permit approval for the subdivision of a beachfront property." This proposed revision guaranteed 20 percent of the lineal frontage of each newly created parcel would be maintained as one contiguous public view corridor even if the resultant lots were 50 feet or less in width.

The addendum also attached written disclosures of ex parte communications received by certain members of the commission; a June 9, 2008 report from one of the developer's consultants entitled "Second Botanical Evaluation of Primrose/Lupine Area"; and a June 9, 2008 supplemental memorandum from Dr. Engel. In her supplemental memorandum, Dr. Engel clarified her dune landscape terminology and the definition of environmentally sensitive habitat areas in the Coastal Act. She also explained her reasons for including the primrose/lupine area as a component of overall dune environmentally sensitive habitat areas. Dr. Engel again recommended a 25-foot buffer be imposed. Dr. Engel agreed that the developer had proposed to restore the disturbed southern foredune environmentally sensitive habitat areas and had incorporated a number of best management practices into its design. She agreed these measures would help maintain the ecological functions of the southern foredune community. But Dr. Engel concluded these measures did not vitiate the need to set back development from the very edge of the environmentally sensitive habitat areas.

4. The commission hearing and decision

At the June 11, 2008 meeting, the commission considered the city's proposed local coastal program amendment. The commission heard testimony concerning the city's local coastal program amendment from several speakers including representatives for plaintiffs; the city; the developer; and the commission staff including Executive Director Peter Douglas and Dr. Engel. Dr. Engel again recommended a 25-foot buffer for environmentally sensitive habitat areas.

During the commission's deliberations, Commissioner Ben Hueso expressed concern that the local coastal program amendment might cause a change in residential density that had not been subject to environmental review. Mr. Douglas replied that there were only two other properties that might be affected; thus, the commission staff did not think the local coastal program amendment would increase density, either individually or cumulatively within the city. As to the buffer for environmentally sensitive habitat areas, Commissioner Mary Shallenberger questioned what fair and equitable meant in the context of the Coastal Act. Commissioner Shallenberger stated that in the future when there is a single lot left in any local government jurisdiction, the commission might not be able to utilize the best science as recommended by its biologist. Instead, she indicated the commission may have to compromise and impose conditions consistent with existing permits. In response, Mr. Doug-

las stated that the issue of fairness and equity is always considered by the commission and is applied from time to time where other properties or areas are similarly situated. Mr. Douglas explained the commission staff's rationale: "[I]n this case, when you look at the other approvals in the City of Malibu, that there were no buffer setbacks required before, we didn't [appeal] those approvals in the past, and therefore this is a case of first impression. So, we felt that treating this party, in as much similarly to others situated in the same way made sense, but the additional factor was that the restoration that we are getting here was of such importance that we felt both the equity issues, in terms of how others had been treated--and this is the first time that we are requiring this kind of a buffer--and the restoration component warranted the requirement of a 5-foot buffer to avoid a direct impact on the [environmentally sensitive habitat areas]."

At the conclusion of the June 11, 2008 hearing, the commission adopted the staff report. The commission conditionally certified the local coastal program amendment with the staff's recommended modifications. On November 10, 2008, the city approved an ordinance adopting the local coastal program amendment with the commission's proposed modifications. On January 7, 2009, the local coastal program amendment became effective when the commission concurred with Mr. Douglas's determination that the city had accepted the modifications proposed on June 11, 2008.

D. The Trial Court Proceedings

1. The mandate petition

On February 6, 2009, plaintiffs filed a verified mandate petition challenging the commission's approval of the local coastal program amendment asserting claims based on noncompliance with the Coastal Act and the California Environmental Quality Act. Plaintiffs alleged three causes of action: the commission violated numerous land use plan policies of the city; the commission's certification of the local coastal program amendment violated the California Environmental Quality Act; and the city's adoption of the local coastal program amendment was contrary to the land use plan and constituted impermissible "spot" zoning.

2. The trial court's rulings

a. Coastal Act issues

On February 2, 2010, the trial court issued a decision granting the mandate petition in part. As to plaintiffs' challenge of the appropriate buffer for environmentally sensitive habitat areas, the trial court found the commission could use common sense and principles of equity to consider the appropriate buffer provided its conclusion was supported by scientific evidence. The trial court found Mr. Crawford's no buffer conclusion supported the commission's imposition of a five-foot buffer if the city had consulted with the Department of Fish and Game as required under Local Implementation Plan section 4.6.1.G. Because there was no evidence that the Department of Fish and Game was consulted, the commission staff report did not constitute substantial evidence to support the five-foot buffer requirement. As will be noted, the trial court, in response to the developer's new trial motion, reversed the finding that there was insufficient "consultation" with the Department of Fish and Game.

The trial court rejected plaintiffs' argument that the local coastal program amendment violated the city's "Land Use Plan Policy" 5.35 because the 45-foot lot width of the proposed lots was less than the 50-foot average parcel width for the city's 733 single-family medium-density zoned beachfront lots and the 48-foot average of Broad Beach properties. The city's Land Use Plan Policy 5.35 requires, "The minimum lot size in all land use designations shall not allow land divisions, except mergers and lot line adjustments, where the created parcels would be smaller than the average size of surrounding parcels." The trial court found the local coastal program amendment would result in four lots, each greater than 0.50 acre on the subject property, while the parcels on each side of the property were 0.25 and 0.38 acres. Thus, according to the trial court, the proposed lots were consistent with the city's Land Use Plan Policy 5.35.

The trial court also rejected plaintiffs' contention that the local coastal program amendment violated the city's Land Use Plan Policy 6.18's requirement of "one contiguous view corridor" of at least 40 feet (20 percent of the property's lineal frontage). The trial court found the city's Land Use Plan Policy 6.18 requires that 20 percent of the lineal frontage for a particular lot be available for a contiguous view corridor, not 20 percent of the undivided parcel. Thus, once the property is divided into four lots, the developer could have provided for three 10-foot corridors between four houses with 2 five-foot perimeter corridors and still complied with the city's Land Use Plan Policy 6.18. The trial court ruled substantial evidence supported the commission's conclusion that two 20-foot view corridors met the requirements of Land Use Plan Policies 6.5 and 6.18.

b. California Environmental Quality Act issues

The trial court ruled the commission failed to comply with various provisions of the California Environmental Quality Act. The commission argued it was a responsible, and not the lead, agency under the California Environmental Quality Act. The trial court rejected

this contention. The trial court ruled the commission was the lead agency. The trial court found that under *Public Resources Code section 30514*, the commission must certify the proposed local coastal program amendment. Absent commission certification, the local coastal program amendment could not take effect. And according to the trial court, the commission does not share approval authority with the city. Hence, in the trial court's view, the commission is a lead, not a responsible, agency.

The trial court found the city and the commission were required to, but did not, consider the cumulative impacts of the local coastal program amendment. The trial court agreed the commission was not required to conduct cumulative impact analysis for two developed lots that were previously tied. This was because it was unlikely that the two parcels would be untied and subdivided in the future given the local coastal program policies that restricted potential development of these tied lots. However, the trial court ruled the city and the commission should have performed an environmental impact analysis on the two developed lots that could be feasibly subdivided in the future. The trial court ruled, "It may be that the [c]ity biologist would apply the same [environmentally sensitive habitat areas] analysis to these two lots--that no dune [environmentally sensitive habitat areas] protection is required beyond the stringline--the court cannot assume that to be true. [Dr.] Engel also may have a different opinion. Moreover, the report fails as an informational document with respect to that issue." The trial court also found the commission failed to adequately respond to comments concerning the cumulative impacts of the local coastal program amendment on the two affected lots.

Further, the trial court ruled the commission staff report failed as an informational document due to inadequate analysis of the alternatives of a wider view corridor and fewer lots in the subdivision of the subject property. The trial court noted the city considered alternatives by comparing view corridors and development envelopes for one, two, three and four lots on the subject property and concluded, "[F]our lots resulted in the smallest development footprint and greatest viewing area and was the least environmentally damaging alternative." But the commission staff report did not expressly state it relied on the city's alternatives analysis. The trial court also found: "[T]here is no analysis of the view corridors for the other two lots affected by the [local coastal program] amendment, and whether different development envelopes would mitigate view impacts from those lots. The [c]ommission did impose [Local Implementation Plan] [s]ection 6.5(E), which would prevent a reduction in view corridor for those two lots, but provides no analysis of the view corridors and development envelopes [for] those two lots."

The trial court also agreed with plaintiffs' argument that the commission did not provide adequate notice and time for public review of the staff report. The commission argued it complied with its regulations by mailing notice of the meeting and posting the staff report on May 29, 2008, 13 days prior to the June 11, 2008 hearing. The 13-day notice of the hearing and circulation of the staff report by the commission exceeded the regulations' requirement of a minimum of seven days for the report and 10 days for the hearing notice. But, the trial court ruled the commission's regulations failed to comply with the 30-day public review period required under *Public Resources Code section 21091, subdivision (a)*. The trial court also found that the 13-day review period was unreasonable because the issues concerned a zoning amendment that affected more than the subject property, they were biological in nature, and the commission released the staff report addendum just two days before the hearing. The trial court further held plaintiffs did not have to show prejudice: "Although lack of adequate notice usually requires prejudice in other contexts, and there is no evidence that [plaintiffs] or any other member of the public was prejudiced by the actual notice and period for comment on the staff report, full compliance with the letter of [the California Environmental Quality Act] is essential to its public purpose and a failure to provide the full [30-day] period by itself warrants setting aside the [commission's] decision.?

On February 16, 2010, the developer filed a new trial motion. On April 5, 2010, the trial court granted the new trial motion with respect to the Department of Fish and Game consultation issue. The trial court found consultation, within the meaning of Local Implementation Plan section 4.6.1.G, had occurred. But the trial court otherwise denied the developer's new trial motion.

III. DISCUSSION

A. Standards of Review

An "aggrieved person," which includes anyone who appears at a public hearing of the commission in connection with the decision or action appealed, may file a mandate petition seeking judicial review under *Code of Civil Procedure section 1094.5*. (*Pub. Resources Code, § 30801*; see *La Costa Beach Homeowners' Assn. v. California Coastal Com. (2002) 101 Cal.App.4th 804, 814 [124 Cal. Rptr. 2d 618]*.) The trial court's responsibilities are as follows: "In reviewing an agency's decision under *Code of Civil Procedure section 1094.5*, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion." (*McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912, 921 [87 Cal. Rptr. 3d 365]*; see *La Costa Beach Home-*

owners' Assn. v. California Coastal Com., supra, 101 Cal.App.4th at p. 814; *Code Civ. Proc., § 1094.5 subd. (b).*) *Code of Civil Procedure section 1094.5, subdivision (b)* defines any abuse of discretion thusly, "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (See *McAllister v. California Coastal Com., supra, 169 Cal.App.4th at p. 921*; *La Costa Beach Homeowners' Assn. v. California Coastal Com., supra, 101 Cal.App.4th at p. 814.*)

The agency's findings and actions are presumed to be supported by substantial evidence. (*McAllister v. California Coastal Com., supra, 169 Cal.App.4th at p. 921*; *Desmond v. County of Contra Costa (1993) 21 Cal.App.4th 330, 335-336 [25 Cal. Rptr. 2d 842].*) A person challenging an administrative determination bears the burden of showing the agency's findings are not supported by substantial evidence. (*Desmond, at p. 336*; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners (1993) 18 Cal.App.4th 729, 740 [22 Cal. Rptr. 2d 618]* ["plaintiff in a [California Environmental Quality Act] action has the burden of proving otherwise"].) When reviewing the agency's determination, the court examines the whole record and considers all relevant evidence, including that which detracts from the administrative decision. (*McAllister v. California Coastal Com., supra, 169 Cal.App.4th at p. 921*; *Bolsa Chica Land Trust v. Superior Court (1999) 71 Cal.App.4th 493, 503 [83 Cal. Rptr. 2d 850]*; see *Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392, 422 [253 Cal.Rptr. 426, 764 P.2d 278]* [court must review whole record to determine whether substantial evidence supported Cal. Environmental Quality Act decision].) The Court of Appeal has held: "Although this task involves some weighing to fairly estimate the worth of the evidence, that limited weighing does not constitute independent review where the court substitutes its own findings and inferences for that of the Commission. Rather, it is for the Commission to weigh the preponderance of conflicting evidence, as [the court] may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it." (*Kirkorowicz v. California Coastal Com. (2000) 83 Cal.App.4th 980, 986 [100 Cal. Rptr. 2d 124]*; accord, *Ryan v. California Interscholastic Federation-San Diego Section (2001) 94 Cal.App.4th 1048, 1077-1078 [114 Cal. Rptr. 2d 798].*) Our scope of review is identical to that of the trial court. (*Bolsa Chica Land Trust v. Superior Court, supra, 71 Cal.App.4th at p. 503*; *Saad v. City of Berkeley (1994) 24 Cal.App.4th 1206, 1212 [30 Cal. Rptr. 2d 95].*) We, like the trial court, examine all relevant materials in the entire administrative record to determine whether the agency's decision is supported by substantial evidence. (*Saad v. City of Berkeley, supra, 24 Cal.App.4th at p. 1212*; *Desmond v. County of Contra Costa, supra, 21 Cal.App.4th at pp. 334-335.*)

We apply the following standards when interpreting a statute: "When we interpret the meaning of statutes, our fundamental task is to ascertain the aim and goal of the lawmakers so as to effectuate the purpose of the statute. We begin by examining the statutory language, giving the words their usual and ordinary meaning. If we find no ambiguity, we presume that the lawmakers meant what they said, and the plain meaning of the language governs. [Citation.] If, on the other hand, the statutory language is unclear or ambiguous and permits more than one reasonable interpretation, we may consider various extrinsic aids to help us ascertain the lawmakers' intent, including legislative history, public policy, settled rules of statutory construction, and an examination of the evils to be remedied and the legislative scheme encompassing the statute in question. [Citation.] In such circumstances, we must select the construction that comports most closely with the aim and goal of the Legislature to promote rather than defeat the statute's general purpose and avoid an interpretation that would lead to absurd and unintended consequences. [Citation.]" (*McAllister v. California Coastal Com., supra, 169 Cal.App.4th at p. 928*; accord, *Gualala Festivals Committee v. California Coastal Com. (2010) 183 Cal.App.4th 60, 67 [106 Cal. Rptr. 3d 908].*) Although the courts have final responsibility for interpreting a statute, an agency's interpretation of its governing statutes is entitled to great weight. (*Gualala Festivals Committee v. California Coastal Com., supra, 183 Cal.App.4th at p. 66*; *La Fe, Inc. v. County of Los Angeles (1999) 73 Cal.App.4th 231, 240 [86 Cal. Rptr. 2d 217].*)

B. The City's Local Coastal Program

Plaintiffs challenge the trial court's ruling that the commission complied with the various Coastal Act provisions. They argue the local coastal program amendment does not conform to the policies of the certified land use plan regarding the protection of dune environmentally sensitive habitat areas and the minimum lot size requirement.

The Coastal Act was adopted in 1976 and is codified in *Public Resources Code section 30000 et seq.* (*Douda v. California Coastal Com. (2008) 159 Cal.App.4th 1181, 1187 [72 Cal. Rptr. 3d 98]*; *McAllister v. County of Monterey (2007) 147 Cal.App.4th 253, 271 [54 Cal. Rptr. 3d 116].*) It has myriad purposes and goals and is a comprehensive scheme to govern coastal land use planning for the entire state. (*Pub. Resources Code, § 30001.5*;[2] *Yost v. Thomas (1984) 36 Cal.3d 561, 565-566 [205 Cal. Rptr. 801, 685 P.2d 1152].*) *Public Resources Code section 30500, subdivision (a)* requires each local

government within the coastal zone to prepare a local coastal program. (*Landgate, Inc. v. California Coastal Com. (1998) 17 Cal.4th 1006, 1011 [73 Cal. Rptr. 2d 841, 953 P.2d 1188]*; *North Pacifica LLC v. California Coastal Com. (2008) 166 Cal.App.4th 1416, 1429 [83 Cal. Rptr. 3d 636].*)

> 2 *Public Resources Code section 30001.5* states: "The Legislature further finds and declares that the basic goals of the state for the coastal zone are to: [¶] (a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources. [¶] (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state. [¶] (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners. [¶] (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast. [¶] (e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone."

Public Resources Code section 30108.6 identifies the components of a local coastal program: " 'Local coastal program' means a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." (See *Yost v. Thomas, supra, 36 Cal.3d at p. 566.*) The term "land use plan[]" in *Public Resources Code section 30108.6* is defined in *Public Resources Code section 30108.5* as follows, " 'Land use plan' means the relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions." (See *Douda v. California Coastal Com., supra, 159 Cal.App.4th at p. 1187.*) The term "implementing actions" is defined in *Public Resources Code section 30108.4* as follows, " 'Implementing actions' means the ordinances, regulations, or programs which implement either the provisions of the certified local coastal program or the policies of this division ... ." (See *Security National Guaranty, Inc. v. California Coastal Com. (2008) 159 Cal.App.4th 402, 408, fn. 2 [71 Cal. Rptr. 3d 522].*) In order to be effective, any local coastal program must be reviewed, adopted and certified pursuant to the commission's regulations. (*Pub. Resources Code, §§ 30501, 30333.*)

The city did not implement a local coastal program after its incorporation. Thus, the Legislature enacted *Public Resources Code section 30166.5*[3] in 2000 and directed the commission to prepare and certify the city's local coastal program. (*City of Malibu v. California Coastal Com. (2004) 121 Cal.App.4th 989, 992 [18 Cal. Rptr. 3d 40].*) The commission prepared an initial draft of the land use plan and submitted it to the city for consideration. The commission also prepared the city's Local Implementation Plan. The commission certified the city's local coastal program, including the land use and the Local Implementation Plans, on September 13, 2002. Thereafter, the city assumed responsibility for the administration of the local coastal program and for reviewing coastal development permit applications as required by *Public Resources Code section 30166.5, subdivision (b).*

> 3 *Public Resources Code section 30166.5* provides in its entirety: "(a) On or before January 15, 2002, the commission shall submit to the City of Malibu an initial draft of the land use portion of the local coastal program for the City of Malibu portion of the coastal zone, which is specifically delineated on maps 133, 134, 135, and 136, which were placed on file with the Secretary of State on September 14, 1979. [¶] (b) On or before September 15, 2002, the commission shall, after public hearing and consultation with the City of Malibu, adopt a local coastal program for that area within the City of Malibu portion of the coastal zone that is specifically delineated on maps 133, 134, 135, and 136, which have been placed on file with the Secretary of State on March 14, 1977, and March 1, 1987. The local coastal program for the area shall, after adoption by the commission, be deemed certified, and shall, for all purposes of this division, constitute the certified local coastal program for the area. Subsequent to the certification of the local coastal program, the City of Malibu shall immediately assume coastal development permitting authority, pursuant to this division. Notwithstanding the requirements of Chapter 4.5 (commencing with *Section 65920*) of Division 1 of Title 7 of the Government Code, once the City of Malibu assumes coastal development permitting authority pursuant to this section, no application for a coastal development permit shall be deemed approved if the city fails to take timely action to approve or deny the application."

A local coastal program may be amended by a local government but does not take effect until it has been certified by the commission. (*Pub. Resources Code, § 30514, subd. (a)*.) The local government submits the proposed local coastal program amendment to the commission. The commission then processes the proposed amendment using the applicable procedures and time limits specified in *Public Resources Code section 30512, subdivision (a)*.[4] When submitting a local coastal program amendment to the commission for certification, the submission includes those matters specified in the *California Code of Regulations, title 14, section 13552*.[5]

4 *Public Resources Code section 30512, subdivision (a)* states: "(a) The land use plan of a proposed local coastal program shall be submitted to the commission. The commission shall, within 90 days after the submittal, after public hearing, either certify or refuse certification, in whole or in part, of the land use plan pursuant to the following procedure: [¶] (1) No later than 60 days after a land use plan has been submitted to it, the commission shall, after public hearing and by majority vote of those members present, determine whether the land use plan, or a portion thereof applicable to an identifiable geographic area, raises no substantial issue as to conformity with the policies of Chapter 3 (commencing with *Section 30200*). [¶] If the commission determines that no substantial issue is raised, the land use plan, or portion thereof applicable to an identifiable area, which raises no substantial issue, shall be deemed certified as submitted. The commission shall adopt findings to support its action. [¶] (2) Where the commission determines pursuant to paragraph (1) that one or more portions of a land use plan applicable to one or more identifiable geographic areas raise no substantial issue as to conformity with the policies of Chapter 3 (commencing with *Section 30200*), the remainder of that land use plan applicable to other identifiable geographic areas shall be deemed to raise one or more substantial issues as to conformity with the policies of Chapter 3 (commencing with *Section 30200*). The commission shall identify each substantial issue for each geographic area. [¶] (3) The commission shall hold at least one public hearing on the matter or matters that have been identified as substantial issues pursuant to paragraph (2). No later than 90 days after the submittal of the land use plan, the commission shall determine whether or not to certify the land use plan, in whole or in part. If the commission fails to act within the required 90-day period, the land use plan, or portion thereof, shall be deemed certified by the commission."

5 *California Code of Regulations, title 14, section 13552* states: "The [local coastal program] ... amendment submittal shall include: [¶] (a) A summary of the measure taken to provide the public and affected agencies and districts maximum opportunity to participate in the [local coastal program] ... amendment process, pursuant to *Section 13515* and *Public Resources Code Section 30503*; a listing of members of the public, organizations, and agencies appearing at any hearing or contacted for comment on the [local coastal program] ... amendment; and copies or summaries of significant comments received and of the local government or governing authority's response to the comments. [¶] (b) All policies, plans, standards, objectives, diagrams, drawings, maps, photographs, and supplementary data, related to the amendment in sufficient detail to allow review for conformity with the requirements of the Coastal Act. Written documents should be readily reproducible. An amendment to a land use plan ... shall include, where applicable, a readily identifiable public access component as set forth in *Section 13512*. [¶] (c) A discussion of the amendment's relationship to and effect on the other sections of the certified [local coastal program] ... . [¶] (d) An analysis that meets the requirements of *Section 13511* or an approved alternative pursuant to *Section 13514* and that demonstrates conformity with the requirements of Chapter 6 of the Coastal Act. [¶] (e) Any environmental review documents, pursuant to [the California Environmental Quality Act], required for all or any portion of the amendment to the [local coastal program] ... . [¶] (f) An indication of the zoning measures that will be used to carry out the amendment to the land use plan (unless submitted at the same time as the amendment to the land use plan)."

C. Environmentally Sensitive Habitat Areas

a. State and city law

Public Resources Code section 30240, subdivision (a) requires protection of environmentally sensitive habitat areas. *Public Resources Code section 30240, subdivision (b)* states, "Development in areas adjacent to environmentally sensitive habitat areas ... shall be sited and designed to prevent impacts which would significantly degrade those areas ... ." Consistent with *Public Resources Code section 30108.6*, the city's local coastal program contains various land use policies designed to protect environmentally sensitive habitat areas. The city's

Land Use Plan Policy 3.1 states: "Areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments are Environmentally Sensitive Habitat Areas ... and are generally shown on the [land use plan environmentally sensitive habitat areas map]. The [environmentally sensitive habitat areas] in the City of Malibu are riparian areas, streams, native woodlands, native grasslands/savannas, chaparral, coastal sage scrub, dunes, bluffs, and wetlands ... ." The city's Land Use Plan Policy 3.16 provides: "Dune [environmentally sensitive habitat areas] shall be protected and, where feasible, enhanced. Vehicle traffic through dunes shall be prohibited. Where pedestrian access through dunes is permitted, well-defined footpaths or other means of directing use and minimizing adverse impacts shall be used. ..." Land Use Plan Policy 3.23 requires: "Development adjacent to [environmentally sensitive habitat areas] shall minimize impacts to habitat values or sensitive species to the maximum extent feasible. Native vegetation buffer areas shall be provided around [environmentally sensitive habitat areas] to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the [environmentally sensitive habitat areas] they are designed to protect. All buffers shall be a minimum of 100 feet in width ... ." As will be noted, plaintiffs rely on this 100-foot buffer requirement in the city's Land Use Plan Policy 3.23 as part of their attack on the local coastal plan amendment.

The city's Local Implementation Plan contains specific standards for various types of environmentally sensitive habitat areas. Section 4.6.1 of the city's Local Implementation Plan[6] requires 100-foot buffers for stream/riparian, wetlands, woodland, coastal bluff, coastal sage scrub, and chaparral environmentally sensitive habitat areas. But the city's Local Implementation Plan section 4.6.1.G provides, "For other [environmentally sensitive habitat] areas not listed above, the buffer recommended by the Environmental Review Board or City biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the [environmentally sensitive habitat areas] shall be required." As will be apparent, the commission, the city and the developer rely on the more flexible buffer requirement in the city's Local Implementation Plan section 4.6.1.G.

6 The city's Local Implementation Plan section 4.6.1 is labeled "Development Standards" and states in its entirety: "4.6.1. Buffers [¶] New development adjacent to the following habitats shall provide native vegetation buffer areas to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Vegetation removal, vegetation thinning, or planting of non-native or invasive vegetation shall not be permitted within buffers except as provided in Section 4.6.1 (E) or (F) of the Malibu [Local Implementation Plan]. The following buffer standards shall apply: [¶] A. Stream/Riparian [¶] New development shall provide a buffer of no less than 100 feet in width from the outer edge of the canopy of riparian vegetation. Where riparian vegetation is not present, the buffer shall be measured from the outer edge of the bank of the subject stream. [¶] However, in the Point Dume area, new development shall be designed to avoid encroachment on slopes of 25 percent grade or steeper. [¶] B. Wetlands [¶] New development shall provide a buffer of no less than 100 feet in width from the upland limit of the wetland. [¶] C. Woodland [Environmentally Sensitive Habitat Area] [¶] New development shall provide a buffer of no less than 100 feet in width from the outer edge of the tree canopy for oak or other native woodland[.] [¶] D. Coastal Bluff [Environmentally Sensitive Habitat Area] [¶] New development shall provide a buffer of no less than 100 feet from the bluff edge. [¶] E. Coastal Sage Scrub [Environmentally Sensitive Habitat Area] [¶] New development shall provide a buffer of sufficient width to ensure that no required fuel modification area (Zones A, B, and C, if required) will extend into the [environmentally sensitive habitat area] and that no structures will be within 100 feet of the outer edge of the plants that comprise the coastal sage scrub plant community. [¶] F. Chaparral [Environmentally Sensitive Habitat Area] [¶] New development shall provide a buffer of sufficient width to ensure that no required fuel modification area (Zones A, B, and C, if required) will extend into the [environmentally sensitive habitat area] and that no structures will be within 100 feet of the outer edge of the plants that comprise the chaparral plant community. [¶] G. Other [Environmentally Sensitive Habitat Area] [¶] For other [environmentally sensitive habitat] areas not listed above, the buffer recommended by the Environmental Review Board or City biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts to the [environmentally sensitive habitat area] shall be required."

D. Buffer for Dune Environmentally Sensitive Habitat Areas

Plaintiffs argue the five-foot buffer, as certified by the commission on November 10, 2008, fails to conform to the city's Land Use Plan Policy 3.23. Plaintiffs assert the city's Land Use Plan Policy 3.23 requirement must be imposed for all environmentally sensitive habitat areas. The commission, the city and the developer argue there is no requirement of a 100-foot buffer for dune environmentally sensitive habitat areas because of the provisions of Local Implementation Plan section 4.6.1.G. And they argue there is substantial evidence to support the five-foot buffer requirement. We agree with the commission, the city and the developer.

The city's Land Use Plan Policy 3.23, with its 100-foot buffer requirement, cannot be considered in isolation. Rather, as we will explain, the city's Land Use Plan Policy 3.23 must be considered in conjunction with its Local Implementation Plan section 4.6.1.G. The city's Local Implementation Plan section 4.6.1.G, which applies to dune environmentally sensitive habitat areas, as are present here, does not in all cases require a 100-foot buffer. The commission's regulations set forth the applicable method for examining implementing actions, "The standard of review of the implementing actions shall be the land use plan as certified by the Commission." (*Cal. Code Regs., tit. 14, § 13542, subd. (c).*) Further, *Public Resources Code section 30108.6* defines a local coastal program and includes the land use plans and implementing actions, which when construed together, further the purposes of the Coastal Act at the local level. (See *Yost v. Thomas, supra, 36 Cal.3d at p. 566.*) When certifying the local implementation plan, including amendments, the commission is required to consult the land use plan. This is done to ensure conformity between the land use and the local implementation plans. (*Pub. Resources Code, § 30513.*)

The city's Land Use Plan Policy 3.23 and Local Implementation Plan section 4.6.1.G, which were simultaneously certified by the commission on September 13, 2002, should be interpreted together to give effect to all provisions of the local coastal program. (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist. (2009) 46 Cal.4th 822, 831 [95 Cal. Rptr. 3d 164, 209 P.3d 73]* [provisions are construed in reference to each other so as to give each part effect]; *DeVita v. County of Napa (1995) 9 Cal.4th 763, 778-779 [38 Cal. Rptr. 2d 699, 889 P.2d 1019]* [same].) Further, our Supreme Court has held: " 'When two statutes touch upon a common subject, they are to be construed in reference to each other, so as to "harmonize the two in such a way that no part of either becomes surplusage." [Citations.] ...' " (*San Leandro Teachers Assn. v. Governing Bd. of San Leandro Unified School Dist., supra, 46 Cal.4th at p. 836*; see *DeVita v. County of Napa, supra, 9 Cal.4th at pp. 778-779*; *Chaffee v. San Francisco Public Library Com. (2005) 134 Cal.App.4th 109, 114 [36 Cal. Rptr. 3d 1].*) Our Supreme Court has also held, "If conflicting statutes cannot be reconciled ... more specific provisions take precedence over general ones [citation]." (*Collection Bureau of San Jose v. Rumsey (2000) 24 Cal.4th 301, 310 [99 Cal. Rptr. 2d 792, 6 P.3d 713]*; see *Strother v. California Coastal Com. (2009) 173 Cal.App.4th 873, 879 [92 Cal. Rptr. 3d 831].*) In addition, our Supreme Court has held, "[I]f a specific statute is enacted covering a particular subject, the specific statute controls and takes priority over a general statute encompassing the same subject." (*Estate of Kramme (1978) 20 Cal.3d 567, 576 [143 Cal. Rptr. 542, 573 P.2d 1369]*; see *Los Angeles County Dependency Attorneys, Inc. v. Department of General Services (2008) 161 Cal.App.4th 230, 236 [73 Cal. Rptr. 3d 817].*)

The 100-foot buffer specified in the city's Land Use Plan Policy 3.23 applies to all environmentally sensitive habitat areas. By contrast, the city's Local Implementation Plan section 4.6.1 requires a 100-foot buffer for stream/riparian, wetlands, woodland, coastal bluff, coastal sage scrub and chaparral environmentally sensitive habitat areas. For other than the immediately foregoing areas, the buffer is that "recommended by the Environmental Review Board or City biologist, in consultation with the California Department of Fish and Game, as necessary to avoid adverse impacts" to the environmentally sensitive habitat areas. (Local Implementation Plan, § 4.6.1.G; see fn. 6, *ante.*)

Plaintiffs argue we should apply the 100-foot buffer in the city's Land Use Plan Policy 3.23 to all environmentally sensitive habitat areas. This application, plaintiffs argue, must be made without regard to those areas specified in the city's Local Implementation Plan section 4.6.1. Such an interpretation would render the city's Local Implementation Plan section 4.6.1 superfluous and inoperable. Moreover, the city's Local Implementation Plan section 4.6.1, with its differing treatment of various environmental conditions, is more specific than the broad 100-foot requirement in the city's Land Use Plan Policy 3.23. Further, in the case of environmentally sensitive habitat areas other than stream/riparian, wetlands, woodland, coastal bluff, coastal sage scrub, and chaparral environments, Local Implementation Plan section 4.6.1.G provides a specified case-by-case method for determining the appropriate buffer.

Finally, the commission has interpreted the city's Land Use Plan Policy 3.23 in conjunction with Local Implementation Plan section 4.6.1. The commission's interpretation of the city's Land Use Plan Policy 3.23 is entitled to deference. As we have previously explained, the *commission* drafted and simultaneously certified the

city's land use plan and Local Implementation Plan. As noted, we grant broad deference to the commission's interpretation of the local coastal program it prepared. (*Albertstone v. California Coastal Com. (2008) 169 Cal.App.4th 859, 864 [86 Cal.Rptr.3d 883]*; *Trancas Property Owners Assn. v. City of Malibu (1998) 61 Cal.App.4th 1058, 1061-1062 [72 Cal. Rptr. 2d 131]*.)

E.-H.* [NOT CERTIFIED FOR PUBLICATION]

* See footnote, *ante*, page .

I. California Environmental Quality Act

1. Overview

The commission challenges the ruling that it failed to comply with specified provisions of the California Environmental Quality Act. The city and the developers join in the commission's arguments. Plaintiffs contest the trial court's ruling on one of their claims under the California Environmental Quality Act.

The purpose of the California Environmental Quality Act is to ensure that the agencies regulating activities "that may" affect the environmental quality give primary consideration to preventing environmental damages. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors (2001) 87 Cal.App.4th 99, 117 [104 Cal. Rptr. 2d 326]*; see *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist. (2006) 139 Cal.App.4th 1356, 1372 [44 Cal. Rptr. 3d 128]*.) Under the California Environmental Quality Act, a state agency with a regulatory program may be exempted from the requirements of preparing initial studies, negative declarations and environmental impact reports. This exemption arises if the secretary certifies that the agency's regulatory program satisfies the criteria set forth in *Public Resources Code section 21080.5*. (*Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1230 [32 Cal. Rptr. 2d 19, 876 P.2d 505]*; *Californians for Alternatives to Toxics v. Department of Pesticide Regulation (2006) 136 Cal.App.4th 1049, 1067 [39 Cal. Rptr. 3d 393]*.)

The secretary approved the commission's certified regulatory program, including the statutes and regulations relating to the preparation, approval and certification of the local coastal programs on May 22, 1979. The secretary's certification under *Public Resources Code section 21080.5* included the commission's approval of local coastal program amendments. (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal.App.4th 523, 552, fn. 18 [45 Cal. Rptr. 2d 117]*.) The secretary's certification of a regulatory program can be challenged in court subject to a 30-day statute of limitations. (*Pub. Resources Code, § 21080.5, subd. (h)*; *Laupheimer v. State of California (1988) 200 Cal.App.3d 440, 459 [246 Cal. Rptr. 82]*.) Failure to do so renders the commission's certification free from subsequent collateral attack. (*Pub. Resources Code, § 21080.5, subd. (h)*; *Elk County Water Dist. v. Department of Forestry & Fire Protection (1997) 53 Cal.App.4th 1, 10 [61 Cal. Rptr. 2d 536]*; *Laupheimer v. State of California, supra, 200 Cal.App.3d at pp. 458-459*.)

As explained previously, once the secretary certifies a regulatory program, as occurred here, an administrative agency is exempted from the requirements of preparing initial studies, negative declarations and environmental impact reports. In that case, the agency must prepare paperwork which acts as a substitute document for the normal environmental review papers, such as an environmental impact report. (*Pub. Resources Code, § 21080.5, subd. (a)*.)[7] The requirements of a certified regulatory program which permits an agency to use a substitute document in lieu of planning documents such as an environmental impact report are specified in *Public Resources Code section 21080.5, subdivision (d)*.[8]

7 *Public Resources Code section 21080.5, subdivision (a)* states, "Except as provided in *Section 21158.1*, when the regulatory program of a state agency requires a plan or other written documentation containing environmental information and complying with paragraph (3) of subdivision (d) to be submitted in support of an activity listed in subdivision (b), the plan or other written documentation may be submitted in lieu of the environmental impact report required by this division if the Secretary of the Resources Agency has certified the regulatory program pursuant to this section."

8 *Public Resources Code section 21080.5, subdivision (d)* states: "To qualify for certification pursuant to this section, a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decisionmaking and that shall meet all of the following criteria: [¶] (1) The enabling legislation of the regulatory program does both of the following: [¶] (A) Includes protection of the environment among its principal purposes. [¶] (B) Contains authority for the administering agency to adopt rules and regulations for the protection of the environment, guided by standards set forth in the enabling legislation. [¶] (2) The rules and regulations adopted by the administering agency for the regulatory program do all of the following: [¶] (A) Require that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitiga-

> tion measures available that would substantially lessen a significant adverse effect that the activity may have on the environment. [¶] (B) Include guidelines for the orderly evaluation of proposed activities and the preparation of the plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program. (C) [¶] Require the administering agency to consult with all public agencies that have jurisdiction, by law, with respect to the proposed activity. [¶] (D) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process. [¶] (E) Require the filing of a notice of the decision by the administering agency on the proposed activity with the Secretary of the Resources Agency. Those notices shall be available for public inspection, and a list of the notices shall be posted on a weekly basis in the Office of the Resources Agency. Each list shall remain posted for a period of 30 days. [¶] (F) Require notice of the filing of the plan or other written documentation to be made to the public and to a person who requests, in writing, notification. The notification shall be made in a manner that will provide the public or a person requesting notification with sufficient time to review and comment on the filing. [¶] (3) The plan or other written documentation required by the regulatory program does both of the following: [¶] (A) Includes a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity. [¶] (B) Is available for a reasonable time for review and comment by other public agencies and the general public."

Our Supreme Court has synthesized the controlling legal principles for the circumstances where the secretary's certification permits the use of a substitute document: "The Legislature has provided that the Secretary of the Resources Agency may certify a regulatory program of a state agency as exempt from the requirement of [environmental impact report] preparation *if* the program requires that a project be preceded by the preparation of a written report containing certain information on the environmental impacts of the project. ([*Pub. Resources Code, § 21080.5, subd. (a).*]) To qualify for such certification, the regulatory program must be governed by rules and regulations that: (1) require that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen any significant adverse impact the activity might have on the environment ([*Pub. Resources Code, § 21080.5, subd. (d)(2)(i)*]); (2) that include guidelines for the preparation of the project plan and for an evaluation of the proposed activity 'in a manner consistent with the environmental protection purposes of the regulatory program' ([*Pub. Resources Code, § 21080.5, subd. (d)(2)(ii)*]); (3) that require the administering agency to 'consult with all public agencies which have jurisdiction, by law, with respect to the proposed activity' ([*Pub. Resources Code, § 21080.5, subd. (d)(2)(iii)*]); and (4) that require that 'final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process.' ([*Pub. Resources Code, § 21080.5, subd. (d)(2)(iv).*]) The document that functions as the equivalent of an [environmental impact report] must also include a description of the proposed activity, its alternatives, and mitigation measures to minimize any significant adverse environmental impact, and must be available for a reasonable time for review and comment by other public agencies and the general public. ([*Pub. Resources Code, § 21080.5, subd. (d)(3).*])" (*Sierra Club v. State Bd. of Forestry, supra, 7 Cal.4th at pp. 1229-1230.*)

The substantive and procedural components for environmental documentation used in a certified regulatory program, which are pertinent to this appeal, are those specified in *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)*. Although we refer to them in footnote 8, *ante*, for clarity purposes, we reiterate here the relevant requirements imposed by *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*: "To qualify for certification pursuant to this section, a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decisionmaking and that shall meet all of the following criteria: [¶] ... [¶] (2) The rules and regulations adopted by the administering agency for the regulatory program do all of the following: [¶] ... [¶] (B) Include guidelines for the orderly evaluation of proposed activities and the preparation of the plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program. [¶] ... [¶] (D) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process. [¶] ... [¶] (F) Require notice of the filing of the plan or other written documentation to be made to the public and to a person who requests, in writing, notification. The notification shall be made in a manner that will provide the public or a person requesting notification with sufficient time to review and comment on the filing. [¶] (3) The plan or other written documentation required by the regulatory program does both of the following: [¶] (A) Includes a description of the proposed activity with

alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity. [¶] (B) Is available for a reasonable time for review and comment by other public agencies and the general public."

Further, Guidelines *section 15252, subdivision (a)* provides: "(a) The document used as a substitute for an [environmental impact report] or negative declaration in a certified program shall include at least the following items: [¶] (1) A description of the proposed activity, and [¶] (2) Either: [¶] (A) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, or [¶] (B) A statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion."

We apply the pertinent provisions of *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)* in evaluating plaintiffs' procedural and substantive challenges to the commission's approval of the city's local coastal program amendment. Some of the parties' briefing relies on statutory and regulatory requirements for review of an environmental impact report. No doubt, there is an overlap between the requirements of a substitute document prepared for use in a certified regulatory program and those applicable to the preparation of an environmental impact report. We need not describe in detail how the requirements for a negative declaration or an environmental impact report, on one hand, and a certified program substitute document, on the other, differ or are the same. Rather, we apply the statutory and regulatory requirements specified in *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)*. We hold the commission's documentation complies with the relevant substantive and procedural requirements applicable to a certified regulatory program substitute document.

2. Public review period

The trial court refused to apply the seven-day review period for notice of public circulation of the commission staff report in *California Code of Regulations, title 14, section 13532*, which is part of the certified regulatory program approved by the secretary. *California Code of Regulations, title 14, section 13530*[9] requires a hearing be held on any proposed land use plan unless no substantial issue is raised by the proposal. *California Code of Regulations, title 14, section 13532* requires the commission's executive director to prepare a staff recommendation prior to a hearing on a proposed land use plan. The staff recommendation must set forth specific findings, including a statement of facts and legal conclusions, as to whether a proposed land use plan conforms to the requirements of the Coastal Act and the commission's regulations. The proposed findings must include any suggested modifications necessary to bring the land use plan into compliance with the Coastal Act. (If the local government has requested that no modifications be part of the commission's action, then the staff report need not discuss any amendments.) The proposed findings must also include any additional documentation, governmental actions or other activity necessary to carry out the Coastal Act's requirements. (*Cal. Code Regs., tit. 14, § 13532.*) *California Code of Regulations, title 14, section 13532* provides a timeframe for circulation of the staff report prior to the hearing, "In order to assure adequate notification the final staff recommendation shall be distributed to all commissioners, to the governing authority, to all affected cities and counties, and to all other agencies, individuals and organizations who have so requested or who are known by the executive director to have a particular interest in the [local coastal program or long range development plan], within a reasonable time but in no event less than 7 calendar days prior to the scheduled public hearing."[10] As noted, the commission gave 13 days' notice in the case. The trial court ruled the commission was obligated to comply with the longer 30-day public review period under *Public Resources Code section 21091, subdivision (a)*, the timeframe applicable to draft environmental impact reports. We hold the commission's certified regulatory program is exempted from the notice and comment requirements of *Public Resources Code section 21091, subdivision (a).*

9 *California Code of Regulations, title 14, section 13530* states in its entirety: "Unless the Commission finds no substantial issue is raised by the land use plan, it shall conduct a public hearing on [t]he specific provisions of the land use plan that it has determined raise a substantial issue as to conformity with the policies of Chapter 3 of the California Coastal Act of 1976. The hearing may be conducted at the same meeting at which substantial issue is determined or at a later meeting. Notice and hearing procedures shall be the same as those set forth in Article 9. Final action shall be within ninety (90) days after submittal of land use plan, pursuant to *Public Resources Code Section 30512.*"

10 *Section 13532* states in its entirety: "The executive director shall prepare a staff recommendation which shall set forth specific findings, in-

cluding a statement of facts and legal conclusions as to whether or not the proposed land use plan or [long range development plan] conforms to the requirements of the California Coastal Act of 1976 and of these regulations. The proposed findings shall include any suggested modifications necessary to bring the land use plan or [long range development plan] into compliance with the California Coastal Act of 1976, unless the local government has requested that such modifications not be part of the Commission's action. The proposed findings shall also include any additional documentation, governmental actions or other activity necessary to carry out the requirements of the Coastal Act. In order to assure adequate notification the final staff recommendation shall be distributed to all commissioners, to the governing authority, to all affected cities and counties, and to all other agencies, individuals and organizations who have so requested or who are known by the executive director to have a particular interest in the [local coastal program] or [long range development plan], within a reasonable time but in no event less than 7 calendar days prior to the scheduled public hearing." (*Cal. Code Regs., tit. 14, § 13532.*)

As discussed, the commission's certified regulatory program was approved in 1979. (*Guidelines, § 15251, subd. (f).*)[11] The certified regulatory program includes the commission's regulations on certification of a local coastal program. Under the commission's regulations, a local government is required to provide maximum opportunities for public participation in the review and approval of local coastal program amendments and must provide notice and transmittal of documents at least six weeks prior to local government action. (*Pub. Resources Code, § 30503*; *Cal. Code Regs., tit. 14, § 13515, subd. (c).*) As noted, after a local government adopts the local coastal program amendment, it is submitted to the commission. Then, the commission's executive director prepares a summary of the local coastal program amendment accompanied by the staff's analysis and comments. (*Cal. Code Regs., tit. 14, § 13532.*) And as also noted, the commission's regulations require a seven-day notice period for public circulation of the staff report prior to the public hearing and adoption of a local coastal program amendment. (*Cal. Code Regs., tit. 14, § 13532.*)

11 *Guidelines section 15251, subdivision (f)*, states: "The following programs of state regulatory agencies have been certified by the Secretary for Resources as meeting the requirements of *Section 21080.5*: [¶] ... (f) The program of the California Coastal Commission involving the preparation, approval, and certification of local coastal programs as provided in *Sections 30500 through 30522 of the Public Resources Code.*"

Under *Public Resources Code section 21080.5, subdivision (d)(3)(B)*, a certified regulatory program's "plan or other written documentation" must be available for a reasonable time for review and comment by other agencies and the public.[12] Here, the secretary certified the commission's regulations relating to its review of local coastal program amendments including the seven-day notice for staff reports. By providing 13 days' notice of the filing of the staff report, the commission complied with the California Environmental Quality Act. (See *Californians for Alternatives to Toxics v. Department of Pesticide Regulation, supra, 136 Cal.App.4th at pp. 1067-1068* [complying with the terms of the Department of Pesticide Regulations certified regulatory program constitutes compliance with the Cal. Environmental Quality Act].) Given the May 22, 1979 certification of the commission's regulatory regime by the secretary, plaintiffs may not now challenge the seven-day notice provision in *California Code of Regulations, title 14, section 13532.* (*Pub. Resources Code, § 21080.5, subd. (h)*; *Elk County Water Dist. v. Department of Forestry & Fire Protection, supra, 53 Cal.App.4th at p. 10*; *Laupheimer v. State of California, supra, 200 Cal.App.3d at pp. 458-459.*)

12 *Public Resources Code section 21080.5, subdivision (d)(3)(B)* states: "(d) To qualify for certification pursuant to this section, a regulatory program shall require the utilization of an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decisionmaking and that shall meet all of the following criteria: [¶] ... [¶] (3) The plan or other written documentation required by the regulatory program does both of the following: [¶] ... [¶] (B) Is available for a reasonable time for review and comment by other public agencies and the general public."

The trial court relied on *Ultramar, Inc. v. South Coast Air Quality Management Dist. (1993) 17 Cal.App.4th 689, 702-703 [21 Cal. Rptr. 2d 608]*, in imposing the 30-day review period for the staff report. *Ultramar* involved a certified regulatory program adopted by the South Coast Air Quality Management District. Rather than prepare an environmental impact report, the South Coast Air Quality Management District regulations permitted the agency to draft an abbreviated environmental assessment. (*Id. at pp. 696-697.*) The South Coast Air Quality Management District adopted the California Environmental Quality Act "implementation guidelines" which thereby included the *Public Resources Code section 21091, subdivision (a)* 30-day period for

ex. 3

review of a draft abbreviated environmental assessment. (*17 Cal.App.4th at pp. 696-700, 702-703.*) Our colleagues in Division One of this appellate district held that since the South Coast Air Quality Management District's own certified program adopted the California Environmental Quality Act implementation guidelines, compliance with the *Public Resources Code section 21091, subdivision (a)* 30-day review period was mandatory. (*17 Cal.App.4th at pp. 702-703.*) (The term "implementation guidelines" did not refer to the regulatory provisions in the Guidelines.) Rather, the Court of Appeal explained that the secretary expected the same rules would apply to environmental impact reports and environmental assessments by the South Coast Air Quality Management District. (*17 Cal.App.4th at p. 699.*)

The trial court also relied on *Joy Road Area Forest & Watershed Assn. v. California Dept. of Forestry & Fire Protection (2006) 142 Cal.App.4th 656, 667-668 [47 Cal. Rptr. 3d 846]*. In *Joy Road*, the Department of Forestry and Fire Protection approved a timber harvest plan without complying with the notice and recirculation requirements under *Public Resources Code sections 21092* and *21092.1*. (*142 Cal.App.4th at p. 667.*) The Court of Appeal held the Department of Forestry and Fire Protection's certified regulatory program exemption from California Environmental Quality Act requirements did not extend to the agency's notice and recirculation provisions. (*142 Cal.App.4th at p. 668.*)

Neither *Ultramar* nor *Joy Road* is controlling. To begin with, *Public Resources Code section 21174* provides for the primacy of the Coastal Act over the California Environmental Quality Act's statutory provisions: ?No provision of this division is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer, including, but not limited to, the powers and authority granted to the California Coastal Commission pursuant to Division 20 (commencing with *Section 30000*). To the extent of any inconsistency or conflict between the provisions of the California Coastal Act of 1976 (Division 20 (commencing with *Section 30000*)) and the provisions of this division, the provisions of Division 20 (commencing with *Section 30000*) shall control." Our colleagues in Division Three of the Fourth Appellate District have explained: "In *Sierra Club v. California Coastal Com. (2005) 35 Cal.4th 839 [28 Cal. Rptr. 3d 316, 111 P.3d 294]*, the Supreme Court applied *section 21174*, stating, ' "To the extent of any inconsistency or conflict between the provisions of the ... Coastal Act ... and the provisions of [the California Environmental Quality Act], the provisions of [the Coastal Act] shall control." ' (*35 Cal.4th at p. 859.*)" (*Strother v. California Coastal Com. (2009) 173 Cal.App.4th 873, 879-880 [92 Cal. Rptr. 3d 831].*) Further, the seven-day notice period is part of the commission's certified regulatory period and thus has the force of law. Here the commission, with its broad powers specified in *Public Resources Code section 21174*, was acting in compliance with a certified regulatory program which allows for a period in which to act that differs from the *Public Resources Code section 21091, subdivision (a)* 30-day review period. Neither *Ultramar* nor *Joy Road* involves a similar grant of power and a certified regulatory program which expressly deviates from the 30-day notice timeframe specified in *Public Resources Code section 21091, subdivision (a)* for a draft environmental impact report.

In addition, plaintiffs argue the commission violated *Public Resources Code section 21080.5, subdivision (d)(3)(B)* and *California Code of Regulations, title 14, section 13532* because the staff report and addendum were not made available for a reasonable time for public review and comment. As noted (fn. 8, *ante*), *Public Resources Code section 21080.5, subdivision (d)(3)(B)* requires that the environmental documentation used in a certified regulatory program (in this case the staff report) must "be available for a reasonable time for review and comment" by other public agencies and the general public. In addition, the commission regulation in *California Code of Regulations, title 14, section 13532* requires it to distribute the staff report to the interested parties "within a reasonable time but in no event less than 7 calendar days prior" to the scheduled public hearing.

As discussed previously while synthesizing the trial court's California Environmental Quality Act analysis (see p. 920, *ante*), the trial court ruled the words "reasonableness" and "at least" in *California Code of Regulations, title 14, section 13532* permitted it to make a case-by-case determination as to the reasonableness of the notice. The trial court found the 13-day comment period was not reasonable because the issues concerned a zoning amendment that affected more than the subject property; the issues were biological in nature; and the commission released the staff report addendum just two days before the hearing. Plaintiffs contend the evidence supports the trial court's ruling that the 13-day review period was unreasonable. In addition, plaintiffs argue the 13-day review period was not reasonable because the staff report discussed or referenced numerous biological reports and other documents, many of which had not previously been made available to the public.

We disagree. The secretary is authorized to determine whether a regulatory program satisfies the "reasonable time for review and comment" requirement of *Public Resources Code section 21080.5, subdivision (d)(3)(B)*. As we previously explained, plaintiffs may not now challenge the secretary's determination as to the

"reasonable time for review and comment" under *Public Resources Code section 21080.5, subdivision (d)(3)(B).* This is because plaintiffs, or anybody else, were obligated to challenge the secretary's certification of the commission's regulatory program within 30 days from the date it was certified. Since the secretary certified the commission's regulatory program in 1979, plaintiff's challenge is untimely. (*Pub. Resources Code, § 21080.5, subd. (h)*; *Elk County Water Dist. v. Department of Forestry & Fire Protection, supra, 53 Cal.App.4th at p. 10*; *Laupheimer v. State of California, supra, 200 Cal.App.3d at pp. 458-459.*)

We also respectfully disagree with the trial court's reasonableness ruling. We are required to defer to the commission's interpretation of its own regulations. Courts must defer to an administrative agency's interpretation of a statute or regulation involving its area of expertise unless the challenged construction contradicts the clear language and purpose of the interpreted provision. (*Reddell v. California Coastal Com. (2009) 180 Cal.App.4th 956, 968 [103 Cal.Rptr.3d 383]*; *Alberstone v. California Coastal Com., supra, 169 Cal.App.4th at p. 866*; *Divers? Environmental Conservation Organization v. State Water Resources Control Bd. (2006) 145 Cal.App.4th 246, 252 [51 Cal.Rptr.3d 497].*) In addition, a case-by-case determination of reasonableness under California Code of Regulations, title 14, section 13532 without deference to the agency's interpretation would create unwarranted uncertainty in connection with many local coastal program amendment approvals. Such would allow a party to challenge a commission action based on the alleged failure to circulate the staff report within a reasonable time period.

We conclude the staff report was available for a reasonable time for review and comment. The 13-day review period is nearly twice the period required by *California Code of Regulations, title 14, section 13532.* And there is no evidence the public did not have adequate time to comment on the staff report. As noted, the trial court found there was no evidence that plaintiffs or other members of the public were prejudiced by the 13-day review period for the staff report. Although the addendum was issued only two days before the commission's public hearing, the addendum is not subject to the notice requirement under *Code of Regulations, title 14, section 13532.* In the addendum, the commission responded to public comments; recommended modification of the view corridors in response to public comments, and discussed additional biological information specific to the subject property's proposed subdivision.

In addition, the staff report was available for a reasonable time given the ample public notice provided by the earlier stages of the local coastal program amendment process. The commission regulations require the city to make the proposed local coastal program amendment and relevant studies or documents available for public review at least six weeks prior to the city's action. (*Cal. Code Regs., tit. 14, § 13515, subd. (c).*) The city must then summarize significant public comments and its response to the comments as part of the local coastal program amendment submittal to the commission. (*Cal. Code Regs., tit. 14, § 13552.*) Also, the city provided the public opportunities to comment on the proposed local coastal program amendment and mitigated negative declaration at three city public meetings. Thus, the staff report was the culmination of a process that allowed for public review and input on the local coastal program amendment at earlier stages.

3. Lead agency

The commission contends the trial court erred in requiring compliance with provisions of the California Environmental Quality Act that apply only to lead agencies. The commission argues it was the responsible, not the lead, agency. The commission reasons the city was the first public agency to review the project. The commission asserts the city is the only agency involved in review of the project that has general governmental powers. The commission argues as the responsible agency, it does not have to comply with California Environmental Quality Act provisions regarding public review requirements; response to public comments; alternatives analysis; and cumulative impact analysis. These requirements, the commission notes, only specifically apply to the preparation, review and certification of environmental documentation by lead agencies.

Public Resources Code section 21067 defines, "lead agency" as the public agency with the principal responsibility for approving a project. *Public Resources Code section 21069* defines a "responsible agency" as any other public agency that shares responsibility for approving a project. In some cases, two or more public entities may qualify as lead agencies. In that case, the entity that acts first is the lead agency. (*Citizens Task Force on Sohio v. Board of Harbor Commissioners (1979) 23 Cal.3d 812, 814 [153 Cal. Rptr. 584, 591 P.2d 1236]*; *Guidelines, § 15051, subd. (c).*)

Under *Public Resources Code section 21080.5*, both the city and the commission are exempted from preparing an environmental impact report prior to approval of a local coastal program amendment. (*Pub. Resources Code, §§ 21080.5, 21080.9*; *Santa Barbara County Flower & Nursery GrowersAssn. v. County of Santa Barbara (2004) 121 Cal.App.4th 864, 873 [17 Cal. Rptr. 3d 489].*) Under *Guidelines section 15265*: " '(a) [The California Environmental Quality Act] does not apply to activities and approvals pursuant to the California Coastal Act ... by: [¶] (1) Any local government ... nec-

essary for the preparation and adoption of a local coastal program ... . [¶] ... [¶] (c) This section shifts the burden of [California Environmental Quality Act] compliance from the local agency ... to the California Coastal Commission. ...' " (*Santa Barbara County Flower & Nursery Growers Assn. v. County of Santa Barbara, supra, 121 Cal.App.4th at p. 873.*) Thus, the commission, not the city, has the burden of complying with the California Environmental Quality Act in connection with the local coastal program amendments. But, as noted, the commission is exempted from preparing an environmental impact report because of the secretary's approval of its certified regulatory program. Thus, the commission must only comply with the environmental documentation requirements in *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)* which are synthesized in detail in *Sierra Club v. State Bd. of Forestry, supra, 7 Cal.4th at pages 1229-1230* and *Guidelines section 15252, subdivision (a).* Hence, no environmental impact report had to be prepared in this case. Nor are the requirements imposed on a lead agency for preparation of an environmental impact report applicable to the commission's environmental decisionmaking.

4. Adequacy of response to public comments

The trial court ruled the commission failed to respond to plaintiffs' comments on cumulative impacts. We disagree. For purposes of *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)*, the commission adequately responded to plaintiffs' comments on the cumulative effects of adoption of the local coastal program amendment. Plaintiffs commented that the local coastal program amendment would cause view corridor impacts, accelerate erosion, reduce bluewater views, and threaten the integrity of environmentally sensitive habitat areas. Plaintiffs generally commented that the local coastal program amendment "could result in significant direct, indirect, and cumulative effects" on the environment in the areas of land use, environmentally sensitive habitat areas, view corridors and parking. The June 9, 2008 staff report addendum responded that although the 45-foot width standard would apply to all beachfront parcels zoned single-family medium density, the only vacant site that would be affected was the subject property; two other properties could be affected by the new 45-foot width standard only if the existing structures were demolished; and the review of environmentally sensitive habitat areas had been conducted to a level of specificity that would normally be carried out at a coastal development permit juncture, rather than a local coastal program approval stage.

The June 9, 2008 staff report addendum also addressed comments regarding view resources. The staff recommended the addition of section 6.5.E.6 to the city's Local Implementation Plan to require "no less than [20 percent] of the lineal frontage of each newly created parcel ... be maintained as one contiguous public view corridor" even if the new lots were 50 feet or less in width. Thus, the commission responded to plaintiffs' general comments about land use and environmentally sensitive habitat areas. Further, the commission added Local Implementation Plan section 6.5.E.6 in response to plaintiffs' specific comment about the view corridor impacts. In addition, the commission also considered the city's responses to plaintiffs' comments.

Plaintiffs also generally commented that the mitigated negative declaration failed to adequately discuss potential cumulative impacts to biological resources, view corridors, land use, parking, traffic and hydrology and water quality. Plaintiffs argued the local coastal program amendment allowed for great density as lots could be combined and then readjusted to form additional buildable parcels along the entire coastline. The city staff's responses to these general comments are found in the November 28, 2006 report. Authored by an assistant planner, the report explained the city staff's methodology for identifying the lots which would be affected by the local coastal program amendment and stated that the development pattern would be consistent with existing patterns and parcel widths. The report further stated cumulative impacts were negligible because mitigation measures would be imposed on the subject property and the local coastal program amendment applied to only two other recently developed lots in the city. The city and the commission adequately responded to plaintiffs' comments regarding cumulative impacts during the local coastal program amendment process. No violation of the content requirements imposed by *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)* or *Guidelines section 15252, subdivision (a)* occurred.

5. Project Alternatives

The trial court found the commission's staff report failed as an informational document on the alternatives of a wider view corridor and whether fewer lots should result from the subdivision of the subject property. The trial court noted that the city considered alternatives by comparing view corridors and development envelopes for one, two, three and four lots on the subject property. The trial court further stated that the city found that four lots resulted in the smallest development footprint; provided the greatest viewing area; and was the least environmentally damaging alternative. Despite acknowledging the city's foregoing analysis, the trial court ruled, "[The commission] staff report does not even say that it is relying on the [c]ity's analysis of alternatives ... ." As previously noted, the trial court also found: "[T]here is

no analysis of the view corridors for the other two lots affected by the [local coastal program] amendment, and whether different development envelopes would mitigate view impacts from those lots. The [c]ommission did impose [Local Implementation Plan] [s]ection 6.5(E), which would prevent a reduction in view corridor for those two lots, but provides no analysis of the view corridors and development envelopes [for] those two lots." The commission, city and the developer contend the commission adequately considered alternatives to the project. We agree.

The commission staff report considered reasonable alternatives to the local coastal program amendment. The commission staff report considered alternatives to the proposed four-lot configuration. The commission staff report discussed a potential layout of the subject property with two lots with 100-foot widths; one lot with a 200-foot width; as well as lot configurations with different view corridors. The commission found that under the local coastal program amendment, as initially proffered by the city, smaller view corridors on either side of subdivided parcels could occur which would impact visual resources. To mitigate this problem, the commission considered the alternative of requiring greater view corridors for lots that could be subdivided under the local coastal program. As noted, the commission required amendment to the city's Local Implementation Plan section 6.5.E, which as ultimately certified, mandates larger view corridors for subdivided parcels where the resultant lots are 50 feet or less in width.

In addition, the city submitted its alternatives analysis to the commission. The commission considered the city's alternatives analysis as part of the local coastal program amendment process. The city compared view corridors and development footprints for one, two, three and four lots on the subject property. The city found that four lots resulted in the greatest viewing area, the smallest development footprint and the least environmentally damaging alternative. Thus, the entire administrative record before the commission demonstrates consideration of alternatives to the city's proposed coastal program amendment.

6. The parties' cumulative impact contentions

a. Plaintiffs' arguments

As noted, plaintiffs appealed from that portion of the judgment which did not favor them. Plaintiffs contend the trial court erred in accepting the commission's unsupported conclusion that the local coastal program amendment would allow for subdivision of no more than three lots. We evaluate this contention in the context of whether the commission staff report complies with the requirements imposed in *Public Resources Code section 21080.5, subdivision (d)(2)(B), (D), (F)* and *(3)*, and *Guidelines section 15252, subdivision (a)*. As noted, in the revised initial study and mitigated negative declaration, the city council found only two developed lots which could potentially, under the local coastal program amendment, be subdivided to create an additional parcel each in the event of the demolition of the existing single-family homes. To subdivide, the owners of these two developed parcels would be required to apply for coastal development permits and environmental review under the California Environmental Quality Act. The city staff's discussion concerning the two currently developed lots in the revised initial study and mitigated negative declaration was part of the analysis as to why the local coastal program amendment would have negligible direct and cumulative impacts on aesthetics, biological resources and land use and planning.

The commission staff report relied on the city staff's analysis of the number and location of the lots, other than the subject property, that could be affected by the local coastal program amendment. The commission staff report discussed in depth the city staff findings incorporated into the mitigated negative declaration The commission staff report cited to the following analysis by the city staff: the categorization of parcels as either vacant or developed; the evaluation of both the lot width and size; the finding that only 16 lots, which have lot widths of at least 90 feet, could be potentially subdivided under the local coastal program amendment's 45-foot lot width standard; of the 16 lots, four parcels could not be divided because they do not have the minimum required acreage; another eight lots could not be subdivided under Local Implementation Plan section 10.4.R because they would require shoreline protection devices; the conclusion that only four developed lots could be potentially subdivided under the local coastal program amendment; the finding that two of the parcels resulted from prior lot ties or mergers; and these two lots were created by combining smaller, approximately 50-foot- wide parcels. Thus, only the aforementioned two developed parcels could potentially be subdivided under the local coastal program amendment.

In the face of this evidence, plaintiffs argue there is no legal or factual basis to conclude that the two previously tied or merged lots could not be subdivided under the local coastal program amendment. And plaintiffs argue the commission, itself, should be required to conduct environmental review on these two lots. Plaintiffs also contend the local coastal program amendment could have additional environmental impacts associated with the creation of new lots because developed adjoining properties could potentially merge and subdivide into more parcels. Plaintiffs conclude this part of their analy-

sis by arguing the trial court should have required review of all lots in the city that could be divided. We disagree.

No provision of law required the commission to *speculate* on the environmental impacts of the two previously tied parcels or on lots that could be created in the future through purchase of developed adjoining properties that could be merged and subdivided. Moreover, the two previously tied lots are unlikely to be subdivided because they were tied through a covenant and there is no evidence the city would allow redivision of those lots. (*Civ. Code, §§ 1460, 1465* [a covenant running with the land binds successors]; *Citizens for Covenant Compliance v. Anderson (1995) 12 Cal.4th 345, 352-355 [47 Cal. Rptr. 2d 898, 906 P.2d 1314]* [same].) In addition, any future subdivision of already developed lots would require a coastal development permit. The future subdivided lots would need to comply with all the requirements of the local coastal program, including provisions regarding minimum lot size, protection of coastal resources including environmentally sensitive habitat areas, and restrictions on mergers and subdivisions.

b. The two developed lots--the appeals of the commission, the city and the developer

The commission, city and developer argue it was error for the trial court to require further environmental analyses on the two developed lots that could potentially be subdivided under the local coastal program amendment. They contend the California Environmental Quality Act does not require a lot-by-lot environmental analysis for the local coastal program amendment, which sets forth the land use standards for development. We agree.

In response to the developer's request for a coastal development permit, the city and commission obtained information on the existing views; proposed view corridors; and dune environmentally sensitive habitat areas for the subject property. The commission properly considered the secondary effects that could follow from the local coastal program amendment of the lot width standard. The commission staff report found the local coastal program amendment, as initially submitted by the city, would increase the number of smaller sized lots. This would in turn result in smaller view corridors. Because the local coastal program amendment could have a significant adverse effect on visual resources, the commission lessened these view impacts to below a level of significance by requiring the adoption of Local Implementation Plan section 6.5.E.6. As noted, this amendment created larger view corridors from Pacific Coast Highway to the ocean. New Local Implementation Plan section 6.5.E.6 requires a minimum of 20 percent of the lineal frontage of each newly created parcel be maintained as one contiguous public view corridor even if the lots are 50 feet or less in width.

In addition, the commission staff report also discussed the general conditions of dune environmentally sensitive habitat areas in the city. The commission staff report indicated the dunes range from lightly to heavily impacted and were invaded by nonnative plants. According to the city's biologist, Mr. Crawford, the remnant dunes in Malibu are highly disturbed and have limited function and value. Mr. Crawford stated, "The majority of the dunes remaining in Malibu support predominately non-native and invasive ice plant, that not only outcompetes (and often eliminates) the native dune vegetation, but over-stabilizes the dunes, thus resulting in an unnatural condition that prevents the natural 'movement' of the dunes and reduces their value as native habitat."

In light of the foregoing environmental analysis, the commission was not required to conduct site-specific biological reports on the two developed lots that might someday subdivide. It is unreasonable to require the commission, city or developer to conduct a biological assessment on developed private property it does not own and for which there is no reason to expect will be subdivided. Should these two developed lots be subdivided in the future, their owners would need to obtain coastal development permits, which would require site-specific environmental impact analyses, including reviews of environmentally sensitive habitat areas on the lots. No further discussion was necessary.

IV. DISPOSITION

The judgment is reversed insofar as it granted the mandate petition. The judgment is affirmed in all other respects. Upon remittitur issuance, the trial court is to deny the mandate petition in its entirety. The California Coastal Commission, City of Malibu and Malibu Bay Company shall recover their costs incurred on appeal from plaintiffs, Deane Earl Ross individually and as co-trustee of the Ross Family Trust.

Kriegler, J., and Kumar, J.,* concurred.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

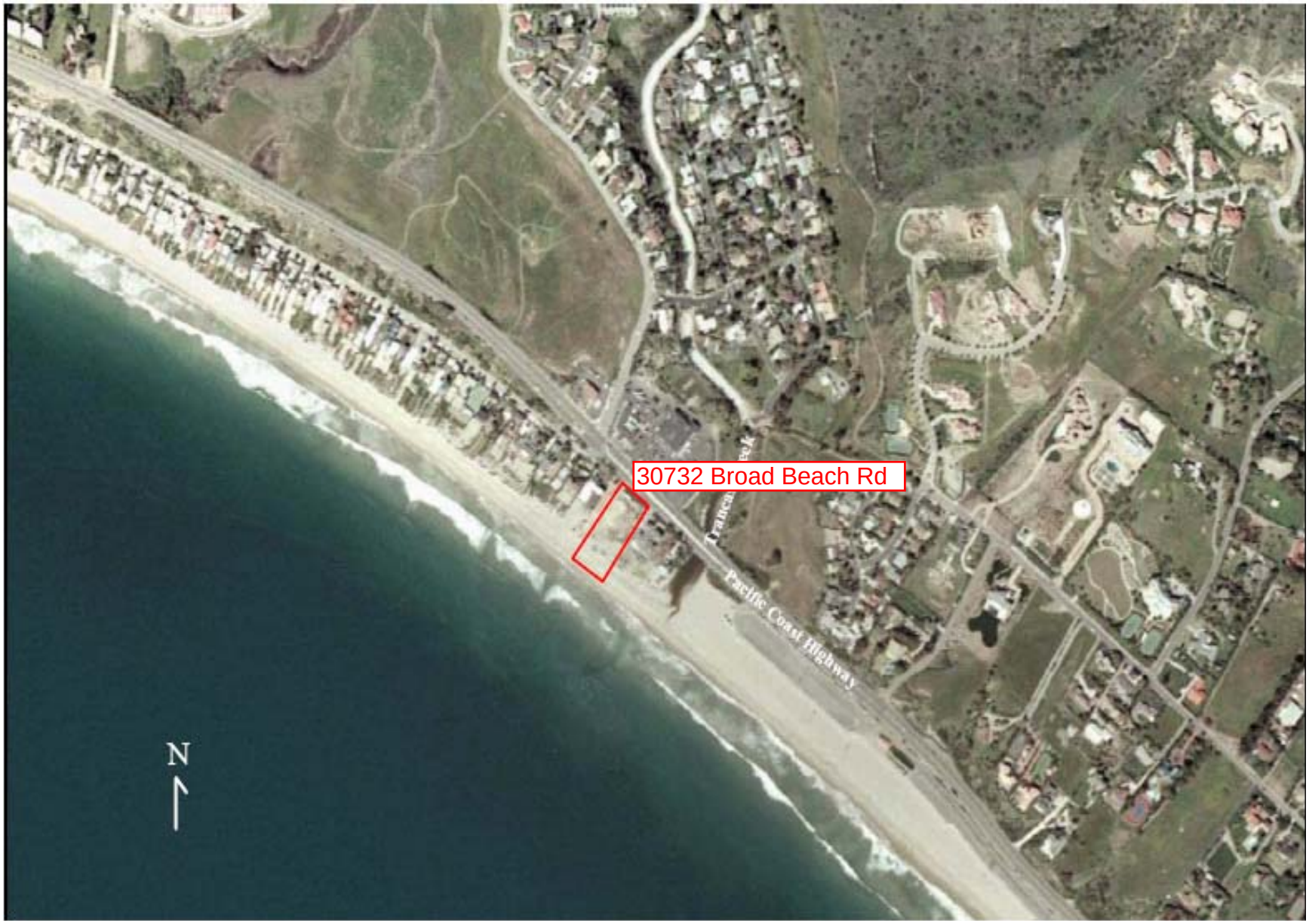

Exhibit 4
Appeal A-4-MAL-10-008
Location Map

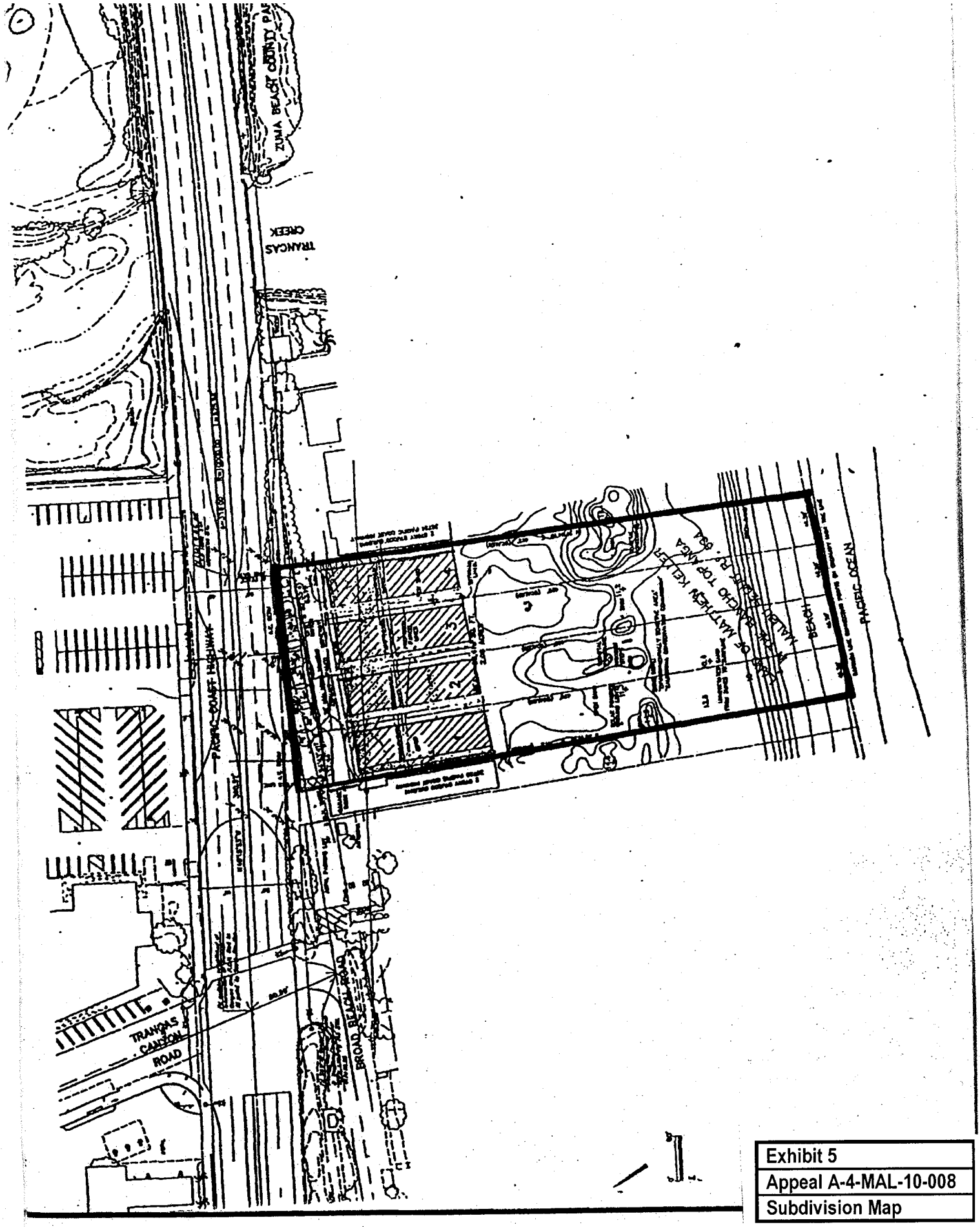

Exhibit 5
Appeal A-4-MAL-10-008
Subdivision Map

October 2004. Photo courtesy Coastal Records Project.

Exhibit 6
Appeal A-4-MAL-10-008
Aerial View

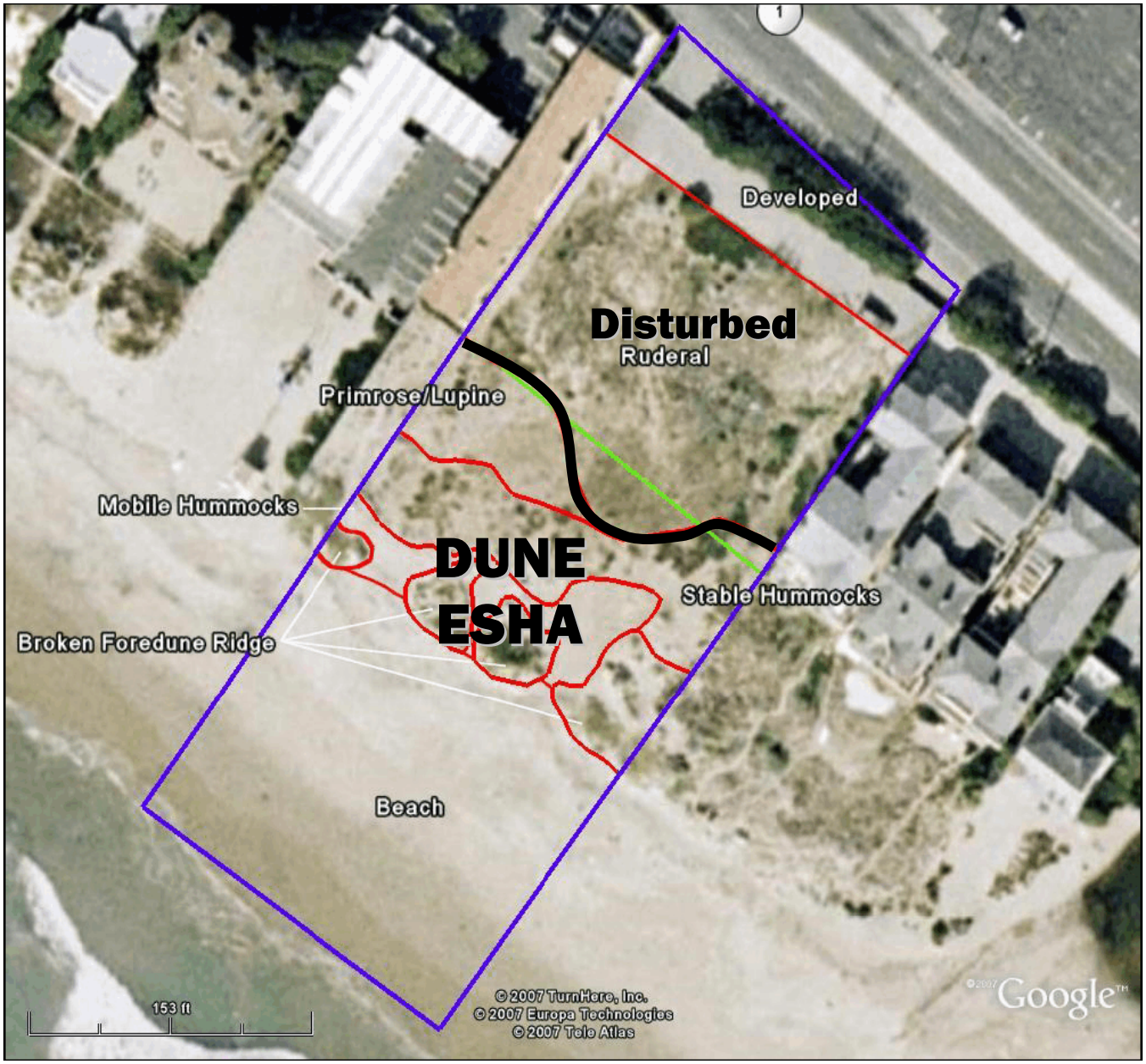

Exhibit 7
Appeal A-4-MAL-10-008
ESHA Delineation Map