

**Subject: Re: Appeal - County File Number PLN 1999-00654 re: APN 048-021-160**

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RE: Appeal-County File Number PLN 1999-00654 re: APN 048-021-160, set to be heard on Wednesday, February 9, 2000 at 9:30 a.m.

Dear Members of the Planning Commission:

This letter is in regards to the above referenced appeal set to be heard on Wednesday, February 9 at 9:30 a.m. This appeal is Item #5/Menden on the regular agenda.

I have reviewed the report prepared by the Planning Staff which recommends the denial of this appeal and approval of the Coastal Development Permit for this project.

I disagree with the recommended findings of this report as follows:

First, the California Environmental Quality Act does apply to this project as a single family residence is not exempt from CEQA when the cumulative impact of successive projects of the same type in the same place is significant.

On page 6 of the report Miroo Brewer states in paragraph A. "For the Environmental Review, find that: 1. This project is categorically exempt under the provisions of Section 15303, Class 3, Construction of New Single Family Residences. This statement ignores Section 15300.2 "Exceptions" of Article 19 of Title 14 of the California Code of Regulations which provides as follows:

15300.2. Exceptions

(a) Location. Classes 3, 4, 5, 6, and 11 are qualified by consideration of where the project is to be located--a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant....

(b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.

(c)...

(d) Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.

The strength and importance of these limitations on the categorical exemption, Class 3 are further supported by Public Resource Code Section 21083 which is one of the sections cited as authority for the

Federal Regulations. Code Section 21083 provides in part:

21083. The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division [CEQA] by public agencies...

The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a "significant effect on the environment." The criteria shall require a finding that a project may have a "significant effect on the environment" if any of the following conditions exist:

(a) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.

(b) The possible effects of a project are individually limited but cumulatively considerable. As used in this subdivision, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(c) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

This single family residence falls within the category of cumulative impact under both section 15300(b) and section 21083(b) when you consider it is part of the sizable development known as "Miramar" on the east side of Highway One, and this house is now the third home to be built on the east side of Magellan Ave adjacent to the creek bed and the watershed/sensitive habitat area discussed in the appeal. The environmental study ordered by the owners even refers to "future home sites" and the adjacent "Mirada Surf property" which has been proposed for development.

Second, the Bolsa Chica case is applicable to this project because the site is adjacent to a wetland and a sensitive habitat. In Bolsa Chica the court specifically stated, "In terms of general protection the Coastal Act provides for the coastal environment, we have analogized it to the California Environmental Quality Act (CEQA) (citations omitted). We have found that under both the Coastal Act and CEQA: "The courts are enjoined to construe the statute liberally in light of its beneficial purposes. The highest priority must be given to environmental consideration in interpreting the statute."

The court discussed environmentally sensitive habitats as follows: "In addition to the protection afforded by the requirement that Commission consider the environmental impact of all its decisions, the Coastal Act provides heightened protection to ESHA's. (citations omitted). Section 30107.5 identifies an ESHA as 'any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments'. The consequences of ESHA status are delineated in section 30240: '(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values,...(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with continuance of those habitat and recreation areas.'"

Furthermore, "...section 30240 does not permit its restrictions to be ignored based on the threatened or deteriorating condition of a particular ESHA...under the statutory scheme, ESHA's whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection. (citation omitted.)

The environmental report prepared by LSA Associates does not adequately address the issue of whether this parcel is an environmentally sensitive habitat for the following reasons:

1. In paragraph 2 of their letter LSA Assoc. state that "The majority of the properties are void of vegetation." They neglect to say that this is because the property has been bulldozed and graded.
2. Also in paragraph 2, LSA Assoc. state that the "The eucalyptus grove contains a shrubbery understory of non wetland vegetation including..." She neglects to address the issue of any riparian vegetation as defined in Policy 7.7 of the LCP. This is relevant in light of the fact that the "drainage" she refers to in paragraph 3 is actually the damaged remains of an old creek which still fits the definition of "intermittent stream" LCP policy 7.1 and 7.11(b).
3. LCP Assoc.'s reliance on the Mirada Surf Draft EIR as a basis for their conclusions is inappropriate, and their statements about the Draft EIR are inaccurate:

First the Mirada Surf EIR is a draft and not certified. Second, LCP Assoc. state in paragraph 4 that "We find no evidence that the study area meets any criteria for being a wetland or riparian corridor as described in the San Mateo County Local Plan and it was not mapped as a potentially jurisdictional area in the 1998 Mirada Surf Environmental Impact Report." This statement is misleading. In part because as pointed out in Response 53-53 of the Final EIR, "[a]s a condition of project approval, and prior to construction, the project sponsor will need to obtain permits...As part of this application process, a detailed wetlands delineation will be conducted. This implies that at the time of the drafting of the EIR no detailed wetland delineation had been conducted, so it is erroneous to rely on the draft EIR as an accurate report of the area covered by wetlands.

Third, the Draft EIR does discuss this creek which LCP Assoc. describe as "drainage" as follows: "The access road appears to have been constructed on fill placed in a small creek that paralleled the southeast boundary of the parcel and drained about 30 acres of forested uplands east of the parcel and 25 acres of coastal terrace..." (page 3.7-5)

"the presence of wetland plant species (see section 3.8 Vegetarian and Wildlife) and standing water in the creek channel less than 1 foot below the adjacent ground surface indicate a very shallow water table, probably less than 5 feet below the ground surface." (page 3.7-6)

"Natural stream flow is limited to the area of the old creek channel." (page 3.7-7)

"In addition to runoff from the local watershed that formerly went down the old creek..." (page 3.7-9)

As pointed out in the letter by the Sierra Club (Letter 64 in Final EIR) addressing this creek bed, "These references indicate a significant seasonal stream on the property, however it has not been dealt with as such. The stream drainage is also identified in the EIR for the Montara-Moss Beach-El Granada Community Plan dated November 1978, on a hydrology map from the San Mateo County Planning Department (page 43). It is clear from this map that the stream drains a sizable watershed.

The acknowledgment that partial filling of a "small creek" occurred at some point in the past does not negate its existence. The DEIR fails to identify if this filling was done after the adoption of the Clean Water Act, and if so whether it got appropriate permits. If not, it is illegal fill, and should be treated in the same manner as the original habitat.

Despite the damage to a portion of the stream caused by construction of an access road; this is a seasonal riparian corridor as defined by Section 7.8 of the LCP, and protected by section 7.11, which establishes a buffer zone for intermittent streams of 30 feet from the midpoint, irrespective of whether or not riparian vegetation exists. Additionally, the present residential development underway between Magellan and the

subject property is removing trees that comprise part of the disturbed creek watershed. The project's final EIR should evaluate the impacts of the project on the watershed, how best to preserve the disturbed creek, and gauge the cumulative impact of both development projects on the watershed."

Fourth, in responding to the above comments by the Sierra Club, Response 64-13 specifically identifies the stream as being "within the riparian corridor buffer zone."

Fifth, LSA Assoc. state that the eucalyptus forest habitat is described in the 1998 Mirada Surf EIR as "undesirable and invasive..." This ignores the comment that the visual impact of eucalyptus tree removal "is listed as a significant, unavoidable impact. Any removal of eucalyptus trees in adjacent parcels that border the eucalyptus trees on the Mirada Surf development parcel, inclusive of the Miramar neighborhood, would exacerbate the impact." Response 53-24, Final EIR.

Sixth, in the third full paragraph of the second page of their letter, LSA Assoc. state that during 1998 investigations conducted for preparing the Mirada Surf EIR, no sensitive raptor species nests were observed. This statement ignores the fact that the Draft EIR expressly states "that the Development is likely to destroy nesting and foraging habitat for sensitive bird species" (Impacts 3.8-6 through 3.8-9) The proposed mitigation for this is that "Prior to receiving permits, surveys for active raptor nests in eucalyptus trees, or other tall trees on the project site, shall be conducted by a qualified wildlife biologist engaged by the Project Sponsor." (Mitigation Measures for Impact 3.8-6). Moreover, the DEIR states that "[A] pre-construction survey should be conducted to identify the presence or lack thereof, of nesting raptors and migratory species. If nests are identified, the California Department of Fish and Game would be contacted and appropriated protocols implemented." (Mitigation Measures for Impact 3.8-7) Response 39A-38 in the Final EIR explains that the California Department of Fish and Game "requires that pre-construction surveys for nesting birds be conducted no earlier than 45 days and no later than 25 days prior to proposed construction that would remove trees containing nests or disturb bird nests or young. Because birds are highly mobile, surveys conducted earlier than 45 days prior to construction would not be an accurate assessment of the use of the site by breeding birds."

Seventh, LSA Assoc. also state in their second to the last paragraph that "[n]o sensitive species within the eucalyptus grove were observed by LSA during the site assessment." I would have to wonder how long LSA was actually at the site because this statement contradicts the experience of several coastside residents who have visited the site and seen Monarch butterflies, hawks, tree frogs, deer and fox.

Finally, the Planning Staff ignores the allegations in the appeal of "illegally excavating Mirada Surf/Quarry park access road (no permits) and installing pipes to divert water feeding wetlands area. Refer to 048-021-300 violations."

This allegation refers to a builder, Dennis Doherty who did some excavation and placed/replaced a drainage culvert which was located adjacent and to the north of his property. Ironically the "qualified and professional biologist" who concluded that the intermittent creek channel providing drainage to the culvert had no associated riparian or wetland habitat in any proximity to the excavation work completed for the culvert pipe section is the same LSA Assoc. used by the owners of the parcel subject to this appeal. Moreover, as discussed in the Mirada Surf Final EIR this "intermittent creek channel" carries significant runoff to the wetlands of Mirada Surf and thus changing the runoff could very easily damage the wetlands (and thus make them harder to protect from development?). This fact was conveniently ignored by LSA Assoc. This fact also seemed to be overlooked by Planning Staff who decided to process a Coastal Development Exemption Certificate for the drainage culvert work (which had already been completed without permits.)



Moreover another connection between Dennis Doherty and these owners is the issue of the cutting of trees without a permit. The tree cutting without permits was also brought to the Planning Staff's attention in the complaint filed against Dennis Doherty, but it was not addressed in the Planning Staff's response. Now in this appeal the Planning Staff is again ignoring the issue. The fact is that trees of substantial size have been cut down adjacent to a ESHA, and their destruction will undermine the adjacent wetlands and riparian corridor. This is yet another cumulative negative impact on the wetlands and riparian corridor which exists in Mirada Surf.

**Conclusion:**

This project is not exempt from the requirements of CEQA because of the cumulative impact of the development, destruction of trees, and diversion of natural runoff adjacent to Mirada Surf wetlands and riparian corridor.

This Bolsa Chica decision does apply to this project because it is "adjacent to" a sensitive habitat. The gradual boxing in of coastal resources is why Bolsa Chica confirms protection against harm to an ESHA from adjacent projects. The finding of no ESHA on the parcel is not relevant to this requirement. Further more the environmental study which was ordered by the owners of the property and supports their claim of no ESHA is woefully inadequate and not an "independent" study.