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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

10  
11 BARBRA STREISAND, an individual,, )  
12 Plaintiff, )  
13 vs. )  
14 KENNETH ADELMAN, an individual; )  
15 PICTOPIA.COM, a California corporation; )  
16 LAYER42.NET, a California corporation; and )  
DOE 1 through DOE 20, inclusive., )  
17 Defendants. )

Case No. SC077257

**REPLY IN SUPPORT OF MOTIONS OF  
KENNETH ADELMAN AND  
PICTOPIA.COM TO STRIKE  
COMPLAINT PURSUANT TO CIV.  
PROC. CODE § 425.16; SUPPLEMENTAL  
DECLARATION OF LAURA S. SEIGLE**

Date: July 14, 2003  
Time: 1:30 p.m.  
Dept.: H (Hon. Allan J. Goodman)

Complaint filed: May 20, 2003

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INTRODUCTION

1  
2 Plaintiff Barbra Streisand's opposition to Kenneth Adelman's and Pictopia.com's special  
3 motions to strike under the anti-SLAPP statute rests on innuendo, inapposite cases, and  
4 unsubstantiated argument. This is not enough to survive an anti-SLAPP motion. Under the anti-  
5 SLAPP statute, Streisand has the burden of "demonstrat[ing] that her complaint is both legally  
6 sufficient and supported by a sufficient prima facia showing of facts to sustain a favorable  
7 judgment." *Matson v. Dvorak*, 40 Cal. App. 4th 539, 548 (1995). She fails on the law and she  
8 fails on the facts.

9 The motions to strike demonstrated that Streisand's complaint is insufficient as a matter of  
10 law. Streisand's opposition ignores the controlling caselaw cited in the motions and offers instead  
11 a litany of cases supposedly confirming a right of privacy in the home that would prohibit a  
12 private citizen's publication of Image 3850. But Streisand's cases hold no such thing. Some are  
13 federal constitutional cases that restrict only the ability of the *state* to interfere in certain private  
14 activity. Others address privacy rights under the federal Freedom of Information Act that have no  
15 bearing on state privacy rights. The remainder concern the rights of non-celebrities thrust into the  
16 spotlight. The cases are similar only in that they contain the words "home" and "privacy." None  
17 holds that a private citizen's photograph of a home, or publishing of the photograph, infringes the  
18 homeowner's privacy rights. Streisand's cases provide no guidance here and do not answer the  
19 binding California caselaw cited in the motions.

20 The motions to strike also supplied evidence that conclusively refuted the key factual  
21 allegations of Streisand's complaint. Streisand's opposition fails to make a prima facia showing of  
22 facts to sustain her claims. For example, while she *argues* that Adelman's photograph allows  
23 website users to view into her house, that the photograph is high resolution, that he used a  
24 telescopic device to take the photograph, that he intended to capture a picture of her engaged in a  
25 personal activity, and that he identifies the location of her home by longitudinal and latitudinal  
26 coordinates, she submits no *evidence* to support these allegations. Adelman's contrary evidence  
27 remains undisputed. Streisand's failure to produce evidence of the facts necessary to support her  
28 claims is a separate and independent basis on which the motions must be granted.

1 ARGUMENT

2 I. Adelman's Website Falls Within The Purview Of The Anti-SLAPP Statute

3 For this lawsuit to fall under the anti-SLAPP statute, Adelman need only show that it arises  
4 from acts "in furtherance of [his] right of petition or free speech . . . in connection with a public  
5 issue." Civ. Proc. Code § 425.16(b)(1). Streisand does not dispute that websites and photographs  
6 are acts of speech and that the protection of the California coastline is "a paramount concern to  
7 present and future residents of the state and nation." Pub. Res. Code § 30001.

8 Instead, Streisand contends that section 425.16 cannot apply to her lawsuit because  
9 "California courts have rejected the notion that an anti-SLAPP motion can defeat privacy claims."  
10 Opp. at 4:19-20. She is wrong. California courts repeatedly have held that section 425.16 applies  
11 to privacy claims. *See, e.g., Seelig v. Infinity Broadcasting Corp.*, 97 Cal. App. 4th 798, 807  
12 (2002) (holding that lawsuit raising invasion of privacy claim "satisfied [section 425.16's]  
13 standard"); *Matson*, 40 Cal. App. 4th at 542 ("trial court correctly applied section 425.16 to this  
14 lawsuit because it arises from an act in furtherance of the right of free speech").<sup>1</sup>

15 Streisand then suggests that section 425.16 does not apply because the purpose of  
16 Adelman's website is not really to promote conservation but "to reveal the location of an  
17 individual's residence and to peer into the private areas of someone's home." Opp. at 4:7-8.  
18 Throughout her opposition, she accuses Adelman of using the cause of protecting the coastline to  
19 cloak his supposed true objective of photographing houses. *See, e.g.,* Opp. at 1:5, 1:10, 1:12  
20 (describing Adelman's "ill-conceived guise of environmental protection," "pretence," and "pretext  
21 that he is exploring and documenting the environment"). Streisand offers no evidence to support  
22 these insulting accusations, and everything about the website proves them false. Ex. C.

23  
24 <sup>1</sup> Streisand's citations do not support her argument. In *Paul v. Friedman*, 95 Cal. App.  
25 4th 853 (2002), the court addressed "whether a lawyer's investigative acts in the course of  
26 prosecuting his clients' arbitration claims against a securities broker were acts in furtherance of his  
27 free speech rights within the meaning of" section 425.16. *Id.* at 856. The court held that "the  
28 lawyer's acts alleged in the broker's subsequent lawsuit did not fall within the purview of the anti-  
SLAPP statute." *Id.* (emphasis added). The court never addressed if privacy claims are precluded  
from the protection of section 425.16. Streisand also cites to *Gates v. Discovery*, 106 Cal. App.  
4th 677, reviewed granted, 135 Cal. Rptr. 2d 403 (2003), reversing a denial of an anti-SLAPP  
motion to strike a privacy claim. Streisand maintains that by granting review of this decision, the  
California Supreme Court "reaffirmed" that privacy claims do not fall within section 425.16. Opp.  
at 4 n.1. That is not correct. Nothing can be inferred from the grant of review.

1           Lastly, Streisand raises the specter that this Court will "nullify in one fell swoop all the  
2 common law privacy doctrines as well as California's and the United States' constitutional  
3 guarantees of privacy" if it grants this motion. Opp. at 4:9-12. Streisand's fear-mongering must  
4 be rejected for what it is – absurd hyperbole. Granting the motion will merely confirm that  
5 Adelman is engaged in free speech concerning a public issue, and that on the facts of this case  
6 Streisand has failed to show a probability of prevailing on her claims.

7 **II. Streisand Has Failed To Demonstrate A Probability Of Success On Any Claims**

8           To defeat an anti-SLAPP motion, a plaintiff must establish a probability of prevailing on  
9 the merits of her complaint. Civ. Proc. Code § 425.16(b). To satisfy this burden of proof, the  
10 plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a  
11 sufficient prima facia showing of facts to sustain a favorable judgment if the evidence submitted  
12 by the plaintiff is credited." *Matson*, 40 Cal. App. 4th at 548. An anti-SLAPP motion must be  
13 granted when the plaintiff fails to submit "competent evidence supporting the elements" of her  
14 claims. *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port District*, 106 Cal.  
15 App. 4th 1219, 1238, 1241 (2003) (disregarding plaintiff's evidence that was hearsay, lacked  
16 foundation and personal knowledge, was argumentative, was speculative and impermissible  
17 opinions). Streisand's opposition fails on both accounts – it fails to show that her claims are  
18 legally viable and not precluded by Adelman's free speech rights, and it fails to submit admissible  
19 evidence supporting her factual allegations.

20 **A. No Law Supports The Cause Of Action For Intrusion**

21           Streisand's argument in support of her intrusion cause of action confirms its meritlessness.  
22 Streisand cannot cite a single case holding that taking aerial photographs that happen to include  
23 people's homes constitutes an act of intrusion into the homeowners' seclusion.<sup>2</sup> Nor can she refute  
24 that in every California case in which the court did not reject the intrusion cause of action, there  
25 were either allegations of *physical* intrusion into homes or places of medical treatment, or  
26 allegations of the recording of conversations. See, e.g., *Sanchez-Scott v. Alza Pharmaceuticals*, 86

27 \_\_\_\_\_  
28 <sup>2</sup> Thus, although the California Supreme Court has stated, as Streisand claims, that the  
tort of intrusion can include "visual or photographic spying," no California court has ever upheld  
an intrusion claim on those grounds. Opp. at 5:24-27.

1 Cal. App. 4th 365 (2001) (intrusion into medical examination room during examination of  
2 plaintiff) and other cases cited in Adelman Motion at 8. The simple facts are that Adelman did not  
3 photograph a topless sunbather (Opp. at 6), did not use a telephoto lens, and did not photograph  
4 anything that cannot be seen from hundreds of helicopters and airplanes every day.

5 Faced with an absence of case law on point, Streisand attempts to shift ground with a  
6 sundry collection of cases supposedly holding that there is "a constitutional right to privacy" in the  
7 home. These cases hold no such thing. The recent Supreme Court case, *Lawrence v. Texas*, 2003  
8 WL 21467086 (U.S. June 26, 2003), held that the State of Texas cannot constitutionally  
9 criminalize private consensual sexual conduct occurring in the home. It did not create a universal  
10 right to privacy in the home that limits the actions of private citizens. Indeed, there cannot be any  
11 such right because the Constitution limits only "the *States'* power to substantively regulate  
12 conduct" and the Constitution's right of privacy protects only "matters relating to marriage,  
13 procreation, contraception, family relationships, and child rearing and education," not houses.  
14 *Paul v. Davis*, 424 U.S. 693, 713 (1976) (rejecting argument that Constitutional right to privacy  
15 protects against state's disclosure of fact of arrest on shoplifting charges) (emphasis added).<sup>3</sup>  
16 Similarly, the court in *Ortiz v. Los Angeles, Police Relief Ass'n*, 98 Cal. App. 4th 1288 (2002),  
17 addressed the privacy rights "surrounding the marriage relationship" and held that the plaintiff's  
18 right to marry was not violated when the defendant fired her for marrying a felon. *Id.* at 1303,  
19 1314. In *United States Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994), the court held  
20 that federal employers' disclosure of employee' home addresses to a union representative violated  
21 privacy rights under the Freedom of Information Act ("FOIA"). However, the extent of privacy  
22 rights afforded by FOIA provides no guidance to the boundaries of California common law  
23 privacy rights. *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*,  
24 489 U.S. 749, 762 n.13 (1989) ("statutory meaning of privacy under the FOIA is, of course, not  
25 the same as the question whether a tort action might lie for invasion of privacy").

26 Streisand also fails to submit evidence supporting her allegations. Streisand *argues* that

27 <sup>3</sup> For this reason, all of Streisand's citations to the federal constitutional right to privacy  
28 are inapposite. For example, in *Whalen v. Roe*, 429 U.S. 589 (1977), cited by Streisand at page 4,  
the Supreme Court stated that the federal constitutional right to privacy is founded on the right to  
be free from *government* surveillance, intrusion, and compulsion. *Id.* at 599 n.24.



1 Adelman's camera is equivalent to a "telephoto lens" or "high-powered zoom," that he used high-  
2 tech equipment "to enhance the image," and that the resulting photograph is so detailed that it  
3 shows more than can be seen with the naked eye, including "into the home. Opp. at 2:23-3:3, 6:4-  
4 8. All of this is unsubstantiated. Streisand submitted no *evidence* that Adelman's camera used  
5 optical aids to enhance the image beyond what could be seen by the naked eye. All evidence is to  
6 the contrary. See Adelman Decl., ¶ 2; Gatti Decl., Ex. 11 (showing no view into the house).

7 **B. Streisand Does Not Demonstrate The Merits Of The Second Cause Of Action**

8 As with her first cause of action, Streisand fails to show that her cause of action for  
9 publication of private facts is either legally or factually meritorious.

10 **1. That the facts are already public is a complete bar to this claim**

11 In response to the fact that her address and photographs of her house are already publicly  
12 available, Streisand tries three arguments. First, she cites cases supposedly holding that "the  
13 public availability of private information does not create a public fact." Opp. at 6:24. This  
14 argument is legally insupportable because the cases address the *government's* disclosure  
15 obligations under *FOIA* or the California equivalent, not whether a common law action lies against  
16 a private citizen for allegedly disclosing a private fact.<sup>4</sup> She dismisses the applicable authority that  
17 "there can be no privacy with respect to a matter which is already public." *Sipple v. Chronicle*  
18 *Publishing Co.*, 154 Cal. App. 3d 1040, 1047 (1984); *Wasser v. San Diego Union*, 191 Cal. App.  
19 3d 1455, 1460 (1987) ("It is, of course, axiomatic that no right of privacy attaches to a matter of  
20 general interest that has already been publicly released . . .") (quotation omitted). Indeed, the  
21 United States Supreme Court has stated that "there is no liability for giving publicity to facts about  
22 the plaintiff's life which are matters of public record." *Cox Broadcasting Corp. v. Cohn*, 420 U.S.  
23 469, 494, 496 (1975) (quotation omitted). Here, Streisand's address and maps showing the  
24 location of her house are part of the City of Malibu's public record and available for public  
25 inspection on the Internet. Supp. Seigle Decl., ¶¶ 2-5, Exs. T, U, V.

26  
27 <sup>4</sup> See *FLRA*, 510 U.S. at 497; *Reporters Committee*, 489 U.S. at 762 n.13; *City of San*  
28 *Jose v. Superior Court*, 74 Cal. App. 4th 1008, 1019 (1999). In *City of San Jose*, the court  
explained that the California Public Records Act was "modeled on" FOIA, and that "federal  
legislative history and judicial construction of the FOIA may be used in construing California's  
Act." 74 Cal. App. 4th at 1016.

1 Second, Streisand argues that "[j]ust because others have tortiously violated her privacy by  
2 publishing these private facts" does not deprive her of a claim against Adelman. Opp. at 7:14.  
3 However, Streisand submits no evidence that her address, location of her house, and photographs  
4 of her house were first made public tortiously. To the contrary, the evidence shows that Streisand  
5 herself made this information public by granting the *People* magazine interview and submitting  
6 information to the City of Malibu's public records. Ex. K; Supp. Seigle Decl., ¶¶ 2-5, Exs. T, U.

7 Third, Streisand claims that the *People* interview was not a waiver of privacy because even  
8 though she consented to the publication, she can withdraw her consent. Opp. at 7:27-8:8. This  
9 makes no sense, and her legal authority, *Virgil v. Time*, 527 F.2d 1122 (9th Cir. 1975), does not  
10 support her. That case held that after a person talks to the press, "if consent [to publish the  
11 communication] is withdrawn *prior to the act of publicizing*, the consequent publicity is without  
12 consent." *Id.* at 1127 (emphasis added.) Here, of course, Streisand is attempting to "withdraw"  
13 her consent five years after the publication in *People* of the photograph. The barn door has been  
14 open for five years, and the horse is long gone.

15 **2. There is no evidence that the publication was offensive**

16 Streisand's arguments about the supposed offensiveness of the website are equally  
17 defective as a matter of both fact and law. She contends that the photograph of her house and  
18 information about its location are offensive because of her special safety concerns.<sup>5</sup> Opp. at 8-9.  
19 Yet, Streisand herself publicized her house and its location by granting the *People* interview and  
20 entertaining the President at a lavish fundraising event her house (rather than, for instance, at a  
21 hotel or resort). She asserts, with no evidentiary support, that Adelman's website contains  
22 navigational coordinates of her house and a map that "serves as the functional equivalent of a road

23 \_\_\_\_\_  
24 <sup>5</sup> Streisand cites the declaration of a detective that "public figures are more likely to be  
25 victims of stalking incidents" and that he is "aware of several occasions where Barbra Streisand  
26 was the reported victim or target of such incidents" at "her residence." Soderberg Decl., ¶¶ 3, 4.  
27 This evidence is inadmissible because it lacks foundation and personal knowledge and consists of  
28 hearsay, speculation and impermissible opinions. *Tuchscher Development Enterprises*, 106 Cal.  
App. 4th at 1238. For instance, it does not state how he knows this information, if the reported  
incidents were credible threats or a house alarm mistakenly triggered, or if the "residence"  
involved is her current house. Her citation to *Planned Parenthood Golden Gate v. Superior  
Court*, 83 Cal. App. 4th 347 (2000), is similarly inapt. That court held that addresses of Planned  
Parenthood employees should not be produced in discovery because a website was collecting and  
publishing such addresses to promote violence against abortion providers. *Id.* at 360-61. Here,  
there is no evidence of any such established group promoting violence against Streisand.

1 map to her home." Opp. at 2:20-21, 8:17, 8:28-9:1. Yet, Streisand ignores the evidence that the  
2 coordinates are *not* of the house but of the helicopter's location over the Pacific Ocean when  
3 Adelman took the photograph and that the coordinates of her actual address are available  
4 elsewhere on the Internet. Adelman Decl., ¶ 3; Ex. M. And, she conveniently overlooks the fact  
5 that the so-called "road map" contains no road names or addresses. Ex. E. Finally, she complains  
6 that Adelman posts on his website people's comments about the website. Posting these comments  
7 is all part of Adelman's purpose of spurring interest in the conservation of the coastline. It is  
8 obviously constitutionally protected speech.

9 **3. Streisand cannot dispute that her estate is newsworthy**

10 In arguing that the location and appearance of her estate are not newsworthy, Streisand  
11 does not dispute that she is a renowned celebrity, has entertained the President at her estate, is  
12 outspoken on environmental matters, and is engaged with her neighbors in a public dispute over  
13 her proposed huge expansion of one of her homes that could destabilize the bluff. Adelman  
14 Motion at 11-12, Ex. T. Instead, she asserts that Image 3850 is not newsworthy because  
15 Adelman's website does not explicitly state that Streisand is engaged in the development dispute  
16 with her neighbors. Opp. at 10:10-19. Not surprisingly, Streisand can find no legal authority that  
17 a publication is newsworthy only if it explicitly explains on its face why it is newsworthy.

18 She also all but ignores the cases directly on point holding that almost everything about a  
19 celebrity is newsworthy and instead cites inapposite cases. She relegates *Carafano v.*  
20 *Metrosplash.com, Inc.*, 207 F. Supp. 2d 1055 (C.D. Cal. 2002), a case on all fours with this one  
21 with respect to privacy rights, to a footnote and asserts that *Carafano* "contradicts the weight of  
22 California jurisprudence."<sup>6</sup> Opp. at 10 n.5. The supposed authority for this proposition is *Briscoe*  
23 *v. Reader's Digest Ass'n Inc.*, 4 Cal. 3d 529 (1971). That case, however has been significantly  
24 narrowed and all but disapproved by the California Supreme Court. *Shulman v. Group W*  
25 *Productions, Inc.*, 18 Cal. 4th 200, 222 (1998) (*Briscoe* is "an exception to the more general rule  
26 that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to  
27

28 <sup>6</sup> See also *Gilbert v. National Enquirer*, 43 Cal. App. 4th 1135, 1146 (1996) (holding that information about Melissa Gilbert's personal relationships, marriage, divorce, and remarriage are newsworthy because she is "a well-known actress" who "has sought media attention").

1 the public mind to the end of his days"); *Forsher v. Bugliosi*, 26 Cal. 3d 792, 810 (1980)  
2 ("California courts have refrained from extending the *Briscoe* rule to other fact situations" not  
3 implicating "the rehabilitative process and . . . identity of past criminals"). Streisand's cites to  
4 *Virgil, Wasser, FLRA*, and *Lawrence* are similarly inapposite (*see* pages 4, 5, 6 above), and none  
5 of these cases involves a celebrity like Streisand.

6 **C. Streisand Failed To Establish The Merits Of Her Constitutional Claim**

7 Streisand's attempt to prove the merits of her constitutional privacy claim boils down to an  
8 assertion that because her other privacy claims will probably succeed, this one will too. To the  
9 contrary, as detailed above, because Streisand fails to establish the legal sufficiency or evidentiary  
10 basis of these claims, the constitutional claim will fail as well.

11 The additional contention that Adelman can pursue his purpose of documenting the  
12 coastline without "posting detailed photographs of Streisand's home and without identifying  
13 Streisand as the homeowner and using Streisand's name to sell pictures" does not advance  
14 Streisand's case. Opp. at 11:9-13. As explained in detail in Adelman's opposition to Streisand's  
15 motion for a preliminary injunction, the California Supreme Court has repeatedly rejected the  
16 argument that the courts may act as editors or censors of speech and determine what is really  
17 necessary to achieve the speaker's purpose. *Shulman*, 18 Cal. 4th at 229 ("[t]he courts do not, and  
18 constitutionally could not, sit as superior editors of the press); *Wilson v. Superior Court*, 13 Cal.  
19 3d 652, 655, 661 (1975) (court acting as "governmental censor" is "intolerable role").<sup>7</sup>

20 **D. Streisand's Anti-Paparazzi Claim Utterly Fails**

21 The lack of any merit to Streisand's anti-Paparazzi claim is evident in her half-hearted stab  
22 at showing its probability of success. To preserve this claim, Streisand must submit *evidence* that  
23 Adelman used a visual enhancing device to attempt to capture an image of Streisand engaging in a  
24 personal or familial activity. Civ. Code § 1708.8. Streisand submits absolutely no evidence of  
25 any of this. Instead she charges that "Adelman has not shown that he did not intend to capture  
26 images of Streisand." Opp. at 11:19. However, it is her evidentiary burden, not his.

27  
28 <sup>7</sup> In *Hill v. NCAA*, 7 Cal. 4th 1, 9 (1994), the court addressed the constitutionality of the  
NCAA's drug testing program, which did not raise free speech issues and so the court as censor  
was not an issue.

1           **E.       Streisand Does Not Prove Her Misappropriation Claim**

2           As with her other claims, Streisand ignores the relevant authority establishing that no  
3 misappropriation claim exists for the use of a name "in connection with any news, public affairs . .  
4 . ." Civ. Code § 3344(d); *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 545-46 (1993)  
5 (surfing video concerns public affairs); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th  
6 790, 797 (1995) (posters of football player were "newsworthy items of public interest");  
7 *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 416 (2002) (baseball website and  
8 game programs concerned public affairs). If a surfing video, football poster, and baseball website  
9 fall into section 3344(d)'s exemption, then certainly a website dedicated to preserving the coastline  
10 – a purpose declared by the legislature to be of utmost public interest – also is a matter of public  
11 affairs. Accordingly, the use of Streisand's name in connection with the website is exempt.<sup>8</sup>

12           **III.     Streisand Fails To Show That The Communications Decency Act Does Not Apply**

13           Streisand makes three legally insupportable arguments about the applicability of the CDA  
14 to the claims against Adelman and Pictopia.com. First, she asserts that they are not "interactive  
15 computer service" providers because the statute does not apply to websites. Opp. at 15 n.7. This  
16 is simply wrong. *Gentry v. Ebay, Inc.*, 99 Cal. App. 4th 816, 831 n.7 (2002) ("web site enabl[ing]  
17 users to conduct sales transactions, as well as provide information" within statute); *Batzel v. Smith*,  
18 2003 WL 21453358 at \*9 (9th Cir. June 24, 2003) (rejecting argument that "only services that  
19 provide access to the Internet as a whole are covered" and holding that websites are included);  
20 *Carafano*, 207 F. Supp. 2d at 1965-66 ("web site operator" covered).

21           Next, Streisand argues that Adelman (but not Pictopia.com) is an "internet content  
22 provider" because he developed a large amount of the information on his website. Opp. at 13:13-  
23 14. Most website operators (e.g., eBay, AOL) develop material that is included on their websites,  
24 but that commonplace fact is beside the point; the CDA shields the operator from state-law claims

25           <sup>8</sup> The fact that a user can purchase a copy of Image 3850 is irrelevant. In *Gionfriddo*, the  
26 court explained that even if the defendant makes a profit from the item that incorporates the  
27 plaintiff's name, there is no misappropriation if the uses of the name "are not advertisements, nor  
28 speech where the primary message is 'buy'." 94 Cal. App. 4th at 413. Otherwise, there could  
never be sales of items that incorporate a celebrity's name. *Id.* at 414 ("The owner of a product is  
entitled to show that product to entice customers to buy it."). Here there is no evidence that  
Adelman uses Streisand's name as an advertisement. Indeed, he purposefully designed the website  
so that the captions would be invisible to Internet search engines. Adelman Decl., ¶ 9.

1 based on the discrete content provided by others. *Batzel*, 2003 WL 21453358 at \*10 (website  
2 operator not content provider of email created by third party); *Gentry*, 99 Cal. App. 4th at 831  
3 (eBay not content provider of descriptions of items sold on its website). Here, it is undisputed that  
4 a third party suggested the "Streisand Estate" caption. Thus, neither Adelman nor Pictopia can be  
5 liable for claims *based on the caption*, regardless of other content that Adelman did provide.

6 Finally, Streisand argues that the CDA "is limited to protecting internet providers who  
7 filter indecent content," applies just to defamation lawsuits, and does not apply to  
8 misappropriation and privacy claims or intellectual property claims. Opp. at 12:22-23, 14. The  
9 courts disagree and thus have applied the CDA to diverse claims not involving obscenity or  
10 defamation. *See, e.g., Gentry*, 99 Cal. App. 4th at 832-33 (eBay not liable for false product  
11 descriptions); *Stone v. eBay Inc.*, 56 U.S.P.Q.2d 1852 at \*2 (Cal. Super. Ct. 2000) (eBay not liable  
12 for selling contraband musical recordings). Streisand cites no law that misappropriation or  
13 privacy claims are exempt from the protections of the CDA. Indeed, *Carafano* involved the  
14 applicability of the CDA to precisely such claims, and although the court held that the CDA was  
15 not applicable on other grounds, it did not hold that the nature of the claims was a bar. 207 F.  
16 Supp. 2d at 1059. *See also Stone*, 56 U.S.P.Q.2d 1852 at \*1 (applying CDA to intellectual  
17 property claim that eBay sold "'infringing' sound recordings").

### 18 CONCLUSION

19 Adelman respectfully requests that the Court strike the Complaint pursuant to section  
20 425.16 and award him his attorneys' fees and costs under sections 425.16(c) and 3344.

21 Dated: July 9, 2003

IRELL & MANELLA LLP

22 By: 

23 Richard B. Kendall  
24 Attorneys for Defendants  
25 Kenneth Adelman and Pictopia.com  
26  
27  
28

1                                    SUPPLEMENTAL DECLARATION OF LAURA A. SEIGLE

2            I, Laura A. Seigle, declare as follows:

3            1.        I am an attorney at the law firm of Irell & Manella LLP, counsel of record for  
4 defendants Kenneth Adelman and Pictopia.com in the above-captioned action. I am a member in  
5 good standing of the State Bar of California. I have personal knowledge of the facts set forth in  
6 this Declaration and, if called as a witness, could and would testify competently to such facts  
7 under oath.

8            2.        Attached as Exhibit T are true and correct copies of documents that Irell & Manella  
9 LLP obtained from the City of Malibu's public records pertaining to proposed construction at 6830  
10 Zumirez Drive. Streisand's estate includes 6830 Zumirez Drive. See Ex. U. The first two pages  
11 of Exhibit T are maps entitled "6830 Zumirez Drive, Bluff Top Setback Comparison for Adjacent  
12 Bluff Top Properties." The following pages of Exhibit T are excerpts from the January 10, 2000  
13 Minutes of the Malibu City Council.

14           3.        On July 7, 2003, I accessed the City of Malibu website located at  
15 www.ci.malibu.ca.us. I then viewed the May 2003 city calendar. The calendar for May 19, 2003  
16 lists a meeting of the Planning Commission. Clicking on "Planning Commission" brought me to  
17 the May 19, 2003 Meeting Agenda for the Planning Commission. Clicking on "Meeting Agenda"  
18 brought me to a list of agenda items and documents. A true and correct copy of the document  
19 listed as Agenda Item 4.D and entitled "Commission Agenda Report," which I printed from the  
20 website, is attached hereto as Exhibit U.

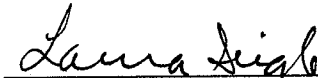
21           4.        The first page of the Exhibit U states that the "Appellant" is "Douglas W. Burdge,  
22 AIA, on behalf of James and Barbara Brolin." Barbra Streisand is married to James Brolin. See  
23 Exs. K, P. Page 4 of Exhibit U states that "appellant's property . . . is situated south of the subject  
24 property, at 6830, 6836 and 6838 Zumirez Drive."

25           5.        Also included in the list of agenda items and documents for the May 19, 2003  
26 Meeting Agenda for the Planning Commission is Item 4.D -- Attachment 8, entitled "Results of  
27 General Biological Assessment, Proposed Jacobson Residence, City of Malibu, Los Angeles  
28 County, California," which I printed from the website. A true and correct copy of that document

1 is attached hereto as Exhibit V. Pages 2 and 3 of Exhibit V consist of topographical maps  
2 showing the location of the subject property. As Exhibit U states, Streisand's property "is situated  
3 south of the subject property."

4 Executed on July 9, 2003, at Los Angeles, California.

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

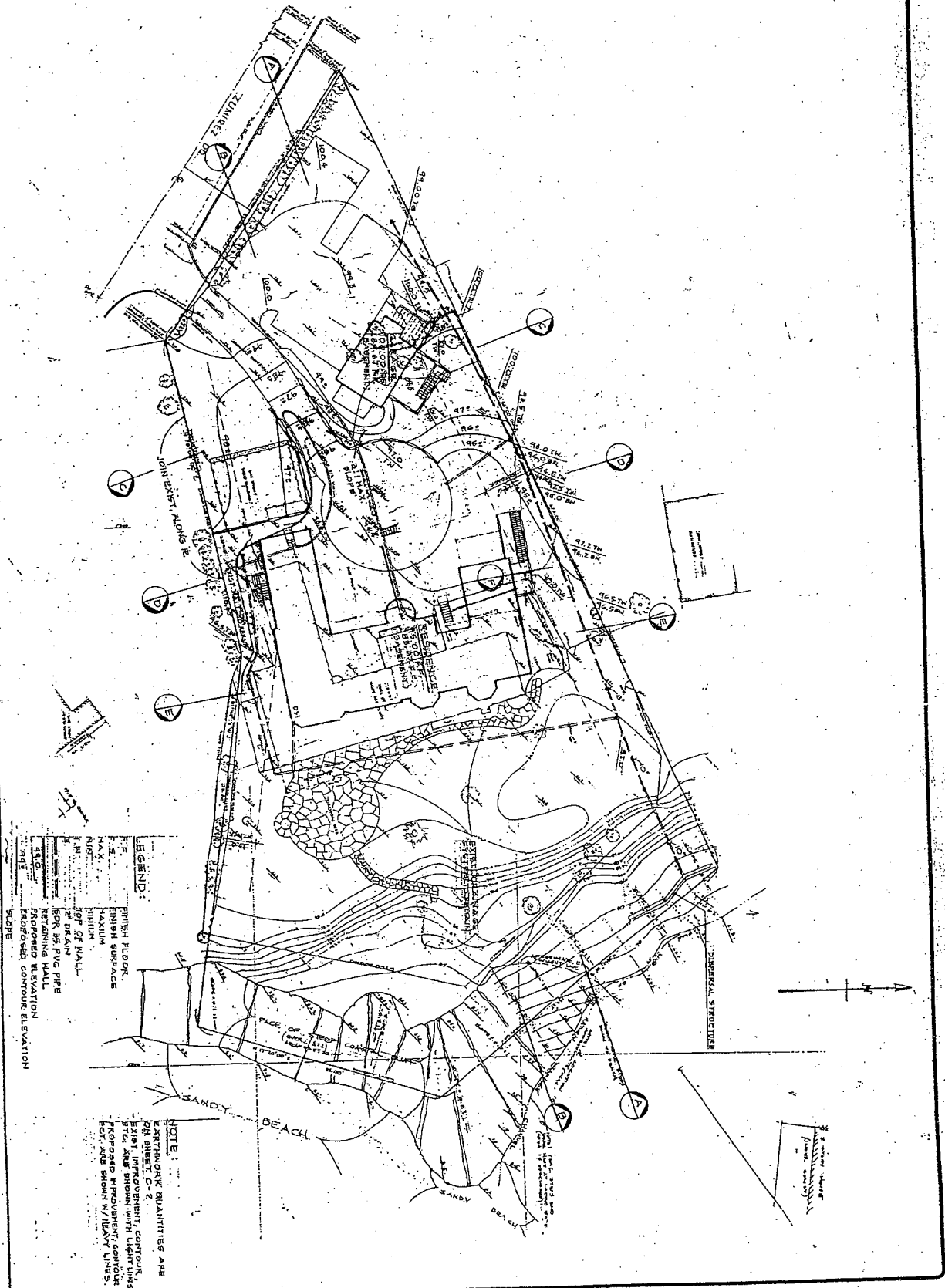
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10 Laura A. Seigle

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SITE / GRADING PLAN



C-1	DATE	BY
	1/1/18	
	1/1/18	
	1/1/18	

**SINGLE FAMILY RESIDENCE**  
**6830 ZUMIREZ DRIVE**  
**MALIBU, CALIFORNIA**

**ROBERT NEWLON DESIGN, INC.**  
 3550 Las Flores Canyon Road, Malibu, CA 90265  
 (310) 456-8750 Tax (310) 456-9009

NO.	REVISIONS

**MOTION** Mayor Pro Tem Barovsky moved, seconded by Councilmember Hasse, to approve staff's recommendation (both 1 and 2). The motion carried unanimously.

#### **ORDINANCES AND PUBLIC HEARINGS**

**ITEM 4A.** **Plot Plan Review number 98-294 - Site Plan Review Number 98-090 and Minor Modification Number 99-013 (V.N.B. Trust).** *Staff recommendation: City Council to deny appeal and adopt Resolution No. 00-01 upholding the Planning Commission's decision to approve Plot Plan Review No. 98-294 and Site Plan Review No. 98-090.*

Mayor Van Horn read a request from Barbra Streisand to continue the item.

Eric Jacobson, appellant, indicated he was not previously aware of the request for a continuance. He indicated the item had already been postponed because of inadequate notice to neighbors. He questioned the sincerity of the request because the matter had been pending for almost a year and the applicant had not yet expressed an interest in the neighbors' concerns. He stated he informed the applicant's attorney that he was willing to discuss options if they were willing to specifically address his concerns. He indicated they have been unable to respond to his concerns to date. He objected to the request.

Mayor Pro Tem Barovsky did not support continuing the item. He mentioned there were numerous people present. He would agree to postpone the item if the applicant would agree to the two concessions.

Mayor Van Horn indicated the council consistently encouraged peaceful resolutions between neighbors. She supported allowing neighbors to work out their differences.

Councilmember House preferred hearing the item tonight. She asked Mr. Jaime Harnish about the applicant's intentions. Mr. Harnish indicated he could not make any commitments on behalf of the applicant. He indicated the applicant was sincerely interested in working with the neighbors. He indicated they discussed holding a workshop with the neighbors to discuss the issues. Councilmember House indicated the neighbors were concerned about the ESHA setbacks and minor modifications. Mr. Harnish indicated the applicant was willing to discuss those issues. He stated he questioned the appellant's sincerity because the issues were not previously raised with the City or neighbors. Councilmember House supported hearing from the people who were present in the audience.

Councilmember Keller realized a lot of people were present and believed their presence would apply pressure to the applicant to resolve the issues. He supported a continuance to allow that to occur.

Councilmember Hasse supported applying rules consistently regardless of who the applicant was. He indicated he had consistently granted continuances to allow the opportunity for neighbors to resolve their differences. He indicated he met with the applicant who indicated she felt she could address the issues with the neighbors. He indicated he also met with the appellant who felt there was no way the issues could be resolved. He supported hearing testimony from the people who were present and then supported continuing the item until the neighbors had an opportunity to resolve the issues.

**MOTION** Mayor Pro Tem Barovsky moved to require the applicant to concede to the concerns of the appellant. There was no second to the motion and the motion was deemed out of order.

**MOTION** Councilmember Hasse moved, seconded by Mayor Van Horn to receive public testimony and then continue the item. The motion carried unanimously.

Assistant Planner Michitsch gave a staff report.

Eric Jacobson, appellant, did not believe the project was in the best interest of the neighborhood. He stated he lived next door to the site. He was concerned about the magnitude of the proposal and its deviation from neighborhood standards. He believed the applicant received preferential treatment by the City. He did not support the waiver of the ESHA setback. He did not believe the City considered homes which should have been considered in its review of neighborhood standards. He indicated Zumirez Drive was the only access to the property and there are properties both land side and beach side which should have been considered in the review. He urged the council to reject the neighborhood established by the applicants. He indicated the project exceeded the 2/3rds height limitation. He asked the Council to find that false and misleading information was considered in the approval process and to refund him his appeal fees. He did not support the waiver of the ESHA setback and urged the Council to grant the appeal.

Jaime Harnish, representing VNB trust, indicated the applicants did not realize there was so much opposition to the project. He indicated the project was a redesign of a home. He indicated the applicant did not ask for a waiver and that Dr. Witter had recommended that the project be setback from the original footprint. He stated the project was not submitted under neighborhood standards. He indicated the project is 74 feet from the bluff and has been determined not to be a disruption to the habitat.

He stated the applicant planned on reintroducing native natural landscaping to the area.

Robert Shachtman, architect, indicated that if the house was moved back farther it would become more visible from the street.

Cheryl Jacobson lived next door to the subject site. She believed the proposed home was excessive. She believed it was intended for use as an entertainment center.

Kristin Jacobson had also lived next door to the site. She indicated the lot is smaller than other lots in the neighborhood. She stated she had already noticed excessive water run-off from the current activity on the property.

Ruth White hoped the neighbors would be able to resolve the issues with the applicant. She hoped the neighborhood did not end up with the same problems that the Zumirez neighborhood was suffering from.

Hugh Dan Wallace believed the proposed structure was almost commercial in nature and would exceed the traffic limitations on Zumirez Drive.

Howard Bernstein supported the City's procedures and had confidence in its policies and their application. He urged the Council to keep in mind that all residents needed to be treated equally without regard to their standing in life.

John Mazza, president of Malibu Riviera One, did not support or oppose the project. He was interested in the protection of the Riviera's shared beach lot which was located below the site. He was concerned about beach sloughing caused by over watering on the bluff and poor drainage. He believed water should be directed away from the beach.

Paul Grisanti urged the Council to consider this project carefully. He was concerned the home that was proposed was intended for public use. He questioned whether certain Councilmembers should recuse themselves from voting on the project.

Dusty Pete was concerned about the project's impact to the bluff and beach from excess water and drainage.

Denise Jacobson-Ferris grew up on the property next door to the subject site. She was concerned about increased traffic from the proposed project.

Mari Stanley lives within 500 feet of the applicant's property. She indicated that she did not receive notice of the project because the addresses used by the applicant were old and out of date. She expressed concern about the ESHA setback and the drainage and run-off concerns raised.

Steve Deitrich asked the Council to consider this project in its entirety and to apply the City's standards uniformly as with all applications.

Eric Jacobson believed the home was a large entertainment facility dressed as a two bedroom house. He urged the Council to consider the project and the applicant and use its intuition to determine the actual intended use of the proposed structure. He did not support a hardship or waiver when not applied to a residential home. He urged the Council to apply its tools fairly to this project.

Jamie Harnish indicated the applicant was willing to record a deed restriction indicating that the property would never be used for commercial use. He indicated the basement was for storage of the applicant's memorabilia. He believed most of the people present were discriminating against the applicant herself. He indicated the applicant intends to follow the direction of the City with respect to drainage. He reiterated the home was not intended for public or commercial use. He reiterated the project was not submitted under neighborhood standards and the set back was due to the recommendation of Dr. Witter and did not constitute a waiver. He urged the Council to grant the continuance to allow the applicant the opportunity to resolve the issues with the neighbors.

Councilmember Hasse thanked the speakers for coming to the hearing and expressing their concerns. He polled the audience by hands and noted there were 30 other people present who objected to the project who did not speak. He supported continuing the item for a month to allow the applicant an opportunity to resolve the issues.

Councilmember Keller supported allowing the applicant an opportunity to work with the neighbors to resolve the issues and to bring the matter back before the election.

Councilmember House stated that at the last Council meeting Mayor Van Horn and Councilmember Keller both denied three requests for continuances. She indicated she would not support a continuance and was prepared to move forward with the hearing. She did believe the issues could be resolved if all parties were sincerely interested in a resolution.

Mayor Pro Tem Barovsky asked what the hardship was in not complying with the 100 foot setback. Mr. Harnish indicated there was no hardship necessary but that the lot was pie shaped such that it narrowed the house. Mayor Pro Tem Barovsky asked if the property was in an ESHA. Mr. Harnish indicated it was located in a disturbed ESHA. He indicated he did not believe the 100 ft. setback applied on a coastal bluff. Mayor Pro Tem Barovsky asked why there were ramps into the basement. The architect, Mr. Shachtman, indicated the ramp was for access to move storage stuff down to the floor below and would allow the applicant access to his wood shop. He indicated the ramp was not wide enough for vehicle access. Mayor Pro Tem Barovsky asked about the deed restriction. Mr. Harnish stated the applicant was willing to record a deed indicating the property would not be transferred to governmental use. Mayor Pro Tem Barovsky asked the City Attorney about restricting use on a property. Interim City Attorney Terzian indicated that was the purpose of the City's zoning ordinance but that further restrictions could be applied through a deed restriction.

Mayor Van Horn mentioned she received notice about this hearing through the mail. She asked about the use of a home for filming and if that was a commercial use. City Manager Peacock indicated it was not considered a commercial use under the City's ordinance.

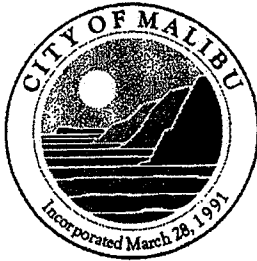
Mayor Pro Tem Barovsky asked if the City could preclude installation of the ramp to the basement. Planning Director Ewing indicated there were standards for access but believed the standards were met without the ramp.

**MOTION** Councilmember Hasse moved, seconded by Councilmember Keller, to continue the public hearing to February 28, 2000.

Mayor Pro Tem Barovsky asked that the motion be amended to continue the item to the first meeting in February. There was no reply to the proposed amendment.

The motion carried 3-2 (House, Barovsky voted no).

**RECESS** Mayor Van Horn called a recess at 9:05 p.m. The meeting reconvened at 9:18 p.m. with all Councilmembers present.



# Commission Agenda Report

Planning  
Commission Meeting  
05-19-03

**Item  
4.D.**

To: Honorable Members of the Planning Commission

Prepared by: Scott Albright, Senior Planner **SA**

Reviewed by: Edward M. Knight, Interim Planning Manager *EMK*

Date prepared: March 13, 2003 Meeting date: May 19, 2003

Subject: Appeal No. 02-009 - An appeal of the Planning Director's approval of Site Plan Review No. 02-033, for the construction of a two-story, single-family residence, not to exceed 28 feet in height.

APPELLANT: Douglas W. Burdge, AIA, on behalf of James and  
Barbra Brolin

APPLICANT: Robert Leese

OWNER: Eric and Cheryl Jacobson

LOCATION: 6804 Zumirez Drive

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**RECOMMENDED ACTION:** Adopt Planning Commission Resolution 03-02 denying Appeal No. 02-009 and upholding the Planning Director's decision on the approval of Plot Plan Review No. 02-091 and Site Plan Review No. 02-033.

**PROCEDURAL POSTURE:**

The following is a chronological listing of this project's status at pivotal stages during the planning review process:

On June 5, 2002, an application was received from the applicant, Robert Leese on behalf of the owners, Eric and Cheryl Jacobson, for the demolition of an existing 2,058 square foot residence, and the construction of a new two-story, 4,833 square-foot single-family residence, attached garage and guest house, swimming pool, spa, driveway and motor court, and septic system. The request was received as Plot Plan Review No. 02-091. In addition, a request for a height increase to allow up to 28 feet (for a pitched roof) was also received (Site Plan Review No. 02-033).

On June 5, 2002, the Los Angeles County Fire Department issued a conceptual approval of the project plans as proposed.



On June 20, 2002, the City's Environmental Health Specialist issued an "In-Concept Approval" of the project.

On July 5, 2002 the City's Biologist granted an "Approved in Concept" for the project.

On July 23, 2002 the City's Geologist granted an "Approved in Concept in the Planning Stage" for the project.

On August 21, 2002, the City's Planning Department determined that the application was complete.

On September 13, 2002, the California Coastal Commission adopted and certified the City of Malibu Local Coastal Program (LCP), which granted City staff coastal permitting authority. The applicants were informed by City staff that the City would be the agency issuing the Coastal Development Permit.

On October 11, 2002, the City of Malibu suspended implementation of the LCP. As such, the application was once again processed pursuant to previously established Interim Zoning Ordinance procedures only.

On October 17, 2002, the Planning Department's Quality Assurance Committee found the project proposal in compliance with the requirements of Title 17 of the Malibu Municipal Code and was ready for public noticing.

On October 23, 2002, the Planning Staff mailed a "Notice of Application" to all property owners and occupants within a 500-foot radius of the subject site.

On December 5, 2002, the Planning Director affirmatively found that the applicant's request for a height increase over the base eighteen feet in height, not to exceed 28 feet in height, met the requirements established in Section 17.62.040.D of the Malibu Municipal Code (MMC). The "Notice of Decision" was mailed to all property owners within a 500-foot radius of the subject site (see Attachment 3).

On December 16, 2002, a timely appeal was filed by Douglas W. Burdge, on behalf of James and Barbra Brolin.

On March 17, 2003, the Planning Commission voted to continue this item in order to allow time for the appellants and the applicants to work toward a compromise.

**CEQA REVIEW:**

Pursuant to the authority and criteria contained in the California Environmental Quality Act (CEQA), the Planning Director has analyzed the proposal as described above. The Planning Director has found that this project is listed among the classes of projects that have been determined not to have a significant adverse effect on the environment, and

therefore, shall be exempt from the provisions of CEQA. Accordingly, a CATEGORICAL EXEMPTION, CLASS 3(a) has been issued.

**DISCUSSION:**

This is an appeal, by an adjacent neighbor, of the Planning Director's approval of Site Plan Review No. 02-033 granting an increase in height, not to exceed 28 feet, for the construction of a new two-story, single-family residence at 6804 Zumirez Drive.

On December 5, 2002, staff issued a Notice of Decision regarding Site Plan Review No. 02-033 (see Attachment 3). This notice contained the following findings, verbatim, as identified in Section 17.62.040.D of the MMC, in support of the requested height increase in excess of the City's base height of 18 feet, up to 28 feet for a pitched roof.

1. *The project does not adversely affect neighborhood character.*

Staff notes that there are one and two-story residences in the neighborhood, designed similarly as the proposed residence.

2. *The project protects the natural resources and complies with the City's land use policies, goals and objectives, as defined by staff.*

The proposal will allow for reasonable development of the property and it will preserve the sites existing natural topography, as the proposed development will be within the permitted development envelope.

3. *That the project provides maximum feasible protection to significant public and private views.*

The proposed project is located within a neighborhood of single-family residences, some of which are two-stories in height. The proposed residence will be situated on the subject parcel so as to not impair public and private views, particularly views of the ocean that are currently enjoyed by the neighboring properties to the north and south.

4. *That the project does not affect solar access.*

The project is sited within the City's permitted development envelope for the subject parcel and the nearest structures built for human habitation will not be shaded by this project.

5. *That the project will not adversely affect the City's ability to prepare a General Plan.*

The City of Malibu adopted its General Plan in November 1995.

6. *That the project is consistent with the General Plan.*

According to the General Plan Land Use map, the proposed project is located within an area that has been identified for Rural Residential (RR) land uses. This district permits single-family residential development. The proposal is for the construction of a single-family residence in a manner that will avoid significant alterations to the site's natural topography, protect the existing native landscaping, and mitigate visual impacts to the maximum extent feasible.

7. *The proposed project complies with all applicable requirements of state and local law.* The project will comply with all applicable requirements of state and local laws.

Permits from the California Coastal Commission and the City of Malibu Building Safety Department will be required prior to construction.

**Appellant Issue Item No. 1: What is the primary view from the appellant's property?**

In the letter of appeal, dated December 16, 2002, the appellants contend that the height of the residence proposed for 6804 Zumirez Drive "...does not provide maximum feasible protection to significant private views, which include primary views of the Santa Monica Mountains..." (see Attachment 2).

**Staff Response to Issue Item No. 1:** The initial question of this particular appeal is "What is the primary view from the appellant's property, which is situated south of the subject property, at 6830, 6836 and 6838 Zumirez Drive", and would the proposed height negatively impact the primary view of each of these addresses?

Section 17.40.040.A.17 of the MMC defines "Primary View" as follows:

*"...means the view from the ground floor of a principal residence, excluding hallways and closets, immediately adjoining patio or deck area at the same elevation as the residence which consists of a visually impressive scene or vista not located in the immediate vicinity of the residence, such as a scene of the Pacific Ocean, off-shore islands or the Santa Monica Mountains. The determination of the primary view shall be made by the director, in consultation with the property owner claiming the view. The Director shall consider the nature of the view to be protected and the importance of the area within the structure where the view is taken. The primary view for any structure shall only be determined once. A property owner may appeal the determination of the primary view pursuant to the provisions of Sections 17.04.160 through 17.04.230."*

The appellants, who own and reside in three houses on three separate lots along Zumirez Drive, enjoy unobstructed views of the Pacific Ocean (both bluewater and whitewater), the "Queen's Necklace", and Catalina island from each of their properties. To some extent, views of the Santa Monica Mountains are also in sight beyond these other natural and manmade features. Staff maintains that the appellant's primary view is of these coastline features, and not the Santa Monica Mountains to the north. Staff contends that the existing design and orientation of the dwellings located on the three appellant properties are situated in a manner that maximizes views toward the ocean and the other shoreline features, and reiterates staff's determination of the primary view.

Staff believes that a proposed site design for a new single-family residence at 6830 Zumirez, the appellant's property adjacent to the applicant's proposed site of construction, supports staff's opinion that the primary view of this residence is to the Pacific Ocean. Although, it has been City policy to determine view impacts based on existing structures as opposed to a "proposed" residence, it is important to note that a final planning approval was granted on January 13, 2003, to allow the construction of a new single-family residence on this site. Staff has reviewed the final site layout and notes that the new structure is sited almost identically to the existing structure, which staff believes would maximize views toward the Pacific Ocean, and not the Santa Monica Mountains.

Historically, views of the above mentioned features have been the focus of view preservation efforts when structures are proposed above the base height of 18 feet. Staff further notes that this assertion is supported by a decision of the Malibu City Council on March 13, 2000, and through the final planning approval granted to the appellant for the proposed residence at 6830 Zumirez Drive, as described below:

- On March 13, 2000, the Malibu City Council approved Resolution No. 00-17 (see Attachment 5). The issue at hand was an appeal of the Planning Director's decision to approve Plot Plan Review No. 98-294, Site Plan Review No. 98-090, and Minor Modification No. 99-013, and allow the construction of a new single-family residence at 6830 Zumirez Drive. In affirming the decision of the Planning Director, the City Council (through language contained within the resolution) established that the "primary views of the residences located to the south [of 6830 Zumirez] are to the east and south toward the Pacific Ocean." Therefore, this language established the primary view of 6836 and 6838 Zumirez Drive, two of the appellant's properties, as being toward the Pacific Ocean, and not to the Santa Monica Mountains.

In summation, staff believes that the appellant has a significant view of the Pacific Ocean and other coastline features from each of their properties along Zumirez Drive. Based on the definition contained within the Malibu Municipal Code, staff further believes that these views qualify as "primary views", and will not be impacted by the construction (specifically the height increase) that is proposed at 6804 Zumirez Drive.

**Appellant Issue Item No. 2: Will the proposed height further or oppose the goals, objectives, and policies of the Land Use Element of the General Plan?**

The appellant letter of December 16, 2003 also indicates the following:

*"...Nor does the site plan application establish compliance with all applicable city land use goals, objectives and policies, and other provisions of law."*

The appellants contend that the proposed height of the structure at 6804 Zumirez Drive (28 feet) would contradict the goals, objectives and policies of the Land Use Element of the General Plan. Therefore, the question to be answered is "will the proposed height further or oppose the goals, objectives, and policies of the Land Use Element of the General Plan"?

**Staff Response to Issue Item No. 2:**

Staff has reviewed each of the aforementioned concerns, noting the following that are most applicable to the protection of views, or establish guidelines concerning residential building heights (Please Note: Actual Text from the General Plan is noted in ***bold italics***)

***Land Use Policy 1.1.5: The City shall require careful site planning which blends development with the natural topography***

- ***LU Implementation Measure 9: Require that development not interfere with public and private views and view corridors to the greatest extent feasible.***

As indicated previously, staff believes that the primary view of the appellant's properties is to the south and east (toward the Pacific Ocean). Staff further contends that proposed height of the residential structure at 6804 Zumirez Drive will not adversely interfere with the PRIMARY view of the appellant's properties at 6830, 6836 and 6838 Zumirez Drive. Staff's conclusion is that the proposed height will not inhibit implementation of this particular measure.

***Land Use Objective 1.4: Development consistent with the preservation of the natural topography and viewshed protection.***

- ***LU Policy 1.4.1: The City shall preserve significant ridgelines and other significant topographic features (such as canyons, knolls, hills and promontories).***
- ***LU Policy 1.4.2: The City shall minimize the visual impact of hillside development.***

Staff notes that each of these policies is directly related to construction activities proposed on hillsides and other significant topographic features. As the subject property

and proposed structure is not located on a hillside or any other significant topographic feature, these policies would not be applicable, and a no-impact conclusion would be warranted.

***LU Policy 2.1.5: Consistent with the primary objective of protecting RPAs [Resource Protection Areas], the City shall protect and preserve public and private ocean and mountain views, by striking an equitable balance between the right to reasonable use of one's property including the maintenance of privacy and the right to protection against unreasonable loss of views.***

The General Plan is very detailed and specific in identifying implementation measures for each of the established policies, or groups of policies. A review of the Land Use Implementation Measures that have been developed for Land Use Policies 2.1.1 through 2.1.7 (as identified as LU Implementation Measures 35 through 43, inclusive) reveals that, currently, there are no measures in place that specifically target protection of views at the planning review phase. LU Implementation Measure 42 only recommends the adoption of a citywide view protection ordinance. To date, the City of Malibu has not adopted such an ordinance. Therefore, because the implementation measure is very specific in requiring the adoption of an ordinance, and does not mandate view protection at the planning review phase, this policy would not be applicable, and a no-impact conclusion would be justified. Please note that while an ordinance may not be in place officially, it has been a long-standing policy of staff to determine and implement protection of primary public and private views. This is typically done during the Site Plan Review process, when structures proposed over 18 feet in height are analyzed for primary view impacts to neighboring residences.

Staff would like to reiterate that the primary view of the appellant's property is to the south and east (toward the Pacific Ocean and other coastline features).

***Land Use Objective 2.3: Development of appropriate scale and context***

- ***LU 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.***

Staff again notes that the measures specifically designed to implement this policy (as well as the others in this section) do not provide direction during the planning review phase of a project. They merely provide for the development of overall policies to regulate development.

It should be noted that the proposal for 6804 Zumirez Drive is not unique. It is not unusual within the City of Malibu for an older residence to be demolished and replaced with a larger residence.

**Land Use Objective 2.4: Rural residential neighborhoods in Western Malibu**

- **LU Policy 2.4.1: The City Shall preserve and protect vistas and large open areas that contribute to the rural feeling of the area.**

Once again, staff notes that the adopted implementation measures (identified as LU Implementation Measures 56 through 59, inclusive) do not identify policy/procedures during the planning review phase of a project.

Even so, staff believes that the intent of this objective and policy is to specifically preserve the existing and perceived low-density lifestyle that has emerged in the western portions of the City. It should be noted that the General Plan is not specific in defining what exactly constitutes "Western Malibu"; therefore, it is not certain if this would be applicable to the subject site on Zumirez Drive. In addition, since the proposal is to demolish and rebuild a single-family residence, staff believes that view preservation cannot be an issue since the site has been previously developed.

Finally, the appellant's letter indicates, "we have questions concerning yard and setback determinations". Although staff contends that the appellant has not technically appealed the Plot Plan Review determination (PPR 02-091), information concerning the proposed yard and setback requirements are provided below. Staff notes that with the exception of height, which required Site Plan Review, the proposed project is in conformance with the requirements of Chapter 17.40.

<b>Zoning Conformance Table</b>			
<b>Development Requirement</b>	<b>Required</b>	<b>Proposed</b>	<b>Comments</b>
<b>LOT DIMENSIONS</b>			
Lot Width	150 feet	120 feet	OK – Existing Condition
Lot Depth	250 feet	368 feet	OK – Existing Condition
Lot Area	1 acre	1 acre	OK – Existing Condition
<b>SETBACKS</b>			
Front Yard (20 percent of Lot Depth or 65 feet, whichever is less)	65 feet	65 feet	OK
Rear Yard (15 percent of Lot Depth)	55 feet	55 feet	OK
Side Yard (minimum) (10 percent of Lot Width)	12 feet	12 feet (south) 26 feet (north)	OK
Side Yard (cumulative) (25 percent of Lot Width)	30 feet	38 feet	OK
<b>PARKING</b>	2/2	2/2	OK
<b>STRUCTURE SIZE</b>	7,033 sq. ft.	6,758 sq. ft.	OK
<b>2/3RDS RULE</b>	2,776 sq. ft. (2 <sup>nd</sup> Floor area)	2,594 sq. ft.	OK
<b>HEIGHT</b>	18 feet or 24' FLAT 28' PITCHED	28 feet pitched	Site Plan Review
<b>IMPERMEABLE COVERAGE</b>	13,068 sq. ft.	13,053 sq. ft.	OK
<b>NON-EXEMPT GRADING</b>	1,000 cubic yards	250 cubic yards	OK
<b>SLOPE</b>	< 3:1	< 3:1	OK

In summation, staff contends that the appellant's claim that the proposed height of the residence will contradict the goals, objectives, and policies of the Land Use Element of the General Plan is not warranted. Furthermore, staff believes that the arguments presented herein support this contention, and show that no adverse impact to General Plan will occur.



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**PUBLIC NOTICE AND CORRESPONDENCE:**

On January 30, 2003, pursuant to Section 17.04.180 of the MMC, staff published the required 21-day public notice in the Malibu Surfside News. Property owners and occupants within a 500-foot radius of the subject property were notified of the proposal and appeal. All correspondences received to date are attached and are in

**ATTACHMENTS:**

1. Proposed Resolution No. 03-02
2. Letter of Appeal, dated December 16, 2002
3. Notice of Decision, dated December 5, 2002
4. Proposed Development Plans for 6804 Zumirez Drive
5. City Council Resolution No. 00-017, dated March 13, 2000
6. Public Notices
7. Public Correspondence
8. Biological Assessment, prepared by Ecological Sciences, Inc.



2840 S. HARBOR BLVD., SUITE C-5 ♦ CHANNEL ISLANDS HARBOR, OXNARD, CA 93035  
TEL 805.985.1944 ♦ FAX 805.985.1945 ♦ EMAIL: SCAMERON@ECOSCIENCESINC.COM

February 24, 2003

Mr. Eric Jacobson  
6804 Zumirez Drive  
Malibu, CA 90265

**SUBJECT: Results of General Biological Assessment, Proposed Jacobson Residence, City of Malibu, Los Angeles County, California**

Dear Eric:

This letter report presents findings of a reconnaissance-level survey conducted to generally evaluate the potential of a ±2-acre site to support potentially occurring sensitive biological resources known from the site vicinity. This analysis is based on information compiled through field reconnaissance and by applicable reference materials.

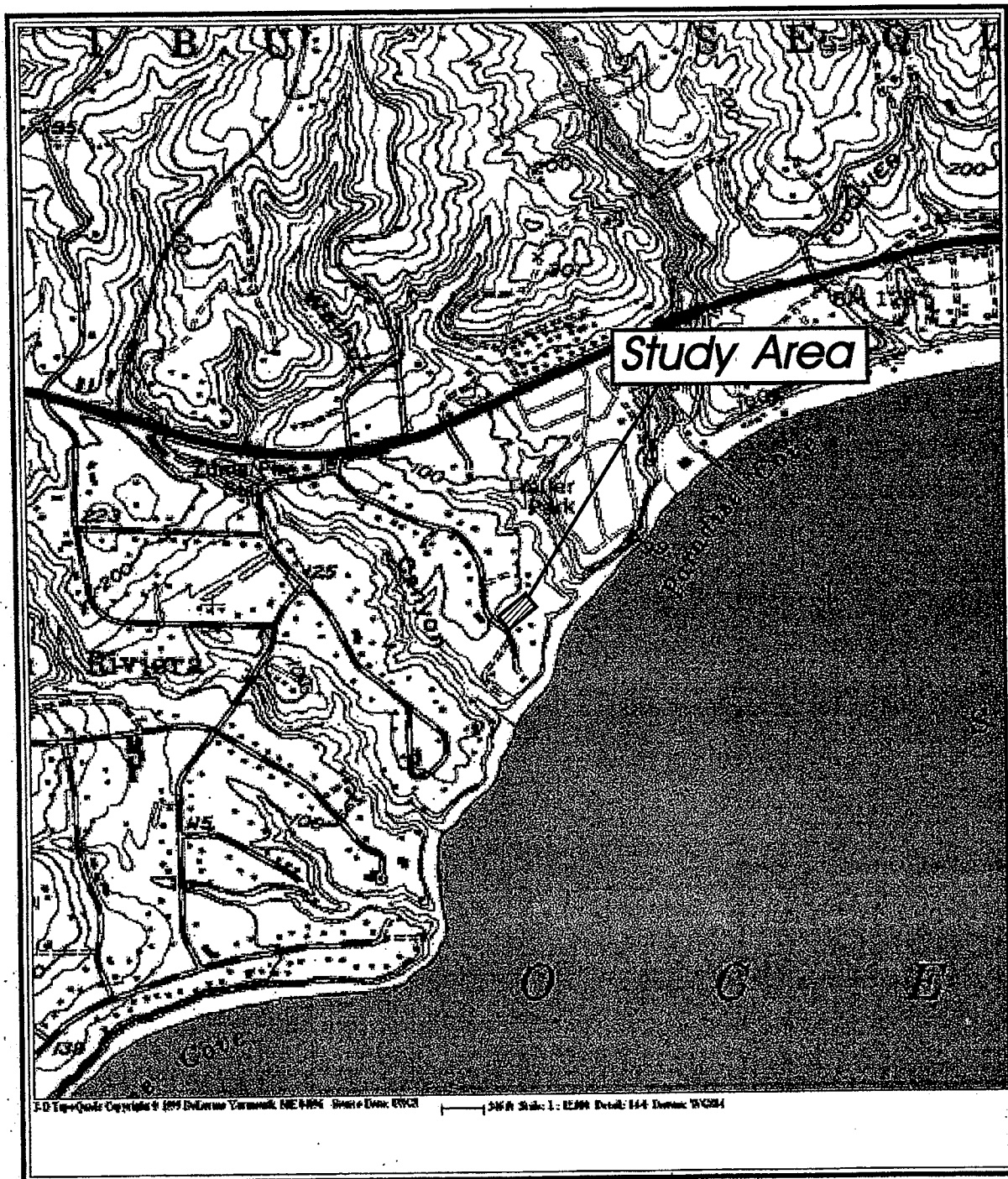
### ***Introduction***

The proposed project site is located at 6804 Zumirez Drive, City of Malibu (City), Los Angeles County, California (Plate 1). The site occurs on the Point Dume USGS 7.5-minute topographic map. The applicant proposes to construct a single-family residence in roughly the same location as the existing residence. The subject area is zoned as RR1: Rural Residential-one dwelling unit per acre (1du/acre) per review of the City of Malibu Land Use Maps (Zuma Beach to Escondido Beach).

Projects proposed in the City that contain potentially suitable habitat to support sensitive biological resources must demonstrate to reviewing agencies that project-related impacts to these resources are avoided or minimized. Under the City's existing Planning Department system, projects that involve new construction, grading, or increases to an existing building footprint requires review by the City Biologist. In addition to project review by the City Biologist, biological resources present within the project site may fall under the jurisdiction of state and/or federal agencies, including but not necessarily limited to, California Department of Fish and Game (CDFG), Regional Water Quality Control Board (RWQCB), U.S. Army Corps of Engineers (USACOE), U.S. Fish and Wildlife Service (Service), California Coastal Commission (CCC), and the County of Los Angeles (County). Accordingly, results of the biological survey detailed herein provide necessary biological information to the applicant for use in environmental compliance and permitting. No focused surveys for potentially occurring sensitive biological resources were conducted as a part of this assessment. Therefore, conclusions relative to presence or absence of certain sensitive biological resources are primarily based on habitats present.

Pursuant to the California Coastal Commission City of Malibu Local Coastal Program adopted on September 13, 2002 and the City's Land Use Plan (LUP), which provides for protection of sensitive biological resources, projects proposed within the City limits must, at a minimum, have a biological inventory prepared prior to site development. Applications for new development on properties that are located within areas identified as an Environmentally Sensitive Habitat Area (ESHA) per the CCC, or are adjacent to an identified ESHA (within 200 feet), shall have a detailed biological study of the site. In cases where projects are proposed on parcels that support natural vegetation, the City Biologist works with the applicant and/or architect to ensure that biological impacts are minimized to the extent feasible. In the event that project impacts cannot be minimized, review requirements of the California Environmental Quality Act (CEQA) are applied.

Attachment 8



U.S. Topographic Copyright © 1979 DeLorme Vermont, ME & NY State Dept. 07621 1:25,000 Scale: 1:12,500 Detail: 1:44,000 Datum: NAD83

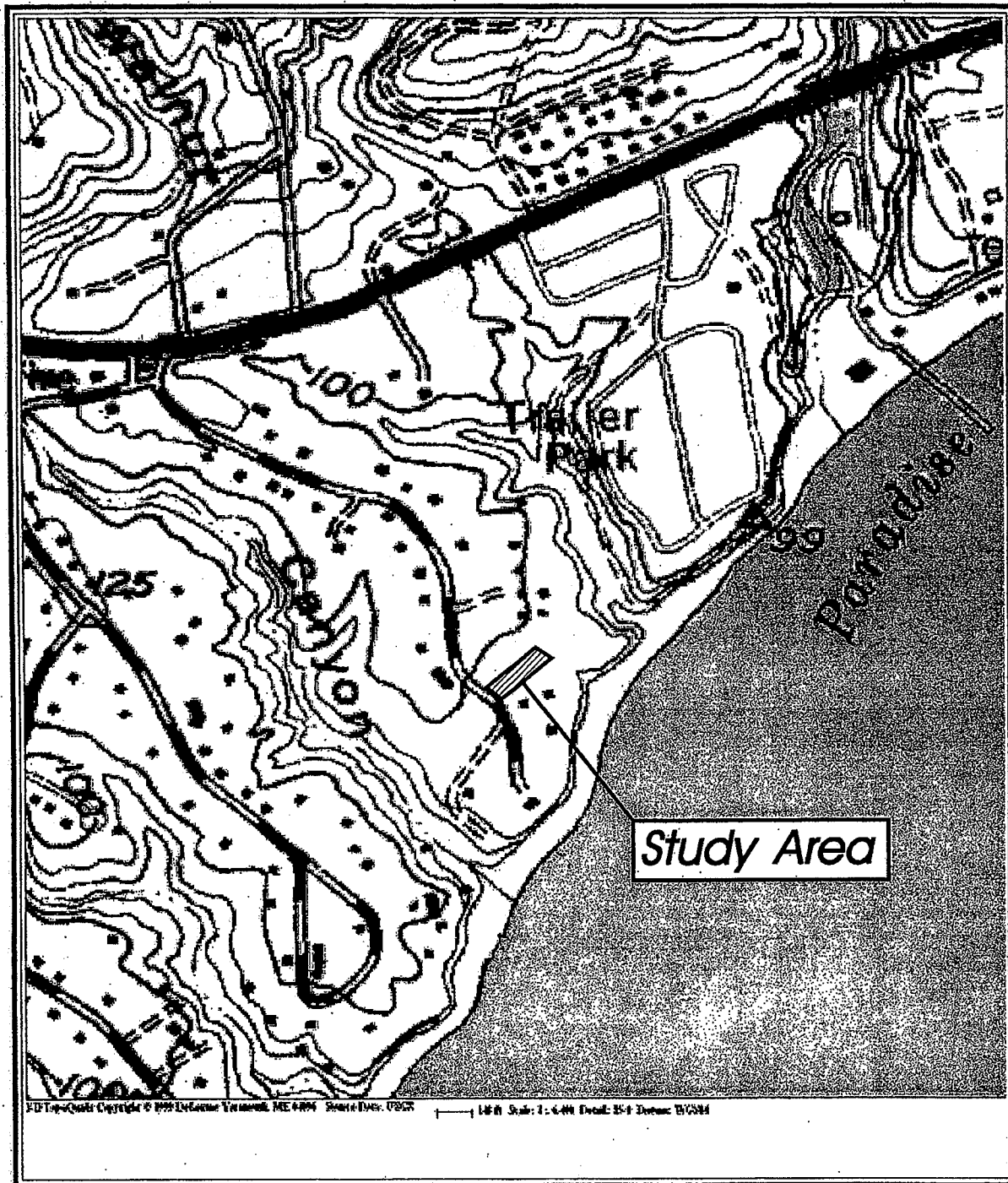
plate 1



February 2003

## Regional Site Location

Jacobson Residence



February 2003

plate 2

**Site Vicinity**

Jacobson Residence

ESHA's are generally defined by the LCP as 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. These areas are generally shown on the LUP ESHA maps. Riparian areas, streams, native woodlands, native grasslands/savannas, chaparral, coastal sage scrub, dunes, bluffs, and wetlands are considered, unless there is site-specific evidence that a habitat area is not especially valuable because of its special nature or role in the ecosystem. Regardless of whether streams and wetlands are designated as ESHA, the policies and standards in the LCP applicable to streams and wetlands shall apply. Existing, legally established agricultural uses, confined animal facilities, and fuel modification areas required by the Los Angeles County Fire Department for existing, legal structures do not meet the definition of ESHA (City of Malibu, Local Coastal Program, Land Use Plan, adopted by the CCC on September 13, 2002, pursuant to the provisions of PRC Section 30166.5).

### ***Investigative Methods***

Biological investigations conducted during the preparation of this report consisted of a review of available literature on the biological resources of the region and a reconnaissance-level field survey of the project site as described below.

#### **Scientific Literature Compilation and Review**

Various data sources were reviewed to evaluate botanical and zoological resources of the area, as well as the potential occurrence of special-status species on the project site. Historical occurrence records of special-status plant and wildlife species were obtained from the California Natural Diversity Data Base (CNDDDB 2002) for the Point Dume USGS 7.5 minute quadrangle map and the California Native Plant Society (CNPS) electronic inventory (2001). This quadrangle map completely contains the property, as well as an appropriate buffer area around the project site. Other data sources reviewed include: (1) literature pertaining to habitat requirements of special-status species potentially occurring in the project site and (2) distributional data contained in Hall (1981); Holland (1986); and Stebbins (1985). Special-status or sensitive species are those that have been afforded special protection or recognition by federal, state, or local resource conservation agencies due principally to declining or limited populations, mainly as a result of habitat reduction.

Sources used to determine the sensitivity status of biological resources included: **Plants**-Service (1996), CDFG (2001), CNDDDB (2001), (CNPS 2001); **Wildlife**-Service (1996), CDFG (2001), CNDDDB (2002); **Habitats**- CNDDDB (2001). Names used to describe plant communities are based on the nomenclature of Holland (1986) where applicable. Common plant names are taken from Hickman (1993) and McCauly (1985). References used for the nomenclature of wildlife include Jennings (1983) for amphibians and reptiles, the American Ornithologists' Union (1989, 1993 and supplements) for birds, and Jones et al (1992) for mammals.

#### **Reconnaissance-level Field Survey and Jurisdictional Evaluation**

Ecological Sciences, Inc. conducted a field visit on February 16, 2003 to evaluate the site's potential to support sensitive biological resources (e.g., plant, animal, or habitats considered rare, threatened, sensitive, endangered, or otherwise unique by regulatory or resource agencies). Plant species and vegetation communities were identified by walking transects over portions of the site, with particular emphasis placed on the drainage/ravine area. All direct observations of wildlife were recorded, as was wildlife sign. In addition to species actually detected, expected use of the site by other wildlife was evaluated from habitat analysis of the site, combined with known habitat preferences of locally occurring wildlife species.

Weather conditions at the time of the survey effort were warm and clear, with a slight breeze (1-2 mph). Ambient air temperature at the time of the survey effort was 70 degrees Fahrenheit.



## Existing Site Conditions

The subject site currently contains a single-family residence with a gated entrance and an asphalt driveway. Most of the lot is landscaped with various native and non-native ornamentals. Of the plant species recorded on site (n=64), 21 were native (33 percent), 43 were non-native (67 percent). Railroad tie and brick steps lead to several dirt paths within an on-site drainage/ravine feature that has been robustly landscaped with both native and non-native species. Vegetation in the ravine is often generally referred to as "Point Dume Scrub." This vegetation type consists of a combination of native plants and non-native ornamentals that have been planted and groomed to provide cover, shade, fruit, and fire protection. The east side of the ravine is dominated by myoporum (*Myoporum* sp.), pittosporum (*Pittosporum* sp.), and coyote brush (*Baccharis pilularis*). A plant list is included below in Table 1.

The ravine bottom and much of the banks are dominated by a dense coverage of ice plant (*Carpobrotus* spp.). Within the ground cover openings, relatively widely spaced native and ornamentals were either planted by the property owner, allowed to persist if present, or were considered "recruitments." Planted trees included western sycamore (*Platanus racemosa*), gum tree (*Eucalyptus* spp.), non-native ash (*Fraxinus* spp.), coral tree (*Erythrina* sp.), acacia (*Acacia* sp.), citrus (*Citrus* spp.), and avocado (*Persea americana*). Shrubs present include lemonadeberry (*Rhus integrifolia*), California sagebrush (*Artemisia californica*), coyote brush, buckbrush (*Ceanothus* sp. cultivar), tree mallow (*Lavatera* sp.), toyon (*Heteromeles arbutifolia*), canna lilies (*Canna* sp.), oleander (*Nerium oleander*), and bush poppy (*Dendromecon rigida*).

The coastal bluff face (outside the subject property boundary) supports patches of quailbush (*Atriplex lentiformis*), lemonadeberry, and ice plant where soil conditions are suitable. Where the ravine bottom spills water over the edge of the bluff, a few willows (*Salix* sp.) and knotweed (*Polygonum* sp.) have become established, although sparse. Existing land uses surrounding the project site include existing single-family residences. Appendix A photographically illustrates existing site conditions within and adjacent to the ravine area.

Table 1

Flora Recorded during the February 2003 Site Survey

SCIENTIFIC NAME	COMMON NAME	PLANT TYPE
<i>Acacia</i> sp.	Acacia	Ornamental shrub
<i>Agapanthus</i> sp.	Lily of the Nile	Ornamental herb
<i>Agave</i> sp.	Agaves	Ornamental shrub
<i>Agrostis</i> sp.	Bent grass	Native grass
<i>Anagallis arvensis</i>	Scarlet pimpernel	Non-native herb
<i>Aptenia cordifolia</i>	Red apple	Ornamental ground cover
<i>Artemisia californica</i>	California sagebrush	Native shrub
<i>Atriplex lentiformis</i>	Quail bush	Native shrub
<i>Baccharis pilularis</i>	Coyote brush	Native shrub
<i>Bromus diandrus</i>	Rippgut grass	Non-native grass
<i>Bromus madritensis</i> ssp. <i>rubens</i>	Soft chess	Non-native grass
<i>Brugmansia candida</i>	Angel's trumpet	Ornamental shrub
<i>Calystegia macrostegia</i>	Morning glory	Native herb
<i>Canna</i> sp.	Canna lilies	Ornamental shrub
<i>Carpobrotus</i> spp.	Ice plant, Hottentot fig	Non-native ground cover
<i>Ceanothus</i> sp. cultivar	Buck brush	Native shrub
<i>Chenopodium murale</i>	Goosefoot	Non-native herb
<i>Citrus</i> sp.	Tangerine, Grapefruit	Ornamental shrub
<i>Coreopsis gigantea</i>	Giant coreopsis	Native herb
<i>Crassula argentea</i>	Jade plant	Ornamental shrub
<i>Dendromecon rigida</i>	Bush poppy	Native shrub



Table 1-continued

## Flora Recorded during the February 2003 Site Survey

SCIENTIFIC NAME	COMMON NAME	PLANT TYPE
<i>Eriogonum cinereum</i>	Ashy-leaved buckwheat	Native shrub
<i>Erythrina</i> sp.	Coral tree	Ornamental tree
<i>Eschscholtzia californica</i>	California poppy	Native herb
<i>Eucalyptus</i> spp.	Gum tree	Ornamental tree
<i>Euphorbia peplus</i>	Petty spurge	Non-native herb
<i>Fraxinus</i> sp.	Ash	Ornamental tree
<i>Heteromeles arbutifolia</i>	Toyon	Native shrub
<i>Hibiscus</i> sp.	Hibiscus	Ornamental shrub
<i>Iris</i> sp.	Iris	Ornamental herb
<i>Lavatera</i> sp.	Tree mallow	Ornamental shrub
<i>Leymus</i> sp.	Rye grass	Native grass
<i>Lilium</i> spp.	Daylilies	Ornamental lilies
<i>Limonium</i> sp.	Sea lavender	Ornamental herb
<i>Lotus scoparius</i>	California broom	Native shrub
<i>Malva parviflora</i>	Cheeseweed	Non-native herb
<i>Marah macrocarpa</i>	Wild cucumber	Native perennial vine
<i>Medicago polymorpha</i>	Bur-clover	Non-native herb
<i>Mentha</i> sp.	Mint	Non-native herb
<i>Myoporum</i> sp.	Myoporum	Ornamental shrub
<i>Nephrolepis cordifolia</i>	Swordferns	Native herb
<i>Nerium oleander</i>	Oleander	Ornamental shrub
<i>Opuntia ficus-indica</i>	Mission cactus	Ornamental shrub
<i>Osteospermum</i> sp.	African daisies	Non-native herb
<i>Oxalis pes-caprae</i>	Bermuda buttercup	Non-native herb
<i>Pelargonium</i> sp.	Geranium	Ornamental shrub
<i>Persea americana</i>	Avocado	Ornamental shrub
<i>Phlomis russelliana</i>	Jerusalem sage	Ornamental shrub
<i>Picris eschoides</i>	Bristly ox-tongue	Non-native herb
<i>Pittosporum</i> sp.	Pittosporum	Non-native tree
<i>Platanus racemosa</i>	Western sycamore	Native tree
<i>Rhus integrifolia</i>	Lemonadeberry	Native shrub
<i>Rumex</i> sp.	Dock	Native herb
<i>Salix</i> spp.	Willows	Native tree
<i>Sambucus mexicana</i>	Elderberry	Native shrub
<i>Senecio vulgare</i>	Common senecio	Non-native herb
<i>Solanum</i> sp.	Nightshade	Native herb
<i>Sonchus</i> spp.	Dandelion	Non-native herb
<i>Strelitzia nicolai</i>	Bird of paradise	Ornamental shrub
<i>Tecomaria capensis</i>	Cape honeysuckle	Ornamental shrub
<i>Tropaeolum majus</i>	Nasturtium	Non-native herb
<i>Vinca major</i>	Periwinkle	Non-native ground cover
<i>Washingtonia</i> sp.	Palm	Ornamental shrub
<i>Zantedeschia</i> sp.	Calla lilies	Ornamental herb

## Wildlife

Wildlife species directly observed, or of which sign was detected, included American crow (*Corvus brachyrhynchos*), mourning dove (*Zenaida macroura*), California towhee (*Pipilo crissalis*), house finch (*Carpodacus mexicanus*), Anna's hummingbird (*Calypte anna*), and northern mockingbird (*Mimus polyglottos*).



### **Potential Jurisdictional Feature**

The site was generally inspected for drainage features that may fall under the jurisdiction of the USACOE and CDFG. The USACOE regulates the deposition of fill material into waters of the U.S. CDFG regulates alterations to lakes, streambeds and associated riparian vegetation.

A ravine is located on the eastern portion of the property. The ravine appears to only carry water during large rain events, as evidenced by the small areas of water-carried litter present on the relatively broad drainage floor. Over time, the owner has landscaped the on-site ravine with trees, shrubs, and groundcovers. Using lawn clippings and other vegetative material, the owner has successfully prevented further erosion of the ravine bottom. A deep layer of humus has developed on the floor and west bank of the ravine. This deep layer, combined with the ground cover plants and broadness of the ravine bottom (6 feet), absorbs and dissipates erosive water flows. Head cutting from the coastal bluff at the south edge of the ravine is no longer occurring. Water from this ravine pours down the coastal bluff cliff face and onto the beach sand, where it pools or percolates.

The ravine bottom may be considered "waters of the U.S." by USACOE and a streambed per the CDFG Code. The landscaping/humus layer has obscured the channel definition and ordinary high water mark on the site. Upstream of the subject property, the ravine has a small, incised, low-flow channel about 6 to 8 inches deep and wide resulting in a defined channel, bed, and bank, which could be extrapolated downstream through this subject property. No impacts to the drainage feature are proposed based on our understanding of current site plans.

### **Regulatory Framework**

Several regulatory agencies evaluate projects that may impact jurisdictional resources and each issues a permit with conditions. Under Section 404 of the Federal Clean Water Act the USACOE regulates fill material discharged into "waters of the U.S.," including wetlands. Wetlands are defined through a three-parameter test involving wetland hydrology, wetland vegetation, and hydric soils. If a project is determined to need a permit from the USACOE, then the RWQCB reviews the action and may issue a Section 401 certification. In addition to the federal Section 404 regulatory process, the State of California regulates water resources under Section 1601-1603 of the California Fish and Game Code. These regulations cover "...any project which will divert, obstruct or change the natural flow or bed, channel or bank of any river, stream or lake designated by the department in which there is at any time an existing fish or wildlife resource or from which these resources derive benefit..." (California Fish and Game Code, Section 1601). The CDFG considers most drainages to be "streambeds" unless it can be demonstrated otherwise. A stream is defined as "a body of water that flows at least periodically or intermittently through a bed or channel having banks and supports fish or other aquatic life. This includes water courses having a surface or subsurface flow that supports or has supported riparian vegetation" (California State Register No. 87, No. 9, Section 1.72). In general, CDFG defines riparian vegetation more broadly than the hydrophytic vegetation criterion in the USACOE manual. CDFG jurisdiction extends to the outer limit of the riparian vegetation canopy along a stream if it extends beyond the top of the bank. No direct impacts to jurisdictional resources are expected as a result of construction based on our understanding of project footprint limits.

### **Sensitive Biological Resources**

Discussed in this section is plant and wildlife species potentially occurring on the project site based on review of the CNDDB (2002), CNPS (2001), other pertinent literature, and habitat types present. These sensitive biological resources have been afforded special recognition by federal, state, or local resource conservation agencies and organizations.

### **Special-Status Plant Species**

No special-status plant species were detected on site during the reconnaissance survey of site and none are expected due to lack of suitable habitat. The occurrence potential of sensitive plant species is primarily based on habitat types present, occurrence records of sensitive species in the vicinity, and





results of the general botanical site survey. Special-status plant species known from the region that potentially occur within the project site are summarized below in Table 2. No focused surveys were conducted for sensitive plant species.

Table 2

Summary of Special-Status Plant Species Potentially Present on the Project Site<sup>1</sup>

Scientific Name	Common Name	Status			Habitats	Blooming Period	Occurrence Potential
		CNPS	CDFG	USFWS			
<i>Atriplex coulteri</i>	Coulter's saltbush	1B	-	-	Cb, Cs, Gr with alkaline or clay soils	March-October	Low
<i>Baccharis malibuensis</i>	Malibu baccharis	1B	-	-	Ch, Cs, Cw	August	Low
<i>Carnissonia lewisii</i>	Lewis's evening primrose	3	-	-	Cb, Cw, Cd, Cs, Gr	March-June	Low
<i>Chorizanthe parryi</i> var. <i>parryi</i>	Parry's spineflower	3	-	FSC	Ch, Cs with sandy or rocky openings	April-June	Low
<i>Calochortus plummerae</i>	Plummer's mariposa lily	1B	-	FSC	Ch, Cw, Cs, Gr, granitic soils	May-July	Low
<i>Thelypteris puberula</i> var. <i>sonorensis</i>	Sonoran maiden fern	2	-	-	Md with seeps and streams	January-September	Low
<i>Dudleya blochmaniae</i> ssp. <i>blochmaniae</i>	Blochman's dudleya	1B	-	FSC	Cb, Cs, Gr rocky, clay, serpentine	April-June	Low
<i>Dudleya cymosa</i> ssp. <i>marcescens</i>	Marcescent dudleya	1B	CR	FT	Ch volcanic	May-June	Low
<i>Dudleya cymosa</i> ssp. <i>ovatifolia</i>	Santa Monica Mountains dudleya	1B	-	FT	Ch, Cs volcanic	Mar-June	Low
<i>Deinandra minthornii</i>	Santa Susana tarplant	1B	CR	FSC	Ch, Cs rocky	July-November	Low
<i>Juglans californica</i> var. <i>californica</i>	Southern California black walnut	4	-	-	Ch, Cw, Cs alluvial	March-May	Low
<i>Pentachaeta lyonii</i>	Lyon's pentachaeta	1B	CE	FE	Ch openings, Gr	March-August	Low
<i>Astragalus brauntonii</i>	Braunton's milkvetch	1B	-	FE	Cc, Ch, Cs, Gr	March-July	Low
<i>Erodium macrophyllum</i>	Round-leaved filaree	2	-	-	Cw, Gr	March-May	Low
<i>Sidalcea neomexicana</i>	Salt Spring checker bloom	2	-	-	Ap, Bm, Ch, Cs, Lm	March-June	Low

KEY:

<sup>1</sup>Primarily based on review of 2002 CNDDDB and 2001 CNPS databases.

**\*Habitat Type:**

Ap: Alkali playas  
 Bm: Brackish marshes  
 Cb: Coastal bluff scrub  
 Cc: Closed-cone coniferous forest  
 Cd: Coastal dunes  
 Ch: Chaparral  
 Cs: Coastal sage scrub  
 Cw: Cismontane woodland  
 Gr: Grasslands  
 Lm: Lower-montane coniferous forest  
 Md: Meadows

**\*Status:**

**CNPS: California Native Plant Society**  
 1B = Plants Rare, Threatened, or Endangered in California and elsewhere  
 2 = Plants Rare, Threatened, or Endangered in California, but more common elsewhere  
 3 = Plants about which more information is needed  
 4 = Plants of limited distribution - a Watch List

**CDFG: California Department of Fish and Game**  
 CE = California Endangered Species  
 CR = California Rare

**USFWS: U.S. Fish and Wildlife Service**  
 FSC = Federal Species of Concern  
 FE = Federal Endangered Species  
 FT = Federal Threatened Species



## Special-Status Wildlife Species

No sensitive invertebrates, amphibians, reptiles, birds, or mammals were directly observed within the project site, and most potentially occurring sensitive species are not expected due to lack of suitable habitat. The occurrence potential of sensitive wildlife species is primarily based on habitat types present, occurrence records of sensitive species in the vicinity, and results of the on-site reconnaissance survey. Sensitive wildlife species known from the site vicinity are summarized below in Table 3. No focused surveys were conducted for sensitive wildlife species.

**Table 3**  
**Special-Status Wildlife Species Potentially Occurring on the Project Site<sup>1</sup>**

Scientific Name	Common Name	Status	Occurrence Potential
<b>Invertebrates</b>			
<i>Danaus plexippus</i> (roosting sites)	Monarch	♦	Low
<i>Neduba longipennis</i>	Santa Monica shieldback katydid	♦	Low
<b>Amphibians</b>			
<i>Taricha torosa torosa</i>	Coast range newt	CSC	Low
<b>Reptiles</b>			
<i>Cnemidophorus tigris multiscutatus</i>	Coastal western whiptail	FSC	Low
<i>Phrynosoma coronatum blainvillii</i>	San Diego horned lizard	FSC/CSC	Low
<i>Anniella pulchra pulchra</i>	Silvery Legless lizard	FSC/CSC	Low
<i>Clemmys marmorata pallida</i>	Southwestern pond turtle	CSC	Low
<i>Diadophis punctatus modestus</i>	San Bernardino ringneck snake	♦	Low
<i>Thamnophis hammondi</i>	Two-striped garter snake	CSC	Low
<b>Birds</b>			
<i>Riparia riparia</i>	Bank swallow	FT	Low
<i>Accipiter striatus</i>	Sharp-shinned hawk	CSC	Low
<i>Accipiter cooperi</i>	Cooper's hawk	CSC	Moderate
<i>Aimophila ruficeps canescens</i>	Southern California rufous-crowned sparrow	FSC/CSC	Low
<i>Amphispiza belli belli</i>	Bell's sage sparrow	FSC	Low
<b>Mammals</b>			
<i>Neotoma lepida intermedia</i>	San Diego desert woodrat	FSC/CSC	Low
<i>Taxidea taxus</i>	American badger	♦	Low

**KEY:**

<sup>1</sup>Primarily based on review of 2002 CNDDB

**\* Status:**

**Federal—U.S. Fish and Wildlife Service**

FE: Federally Endangered  
 FT: Federally Threatened  
 FPE: Federally Proposed Endangered  
 FPT: Federally Proposed Threatened  
 FC: Federal Candidate for listing as threatened or endangered  
 FSC: Federal Species of Concern—a designation that does not provide formal protection under law.  
 MNBMC: Migratory Nongame Birds of Management Concern (not shown for federally listed or proposed threatened or endangered species)

**State—California Department of Fish and Game**

CE: California Endangered  
 CT: California Threatened  
 CCE: California Candidate (Endangered)  
 CCT: California Candidate (Threatened)  
 CFP: California Fully Protected  
 CP: California Protected  
 CSC: California Special Concern  
 ♦: Special Animal (species with no official federal or state status, but are included on CDFG's Special Animals list)

## Special-Status Habitats

Special-status habitat types are vegetation communities that support concentrations of sensitive plant or wildlife species, are of relatively limited distribution, or are of particular value to wildlife (CNDDB 2002). Although sensitive habitats are not necessarily afforded legal protection unless they support protected species, potential impacts to them may increase concerns and mitigation suggestions by resources



agencies. No special-status habitat types were recorded on site. The on-site ravine area does not support native riparian habitat, and no direct impacts are proposed to the on-site ravine based on our review of site plans for the project.

### **Wildlife Movement**

Wildlife movement corridors link together areas of suitable wildlife habitat that are otherwise separated by rugged terrain, changes in vegetation, human disturbance, or the encroachment of urban development. Drainages and their associated vegetation also provide food, cover, and water for wildlife species, as well as for localized movement of smaller animals and many plant species. Given the context in which the drainage occurs relative to the location of the proposed development, the nature of the proposed development (construction of a newer single-family residence), and that the development area avoids direct impacts to the drainage area, project implementation would not be expected to adversely affect wildlife movement through the site.

### **Potential Constraints Posed by Sensitive Biological Resources**

Constraints posed by biological resources upon development of the project site were generally evaluated by ranking the following sensitive biological issues, listed in descending order of significance: (1) a federally or state-listed endangered or threatened species of plant or animal; (2) streambeds, wetlands, and their associated vegetation; (3) habitats suitable to support a federally or state-listed endangered or threatened species of plant or wildlife; (4) species designated as candidates for federal listing; (5) habitat, other than wetlands, considered sensitive by regulatory agencies or resource conservation organizations; and (6) other species or issues of special concern to agencies, resource conservation organizations, or other interest groups.

The level of constraint that a biological resource would pose to potential development typically depends on the following criteria: (1) the relative value of that resource; (2) the amount or degree of impact to the resource; (3) whether or not impacts to the resource would be in violation of state and/or federal regulations or laws; (4) whether or not impacts to the resource would require permitting by resource agencies; and (5) the degree to which impacts on the resource would otherwise be considered "significant" under CEQA.

Based on the aforementioned criteria, current land use and vegetation types were ranked with respect to relative biological value, both within the site and in comparison to natural communities nearby. Based on this analysis, on-site areas have been given a low biological constraint rating based on the degree in which expected impacts to on-site resource would meet the various criteria discussed above. This designation is due to the existing disturbance level associated with existing residential development and long-standing landscaping uses that have resulted in low biological diversity on the site, overall absence of native plant communities, and the generally low potential for special-status species to utilize or reside within areas proposed for development.

### **Discussion**

The nearby presence of a ravine potentially considered jurisdictional may impose some degree of constraint on development depending upon the nature of both direct and indirect impacts on this resource. An evaluation of whether or not an impact on biological resources would be substantial must consider both the resource itself and how that resource fits into a regional or local context. Substantial impacts would be those that would diminish, or result in the loss of, an important biological resource, or those that would obviously conflict with local, state, or federal resource conservation plans, goals, or regulations. Given that impacts to sensitive biological resources are not expected based on review of site plans, development of the project is not expected to adversely affect sensitive biological resources.

A formal delineation for either state or federal wetland jurisdiction was not conducted for this analysis. However, because the on-site drainage may be considered jurisdictional by regulatory agencies, any encroachment beyond the terrace may impact the jurisdictional drainage feature and trigger the need to obtain appropriate permits prior to development. Care must be exercised when development



approaches the top of the bank to ensure that any potential jurisdictional resources are not directly impacted. Landscaping under the direction of the City biologist should be implemented where appropriate or if necessary, such that erosion or other instabilities are not created. When developing adjacent to the unnamed drainage, and to possibly avert the need to obtain jurisdictional permits, the channel should be avoided such that no fill material is placed in the drainage. Conversely, if the drainage must be impacted as a result of development either to mitigate a geotechnical hazard or provide water conveyance, impacts may be mitigated by habitat-inclusive improvements by enhancing habitat values along the drainage. Non-native vegetation may be removed and replaced with native shrubs, elderberry, mule fat, or willows, for example. If the drainage is inadvertently impacted during construction activities prior to obtaining appropriate jurisdictional permits, the impact could violate state and/or federal regulations with the possible result of fines and/or project delays. Based on a site visit with the project applicant/landowner and our preliminary review of the proposed site plan, the drainage area is not expected to be directly impacted as a result of construction activities. Site plans indicate a 55-foot rear setback from the eastern property boundary (drainage area).

No federal- or state-listed species are expected in areas proposed for residential development. However, many potentially occurring native bird species, although not protected by state or federal endangered species acts, are protected under the federal Migratory Bird Treaty Act (MBTA) of 1918 (16 U.S.C. 703-711) and/or CDFG Code sections 3503, 3503.5, and 3800. These sections prohibit take, possession, or destruction of birds, their nests or eggs. If it were later determined that active nests of any of special-status species would be lost or indirectly impacted as a result of site-preparation, it would be in conflict with these regulations. In order to avoid violation of the MBTA or CDFG Code sections, general guidelines suggest that project-related disturbances at active nesting territories be reduced or eliminated during the nesting cycle (typically February to August). Should eggs or fledglings be discovered on a site, the nest cannot be disturbed (pursuant to CDFG guidelines) until the young have hatched and fledged (matured to a stage that they can leave the nest on their own). Compliance with the MBTA and/or CDFG codes would be necessary prior to development, however no special permit or approval is typically required in most instances. Depending upon the species and seasonal timing of proposed construction activities, pre-activity surveys may be required prior to construction activities in order to avoid or even further reduce potential impacts to special-status avian species.

## Conclusion

Based on results of the general biological assessment conducted in support of the proposed project, the potential of the subject site to support sensitive biological resources would be considered low due to the sites existing disturbed condition and overall absence of suitable native habitats. Construction related activities are not expected to adversely affect any federal- or state-listed threatened or endangered species, nor would construction adversely impact designated critical habitat. Construction activities would also not be expected to significantly affect the diversity of biological resources present in the area because no unique, rare, or endangered plant or wildlife species are expected to occur on site. In addition, a significant introduction of new plant species to the site is not expected following construction, as the site currently supports extensive landscaping, much of which would remain on the site (e.g., ravine area). If additional landscaping were proposed or required as part of the proposed development, landscaping species would be chosen from approved native plant palette under the direction of the City Biologist.

According to our review of the Local Coastal Program, City of Malibu, ESHA Overlay Map 2: Zuma Beach to Escondido Beach (adopted September 13, 2002), the subject site (in particular the on-site ravine) is not located within an area designated as ESHA, and vegetative characteristics of the site are not consistent with those that would be considered to meet ESHA criteria. While the development project is located within 200 feet of an ESHA (the coastal bluff area), no direct impacts to the coastal bluff ESHA would occur. The subject development footprint is located greater than 100 feet away from the nearest ESHA boundary. Accordingly, no ESHA impacts are associated with the proposed development project.



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The development project is designed to be highly compatible with biotic resources present on the site by maximizing existing disturbed areas and avoiding direct impacts to the on-site ravine (unnamed drainage). Accordingly, no significant direct impacts to sensitive biological resources are expected as a result of construction activities.

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It has been a pleasure conducting this general habitat suitability evaluation at the ±2-acre project site located in Malibu, California. If you have any questions regarding the results presented in this report, please don't hesitate to call.

Sincerely,

Ecological Sciences, Inc.

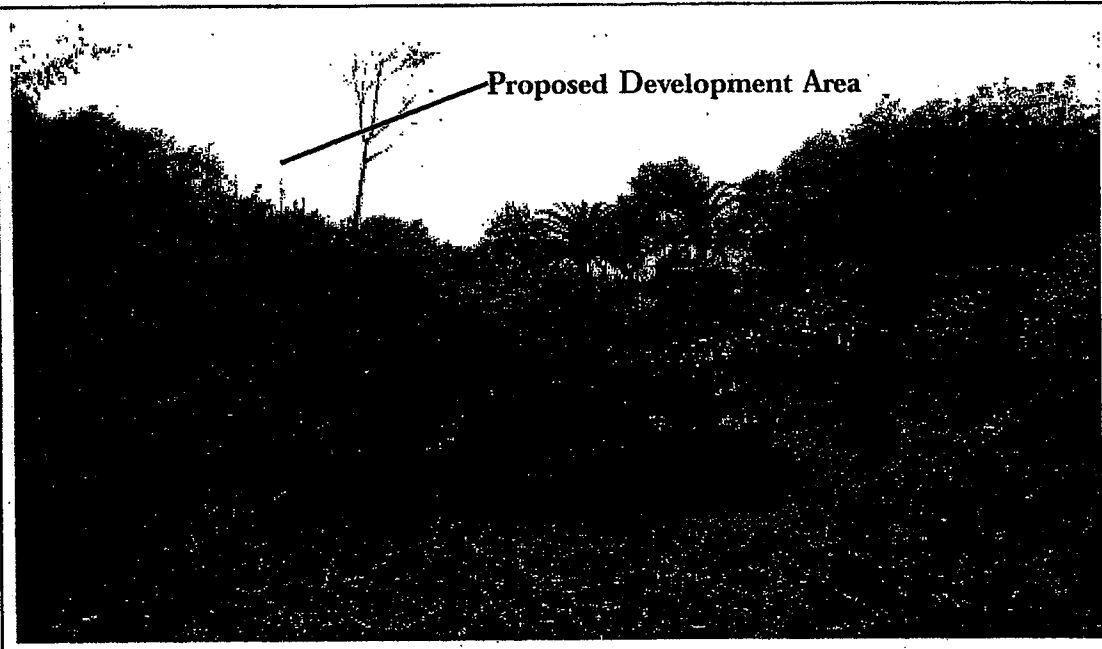
Scott D. Cameron  
Principal Biologist



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View to north of on-site ravine (off site)



View to north of on-site ravine (on site)



View to north of ravine and walking path



View to south from on-site ravine

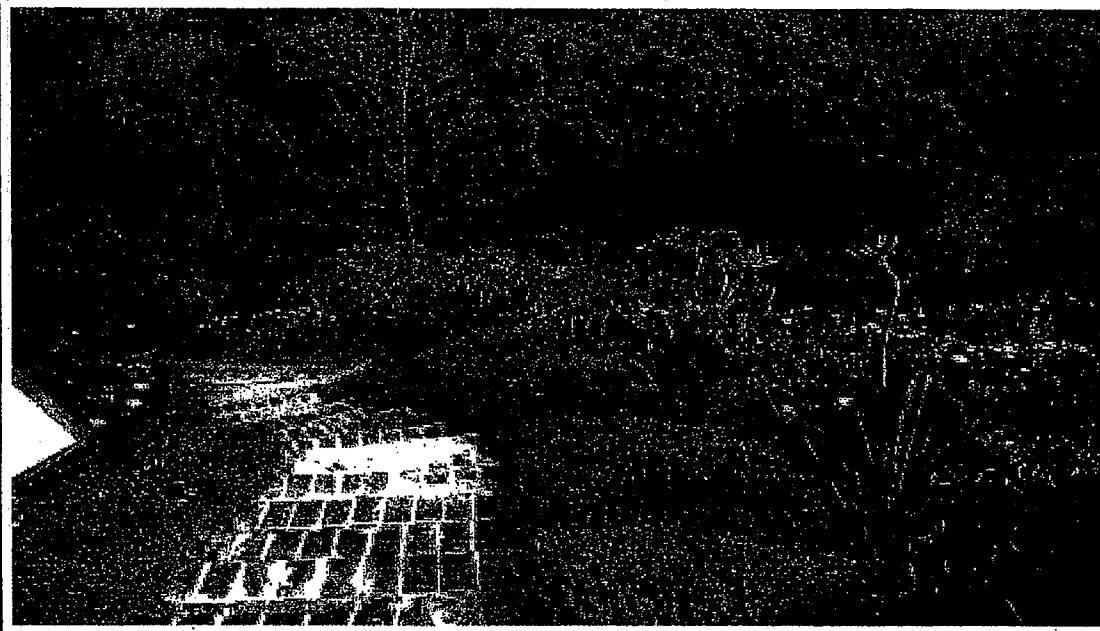


February 2003

*appendix a-2*

**Site Photographs**  
Jacobson Residence





View to east from terrace area



View to north from terrace area



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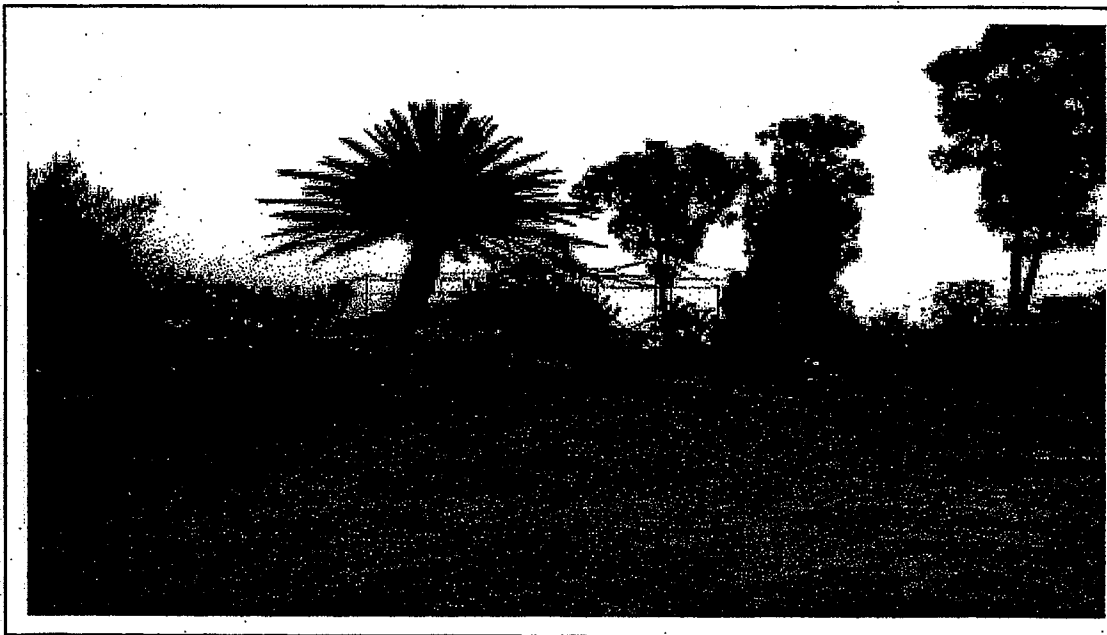
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**Site Photographs**

Jacobson Residence



View to west near existing residence



View to south from front portion of property



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February 2003

*appendix a-4*

**Site Photographs**

Jacobson Residence

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Kenneth Adelman and Pictopia.com

7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 FOR THE COUNTY OF LOS ANGELES

10  
11 BARBRA STREISAND, an individual, ) Case No. SC077257  
12 vs. )  
13 KENNETH ADELAMN, an individual; ) APPENDIX OF NON-CALIFORNIA  
PICTORIA.COM, a California corporation; ) AUTHORITIES IN SUPPORT OF REPLY  
14 LAYER42.COM, a California corporation; and ) TO MOTIONS TO STRIKE COMPLAINT  
DOE 1 through DOE 20, inclusive. ) PURSUANT TO CIV. PROC. CODE § 425.16  
15 Date: July 14, 2003  
16 Time: 1:30 p.m.  
Dept.: H (Hon. Allan J. Goodman)  
17 Complaint Filed: May 20, 2003

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Defendants Kenneth Adelman and Pictopia.com hereby submit the following non-California authorities in support of their reply to motions to strike complaint pursuant to Civil Procedure Code § 425.16.

- No.
1. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)
  2. *Paul v. Davis*, 424 U.S. 693 (1976)

Dated: July 9, 2003

IRELL & MANELLA LLP  
Richard B. Kendall  
Laura A. Seigle  
Christopher M. Newman

By: Laura Seigle  
Laura A. Seigle  
Attorneys for Defendants  
Kenneth Adelman and Pictopia.com