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July 21, 2017

Robert Dostalek
Planning & Building Services
County of Mendocino
Ukiah, CA 95482 (via emial to dostalekr@co.mendocino,ca.us)

Re: CDP 2015-0031 (Bowen)

Dear Mr. Dostalek:

I write on behalf of Poppy Crum and Sven Khatri, reflecting their concerns and those of many other residents of the coastal Drifters Reef Drive subdivison, in response to the initial staff report prepared for the Coastal Permit Administrator's review/decision scheduled for July 26, 2017,

Background

This project comes on the heels of erection of a spite fence by the Bowens in 2015, erected the very day following the sale to my clients of the improved parcel adjacent to the Bowen lot. As you know, the Bowens were the original owner/developer of 45450 Drifter's Reef Drive. It was the Bowens who chose to erect the existing grapestake fence that still stands at that property, a feature that makes my clients' fence tend to stand out in a residential setting that is intentionally largely devoid of fences and similar visual barriers.

Zoning Violation #ZC 2015-0018 involved the unpermitted erection by the Bowens of fencing and free-standing posts on their remaining undeveloped parcel which, as you've aptly noted, involved a fence encroachment on a well-established ESHA. As pointed out in prior correspondence from my clients to you, along with photographs reflecting vegetative damage, the Bowens' unlawful behavior took place many years after legal protections for ESHAs had come into being, making it unlikely they could plead ignorance of the law. Yet they now seek to re-open that wound by reconstructing at a higher level the very fence they illegally installed, one that gravely damaged native vegetation, and they wish to intrude on the defined ESHA by 50-feet more than what the law provides.

To add insult to injury, the applicants seek to develop this bare parcel by erecting a pointless fence on three sides. It is, a bit like the bridge-to-nowhere in Alaska, the fence for no purpose, except to irritate neighbors by putting a thumb in their collective eye and flaunt the Coastal Act in a manner that seems designed as a

set-up for further special exceptions when and if Bowens elect to build on the parcel.

There plainly is no need to "discourage public vehicular access," as there is no evidence of any and no path or roadway going onto the parcel that would invite such parking. Any parking by residents or their guests at this subdivision on the common property adjacent to the Bowens' land would be specifically allowed under the subdivision CC&Rs. To the extent, however, that the Bowens entertain a bona fide fear that much traffic attends to their parcel, then the admonition of the Coastal Commission should be adhered to. The County must abide by LUP Policy 3.6-27 and Section 20.528.030 to discern "evidence of historical use" and assess the "potential for the existence of prescriptive rights" to insure compliance with PRC section 30211.

Parcel demarcation is not needed. Numerous reflector-posts already mark the southern boundary and an illegal fence delineate the eastern one. "Intruders" would only advance from *those* directions toward the bluffs, making a western demarcation unnecessary. Consequently, this project can only be justified as one to "create a visual barrier." In other words, to put a thumb in the eye of neighbors.

If, as asserted by the project applicant, they honestly share the same goal as my clients, i.e. "protecting the parcel [from intrusion into] existing ESHAs" (Project Summary, Bowen Biological Report, p. 2), then the best way of doing that is to simply maintain the status quo. The area adjacent to the pathway to the bluffs is sufficiently peppered with vertical markers ("free-standing posts) that adequately convey the message to outsiders to stay off this parcel. Allowing further construction, even outside the defined ESHA, is pointless and is likely to discourage re-propagation by native plant species.

Issues Presented

1. Adequate notice to adjacent homeowners.

My understanding in that the June 29, 2017 Notice of Pending Action was not provided to all residents of the Drifters Reef subdivision even though certain common lands (owned by fractional interests among all other landowners) do fall within the scope of MCC sections 20.536.005(D) and 20,536.010(C), i.e. all property owners within 300 feet of the property lines. Your report does note that the project site is "one parcel east of the *commonly owned* blufftop parcel..." (p. 2 [emphasis added].)

Given the unique placement of this undeveloped parcel at the gateway to ocean bluff access by every resident/owner in this subdivision, it is particularly appropriate that they all receive such notice and be allowed an opportunity to comment.

2. Need for wholistic treatment of defined ESHA.

As you know, the Permit Administrator is charged with the duty of "determining the extent of ESHA," under MCC section 20.496.015(A). This obligation attaches when any development is "within one hundred (100) feet" of an ESHA or "has

potential to negatively impact the long-term maintenance of the habitat." (Subpart (A)(3).) For reasons expressed below, my clients urge that PBS act pursuant to MCC Section 20.532.060 in terms of requiring supplemental application and review based on development that has this potential and is within 500 feet of an ESHA, to insure that environmental resources "will not be significantly degraded" by all this additional and unnecessary fence construction and that really is "no feasible less environmentally damaging alternative" (such as small posts-and-bollards). (MCC Section 20.532.100)

3. Waiver of 100-foot ESHA boundary & overall ESHA protection.

Allowance of this exception to the standard rule does nothing but endanger the county's ability to insist on full 100-foot compliance set-back when and if a residence is eventually constructed. It is unclear why the Biological Report evidently failed to take into account the entire wetland ESHA that extends upstream to the east and well onto my clients' parcel in deciding the appropriateness of a lenient 50-foot setback. Nor did the Report writer advance any justification for such a set-back reduction.

I found no indication that the California Department of Fish & Wildlife ever approved or "signed off" on barrier reduction. Casual email correspondence from DFW of December 29, 2016 (all that has been made available to my clients to date) does not analyze the barrier reduction but simply addresses the merits of Alternatives A and B (discussed further below). Notably, DFW concludes that, while the proposed fencing would provide a "symbolic" barrier, "it is unclear whether fencing within the ESHA or 50 foot buffer (Alternative A) would accomplish this goal." (Email Liebenberg to Dostalek.)

At the same time, in reviewing the Coastal Commission's February 10, 2017 letter, I note that Tamara Gedik wrote:

> According to these policies [in Section 20.496.020], a buffer area of a minimum of 100 feet shall be established adjacent to all ESHAs, unless an applicant can demonstrate, after consultations and agreement with the California Department of Fish and Wildlife (CDFW) that 100 feet is not necessary to protect the resources of that particular habitat area from possible significant disruption caused by the proposed development.

The Bowen Report fails to justify reduction of the 100-foot ESHA setback. Indeed, the writer is quick to jump to the conclusion that, "Compliance with thee Avoidance Measure should reduce potential for impacts to a less-than-significant level." (Report, 9.0, p. 24) But these measures only concern the time and circumstances for fence construction. Skant attention is given to explaining why Alternative C (discussed below) is not the overall best method of avoiding impacts. The writer fails to explain, as well, how fencing around three sides of the parcel, at a low enough level to easily climb over, merits this conclusion: "Consideration should be given that approval of this project could reduce the number of trespassers that walk down the drainage and potentially damage the riparian habitat and disturb potential nesting migrating birds." (*Ibid.*) The supposed need for this fencing project is to exclude trespassing from the south and west. Given the thicket covering the wetlands, it would be rather difficult to imagine "trespassers" entering from the east and walking westward "down the

drainage." Further, such "trespassers" would necessarily have had to first enter the drainage from another private parcel to the east, an unlikely scenario.

Bowen's Alternative A (Report, 7.1, p. 21) is based on a false premise in terms of assessing ESHA protection. The proponents have erected a fictional fear of vehicular and foot intrusion and thus the "need" for "reducing foot and vehicle traffic across the Wetland and [damage to] *Hosackia gracilis*." Without a showing by the proponent that there such "traffic" even exists, one cannot logically conclude that a new fence would "reduce" it.

Alternative B carries the same flaw of Alternative A with respect to unsupported reduction of the 100-foot standard exclusion zone. It illogically asserts that Alternative B would "not provide immediate nor as complete protection" of the area, based again on the false assumption of existing foot or vehicular intrusion.

In reviewing the Coastal Commission letter after recently obtaining a copy, I note that it identified the same problem. While the installation of fencing and/or native plantings is proposed to "protect" the wetland and rare plant ESHAs and ESHA buffers, the Bowen Report contains no evidence that the existing ESHAs have been adversely affected by public access." (p. 6) As you know, it also analyzes Alternative B's proposed "plant barrier," aptly noting that it would take a considerable period of time for plants to develop sufficiently to achieve this objective, one that the proponents imply is an urget one requiring virtually an immediate response. Additionally, the "linear, unnatural arrangement" as a boundary demarcation goes quite contrary to the use of native plantings to supposedly create a more natural situation on site. (*Ibid*.)

Only Alternative C (no action) offers the proper response. Though it somehow manages to ignore that leaving the current fencing does nothing to correct the improper placement of the southern boundary posts. If the proponents are truly as concerned about the intrusion of traffic on *Hosackia gracilis*, they are always free to install simple low-level warning signs that indicate the presence of the plant at its locations. It is rather preposterous to assert that the parcel even can be used "as a vehicular turn around," given the existence of the posts along the perimeter of the adjacent dirt road.

The Report also fails to explain why no ESHA was evaluated with respect to the native blackberry bush at the southeast corner of the parcel and why the Bowens saw fit to chop through the middle of that bush to install their fence in the first place.

Finally, it must be noted that the Figures 17 & 18 of the Bowen Report (pp. 22-23) inaccurately reflect the necessary ESHA setback measurements, whether at 50 or 100', because the setbacks are measured from the common straight boundary line rather than the actual ESHA contours.

My clients informally consulted with Biologist Asa Spade in early 2015. He has since been employed by Wynn Coastal Planning. But two years ago, he sketched out the apparent contours of the wetland ESHA (abent further soil studies) and thought that its contour line crossed onto my clients' parcel and bent noticeably to the south. He provided the attached annotated aerial photo (Spade ESHA Aerial) reflecting his professional judgment. It is that contour line,

rather than the property line, that must be used for measurement of the appropriate setback. The Bowen Report fails to do this.

4. Inappropriate fence height proposed into viewshed easement.

As my clients have informed PBS, they have a recorded triangular view easement extending in a basically westerly direction that overlooks much of the existing defined ESHA. (APN 118-200-10) There are no restrictions on the scope of this easement, suggesting it is the right to an entirely unobstructed view, particularly given the nature/purpose and location of this easement. Obstruction can occur either by new fencing or planting of new vegetation. Violation of its terms by zoning violations can constitute an actionable nuisance. (*Pacifica Homeowners' Assn. V. Wesley Palms Retirement Community* (1986) 178 Cal.App.3d 1147, 1153 [injunctive relief involving tree height of neighboring property that interfered with easement to light, air, and unobstructed view]; see also *Petersen v. Friedman* (1958) 162 Cal.App.2d 245, 247 [Television antennae found to be obstruction of view easement] and *Seligman v. Tucker* (1970) 6 Cal.App.3d 691, 694 [panoramic view of lower valley easement

Despite this absolute right possessed by my clients, it seems that the Bowens wish to install a three-foot tall fence along this line and receive county approval for doing so. Ignored by Bowens is the fact that the existing fence itself may already violate that easement. To date, they have chosen not complain about the Bowen fence, in order to avoid unnecessary friction with the Bowens and because the fence itself is of a stepped-down design, appearing to be no higher than 24" in the viewshed, and is currently disguised by native vegetation growing around it.

Given an existing fence of dubious legitimacy, lacking grape stake infill, that already serves to define the Bowen boundary, it is unclear what would be achieved by permitting installation of a solid three-foot fence or the planting of new vegetation in this area. Exactly how the County can justify authorizing such an encroachment on the Crum/Khatri viewshed easement is unclear.

5. Senseless western boundary visual blight fencing.

While this project is not within a designated Highly Scenic Area involving public views of the coast, it is incorrect to simply write-off new fence construction on the western boundary as "not adversely affect[ing] visual resources." (Report, p. 9) This error may be grounded in the notion that "view obstruction" only concerns objects in the line-of-sight of an adult, i.e. at a height of above four to five feet. (*Quail Botanical Gardens Foundation v. City of Encinitas* (1994) 29 Cal.App.4 th 1597, 1606 [four foot restriction still can result in "total obstruction" to a child or disabled person in a wheelchair].)

6. Need for revision/publication of site plan showing corridor set-backs & Final Landscaping Plan.

Condition #9 of the proposed permit requires the applicant to submit a revised site plan to demonstrate that the proposed fencing will be positioned outside the required corridor preservation setback.

Condition #11 similarly allows for filing of a landscaping plan "prior to issuance" of the CDP and with review only by PBS and DFW.

No member of the public has seen either the revised corridor plan or the landscaping plan for native species. Both should be available for review and comment before, *not after*, a decision by the Permit Administrator. (See Staff Report at p. 3.) Presently, compliance is only required "prior to issuance" of the CDP, which skirts any public input obligation.

The Landscaping Plan is particularly crucial because the Bowens' own survey showed numerous rare plan communities to the north and south of their property that evidently have not had a chance to spread and take hold anywhere on the subdivision bluffs, probably because of the continued annual mowing that itself serves no fire protection need. (See Figure 10 of Bowen Report.)

7. This project has been piecemealed with a useless accessory structure.

MCC Section 20.456.010 allows for accessory structures and these may be constructed prior to construction of a dwelling. But this provision implied some temporal and long-range plan by the applicant, not the erection of a meaningless fence absent any overall related residential development of the parcel. New future owners of this parcel would likely have their own design preferences that would be consistent with an overall development plan. That is the point in time when decisions as to fencing would be appropriately considered by PBS. (See generally *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 280, discussing piecemealing "when the purpose of the reviewed project is to be the first step toward future development"], and *Tuolomne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226 [City piecemealed shopping center review by separating out street widening, which was a condition precedent to overall development],)

Requested Action

1. For the time being, leave the existing encroaching "free-standing posts" along the southern boundary in place to satisfy the Bowens' concern about vehicular trespass on their parcel, and record a deed restriction that obliges removal when and if a permit for further residential development is applied for.

2. Crum/Khatri will acquiesce in the intrusion by Bowen of their view easement by the existing two-foot high stepped fence structure along their common boundary (east boundary of Bowen parcel), provided there is no additional vegetation planted in the viewshed, that no fencing is approved for the western Bowen parcel boundary, and that there is removal of that portion of fencing that presently intrudes on the native blackberry bush (itself a potential ESHA), located at the southeast lot corner, so that there might be potential native plant regeneration there.

3. Clarify that the standard 100' ESHA boundary remain in place for this parcel, absent some biological assessment that demonstrates the justification for an exception to the rule, with appropriate DFW review of the assessment.

Thank you for giving your serious consideration to the issues presented.

Sincerely,

Rod Jones

Rodney R. Jones

Attachment: Spade ESHA Aerial (2015)