

**COUNTY OF SAN LUIS OBISPO BOARD OF SUPERVISORS
AGENDA ITEM TRANSMITTAL**

(1) DEPARTMENT Planning and Building		(2) MEETING DATE May 2, 2006		(3) CONTACT/PHONE Matt Janssen/(805) 781-5104	
(4) SUBJECT Hearing to consider an appeal by Magda Fichter of a Planning Commission determination (pursuant to Section 23.04.118c of the Coastal Zone Land Use Ordinance) that hot tubs are not allowed within a bluff setback. The property is located at 930 Pacific Street, in the community of Cayucos (APN 064-151-007).					
(5) SUMMARY OF REQUEST The Board is asked to consider an appeal of a landowner in Cayucos requesting to have the county interpret Section 23.04.118c of the Coastal Zone Land Use Ordinance such that hot tubs are an allowable use within a bluff setback.					
(6) RECOMMENDED ACTION Adopt the resolution upholding the decision of the Planning Commission and denying the appeal of the Planning Director determination based on the findings in Exhibit A.					
(7) FUNDING SOURCE(S) N/A		(8) CURRENT YEAR COST N/A		(9) ANNUAL COST N/A	
(10) BUDGETED? <input type="checkbox"/> No <input type="checkbox"/> Yes <input checked="" type="checkbox"/> N/A					
(11) OTHER AGENCY/ADVISORY GROUP INVOLVEMENT (LIST):					
(12) WILL REQUEST REQUIRE ADDITIONAL STAFF? <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes, How Many? _____ <input type="checkbox"/> Permanent _____ <input type="checkbox"/> Limited Term _____ <input type="checkbox"/> Contract _____ <input type="checkbox"/> Temporary Help _____					
(13) SUPERVISOR DISTRICT(S) <input type="checkbox"/> 1st, <input checked="" type="checkbox"/> 2nd, <input type="checkbox"/> 3rd, <input type="checkbox"/> 4th, <input type="checkbox"/> 5th, <input type="checkbox"/> All			(14) LOCATION MAP <input checked="" type="checkbox"/> Attached <input type="checkbox"/> N/A		(15) Maddy Act Appointments Signed-off by Clerk of the Board
(16) AGENDA PLACEMENT <input type="checkbox"/> Consent <input checked="" type="checkbox"/> Hearing (Time Est. 45 minutes) <input type="checkbox"/> Presentation <input type="checkbox"/> Board Business (Time Est. _____)			(17) EXECUTED DOCUMENTS <input checked="" type="checkbox"/> Resolutions (Orig + 4 copies) <input type="checkbox"/> Contracts (Orig + 4 copies) <input type="checkbox"/> Ordinances (Orig + 4 copies) <input type="checkbox"/> N/A		
(18) NEED EXTRA EXECUTED COPIES? <input type="checkbox"/> Number: _____ <input type="checkbox"/> Attached <input checked="" type="checkbox"/> N/A			(19) APPROPRIATION TRANSFER REQUIRED? <input type="checkbox"/> Submitted <input type="checkbox"/> 4/5th's Vote Required <input checked="" type="checkbox"/> N/A		
(20) OUTLINE AGREEMENT REQUISITION NUMBER (OAR) _____			(21) W-9 <input checked="" type="checkbox"/> No <input type="checkbox"/> Yes		(22) Agenda Item History <input checked="" type="checkbox"/> N/A Date _____
(23) ADMINISTRATIVE OFFICE REVIEW <p align="center"><i>Ok Leslie Brown</i></p>					

*CJ
(5.2.06)*



SAN LUIS OBISPO COUNTY DEPARTMENT OF PLANNING AND BUILDING

VICTOR HOLANDA, AICP
DIRECTOR

TO: BOARD OF SUPERVISORS

FROM: MATT JANSSEN, CURRENT PLANNING

VIA: WARREN HOAG, DIVISION MANAGER, CURRENT PLANNING *WH*

DATE: MAY 2, 2006

SUBJECT: HEARING TO CONSIDER AN APPEAL BY **MAGDA FICHTER** OF A PLANNING COMMISSION DETERMINATION (PURSUANT TO SECTION 23.04.118c OF THE COASTAL ZONE LAND USE ORDINANCE) THAT HOT TUBS ARE NOT ALLOWED WITHIN A BLUFF SETBACK. THE PROPERTY IS LOCATED AT 930 PACIFIC STREET IN THE COMMUNITY OF CAYUCOS (APN 064-151-007). SUPERVISORIAL DISTRICT 2.

RECOMMENDATION

Adopt the resolution upholding the decision of the Planning Commission and denying the appeal of the Planning Director determination based on the findings in Exhibit A.

DISCUSSION

On February 9, 2006, the Planning Commission denied an appeal by Magda Fichter of a Planning Director determination that hot tubs are not allowed within a bluff setback. This interpretation of Section 23.04.118c of the Coastal Zone Land Use Ordinance (CZLUO) is consistent with how staff has applied the regulation since the county Local Coastal Program was certified in 1988.

Although they have not responded in writing, Coastal Commission staff agree with our interpretation of Section 23.04.118c of the CZLUO. They are also concerned about the adverse precedent upholding the appeal would set, the types of uses that eventually may be considered acceptable within a bluff setback, and the potentially significant adverse direct and cumulative impacts to adjacent properties and the bluff.

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For Residential Single Family land use category properties along the coast within the community of Cayucos, there are three “standard” setbacks, and a “bluff” setback. The three standard setbacks are a front setback (in this case 0 feet – adjacent to Pacific Street), and two side setbacks (in this case 3 feet). The bluff setback is different because it is not considered a rear setback. The bluff setback is determined through the preparation of a “site stability evaluation report” (i.e. a bluff retreat study). This report evaluates the erosion of the bluff (from surface erosion and wave action) for a minimum of 75 years. If the report concludes the bluff setback for new development needs to be greater than 25 feet, the bluff setback line is delineated on the site plan and all new development must occur beyond that line (25 feet is the minimum bluff setback pursuant to a Planning Area Standard in the Estero Area Plan). For most sites in Cayucos, 25 feet is an adequate bluff setback. The bluff setback for the appellant’s property was determined to be 25 feet prior to a substantial remodel of the existing residence in 2001.

Section 23.08.032 of the CZLUO (Residential Accessory Structures) regulates uses that are “accessory” to a residence, and subsection “f” states the following:

Swimming pools. *Including hot tubs, spas, and related equipment, may be located within any required side or rear setback, provided that they are no closer than 18 inches to a property line, and provided that they are fenced as required by Section 23.04.190a(5) (Screening and Fencing).*

This section of the CZLUO was written specifically to regulate the location and use of pools, hot tubs, and spas. It allows hot tubs to be located “within any required side or rear setback”. However, since a bluff setback is not a “rear” setback, this is more evidence that hot tubs are not allowed in a bluff setback (otherwise it would have been specified in this section). If a site had adequate space between the bluff setback line and the edge of primary structure development, that area could be considered within the rear setback, and a hot tub would be allowed within that area. For example, if a residence was located 50 feet from the bluff, and the bluff setback was determined to be 25 feet, the remaining 25 feet between the bluff setback line and the residence could be considered the rear setback and a hot tub would be allowed within that area. However, this scenario is mostly theoretical because very few residences on the bluff in Cayucos have any extra space between the bluff setback line and the residence (some older cottages may fall into this category, but they are being converted to larger residences built to the minimum bluff setback line).

Section 23.04.118c of the CZLUO lists the uses that are exceptions of bluff setback requirements within a bluff setback. This section has two purposes; first, it lists the uses within a bluff setback that do not have to conduct a site stability evaluation report; and second, it is used by staff as guidance on the types of uses that are allowed within the bluff setback. Specifically, this section states:



Exceptions to bluff setback requirements. *The minimum setback requirements of this section do not apply to the following:*

- (1) Wood fences or hedges three feet or less in height above natural grade, and wire fences no higher than six feet located in the Agriculture or Rural Lands categories.*
- (2) Landscaping, minor earthworks, steps or similar design elements (not including decks or other solid structures) placed directly on natural grade.*
- (3) Roof and wall projections including cantilevered and projecting architectural features including chimneys, bay windows, balconies, cornices, eaves and rain gutters may project into the required setback a maximum of 30 inches.*

If a proposed use is similar in nature and intensity to a listed use in 23.04.118c, it will be allowed. If a proposed use is not similar in nature and intensity to a listed use in 23.04.118c, it is not allowed. For example, if a property owner wants to place flagstones on natural grade within the bluff setback, staff has determined that type of development and uses to be similar in nature and intensity to “minor earthworks”, and is therefore allowable development within the bluff setback. However, if a landowner wants to construct a gazebo within the bluff setback, staff has determined that a gazebo is not similar to the nature and intensity of any of the uses listed in this section, and therefore not allowed as an exception.

APPEAL ISSUES

Appeal Issue 1

Appellant: *Section 23.04.118 does not prohibit the placement of the portable hot tub unit at the Appellant’s residence.*

Staff Response: Planning Department staff has interpreted 23.04.118 consistently since the Local Coastal Program was certified in 1988 by the California Coastal Commission. Section 23.04.118 lists the types of uses in the bluff setback that can be located there without the preparation of a site stability evaluation study, and it lists the types of uses allowed within the setback. If a use is similar to one of the listed uses, it is allowed. If not, it is not allowed. The Planning Commission affirmed this determination.

Appeal Issue 2

Appellant: *The placement or use of the hot tub does not require a land use permit; this unit is portable and is not attached to the ground, and it is not a structure, as defined by the CZLUO; the unit at issue does not require a permit for installation; it is not a “development” and does not represent “an expansion of existing uses” of Ms. Fichter’s single family residence at 930 Pacific Street.*

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Staff Response: The crux of this issue is not whether the hot tub is a “structure” or “development”, but rather whether it is similar in nature and intensity to any of the uses listed in the exceptions section, and whether it is an allowable **use** within the bluff setback. If it is not listed as an “exception”, or allowable within the bluff setback, it is not necessary to debate the issue of “structure” or “development” because a hot tub is not allowed.

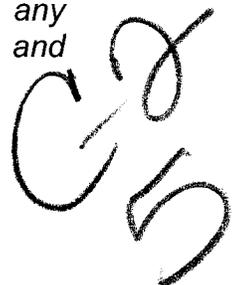
However, in an effort to provide information for the discussion, staff offers the following response: there are three separate definitions of “structure” in the CZLUO. All three definitions are found in Chapter 11 (23.11.030), and are as follows:

1. **Structure.** *Any artifact constructed or erected, the use of which requires attachment to the ground, including any building, but not including fences or walls six feet or less in height.*
2. **Structure, Accessory.** *A structure, the use of which is incidental to that of a principal structure on the same lot. May be either detached, or attached if part of the structure of the principal structure.*

The third definition of structure is found *within* the definition of “development”. This definition comes directly from the Coastal Act and is the most applicable definition in this case because the placement of a hot tub meets the parameters of “development” as follows:

3. **Development.** *Pursuant to PRC 30106, “Development” means, on land, in or under water, the placement or erection of any solid material or **structure**; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any **structure**, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z’Berg-Nejedly Forest Practice Act of 1973(commencing with Section 4511).*

As used in this section, “**structure**” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.



It is the opinion of staff that this third definition of “structure” contained within the definition of “development” is most applicable and should prevail because the hot tub is “...*the placement or erection of any solid material or structure...*”.

Appeal Issue 3

Appellant: *There is no evidence which supports the adoption of the findings.*

Staff Response: There is no formal or official evidence that supports the findings that hot tubs may lead to privacy issues between neighbors, and that hot tubs may create adverse visual impacts when viewed from the public beach (i.e. there is no formal “Hot Tubs in the Bluff Setback” Study to support these findings). However, the findings are supported by information gathered by staff after hundreds of site visits to individual project sites over almost a 20 year period (1988-2006). Also, this interpretation of Section 23.04.118c is consistent with our interpretation since 1988, and is supported by Coastal Commission staff.

OTHER AGENCY INVOLVEMENT

County Planning Commission, County Counsel, Code Enforcement, and the California Coastal Commission. The Coastal Commission has not formally responded to the referral process in writing. However, staff has discussed this issue with Commission staff in person and on the telephone. Also, the Cayucos Citizen’s Advisory Council (CCAC) has not received an official referral because the Planning and Building Department does not technically have a “project” application to date. However, the chair of the CCAC knows of the appeal hearing, and has indicated support of staff on the telephone.

FINANCIAL CONSIDERATIONS

No appeal fee was charged because the appeal was filed based on issues related to the Local Coastal Program.

RESULTS

Denial of the appeal would affirm the Planning Commission’s decision to uphold the staff interpretation of Section 23.04.118 of the CZLUO, and require the appellant to remove the hot tub within a specified time period (pursuant to Enforcement standards contained in Chapter 9 of the CZLUO).

Approval of the appeal and a determination a hot tub is allowable as an exception to the bluff setback standards and an allowable use would trigger the requirement of a Minor Use Permit/Coastal Development Permit (MUP/CDP). If the appellant kept the hot tub in place during the processing of the MUP/CDP, it

would be a land use violation until the MUP/CDP was approved. If the appellant removed the hot tub during the processing of the MUP/CDP, no land use violation would occur, and the hot tub could be re-established within the bluff setback when and if the MUP/CDP was approved. The MUP/CDP would be appealable to, or by the Coastal Commission. Also, approval of the appeal may have serious precedent setting effects for other future uses and subsequent impacts on the bluff.

ATTACHMENTS

1. Resolution upholding the Planning Commission decision.
2. Appeal Form and letter from appellants addressing appeal issues.
3. Correspondence received since the Planning Commission hearing.
4. Staff report and draft minutes, with attachments and correspondence, received from the February 9, 2006 Planning Commission hearing.

Handwritten initials "CD" with a checkmark.

ATTACHMENT 1

**RESOLUTION UPHOLDING THE
PLANNING COMMISSION DECISION**

Handwritten signature or initials in black ink, located in the bottom right corner of the page. The signature appears to be a stylized 'C' followed by a large 'S' and a '2'.

IN THE BOARD OF SUPERVISORS
COUNTY OF SAN LUIS OBISPO, STATE OF CALIFORNIA

2nd day of May, 2006

PRESENT: Supervisors

ABSENT:

RESOLUTION NO. _____

RESOLUTION UPHOLDING THE DECISION OF THE PLANNING COMMISSION AND
DISAPPROVING THE REQUEST BYMAGDA FICHTER FOR AN APPEAL OF A
PLANNING DIRECTOR DETERMINATION

The following resolution is now offered and read:

WHEREAS, on February 9, 2006, the Planning Commission of the County of San Luis Obispo (hereinafter referred to as the "Planning Commission") duly considered and disapproved the appeal of Magda Fichter of a Planning Director determination; and

WHEREAS, Magda Fichter has appealed the Planning Commission's decision to the Board of Supervisors of the County of San Luis Obispo (hereinafter referred to as the "Board of Supervisors") pursuant to the applicable provisions of Title 23 of the San Luis Obispo County Code; and

WHEREAS, a public hearing was duly noticed and conducted by the Board of Supervisors on May 2, 2006, and a determination and decision was made on May 2, 2006; and

WHEREAS, at said hearing, the Board of Supervisors heard and received all oral and written protests, objections, and evidence, which were made, presented, or filed, and all persons present were given the opportunity to hear and be heard in respect to any matter relating to said appeal; and

WHEREAS, the Board of Supervisors has duly considered the appeal and finds that the appeal should be denied and the decision of the Planning Commission should be affirmed subject to the findings set forth below.

NOW, THEREFORE, BE IT RESOLVED AND ORDERED by the Board of Supervisors of the County of San Luis Obispo, State of California, as follows:

1. That the recitals set forth hereinabove are true, correct and valid.
2. That the Board of Supervisors makes all of the findings of fact and determinations set forth in Exhibit A attached hereto and incorporated by reference herein as though set forth in full.



3. This project is found to be statutorily exempt from the California Environmental Quality Act under the provisions of Public Resources Code section 21080(b)(5), which provides that CEQA does not apply to projects which a public agency rejects or disapproves.

4. That the appeal filed by Magda Fichter is hereby denied and the decision of the Planning Commission is upheld that the appeal by Magda Fichter of a Planning Director determination is hereby disapproved based upon the findings of fact and determinations set forth in Exhibit A, incorporated by reference herein as though set forth in full.

Upon motion of Supervisor _____, seconded by Supervisor _____, and on the following roll call vote, to wit:

AYES:

NOES:

ABSENT:

ABSTAINING:

the foregoing resolution is hereby adopted.

Chairman of the Board of Supervisors

ATTEST:

Clerk of the Board of Supervisors

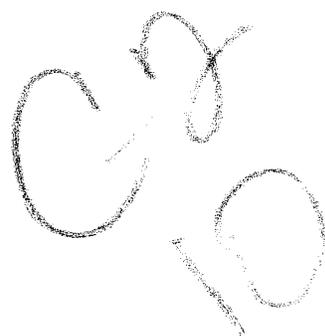
[SEAL]

APPROVED AS TO FORM AND LEGAL EFFECT:

JAMES B. LINDHOLM, JR.
County Counsel

By: 
Deputy County Counsel

Dated: April 13, 2006



STATE OF CALIFORNIA,)
) ss.
County of San Luis Obispo)

I, _____, County Clerk and ex-officio Clerk of the Board of Supervisors, in and for the County of San Luis Obispo, State of California, do hereby certify the foregoing to be a full, true and correct copy of an order made by the Board of Supervisors, as the same appears spread upon their minute book.

WITNESS my hand and the seal of said Board of Supervisors, affixed this _____ day of _____, 2006.

County Clerk and Ex-Officio Clerk of the Board of Supervisors

(SEAL)

By: _____
Deputy Clerk

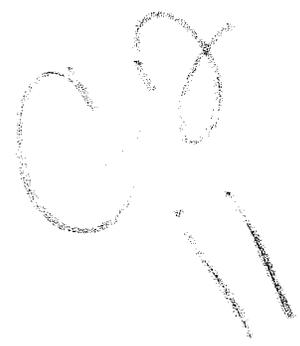
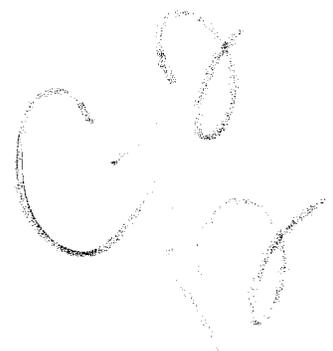


EXHIBIT A - FINDINGS

- A. The proposed use of a hot tub within the bluff setback is not allowed because it is not specifically listed within the *Exceptions to bluff setback requirements* section of the Coastal Zone Land Use Ordinance (Section 23.04.118c).
- B. The proposed use of a hot tub within the bluff setback is not allowed because it is not similar or equivalent in nature and intensity to any of the uses listed in the *Exceptions to bluff setback requirements* of the Coastal Zone Land Use Ordinance (Section 23.04.118c).
- C. The proposed use of a hot tub within the bluff setback is not allowed because the proposed use is inconsistent with many of the listed goals of the Setbacks section; specifically, the use may lead to incompatibilities between properties regarding privacy.
- D. The proposed use of a hot tub within the bluff setback is not allowed because the proposed use is inconsistent with many of the listed goals of the Setbacks section; specifically, the use may lead to adverse individual and cumulative visibility impacts when viewed from the adjacent public beach.
- E. This request for an interpretation of the Coastal Zone Land Use Ordinance is not a "project" under the California Environmental Quality Act, and therefore does not require an environmental determination.



ATTACHMENT 2

**APPEAL FORM AND LETTER FROM
APPELLANTS ADDRESSING APPEAL ISSUES**

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Coastal Zone Appeal Application

San Luis Obispo County Department of Planning and Building

NOTE: To appeal a Board of Supervisors decision you will need to obtain appeal forms from the California Coastal Commission - 725 Front Street, Suite 300 - Santa Cruz, CA (408) 427-4863.

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PROJECT INFORMATION

Type of permit being appealed:

- Plot Plan Minor Use Permit Development Plan Variance Land Division
 Lot Line Adjustment Other SEE ATTACHED File Number: _____

The decision was made by:

- Planning Director Building Official Administrative Hearing Officer Subdivision Review Board
 Planning Commission Other SEE ATTACHED Date the application was acted on _____

The decision is appealed to:

- Board of Construction Appeals Board of Handicapped Access Planning Commission Board of Supervisor

BASIS FOR APPEAL

Please note: An appeal must be filed by an aggrieved person or the applicant at each stage in the process if they are still unsatisfied by the last action.

INCOMPATIBLE WITH THE LCP: The development does not conform to the standards set forth in the certified Local Coastal Program of the county for the following reasons (attach additional sheets if necessary)
Explain: SEE ATTACHED

INCOMPATIBLE WITH PUBLIC ACCESS POLICIES: The development does not conform to the public access policies of the California Coastal Act - Section 30210 et seq. Of the Public Resource Code (attach additional sheets if necessary)
Explain: _____

Specific Conditions. The specific conditions that I wish to appeal that relate to the above referenced grounds for appeal are:

Condition Number	Reason for appeal (attach additional sheets if necessary)

APPELLANT INFORMATION

Print name: Magda Fichter c/o P. Terence Schubert
Address: 1254 Marsh St., San Luis Obispo, CA 93401 Phone Number (daytime): 805-543-1113

I/We are the applicant or an aggrieved person pursuant to the Coastal Zone Land Use Ordinance (CZLUO) and are appealing the project based on either one or both of the following grounds, as specified in the CZLUO and State Public Resource Code Section 30603 and have completed this form accurately and declare all statements made here are true.

By: P. Terence Schubert
Signature P. Terence Schubert, Esq.

February 22, 2006
Date

A Professional Law Corporation

OFFICE USE ONLY
Date Received: 2-22-06
Amount Paid: N/A

By: MLV
Receipt No. (if applicable): _____
Revised 5/05/04/LE

2006 FEB 22 PM 3:31
PLANNING/BUILDING
STENOGRAPHER
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ATTACHMENT TO COASTAL ZONE APPEAL APPLICATION

In 2001 or 2002, Ms. Magda Fichter (the Appellant)(and a consultant that was assisting her with the proposed reconstruction of her house in Cayucos) met with a Planning Department representative during an initial planning meeting. During that meeting, the Planner went through the Bluff Setback provisions of the County Land Use Ordinance with Ms. Fichter and her consultant and the Planner explained what improvements could be placed on this property on the Coastal Bluff. After this explanation was provided, Ms. Fichter expressed her plan to install a spa on the portion of the property located on the Coastal Bluff behind her house. She was advised that permanent structures could not be installed in the Bluff Setback Area, but that a portable spa would be allowable.

On March 11, 2005, a portable hot tub was installed at Ms. Fichter's residence. This particular model was chosen because it did not require attachment to the ground, and because it complied with the direction received from the Planning Department.

On or about April 12, 2005, Ms. Fichter received a Notice of Violation from Timothy L. Fielder of the San Luis Obispo County Department of Planning and Building, a copy of which is attached hereto, marked as Exhibit "A". Clarification of the basis for the Notice of Violation was sought through communications with County Staff, specifically, Mr. Fielder, Mr. Randy Sabin, Ms. Karen Nall, Ms. Marie Cowan, and Mr. Matt Janssen.

On or about April 21, 2005, Ms. Fichter replied to the Notice of Violation by letter dated April 21, 2005, a copy of which is attached hereto, marked as Exhibit "B".

In October of 2005, Ms. Fichter was advised, through her representative, to request a clarification of the County's position. This clarification was sought through telephone communications with Ms. Marie Cowan, and by e-mail to Ms. Cowan of October 7, 2005, a copy of which is attached hereto, marked as Exhibit "C".

On October 17, 2005, Mr. Janssen advised the Appellant's counsel that it was the County Planning Department's opinion that the portable hot tub in Ms. Fichter's backyard was violative of Section 23.04.118 of the Coastal Zone Land Use Ordinance ("CZLUO"). A copy of e-mail by which this information was provided to the Appellant is attached hereto, marked as Exhibit "D".

On October 21, 2005, Appellant's representative requested additional clarification concerning the interpretation of Section 23.04.118 that had been provided by Mr. Janssen. A copy of the request of this clarification is attached hereto, marked as Exhibit "E".

On October 24, 2005, Appellant's representative received another e-mail from Mr. Janssen concerning his interpretation of Section 23.04.118. A copy of the e-mail providing this information is attached hereto, marked as Exhibit "F".

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On October 24, 2005, Appellant's representative requested further clarification or a reconsideration of the County's position with regard to the placement of the portable hot tub in the bluff setback area at issue. A copy of the e-mail which was sent to Mr. Janssen is attached hereto, marked as Exhibit "G".

On October 24, 2005, Appellant's representative received an e-mail from Mr. Janssen, advising that the County's determination was the hot tub is not allowed. A copy of this e-mail is attached hereto, marked as Exhibit "H".

At the direction of county Staff, the Appellant appealed Mr. Janssen's opinion to the County Planning Commission, and a hearing was held on February 9, 2006. The Commission denied the appeal, and adopted five findings. An undated letter from the County Planning Commission evidencing the denial is attached hereto, marked as Exhibit "I."

The Appellant is appealing the following issue: Whether CZLUO Section 23.04.118 prohibits the placement of a portable hot tub in the position in which it is located at 930 Pacific Street, Cayucos, California.

It is Appellant's position that Section 23.04.118 does not prohibit the placement of the portable unit at Appellant's residence. Among other things, the placement or use of this hot tub does not require a land use permit; this unit is portable and is not attached to the ground, and it is not a structure, as defined by the CZLUO; the unit at issue does not require a permit for installation; it is not a "development" and does not represent "an expansion of existing uses" of Ms. Fichter's single family residence at 930 Pacific Street. Additionally, there is no evidence which supports the adoption of the findings.

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ATTACHMENT 3
CORRESPONDENCE

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P. TERENCE SCHUBERT

ATTORNEY AT LAW
1254 MARSH STREET
SAN LUIS OBISPO, CALIFORNIA 93401
(805) 543-1113
FAX (805) 543-1205

RECEIVED

FEB 08 2006

Planning & Bldg

February 8, 2006

Via Facsimile and Hand Delivery

Chairman Gene Mehlschau
Commissioner Sarah Christie
Commissioner Bruce Gibson
Commissioner Penny Rappa
Commissioner Bob Roos
County of San Luis Obispo Planning Commission
Department of Planning and Building
County Government Center
San Luis Obispo, California 93408

Re: February 9th Agenda Item 6; Ms. Magda Fichter's portable hot tub

Dear Chairman Mehlschau and Commissioners Christie, Gibson, Rappa and Roos:

I represent Ms. Magda Fichter, regarding her property located 930 Pacific Street, in Cayucos. This letter is written to you with regard to Ms. Fichter's appeal of the Planning Director's Determination that a portable hot tub is not allowed within the Bluff Setback.

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Chairman Mr. Gene Mehlschau,
Commissioner Sarah Christie
Commissioner Bruce Gibson
Commissioner Penny Rappa
Commissioner Bob Roos
Planning Commission
February 8, 2006
Page 2

Background

In 2001 or 2002, Ms. Fichter (and a consultant that was assisting her with the proposed reconstruction of her house in Cayucos) met with Karen Nall during an initial planning meeting. During that meeting, Ms. Nall went through the Bluff Setback provisions of the County Land Use Ordinance with Ms. Fichter and her consultant and Ms. Nall explained what improvements could be placed on this property on the Coastal Bluff. After this explanation was provided, Ms. Fichter verbally expressed her desire to install a spa on the portion of the property located on the Coastal Bluff behind her house. She was advised that permanent structures could not be installed in the Bluff Setback Area, but that a portable spa would be allowable.

On March 11, 2005, Ms. Fichter had the portable hot tub installed. This particular model was chosen because it did not require attachment to the ground, and because it complied with the direction that my client had received from the Planning Department.

Ms. Fichter was not aware of any issues concerning the installation or use of the this hot tub until April 12, 2005, when she received a letter from Tim Fielder of the Department of Planning and Building Code Enforcement, the first page of which letter is attached as set forth at Page 6-11 of the Staff Report. In response to that letter, Ms. Fichter sent a letter back to Mr. Fielder, which letter is presented at Page 6-13 of the Staff Report.

In reviewing the Staff Report, it is noted that Mr. Matt Janssen has indicated that Ms. Fichter may have had communications with Karen Nall in or about "Spring of 2005" with regard to this situation. No such communication occurred at that time. However, Ms. Fichter did speak with Ms. Nall in either September or October of 2005, about Code Enforcement's position on the hot tub situation. It is my understanding that Ms. Nall spoke to Mr. Janssen at that time, and that is when Mr. Janssen initially opined that a portable hot tub would not be allowed on the bluff.

With regard to the use of the hot tub, Ms. Fichter suffers from certain medical conditions which are greatly relieved by soaking in this hot tub. Among other things, the third and fourth vertebrae of Ms. Fichter's neck have been fused, and the application of hot water jets on this area provides significant relief to the pain associated with this condition.

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Chairman Mr. Gene Mehlschau,
Commissioner Sarah Christie
Commissioner Bruce Gibson
Commissioner Penny Rappa
Commissioner Bob Roos
Planning Commission
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Analysis

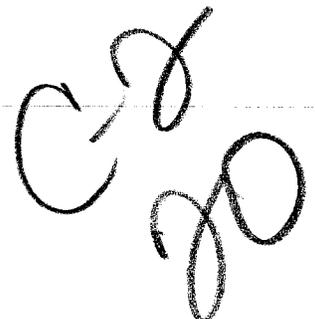
Although references made to Section 23.04.118 of the Coastal Zone Land Use Ordinance ("CZLUO") this section is not presented in the Staff Report in its entirety. I have attached, as Exhibit "A", a copy of that section of the San Luis Obispo County Code (which is identical to the CZLUO) for your convenience and review.

When boiled down to its essence, County Staff has concluded that, since the portable hot tub is not an "exception" to Bluff setback requirements of County Code Section 23.04.118(3), then this hot tub is not a "use" allowed within a bluff setback. The Appellant respectfully disagrees with this analysis.

In fact, under County Code (CZLUO) Section 23.04.118, if the portable hot tub is not an exception to those requirements, then potentially one of the two setback methods described under this section (the Stringline Setback Method or the Bluff Retreat Setback) may be applicable.

This Code Section states that "new development or expansion of existing uses proposed to be located adjacent to a beach or coastal bluff shall be located in accordance with" one of the two setback methods referred to above. Obviously, in order for this Code Section to apply, the placement of the portable hot tub must be either viewed as a "new development" or "expansion of an existing use."

Under the Stringline Setback Method, under certain conditions, no part of a proposed **new structure** is to be located in a certain specified area. County Code (CZLUO) Section 23.11.030 (339) defines "structure" as "any artifact constructed or erected, the use of **which requires attachment to the ground**, including any building, but not including fences or walls six feet or less in height." It is clear, that a portable hot tub which does not require attachment to the ground is not defined as a "structure" under the County Code.



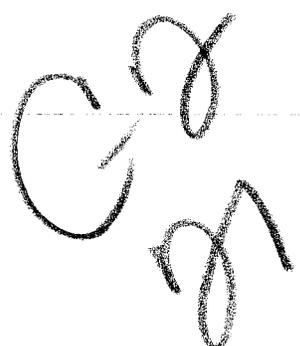
Chairman Mr. Gene Mehlschau,
Commissioner Sarah Christie
Commissioner Bruce Gibson
Commissioner Penny Rappa
Commissioner Bob Roos
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Under the Bluff Retreat Setback Method, a process is described which requires a site stability evaluation report to be prepared and submitted, along with the "Land Use Permit Application." In order for this method to apply, it is obviously necessary that a Land Use Permit Application be required for the placement for a portable hot tub. My understanding is that generally, a land use permit has not been required by the County in the past for such an activity.

The Appellant would respectfully submit that County Code (CZLUO) Section 23.04.118 does not prohibit the placement of a portable hot tub in Ms. Fichter's backyard, and would propose that, if an analysis were to be undertaken, that the issue at the heart of this analysis should be whether or not the placement of this unit has a negative impact on bluff stability, since that is the reason that the setback requirements have been adopted.

At Page 6-2 of the Staff Report, Staff states that the County has "historically allowed structures that are wood or concrete as long as they are; 100 square feet or less, less twelve inches above natural grade, and not connected to each other or to the single family residence." (sic) Again, as stated above, the portable hot tub clearly is not a "structure" as defined by the County Code and CZLUO. This unit is less than 100 square feet (in fact it is 64 square feet) and while it is more than twelve inches above natural grade, the hot tub is not connected to the ground or to Ms. Fichter's residence. The unit is located high above the beach, and a high storm or high wave event will not cause structural damage to either the portable hot tub or to Ms. Fichter's residence.

Lastly, the Staff Report raises two issues concerning "privacy" and "visibility." Neither of these terms are mentioned in Section 23.04.118, and it is difficult to understand what is inherently wrong (from a privacy or visibility standpoint) with the reasonable use of a portable hot tub in a backyard, no matter where that backyard is located. With regard to the issue of visibility, as the Staff Report admits, the issue of visibility is primarily intended to preserve visibility around structures to allow people to view the ocean. This portable hot tub does not in any way impact such visibility. This spa is not visible from the beach, nor from the road fronting Ms. Fichter's residence.



Chairman Mr. Gene Mehlschau,
Commissioner Sarah Christie
Commissioner Bruce Gibson
Commissioner Penny Rappa
Commissioner Bob Roos
Planning Commission
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In closing, it is respectfully requested that the Planning Commission uphold Ms. Fichter's appeal.

Thank you for your time and consideration of this matter.

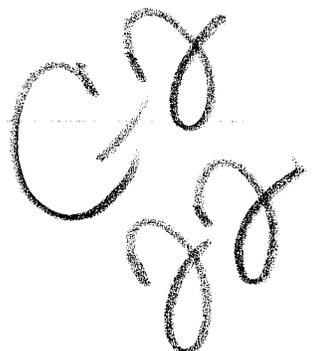
Respectfully yours,



P. Terence Schubert

Enclosure

cc: Ms. Magda Fichter (with Enclosure)
Mr. James B. Orton (with Enclosure)
Mr. Matt Janssen (with Enclosure)



CD
23

23.04.118 Blufftop Setbacks

New development or expansion of existing uses proposed to be located adjacent to a beach or coastal bluff shall be located in accordance with the setbacks provided by this section instead of those provided by Sections 23.04.110 or 23.04.112. The required setback shall be the larger of the two required by subsections (1) and (2) of this section.

(1) Stringline Setback Method. Where fifty percent of the lots adjacent to the coastline within three hundred feet of the site are developed at the time of application, no part of a proposed new structure, including decks, shall be located closer to the seaward property line of the site than the greatest distance determined by either of the following:

(A) A line between the most seaward portions of the structures on the adjacent lots; or

(B) Where there is substantial variation of land from between adjacent lots, the average setback of structures on the adjoining lots shall be used.

(2) Bluff Retreat Setback Method. New development or expansion of existing uses on blufftops shall be designed and set back from the bluff edge a distance sufficient to assure stability and structural integrity and to withstand bluff erosion and wave action for a period of seventy-five years without construction of shoreline protection structures that would in the opinion of the planning director require substantial alterations to the natural landforms along bluffs and cliffs. A site stability evaluation report shall be prepared and submitted by a certified engineering geologist based upon an on-site evaluation that indicates that the bluff setback is adequate to allow for bluff erosion over the seventy-five-year period. The report shall accompany the land use permit application, and shall contain the following information:

(A) Historic, current and foreseeable cliff erosion, including investigation of recorded land surveys and tax assessment records in addition to the use of historic maps and photographs, where available, and possible changes in shore configuration and sand transport;

(B) Cliff geometry and site topography, extending the surveying work beyond the site as needed to depict unusual geomorphic conditions that might affect the site and the proposed development;

(C) Geologic conditions, including soil, sediment and rock types and characteristics in addition to structural features such as bedding, joints, and faults;

(D) Evidence of past or potential landslide conditions, the implications of such conditions for the proposed development, and the potential effects of the development on landslide activity;

(E) Wave and tidal action, including effects of marine erosion on sea cliffs;

(F) Ground and surface water conditions and variations, including hydrologic changes caused by the development (e.g., introduction of sewage effluent and irrigation water to the groundwater system; alterations in surface drainage);

(G) Potential effects of seismic forces resulting from a maximum credible earthquake;

(H) Effects of the proposed development including siting and design of structures, septic system, landscaping, drainage, and grading, and impacts of construction activity on the stability of the site and adjacent area;

(I) Potential erodibility of the site and mitigation measures proposed to minimize erosion problems during and after construction. Such measures may include but are not limited to landscaping and drainage design;

(J) The area of demonstration of stability shall include the base, face, and top of all bluffs and cliffs. The extent of the bluff top considered should include the area between the face of the bluff and a line described on the bluff top by the intersection of a plane inclined a 20-1/4 degree angle from the horizontal passing through the toe of the bluff or cliff, or fifty feet inland from the edge of the cliff or bluff, whichever is greater;

(K) Any other factors that may affect slope stability.

(3) Exceptions to Bluff Setback Requirements. The minimum setback requirements of this section do not apply to the following:

(A) Wood fences or hedges three feet or less in height above natural grade, and wire fences no higher than six feet located in the agriculture or rural lands categories;

(B) Landscaping, minor earthworks, steps or similar design elements (not including decks or other solid structures) placed directly on natural grade;

(C) Roof and wall projections including cantilevered and projecting architectural features including chimneys, bay windows, balconies, cornices, eaves and rain gutters may project into the required setback a maximum of thirty inches. (Ord. 2344 § 1 (Exh. A) (part), 1988)

Phyllis Stiles
950 Pacific Avenue
Cayucos, CA 93430

February 3, 2006

Victor Holanda, AICP, Director
San Luis Obispo Department of Planning and Building
County Government Center
San Luis Obispo, CA 93408

RE: Thursday, February 9, 2006 hearing to consider an appeal by MAGDA FICHTER of a Planning Director Determination to not allow a hot tub within the bluff setback in accordance with Coastal Zone Land Use Ordinance Section 23.04.0118.

County File No.: NONE

APN: 064-151-997

Supervisor District: 2

Dear Mr. Holanda:

I own and reside in the house located at 950 Pacific Avenue in Cayucos, which abuts Ms. Fichter's 930 Pacific Avenue property on its southern side. I will not be able to attend the February 9th hearing due to personal reasons, so I wish this letter to serve as my objection to Ms. Fichter's appeal to retain her hot tub in its current location on her blufftop setback.

The hot tub was placed on the edge of the bluff less than two feet from the oceanside property line. The weight of the water-filled hot tub itself, not to mention the additional weight of the four occupants it can accommodate, poses a significant threat to the unprotected bluff on my property. In fact, there is already a small wash fissure on the face of the bluff near the property line dividing my property from Ms. Fichter's.

I strongly recommend that the Planning Commission reject Ms. Fichter's appeal in accordance with its responsibility to uphold regulations protecting San Luis Obispo County's oceanside bluffs. A rejection of this appeal will protect the County from any future financial repercussions in the event of bluff failure or serious erosion precipitated by the current hot tub placement at 930 Pacific Avenue.

Sincerely,



Phyllis Stiles
805-995-3707

cc: Matt Janssen, Project Manager
Ellie Porter, Secretary

RECEIVED

FEB 06 2006

Planning & Bldg

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Sarah Poljak

7704 Buena Tierra
Bakersfield, CA 93309

974 Pacific Ave.
Cayucos, CA 93430

Phone: 661-301-0956
Fax: 661-834-2873

Phone: 805-995-2200
Fax: 805-995-2923

January 29, 2006

Matt Janssen
Project Manager
Department of Planning and Building
San Luis Obispo, CA 93408
RE APN:064-151-007
Supervisory District 2

Dear Mr. Janssen,

We are writing this letter in support of Magda Fichter. We have been unable to read your report at this time. We are co-owners of 974 Pacific, two doors south of Ms. Fichter. We have never been disturbed visually or by any noise from her hot tub. The strong noise from the ocean overwhelms most other noises. As a property owner we believe she should have some rights as to how to use and enjoy her property. She has been a respectful neighbor. If the complaint filed is from the residents of 950 Pacific Ave, I would like to express that they have been less than neighborly. We have tried to settle any disputes respectfully and have been extremely unsuccessful. We have been at this location for four years and our sympathies lie with the challenges Ms. Fichter has with the use of her property.

Thank you for your consideration,


Sarah and Sasha Poljak



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Planning & Bldg

Joseph and Catherine Clark
974 Pacific Ave, Cayucos Calif. 93430

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JAN 30 2006

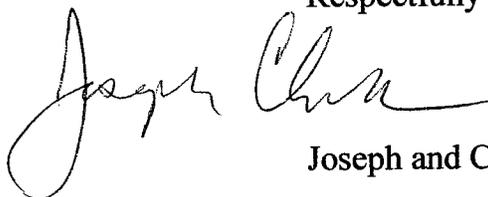
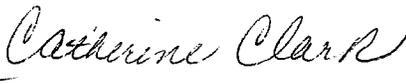
Planning & Bldg

Matt Janssen
Project Manager
Department of Planning and Building
San Luis Obispo, Calif. 93408
RE APN: 064-151-007.
Supervisorial District 2

January 26, 2006

We are writing in support of Magda Fichter and to allow her to keep her hot tub within the bluff set back. We were unsuccessful in viewing your report at the time of this letter. We live two doors to the south of her and have not been disturbed by the hot tub. It is located in a position that it is not offensive from the beach. The neighbor between us has a large shrub that hides its view and buffers the sound. We have never been disturbed by anyone using the hot tub. The noise of the street in front of us with the noise of the ocean drowns out any tub noises. As a property owner she should have some rights as to how to use her property. Ms Fichter should have the right to use her hot tub for therapeutic purposes and has a right to privacy. She has been a good neighbor and respectful of her fellow neighbors. We have been members of this community for 26 years and have lived at this location for four years. The neighbor between us at 950 Pacific Ave has been less than neighborly. We have both tried to settle differences between us in a neighborly fashion without success. Thank you for your consideration.

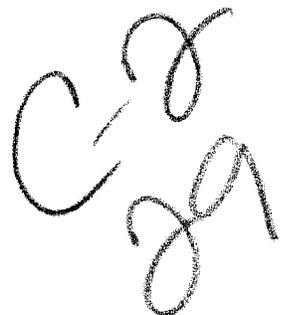
Respectfully

 
Joseph and Catherine Clark



ATTACHMENT 4

**STAFF REPORT AND DRAFT MINUTES FROM
THE FEBRUARY 9, 2006 PLANNING
COMMISSION HEARING**

A handwritten signature in black ink, appearing to be 'C. J. Fichter', located in the bottom right corner of the page.

6-1



**COUNTY OF SAN LUIS OBISPO
DEPARTMENT OF PLANNING AND BUILDING
STAFF REPORT**

PLANNING COMMISSION

Promoting the wise use of land
Helping build great communities

MEETING DATE February 9, 2006		CONTACT/PHONE Matt Janssen, project manager 781-5104		APPLICANT Magda Fichter		FILE NO. N/A	
SUBJECT Appeal by Magda Fichter of a Planning Director determination [pursuant to Coastal Zone Land Use Ordinance Section 23.04.118c] that a hot tub is not allowed within the bluff setback. The site is located within the Residential Single Family land use category and is located at 930 Pacific Street, in the community of Cayucos. The site is in the Estero Planning Area.							
RECOMMENDED ACTION Deny the appeal based on the findings listed in Exhibit A.							
ENVIRONMENTAL DETERMINATION Not required							
LAND USE CATEGORY Residential Single Family		COMBINING DESIGNATION Local Coastal Program, Geologic Study Area, Coastal Appealable Zone		ASSESSOR PARCEL NUMBER 064,151,007		SUPERVISOR DISTRICT(S) 2	
PLANNING AREA STANDARDS: None applicable							
LAND USE ORDINANCE STANDARDS: Sections 23.04.118; Blufftop Setbacks							
EXISTING USES: Single Family Residence							
SURROUNDING LAND USE CATEGORIES AND USES: <i>North:</i> Residential Single Family/single family residences <i>East:</i> Residential Single Family/single family residences <i>South:</i> Residential Single Family/single family residences <i>West:</i> Pacific Ocean							
OTHER AGENCY / ADVISORY GROUP INVOLVEMENT: Cayucos Citizen's Advisory Council							
TOPOGRAPHY: Relatively level to steeply sloping				VEGETATION: Ornamentals			
SERVICES: Water supply: community Sewage Disposal: community Fire Protection: Cayucos Fire							
ADDITIONAL INFORMATION MAY BE OBTAINED BY CONTACTING THE DEPARTMENT OF PLANNING & BUILDING AT: COUNTY GOVERNMENT CENTER ♦ SAN LUIS OBISPO ♦ CALIFORNIA 93408 ♦ (805) 781-5600 ♦ FAX: (805) 781-1242							

6-2

BACKGROUND:

On or about April 3, 2005, the Code Enforcement Division of Planning and Building Department received a telephone complaint regarding a hot tub on a neighboring property. Code Enforcement staff conducted a site visit on April 5, 2005, and a Notice of Violation from Code Enforcement was mailed out soon thereafter. On April 21, 2005, the landowner with the hot tub (Ms. Magda Fichter) responded to the Notice of Violation in writing (see attachment). In her response, Ms. Fichter indicates that she had "checked with the county about a portable spa", and was told that "the only issue on the bluff was that it could not be a permanent fixture..."

Sometime in the spring of 2005, Karen Nall (Permit Center Senior Planner) approached Matt Janssen (Coastal Permitting Supervisor) about a question a member of the public had at the Permit Center regarding the issue of "a hot tub in a bluff setback". At that time, Mr. Janssen indicated to Ms. Nall that the use was not allowed because it was not listed (or similar to the uses listed) in the *Exceptions to bluff setback requirements* in Section 23.04.118c of the Coastal Zone Land Use Ordinance. It's impossible to know whether the conversation the Mr. Janssen and Ms. Nall had was related to the Fichter property. However, the question is rare and the timing is similar.

COASTAL ZONE LAND USE ORDINANCE STANDARDS:

Although it is tempting to launch into a discussion of whether a hot tub (portable or permanent) is "development" or a "structure" in the coastal zone, staff feels that this is not the crux of the issue in front of the Planning Commission. The issue of this Planning Director's appeal is whether a hot tub is an allowed use within a bluff setback.

Staff is often confronted with questions regarding what is allowed within a bluff setback. Most of these questions are related to fences, concrete "flatwork", or "deck-like" structures (we use the term "deck-like" because decks are not allowed within a bluff setback; see discussion below). However, many landowners would like something similar to a deck between their residence and the coastal bluff. For example, staff has historically allowed structures that are wood or concrete as long as they are; 100 square feet or less, less twelve inches above natural grade, and not connected to each other or the single family residence. The theory here is that these small "deck-like" structures will float away in a high storm and/or wave event, and that their detachment from the property would not jeopardize the structural integrity of the single family residence on the property. If these structures detach from the property during a high storm and/or wave event without causing structural damage to the single family residence, then a shoreline protection device (aka seawall) would not be necessitated by this event (a landowner may have other legitimate reasons for a seawall). Coastal Commission staff has endorsed this theory and our interpretation of this section of our Coastal Zone Land Use Ordinance (CZLUO).

To gain a better understanding of how staff interprets this section of the CZLUO, it's worthwhile to spend a minute-or-two discussing the sequencing of the ordinance. The CZLUO starts by telling us that the provisions in the Coastal Zone Land Use Ordinance are minimum requirements, as set forth in Section 23.01.041a,1 (*Rules of Interpretation*):

- (1) **Minimum requirements.** *The regulations and standards set forth in this title are to be considered minimum requirements, which are binding upon all persons and bodies charged with administering or enforcing this title.*

Section 23.01.041d,1 (*Rules of interpretation; Allowable uses*) then tells us that if staff (as designated by the Planning Director) feel that an unlisted use is similar to a listed use, then we need to do so in writing. Specifically, this section says:

- (1) *Where a proposed land use is not specifically listed in Section D, Chapter 7, Part I of the Land Use Element, the Planning Director will review the proposed use when requested to do so by letter and, based upon the characteristics of the use, determine which of the uses listed in the Land Use Element definitions is equivalent to that proposed, and*
- (2) *Upon a written determination by the Planning Director that a proposed unlisted use is equivalent in its nature and intensity to a listed use, the proposed use will be treated in the same manner as the listed use in determining where it is allowed, what permits are required and what standards affect its establishment.*

When Mr. Janssen was approached by Ms. Nall about a proposed hot tub in the spring in 2005, he did not consider the proposed use to be similar or equivalent to a listed use because the Department has never interpreted the *Exceptions* section of the CZLUO to include hot tubs (or anything similar). Therefore, Mr. Janssen did not forward the issue to the Planning Director for a written determination. So, in affect, the appellant is appealing the Planning Director's lack of a determination in this case (i.e. no written determination is a determination in and of itself).

Next, the CZLUO instructs us how to implement the standards and requirements set forth in the *Setbacks* Section (23.04.100). Specifically, this section starts by stating:

The purpose of these standards is to provide for open areas around structures where needed for : visibility, traffic safety and fire safety; access to and around buildings, access to natural light, ventilation and direct sunlight; separation of incompatible land uses; and space for privacy, landscaping and recreation.

Within the *Setbacks* Section, the *Blufftop Setbacks* Section of the CZLUO (23.04.118) states the following:

New development or expansion of existing uses proposed to be located adjacent to a beach or coastal bluff shall be located in accordance with the setbacks provided by this section...

Subsection 23.04.118c of the *Bluff Setbacks* Section of the CZLUO (*Exceptions to bluff setback requirements*), lists the uses allowed within a bluff setback area. Specifically, it states the following:

Exceptions to bluff setback requirements: *The minimum setback requirements of this section do not apply to the following:*

- (1) *Wood fences or hedges three feet or less in height above natural grade, and wire fences no higher than six feet located in the Agriculture or Rural Lands categories.*
- (2) *Landscaping, minor earthworks, steps or similar design elements (not including decks or other solid structures) placed directly on natural grade.*

6-4

- (3) *Roof and wall projections including cantilevered and projecting architectural features including chimneys, bay windows, balconies, cornices, eaves and rain gutters may project into the required setback a maximum of 30 inches.*

Because a hot tub is not listed in the *Exceptions to bluff setback requirements* section, and because a hot tub is not similar or equivalent to any of the uses allowed within the bluff setback, the use is not allowed.

In addition to not being listed in the *Exceptions* section, and a hot tub not being similar or equivalent to any of the uses listed, it is also notable that the weight of a full hot tub may contribute to the instability of a coastal bluff over time. It's not known if the issue of hot tub weight within a bluff setback has ever been evaluated in detail by an expert, but staff feels that it is something worth of mention and consideration. In short, staff feels that something that could weight as much as 4500 pounds (*this conservative calculation is based on a four person hot tub full of water and four people*) may result in long term adverse impacts to the stability of a coastal bluff. Potential adverse impacts to coastal bluffs may lead to the need of a shoreline protection device (aka seawall), and seawalls can lead to adverse geologic and visual impacts to the beach and the users of the beach.

Finally, the two issues of privacy and visibility deserve consideration. As stated above, privacy is one of the issues addressed within the *Setbacks* Section of the CZLUO. Since only a three foot tall fence is allowed within the bluff setback in a residential area (see above), everything that occurs within your neighbor's bluff setback is also part of your life. Although the issue of visibility (as listed above in *Setbacks*) is primarily intended to preserve visibility around structures, another type of visibility is worthy of consideration; the visibility of the hot tubs from the beach. Although the single family residences would dominate the view from the beach, hot tubs of all different sizes, shapes, and colors may result in an increased adverse visual impact to the users of the public beach. Staff feels that allowing this use would be contrary to the goals of the *Setbacks* section (see above) and several coastal policies protecting visual resources.

Staff report prepared by Matt Janssen

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EXHIBIT A - FINDINGS

- A. The proposed use of a hot tub within the bluff setback is not allowed because it is not specifically listed within the *Exceptions to bluff setback requirements* section of the Coastal Zone Land Use Ordinance (Section 23.04.118c).
- B. The proposed use of a hot tub within the bluff setback is not allowed because it is not similar or equivalent in nature and intensity to any of the uses listed in the *Exceptions to bluff setback requirements* of the Coastal Zone Land Use Ordinance (Section 23.04.118c).
- C. The proposed use of a hot tub within the bluff setback is not allowed because the proposed use is inconsistent with many of the listed goals of the Setbacks section; specifically, the use may lead to incompatibilities between properties regarding privacy.
- D. The proposed use of a hot tub within the bluff setback is not allowed because the proposed use is inconsistent with many of the listed goals of the Setbacks section; specifically, the use may lead to adverse individual and cumulative visibility impacts when viewed from the adjacent public beach.
- E. This request for an interpretation of the Coastal Zone Land Use Ordinance is not a "project" under the California Environmental Quality Act, and therefore does not require an environmental determination.



San Luis Obispo County Department of Planning and Building

NOTE: To appeal a Board of Supervisors decision you will need to obtain appeal forms from the California Coastal Commission - 725 Front Street, Suite 300 - Santa Cruz, CA (408) 427-4863.

PROJECT INFORMATION

#611

Type of permit being appealed: **SEE ATTACHED**

- Plot Plan
 Minor Use Permit
 Development Plan
 Variance
 Land Division
 Lot Line Adjustment
 Other APN 064,151,007
 File Number: _____
Planning Director Determination

The decision was made by: **SEE ATTACHED**

- Planning Director
 Building Official
 Administrative Hearing Officer
 Subdivision Review Board
 Planning Commission
 Other 10-24-05
 Date the application was acted on _____
e-mail from Matt Janssen,

The decision is appealed to:

- Board of Construction Appeals
 Board of Handicapped Access
 Planning Commission
 Board of Supervisors

BASIS FOR APPEAL: Please note: An appeal must be filed by an aggrieved person or the applicant at each stage in the process if they are still unsatisfied by the last action.

INCOMPATIBLE WITH THE LCP. The development does not conform to the standards set forth in the California Coastal Program of the county for the following reasons (attach additional sheets if necessary):

Explain: SEE ATTACHED

INCOMPATIBLE WITH PUBLIC ACCESS POLICIES: The development does not conform to the public access policies of the California Coastal Act - Section 30210 et seq. Of the Public Resource Code (attach additional sheets if necessary):

Explain: _____

Specific Conditions. The specific conditions that I wish to appeal that relate to the above referenced grounds for appeal are

Condition Number	Reason for appeal (attach additional sheets if necessary)

APPELLANT INFORMATION

Print name: Magda Fichter c/o P. Terence Schubert Phone Number (daytime): (805) 543-1113
 Address: 1254 Marsh St., San Luis Obispo, CA 93401

I am the authorized representative of _____
 I am the applicant or an aggrieved person pursuant to the Coastal Zone Land Use Ordinance (CZLUO) and are appealing the project based on either one or both of the following grounds, as specified in the CZLUO and State Public Resource Code Section 30603 and have completed this form accurately and declare all statements made here are true.

Signature P. Terence Schubert, Esq. Date Nov. 7, 2005

OFFICE USE ONLY	By: <u>MLV</u>	Date Received: <u>11-7-05</u>	Receipt No. (if applicable): <u>N/A</u>
Amount Paid: <u>None at this time</u>			Revised 5/05/04/LLF

6-8

ATTACHMENT TO COASTAL ZONE APPEAL APPLICATION

On or about April 12, 2005, Ms. Magda Fichter received a Notice of Violation from Timothy L. Fielder of the San Luis Obispo County Department of Planning and Building, a copy of which is attached hereto, marked as Exhibit "A". Clarification of the basis for the Notice of Violation was sought through communications with County staff, specifically, Mr. Fielder, Mr. Randy Sabin, Ms. Karen Nall, Ms. Marie Cowan, and Mr. Matt Janssen.

On or about April 21, 2005, Ms. Fichter replied to the Notice of Violation by letter dated April 21, 2005, a copy of which is attached hereto, marked as Exhibit "B".

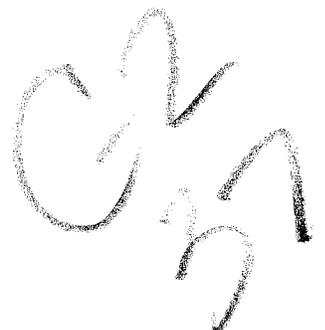
In October of 2005, Ms. Fichter was advised, thorough her representative, to request a clarification of the County's position in writing. This clarification was sought through telephone communications with Ms. Marie Cowan, and by e-mail to Ms. Cowan of October 7, 2005, a copy of which is attached hereto, marked as Exhibit "C".

On October 17, 2005, Mr. Janssen advised the Appellants' counsel that San Luis Obispo County Code Section 23.04.118c did not allow a hot tub to be placed within a bluff setback. A copy of e-mail by which this information was provided to the Appellant is attached hereto, marked as Exhibit "D".

On October 21, 2005, Appellant's representative requested additional clarification concerning the interpretation of County Code Section 23.04.118 that had been provided by County representative Matt Janssen. A copy of the request of this clarification is attached hereto, marked as Exhibit "E".

On October 24, 2005, Appellant's representative received another e-mail from Mr. Janssen concerning his interpretation of Section 23.04.118. A copy of the e-mail providing this information is attached hereto, marked as Exhibit "F".

On October 24, 2005, Appellant's representative requested further clarification or a reconsideration of the County's position with regard to the placement of the portable hot tub in the bluff setback area at issue. A copy of the e-mail which was sent to Mr. Janssen is attached hereto, marked as Exhibit "G".



6-9

On October 24, 2005, Appellant's representative received an e-mail from Mr. Janssen, advising that the County's determination was the hot tub is not allowed. Mr. Janssen further advised Appellant that an Appeal to this determination could be taken to the Planning Commission, and that there would be no charge for this Appeal. A copy of this e-mail is attached hereto, marked as Exhibit "H".

On November 4, 2005, the Appellant sought to obtain a form in which to file this Appeal, but was advised by representatives of the County Department of Planning that no forms were available on that date. Appellant sought to file the Appeal again on November 7, 2005, and was advised by Planning Department staff that a fee of \$604.00 would need to be paid before the Appeal would be accepted, contrary to the interpretation provided by Mr. Janssen on October 24, 2005 (see Exhibit "H"). Clarification of the County's position on the fee was sought through an e-mail sent by Appellant's representative to Mr. Janssen on November 7, 2005, a copy of which is attached hereto, marked as Exhibit "I".

Mr. Jansen replied via that e-mail attached hereto, marked as Exhibit "J".

In response to the information received from the County with regard to the fee for the Appeal of the County's interpretation of Section 23.04.118, Appellant's representative sent an e-mail to Mr. Jansen on November 7, 2005, a copy of which is attached hereto, marked as Exhibit "K".

As of the drafting of this Appeal, no response has been received from the County to that e-mail attached hereto as Exhibit "K."

The Appellant is appealing the following issues: (1) Whether San Luis Obispo County Code Section 23.04.118 prohibits the placement of a portable hot tub in the position in which it is located at 930 Pacific Street, Cayucos, California; and (2) whether Appellant is required to pay a fee for the Appeal of this interpretation.

It is Appellant's position that Section 23.04.118 does not prohibit the placement of the portable unit at Appellant's residence. The unit at issue does not require attachment to the ground, and its placement at 930 Pacific Street is not in violation of Section 23.04.118.

C-2
JH

6-10

EXHIBIT A

C2
309

6-11



SAN LUIS OBISPO COUNTY
DEPARTMENT OF PLANNING AND BUILDING

VICTOR HOLANDA, AICP
DIRECTOR

April 12, 2005

Magda Fichter
PO Box 257
Cayucos, Ca 93430

NOTICE OF VIOLATION

Dear Ms. Fichter:

We have recently determined that there are violations of county code at your property located at:

ADDRESS	PARCEL NUMBER
930 Pacific St	064,151,007

Violations:

- 1 SLOCC 19.01.220 as defined by
SLOCC 19.04.020 Permits required for the installation of the hot tub/spa

Violations of County Code make your property a public nuisance and are misdemeanors, so please take this notice seriously. We will assist you if possible, but it is your responsibility to resolve this problem.

How to bring your property into compliance:

- 1 Remove the hot tub from the bluff setback area, and apply for a permit to install it in an allowed area.

C-2
40

6-12

EXHIBIT B

02
11

6-13



April 21, 2005

Subject: Notice of Violation, 930 Pacific, Cayucos, CA APN 064,151,007

Dear Mr. Fielder:

I am very sorry that my neighbor has created this problem. I have just built this house and the exterior electrical was approved during final inspection. I checked with the county about a portable spa, and was told the only issue on the bluff was that it could not be a permanent fixture, no permanent decks, slabs, or anything like that. So when I purchased the spa and placed it in my yard, I had no idea it would be a problem.

I am going to ask for a hearing and therefore this is my formal request for an extension as stated in your correspondence.

I will be turning this over to my attorney, Terrence Schubert for his advise and then we will be contacting you.

If you have any further questions please do not hesitate to contact me by phone, fax, email or mail. All of my information is below.

I produce a trade-show that is taking place in Las Vegas at the end of this month and I will be out of town from the 25th through the 5th.

If you need to contact my attorney his number is 543-1113.

Thank you for your understanding regarding this situation.

Magda E. Fichter

Cc: Terrence Schubert, Attorney at Law

SHOW MANAGEMENT, INC.

71 S. Ocean Avenue • Box 257 • Cayucos, CA 93430

00.MAGDA.4U or 800.624.3248 or 805.995.2989 • F 805.995.2504 • W www.iecsc.com • E magda@magda.com

6-14

EXHIBIT C

2
43

6-15

Dear Ms. Cowan:

10/7/05

As we discussed, I represent Magda Fichter with regard to the County Code issue which has arisen in connection with the portable hot tub that was installed, after consultations with the County, in her backyard in Cayucos.

I have previously spoken with Tim Fielder, Randy Sabin and Karen Nall regarding this situation, and I met with Mr. Sabin during a site visit at Ms. Fichter's residence. After I met with Mr. Sabin, I spoke with Karen Nall, and she advised me that the County's concerns revolved around bluff stability, which mirrored the discussions that I had previously had with Mr. Sabin. Ms. Nall informed me that she would discuss this matter with Matt Janssen, and that she would get back to me with any questions, concerns or any clarifications and updates as to the County's position.

I have not heard from Ms. Nall (or any other County representative) since we last spoke some time ago, and the voicemail message (asking for an update) that I left with her some weeks ago has not been returned. Accordingly, to my knowledge, this issue is still on Matt Janssen's desk for some type of judgment call on his behalf. However, in speaking with Ms. Fichter, she understands otherwise, and has advised me that you are now working on this matter, in place of Mr. Sabin.

It would be greatly appreciated if you could advise me as to the County's current position on this matter, at your earliest convenience. Since there is at least some confusion, perhaps only on my part, a written communication would be appreciated.

I can be reached by phone at 543-1113, and my address is 1254 Marsh Street, SLO 93401, fax: 543-1205. As we discussed, please direct all future correspondence regarding this matter to me.

Your courtesy and cooperation are appreciated.

Sincerely yours,

Terry Schubert

EXHIBIT "C"

Handwritten initials 'CS' and 'AM' in the bottom right corner.

6-16

EXHIBIT D

CS
45

6-19

Terry: 10/17/05

Marie Cowan thought it best if I responded directly to you on this one.

Yes, I do remember Karen Nall coming back to talk with me about Magda's hot tub about 3 or 4 months ago. I remember Karen and I agreeing that 23.04.118c (Exceptions to bluff setback requirements) did not allow hot tubs within the bluff setback. I had the impression that Karen was going immediately back out to the Permit Center after we talked and delivered that message to someone at the counter. I assumed it was Magda out there...apparently, I was wrong about that.

Lastly, we would not support a Variance to this standard.

I hope that helps.

Matt

EXHIBIT "D"

Handwritten signature or initials in the bottom right corner of the page, appearing to be 'CJ' over '40'.

6-18

EXHIBIT E

Handwritten signature or initials in black ink, located in the bottom right corner of the page. The signature is stylized and appears to consist of several loops and strokes.

6-19

Dear Matt: 10/21/05

Thanks for the response.

I have reviewed Section 23.04.118, and did not come across any language that appeared to disallow the placement of a hot tub at Ms. Fichter's residence.

While I understand that hot tubs are not mentioned in

Section 23.04.118c, the remainder of that Code Section does not appear to provide the basis for what I understand to be your opinion on this matter.

When I spoke to Ms. Cowan, I was advised that you would be providing an explanation of the analysis that led to your decision. It would be appreciated if that could be provided.

Thank you,

Terry

EXHIBIT "E"

A large, stylized handwritten signature or set of initials, possibly reading 'CJ' or 'CS', is located in the bottom right corner of the page.

6-20

EXHIBIT F

C2
49

6-21

Terry: 10/24/05

I guess my "analysis" is simple... If we allow a use that is not explicitly identified in the CZLUO (or can be reasonably interpreted to be in the same "family" as something else listed), where does that methodology end? It's a slippery-slope and we are not willing to go there. Also, my determination is consistent with how our department has interpreted this section of the LCP since its inception in 1988.

Let me know if I can be of further assistance.

Matt

EXHIBIT "F"

CSO

6-22

EXHIBIT G

CS1

6-23

Dear Matt:

10/24/05

Thanks for your prompt response. Are there any written guidelines that have been adopted by the County which provide any support for the interpretation that has been applied to Ms. Fichter's property?

It seems as though under that analysis, the placement of a chair within the bluff setback to watch sunsets might be prohibited, since it is not mentioned as an exception in Section 23.04.118c.

My client purchased and chose to place a portable unit in her backyard, in light of the County Code, which does not appear to prohibit the placement of that type of unit. Your reference to a slippery slope is of interest, since the Code Section at issue does focus on the purpose of restrictions in the bluff setback, which is to "assure stability and structural integrity and to withstand bluff erosion and wave action for a period of seventy-five years without construction of shoreline protection structures...." Ms. Fichter's use of that unit does not in any manner impact the stability of the bluff.

It is respectfully requested that you reconsider the position that the County has taken with regard to this unit.

Your professional courtesy is appreciated.

Thank you,

Terry

EXHIBIT "G"

C2
S2

6-24

EXHIBIT H

CS

6-25

Terry: 10/24/05

I guess the short answer is "no", I know of no guidelines adopted by the county regarding how to interpret 23.04.118c. However, my determination that the hot tub is not allowed is consistent with historical department determinations on this issue. I know that may not seem like much, but members of the public are always telling me that they "wish we would be consistent with our application of the rules". I believe they are just and correct with that request... With that in mind, this is our determination on the hot tub...it is not allowed.

Your client can appeal this determination to the Planning Commission (and ultimately the Board and Coastal Commission) pursuant to 23.01.042b,1,i if she wants to pursue the issue. It would be a "free" appeal (because of LCP issues) and would take approximately 3 months to get in front of the Planning Commission.

Matt

EXHIBIT "H"

CR
54

6-26

EXHIBIT I

CS

6-27

Dear Matt:

11/07/05

Here's an excerpt from your e-mail to me of October 24, 2005:

"Your client can appeal this determination to the Planning Commission (and ultimately the Board and Coastal Commission) pursuant to 23.01.042b,1,i if she wants to pursue the issue. It would be a "free" appeal (because of LCP issues) and would take approximately 3 months to get in front of the Planning Commission."

I have been advised by my legal assistant, Janis Burns, that you and the Planning Department are now requesting a \$604 fee before the appeal will be accepted. I called your office for clarification of this issue, but you were unavailable, so I left a message.

An explanation would be appreciated. I can be reached at 543-1113.

Thank you,

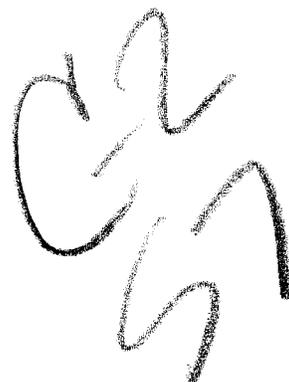
Terry Schubert

EXHIBIT "1"

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6-28

EXHIBIT J

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6-29

Terry: 11/07/05

I apologize for the confusion. There has been some internal differences on this issue regarding the fee for coastal zone appeals that are not related to a specific project approval. In other words, because your client is not appealing a project (e.g. a neighbor receiving a MUP for an addition to an existing sfr), some here feel that a fee should be collected for an appeal of a Planning Director's interpretation (even if it is related to a "coastal" issue). Others disagree.

We have an adopted Policy and Procedure for accepting appeals. However, it does not direct us what to do in this case. I will be forwarding the issue to my counsel for an opinion today. In the meantime, your client will need to pay the fee. It will be reimbursed if my counsel directs me to do so.

Matt

EXHIBIT "J"

Handwritten signature or initials, possibly "CS" or "CSO", written in dark ink.

6-30

EXHIBIT K

CSA

6-31

Dear Matt:

11/07/05

Now I am confused. I had understood that you were the person charged with the responsibility for interpreting the County Code, and, in this instance, the fee for the appeal of your decision with regard to Section 23.04.118.

Apparently some other County representative has overruled your opinion that no appeal fee will be imposed, as was set forth in the October 24th e-mail to me, even though this new interpretation does not have any support from the "adopted Policy and Procedure for accepting appeals." An explanation of how this change in interpretation occurred, and who made the new interpretation would be appreciated, as it appears as my client will now need to appeal the imposition of this fee. In that regard, please accept this e-mail as request for a copy of the Policy.

As long as legal counsel is reviewing the imposition of the fee, it is respectfully requested that the underlying appeal issue be revisited as well. A lot of time, effort and cost could be avoided.

Thank you for your consideration of these issues, and your professional courtesy and cooperation.

Best regards,

Terry Schubert

EXHIBIT "K"

A large, stylized handwritten signature or set of initials, possibly reading 'CS' or 'CO', is written in the bottom right corner of the page.

DRAFT

THURSDAY, FEBRUARY 9, 2006 Planning Commission minutes

Item 6

Hearing to consider an appeal by **MAGDA FICHTER** of a Planning Director Determination to not allow a hot tub within the bluff setback in accordance with Coastal Zone Land Use Ordinance Section 23.04.0118. The site is located within the Residential Single Family land use category and is located at 930 Pacific Street in the community of Cayucos, in the Estero Planning Area. An environmental determination is not required. County File No.: None. APN: 064-151-007. Supervisorial District: 2.

Matt Janssen: Planning Staff, presents the staff report. States he received a letter from landowner's attorney yesterday regarding the stringline method. Shows overhead of the site showing the location of the hot tub on the bluff. Staff recommends denial of the project because of bluff stability, erosion, and future justification for shoreline protection, visibility and privacy issues.

Commissioner Roos: what is a normal bluff setback, with staff responding there is a bluff retreat study required.

Commissioner Gibson recuses himself because he owns property within 500 feet of the project.

COMMISSIONER GIBSON IS NOW ABSENT

Commissioner Christie: did the stairway and fence need a permit, with staff responding it appears the stairways was built pre- coastal act.

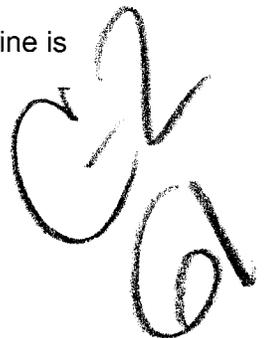
Terence Schubert: attorney, this is an appeal of the Planning Department decision that the hot tub is not allowed within the bluff setback. The hot tub is not a permanent structure. Discusses stringline setback method. Asks the Planning Commission to uphold Ms. Fichter's appeal. Analysis for a bluff setback was done for the house, but not for the hot tub.

Matt Janssen: the bluff setback was an important issue and went through a detailed review. Planning allowed the grandfathered westerly wall of the old structure to remain to allow Ms. Fichter to rebuild the house. They went off that western wall to determine the bluff setback.

Commissioner Christie: was the hot tub put on nature grade with staff responding.

Commissioner Rappa: is a permit required for a hot tub of this size with staff responding it is in the coastal appeal area.

Commissioner Roos: if you don't need a permit for a hot tub, why can't the applicant have a bluff setback study, with staff responding the bluff setback line is located easterly of the western wall.



The matter is further discussed, and thereafter, on motion of Commissioner Christie, seconded by Commissioner Mehlschau, and on the following roll call vote:

AYES: Commissioners Christie, Mehlschau, and Roos

NOES: Commissioner Rappa

ABSENT: Commissioner Gibson

the commission denies the appeal by Ms. Fitchter of a Planning Director determination based on Findings in Exhibit A.

Respectfully submitted,

Eleanor Porter, Secretary
County Planning Commission

C2
62