

MINUTE ITEM

This Calendar Item No. 16
was approved as Minute Item
No. 16 by the State Lands
Commission by a vote of 3
to 0 at its 10/26/78
meeting.

MINUTE ITEM

10/78
Mills

16. PERMIT FOR RESIDENCE ON PATENTED TIDELANDS - W 21493

During consideration of Calendar Item 16, attached, Mr. Peter Kagel, the applicant, appeared in support of his item. In addition, Mr. William Howe, President, Tomales Bay Association, appeared in support of the staff's recommendation. He submitted a letter from the Inverness Association to Mr. Cory dated October 21, 1978, and a mailgram from the Marin Conservation League to Mr. Cory, both supporting the staff's recommendation.

Due to the unique set of circumstances present in the Kagel application including, but not limited to, (1) the placement of fill and two septic systems pursuant to then applicable approval procedures and the consequent alteration of the characteristics of this specific parcel; (2) the securing of all necessary permits from the local agency, the County of Marin, to construct a proposed single family residence, the Commission, by a vote of 3-0 finds:

1. That the applicant has made a good faith, long term attempt to obtain necessary approvals and to comply with those approval procedures required to obtain final approval to construct a single family residence on the subject property.
2. That the subject property lies partially within Tideland Survey 185 and partially within the Rancho Punta De Los Reyes. The boundary between Tideland Survey 185 and Rancho Punta De Los Reyes is uncertain due to inter alia, the absence of monuments. Therefore, the public does not now have access to Tomales Bay from Sir Francis Drake Boulevard at the location of the subject property.
3. That as a consequence of applicant's good faith installation of improvements on the subject property in compliance with then existing approval requirements, the consequent change in the character of the parcel, the uncertainty as to the boundary between Tideland Survey 185 and Rancho Punta De Los Reyes, and the lack of public access from Sir Francis Drake Boulevard across the property to Tomales Bay, the Commission believes an exchange pursuant to Public Resources Code Section 6307 is appropriate.
4. Nothing contained herein shall be construed as establishing a policy or precedent that private residential use of tidelands is consistent with the public trust.
5. No findings are made at this time with regard to the consistency of the proposed development with the provisions of the California Coastal Act of 1976.

MINUTE ITEM (CONTD)

7. The Commission formally exercises the public trust for public recreation, pedestrian use, and wildlife habitat over the balance of the tideland parcel and over the parcel it is receiving in exchange. Mr. Kagel concurs and accepts such exercise.

Attached and by reference made a part hereof is a complete verbatim transcript of the proceedings.

Attachment: Transcript -- 75 pages
Calendar Item 5 pages

P R O C E E D I N G S

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3 CHAIRPERSON CORY: Item 16, Kagel and Kagel
4 Corporation.

5 EXECUTIVE OFFICER NORTHROP: Mr. Chairman, Item
6 16 on the staff presentation will be Mr. Flushman from the
7 AG's Office and Mr. Mills.

8 MR. FLUSHMAN: I don't know whether there is any
9 presentation to be made on behalf of the Applicant today,
10 Mr. Chairman.

11 EXECUTIVE OFFICER NORTHROP: We understand he
12 has asked to speak.

13 MR. FLUSHMAN: Is he here?

14 CHAIRPERSON CORY: Mr. Peter Kagel?

15 MR. KAGEL: I'm here.

16 MR. FLUSHMAN: Members of the Commission,
17 Executive Officer, counsel, this application is being
18 brought to your attention in the manner that it is because
19 of the direction that the staff was given in June of 1977
20 to prepare a comprehensive plan for the development or non-
21 development of tidelands in Tomales Bay subject to the
22 trust. Those lands have generally been identified for
23 planning purposes as all lands that were subject of
24 tidelands patents around the perimeter of the Bay. The
25 application that was filed here, it was filed in June of

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1 1977 and was recently updated by the submission of certain
2 environmental data. As a result of the direction to the
3 staff, a series of meetings have been conducted on
4 approximately a six-week or bimonthly basis with the
5 County of Marin, the Coastal Commission, the North Central,
6 North Coast, North Central Coastal Regional Commission,
7 whichever one it is, to prepare in conjunction with the
8 local coastal planning process a recommendation to the
9 Commission as to what the appropriate use of the tidelands
10 is in the Tomales Bay area and how it should be exercised.

11 The data compilation process has been going on.
12 In Mr. Golden's report today he indicated that contact
13 has been made with Pacific Marine Station. There have
14 been ongoing studies by Fish and Game to have inventory
15 of the flora and fauna in the tidelands area, including an
16 inventory of all clams, oysters and et cetera that exist
17 along the shore.

18 They have prepared certain maps which show
19 preliminarily their determinations which have been
20 considered in conjunction with this application. It is
21 expected that after this compilation process is completed,
22 that there will be a draft plan for consideration of the
23 various bodies in the county, the Coastal Commission and
24 the Lands Commission by the end of this year or the
25 beginning of next year.

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1 As a part of this process, the Commission entered
2 into a Letter of Understanding with Marin County and the
3 Coastal Commission to prevent the uncoordinated and premature
4 land-use characterization in this area. The Letter of
5 Understanding was entered into and it generally provides
6 that permits will not be issued unless there is consultation
7 between the parties and comments are made on them and that
8 the land-use proposal is for uses or activities that are
9 continuations of an existing use or activity which are
10 consistent with the public trust and the objectives of the
11 California Coastal Act and consistent with uses of adjacent
12 or affected tidelands or submerged lands or et cetera.

13 There are certain exemptions to that not
14 pertinent here.

15 The Lands Commission, as you are aware, is charged
16 with the exclusive jurisdiction and authority of all
17 interests of the state in these granted tidelands pursuant
18 to Public Resources Code Section 6301.

19 In May of 1977, Kagel and Kagel Corporation applied
20 for a Claim of Exemption and a Permit from the Coastal
21 Commission. That Claim of Exemption and Permit were denied.
22 In June of 1977, the State Commission denied it. It was a
23 reapplication for a permit to the Regional Coastal
24 Commission in August, I guess it was August of this year.
25 That was denied and the State Coastal Commission has denied

1 the appeal of this.

2 The Applicant now wants the State Lands
3 Commission to approve his project as proposed in his
4 application. The project is located -- I'm going to put
5 this up for demonstrative purposes. We seem to be short.
6 This is a photogrammetric map which fits the tidelands
7 surveys in the area which are identified by --

8 MR. McCAUSLAND: Because of the glare, we can't
9 see your map.

10 CHAIRPERSON CORY: The nonglare overlay material,
11 Prop. 13 doesn't allow us to afford that.

12 MR. FLUSHMAN: The tidelands patents are
13 identified on there and they have been fixed photo-
14 grammetrically and topographically. That is for
15 demonstrative purposes only and does not represent a
16 boundary determination by the Commission. We have placed
17 the parcel and the proposed development on the map itself.

18 Mr. Gorfain was at the site last week and is
19 prepared to show slides which will depict the site in its
20 various aspects and show the surrounding area to the
21 Commission.

22 CHAIRPERSON CORY: How much minutiae do we need
23 to have to deal with this issue?

24 MR. FLUSHMAN: I believe it's important that we
25 do so to establish a record in case there is later action to

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1 mandate the Commission to exercise its authority.

2 MS. SMITH: You have the proposed building
3 located on your map?

4 MR. FLUSHMAN: Yes.

5 MS. SMITH: Are there other residences nearby?

6 MR. FLUSHMAN: I think that will be shown by these
7 slides. You can see it on the map.

8 CHAIRPERSON CORY: Okay. Another dog-and-pony
9 show.

10 MR. McCAUSLAND: Mr. Kagel would like to see
11 the maps.

12 EXECUTIVE OFFICER NORTHROP: Would you leave the
13 set on in the rear, please? The back set on.

14 MR. GORFAIN: This is the Kagel site looking
15 toward the street on the Bay. The house will be located
16 approximately over there. There are two septic systems
17 on either side.

18 Next slide.

19 CHAIRPERSON CORY: Pardon me. There are septic
20 systems for what?

21 MR. GORFAIN: For a single-family residence.

22 CHAIRPERSON CORY: In other words, they're not
23 there yet.

24 MR. KAGEL: No, they're there.

25 MR. GORFAIN: The septic systems are in, the

1 Marin County on Saturday is taking our tidelands permit
2 away from us and we have no choice but to go to court. I've
3 drafted everything last night. It's going to be typed
4 today and I'm going to present it to a court today or
5 tomorrow. It's vital, I think, that you hear this on its
6 merits.

7 CHAIRPERSON CORY: I'm prepared to do that, but
8 I'm still puzzling this point, the question of clarifying
9 at this point in the record, if you would like to, where
10 that point should be if --

11 MR. KAGEL: Yes, Mr. Cory.

12 It is back towards the road. It has to have a
13 25-foot setback by Marin County ordinance. We are in
14 compliance.

15 CHAIRPERSON CORY: Twenty-five foot from --

16 MR. KAGEL: From I think the top of that bank.

17 We are up to ordinance. We have the right to
18 have a building permit right now. We have a conceptual
19 building permit. I have a letter in my file that says we
20 are up to code on everything, including septic systems.

21 MR. GORFAIN: We have one more quick slide.

22 This is the house you saw sitting over the water
23 and it is approximately the same height as the house that
24 Mr. Kagel is proposing.

25 MR. KAGEL: Incidentally, that house is on the

1 house is not.

2 CHAIRPERSON CORY: Okay.

3 MR. GORFAIN: This is looking across the site
4 towards the southeast from Sir Francis Drake Boulevard.

5 Next slide.

6 The property immediately to the south from
7 Mr. Kagel's property. You can see that the type of
8 terrain, the type of vegetation that possibly could have
9 been on the Kagel site, probably was on the Kagel site
10 before it was filled. The house on the property to the
11 south sits all the way back towards the street.

12 Next slide, please.

13 Just another closeup.

14 Next slide.

15 CHAIRPERSON CORY: That's the same house?

16 MR. GORFAIN: The same house with the same house
17 on the site.

18 This house is, I presume, pre-Prop. 20 and it is
19 on the property immediately adjacent to the north of
20 Mr. Kagel's property. The sign you see on the property
21 here is the notice for the filing of Coastal Permit.

22 Next slide.

23 This shows you the Tomales Bay immediately north
24 of the house you just saw and, again, it's possible that this
25 was the type of vegetation that characterized the Kagel site

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1 or at least part of it before it was filled.

2 Next slide.

3 A shot along the shoreline and where the person
4 is standing is approximately, as best as we can determine,
5 the seaward extent of the house if it is built, Mr. Kagel's
6 house, if it is built.

7 MR. KAGEL: That's not true.

8 MR. GORFAIN: We can discuss that, but from the
9 plot plans we had, that was the best we could determine.

10 MR. McCAUSLAND: Could we have that slide so
11 Mr. Kagel can show us?

12 EXECUTIVE OFFICER NORTHROP: For the record,
13 would you identify yourself, sir?

14 MR. KAGEL: My name is Peter Kagel.

15 It's kind of an interesting way to present this.
16 We could probably do it a lot faster if I could bring you
17 up to date on what we went through. As we go through
18 these slides, I can explain to you where we are, if I may
19 do that.

20 CHAIRPERSON CORY: I'm not convinced I want to
21 listen to all the staff is giving me.

22 MR. KAGEL: I can tell you this, Mr. Cory, that
23 we're entitled to have this heard on its merits and I really
24 do want to come here and have it heard on its merits
25 because you are a party to a three-party understanding.

1 same fill.

2 MR. FLUSHMAN: Yes, Chairman Cory, there has
3 been no permits issued by the Commission for the septic
4 systems or the fill that took place on this property.
5 The staff has recommended a denial in accordance with the
6 calendar item. We don't believe it's consistent with the
7 Letter of Understanding and it involves some premature
8 characterization of the tidelands and there is some
9 question as to the consistency of a single-family residence
10 with the public trust for commerce, navigation and
11 fisheries.

12 CHAIRPERSON CORY: Is the question over the
13 ownership of the property, whether it's patent or --

14 MR. FLUSHMAN: No. There's no question over the
15 title, over the ownership. The question is whether or not
16 the use that he wishes to put his fee is consistent with
17 the easement that we have for commerce, navigation and
18 fishery.

19 I might note that this is a sensitive environ-
20 mental area and has been so designated by the Commission
21 in its inventory.

22 CHAIRPERSON CORY: We have an easement over what,
23 the entire parcel?

24 MR. FLUSHMAN: The tidelands patent as it is
25 described.

1 CHAIRPERSON CORY: Is there a fee parcel and a
2 patent parcel, or what?

3 MR. FLUSHMAN: Well, the demonstrative map
4 reflects that there is a certain portion of the parcel that
5 lies within the Rancho line and within the Tidelands Act
6 as well as outside of the tidelands patent. But the
7 development itself, as it is depicted, falls within the
8 tidelands patent.

9 This map is not a survey, as I've indicated.

10 MS. SMITH: You indicated in your presentation
11 that there is certain conditions that had to be met in
12 accordance with the Memorandum of Understanding. Are you
13 suggesting that the use which Mr. Kagel is proposing would
14 be inconsistent with the uses that are being made of the
15 property now?

16 MR. FLUSHMAN: That are inconsistent with the
17 uses made of the property now?

18 MS. SMITH: Yes.

19 MR. FLUSHMAN: Well, the use that's being made
20 of the property now is that it's open space.

21 MS. SMITH: But there are other residences in the
22 area.

23 MR. FLUSHMAN: I think you can see from the
24 indication on this map and the slide presentation that the
25 residences are spread apart. Whether or not there are other

1 residences there does not necessarily mean that the
2 Commission in its monitoring or in its approval for
3 tidelands should be issuing permits to build residences
4 on tidelands. I'd be happy to provide the Commission with
5 my opinion on this in Executive Session, if you wish.
6 I'm not sure this is the appropriate time to do it.

7 CHAIRPERSON CORY: Okay. Does that conclude
8 what you have to say?

9 MR. FLUSHMAN: I might add that this land has
10 been designated in the Inverness Ridge Community Plan as
11 a park and open space and that we were advised by the
12 Applicant yesterday or, excuse me, the 24th, that he would
13 not appear and he wished certain matters to be presented
14 to the Commission. We have done so through a letter from
15 Mr. Mills confirming that conversation to the Commission.
16 We will be introducing matters as part of the record of the
17 Commission which I have not taken the time to do now.
18 Copies will be provided to Mr. Kagel if he desires them.

19 I have nothing further.

20 CHAIRPERSON CORY: Okay. Mr. Kagel.

21 MR. KAGEL: May I sit down?

22 CHAIRPERSON CORY: Sure.

23 MR. KAGEL: The property you saw, plus the house
24 that was built just adjacent to it, are build on the same
25 filled land. That land was filled in 1970. At that time

1 no one was required to get a filling permit, et cetera,
2 except probably from Marin County. At least State Lands
3 wasn't involved. As a matter of fact, we've been trying to
4 get State Lands involved in this thing for some years,
5 and I guess it's a question of being overburdened.

6 At the time that the lots were built we put in
7 two septic tank systems because we wanted to build two
8 single-family residences and we had building permits
9 granted from Marin County prior to Proposition 20. Then
10 the next thing that happened was the price of money went
11 up and we let them expire because we just didn't have the
12 funds.

13 Then we reapplied when we did have the funds
14 and, lo and behold, Marks versus Whitney came down. Now,
15 I don't know if you're familiar with Marks versus Whitney,
16 but you must be.

17 Marin County was the only county in the state
18 that said building above the water, or building any solid
19 structure above the ground violated Marks versus Whitney.
20 Then Marin County passed what they called a tidelands
21 permit which is Ordinance Number 22.77 of their Code.

22 So, to get to court to argue with this, you have
23 to exhaust your administrative remedies. So we proceeded
24 to go through that tidelands permit procedure which took
25 some years. In doing so, we had to develop an Environmental

1 Impact Report which you have here. It's over a hundred
2 pages.

3 Now, pursuant to that and on all of the hearings
4 we had, we finally got a tidelands permit on the Board of
5 Supervisors' level from Marin County. The Board of
6 Supervisors of Marin County -- and this is the last word
7 in how they planned and how they planned for that particular
8 parcel -- they ruled, they made 12 findings and the
9 findings are:

10 Number one, it would not inhibit navigation.

11 Number two, it would not inhibit access to
12 publicly-owned tidelands.

13 I want to say at this point, all the way along
14 this process we said we'd dedicate 100 percent of this
15 property to the public trust except for where the house
16 sits and the two parking spaces. In other words, people
17 can walk all over that place. We don't care. Matter of
18 fact, we want them to. Let them do it. So bear in mind,
19 we said, sure, go ahead. Okay.

20 Number three, this will not cause or increase
21 the likelihood of water pollution.

22 Number four, it will not cause or increase the
23 likelihood of flooding of adjacent lands, likelihood of
24 flooding adjacent lands.

25 Five, it will not destroy or accelerate the

1 destruction of habitats essential to species of fish,
2 shell fish or other wildlife of a substantial public
3 benefit.

4 Number six, it will not interfere with or
5 detract from the line of sight of the public toward the
6 water, particularly natural features of visual prominence.

7 What those pictures didn't show you is that
8 property's on a curve and it's got willows growing up and
9 you can't see from the road. You can't see out there from
10 the road at all.

11 Number seven, it will not conflict with the
12 scenic beauty of the shoreline due to height, bulk,
13 form, color, materials, illumination and the standard
14 design of parking facilities.

15 Eight, it will not create a safety hazard in
16 connection with settlement, fill or earthquakes.

17 Nine, it will not diminish natural waterways
18 by siltation, sedimentation or bank erosion.

19 Ten, that the project is in substantial harmony
20 with the adopted General Plan.

21 Number eleven, public benefits would be created to
22 offset some of the detriments which may be caused by the
23 nature of the proposal.

24 Finally, proposed fill excavation and
25 construction will not adversely affect any existing public

1 rights on the property.

2 So we have that tidelands permit.

3 MR. FLUSHMAN: Excuse me. Let me interject at
4 this point. This is a Marin County Tidelands Permit for
5 what it's worth since no grant has been made of the
6 public trust to the County of Marin in the area of
7 Tomales Bay. So with that characterization, --

8 MR. KAGEL: If you look at your report compiled
9 by Mr. Mills, you will see that they beg the question of
10 what public trust is. What they do is they say the public
11 trust is whatever Marin County's planning groups are going
12 to say it is. It's your job. I submit it's your job.
13 You can't delegate that duty. You have to decide on an
14 individual case-by-case basis about what the public
15 trust is on each and every single parcel there. Then we
16 have to run the gamut and run their local plan. But the
17 public trust situation is the only thing that you should
18 be addressing yourselves to.

19 Now, the Coastal Commission in their infinite
20 wisdom turned us down in our vested rights application
21 by saying, well, we didn't construct those septic tank
22 systems with reliance on building permits. Which, you
23 know, is somewhat absurd. That's number one.

24 Getting back to the regular thing, let's just
25 say that the Code, that the Coastal Commission, that the

1 Coastal Act does have authority over us. They said that
2 they turned us down on the basis of the public trust wasn't
3 delineated by you. What you've got here is a situation
4 where agency after agency is playing ping-pong back and
5 forth in an effort to stall the people who have land there,
6 not giving them an answer. We played ball for seven years
7 but we can't because Marin County is pulling our permits,
8 as I said, on Saturday. I'm getting a Writ of Mandate and
9 we're also bringing a declaratory relief action for
10 inverse condemnation and somebody's going to end up paying
11 for that property because we have a failure here in our
12 State Government for everybody to take care of their jobs.
13 You know, the Coastal Commission did not tell me that they
14 had this Letter of Understanding between Marin County and
15 you. I say that's a lot of nerve. I say that's damn sub
16 rosa, sickening, totalitarian. They knew all along they
17 were going to turn it down and they didn't tell us.

18 I went through all this hassle compiling reports,
19 hoping, right? I'm a lawyer. I'm supposed to say, well,
20 you're not supposed to hope. Just be objective. Just keep
21 your head back. I was hoping. All the time it was on --
22 okay. Let me show you something else the Coastal Commission
23 said.

24 Because your staff has incorporated their findings
25 in its findings, I think you have to address yourself.

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1 The Coastal Commission said we're not up to Code
2 in our septic system. We are up to Code. What they're
3 doing is they're creating a super agency for the state to
4 decide what is up to Code and what is not up to Code.
5 That's a county situation. They knew all the way along
6 the line that that house that you saw next door was on the
7 same fill and has one septic system and they never had any
8 problem. They're saying we're going to have a problem and
9 we've got two septic systems. One's a fail-safe, a backup
10 system.

11 So here we are since 1970 playing the game and
12 it's running out. We want you people on an individual
13 basis, not on some Letter of Understanding, to cope with
14 your authority, to take it on a case-by-case basis and tell
15 us whether or not we are consistent with the public trust
16 or not, bearing in mind that we've given a hundred percent
17 of the property to the public trust for access.

18 Now, if you say that we are not, that we are
19 not consistent with the public trust, then you're virtually
20 going to say that nobody is consistent with the public
21 trust in terms of a single-family residence. That's all.
22 Plain and simple, that's it.

23 The other thing that this staff report says is,
24 well, we've got the proposed local coastal program and we
25 know about them. That's in the Letter of Understanding.

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1 If you know about it, you're supposed to go by those
2 guidelines even though they haven't been certified or
3 anything else. The only testimony that's ever been put
4 before any public hearing on that property, despite this
5 convenient representation that I just heard from your
6 counsel, that they want to make it a park, is they want
7 to have a linear trail across the property. Now, that
8 piece of property is 43,000 square feet. The house is
9 going to take up like 1265 square feet plus the two parking
10 spaces. You're telling me that they can't put a lousy
11 eight-foot trail across 42,000 square feet? It's absurd,
12 unbelievable, and it's unfair.

13 Now they're trying to hold us out and say, okay,
14 we've got some group, the Inverness Ridge Committee saying
15 we want a park there. Let's have a park. I'm telling you
16 they considered that at the EIR and they ruled it out.
17 They wanted a boat launching site. They ruled it out.
18 There's no parking space. If you show the pictures again,
19 you'll see it doesn't go right on Tomales Bay. It has sort
20 of a little finger, sort of a dike that was put in there.
21 It is not appropriate for that. There are houses not only
22 next door in sight, but there's houses all the way up and
23 there's even a motel.

24 So what we've got here is a situation where the
25 green panthers are running amuck. They may destroy it for

1 everybody because I voted for that Coastal Act, but we've
2 got a situation where we've got to be the bad guys. I
3 almost feel like let's cut everybody off at the knees
4 because nobody is taking their authority, nobody is
5 addressing themselves to the issue. The issue is, on this
6 particular piece of property, is it consistent with the
7 public trust. Letter or no letter.

8 MR. McCAUSLAND: Just to start things off, we
9 rejected an application last year on the basis that if we
10 had to go house by house, we would deny each application
11 on the basis that there was no way for us to understand
12 at what point equity was reached in terms of the balance
13 of the need for bayside housing and the need for public
14 access. We, as an alternative, suggested if we could have
15 before us a Master Plan for the area that demonstrates to
16 us that in aggregate the public trust is adequately
17 protected, then we as a Commission can have a legal basis
18 for on a case-by-case basis saying this particular structure
19 is consistent with the Master Plan for the area.

20 Since the Master Plan for the area makes
21 adequate provision for the public trust, we can go along
22 with specific structures. That's the position that the
23 Commission finds itself in.

24 MR. KAGEL: I can understand that. Now, under
25 Section 30600 of the Coastal Act, the local government, which

1 is Marin County, and I assume you'd be paying attention
2 to them, has the option to put in procedures during the
3 course of the formulation of the local coastal program.
4 If they don't take that option, which they didn't, then
5 they leave it up to the state. Now, the state has a staff
6 to do it and they're going on a case-by-case basis and
7 maybe you don't have the staff to do it. But I suggest
8 to you that maybe you should be exercising, you should be
9 looser on your exercising of your jurisdiction because
10 we're going to be in a situation where we're going to have
11 judicial -- the courts are going to decide it for you.
12 It isn't going to be a question of planning. It's going
13 to be plain and simple Writ of Mandate time and it is.
14 I'm sorry, but it is. I can't go any further. We played
15 ball all the way along. We think we have a meritorious
16 situation. The public trust stopped on that land when
17 those septic tanks were put in and the land was filled.
18 We are saying we can all live together.

19 CHAIRPERSON CORY: Let me clarify just in my own
20 mind. I believe I heard you say that there is a some 1200
21 square foot house that you wish to build.

22 MR. KAGEL: Yes, sir.

23 CHAIRPERSON CORY: Some 25 feet back from the
24 bank.

25 MR. KAGEL: It's the only place it could be

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1 built because of all the leachlines running all over the
2 property.

3 CHAIRPERSON CORY: But you are prepared to grant
4 public access to everything save that 1200 feet plus the
5 parking?

6 MR. KAGEL: Yes, sir, we've always done that.

7 CHAIRPERSON CORY: That's somewhat of a unique
8 offer; is it not, staff?

9 EXECUTIVE OFFICER NORTHROP: Yes. I don't know
10 anyone who has offered that.

11 MR. FLUSHMAN: I wasn't present at the earlier
12 application hearing that Mr. Kassel made an offer of
13 dedication. It may have been for the same amount of a
14 comparable amount of his parcel. This is another parcel
15 in Inverness along the tidelands between two houses.

16 CHAIRPERSON CORY: I just wanted to make sure
17 I wasn't misunderstanding.

18 MR. KAGEL: Yes, I have the authority and I
19 hereby stipulate that 100 percent of that property belongs
20 to the public trust except for the house and the two parking
21 spaces.

22 CHAIRPERSON CORY: Okay. Betty, you had some
23 questions?

24 MR. MILLS: I don't quite understand what belongs
25 to the public trust. Do you mean you would dedicate fee

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1 title to a hundred percent of the property?

2 MR. KAGEL: I'm saying that people can enjoy it,
3 can come on it, do whatever they want on it, short of
4 creating a nuisance.

5 MR. FLUSHMAN: The easement is there regardless
6 of whether he dedicates it or not. That's an offer that he
7 is making that has no legal effect. The easement is not
8 terminated by the filling of that property.

9 CHAIRPERSON CORY: No. Wait. Let's clarify that.
10 As I understand from that map, there is a small
11 portion of it to which there is tideland easement.

12 MR. FLUSHMAN: We are assuming now, perhaps I've
13 stated, that for purposes of our discussion that the entire
14 parcel is encumbered by the trust. Even if it isn't, well,
15 then his offer of dedication does have some effect. As to
16 the parcel that lies outside the perimeter description of
17 the tideland pat.

18 CHAIRPERSON CORY: Take me very slowly through
19 the derivation of that easement, what you're talking about.
20 I'm trying to find out whether that's an offer or a non-
21 offer.

22 MR. KAGEL: Well, I think I might be able to help
23 you. It's your job to decide what the easement means.

24 CHAIRPERSON CORY: But I'd like to understand
25 because that seems to have been glossed over in the

1 presentation. There were a lot of details, and I don't
2 understand that. It seems to me an integral part of what
3 our position is or isn't.

4 MR. FLUSHMAN: The tideland patent is placed on
5 this photograph which is not a rectified photograph. It
6 was not taken with any controls by control set. So this
7 has been photogrammetrically fit, all of these parcels,
8 these maps have been photogrammetrically fit.

9 This is a 1974 photograph, excuse me, 1977
10 photograph of Inverness at one to two hundred feet is
11 the scale. Superimposed over that is the property as it
12 was depicted by the United States in 1862. On that 1862
13 topographic, on that is depicted the parcel in tape which
14 indicates that as far as the topographic map, a portion of
15 the parcel was on a map upland part and part of it was on
16 either submerged lands or tidelands. The tideland patents
17 are depicted on the next overlay which indicates that
18 substantially all of the parcels fall within, within
19 tidelands survey 185. Also imposed on this map is the
20 Rancho line in the area. The Rancho line is the base title
21 for the upland parcels which show that there is a conflict
22 between the tideland survey and the Rancho line which is not
23 an infrequent occurrence in Western Marin County where the
24 monumentation is slack and lax to put it mildly.

25 Does that answer your question?

1 MR. MILLS: In other words, what he's saying is
2 that substantially all the parcel, and I think it's
3 accepted by Mr. Kagel, was included within a tideland
4 patent which was sold by the state, fee title was sold by
5 the state to the private owner. However, the state
6 retained an easement over that parcel for commerce,
7 navigation and fisheries. It's that easement which has been
8 referred to as the public trust easement.

9 CHAIRPERSON CORY: And Mr. Kagel's position is
10 that that was terminated when the fill was made in 1977?

11 MR. KAGEL: No. I'm trying to persuade you to
12 say that the use is what we're talking about here.

13 CHAIRPERSON CORY: Is consistent with?

14 MR. KAGEL: Yes. It ceases to be a bird preserve.
15 You can't use it as a bird preserve because it's filled.
16 It's got septic tanks underneath it. The law's going to
17 look and say, what's the most proper and best use for it.
18 It's got septic tanks on it. You have access to a highway.
19 You have water to it. You have power to it. There are
20 houses on each side. So, you know, we're not arguing over
21 whether or not it falls within the jurisdiction of state
22 lands. We are saying, what I was trying to say to you is
23 that the use is, you know -- Let me say something else.

24 You say that you don't have enough staff and you
25 can't take it on a case-by-case basis.

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1 MR. McCAUSLAND: I made no representation about
2 staff. I said the policy statement that if we went case
3 by case, we would determine that we would never know in
4 aggregate at what point we had built so many houses that
5 we had damaged the public trust. But if we had a Master
6 Plan to compare the project-by-project proposal, we could
7 determine that in aggregate we were still protecting --

8 MR. KAGEL: As a practical matter, this is the
9 only single house that you're going to have to worry about
10 between now and the time you get your Master Plan, and I'll
11 tell you why.

12 Mr. Mills told me Mr. Cassel did not have all of
13 his permits in order with Marin County. That's why you
14 didn't consider it. There's no way anybody else is going
15 to get their permits in order with Marin County because
16 they have to go through this bloody tidelands ordinance
17 which I just read you all the findings you have to satisfy.
18 To my knowledge, there is absolutely no Environmental
19 Impact Report in the process of being made on any other
20 parcel. This parcel is the only parcel that I know of that's
21 large enough to accommodate up to Code septic systems.
22 As a matter of fact, what they did to us, we're grandfathered
23 in on that septic system. We're probably grandfathered in
24 for two houses. Well, I just as soon wait.

25 MS. SMITH: I have a question for staff.

1 Would the approval of Mr. Kagel's application be
2 in breach of the Memorandum of Understanding that you've
3 reached with the County of Marin and the Coastal
4 Commission? If so, in what respects and what are the
5 consequences?

6 MR. FLUSHMAN: All that the Memorandum of
7 Understanding requires us to do is to consider the
8 criteria that are set forth in that understanding. As far
9 as being in breach of it, I'm not sure it's possible to
10 breach it by an approval because the agreement, the Letter
11 of Understanding does not say that you cannot approve.
12 It says you have to give consideration to these factors
13 when you do approve. The reason that we entered into the
14 Letter of Understanding, of course, is so that we didn't
15 have approvals being adopted by one agency and not by
16 others and to prematurely characterize what the ultimate
17 plan is going to be. So it wouldn't be a breach in short.
18 It would not be something that I would recommend the
19 Commission doing, however.

20 MS. SMITH: For what reason?

21 MR. FLUSHMAN: For the reasons that are stated
22 in the calendar item.

23 MS. SMITH: What is the date certain for the
24 completion of the Master Plan?

25 MR. FLUSHMAN: A date certain? The date certain

1 is that it will be sometime after the first of the year.

2 CHAIRPERSON CORY: Mr. Kagel's problem is that
3 he bites the bullet the 28th.

4 MR. KAGEL: That's right.

5 MR. FLUSHMAN: Well, of course, this has been a
6 year since he made his first application and now he wants
7 the Commission to decide today.

8 MR. KAGEL: Let me say, I want to address myself
9 to that and then I want to come back and talk to what I was
10 talking to you about.

11 When I went before the Coastal Commission down
12 south, Mr. Golden was there. They told me, they said you
13 don't have to wait your six months pursuant to the
14 Administrative Code to come back. The Master Plan, you
15 know, is moments away. I've waited and I waited. So we've
16 been good faith on this thing all the time. The minutes
17 don't reflect that, but the tape does.

18 CHAIRPERSON CORY: Of the Coastal Commission?

19 MR. KAGEL: Yes, sir.

20 So what's the point of doing that, what's the
21 point of incurring all of this expense unless you know
22 that you're really up against the wall. We've tried to
23 play ball with everybody.

24 Now, let me finish why you're not going to have
25 any other houses. No one -- We have one acre there, one

1 acre. And I don't think there's another acre parcel there.
2 There's no way that anybody can conform with Marin County's
3 septic ordinance on even one acre any more. What they did,
4 when we came back and reapplied for our building permits
5 again, they knocked us down from two houses to one. They
6 said you had to have a 100 percent fail-safe system. Now
7 they've even changed it more. So you're not going to have
8 to face this thing.

9 We have a lot of hardship in this thing, seven
10 years. Seven years and it's not going to be any skin off
11 anybody's nose because they're going to be able to use the
12 property.

13 MR. FLUSHMAN: That seven-year period is not
14 taken up by consistent pressing of the application on a
15 daily basis. This is a sporadic process that has been
16 going on as is evidenced by the matters which we'll be
17 submitting to the Commission.

18 CHAIRPERSON CORY: Questions from Commissioners?

19 MR. MILLS: I think there may be some other
20 people in the audience.

21 MR. McCAUSLAND: As long as people in the audience
22 want to testify, I would like Mr. Golden, if he could relate
23 for us, how this application might relate to an application
24 within the Bay Conservation and Development Commission
25 jurisdiction because it appears to me, although this is

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1 really a superficial forum in which to try to get to this,
2 that public use of all nondeveloped portions of the parcel
3 is a fairly significant commitment and one that many
4 property owners are most reluctant to agree to in fact, if
5 not in semantics. But can you describe for me how we can
6 make a public trust finding in a San Francisco Bay
7 project which perhaps is virtually identical to this one?

8 MR. GOLDEN: I think, Mr. McCausland, in
9 response to that, the McAteer-Petris Act which set up the
10 Bay Development Commission was an exercise of the public
11 trust in itself and it's significantly different in any
12 respect than the Coastal Act which is also an exercise of
13 the public trust.

14 So you have a number of different items in the
15 Coastal Act which have to be considered as exercised. For
16 instance, the effect on the environmental factors, whether
17 or not these leach fields have an impact on the environment
18 and what not would be a matter for the Coastal Commission
19 to consider but perhaps not in the same context as the
20 BCDC.

21 MR. McCAUSLAND: Plus perhaps the fact that BCDC
22 has already adopted plans and elaborate rules and
23 regulations to allow you to view each application on its
24 merits.

25 MR. GOLDEN: Yes.

1 MR. FLUSHMAN: If I might add, Commissioner
2 McCausland, that maybe a result of this planning process
3 that goes on here is that that's what will be recommended
4 for the Lands Commission to do in the Tomales Bay area.

5 CHAIRPERSON CORY: Just what I always wanted,
6 get elected Controller and be a Planning Commissioner.
7 I'm sorry.

8 Are there any other people in the audience who
9 wish to comment on this permit?

10 Would you come forward and identify yourself for
11 the record, please.

12 (Thereupon a discussion was held off
13 the record.)

14 CHAIRPERSON CORY: Yes, sir.

15 MR. HOWE: My name is William Howe and I'm the
16 President of the Tomales Bay Association.

17 You have, I hope you've received it, letters from
18 the Inverness Association signed by Daniel Morse and a
19 Mailgram from the Marin Conservation League. There is one
20 other organization in West Marin called the Environmental
21 Action --

22 CHAIRPERSON CORY: Do you have copies of those
23 documents because we do not have them?

24 MR. HOWE: Oh, you do not have them. I have these
25 here. Maybe they didn't reach you.

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1 There is one other organization called the
2 Environmental Action Committee of West Marin whose
3 chairman is in Europe. However, the history of that
4 organization is in accordance with those of the rest of it.

5 We all support the staff report. We were up here
6 for the Cassel hearing, as you may recall, when the
7 situation was a little bit different. Our organization
8 specifically, a long time ago, sent a letter to you shortly
9 after the Marks-Whitney decision stating our general
10 position. Many of our members actually own tidelands, but
11 most of them are not the people who own undeveloped property
12 They own some of these small houses that are around the Bay.
13 So we've been rather conservative in this issue.

14 However, we very early came to the decision that
15 in cases of undeveloped property, we strongly urge you in
16 undeveloped property, such as Mr. Kagel's, I believe, to
17 give maximum weight to the public trust. Tomales Bay is not
18 San Francisco Bay. Tomales Bay is a rural area surrounded
19 by the seashore. It's an area in which it's become a very
20 great recreation area and it's the general feeling that
21 for houses to be built along the Bay which are conflicting
22 with the views and conflicting with the recreational use,
23 that there is a strong case to be made to not encourage them.
24 That's basically the point that I wish to convey to you.
25 It's a matter of community sentiment.

1 MR. KAGEL: May I --

2 CHAIRPERSON CORY: There are a couple of things
3 that go through my mind that's puzzling to me. One, because
4 I feel as a representative of the government and put in a
5 position of being asked to decide upon something to try to
6 absolve somebody from the sins of another governmental
7 agency. I mean, I'm uncomfortable about that. I feel that
8 there may have been something less than a meritorious
9 treatment by some of my other people in government of an
10 applicant here.

11 The thing that I'm going through in my own mind,
12 and I don't know where this comes out in terms of a final
13 decision, but the down side of what you told me, I'm
14 receiving this way and I'd like to tell you how I'm
15 receiving it so you'd have a chance to correct me if I'm
16 misperceiving it.

17 The concept that you're representing a group
18 of people who have their houses and, therefore, don't want
19 anybody else to have houses. I mean, "I've got mine." I'm
20 sitting here trying to weigh using the public power as a
21 trustee to preclude this person's use of his property right
22 for your convenience. I think there may be something more
23 to your argument than that, but I want you to know what the
24 kind of things that I'm going through. I don't know how
25 I'm going to vote on this, but rather than you walk away

1 with just that statement, I'd like for you, if you could,
2 to respond to that in some way.

3 MR. HOWE: Well, there's obviously an ambiguous
4 situation now. People who have had their houses for a long
5 time, you know, have a homeowner's interest in their own
6 property. They live there. You know, they've lived there,
7 many of them for a long, long time. Of course, such
8 property does change hands.

9 It seems to me that that's one situation, but it's
10 a completely different situation where you can look out and
11 see the birds and so on and for someone else to come in and
12 then put a structure up.

13 CHAIRPERSON CORY: If I could just pursue that
14 and then Sid has a question for you.

15 In this particular case, as I understand it and
16 nobody's disputing the fact that either rightfully or
17 wrongfully the property was filled in 1970 and septic
18 tanks were put in. Is there any way in your hearts that
19 you can conceive that he's one of you rather than one of
20 them? He has already done his development. I mean, I don't
21 know.

22 MR. HOWE: At the Regional Coastal Commission,
23 I got up at that time because I was somewhat concerned about
24 the fact that Mr. Kagel had an investment in his property
25 through the work that he had done. I suggested at that

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1 time that possibly that this was an instance where,
2 although I really thought that he should not be allowed to
3 build, that possibly this was a case where he should receive
4 some compensation.

5 MR. FLUSHMAN: Compensation for --

6 MR. HOWE: For the things that he did before the
7 decision, you know, before the Marks-Whitney decision.

8 MR. KAGEL: Including reasonably attorney's fees
9 from then on?

10 MR. HOWE: I'm not an attorney so I will pass on
11 that one, what is a reasonable attorney's fee.

12 At which point the attorney for the Regional
13 Commission asked Mr. Kagel a question and I'm not going to
14 pretend that I can give a completely accurate answer to this.
15 Mr. Kagel, I'm sure, will correct me. But the general gist
16 of the thing was there was a point after the decision that
17 Mr. Kagel for personal reasons allowed his permits to
18 expire at which point Mr. Kagel then began all over again.

19 Now, I don't know how you feel about it, but I
20 feel that this was the point at which -- I've changed my
21 mind, obviously -- that this was the point at which the
22 local and state agencies involved were off the hook on this
23 one.

24 MR. KAGEL: This is prior to Proposition 20
25 ever coming down. This was conforming with their laws all

1 the way down the line. If we didn't stand a chance in the
2 beginning, why would we even go forward.

3 CHAIRPERSON CORY: Sid, did you have a question?

4 MR. McCAUSLAND: Do you reside in the vicinity
5 of this?

6 MR. HOWE: I have a so-called weekend residence
7 in Inverness. It's up on the hill. It's on the other side
8 of the highway. I'm a legal resident of San Francisco.

9 MR. McCAUSLAND: Are you familiar with many
10 undeveloped pieces of property that already have fill and
11 septic systems in place around the perimeter of the Bay?

12 MR. HOWE: Well, I was talking about places with
13 houses.

14 MR. McCAUSLAND: I'm curious to know, Mr. Kagel
15 has a piece of property that's been filled and it has a
16 septic system in place. Are you familiar with other pieces
17 of property in that vicinity that have undergone that degree
18 of development?

19 MR. HOWE: Off the top of my head, no.

20 MR. McCAUSLAND: Is our staff aware of any?

21 MR. FLUSHMAN: I don't believe there are any.

22 MR. McCAUSLAND: Did Mr. Cassel or whoever the
23 other party was have a similar circumstance?

24 MR. FLUSHMAN: I think there's partial fill on his
25 property, but that's it. There is no septic system.

1 MR. McCAUSLAND: There is no septic system.

2 MR. FLUSHMAN: Whatever the origin of that fill is,
3 it's undetermined whether he did it himself or it's a --

4 MR. McCAUSLAND: Was the State Lands Commission
5 actively administering any permit laws related to fill in
6 1970?

7 MR. FLUSHMAN: Were they actively administering
8 or did they have the authority? They were not actively
9 administering it, I believe. I wasn't counsel to the
10 Commission.

11 MR. McCAUSLAND: Did they have the authority?

12 MR. FLUSHMAN: I believe they did.

13 MR. McCAUSLAND: Do we have any evidence that
14 suggests to us at all that the fill or the septic tank was
15 not in full conformity with the laws in place at the time
16 those actions transpired?

17 MR. FLUSHMAN: Which laws?

18 MR. McCAUSLAND: Whichever laws were applicable to
19 fill and septic.

20 MR. FLUSHMAN: As far as the County of Marin,
21 according to the Coastal Commission findings, they were in
22 accordance with the standards as they existed for septic
23 systems in 1970. Whether or not they meet present standards
24 is subject to question, but you also have to consider that
25 there has been studies of the ground water and septic

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1 sewage disposal systems in the Inverness area along the
2 tideland which will be presented at the time that the
3 planning determinations hopefully will be made by the
4 Commission as to what should go on the tidelands. So
5 regardless of the fact that they meet Marin County
6 standards, if, for example, the septic system studies show
7 that two septic systems, whatever the fail-safe procedures,
8 would cause a discharge of effluent into the Bay at this
9 area, the Commission may have to make an independent
10 determination as to whether or not the use of the property
11 so as to cause effluent to flow into the Bay --

12 CHAIRPERSON CORY: I think that's irrelevant to
13 what Sid is driving at.

14 MR. FLUSHMAN: I'm not sure that it is.

15 MR. McCAUSLAND: Let me go on to my next question
16 then.

17 Is there any contention on the part of this
18 Commission staff that any actions have been taken since
19 Marks versus Whitney that are not in compliance with
20 applicable law at this time?

21 MR. FLUSHMAN: I'm not sure that I understand your
22 question.

23 MR. McCAUSLAND: It occurs to me or it seems to me
24 that everything that he's done up to this point in time has
25 been in conformance with the laws under which he undertook

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1 those actions to the best of our ability to discern that.
2 That any impairment made to the public trust was made prior
3 to Marks versus Whitney. As far as the state's sovereign
4 interest in the public trust relevant to this particular
5 parcel, it's been substantially altered already. While
6 there are potential trust uses available to us, I don't
7 quite understand what premise we should use at this point
8 in time, in the absence of planning by Marin County for
9 this area earlier in its General Plan, and in view of the
10 fact that the Coastal Commission has yet to act on this
11 property at the regional level --

12 MR. MILLS: The Coastal Commission has already
13 acted on it.

14 MR. FLUSHMAN: It's acted by a denial as
15 affirmed by the State Commission.

16 MR. McCAUSLAND: On the basis of a plan?

17 MR. MILLS: On the basis that it was not --

18 MR. FLUSHMAN: I'll be happy to read to you what
19 the findings are. The findings are that the proposed
20 development represents private residential use of historic
21 state tidelands that are subject to the public trust
22 doctrine. The applicant's offer to dedicate a pedestrian
23 easement does not satisfactorily resolve the conflict
24 between private development and the public right to use
25 of these tidelands.

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1 There are also other findings that are available.

2 MR. McCAUSLAND: Is it their place to make that
3 specific finding?

4 MR. FLUSHMAN: There is a conflict between the
5 Coastal Act of 1970 and the Public Resources Code,
6 Section 6301 as to exactly who has the exclusive jurisdiction
7 over the tidelands.

8 MR. McCAUSLAND: Is there exclusive jurisdiction
9 or is it shared?

10 MR. FLUSHMAN: Well, the 6301 says exclusive.
11 The Coastal Act says that the State Commission retains
12 jurisdiction over the tidelands regardless of whether
13 there's a local coastal program instituted in the area,
14 the State Commission.

15 MR. McCAUSLAND: Let my attorneys correct me if
16 I'm wrong. So, in fact, the more current and more specific
17 language of the Coastal Act is very likely to prevail in
18 this instance?

19 MR. MILLS: Yes.

20 CHAIRPERSON CORY: Let me stop here at this
21 point. Mr. Kagel, you've indicated, I believe on the
22 record, that you feel, in fact you've gone to the point of
23 drafting documents that you're going to have to do whatever
24 you have to do in terms of mandamus actions and the like
25 to protect your property; is that correct?

1 MR. KAGEL: That's right.

2 CHAIRPERSON CORY: Okay. In view of that --

3 MR. KAGEL: But I hope you're not going to say:
4 Well, take us along with you.

5 CHAIRPERSON CORY: No. I'm going to say, and it's
6 a substantial inconvenience, but I think it's important
7 at this point that because of the potential litigation
8 question, we confer with our lawyers just to make sure
9 because at one point there was a statement by one of the
10 staff people that there was something that he didn't want
11 to get into at this point. It might be appropriate for
12 us to confer with our counsel and then --

13 MR. KAGEL: In an Executive Session.

14 CHAIRPERSON CORY: -- in Executive Session right
15 now. We will come right back. No decision is going to
16 be made there, but I need a clarification of what --

17 MR. KAGEL: May I just say, I want to read you
18 three sections out of the Coastal Act. I think I can clear
19 this up, your question about who has exclusive jurisdiction
20 over the public trust.

21 The public trust is what you have. Now, they
22 have jurisdiction over the same territory for other reasons,
23 but when it comes to public trust, they can't hang their
24 hat on the public trust.

25 Now, Section 30400 reads:

1 "It is the intent of the Legislature to
2 minimize duplication and conflicts among
3 existing state agencies carrying out the
4 regulatory duties and responsibilities."

5 30401 reads:

6 "Except as otherwise specifically provided
7 in this division, enactment of this division does
8 not increase, decrease, duplicate, or supersede
9 the authority of any existing state agency."

10 And then it goes on in another section talking
11 State Lands specifically saying what State Lands has.
12 That's 30416. Then it reiterates the fact that you have
13 what you had before this Act was passed; and what you had
14 before this Act was passed was exclusive jurisdiction.
15 Exclusive means exclusive.

16 MR. McCAUSLAND: That's what I thought it meant.

17 MR. KAGEL: That's right. That's exactly it.

18 CHAIRPERSON CORY: I would like the room cleared.
19 This should not take more than five or ten minutes, but I
20 would like to get that additional information before we
21 make a decision.

22 (Thereupon a recess was taken.)

23 CHAIRPERSON CORY: Okay. Now, where were we
24 before I so rudely interrupted?

25 MR. FLUSHMAN: We were considering this

1 application.

2 CHAIRPERSON CORY: Oh, yes, Item 16.

3 (Laughter.)

4 MR. McCAUSLAND: We had just determined with the
5 help of the Applicant that we had exclusive jurisdiction
6 over the finding of public trust, but also with a
7 reminder from counsel that our actions should not be
8 inconsistent with Coastal Commission actions.

9 MR. KAGEL: Why not? We're entitled to our --

10 MR. McCAUSLAND: Let me finish. That area over
11 which we have exclusive jurisdiction is public trust.
12 As a Commissioner I would be unwilling to make findings
13 other than those specifically consistent with that
14 exclusive jurisdiction. Then anybody else who wants to
15 say that our findings are inconsistent with theirs, can
16 argue as to whether or not they had jurisdiction.

17 CHAIRPERSON CORY: Okay. Mr. Kagel, do you have
18 any --

19 MR. KAGEL: Have I apologized for that last
20 outburst?

21 CHAIRPERSON CORY: You've been down the road.

22 MR. McCAUSLAND: Seven years even if only
23 sporadic is a big investment.

24 (Laughter.)

25 MR. McCAUSLAND: Most things in my life are

1 sporadic too.

2 MR. KAGEL: Well, I thank you for your
3 consideration and I feel that you've heard me. I can't
4 say that about the Coastal Commission, but I felt you've
5 heard me today. I don't think we present any threat
6 whatsoever to anybody's future plans on Tomales Bay and I
7 think it's only just, considering the investment we have
8 there and the fact that we've been law-abiding all the
9 way down the line.

10 CHAIRPERSON CORY: I want to get back to this
11 confusing area of public trust easement and the like.

12 How far are you willing to go for the non-house,
13 non-parking and driveway into that?

14 MR. KAGEL: The public may use it as it wishes.
15 I don't want an RV next door to the house, I mean, you
16 know --

17 MS. SMITH: What's that?

18 CHAIRPERSON CORY: A recreational vehicle. He
19 doesn't want a motor home coming in with its generators
20 going all night.

21 MR. KAGEL: The people can use it to pass over
22 to Peppermill Creek. They can walk over the property.
23 If there's ever a bicycle path, which is highly unlikely
24 because they're going to hate to condemn all the property
25 on each side, then, by God, they could have a bicycle path

1 with our blessing.

2 In other words, we'll give you 100 percent, 100
3 percent dedication to the public trust for pedestrian
4 right-of-way.

5 MR. FLUSHMAN: Is that in fee or is that in
6 easement?

7 MR. KAGEL: In easement.

8 MR. FLUSHMAN: Only an easement.

9 MR. KAGEL: Yes, sir, it's an easement, but it
10 lasts forever. That's the difference. If you want to
11 pay the taxes, we'll give it to you in fee.

12 CHAIRPERSON CORY: If we took it in fee and gave
13 you an easement for your septic leases which I guess are
14 in that area, --

15 MR. KAGEL: They're underneath the entire
16 property.

17 CHAIRPERSON CORY: -- that might alleviate you
18 of some portion of the tax burden.

19 MR. KAGEL: We have a problem. Because we were
20 in court, we have to represent that we were the fee owners
21 of the property. I think we might lose our standing to stop
22 Marin County and to pursue our remedy with the Coastal
23 Commission.

24 CHAIRPERSON CORY: What would happen -- I'm just
25 thinking hypothetically here -- that if we found some

1 mechanism that a portion of that was not adverse to the
2 public trust, the house site, and at this time you still
3 have a lot of problems down the road.

4 MR. KAGEL: But they're going to be solved in
5 short order.

6 CHAIRPERSON CORY: But --

7 MR. KAGEL: If you say the house and the two
8 parking spaces are consistent with the public trust, I
9 guess that's all you have to say.

10 CHAIRPERSON CORY: I'll put a caveat on there,
11 at this time.

12 MR. KAGEL: Fine. I don't see anybody coming in
13 and razing the house if they change the use.

14 MR. FLUSHMAN: If I can suggest that if you were
15 going to do that, hypothetically, it might be more
16 appropriate to do it and find that this area is no longer
17 subject to the public trust in that it has been filled,
18 reclaimed and is no longer useful or acceptable to that
19 purpose.

20 CHAIRPERSON CORY: Well, I was thinking of the
21 other way, that if down the road, since we don't know what's
22 going to happen with the other agencies and all, if at some
23 point -- I'm trying to avoid digging the state in a hole
24 that's, say, two years from now you're still in the saga
25 of fighting the bureaucracy's battle and a plan came out

1 that they needed that for a purpose --

2 MR. KAGEL: Now, wait a second. We do own that
3 property.

4 CHAIRPERSON CORY: Yes.

5 MR. KAGEL: And we do have a right. If somebody
6 wants to come in with eminent domain, I suppose they could
7 do it at any time.

8 CHAIRPERSON CORY: As I understand where we are
9 legally at this point in time, if we wanted to exercise the
10 public trust and we needed it for some legitimate public
11 purpose, the improvements that have been placed there we
12 would under law have an obligation to compensate you for
13 taking.

14 MR. KAGEL: Absolutely.

15 CHAIRPERSON CORY: I've got no problem with that.
16 What I'm concerned about is if for other people or other
17 reasons, not our control, you have not actually built the
18 structure and at a future point in time you wish to do that
19 because circumstances change or more information is
20 available, --

21 MR. KAGEL: Then you're not going to have to pay
22 for structures that we couldn't build.

23 CHAIRPERSON CORY: That's the point I'm trying to
24 clarify and put on the record. If they haven't been built,
25 this grant here does not convey a right to increase the

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1 value of whatever is there. Whatever is there is there and
2 what its value is is not enhanced by our approval today.

3 MR. KAGEL: It's my understanding you can't
4 sell a building permit. You've got to build a building
5 permit. What you're saying is, you're essentially
6 licensing us to build a house. You're saying that it's
7 an easement in growth, only belongs personally to you.
8 I guess that's right, or a profit or whatever. You're
9 saying it's a personal right is what you're telling me.

10 MR. McCAUSLAND: I want it understood that no
11 action taken by this Commission today should ever be
12 construed as a license to build a house. We're simply
13 discussing the matter of the finding regarding the public
14 trust.

15 MR. KAGEL: That's exactly right. That's why
16 we're here. We're here because you have to decide what is
17 the proper use under the public easement, and the proper
18 use under the public easement is a single-family residence.
19 It's okay. But we are going to --

20 CHAIRPERSON CORY: I think that getting you as
21 close to where you might like to be is going to not quite
22 be that as I read the Commissioners. I'm not so sure that
23 there are three votes to find a single-family residence is
24 consistent with trust purposes.

25 MR. KAGEL: Well, we're not going to put up a

1 tent.

2 CHAIRPERSON CORY: That you might well find that
3 in this unique property that acts that occurred prior to
4 Marks versus Whitney may make this particular homesite an
5 act that the public trust is no longer applicable.

6 MR. KAGEL: I'm here because I have to go through
7 the laws of the Public Resources Code and your laws.
8 Now, I'm here and I presented to you a single-family
9 residence because that's what we're talking about. Either
10 you give it to me or you don't. I can't understand this
11 gray area in between. Now, yes, we may not make it with
12 the Coastal Commission and then the whole issue is forever
13 dead if that's what you're saying. There's no way that you,
14 how can you --

15 MR. McCAUSLAND: Perhaps I can frame a motion
16 for the Chairman that we can discuss and you can respond
17 to.

18 MR. KAGEL: Fine.

19 MR. McCAUSLAND: Let's move that the State Lands
20 Commission find that due to the placement of fill and a
21 septic system prior to the finding in Marks versus Whitney
22 and the subsequent alteration of the character of the
23 land on this specific parcel, State Lands Commission finds
24 that the public trust would not be irreversibly damaged by
25 the construction of a structure on that land, granted that

1 all other portions of the parcel be dedicated in fee for
2 public access in perpetuity.

3 CHAIRPERSON CORY: With an easement for his
4 septic system. If you're going to take it in fee, you've
5 got to give him an easement back to use his portion of
6 it.

7 MR. McCAUSLAND: Incorporate any relevant
8 easements into the motion.

9 MR. KAGEL: I think we're getting there, but I
10 have a difficult problem with what you mean by "in fee."
11 Why do you want to end up owning the land? You see, what
12 you're doing then, of course, if we have an easement and
13 something happens to that land, we can make you fix it.
14 If the land starts caving in and the septic systems don't
15 work, we could say, hey, come fix your land, you've wrecked
16 our easement. Or if you do something there or something
17 happens with people coming over the property and you own
18 the property and their activities are interfering with the
19 septic system, then you have a real problem. I would
20 suggest that you just reshape it and let us give you the
21 easement. We'll keep the fee. I'm trying to keep you out
22 of trouble, out of managing, out of all that hassle.

23 MR. McCAUSLAND: Let me suggest that the Coastal
24 Conservancy reluctantly has been accepting public access
25 easements on behalf of the State Coastal Commission lately

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1 because no other agency was willing to accept them. We
2 could either take this as the State Lands Commission or
3 we could request that the Coastal Conservancy take such a
4 public access in perpetuity.

5 MR. KAGEL: Sure, we'll give it to the State
6 Conservatory or whatever it is.

7 CHAIRPERSON CORY: If we did this, what form do
8 you think it should be in?

9 MR. FLUSHMAN: If I might suggest that the
10 Commission rephrase its motion to indicate that the
11 parcel, because of its configuration being filled and
12 the septic systems being installed with appropriate permits
13 from the local governmental agencies, is no longer needed
14 for the trust. In return for that, and that further it is
15 no longer needed because there has been a dedication of
16 whatever form it takes that the application be granted.

17 MR. McCAUSLAND: What is the application?

18 MR. FLUSHMAN: The application is to build the
19 residence.

20 MR. McCAUSLAND: Why should we make a finding
21 about granting the application? All we have to do is make
22 a finding that the public trust is --

23 MR. FLUSHMAN: That's what you're doing. You're
24 saying that the land is no longer needed for the public
25 trust.

1 MR. McCAUSLAND: I don't want to go so far as to
2 saying an application should be granted. I merely want
3 to say that, as the State Lands Commission, we don't find
4 adequate grounds for suggesting that the public trust has
5 been irreversibly impaired.

6 MR. KAGEL: See, the problem is the vehicle we
7 get here which is an application.

8 CHAIRPERSON CORY: An application will be
9 approved delineating whether something is or is not within
10 the public trust. We are trying to avoid the problem of
11 ever saying that a single-family residence is consistent
12 with the public trust.

13 MR. KAGEL: Why don't you just say for this
14 particular parcel, and you keep your options open everywhere
15 else. So, as far as this particular parcel goes, the
16 application is approved that it is no longer needed as a
17 public trust because of what occurred prior to then, and
18 as a condition of approval you have from the applicant an
19 easement in perpetuity for the public, for pedestrian
20 right-of-way.

21 MR. McCAUSLAND: What do we have before us,
22 Mr. Hight?

23 MR. HIGHT: Mr. Chairman, if I could comment on
24 something first. The Commission still owns an easement.
25 So technically they are gaining little, if anything, from

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1 the conveyance of the easement back. It's a nullity.

2 The suggestion of the conveyance of a fee for
3 all that area except the area of the house and the parking
4 lot, to me seems like it would be the best position for the
5 state to be in.

6 MR. KAGEL: Excuse me. I don't think we can
7 do it either, because then you're creating a new parcel
8 of interest and you have to go through Marin County to do
9 that and then I got to go to court. You're creating another
10 parcel if you do that.

11 MR. FLUSHMAN: The interest is there.

12 MR. KAGEL: You're creating two parcels.

13 MR. FLUSHMAN: Well, there are ways that parcels
14 can be created without the necessity of going to the local
15 agencies through boundary line agreements with the State
16 Lands Commission. And if there is, as there appears to
17 be, a boundary question in this area, it may be possible to
18 work out a boundary line agreement with them as to where
19 the state's interest is and where his interest is, which
20 may include the homesite and may not.

21 MR. KAGEL: Your interest is over the entire
22 property right now.

23 CHAIRPERSON CORY: Well, we could enter into a
24 boundary line agreement redefining that for mutual interest.

25 MR. KAGEL: Well, what does the boundary line

1 mean? Is it going to show up on the official records
2 of Marin County or not?

3 MR. FLUSHMAN: It will show up on the official
4 records of Marin County. It is not subject to the
5 Subdivision Map Act.

6 MR. KAGEL: Regardless of whether it's, you know,
7 up to the Subdivision Map Act or not, you're still going
8 to have to get a tentative map approved.

9 MR. FLUSHMAN: If it's not subject to it, you
10 don't have to have it approved. It's exempt from it.

11 MR. TROUT: We might make an exchange. We could
12 agree on the location of the inner boundary of the tideland
13 survey. We can make an exchange of interest whereby from
14 that line to the Rancho line or to the balance of the
15 upland the property would be exchanged and become tidelands
16 and some other piece of the property would then become
17 upland through a boundary exchange.

18 MR. KAGEL: Maybe we could --

19 MR. TROUT: We have a problem if you have a date --

20 MR. KAGEL: Could we all have lunch together and
21 maybe we can work it out?

22 (Laughter.)

23 EXECUTIVE OFFICER NORTHROP: No. It's a public
24 meeting.

25 MR. KAGEL: Well, maybe the lawyers could have

1 lunch together with me on the State.

2 (Laughter.)

3 CHAIRPERSON CORY: Okay. If we could get a couple
4 of other points from some Commissioners. If that could be
5 put in the record, I think at the conclusion of that what
6 we might ask is some of the staff people sit down with
7 Mr. Kagel and see what they come back with and bring that
8 back before the Commission. The Commissioners will not be
9 here. I want to say, I have a problem that I have to catch
10 a 1:15 airplane, but I will try to go ahead and conclude
11 this calendar, the entire calendar here this morning
12 before that time.

13 Betty, you had some comments you wanted to make.

14 MS. SMITH: We're instructing staff to go out
15 and try to work out a suggested finding, right, --

16 CHAIRPERSON CORY: Yes.

17 MS. SMITH: -- to reach some sort of agreement.

18 MR. KAGEL: Can we do it before you leave?

19 CHAIRPERSON CORY: I'm hopeful.

20 MS. SMITH: Included in that finding I would like
21 to have that the State Lands Commission makes no finding
22 at this time with respect to the consistency of the proposed
23 development with the provisions of the California Coastal
24 Act of 1976.

25 MR. KAGEL: Fine. Great. Wonderful.

1 MS. SMITH: We, in making this, whatever finding
2 we make, should we decide that we are going to approve
3 the application contingent on some conditions, that nothing
4 contained in that declaration indicates in any form that we
5 are setting a policy that private residential use of
6 tidelands is consistent with the public trust.

7 MR. KAGEL: That's fine with us, too. If someone
8 can remember that, that's fine with us. I don't see why
9 we can't just say we accept that, we accept both of those,
10 we will give you an easement for the public in perpetuity
11 for pedestrians.

12 CHAIRPERSON CORY: If we could have some of the
13 people in the hall, somewhere, sit down and see what you can
14 come back with.

15 MR. McCAUSLAND: You can go down and use my
16 office.

17 MR. KAGEL: When we come back, can we come
18 immediately here?

19 CHAIRPERSON CORY: Yes.

20 Item 16 will be held in abeyance.

21 (Thereupon a recess was taken.)

22 MR. McCAUSLAND: Let's keep this thing at a low
23 emotional level if we can.

24 Go ahead, Mr. Kagel.

25 MR. KAGEL: It's not a problem we have here. We

1 can exchange a swap of -- we'll give you the land that gives
2 the public access from the highway to the rest of the
3 property and you're going to give us the building site and
4 the parking spaces. That's fine. The only problem we've
5 got is we have to have a finding. The finding is they have
6 to be of equal value which means these guys are telling me
7 you have to have an appraiser. We can't settle this thing
8 today. That's really upsetting me. We've got to settle
9 it today. If you are in agreement that our thing is just,
10 we'll be glad, we'll be glad to make the finding, you know,
11 along the lines that they outlined --

12 MR. McCAUSLAND: We can make the determination
13 today that our decision is contingent upon the ability to
14 develop an equal value determination here, can't we?

15 MR. KAGEL: Now, Bruce is --

16 MR. McCAUSLAND: Let me find out if I'm doing
17 something that you can't handle.

18 Our normal procedure would be in all likelihood
19 to put the calendar item over and ask that an appraisal
20 be completed and brought back to us. We don't want to do
21 that today because of permits lapsing. So what we're
22 proposing is to include in our decision a hook that says
23 our decision only holds if we can make this equal value
24 determination.

25 Is that something that staff can work with?

1 MR. KAGEL: And if, in fact, there's, you know,
2 the land is raw land --

3 MR. McCAUSLAND: Before we change the issue --

4 MR. KAGEL: I'm not changing it.

5 MR. McCAUSLAND: I know. But let me finish.

6 EXECUTIVE OFFICER NORTHROP: That's a question of
7 staff. Jim, what do you think?

8 MR. McCAUSLAND: Before you even answer that,
9 let me ask you another question. It's not clear to me that
10 the Commission really is intent upon any fee interest.

11 MR. KAGEL: We've given that up.

12 MR. McCAUSLAND: That's not a question.

13 MR. KAGEL: We just want to be able to supplement
14 in money. We're talking about raw land. It's going to come
15 down to square footage. Now, let's just say the building
16 site and the two parking spaces are more land than what is
17 not out, what we're giving you for public easement, and
18 nobody knows what the line is anyway because there's never
19 really been an accurate survey. Let's say it's more. And
20 I think we should allow us to make up the difference in
21 dough.

22 MR. McCAUSLAND: We can allow others to make up
23 the difference in dough.

24 MR. TROUT: We could put it in the land bank fund.

25 MR. FLUSHMAN: But the finding still has to be

1 made regardless of whether he agrees now to do it.

2 MR. McCAUSLAND: The finding needs to be made
3 that we can find a basis for the equal shares arrangement,
4 whatever the appropriate terminology is.

5 MR. FLUSHMAN: And the other findings that are
6 required by Section 6207.

7 MR. MILLS: Could I make one other suggestion?

8 It seems to me that there is at least a possibility
9 that Mr. Kagel will not get a permit from the Coastal
10 Commission.

11 MR. McCAUSLAND: That is a possibility.

12 MR. MILLS: And it also seems to me that the
13 land we're giving up since it's located within 21 feet
14 of the edge of the fill, --

15 MR. KAGEL: Twenty-five feet.

16 MR. MILLS: Well, your plot there shows 21 feet.

17 MR. KAGEL: Well, it's 25.

18 MR. MILLS: Well, you submitted the plot.
19 That's what it says.

20 MR. KAGEL: What's your point?

21 MR. MILLS: The point is that this whole
22 settlement be contingent upon Mr. Kagel obtaining a
23 Coastal permit through a court action or whatever.

24 MR. KAGEL: You can't do that. It's illegal.
25 You can't do that. We're only talking here about where we

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1 stand now. You can't say what another agency is going to
2 do. I don't think that's fair.

3 MR. FLUSHMAN: We're not saying what they're going
4 to do.

5 MR. McCAUSLAND: The question is, see, one of the
6 things that we're doing is because you have a very unique
7 set of circumstances and a fact pattern that is unlike
8 any we've dealt with before. We're trying to develop a
9 solution --

10 CHAIRPERSON CORY: It was so interesting, I
11 couldn't --

12 (Laughter.)

13 MR. McCAUSLAND: I knew I wasn't doing it right.

14 (Laughter.)

15 MR. McCAUSLAND: We're trying to find a fact
16 pattern that will allow you to exercise whatever residual
17 rights you might have.

18 MR. KAGEL: Yes, sir.

19 MR. McCAUSLAND: But we also wouldn't mind having
20 the ability to say, if the time ever arrived at which it
21 was here that you weren't going to be able to exercise any
22 more substantive rights than you've already exercised, that
23 we could withdraw this special finding that we're essentially
24 making on your behalf.

25 MR. KAGEL: You know, it's almost like we don't

1 know if the Coastal Act is going to be dissolved or the
2 local program is going to change. Once we get this
3 eligibility, I think we should at least have this
4 eligibility. We're giving you something forever. We're
5 giving you access from the road all the way out.

6 MR. McCAUSLAND: It would clearly be the
7 contention of the State Lands Commission that we already
8 have access from the road all the way out.

9 MR. KAGEL: No, you don't. That's what you don't
10 have right now. The line from the Rancho line does not
11 extend to the road. So you don't have it, and that's what
12 we're talking about. Here's a plot map. May I approach
13 the Bench?

14 EXECUTIVE OFFICER NORTHROP: Jim is doing a
15 drawing.

16 MR. TROUT: I hope we can kind of explain this.
17 I can't show both the Commission and the audience, but if
18 we have a piece of total parcel here in which we have an
19 approximate location of the boundary, the inner boundary of
20 Tidelands Survey 185 which would be the high tide line.
21 The area landward of this high tide line we first would
22 agree that the line shown on the plat, and we can locate
23 it by distances, is in fact as between Mr. Kagel and the
24 state. The boundary between the trust lands and the Rancho
25 lands. Then in an exchange of interest within the boundary

1 settlement, Mr. Kagel would quitclaim to the state in
2 effect the Rancho lands in this location and this location.
3 These lands would be accepted as trust lands by the state.

4 MR. KAGEL: As an easement, not in fee.

5 MR. TROUT: Tidelands trust easement. We would
6 agree that these lands then would have the same character
7 as all of the remaining patented tidelands under 185.

8 Then in turn the state would patent to
9 Mr. Kagel with the necessary finding of equal value this
10 portion of the tideland, free and clear of the trust, in
11 exchange for getting the trust implied on this and access
12 to the water across these parcels. Then Mr. Kagel would
13 have to go ahead and make his already agreed to finding
14 that the whole property would be available to the public
15 other than his building site and the parking area.

16 MR. McCAUSLAND: We don't get that good a deal
17 in the San Francisco Bay.

18 MR. KAGEL: Furthermore, in the event that these
19 two pieces of property don't match up in terms of size,
20 then we have the option to put in money to your land bank
21 to make it up. Okay?

22 MR. McCAUSLAND: And you will donate the state
23 any excess if it turns out that yours is worth more than
24 ours? Do you get tax advantages for doing this?

25 MR. KAGEL: If we're getting more than you are

1 giving us, is that your question?

2 CHAIRPERSON CORY: No. If you're giving us more
3 than we're giving you --

4 MR. KAGEL: We'll just donate that as in kind.
5 But let us be understood that this thing is going to be
6 appraised at the current use which is about zero. Okay?

7 MR. FLUSHMAN: Well, the Commission has an
8 understanding of how it's going to be appraised, but it
9 will be conveyed to the staff whether that's the way it is
10 or not. It's the present use is it's filled lands.

11 MR. KAGEL: Without a house.

12 MR. McCAUSLAND: So we have agreed that part of
13 the Commission finding will be that there will be this --

14 CHAIRPERSON CORY: And how many weekends' use?
15 (Laughter.)

16 CHAIRPERSON CORY: That's a joke.

17 Have we got an agreement?

18 MR. McCAUSLAND: That one element of the
19 agreement. Our staff said we had to have an appraisal
20 before we could go much further and I suggested that we
21 should just make the equal exchange provision part of our
22 finding.

23 MR. TROUT: The covenant would be that, the deal
24 would be that it was equal and that if the property received
25 by the state is less than that that the state gives up, the

1 agreement would bind Mr. Kagel. In other words, the
2 Commission would make the finding today that Mr. Kagel
3 would be bound to deliver the difference in money to be
4 used in the land bank to purchase the small additional
5 portion of Brown's Island or something like that.

6 MR. KAGEL: At today's property value.

7 MR. MILLS: My suggestion was that should
8 Mr. Kagel be denied a Coastal permit through his court
9 action, that it seems to me that this parcel may, in fact,
10 be more valuable for the trust than having this here. I
11 would suggest that the Commission consider at least making
12 this finding contingent upon Mr. Kagel being able to secure
13 all necessary permits to actually build on his homesite.

14 MR. KAGEL: Is he a Commissioner or a lawyer?
15 We're sitting here, we're making policy here.

16 MR. McCAUSLAND: He's making a proposal for
17 policy that is a legitimate proposal from our standpoint
18 because if, in fact, there is a bike path down the side of
19 the Bay, it would be advantageous to us to have the bayward
20 portion of the land under those circumstances for picnic
21 areas or stopover spot. We even have the ability to put
22 two public restrooms in there.

23 (Laughter.)

24 MR. KAGEL: We're losing sight of what the
25 situation is in reality. There's houses going up. That way

1 a motel and there's houses going up like that. There's no
2 sidewalk along the road. It isn't going to happen. We
3 don't know what the Coastal Commission is going to do, if
4 the local coastal program is going to change or anything
5 else. I don't think it's fair. We're giving you access.

6 MR. MILLS: If you can't build on the property,
7 why do you want the site?

8 MR. McCAUSLAND: Isn't it possible for us to
9 defer signature of the land exchange agreement until such
10 time as all permits, whatever, are decided to your
11 satisfaction?

12 MR. KAGEL: No, sir, that's not fair. That's not
13 what we're here for. We're here to get this thing resolved
14 today. That's our duty.

15 MR. McCAUSLAND: We are willing to offer you, I
16 believe we are willing to offer you, an opportunity for a
17 land exchange that we believe we can find will be in our
18 responsibility for the management of the public trust. I
19 don't see if we've already entered into that agreement why
20 the execution of the document cannot be deferred until such
21 time as you as developer --

22 MR. KAGEL: If you're entering into an agreement,
23 it's specifically enforceable. I mean, after all, we have
24 to have some kind of status. What is our status? If you're
25 going to tie it into every single state agency, you're just

1 talking about a can of worms again. You're just hanging us
2 up again. What is our status? We'll give it to you if the
3 Coastal Commission does, I mean.

4 MR. McCAUSLAND: Your status is that at some point
5 in time you're either going to get to build a structure
6 on that land or you're going to get compensated for the
7 improvements you made to it to date.

8 MR. KAGEL: We still have to get past the coastal
9 plan. If the coastal plan doesn't work, if we don't get
10 past them, we're probably not going to build for the time
11 being or at least for the next 200 years. But you guys
12 still have a right to go over the land and we'll give it
13 to you anyway. I came in here and said you can use the
14 land anyway, regardless of this thing, regardless of this
15 public trust, but I'm not going to give away that building
16 site. I mean, that's not fair.

17 MR. McCAUSLAND: We're not asking you to give
18 away that building site.

19 MR. KAGEL: That's what he's talking about.

20 MR. McCAUSLAND: What he's talking about is --

21 MR. KAGEL: If we don't get the permits, give it
22 back.

23 MR. McCAUSLAND: Our staff is being instructed by
24 the Commissioners to develop a suitable land exchange.

25 MR. KAGEL: Yes, sir.

1 MR. McCAUSLAND: Our staff is also advising us as
2 Commissioners that that exchange is really only of interest
3 to this Commission if you in fact get to build on your site.
4 If you don't, it's awfully difficult for our staff to believe
5 that we should have agreed to that exchange because the
6 integrity of the other parcel looks better to them in terms
7 of potential public uses.

8 MR. KAGEL: That's fine if you think that you can,
9 under the law, under the law, make the value of the property
10 that we're exchanging on the day that you agree or is some-
11 body going to hold it's at the time you get the permits?
12 If it's at the time you get the permits, then we'll be paying
13 off a lot of money to the state trust fund.

14 MR. McCAUSLAND: We're willing to gear the value
15 from the date of today's Commission.

16 MR. KAGEL: All right. Fine. We'll take it.

17 MS. SMITH: I have one other question. Are we
18 saying that if or in the event that he doesn't get the
19 permits from the Coastal Commission to build --

20 MR. MILLS: Or from Marin County. If he can't
21 secure all necessary permits to build, that we will return
22 to the status quo as it sits now.

23 MS. SMITH: Just continue exercising the public
24 trust over the entire lot.

25 CHAIRPERSON CORY: If that should happen, I would

1 like for the staff to start looking around as to where we
2 find the money to acquire the improvements that were put
3 there. I don't have any strong feelings vis-a-vis the
4 legal time. I understand that's a real expense, but there's
5 a problem in terms of state precedent. But it would seem
6 to me that we have an obligation to an individual who has
7 invested some effort in trying to comply with the law, to
8 go ahead and clean up a mess rather than letting it sit
9 there in perpetuity.

10 MR. KAGEL: Miss Smith, I want to speak to some-
11 thing you said. The State Coastal Commission said that
12 they turned us down because we interfered with the public
13 trust. Okay? Now, I'm going to go into a court of law
14 and I'm going to say we have an arrangement with the State
15 Coastal Commission that we're not interfering with the
16 public trust, State Lands Commission that we're not
17 interfering in the public trust and they have acknowledged
18 that they have exclusive jurisdiction over that property.

19 MR. TROUT: That's not what we're purporting to
20 do.

21 MR. KAGEL: In terms of public trust.

22 MR. FLUSHMAN: That's not what's been acknowledged
23 here as I understand what the Commission is saying. In
24 fact, --

25 CHAIRPERSON CORY: We're silent on that issue.

1 MS. SMITH: We made absolutely no finding at all
2 in terms of the consistency of this proposal with the
3 Coastal Act.

4 MR. FLUSHMAN: As I understand what you indicated,
5 Commissioner Smith, that you weren't approving a residential
6 use of tidelands either as consistent with the trust.

7 MS. SMITH: Yes, I did make that stipulation to
8 the findings before you left the room.

9 MR. McCAUSLAND: You haven't said any of those
10 things.

11 MR. KAGEL: What I'm trying to say is this:
12 They said, what they did is they went into your bailiwick
13 and they said that because State Lands, they said there's
14 been no determination public trust-wise. That's what they
15 said. So they turned us down in that regard. Now, I don't
16 think they can. I think it's up to you guys. So I'm going
17 to make the presentation to court that I have reached an
18 agreement with State Lands whereby we have avoided the
19 entire issue because the land is no longer in the public
20 trust as far as State Lands goes; is that correct?

21 CHAIRPERSON CORY: That's correct.

22 MR. FLUSHMAN: As far as the homesite is
23 concerned.

24 MS. SMITH: Just the homesite.

25 MR. KAGEL: But you can't landlock us. We can get

1 a right --

2 MR. FLUSHMAN: We're not talking about landlock.

3 MR. KAGEL: Good. We have an agreement then.

4 Okay?

5 MR. TROUT: It has been common in these boundary
6 settlements that they were effective immediately and for a
7 period of time until some specific event occurred. I just
8 wanted to see if we're understanding where we're going.
9 That we enter into this agreement. We all make the
10 agreement. However, if at the end of three years there is
11 no house, then both sides agree to undo the agreement.
12 Now, that I think is what Mr. Mills was saying and I'm
13 not clear in my mind whether that's in or out of the
14 deal.

15 MR. McCAUSLAND: It is the desire of the
16 Commission to find the ability.

17 MR. KAGEL: Fine.

18 MR. McCAUSLAND: If this land exchange has not
19 been completed within five years --

20 MR. KAGEL: Then we go back to status quo.

21 MR. McCAUSLAND: -- then we go back to the
22 boundaries as they existed this morning.

23 MR. TROUT: A little longer than normal, but
24 with the unusual circumstances, that's understood.

25 MR. KAGEL: Do you have to take a vote on that?

1 MR. McCAUSLAND: Since this is a transcript that
2 you're undoubtedly going to ask for, I would like somebody
3 to restate for the record the agreement that we have just
4 made.

5 MR. TROUT: I think staff, under Commission
6 direction, the staff would propose this as a settlement
7 to the problem.

8 We would propose that Mr. Kagel or the upland
9 owner, the owner of the property and the state agree, first,
10 as to the location of the inner or high tideland boundary
11 of Tideland Survey 185. Have I got the right number?

12 MR. RUMP: Yes.

13 MR. TROUT: Once having done that, Mr. Kagel would
14 deed to the state or grant to the state an easement and the
15 state would accept as tidelands trust lands two parcels of
16 property now lying between the agreed boundary and the
17 inner or highway limits of the Applicant's property. In
18 exchange, the state would grant to Mr. Kagel a parcel of
19 land inside the tidelands survey that would be without
20 trust characteristics.

21 In other words, we're exchanging trust lands for
22 trust lands. We would give up some lands now subject to the
23 trust and apply the trust on other lands. So that, in effect,
24 the building site would no longer be trust lands. It would
25 have the character of the uplands portion of Mr. Kagel's

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1 lot. That the Commission finds that in this transaction
2 that the state is receiving equal or greater value and that
3 in the event that the value of the lands themselves that
4 are exchanged are not equal or greater in favor of the
5 state, Mr. Kagel agrees to give to the state sufficient
6 monies to meet the equal value requirements and that those
7 funds would be applied by the Commission to purchase other
8 tidelands under one of the land bank agreements.

9 MR. KAGEL: And it's today's prices that we're
10 talking about.

11 CHAIRPERSON CORY: Today's prices.

12 MR. TROUT: And the last point would be that both
13 parties covenant that if after five years from the date
14 of the agreement Mr. Kagel does not have his house
15 constructed on the property, that both sides agree to
16 return the deed.

17 MR. KAGEL: But if we are currently in litigation
18 at that time, we will extend it until we get out of court.

19 CHAIRPERSON CORY: Fine.

20 EXECUTIVE OFFICER NORTHROP: One other point,
21 if I may, Mr. Kagel.

22 You talked about a bike trail or path. Supposing
23 a bike trail came across the area.

24 MR. KAGEL: And we will give you a bike trail.

25 EXECUTIVE OFFICER NORTHROP: Even though it would

1 cross your driveway?

2 MR. KAGEL: Bicycle, not putt-putt. A bicycle.

3 MR. MILLS: Could I suggest that we can resolve
4 the problem of public access and guarantee public access
5 by at the same time asking the Commission here to exercise
6 a public trust over the balance of the tidelands parcel,
7 the present tidelands parcel for public use and access.

8 MS. SMITH: I thought you were doing --

9 MR. KAGEL: You already have that.

10 EXECUTIVE OFFICER NORTHROP: No, exercise the
11 trust.

12 MR. KAGEL: What does that mean?

13 MR. FLUSHMAN: It means that it is now in formal
14 existence.

15 MR. KAGEL: Good God, fine.

16 Do we have to take a vote?

17 MR. McCAUSLAND: Well, the motion is, I believe,
18 and let's go back to the beginning, on the basis of unique
19 set of facts related to the fact that, number one, this
20 parcel has been filled apparently pursuant to all laws in
21 existence at the time, that this parcel possesses two
22 septic systems installed apparently in conformance with the
23 laws in existence at the time of such installation, and
24 the just-described land exchange agreement presented to us,
25 and on the basis of the findings Miss Smith reiterated

1 sooner -- maybe you should read those into the record
2 again -- we make the finding that this specific parcel,
3 the Applicant's portion of the parcel after the land
4 exchange agreement, can be suitably freed from the public
5 trust.

6 MR. KAGEL: Wonderful. And Miss Smith said your
7 action today does not condone private residential uses on
8 any other public trust lands. That's essentially what she
9 said.

10 MR. FLUSHMAN: I think it's in the record. It
11 was more eloquently stated.

12 MR. KAGEL: I'm sure it was. She's an eloquent
13 lady.

14 MR. MILLS: And also that we make no finding with
15 respect to the Coastal Act.

16 MS. SMITH: Does that take care of all the
17 findings for 6307?

18 MR. TROUT: There's one more technical finding;
19 and that is that the Commission needs to find that the
20 transaction is in settlement of title and boundary
21 disputes and that the provisions of CEQA are inapplicable
22 under 6307.

23 CHAIRPERSON CORY: There we have it. Ready for
24 the question?

25 All those in favor, signify by saying aye.

1 (Ayes.)

2 MS. SMITH: I have a question. The gentleman
3 indicated that we had to make findings under 6307 of the
4 Public Resources Code. We've taken care of all of those,
5 right?

6 MR. FLUSHMAN: Yes.

7 CHAIRPERSON CORY: Are we ready for the question?
8 All those in favor, signify by saying aye.

9 CHAIRPERSON CORY: Opposed.

10 Motion is carried.

11 MR. KAGEL: Thanks so much.

12 (Thereupon the foregoing concludes
13 Agenda Item 16.)

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CALENDAR ITEM

16.

10/78
W 21493
Mills

PERMIT FOR RESIDENCE ON PATENTED TIDELANDS

In June 1977, Mr. Peter Kagel, on behalf of Kagel and Kagel Corporation, applied to the State Lands Commission for a permit to build a single family residence on a 1-acre parcel located at 12650 Sir Francis Drake Boulevard in Inverness Park, Marin County. Preliminary investigation by the Commission staff has revealed that substantially all of the parcel on which the applicant proposes to construct the residence is within the perimeter description of Tideland Survey 185 and, as such, is subject to the public trust easement for commerce, navigation and fisheries.

This parcel has been partially filled and 2 septic systems have been installed. No applications to accomplish such acts were filed with the State Lands Commission. Mr. Kagel presently has secured certain approvals from the county but must have a coastal permit before Marin County will issue a building permit. However, as these approvals will expire on October 28th of this year, the applicant has requested this matter be placed before the Commission at this time.

In May of 1977, Mr. Kagel's application for a claim of exemption and a coastal development permit was denied by the North Central Coast Regional Commission, and in June of 1977 his appeal to the California Coastal Commission was rejected on the grounds that it presented no substantial issue. In July, 1978, Mr. Kagel reapplied for a coastal permit and on August 10, 1978 the North Central Coast Regional Commission again denied Mr. Kagel's application for a permit on the grounds that the proposed development was not consistent with the policies, declarations and objectives contained in Chapter 3 of the California Coastal Act of 1976. Mr. Kagel's second appeal to the State Coastal Commission was rejected on a finding that it presented no substantial issue.

Shortly after receipt of Mr. Kagel's application, the State Lands Commission was presented with a similar unrelated application for the construction of a single family residence on tidelands adjacent to Tomales Bay. In its consideration of that application, the Commission directed the staff to prepare a comprehensive land use plan for the tide and submerged lands in Tomales Bay. Pursuant to this directive,

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CALENDAR ITEM NO. 16. (CONTD)

the Commission staff began meeting in August of 1977 with representatives for the North Central Coast Regional Coastal Commission, the County of Marin, the Department of Fish and Game, and other State and federal agencies to formulate a comprehensive plan for the Tomales Bay area in conjunction with the preparation of Marin County's Local Coastal Program. This ongoing, complex and cooperative planning effort includes a study of the ecosystem and present and future public uses of the tide and submerged lands in Tomales Bay.

In February 1978, the Commission authorized the Executive Officer to enter into a letter of understanding with the County of Marin and the North Central Coast Regional Commission. The calendar item provided in part:

"In order to permit some development in (the Tomales Bay) area, while at the same time not prejudicing the ability of Marin County, to decide potential land uses in the Local Coastal Program and minimize the likelihood of impacts on critical habitat areas within Tomales Bay, the Commission's staff has proposed that the Commission execute a letter of understanding with the Coastal Commission and Marin County. This letter of understanding basically provided that the respective parties (1) will discuss and comment on all applications prior to action by any one of the parties, (2) intent to limit the issuance of permits or other approvals upon a finding that the proposed development or activities is found to be:

- (a) A continuation of either an existing use or an existing activity, which is consistent with the public trust, and which is also consistent with the objectives of the California Coastal Act of 1976 (P.R.C. Section 30000 et seq.); and
- (b) Consistent with uses of adjacent or affected tidelands, submerged lands or uplands as such uses are, at the time of consideration of such application, known or contemplated as part of the formulation of the LCP or ancillary determinations concerning the public

CALENDAR ITEM NO. 16. (CONTD)

trust. The letter of understanding would also exempt from these considerations, minor alterations and repair of existing residences."

Mr. Kagel's proposed residential development is not consistent with the first of the criteria set forth in the letter of understanding as the development proposal is not a continuation of an existing use or an existing activity. In addition, it has been determined by the Coastal Commission that the development proposal is not consistent with the policies, declarations and objectives of the Coastal Act.

Furthermore, to allow Mr. Kagel to proceed with the proposed development, the Commission would have to determine, in accordance with the letter of understanding, that the proposed development is consistent with the public trust. In order to make such a finding, the Commission must first determine the desirability of the exercise of and if exercised the nature and extent of the public trust easement. Data to support such a determination is currently being developed but is not as yet finalized.

Staff investigations, however, reveal that there may be public trust uses contemplated in this area which potentially conflict with the proposed development. For example, the draft Inverness Ridge Communities Plan proposes creation of a linear park between Sir Francis Drake Boulevard and the Bay to maintain viewsheds and to establish a pedestrian and bicycle path--a use consistent with the public trust. The draft plan further recommends that private residential development generally not be permitted in areas subject to the public trust.

While the exact location of the proposed trail and linear park have not been determined, they are at least indicative of present and future public uses in this area. Also, the proposed development will be located adjacent to an area preliminarily indicated by the Department of Fish and Game to be environmentally sensitive, as has the State Lands Commission pursuant to Section 6370 of the P.R.C.

EXHIBIT: A. Location Map.

IT IS RECOMMENDED THAT THE COMMISSION:

1. FIND AND DECLARE THAT UNTIL SUCH TIME AS THE PRESENT AND FUTURE USES OF THE TIDE AND SUBMERGED LANDS IN TOMALES BAY HAVE BEEN IDENTIFIED AND A DETERMINATION

CALENDAR ITEM NO. 16. (CONTD)

MADE TO EXERCISE THE PUBLIC TRUST EASEMENT, THE COMMISSION CANNOT DETERMINE WHETHER THE PROPOSED DEVELOPMENT IS CONSISTENT WITH THE PUBLIC TRUST EASEMENT.

2. FIND AND DECLARE THAT THE PROPOSED DEVELOPMENT PROJECT IS NOT CONSISTENT WITH THE LETTER OF UNDERSTANDING EXECUTED BY THE STATE LANDS COMMISSION, THE NORTH CENTRAL COAST REGIONAL COMMISSION AND THE COUNTY OF MARIN.
3. MAKE NO FINDING AT THIS TIME WITH RESPECT TO THE CONSISTENCY OF THE PROPOSED DEVELOPMENT WITH THE PROVISIONS OF THE CALIFORNIA COASTAL ACT OF 1976.
4. FIND AND DECLARE THAT NOTHING CONTAINED HEREIN SHALL INDICATE IN ANY FORM THAT PRIVATE RESIDENTIAL USE OF TIDELANDS IS CONSISTENT WITH THE PUBLIC TRUST EASEMENT.
5. DISAPPROVE THE APPLICATION BY KAGEL AND KAGEL CORPORATION FOR THE REASONS STATED IN PARAGRAPH 1 AND 2 ABOVE.
6. ALLOW KAGEL AND KAGEL CORPORATION TO REAPPLY FOR A PERMIT OR OTHER ENTITLEMENT FOR USE AT SUCH TIME AS THE PRESENT AND FUTURE PUBLIC USES IN THE AREA HAVE BEEN ASCERTAINED.

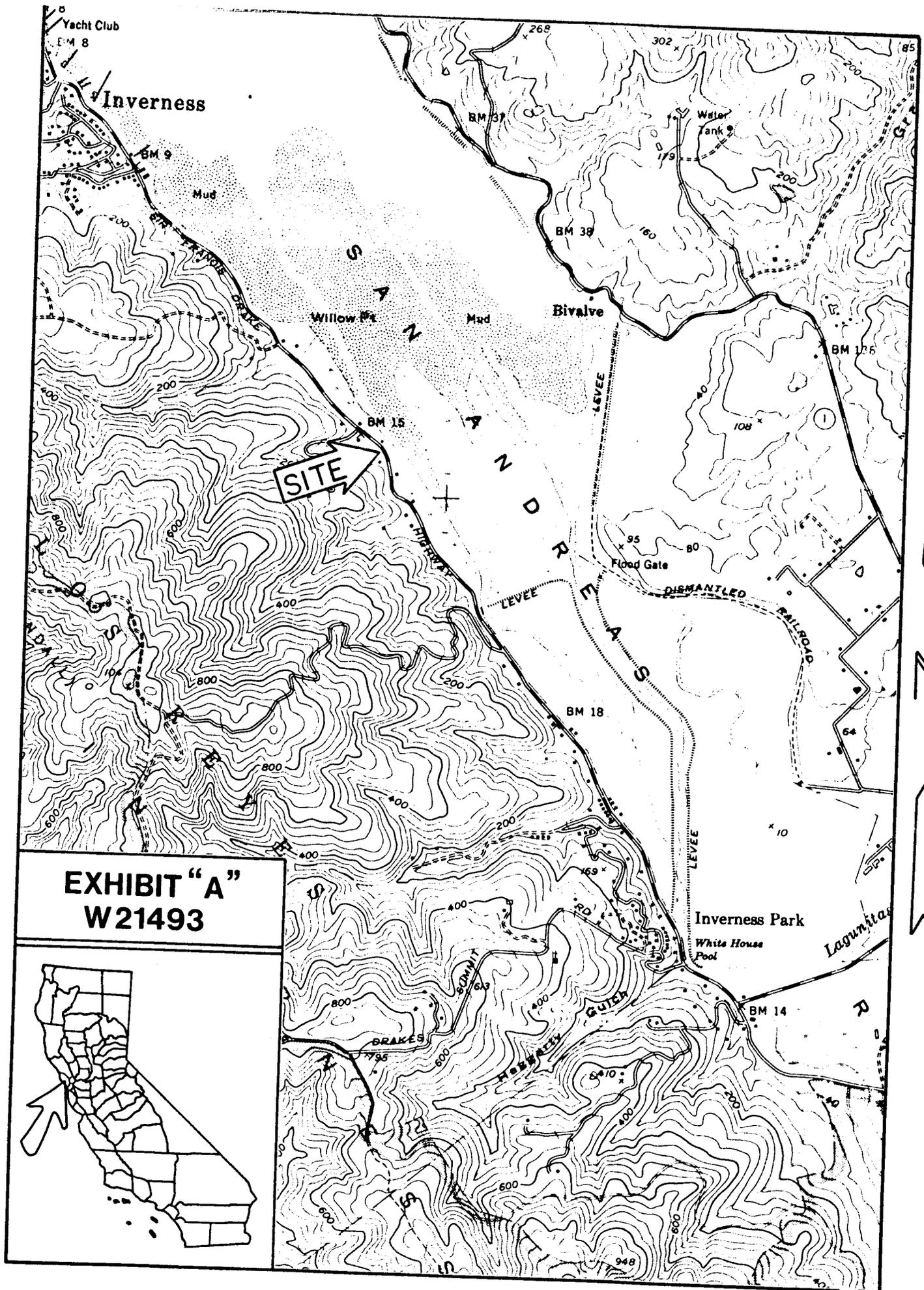


EXHIBIT "A"
W21493



MINUTE ITEM

10/78
Trout

17. ENVIRONMENTAL IMPACTS - LAKE TAHOE - PROPOSED
FINDINGS AND POLICY - W 30005

Calendar Item 17, attached, was deferred at the time of consideration.

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