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PARALEGAL
Jana Rinaldi

April 8, 2004

Susan Craig
California Coastal Commission
725 Front Street, Suite 300
Santa Cruz, CA 95060

Re: Wavecrest Village Project (Redondo View Map)

Dear Ms. Craig:

This office represents The Committee for Green Foothills. The purpose of this letter is to request that the Coastal Commission thoroughly and carefully investigate the parcel legality status of the "lots" shown on the Redondo View Map. Substantial questions regarding parcel legality arise to these "lots" as a result of the recent unanimous decision of the California Supreme Court in *Gardner v. County of Sonoma* (2003) 29 Cal.4th 990. The Wavecrest Village Project ("Project") proposes the retirement of "development rights" regarding the "lots" shown on the Redondo View Map. There is a substantial question whether there are any such development rights because the "lots" shown on the Redondo View Map do not appear to have been lawfully created in light of the reasoning of the Supreme Court in the *Gardner* case, *supra*. This request is based on the November 29, 2001, California Coastal Commission ("Commission") Staff Report and other materials on file with the Commission, this letter, and all information previously submitted to the City of Half Moon Bay and the Commission on behalf of the Committee for Green Foothills (all of which is hereby incorporated by this reference).

The Redondo View Map, recorded March 7, 1912 (see Exhibit "A" enclosed), shows approximately 206 "lots" which are proposed to be recognized to justify the retirement of development rights for the Wavecrest Village Project that is pending on appeal before the Commission. To date, it appears that there have been no Certificates of Compliance issued for any of the "lots" associated with the Redondo View Map.

Whether these 206 "lots" have been created and remain as separate legal parcels having development rights which may be "retired," raises at least the following substantial issues:

(1) Does the mere recordation of the Redondo View Map in 1912 "create" any parcels, or does only the subsequent conveyance of a "lot" into separate ownership from surrounding lots "create" a parcel shown on the Map? To the extent that the approximately 206 "lots" in question have "remained intact" and never been separated as to ownership, they would **not** constitute separate legal parcels under the reasoning in the *Gardner* case, *supra*.

(2) Even if the 206 "lots" were "created" by the Redondo View Map, have the findings required (if any) for creation of separate legal parcels under the City of Half Moon Bay Local Coastal Program Land Use Plan or other applicable local regulations been made for any of the 206 "lots" in question?

(3) Even if the 206 "lots" in question were "created," and any required findings made, do they remain separate legal parcels; or, rather, have they been combined or merged by action of a former owner under Civil Code Section 1093 or otherwise?

The Committee for Green Foothills submits that each of the above listed issues warrants thorough and careful review by the Commission. Each will be addressed separately in the order set forth above.

(1) Mere Recordation of Map in 1912 Does Not "Create" Parcels

The recent unanimous decision of the California Supreme Court makes it clear that the mere recordation of the Redondo View Map does not "create" the parcels shown on the Map unless the local government having jurisdiction reviewed and approved the "design and improvements" of the division of land in question. *Gardner*, 29 Cal. 4th 990. As of 1912, no local government had the legal authority to review the "design and improvements" of the Redondo View Map. Hence, the mere recordation of the Map did not itself "create" any separate, legal parcels.

As is shown below by direct quotes from the *Gardner* case, the reasoning of the California Supreme Court is easily applied to a map such as the "Map of Redondo View" recorded March 7, 1912. Although the express holding of the Supreme Court applied only to a subdivision map recorded before 1893, the Supreme Court explained this limitation in the Court's opinion at footnote 7. There, the Court stated that because "the map at issue here predates the earliest predecessor statute enacted in 1893," the Court "need not resolve" the assertion by "[c]ertain *amici curiae*" that maps recorded prior to the 1929 legislation did not create parcels. The *amici* referenced include the California Coastal Commission, the California State Association of Counties and California Cities.[1] Attached as Exhibit "C" are the predecessors to the 1929 legislation from 1893, 1901, and 1907.

[1] Enclosed as Exhibit B are the following which elucidate the foregoing position of these *amici* that maps recorded prior to the 1929 legislation did not create parcels:

(1) The cover page and page 10 of the *Amicus Curiae* of the California Coastal Commission for *Gardner v. County of Sonoma* stating that "[t]he trial court correctly concluded that more than mere recordation of a map in 1865 was required in order to create legal parcels. Some element of reliance is required. Recent case law is in accord." In a footnote to this statement, the Commission made the following observation: "The Commission agrees with the County's statements in footnote 10 on pages 26-27 of the Respondent's Brief. The Act of 1893 provided for very limited review of maps whereas substantive, discretionary review of the design and improvement of subdivisions only began after the enactment of the Act of 1929. (Stats. 1893, Ch. 80 §1, p. 96; Stats. 1929, ch. 837, §§ 8-9, pp. 1794-

(a) 1912 Map Does Not Qualify as a "Final Map" Which Creates Parcels

The California Supreme Court commenced its logical analysis by placing the issue of recognizing "lots" shown on antiquated maps in proper legal context. The Court described the general application of the Subdivision Map Act as follows. "Ordinarily, subdivision under the Act may be lawfully accomplished **only by** obtaining **local approval** and recordation **of a tentative and final map pursuant to section 66426**, when five or more parcels are involved. *Gardner*, 29 Cal.4th at 997. (Emphasis added). "By generally requiring **local review and approval** of all proposed subdivisions, the Act aims to 'control the **design** of subdivisions **for the benefit of adjacent landowners**, prospective purchasers **and the public** in general.'" *Id.* at 997-998. (Emphasis added).

The Supreme Court held that a map recorded in 1865 is **not a "final map"** or a "parcel map," which are statutorily defined to include only those maps that have been **reviewed and approved for recordation by a local agency under the provisions of the Map Act or a local ordinance adopted thereunder**. (See §§ 66433-66443 [content and form of final maps]." The Supreme Court held that because the 1865 map was not a "final map" it did not itself qualify as a certificate of compliance. *Gardner*, 29 Cal.4th at 998-999. Likewise, the Redondo View Map is not a "final map" as defined. In 1912, just as in 1865 and in 1893, there was no applicable statute or local ordinance using the term "final map."

1795). However, it is not necessary to decide here whether substantive review of the design and improvement of subdivisions was required to create legal lots since the map in question was recorded in 1865, long before review was provided for by law."

(2) The cover page and page 17 of the *Amicus Curiae* of the California Coastal Commission for *Circle K Ranch Corp. v. Board of Supervisors of the County of Santa Barbara* stating that "[t]he courts have consistently required more than mere recordation of a map in order to find legally created parcels (*See, Gisler v. County of Madera, supra*, 38 Cal.App.3d at p. 309; *Hays v. Vanek, supra*, 217 Cal.App.3d at pp. 287-290.) The trial court below correctly held that neither the 1888 recordation of the Map of Canada de los Pinos nor the adoption by the County of assessors maps in 1888 or 1909 created a legal parcel and that the County properly denied Circle K's application for a certificate of compliance. The judgment below should be affirmed."

(3) The cover page and page 18 of the *Amicus Curiae* Brief of CSAC and California Cities in *Circle K, supra*, stating that the 1929 predecessor act to the Subdivision Map Act required for the first time "tentative maps" and "final maps" subject to regulation of the "design and improvement" of subdivisions and authorized recordation only of final maps approved by a city or county. This *Amicus* Brief was authored by Miller, Starr & Regalia, whose voluminous treatise on real property law is regularly used by attorneys in that field. This brief also concludes that all prior acts recognized previously recorded maps as being only for the purpose of lot description rather than parcel creation.

(4) The cover page and pages 34-35 of the *Amicus Curiae* Brief of CSAC in *Gardner, supra*, state that "[n]one of the cases cited by appellants support the proposition that mere 'recordation' of pre-1893 subdivision maps alone creates valid parcels or lots within the meaning of the [Subdivision Map Act]. In fact, those cases and other [sic] CSAC have reviewed and analyzed confirm that (1) such maps served merely as tools of legal description for subsequent deeds, and (2) such maps were quite different in purpose and legal effect than modern final subdivision maps under the [Subdivision Map Act]."

(b) There Are No "Grandfather" Provisions Requiring Recognition of the "Lots" Shown on the 1912 Map as "Created" Thereby

The Supreme Court next rejected the argument that the Map Act contains two "grandfather" provisions, Section 66499.30, subdivision (d) and Section 66451.10, subdivision (a), that support legal recognition of the already subdivided nature of the property shown on an antiquated map and compel the recognition of a parcel as legal, and hence issuance of any requested certificates of compliance.

(1) Grandfathering Under Government Code § 66499.30(d)

Again, the Supreme Court established the context. "To enforce its important public purpose, the Act generally prohibits the sale, lease, or financing of any parcel of a subdivision until the recordation of an **approved map** in full compliance with the law. (§66499.30, subds. (a), (b), (c)). Subdivision (d) of Section 66499.30 (Section 66499.30(d)) provides, however, that these prohibitions 'do not apply to any parcel or parcels of a subdivision offered for sale or lease, contracted for sale or lease, or sold or leased in compliance with or exempt from any law (including a local ordinance), **regulating the design and improvement of subdivisions** in effect at the time the subdivision was **established**." *Id.* at 999. (Emphasis added).

"In turn [the Court states], section 66412.7 specifies that for purposes of this exception [66499.30(d)], a **subdivision is deemed "established** . . . on the date of recordation of the final map or parcel, except that in the case of (1) maps **filed for approval prior to March 4, 1972, and subsequently approved by the local agency** or (2) subdivisions exempted from map requirements by a certificate of exception (or the equivalent) applied for prior to such date and subsequently issued by the local agency pursuant to local ordinance, the subdivision shall be deemed established on the date the map or application for a certificate of exception (or the equivalent) was filed with the local agency." *Gardner*, 29 Cal.4th at 999. (Emphasis added).

The Supreme Court then asked itself whether the 1865 map recordation **established** a subdivision under the Act's provisions (§66412.7). The Court said the answer to this question is no. The Court's reasoning was that the [1865] "map is not a final map or a parcel map [citations omitted] and is not a certificate of exception [citation omitted]." Nor, the Court reasoned, was the 1865 "map ever 'filed for approval' or 'subsequently approved' by a local agency as section 66412.7 contemplates." *Id.* at 1000.

The Court continued as follows. "Because section 66499.30(d) recognizes only parcels or parcel sales that were made in compliance with or were exempt from the provisions of any law '**regulating the design and improvement of subdivisions** in effect at the time the subdivision was established,' **the logical inference is that section 66412.7's required approval for maps filed before March 4, 1972 must likewise be related to subdivision design and improvement. Reasonably read, sections 66499.30(d) and 66412.7 protect subdivisions that**

either already were approved by local agencies, or were deemed exempt under previous subdivision laws in effect at the time the subdivisions were established." *Id.* (Emphasis added).

The above paragraph states the essential holding and reasoning of the *Gardner* case. It is clear that the holding is that a map qualifies for grandfathering only if (1) it is in compliance with a law regulating the design and improvement of subdivisions; and (2) has been approved as to such design and improvement by the local governmental agency having jurisdiction.

The Redondo View Map does not meet either of the two above-described prongs of the test for grandfathering. It is clear that the "lots" shown thereon are not grandfathered because they were not "made in compliance with or exempt from the provisions of any law "**regulating the design and improvement of subdivisions** in effect at the time the subdivision was established." **There was no such law on March 7, 1912.** The definition of "design" (quoted from the Act by the Supreme Court at footnote 4 in the *Gardner* case) includes far more than highways, streets and roads. It includes "(5) lot size and configuration; (6) traffic access; (7) grading; (8) land to be dedicated for park or recreational purposes; and (9) other specific physical requirements in the plan and configuration of the entire subdivision that are necessary to ensure consistency with, or implementation of the entire subdivision, the general plan or any applicable specific plan . . .." *Gardner*, 29 Cal.4th at 997. (Emphasis added).

Some might argue that the County's acceptance of certain roads shown on the 1912 Map compels recognition of the parcels shown thereon. The language from the certificate from the Redondo View Map reads as follows:

> "The County of San Mateo, acting through its Board of Supervisors, duly assembled has accepted and does hereby accept for and on behalf of the said County of San Mateo and the public, all of the highways, streets and avenues set forth as Railroad Ave, Boulevard Drive, University Ave, Stanford Ave, Yale Ave, and Harvard Ave, shown and described within and upon the map or plat to which this certificate is attached, the same being known as "Redondo View" and that from and after the recording of this plat, in the manner required by law, all of said highways, streets and avenues shall be and there upon become dedicated to the public use.
>
> In Witness Whereof, the said Board of Supervisors, pursuant to a resolution duly passed on the 5 day of February 1912 has caused this certificate to be duly affixed and attached hereto and signed by the Clerk of said Board of Supervisors, this 5 day of February A.D. 1912."

The 1907 predecessor to the 1929 Subdivision Map Act (which was applicable to the 1912 Map) read (in pertinent part) as follows:

> "The map or plat so made, endorsed and acknowledged shall, if the same offers for dedication any highway, or portion thereof, be presented to the board of supervisors, board of trustees, city council or other government body having control of public highways in the territory shown on such map or plat, and **said governing body shall endorse thereon which of the public highways offered by said map or plat they accept on behalf of the public, and thereupon such highways as have been so accepted, and not others, shall be and become dedicated to the public use."**

This language is nearly identical to the certificate found on the Redondo View Map. However, this language cannot be used to imply that the subdivision itself was approved. This section of the 1907 predecessor to the Map Act did not authorize a county or city to preclude recordation of the 1912 Map because of the subdivision "design or improvements." It merely authorized a county or city to determine which public highways its governing board would accept.

The Redondo View Map does not meet the second prong of the test for grandfathering either because the subdivision **has not been "established."** As the Supreme Court put it, "[t]he logical inference is that section 66412.7's required approval for maps filed before March 4, 1972 must likewise be related to **subdivision design and improvement**." Hence, "[r]easonably read, section 66499.30(d) and 66412.7" do not "protect subdivisions" such as the Redondo View Map because it was **not** "either already . . . **approved by local agencies** [as to design and improvements], or . . .deemed exempt under previous subdivision laws in effect at the time the subdivision[s] were established." *Id.* at 1000. (Emphasis added). This is evidenced by the both the Certificate on the map and Resolution attached as Exhibit "D," neither of which discusses design or improvement standards, but only accept the highways and streets and clearly do not take responsibility for maintenance of such highways and streets.

(2) Grandfathering Under Government Code § 66451.10(a)

Section 66451.10(a) offers additional grandfather protections. They are also inapplicable to the Redondo View Map. Section 66451.10(a) is commonly known as the "anti-merger provision" and it prevents local agencies from automatically merging contiguous legal parcels when those parcels come into common ownership. That section reads as follows: "two or more contiguous parcels or units of land **which have been created** under the provisions of this division, or any prior law regulating the division of land, or a local ordinance enacted pursuant thereto, or which were not subject to those provisions at the time of their creation, shall not be deemed merged by virtue of the fact that the contiguous parcels or units are held by the same owner, and no further proceeding under the provisions of this division or a local ordinance enacted pursuant thereto shall be required for the purpose of sale, lease, or financing of the contiguous parcels or units, or any of them." Government Code §66451.10(a). (Emphasis added).

The *Gardner* court viewed Section 66451.10(a) as follows:

> "By its own terms, section 66451.10(a) applies to only those units of land that **already were "created"** as separate parcels at some point in the past. As we explained nearly a decade ago, the anti-merger protections of section 66451.10(a) 'apparently sprang from a concern that without them, section 66424 would cause contiguous units of land that had already been qualified as separate parcels under the Act to be automatically merged by virtue of common ownership and thus to require further compliance with the Act before they could be sold separately.'" [Citation omitted]. (Emphasis added).

Gardner, 29 Cal.4th 990, at 1003-1004. The Court went on to state that "[s]ection 66451.10(a) does not, however, address the creation of parcels in the first instance. Nor does it provide a basis for legal recognition of subdivided lots depicted on antiquated maps." *Id.* at 1004. In *Gardner* the plaintiffs could not demonstrate through any authority that the recordation of the 1865 map lawfully created the parcels at issue and the Court found that their reliance on Section 66451.10(a) was misplaced. This is true for the Redondo View Map as well.

The *Gardner* Court found that grandfathering "lots" under Section 66451.10(a) would frustrate the purpose of the Map Act's objectives "'to encourage and facilitate orderly community development, coordinate planning with the community pattern established by local authorities, and assure proper improvements are made, so that the area does not become an undue burden on the taxpayer.' That is, when substandard parcels, such as those at issue here, are validated by certificates of compliance, they 'may be sold, leased, or financed without further compliance with the Subdivision Map Act or any local ordinance enacted pursuant thereto.'" *Id.* Furthermore, the Court noted that "if we were to adopt plaintiffs' position and hold that local agencies must issue a certificate of compliance for any parcel depicted on an accurate, antiquated subdivision map, we would, in effect, be permitting the sale, lease, and financing of parcels: (1) without regard to regulations that would otherwise require consistency with applicable general and specific plans (§§ 66474, subd. (b), 66418, 66419) and require consideration of potential environmental and public health consequences (§ 66474, subds. (e), (f)); (2) without consideration of dedications and impact mitigation fees that would otherwise be authorized by the Act; and (3) without affording notice and an opportunity to be heard to interested persons and landowners likely to suffer a substantial or significant deprivation of their property rights. *Gardner*, 29 Cal.4th at 1004.

(3) Grandfathering Under the 1929 Map Act

The definition of "subdivision" found in the 1929 legislation (Section 1) specifically exempts from the requirement of the 1929 Act "any subdivision of a map of which has been duly recorded under the provision of any previous act." Some have argued that this grandfather clause means that the mere recordation of a subdivision map prior to 1929 created the parcels

shown thereon. In *Gardner*, the Supreme Court refuted this, citing with favor and quoting from (*Hays v. Vanek* (1989) 217 Cal.App.3d 271, 289), which interpreted this very grandfather provision in the 1929 version of the predecessor to the Subdivision Map Act. After observing that "[t]he clear purpose of the so-called 'grandfather' clause is to protect developers who have detrimentally relied on an earlier state of the law," the *Hays* Court aptly remarked that such purpose "is hardly served by allowing later purchasers of property which has never been sold in subdivided form to take advantage of" the clause. *Hays*, 217 Cal.App.3d at 289. In such cases, *Hays* reasoned, "the later purchaser placed no reliance on the prior state of the law." *Id.* The same may be said for the Redondo View Map, assuming all previous purchasers of the subject property dating back to 1912 acquired the property containing the 206 "lots" in question (or at least portions thereof) as a single unit or part of a single unit of land.

It would not cause any problem to disavow creation of parcels by the mere filing of the Redondo View Map. Some have argued that this would somehow affect prior conveyances in the City of Half Moon Bay. However, the California Supreme Court made clear that prior conveyances referencing a map to supply a legal description are legal and "create" the parcels conveyed as long as the conveyance was legal at the time it was made. In fact, making reference to the map for the purpose of making a conveyance was described by the Supreme Court as the purpose of such maps prior to the enactment of State law enabling local agencies to approve or disapprove the design and improvement of subdivisions. As the Supreme Court ruled, "[a]lthough plaintiffs cite a number of judicial decisions for the proposition that subdivision maps recorded before 1893 resulted in the legal creation of parcels under the common law, those decisions merely recognized the principle that subdivision maps could properly supply the legal description of property conveyed by deed. *See, e.g., McCullough v. Olds* (1895) 108 Cal. 529, 531-532; see also *Masterson v. Munro* (1895) 105 Cal. 431, 433-434. The Supreme Court held that case law indicates that, where an antiquated map was not recorded pursuant to any subdivision statute, ordinance, or regulation, a subdivided lot shown on that map generally enjoyed no independent legal status until the owner actually conveyed the lot separately from the surrounding lands through a deed or patent. *Gardner*, 29 Cal.4th at 1001. Thus, while antiquated maps served to facilitate land conveyances involving the properties they depicted, such maps generally could not alter the legal status of those properties without the attendant conveyances. *Id.* at 1002.

Consequently, the Supreme Court stated, "unlike a modern-day final map or parcel map, which upon recordation ordinarily converts what was formerly a single parcel into as many separate lots as appear on the map (see *County of Los Angeles v. Hartford Acc. & Indem. Co.* (1970) 3 Cal.App.3d 809, 813), the recordation of a subdivision map in . . . 1865, without something more (such as a conveyance), could not and did not work a legal subdivision of the property shown thereon, and property owners who recorded subdivision maps in . . . 1865 generally remained free to deed parcels and lots as they desired without regard to the depicted subdivisions. *Gardner*, 29 Cal.4th at 1002. This reasoning applies equally to the 1912 Redondo View Map.

The Supreme Court concluded its discussion of grandfathering by stating that "[a]lthough the grandfather provisions of the Act reflect the Legislature's intent to protect those who detrimentally relied on prior subdivision laws in individual situations, they evince no intent to imbue antiquated maps with a legal significance that did not exist in their own time." *Id.* at 1006.

(2) Even if the Redondo View Map Had "Created" Parcels, Further Review of the Legal Status of the Parcels is Required Under the Half Moon Bay Local Coastal Program Land Use Plan

Even if the 206 "lots" shown on the Redondo View Map were somehow "created," it is still necessary for the Commission to further research whether the 206 "lots" are separate legal parcels under the City of Half Moon Bay Local Coastal Program Land Use Plan or other regulations applicable to the Project area.

To date, there have been no Certificates of Compliance issued for the Redondo View Map. Certificates of Compliance may only be issued when subdivided lots have been conveyed as separate parcels or lots prior to the effective date of any applicable local subdivision ordinance or the Coastal Act. It does not appear that any of the 206 "lots" on the Redondo View Map were ever separately conveyed or "approved for development" under local law so as to qualify for Certificates of Compliance.

(3) The 206 "Lots" in Question Only Remain Separate Legal Parcels if they have not been Combined or Merged by Action of a Former Owner Under Civil Code Section 1093 or Otherwise

Civil Code Section 1093 provides that "unless specifically stated otherwise," no merger of separate parcels occurs by reason of conveyance in a single instrument. Witkin summarizes Section 1093 as follows:

> "**Unless specifically stated otherwise**, the consolidation of separate and distinct legal descriptions of real property contained in separate instruments of conveyance or security documents into a subsequent single instrument, whether by individual listing of the legal descriptions or by a consolidated legal description, 'does not operate in any manner to alter or affect the separate and distinct nature of the real property so described in the subsequent single instrument'." 4 Witkin, Summary (9th Ed) Real Prop § 136; Civil Code § 1093 (Emphasis added).

It does not appear that the 206 "lots" in question have ever been "contained in separate instruments of conveyance or security documents." Hence, the affirmative rule of Section 1093 against combination or merger by subsequent single instrument would not appear to apply.

Furthermore, even if some of the "lots" shown on the Redondo View Map were once separately conveyed (of which there is not evidence to date), these "lots" may have been subsequently combined or merged by the actions of prior owners by a specific statement to this effect in a deed. A Chain of Title is necessary for the "lots" in question in order to adequately investigate this issue.

CONCLUSION

As the *Gardner* Court made clear, one of the fundamental reasons for requiring pre-1929 maps shown on lots to go through the modern subdivision process is to avoid creating an undue burden on the taxpayer. The use of 206 "lots" which are not actual legal parcels to claim that there is a benefit from the retirement of their phantom development rights would result in illusionary mitigation.

Thank you for the opportunity to submit our input on the Wavecrest Village Project. Please investigate this matter prior to rendering any final decision on the Wavecrest Village Project appeal.

Please direct all future communication regarding this Application to:

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Sincerely,

WITTWER & PARKIN, LLP

Jonathan Wittwer

Encls.

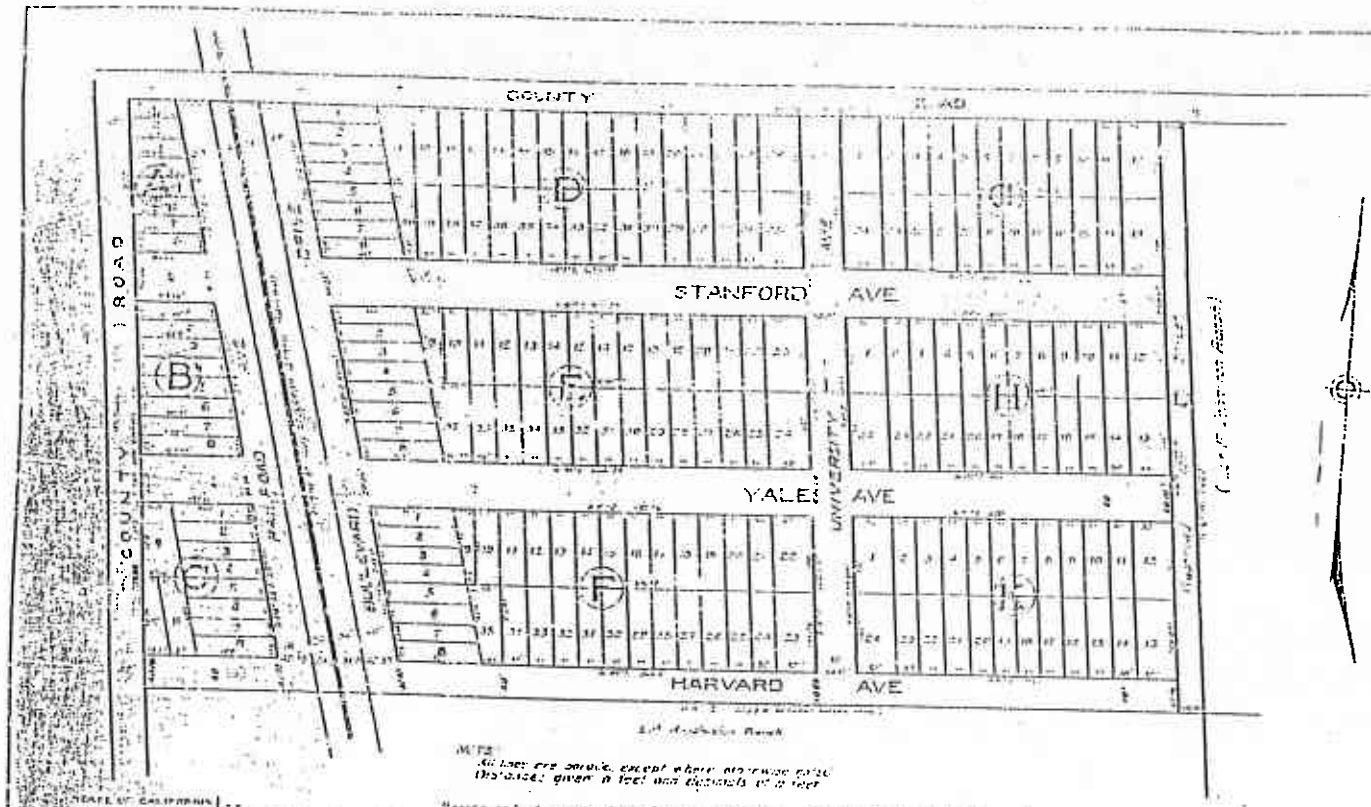
cc: The Committee for Green Foothills
City of Half Moon Bay

EXHIBIT NO. 26

APPLICATION NO.
A-1-HMB-99-051
(WAVECREST VILLAGE PROJECT)

REDONDO VIEW ANTIQUATED SUBDIVISION

EXHIBIT A



MAP
OF
REDONDO VIEW
SAN MATEO COUNTY, CALIFORNIA
SCALE 1"=100' FEBRUARY 2nd 1912
SURVEYED BY GEO. SMITH

I hereby certify this to be a true copy of an official map recorded in Map Book 8 at page 4
Geo. A. Kincaid
County Clerk and Ex-officio Recorder of Maps

BOOK 8 PG 4