

**SUPPLEMENTAL INFORMATION
No. 8**

For Planning Commission Agenda of:
April 1, 2010

- Administrative Agenda Item }
- Continued Public Hearing Item } No. 4
- New Public Hearing Item }
- Old Business Item }
- New Business Item }

Re: Applicant: John and Katrin Homan
 Case Nos.: FMS-08-02
 File No.: APN: 515-191-37

Attached is an additional public comment letter.

March 20, 2010

TO: Humboldt County Planning Commission

RE: Homan, John & Katrin, Major Subdivision File No. APN 515-191-37



Dear Humboldt County Planning Commissioners,

These are comments on the **Cultural Resources Section** of the Mitigated Negative Declaration (MND) for the Homan Major Subdivision in Trinidad.

Summary

- *In order to identify and evaluate impacts to historical resources, CEQA requires an archaeological inspection on all discretionary projects. This has not been done.*
- *The MND claims that a request for a cultural resources records search made to the North Coastal Information Center (NCIC) – resulted in a recommendation of project approval.*
- *That is not true. In 2008, NCIC recommended conditional approval for a well permit, stating that “the surrounding area has findings. Therefore there is a moderate likelihood of cultural resource findings.” These words should have triggered an archaeological inspection.*
- *The July 9, 2008 Staff Report inaccurately stated that NCIC recommended approval for the well permit. Based on that, no inspection was ever performed. Because the NCIC review clearly indicated the requirement to conduct a field inspection, the subdivision MND itself is premature without the completion of that inspection.*

Introduction

I worked professionally in Hoopa for 15 years. Since then, my interest in Native American cultural and political issues has continued. Many of the positions expressed in this letter are drawn from Dr. John Parker’s work, particularly his article “Environmental Quality Act (CEQA) and Historical (Archaeological) Resources – 2008.” (Attached)

Dr. Parker is a Registered Professional Archaeologist with 39 years of expertise in the field of Cultural Resource Land Use Planning. He served as a Clearlake Planning Commissioner, was responsible for the \$3.4 million State purchase of the Anderson Marsh State Historic Park and taught archaeology in Yuba and Mendocino Community Colleges. His positions on CEQA have been upheld by various commissions, from city and county to the Coastal Commission.

Cultural Resource Section of the MND

The MND provides the following background information for the project site: "Native Americans are known to have settled along the Humboldt County Coast, in the general vicinity of the project area." Then, non-Natives came. "Therefore, paleontological, archaeological, historical or unique ethnic or sacred resources are known to occur throughout the North coast region." Unfortunately, that's about it for information about this specific project area, which is surrounded by Native American cultural and historic sites.

Humboldt County Planning Department findings are (ironically) stated at the beginning of the Cultural Resource Section:

- The project will not cause a substantial adverse change in the significance of a historical resource as defined in Section 15064.5; or of an archaeological resource pursuant to Section 15064.5; will not disturb any human remains, including those interred outside of formal cemeteries if appropriate mitigation measures are implemented.

But these findings are based on no more than a perfunctory, background records search and the casual observations of site workers involved in something else. There was no field inspection. According to Dr. Parker, this does not meet CEQA requirements:

- CEQA states that a lead agency must make two determinations regarding historical or archaeological resources: 1. "Whether a project will impact a resource that falls within the definition of "historical resource," and 2. Whether any such impact will cause a substantial adverse change to the significance of the resource." (Remy et.al. 1999:181) (CEQA Sec. 21084.1)
- In order for the Item #1 determination to be completed, it is necessary to find out if there are any "historical resources" at a proposed project location. *This information cannot be obtained by simply reviewing the existing records of historical resources housed at a state or local agency.*⁶ *An archaeological field inspection must be conducted on all discretionary projects in order to discover if any historical resources are present.*⁷ Such inspections are often called "**Phase 1 archaeological inspections**"

⁶ "It is estimated that less than 5% of San Luis Obispo County has been inspected to record historical resources."

⁷ "Although CEQA requires archaeological inspections on all discretionary projects, many lead agencies in "development oriented" communities hedge the law by only requiring inspections on projects in moderate to highly sensitive areas. However, such hedging exposes the lead agency to legal action should an unidentified resource be damaged through the issuance of a permit without the required archaeological inspection."

- Why is a “Phase 1” inspection required on all discretionary projects? Because CEQA Sec. 21083.2 stipulates that only impacts to “unique” archaeological resources need to be addressed during the environmental review and project planning process. Therefore, before the decision is made to issue a Negative Declaration, Categorical Exemption, or require an EIR, archaeological and historical resources on the property must have already been identified and evaluated for significance.
- *The land use planner can’t make the determination to require an EIR, issue a Negative Declaration, or issue a Categorical Exemption unless they have identified and evaluated the significance of any archaeological resources within the project area.*

Problem with MND Report of NCIC Results

For this subdivision, the MND states that a request was made to the North Coastal Information Center (NCIC), a unit of the State Historical Resources Information System, for a cultural resources record search. The MND states that the center found “no reports of historical resources for the project site “(true) and “further studies are not recommended “(false).

What the MND reports and what the NCIC actually recommended are two different things. This is what I found:

In 2008 the developer applied for a well permit for the project. The Administrative Item Transmittal dated 6/10/2008 states: “NCIC was referred and recommended approval.” But the response from Vicky Bates, Interim NCIC Coordinator, was not even written until 7/7/2008 –one month later—and she did not recommend approval. Ms. Bates checked “*Recommend conditional approval (Suggested conditions attached).*” Her hand written note reads:

- *“While record search indicates no known recorded sites in project area, the surrounding area have findings. Therefore there is a moderate likelihood of cultural resources findings.” (attached)*

These words should have triggered a Phase 1 archaeological inspection. They did not. Instead, the Staff Report to the Planning Commission (7/09/2008) repeated “NCIC was referred and recommended approval.” On this basis, nothing was done about NCIC’s concerns, and the Planning Commission approved the well permit.

Subsequently, in 2009 a subdivision application was filed for the same parcel. The Planning Status Sheet shows that Planning sent a referral to the Bear River Band 2/11/2009, and that a response of “no comment” was received 2/17/2009 (attached). Since the subdivision property is located well to the north of the Wiyot’s historic lands, which stop at Little River, it is unclear why a referral was sent to them, and obvious why they had no comment.

Planning apparently then used information from the 2008 well permit for the subdivision application, and did not submit a new referral to NCIC. Trevor Estlow confirms this in an email dated 11/16/2009 (attached):

- *"We sent out a referral for the well permit and NCIC had no concerns, so Vicky signed it off. Since the parcel has already been flushed through their database, we don't send another referral to the same agency to do the same research. Yes, the first response covered their concerns."*

The following statement was then made in the Staff Report for the 3/04/2010 hearing:

"The site is outside the Wiyot Tribe's historical area. The North Coastal Information Center has recommended approval with no further study. A standard condition has been included should any cultural resources be found during site development (attached)."

I did not find Vicky Bates' NCIC report in the ~530 page Staff Report to the Planning Commission. Apparently it was left in the 2008 well permit file.

My concern is that neither the 2008 well permit Staff Report nor the 2010 subdivision MND/Staff Report acknowledged or addressed the *"moderate likelihood of cultural resource findings"* noted in the NCIC response.

The language in the MND does not reflect what Vicky Bates stated in her comments, nor does Trevor Estlow's statement that "NCIC had no concerns." Ms. Bates said they do have concerns, and a Phase 1 archaeological inspection would have been a proper response to them. That still has not happened and the current MND does not recommend it. This is a serious problem.

Further Inadequate Responses to NCIC Report

First, when NCIC stated that there were no reports of historical resources, this alone should have triggered a Phase 1 archaeological investigation. What the NCIC report means is that nobody has ever examined the site for cultural resources. If a site has been investigated and nothing found, that information will appear in the report, including who did the investigation and when it occurred. The NCIC was reporting that no investigation had ever been conducted. Therefore, the Planning Department conclusion that "no further action" is warranted is completely arbitrary and unsupported by evidence. Furthermore, as Dr. Parker pointed out earlier, this simple review of existing records is inadequate to meet CEQA.

Second, anyone wishing to make a serious investigation of potential cultural resources at this site could have contacted any or all of the local tribal agencies. A short web search indicates that contacting local native groups for information is part of standard development protocol for many cities and counties in California.

A half mile from the project site the developer could easily have found the Tsurai people (of the Yurok Tribe) who have lived in Trinidad since 1620. The Tsurai Ancestral Society is well known for its active protection of tribal cultural resources in the Trinidad area. Currently, the Society is in the process of acquiring its traditional village site, prominently located directly below the lighthouse, from the City of Trinidad. This is not a secret; it is a tourist attraction. Additionally, LACO worked for the Society on this site.

Other obvious sources for cultural resources information are the Yurok Tribal Office in Klamath, and the Trinidad Rancheria. The Rancheria has been in existence since 1958. Both the Yurok Nation and the Rancheria have offices and staff specifically dedicated to cultural resource issues. Both Planning and the developer either know or should know this information.

None of these tribal groups were notified of the proposed subdivision by the county or the developer. The Tsurai Ancestral Society and Rancheria learned about it from flyers posted by Friends of College Cove. While I don't know if CEQA requires that they be notified, in my opinion these local native groups should have been, particularly when the NCIC found that no previous site inspection had occurred. In at least some other California cities and counties, all of the local native groups would have been contacted as a matter of course.

Observations by Unqualified Personnel

The second reason for the MND recommendation of "no further studies" (actually, there never was an initial study) is that no "evidence of paleontological, archaeological, historical, ethnic or religious resources was found" during the Fault Hazard, Soils, and Wetlands Delineation fieldwork.

I have reviewed all 3 of these studies, and not one of them mentions anything about cultural resources. There is no statement indicating that anybody looked even in passing for evidence of "paleontological, archaeological, historical, ethnic or religious resources" during the course of their work. So who made the MND statement that "nobody saw nothin'?" Who observed nothing? What was their training? Everything else is quantified in these reports, which include lengthy resumes. If cultural resources were truly addressed, why isn't it noted?

I think this MND reason is really just a flimsy rational for doing nothing. The professionals involved in those studies (such as geologists, biologists, Fish & Game, birders, and possibly backhoe operators), unless specifically trained, are unqualified to make definitive archaeological observations, and they were onsite for other work.

I sincerely doubt that Planning would dismiss the requirement for Fault, Soils, or Wetland studies based on an archaeological inspection mentioning that unspecified personnel saw no evidence of faults, soil problems or wetlands as they went about their archaeological work.

Please consider the possibility that off-hand observations by unqualified and unnamed personnel---observations that do not appear in any report--- do not meet CEQA requirements for cultural resources protection.

Possible Damage to Potential Cultural Resources

The MND states that each of the 3 previously mentioned studies (Faults/Soils/Wetlands) “required considerable trenching and excavations ranging from one foot to 21 feet in depth, throughout the site.” To my knowledge all this heavy earthmoving, pre-construction work was done without a Phase 1 archaeological inspection and without the presence of a qualified cultural monitor. If cultural resources are on this site, it is possible that they have already been damaged or destroyed. In Dr. Parker’s opinion, the lead agency exposes itself to legal action “should an unidentified resource be damaged through the issuance of a permit without the required archaeological inspection.”

Inadequate Mitigation

Mitigation #8 states:

- If any area of cultural deposits is discovered during the course of the project, as required by law, all work shall cease and a qualified cultural resources specialist shall be contacted to analyze the significance of the find and formulate further mitigation (e.g. project relocation, excavation plan, protective cover). And, pursuant to the California Health and Safety Code Section 7050.5, if human remains are encountered, all work must cease and the County Coroner contacted.

Dr. Parker explains why this mitigation is inadequate, and what CEQA requires:

- (The requirement of “up-front” inspections) addition to CEQA occurred in the 1980’s as a result of a compromise between the development lobby and the environmental lobby. Prior to that time, a Phase 1 archaeological inspection was often an afterthought, tacked on as a stipulation when the permit was issued. This caused nothing but problems as historic sites were being discovered after the permits had already been issued. By then it was impossible to redesign projects around sites, or mitigate damage to sites prior to construction. The 1980’s change required that Phase 1 inspections be conducted on all projects “up-front” in the planning process, so projects could be designed to avoid or mitigate impacts to resources before permits were issued. Those design changes could then be added as permit stipulations allowing for the issuance of a Mitigated Negative Declaration for the project.

Mitigation #8 puts the cart (permit) before the horses (inspection +). No one will know what –if any- cultural resources exist within the project area, nor what impacts will occur to those resources until after the project has been approved. By then it will be too late for the county to have any say about what mitigation plans should be carried out.

In fact, the only person responsible for monitoring the mitigation will be the developer himself, and the only requirement is that he “review construction plans” once, and “assure compliance” once. But what does that mean, and how does it protect cultural resources?

Conclusion

According to Dr. Parker, the MND itself is premature without the completion of a Phase 1 Archaeological Inspection for this project.

The MND reports that the NCIC signed off on the project when they did not. The NCIC checked the “Conditional Approval” box, stating: “the surrounding area have findings. Therefore there is a moderate likelihood of cultural resource findings.” An Archaeologic Inspection is the implicit “Suggested Condition” that should have been triggered by those words. The NCIC response was not included in the subdivision Staff Report.

The plan does not appear to conform to the spirit and legislative intent of CEQA. As currently written, I do not believe that it complies with CEQA requirements.

- It does not identify all cultural resources that exist within the project area.
- Because all resources are not known, it is impossible to determine the significance of all cultural resources as required by CEQA (sec. 21083.2 and sec. 21084.1).
- Specific direct or indirect impacts to specific resources are not listed or known as is required by CEQA (sec. 15126.2 sub (a)).
- Because existing potential resources are still unknown and the specific impacts are unknown, the MND was unable to list meaningful mitigation alternatives that would address or lessen those impacts as required by CEQA (sec. 15126.4 (3)).

I am asking this commission to deny the current subdivision application. If the developer wishes to resubmit it, it should be in a form that complies with CEQA guidelines for Cultural Resources Protection.

Thank you.

Carol Boyd, MA PO Box 744 Trinidad CA 95570

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) AND HISTORICAL (ARCHAEOLOGICAL) RESOURCES

A review by Dr. John Parker, RPA 2008

WHAT PROJECTS REQUIRE CEQA REVIEW?

All discretionary projects require CEQA review. A “discretionary” project is one where the permitting agency has the discretion to approve, disapprove, or require changes to a project before granting a permit (CEQA Sec. 21080).

HOW DOES CEQA ADDRESS HISTORICAL RESOURCES

What is a Historical Resource¹

Historical Resources are one of the resources that require a “mandatory finding of significance” under CEQA law (Sec. 15065a). But CEQA does not apply to all resources that a layperson might consider to be historic. CEQA only applies to “historical resources” as described in CEQA and cross-referenced in the Public Resources Code. There are 4 categories of “historical resources” that must be considered during CEQA project review (CEQA sec. 21084.1):

1. A resource listed in or determined eligible for listing in the California Register of Historic Resources (such resources “must in all cases be granted status as historical resource” CEQA sec. 15064.5)²,
2. A resource included in a local register is presumed to be historically significant,
3. A resource deemed significant based on Public Resources Code Sec. 5024.1
4. A resource that may not qualify under the previous three categories, but that a local agency chooses to consider “historical”.

¹ In this review, the terms “Historical Resource”, “Cultural Resource”, and “Archaeological Resource” are used interchangeably.

² In the absence of formal listing or determination of eligibility, a lead agency shall consider a resource to be “historically significant” if it meets any of the criteria for listing in the State Register (see page 3) Remy et. al. 1999:182).

³ City or County planning department, public works department, special district, public utility, etc.

⁴ In CEQA “adverse change to the significance of an historical resource means physical demolition, destruction, relocation, or alteration of the resource or its surroundings such that its significance is materially impaired.” (sec. 15064.5 b)

⁵ Archaeological resources are considered a subset of “historical resources” under CEQA Sec. 15064.5

⁶ It is estimated that less than 5% of San Luis Obispo County has been inspected to record historical resources.

⁷ Although CEQA requires archaeological inspections on all discretionary projects, many lead agencies in “development oriented” communities hedge the law by only requiring inspections on projects in moderate to highly sensitive areas. However, such hedging exposes the lead agency to legal action should an unidentified resource be damaged through the issuance of a permit without the required archaeological inspection.

What is Required of the Lead Agency³

CEQA states that a lead agency must make two determinations regarding historical or archaeological resources:

1. “Whether a project will impact a resource that falls within the definition of “historical resource”, and
2. “Whether any such impact will cause a substantial adverse change to the significance of the resource⁴.” (Remy et. al. 1999:181) (CEQA Sec. 21084.1)

In order for the Item #1 determination to be completed, it is necessary to find out if there are any “historical resources”⁵ at a proposed project location. This information cannot be obtained by simply reviewing the existing records of historical resources housed at a state or local agency⁶. An archaeological field inspection must be conducted on all discretionary projects in order to discover if any historical resources are present.⁷ Such inspections are often called “**Phase I archaeological inspections**”.

Why is a “Phase I” inspection required on all discretionary projects? CEQA Sec. 21083.2 stipulates that only impacts to “unique” archaeological resources need be addressed during the environmental review and project planning process. Therefore, before the decision is made to issue a Negative Declaration, Categorical Exemption, or require an EIR, archaeological and historical resources on the property must have already been identified and evaluated for significance.

The land use planner can’t make the determination to require an EIR, issue a Negative Declaration, or issue a Categorical Exemption unless they have

identified and evaluated the significance of any archaeological resources within the project area.

This addition to CEQA occurred in the 1980's as the result of a compromise between the development lobby and the environmental lobby. Prior to that time, a Phase I archaeological inspection was often an afterthought, tacked on as a stipulation when the permit was issued. This caused nothing but problems as historic sites were being discovered after the permits had already been issued. By then it was impossible to redesign projects around sites, or mitigate damage to sites prior to construction. The 1980's change required that Phase I inspections be conducted on all projects "up-front" in the planning process, so projects could be designed to avoid or mitigate impacts to resources before permits were issued. Those design changes could then be added as permit stipulations allowing for the issuance of a Mitigated Negative Declaration for the project.

What is a "Unique" or "Significant" Historical Resource?

CEQA relies on the California Register of Historic Resources to determine what is a "Unique" or "Significant" historical resource (CEQA Sec. 15064.5 a).

According to the Register, a resource is determined "significant" if it meets one of the following:

- A. Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
- B. Is associated with the lives of persons important in our past;
- C. Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic value; or
- D. Has yielded, or may be likely to yield, information important in history or prehistory. (Pub. Res. Code Sec. 5024.1, Title 14 CCR, Sec. 4852)

Most archaeological sites will be determined "significant" under item "D" above as long as they have maintained their integrity over the years. As long as an archaeological site can be avoided during construction, no further cultural resource work need take place following the Phase I field inspection listed above. If disturbance to an archaeological site can't be avoided during a construction project, it becomes necessary to determine whether the resource is "significant". It is possible that the surface observations made during the Phase I inspection can be used to determine if the site is intact. If this is not possible, then this determination will need to be made by an archaeologist doing a small scientific excavation and analysis of a sample from the proposed area of impact. These test excavations are often called "**Phase II subsurface tests**".

ATTACHMENTS RE CULTURAL RESOURCE PROTECTION

In 2008 Planning sent a referral to NCIC for a Cultural Resources records search for the project's well drilling permit. This is NCIC's reply:

HEARING DATE: August 7, 2008	SUBJECT: <input checked="" type="checkbox"/> Public Hearing Item <input type="checkbox"/> Consent Agenda COASTAL DEVELOPMENT PERMIT	CONTACT: Trevor Estlow
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We have reviewed the above application and recommend the following (please check one):

- Recommend approval. The Department has no comment at this time.
- Recommend conditional approval. (Suggested conditions attached)
- Applicant to submit additional information. (Attach list of items needed)
- Recommend denial. (Attach reasons for recommended denial)
- Other comments:

While record search indicates No known recorded sites in project area - the surrounding area have findings therefore there is a moderately likelihood of cultural resource findings.

DATE: 7-7-08

SIGNATURE: Vicky Bates Interim NCIC Coordinator

This is the Staff Analysis in the Administrative Item Transmittal (6/10/2008) RE NCIC's response to Planning's request for a records search. The Staff Report (7/09/2008) is exactly the same:

Cultural Resource Protection: §3.29(TAP)	New development shall protect cultural, archeological and paleontological resources.	NCIC was referred and recommended approval. Additionally, an informational note has been added to the Conditions of Approval regarding legal requirements should ground-breaking activities reveal presence of archaeological resources or human remains.
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This is the Referral Agencies checklist on Planning's 2/04/2009 Status Sheet showing referral to the Bear River Band (Wiyot):

HOMAN, John & Katrin

APN: 515-191-37 (Trinidad area)

Case Nos.: FMS-08-02/CDP-08-25/SP-08-04

ATTACHMENT 4

Referral Agency Comments and Recommendation

All referral agencies that the proposed project was sent to for review and comment are listed below. Those agencies that provided written comments are checked off.

Referral Agency	Response	Recommendation	Attached	On File
County Building Inspection	✓	Conditional Approval	✓	
County Public Works, the Land Use Division	✓	Conditional Approval	As Attachment 1, Exhibit "A"	
County Division of Environmental Health	✓	Conditional Approval	✓	
Trinidad Volunteer Fire Department		No Response		
California Coastal Commission	✓	Comments	✓	
California Department of Forestry and Fire Protection (Calfire)	✓	Comments	✓	
California Department of Fish and Game	✓	Conditional Approval	✓	
Regional Water Quality Control Board	✓	Comments		✓
North Coast Air Quality Management District		No Response		
North Coastal Information Center	✓	Approval		✓
Bear River Band	✓	No comment		✓
City of Trinidad	✓	Comments	✓	
PG&E		No Response		
California State Parks	✓	Comments		✓
Army Corps of Engineers	✓	Comments	✓	
Giblin Associates	✓	Conditional Approval	✓	

This is the 11/16/2009 email from Trevor Estlow, Senior Planner, responding to the question re a Cultural Resources records search for the subdivision application:

----- Original Message -----

Subject:RE: thanks

Date:Tue, 16 Mar 2010 16:37:57 -0700

From:Estlow, Trevor

We sent out a referral for the well permit and NCIC had no concerns, so Vicky signed it off. Since the parcel has already been flushed through their database, we don't send another referral to the same agency to do the same research. Yes, the first response covered their concerns.

This is Planning's Cultural Resource Protection plan (Staff Report) for the 3/04/2010 Planning Commission hearing:

MEETING DATE: March 4, 2010	AGENDA ITEM: Final Map Subdivision, Coastal Development Permit and Special Permit	CONTACT: Trevor Estlow
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Cultural Resources §3.16 TAP	To protect designated historical and archeological resources.	The site is outside the Wiyot Tribe's historical area. The North Coastal Information Center has recommended approval with no further study. A standard condition has been included should any cultural resources be found during site development.
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