

TIMELINE OF EVENTS RELATING TO 67 WINDY WAY

- 6-19-2007 - Letter from Larry Lewis to Mia Nelson stating that both lots are buildable but states that "all city standards apply except the lot size." (Attached)
- 2-24- 2012 - Letter from Nelson to Planning Commission re: proposed changes to 9.52.070(F) objecting to 25 ft. Ocean set back. (No mention of riparian boundary.) (Attached)
- August 2012 - Ordinance 315 adopted including an Exception to the 25 ft. Ocean setback for Nelson property. (See City Code)
- 9-18- 2012 - Email from Lewis to Don Niskanen, Gregg Scott and Sandy Rutherford stating that "Gender Creek is considered a riparian area." (Attached)
- 12-31-2013 - Lewis sends notice to residents re: Nelson Variance Request – No indication of Riparian Protection Boundary. (See city records)
- Early January 2013 - Lewis posts staff report on Yachats website saying Gender Creek is a perennial stream and 50 foot Riparian Protection Boundary applies. Says variance request includes a 17 ft. variance of 50 foot area. (See city records and attached map at page 36 showing riparian boundary in relation to Nelson lot.)
- 1-19-2014 - Rutherford sends email to city requesting that the hearing be postponed to allow public time to inform themselves about issues relating to the Riparian Protection Boundary. (Attached)
- January 2014 - 15 letters submitted by neighbors in opposition to the Variance Application, several mentioning the Riparian Protection Boundary required for Gender Creek (See city records)
- 1-19-2014 - Lewis drafts memo to Planning Commission explaining that it was brought to his attention that Gender Creek is an intermittent stream not a perennial stream. (Attached)
- 1-21-2014 - A few hours before the start of the public hearing scheduled for 3:00 PM Lewis posts a REVISED staff report stating Gender Creek is an intermittent stream and removes all reference to a Riparian Protection Boundary. (See city records)
- 1-21-2014 - Vice Chair of the Planning Commission tells members of the public present that they cannot testify about the status of Gender Creek because it is no longer part of the variance request.
- 1-21-2014 - Betty Reed testifies that she was prepared to testify about the Riparian Boundary Protection Standards and requests that the Planning Commission continue the public hearing so that the PC and public can investigate the status of Gender Creek. (See city records.)

- 1-21-2014 - During the Commission deliberation, Commissioner Helen Anderson stated three times that she did not have enough information to vote and needed more time. There was no motion to continue the hearing. (See city records.)
- 1-21-2014 - Planning commission votes to approve Variance Request with conditions to be drafted by staff. (See city records.)
- 2-18-2014 - Planning commission meets. Reed speaks under "citizen concerns" stating that she and other residents are concerned about the classification by staff of Gender Creek as Intermittent and submits evidence that it is perennial (pictures, statement of 25 residents that it flows year round, statement of concern by Sandy Rutherford, USGS map inaccuracies, comments from cartographers and an article re: unreliability of maps to classify streams.) (Attached)
- 2-18-2014 - Planning commission rejects letter of dissent by members Anderson and Nan Scott because it contained information "not in the record." PC discusses and rejects re-opening record based on legal advice that it would "open a can of worms." PC approves Variance with condition that house be substantially as indicated on application. (See city records)
- 2-20-2014 - Nelson writes to neighbors threatening to build a larger house if they appeal. (See attached)
- 3-5-2014 - Attorney Sean Malone files appeal on behalf of 10 residents. (See attached)
- 3-7-2014 - Nelson withdraws her Variance Request. See attached
- 3-14-2014 - Thomas Horning, CEG of Horning Geosciences sends letter to Rutherford stating Gender Creek is perennial and providing maps.



City of Yachats

441 Hwy 101 N.
P O Box 345
Yachats, OR 97498

June 19, 2007

To: Mia Nelson, executor of Bonnie Nelson
Via Fax: 541-937-1407

From: Larry Lewis, City Planner

Re: 67 Windy Way, Yachats, OR

67 Windy Way is zoned R-1, and is connected to municipal water and sewer. The property is comprised of two undersized lots of record as defined by Yachats Municipal Code (YMC) Section 9.76.080. If desired, both undersized lots of record can be made buildable. In order to do this, the existing house must first be removed, and a request must be made to Lincoln County to reestablish the old tax lot line and create two tax lots.

The May 30, 2007 geotech report prepared for the property by Oregon Geotechnical Services meets the City of Yachats standards for purposes of deviating from the default shoreland setbacks of YMC Section 9.52.070(B), and two dwellings are able to be constructed on the property under our current Yachats Municipal Code with a minimum shoreland setback in accordance with the recommendations of the engineering geologists, i.e. 7-10 feet from the top of the bluff.

When constructing new homes on these two lots, all the city standards apply except the lot size standards in YMC Section 9.12.040A(1-5). Standard building permits, etc., must be obtained. The conceptual layout shown on the drawing titled "Potential New Structures" for siting two homes is generally workable under the current YMC, except that the 8 foot rear setback shown for the westerly lot must be increased to 10 feet. Also, the 8 foot side yard would restrict the building height to 24 feet (1 foot side yard for every 3 feet of building height).

A recorded joint maintenance access easement is required across the front of the easterly lot to provide physical driveway access to the westerly lot. Building out the second lot will not trigger the need to improve Windy Way to current street standards.

MIA M. NELSON
40160 East First Street
Lowell, OR 97452

541.520.3763

mia@sunridge.net

February 24, 2012

Planning Commission
City of Yachats
441 Highway 101 North
Yachats, OR 97498

Re: Proposed changes to Yachats Municipal Code 9.52.070(F)

Dear Commissioners:

Thank you for the opportunity to provide testimony on this important matter. I regret that cannot attend your hearing in person. I am concerned about the proposed deletion of the underlined passage in Yachats Municipal Code 9.52.070(F), which would eliminate the current practice of allowing reduced setbacks on oceanfront lots if recommended by a geotechnical professional:

On shorelands along the ocean, west of the Yachats River Bridge, setbacks shall be twenty-five (25) feet from the top of the bank or that arrived at by using formulae elucidated in the RNKR study (RNKR Associates, 1978; copies are on file at City Hall) and outlined in Appendix D, whichever is greater. Any deviation from this setback must be accompanied by a recommendation from a State of Oregon registered professional geologist or geotechnical engineer and approved by the City.

While I do not live in your community, my late mother left my sister and me a house at the end of Windy Way. There was one house straddling two legal lots, each large enough to site a home, provided we could gain an exception to the 25-foot setback requirement. I commissioned a geotechnical report that concluded the property is above the tsunami line and is underlain by solid rock. The report recommended a 7-foot setback from the bluff top. We had the report approved by the city in conformance with code requirements; see attached letter.

Since the approved 7-foot setback enabled construction of homes on both lots, we demolished the existing home, and my sister built a new house on the rear lot. I still have the oceanfront lot, and have been trying to sell it for the last few years. I have reviewed the effects of the proposed elimination of the reduced setback provision, and conclude that the change will destroy the value of my property. The attached drawing shows a conceptual home on the property, using the city-approved 7-foot setback. The drawing also shows the small area of land that would remain buildable under the new rules; it is about 800 square feet.

The variance provisions are not helpful. It appears that as long as we could build an 800 square foot structure, the lot wouldn't even qualify for a variance. Since the buildable area under the new rules is about that size, in theory, a triangle-shaped cabin with no garage could be built here. But even if we did get a variance, we would be limited to that same 800 square foot footprint, which would severely constrain the building opportunities and greatly devalue the property.

I hope you will think carefully about whether there is enough real evidence that this drastic change is needed. While I agree that in some cases, stricter ocean setbacks might make sense, it is important not to cast the net too wide. We have all seen examples of houses built on sand close to the high tide line, and we have seen how powerful storm erosion can be. However, not all oceanfront property is the same. Some lots are like mine, elevated above the ocean on a rock outcrop.

If a professional engineering geologist with years of training and a state certification does a site-specific analysis and concludes a lesser setback would be safe, why would the city dispute that? How will the city prove that a 25-foot setback is truly needed in every single instance, no matter what the on the ground facts are? Why should an arbitrarily decided 25-foot setback overrule a reasoned, fact-based decision by an expert, even in the face of ruinous financial consequences for the hapless property owner?

But there is something even worse about the proposed change: it doesn't even exempt properties like mine, which already have approved geotech reports on file. This city made a commitment to me; and I acted on it by tearing down the old house and re-developing the property as two lots. It shouldn't even be a possibility that this prior written approval would be rendered worthless. So, at the very least, please honor this commitment. I would be satisfied if Section F was rewritten thus:

Prior to development on shorelands along the ocean, west of the Yachats River Bridge, a site specific geotechnical report shall be submitted to the City in accordance with Section 9.52.050. Setbacks shall be a minimum twenty-five (25) feet from the top of the bank or greater if recommended by an Oregon certified engineering geologist, unless a lesser setback was recommended by a State of Oregon registered professional certified engineering geologist or geotechnical engineer and approved by the City prior to January 1, 2012.

I hope you will make this change. Thank you for your consideration.

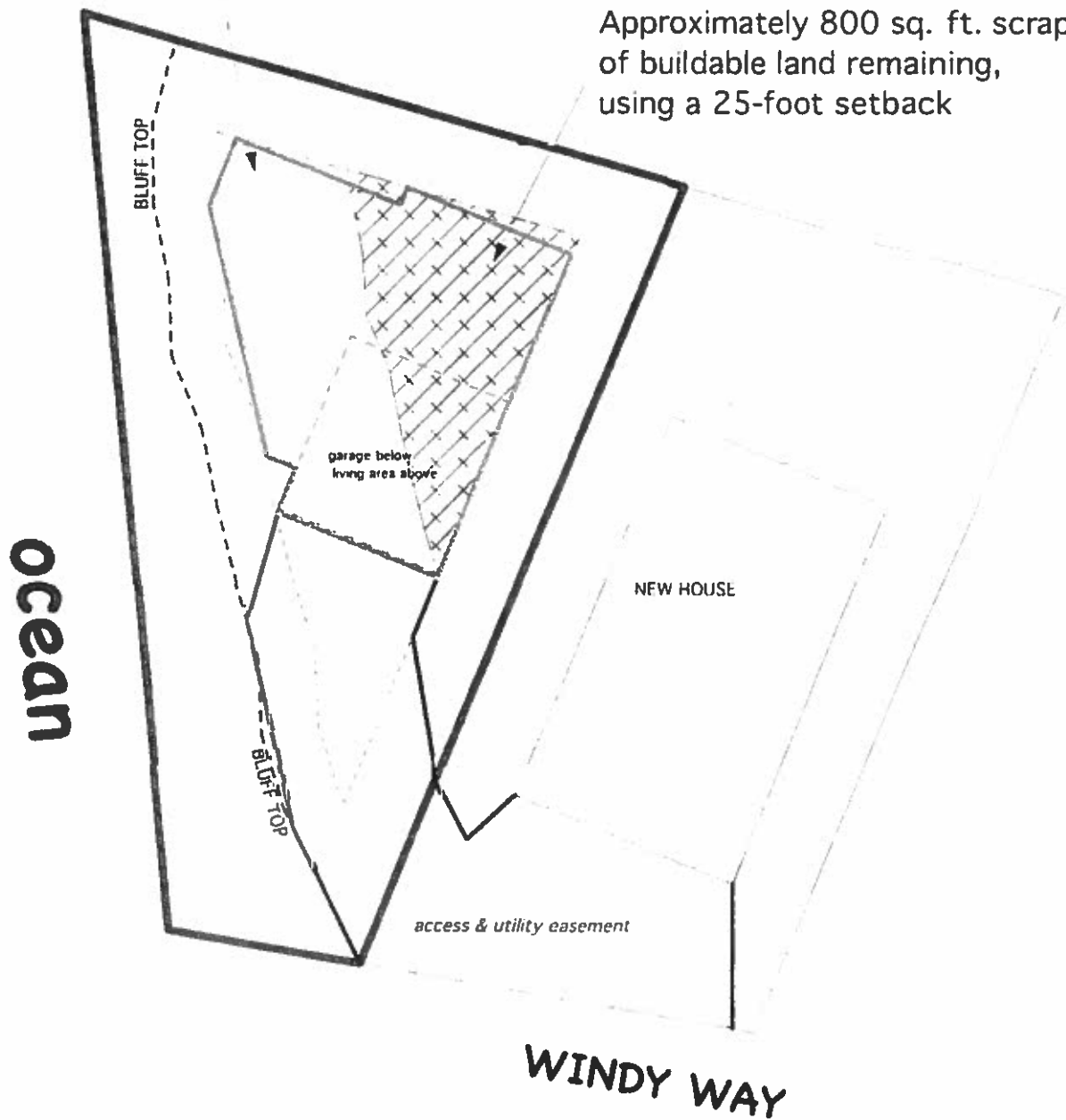
Sincerely,



Mia Nelson

Contemplated New House - 1000 sq. ft. ground floor, plus garage
Sited with city-approved 7-foot setback

Approximately 800 sq. ft. scrap
of buildable land remaining,
using a 25-foot setback



From: "Larry Lewis" <Larry@ci.yachats.or.us>
Date: September 18, 2012 at 8:29:51 AM PDT
To: "Donald Niskanen" <DWN@peak.org>, "Scott, Greg" <ScottGr@bus.oregonstate.edu>
Cc: "y - Sandy Rutherford & Kathy" <snrth1@gmail.com>, "Kathy Kick" <katku99@aol.com>
Subject: RE: Gender creek construction

Gender Creek is considered a riparian area however the property owner obtained a building permit in May and our 'we ordinance was not adopted until August. This is considered an accessory structure and required a building permit because it exceeds a 10 foot height.

Our wetlands ordinance is now in place so future reports of other Gender Creek activity is appreciated.

Larry

Larry Lewis, City Planner
City of Yachats
541-547-3565

From: Donald Niskanen [mailto:DWN@peak.org]
Sent: Saturday, September 15, 2012 7:11 PM
To: Scott, Greg
Cc: Larry Lewis; y - Sandy Rutherford & Kathy; Kathy Kick
Subject: Re: Gender creek construction

Hi All,

I'll check it tomorrow. We have multiple complaints against this property from rip rapping Gender Creek to an illegal "fence" above the three foot level in front of the house. The shed looks like 10' x 10' foot which is a without a building permit, if there is a permitted building on the lot. A connection to the main house is requested. I'll also check with Larry on Tuesday. Set-backs are also a question.

Don

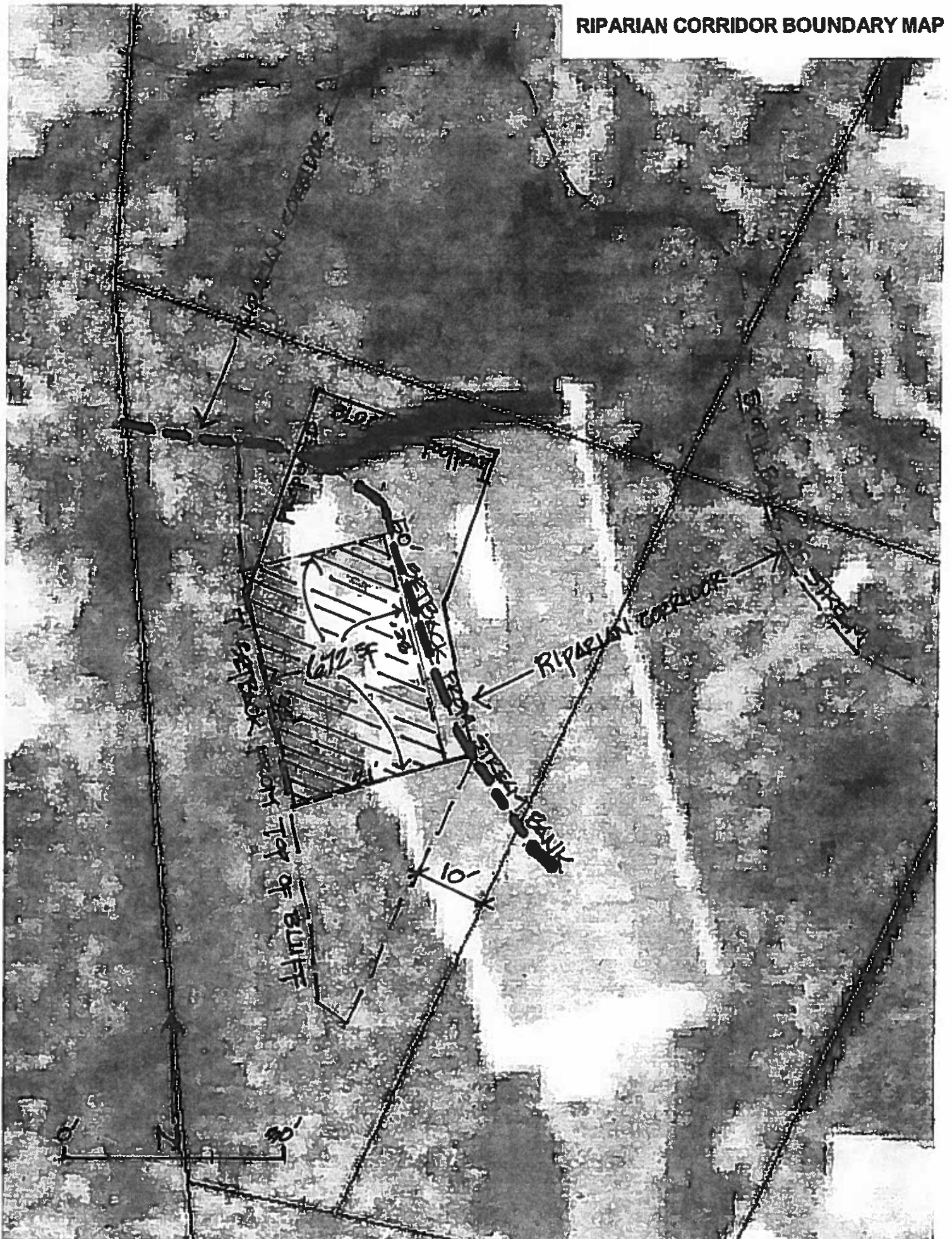
On Sep 15, 2012, at 6:30 PM, Scott, Greg wrote:

I would be surprised if the project below, on Gender Creek meets the setback requirements for riparian areas. Larry, is Gender Creek considered a riparian area? This looks like an addition to a home that is requested as a shed.

The residents in the area are concerned and I am wondering if this an end run on our building permit process.

Greg

RIPARIAN CORRIDOR BOUNDARY MAP



From: Sandy Rutherford <snrth1@gmail.com>
Date: Sun, 19 Jan 2014 13:22:46 -0800
Subject: Request for delay
To: Sandy Rutherford <snrth1@gmail.com>

Dear Nancy Batchelder

The Notice of Public Hearing Variance Application sent out on New Years Eve contains an omission in the Proposed Development Action section - which I believe is so material that the scheduled hearing should be postponed for at least one month.

In this section only two of the three variance requests are cited. The most important one, No. 3 in the Applicants Request, regarding a variance in the Riparian Zone Corridor for Gender Creek, is completely missing. This means that the public has not had adequate notice regarding what is actually being requested.

There is also no other mention of this Riparian Zone Variance request in the body of the notice.

Since the public has not received adequate notice, a fair public hearing cannot be held.

It is also true that the majority of homeowners are not in Yachats in this immediate post-holiday period. We (23 Windy Way) are out of state. The Klemps are out of the country. Owners from 33 Windy Way are in Michigan. The Reeds from Gender St. are in California. I could go on, but I think my point is clear.

Since my mail is being forwarded, I did not even receive the hearing notice until approximately January 10th. And even then I did not read anything about a variance for the Riparian Zone - because it wasn't mentioned.

I believe that virtually every homeowner on Windy Way and every homeowner on the south side of Gender Drive will have their view materially altered by the proposed structure. It is the specific view down the creek to the ocean which will be changed for almost everyone. Some houses will also have their view altered in other very negative ways.

Many Windy Way and Gender Drive residents are only now beginning to understand what is being requested. They certainly lack adequate time to digest all these pages of information and formulate a response.

The information available on the website is also misleading. The one letter in support of this variance request purports to be from a member of the public. This is simply not true. The letter included in support of this request is from the applicant's own family member. This is a material fact, and the family relationship should have been clearly identified.

Please delay this hearing for at least one month to allow adequate public response.

Thank you.

Sandra Rutherford
23 Windy Way

January 19, 2014

To: Yachats Planning Commission

From: Larry Lewis, City Planner

**Re: #1-VAR-PC-14 Nelson Variance Application
Updated Staff Report – Non-fish bearing and Non-Perennial Drainage Way
Protection Standards**

When the staff report was initially prepared I identified Gender Creek as a perennial stream and therefore addressed the protection standards that require a 50 foot setback from top of the creek bank. The house is proposed to be partially located within 50 feet of the top of the creek bank therefore the staff report discussed the need for a variance for the proposed creek setback.

It was brought to my attention that Gender Creek is not designated as a perennial stream. The United States Geological Survey (USGS) Map for Yachats identifies Gender Creek as an intermittent stream. The Yachats Local Wetland Inventory (LWI) does not identify Gender Creek as a perennial stream. Gender Creek is a non-fish bearing stream. The LWI does not identify a riparian corridor associated with Gender Creek.

Based on this information the Non-fish bearing and Non-Perennial Drainage Way Protection Standards apply to this property (not the riparian corridor standards). The Non-fish bearing and Non-Perennial Drainage Way Protection Standards prevent new development from significantly increasing the amount or flow rate of surface water runoff destined for the drainage way. For any new development or redevelopment proposed on land containing or adjoining a drainage way 1) No drainage way shall be altered, i.e. filled, culverted, re-routed, or disturbed without prior approval by the City of Yachats and, 2) A drainage easement 10-foot on-center shall be maintained. Therefore development of the subject property should not increase the amount or flow rate of surface water runoff destined for Gender Creek. Gender Creek is over 20 feet from the subject property at its closest point therefore the drainage easement 10' on-center does not apply (since the easement would be on another property). No variance is needed or requested for the setback from Gender Creek.

The attached *Staff Report Updated Jan. 19, 2014* provides this updated information.

Madam Chair and Members of the Commission

My name is Betty Reed a resident of 62 Gender Drive

I and a number of other residents are concerned about the classification by staff of Gender Creek as an intermittent stream under City Ordinance 315. We have gathered convincing evidence that Gender Creek is in fact a perennial stream and has water flowing in its stream bed year round.

I have a number of documents on this subject for you today

**Citizens' Concern Presented to Yachats Planning
Commission on February 18, 2014**

Gender Creek is a Perennial Stream

Documents provided to Commission:

- **Photographs of Gender Creek taken June 2013, October 2011 and winter prior to 2010 showing water in stream bed**
- **List of residents stating Gender Creek has year-around water flowing in its streambed**
- **Statement of concern from Sandy Rutherford**
- **USGS map referenced in today's Staff Report – Note: This map is outdated. It shows Gender Creek flowing into the ocean South of Windy Way. Gender Creek actually flows North of Windy Way.**
- **Comments from three cartographers regarding unreliability of maps to classify streams.**

A black and white photograph of a garden scene, viewed through a software interface. The garden features a wooden fence, a stone path, and various plants. The software interface includes a toolbar with icons for navigation and editing, and a sidebar with a search bar and a list of items.

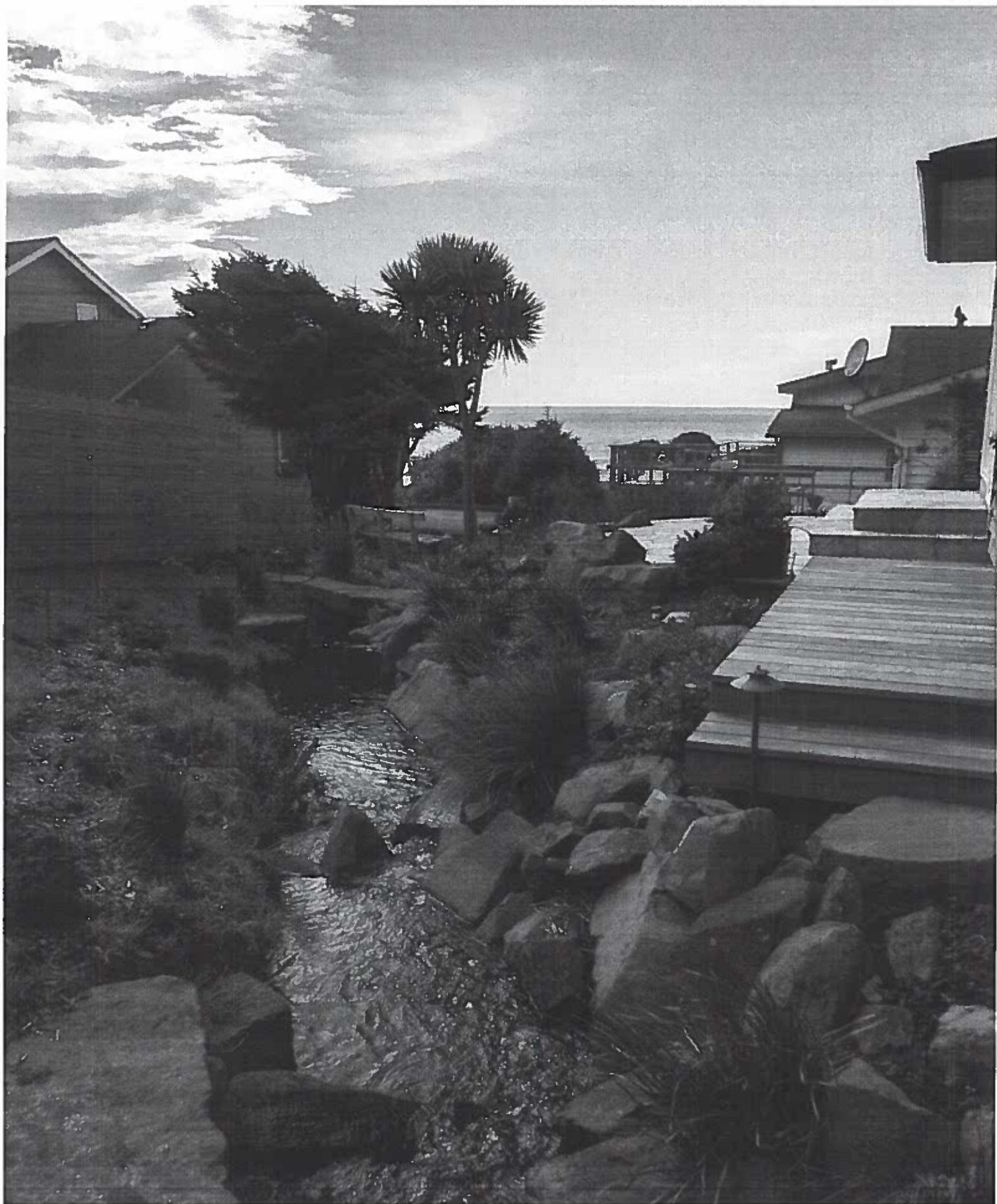
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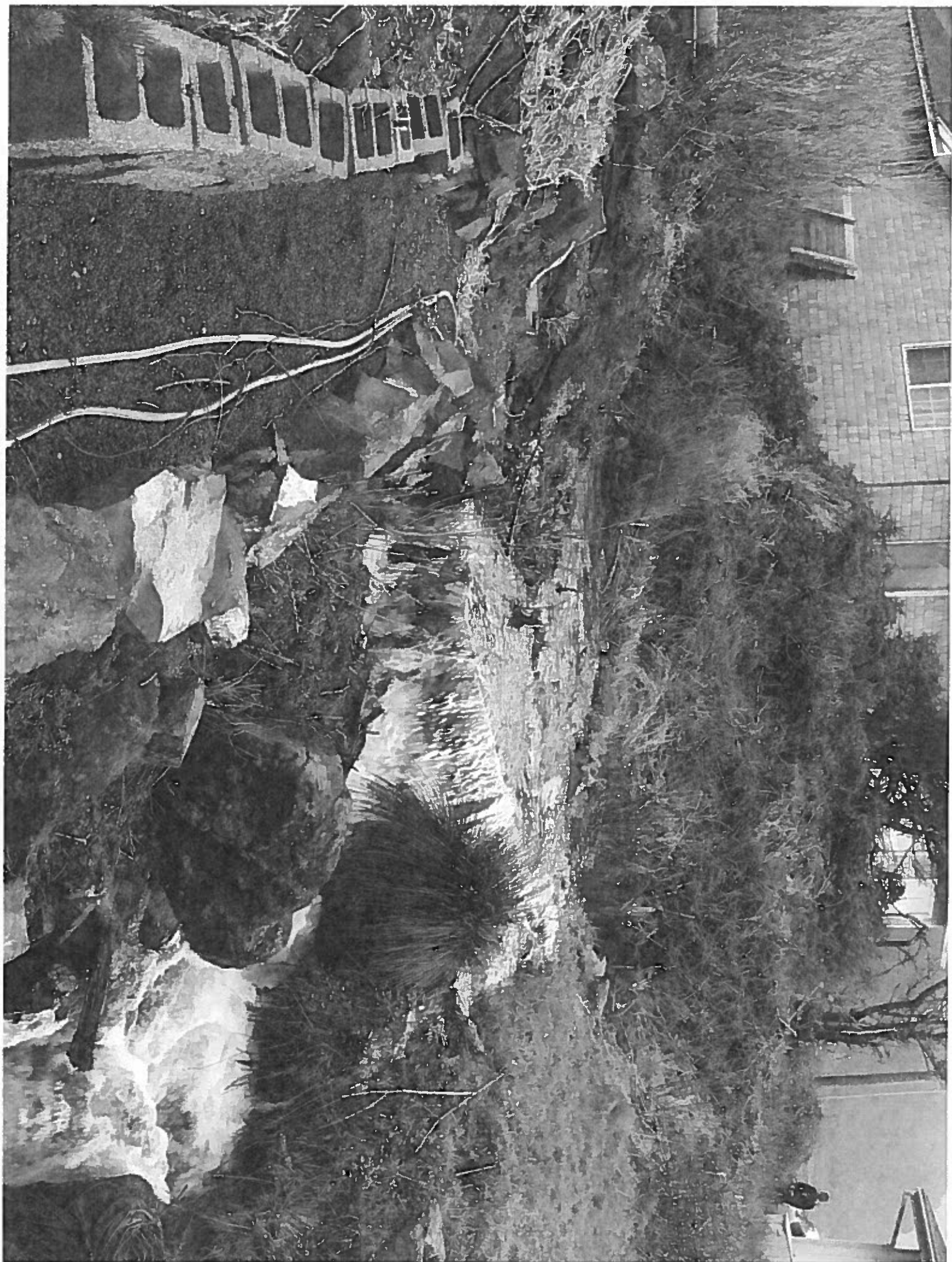


OCTOBER 20, 2011



MARCH 2014





The following people, based on their personal experience, agree with this statement:

GENDER CREEK IS A YEAR-ROUND STREAM.

GENDER CREEK ALWAYS HAS WATER FLOWING THROUGH IT.

1. Sandy Rutherford
2. Kathy Kuck
3. Norty Kalishman
4. Summers Kalishman
5. Barbee Bird
6. Tom Bird
7. Lucy Moore
8. Tamara McGuire
9. Molly McGuire
10. Ann Klemp
11. Dan Klemp
12. Steven Schonborn
13. Diana Couey
14. Joe Couey
15. Matt Olson
16. Elaine Olson
17. Glenn Olson
18. Will Reed
19. Betty Reed
20. Victoria Machado
21. James Krumsick
22. Kyle Krumsick
23. Holly Krumsick
24. Vern Daniel
25. Jocille Daniel

Everyone in the Windy Way/Gender Drive neighborhood knows that there is always water flowing in Gender Creek, wet season or dry season. There is really no question that in reality Gender Creek is a year-round creek ("perennial").

The USGS maps are not reliable for stream classification; even the USGS admits this. Two cartographers have written me saying the same thing.

Stream classification is difficult when a stream is hard to locate, say if it's high up in the coast range back country. Then it can be tough to figure out if a stream is intermittent or perennial. You have to be there. But Gender Creek isn't hard to get to - lots of people see it in their backyards all the time - for years. There's always water flowing in it.

If there's always water, it's a perennial stream. That's it. Not complicated. There are no other qualifications.

Local on-the-ground observation by real people is considered the best way to actually know what's going on with a stream. Also, **there are photographs of water running** in the creek in June (summer) and early fall (Oct 3 and 5) (early fall is part of the the "dry" season in Oregon).

Every creek in the area has water running through it in winter and spring. Summer and fall - these are the seasons when the water would not be there if a stream were "intermittent."

The City Planner has located one broken line on a very old, very inaccurate USGS map, and on that basis has decided that Gender Creek is "intermittent." The USGS map, when you zoom in really, really close, shows Gender emptying South of windy way. Gender Creek doesn't empty South of Windy Way, it empties to the North, running through the backyards of Windy Way/Gender Drive. The map the City Planner cites is very old and, on the face of it, inaccurate. Several floods and either ODOT or the US Army Corps of Engineers have changed the creek dramatically. It is not the same creek shown on the indicated map - which may have reflected conditions as early as the 1930s.

There is also nothing in the LWI to support Gender Creek as "intermittent." And even if there were, it would still be perennial. In real life.

When I used to work as a nurse in Coronary Care Units - we looked at machines showing the heart rate and rhythm of patients all the time. We were totally fixated on the machines. But cardiologists used to always say: LOOK AT THE PATIENT! Even if the machine shows a flat line - look and see if the patient is eating his dinner or talking to his wife. If so, he's not dead!

Look at the creek! It always has water in it. It always has water in it because it is a year-round creek.

--

Sandy

The following is from Dave Imus, of Imus Geographics in Eugene. He is a well-respected cartographer.

Hi Sandy,

Unfortunately, your request falls outside of my expertise. I can tell you that ***small streams and springs are not accurately mapped***. In wet, mountainous areas, like the Coast Range, there are many more streams and springs than are shown on even the most detailed maps. ***I believe the only reliable way to definitively determine whether or not a stream is perennial or intermittent is by direct observation over several years.***

Sorry I couldn't be more helpful.

Thanks for writing,

Dave Imus

**From Harry Johnson, cartographer, San Diego State University
Geography Department**

I'm not sure that a USGS map would be the best, most definitive, source for that information. A better option would be the State Hydrographer, if there is one. The ArchHydro application and dataset in ESRI's ArcGIS might be an option if the state contributes to the maintenance of that dataset. If not, it will probably show what is on the USGS sheets. Another option might be NOAA, the National Oceanic and Atmospheric Administration, they do a lot with coastlines and estuaries.

USGS topo sheets don't get updated too often, so that may be where you're running into problems. Though you would hope that they would have updated in the past 40-60 years. ***They are making an effort in updating, however, they may not have gotten to that area yet. And they may not even correct the classification of the creek if it is a small one.***

No one down here is familiar with Oregon or its coast to make a determination on whether the creek is perennial or intermittent. A better source would be the State as I mentioned above, or a university in Oregon. I believe it is more than a map reading/classification issue. ***As you know, not everything on a map is always or 100% true. It takes local knowledge to determine some things, especially at such a large scale.***

If you have any more questions, please let me know.

**PLEASE NOTE THAT BELOW ARE SEPARATE EXCERPTS TAKEN FROM THE
USGS PUBLICATION CITED -**

<http://pubs.usgs.gov/sir/2009/5015/section2.html>U.S. GEOLOGICAL
SURVEY

Scientific Investigations Report 2009–5015

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Introduction

The perennial or intermittent status of a stream has bearing on many regulatory requirements.... ***there is a general recognition that the cartographic representations of perennial and intermittent streams on USGS topographic maps are not as accurate or consistent as desirable from one map sheet to another.*** As a result, the USGS, in cooperation with the Idaho Department of Environmental Quality (IDEQ) and Bureau of Reclamation, is attempting to better define the perennial and intermittent status of streams in Idaho.

Although the information represented on USGS topographic maps generally was field verified at the time of map compilation, **it was not always possible to verify the perennial or intermittent status of every stream.** Additionally, the various topographic maps were compiled over a period of many decades, using **varying technologies, cartographers, and standards.**

Differing techniques and standards also were used and mistakes sometimes were made in the process of digitally capturing the topographic map information and incorporating it into the NHD.

MIA M. NELSON
40160 East First Street
Lowell, OR 97452

541.520.3763

mia@sunridge.net

February 20, 2014

Neighbors:

I am writing to provide you with additional information about the 5' rear setback variance request I made to the Planning Commission. The variance was approved on Tuesday, along with limitations on current and future building heights, and on the location of the structure.

At the hearing, I tried to explain why the variance would enable us to build a smaller house that was much narrower and shorter, and why this would have less impact on ocean views from surrounding homes. The variance would also allow the house to be set back 12' farther from the creek – something I assumed everyone would support.

My family and I still cannot understand why so many of you opposed our request at the hearing. Every impact that people are concerned about will be only become worse without the variance. Nothing positive would be gained.

Based on the amount of opposition and the possibility of an appeal, we have started on a new design that does not require a variance. If the variance request is appealed to the city council, we will proceed with that alternate design, because we can't wait for the appeal process to run. Our plans need to be submitted only 6 weeks from now, because we need to break ground in May to finish the exterior during dry weather.

While we are still in the early stages of our re-design, at this point, it appears that because of floor plan and framing constraints, our "no variance" house will be larger in terms of square footage, almost 20' wider on the north end, and much higher – there will likely be a 30' ridgeline running across the entire north 2/3 of the house. Finally, the house will be about 12' closer to the creek. These changes are roughly illustrated on the attached drawing.

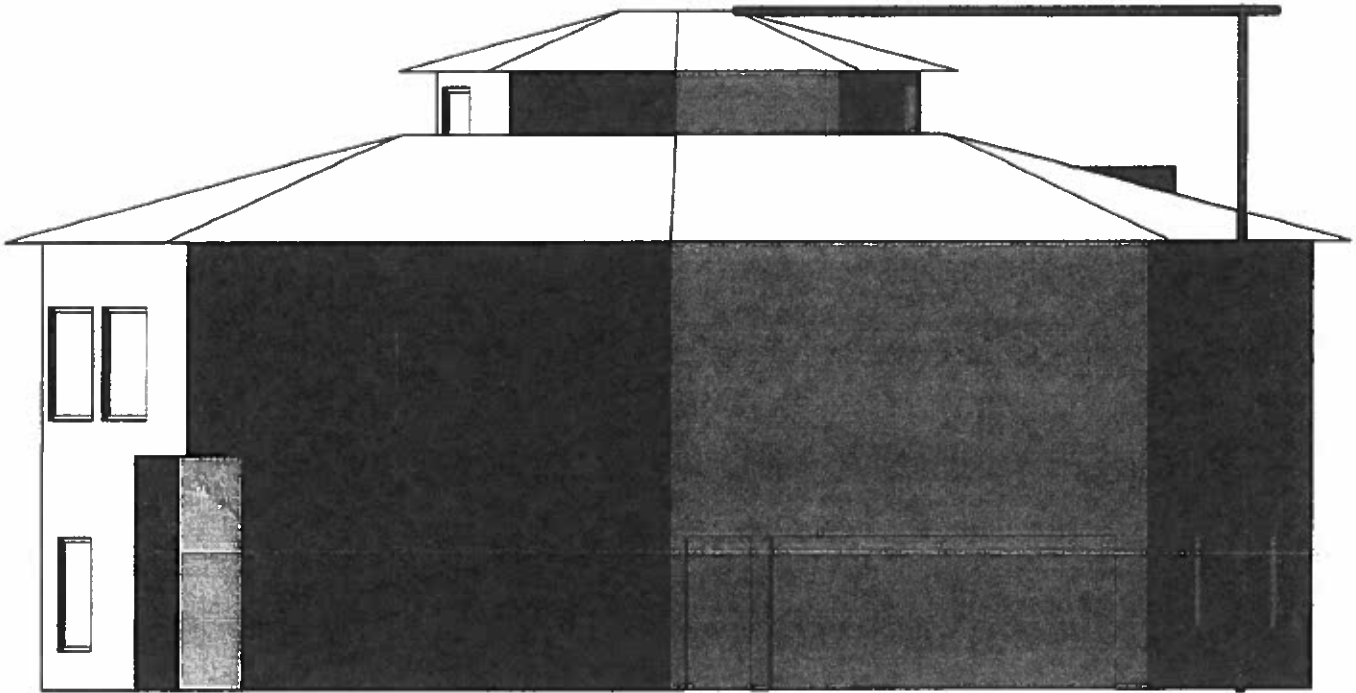
We believe these changes will have significant adverse effects on ocean views from many homes, and that there will no benefits for anybody. However, if any of you truly believe that things will somehow turn out better without this variance, then by all means, appeal the Planning Commission's decision, and we will build it that way.

I wrote this letter to make sure that everyone understands these design realities now, so that there are no surprises later on, if we are forced to go ahead with the alternate design. My intent is to avoid more misunderstandings and confusion, and ensure that once the house is sitting there, blocking views, nobody will say, "If only I knew!"

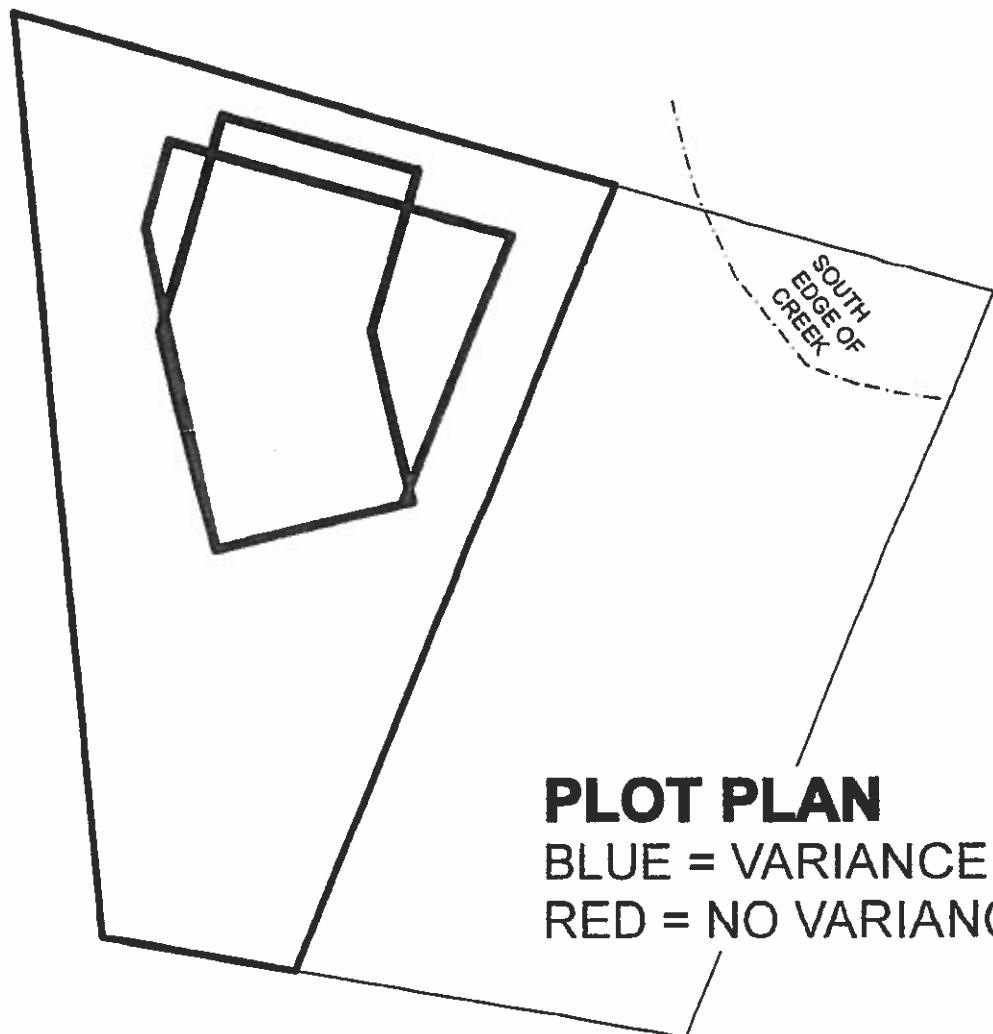
As I said at the hearing, we are not attached to getting the variance – we are attached to making a good faith effort to get one. That way, we can know that we fully explored all options for a better outcome before resorting to a less creative, more intrusive design – we can say we tried. This letter is the final step in that good faith effort.

Mia Nelson

PROBABLE ROOFLINE WITHOUT VARIANCE



EAST SIDE OF HOUSE



PLOT PLAN

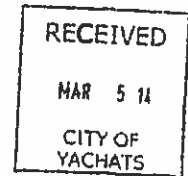
BLUE = VARIANCE

RED = NO VARIANCE

Sean T. Malone
Attorney at Law

259 E. Fifth Ave.,
Suite 200-G
Eugene, OR 97401

Tel. (303) 859-0403
Fax (541) 393-2744
seanmalone8@hotmail.com



March 5, 2014

City of Yachats
Yachats Common Room 2
Yachats OR 97498

Re: Appeal of City of Yachats Planning Commission Decision, File No. 1-VAR-PC-13

The appellants listed below hereby appeal the Planning Commission's decision of File No. 1-VAR-PC-13, a request for a variance for property located at 67 Windy Way, and described on the Lincoln County Assessor's Map as 14-12-34AC, Tax Lot 8800:

Sandy Rutherford
Kathy Kuck
PO Box 160
23 Windy Way
Yachats OR 97498
(541)-547-3550

Will Reed
Betty Reed
PO Box 446
62 Gender Dr.

James P. Krumsick
Victoria L. Machado
85193 Appletree Dr.
Eugene OR 97405
(and)
52 Gender Dr.
Yachats OR 97498
(541) 345-7813

Summers Kalishman
Norty Kalishman
1043 Columbia Dr. NE
Albuquerque NM 87106

(and)
53 Windy Way
Yachats OR 97498
(505) 266-3811

Vern and Jocille M. Daniel
42 Gender Dr.
PO Box 753
Yachats OR 97498
(541) 547

Authorized representative

Appellants' authorized representative is:

Sean T. Malone
Attorney at Law
259 E. 5th Ave, Ste 200-G
Eugene OR 97402
(303) 859-0403

Standing

Appellants have standing before the City Council because Appellants either submitted written testimony or appeared before the planning commission and gave oral testimony.

Use of Form

Yachats City Code Section 9.88.040 and 9.88.120(B) require an appeal to be set forth on the applicable form. Counsel for Appellants could not locate a form for an appeal. Counsel for Appellants contacted city staff, and city staff indicated that there was no such form for an appeal. City staff indicated that a cover letter with the file number would be sufficient.

Grounds for the Appeal

The Yachats city code does not prescribe any requirement for raising issues in the notice of appeal. Regardless of the lack of any such requirement, Appellants set forth the following issues, but Appellants reserve the right to raise new issues before the City Council not set forth below. Appellants also intend to submit an appeal memorandum at the appropriate time, prior to the City Council hearing.

The Planning Commission misconstrued applicable law because the Applicant failed to satisfy the relevant criteria

Under Yachats Municipal Code (YMC) 9.80.020, an applicant for a variance must satisfy "all" of the criteria.

Subsection (A) provides: "Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, legally existing prior to the date of the ordinance codified in this title, topography, or other circumstances over which the applicant has no control."

According to LUBA, the "extraordinary or unique circumstances" standard is "demanding." *Corbett/Terwilliger/Lair Hill Neighborhood Assn. v. City of Portland*, 19 Or LUBA 1, 14 (1990). Under this demanding standard, "a variance is not justified ... simply to allow an applicant to maximize the permissible use of property." *Harris v. Polk County*, 23 Or LUBA 152, 156 (1992) (citing *Wentland v. City of Portland*, 22 Or LUBA 15, 25 (1991)).

The applicant argues three points related to subsection (A): narrow front line; impaired access to Windy Way; and extreme exposure to wind. The argument that wind is an "exceptional and ordinary circumstances" that allegedly does "not apply generally to other properties in the same zone or vicinity" is without merit. Simply put, there is nothing unique about wind affecting the property that does not also affect properties in the vicinity. The applicant has not presented any evidence to allow a reasonable decision-maker to conclude that wind disproportionately affects the subject property when compared to other properties in the vicinity.

There is nothing in the record to demonstrate that access to Windy Way is "impaired."

The shape of the lot exists is a result of the Applicant's division of the property. The Applicant cannot complain of the shape of the lot and seek a variance when the Applicant caused the issue.

In essence, the variance is sought because the applicant desires a particular development plan for the proposed property. LUBA has been clear in stating that variance relief is not available merely to facilitate particular site plans or development. *Bowman Park v. City of Albany*, 11 Or LUBA 197, 223 (1984). Extraordinary circumstances "must arise out of the land itself, not the applicant's desire for a particular lot configuration or numbers of lots." *Patzkowsky v. Klamath County*, 8 Or LUBA 64, 70 (1983). The desire to maximize allowable uses or to accommodate a landowner's particular development desires is not a basis for finding that the exceptional or extraordinary circumstances criterion has been met. *Wentland v. City of Portland*, 22 Or LUBA 15, 26 (1991); see also *Lovell v. Planning Com. Of Independence*, 37 Or App 3, 7 (1978); *Corbett/Terwilliger/Lair Hill Neighborhood Assn. v. City of Portland*, 19 Or LUBA 1, 14 (1990). A variance is not warranted simply because the property owner wishes to pursue a development that requires a variance, even though the property can be developed without the need for the variance. *Wentland*, 22 Or LUBA at 26.

The findings say that it is "impossible to site a garage on the front of the house without certain livability and safety problems." This demonstrates that the variance is sought for nothing more than design purpose. The Applicant argues that without a variance the Applicant would be required reach Windy Way via a 60-foot driveway, which is allegedly unsafe. For example, the applicant argues that "some people might not have problems navigating that distance," but that "others will feel uncomfortable, and may even have trouble avoiding a mishap." There is no

evidence to demonstrate that a 60-foot driveway is inherently unsafe, and the notion that the possibility that someone may be "uncomfortable" justifies a variance is unfounded in law. The same lack of evidence and foundation in law surrounds the alleged effects of wind and internal barricades. Regardless of that, the alleged requirement that the Applicant would be subject to a 60-foot driveway is a result of the Applicant's desired design. The notion that there is a "safety concern for some drivers" which necessitates preservation of "the applicant's right to have safe access to Windy Way" is entirely unsupported by the evidence and caused by the Applicant's proposed design.

Subsection (B) provides: "The variance is necessary for the preservation of a property right of the applicant substantially the same as owners of other property in the same zone or vicinity possess."

There is no property right to a garage, and the applicant has not demonstrated anything to the contrary. There has been no showing that a 60-foot driveway is inherently less safe or convenient. There is also no case law permitting a variance based on "convenience." If convenience were a basis for a variance, then land development regulations would be superfluous. There is no property right to convenience.

Subsection (C) provides: "The variance would not be materially detrimental to the purposes of this title, or to property in the zone or vicinity in which the property is located, or otherwise conflict with the objectives of any city plan or policy."

The Planning Commission violated this criterion because allowing the variance would create a material detriment to the neighbors' views of the ocean and it would be contrary to the policies enshrined in protecting riparian corridors.

Subsection (D) provides: "The variance requested is the minimum variance which would alleviate the hardship."

The variance is not the minimum variance that would alleviate the hardship. The Planning Commission failed to identify what constitutes a reasonable use of the property and why the approved variance is the minimum necessary to allow the requested use. The Planning Commission also failed to consider alternatives that could eliminate the need for a variance. Therefore, this alternative has not been satisfied.

It is legal error to not entertain alternatives that would eliminate the need for the hazard. In the alternative, it is clear that this variance is premised solely on the applicant's particular design, which is not a valid reason to grant a variance.

Regardless of these errors, the Applicant cites to "Median and Average Square Feet of Floor Area in New Single-Family Houses Completed by Location." This article fails to account for the square footage of the lot at issue, and similarly fails to account for houses in the vicinity of the property, within Yachats, or on the Oregon coast. As such, any finding that the document establishes what is reasonable in Yachats is not based on substantial evidence.

Subsection E provides: "The hardship asserted as a basis for the variance does not arise from a violation of the zoning ordinance."

The Planning Commission misconstrued this factor by not applying it to the facts. Appellants assert that this provision has been violated.

Gender Creek

Gender Creek is located north of the property and it is not an intermittent stream. The neighbors, who have lived adjacent to Gender Creek for years, have testified that the stream runs throughout the year. The Planning Commission erred when it identified the stream as intermittent. The applicant received an exception to the setback in section 9.52.070 D.1 but not section D.2. As such, the application does not comply with section 9.52.070 D.2, the requirement for a ~~25~~ 50-foot setback from Gender Creek.

Off-street parking spaces

Section 9.48 requires that there be two parking spaces for a single-family dwelling. The applicant's proposal includes three. It makes little sense to request a variance for setbacks when the applicant is proposing more than what is required by the code. Clearly, the applicant could choose to have the required amount, and decrease the footprint of the house. In addition, more parking spaces mean that there will be greater impervious surface areas near Gender Creek.

Failure to determine whether the property is in the flood hazard area

The applicant failed to determine whether the property occurs in a flood hazard zone.

The nonconforming status has expired

The findings provide that "the lot is considered a lawful nonconforming lot because it was originally created prior to the establishment of the current R-1 standards. Development on nonconforming lots must meet zoning standards unless a variance is requested and approved." The nonconforming status of the lot has expired because there has been no activity on the project for a period of six months.

Failure to make the staff report available 7 days prior to the hearing

The staff report was not made available in its final form 7 days prior to the hearing. Hours before the hearing, the staff report was changed to identify Gender Creek as an intermittent stream, instead of a perennial stream. This last minute change prejudiced the substantial rights of the appellants.

The subdivision was granted on the condition that setbacks would be satisfied

The subdivision was granted on the condition that the setbacks would be satisfied. As a result, the variance cannot be granted.

Failure to comply with section 9.52.070 E.2.b

Section 9.52.070 E.2.b provides:

"Where a minimum building footprint of less than 800 square feet would result from application of the rules of this section, reduction or removal of the restrictions under this section can be granted to allow the building of a structure within such a building footprint through the variance procedure. Applicants for variance from this section should demonstrate, in addition to the criteria found in the variance ordinance (Chapter 9.80), that intrusion into the required riparian corridor, wetland, or drainage way protection."

There has been no showing that setbacks, if complied with, would result in a house with less than an 800 square foot footprint. Furthermore, there has been no showing that an 800 square foot footprint would not alleviate the issues faced by the applicant, rendering the requested variance unnecessary.

Incorporation by Reference

Appellants incorporate by reference all arguments and testimony in opposition to the proposed variance as if they were specifically set forth herein.

Appeal Fee

Appellants are submitting the appeal fee in the amount of \$187.50 for the appeal fee.

If you have any questions, please do not hesitate to contact me through phone or email.

Sincerely,

A handwritten signature in black ink, appearing to read 'Sean T. Malone', with a stylized flourish at the end.

Sean T. Malone
Attorney for Appellants

Horning Geosciences

808 26th Avenue, Seaside, OR 97138

Ph./FAX: (503)738-3738

Email: horning@pacifier.com



March 14, 2014

Sandy Rutherford
PO Box 160
Yachats, Oregon 97498

RE: Geologic Map Interpretation and Creek Definition; Tax Lot 8800, Map 14S 12W 34AC; 67 Windy Way, Yachats, Lincoln County, Oregon

Dear Sandy:

I understand from you that there is a disagreement within the City of Yachats as to the classification of Gender Creek; whether it is intermittent or not.

I understand from you that the City uses a recent version of the Yachats 7.5-minute USGS quadrangle map, circa 2011, that shows the creek graphically represented by a dashed line- the approved USGS format for an intermittent stream. Older maps, however, show it as a solid line, indicating a year-round flowing stream. The 1984 quadrangle map is shown in Figure 1, showing the creek draining into a chasm south of Windy Way as a year-round stream.

I further understand from you that the stream has been re-routed so that it flows westward to empty onto the rock beach just north of Windy Way, at about the location of the red flag in Figure 1, the channel situated north of 67 Windy Way. The channel of this drainage is visible in aerial photos on the ORMAP and Google websites, and it is visible in shaded relief LIDAR imagery on the DOGAMI LIDAR web viewer.

The Siuslaw National Forest boundary line coincides with the present drainage channel for Gender Creek, according to the quadrangle topographic map.

I understand from you that you have photos of water in the channel during dry summer months, although I have not seen these photos. The presence of water defines the creek as having year-round flow and that it therefore should not be classified as an intermittent stream. It appears that the cartographers who updated the 1984

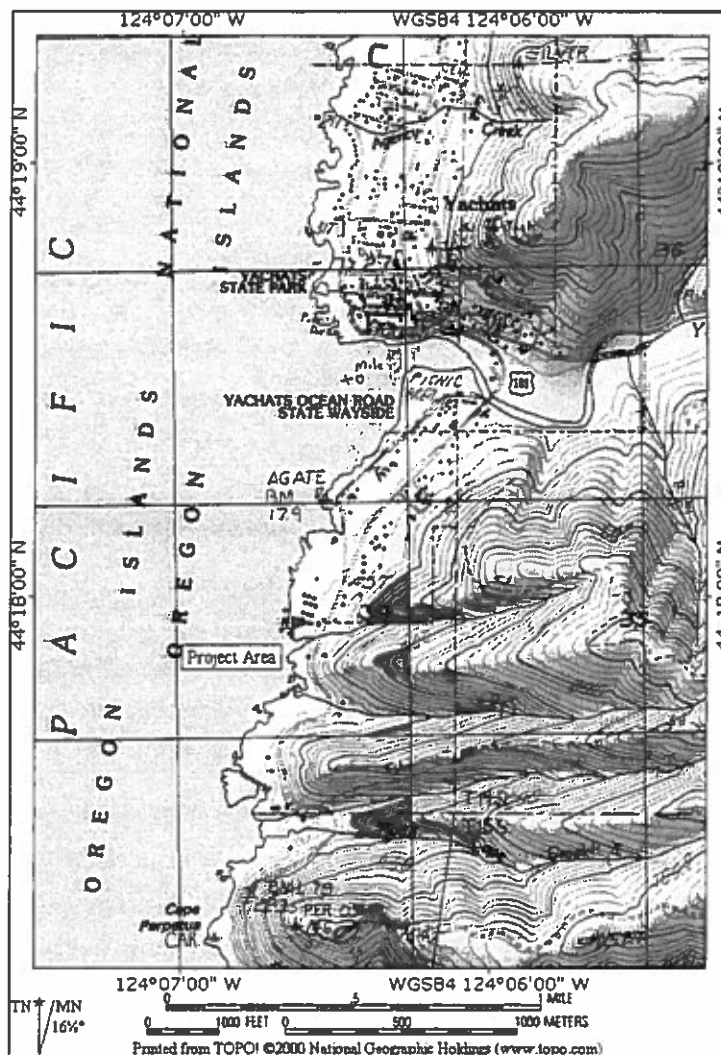
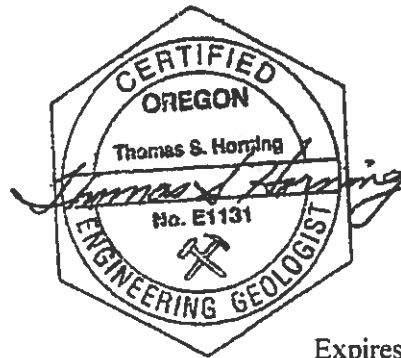


Figure 1: Property location map, extracted from the Yachats 7.5-min USGS quadrangle map.

quadrangle map mistook the dashed line of the National Forest boundary for the Gender Creek channel, and so they drew it as a dashed line, creating the impression that the creek is intermittent. Based on the information cited herein, the creek should be regarded as a year-round drainage feature (perennial stream).

Please call if you have questions.

Thomas S. Horning, CEG
Horning Geosciences
503-738-3738



Expires: 6/30/14

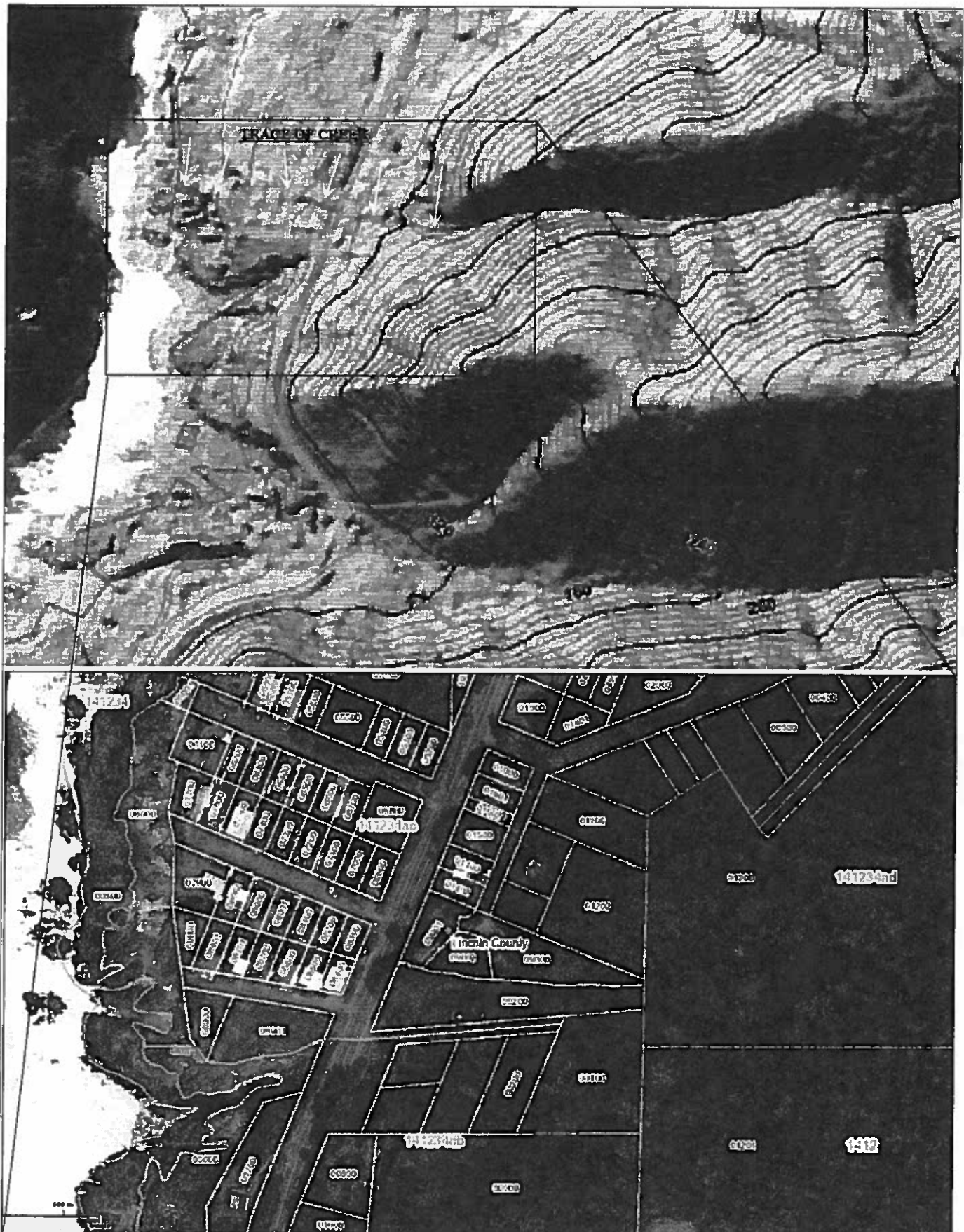


Figure 2: LIDAR (top) and aerial view (bottom) for the project area. Yellow arrows point to interpreted landform of a creek drainage.