

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 OceanGate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



May 11, 2010

SECOND ADDENDUM**Th12a**

TO: COMMISSIONERS AND INTERESTED PERSONS

FROM: SOUTH COAST DISTRICT STAFF

SUBJECT: SECOND ADDENDUM TO ITEM Th12a, CALIFORNIA COASTAL COMMISSION APPEAL NO. A-5-DPT-10-082 FOR THE COMMISSION MEETING OF MAY 13, 2010.

I. Revision to Staff Report

Commission staff recommends changes to the staff report to respond to the letter dated May 5, 2010, from the attorney for the City of Dana Point . Text added shown in underline, text deleted shown in ~~strike-through~~, as shown below:

On page 18, add new Section D to the staff report, as follows:

D. Response to City of Dana Point Letter dated May 5, 2010

The City Attorney for the City of Dana Point submitted a letter dated May 5, 2010, faulting Commission staff for not working with the City to resolve public access issues at the Dana Point Headlands and arguing that the Commission lacks jurisdiction to appeal the City's determination that no coastal development permit is required to authorize limitations on use of the public access trails.

In response to the City Attorney's claims, Commission staff did make an effort to work with City staff and address the issues raised by the gates and restricted hours. Commission staff met with City staff at the subject site in early October 2009 to identify issues prior to the City accepting the public facilities. Commission staff sent a follow-up letter dated October 20, 2009 (Exhibit 6) explaining concerns with the Headlands facilities, identified preferred solutions, and also identified the procedures the City should follow with regard to establishing hours of operation (by way of a CDP) and installing gates (that would require an LCP amendment). In a letter dated November 5, 2009, from the City of Dana Point's Director of Community Development, it became clear that the City did not agree with the process requirements provided by Commission staff. Commission staff sent a follow-up letter to the City dated November 20, 2009 (Exhibit 7) and also met with City staff, the City Attorney, and representatives from Headlands Reserve LLC shortly thereafter to discuss possible resolution. Commission staff met again with these same individuals and additional City staff at the site in February 2010, advising them of staff's preferred resolution, and also identifying the procedures the City would need to follow if they wished to pursue approval of the hours and gates they wanted. Commission staff followed up again with a letter in early March 2010 (Exhibit 8). Instead of responding to Commission staff's letter, and without any contact from the City advising of their intended course of action, the City scheduled the

City Council meeting on the urgency ordinance that is the subject of this appeal. Learning of the hearing the day of the hearing, Commission staff sent a letter to the City Council urging them not to adopt the ordinance, and additionally, expressly offering to extend our enforcement deadline as a means of providing additional time for us to work together. Nevertheless, the ordinance was adopted by the City. Finally, while Commission staff has advised the City to minimize the hours of accessway closure, it has never suggested that the City could not establish operating hours (i.e. that it must keep the accessways open 24 hours a day). Rather, as expressly stated in the LCP, Commission staff has consistently taken the position that a coastal development permit is needed for establishing such hours and that access should be maximized.

The City makes two basic arguments for why it believes the Commission lacks jurisdiction over this matter: that the Coastal Act does not limit the power of local governments to declare and abate nuisances and that the City's action here is not appealable to the Commission.

Nuisance Abatement

Like numerous other state environmental statutes, the Coastal Act contains a "savings clause" that provides that the Act does not limit "the power of any city . . . to declare, prohibit, and abate nuisances." Pub. Res. Code § 30005(b), see also Health & Safety Code § 5415(b) (sewage), Health & Safety Code § 41509(a) (air quality), Health & Safety § 46001(b) (noise control), Pub. Res. Code § 2715(a) (surface mining), Pub. Res. Code § 4514(a) (forestry), Water Code § 13002(b) (water quality). The primary purpose of these savings clauses is to clarify that the statutes are not intended to preempt local governments from exercising their police power to address nuisances that fall within the scope of those state statutes. See *People v. City of Los Angeles*, 160 Cal.App.2d 494, 502-04 (1958), see also *Pacific Lumber Co. v. State Water Resources Control Board*, 37 Cal.4th 921 (2006) (construing similar savings clause with respect to state agency authority). Absent the savings clauses, those state statutes could be interpreted as preempting any local action to address nuisances that fall within the scope of these statutes. *O'Connell v. City of Stockton*, 41 Cal.4th 1061, 1067-68 (2007). These savings clauses, therefore, were intended to preserve a wide range of remedies to address environmental problems.

The City's invocation of Section 30005(b) as a basis for shielding actions that conflict with Coastal Act policies from Coastal Act review goes beyond the core purpose of the savings clause. Nonetheless, the language of Section 30005(b) is not expressly limited to situations where a local government is attempting to accomplish Coastal Act objectives through its nuisance abatement authority. Consequently, where a local government properly declares a nuisance and requires abatement measures that are narrowly targeted at abating the declared nuisance, those measures do not require a coastal development permit (CDP).

Although Section 30005(b) does exempt nuisance abatement from CDP requirements, it is not a limitless exemption. As the Coastal Act itself directs, the Act shall be liberally construed to accomplish its purposes and objectives. *McAllister v. California Coastal Commission*, 169 Cal.App.4th 912, 928 (2008), Pub. Res. Code § 30009. In addition, courts narrowly construe exemptions from statutory requirements. See, e.g., *Save Our*

Carmel River v. Monterey Peninsula Water Management Dist., 141 Cal.App.4th 677, 696 (2006) (narrowly construe CEQA categorical exemptions), Citizens for a Better Environment v. Dep't of Food and Agriculture, 171 Cal.App.3d 704, 711 (1985) (narrowly construe Public Records Act exemptions).

Here, the City's measures to restrict use of the public access trails address not only unlawful activities such as vandalism and trespassing, but also otherwise entirely lawful use of the trails by the general public. Notably, the City did not declare otherwise lawful use of the trails to itself constitute a nuisance. The promotion of public access and coastal recreation is among the primary objectives of the Coastal Act, so to construe Section 30005(b) as exempting significant restrictions on lawful public access and recreation from Coastal Act review would defeat one of the primary purposes of the Coastal Act. See Pub. Res. Code §§ 30001.5(c), 30210-30223, 30604(c).

The City does not cite any authority for its position that any action that a local government characterizes as nuisance abatement is exempt from Coastal Act permitting requirements regardless of whether that action primarily targets the nuisance itself or instead restricts a broad range of otherwise legal, non-nuisance activity. The caselaw the City cites in footnote 2 of its letter regarding other statutory savings clauses does not help the City's argument. Both cases involve situations where public agencies invoked nuisance or other authority in order to address environmental problems. Neither involved situations where an agency attempted to take an action contrary to statutory goals of environmental protection. See Pacific Lumber Co., 37 Cal.4th 921, City of Los Angeles, 160 Cal.App.2d 494.

The City also argues the "index letter" from the Attorney General's Office dated May 18, 1978 supports its position that CDPs are not required for actions to abate nuisances. The index letter concludes, however, by pointing out that a CDP is required for activity that exceeds what is necessary to abate the nuisance. The index letter therefore actually supports requiring a CDP in this instance because the City's actions go significantly beyond nuisance abatement.

Appealability

The City's argument that Commission lacks statutory authority to hear this appeal disregards the express language of Section 30625(a) and misreads section 30603.

As explained in the staff report, Section 30625(a) provides that a "claim of exemption for any development by a local government" may be appealed to the Commission. The City argues that, pursuant to Section 30603, the only actions that may be appealed to the Commission are actions by local governments on CDP applications for the categories of development listed in Section 30603(a). Section 30603(a), however, does not address appeals of claims of exemption. It simply defines what categories of local government actions on CDP applications are appealable. By definition, a claim of exemption does not involve a CDP application. The language from Section 30603(a) that the City relies upon therefore does not govern here.

In footnote 4 of its letter, the City argues that appeals of claims of exemption under Section 30625 should be limited to claims that a proposed development is exempt

pursuant to Section 30610. Section 30625, however, does not contain any such limitation. Moreover, this argument is incompatible with the City's primary argument that Section 30603 provides the complete and exclusive definition of what local government actions are appealable to the Commission. Even if appeals of claims of exemption were limited to claims of exemption under Section 30610, under the City's theory, those appeals would still not be appealable because they are not actions on CDP applications pursuant to Section 30603. The City's argument fails to give meaning to the provision of Section 30625 authorizing appeals of claims of exemption and should therefore be rejected.

Finally, the City argues that the Commission lacks authority to review the City's urgency ordinance. This argument mischaracterizes the appeal. The Commission is reviewing only the City's decision not to require a CDP prior to implementing the ordinance.

II. Copy of letter from Attorney General dated May 18, 1978 cited in the City's May 5, 2010 letter and identified in the response above.

III. Sample of form letter in support of the staff recommendation; 61 individuals signed and submitted such letters, which are on file at the Commission's South Coast District Office. One letter was modified by hand to indicate support of the City's action.



OFFICE OF THE ATTORNEY GENERAL

Department of Justice

STATE BUILDING, SAN FRANCISCO 94102

(415) 557-0285

May 18, 1978

IL 78-73

Formerly Op. ^{SO} 78/2 IL

Michael L. Fischer
Executive Director
California Coastal Commission
631 Howard Street
San Francisco, CA 94105

Re: SO 78/2 IL

Dear Mr. Fischer:

By memorandum dated January 25, 1978, your predecessor as Executive Director requested the opinion of this office on the question whether a coastal permit is required prior to the abatement of a nuisance so declared by a local government, where the abatement would otherwise constitute a development within the meaning of Public Resources Code section 30106.

We conclude that neither a local government nor a person acting under order of a local government is required to obtain a permit under the California Coastal Act of 1976 for the abatement of a nuisance, even though such abatement would otherwise constitute a development under the Act.

ANALYSIS

Public Resources Code section 30600(a) requires that any person wishing to perform or undertake any development within the coastal zone shall, with exceptions not here pertinent, obtain a coastal development permit. 1/ "Person" is defined by the Act as including "any . . . local government . . . or an agency thereof." Section 30111. We assume, consistent with the

1. All statutory references herein, unless otherwise specified, are to the Public Resources Code.

Michael L. Fischer
Page 2
May 18, 1978

opinion request, that the process of abating the nuisance would otherwise constitute a development within the meaning of section 30106. Hence, under the statutory provisions and the assumption we have been given, it is clear that the pertinent provisions of the Public Resources Code would require a permit for the abatement of a nuisance by a local government, unless another provision excludes the abatement from the requirements of the Act.

In pertinent part, section 30005 provides:

"No provision of this division is a limitation on any of the following:

- (a)
- (b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.

. . . ."

We earlier tentatively advised you that the section did not exempt local governments from the requirement of obtaining a coastal permit prior to abatement of a nuisance. At that time, we thought the section was intended to preserve the authority of local governments to declare, prohibit and abate nuisances, as against the possibility that the comprehensive regulatory provisions of the Act might be read to express a legislative intent to completely entrust regulatory authority in the Commissions. ^{2/} Moreover, each of the remaining provisions of section 30005 refer not to physical activities, but to regulatory and judicial measures; the subsection referring to abatement is likewise not included with the other provisions of the statute establishing various exceptions to the permit requirements (sections 30608-30611). It was therefore possible to read the section as not referring to an exemption for an activity which would otherwise be a development, but only to the institution of judicial abatement proceedings.

2. For example, when the Dickey Water Pollution Act was first enacted, the Courts read its comprehensive regulatory provisions as precluding the Attorney General from exercising his long-established common law powers to seek judicial abatement of nuisances. People v. New Penn Mines, Inc. (1963) 212 Cal.App.2d 667.

Michael L. Fischer
Page 3
May 18, 1978

The Civil Code, however, expressly distinguishes between "[a] civil action" and "abatement." Civil Code section 3491 provides that the remedies against a public nuisance are either a civil action or abatement. Civil Code section 3494 further specifies that a public nuisance may be abated by "any public body or officer authorized thereto by law." Government Code sections 25845, 38773 and 38773.5, in turn, explicitly authorize counties and cities to abate nuisances, without resort to the judicial process.

Because of this legislative specificity in distinguishing between a judicial action to abate a nuisance, and the abatement of a nuisance without resort to the judicial process, we must conclude that the reference in Public Resources Code section 30005 refers to the physical abatement of a nuisance by a local government. Indeed, a contrary reading of the section would make it superfluous: there would have been no need to include a proviso in section 30005 excepting the institution of judicial proceedings from the permit requirements of the Coastal Act, since there is no provision in the Act which would otherwise impose such a permit requirement. We must presume, however, that every word, phrase and provision used in a statute was intended to have meaning, and a construction making some words surplusage must be avoided. People v. Gilbert (1969) 1 Cal.3d 475, 480. The section can be given meaning only if it excepts an action for which a permit is required. We accordingly conclude that a local government is not required to obtain a permit under the California Coastal Act of 1976 for the abatement of a nuisance, even though such abatement would otherwise constitute a development. 3/

One further question remains: does section 30005 also allow the owner of property who is directed by a city or county to abate a nuisance to take such an action without a coastal permit. Since the property owner would be simply carrying out

3. It has been suggested that the section should be read not as exempting abatement of a nuisance from the permit requirements of the Act, but as limiting the Commissions' powers when considering a permit application for abatement. In other words, the Commissions could not completely deny such a permit application, but could impose conditions to protect coastal resources. The section, however, cannot fairly be so read: the power of the Commissions to impose such conditions would improperly circumscribe the power of a local government to abate nuisances. Any such change in the section must come from the Legislature.

Michael L. Fischer
Page 4
May 18, 1978

the city or county's order, we conclude that the owner similarly cannot be compelled to first obtain a coastal permit. If the owner's activity exceeds the amount necessary to abate the nuisance, the owner of course must obtain a coastal permit for that additional work.

Very truly yours,

EVELLE J. YOUNGER
Attorney General

Richard C. Jacobs
RICHARD C. JACOBS
Deputy Attorney General

RCJ:jl

April 3, 2010

Attention: Coastal Commission

Karl Schwing & Enforcement Officers

200 Oceangate, 10th Floor

Long Beach, CA 90802-4416

61
Copies
Rec'd

Please do not allow the city of Dana Point to restrict the gates of the **MSVPA** without getting a **permit approval** from the Coastal Commission to protect the Beach Access for the public.. We are not opposed to reasonable hours, but we are opposed to the city of Dana Point making the changes without going through the Coastal Commission. The city called it an "Urgency Ordinance"

Without your approval, we feel that the city of Dana Point will close the **MSVPA** down at a later date for unreasonable excuses. We know that the city failed to work with the Coastal Commission on this, even after the Coastal Commission offered to listen and be reasonable with the city. Please override the actions of the city and remove the restrictions on public access.

Thank you for protecting our beach access for the public.

Sincerely, *R Scott Cornelius*

Signature: *R Scott Cornelius*

Name:

St. City, Zip: *Dana Pt Calif 92629*

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



May 11, 2010

ADDENDUM**Th12a**

TO: COMMISSIONERS AND INTERESTED PERSONS

FROM: SOUTH COAST DISTRICT STAFF

SUBJECT: ADDENDUM TO ITEM Th12a, CALIFORNIA COASTAL COMMISSION APPEAL NO. A-5-DPT-10-082 FOR THE COMMISSION MEETING OF MAY 13, 2010.

A. Revision to Staff Report

Commission staff recommends changes to the staff report to add additional detail regarding some Commission history with permitting related to hours of access to beaches and beach accessways. Text added shown in underline, text deleted shown in ~~strike through~~, as shown below:

On page 2, add Exhibit 10 to the list of exhibits:

10. Examples Of Commission Actions Regarding Beach Curfews, Beach Parking Lot Hours, And Beach Accessway Hours

On the bottom of page 10 and top of page 11, add reference to new exhibit 10 (Examples Of Commission Actions Regarding Beach Curfews, Beach Parking Lot Hours, And Beach Accessway Hours) to the paragraph:

... For example, in the City of Coronado, the Commission approved a beach curfew for a portion of beach where fire rings were located. The City had requested a much broader curfew area, but the Commission authorized the more limited area as that was the area where public safety issues had been demonstrated, and allowed for removal of some fire rings from a particularly problematic area (see CDP 6-93-160/6-96-22 (City of Coronado)). The restriction was also only allowed to be in place for a pilot period, after which time the need would be reviewed. Another example like this occurred in the City of Long Beach (see CDP 5-93-232 (City of Long Beach) and amendments). Where it has allowed beach accessways to be closed, it has generally limited closures to a period beginning in the late evening (e.g. 10pm to 12 am), and ending in the early morning (e.g. 4am to 5am) (see Exhibit 10 for examples of various Commission actions regarding accessway closures, beach curfews, and beach parking lot closures)..

On page 11, modify the last paragraph as follows:

...The City's action does raise significant questions of new precedents with regard to future interpretations of the LCP. The Commission has approved permit applications for limited restrictions on beach access hours that are tailored to address the documented concerns of different localities (e.g. 6-93-160 (City of Coronado))(see also Exhibit 10). The City's assertion that implementing an ordinance that limits public beach access does not constitute development

raises significant issues for future actions. Moreover, the City's claim that no coastal development permit is required because the action is necessary to abate a public nuisance is also a significant issue. If other localities also seek to circumvent Coastal Act permitting requirements, the Commission's ability to carry out its duty to ensure that Coastal Act and LCP policies protecting public access and recreation are implemented will be significantly constrained. Thus, the appeal does raise a substantial issue with regard to future interpretations of the LCP.

On page 13, modify fourth paragraph, as follows:

...The signage and gates restricting the hours of operation of the accessways change the intensity of use and adversely affect public access. They therefore are not exempt. There are numerous examples where the Commission has required a coastal development permit to implement closure of beach accessways, beaches/parks, and beach parking lots (see Exhibit 10).

On page 17, modify second paragraph, as follows:

...They also go beyond the kind of targeted police measures that local governments, including the City, frequently adopt and which the Commission has not treated as subject to the Coastal Act's permitting requirements. In addition, the Coastal Act allows for case-by-case restrictions on public access and the Commission has approved permits for such restrictions (e.g. 5-93-232 (City of Long Beach) and amendments, 6-93-160/6-96-022 (City of Coronado))(see also Exhibit 10). Because of the possibility of restrictions sweeping much more broadly than is necessary to address legitimate concerns regarding unlawful conduct, the permit process is crucial to ensuring that an appropriate balance is struck....

B. Exhibit 10 (attached) Examples Of Commission Actions Regarding Beach Curfews, Beach Parking Lot Hours, And Beach Accessway Hours

C. Letter from the attorney representing the City of Dana Point (letter attached with exhibits C and E to the letter and without exhibits A (Ord 10-5), B (City staff report on Ord 10-5), D (Video of City Council Mtg), and F (Letter from Attorney General dated May 18, 1978) to the letter.

D. Letter of Support of the Staff Recommendation From Ms. Vonne Barnes (attached as separate handout/contains color exhibits)

**Examples Of Commission Actions Regarding Beach Curfews,
Beach Parking Lot Hours, And Beach Accessway Hours**

COUNTY	COMMUNITY	CDP #s	PROJECT TYPE	PROJECT	COMMENTS
Santa Cruz	County of Santa Cruz	A-3-SCO-95-001 Santa Cruz County CSA#2	Accessway Hours	Proposal to close stairway from 10 pm to 6 am at Oceanview Drive, consistent with existing curfew at adjacent Manresa State Beach.	Denied
Los Angeles	City of Long Beach	5-93-232, 5-93-232-A, 5-00-050-A1/A-5-LOB-00-434-A1 City of Long Beach	Beach Curfew & Beach Parking Lot Hours	City made various proposals to extend existing beach curfew and to change periods of closure of beach parking lots	CCC required 24 hour beach use. Allowed beach lots and launch ramps to close from 10 pm to 5 am with exceptions for 8 pm closure at some locations, and 8 am opening at some locations
Orange	Laguna Beach/Emerald Bay (County unincorporated area)	A-5-EMB-91-078 (Brindersen/Smithcliffs)/City Issued CDP CD89-43P	Accessway Hours (in conjunction with subdivision)	Vertical accessway to viewpoint, closed sunset to sunrise (proposed to be gated)	Commission found NSI on appeal, upholding County's permit
Orange	City of Huntington Beach	5-07-127-EDD (Piedmont Cove)/ amendment to P-79-5948/ A-80-6590/ 5-81-401A	Accessway Hours	Vertical and lateral accessway to bayfront required under original permit (no hours or gates identified), proposed amendment to close accessways from sunset to sunrise with gate	Commission upheld Executive Director's rejection of the amendment request, effectively denying the request

**Examples Of Commission Actions Regarding Beach Curfews,
Beach Parking Lot Hours, And Beach Accessway Hours**

COUNTY	COMMUNITY	CDP #s	PROJECT TYPE	PROJECT	COMMENTS
Orange	City of Laguna Beach	City-issued CDP No. 10-12 & Ordinance No. 1521	Beach Curfew/closure (and parks)	All beaches and parks closed from 1 a.m. to 5 a.m., with exception for access to and use of wet sand and 20 feet of dry sand while undertaking active recreation (e.g. jogging, walking, diving) and fishing	No appeal filed, City permit final.
Orange	City of San Clemente	Vista Pacifica	Accessway Hours (in conjunction with new development)	Vertical accessway to viewpoint, closed sunset to sunrise (signs only, not proposed to be gated)	
San Diego	City of Oceanside	A6-OCN-93-200 City of Oceanside	Accessway Hours	Proposed time lock gates to close stairway located between two residences from 10 pm to 6 am	Modified to allow 10 pm to 4 am closure
San Diego	City of Carlsbad	6-85-404 City of Carlsbad	Accessway Hours	Proposed installation of time lock gates from 10 pm to 5 am on Cedar Street Accessway (located between two residences), one block south of Beach St access.	Approved; finding that three nearby verticals provide adequate access
San Diego	City of Carlsbad	6-88-374 City of Carlsbad	Accessway Hours	Requested permanent approval of time lock gates (on accessway between two residences) approved per 6-85-404	Approved
San Diego	City of Carlsbad	6-92-132 (R) City of Carlsbad	Accessway Hours	Proposed time lock gates at 3 existing accessways (Ocean St, Grand Ave, Beech Ave) to allow closure from 10 pm to 5 am	Denied, would impact access to the beach
San Diego	City of San Diego	6-88-366 City of San Diego	Beach Parking Lot Hours	Proposed gate at Mariner's Point to close lot from 10 pm to 4 am	Approved

**Examples Of Commission Actions Regarding Beach Curfews,
Beach Parking Lot Hours, And Beach Accessway Hours**

COUNTY	COMMUNITY	CDP #s	PROJECT TYPE	PROJECT	COMMENTS
San Diego	City of San Diego	6-85-545 City of San Diego	Beach Parking Lot Hours	Proposed closure of parking lots at South Mission Beach Park (oceanfront) and Mission Point Park (Bay side) from 8 pm to 5 am	CCC modified to allow closure from 8 pm to 4 am in winter and 10 pm to 4 am in summer
San Diego	City of San Diego	6-89-314 City of San Diego	Beach Parking Lot Hours	Proposed to modify 6-88-545 to extend closure during summer	Denied change in hours.
San Diego	City of San Diego	6-89-359, A-6-LJS-90-161, 6-91-146, 6-91-146-A, 6-91-146-A-2, 6-91-146-A-3 City of San Diego	Beach Parking Lot Hours	Various proposals to close beach parking lots between 10 pm to 4 am, either daily or on weekend nights (including installation of gates on the parking lot entry/exit)	Approved in some locations, or approved only between 12am and 4am, and often with requirement for exit only gates for after hours exit, and sometimes with a time limit (e.g. 5 years)
San Diego	City of San Diego	6-02-90 City of San Diego	Beach Parking Lot Hours	Proposal to extend closure of 3 parking lots (769 parking spaces) in Mission Bay from 2 am to 4 am, to 10 pm to 4 am.	Allowed 10 pm closure with requirement to allow exit only after 10 pm. Limited to 2 years
San Diego	City of Coronado	6-93-160, 6-96-22 City of Coronado	Beach Curfew/Parking Restrictions	Implementation of a beach curfew (11 pm to 4 am), removal of fire rings, and parking prohibition (11 pm to 4 am)	Approved with time limits to 2001

May 5, 2010

RECEIVED
South Coast Region

MAY 06 2010

CALIFORNIA
COASTAL COMMISSION

VIA OVERNITE EXPRESS

Honorable Bonnie Neely, Chair
and Commissioners of the California Coastal
Commission
45 Fremont, Suite 2000
San Francisco, CA 94105

Re: Appeal No. A-5-DPT-10-082 (City of Dana Point)
Hearing Date: Thursday, May 13, 2010
Agenda Item: Th 12a

Dear Chairwoman Neely and Members of the Commission:

This office represents the City of Dana Point ("City") as its City Attorney. We are submitting this letter on behalf of the City challenging the Coastal Commission's jurisdiction to hear and consider the above-referenced item. The "appeals" which give rise to the item allege that the Coastal Commission has jurisdiction to review the City's adoption of a nuisance abatement ordinance. However, as explained below, the Coastal Commission has no such jurisdiction, and accordingly any action that the Coastal Commission takes with respect with this item would be void as a matter of law. The City therefore requests that the item be **removed from the Agenda** prior to the scheduled hearing date and points out that by taking action as proposed by staff the Commission would be abusing its discretion and acting in direct violation of the Coastal Act.

INTRODUCTION AND SUMMARY

At the outset the City Council has asked that I convey to you its dismay at the unjustified manner in which its actions have been vilified by your staff. Having watched the video of the public comment portion of your last meeting, and based on comments we are receiving, it is clear that staff has portrayed the City's actions as a "specious" attempt to fabricate nuisance conditions to create an "elite private beach" at which public access has been denied. Nothing could be further from the truth. Contrary to statements that have been made, the City's action is not a slap in the face to the Commission, or the public, and rather is a legitimate and responsible action to ensure safe public access exists at Strand Beach at all times when it is open to the public.

The City has worked diligently with your staff to resolve these issues, and only took action when your staff decided to disregard the facts and the law, and notified the City it would be subject to legal action if it did not immediately cease enforcing operating hours and related

Honorable Bonnie Neely, Chair
May 5, 2010
Page 2

enforcement devices, making the Strand Vista Park available for unfettered access 24 hours a day, 7 days a week. While the City would have preferred to avoid a confrontation with the Commission, your staff continues to ignore the facts and the law (including an opinion from the Attorney General making clear that the City's actions are perfectly legal and that the Commission has no jurisdiction on this subject) and seems intent on forcing a legal challenge. We believe that in light of the clear legal precedent, and the actual underlying facts, your staff's actions are likely to force the Commission to incur both an unfavorable ruling, and the obligation to pay the City's legal fees associated therewith.

The true facts are that the City has gone to great lengths to create and ensure the existence of public access. Whereas previously Strand Beach was private, and not available for public use, it is now a public beach. Contrary to the false statements being made, the City has not somehow cut off previously available beach access, instead it has acted to create substantial new access. There are now five access ways available during all daylight hours, seven days per week, to serve a mere 1/2 linear mile of beach. Two of these beach access paths are located on the north and south ends of the beach, both are ungated and open during daylight hours (from sunrise to 10:00 pm and from sunrise to sunset, respectively). The access ways also include a funicular for weekend and summer use that did not previously exist. Indeed, while the Commission authorized the City to charge for rides on the funicular, the City recently voted to allocate substantial budget dollars to ensure funicular rides would be free to the public, to further enhance public access opportunities. There is no other project in the Coastal Zone that has provided the same amount of quality coastal access.

The City's recent actions related to the nuisance ordinance simply create hours of operation for the beach access ways, so as to limit nighttime uses when and where criminal activities either have occurred or are reasonably certain to occur if not prohibited by reasonable regulations. In doing so, the City went to great pains to ensure maximum access would continue to exist, and to ensure there would always be access open at all times when Strand Beach is open to the public. Your staff has no law enforcement expertise, has no local knowledge of the nuisance conditions created by unmanaged beach access, and has no idea of the costs associated with nuisance abatement and law enforcement. Incredibly your staff has characterized the Sheriff's professional opinion regarding these matters as "specious" and derided the opinions and testimony of local law enforcement who are experts in the field. Your staff seems to think it is free to spend the City's limited funds for law enforcement, and seemingly suggests that the City could post armed police at the locations where gates exist; yet, takes the irrational position that more cost effective measures (such as gates for use when paths are closed) may not be evoked. This position is the very reason why the California Legislature specifically and unambiguously prohibits the Commission from having any role in the local nuisance abatement business. We invite and encourage you to actually watch the testimony offered by the Sheriff at the City's meeting related to the adoption of its nuisance abatement ordinance and you will see for

Honorable Bonnie Neely, Chair
May 5, 2010
Page 3

yourselves that the City's actions are a legitimate exercise of its police powers, and not some sort of "specious" slap in the face to the Commission or public.

Although not relevant to the primary legal issue (your lack of jurisdiction in connection with this matter), the City points out that its actions are consistent with express project approvals. Your staff simply chooses to ignore the fact that setting hours of operation, and more importantly, the existence of pedestrian gates, have already been expressly approved by the Commission. The LCP and CDP expressly depict the existence of the pedestrian gates, and the gates were part of the matters previously appealed to the Commission. There is not an opportunity for either the Commission, or the City, to "take a second bite at the apple" in connection with these matters, nor is it an opportunity for the Commission to create jurisdictional powers of review when it has none. In sum, we trust that you will seriously consider the following legal issues, and remove this matter from your agenda.

**BACKGROUND: THE STRAND VISTA PARK NUISANCE ORDINANCE AND
THE COMMISSION'S ATTEMPTED APPEAL OF THE ORDINANCE**

On March 22, 2010, the Dana Point City Council adopted Urgency Ordinance No. 10-05 (the "Strand Vista Park Nuisance Ordinance"), a copy of which is attached hereto as Exhibit A. The ordinance adopts findings recognizing the existence of conditions deemed to be a threat to the health and safety of the community, declares those conditions to be a nuisance, and mandates the implementation of certain measures that prohibit and abate the nuisance. The measures include placement of gates, closure hours and associated signage designed to control public nighttime and after-hours access to specific portions of the Strand Vista Park beach access paths in areas where the nuisance conditions will have the greatest potential impact on the public's health, safety and welfare. The written record reviewed and considered by the Dana Point City Council is attached hereto as Exhibit B. The Council also heard testimony from law enforcement officials and from the City's Habitat Monitor supporting adoption of the Ordinance, as well as testimony from the public; the official Minutes reflecting that testimony are attached hereto as Exhibit C. A video recording of the actual hearing on the matter, during which law enforcement officers documented the conditions which the Council felt the need to prohibit and abate, is attached hereto as Exhibit D.

On March 25, 2010, the Coastal Commission issued a "Notification of Appeal Period" indicating that the City's adoption of the Strand Vista Park Nuisance Ordinance would be subject to appeal under the Coastal Act. The Notification characterized the Ordinance as a "decision" by the City to undertake a "development" which purports to be "exempt from coastal development permit requirements." In response to the Notification, three "appeals" were filed with the Coastal Commission on April 8, 2010, as follows:

Honorable Bonnie Neely, Chair
May 5, 2010
Page 4

The Wan/Bloom Appeal. The appeal filed by Commissioners Wan and Bloom implores the Commission to challenge the City's statutorily-authorized nuisance abatement ordinance:

"On March 22, 2010, the City Council of the City of Dana Point approved an 'urgency ordinance'. . . ***This action cannot go unchallenged*** as the establishment of restrictive hours and placement of gates across public access ways. . ."

". . . the City's use of its nuisance abatement powers in this circumstance goes beyond the usual type and approach to nuisance abatement and far exceeds the steps that ought to be taken to address the behavioral concerns of just a few individuals that it has identified. The City of Dana Point already has ordinances in place to address unlawful behavior and has the ability to enforce those ordinances. Mere public use of the access ways is not unlawful behavior nor is the presence of the public *en route* to the beach a "nuisance." (Wan appeal, pp. 3, 5; emphasis added)

The Barnes Appeal. Vonne Barnes owns four rental condominiums across the street from Strand Vista Park (in units that were originally established as low income housing), marketed through a website that touts the beach access amenities as a benefit to the community at large, and to her properties in particular (Exhibit E hereto). Nevertheless, Ms. Barnes urges the Commission to "override" the City's ordinance:

"The Coastal Commission must step in to override the Urgency Ordinance and require the City to obtain approval and a permit that is consistent with the Coastal Act." (Barnes appeal, p. 13; emphasis added)

The Surfrider Appeal. The appeal filed by Surfrider Foundation argues that the Coastal Commission is empowered to reconsider evidence on which the Strand Vista Park Nuisance Ordinance was based, as well as alleging broader policy ramifications of "allowing" cities to adopt such ordinances:

"The City's 'evidence' of community safety issues as a basis for passing the Ordinance does not provide adequate support for the Ordinance and is open to interpretation and perception. . . ."

"Moreover, as a public policy consideration, ***allowing Cities through nuisance ordinances to restrict public access*** . . . threatens coastal access on a broader scale, leading to the use of

Honorable Bonnie Neely, Chair
May 5, 2010
Page 5

frivolous claims statewide to prohibit public access rights."
(Surfrider appeal, p. 5; emphasis added)

The appeals are now set for a Substantial Issue hearing. Staff's report recommends that the Commission find that the appeals present a Substantial Issue and that the City's alleged "claim of exemption" be denied.

**LEGAL ANALYSIS: ANY COASTAL COMMISSION ACTION CONCERNING
THE APPEALS WILL BE NULL AND VOID BECAUSE THE CITY'S ABATEMENT
OF A NUISANCE IS NOT SUBJECT TO REVIEW BY THE COMMISSION**

Irrespective of the allegations that the Strand Vista Park Nuisance Ordinance contravenes the policies of the Coastal Act,¹ the Coastal Commission has no jurisdiction to review or otherwise limit the enforceability of the City's nuisance ordinance. Coastal Act section 30005 mandates that no provision of the Coastal Act limits a city's ability to declare, prohibit and abate nuisances. The statute is clear:

"No provision of this division is a limitation on any of the following:

...

(b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances."

Coastal Act section 30005 is a "savings clause," designed to reserve and save the power of the local government to address nuisances. Savings clauses with nearly *identical language* reserving to cities the power to abate nuisances exist in other statutory schemes in California—such as the Porter Cologne Water Quality Control Act and the Z'berg-Nejedly Forest Protection

¹ In fact, the measures mandated by the Strand Vista Park Nuisance Ordinance are *consistent* with the certified LCP, *authorized* by the Coastal Development Permit issued for the Headlands project, and do *not* impair public access to the beach or other amenities. Specifically, the City is authorized under the LCP to set the hours of operation for the Strand Vista Park trails, as well as the other public parks and public amenities ("The City will determine hours of operation" [HDCP, Table 4.5.4]) and the gates installed on the Mid and Central Strand access trails were depicted both in the LCP and on the approved plans issued for the Coastal Development Permit # 04-23. Moreover, the Mid and Central Strand access gates are kept in a locked "open" position during operating hours, then only closed after hours. Abundant public access to the beach and the park remains open and available at two different access trails when the Mid and Central Strand gates are closed as mandated by Strand Vista Park Nuisance Ordinance.

Honorable Bonnie Neely, Chair
May 5, 2010
Page 6

Act of 1973—and have consistently been upheld against challenges claiming the savings clause would sanction activities that violate the substantive provisions of statutory schemes.²

As for the savings clause in the Coastal Act, the California Attorney General addressed its application and concluded that *Coastal Act permit requirements have no application to local government nuisance abatement activities*. The May 18, 1978 opinion letter (Ex. F hereto) delivered to the Coastal Commission's Executive Director plainly stated its conclusion:

"We conclude that neither a local government nor a person acting under order of a local government is required to obtain a permit under the California Coastal Act of 1976 for the abatement of a nuisance, even though such abatement would otherwise constitute a development under the Act." (Ex. F, p.1)

Therefore, the Attorney General has made it clear: local government actions to "declare, prohibit and abate nuisances" (Coastal Act §30005) are *outside the jurisdictional reach of the Coastal Act* even where such actions "otherwise constitute development under the Act" (Ex. F, p.1).

The Staff report acknowledges that the City did not issue a coastal development permit³— which is a critical fact, because local government action on a coastal development permit is the sole trigger for the Commission's appeal jurisdiction. Specifically, Coastal Act §30603 governs and limits the Commission's appeal jurisdiction after LCP certification. Section 30603 provides: "(a) After certification of its local coastal program, *an action taken by a local government on a coastal development permit application* may be appealed to the commission for only the following types of development"

Thus, the Commission has no jurisdiction to proceed with an appeal because (1) the Commission's appellate jurisdiction derives solely from "action taken by a local government on a coastal development permit application" (Coastal Act §30603), and (2) the adoption of the Strand Vista Park Nuisance Ordinance did not require any City action on a coastal development

² See, e.g., Porter Cologne Water Quality Control Act (Water Code §13000, et. seq.), savings clause at Water Code §13002; *People v. City of Los Angeles*, 160 Cal. App.2d 494, 502 (1958): "This express reservation of the rights of the plaintiff cities to prosecute the subject action clearly negatives any intent to give the control boards the exclusive right to determine either what does or does not constitute a nuisance . . ." See also, Z'berg-Nejedly Forest Protection Act of 1973 (Pub. Res Code §4511, et. seq.), savings clause at Pub. Res Code §4514; *Pacific Lumber v State Water Resources Control Resources Board*, 37 Cal.4th 921, 934, enforcing plain language of the savings clause as a "direct and pellucid expression of legislative intent."

³ "The City has not approved a local coastal development permit, or permit amendment, in conjunction with its approval of the urgency ordinance." (Staff report, p. 8)

Honorable Bonnie Neely, Chair
May 5, 2010
Page 7

permit. Indeed, the Attorney General has already expressly advised the Commission that nuisance abatement actions by a local agency, or by private parties when ordered by a local agency, do not require a coastal development permit. (Exhibit F, p. 3-4)⁴

It is impossible to determine from the Staff report whether the Commission is aware of the Attorney General's opinion in the above noted Index Letter or has simply decided to ignore that advice. What is clear is that the Staff report does not reflect *any analysis* of the law concerning the application of the Coastal Act section 30005 savings clause. Instead, while the Staff report at p.17 includes the express admission that the law places this matter beyond the jurisdiction of the Commission ("*The Commission does not question that the Coastal Act does not limit the power of the City to declare and abate nuisances.*"), it attempts to invent authority where none exists, despite this admission, by recommending that the Commission can, in effect, *circumscribe the City's exercise of its power* by reviewing the nuisance declaration or abatement measure for consistency with the Coastal Act. The reasoning used by Staff to justify this attempted jurisdictional power grab is circular and speculative; the report says:

"Because the measures go significantly beyond mere abatement of a public nuisance and because they qualify as non-exempt development, they are subject to the Coastal Act's permitting requirements." (Staff report, pp. 1-2)

...

"The Commission also does not question that some of the conduct that the City has identified as constituting a public nuisance can qualify as a nuisance. The measures the City has required to abate the nuisance, however, go far beyond abating the identified nuisance . . . Because the possibility of restrictions sweeping much more broadly than is necessary to address legitimate concerns regarding unlawful conduct, *the permit process is crucial to*

⁴ Without being forthright concerning the jurisdictional problem it faces, the Staff report strains to invent jurisdiction on the basis that Coastal Act section 30625 makes reference to Commission appeal of a "claim of exemption" from permit requirements. (Staff report, p.3) But that statutory reference to a "claim of exemption" does not provide a ground for appeal separate and apart from section 30603. The "exemption" refers to developments that would otherwise be within the Commission's permit jurisdiction but are deemed exempt under the Coastal Act (*cf.*, §30610). By contrast, under section 30005 the Strand Vista Park Nuisance Ordinance is subject to "*no provision*" of the Coastal Act—which is why the City properly took *no action* to assert a statutory "claim of exemption" under the Act's permit/exemption provisions. Accordingly, the alleged "claim of exemption" ground for appeal jurisdiction simply does not exist in these circumstances, legally or factually.

Honorable Bonnie Neely, Chair
May 5, 2010
Page 8

ensuring that an appropriate balance is struck." (Staff report, p. 17; emphasis added)

Contrary to Staff's assertion, the Commission's permit process is not intended to be construed or utilized as a "balance" to the City's nuisance abatement power—rather, pursuant to the Coastal Act section 30005 the City's legal right to "declare, prohibit, and abate nuisances" is unqualified, and the coastal permit process is distinct from and *irrelevant* to the City's legislation. Staff has supplied no legal analysis supporting the Commission's power to second-guess or qualify what in Staff's own words is a "legitimate concern." Staff also fails to provide any legal basis or rationale for coming to their independent conclusion that the ordinance restrictions "sweep[] much more broadly than is necessary" to prohibit and abate nuisances at the site. These are nothing more than the speculative opinions of the Staff and they have no basis in the facts or the law. The Staff report's disregard of the clear and unambiguous language in the Coastal Act section 30005, the Attorney General's Index Letter, and of the precedent upholding the power reserved to local government under savings clauses constitute glaring and fatal omissions given the circumstances.

Coastal Commission permit and appeal jurisdiction is not somehow expanded or created in this instance by Staff's interpretive disagreement with the Strand Vista Park Nuisance Ordinance. The Coastal Commission has no power to conduct proceedings to "challenge," "override" or otherwise "review" the ordinance. In fact, the law clearly precludes it from doing so because the exclusive avenue to challenge a statute or ordinance is *through the Courts* via ordinary mandamus or an action for declaratory relief.⁵ Moreover, where courts are called upon to enforce nuisance laws enacted by a legislative body, they must defer to the legislative determination about what is or is not a nuisance:

"Where the Legislature has determined that a defined condition or activity is a nuisance, it would be a usurpation of the legislative power for a court to arbitrarily deny enforcement merely because in its independent judgment the danger caused by a violation was not significant. The function of the courts in such circumstances is

⁵ See, *Friends of Sierra Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 195 (2001): "[T]he use of a petition for writ of mandate is a proper procedure by which to challenge the validity of a statute or ordinance."). Both mandamus and declaratory relief causes of action are within the original jurisdiction of the judiciary. (Cal. Const. Article X, section 10 [judiciary has "original jurisdiction in proceedings for extraordinary relief in the nature of mandamus . . . [and] all other causes . . ."]; see also Cal. Const. Art. III, § 3 ["The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."]) As noted in *Marine Forests Society v. California Coastal Com.*, 36 Cal. 4th 1, 26 (2005), "the Coastal Commission properly is considered part of the executive branch." As such, it is not empowered to review the validity or factual basis for statutes and ordinances.

Honorable Bonnie Neely, Chair
May 5, 2010
Page 9

limited to determining whether a statutory violation in fact exists, and whether the statute is constitutionally valid.. (*Bakersfield v. Miller*, 64 Cal. 2d 93, 100 (1966); *see also Santa Monica Beach Ltd. v. Superior Court*, 19 Cal.4th 952, 970 (1999) [third parties may not seek invalidation of, and courts may not overturn, local legislation based on the theory the legislation does not work or is too encompassing].)

Thus, even if the Commission had the power of *judicial* review here, which it plainly does not, the analysis by the Staff would be a usurpation of the City's legislative power. More to the point, as the Court explained in *Security National Guaranty, Inc. v. California Coastal Commission*, 159 Cal.App.4th 402, 419 (2008), the Coastal Commission's powers are confined to those expressly granted by the Coastal Act, and any action taken by the Commission in excess of those express powers is *void*:

"The Commission, like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the state Constitution or by statute. [citations omitted] 'Administrative agencies derive their power and authority from other sources ... and hence agencies have only such authority as is delegated by the legislature.' '[A]n agency literally has *no power to act* ... unless and until [the Legislature] confers power upon it.' [citations omitted] That an agency has been granted *some* authority to act within a given area does not mean that it enjoys *plenary* authority to act in that area. [citations omitted; italics in original] ***As a consequence, if the Commission takes action that is inconsistent with, or that simply is not authorized by, the Coastal Act, then its action is void.***" [citations omitted; boldface added]

Should the Coastal Commission attempt to act beyond its jurisdiction, an administrative mandamus action pursuant to Code of Civil Procedure §1094.5 would lie against the Commission. (*See, e.g., Schneider v. California Coastal Commission*, 140 Cal.App.4th 1339, 1348 (2006): ". . . Coastal Commission was not empowered to adopt a new offshore visual resource policy for San Luis Obispo County. . . . Administrative action that is not authorized by, or is inconsistent with, acts of Legislature is void." *See also, Buckley v. California Coastal Commission*, 68 Cal.App.4th 178, 191 (1998): "The Commission had no power to deny the Buckleys permission to improve any portion of their lot. Because it lacked power to make any determination, the denial of a permit to the Buckleys was a void act that could be set aside at any time.")

Honorable Bonnie Neely, Chair
May 5, 2010
Page 10

In conclusion, to ignore the simple facts and legal authority underlying this case, and to proceed with the appeals hearing will result in a significant waste of public resources. Any action by the Coastal Commission will be outside the Commission's jurisdiction and therefore void.⁶ At a time when the Coastal Commission staff repeatedly asserts that they lack funding for their basic workload, we find it regrettable that they have chosen to spend a significant amount of time and resources creating a hypothetical dispute that the Commission has no legal jurisdiction to address. For the above reasons, the City respectfully requests that the Coastal Commission remove Item 12a from its May 13, 2010 agenda.

Sincerely,

RUTAN & TUCKER, LLP



A. Patrick Muñoz

APM:cbr
Enclosures

Exhibits:

- A. Adopted Ordinance
- B. Staff Report and all correspondence received prior to council meeting on the matter (late agenda items, etc)
- C. Minutes
- D. Video of applicable part of meeting
- E. Vonne Barns letter
- F. AG Index Letter

cc: Commissioners of the California Coastal Commission
City Council, City of Dana Point

⁶ In light of the statements by some Commissioners at your April 14th [which were a clear violation of applicable open meeting laws], it is (regrettably) apparent that they have already decided that the patently false assertions to the effect the City has denied the public access to the beach are true. Indeed, their participation is further tainted by their avid efforts to achieve a result consistent with their predetermined position, as evidenced by their creation of an appeal form that adds a basis for an appeal that neither exists in statute, nor any other forms used by the Commission. Accordingly we question (and object to) the legitimacy of a hearing on this matter, in light of applicable open meeting law requirements and the plethora of cases that set forth your due process obligations when acting in a quasi-judicial function, even if you had the jurisdiction to hear this matter.



STATE OF CALIFORNIA)
COUNTY OF ORANGE) ss.
CITY OF DANA POINT)

I, KATHY M. WARD, City Clerk of the City of Dana Point, California, DO HEREBY CERTIFY that the attached copies of:

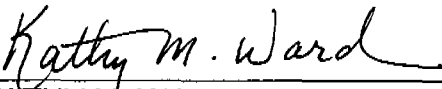
Exhibit A - Adopted Ordinance 10-5;

Exhibit B - March 22, 2010 Agenda Item 12 for the Urgency Ordinance Declaring the Existence of Public Nuisance Conditions in the Vicinity of Strand Vista Park and Ordering the Prohibition and Abatement Thereof by Amending Chapter 13.04 of the Dana Point Municipal Code so as to Adopt Operational Hours and Order the Implementation of Enforcement Devices; and Agenda Related Items;

Exhibit C – March 22, 2010 City Council Minutes

Exhibit D – Video of Agenda Item 12 (Urgency Ordinance)

constitute full, true and correct certified copies of the files on record with the City of Dana Point.



KATHY M. WARD
CITY CLERK

Dated this 5th day of May, 2010.

EXHIBIT C

March 22, 2010 City Council Minutes

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

CALL TO ORDER

The Regular Meeting of the City Council of the City of Dana Point, California, was called to order by Mayor Weinberg at 5:00 p.m. in the Dana Point City Council Chamber, 33282 Golden Lantern, Suite 210, Dana Point.

ROLL CALL OF CITY COUNCIL MEMBERS:

Present: Mayor Steven Weinberg
Mayor Pro Tem Scott Schoeffel
Council Member Lara Anderson
Council Member Lisa Bartlett
Council Member Joel Bishop

Absent: None

CLOSED SESSION

City Attorney Munoz indicated that there was a need for a Closed Session as follows:

- A. CONFERENCE WITH LEGAL COUNSEL - ANTICIPATED LITIGATION, SIGNIFICANT EXPOSURE TO LITIGATION, Government Code § 54956.9 (b1), (5 cases)
- B. CONFERENCE WITH LEGAL COUNSEL - EXISTING LITIGATION, Government Code § 54956.9 (a), (5 cases)

Name of Case(s):

The Point Alternative Care - Case No. 30-2009-00298187
Holistic Health - Case No. 30-2009-00298196
Beach Cities Collective - Case No. 30-2009-00298208
Dana Point Safe Harbor Collective - Case No. 30-2009-00298200
Dana Point Beach Collective - Case No. 30-2009-00298206

Mayor Weinberg recessed the meeting into a Closed Session at 5:01 p.m. pursuant to Government Code Section 54956 et. seq.

RECONVENE CITY COUNCIL MEETING - CALL TO ORDER

Mayor Weinberg reconvened the meeting at 6:03 p.m. All Council Members were present.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

STAFF PRESENT: Douglas C. Chotkevys, City Manager; Patrick Munoz, City Attorney; Kathy M. Ward, City Clerk; Mike Killebrew, Assistant City Manager; Mike Rose, Director of Disaster Preparedness; Lt. Mark Levy, Police Services; Sgt. Jim Greenwood; Kyle Butterwick, Director of Community Development; Matthew Sinacori, City Engineer; John Tilton, City Architect; Jeff Rosaler, Natural Resources Protection Officer; Kevin Evans, Director of Community Services and Parks; Christy Teague, Economic Development Manager; DyAnne Weamire, Administrative Secretary; Jennifer Ransom; and Bobbi Ogan, Deputy City Clerk.

CLOSED SESSION ANNOUNCEMENT

City Attorney Munoz stated that there was no announcement.

PLEDGE OF ALLEGIANCE

The Pledge of Allegiance was led by Chief of Police, Lt. Mark Levy.

INVOCATION

The Invocation was provided by Assistant Chief Senior Chaplain Rick Yeomans.

PRESENTATIONS AND PROCLAMATIONS

VFW 2009 Deputy of the Year

Bill Manes and Bob Fowler of the VFW presented a plaque to Deputy John Goode for being selected the VFW Deputy of the Year, 2009. Mayor Weinberg presented a Certificate of Recognition on behalf of the City in honor of his selection.

VFW 2009 Fire Fighter of the Year

Bill Manes and Bob Fowler presented a plaque to Shane Munson for his selection as the VFW 2009 Fire Fighter of the Year. Mayor Weinberg presented a Certificate of Recognition on behalf of the City in honor of his selection.

VFW 2009 Reserve Fire Fighter of the Year

Bill Manes and Bob Fowler presented a plaque to Steve McIntrye for his selection of VFW 2009 Reserve Fire Fighter of the Year. Mayor Weinberg presented a Certificate of Recognition on behalf of the City in honor of his selection.

MADD Awards - Deputy Patrick Kinney and Deputy Paul Martin

Sam Saha, representative from Mothers Against Drunk Driving (MADD), recognized Deputy Paul Martin for his 26 DUI arrests and Deputy Patrick Kinney for his 63 DUI arrests.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

CONSENT CALENDAR

Council Member Bartlett removed Item #8 from the Consent Calendar.

IT WAS MOVED BY COUNCIL MEMBER LISA BARTLETT, SECONDED BY COUNCIL MEMBER JOEL BISHOP, THAT ALL RECOMMENDATIONS BE ACCEPTED FOR ALL ITEMS ON THE CONSENT CALENDAR WITH THE EXCEPTION OF ITEM #8.

The motion carried by the following vote:

AYES: Council Member Lara Anderson, Council Member Lisa Bartlett, Council Member Joel Bishop, Mayor Pro Tem Scott Schoeffel, and Mayor Steven Weinberg

NOES: None

1. WAIVE THE READING OF ORDINANCES AND APPROVE READING BY TITLE ONLY

APPROVED THE READING BY TITLE ONLY OF ALL ORDINANCES ON THE CONSENT CALENDAR AND THAT FURTHER READING OF SUCH ORDINANCES BE WAIVED.

2. REGULAR MEETING MINUTES, MARCH 8, 2010

APPROVED THE MINUTES.

3. PLANNING COMMISSION MEETING MINUTES, MARCH 1, 2010

RECEIVED AND FILED.

4. PLANNING COMMISSION ACTIONS, MEETING OF MARCH 15, 2010

RECEIVED AND FILED.

5. YOUTH BOARD MEETING MINUTES, FEBRUARY 18, 2010

RECEIVED AND FILED.

6. MEETING CALENDAR / COMMUNITY SPECIAL EVENTS CALENDAR

RECEIVED AND FILED.

7. CLAIMS AND DEMANDS

RECEIVED AND FILED THE CLAIMS AND DEMANDS.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

8. ADOPTION OF AN ORDINANCE AMENDING CHAPTER 13.04, PARKS AND RECREATIONAL FACILITIES REGULATIONS, OF THE MUNICIPAL CODE TO INCLUDE THE PROHIBITION OF THE SMOKING IN CITY PARKS

Council Member Bartlett removed Item #8 from the Consent Calendar.

Council Member Bartlett stated that she understands the prohibition of smoking in City parks, but a park such as Sea Terrace Park that is 27 acres in size does not make sense. She suggested an incremental approach where the City would ban smoking for large scale City sponsored events to see how that would work.

Council Member Bishop felt that there has been some misinformation and asked if the Ordinance would affect smoking in the Harbor, at Strand or Salt Creek Beach. He stated that the City is encouraging international visitors and that from his experience, they like to smoke.

City Manager Chotkevys replied that it was his understanding that the Ordinance would not affect County facilities.

Council Member Anderson stated that the reality is that people are very careless with their cigarette butts and we are only talking about our City parks. She added that she would move the recommended action.

IT WAS MOVED BY COUNCIL MEMBER LARA ANDERSON, SECONDED BY MAYOR PRO TEM SCOTT SCHOEFFEL, HOLD A SECOND READING AND ADOPT ORDINANCE 10-04 ENTITLED:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA AMENDING CHAPTER 13.04.020 "DEFINITIONS" AND ADDING SECTION 13.04.105 "PROHIBITION OF SMOKING IN PUBLIC PARKS" TO THE DANA POINT MUNICIPAL CODE CHAPTER 13.04 PARKS AND RECREATIONAL FACILITIES REGULATIONS.

The motion carried by the following vote:

AYES: Council Member Lara Anderson, Mayor Pro Tem Scott Schoeffel, and Mayor Steven Weinberg

NOES: Council Member Lisa Bartlett, and Council Member Joel Bishop

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

9. **ADOPTION OF AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA AMENDING CHAPTER 13.04, PARKS AND RECREATIONAL FACILITIES REGULATIONS, OF THE MUNICIPAL CODE TO ADDRESS THE CENTER FOR NATURAL LANDS MANAGEMENT DANA POINT PRESERVE OWNED AND OPERATED BY THE CENTER FOR NATURAL LANDS MANAGEMENT**

HELD A SECOND READING AND ADOPTED **ORDINANCE 10-04** ENTITLED:

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA AMENDING CHAPTER 13.04, PARKS AND RECREATIONAL FACILITIES REGULATIONS, OF THE MUNICIPAL CODE TO ADDRESS THE CENTER FOR NATURAL LANDS MANAGEMENT DANA POINT PRESERVE OWNED AND OPERATED BY THE CENTER FOR NATURAL LANDS MANAGEMENT.

10. **CALIFORNIA ASSEMBLY BILL 2407 (HARKEY) - REGIONAL WATER QUALITY CONTROL BOARD JURISDICTIONAL BOUNDARY CHANGE**

AUTHORIZED THE MAYOR TO SIGN A LETTER OF SUPPORT OF SUBJECT LEGISLATION.

11. **AWARD OF CONTRACT FOR MARKETING SERVICES FOR DANA POINT TOURISM BUSINESS IMPROVEMENT DISTRICT**

AUTHORIZED THE CITY MANAGER TO EXECUTE A CONTRACT WITH AGENCY 51 FOR MARKETING SERVICES ON BEHALF OF THE DANA POINT BUSINESS IMPROVEMENT DISTRICT.

PUBLIC COMMENTS

Pete Hammer, Dana Point, spoke about the VFW golf tournament held on behalf of Craig Brandemeier. He announced that the 5th Marine Support Group will have two humvees on static display on April 11th at the Dana Point Grand Prix. He added that on Wednesday, April 14th, Lt. Col. McCollough will provide a brief on his recent deployment in Afghanistan.

Joanna Adrian, Dana Point, thanked Kevin Evans for his assistance with investigating the situation at the Dana Point Library. She spoke about a letter she had received from the County of Orange in response to her concerns for the Library.

PUBLIC HEARINGS

There were no Public Hearing items.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

UNFINISHED BUSINESS

There was no Unfinished Business.

NEW BUSINESS

- 12. AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA DECLARING THE EXISTENCE OF PUBLIC NUISANCE CONDITIONS IN THE VICINITY OF STRAND VISTA PARK AND ORDERING THE PROHIBITION AND ABATEMENT THEREOF BY AMENDING CHAPTER 13.04 OF THE DANA POINT MUNICIPAL CODE SO AS TO ADOPT OPERATIONAL HOURS AND ORDER THE IMPLEMENTATION OF ENFORCEMENT DEVICES**

Council Member Bishop recused himself due to a potential conflict of interest and left the Council Chambers at 6:36 p.m.

City Manager Chotkevys provided summary comments and City Attorney Munoz provided background information related to the urgency basis for the ordinance adoption.

Mayor Pro Tem Schoeffel asked if the City was being asked to take action that would be declaratory of actions that have already been taken.

City Attorney Munoz replied that for all practical purposes, yes. He stated that one substantive change in the proposed Ordinance, that was different from last year's version, is that the City has expanded the hours of operation of the Mid Strand and Central Strand access.

Director Butterwick provided a PowerPoint presentation detailing the public access ways provided at the Headlands.

Lt. Levy stated that it was his opinion that the removal of the gates at Strand Vista Park and modification of the hours of operation and/or the removal of the existing hours of operation at the South Switchback Trail or any other trails in connection with this development would be a mistake. He added that crime prevention through environmental design was one of the most effective tools in creating areas that provide enhancement for the community while preventing criminal activities. He stated that any of the proposed changes would lead to conditions that would lend themselves to increases in illegal activity in the area, negatively impacting the quality of life of those living or visiting our community and place a very difficult and time-consuming public safety responsibility upon Dana Point Police Services. He added that if the gates and signage were removed, the stage would be set for the public to expect unfettered access to this beach through sensitive and challenging areas.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Sgt. Greenwood provided an overview of statistics of the calls for service that have taken place at the Strand Vista Park. He described the nuisance conditions that were occurring. He explained that an exorbitant number of calls for services were occurring at Strand Vista Park, noting 139 calls occurred there compared to 50 at the park with the next highest level of service calls. He noted calls for service are greater at night. He explained that the calls for service at the site are a drain on resources, and are already an unreasonable demand on police services with the controls in place, and that the numbers he is working with are conservative, such that the actual demand on services is even higher than reflected.

Sgt. Greenwood expressed the opinion that if the controls provided by gates, signs and hours of operation are removed, the area will turn into an "amusement park" for criminal behavior. Moreover, that unlimited access by removal of the controls will result in vandalism, theft, burglaries, trespassing, sex parties, teenage drinking, and partying. He stated that the Sheriff's department does not have the resources to post officer patrols at the trails as would be needed without the existing controls.

Sgt. Greenwood further explained that the area is unique and attractive to criminal behaviors because it is dark, secluded, and hard to get to. It is hard to provide enforcement because the area cannot be seen from the road, and when officers enter the area for enforcement they can be seen coming. He stated that in his tenure with the City this is one of only three other instances in which the need for police services at a given location has arisen to the level of a nuisance, and needs special attention to bring into control. He stated that complying with the request to remove the existing controls, and allow unlimited access, would be a catastrophic situation. He stated that if the controls are removed, allowing unlimited access, the dam will explode and Police Services will be asked to manage an unmanageable situation. He opined that the result would be to take a beautiful coastal development and turn it into a black eye for the City.

City Attorney Munoz mentioned that in the preparation of the staff report, environmental terrorism acts that had occurred at the property were discussed and asked if this type of terrorism was still a concern.

Sgt. Greenwood replied that none of the eco-terrorism groups have gone away. He stated that threats from such groups are still occurring; that the Sheriff's Department still stands guard against their activities and that the property is still considered at risk.

Council Member Anderson asked if anyone was living in the homes, noting that the number of calls for service would undoubtedly be even higher if homeowners were present to report on illegal behavior.

City Manager Chotkevys confirmed that no one was living in the homes.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Council Member Anderson asked who was paying for all of this police action.
City Manager Chotkevys replied that the City of Dana Point was paying.

Council Member Anderson asked if the Headlands development has a security guard on site.

City Manager Chotkevys replied yes they do.

Sgt. Greenwood stated that 35% of all calls for service at the City's seventeen parks are going to this one park.

City Attorney Munoz stated that Mr. Rosaler has information to share in relation to the staff proposal and what the impact of this proposal will have on the environmentally sensitive habitat areas.

Jeff Rosaler, Natural Protection Resource Officer, stated that since the facilities have been open he has had to issue two to three warnings per week to those people trespassing off the trails and going into the ESHA. He felt that without operational hours and gates the area would be impacted by trespassers causing damage not only to the ESHA but to federally threatened species that are active in that area.

He identified the area on a map of how people on several occasions have been able to enter the neighborhood area and then go off the Mid-Strand and Central Strand trails and into areas of ESHA which contain, among other things, federally-threatened species adjacent to the south switchback trail. He indicated the existing controls are needed to protect against graffiti, litter and similar problems occurring in the ESHA. He said preventing these problems is an ongoing battle.

City Manager Chotkevys stated that it was important to point out the concept of balance. He added that the City is not trying to restrict access, but to manage it. He added that a lot of thought and analysis has gone into this.

Mayor Pro Tem Schoeffel asked about how the access hours were determined by the Sheriff's Department.

City Manager Chotkevys replied that the hours were set in part based upon the shift change times for City staff.

City Attorney Munoz added that the setting of the hours was a collaborative decision with information from various departments.

Lt. Levy clarified that the Sheriff's Department did not set hours on its own, and that this was a collaborative effort. He stated that the Sheriff's Department would have made the hours more restrictive, but that as part of the collaborative effort these were the hours arrived upon and that the

CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010

Sheriff's Department felt that they could police the hours that were set. Sgt. Greenwood added that in considering the hours greater access was allowed at the South Stand Switchback, where vagaries related to when sunrise and sunset occur could be dealt with, but that fixed times were needed for the Mid-Strand and Central Strand Access because of greater law enforcement demands in those areas. .

Mayor Pro Tem Schoeffel asked if there were comparable circumstances where jurisdictions have used comparable methods to manage access.

City Attorney Munoz replied that Laguna Beach has just gone through something similar.

Mayor Pro Tem Schoeffel asked for the reading of the text of Public Resources Code 30210.

City Attorney Munoz read the following " In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse."

Mike Rose stated that from the facilities perspective when we were working with the other departments to establish the hours, it came down to what resources we can guarantee are available. He added that from an operational standpoint we know we can open the gates by 8 a.m., but could not guarantee having the resources to be able to open the gates at earlier hours. He stated that he was still not sure how the later hours of closure for the summer will work out but that staff will make it happen.

City Manager Chotkevys reiterated that staff had looked at a number of variables when setting the hours and that we are all working together to make this happen.

Mayor Weinberg stated that Strand Vista Park was not open until December or January, were those statistics from the last couple of months.

Sgt. Greenwood replied that the park may not have been open but the surrounding area was.

City Attorney Munoz clarified that when you look at the numbers of calls in 2009, since the opening of the facilities the numbers have tripled from last year. Sgt. Greenwood confirmed that the calls for service have escalated since the trails were opened. He added that once development is complete, and if the existing controls are removed, the numbers of calls for service will go through the roof.

Mayor Weinberg opened the Public Comments.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Vonne Barnes, San Clemente, felt that staff did not provide enough evidence to support the Urgency Ordinance.

Denise Erkeneff, Dana Point, felt that staff did not provide a compelling report and that it was lacking police evidence.

Kevin Darnall, Headlands Reserve, felt that the staff report was thorough. He provided details of what was happening in the residential area including many instances of trespass and vandalism that are not reported. He stated that in the past month there were two instances of felony vandalism with arrests. He added that without the gates and hours of operation it would be an uncontrollable situation.

Mayor Weinberg closed the Public Comments.

City Attorney Munoz stated that based on the comments received from the public, Council needs to reflect on the fact that they have the ability to prohibit nuisances, to anticipate that nuisance conditions will exist, and to prohibit them as well as to recognize the existence of nuisance conditions and take action to abate those conditions. He felt that it would be worthwhile to pose the question to the Sheriff's Department if in their professional opinion whether they think these measures are necessary to prohibit public nuisances that would otherwise exist.

Lt. Levy replied that the removal of the gates or any alteration to the hours would definitely create a nuisance condition and felt that the City would be derelict in allowing access through those communities in anticipation of the amount of crime and calls for service. He stated that the Sheriff's Department could be responding to calls all through the night for trespassing. He added that as it had been mentioned these homes are not yet occupied. He stated that the majority of the calls for service at the City's parks are for parks that are located in residential areas and as those homes are occupied there will be an increase in calls. He felt that without the gates and the hours of access, the Council would be creating an attractive nuisance and a nuisance condition within our community.

Mayor Pro Tem Schoeffel asked since the Coastal Commission staff wants the City to remove the gates as they are citing that the gates are a new development and would require a new discretionary approval; have they made any recommendations for the hours of access, do they want any limitations, have they suggested any constraints. He added that even the County limits their access at 12 midnight to 5:00 a.m.

City Attorney Munoz replied that staff met with the Coastal Commission staff and that they did not provide any alternatives.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Mayor Pro Tem Schoeffel stated that if the Coastal Commission has threatened to file a cease and desist, it would seem to him that they are not in favor of any hours of constraint and no gates.

City Attorney Munoz replied that if the Council does not approve the Urgency Ordinance and if the City complied with the deadline that they have set, the impact would be unfettered 24/7 access with no gates and no signage.

Council Member Bartlett stated that she was concerned with the number of calls for this area in the winter months; she asked if we could expect the numbers to be larger in the summer.

Lt. Levy replied that traditionally the number of calls for services do go up in the summer months. He added that spring break is the start of the busy season.

Council Member Bartlett stated that it is the City's goal to strive for proper balance here. She added that Council has to manage responsible public access and provide a certain level of public safety. She felt that staff's recommendation achieves both objectives.

Council Member Anderson stated that if Dana Point residents could tell us what times they want to have access they should. She added that they are paying for the Sheriff Deputies to make the calls for service and that it was not fair for residents to have to subsidize this. She stated that she was not willing to take a chance that the data from the Sheriff's Department was incorrect, that if the City needs to modify the hours of access later then we could.

Mayor Pro Tem Schoeffel stated that the foundation coastal entitlement gave the City ability to set reasonable hours of use with the implicit authority to enforce the hours. He felt that the Coastal Commission staff's demand to remove the gates and allow 24 hour access seems to be inconsistent with Public Resources Code 30210.

Mayor Weinberg stated that he agrees with his colleagues. He added that there was nothing stopping anyone from accessing the beach from the north stairs from 5:00 a.m. to midnight. He stated that from 8:00 a.m. to 5:00 p.m. you can go down the middle, or from 6:00 a.m. to 6:30 p.m. you could use the switchback trail.

Council Member Anderson stated that this not just about property rights, but taxpayer rights. She added that every dollar that has to be paid for Police Services doesn't go to the library that needs repairs, or other parks that need attention, or for other areas that require assistance from the Police.

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

City Manager Chotkevys stated that the recent survey ranked public safety very high. He added that the City has taken on this additional resource without additional staff with the exception of Mr. Rosaler, so the City's task is to try and find a balance given the limited resources.

Mayor Weinberg stated that this Ordinance was the appropriate thing to do, that we need to take control of our City and utilize our resources the best way we can.

Council Member Bartlett stated that the balance issue is really important. She added that if Police Services are deployed here they will not be available elsewhere in the City where they are needed. She felt that staff's recommendation was right on point.

IT WAS MOVED BY COUNCIL MEMBER LISA BARTLETT, SECONDED BY MAYOR PRO TEM SCOTT SCHOEFFEL, ADOPT URGENCY ORDINANCE 10-05 ENTITLED:

AN URGENCY ORDINANCE OF THE CITY COUNCIL OF THE CITY OF DANA POINT, CALIFORNIA DECLARING THE EXISTENCE OF PUBLIC NUISANCE CONDITIONS IN THE VICINITY OF STRAND VISTA PARK AND ORDERING THE PROHIBITION AND ABATEMENT THEREOF BY AMENDING CHAPTER 13.04 OF THE DANA POINT MUNICIPAL CODE SO AS TO ADOPT OPERATIONAL HOURS AND ORDER THE IMPLEMENTATION OF ENFORCEMENT DEVICES.

The motion carried by the following vote:

AYES: Council Member Lara Anderson, Council Member Lisa Bartlett, Mayor Pro Tem Scott Schoeffel, and Mayor Steven Weinberg

NOES: None

RECUSE: Council Member Joel Bishop

Council Member Bishop returned to the Council Chambers at 8:04 p.m.

PUBLIC COMMENTS

There were no additional Public Comments.

STAFF REPORTS

City Manager Chotkevys commended Lt. Levy for his recent active shooter exercise. He stated that it was an all day event which he believes was a first for south county. He gave thanks to Mike Killebrew and Kevin Evans and the rest of the staff for their efforts with the Festival of Whales event. He stated that they have worked very well with the

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

business community. He read thank you note from the Dana Hills High School swim team for being allowed to hold the BBQ fundraiser for their new scoreboard at our event.

City Attorney Munoz reported that they have received confirmation that of the six medical marijuana dispensaries in the City, one has closed and that he has been told that two others will be shutting down in the near future.

COUNCIL REPORTS, INCLUDING CITY RELATED MEETINGS ATTENDED

Council Member Bartlett reported that she had attended the following:

Several TCA and League of Cities meetings

March 11 - Dana Point Coastal Arts Concert Series, it was the second of the series and she encouraged everyone to attend

March 13 - Served the seniors at a special St. Patrick's Day luncheon at the Senior Center

March 14 - Festival of Whales celebration

March 16 - Mayor's Prayer Breakfast at the Irvine Hyatt

March 18 - Artist by the Sea event at the Ocean Institute

She stated that there were many future events:

April 2 - Ribbon Cutting ceremony at Paddle Surf Warehouse at 3:00 p.m.

April 11 - Dana Point Grand Prix

April 12 - Veteran's Memorial Dedication ceremony at Strands Vista Park at 11:30 a.m.

April 15 - Third in the series of the Dana Point Coastal Arts Concert Series

April 17 - Earth Ocean Day with clean up in La Plaza and Doheny State Beach

April 22-24 - California Wine Festival in Dana Point with special events

Council Member Bishop felt that the Festival of Whales was outstanding and thanked staff. He announced that SOSCA had two events coming up; SOSCA Opera Night on March 27th at 7:00 p.m. to be held at the Portal at Dana Hills High School and their Gala on March 28th at 6:00 p.m. to be held at the Marriott. He stated that tickets were available through www.soscaarts.org.

Council Member Anderson thanked everyone who made the Festival of Whales possible. She stated that everyone loved the floating concert at the beach. She announced that she had attended a Coastal Animal Services Authority JPA meeting on March 15th. She stated that the job is now posted for the animal shelter General Manager position. She added that the City of San Clemente was handling the recruitment. She reminded everyone that the on April 3rd the City would be holding the annual Easter egg hunts in Sea Canyon and Pines parks beginning at 10:00 a.m.

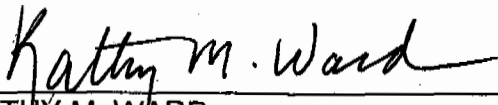
**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Mayor Pro Tem Schoeffel stated well done to everyone who helped put on the Festival of Whales and added that he had received many glowing comments. He reported that there were two more Dana Point Coastal Arts Classical Arts Concerts; April 15th and the other in May.

Mayor Weinberg stated that he had turned in his list of meetings attended to the City Clerk. He reported that on April 10th a time trial has been added to the Grand Prix and that on April 11th was the Criterion along with the kid's races. He stated that Sunday's races will be aired on Channels 30 and 855.

ADJOURNMENT

There being no further business before the City Council at this session, Mayor Weinberg declared the meeting adjourned at 8:16 p.m. and announced that the next Regular Meeting of the City Council will be April 12, 2010, at 5:00 p.m. in the City Council Chamber located at 33282 Golden Lantern, Suite 210, Dana Point, California.



KATHY M. WARD
CITY CLERK

APPROVED AT THE MEETING OF APRIL 12, 2010

**CITY OF DANA POINT, CALIFORNIA
CITY COUNCIL REGULAR MEETING MINUTES
MARCH 22, 2010**

Meetings Attended Since the Last City Council Meeting:

Mayor Steven Weinberg

March 10	OCFA Budget and Finance
March 13	St. Patrick's Day for Seniors at the Community Center
March 13-14	FOW events
March 15	OCFA Budget Study Session
March 18	Vector Control Budget and Finance Vector Control Board

Mayor Pro Tem Scott Schoeffel

March 11	San Joaquin Hills Transportation Corridor Agencies Board Meeting Dana Point Coastal Arts classical music concert at St. Edward's Church
March 13	Attended and performed at St. Patrick's Day seniors party at Dana Point Community Center
March 14	Veterans of Foreign Wars pancake breakfast in Dana Point Harbor (Festival of Whales event) Attended and announced performers at Festival of Whales concert in Dana Point Harbor
March 16	Attended and spoke at Coastal Mayor's Prayer Breakfast at Hyatt Regency Hotel in Irvine
March 19	Attended and spoke at Dana Point Civic Association meeting in Dana Point Harbor Attended seniors birthday celebration for 99-year old Forrest Lunsway at Dana Point Community Center with Kevin Evans and Doug Chotkevys

WINTER

2010

Lighthouse Newsletter

Dana Point Vacation Rental at Niquel Beach Terrace—Tom & Vonne Barnes, Owners/Managers of the Lighthouse

Strand Vista Park is Now Open

January 7, 2010 marked the opening of Dana Strand Vista Park, a magnificent ocean view walkway extending 1/3 mile along the bluff.

Jeweled with colorful glass and sea life mosaics, the walkway features ocean view rest areas, picnic tables, and breathtaking overlooks. The level surface is ideal for leisure walks along the bluff in refreshing ocean breezes.

Enjoy 5 ways to get to the beach from Strand Vista Park: the North Stairs; the Funicular; the Mid Strand Stairs; the Veterans' Park walkway, or the Switchback Hiking Trail. Don't forget to bring your camera to capture fantastic photos — you may even see dolphins & whales!

For more information about the Lighthouse Vacation Rental go to our website at LighthouseAtDanaPoint.com.

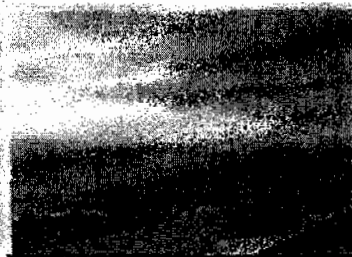


Funicular to the Beach is Running

The funicular is open daily from Memorial Day to Labor Day (Summer Season) and on weekends and holidays the rest of the year.

This ocean-view ride goes 2/3 of the way down to the beach. After you exit head

down the ramp for some sun at the beach, or walk south along the revetment as far as the Headlands. Make your way back to the top of the bluff via the Switchback Hiking Trail, the Mid Strand Access, Veterans' Park Access, North Stairs, or the Funicular—enjoy!



The Mid Strand Vista Park Beach Access opens off the bluff walkway



Free public Funicular runs beside the North Strand Beach stairs



The Revetment connects to the Funicular, North Stairs, Mid Strand Access, & Veterans Park Access

Exhibit E TO CITY
LETTER

Th 12a • A-5-DPT-10-082• Appeal by Ms. Vonne Barnes, Surfrider Foundation & Coastal Commissioners Bloom & Wan from decision of City of Dana Point to authorize implementation of operational hours and installation of enforcement devices such as signs and gates that regulate public access to public parks and accessways without a coastal development permit, in the Vicinity of Strand Vista Park, incl. South Strand Switchback Trail, Mid-Strand Beach Access, Central Strand Beach Access, and Strand Beach Park, Dana Point Headlands, Dana Point, Orange County.

The Urgency Ordinance is in Conflict with the Coastal Act

On March 22, 2010 the City of Dana Point approved an Urgency Ordinance declaring nuisance conditions at Strand Vista Park, the Mid Strand Access, the Central Strand Access, the South Strand Access; and ordered prohibition and abatement of the nuisance condition by restricting operational hours and implementing enforcement devices. The city did not obtain permit approval from the Coastal Commission for this action.

The Coastal Act has provisions that allow this action, unless the action is limited by or in conflict with state law (Coastal Act § 30005 a, b, California Constitution, Article 11, Local government §7).

State and municipal codes require that Urgency Ordinances include supportive facts to demonstrate the immediate need to abate nuisances in order to preserve public health, safety, and welfare (California Government Code § 36937 (b)). The LCP also requires that “public access shall be implemented in a manner that takes into account the need to regulate the time...**depending on the facts** and circumstances in each case...” (HDCP, Section 5.0, Coastal Act Consistency, Table 5.1, p. 5-4).

City staff produced “Supportive Documents “D” and “E” as facts to justify implementation of the Urgency Ordinance. As these facts do not appear to demonstrate an immediate need to restrict beach access, the City’s actions appear to be in direct conflict with the California Constitution (Article 11, Local Government § 7), California Government Code (§ 36937 (b)), the Headlands LCP, and the Coastal Act (§ 30005).

The Facts do not support the Urgency Ordinance

The City’s action is based on the premise that if they do not immediately restrict hours and lock gated entries at the Mid Strand Access and Central Strand Access *et. al.* in the Urgency Ordinance:

- people will have picnics and dangle their feet over the edges of the lots
- the Headlands gated community will turn into an amusement park
- there will be a serious imminent threat to safety, health, and well-being
- there will be every fashion of criminal behavior known to mankind
- there will be sex parties, drugs, and rock’ n roll
- there will be acts of environmental terrorism

- undeveloped lots will become campgrounds for homeless people
- a beautiful coastal development will turn into a black eye

The City used “Supportive Documents “D” and “E” as the fact basis for restricting the target areas of the Urgency Ordinance: the Mid Strand Access (MSA), Central Strand Access (CSA), South Strand Access, and Strand Vista Park (SVP). The Mid Strand Access and Central Strand Access were not constructed until 2009 and were not open until January 7, 2010 (**Map Exhibit V-1**).

Police Reports

City Staff’s “Supportive Document D” consists of 16 items described as police reports dated August 15, 2005 to March 3, 2010 (**Exhibit V-2, Table of Items 1-16**).

There are only 15 police reports over a time period of 4 ½ years, and none of them are from the Mid Strand Access, Central Strand Access, or Strand Vista Park. All but two of the reports occurred before these public pathways opened. Most of the reports have no street addresses, and one of the reports, Item 8, is not a police report. The two reports that occurred after the Mid Strand Access, Central Strand Access, and Strand Vista Park were opened to the public, relate to incidents that did not occur at these locations.

One of these incidents occurred on January 10, 2010 at Hilltop Park at Green Lantern and Cove Rd more than a mile away from the Mid Strand Access (**Item 2, Exhibit V-2**). The City Manager had 3 women arrested because they stepped outside a nature trail on a Sunday afternoon. The Urgency Ordinance does not apply to this area.

The other incident (**Item 1, Exhibit V-2**) occurred at 11:10 am on Wednesday, March 3, 2010. Two teenagers were arrested for throwing rocks at an outside fence leading to the Switch Back Trail. The Urgency Ordinance does not stop teenagers from throwing rocks.

All of the rest of the incidents occurred before the Mid Strand Access and Central Strand Access were opened to the public on January 7, 2010 (**Exhibit V-2, Table of Items 3-16**).

- An incident (**Item 3, Exhibit V-2**) occurred on August 28, 2009 on Oceanfront Lane in the Headlands gated community that had to do with an employee of Valley Crest Landscaping, a company hired by the Headlands LLC to do landscaping in the project. The report said an employee of Valley Crest Landscaping was illegally parked on Oceanfront Lane and that he had pulled up some star jasmine plants, damaged some sprinkler heads, and jumped over a fence to use a restroom. He was arrested for trespassing and vandalism, and his car was towed away. The Urgency Ordinance does not apply to illegally parked vehicles, or motorized access into the gated community along the roadway on Oceanfront Lane, or to employees of sub-contractors of the Headlands LLC.

- Another report (**Item 8, Exhibit V-2**) dated July 30, 2008 is written by CPS, a security service employed by the Headlands LLC. A contractor’s sub was fired for driving unauthorized persons down into the development onto private property where incidents of dirt bike riding and joy riding were observed. CPS also reported that “... many realtors race by the gate guards and

are chased down and escorted off the property.” The Urgency Ordinance does not apply to motorized access into the gated community through the guard gate on Oceanfront Lane, or to dirt bike operators or joy riders, or to realtors who illegally enter the property. None of these transgressions are covered in the Urgency Ordinance. Furthermore, this report does not appear to be a police report and should not have been included as such in the City’s Exhibit “Supportive Document D.”

- All of the police reports from August 15, 2005 to August 28, 2009, except for one, relate to graffiti that occurred during the construction phase of the Headlands project. The one exception, (**Item 15, Exhibit V-2**), dated October 6, 2005, does not include a description of the incident.

- Two 2005 reports for graffiti (**Items 14 & 16, Exhibit V-2**) are located near a busy cross-street at Chula Vista Ave., which is more than a mile away from the Mid Strand Access. Another 2005 report for graffiti (**Item 13, Exhibit V-2**) listed a location near an elementary school at the cross-street of Selva and La Cresta, almost a mile away from the Mid Strand Access. The Urgency Ordinance does not apply to these locations.

- None of the reports indicate that there were any convictions for any of the incidents.

- None of the reports are about amusement parks, camps for homeless people, sex and drug parties, or rock n’ roll. None of the reports are about health, safety, or well being, which is the reason given for the Urgency Ordinance.

Police Calls

City Staff’s “Supportive Document E” titled “Headlands Police Call and Police Report Summary,” is a list of police calls from August 15, 2005 to March 3, 2010, and includes the 15 police reports previously mentioned. It is important to note that the city manager described the numbers in the call log as ‘soft’ numbers (Dana Point public hearing, March 22, 2010).

The log, a list of “soft” numbers, is problematic in a number of ways. First, there are only 139 calls over a span of 4 ½ years. This averages to only 2.6 calls per month, which is less than one call per week. Second, none of the calls are from the Mid Strand Access or Central Strand Access, which are the pedestrian pathways targeted in the Urgency Ordinance (**Map Exhibit V-3**).

Another problem is that only 3 out of 139 entries include the numeric street number in the address. In fact, 59 of the entries (42%) only list the name of a street, making it difficult to identify the precise location. For example, only a small segment of Selva Road is located on the seaward side of Pacific Coast Hwy. Most of Selva Road is on the landward side of Pacific Coast Hwy and it stretches for miles to the north until it curves easterly up into the hills in the inland area of Dana Point. Calls reporting graffiti on Selva Road without a street address or cross - street intersection cannot be presumed to have originated from the Mid or Central Strand Access.

Several of the calls included in the log had no addresses listed at all.

Eleven calls are from a street called Marquerite which does not exist. It used to be a road

running north and south across the Headlands. After it was removed five years ago, the land was fenced off and redeveloped as part of the Headlands Conservation Park.

The 139 calls in the log are summarized in a bar graph (**Exhibit V-4**) as follows:

- There are only 3 arrests in 4 ½ years. None of them occurred on the Mid Strand Access or Central Strand Access, and the Urgency Ordinance does not apply to the locations listed. These entries should not have been included in the log as supportive facts. **Removing these entries reduces the log from 139 to 136.**

- There are only 3 calls relating to drugs or alcohol in 4 ½ years. None of them occurred on the Mid Strand Access or Central Strand Access, and the Urgency Ordinance does not apply to the locations listed. These entries should not have been included in the log as supportive facts. **Removing these entries reduces the log from 136 to 133.**

- Eight calls have descriptions for incidents listed as “N/A.” As they provide no facts about what happened, it is misleading to have included them. None of them occurred on the Mid Strand or Central Strand Access, and the Urgency Ordinance does not apply to the locations listed. These misleading entries should not have been included in the log as supportive facts. **Removing these entries from the log reduces the log from 133 to 125.**

- There are 17 calls for assistance, 15 calls for suspicious persons, 23 calls for vandalism, and 32 calls for traffic incidents. Most of these are from the Headlands guard gate located at Selva Rd and Dana Strand Rd. Vehicles must pass through this check station to enter the gated community. The guards are not police officers and do not have access to police data. When they have questions about license plates, motorists, or other vehicular information, they call the police. Traffic related calls include illegally parked cars, abandoned vehicles, traffic tickets, disabled vehicles, suspicious persons in vehicles, and accidents. The Urgency Order does not apply to vehicular entry along roadways into the gated community and it does not apply to the Headlands guard gate station located at Dana Strand and Selva Rd. Validity of calls made by Headlands employees is also questionable. None of the calls occurred on the Mid Strand or Central Strand Access, and the Urgency Ordinance does not apply to the locations listed. **Removing these entries from the log reduces the log from 125 to 38.**

- There are 15 calls for trespassing and 12 calls for disturbances. Some of these appear to have occurred because construction workers let unauthorized vehicles enter the project through the guard gate at Dana Strand and Selva Rd (**Item 8, Exhibit V-2**). The Urgency Order does not apply to vehicular entry along roadways into the gated community and it does not apply to the Headlands guard gate station located at Dana Strand and Selva Rd. None of the call locations are listed as the Mid Strand Access or Central Strand Access, and the Urgency Ordinance does not apply to the locations listed in the call log. These entries should not have been included in the log. **Removing these entries from the log reduces the log from 38 to 11.**

- There are only 3 calls relating to thefts or burglary in 4 ½ years. Several calls were about sprinkler heads reported to have been stolen during the construction phase of the Headlands (**Item 3, Exhibit V-2**). Other incidents occurred near Hilltop Park at Scenic Drive and Green Lantern. These calls were made before the Mid Strand and Central Strand Access were constructed and the Urgency Ordinance does not apply to any of these distant locations.

These entries should not have been included in the log. **Removing these entries from the log reduces the log from 11 to 8.**

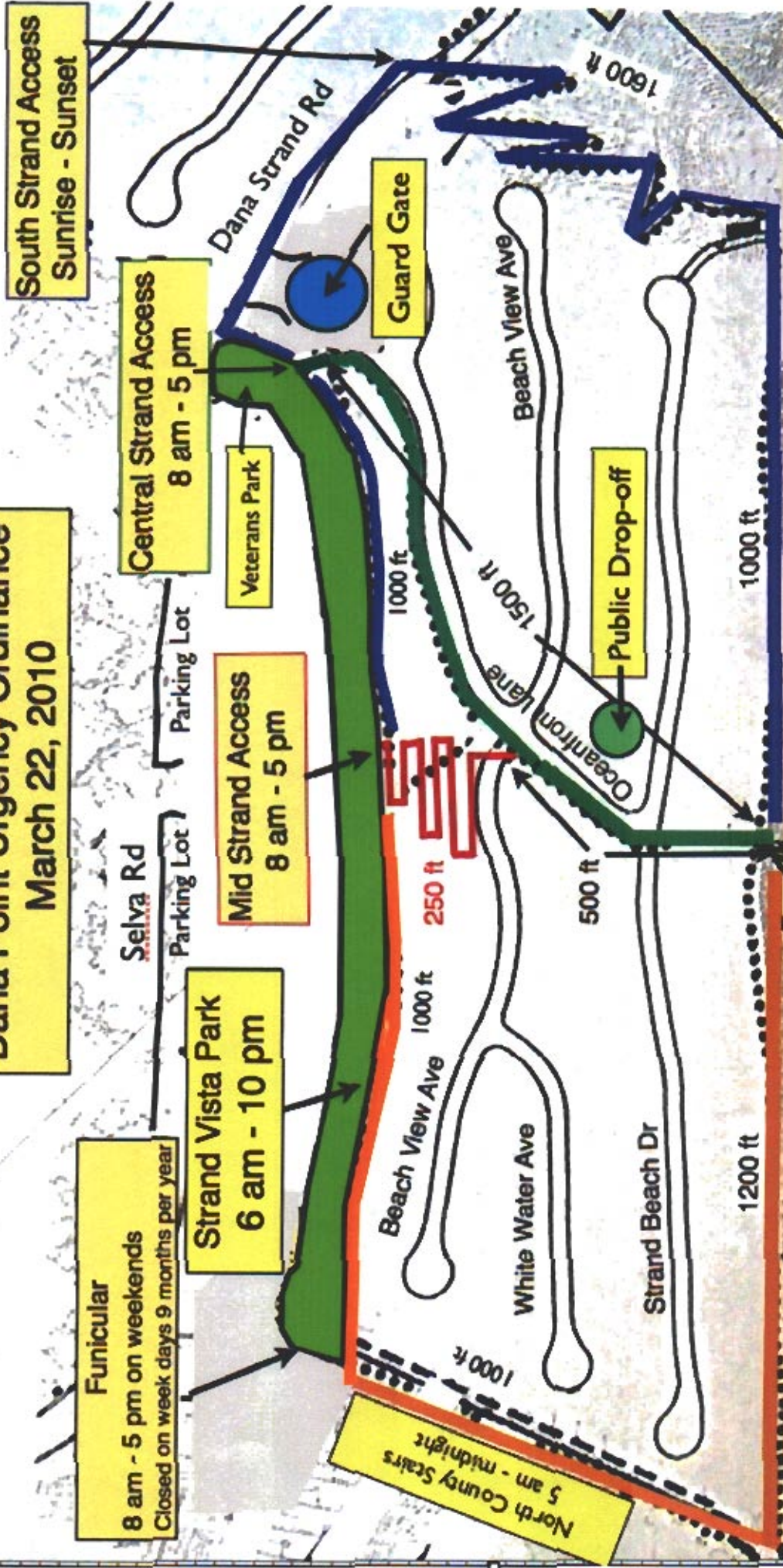
- There are two calls for follow-up reports. These do not represent any crimes and are not located at the Mid Strand or Central Strand Access. They supply no facts to support the Urgency Ordinance. **Removing these entries from the log reduces the log from 8 to 6.**

- There are 6 miscellaneous calls. Each occurred only one time over a period of 4 ½ years. These are: a municipal code violation, a general broadcast, a special event, a fireworks violation, one indecent exposure, and one incident of battery. None of these occurred at the Mid Strand Access or Central Strand Access. The Urgency Ordinance does not apply to the locations entered in the log for these calls. **Removing these entries from the log reduces the log from 6 to zero.**

The police reports and call log simply do not demonstrate nuisance conditions at the Mid Strand Access, Central Strand Access, or Strand Vista Park. The entries do not serve as a reliable fact basis to justify an immediate need to restrict beach access; nor do they indicate an imminent threat to health, safety, or well - being. Since the facts do not support the premise, the city's action and Urgency Ordinance are in conflict with fact requirements in state and local laws, as well as fact requirements in the Headlands LCP. Therefore, the City's action is not exempt from §30005 of the Coastal Act, and the Coastal Commission has power and authority to protect public beach access. Please do so.

Exhibit V-1

Restricted Beach Access Dana Point Urgency Ordinance March 22, 2010



Funicular
8 am - 5 pm on weekends
Closed on week days 9 months per year

Strand Vista Park
6 am - 10 pm

Mid Strand Access
8 am - 5 pm

Central Strand Access
8 am - 5 pm

South Strand Access
Sunrise - Sunset

North County Stairs
5 am - midnight

Alternate Beach Paths

- 3200 ft = 10.7 football fields
- 4200 ft = 14 football fields



Restricting the Mid Strand Access restricts public use of Central Strand Beach, the best surfing location. The public is forced to South Strand Beach or North Strand Beach. Central Strand Beach becomes the exclusive enclave of affluent residents of the gated Headlands Community.

Summary of 16 Police Reports

Dana Point City Staff used these reports to justify an Urgency Ordinance to restrict beach access at the Mid Strand Access, Central Strand Access, and Strand Vista Park. These 16 incidents occurred over a 5 year period and none of them took place at the Mid Strand Access, Central Strand Access, or Strand Vista Park.

Source: City Staff Report, March 22, 2010, Supportive Document D, pp. 32-93.

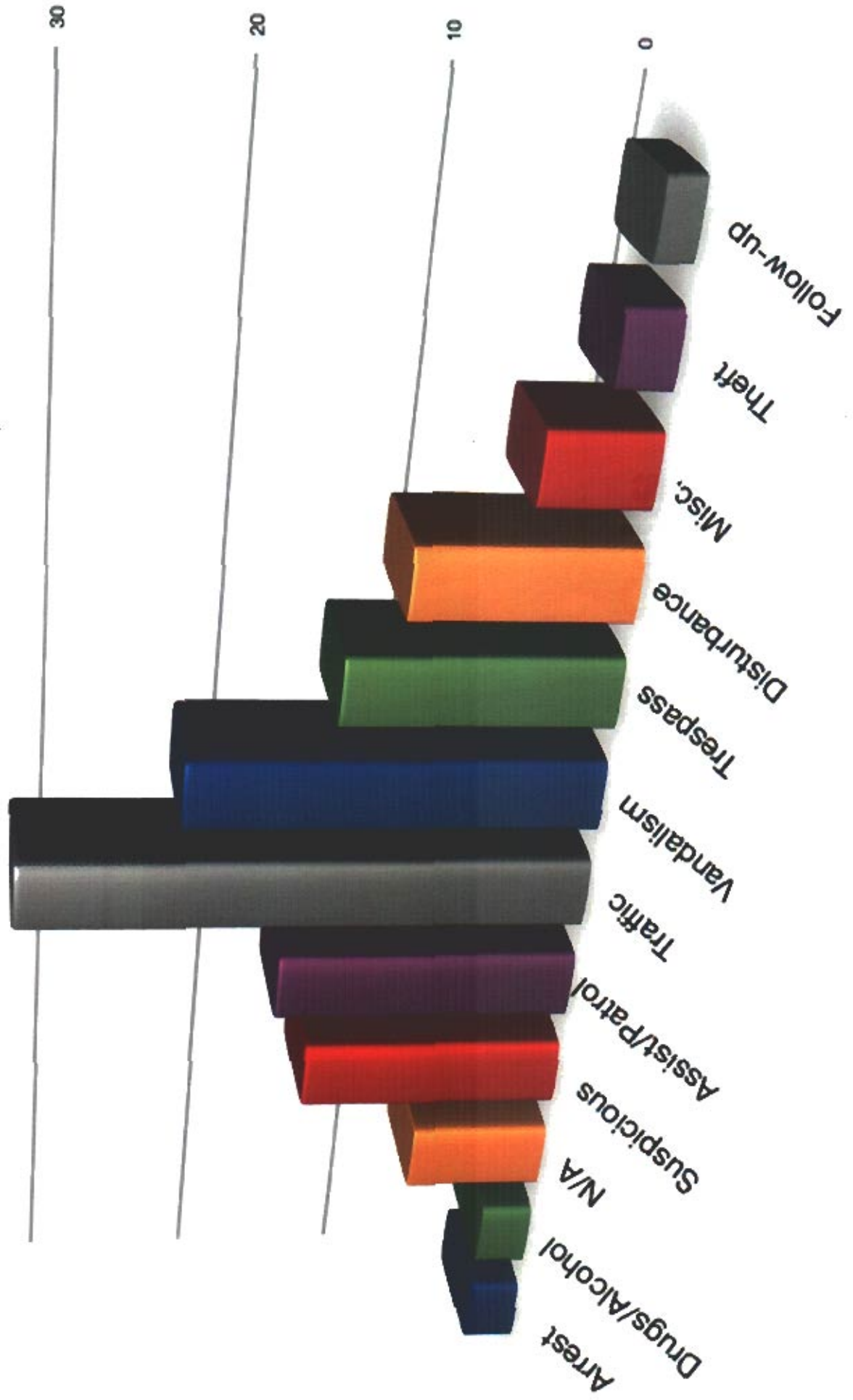
Item	Date	Time	Location	Description	Call or Report	Arrest	Other
1	3/3/ 2010 Wednesday	11:10 am	Selva/PCH	vandalism	report	arrest	teens throwing rocks at fence
2	1/10/2010 Sunday	4:30 pm	Cove/Green Lantern HillTop Park	trespass	report	arrest	walked off nature trail
3	8/28/ 2009 Friday	6:45 am	Selva/Dana Strand	trespass/ vandalism	report	arrest	construction site/ disgruited employee
4	8/18/2009 Tuesday	6:30 pm - 6:00 am	34352 Dana Strands Headlands Reserve	vandalism	report	no	construction site/ graffiti
5	7/22/2009	12pm-3pm	Headlands Reserve PCH/Selva	vandalism	report	no	construction site/graffiti
6	4/22/08- 4/23/09	9pm-5am	Selva/Dana Strand Rd.	theft	report	no	construction site/ sprinklers
7	12/21/08- 12 22/08	1am-1am	Ocean Front Lane	vandalism	report	no	crayons & paint

Item	Date	Time	Location	Description	Call or Report	Arrest	Other
8	7/30/08	unknown	unclear	unclear	n/a	no	not a police report *
9	2/15/09	4pm-12am	Whitewater	vandalism	report	no	construction site
10	3/30/07 - 3/31/07	9am-4 am	Selva/Dana Strand Rd.	vandalism	report	no	construction site/graffiti
11	3/15/07- 3/16/07	8pm- 7:15 am	34352 Dana Strand Headlands Reserve	vandalism	report	no	construction site/graffiti
12	2/22/07- 2/23/07	5pm- 12pm	34352 Dana Strands Headlands Reserve	vandalism	report	no	construction site/graffiti
13	11/3/06- 11/04/06	6pm-8am	33900 blk Selva Rd/ La Cresta	vandalism	report	no	construction site/graffiti
14	1/6/08- 1/7/08	6pm- 11:30am	24200 Selva Rd/ Chula Vista Ave	vandalism	report	no	construction site/graffiti
15	10/6/05- 10/7/05	unknown	Dana Strands/Selva Rd	vandalism	report	no	n/a
16	8/15/05	unknown	23920 Selva Rd/ Chula Vista Ave	vandalism	report	no	construction site/graffiti

* Item 8 appears to be a report by CSP, a security service employed by the Headlands LLC. A sub contractor was fired for admitting unauthorized vehicles into the gated residential community. This should not be included as a police report.

Summary of Police Calls

August 2005 - March 2010



CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

Th12a

Filed: April 5, 2010
49th Day: May 24, 2010
Staff: Karl Schwing-LB
Staff Report: April 29, 2010
Hearing Date: May 12-14, 2010
Commission Action:

**STAFF REPORT:****APPEAL - SUBSTANTIAL ISSUE & DETERMINATION ON CLAIM OF EXEMPTION****LOCAL GOVERNMENT:** City of Dana Point**LOCAL DECISION:** Claim of Exemption from Coastal Development Permit Requirement**APPEAL NUMBER:** A-5-DPT-10-082**APPLICANT:** City of Dana Point**PROJECT LOCATION:** In the Vicinity of Strand Vista Park, incl. South Strand Switchback Trail, Mid-Strand Beach Access, Central Strand Beach Access, and Strand Beach Park, Dana Point Headlands, Dana Point, Orange County**PROJECT DESCRIPTION:** Appeal of decision by the City of Dana Point to exempt from coastal development permit requirements the implementation of operational hours and installation of enforcement devices including gates and signs that restrict public access to public parks, accessways and beaches.**APPELLANTS:** Surfrider Foundation
Ms. Vonne Barnes
Coastal Commissioners Bloom & Wan**SUMMARY OF STAFF RECOMMENDATION**

This matter is an appeal of the City's decision not to require a coastal development permit for closure of public beach accessways during evening, nighttime, and early morning hours and/or for installation of gates and signage to implement those closures. The City's decision is based on a claim that implementation of the accessway closures is exempt from coastal development permitting requirements because the City's action is a necessary action to abate a public nuisance. The appellants contend that implementing the ordinance would constitute non-exempt "development" as defined in both the City's certified Local Coastal Program (LCP) and the Coastal Act and so a coastal development permit should have been required. The appellants also contend that the City's action goes beyond abating a nuisance. In addition, the appellants contend that the development, limiting access to public beaches, is inconsistent with the public access and recreation policies of both the City's certified LCP and the Coastal Act. Section 30625 of the Coastal Act allows an appeal of a claim of exemption by a local government. Pursuant to Coastal Act Section 30603(b) the grounds upon which an appeal can be filed are limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in the Coastal Act.

Commission staff agrees that the appeals raise a substantial issue. In particular, the implementation measures that the City has adopted to abate the nuisance do much more than simply abate the nuisance. They also significantly restrict a wide range a lawful conduct that is protected under the Coastal Act. Because the measures go significantly beyond mere

abatement of a public nuisance and because they qualify as non-exempt development, they are subject to the Coastal Act's permitting requirements. Therefore, Commission staff recommends that the Commission determine that a **SUBSTANTIAL ISSUE** exists with respect to the grounds on which the appeals have been filed. In addition, Commission staff recommends that the Commission **DENY THE CLAIM OF EXEMPTION** and find that the implementation of the ordinance requires a coastal development permit (or permit amendment), and return this matter to the City for appropriate processing. The **motions** to carry out the staff recommendation are on **pages 2 and 3**.

SUBSTANTIVE FILE DOCUMENTS:

1. City of Dana Point Certified Local Coastal Program.
2. Revised Findings in Support of the Commission's Approval of City of Dana Point LCP Amendment 1-03, adopted by the Commission in August 2004
3. Staff reports/findings for CDP 6-93-160/6-96-022 (City of Coronado), 5-93-232 (City of Long Beach) and amendments

LIST OF EXHIBITS:

- 1.a. Vicinity Map
- 1.b. Land Uses
- 1.c. Trail and Park Areas
- 2.a. City of Dana Point Urgency Ordinance 10-05 adopted 3/22/2010
- 2.b. City of Dana Point Urgency Ordinance 09-05
3. Appeal by Ms. Vonne Barnes
4. Appeal by Surfrider Foundation (contains City staff report & attachments (e.g. police reports) relative to adoption of the urgency ordinance)
5. Appeal by Commissioners Richard Bloom and Sara Wan
6. Letter from Commission staff to City dated October 20, 2009
7. Notice of Violation to City dated November 20, 2009
8. Follow-up letter regarding violation dated March 4, 2010
9. Letter from Commission staff to City Council dated March 22, 2010

I. STAFF RECOMMENDATION ON SUBSTANTIAL ISSUE & CLAIM OF EXEMPTION

MOTION #1: *I move that the Commission determine that Appeal No. A-5-DPT-10-082 raises NO substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

STAFF RECOMMENDATION:

Staff recommends a **NO** vote. Failure of this motion will result in a de novo hearing on the claim of exemption, and adoption of the following resolution and findings. Passage of this motion will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

RESOLUTION TO FIND SUBSTANTIAL ISSUE:

The Commission hereby finds that Appeal No. **A-5-DPT-10-082** presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30625 of the Coastal Act regarding the claim of exemption.

MOTION #2: *I move that the Commission approve Claim of Exemption No. A-5-DPT-10-082 for the development proposed by the applicant.*

STAFF RECOMMENDATION OF DENIAL:

Staff recommends a **NO** vote. Failure of this motion will result in denial of the claim of exemption and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE CLAIM OF EXEMPTION:

The Commission hereby denies the claim of exemption for the proposed development on the ground that the development is not exempt from the permitting requirements of the Coastal Act.

II. APPEAL PROCEDURES

Location of Appealable Actions & Grounds for Appeal

After certification of Local Coastal Programs, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits and claims of exemption. Developments approved by cities or counties may be appealed if they are located within the appealable areas, such as those located between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide of the sea where there is no beach, which ever is the greater distance. Furthermore, developments approved by counties may be appealed if they are not designated "principal permitted use" under the certified LCP. In addition, any local government action on a proposed development that would constitute a major public work or a major energy facility may be appealed, whether approved or denied by the city or county. [Coastal Act Section 30603(a)]. Finally, Section 30625 provides that any "claim of exemption from coastal development permit requirements" may be appealed to the Coastal Commission. Section 30625 of the Coastal Act is as follows:

(a) Except as otherwise specifically provided in subdivision (a) of Section 30602, any appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body may be appealed to the commission by an applicant, any aggrieved person, or any two members of the commission. The commission may approve, modify, or deny such proposed development, and if no action is taken within the time limit specified in Sections 30621 and 30622, the decision of the local government or port governing body, as the case may be, shall become final, unless the time limit in Section 30621 or 30622 is waived by the applicant.

(b) The commission shall hear an appeal unless it determines the following:

...

(2) With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

*...
(c) Decisions of the commission, where applicable, shall guide local governments or port governing bodies in their future actions under this division.*

This action is appealable because the subject site is located between the sea and the first public road, is within 300 feet of the mean high tide line of the sea, and is within 300 feet of the top of the seaward face of a coastal bluff.

Hearing Process and Qualifications to Testify before the Commission

The action currently before the Commission is to find whether there is a "substantial issue" or "no substantial issue" raised by the appeal. Section 30625(b)(2) of the Coastal Act requires the Commission to hold a de novo hearing on the matter appealed unless the Commission determines that no substantial issue exists with respect to the grounds for appeal. If the Commission finds no substantial issue, then the local government action becomes final.

If Commission staff recommends a finding of substantial issue, as it has in this case, and there is no motion from the Commission to find no substantial issue, the appeal will be presumed to raise a substantial issue, and the Commission will proceed to the de novo phase of the public hearing on the issue of whether a coastal development permit is required to implement the urgency ordinance. The de novo phase of the public hearing on the matter appealed uses the certified LCP as the standard of review. In addition, for projects located between the first public road and the sea, findings must be made that any approved development is consistent with the public access and recreation policies of the Coastal Act. Sections 13110-13120 of the California Code of Regulations further explain the appeal hearing process.

If the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The Chair will set the time limit for public testimony at the time of the hearing. As noted in Section 13117 of Title 14 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the appeals.

If the appeals are found to raise a substantial issue, at the de novo phase of the hearing on the claim of exemption, all interested persons who submit timely requests to the Commission Chair may speak when called upon during the public hearing.

Factors to be Considered in Substantial Issue Analysis

Section 30625 of the Coastal Act states that the Commission shall hear an appeal of a local government action unless it finds that no substantial issue exists with respect to the grounds on which the appeal has been filed. The term "*substantial issue*" is not defined in the Coastal Act. Section 13115(b) of the Commission's regulations indicates that the Commission will hear an appeal

unless it finds that the appeal raises no significant question as to conformity with the certified LCP or there is no significant question with regard to the public access policies of Chapter 3 of the Coastal Act. In previous decisions on appeals, the Commission has been guided by the following factors.

1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the Local Coastal Program and the public access policies of the Coastal Act;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and,
5. Whether the appeal raises local issues, or those of regional or statewide significance.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing petition for a writ of mandate pursuant to Code of Civil Procedure, Section 1094.5. Staff is recommending that the Commission find that **a substantial issue** exists for the reasons set forth below.

III. APPELLANTS' CONTENTIONS

The appellants contend that the City's claim of exemption from coastal development permit requirements is not consistent with the requirements of either the City's certified Local Coastal Program or the Coastal Act; and, further, that implementation of the operational hours and installation of enforcement devices including gates and signs that restrict public access as allowed in the City's Urgency Ordinance would have adverse impacts on public access and recreation, inconsistent with the City's certified LCP and the Coastal Act. The appellant's contentions are summarized below. The appeals are attached as Exhibits 3-5.

1. Implementation of the 'urgency ordinance' constitutes "development" as defined in both the City's certified Local Coastal Program (LCP) and Coastal Act. This development is not exempt and requires a coastal development permit. (CCC, Surfrider Foundation)
2. The hours of operation approved by the City have adverse impacts on public access & recreation. (CCC, Barnes, Surfrider Foundation)
3. Existing signs placed by the City to implement the ordinance are misleading and incomplete, resulting in adverse impacts on public access and recreation. (CCC)
4. The City's use of a nuisance abatement declaration is inappropriate and overly broad. The coastal development permit process should be used instead to ensure that an even handed approach is used to address problematic behavioral issues and to ensure that impacts are mitigated. (CCC)

5. Cumulative adverse impacts on public access would result from expanded use of nuisance abatement to address conditions at public accessways elsewhere in the City and other areas of the California coast. (CCC, Barnes, Surfrider Foundation)
6. Gates the City has installed or intends to install to implement the ordinance are inconsistent with LCP policies that prohibit such gates and inconsistent with LCP language requiring that all public beach accessways conspicuously invite and encourage maximum public use. (CCC, Surfrider Foundation)
7. The imposition of restrictive hours and gates on these public accessways undermines the basis on which the Commission found the Headlands Development and Conservation Plan to be approvable under the Coastal Act. Thus, the entire Headlands development has been rendered inconsistent with the Coastal Act. (CCC, Surfrider Foundation)
8. The City's use of a 'nuisance abatement' declaration in this case is an effort to circumvent the requirements of the Coastal Act and evade the authority of the California Coastal Commission. (Barnes)
9. There is no evidence of unlawful activities to support the City's declaration of a nuisance at the subject accessways and parks. Evidence supplied does not support the City's findings (Barnes, Surfrider Foundation)
10. The urgency ordinance violates the requirements of the California Environmental Quality Act (CEQA). (Barnes)
11. Reduction of public access to and use of the Mid-Strand Vista Point Accessway (MSVPA) for a cumulative period of 228 days of closure per year is a significant loss of public access. (Barnes)
12. The 'alternative' access identified by the City available when the other accessways are restricted are not equivalent given the substantial distance between the closed accessways and the alternative accessway. (Barnes)
13. Restriction and closure of the subject accessways will result in overuse of parking resources at the alternative accessway. (Barnes)
14. Restriction and closure of the MSVPA, Strand Vista Park, and Central Strand Vista Park Access will impact public access to and use of other accessways that the MSVPA, Strand Vista Park, and Central Strand Vista Park Access provide linkage to. (Barnes)
15. Limitations on use of the accessways could potentially increase use at the accessways to which the public would be redirected as a result of the proposed restrictions. The cumulative effect of this approach could lead to overuse by the public of a single recreational area. (CCC)
16. The rock revetment construction along Strand Beach to protect the new development has caused significant loss of the beach seaward of it, thus the only available lateral public access is now the new public walkway on top of the revetment, and that access will now be restricted by the City's urgency ordinance. (Barnes)

The appellants do not contend that the City Council's adoption of the ordinance itself constitutes 'development' (as that term is defined in the Coastal Act and LCP). Rather, it is implementation of the Ordinance that would change the intensity of use of water, or of access thereto. Thus, it is **implementation** of the Ordinance and construction of signs, gates and other "enforcement devices" described therein that constitutes development and triggers the requirement for a coastal development permit.

IV. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Description of Location of Affected Area and the 'Urgency Ordinance'

On March 22, 2010, the Dana Point City Council approved an "urgency ordinance", Ordinance No. 10-05 (Exhibit 2a), to establish operational hours and to install enforcement devices including gates and signs that restrict public access to public parks, accessways and beaches in the vicinity of Strand Vista Park, including South Strand Switchback Trail, Mid-Strand Beach Access, Central Strand Beach Access, and Strand Beach Park, at the Dana Point Headlands (see Exhibits 1a, 1b, 1c). The urgency ordinance orders the following:

- Mid-Strand Beach Access and Central Strand Beach Access are only open between 8:00 a.m. and 7:00 p.m. from May 1st through September 30th, and from 8:00 a.m. to 5:00 p.m. the remainder of the year. Gates and signs will be used to enforce these hours;
- South Strand Beach Access (i.e. switchback trail) is open from sunrise to sunset throughout the year;
- Strand Beach Park (i.e. lateral accessway on top of rock revetment) is open from sunrise to sunset throughout the year.

With regard to the South Strand Beach Access and Strand Beach Park, the ordinance states specifically that signs will be utilized to identify the hours. However, elsewhere in the ordinance, the document states that the City deems the use of gates to be essential to nuisance abatement and prohibition. Thus, City placement of gates remains a possibility at these locations as well.

The ordinance goes on to state that "...all text of Title 13, Chapter 13.04, which remains unchanged by this ordinance, including specifically text adopted by the passage of Ordinance 09-05, is hereby readopted and reaffirmed, and the entirety of the text (as amended hereby) is deemed to be necessary to prohibit and abate public nuisances that would otherwise exist...". Ordinance 09-05 (Exhibit 2b), identifies the closure of all City parks between the hours of 10:00 p.m. and 6:00 a.m., with certain exceptions that are even more restrictive for certain parks in the City, including parks that are at the Dana Point Headlands. With regard to the parks at the Headlands, in addition to the restrictions noted above at the Mid-Strand, Central Strand, and South Strand Beach Accessways and the Strand Beach Park, Ordinance 09-05 orders the following:

- Hilltop Park and Harbor Point Park are open between 7:00 a.m. and sunset, all year;
- Nature Interpretive Center and Parking Lot are open Tuesday-Sunday 10:00 a.m. to 5:00 p.m.;

- Strand Funicular is open daily from sunrise to sunset from Memorial Day through Labor Day; and from sunrise to sunset on weekends and holidays the rest of the year.

The City has not approved a local coastal development permit, or permit amendment, in conjunction with its approval of the urgency ordinance. In its adoption of the urgency ordinance, the City took the position that this establishment of closing times and the installation of 'enforcement devices' is exempt from coastal development permit requirements because the City found these actions to be 'nuisance abatement'. The City has also taken the position that the gates were authorized in the City's coastal development permit for the Dana Point Headlands project.

Subsequently, an appeal period was set up beginning on March 23, 2010 and ending on April 6, 2010. Three appeals of the City's decision were timely filed on the City's action.

Background

The parks and accessways that are the subject of this appeal are located in an area known as the Dana Point Headlands, in the City of Dana Point, Orange County. In the late 1980's, Dana Point incorporated as a City and soon thereafter, on September 13, 1989, obtained certification of its Local Coastal Program, which only covered portions of the City. In 2004-2005, the Commission reviewed and approved LCPA 1-03, which amended the Dana Point Local Coastal Program (LCP) to certify a new plan (called the Headlands Development and Conservation Plan, or HDCP) for the 121.3 acre Dana Point Headlands project site. That plan, among other things, allowed for development of up to 125 single family residential lots, a maximum of 110,750 square feet of visitor serving commercial land use including a 65-90 room inn, a 35,000 square foot commercial site with visitor information center and 40-bed hostel and 68.5 acres of public parks, coastal trails and open space, and a funicular (inclined elevator) to serve Strand beach. Shortly after certification, the City approved a coastal development permit (CDP No. 04-23) for the project and development commenced in April 2005.

The subject parks and trails are located within a portion of the project referred to as "the Strand." This area is comprised of an expansive slope/bluff top area developed with a public parking lot and a linear public view park with walkway along the slope/bluff edge known as Strand Vista Park. A residential enclave is under development on the slope/bluff face. At the toe of the slope/bluff face is a rock revetment and sandy beach. These areas are now referenced in the LCP as Planning Areas 1 (Strand Vista Park), Planning Area 2 (Strand Neighborhood (Residential)), and Planning Area 3 (Strand Beach Park (Recreation Open Space)) (Exhibit 1b). The waters offshore are within a Marine Protected Area.

There are several public accessways that provide vertical access to the beach and lateral access along the beach in this area. Along the slope/bluff edge is the recently constructed lateral walkway noted above that is within the Strand Vista Park. Strand Vista Park (Planning Area 1) is a linear-shaped public view park, with a trail along its length parallel to the shoreline that has coastal/ocean views, as well as several nodes with picnic areas and benches. An existing public parking lot, the Salt Creek Parking Lot is located inland of the view park. The park and public parking lot are approximately 1,300 feet long (more than 400 yards long or 4 football fields). Thus, multiple access points to the beach are provided along the length of the park. There are four access points that merge into three vertical access corridors that lead from the Strand Vista Park to a lateral walkway along the top of the rock revetment and ultimately to the sandy beach. There is an access point at the northerly end of the Strand Vista Park, known

as the North Strand Beach Access that is comprised of a stairway and public funicular to the beach. At roughly the mid-point of Strand Vista Park, is the Mid-Strand Vista Park Access (MSVPA), which is a public stairway that provides a connection between the vista park and parking lot to the Central Strand Beach accessway. Next are the Central Strand Beach Access and the South Strand Beach Access. The entry point to the Central Strand Beach access is at the southerly end of Strand Vista Park and the parking lot, adjacent to a private gated roadway that provides vehicular access to the Strand Residential area. The entry point to the South Strand Beach Access is located about 500 feet further south of the southerly end of the Strand Vista Park and parking lot.

Except for the existing North Strand Beach Access, all of these publicly accessible improvements were required by the Commission in conjunction with its certification of LCPA 1-03. These public improvements were required as offsets necessary to mitigate impacts associated with allowing the developer to prohibit public vehicular access into the proposed residential community (however, public pedestrian access was required). These public improvements were also part of a package of public benefits the Commission found were necessary to offset impacts caused by the project and to justify a finding that the proposed project, which has adverse impacts to ESHA, public access, visual resources, shoreline processes, among other impacts, is, on balance, consistent with the Coastal Act.

The City's latest action would impose strict closures on all of the accessways noted above (except for the North Strand Beach Access, which is managed by the County, not the City), such that the public would only be allowed to use most of the accessways during the daytime, and further prohibited from using two of the accessways during daylight hours by opening as late as 8 a.m. (well after sunrise) and closing as early as 5 p.m. (well before sunset).

B. Substantial Issue Analysis

As stated in Section II of this report, the grounds for appeal are specific when a party appeals an action by a local government that has a certified Local Coastal Program. In this case, the City's determination that its actions to implement the urgency ordinance are exempt from coastal development permit requirements may be appealed to the Commission. In addition, the effects of the City's action for which no coastal development permit was required must be considered on the grounds of whether it conforms to the certified Local Coastal Program and with the public access and recreation policies of the Coastal Act. Unless the Commission finds that the appeals do not raise any substantial issues, the Commission must consider the City's claim of exemption de novo.

In making the substantial issue assessment, the Commission typically considers whether the appellants' contentions regarding the inconsistency of the local government action with the certified LCP or the Coastal Act raise significant issues in terms of the extent and scope of the approved development, the support for the local action, the precedential nature of the project, whether a significant coastal resource would be affected, and whether the appeal has statewide significance.

In this case, the appellants contend that the City's decision that no coastal development permit is required and implementation of its adoption of 'urgency ordinance' do not conform to the requirements of the certified LCP or with the public access and recreations policies of the Coastal Act.

All of the appellants' contentions stated in Section III. except for #10 are considered valid and will be addressed in detail in Section 1 (below). Of the valid appeal contentions raised, Commission staff recommends the Commission find that a substantial issue exists with respect to the grounds on which the appeals have been filed. The one invalid contention is addressed in section 2 (below)

1. Valid Contentions – Substantial Issue

In this case, the appellants contend that, first, the City's action to not require a coastal development permit is inconsistent with the certified LCP, and that second, if the Ordinance were to be implemented it could not be found to conform to the requirements of the certified LCP regarding public access and recreation. In addition, the appellants contend that the City's approval of the proposed project is inconsistent with the public access and recreation policies of the Coastal Act.

As explained in the de novo section of these findings, implementation of the accessway closure hours and installation of the gates and signs qualifies as non-exempt development. In addition, the LCP provides that limitations on time of use of recreation and access opportunities at public beaches and parks at the Headlands shall be subject to a coastal development permit. [LUE Policy 5.31.] Contrary to the City's contention that the CDP for the Dana Point Headlands project authorized installation of the gates, neither the City's findings regarding the CDP nor the project plans expressly identified the gates at issue here. This silence is significant given the express restrictions in the LCP regarding gates that limit pedestrian access and given that the CDP findings and project plans clearly identified other gates that were expressly authorized in the LCP.

With regard to the degree of factual and legal support for the local government's decision – the City has provided little factual support for the extensive closure of the subject areas. The City's claim that implementation of the ordinance does not constitute development, as described elsewhere in this report, is not accurate. Furthermore, the City's claim that even if implementing the ordinance did constitute "development," a coastal development permit would not be required because the City's action is necessary to abate a public nuisance, raises significant questions. As explained in the de novo section of these findings, the City's nuisance declaration is not sufficient to entirely exempt measures to implement the urgency ordinance from coastal development permitting requirements. Therefore, adequate factual and legal support for the City's decision is poor.

The extent and scope of the development is significant. Public access and recreation are among the Coastal Act's highest priorities. The legislature expressly stated in Section 30001.5 of the Coastal Act that one of the state's primary goals in the coastal zone is to "[m]aximize public access to and along the coast and maximize public recreational opportunities in the coastal zone." Limiting such uses must be very carefully considered and only the minimum limitation necessary to protect public safety or other valid need should be allowed. For example, in the City of Coronado, the Commission approved a beach curfew for a portion of beach where fire rings were located. The City had requested a much broader curfew area, but the Commission authorized the more limited area as that was the area where public safety issues had been demonstrated, and allowed for removal of some fire rings from a particularly problematic area (see CDP 6-93-160/6-96-22 (City of Coronado)). The restriction was also only allowed to be in place for a pilot period, after which time the need would be reviewed. Another

example like this occurred in the City of Long Beach (see CDP 5-93-232 (City of Long Beach) and amendments). In this case, the hours of closure are broader than necessary. Such broad closure cannot be found to be consistent with either the City's LCP or the Coastal Act. Furthermore, as explained in the de novo section of these findings, the use of gates to enforce closure hours is flatly inconsistent with the LCP. Thus, the extent and scope of the development is broad and therefore does raise a substantial issue.

The coastal resources affected by the City's action, public access and recreation, are significant resources. Strand Beach is a particularly popular recreational beach, especially with surfers. Based on the observations of the public, the use of this beach has expanded, especially in the central and southerly parts of the beach (closest to the Headlands promontory), since opening the accessways and support facilities (e.g. restrooms) that are a part of the Headlands development. Also, with the new revetment-top access, more people, of varying physical capabilities, are now able to make use of the central and southerly areas of the beach than were able to do so prior to the construction of that access because there is now easier passage via the hardened walkway (instead of over the sand), and because the walkway provides lateral access to wider areas in the central and southerly parts of the beach that would otherwise become periodically difficult to access or were inaccessible due to high tides and waves striking against the revetment. That access would be diminished by the gates and restrictive hours. The existing North Beach Access, which isn't affected by the urgency ordinance, doesn't provide equivalent access to the central and southerly beach areas. The City's action would result in adverse impacts to public access and recreation to and along Strand Beach Park. Therefore, the appeals do raise a substantial issue with regard to protection of significant coastal resources.

The City's action does raise significant questions of new precedents with regard to future interpretations of the LCP. The Commission has approved permit applications for limited restrictions on beach access hours that are tailored to address the documented concerns of different localities (e.g. 6-93-160 (City of Coronado)). The City's assertion that implementing an ordinance that limits public beach access does not constitute development raises significant issues for future actions. Moreover, the City's claim that no coastal development permit is required because the action is necessary to abate a public nuisance is also a significant issue. If other localities also seek to circumvent Coastal Act permitting requirements, the Commission's ability to carry out its duty to ensure that Coastal Act and LCP policies protecting public access and recreation are implemented will be significantly constrained. Thus, the appeal does raise a substantial issue with regard to future interpretations of the LCP.

Maximizing public access and recreation are issues of regional and statewide significance. The City's action is problematic in that no coastal development permit was required for an action that will limit public access. The City has indicated that the limits on public access and recreation are required in order to assure public safety. However, the limits imposed by the City's action are not the least necessary to protect public safety. All limits on public access and recreation are significant, but especially in a case like this where the access being limited is the very same access the Commission found was necessary to even authorize the residential development through which public access is required. Thus, the appeal does raise a substantial issue of statewide and regional significance.

2. Invalid Contentions

Not all of the contentions raised by the appellants can be considered valid appeal grounds, as the grounds for an appeal are limited to an allegation that the development does not conform to the certified LCP or the public access policies of the Coastal Act.

- The urgency ordinance violates the requirements of the California Environmental Quality Act (CEQA). (Barnes)

An allegation that a local government has not complied with CEQA does not relate to conformity with the certified LCP or the public access policies of the Coastal Act and is therefore not a valid ground for appeal to the Commission.

V. FINDINGS AND DECLARATIONS FOR DE NOVO HEARING ON CLAIM OF EXEMPTION

The Commission hereby finds and declares as follows:

A. Project Description and Location

The project description and location is hereby incorporated by reference from Section IV of Substantial Issue portion of this staff report on pages 7 thru 9.

B. Coastal Development Permit Required

Pursuant to Section 9.27.010 of the City of Dana Point Zoning Code (Title 9), a coastal development permit, subject to the standards of the specific zoning designation, is required for all “development” within the Coastal Overlay (“CO”) District. “Development” is defined in Section 9.75.040 of the City’s zoning code as:

Development, Coastal — the placement or erection, on land, in or under water, of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto, construction, reconstruction, demolition, or alteration of the size of any structure; including any facility of any private, public, or municipal utility; and the removal of harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provision of the Z’berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511). As used in this section, “structure” includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line. (emphasis added)

This definition corresponds to the Coastal Act’s definition of development at Section 30106. Implementation of the urgency ordinance approved by the City Council would have the effect of

"changing the intensity of use of water, or of access thereto" because it limits access to the beach. In addition, the installation of 'enforcement devices' such as gates and signs is "the placement or erection, on land...of any solid material or structure...", so it too is development. Thus, the installation of gates on public coastal accessways, closure of the beach accessways through establishment of hours of operation by ordinance, and installation of signs displaying the hours of closure of accessways meets the definition of development as defined in the City's certified LCP. The above-mentioned gates and signs which limit or restrict public beach access are: 1) located within the CO District; 2) are not authorized by Coastal Development Permit ("CDP") No. 04-23 (or any other coastal development permit) and; 3) are not exempt.

In addition, the LCP provides that limitations on time of use of recreation and access opportunities at public beaches and parks at the Headlands shall be subject to a coastal development permit. [LUE Policy 5.31.] The City's implementation of hours of operation on the City's accessways to the beach at the Headlands constitutes a limitation on the time of use of the public beach and therefore requires a coastal development permit.

Contrary to the City's contention that the CDP for the Dana Point Headlands project authorized installation of the gates, neither the City's findings regarding the CDP nor the project plans expressly identified the gates at issue here. This silence is significant given the express restrictions in the LCP regarding gates that limit pedestrian access and given that the CDP findings and project plans clearly identified other gates that were expressly authorized in the LCP.

Section 30610 of the Coastal Act, and Section 9.69.040 of the City's Local Coastal Program, identifies categories of development that are exempt from the Act's permitting requirements. The only potentially applicable exemption is the exemption for improvements to structures other than single-family residences. Pursuant to Section 30610(b), however, that exemption does not apply to types of improvements identified in the Commission's regulations that adversely affect public access. Section 13253(b)(7) of the Commission's regulations provides that improvements that change the intensity of use of a structure are not exempt (see also Section 9.69.040 of the City's Local Coastal Program). The signage and gates restricting the hours of operation of the accessways change the intensity of use and adversely affect public access. They therefore are not exempt.

The measures required by the City to implement the urgency ordinance therefore constitute development under the Coastal Act and the City's local coastal program ("LCP") and require a coastal development permit or an amendment to CDP No. 04-23.

As discussed further below, although the Coastal Act does not limit the City's power to declare and abate nuisances, the implementation measures the City is requiring here go far beyond the scope of the identified nuisance and significantly restrict lawful activities that are protected under the Coastal Act. The City's implementation measures to restrict those lawful, non-nuisance activities remain subject to the requirements of the Coastal Act.

Therefore, for the reasons described above, the City's determination that no coastal development permit is required to implement the subject 'urgency ordinance' is not consistent with the certified LCP provisions and thus the Commission finds the City's claim of exemption is erroneous, and that a coastal development permit is required.

C. Impacts Associated with the Development

As described above, implementation of 'urgency ordinance' approved by the City of Dana Point City Council, constitutes development as defined in the certified LCP and in the Coastal Act. As such, review of the merits of the development is appropriate. Whether the development allowed under 'urgency ordinance' can be found consistent with the City's certified LCP and the public access and recreation policies of the Coastal Act is considered below.

The effects on public access arising from implementing the ordinance must be considered. The standard of review for all development located between the sea and the first public road paralleling the sea includes the public access and recreation policies of the Coastal Act. Coastal Act Section 30210 states:

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

Further, Coastal Act Section 30212.5 states:

Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

The Coastal Act includes Sections 30220, 30221, and 30223 which promote public recreational opportunities. The gates and hours of operation adversely impact, rather than maximize, public access.

The Coastal Act's protections for public access and recreation, however, are not absolute. Section 30214 provides:

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

- (1) Topographic and geologic site characteristics.*
- (2) The capacity of the site to sustain use and at what level of intensity.*
- (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.*
- (4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.*

(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the

rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

(c) In carrying out the public access policies of this article, the commission and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management costs and encourage the use of volunteer programs.

Relevant policies from the certified Local Coastal Program, include but are not limited to the following:

Land Use Element Policy 5.9: Provide public trails within the Headlands. The system shall provide access to the existing sandy beach areas, including but not limited to a minimum of three (3) public accessways, and an inclined elevator/funicular, from Selva Road, through the Strand area, to the beach, and to the visitor-serving recreational and public places developed within the Headlands.

LUE Policy 5.13: Create new public view and coastal access opportunities by establishing additional public shoreline access, an integrated, on-site public trail system, and coastal recreational facilities. (Coastal Act/30212, 30222, 30251)

LUE Policy 5.15: Provide non-vehicle circulation throughout the Headlands by establishing an interconnected network of trails, walkways and bikeways. (Coastal Act/30252)

LUE Policy 5.18: Provide public recreational opportunities and distribute visitor-serving recreation facilities in appropriate areas compatible with adjacent uses and to minimize the potential for overuse of any single area by the public. (Coastal Act/ 30212.5, 30252)

LUE Policy 5.31: Recreation and access opportunities at public beaches and parks at the Headlands shall be protected, and where feasible, enhanced as an important coastal resource. Public beaches and parks shall maintain lower-cost user fees and parking fees, and maximize hours of use to the extent feasible, in order to maximize public access and recreation opportunities. Limitations on time of use or increases in user fees or parking fees shall be subject to a coastal development permit. (Coastal Act/30210, 30212, 30213, 30221) [emphasis added]

LUE Policy 5.35: Except as noted in this policy, gates, guardhouses, barriers or other structures designed to regulate or restrict access shall not be permitted upon any street (public or private) within the Headlands where they have the potential to limit, deter, or prevent public access to the shoreline, inland trails, or parklands. In the Strand residential area, gates, guardhouses, barriers and other structures designed to regulate or restrict public vehicular access into the residential development may be authorized provided that 1) pedestrian and bicycle access from Selva Road and the County Beach parking lot through the residential development to the beach remains unimpeded; 2) a public access connection is provided that gives direct access from approximately the mid-point of the County Beach parking lot to the Central Strand Access; and 3) an

inclined elevator/funicular providing mechanized access from the County Beach parking lot to the beach is constructed, operated and maintained for public use for the duration of the period that public vehicular access through the residential subdivision is regulated or restricted.

The City has asserted that the hours of operation it has set for the Mid-Strand and Central Strand accessways, at 8:00 am to 5/7:00 pm (depending on the season), are necessary because the presence of public accessways in a residential community creates significant safety issues. The mere presence of a public accessway in a residential neighborhood is not a public safety issue. There are many such accessways in residential neighborhoods along the California coast that present no more of a safety issue than accessways located in non-residential areas. If free of view obstructing vegetation, the accessways are accessible to monitoring from multiple vantage points during daylight hours, and if adequately lit, at all hours. For instance, the MSVPA, Central Strand and South Strand accessways can be seen from the lateral accessway in Strand Vista Park from many vantages. Parts of these accessways are also visible from the walkway on top of the revetment. Where visibility is limited along some of the accessways, those areas become visible once on the accessway itself. In addition, these hours prevent the public from gaining access to State tidelands via these accessways even during daylight hours, which can be as early as 5am and as late as 9pm during some times of the year. In fact these hours are far more restrictive even than the hours listed on the sign for Strand Vista Park, which are 6am to 10pm.

The proposed signage prohibits public use of the Mid-Strand Vista Park Accessway and Central Strand Access earlier than the other vertical accessways in the project area but includes a sign indicating that alternative vertical access (free funicular) exists 200 yards away. However, that signage neglects to inform the public of the fact that the funicular is open only on weekends and holidays nine months of the year, and is only open from sunrise to sunset when it is open. In addition, the signage for the funicular itself is misleading in that it suggests beach access is limited to the hours of the funicular. Other signage present is also misleading and adversely affects public access¹. In summary, the combination of gates, hours of operation and signage proposed by the City does not maximize public access opportunities, as required by the certified LCP and the Coastal Act.

Moreover, the gates are inconsistent with the access policies of the HDCP. HDCP Section 3.4.A.6 expressly prohibits gates or other development in Planning Areas 2 and 6 that restrict public pedestrian and bicycle access. Section 3.4.A.6 reads in pertinent part:

Gates, guardhouses, barriers or other development designed to regulate or restrict public access shall only be allowed in conjunction with a public funicular in Planning Area 1 providing mechanized public access from the County beach parking lot to the beach. Only public vehicular access may be restricted. Public pedestrian and bicycle access shall not be restricted. [underlining added for emphasis]

All development must be consistent and comply with the requirements of the HDCP. The pedestrian gates are clearly inconsistent with the HDCP.

¹ For example, there is a sign near the intersection of the Central Strand Access and the Strand Beach Park accessway on top of the revetment which reads "stay on the sidewalk" which suggests that pedestrians cannot access the beach via the accessway.

The proposed hours of operation limit public access to a greater degree than anticipated or allowed by the policies of the certified LCP and the public access and recreation policies of the Coastal Act and should not be permitted. Nor are the hours consistent with public access policies of the Headlands Development and Conservation Plan, including Section 4.4, which specifies that trails will maximize public coastal access.

The Commission does not question that the Coastal Act does not limit the power of the City to declare and abate nuisances. The Commission also does not question that some of the conduct that the City has identified as constituting a public nuisance can qualify as a nuisance. The measures the City has required to abate the nuisance, however, go far beyond abating the identified nuisance and significantly restrict lawful activities that the City has not declared to be a nuisance and that are protected under the Coastal Act. They also go beyond the kind of targeted police measures that local governments, including the City, frequently adopt and which the Commission has not treated as subject to the Coastal Act's permitting requirements. In addition, the Coastal Act allows for case-by-case restrictions on public access and the Commission has approved permits for such restrictions (e.g. 5-93-232 (City of Long Beach) and amendments, 6-93-160/6-96-022 (City of Coronado)). Because of the possibility of restrictions sweeping much more broadly than is necessary to address legitimate concerns regarding unlawful conduct, the permit process is crucial to ensuring that an appropriate balance is struck.

The police reports and calls for service the City considered in finding that a nuisance exists show that the chosen method of abatement goes beyond the nuisance activities identified in the reports. In support of its claim, the City provided copies of police reports and a summary of "calls for police service" that it has documented that relate to the subject area (see Exhibit 4, pages 39 to 99, for copies of police reports, and Exhibit 4, pages 100 to 105, for City-prepared summary table). These reports cover a time period primarily between February 2009 and early March 2010 (some police reports taken between August 2005 and December 2008 were also on the table). The summary table identifies a total of 117 calls and 9 police reports (total 126), over the 12 month period between February 2009 and February 2010. About 60 of those calls and police reports (less than half) occurred between 5 p.m. and 6 a.m. (i.e. the period that the accessway closures would occur), or about 5 calls or police reports per month involving issues at night. So, on average, there were about 10 calls or police reports per month. About 40 of the 126 calls/reports occurred outside of the area of Strand Vista Park and the accessways (leaving about 87 calls/reports from within the area). Of the 87 calls/reports actually in the area where the City declared a nuisance, 39 occurred during the evening (an average of slightly more than 3 calls per month).

During most of this period, the subject parks and accessways were under construction, and were only opened to public use gradually starting in late 2009. It should also be noted that the police call data supplied does not distinguish between calls that relate specifically to the subject parks and trails and those that relate to the surrounding public parking lots, public roads, areas under construction, and surrounding residential development. A close look at all of the calls reveals that many of them had to do with motor vehicle violations, parking citations, traffic accidents, and suspicious persons sitting in vehicles. In fact, at least 11 of the 39 calls/reports that occurred in the evening in the Strand area had to do with vehicles. The remaining 28 calls/reports had to do with vandalism (5)², undefined disturbance (4), undefined problem (4), suspicious person/circumstances (4), trespassing (4), misdemeanor narcotics/drinking (2), assisting a citizen (1), request for foot patrol (1), report of indecent exposure (1), a call for

² The number shown in parenthesis are the number of calls/reports made of that type of activity.

service at a special event (1), and theft (1). Closing and gating the accessways clearly won't address calls related to suspicious persons sitting in vehicles, traffic stops, auto-related disturbances, traffic accidents, or vehicle code violations. Furthermore, it remains unclear how closing the accessways would address the trespassing and graffiti problem, or any of the other issues identified, especially given the other ways to gain access to the site that do not involve use of the beach accessways.

Mere public use of the accessways is not unlawful behavior nor is the presence of the public *en route* to the beach a "nuisance". In areas where there are demonstrated problems, alternatives to closure to address the problem need to be considered. If there are no feasible alternatives to closure, then, in order to maximize public access, the accessways and parks that are closed must be limited to only those where valid public safety concerns are demonstrated. The hours of closure must be minimized and the length of time that the closure is in place should also be minimized; perhaps for just a "pilot" period after which the need for such closure would be revisited (e.g. 5-93-232 (City of Long Beach), 6-93-160/6-96-022 (City of Coronado)). Finally, appropriate mitigation must be provided for any closures that are ultimately allowed. The coastal development permit provides the process to address these issues and provide a more even handed approach to assure that accessway and park closures are only allowed for legitimate public safety reasons and are not excessively restrictive, thus ensuring maximum public access as required by the Coastal Act and the City's certified LCP.

Gates and restrictive access hours on dedicated public accessways are contrary to the public access requirements of the LCP and the Coastal Act. The local coastal program expressly prohibits gates or other development designed to restrict public access through public accessways to Strand Beach. The presence of gates on these accessways is contrary to the public access improvement goals of both the Coastal Act and the Local Coastal Program. Both a local coastal program amendment and coastal development permit would be needed to authorize such gates.

Finally, the City's action to impose excessively restrictive hours on public use of the accessways and construction of gates at the Headlands undermines the very basis on which the Commission found the Headlands Development and Conservation Plan (HDCP), and the development it describes, to be approvable under the Coastal Act. The development contemplated in that plan, and ultimately approved by the City and built by the developer, was found to be inconsistent with the Coastal Act in a number of ways (see Revised Findings adopted in August 2004 in support of the Commission's approval of the HDCP). The Commission found it could approve the HDCP only by invoking the conflict resolution provisions of the Coastal Act (see PRC §§ 30007.5 and 30200(b)). The coastal accessways that are being gated/restricted by the City, are the very same accessways that the Commission found to be a substantial benefit of the development and contributed to the HDCP and the development it described as being "...on balance ... the most protective of significant coastal resources..." Thus, the restrictions the City has placed on these accessways calls into question the consistency of the entire Headlands development with the Coastal Act.

[Click here to go to the exhibits.](#)