

CALIFORNIA COASTAL COMMISSION

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Item Th 8

Staff: Aaron McLendon-SF
Staff Report: Sept. 27, 2006
Hearing Date: Oct. 12, 2006

STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER

CEASE AND DESIST ORDER: CCC-06-CD-12

RELATED VIOLATION FILE: V-5-06-018

PROPERTY LOCATION: The southwest corner of Humboldt Drive and Saybrook Lane, Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

DESCRIPTION OF PROPERTY: An approximately four-acre common, open space area owned by the homeowners association, within the Tennis Estates residential complex seaward of Humboldt Drive and Saybrook Lane, adjacent to Huntington Harbor in the City of Huntington Beach.

PROPERTY OWNER: Tennis Estates Homeowners Association

VIOLATION DESCRIPTION: Unpermitted removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active Great Blue Heron, Great Egret, and Snowy Egret nesting and roosting.

PERSONS SUBJECT TO THESE ORDERS: Tennis Estates Homeowners Association

SUBSTANTIVE FILE DOCUMENTS: 1. Notice Prior to Issuance of an Executive Director Cease and Desist Order and Notice of Intent to Commence Cease and Desist Order Proceedings, 7/21/06

2. Executive Director Cease and Desist Order No. ED-06-CD-02, July 27, 2006
3. Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist, September 27, 2006
4. Exhibits #1 through #11 of this staff report

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-06-CD-12

Staff recommends that the Commission approve a Cease and Desist Order (as described below) which would require the Tennis Estates Homeowners Association (hereinafter, "TEHOA") to 1) cease and desist from performing unpermitted development including, but not limited to, removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas on property located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach (hereinafter, "subject property"), 2) cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves, and 3) plant a tree of the same species and size as, and in the similar location to, the tree that TEHOA removed without Coastal Act authorization.

The unpermitted development which is the subject of this Cease and Desist Order (hereinafter, "CDO") includes removal of major vegetation consisting of complete removal of one pine tree and removal of many large limbs of the remaining four pine trees that supported active heron and egret nesting and roosting sites. The trees that are the focus of this Cease and Desist Order proceeding consist of a grove of five, approximately 75-foot tall pine trees.¹ Commission staff, staff of the California Department of Fish and Game (hereinafter, "CDFG"), and members of the public have witnessed and documented at least eight active Great Blue Heron and Snowy Egret

¹ Commission staff notes that there are only four trees left in this grove because TEHOA had cut down one of the pine trees prior to Commission staff and CDFG staff halting the unpermitted activity.

nests in this grove as well as continuous roosting² by both herons and egrets (Exhibit #9-#11). These nests and activities were observed at site visits made immediately after the actions taken by the TEHOA, which were temporarily halted by CDFG. Subsequent to CDFG's actions, on July 27, 2006, the Executive Director of the Commission issued Executive Director Cease and Desist Order No. ED-06-CD-02 directing TEHOA to cease and desist from undertaking further unpermitted development at the subject property and to cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves (as discussed more fully in Section C of this staff report).

In addition to the direct effect the tree removal had on the herons and egrets, there are also effects on the larger ecological systems in the area. Herons and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles³. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. Stands of trees such as the ones on the subject property are an important natural resource and provide necessary ecological services for local southern California heron and egret populations. Clearly, this activity, active nesting and roosting of Great Blue Heron and Snowy Egret at this location near the wetlands, and the essential role that this grove of trees plays in supporting this activity, establishes this grove of trees as major vegetation (see September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report) and Section B of this staff report).

The subject property is adjacent to Huntington Harbor within the City of Huntington Beach, in an area covered by the City of Huntington Beach certified Local Coastal Program (hereinafter, "LCP"), within the Commission's appeals jurisdiction (discussed more fully, herein). The subject property is an approximately four acre common, open space lot within the Tennis Estates residential community, owned by the homeowners association, located between the sea (Huntington Harbor) and the first public roadway inland of the sea (Humboldt Drive and Saybrook Lane) (Exhibit #1). The development at issue herein has occurred on the site without the required authorization in a coastal development permit (hereinafter, "CDP"). "Development" is broadly defined by Section

² Commission staff notes that while this staff report addresses both the impact on active nesting and roosting of herons and egrets, we note that roosting activities at this location are equally if not more important for these particular birds in this particular setting, and in the evaluation of their impact on surrounding ecosystems. Moreover, although the biologists who have visited the site have confirmed that this stand of trees is an active roosting site, this may not be as evident to lay persons, since there are fewer obvious physical indications of roosting than there are for nesting activities, which include nests and the presence of young.

³ Keddy, P.A. Wetland Ecology: Principles and Conservation. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

30106 of the Coastal Act and includes “the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation.” “Development” is also defined by Section 245.04(J) of the City of Huntington Beach LCP as including “the removal or harvesting of major vegetation.” As previously stated, the grove of trees that was impacted by the unpermitted activity and that supported active heron and egret nesting and roosting is major vegetation⁴, and thus, the removal of one of those trees and major branches from another is “development.” Section 30600(a) of the Coastal Act and Section 245.06 of the City LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP.

Because the unpermitted activity clearly constitutes “development” within the meaning of Section 245.04 of the LCP and Section 30106 of the Coastal Act, it requires a CDP. Since the City of Huntington Beach has a certified LCP, the performance of this development requires a CDP from the City of Huntington Beach. No such permit was issued by the City nor has a permit application been submitted.⁵ No permit was issued for the activity at issue, either by the California Coastal Commission or by the City of Huntington Beach pursuant to its authority under the LCP, implementing the Coastal Act.

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where they find that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP.⁶ As noted above, the activity that is the subject of this Cease and Desist Order proceeding is clearly “development” as that term is defined by the Coastal Act and the LCP, the development is not exempt under the Coastal Act or the LCP, and no CDP was issued by either the Commission or the City of Huntington Beach to authorize the development.

Again, staff recommends approval of this Cease and Desist Order to require TEHOA: (1) to cease and desist from conducting further unpermitted development on the subject property, including removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas; (2) to cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect

⁴ See Exhibit #5, Memorandum dated September 27, 2006, by staff ecologist Dr. Jonna Engel.

⁵ The location of the unpermitted development and the property on which the activity occurred is located within the Commission’s “Appeals Area”, as that term is defined by Section 245.04 (B) of the City of Huntington Beach LCP, since the subject property is located between the sea (Huntington Harbor) and first public road (Humboldt Drive and Saybrook Lane). This area is also within the Commission’s appeals jurisdiction as defined in the Coastal Act, for the same reason. See Cal. Pub. Res. Code § 30603(a)(1). Therefore, if TEHOA had applied for and obtained any permit for this activity, which it did not, any action taken by the City of Huntington Beach, under its LCP, approving proposed development at this location, including proposed trimming or removal of trees that support active heron or egret nesting and roosting areas on the subject property, would be appealable to the Commission.

⁶ Pursuant to Cal. Pub. Res. Code §30810(a)(1) and (2), Commission staff requested that the City of Huntington Beach take action to enforce the policies of the City’s certified LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation. On July 20, 2006, the City recommended that Commission staff proceed with enforcement.

of removing, disturbing, or harassing herons or egrets, themselves; and (3) to plant a tree of the same species as, and in the similar location to, the tree that TEHOA removed without authorization from a coastal development permit.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in Title 14, Division 5.5, Section 13185 of the California Code of Regulations (CCR).

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in Title 14, California Code of Regulations (CCR) Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order.

III. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following motion:

Motion

I move that the Commission issue Cease and Desist Order No. CCC-06-CD-12 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Cease and Desist Order No. CCC-06-CD-12, as set forth below, and adopts the findings set forth below on grounds that development, conducted by the Tennis Estates Homeowners Association, has occurred without a coastal development permit.

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-06-CD-12

Staff recommends the Commission adopt the following findings of fact in support of its action.

A. Description of Unpermitted Development

The subject property is an approximately four-acre common, open space lot within the Tennis Estates residential community adjacent to Huntington Harbor within the City of Huntington Beach (Exhibit #1). The grove of trees that is the subject of this Cease and Desist Order is located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The grove is also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area.

The unpermitted development, which is the subject matter of this Cease and Desist Order, includes removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active heron and egret nesting and roosting sites. The trees that are the subject of this Cease and Desist Order proceeding consist of a grove of five, approximately 75-foot tall pine trees, one of which was cut down by TEHOA without benefit of a coastal development permit, during active nesting and roosting of both egrets and herons. The grove was not present in 1972, when the Tennis Estates residential community was being constructed (as seen in a 1972 aerial photograph and attached hereto as Exhibit #8 of this staff report). Therefore, since the grove could have been planted at either a mature state or as saplings, the precise age of the trees is unknown.

Great Blue Heron, Great Egret, and Snowy Egret nesting, as well as continuous roosting activity by both herons and egrets, have been well documented in this grove of trees at the subject property. As is explained in Section B below and in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6), this activity, active nesting and roosting of Great Blue Heron, Great Egret, and

Snowy Egret whose presence is critical to the healthy functioning of the nearby wetlands, establishes this grove of trees as major vegetation.

B. Herons and Egrets and Their Relationship to the Subject Property⁷

The heronry that has been established at the subject property is presently used year round for roosting and seasonally for nesting by three species of herons and egrets: Great Blue Herons, *Ardea herodias*, Great Egrets, *Aldea alba*, and Snowy Egrets, *Egretta thula*. Herons and egrets experienced severe population declines at the turn of the 20th century when they were hunted for their beautiful plumage which was highly prized for woman's hats. Several laws outlawing hunting, including the 1918 Migratory Bird Treaty Act, were passed and heron and egret populations recovered. While heron and egret populations are no longer threatened, the wetland ecosystems upon which they depend are in trouble. The United States Geologic Survey conducted a study of wetland loss in the United States between the 1780's and 1980's. California has lost the largest percentage of original wetland habitat (91%) of all the states⁸. It is now estimated that California has less than 500,000 wetland acres remaining (from an estimated 5 million in 1780). This is less than one-half of one percent of California's total acreage. In southern California, many wetlands have been replaced by marinas and herons and egrets have adapted by relocating their roosting and nesting sites to stands of tall non-native pines, palms, ficus, and coral trees within highly developed areas^{9,10}. This relocation to non-native trees near marinas is because of the virtual absence of any native trees, the proximity of the non-native trees to primary foraging habitat, and the height of the non-native trees which affords protection from predation and disturbance. The herons and egrets are utilizing these trees for both roosting and nesting. In many southern California locations, herons and egrets roost at colony sites all year^{11,12}.

Herons and egrets establish roosting and nesting sites based on several important criteria including proximity to primary foraging habitat and avoidance of predation and disturbance. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance. The fact that they have established roosting and nesting sites in areas of high human density and disturbance suggests that suitable roosting and nesting areas are scarce.

⁷ This section is taken largely from Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this staff report)

⁸ United States Geologic Survey: <http://www.inpwrc.usgs.gov/resource/wetlands/wetloss/summary.htm>

⁹ Report on the Marina Del Rey Heronry. 2005. Prepared for Mark D. Kelly, Senior Vice President, Lyon Capital Ventures, by Dr. Jeffery Froeke.

¹⁰ Letter to California Coastal Commission from Daniel Cooper, Cooper Ecological Monitoring Inc., dated Aug 18, 2006

¹¹ Butler, R. W. 1992. Great Blue Heron. *In* The Birds of North America, No. 25 (A. Poole, P. Stettenhelm, and F. Gill, Eds.). Philadelphia: The Academy of Natural Sciences; Washington, DC: The American Ornithologists Union

¹² Parson, K. C. and T. L. Master. 2000. Snowy Egret (*Egretta thula*). *In* The Birds of North America, No. 489 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

The major determinate of heron and egret colony location is suitable wetland foraging habitat. For Great Blue Herons, the mean distance flown from nests to principle feeding sites is 1.4 to 4 miles¹³. An average Snowy Egret foraging trip is 1.7 miles from roosting and nesting sites to their main foraging area¹⁴. The Tennis Estates pines are located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The pines are also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area. Research has shown that Great Blue Herons exhibit strong fidelity to the choice of tree species within colonies whereas in Great Egret males, presence of old nests can induce site preference^{15,16}. Great Blue Herons, Great Egrets, and Snowy Egrets all roost and nest in the Seal Beach Wildlife Refuge and the Bolsa Chica wetlands. It is likely that the reason herons and egrets have established nests and are roosting in the Tennis Estates pines, as they are doing in non-native tree stands in other parts of coastal southern California such as Ventura Harbor, Marina del Rey, and Long Beach, is a lack of suitable nesting and roosting areas in remaining local wetlands.

In addition to proximity to primary foraging habitat, predation and disturbance also influence heron and egret choice of roosting and nesting tree species and locations. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into a preference for tall trees. In southern California the average nest height for Great Egrets is 88 feet¹⁷. Raccoons are one of the top heron and egret nest predators in Southern California¹⁸. Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as American crows, *Corvus brachyrhynchus*, who prey on eggs and chicks and red-tailed hawks, *Buteo jamaicensis*¹⁹. Both herons and egrets choose specific trees that are within a specific distance of primary foraging grounds and are safe from predation and disturbance. Herons do habituate to non-threatening repeated activities which explains the location of Southern California heronries in highly disturbed areas. Even so, most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season²⁰.

Heron and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and

¹³ Ibid 9

¹⁴ Ibid 10

¹⁵ Kesall, J.P. & J. Simpson. 1980. A three year study of the Great Blue Heron in British Columbia. Proc. Colonial Waterbirds Group, 3:69-74.

¹⁶ Ibid 9

¹⁷ McCrimmen, D. A. Jr., J. C. Ogden, and G. T. Bancroft. 2001. Great Egret (*Ardea alba*). In The Birds of North America, No. 570 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

¹⁸ Ibid 10

¹⁹ Ibid 10

²⁰ Ibid 9

any number of other undesirable cycles²¹. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. The Tennis Estates pine stand fit the criteria for a heron and egret roosting and nesting site. The pine trees are within the foraging range required by the three heron and egret species utilizing the trees. The pine trees are tall, upwards of 75 feet, thus distancing the birds from predation and disturbance, and before the tree removal and trimming, had dense foliage that offered camouflage and protection from predation. Stands of trees such as those located on the subject property are an important natural resource and provide necessary ecological services for local southern California heron and egret populations, which, in turn, are critical to the healthy functioning of the nearby wetlands. Based on this finding of biological significance, the Tennis Estates trees are major vegetation.

C. Background: Commission's Actions and History of Violation on the Subject Property

On the afternoon of May 24, 2006, Commission staff received reports from members of the public that removal of trees supporting active heron and egret nests was underway at the Subject Property. Commission staff and members of the public then contacted the CDFG. On the same day, a CDFG warden visited the site and confirmed the presence of active bird nests in the trees located at the corner of Humboldt Drive and Saybrook Lane and confirmed that a tree had been removed. Members of the public and the CDFG Warden both observed dislodged eggs and dead hatchlings on the ground below the cut and trimmed trees. Pursuant to Fish and Game Code Section 3503, pertaining to protection of active bird nests and eggs, the California Department of Fish and Game on May 24, 2006 stopped the trimming and removal activities, which were undisputedly being conducted by TEHOA, prohibiting them from removal, trimming, or disturbance of the trees for 30 days.

Commission staff visited the site on June 2, 2006, documented the nesting activity in the subject trees, and confirmed that an entire tree and several very large limbs of other trees that contained active heron and egret nests had been removed. Commission staff clearly identified active nesting occurring in the trees that are the subject of this proceeding.²² As demonstrated by documents submitted by TEHOA, the goal of the unpermitted activity was to rid the subject property of the herons and egrets by cutting down the entire grove of trees that supported the herons and egrets. On June 23rd, the

²¹ Keddy, P.A. Wetland Ecology: Principles and Conservation. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

²² As noted above, Commission staff notes that while this staff report addresses both the impact on active nesting and roosting of herons and egrets, we note that roosting activities at this location are equally if not more important for these particular birds in this particular setting, and in the evaluation of their impact on surrounding ecosystems. Moreover, although the biologists who have visited the site have confirmed that this stand of trees is an active roosting site, this may not be as evident to lay persons, since there are fewer obvious physical indications of roosting than there are for nesting activities, which include nests and the presence of young.

CDFG warden and a CDFG environmental scientist visited the site and again counted approximately 8 active Great Blue Heron and Snowy Egret nests in the subject trees. Therefore, the warden prohibited removal, trimming, or disturbance of the trees for another 30-days.

Because the subject property was located in the City of Huntington Beach's permit jurisdiction under the City's LCP, Commission staff requested, in a letter dated July 14, 2006, that the City of Huntington Beach take action to enforce the policies of the City's certified LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation, as is provided for in Sections 30809 and 30810 of the Coastal Act (Exhibit #2). The letter also stated that if the City declined to act, the Commission could issue an order to enforce the requirements of the LCP. On July 18, 2006, the City recommended that Commission staff proceed with enforcement, including pursuing possible restoration order proceedings and confirmed this in an email to Commission enforcement staff (Exhibit #3).

Therefore, pursuant to Coastal Act Section 30809(a)(1) and (2), on July 21, 2006, the Executive Director of the Commission sent TEHOA a Notice Prior to Issuance of an Executive Director Cease and Desist Order (hereinafter, "EDCDO") for Violation No. V-5-06-018 and provided TEHOA the opportunity to provide assurances which would obviate the need to issue the EDCDO (Exhibit #4).²³ The Notice Prior to Issuance (hereinafter, "Notice") of an EDCDO stated, in part:

To prevent the issuance of the Executive Director Cease and Desist Order ("EDCDO") to you, you must provide a response by the date listed below [COB July 21, 2006] that satisfies the standards of section 13180(a) of the Commission's regulations.... This response must include:

Agreement to immediately and completely cease and desist from performing any development on the subject property, including, but not limited to, removal or trimming of the trees located at the southwest corner of Humboldt Drive and Saybrook Lane that support habitat for nesting herons and egrets, regardless of whether the bird nests supported by the trees are active or inactive.

Unfortunately, TEHOA did not respond at all to the Notice ever, orally or in writing, even after the deadline to respond had passed, and specifically, TEHOA did not commit to refrain from performing further unpermitted development at the Subject Property. Prior to issuance of the EDCDO, Commission staff called TEHOA on July 26, 2006 in an attempt to find out if TEHOA was going to provide assurances that it would not conduct further unpermitted activity. TEHOA did not respond to these telephone calls.²⁴

²³ The July 21, 2006 letter from the Executive Director also included a *Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings*, as described on page 11 of this staff report.

²⁴ In fact, TEHOA did not respond to any of the Commission calls or correspondence until August 9, 2006, despite numerous attempts by Commission staff to contact them.

The Executive Director determined that TEHOA had undertaken development that requires a permit without first securing a permit. The Executive Director also determined that TEHOA failed to respond to the Notice in a "satisfactory manner".²⁵ Therefore, on July 27, 2006, the Executive Director issued EDCDO No. ED-06-CD-02 directing TEHOA to cease and desist from undertaking further unpermitted development at the subject property and to cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves (Exhibit #5). Again, TEHOA did not respond even to the issuance of the EDCDO, until August 9, 2006.

Pursuant to Section 30809(e) of the Coastal Act, EDCDO No. ED-06-CD-02 expires 90 days from issuance of the EDCDO, which would mean that, absent an extension of thereto pursuant to Section 13188 of the Commission's regulations, the EDCDO would expire on October 25, 2006. Therefore, to ensure that no further unpermitted activity occurs at the subject property, to ensure that no additional herons or egrets or other migratory birds are harmed by the removal of their habitat, and to ensure general compliance with the Coastal Act, the Executive Director also sent TEHOA a *Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings* (hereinafter, "NOI") (Exhibit #5).

Notice of Intent to Commence Cease and Desist Order Proceedings

On July 21, 2006, pursuant to Section 13181, Title 14, Division 5.5 of the California Code of Regulations, the Executive Director, sent TEHOA a NOI for a Commission Cease and Desist Order (Exhibit #6). The NOI sent to TEHOA included a thorough explanation of why the subject activity is development under the Coastal Act and how such activity meets the criteria of Section 30810 of the Coastal Act to commence proceedings for issuance of a cease and desist order.

In accordance with Sections 13181(a) of the Commission's regulations, TEHOA was provided the opportunity to respond to the Commission staff's allegations as set forth in the NOI by completing a Statement of Defense form (hereinafter "SOD"). TEHOA was required to submit the SOD form by no later than August 10, 2006.

On August 10, 2006, Commission staff received a SOD from TEHOA in response to the NOI (Exhibit #7). These defenses and Commission staff's response to those defenses are addressed in *Section G* of this Staff Report.

²⁵ Section 13180(a) of the Commission's regulations (Title 14, Division 5.5 of the California Code of Regulations (CCR)) defines the term "satisfactory manner" as that term is used in Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice."

C. Basis for Issuance of Cease and Desist Order

Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Section 30810 of the Coastal Act, which states, in relevant part:

- a) *If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that... requires a permit from the commission without first securing the permit... the Commission may issue an order directing that person...to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program ... or any requirements of [the Coastal Act] which are subject to the jurisdiction of the certified program under [circumstances that are satisfied here, as described on page 10]*
- b) *The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

The following paragraphs set forth the basis for the issuance of the Cease and Desist Order by identifying the substantial evidence on which the Commission relied in determining that the development meets all of the required grounds listed in Section 30810 for the Commission to issue a Cease and Desist Order.

i. Development has Occurred without a Coastal Development Permit (“CDP”)

Unpermitted development consisting of the removal of major vegetation, including the trimming and removal of trees that supported active heron and egret nesting and roosting areas has occurred on the subject property without a CDP. The unpermitted development that is the subject of this Cease and Desist Order meets the definition of “development” contained in Section 30106 of the Coastal Act and Section 245.04 of the City of Hunting Beach LCP.

“Development” is defined by Section 30106 of the Coastal Act as follows:

*"Development" means, on land, in or under water, the placement or erection 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...change in the intensity of use of water, or of access thereto...**and the removal or harvesting of major vegetation other than for agricultural purposes**... (Emphasis added).*

"Development" is defined by Section 245.04 of the City of Huntington Beach LCP as follows:

J. Development: The placement or erection of any solid material or structure on land, in or under water; discharge or disposal of any materials; 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 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 recreation use; and 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 or harvesting of major vegetation.

Section 30600(a) of the Coastal Act and Section 245.06 of the City of Huntington Beach LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit.

The unpermitted development that is the subject of this Cease and Desist Order meets the definition of "development" contained in Section 30106 of the Coastal Act and Section 245.04 of the City of Huntington Beach LCP. In this case, the complete removal of one tree and the trimming of other trees that all supported active heron and egret nesting and roosting is the removal of major vegetation (see September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6) Therefore all the subject unpermitted development clearly constitutes "development" within the meaning of the above-quoted definition and therefore is subject to the permit requirement of section 30600(a) of the Coastal Act and Section 245.06 of the City of Huntington Beach LCP, and therefore may not be undertaken unless such development is authorized in a CDP. A coastal development permit was not issued to authorize the subject unpermitted development. In addition, the exemptions section under the City of Huntington Beach LCP does not provide any exemption for any sort of landscaping, including removal of major vegetation. In this case, the grove of trees on the Subject Property is major vegetation, and therefore removal or trimming of the trees is also not exempt under the City's LCP.

Inconsistent with Resource Policies of the Coastal Act

It should be noted that this is not an element which is required for issuance of a Cease and Desist Order. That is, the Commission does not have to find that the nature of the unpermitted development is inconsistent with the City of Huntington Beach LCP or the Chapter 3 Policies of the Coastal Act to issue Cease and Desist Orders under the Coastal Act (Section 30810). However, this section is provided as background information. The Commission finds that the unpermitted development is, in fact, inconsistent with Chapter 3 policies of the Coastal Act regarding the protection of

marine resources, the biological productivity of coastal waters, and possibly environmentally sensitive habitat areas. The Commission also notes that the unpermitted development is inconsistent with LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly C 7.1 and C 7.1.2

The protection of marine resources, the biological productivity of coastal waters, and environmentally sensitive habitat areas are major policy goals of the Coastal Act as provided for in Sections 30230, 30231, and 30240 of the Coastal Act. In addition, policies within the City of Huntington Beach LCP were also designed to protect these resources. The unpermitted removal of major vegetation, consisting of the complete removal of one tree and the removal of several large limbs from other trees that all supported active heron and egret nesting and roosting appears to be inconsistent with these Coastal Act policies since these birds are, among other things, integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles

Section 30230 (Marine Resources) of the Coastal Act and Policy C 6.1.2 and Policy C 6.1.3 of the City of Huntington Beach LCP states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 (Biological Productivity of Coastal Waters) of the Coastal Act and Policy C 6.1.4 of the City of Huntington Beach LCP states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored...

Section 30240 (Environmentally Sensitive Habitat Areas) of the Coastal Act and, in part, Policy C 7.1.2 of the City of Huntington Beach LCP states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts

which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Objective C 7.1 of the City of Huntington Beach LCP states:

Regulate new development through design review and permit issuance to ensure consistency with the Coastal Act requirements and minimize adverse impacts to identified environmentally sensitive habitats and wetlands areas.

Removing and trimming the subject trees triggered a chain reaction of very significant negative ecological consequences as described below, and in Exhibit #6 to this staff report, Memorandum from Dr. Jonna Engel, dated 27, September 2006. Given the location of the eggs and hatchlings that were observed by both members of the public and the CDFG Warden as being on the ground below the trees that were removed and trimmed, it appears that the immediate results of the tree removal and trimming were the possible loss of unhatched eggs and the death of hatchlings. In addition, even if the unpermitted activity did not cause eggs and hatchlings to fall from the trees, due to the role that the subject trees play in the breeding of great blue herons and snowy egrets and because the nesting and roosting function of the site could be easily disturbed or degraded by removal of tree limbs and trees, the nesting population of herons and egrets in the Huntington Harbor area could be adversely impacted by tree removal or trimming at the Subject Property.

Even more significant, the loss of such important predators could affect the biological productivity of the surrounding wetlands areas, including Huntington Harbor, the Anaheim Bay National Wildlife Refuge, and the Bolsa Chica Wetlands by upsetting the balance of the local ecosystem (see Section B, above and Exhibit #6 of this staff report). Clearly, any additional tree removal would exacerbate both the short and long term losses to the Great Blue Heron, Great Egret, and Snowy Egret populations and would further impact the already diminishing wetlands habitat in Southern California, which could lead to an imbalance in prey populations leading to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles within the wetlands ecosystem.

Therefore, the unpermitted activity impacted the marine resources found in the surrounding area, including Huntington Harbor, Bolsa Chica wetlands and Anaheim Bay National Wildlife Refuge and disrupted the biological productivity of these coastal waters. Because those areas are ESHA, the removal of the trees, if it effects the elimination of the birds from the predation cycle of the wetlands, also disrupts those ESHAs in violation of Section 30240. In addition, since it is possible that the grove of trees itself may be ESHA, any removal of these trees, whether by cutting limbs from the trees or removing the trees entirely, would clearly be inconsistent with the ESHA protection policies of the Coastal Act and the City of Huntington Beach LCP. Therefore, the unpermitted development is inconsistent with Section 30230, 30231 and possibly 30240 of the Coastal Act as well as LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly Policy Sections C 7.1 and C 7.1.2.

D. Cease and Desist Order is Consistent with Chapter 3 of the Coastal Act and the City of Huntington Beach LCP

The Cease and Desist Order attached to this staff report is consistent with the resource protection policies found in Chapter 3 of the Coastal Act as well as with the City of Huntington Beach LCP. The Cease and Desist Order would require TEHOA to 1) cease and desist from performing or maintaining unpermitted development, including, but not limited to removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas on the subject property; 2) cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves; and 3) require TEHOA to plant a tree of the same species as, and in a similar location to, the tree that TEHOA removed without authorization by a coastal development permit. The requirements of the Cease and Desist Order would ensure protection of nesting and roosting sites for egrets and herons, thereby protecting the local population of such birds and, by extension, the marine resources and biological productivity of the surrounding Huntington Harbor area, including Huntington Harbor itself and the Bolsa Chica Wetlands and the Anaheim Bay National Wildlife Refuge. Therefore, the Cease and Desist Order is consistent with the Chapter 3 policies of the Coastal Act and the City of Huntington Beach LCP.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of this Cease and Desist Order is exempt from any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. The Cease and Desist Order is exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines (Title 14 of the California Code of Regulations).

F. Findings of Fact

1. TEHOA owns the property located at the southwest corner of Humboldt Drive and Saybrook Lane, Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach ("subject property"). The subject property is an approximately four-acre common (to the owners of the individual condominiums within the Tennis Estates complex), open space area, within the Tennis Estates residential complex seaward of Humboldt Drive and Saybrook Lane, adjacent to Huntington Harbor in the City of Huntington Beach.
2. TEHOA has undertaken development, as defined by Coastal Act Section 30106 and Section 245.04 of the City of Huntington Beach LCP, at the subject property, including but not limited to the removal of major vegetation consisting of complete removal of one pine tree and removal of several limbs of other pine trees that

supported active nesting and roosting by Great Blue Herons and Snowy Egrets whose presence is critical to the healthy functioning of the adjacent wetlands.

3. TEHOA conducted the above-described development without a Coastal Development Permit or any other Coastal Act authorization, in violation of the Coastal Act and the City of Huntington Beach LCP.
4. TEHOA is responsible for the unpermitted development because they arranged for, paid for, authorized, and/or hired a worker to conduct the unpermitted activity.
5. No exemption from the permit requirements of the Coastal Act or the City of Huntington Beach LCP applies to the unpermitted development on the subject property.
6. On July 18 and 20, 2006, the City of Huntington Beach requested the Commission to take the lead role in enforcement action to resolve the above-described violations. On July 21, 2006, the Executive Director of the Commission informed TEHOA that pursuant to Title 14, California Code of Regulations, Sections 13181(a), the Commission intended to initiate cease and desist order proceedings against them, and outlined steps in the cease and desist order process.
7. On July 27, 2006, the Executive Director issued Executive Director Cease and Desist Order No. ED-06-CD-02 requiring TEHOA to 1) immediately and completely cease and desist from performing further unpermitted development at the subject property and 2) immediately and completely cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves.
8. The grove of pine trees located on the subject property has been colonized by Great Blue Heron, Snowy Egret, and potentially other migratory bird species.
9. The grove of pine trees located on the subject property is used by Great Blue Heron, Snowy Egret, and potentially other migratory bird species for nesting and roosting.
10. The Great Blue Herons, Great Egrets, and Snowy Egrets that have colonized the grove of pine trees and that nest and roost in those trees are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions.
11. The grove of pine trees located on the subject property is major vegetation because of the role the trees play in supporting the nesting and roosting of Great Blue Heron and Snowy Egret, whose presence is critical to the healthy functioning of adjacent wetlands including Huntington Harbor, Seal Beach National Wildlife Refuge, and Bolsa Chica Wetlands.
12. The unpermitted development described in Finding No. 2 is inconsistent with the policies set forth in Sections 30230 and 30231, and possibly section 30240, of the

Coastal Act, as well as LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly Policy Section C 7.1 and C 7.1.2.

13. Unless prohibited, the unpermitted development will cause continuing resource damages.

G. Violators' Defenses and Commission's Response

Hans Van Ligten, on behalf of the TEHOA, submitted a Statement of Defense ("SOD"), which was received by the Commission staff on August 10, 2006, and is included as Exhibit #7 of this Staff Report. The SOD submitted by TEHOA contains general denials and objections as well as brief defenses. In addition, the SOD contains signed Declarations from both Jack L. Williams, Vice President of TEHOA's management company, and Robert Bandy, President of Bandy Landscape Maintenance, Inc. and person who conducted the unpermitted tree removal and trimming. TEHOA also submitted several photographs of the subject trees and bird nests as well as minutes from TEHOA meetings and unsigned correspondence between, Commission staff assumes, members of TEHOA. All but one issue that TEHOA raises are not relevant to whether the evidence before the Commission shows a violation of the Coastal Act, and thus, to whether the Commission is authorized to issue this cease and desist order, but we include a response to these issues nonetheless, for the information of all parties. The only relevant issue to this proceeding is whether there was either unpermitted development or violations of CDP requirements – that is, a violation of the Coastal Act or the Huntington Beach LCP, establishing the grounds to issue an Order under Section 30810. The following paragraphs describe the defenses contained in the SOD and set forth the Commission's response to each defense.

1. The Respondents' Defense:

"TEHOA denies any of the trees fits within the definition of 'major vegetation' or is within an 'environmentally sensitive habitat area'."

Commission's Response:

As noted above, given the location, use, importance, and biological and ecological significance of the trees, the materials that were removed were clearly "major vegetation" under the Coastal Act.²⁶ In fact, in order to reaffirm that these specific trees and limbs were "major vegetation" in this specific case, one of our staff biologists specifically examined the facts of this particular location and these specific birds and concluded that these trees were in fact major vegetation (see Exhibit #6, Memorandum of Dr. Jonna Engel, dated 27 September 2006 for the full text and analysis, and Section B of the Staff Report, above):

²⁶ "Major" in this context does not mean merely large, but rather refers to the significance of the vegetation. We note, however, that in this case, the trees and the limbs of the trees removed, were in fact, also large.

Hérons and egrets establish roosting and nesting sites based on several important criteria including proximity to primary foraging habitat and avoidance of predation and disturbance. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance. The fact that they have established roosting and nesting sites in areas of high human density and disturbance suggests that suitable roosting and nesting areas are scarce.

The major determinate of heron and egret colony location is suitable wetland foraging habitat. For Great Blue Herons, the mean distance flown from nests to principle feeding sites is 1.4 to 4 miles²⁷. An average Snowy Egret foraging trip is 1.7 miles from roosting and nesting sites to their main foraging area²⁸. The Tennis Estates pines are located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The pines are also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area. Research has shown that Great Blue Herons exhibit strong fidelity to the choice of tree species within colonies whereas in Great Egret males, presence of old nests can induce site preference^{29,30}. Great Blue Herons, Great Egrets, and Snowy Egrets all roost and nest in the Seal Beach Wildlife Refuge and the Bolsa Chica wetlands. It is likely that the reason herons and egrets have established nests and are roosting in the Tennis Estates pines, as they are doing in non-native tree stands in other parts of coastal southern California such as Ventura Harbor, Marina del Rey, and Long Beach, is a lack of suitable nesting and roosting areas in remaining local wetlands. Without a biology report for the Tennis Estates heronry, it is not possible to verify this for this site.

In addition to proximity to primary foraging habitat, predation and disturbance also influence heron and egret choice of roosting and nesting tree species and locations. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into a preference for tall trees. In southern California the average nest height for Great Egrets is 88 feet³¹. Raccoons are one of the top heron and egret nest predators in Southern California³². Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as American crows, *Corvus brachyrhynchus*, who prey on eggs and chicks and red-tailed hawks, *Buteo jamaicensis*³³. Both herons and egrets choose specific trees that are within a specific distance of primary foraging grounds and are safe from predation and disturbance. Herons do habituate to non-threatening

²⁷ Ibid 9

²⁸ Ibid 10

²⁹ Kesall, J.P. & J. Simpson. 1980. A three year study of the Great Blue Heron in British Columbia. Proc. Colonial Waterbirds Group, 3:69-74.

³⁰ Ibid 9

³¹ Ibid 15

³² Ibid 10

³³ Ibid 10

repeated activities which explains the location of Southern California heronries in highly disturbed areas. Even so, most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season³⁴.

Heron and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles³⁵. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. The Tennis Estates pine stand fit the criteria for a heron and egret roosting and nesting site. The pine trees are within the foraging range required by the three heron and egret species utilizing the trees. The pine trees are tall, upwards of 75 feet, thus distancing the birds from predation and disturbance, and before the tree removal and trimming, had dense foliage that offered camouflage and protection from predation. Stands of trees such as those that are the subject of this proceeding, are an important natural resource and provide necessary ecological services for local southern California heron and egret populations. Based on this finding of biological significance, the Tennis Estates trees are major vegetation.

Moreover, we note that if there were any question remaining as to the applicability of this term, case law supports our position. This term should be broadly construed in light of the rule that individual provisions of conservation and environmental protection measures must be interpreted broadly so as to ensure attainment of the statute's objective. See e.g. *Friends of Mammoth v. Board of Supervisors*, (1972) 8 Cal.3d 247, 259-61.

2. The Respondents' Defense:

"The trees have created a health and safety issue due to a stench of animal waste. It has coated the plant life, sidewalk and walls. Plants in the 'dropping' zone are dying. There have been reports of persons slipping on the bird feces."

Commission's Response:

The above assertion does not provide any evidence to support a claim that the findings for a cease and desist order have not been met, or address the issue of whether the development required a permit, and the fact that none was obtained by Respondents,

³⁴ Ibid 9

³⁵ Keddy, P.A. *Wetland Ecology: Principles and Conservation*. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

which are the issues relevant to issuance of a Cease and Desist Order under Section 30810 of the Coastal Act.

As described in Section B of this staff report and in the Commission's Response to Respondents' Defense 1, above, the grove of trees that are the subject of this proceedings, and that were removed or trimmed without a CDP by TEHOA, is major vegetation and thus is development as that term is defined in the Coastal Act and the City of Huntington Beach LCP. "Development" is defined by Section 30106 of the Coastal Act as including "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation." "Development" is also defined by Section 245.04(J) of the City of Huntington Beach LCP as including "the removal or harvesting of major vegetation." Section 30600(a) of the Coastal Act and Section 245.06 of the City LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP.

Because the unpermitted development clearly constitutes "development" within the meaning of Section 245.04 of the LCP and Section 30106 of the Coastal Act, it requires a CDP. No CDP was issued for the activity at issue, either by the Commission or by the City of Huntington Beach pursuant to its authority under the LCP, implementing the Coastal Act. Thus, the requirements to issue a cease and desist order have been met.

3. The Respondents' Defense:

"[T]he TEHOA Board specifically directed that any tree work NOT impact nesting birds and the contractor observed the tree to attempt to avoid work when there were any active nests."

Commission's Response:

Again, this assertion does not respond in any way to the substance of this proceeding. Whether or not TEHOA directed that "tree work" not impact nesting birds is irrelevant to the finding necessary for issuance of a Cease and Desist Order pursuant to Section 30810 of the Coastal Act, and does not address the issue of undertaking development activities without a Coastal Development Permit.

Even if this was a valid defense (TEHOA directing tree work to not impact nesting birds), which it is not, the unpermitted activity was, in fact, despite the assertion above, undertaken during the exact time of active nesting. In fact, on numerous site visits conducted by Commission staff and/or staff of the CDFG on May 24th, June 2nd, June 23rd, and August 23rd of this year, staff of both agencies clearly witnessed and documented up to eight active nests of herons and egrets and many egrets and herons roosting in the trees. During the site visits Commission staff identified several active nests located immediately above branches that were cut by TEHOA. Obviously, even if TEHOA directed the "tree work" to not impact active nests, and even if this were a valid defense for issuance of a Cease and Desist Order, the removal and trimming of the

trees obviously was conducted during a time and in a location where there were at least eight active nesting sites and their actions clearly impacted those nests. As described in Exhibit #6 of this Staff Report, egrets and herons have a long nesting period, beginning as early as late December and ending in early September, and are found to roost year round.

In addition, as described in the Memorandum of Dr. Jonna Engel, dated 27 September 2006, attached as Exhibit #6 of this staff report, herons and egrets are normally shy and reclusive birds that are sensitive to human disturbance. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into tall trees. In southern California the average nest height for Great Egrets is 88 feet (2). Raccoons are one of the top heron and egret nest predators in southern California. Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as crows, who prey on eggs and chicks.

One of the five trees used by the herons and egrets was removed, opening the undercarriage of the trees, and exposing the active heron and egret nests to predation. In addition, the unpermitted activity resulted in removal of several large branches on the lower portion of the trees, further exposing the nests, and the chicks and fledglings within the nest, to predation and disturbance.

The unpermitted activity, itself, a human entering into the roosting and nesting areas in a "cherry picker", cutting limbs with a chain saw or other device, clearly disturbs any nesting or roosting activity. Since these birds are highly susceptible to human disturbance, and will abandon nesting efforts due to disturbance, there is no question that the activity alone impacted these birds.

Again, however, we note that to issue a cease and desist order pursuant to 30810 of the Coastal Act the Commission must only find that the activity was conducted without a CDP. In this case, as discussed above, the removal of the trees is removal of major vegetation and therefore is development. No CDP was issued to authorize this activity and therefore the requirements to issue a cease and desist order have been met.

4. The Respondents' Defense:

"[T]he only tree that was removed was NOT occupied by birds or nests. Observations by Mr. Bandy... showed no nests, birds, or more importantly, feces, thus indicating this smaller tree was not being used by herons or egrets."

Commission's Response:

Once again, this is not relevant to the issue of whether the subject activity was conducted without benefit of a CDP. However, in response to this allegation and as discussed more fully in Section B of this staff report, the Commission notes that the

grove of trees on the subject property provides ideal nesting and roosting habitats for egrets and herons, specifically because it is a dense cluster of tall trees (at least prior to the unpermitted activity) close to foraging areas (Huntington Harbor, Seal Beach National Wildlife Refuge, and Bolsa Chica Wetlands). The tree that was completely removed was within this grove, provided potential nesting and roosting opportunities, and also provided the nesting birds camouflage and protection from predation.

Even assuming that removing the smallest of the five trees within this grove of trees (which are major vegetation) could be removed without a CDP, which it could not, observations by Mr. Bandy, who, it appears, is not a qualified biologist or, more importantly, an ornithologist, is not sufficient to ensure the protection of these birds and this grove of trees that support the herons and egrets. It is evident that Mr. Bandy's observations were not sufficient, particularly since this removal, unfortunately, occurred both without permits and prior to any visits by CDFG and/or Commission staff. In fact, the very purpose of the permit process under the Coastal Act is to provide for information gathering, evaluation and recommendations to be made before any development is undertaken. This evaluation is to be based on the conditions which exist prior to any development being performed. If Respondents had applied for a permit, such information could have been verified and evaluated.

In fact, Mr. Bandy removed one tree entirely and, in addition, removed several large branches of other trees despite easily observable active nesting of the herons and egrets. In fact, photographs taken by Mr. Bandy (submitted by TEHOA in their SOD) showing chicks in nests during the time of the unpermitted trimming support this conclusion. While this defense is not relevant to the issue of whether the subject activity was conducted without benefit of a CDP, which it was not, the removal and trimming of major vegetation is development as defined by the Coastal Act and the City of Huntington Beach LCP. No CDP was issued for the activity and therefore the requirements to issue a cease and desist order have been met.

5. The Respondents' Defense:

In attachments to TEHOA's SOD, TEHOA raised several allegations within declarations signed by Jack L. Williams (Vice President of Huntington West Properties, Inc.) and Robert Bandy (President of Bandy Landscaping Maintenance, Inc.). TEHOA also included minutes from TEHOA Board meetings, unsigned, undated correspondence between, what appears to be, members of TEHOA, and photographs. While these documents have no relevance to the issue of whether the subject activity was conducted without benefit of a CDP, the following is a summary of TEHOA's allegations within these documents followed by the Commission's response. TEHOA raises the following issues in these attachments to their SOD:

a) [From Mr. Williams declaration] "[A]t no time did members of the Coastal Commission staff ask me or any of my employees to provide any information regarding these issues and therefore believe that the Commission's two letters are based on a one-sided, and frankly, incorrect presentation of the facts."

Commission's Response:

To clarify the record, as soon as the City of Huntington Beach requested that the Commission take the lead in enforcement of the violations at the Subject Property, the Executive Director of the Commission sent TEHOA a Notice Prior to Issuance of an Executive Director Cease and Desist Order ("EDCDO") for the violation (Exhibit #5 to this Staff Report), and specifically requested that TEHOA provide assurances which would obviate the need to issue the EDCDO. TEHOA did not respond. In fact, when no response was received, Commission staff called TEHOA's management company (Huntington West Properties, Inc) in an attempt to discuss the violation and to determine whether TEHOA would provide assurances that they agree to not perform further unpermitted development. Unfortunately, neither TEHOA nor its property management company, Huntington West Properties, Inc., returned these telephone calls.

Notwithstanding the issues raised by Mr. Williams, or these efforts made by Commission staff to contact TEHOA, the activity at issue constitutes development, as discussed above, which requires a CDP. A CDP was not issued for the removal of the trees (which are major vegetation, as also discussed above), and therefore the requirements to issue a cease and desist order have been met.

b) [Declarations from both Mr. Williams and Mr. Bandy] In each of the declarations submitted as attachments to the SOD (attached as Exhibit #7 of this staff report), TEHOA describes the issue of bird excrement and urine, and states that it was damaging the landscaping underneath the trees and creating a hazardous situation for people walking below the trees.

Commission's Response:

As discussed in the Commission's response to Respondent's Defense No. 2, above, this assertion does not provide any evidence to support a claim that the findings for a cease and desist order have not been met.

c) [Declarations from both Mr. Williams and Mr. Bandy] In each of the declarations submitted with the SOD (attached as Exhibit #7 of this staff report), Mr. Williams and Mr. Bandy allege that TEHOA discussed that removal of the trees be done "with extreme care to avoid any impact to nesting birds" (Declaration of Mr. Williams, page 2). The declarations also allege that Mr. Bandy was instructed to examine the trees and determine if any nesting birds were in the trees before doing any work. The declarations go on to allege that Mr. Bandy did inspect the trees by going up in a "cherry picker" and determined that there were no active nests in the trees, and therefore commenced removing one tree and the lower branches of other trees. Mr. Bandy asserted in his declaration that he did find unoccupied nests but determined that there were no active nests, and therefore he continued trimming the trees. Mr. Bandy states, "I trimmed approximately four to five branches when I discovered a nest in the interior of the tree which contained egrets. Having found an occupied nest, I immediately stopped any trimming and left the nest undisturbed."

Commission's Response:

Again, these allegations made in the declarations do not provide a valid defense to the claim of unpermitted development or for whether a cease and desist order can be issued by the Commission pursuant to Section 30810 of the Coastal Act. However, Commission staff provides the following response to address these allegations and to clarify the issues.

As mentioned in Section B of this Staff Report and as discussed in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report), the grove of trees is major vegetation, and therefore any removal of the trees requires a CDP. No CDP was issued for the removal of the trees or the tree branches, in violation of the Coastal Act and the City of Huntington Beach LCP.

In addition, some explanation of the nesting practices of these birds may explain why this unpermitted development is so significant from a biological coastal resource perspective. The unfortunate effect of the removal of the trees from the subject property was a direct impact to active heron and egret nests and their roosting habitat. The active nesting season of these birds begins as early as late December and ends in early September and they roost year-round. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance, especially during active nesting. As discussed in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report), most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season.

The unpermitted removal of one tree and several large limbs of others was done on May 24, during the very middle of this nesting season, and when there were observable active nests in the trees. Even if the directive given by the TEHOA to not remove the trees until nesting was completed was a valid defense to the issuance of a cease and desist order, which it is not, there were undoubtedly active nests in the trees at the time they were removed. In each of the sites visits conducted by both Commission staff and staff of CDFG, alike, several active nests were easily seen and discovered from ground level locations. As stated in the declarations, Mr. Bandy had the benefit of a "cherry picker" and still allegedly did not see the active nests and proceeded to remove one entire tree and several large branches of other trees, directly impacting heron and egret nesting and roosting areas.

Unfortunately, attempting to observe these highly reclusive birds from a "cherry picker" and sawing limbs of trees with, what appears to be, a chain saw, would limit an accurate assessment of whether there was "active" nesting activities occurring since there is a high likelihood that most if not all the birds would have abandoned their nests (see Memo from Commission staff ecologist, Exhibit #6) and undoubtedly any roosting activity would not have been evident since the birds would have likely been scared away by the cutting of trees and human intrusion. Even if this was an appropriate way to conduct such an examination, it does not appear that Mr. Bandy is a qualified

biologist, or more importantly, a qualified ornithologist, experienced to make such a determination. Commission staff and CDFG staff with relevant expertise observed both the nests and the damage done to the trees in exposing the nests in the remaining trees.

Furthermore, contrary to the statements made in the declarations, the limbs that were removed had a direct impact on active nesting of the egrets and herons. Active nests were observed by Commission staff to be directly above the location of the removed branches, allowing the possibility of predation from other birds and mammalian species. In addition, although not relevant to the question of whether unpermitted development was performed, it is clear that the impact of the tree removal on the bird community was not unknown to the TEHOA. In fact, minutes of TEHOA Board meetings which were included in their SOD state, "Jack Williams will obtain a quote from Bandy Landscaping to trim the trees in that area so that the birds roosting spaces are drastically reduced" and "we would trim the top third of the trees in hope of preventing future nesting by the birds."

The unfortunate results of the unpermitted activity resulted in 1) removal of major vegetation with the required CDP, and 2) the impacts to active nesting and roosting by heron and egrets, which play an important role in the surrounding wetlands ecosystem.

CEASE AND DESIST ORDER NO. CCC-06-CD-12

- 1.0 Pursuant to its authority under Public Resources Code Sections 30810, the California Coastal Commission (hereinafter "Commission") hereby orders and authorizes the Tennis Estates Homeowners Association, all its employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter, "TEHOA"), to take all actions required by this Order, including:
 - A) Cease and desist from performing any unpermitted development on property located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach (hereinafter "Subject Property"), including but not limited to, removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas,
 - B) Refrain from conducting any future development on the Subject Properties not authorized by a CDP or this Cease and Desist Order (hereinafter "Order"),
 - C) Cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves,
 - D) Plant a tree of the same species and size as, and in the similar location to, the tree that TEHOA removed without Coastal Act authorization
- 1.1 Accordingly, TEHOA shall, upon issuance of this Order, immediately cease and desist from conducting any and all trimming or removal of trees that support active or inactive herons or egrets. Within 14 days of issuance of the Order, TEHOA shall submit, for the review and approval of the Executive Director, a report describing the type and size of the tree to be planted and the location on the Subject Property where the tree will be planted.
- 1.2 TEHOA shall plant the tree within 7 days of written approval of the report by the Executive Director.
- 1.3 Within 14 days of completion of the planting, TEHOA shall submit, for the review and approval of the Executive Director, a report documenting the planting. The report shall include photographs that clearly show all portions of the Subject Property, and the location, type and size of the tree.
- 1.4 All plans, reports, photographs and any other materials required by this Order shall be sent to:

California Coastal Commission
Headquarters Enforcement Program
Attn: Aaron McLendon
45 Fremont Street, Suits 2000
San Francisco, California 94105
Facsimile (415) 904-5235

With a copy sent to:
California Coastal Commission
South Coast District Office
Attn: Andrew Willis
200 Oceangate, 10th Floor
Long Beach, CA 90802
Facsimile (562) 590-5084

2.0 PERSONS SUBJECT TO THESE ORDERS

2.1 The persons subject to this Cease and Desist Order are the Tennis Estates Homeowners Association, its officers, directors, members, employees, agents, contractors, and anyone acting in concert with the foregoing.

3.0 IDENTIFICATION OF SUBJECT PROPERTIES

3.1 The property that is the subject of this Order is located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

4.0 DESCRIPTION OF COASTAL ACT VIOLATION

4.1 TEHOA's Coastal Act violations consist of performing development that is not authorized in a coastal development permit, and therefore are violations of the Coastal Act and the Huntington Beach LCP. The unpermitted development includes: removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active Great Blue Heron and Snowy Egret nesting and roosting.

5.0 COMMISSION AUTHORITY TO ACT

5.1 The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

6.1 This Order is being issued on the basis of the findings adopted by the Commission on October 12, 2006, as set forth in the foregoing document entitled: STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER.

7.0 EFFECTIVE DATE

7.1 This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

8.1 Strict compliance with the terms and conditions of this Order is required. If TEHOA fails to comply with the requirements of this Order, including any deadline contained herein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists and additional penalties authorized in Chapter 9 of the Coastal Act, including exemplary damages. Penalties may also accrue (under the terms of Section 30820) in the amount of up to \$30,000 for each violation, and up to \$15,000 per day in which each violation persists.

9.0 EXTENSIONS OF DEADLINES

9.1 Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline. If the Executive Director determines that TEHOA has made a showing of good cause, he/she may at his/her discretion grant extensions of the deadlines contained herein.

10.0 APPEALS AND STAY RESOLUTION

10.1 Pursuant to Public Resources Code Section 30803(b), TEHOA, against whom this Order is issued, may file a petition with the Superior Court for a stay of this Order.

11.0 SITE ACCESS

11.1 TEHOA shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Order with access to the subject property at all reasonable times. Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the subject property on which the violations are located, (2) any areas where work is to be performed pursuant to this Order or pursuant to any plans adopted pursuant to this Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this order may lie, as necessary or convenient to view the areas where work is being performed pursuant to the requirements of this Order or evidence of such work is held, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting, documenting, and reviewing the progress of TEHOA in carrying out the terms of this Order.

12.0 GOVERNMENT LIABILITY

12.1 The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by TEHOA in carrying out activities authorized under this Order, nor shall the State of California be held as a party to any contract entered into by TEHOA or their agents in carrying out activities pursuant to this Order.

13.0 GOVERNING LAW

13.1 This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

14.1 Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 12th day of October, 2006 in Long Beach, California

Peter M. Douglas, Executive Director
California Coastal Commission

Date

Exhibit List

Exhibit Number	Description
1.	Site Map and Location
2.	Letter from Commission staff to Scott Hess, City of Huntington Beach Planning Manager, July 14, 2006
3.	Response from Scott Hess to Commission staff, July 20, 2006
4.	Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings, July 21, 2006
5.	Executive Director Cease and Desist Order No. ED-06-CD-02 and Notification of Intent to Record a Notice of Violation of the Coastal Act, July 27, 2006
6.	Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist, September 27, 2006
7.	Statement of Defense, received by Commission staff on August 10, 2006
8.	Aerial Photograph of Subject Property, 1972
9.	Photograph of Subject Trees, June 2, 2006
10.	Photograph of Snowy Egret in Subject Tree, June 2, 2006
11.	Photograph of Snowy Egret in Subject Tree, June 2, 2006

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

**Item Th 8**

Staff: Aaron McLendon-SF
Staff Report: Sept. 27, 2006
Hearing Date: Oct. 12, 2006

**STAFF RECOMMENDATIONS AND FINDINGS
FOR CEASE AND DESIST ORDER**

CEASE AND DESIST ORDER: CCC-06-CD-12

RELATED VIOLATION FILE: V-5-06-018

PROPERTY LOCATION: The southwest corner of Humboldt Drive and Saybrook Lane, Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

DESCRIPTION OF PROPERTY: An approximately four-acre common, open space area owned by the homeowners association, within the Tennis Estates residential complex seaward of Humboldt Drive and Saybrook Lane, adjacent to Huntington Harbor in the City of Huntington Beach.

PROPERTY OWNER: Tennis Estates Homeowners Association

VIOLATION DESCRIPTION: Unpermitted removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active Great Blue Heron, Great Egret, and Snowy Egret nesting and roosting.

PERSONS SUBJECT TO THESE ORDERS: Tennis Estates Homeowners Association

SUBSTANTIVE FILE DOCUMENTS: 1. Notice Prior to Issuance of an Executive Director Cease and Desist Order and Notice of Intent to Commence Cease and Desist Order Proceedings, 7/21/06

2. Executive Director Cease and Desist Order No. ED-06-CD-02, July 27, 2006
3. Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist, September 27, 2006
4. Exhibits #1 through #11 of this staff report

CEQA STATUS:

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-06-CD-12

Staff recommends that the Commission approve a Cease and Desist Order (as described below) which would require the Tennis Estates Homeowners Association (hereinafter, "TEHOA") to 1) cease and desist from performing unpermitted development including, but not limited to, removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas on property located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach (hereinafter, "subject property"), 2) cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves, and 3) plant a tree of the same species and size as, and in the similar location to, the tree that TEHOA removed without Coastal Act authorization.

The unpermitted development which is the subject of this Cease and Desist Order (hereinafter, "CDO") includes removal of major vegetation consisting of complete removal of one pine tree and removal of many large limbs of the remaining four pine trees that supported active heron and egret nesting and roosting sites. The trees that are the focus of this Cease and Desist Order proceeding consist of a grove of five, approximately 75-foot tall pine trees.¹ Commission staff, staff of the California Department of Fish and Game (hereinafter, "CDFG"), and members of the public have witnessed and documented at least eight active Great Blue Heron and Snowy Egret

¹ Commission staff notes that there are only four trees left in this grove because TEHOA had cut down one of the pine trees prior to Commission staff and CDFG staff halting the unpermitted activity.

nests in this grove as well as continuous roosting² by both herons and egrets (Exhibit #9-#11). These nests and activities were observed at site visits made immediately after the actions taken by the TEHOA, which were temporarily halted by CDFG. Subsequent to CDFG's actions, on July 27, 2006, the Executive Director of the Commission issued Executive Director Cease and Desist Order No. ED-06-CD-02 directing TEHOA to cease and desist from undertaking further unpermitted development at the subject property and to cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves (as discussed more fully in Section C of this staff report).

In addition to the direct effect the tree removal had on the herons and egrets, there are also effects on the larger ecological systems in the area. Herons and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles³. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. Stands of trees such as the ones on the subject property are an important natural resource and provide necessary ecological services for local southern California heron and egret populations. Clearly, this activity, active nesting and roosting of Great Blue Heron and Snowy Egret at this location near the wetlands, and the essential role that this grove of trees plays in supporting this activity, establishes this grove of trees as major vegetation (see September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report) and Section B of this staff report).

The subject property is adjacent to Huntington Harbor within the City of Huntington Beach, in an area covered by the City of Huntington Beach certified Local Coastal Program (hereinafter, "LCP"), within the Commission's appeals jurisdiction (discussed more fully, herein). The subject property is an approximately four acre common, open space lot within the Tennis Estates residential community, owned by the homeowners association, located between the sea (Huntington Harbor) and the first public roadway inland of the sea (Humboldt Drive and Saybrook Lane) (Exhibit #1). The development at issue herein has occurred on the site without the required authorization in a coastal development permit (hereinafter, "CDP"). "Development" is broadly defined by Section

² Commission staff notes that while this staff report addresses both the impact on active nesting and roosting of herons and egrets, we note that roosting activities at this location are equally if not more important for these particular birds in this particular setting, and in the evaluation of their impact on surrounding ecosystems. Moreover, although the biologists who have visited the site have confirmed that this stand of trees is an active roosting site, this may not be as evident to lay persons, since there are fewer obvious physical indications of roosting than there are for nesting activities, which include nests and the presence of young.

³ Keddy, P.A. Wetland Ecology: Principles and Conservation. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

30106 of the Coastal Act and includes "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation."

"Development" is also defined by Section 245.04(J) of the City of Huntington Beach LCP as including "the removal or harvesting of major vegetation." As previously stated, the grove of trees that was impacted by the unpermitted activity and that supported active heron and egret nesting and roosting is major vegetation⁴, and thus, the removal of one of those trees and major branches from another is "development." Section 30600(a) of the Coastal Act and Section 245.06 of the City LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP.

Because the unpermitted activity clearly constitutes "development" within the meaning of Section 245.04 of the LCP and Section 30106 of the Coastal Act, it requires a CDP. Since the City of Huntington Beach has a certified LCP, the performance of this development requires a CDP from the City of Huntington Beach. No such permit was issued by the City nor has a permit application been submitted.⁵ No permit was issued for the activity at issue, either by the California Coastal Commission or by the City of Huntington Beach pursuant to its authority under the LCP, implementing the Coastal Act.

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where they find that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP.⁶ As noted above, the activity that is the subject of this Cease and Desist Order proceeding is clearly "development" as that term is defined by the Coastal Act and the LCP, the development is not exempt under the Coastal Act or the LCP, and no CDP was issued by either the Commission or the City of Huntington Beach to authorize the development.

Again, staff recommends approval of this Cease and Desist Order to require TEHOA: (1) to cease and desist from conducting further unpermitted development on the subject property, including removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas; (2) to cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect

⁴ See Exhibit #5, Memorandum dated September 27, 2006, by staff ecologist Dr. Jonna Engel.

⁵ The location of the unpermitted development and the property on which the activity occurred is located within the Commission's "Appeals Area", as that term is defined by Section 245.04 (B) of the City of Huntington Beach LCP, since the subject property is located between the sea (Huntington Harbor) and first public road (Humboldt Drive and Saybrook Lane). This area is also within the Commission's appeals jurisdiction as defined in the Coastal Act, for the same reason. See Cal. Pub. Res. Code § 30603(a)(1). Therefore, if TEHOA had applied for and obtained any permit for this activity, which it did not, any action taken by the City of Huntington Beach, under its LCP, approving proposed development at this location, including proposed trimming or removal of trees that support active heron or egret nesting and roosting areas on the subject property, would be appealable to the Commission.

⁶ Pursuant to Cal. Pub. Res. Code §30810(a)(1) and (2), Commission staff requested that the City of Huntington Beach take action to enforce the policies of the City's certified LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation. On July 20, 2006, the City recommended that Commission staff proceed with enforcement.

of removing, disturbing, or harassing herons or egrets, themselves; and (3) to plant a tree of the same species as, and in the similar location to, the tree that TEHOA removed without authorization from a coastal development permit.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order are outlined in Title 14, Division 5.5, Section 13185 of the California Code of Regulations (CCR).

For a Cease and Desist Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in Title 14, California Code of Regulations (CCR) Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of a motion, per Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order.

III. STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following motion:

Motion

I move that the Commission issue Cease and Desist Order No. CCC-06-CD-12 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Cease and Desist Order No. CCC-06-CD-12, as set forth below, and adopts the findings set forth below on grounds that development, conducted by the Tennis Estates Homeowners Association, has occurred without a coastal development permit.

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-06-CD-12

Staff recommends the Commission adopt the following findings of fact in support of its action.

A. Description of Unpermitted Development

The subject property is an approximately four-acre common, open space lot within the Tennis Estates residential community adjacent to Huntington Harbor within the City of Huntington Beach (Exhibit #1). The grove of trees that is the subject of this Cease and Desist Order is located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The grove is also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area.

The unpermitted development, which is the subject matter of this Cease and Desist Order, includes removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active heron and egret nesting and roosting sites. The trees that are the subject of this Cease and Desist Order proceeding consist of a grove of five, approximately 75-foot tall pine trees, one of which was cut down by TEHOA without benefit of a coastal development permit, during active nesting and roosting of both egrets and herons. The grove was not present in 1972, when the Tennis Estates residential community was being constructed (as seen in a 1972 aerial photograph and attached hereto as Exhibit #8 of this staff report). Therefore, since the grove could have been planted at either a mature state or as saplings, the precise age of the trees is unknown.

Great Blue Heron, Great Egret, and Snowy Egret nesting, as well as continuous roosting activity by both herons and egrets, have been well documented in this grove of trees at the subject property. As is explained in Section B below and in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6), this activity, active nesting and roosting of Great Blue Heron, Great Egret, and

Snowy Egret whose presence is critical to the healthy functioning of the nearby wetlands, establishes this grove of trees as major vegetation.

B. Herons and Egrets and Their Relationship to the Subject Property⁷

The heronry that has been established at the subject property is presently used year round for roosting and seasonally for nesting by three species of herons and egrets: Great Blue Herons, *Ardea herodias*, Great Egrets, *Aldea alba*, and Snowy Egrets, *Egretta thula*. Herons and egrets experienced severe population declines at the turn of the 20th century when they were hunted for their beautiful plumage which was highly prized for woman's hats. Several laws outlawing hunting, including the 1918 Migratory Bird Treaty Act, were passed and heron and egret populations recovered. While heron and egret populations are no longer threatened, the wetland ecosystems upon which they depend are in trouble. The United States Geologic Survey conducted a study of wetland loss in the United States between the 1780's and 1980's. California has lost the largest percentage of original wetland habitat (91%) of all the states⁸. It is now estimated that California has less than 500,000 wetland acres remaining (from an estimated 5 million in 1780). This is less than one-half of one percent of California's total acreage. In southern California, many wetlands have been replaced by marinas and herons and egrets have adapted by relocating their roosting and nesting sites to stands of tall non-native pines, palms, ficus, and coral trees within highly developed areas^{9,10}. This relocation to non-native trees near marinas is because of the virtual absence of any native trees, the proximity of the non-native trees to primary foraging habitat, and the height of the non-native trees which affords protection from predation and disturbance. The herons and egrets are utilizing these trees for both roosting and nesting. In many southern California locations, herons and egrets roost at colony sites all year^{11,12}.

Herons and egrets establish roosting and nesting sites based on several important criteria including proximity to primary foraging habitat and avoidance of predation and disturbance. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance. The fact that they have established roosting and nesting sites in areas of high human density and disturbance suggests that suitable roosting and nesting areas are scarce.

⁷ This section is taken largely from Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this staff report)

⁸ United States Geologic Survey: <http://www.inpwrc.usgs.gov/resource/wetlands/wetloss/summary.htm>

⁹ Report on the Marina Del Rey Heronry. 2005. Prepared for Mark D. Kelly, Senior Vice President, Lyon Capital Ventures, by Dr. Jeffery Froeke.

¹⁰ Letter to California Coastal Commission from Daniel Cooper, Cooper Ecological Monitoring Inc., dated Aug 18, 2006

¹¹ Butler, R. W. 1992. Great Blue Heron. In *The Birds of North America*, No. 25 (A. Poole, P. Stettenhelm, and F. Gill, Eds.). Philadelphia: The Academy of Natural Sciences; Washington, DC: The American Ornithologists Union

¹² Parson, K. C. and T. L. Master. 2000. Snowy Egret (*Egretta thula*). In *The Birds of North America*, No. 489 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

The major determinate of heron and egret colony location is suitable wetland foraging habitat. For Great Blue Herons, the mean distance flown from nests to principle feeding sites is 1.4 to 4 miles¹³. An average Snowy Egret foraging trip is 1.7 miles from roosting and nesting sites to their main foraging area¹⁴. The Tennis Estates pines are located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The pines are also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area. Research has shown that Great Blue Herons exhibit strong fidelity to the choice of tree species within colonies whereas in Great Egret males, presence of old nests can induce site preference^{15,16}. Great Blue Herons, Great Egrets, and Snowy Egrets all roost and nest in the Seal Beach Wildlife Refuge and the Bolsa Chica wetlands. It is likely that the reason herons and egrets have established nests and are roosting in the Tennis Estates pines, as they are doing in non-native tree stands in other parts of coastal southern California such as Ventura Harbor, Marina del Rey, and Long Beach, is a lack of suitable nesting and roosting areas in remaining local wetlands.

In addition to proximity to primary foraging habitat, predation and disturbance also influence heron and egret choice of roosting and nesting tree species and locations. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into a preference for tall trees. In southern California the average nest height for Great Egrets is 88 feet¹⁷. Raccoons are one of the top heron and egret nest predators in Southern California¹⁸. Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as American crows, *Corvus brachyrhynchus*, who prey on eggs and chicks and red-tailed hawks, *Buteo jamaicensis*¹⁹. Both herons and egrets choose specific trees that are within a specific distance of primary foraging grounds and are safe from predation and disturbance. Herons do habituate to non-threatening repeated activities which explains the location of Southern California heronries in highly disturbed areas. Even so, most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season²⁰.

Heron and egret are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and

¹³ Ibid 9

¹⁴ Ibid 10

¹⁵ Kesall, J.P. & J. Simpson. 1980. A three year study of the Great Blue Heron in British Columbia. Proc. Colonial Waterbirds Group, 3:69-74.

¹⁶ Ibid 9

¹⁷ McCrimmen, D. A. Jr., J. C. Ogden, and G. T. Bancroft. 2001. Great Egret (*Ardea alba*). In The Birds of North America, No. 570 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

¹⁸ Ibid 10

¹⁹ Ibid 10

²⁰ Ibid 9

any number of other undesirable cycles²¹. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. The Tennis Estates pine stand fit the criteria for a heron and egret roosting and nesting site. The pine trees are within the foraging range required by the three heron and egret species utilizing the trees. The pine trees are tall, upwards of 75 feet, thus distancing the birds from predation and disturbance, and before the tree removal and trimming, had dense foliage that offered camouflage and protection from predation. Stands of trees such as those located on the subject property are an important natural resource and provide necessary ecological services for local southern California heron and egret populations, which, in turn, are critical to the healthy functioning of the nearby wetlands. Based on this finding of biological significance, the Tennis Estates trees are major vegetation.

C. Background: Commission's Actions and History of Violation on the Subject Property

On the afternoon of May 24, 2006, Commission staff received reports from members of the public that removal of trees supporting active heron and egret nests was underway at the Subject Property. Commission staff and members of the public then contacted the CDFG. On the same day, a CDFG warden visited the site and confirmed the presence of active bird nests in the trees located at the corner of Humboldt Drive and Saybrook Lane and confirmed that a tree had been removed. Members of the public and the CDFG Warden both observed dislodged eggs and dead hatchlings on the ground below the cut and trimmed trees. Pursuant to Fish and Game Code Section 3503, pertaining to protection of active bird nests and eggs, the California Department of Fish and Game on May 24, 2006 stopped the trimming and removal activities, which were undisputedly being conducted by TEHOA, prohibiting them from removal, trimming, or disturbance of the trees for 30 days.

Commission staff visited the site on June 2, 2006, documented the nesting activity in the subject trees, and confirmed that an entire tree and several very large limbs of other trees that contained active heron and egret nests had been removed. Commission staff clearly identified active nesting occurring in the trees that are the subject of this proceeding.²² As demonstrated by documents submitted by TEHOA, the goal of the unpermitted activity was to rid the subject property of the herons and egrets by cutting down the entire grove of trees that supported the herons and egrets. On June 23rd, the

²¹ Keddy, P.A. *Wetland Ecology: Principles and Conservation*. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

²² As noted above, Commission staff notes that while this staff report addresses both the impact on active nesting and roosting of herons and egrets, we note that roosting activities at this location are equally if not more important for these particular birds in this particular setting, and in the evaluation of their impact on surrounding ecosystems. Moreover, although the biologists who have visited the site have confirmed that this stand of trees is an active roosting site, this may not be as evident to lay persons, since there are fewer obvious physical indications of roosting than there are for nesting activities, which include nests and the presence of young.

CDFG warden and a CDFG environmental scientist visited the site and again counted approximately 8 active Great Blue Heron and Snowy Egret nests in the subject trees. Therefore, the warden prohibited removal, trimming, or disturbance of the trees for another 30-days.

Because the subject property was located in the City of Huntington Beach's permit jurisdiction under the City's LCP, Commission staff requested, in a letter dated July 14, 2006, that the City of Huntington Beach take action to enforce the policies of the City's certified LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation, as is provided for in Sections 30809 and 30810 of the Coastal Act (Exhibit #2). The letter also stated that if the City declined to act, the Commission could issue an order to enforce the requirements of the LCP. On July 18, 2006, the City recommended that Commission staff proceed with enforcement, including pursuing possible restoration order proceedings and confirmed this in an email to Commission enforcement staff (Exhibit #3).

Therefore, pursuant to Coastal Act Section 30809(a)(1) and (2), on July 21, 2006, the Executive Director of the Commission sent TEHOA a Notice Prior to Issuance of an Executive Director Cease and Desist Order (hereinafter, "EDCDO") for Violation No. V-5-06-018 and provided TEHOA the opportunity to provide assurances which would obviate the need to issue the EDCDO (Exhibit #4).²³ The Notice Prior to Issuance (hereinafter, "Notice") of an EDCDO stated, in part:

To prevent the issuance of the Executive Director Cease and Desist Order ("EDCDO") to you, you must provide a response by the date listed below [COB July 21, 2006] that satisfies the standards of section 13180(a) of the Commission's regulations.... This response must include:

Agreement to immediately and completely cease and desist from performing any development on the subject property, including, but not limited to, removal or trimming of the trees located at the southwest corner of Humboldt Drive and Saybrook Lane that support habitat for nesting herons and egrets, regardless of whether the bird nests supported by the trees are active or inactive.

Unfortunately, TEHOA did not respond at all to the Notice ever, orally or in writing, even after the deadline to respond had passed, and specifically, TEHOA did not commit to refrain from performing further unpermitted development at the Subject Property. Prior to issuance of the EDCDO, Commission staff called TEHOA on July 26, 2006 in an attempt to find out if TEHOA was going to provide assurances that it would not conduct further unpermitted activity. TEHOA did not respond to these telephone calls.²⁴

²³ The July 21, 2006 letter from the Executive Director also included a *Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings*, as described on page 11 of this staff report.

²⁴ In fact, TEHOA did not respond to any of the Commission calls or correspondence until August 9, 2006, despite numerous attempts by Commission staff to contact them.

The Executive Director determined that TEHOA had undertaken development that requires a permit without first securing a permit. The Executive Director also determined that TEHOA failed to respond to the Notice in a "satisfactory manner".²⁵ Therefore, on July 27, 2006, the Executive Director issued EDCDO No. ED-06-CD-02 directing TEHOA to cease and desist from undertaking further unpermitted development at the subject property and to cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves (Exhibit #5). Again, TEHOA did not respond even to the issuance of the EDCDO, until August 9, 2006.

Pursuant to Section 30809(e) of the Coastal Act, EDCDO No. ED-06-CD-02 expires 90 days from issuance of the EDCDO, which would mean that, absent an extension of thereto pursuant to Section 13188 of the Commission's regulations, the EDCDO would expire on October 25, 2006. Therefore, to ensure that no further unpermitted activity occurs at the subject property, to ensure that no additional herons or egrets or other migratory birds are harmed by the removal of their habitat, and to ensure general compliance with the Coastal Act, the Executive Director also sent TEHOA a *Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings* (hereinafter, "NOI") (Exhibit #5).

Notice of Intent to Commence Cease and Desist Order Proceedings

On July 21, 2006, pursuant to Section 13181, Title 14, Division 5.5 of the California Code of Regulations, the Executive Director, sent TEHOA a NOI for a Commission Cease and Desist Order (Exhibit #6). The NOI sent to TEHOA included a thorough explanation of why the subject activity is development under the Coastal Act and how such activity meets the criteria of Section 30810 of the Coastal Act to commence proceedings for issuance of a cease and desist order.

In accordance with Sections 13181(a) of the Commission's regulations, TEHOA was provided the opportunity to respond to the Commission staff's allegations as set forth in the NOI by completing a Statement of Defense form (hereinafter "SOD"). TEHOA was required to submit the SOD form by no later than August 10, 2006.

On August 10, 2006, Commission staff received a SOD from TEHOA in response to the NOI (Exhibit #7). These defenses and Commission staff's response to those defenses are addressed in *Section G* of this Staff Report.

²⁵ Section 13180(a) of the Commission's regulations (Title 14, Division 5.5 of the California Code of Regulations (CCR)) defines the term "satisfactory manner" as that term is used in Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice."

C. Basis for Issuance of Cease and Desist Order

Cease and Desist Order

The statutory authority for issuance of this Cease and Desist Order is provided in Section 30810 of the Coastal Act, which states, in relevant part:

- a) *If the Commission, after public hearing, determines that any person...has undertaken, or is threatening to undertake, any activity that... requires a permit from the commission without first securing the permit... the Commission may issue an order directing that person...to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program ... or any requirements of [the Coastal Act] which are subject to the jurisdiction of the certified program under [circumstances that are satisfied here, as described on page 10]*
- b) *The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

The following paragraphs set forth the basis for the issuance of the Cease and Desist Order by identifying the substantial evidence on which the Commission relied in determining that the development meets all of the required grounds listed in Section 30810 for the Commission to issue a Cease and Desist Order.

i. Development has Occurred without a Coastal Development Permit ("CDP")

Unpermitted development consisting of the removal of major vegetation, including the trimming and removal of trees that supported active heron and egret nesting and roosting areas has occurred on the subject property without a CDP. The unpermitted development that is the subject of this Cease and Desist Order meets the definition of "development" contained in Section 30106 of the Coastal Act and Section 245.04 of the City of Hunting Beach LCP.

"Development" is defined by Section 30106 of the Coastal Act as follows:

*"Development" means, on land, in or under water, the placement or erection 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...change in the intensity of use of water, or of access thereto...**and the removal or harvesting of major vegetation other than for agricultural purposes**... (Emphasis added).*

"Development" is defined by Section 245.04 of the City of Huntington Beach LCP as follows:

J. Development: The placement or erection of any solid material or structure on land, in or under water; discharge or disposal of any materials; 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 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 recreation use; and 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 or harvesting of major vegetation.

Section 30600(a) of the Coastal Act and Section 245.06 of the City of Huntington Beach LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a coastal development permit.

The unpermitted development that is the subject of this Cease and Desist Order meets the definition of "development" contained in Section 30106 of the Coastal Act and Section 245.04 of the City of Huntington Beach LCP. In this case, the complete removal of one tree and the trimming of other trees that all supported active heron and egret nesting and roosting is the removal of major vegetation (see September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6)). Therefore all the subject unpermitted development clearly constitutes "development" within the meaning of the above-quoted definition and therefore is subject to the permit requirement of section 30600(a) of the Coastal Act and Section 245.06 of the City of Huntington Beach LCP, and therefore may not be undertaken unless such development is authorized in a CDP. A coastal development permit was not issued to authorize the subject unpermitted development. In addition, the exemptions section under the City of Huntington Beach LCP does not provide any exemption for any sort of landscaping, including removal of major vegetation. In this case, the grove of trees on the Subject Property is major vegetation, and therefore removal or trimming of the trees is also not exempt under the City's LCP.

Inconsistent with Resource Policies of the Coastal Act

It should be noted that this is not an element which is required for issuance of a Cease and Desist Order. That is, the Commission does not have to find that the nature of the unpermitted development is inconsistent with the City of Huntington Beach LCP or the Chapter 3 Policies of the Coastal Act to issue Cease and Desist Orders under the Coastal Act (Section 30810). However, this section is provided as background information. The Commission finds that the unpermitted development is, in fact, inconsistent with Chapter 3 policies of the Coastal Act regarding the protection of

marine resources, the biological productivity of coastal waters, and possibly environmentally sensitive habitat areas. The Commission also notes that the unpermitted development is inconsistent with LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly C 7.1 and C 7.1.2

The protection of marine resources, the biological productivity of coastal waters, and environmentally sensitive habitat areas are major policy goals of the Coastal Act as provided for in Sections 30230, 30231, and 30240 of the Coastal Act. In addition, policies within the City of Huntington Beach LCP were also designed to protect these resources. The unpermitted removal of major vegetation, consisting of the complete removal of one tree and the removal of several large limbs from other trees that all supported active heron and egret nesting and roosting appears to be inconsistent with these Coastal Act policies since these birds are, among other things, integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles

Section 30230 (Marine Resources) of the Coastal Act and Policy C 6.1.2 and Policy C 6.1.3 of the City of Huntington Beach LCP states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 (Biological Productivity of Coastal Waters) of the Coastal Act and Policy C 6.1.4 of the City of Huntington Beach LCP states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored...

Section 30240 (Environmentally Sensitive Habitat Areas) of the Coastal Act and, in part, Policy C 7.1.2 of the City of Huntington Beach LCP states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts

which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

Objective C 7.1 of the City of Huntington Beach LCP states:

Regulate new development through design review and permit issuance to ensure consistency with the Coastal Act requirements and minimize adverse impacts to identified environmentally sensitive habitats and wetlands areas.

Removing and trimming the subject trees triggered a chain reaction of very significant negative ecological consequences as described below, and in Exhibit #6 to this staff report, Memorandum from Dr. Jonna Engel, dated 27, September 2006. Given the location of the eggs and hatchlings that were observed by both members of the public and the CDFG Warden as being on the ground below the trees that were removed and trimmed, it appears that the immediate results of the tree removal and trimming were the possible loss of unhatched eggs and the death of hatchlings. In addition, even if the unpermitted activity did not cause eggs and hatchlings to fall from the trees, due to the role that the subject trees play in the breeding of great blue herons and snowy egrets and because the nesting and roosting function of the site could be easily disturbed or degraded by removal of tree limbs and trees, the nesting population of herons and egrets in the Huntington Harbor area could be adversely impacted by tree removal or trimming at the Subject Property.

Even more significant, the loss of such important predators could affect the biological productivity of the surrounding wetlands areas, including Huntington Harbor, the Anaheim Bay National Wildlife Refuge, and the Bolsa Chica Wetlands by upsetting the balance of the local ecosystem (see Section B, above and Exhibit #6 of this staff report). Clearly, any additional tree removal would exacerbate both the short and long term losses to the Great Blue Heron, Great Egret, and Snowy Egret populations and would further impact the already diminishing wetlands habitat in Southern California, which could lead to an imbalance in prey populations leading to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles within the wetlands ecosystem.

Therefore, the unpermitted activity impacted the marine resources found in the surrounding area, including Huntington Harbor, Bolsa Chica wetlands and Anaheim Bay National Wildlife Refuge and disrupted the biological productivity of these coastal waters. Because those areas are ESHA, the removal of the trees, if it effects the elimination of the birds from the predation cycle of the wetlands, also disrupts those ESHAs in violation of Section 30240. In addition, since it is possible that the grove of trees itself may be ESHA, any removal of these trees, whether by cutting limbs from the trees or removing the trees entirely, would clearly be inconsistent with the ESHA protection policies of the Coastal Act and the City of Huntington Beach LCP. Therefore, the unpermitted development is inconsistent with Section 30230, 30231 and possibly 30240 of the Coastal Act as well as LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly Policy Sections C 7.1 and C 7.1.2.

D. Cease and Desist Order is Consistent with Chapter 3 of the Coastal Act and the City of Huntington Beach LCP

The Cease and Desist Order attached to this staff report is consistent with the resource protection policies found in Chapter 3 of the Coastal Act as well as with the City of Huntington Beach LCP. The Cease and Desist Order would require TEHOA to 1) cease and desist from performing or maintaining unpermitted development, including, but not limited to removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas on the subject property; 2) cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves; and 3) require TEHOA to plant a tree of the same species as, and in a similar location to, the tree that TEHOA removed without authorization by a coastal development permit. The requirements of the Cease and Desist Order would ensure protection of nesting and roosting sites for egrets and herons, thereby protecting the local population of such birds and, by extension, the marine resources and biological productivity of the surrounding Huntington Harbor area, including Huntington Harbor itself and the Bolsa Chica Wetlands and the Anaheim Bay National Wildlife Refuge. Therefore, the Cease and Desist Order is consistent with the Chapter 3 policies of the Coastal Act and the City of Huntington Beach LCP.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of this Cease and Desist Order is exempt from any applicable requirements of the California Environmental Quality Act (CEQA) of 1970 and will not have significant adverse effects on the environment, within the meaning of CEQA. The Cease and Desist Order is exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines (Title 14 of the California Code of Regulations).

F. Findings of Fact

1. TEHOA owns the property located at the southwest corner of Humboldt Drive and Saybrook Lane, Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach ("subject property"). The subject property is an approximately four-acre common (to the owners of the individual condominiums within the Tennis Estates complex), open space area, within the Tennis Estates residential complex seaward of Humboldt Drive and Saybrook Lane, adjacent to Huntington Harbor in the City of Huntington Beach.
2. TEHOA has undertaken development, as defined by Coastal Act Section 30106 and Section 245.04 of the City of Huntington Beach LCP, at the subject property, including but not limited to the removal of major vegetation consisting of complete removal of one pine tree and removal of several limbs of other pine trees that

supported active nesting and roosting by Great Blue Herons and Snowy Egrets whose presence is critical to the healthy functioning of the adjacent wetlands.

3. TEHOA conducted the above-described development without a Coastal Development Permit or any other Coastal Act authorization, in violation of the Coastal Act and the City of Huntington Beach LCP.
4. TEHOA is responsible for the unpermitted development because they arranged for, paid for, authorized, and/or hired a worker to conduct the unpermitted activity.
5. No exemption from the permit requirements of the Coastal Act or the City of Huntington Beach LCP applies to the unpermitted development on the subject property.
6. On July 18 and 20, 2006, the City of Huntington Beach requested the Commission to take the lead role in enforcement action to resolve the above-described violations. On July 21, 2006, the Executive Director of the Commission informed TEHOA that pursuant to Title 14, California Code of Regulations, Sections 13181(a), the Commission intended to initiate cease and desist order proceedings against them, and outlined steps in the cease and desist order process.
7. On July 27, 2006, the Executive Director issued Executive Director Cease and Desist Order No. ED-06-CD-02 requiring TEHOA to 1) immediately and completely cease and desist from performing further unpermitted development at the subject property and 2) immediately and completely cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves.
8. The grove of pine trees located on the subject property has been colonized by Great Blue Heron, Snowy Egret, and potentially other migratory bird species.
9. The grove of pine trees located on the subject property is used by Great Blue Heron, Snowy Egret, and potentially other migratory bird species for nesting and roosting.
10. The Great Blue Herons, Great Egrets, and Snowy Egrets that have colonized the grove of pine trees and that nest and roost in those trees are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions.
11. The grove of pine trees located on the subject property is major vegetation because of the role the trees play in supporting the nesting and roosting of Great Blue Heron and Snowy Egret, whose presence is critical to the healthy functioning of adjacent wetlands including Huntington Harbor, Seal Beach National Wildlife Refuge, and Bolsa Chica Wetlands.
12. The unpermitted development described in Finding No. 2 is inconsistent with the policies set forth in Sections 30230 and 30231, and possibly section 30240, of the

Coastal Act, as well as LCP Policy Sections C 6.1.2, C 6.1.3, C 6.1.4, and possibly Policy Section C 7.1 and C 7.1.2.

13. Unless prohibited, the unpermitted development will cause continuing resource damages.

G. Violators' Defenses and Commission's Response

Hans Van Ligten, on behalf of the TEHOA, submitted a Statement of Defense ("SOD"), which was received by the Commission staff on August 10, 2006, and is included as Exhibit #7 of this Staff Report. The SOD submitted by TEHOA contains general denials and objections as well as brief defenses. In addition, the SOD contains signed Declarations from both Jack L. Williams, Vice President of TEHOA's management company, and Robert Bandy, President of Bandy Landscape Maintenance, Inc. and person who conducted the unpermitted tree removal and trimming. TEHOA also submitted several photographs of the subject trees and bird nests as well as minutes from TEHOA meetings and unsigned correspondence between, Commission staff assumes, members of TEHOA. All but one issue that TEHOA raises are not relevant to whether the evidence before the Commission shows a violation of the Coastal Act, and thus, to whether the Commission is authorized to issue this cease and desist order, but we include a response to these issues nonetheless, for the information of all parties. The only relevant issue to this proceeding is whether there was either unpermitted development or violations of CDP requirements – that is, a violation of the Coastal Act or the Huntington Beach LCP, establishing the grounds to issue an Order under Section 30810. The following paragraphs describe the defenses contained in the SOD and set forth the Commission's response to each defense.

1. The Respondents' Defense:

"TEHOA denies any of the trees fits within the definition of 'major vegetation' or is within an 'environmentally sensitive habitat area'."

Commission's Response:

As noted above, given the location, use, importance, and biological and ecological significance of the trees, the materials that were removed were clearly "major vegetation" under the Coastal Act.²⁶ In fact, in order to reaffirm that these specific trees and limbs were "major vegetation" in this specific case, one of our staff biologists specifically examined the facts of this particular location and these specific birds and concluded that these trees were in fact major vegetation (see Exhibit #6, Memorandum of Dr. Jonna Engel, dated 27 September 2006 for the full text and analysis, and Section B of the Staff Report, above):

²⁶ "Major" in this context does not mean merely large, but rather refers to the significance of the vegetation. We note, however, that in this case, the trees and the limbs of the trees removed, were in fact, also large.

Hérons and egrets establish roosting and nesting sites based on several important criteria including proximity to primary foraging habitat and avoidance of predation and disturbance. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance. The fact that they have established roosting and nesting sites in areas of high human density and disturbance suggests that suitable roosting and nesting areas are scarce.

The major determinate of heron and egret colony location is suitable wetland foraging habitat. For Great Blue Herons, the mean distance flown from nests to principle feeding sites is 1.4 to 4 miles²⁷. An average Snowy Egret foraging trip is 1.7 miles from roosting and nesting sites to their main foraging area²⁸. The Tennis Estates pines are located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The pines are also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area. Research has shown that Great Blue Herons exhibit strong fidelity to the choice of tree species within colonies whereas in Great Egret males, presence of old nests can induce site preference^{29,30}. Great Blue Herons, Great Egrets, and Snowy Egrets all roost and nest in the Seal Beach Wildlife Refuge and the Bolsa Chica wetlands. It is likely that the reason herons and egrets have established nests and are roosting in the Tennis Estates pines, as they are doing in non-native tree stands in other parts of coastal southern California such as Ventura Harbor, Marina del Rey, and Long Beach, is a lack of suitable nesting and roosting areas in remaining local wetlands. Without a biology report for the Tennis Estates heronry, it is not possible to verify this for this site.

In addition to proximity to primary foraging habitat, predation and disturbance also influence heron and egret choice of roosting and nesting tree species and locations. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into a preference for tall trees. In southern California the average nest height for Great Egrets is 88 feet³¹. Raccoons are one of the top heron and egret nest predators in Southern California³². Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as American crows, *Corvus brachyrhynchus*, who prey on eggs and chicks and red-tailed hawks, *Buteo jamaicensis*³³. Both herons and egrets choose specific trees that are within a specific distance of primary foraging grounds and are safe from predation and disturbance. Herons do habituate to non-threatening

²⁷ Ibid 9

²⁸ Ibid 10

²⁹ Kesall, J.P. & J. Simpson. 1980. A three year study of the Great Blue Heron in British Columbia. Proc. Colonial Waterbirds Group, 3:69-74.

³⁰ Ibid 9

³¹ Ibid 15

³² Ibid 10

³³ Ibid 10

repeated activities which explains the location of Southern California heronries in highly disturbed areas. Even so, most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season³⁴.

Hérons and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles³⁵. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. The Tennis Estates pine stand fit the criteria for a heron and egret roosting and nesting site. The pine trees are within the foraging range required by the three heron and egret species utilizing the trees. The pine trees are tall, upwards of 75 feet, thus distancing the birds from predation and disturbance, and before the tree removal and trimming, had dense foliage that offered camouflage and protection from predation. Stands of trees such as those that are the subject of this proceeding, are an important natural resource and provide necessary ecological services for local southern California heron and egret populations. Based on this finding of biological significance, the Tennis Estates trees are major vegetation.

Moreover, we note that if there were any question remaining as to the applicability of this term, case law supports our position. This term should be broadly construed in light of the rule that individual provisions of conservation and environmental protection measures must be interpreted broadly so as to ensure attainment of the statute's objective. See e.g. *Friends of Mammoth v. Board of Supervisors*, (1972) 8 Cal.3d 247, 259-61.

2. The Respondents' Defense:

"The trees have created a health and safety issue due to a stench of animal waste. It has coated the plant life, sidewalk and walls. Plants in the 'dropping' zone are dying. There have been reports of persons slipping on the bird feces."

Commission's Response:

The above assertion does not provide any evidence to support a claim that the findings for a cease and desist order have not been met, or address the issue of whether the development required a permit, and the fact that none was obtained by Respondents,

³⁴ Ibid 9

³⁵ Keddy, P.A. *Wetland Ecology: Principles and Conservation*. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

which are the issues relevant to issuance of a Cease and Desist Order under Section 30810 of the Coastal Act.

As described in Section B of this staff report and in the Commission's Response to Respondents' Defense 1, above, the grove of trees that are the subject of this proceedings, and that were removed or trimmed without a CDP by TEHOA, is major vegetation and thus is development as that term is defined in the Coastal Act and the City of Huntington Beach LCP. "Development" is defined by Section 30106 of the Coastal Act as including "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation." "Development" is also defined by Section 245.04(J) of the City of Huntington Beach LCP as including "the removal or harvesting of major vegetation." Section 30600(a) of the Coastal Act and Section 245.06 of the City LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP.

Because the unpermitted development clearly constitutes "development" within the meaning of Section 245.04 of the LCP and Section 30106 of the Coastal Act, it requires a CDP. No CDP was issued for the activity at issue, either by the Commission or by the City of Huntington Beach pursuant to its authority under the LCP, implementing the Coastal Act. Thus, the requirements to issue a cease and desist order have been met.

3. The Respondents' Defense:

"[T]he TEHOA Board specifically directed that any tree work NOT impact nesting birds and the contractor observed the tree to attempt to avoid work when there were any active nests."

Commission's Response:

Again, this assertion does not respond in any way to the substance of this proceeding. Whether or not TEHOA directed that "tree work" not impact nesting birds is irrelevant to the finding necessary for issuance of a Cease and Desist Order pursuant to Section 30810 of the Coastal Act, and does not address the issue of undertaking development activities without a Coastal Development Permit.

Even if this was a valid defense (TEHOA directing tree work to not impact nesting birds), which it is not, the unpermitted activity was, in fact, despite the assertion above, undertaken during the exact time of active nesting. In fact, on numerous site visits conducted by Commission staff and/or staff of the CDFG on May 24th, June 2nd, June 23rd, and August 23rd of this year, staff of both agencies clearly witnessed and documented up to eight active nests of herons and egrets and many egrets and herons roosting in the trees. During the site visits Commission staff identified several active nests located immediately above branches that were cut by TEHOA. Obviously, even if TEHOA directed the "tree work" to not impact active nests, and even if this were a valid defense for issuance of a Cease and Desist Order, the removal and trimming of the

trees obviously was conducted during a time and in a location where there were at least eight active nesting sites and there actions clearly impacted those nests. As described in Exhibit #6 of this Staff Report, egrets and herons have a long nesting period, beginning as early as late December and ending in early September, and are found to roost year round.

In addition, as described in the Memorandum of Dr. Jonna Engel, dated 27 September 2006, attached as Exhibit #6 of this staff report, herons and egrets are normally shy and reclusive birds that are sensitive to human disturbance. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into tall trees. In southern California the average nest height for Great Egrets is 88 feet (2). Raccoons are one of the top heron and egret nest predators in southern California. Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as crows, who prey on eggs and chicks.

One of the five trees used by the herons and egrets was removed, opening the undercarriage of the trees, and exposing the active heron and egret nests to predation. In addition, the unpermitted activity resulted in removal of several large branches on the lower portion of the trees, further exposing the nests, and the chicks and fledglings within the nest, to predation and disturbance.

The unpermitted activity, itself, a human entering into the roosting and nesting areas in a "cherry picker", cutting limbs with a chain saw or other device, clearly disturbs any nesting or roosting activity. Since these birds are highly susceptible to human disturbance, and will abandon nesting efforts due to disturbance, there is no question that the activity alone impacted these birds.

Again, however, we note that to issue a cease and desist order pursuant to 30810 of the Coastal Act the Commission must only find that the activity was conducted without a CDP. In this case, as discussed above, the removal of the trees is removal of major vegetation and therefore is development. No CDP was issued to authorize this activity and therefore the requirements to issue a cease and desist order have been met.

4. The Respondents' Defense:

"[T]he only tree that was removed was NOT occupied by birds or nests. Observations by Mr. Bandy... showed no nests, birds, or more importantly, feces, thus indicating this smaller tree was not being used by herons or egrets."

Commission's Response:

Once again, this is not relevant to the issue of whether the subject activity was conducted without benefit of a CDP. However, in response to this allegation and as discussed more fully in Section B of this staff report, the Commission notes that the

grove of trees on the subject property provides ideal nesting and roosting habitats for egrets and herons, specifically because it is a dense cluster of tall trees (at least prior to the unpermitted activity) close to foraging areas (Huntington Harbor, Seal Beach National Wildlife Refuge, and Bolsa Chica Wetlands). The tree that was completely removed was within this grove, provided potential nesting and roosting opportunities, and also provided the nesting birds camouflage and protection from predation.

Even assuming that removing the smallest of the five trees within this grove of trees (which are major vegetation) could be removed without a CDP, which it could not, observations by Mr. Bandy, who, it appears, is not a qualified biologist or, more importantly, an ornithologist, is not sufficient to ensure the protection of these birds and this grove of trees that support the herons and egrets. It is evident that Mr. Bandy's observations were not sufficient, particularly since this removal, unfortunately, occurred both without permits and prior to any visits by CDFG and/or Commission staff. In fact, the very purpose of the permit process under the Coastal Act is to provide for information gathering, evaluation and recommendations to be made before any development is undertaken. This evaluation is to be based on the conditions which exist prior to any development being performed. If Respondents had applied for a permit, such information could have been verified and evaluated.

In fact, Mr. Bandy removed one tree entirely and, in addition, removed several large branches of other trees despite easily observable active nesting of the herons and egrets. In fact, photographs taken by Mr. Bandy (submitted by TEHOA in their SOD) showing chicks in nests during the time of the unpermitted trimming support this conclusion. While this defense is not relevant to the issue of whether the subject activity was conducted without benefit of a CDP, which it was not, the removal and trimming of major vegetation is development as defined by the Coastal Act and the City of Huntington Beach LCP. No CDP was issued for the activity and therefore the requirements to issue a cease and desist order have been met.

5. The Respondents' Defense:

In attachments to TEHOA's SOD, TEHOA raised several allegations within declarations signed by Jack L. Williams (Vice President of Huntington West Properties, Inc.) and Robert Bandy (President of Bandy Landscaping Maintenance, Inc.). TEHOA also included minutes from TEHOA Board meetings, unsigned, undated correspondence between, what appears to be, members of TEHOA, and photographs. While these documents have no relevance to the issue of whether the subject activity was conducted without benefit of a CDP, the following is a summary of TEHOA's allegations within these documents followed by the Commission's response. TEHOA raises the following issues in these attachments to their SOD:

a) [From Mr. Williams declaration] "[A]t no time did members of the Coastal Commission staff ask me or any of my employees to provide any information regarding these issues and therefore believe that the Commission's two letters are based on a one-sided, and frankly, incorrect presentation of the facts."

Commission's Response:

To clarify the record, as soon as the City of Huntington Beach requested that the Commission take the lead in enforcement of the violations at the Subject Property, the Executive Director of the Commission sent TEHOA a Notice Prior to Issuance of an Executive Director Cease and Desist Order ("EDCDO") for the violation (Exhibit #5 to this Staff Report), and specifically requested that TEHOA provide assurances which would obviate the need to issue the EDCDO. TEHOA did not respond. In fact, when no response was received, Commission staff called TEHOA's management company (Huntington West Properties, Inc) in an attempt to discuss the violation and to determine whether TEHOA would provide assurances that they agree to not perform further unpermitted development. Unfortunately, neither TEHOA nor its property management company, Huntington West Properties, Inc., returned these telephone calls.

Notwithstanding the issues raised by Mr. Williams, or these efforts made by Commission staff to contact TEHOA, the activity at issue constitutes development, as discussed above, which requires a CDP. A CDP was not issued for the removal of the trees (which are major vegetation, as also discussed above), and therefore the requirements to issue a cease and desist order have been met.

b) [Declarations from both Mr. Williams and Mr. Bandy] In each of the declarations submitted as attachments to the SOD (attached as Exhibit #7 of this staff report), TEHOA describes the issue of bird excrement and urine, and states that it was damaging the landscaping underneath the trees and creating a hazardous situation for people walking below the trees.

Commission's Response:

As discussed in the Commission's response to Respondent's Defense No. 2, above, this assertion does not provide any evidence to support a claim that the findings for a cease and desist order have not been met.

c) [Declarations from both Mr. Williams and Mr. Bandy] In each of the declarations submitted with the SOD (attached as Exhibit #7 of this staff report), Mr. Williams and Mr. Bandy allege that TEHOA discussed that removal of the trees be done "with extreme care to avoid any impact to nesting birds" (Declaration of Mr. Williams, page 2). The declarations also allege that Mr. Bandy was instructed to examine the trees and determine if any nesting birds were in the trees before doing any work. The declarations go on to allege that Mr. Bandy did inspect the trees by going up in a "cherry picker" and determined that there were no active nests in the trees, and therefore commenced removing one tree and the lower branches of other trees. Mr. Bandy asserted in his declaration that he did find unoccupied nests but determined that there were no active nests, and therefore he continued trimming the trees. Mr. Bandy states, "I trimmed approximately four to five branches when I discovered a nest in the interior of the tree which contained egrets. Having found an occupied nest, I immediately stopped any trimming and left the nest undisturbed."

Commission's Response:

Again, these allegations made in the declarations do not provide a valid defense to the claim of unpermitted development or for whether a cease and desist order can be issued by the Commission pursuant to Section 30810 of the Coastal Act. However, Commission staff provides the following response to address these allegations and to clarify the issues.

As mentioned in Section B of this Staff Report and as discussed in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report), the grove of trees is major vegetation, and therefore any removal of the trees requires a CDP. No CDP was issued for the removal of the trees or the tree branches, in violation of the Coastal Act and the City of Huntington Beach LCP.

In addition, some explanation of the nesting practices of these birds may explain why this unpermitted development is so significant from a biological coastal resource perspective. The unfortunate effect of the removal of the trees from the subject property was a direct impact to active heron and egret nests and their roosting habitat. The active nesting season of these birds begins as early as late December and ends in early September and they roost year-round. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance, especially during active nesting. As discussed in the September 27, 2006 Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist (Exhibit #6 of this Staff Report), most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season.

The unpermitted removal of one tree and several large limbs of others was done on May 24, during the very middle of this nesting season, and when there were observable active nests in the trees. Even if the directive given by the TEHOA to not remove the trees until nesting was completed was a valid defense to the issuance of a cease and desist order, which it is not, there were undoubtedly active nests in the trees at the time they were removed. In each of the sites visits conducted by both Commission staff and staff of CDFG, alike, several active nests were easily seen and discovered from ground level locations. As stated in the declarations, Mr. Bandy had the benefit of a "cherry picker" and still allegedly did not see the active nests and proceeded to remove one entire tree and several large branches of other trees, directly impacting heron and egret nesting and roosting areas.

Unfortunately, attempting to observe these highly reclusive birds from a "cherry picker" and sawing limbs of trees with, what appears to be, a chain saw, would limit an accurate assessment of whether there was "active" nesting activities occurring since there is a high likelihood that most if not all the birds would have abandoned their nests (see Memo from Commission staff ecologist, Exhibit #6) and undoubtedly any roosting activity would not have been evident since the birds would have likely been scared away by the cutting of trees and human intrusion. Even if this was an appropriate way to conduct such an examination, it does not appear that Mr. Bandy is a qualified

biologist, or more importantly, a qualified ornithologist, experienced to make such a determination. Commission staff and CDFG staff with relevant expertise observed both the nests and the damage done to the trees in exposing the nests in the remaining trees.

Furthermore, contrary to the statements made in the declarations, the limbs that were removed had a direct impact on active nesting of the egrets and herons. Active nests were observed by Commission staff to be directly above the location of the removed branches, allowing the possibility of predation from other birds and mammalian species. In addition, although not relevant to the question of whether unpermitted development was performed, it is clear that the impact of the tree removal on the bird community was not unknown to the TEHOA. In fact, minutes of TEHOA Board meetings which were included in their SOD state, "Jack Williams will obtain a quote from Bandy Landscaping to trim the trees in that area so that the birds roosting spaces are drastically reduced" and "we would trim the top third of the trees in hope of preventing future nesting by the birds."

The unfortunate results of the unpermitted activity resulted in 1) removal of major vegetation with the required CDP, and 2) the impacts to active nesting and roosting by heron and egrets, which play an important role in the surrounding wetlands ecosystem.

CEASE AND DESIST ORDER NO. CCC-06-CD-12

- 1.0 Pursuant to its authority under Public Resources Code Sections 30810, the California Coastal Commission (hereinafter "Commission") hereby orders and authorizes the Tennis Estates Homeowners Association, all its employees, agents, contractors, and any persons acting in concert with any of the foregoing (hereinafter, "TEHOA"), to take all actions required by this Order, including:
 - A) Cease and desist from performing any unpermitted development on property located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach (hereinafter "Subject Property"), including but not limited to, removal or trimming of trees that support active or inactive heron or egret nesting or roosting areas,
 - B) Refrain from conducting any future development on the Subject Properties not authorized by a CDP or this Cease and Desist Order (hereinafter "Order"),
 - C) Cease and desist from removing or disturbing heron or egret nests and from undertaking any unpermitted development (as that term is used in the Coastal Act), including, but not limited to, any which would have the effect of removing, disturbing, or harassing herons or egrets, themselves,
 - D) Plant a tree of the same species and size as, and in the similar location to, the tree that TEHOA removed without Coastal Act authorization
- 1.1 Accordingly, TEHOA shall, upon issuance of this Order, immediately cease and desist from conducting any and all trimming or removal of trees that support active or inactive herons or egrets. Within 14 days of issuance of the Order, TEHOA shall submit, for the review and approval of the Executive Director, a report describing the type and size of the tree to be planted and the location on the Subject Property where the tree will be planted.
- 1.2 TEHOA shall plant the tree within 7 days of written approval of the report by the Executive Director.
- 1.3 Within 14 days of completion of the planting, TEHOA shall submit, for the review and approval of the Executive Director, a report documenting the planting. The report shall include photographs that clearly show all portions of the Subject Property, and the location, type and size of the tree.
- 1.4 All plans, reports, photographs and any other materials required by this Order shall be sent to:

California Coastal Commission
Headquarters Enforcement Program
Attn: Aaron McLendon
45 Fremont Street, Suits 2000
San Francisco, California 94105
Facsimile (415) 904-5235

With a copy sent to:
California Coastal Commission
South Coast District Office
Attn: Andrew Willis
200 Oceangate, 10th Floor
Long Beach, CA 90802
Facsimile (562) 590-5084

2.0 PERSONS SUBJECT TO THESE ORDERS

2.1 The persons subject to this Cease and Desist Order are the Tennis Estates Homeowners Association, its officers, directors, members, employees, agents, contractors, and anyone acting in concert with the foregoing.

3.0 IDENTIFICATION OF SUBJECT PROPERTIES

3.1 The property that is the subject of this Order is located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

4.0 DESCRIPTION OF COASTAL ACT VIOLATION

4.1 TEHOA's Coastal Act violations consist of performing development that is not authorized in a coastal development permit, and therefore are violations of the Coastal Act and the Huntington Beach LCP. The unpermitted development includes: removal of major vegetation consisting of complete removal of one pine tree and removal of several large limbs of other pine trees that supported active Great Blue Heron and Snowy Egret nesting and roosting.

5.0 COMMISSION AUTHORITY TO ACT

5.1 The Commission is issuing this Order pursuant its authority under Section 30810 of the Public Resources Code.

6.0 FINDINGS

6.1 This Order is being issued on the basis of the findings adopted by the Commission on October 12, 2006, as set forth in the foregoing document entitled: STAFF RECOMMENDATIONS AND FINDINGS FOR CEASE AND DESIST ORDER.

7.0 EFFECTIVE DATE

7.1 This Order shall become effective as of the date of issuance by the Commission and shall remain in effect permanently unless and until rescinded by the Commission.

8.0 COMPLIANCE OBLIGATION

8.1 Strict compliance with the terms and conditions of this Order is required. If TEHOA fails to comply with the requirements of this Order, including any deadline contained herein, it will constitute a violation of this Order and may result in the imposition of civil penalties of up to six thousand dollars (\$6,000) per day for each day in which compliance failure persists and additional penalties authorized in Chapter 9 of the Coastal Act, including exemplary damages. Penalties may also accrue (under the terms of Section 30820) in the amount of up to \$30,000 for each violation, and up to \$15,000 per day in which each violation persists.

9.0 EXTENSIONS OF DEADLINES

9.1 Any extension requests must be made in writing to the Executive Director and received by the Commission staff at least 10 days prior to the expiration of the subject deadline. If the Executive Director determines that TEHOA has made a showing of good cause, he/she may at his/her discretion grant extensions of the deadlines contained herein.

10.0 APPEALS AND STAY RESOLUTION

10.1 Pursuant to Public Resources Code Section 30803(b), TEHOA, against whom this Order is issued, may file a petition with the Superior Court for a stay of this Order.

11.0 SITE ACCESS

11.1 TEHOA shall provide Commission staff and staff of any agency having jurisdiction over the work being performed under this Order with access to the subject property at all reasonable times. Nothing in this Order is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission and other relevant agency staff may enter and move freely about the following areas: (1) the portions of the subject property on which the violations are located, (2) any areas where work is to be performed pursuant to this Order or pursuant to any plans adopted pursuant to this Order, (3) adjacent areas of the property, and (4) any other area where evidence of compliance with this order may lie, as necessary or convenient to view the areas where work is being performed pursuant to the requirements of this Order or evidence of such work is held, for purposes including but not limited to inspecting records, operating logs, and contracts relating to the site and overseeing, inspecting, documenting, and reviewing the progress of TEHOA in carrying out the terms of this Order.

12.0 GOVERNMENT LIABILITY

12.1 The State of California shall not be liable for injuries or damages to persons or property resulting from acts or omissions by TEHOA in carrying out activities authorized under this Order, nor shall the State of California be held as a party to any contract entered into by TEHOA or their agents in carrying out activities pursuant to this Order.

13.0 GOVERNING LAW

13.1 This Order shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California, which apply in all respects.

14.0 NO LIMITATION OF AUTHORITY

14.1 Except as expressly provided herein, nothing herein shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Order.

Issued this 12th day of October, 2006 in Long Beach, California

Peter M. Douglas, Executive Director
California Coastal Commission

Date

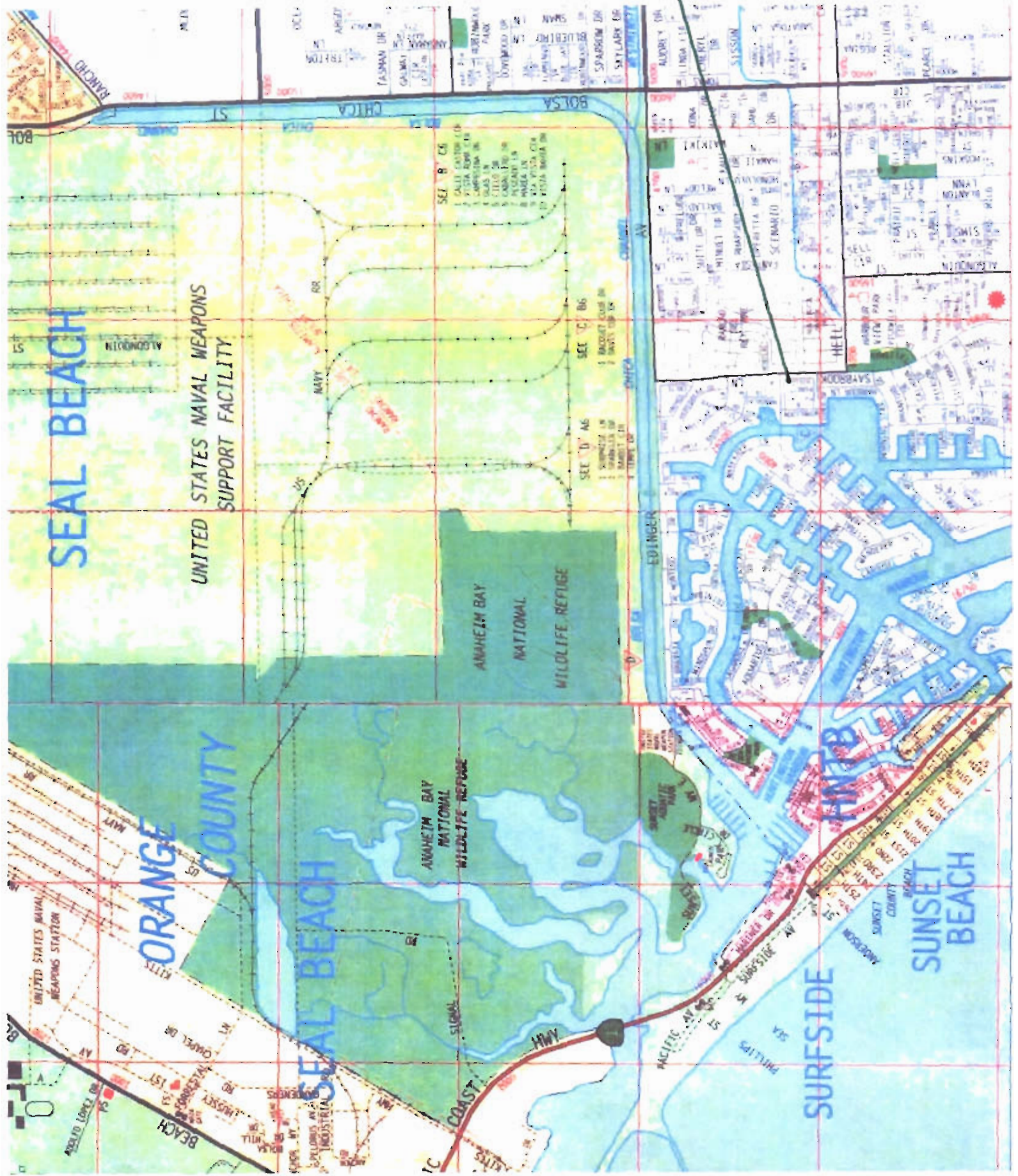
Exhibit List

Exhibit

Number Description

1. Site Map and Location
2. Letter from Commission staff to Scott Hess, City of Huntington Beach Planning Manager, July 14, 2006
3. Response from Scott Hess to Commission staff, July 20, 2006
4. Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings, July 21, 2006
5. Executive Director Cease and Desist Order No. ED-06-CD-02 and Notification of Intent to Record a Notice of Violation of the Coastal Act, July 27, 2006
6. Memorandum from Jonna D. Engel, Ph.D., Commission staff ecologist, September 27, 2006
7. Statement of Defense, received by Commission staff on August 10, 2006
8. Aerial Photograph of Subject Property, 1972
9. Photograph of Subject Trees, June 2, 2006
10. Photograph of Snowy Egret in Subject Tree, June 2, 2006
11. Photograph of Snowy Egret in Subject Tree, June 2, 2006

Subject
Property



CALIFORNIA COASTAL COMMISSION

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



July 14, 2006

Scott Hess
Planning Manager
City of Huntington Beach Planning Department
2000 Main Street
Huntington Beach, CA 92648

Exhibit 2
CCC-06-CD-12 (Tennis Estates HOA)

Page 1 of 3

Re: Unpermitted removal of heron and egret nesting trees at Tennis Estates, Huntington Beach, Assessor's Parcel Number 178-601-64

Dear Mr. Hess:

It has come to the attention of Coastal Commission staff that the Tennis Estates Homeowners Association removed trees and is preparing to remove additional trees at the Tennis Estates complex adjacent to the intersection of Humboldt Drive and Saybrook Lane, which is located in the coastal zone of Huntington Beach. Pursuant to Fish and Game Code Section 3053, pertaining to protection of active bird nests, the California Department of Fish and Game stayed removal of the trees for 30 days on May 24th and again on June 23rd. If the bird nests are inactive on July 23rd, when this second stay will expire, the property owner may decide to proceed with the tree removal. If this is the case, the heron and egret rookery will be lost.

Due to the role that these trees play in the breeding of great blue herons and possibly of other bird species, removal of these trees requires a coastal development permit from the City of Huntington Beach. Pursuant to Section 245.06 of the City of Huntington Beach Local Coastal Program, any person wishing to perform or undertake development in the coastal zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 245.04 of the City Local Coastal Program, in relevant part, as "the removal or harvesting of major vegetation." Based on the information currently provided to us, we believe that the trees removed by Tennis Estates HOA and those trees slated for removal must be considered major vegetation, and possibly an Environmentally Sensitive Habitat Area, because of the nesting habitat that they support. Since the subject trees qualify as major vegetation, no LCP policy exempts their removal.

Due to the scarcity of groves of trees that provide alternative roosting and nesting locations within the Huntington Harbor area, the nesting population of herons in the Huntington Harbor area could be adversely impacted by tree removal performed by Tennis Estates HOA. In order to determine the impacts of the tree removal on sensitive coastal resources and impose mitigation measures for any negative impacts that have already occurred and to avoid impacts that may occur, Tennis Estates HOA must undertake, through the development review process, a site specific biological assessment of 1) impacts that tree removal may have on nesting habitat and on the biological diversity and productivity of the Huntington Harbor area, and 2) measures that may avoid or mitigate adverse impacts. This will insure that important nesting locations in the Huntington Harbor area will be protected and at the same time will allow any necessary tree-trimming to proceed where there are legitimate public safety concerns.

Our records indicate that the City has not issued a coastal development permit for the tree removal. Any development conducted in the coastal zone without a valid coastal development permit constitutes a violation of the City's LCP and the Coastal Act. The purpose of this letter is to request clarification from the City regarding the City's intention to address the unpermitted development on the site.

We would like to coordinate with the City of Huntington Beach on enforcement regarding this violation and we are offering to assist in the enforcement of the City Local Coastal Program (LCP) and the Coastal Act. Please notify me by no later than close of business on **July 18, 2006**, regarding whether the City intends to take enforcement action to address the unpermitted development on the subject site and prevent the impending unpermitted development, or would prefer the Commission to address the unpermitted development. If the latter, the Commission will pursue enforcement action which may include the issuance of a cease and desist and restoration order for all of the unpermitted development, including development within the City's LCP jurisdiction. I apologize for the short deadline; it is necessitated by the impending expiration of the DFG's stay.

While enforcement action by the Commission does not preclude the City from pursuing resolution of violations of LCP policies, the Commission may assume primary responsibility for enforcement of Coastal Act violations pursuant to Section 30810(a) of the Act. Section 30810(a) provides that the Commission may issue an order to enforce the requirements of a certified local coastal program in the event that the local government requests the Commission to assist with or assume primary responsibility for issuing such order, if the local government declines to act or fails to act in a timely manner to resolve the violation after receiving a request to act from the Commission, or if the local government is a party to the violation.

Additionally, Section 30811 authorizes the Commission to order restoration of a site if it finds that development inconsistent with the Coastal Act has occurred without a CDP and is causing continuing resource damage.

If we do not receive a response from you by July 18, 2006, we will assume that the City declines to take enforcement action on the above referenced violations at this time and that the Commission can assume primary responsibility to resolve all violations on the above-mentioned property.

Thank you in advance for your time and attention to this matter. We look forward to working with you and your staff to resolve this matter. Should you have questions, please contact me at (562) 590-5071.

Sincerely,



Andrew Willis
District Enforcement Analyst

cc: Michael Fuentes, Senior Code Enforcement Officer, City of Huntington Beach
Deborah Lee, Deputy Director, CCC
Teresa Henry, District Manager, South Coast District, CCC
Karl Schwing, Orange County Area Supervisor, CCC
Pat Veesart, Southern California Enforcement Supervisor, CCC

Andrew Willis

From: Hess, Scott [REDACTED]
Sent: Thursday, July 20, 2006 10:04 AM
To: Andrew Willis
Cc: Fauland, Herb; Fuentes, Mike
Subject: RE: Huntington Harbor heron trees

I spoke with Mike Fuentes and Herb Fauland of our staff - they recommend your restoration process.

thanks,
Scott

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

From: Andrew Willis [REDACTED]
Sent: Wednesday, July 19, 2006 11:27 AM
To: Hess, Scott
Subject: Huntington Harbor heron trees

Hi Scott,

I'm following up on the letter I sent to you last week regarding the heron trees in Huntington Harbor. I am planning to send a notice of violation of the coastal act, and we believe the city's LCP, to the property owner in the next couple of days. I could direct the property owner to submit an application to the city for a coastal development permit either authorizing the tree removal or authorizing tree trimming together with restoration, or alternatively, I could possibly initiate our restoration process. Please let me know if you have a preference for how the matter should proceed. Thank you, Andrew

Andrew Willis
District Enforcement Analyst
California Coastal Commission
(562) 590-5071
<<Andrew.Willis.vcf>>

Exhibit 3
CCC-06-CD-12 (Tennis Estates HOA)

Page 1 of 1

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400



Via Certified and Regular Mail
And Facsimile

July 21, 2006

Tennis Estates Homeowners Association
c/o Huntington West Properties
Attn: Jack Williams
13812 Golden West St.
Westminster, CA. 92683

Subject: Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings

Location: Southwest corner of Humboldt Drive and Saybrook Lane, Tennis Estates, Huntington Beach, Orange County Assessor's Parcel No. 178-601-64

Violation Description: Removal of major vegetation consisting of one pine tree and limbs of other pine trees, which supported heron and egret nests

Dear Tennis Estates Homeowners Association:

The purpose of this letter is to notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission") to: 1) issue an Executive Director Cease and Desist Order directing the Tennis Estates Homeowners Association ("TEHOA") to cease and desist from conducting any further unpermitted development, including, but not limited to, removal or trimming of trees located at the corner of Humboldt Drive and Saybrook Lane, or any trees located on the subject property that support active or inactive heron or egret nests; and 2) commence proceedings for issuance by the Commission of Cease and Desist and Restoration Orders to direct you to cease and desist from undertaking further development on the subject property and to restore the subject property to the condition that existed prior to the occurrence of the unpermitted development, including, but not limited to, replacement of any trees removed without a coastal development permit ("CDP").

The unpermitted development that precipitated this notice consists of the removal of major vegetation supporting heron and egret nests. Commission staff believes that herons and egrets were nesting in the tree that was removed by the TEHOA, as well as in other trees from which TEHOA removed limbs, and such removal harmed or destroyed these active bird nests. This

Exhibit 4
CCC-06-CD-12 (Tennis Estates HOA)

unpermitted development is located at Tennis Estates, at the southwest corner of Humboldt Drive and Saybrook Lane, Huntington Beach, Orange County Assessor's Parcel Number 178-601-64.

History of the Violation Investigation

On the afternoon of May 24th, Commission staff received reports from members of the public that removal of trees supporting active heron and egret nests was underway at the subject property. Commission staff and members of the public contacted the California Department of Fish and Game ("CDFG"). On the same day, a CDFG warden visited the site and confirmed the presence of active bird nests in the trees located at the corner of Humboldt Dr. and Saybrook Ln. and confirmed that a tree had been removed. Pursuant to Fish and Game Code Section 3503, pertaining to protection of active bird nests, the California Department of Fish and Game stayed removal, trimming, or disturbance of the trees on May 24th for 30 days.

Commission staff visited the site on June 2nd and documented the nesting activity in the subject trees and confirmed that limbs had been removed from active nesting trees. On June 23rd, the CDFG warden and a CDFG environmental scientist visited the site and again counted approximately 8 active bird nests in the subject trees. Therefore, the warden issued another 30-day stay of the tree removal, trimming, or disturbance.

Commission staff requested, in a letter dated July 14th, 2006, that the City of Huntington Beach ("City") take action to enforce the policies of the City's certified Local Coastal Program ("LCP"), or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation, as is provided for in Sections 30809 and 30810 of the Coastal Act¹. The letter also stated that if the City declined to act, the Commission could issue an order to enforce the requirements of the LCP pursuant to Section 30810. Additionally, the letter reminded the City that section 30811 authorizes the Commission to order restoration of a site if it finds that development is inconsistent with the Coastal Act, has occurred without a CDP, and is causing ongoing resource damage. On July 18th, 2006, the City recommended that Commission staff proceed with restoration order proceedings, and therefore, Commission staff is proceeding with this enforcement action.

Executive Director Cease and Desist Order

Section 30600(a) states that any person wishing to undertake development in the coastal zone shall obtain a CDP from the Commission or local government in addition to any other permit required by law. "Development" is defined by Section 30106 as including "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation." Undertaking development without a permit is a violation of the Coastal Act and can subject persons undertaking such unpermitted development to orders, penalties and other legal remedies. Additionally, pursuant to Section 245.06 of the City's LCP, any person wishing to perform or undertake development in the coastal zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 245.04 of

¹ The Coastal Act is codified in sections 30000 to 30900 of the California Public Resources Code ("PRC"). All further section references are to the PRC, and thus, to the Coastal Act, unless otherwise indicated.

the City's LCP, as including "the removal or harvesting of major vegetation." No permit was issued for the activity at issue, either by the California Coastal Commission, or by the City of Huntington Beach pursuant to their authority under the LCP, implementing the Coastal Act. Furthermore, the unpermitted activity is not exempt under the Coastal Act or the Commission's Regulations or under the certified LCP.

Section 30809(a) authorizes the Executive Director to issue an order directing a person to cease and desist if that person has undertaken, or threatened to undertake, any activity that may require a permit from the Commission without securing a permit. The order may also be issued to enforce any requirements of a certified LCP under certain specified circumstances, which apply here.² PRC § 30809(a). The City has a certified LCP, and the removal of major vegetation constitutes development that requires a CDP under both the Coastal Act and the City's LCP. Therefore, the unpermitted development is a violation of the City's LCP and the Coastal Act.

Section 30809(b) states:

The cease and desist order shall be issued only if the person or agency has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity.

Section 13180(a) of the Commission's regulations (Title 14, Division 5.5 of the California Code of Regulations (CCR)) defines the term "satisfactory manner" as that term is used in Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice." **Therefore, to prevent the issuance of the Executive Director Cease and Desist Order ("EDCDO") to you, you must provide a response by the date listed below that satisfies the standards of section 13180(a) of the Commission's regulations. If you do not immediately cease the unpermitted development and provide a response meeting these criteria, an EDCDO will be issued to you, the violation of which could subject you to additional penalties. Please respond by telephone to Aaron McLendon of the Commission's San Francisco's office no later than 4:00pm, July 21st, 2006, at (415) 904-5220. Written confirmation of your response must follow by 5:00pm, July 21st, 2006, faxed to the attention of Aaron McLendon at (415) 904-5235. This response must include:**

1. Agreement to immediately and completely cease and desist from performing any development on the subject property, including, but not limited to, removal or trimming of the trees located at the southwest corner of Humboldt Drive and Saybrook Lane that support habitat for nesting herons and egrets, regardless of whether the bird nests supported by the trees are active or inactive.

The Executive Director Cease and Desist Order may be subject to such terms and conditions as the Executive Director may determine are necessary to avoid irreparable injury to any area

² The specific circumstance authorizing the order in this case is that the Commission, in its letter of July 14, 2006, requested that the City take action regarding the alleged violation, and the City declined to act. See PRC § 30809(a)(2).

within the jurisdiction of the Commission pending action by the Commission under Sections 30810 and 30811 (which grant the Commission the authority to issue Cease and Desist and Restoration Orders, respectively). The Executive Director Cease and Desist Order shall be effective upon its issuance.

Notice of Intent to Commence Commission Cease and Desist and Restoration Order Proceedings

I am also notifying TEHOA, as the entity undertaking the activity constituting development under the Coastal Act, of my intent to commence proceedings for issuance by the Commission of a Cease and Desist and a Restoration Order to direct you to cease and desist from undertaking further development on the subject property and to restore the subject property to the condition that existed prior to the occurrence of the unpermitted development.

Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a), which states the following:

If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist. The order may also be issued to enforce any requirements of a certified local coastal program or port master plan, or any requirements of this division which are subject to the jurisdiction of the certified program or plan, under any of the following circumstances:

(1) The local government or port governing body requests the commission to assist with, or assume primary responsibility for, issuing a cease and desist order.

(2) The commission requests and the local government or port governing body declines to act, or does not take action in a timely manner, regarding an alleged violation which could cause significant damage to coastal resources....

The Executive Director of the Commission is issuing this Notice of Intent to Commence Cease and Desist Order proceedings to direct TEHOA, as the entity undertaking the activity constituting development under the Coastal Act, to cease and desist from undertaking further unpermitted development on the subject property. The unpermitted development at issue includes removal of major vegetation consisting of one pine tree and limbs of other pine trees, which supported heron and egret nests. This unpermitted development is located at Tennis Estates, at the southwest corner of Humboldt Drive and Saybrook Lane, Huntington Beach, Orange County Assessor's Parcel Number 178-601-64.

Section 30600(a) states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP. "Development" is defined by Section 30106 as follows:

"Development" means, on land, in or under water, the placement or erection 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...change in the intensity of use of water, or of access thereto...and the removal or harvesting of major vegetation other than for agricultural purposes...

In addition, pursuant to Section 245.06 of the City's LCP, any person wishing to perform or undertake development in the coastal zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 245.04 of the City's LCP, as including "the removal or harvesting of major vegetation."

The subject activity clearly constitutes "development" within the meaning of the above-quoted definitions and therefore is subject to the permit requirement of Section 30600(a) and LCP Section 245.06. A CDP was not issued by the City or the Commission to authorize the subject unpermitted development. Furthermore, the unpermitted activity is not exempt under Coastal Act or the Commission's Regulations or under the certified LCP.

For this reason, the criteria of Section 30810(a) have been met, and I am sending this letter to initiate proceedings for the Commission to determine whether to issue a Cease and Desist Order. Based on Section 30810(b), the Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act.

Restoration Order

Section 30811 authorizes the Commission to order restoration of a site in the following terms:

In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission, local government... the development is inconsistent with this division, and the development is causing continuing resource damage.

Pursuant to Section 13191 of the Commission's regulations, I have determined that the specified activities meet the criteria of Section 30811, based on the following:

- 1) Development consisting of removal of major vegetation consisting of trees and limbs supporting heron and egret nests has occurred on the subject property without a coastal development permit. Commission staff has confirmed that Tennis Estates Homeowners Association did not obtain a coastal development permit for the removal of major vegetation.

- 2) This development is inconsistent with the resource protection policies of the Coastal Act and LCP, including, but not limited to the following:
 - a) Section 30230 (marine resources),
 - b) Section 30240 (environmentally sensitive habitat areas or ESHA),
 - c) LCP Policies C 6.1.2, 6.1.4 (water and marine resources)
 - d) LCP Policies C 7.1, 7.1.2 (environmentally sensitive habitats)

- 3) The unpermitted development is causing continuing resource damage, as defined by Section 13190 of the Commission's regulations. The unpermitted development has impacted the resources listed in the previous paragraph (item number two). Such impacts meet the definition of damage provided in Section 13190(b): "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development." The unpermitted tree and limb removal will lead to adverse impacts to the breeding population of herons and egrets in the Huntington Harbor area and consequently affect the marine resources in the area through the population diminishment of two apex predators.

In addition, the continuation of the unpermitted development, as listed above, will create further adverse impacts to marine resources and an environmentally sensitive habitat area. The impacts from the unpermitted development continue to exist at the subject property; therefore, the damage to resources protected by the Coastal Act is continuing.

Removing the subject trees triggered unfortunate negative ecological consequences as described below. Due to the role that the subject trees play in the breeding of great blue herons and snowy egrets, as well as the scarcity of groves of trees that provide alternative roosting and nesting locations within the Huntington Harbor area, and because the nesting and roosting function of the site could be easily disturbed or degraded by removal of tree limbs and trees, the nesting population of herons and egrets in the Huntington Harbor area could be adversely impacted by tree removal or trimming at the subject site. In addition, the loss of important predators could affect marine resources in the area by upsetting the balance of the local ecosystem.

For the reasons stated above, I have decided to commence proceedings for a Restoration Order before the Commission in order to direct TEHOA, as the entity undertaking the activity constituting development under the Coastal Act, to restore the subject property to the condition it was in before the unpermitted development occurred. The unpermitted development at issue includes removal of major vegetation consisting of one pine tree and limbs of other pine trees which supported heron and egret nests. This unpermitted development is located at Tennis Estates, at the southwest corner of Humboldt Drive and Saybrook Lane, Huntington Beach, Orange County Assessor's Parcel Number 178-601-64.

The procedures for the issuance of Restoration Orders are described in Sections 13190 through 13197 of the Commission's regulations. Section 13196(e) of the Commission's regulations states the following:

Any term or condition that the commission may impose which requires removal of any development or material shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred.

Accordingly, any Restoration Order that the Commission may issue will have as one of its purposes the restoration of the subject property to the conditions that existed prior to the occurrence of the unpermitted development described above, and to restore the resources damaged by the unpermitted activity.

In accordance with Sections 13181(a) and 13191(a) of the Commission's Regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this Notice of Intent to Commence Cease and Desist and Restoration Order proceedings by completing the enclosed Statement of Defense (SOD) form. **The SOD form must be returned to the Commission's San Francisco office, directed to the attention of Aaron McLendon, no later than August 10th, 2006.**

You should be aware that that Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed \$30,000 and shall not be less than \$500. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development, in an amount not less than \$1,000 and not more than \$15,000 per day for each day in which the violation persists. Section 30821.6 provides that a violation of a cease and desist order, including an EDCDO, or a restoration order can result in civil fines of up to \$6,000 for each day in which the violation persists.

In addition, the Commission may commence action to record a Notice of Violation against the subject property, pursuant to section 30812.

We would like to work with you to resolve these issues amicably. One option that you may consider is agreeing to a "consent order". A consent order is similar to a settlement agreement. A consent order would provide you with an opportunity to have input into the process and timing of restoration of the subject property and mitigation of the damages caused by the unpermitted activity, and, if appropriate, would allow you to negotiate a penalty amount with Commission staff. If you are interested in discussing the possibility of a consent order, please contact or send correspondence Aaron McLendon, to his attention at the address listed on the letterhead when you receive this letter to discuss options to resolve this case.

The Commission staff intends to tentatively schedule the hearings for the Cease and Desist and Restoration Order during the Commission's October meeting in Orange County. If you have any

questions regarding this letter or the enforcement case, please call Aaron McLendon at (415) 904-5220 or send correspondence to his attention at the address listed on the letterhead.

Sincerely,

N. Patrick Veesart FOR

Peter Douglas
Executive Director

cc: **Bandy Landscaping and Maintenance Inc.**
Scott Hess, Planning Manager, City of Huntington Beach
Michael Fuentes, Senior Code Enforcement Officer, City of Huntington Beach
Lawrence D. Stephens Jr., CA Dept. of Fish and Game
Erin Wilson, Environmental Scientist, CA Dept. of Fish and Game
Aaron McLendon, Statewide Enforcement Analyst
Lisa Haage, Chief of Enforcement, CCC
Alex Helperin, Staff Counsel, CCC
N. Patrick Veesart, Southern California Enforcement Supervisor, CCC
Andrew Willis, South Coast District Enforcement Analyst, CCC
Teresa Henry South Coast Manager District Manager, CCC
Karl Schwing, Orange County area Permit Supervisor, CCC

Enc. **Statement of Defense Form for Cease and Desist Order and Restoration Order**

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200
FAX (415) 904-5400

**SENT VIA REGULAR AND CERTIFIED MAIL
AND FACSIMILE**

July 27, 2006

Tennis Estates Homeowners Association
c/o Huntington West Properties
Attn: Jack Williams
13812 Golden West Street
Westminster, CA. 92683
(Certified Mail Article No. 7002 2030 0002 6358 2802)

**Subject: Executive Director Cease and Desist Order No. ED-06-CD-02 and
Notification of Intent to Record a Notice of Violation of the Coastal
Act**

Date Issued: July 27, 2006

Expiration Date: October 25, 2006

Violation File No.: V-5-06-018

Property Location: Southwest corner of Humboldt Drive and Saybrook Lane, Orange
County Assessor's Parcel No. 178-601-64, Tennis Estates, City of
Huntington Beach.

Alleged Coastal Act Violation: Removal of major vegetation consisting of the complete
removal of one pine tree and removal of limbs of other
pine trees that supported heron and egret nests

I. ORDER

Pursuant to my authority under California Public Resources Code Section 30809, I hereby order you, as the legal owner of the property identified below, your employees, agents and contractors, and any other persons acting in concert with you (hereinafter, "Respondents") to cease and desist from undertaking further unpermitted development, including but not limited to removal or trimming of trees located at the corner of Humboldt Drive and Saybrook Lane, or any trees that support active or inactive heron or egret nests located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach (hereinafter, "Subject Property"). The Executive Director Cease and Desist Order is subject to the following terms and conditions to

Exhibit 5
CCC-06-CD-12 (Tennis Estates HOA)

avoid irreparable injury to and at the Subject Property pending action by the Commission under Section 30810 and 30811 of the Coastal Act:

1. Respondents (who conducted the unpermitted development and to whom this letter will be sent certified mail) shall immediately and completely cease and desist from all such activities and shall not perform further unpermitted development at the Subject Property.
2. Respondents shall immediately and completely cease and desist from removing or disturbing heron or egret nests and from removing, disturbing, or harassing heron or egrets, themselves.

II. PERSONS SUBJECT TO THE ORDER

The persons subject to this Executive Director Cease and Desist Order are Tennis Estates Homeowners Association, its employees, agents, contractors, and anyone acting in concert with the foregoing.

III. IDENTIFICATION OF THE PROPERTY

The property that is the subject of this Executive Director Cease and Desist Order is Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

IV. DESCRIPTION OF ACTIVITY

Removal of major vegetation consisting of complete removal of one pine tree and removal of limbs of other pine trees that supported active heron and egret nests.

V. COMMISSION AUTHORITY TO ACT

The Executive Director of the Commission is issuing this Order pursuant his authority under Sections 30809(a)(1) and (2) of the Public Resources Code.

VI. FINDINGS

The site is within the City of Huntington Beach, in an area covered by the City's certified Local Coastal Program (hereinafter, "LCP"). The development at issue herein has occurred on the site without the required authorization in a coastal development permit (hereinafter, "CDP"). "Development" is defined by Section 30106 of the Coastal Act as

including "the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operation." "Development" is defined by Section 245.04 of the City of Huntington Beach's LCP as including "the removal or harvesting of major vegetation." Section 30600(a) of the Coastal Act and Section 245.06 of the City's LCP state that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP.

The unpermitted development clearly constitutes "development" within the meaning of Section 245.04 of the LCP and Section 30106 of the Coastal Act, and therefore requires a CDP. Since the City of Huntington Beach has a certified LCP, the performance of this development requires a CDP from the City of Huntington Beach. No such permit was issued by the City nor has a permit application been submitted.

No permit was issued for the activity at issue, either by the California Coastal Commission or by the City of Huntington Beach pursuant to its authority under the LCP, implementing the Coastal Act. Furthermore, the unpermitted development is also not exempt from the Coastal Act's permitting requirements under Section 30610 of the Coastal Act and/or Title 14, California Code of Regulations Sections 13250-13253, under any other provisions of the Coastal Act or its implementing regulations, or under the certified LCP. The grove of trees, which is major vegetation since the grove supports active nesting of herons and egrets, are located on common, open space area owned by the homeowners association and not located on a single property containing a single family residence or other structure. Therefore, since there is no single family home or other structure located on the subject property, the removal and trimming of the trees is not exempt under Section 13250 and 13253 of the Commission Regulations. Even if removal and trimming of trees was considered an improvement to an existing single family home or other structure, which in this case it is not, the grove of trees was found to be an Environmentally Sensitive Habitat Area (hereinafter, "ESHA") by the Commission's biologist because it supports breeding colonies of migratory birds (egrets and herons) and therefore such activity would not qualify for an exemption under Section 13250(b)(1) and (2), Section 13252(a)(3), and Section 13253(b)(1) and (2).

In addition, similar sections within the City's LCP pertaining to exemptions do not exempt maintenance activities within ESHA. Pursuant to Section 245.10(E)(5) of the LCP removal of major vegetation is not exempt from permit requirements. In this case, the grove of trees on the Subject Property is Major Vegetation and ESHA, and therefore removal or trimming of the trees is not exempt under the City's LCP. Therefore, the requirements for issuance of this Executive Director Cease and Desist Order have been met.

On the afternoon of May 24, 2006, Commission staff received reports from members of the public that removal of trees supporting active heron and egret nests was underway at the Subject Property. Commission staff and members of the public then contacted the California Department of Fish and Game (hereinafter, "CDFG"). On the same day, a

CDFG warden visited the site and confirmed the presence of active bird nests in the trees located at the corner of Humboldt Dr. and Saybrook Lane and confirmed that a tree had been removed. Both members of the public and the CDFG Warden observed dislodged eggs and dead hatchlings on the ground below the cut and trimmed trees. Pursuant to Fish and Game Code Section 3503, pertaining to protection of active bird nests, the California Department of Fish and Game on May 24, 2006 issued stop work orders prohibiting Respondents from removal, trimming, or disturbance of the trees for 30 days.

Commission staff visited the site on June 2, 2006, documented the nesting activity in the subject trees, and confirmed that limbs had been removed from active nesting trees. On June 23rd, the CDFG warden and a CDFG environmental scientist visited the site and again counted approximately 8 active bird nests in the subject trees. Therefore, the warden issued another 30-day stop work order prohibiting removal, trimming, or disturbance of the trees.

Commission staff requested, in a letter dated July 14, 2006, that the City of Huntington Beach take action to enforce the policies of the City's certified LCP, or to indicate their preference that the Coastal Commission take action to address the Coastal Act violation, as is provided for in Sections 30809 and 30810 of the Coastal Act. The letter also stated that if the City declined to act, the Commission could issue an order to enforce the requirements of the LCP. Additionally, the letter reminded the City that Section 30811 authorizes the Commission to order restoration of a site if it finds that development is inconsistent with the Coastal Act, has occurred without a CDP, and is causing ongoing resource damage. On July 18, 2006, the City recommended that Commission staff proceed, including pursuing restoration order proceedings. Thus, this action is being taken pursuant to Coastal Act Section 30809(a)(1) and (2).

Removing the subject trees triggered a chain reaction of very significant negative ecological consequences as described below. Given the location of the eggs and hatchlings that were observed on the ground below the trees that were removed and trimmed by both members of the public and the CDFG Warden, it appears that the immediate results of the tree removal and trimming were the loss of several unhatched eggs and the death of hatchlings. In addition, due to the role that the subject trees play in the breeding of great blue herons and snowy egrets, as well as the scarcity of groves of trees that provide alternative roosting and nesting locations within the Huntington Harbor area, and because the nesting and roosting function of the site could be easily disturbed or degraded by removal of tree limbs and trees, the nesting population of herons and egrets in the Huntington Harbor area could be adversely impacted by tree removal or trimming at the Subject Property. In addition, the loss of such important predators could affect marine resources in the area by upsetting the balance of the local ecosystem. Clearly, any additional tree removal would exacerbate both the short and long term losses to the great blue heron and snowy egret populations.

On July 21, 2006, the Executive Director of the Coastal Commission sent Respondents a Notice Prior to Issuance of an Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings (hereinafter, "NOI") and provided Respondents the opportunity to provide assurances which would obviate the need to issue this Order. The NOI stated, in part:

To prevent the issuance of the Executive Director Cease and Desist Order ("EDCDO") to you, you must provide a response by the date listed below [July 21, 2006] that satisfies the standards of section 13180(a) of the Commission's regulations.... This response must include:

Agreement to immediately and completely cease and desist from performing any development on the subject property, including, but not limited to, removal or trimming of the trees located at the southwest corner of Humboldt Drive and Saybrook Lane that support habitat for nesting herons and egrets, regardless of whether the bird nests supported by the trees are active or inactive.

Unfortunately, Respondents did not respond at all to the NOI and specifically, Respondents did not commit to perform no further unpermitted development at the Subject Property. To date, we have still received no response from you.

The Executive Director has determined that you have undertaken development that requires a permit without first securing a permit. The Executive Director has also determined that Respondents failed to respond to the NOI in a "satisfactory manner".¹ Therefore the Executive Director is issuing an EDCDO to direct you to cease and desist from undertaking further unpermitted development at the Subject Property.

VII. COMPLIANCE OBLIGATION

Strict compliance with this order by all parties subject hereto is required. Failure to comply strictly with any term or condition of this order may result in the imposition of civil penalties up to Six Thousand Dollars (\$6,000) per day for each day in which such compliance failure persists and other such penalties and relief as provided for in the Coastal Act, including penalties under Section 30820 and 30822 for unpermitted development under the Coastal Act. In addition, the Executive Director is authorized, after providing notice and the opportunity for a hearing as provided for in section 30812 of the Coastal Act, to record a Notice of Violation against your property (see pages 6-7 of this letter).

¹ Section 13180(a) of the Commission's regulations (Title 14, Division 5.5 of the California Code of Regulations (CCR)) defines the term "satisfactory manner" as that term is used in Section 30809(b) as being, in part, "a response which is made in the manner and within the timeframe specified in the notice."

VIII. APPEAL

Pursuant to Section 30803(b) of the Coastal Act, you may file a petition with the Superior Court seeking a stay of this order.

IX. EFFECTIVE DATE

This order shall be effective upon its issuance and shall expire 90 days from the date this Order was issued.

Notification of Intent to Record a Notice of Violation of the Coastal Act

By this Executive Director Cease and Desist Order, I am also notifying you of my intent to record a Notice of Violation of the Coastal Act for unpermitted development including the removal of major vegetation consisting of one pine tree and limbs of other pine trees that supported heron and egret nests. The unpermitted development is located on property owned by the Tennis Estate Homeowners Association located at Orange County Assessor's Parcel No. 178-601-64, Tennis Estates, City of Huntington Beach.

Section 30600(a) states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the coastal zone must obtain a CDP. "Development" is defined by Section 30106 as follows:

"Development" means, on land, in or under water, the placement or erection 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...change in the intensity of use of water, or of access thereto...and the removal or harvesting of major vegetation other than for agricultural purposes...

"Development" is also defined by Section 245.04 of the City's LCP, as including "the removal or harvesting of major vegetation."

The unpermitted development that has occurred on the Subject Property constitutes development under Section 30106 of the Coastal Act and Section 245.04 of the City's LCP, and as such is subject to Coastal Act and LCP permit requirements. No Coastal Development Permit has been issued for this development by either the City of Huntington Beach or the Coastal Commission.

Previous attempts to resolve this matter have been unsuccessful. Unpermitted development was undertaken at the Subject Property in violation of the Coastal Act and the City's LCP. Therefore, as discussed above, on July 21, 2006, I sent you a *Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order*

Proceedings. You did not respond, including a failure to respond in a "satisfactory manner" as set forth in Section 13180 of the Commission's Regulations, to the NOI.

Notice of Violation

The Commission's authority to record a Notice of Violation is set forth in Section 30812(a) of the Coastal Act, which states the following:

Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed by regular and certified mail to the owner of the real property at issue, describing the real property, identifying the nature of the violation, naming the owners thereof, and stating that if the owner objects to the filing of a notice of violation, an opportunity will be given to the owner to present evidence on the issue of whether a violation has occurred.

I am issuing this notice of intent to record a Notice of Violation because unpermitted development has occurred at the Subject Property, in violation of the Coastal Act. This determination is based on staff's observations of the Subject Property made during a site visit on June 2, 2006 and in consultation with California Department of Fish and Game and members of the public, who repeatedly visited the site and observed active nesting of both blue heron and snowy egrets in the trees that were being disturbed and removed by the unpermitted activity. If you object to the recordation of a Notice of Violation in this matter and wish to present evidence on the issue of whether a violation has occurred, you must respond in writing, within 20 days of the postmarked mailing of this notification. If, within 20 days of the notification's mailing, you fail to inform the Commission of an objection to the recordation of a Notice of Violation, I shall record the Notice of Violation in the Orange County Recorder's office pursuant to Section 30812 of the Coastal Act.

If you object to the recordation of a Notice of Violation in this matter and wish to present evidence on the issue of whether a violation has occurred, you must respond in writing, to the attention of Aaron McLendon, no later than August 16, 2006.

As explained in the July 21, 2006 NOI for Executive Director Cease and Desist Order and Commission Cease and Desist and Restoration Orders, we would like to work with you to resolve these issues amicably and remain willing and ready to discuss options that could involve agreeing to a "consent order". As discussed in the July 21, 2006 NOI, a consent order is similar to a settlement agreement. A consent cease and desist and restoration order would provide you with an opportunity to have input into the process and timing of restoration of the subject property and mitigation of the damages caused by the unpermitted activity, and could potentially allow you to negotiate a penalty amount with Commission staff in order to resolve the complete violation without any

July 27, 2006


Page 8

further formal legal action. A Commission cease and desist and restoration order would provide for a permanent resolution and restoration of the Subject Property. If you are interested in discussing the possibility of a consent order, please contact or send correspondence to the attention of Aaron McLendon, at the address listed on the letterhead when you receive this letter to discuss options to resolve this case.

Should you have any questions regarding any of the above items, please contact Aaron McLendon, Statewide Enforcement Analyst, at (415) 904-5220.

Executed at San Francisco, California on July 27, 2006.

Signed,



PETER M. DOUGLAS
Executive Director
California Coastal Commission

Enclosure (To Respondents only): Notice Prior to Issuance of Executive Director Cease and Desist Order for Violation No. V-5-06-018 and Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings, July 21, 2006

cc: Lisa Haage, Chief of Enforcement, CCC
Alex Helperin, Staff Counsel, CCC
N. Patrick Veesart, Southern California Enforcement Supervisor, CCC
Aaron McLendon, Statewide Enforcement Analyst, CCC
Andrew Willis, South Coast District Enforcement Analyst, CCC
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Area Permit Supervisor, CCC
Bandy Landscaping and Maintenance Inc.
Scott Hess, Planning Manager, City of Huntington Beach
Michael Fuentes, Senior Code Enforcement Officer, City of Huntington Beach
Lawrence D. Stephens Jr., CA Dept. of Fish and Game
Erin Wilson, Environmental Scientist, CA Dept. of Fish and Game

CALIFORNIA COASTAL COMMISSION

45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



MEMORANDUM

FROM: Jonna D. Engel, Ph.D.
Ecologist

A handwritten signature in cursive script that reads "Jonna D. Engel".

TO: Lisa Haage, Chief of Enforcement; Alex Helperin, Enforcement Attorney;
Aaron McLendon, Enforcement Analyst

SUBJECT: Tennis Estates heronry constitutes major vegetation

DATE: September 27, 2006

A stand of non-native pines growing in the northeast corner of the Tennis Estates apartment complex, on the corner of Humboldt Drive and Saybrook Lane, in Huntington Beach, supports a multi-species heronry. The lifespan of this heron and egret colony is unknown; figures ranging from two years to 20 years have been suggested. We do know that the heronry is presently used year round for roosting and seasonally for nesting by three species of herons and egrets: Great Blue Herons, *Ardea herodias*, Great Egrets, *Aldea alba*, and Snowy Egrets, *Egretta thula*. The Tennis Estates pines are approximately 75 feet in height and originally consisted of a stand of five pines. On May 24, 2006 one of the five pines was cut down and major branches were removed from two others. This tree removal and trimming was brought to the attention of the California Coastal Commission, the California Department of Fish and Game, and the United States Fish and Wildlife Service by members of the public the same day that removal and trimming occurred. The California Department of Fish and Game sent a warden to the site who informed the Tennis Estates landscaper that a citation would be issued if tree removal and trimming did not cease. Further tree trimming and removal was curtailed, however, nests were clearly disturbed by this activity and some nests may have been lost. The California Coastal Commission contacted Tennis Estates Homeowners Association on July 21, 2006 with notice of intent to issue an Executive Director Cease and Desist order. The homeowners association did not respond and therefore on July 27, 2006 the Executive Director issued an Executive Director Cease and Desist order.

Hérons and egrets experienced severe population declines at the turn of the 20th century when they were hunted for their beautiful plumage which was highly prized for woman's hats. Several laws outlawing hunting, including the 1918 Migratory Bird Treaty Act, were passed and heron and egret populations recovered. While heron and egret populations are no longer threatened, the wetland ecosystems upon which they depend are in trouble. The United States Geologic Survey conducted a study of wetland loss in the United States between the 1780's and 1980's. California has lost the largest

percentage of original wetland habitat (91%) of all the states¹. It is now estimated that California has less than 500,000 wetland acres remaining (from an estimated 5 million in 1780). This is less than one-half of one percent of California's total acreage. In southern California, many wetlands have been replaced by marinas and herons and egrets have adapted by relocating their roosting and nesting sites to stands of tall non-native pines, palms, ficus, and coral trees within highly developed areas^{2,3}. This relocation to non-native trees near marinas is because of the virtual absence of any native trees, the proximity of the non-native trees to primary foraging habitat, and the height of the non-native trees which affords protection from predation and disturbance. The herons and egrets are utilizing these trees for both roosting and nesting. In many southern California locations, herons and egrets roost at colony sites all year^{4,5}.

Great Blue Herons, Great Egrets, and Snowy Egrets have long lifespans at 23, 22, and 22 years respectively^{6,7,8}. All three species breed in Southern California. Some Great Blue Heron colonies have long histories of use; 71 yrs in Stanley Park, British Columbia and 37 years in Minnesota⁹. Breeding Great Herons in southern California are thought to be year round colony residents or to disperse only locally during the non-breeding season¹⁰. All three species are known to nest and roost in mixed species colonies. Colonies can be crowded with 96 to 2,000 nests per acre¹¹.

Hérons and egrets establish roosting and nesting sites based on several important criteria including proximity to primary foraging habitat and avoidance of predation and disturbance. Herons and egrets are normally shy and retiring birds that are sensitive to human disturbance. The fact that they have established roosting and nesting sites in areas of high human density and disturbance suggests that suitable roosting and nesting areas are scarce.

The major determinate of heron and egret colony location is suitable wetland foraging habitat. For Great Blue Herons, the mean distance flown from nests to principle feeding sites is 1.4 to 4 miles¹². An average Snowy Egret foraging trip is 1.7 miles from roosting

¹ United States Geologic Survey: <http://www/inpwrc.usgs.gov/resource/wetlands/wetloss/summary.htm>

² Report on the Marina Del Rey Heronry. 2005. Prepared for Mark D. Kelly, Senior Vice President, Lyon Capital Ventures, by Dr. Jeffery Froke.

³ Letter to California Coastal Commission from Daniel Cooper, Cooper Ecological Monitoring Inc., dated Aug 18, 2006

⁴ Butler, R. W. 1992. Great Blue Heron. *In* The Birds of North America, No. 25 (A. Poole, P. Stettenhelm, and F. Gill, Eds.). Philadelphia: The Academy of Natural Sciences; Washington, DC: The American Ornithologists Union

⁵ Parson, K. C. and T. L. Master. 2000. Snowy Egret (*Egretta thula*). *In* The Birds of North America, No. 489 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

⁶ McCrimmen, D. A. Jr., J. C. Ogden, and G. T. Bancroft. 2001. Great Egret (*Ardea alba*). *In* The Birds of North America, No. 570 (A. Poole and F. Gill, Eds.). The Birds of North America, Inc., Philadelphia, PA

⁷ Butler (1992) op. cit.

⁸ Parson & Master (2000) op. cit.

⁹ Butler (1992) op. cit

¹⁰ Butler (1992) op. cit

¹¹ Butler (1992) op. cit

¹² Butler (1992) op. cit

and nesting sites to their main foraging area¹³. The Tennis Estates pines are located 0.2 miles from Huntington Harbor and 0.75 miles from the Seal Beach National Wildlife Refuge; both foraging areas for herons and egrets. The pines are also 1.5 miles from the Bolsa Chica wetlands, another heron and egret foraging area. Research has shown that Great Blue Herons exhibit strong fidelity to the choice of tree species within colonies whereas in Great Egret males, presence of old nests can induce site preference^{14,15}. Great Blue Herons, Great Egrets, and Snowy Egrets all roost and nest in the Seal Beach Wildlife Refuge and the Bolsa Chica wetlands. It is likely that the reason herons and egrets have established nests and are roosting in the Tennis Estates pines, as they are doing in non-native tree stands in other parts of coastal southern California such as Ventura Harbor, Marina del Rey, and Long Beach, is a lack of suitable nesting and roosting areas in remaining local wetlands. Without a biology report for the Tennis Estates heronry, it is not possible to verify this for this site.

In addition to proximity to primary foraging habitat, predation and disturbance also influence heron and egret choice of roosting and nesting tree species and locations. Herons and egrets select nest sites difficult for mammalian predators to reach and in areas distant or removed from disturbance. In urban areas this translates into a preference for tall trees. In southern California the average nest height for Great Egrets is 88 feet¹⁶. Raccoons are one of the top heron and egret nest predators in Southern California¹⁷. Tall trees are the main deterrent to raccoon predation. Dense foliage that provides camouflage and protection is also important in southern California as a deterrent to predation from birds such as American crows, *Corvus brachyrhynchus*, who prey on eggs and chicks and red-tailed hawks, *Buteo jamaicensis*¹⁸. Both herons and egrets choose specific trees that are within a specific distance of primary foraging grounds and are safe from predation and disturbance. Herons do habituate to non-threatening repeated activities which explains the location of Southern California heronries in highly disturbed areas. Even so, most studies recommend a minimum 984 feet buffer zone from the periphery of a colony in which no human activity should take place during courtship and nesting season¹⁹.

Herons and egrets are integral components of fully functioning wetland ecosystems. They are top predators whose foraging activities maintain a balance in prey populations. Wetlands lacking such top predators may be subject to invertebrate, amphibian, reptile, rodent, and fish population explosions, eutrophication events, disease outbreaks, and any number of other undesirable cycles²⁰. Southern California wetlands are experiencing pressure from a number of fronts including loss of native species, loss of

¹³ Parson & Master (2000) op. cit.

¹⁴ Kesall, J.P. & J. Simpson. 1980. A three year study of the Great Blue Heron in British Columbia. Proc. Colonial Waterbirds Group, 3:69-74.

¹⁵ Butler (1992) op. cit

¹⁶ McCrimmen, Ogden, & Bancroft (2001) op. cit.

¹⁷ Parson & Master (2000) op. cit.

¹⁸ Parson & Master (2000) op. cit.

¹⁹ Butler (1992) op. cit

²⁰ Keddy, P.A. Wetland Ecology: Principles and Conservation. 2000. Cambridge Univ. Press, Cambridge, United Kingdom. 614 pp.

area due to development, invasive species, and pollution. Herons and egrets are critical members of wetland ecosystems and their roosting and nesting colonies provide very important ecosystem functions. The Tennis Estates pine stand fit the criteria for a heron and egret roosting and nesting site. The pine trees are within the foraging range required by the three heron and egret species utilizing the trees. The pine trees are tall, upwards of 75 feet, thus distancing the birds from predation and disturbance, and before the tree removal and trimming, had dense foliage that offered camouflage and protection from predation. Stands of trees such as the Tennis Estates pines, are an important natural resource and provide necessary ecological services for local southern California heron and egret populations. Based on this finding of biological significance, the Tennis Estates trees are major vegetation.

In the absence of a biology report, it is not possible to designate the Tennis Estate pines as environmentally sensitive habitat. However, this is not to say that the site is not environmentally sensitive habitat, just that I do not have enough information at this time to determine that the Tennis Estate pine stand is environmentally sensitive habitat. A Tennis Estate heronry biology report would provide the information necessary for environmentally sensitive habitat evaluation.

Jul-21-06 11:58am From:

T-001 P 010/01A F-855

STATE OF CALIFORNIA - THE RESOURCES AGENCY

ARNOLD SCHWARZBAUM, Governor

CALIFORNIA COASTAL COMMISSION

15 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE AND TDD (415) 904-5200



STATEMENT OF DEFENSE FORM

DEPENDING ON THE OUTCOME OF FURTHER DISCUSSIONS THAT OCCUR WITH THE COMMISSION ENFORCEMENT STAFF AFTER YOU HAVE COMPLETED AND RETURNED THIS FORM, (FURTHER) ADMINISTRATIVE OR LEGAL ENFORCEMENT PROCEEDINGS MAY NEVERTHELESS BE INITIATED AGAINST YOU. IF THAT OCCURS, ANY STATEMENTS THAT YOU MAKE ON THIS FORM WILL BECOME PART OF THE ENFORCEMENT RECORD AND MAY BE USED AGAINST YOU.

YOU MAY WISH TO CONSULT WITH OR RETAIN AN ATTORNEY BEFORE YOU COMPLETE THIS FORM OR OTHERWISE CONTACT THE COMMISSION ENFORCEMENT STAFF.

This form is accompanied by a notice of intent to initiate cease and desist order and restoration order proceedings before the commission. This document indicates that you are or may be responsible for or in some way involved in either a violation of the commission's laws or a commission permit. The document summarizes what the (possible) violation involves, who is or may be responsible for it, where and when it (may have) occurred, and other pertinent information concerning the (possible) violation.

This form requires you to respond to the (alleged) facts contained in the document, to raise any affirmative defenses that you believe apply, and to inform the staff of all facts that you believe may exonerate you of any legal responsibility for the (possible) violation or may mitigate your responsibility. This form also requires you to enclose with the completed statement of defense form copies of all written documents, such as letters, photographs, maps, drawings, etc. and written declarations under penalty of perjury that you want the commission to consider as part of this enforcement hearing.

You should complete the form (please use additional pages if necessary) and return it **no later than August 10th, 2006** to the Commission's enforcement staff at the following address:

**Aaron McLendon, Legal Division,
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, California 94105**

If you have any questions, please contact **Aaron McLendon** at (415) 904-5200.

Jul-21-06 11:58am From-

T-001 P 011/014 F-955

V-5-06-018
Tennis Estates
SOD Form

1. Facts or allegations contained in the notice of intent that you admit (with specific reference to the paragraph number in such document):

TEHOA admits that on May 24, 2006, Tennis Estates was visited by a representative of the U.S. Fish & Wildlife Service and CDFG (Para 3)
The remainder of paragraph 3 is denied. Please note the NOI does not have numbered paragraphs and thus TEHOA is making a good faith effort to refer to these items by paragraph number.

2. Facts or allegations contained in the notice of intent that you deny (with specific reference to paragraph number in such document):

To the extent necessary, TEHOA denies paragraphs 1-32, except as expressly admitted above.
With respect to paragraphs 2, 3, 4, 14, 24, and 25 TEHOA denies any of these trees fits within the definition of "major vegetation" or is within an "environmentally sensitive habitat area."

3. Facts or allegations contained in the notice of intent of which you have no personal knowledge (with specific reference to paragraph number in such document):

Paragraphs 1, 2, the portion not admitted of paragraph 3, paragraphs 4-32.

Jul-21-06 11:58am From-

T-001 P 012/014 F-055

V-5-06-018
Tennis Estates
SOD Form

4. Other facts which may exonerate or mitigate your possible responsibility or otherwise explain your relationship to the possible violation (be as specific as you can; if you have or know of any document(s), photograph(s), map(s), letter(s), or other evidence that you believe is/are relevant, please identify it/them by name, date, type, and any other identifying information and provide the original(s) or (a) copy(ies) if you can:

The trees have created a health and safety issue due to a stench of animal waste. It has coated the plant life, sidewalk and walls. Plants in the "dropping" zone are dying. There have been reports of persons slipping on the bird feces.

Further, the TEHOA Board specifically directed that any tree work ~~NOT~~ NOT impact nesting birds, and the contractor observed the trees to attempt to avoid work when there were any active nests.

Jul-21-06 11:58am From-

7-00: P 013/014 F-955

V-5-06-018
Tennis Estates
SOD Form

5. Any other information, statement, etc. that you want to offer or make:

In addition (to no. 4), the only tree that was removed was NOT occupied by birds or nests. Observation by Mr. Bandy (see his declaration) showed no nests, birds, or more importantly, feces, thus indicating this smaller tree was not being used by herons or egrets.

6. Documents, exhibits, declarations under penalty of perjury or other materials that you have attached to this form to support your answers or that you want to be made part of the administrative record for this enforcement proceeding (Please list in chronological order by date, author, and title, and enclose a copy with this completed form):

Declaration of Jack L. Williams	8/9/06
Declaration of Robert Bandy	8/9/06
Exhibits to declarations	(undated)

DECLARATION OF JACK L. WILLIAMS

I, Jack L. Williams, declare:

1. I am a Vice President of Huntington West Properties, Inc., a real estate brokerage and management firm, which currently manages the common areas of the Tennis Estates Homeowners' Association located in Huntington Beach, California. Huntington West Properties, Inc. provides management services for items such as maintenance of the common area landscaping, streets, and sidewalks. In that respect, we take direction from the Board of Directors of the Homeowners' Association to maintain those common areas in a safe, clean, and attractive condition.

2. I am familiar with the issues relating to the tree trimming and removal activities identified in the letters from the California Coastal Commission dated July 21, 2006 and July 27, 2006.

3. As an initial point, I must point out that at no time did any member of the Coastal Commission staff ask me or any of my employees to provide any information regarding these issues and therefore believe that the Commission's two letters are based on a one-sided, and frankly, incorrect presentation of the facts. The purpose of this Declaration is to correct the record and explain the steps taken to avoid the exact type of impacts to the birds that are assumed in the letters of July 21 and July 27.

4. By way of background, the Association has been encountering problems for approximately the last two to three years with excessive amounts of bird feces and urine accumulating in the vicinity of many of its taller trees.

5. The trees described in the letters of July 21 and July 27 are part of the common area landscaping of the Tennis Estates development. The area around these trees has become a recurring problem for the last several years due to ever-increasing amounts of bird excrement and urine which are collecting below the canopy of the taller of these trees. The excrement and the urine have become so thick that the underlying landscaping and foliage is damaged, dying, or dead and, in addition, the improvements such as the sidewalk and portions of the street are actually at points in time dangerous due to the

1 presence of the animal waste such that there have been reports that the areas are slippery.
2 In addition, the areas have an overwhelmingly strong, unpleasant odor that has affected
3 residents as well as passers by along the public street immediately adjacent to where the
4 trees are located.

5 6. The Tennis Estates Homeowners' Association responded to residents
6 complaints regarding these conditions by considering what actions can be taken at their
7 February, 2006 meeting. Ultimately, the Board of Directors determined that the landscape
8 maintenance contractor, Bandy Landscape Maintenance, Inc., would remove the five pine
9 trees and replant the area with California pepper trees, as well as repair all of the damaged
10 landscaping in the area.

11 7. There was significant discussion at the Board between February and May
12 that any actions taken would have to be done with extreme care to avoid any impact to
13 nesting birds. Therefore, as the Board Minutes of February, March and May (Exhibit 10)
14 show, the Board directed that the trees would only be removed when it could be
15 confirmed that any birds were gone from any nests in the trees.

16 8. The Commission should be aware that between the February meeting and the
17 May meeting where the contract was finally let for the work, Mr. Bandy had been
18 monitoring the trees to determine the bird activity in the trees. The matter was brought
19 back to the Board for final approval on May 22 when it appeared that the nesting had been
20 completed.

21 9. On May 24, 2006, Bandy Landscape Maintenance went to the site with the
22 intention of performing the contract. However, Mr. Bandy was instructed, and in fact did,
23 first examine the trees to determine if there were any nesting birds there. He proceeded to
24 remove the smallest tree of the five when he determined it was empty. As he progressed
25 trimming the next tree, he determined that there were still nesting birds on the interior and
26 immediately stopped all work. No further work has occurred other than the removal of the
27 materials at the base of the tree.

28 10. I understand from Mr. Bandy that representatives of both the United States

1 Fish and Wildlife Service, and Law Enforcement Division as well as the California
2 Department of Fish and Game, Wildlife Protection Branch, were on the site the day that
3 Mr. Bandy cut down one tree and trimmed the branches on the other. Mr. Bandy
4 explained what he was doing, the efforts he had taken to avoid nests, and also allowed
5 them to examine all of the materials that had been cut down from the tree. Both the
6 representatives from the United States Fish and Wildlife Service and the California
7 Department of Fish and Game indicated to Mr. Bandy that they did not see any violation of
8 law. Each of them recommended, however, that he wait thirty days before proceeding any
9 further to ensure that no additional chicks were impacted by trimming activities.
10 Consistent with what the Board previously had directed him, which was to avoid impacting
11 any birds and nests, Mr. Bandy indicated to them that he would not be proceeding at that
12 time and would wait at least thirty days as they recommended.

13 11. One specific factual statement in both the July 21, 2006, and July 27, 2006
14 letters that is factually incorrect is that the California Department of Fish and Game issued
15 a “stop work order” and then extended it. The California Department of Fish and Game
16 did *not* issue a “stop work order” or any other order that directed Tennis Estates to stop
17 work. In fact, our contractor, Mr. Bandy, discussed with representatives of both the United
18 States Fish and Wildlife Service and the California Department of Fish and Game that the
19 work that had occurred was not in violation of any federal or state wildlife law. Both the
20 federal and state representatives did recommend that Mr. Bandy wait thirty days and he did
21 so. In fact, no work has occurred since May to make sure that the trees were past the
22 nesting season.

23 12. From May until the present time the Board has voluntarily delayed taking
24 any further action until we were clearly past the bird nesting season as well as resolved any

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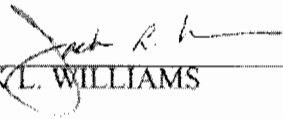
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1 issues raised by the California Coastal Commission. The Board's direction still stands as
2 of today's date that any actions to trim or remove any trees be done in a manner not to
3 adversely affect any nesting birds, eggs, or chicks.

4 I declare under penalty of perjury under the laws of the State of California that the
5 foregoing is true and correct. Executed this 9th day of August, 2006 at Westminster,
6 California.

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8 
9 JACK L. WILLIAMS
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DECLARATION OF ROBERT BANDY

I, Robert Bandy, declare:

1. I am the President of Bandy Landscape Maintenance, Inc. Bandy Landscape Maintenance has provided landscape maintenance services to the Tennis Estates Homeowners' Association for a number of years. In the past approximately three years, a problem has developed in the landscaping areas which contain taller trees due to bird fecal matter and urine collecting underneath those trees. The fecal matter and urine falls all over the landscaping and hardscape areas underneath the canopy of these trees. Although there are several areas throughout the Tennis Estates Development that have taller trees with bird feces issues, the most significantly impacted area is the area described in the Coastal Commission letters of July 21 and July 27, 2006 as the corner of Humboldt Drive and Saybrook Lane in Huntington Beach. These two streets are public streets immediately outside the Tennis Estates Development. The interior streets are known as Forrest Hills and Racquet Club Drive, which is how this area has been referred to by the Tennis Estates Homeowners' Association Board in the past.

2. The problems with the area near the pine trees at Forrest Hills and Racquet Club Drive have deteriorated significantly over the past few years. Based upon my observations in connection with the landscape maintenance of these areas, I have seen a great increase in the amount of bird feces and urine in the areas underlying the canopies of the taller of the pine trees in this area. The layers of bird feces have become so thick that, as can be seen in the attached photograph 9, the ordinarily red "no parking" painted curb appears fully white due to the excrement deposited on top. Although more difficult to see in the photographs, the excrement also has a damaging affect on the landscaping in the area as the plants under the tree canopies have been damaged, and in some instances killed, due to constantly being buried in a large volume of bird excrement and urine. In addition, the hardscaped areas are literally coated in the material, as shown on the curb, to the point that they become slippery. This coating of bird excrement can also be found outside the development's boundaries as the tree branches extend over the public street and sidewalk

1 immediately outside the project area. The presence of this bird excrement and urine on the
2 sidewalk makes that sidewalk potentially dangerous.

3 3. In early 2006 the Board of Directors of the Tennis Estates Homeowners'
4 Association directed Bandy to develop a solution for the bird excrement and urine problem
5 by trimming and/or cutting down the pine trees.

6 4. The Board of Directors was very concerned about disturbing nesting birds
7 with any of the tree trimming or tree removal activities and therefore directed that no work
8 be done that would actually disturb nesting birds. Thus, for a period of several months
9 during the spring I would visually examine the trees to determine if there was evidence of
10 nesting birds and did so at least ten times between March and May.

11 5. In May it appeared to me that there were no nesting birds still in the pine
12 trees and I reported that to the Association.

13 6. On May 22, 2006, I understand the Board of Directors authorized the work
14 of actually cutting down the five trees, although the Board indicated once again that no
15 work was to proceed that would actually affect nesting birds. I was instructed to go ahead
16 and proceed, but as part of that authorization, I was to confirm that in fact there were no
17 nesting birds prior to tree removal.

18 7. On May 24, 2006, I personally went up in the basket of a "cherry picker" to
19 examine the five pine trees. To take a step back for a moment, of the five pine trees, the
20 smallest was only approximately thirty-five feet tall which made it approximately one-half
21 the size of the four larger trees. I visually examined the smallest tree from the cherry
22 picker basket and found that it did not contain any bird nests, any evidence of bird
23 occupation, no evidence of bird excrement of any kind, or any bird nesting. This smallest
24 pine tree I then cut down and in that removal there were no living or dead birds, occupied
25 or unoccupied nests, or any other evidence of bird occupation. I believe that this tree was
26 too short for the herons and egrets.

27 8. To emphasize again, the smallest pine tree showed absolutely no signs of
28 being occupied by either the herons or the egrets or any other birds for that matter, and it

1 was only after that determination that I cut down that tree.

2 9. I then proceeded to another taller tree and examined and determined there
3 was no evidence of any occupied heron nests. I took photographs of the empty nests
4 which are attached hereto as Exhibits 1 - 8. As you can see from those photographs there
5 was evidence that they had been occupied previously, but there were no new eggs, chicks,
6 or any active bird nests occupying them.

7 10. At that time I believed the tree was unoccupied by any active bird nests and I
8 began to trim some of the branches that were overhanging the public street. I trimmed
9 approximately four to five branches when I discovered a nest in the interior of the tree
10 which contained egrets. Having found an occupied nest, I immediately stopped any
11 trimming and left the nest undisturbed and intact with the eggs and chicks.

12 11. My examination of the other trees showed no other active nests. However, I
13 did not continue to trim or cut down any trees due to the presence of the one occupied nest.

14 12. During the course of my work on May 24, 2006, I met at the site a
15 representative from the United States Fish and Wildlife Service by the name of Laura Chee
16 and two representatives from the California Department of Fish and Game, whose names I
17 do not remember.

18 13. I discussed what I was doing with Laura Chee and explained to her how I
19 examined the tree and determined there were no occupied nests before cutting down the
20 first tree. She examined the debris from the first tree which was all still there because my
21 crew had not yet arrived to haul it away. She also examined the branches which were cut
22 from the second tree. She indicated to me that she saw no evidence of any violation in the
23 materials I had cut down. She saw there were egg remnants but recognized that they
24 appeared to be from hatchlings some time before that date. I explained to her how I
25 intended to examine the trees before proceeding and that I had found one nest with
26 hatchlings in it and was going to wait until the hatchlings had left the nest. She agreed that
27 was appropriate, and recommended that I wait thirty days to allow them to fledge the nest
28 before proceeding any further. I indicated that I would do so and that I would visually

1 examine the nest before proceeding to make sure there were no hatchlings and offered to
2 call her and let her examine the tree itself before proceeding. She indicated that would not
3 be necessary and she did not wish to be taken up the tree in the "cherry picker" basket.

4 14. I had a similar discussion with the representatives of the representatives of
5 the California Department of Fish and Game. I remember specifically that one gentlemen
6 who wore a uniform identified himself as a game warden who examined the entire site
7 including walking through the remnants of the tree that had been cut down as well as the
8 branches from the other tree. He also recognized there were egg remnants in that debris,
9 but indicated to me after his review that he saw no evidence of any violation. He
10 recommended, essentially in the same fashion as Ms. Chee, that I not proceed with any
11 further work for thirty days to allow the egret hatchlings to fledge the nest. I indicated that
12 I would do so. At no time did he indicate that he had observed any violation of the law
13 and at no time did he indicate that he was issuing a stop work notice or order of any kind.
14 In fact, no such stop work notice or order was ever provided to me or to my knowledge to
15 anyone else related to the project.

16 15. In addition to the July 21 and July 27 letters being incorrect about the
17 existence of a stop work order, the letters are incorrect to the extent they imply that the tree
18 that was cut down supported breeding colonies of egrets and herons. As I indicated above,
19 the tree that was cut down showed absolutely no signs of being used by the herons and the
20 egrets. There was no sign of excrement on or near the tree, no nests, and no actual birds
21 using them. As I indicated above, I believe that is because this tree was only thirty-five
22 feet tall.

23 16. As to the other tree which I trimmed, that tree was not removed but only
24 some branches that overhung the public right-of-way were removed and that was to
25 prevent the build up of bird feces and urine on the public street and sidewalk.

26 17. In addition, the July 21 and July 27 letters report that both eggs and
27 hatchlings were observed on the ground below the trees. Both the representatives of the
28 United States Fish and Wildlife Service and the California Department of Fish and Game

1 observed those materials and neither expressed any concern about the egg remnants that
2 were found there. I have absolutely no recollection of there being any hatchlings that were
3 on the ground and no one brought any to my attention. In fact, I did not cut down any
4 branches with any nests, and therefore there could have been no hatchlings. I was
5 specifically instructed to avoid any such nests and I did so. There was one nest which was
6 removed from the tree that I was trimming branches and it was completely empty as
7 indicated by the photograph in Exhibit ____.

8 I declare under penalty of perjury under the laws of the State of California that the
9 foregoing is true and correct. Executed this 7 day of August, 2006 at San Marcos,
10 California.

11
12 
13 ROBERT BANDY



EXHIBIT_

1



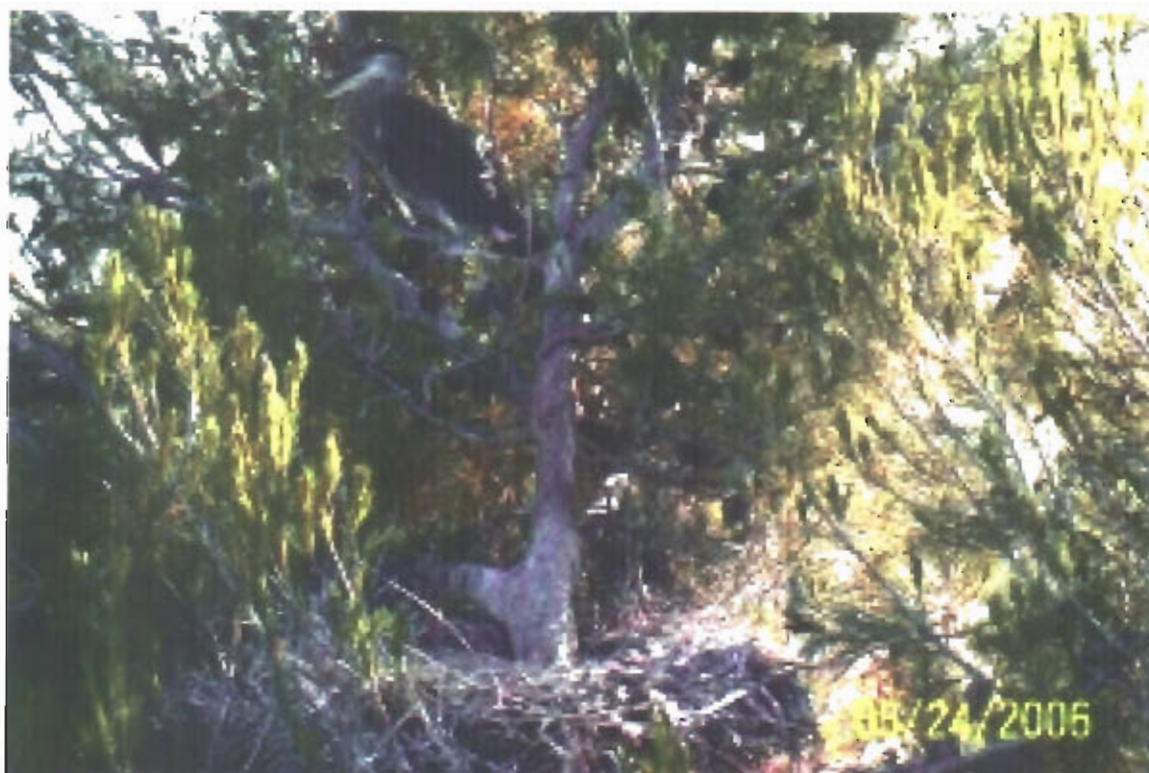
EXHIBIT_

2



EXHIBIT

3



EXHIBIT

4



EXHIBIT

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EXHIBIT

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EXHIBIT

7



EXHIBIT

8



EXHIBIT 9

Exhibit 7
CCC-06-CD-12 (Tennis Estates HOA)

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we do this properly.

- 4. Birds & More Trees – Given the knowledge that in both instances we had someone out cleaning or looking at the "Bird Problem" neighbors living around the community approached and complained of slip and falls, as well as health hazards. I believe it's imperative we cut back the few branches overhanging the public walkways which allow the Herons to open us to liability and cause our neighbors distress. I believe this can be done without major expense, and as long as we're at it we'd best do the same where overhanging the tennis courts and entrance stairs as the droppings are damaging the court surface and creating slip / fall hazard to our members. We may not be able to completely resolve the complete heron issue, but the appropriate pruning would make a world of difference.

Speaking of trees and pruning, I'm interested in knowing the extent of our contract with Mr. Bandi. It is my opinion any landscaping contract must include the appropriate annual pruning of the properties trees. If it's not in the contract shame on the board who executed it, but it's never too late to revise the scope and put it out to bid if necessary. As a matter of practice this board should be seeking quotes on all contracted services regularly. Again, it's very concerning to me when the firm I'm paying to take care of my landscaping doesn't know where all of the sprinkler valves are or what circuits they control. It's bad management.

This went far longer and later than I intended and I apologize. Following my March 16 surgery I'll leave you alone, for a while anyway. I'm sorry I can't address this stuff at meetings as I'm not home early enough to make them however I would like to be receiving the minutes as was discussed, and I thought ordered by the board at one of the meetings I did attend, to be distributed along with an agenda prior to every meeting. I've yet to see one, but I did get the letter about the dogs. I wonder which is more important.

Thanks for your help.

Jim Buchanan Jr.
 President
 Buchanan Company, Inc.
<http://www.Wilky.com>
<http://www.WesternChutes.com>
<http://www.ChuteDr.com>

Mr. Williams updated the Board on the water intrusion into units at 16397 – 16411 Wimbledon that was caused when sub-contracted vendors working for Verizon hit the water supply line. It was noted that Servpro had been contacted and that they were handling the urgent response part of the clean up. Mr. Williams noted that the costs for services from Servpro were approximately \$5,600.00 and that the sub-contracted vendor had made arrangements for the payment of that bill.

The manager updated the Board on the account's receivable for the association's homeowner's assessments.

Mr. Williams provided a draft copy of the association's collection policy that had been modified to include the new California Civil Code provisions that took effect January 1, 2006. The Board will review the draft and vote on approving it at the next association meeting.

Mr. Williams informed the Board that he had contacted the association's plumber and asked for a bid to replace the transite pipes servicing the complex. It was noted that concern had been raised about the fact that the pipes did contain asbestos. Mr. Williams provided information from the Internet on the use of transite pipes and found no information on cases where ill effect was noted. Mr. Williams informed the Board that the search was conducted on Google and may obviously not be complete and was not intended to offer a conclusive opinion on the matter.

OLD BUSINESS

It was noted that the revision of the dock rules was underway by the Board and Dock Committee.

The Board tabled discussion on the reallocation of the association's Balance Sheet.

It was noted that the main installation of the fiber optic network had been completed. Repairs still needed to be made to the common area walkways and landscape in some areas.

It was noted that we were still waiting for Verizon to drill the drain line for the drainage vault that will be installed next to 4202 Racquet Club.

It was noted that the reserve study report was underway.

Discussion was held with regard to the progress of the exterior painting.

NEW BUSINESS

Discussion was held with regard to the nesting birds located in the trees at the corner of Forrest Glen and Racquet Club. After much discussion it was noted that when the nesting season was completed, we would trim the top third of the trees in hope of preventing future nesting by the birds.

It was noted that the next association meeting would be held at the Moyer residence.

There being no further business before the Board, the meeting was adjourned at 9:40 P.M.

Submitted

by:

Jack L. Williams
Account Manager

Tennis Estates Homeowners Association

Minutes for the meeting conducted on

May 22, 2006

Members Present: Alan Harriman, Patsy Fenner, Marcia Lynch, Eric Hartman and Ron Moyer.

The meeting was called to order at 6:00 P.M.

MINUTES & FINANCIAL STATEMENT

A motion was made and 2nd to approve the minutes from the previous meetings minutes as submitted. All in favor, motion carried.

A motion was made and 2nd to approve the April 2006 financial statements as submitted. All in favor, motion carried.

It was noted that Mr. Vasquez has not yet moved his boat from the marina. A letter will be sent.

HOMEOWNER DISCUSSION

None.

MANAGEMENT REPORT

The manager updated the Board on the account's receivable for the association's homeowner's assessments.

Mr. Williams informed the Board that the Saybrook wall repairs were completed and that the City had approved the repairs.

Mr. Williams informed the Board that he had mailed the notice for the annual meeting to all owners.

Mr. Williams provided a draft of the annual meeting rules and regulations to the Board. The Board will review the document at the July meeting.

OLD BUSINESS

Discussion was held with regard to the water intrusion that occurred at 16397-16411 Wimbledon. It was noted that Mr. Cort Greeley of Quanta Services had sent his insurance adjuster out to meet with the owners that had damages and that negotiations were underway to resolve the problems and losses. The Board asked the manager to follow up with Verizon on the matter to keep the momentum towards the final resolution. It was noted that Brian Brown would serve as the representative for the on-site owners with respect to obtain information from Verizon, Quanta Services and their insurance company.

Discussion was held with regard to the progress of the exterior painting and wood repairs. The Board signed the checks paying for the painting but held the checks for the wood repairs until such time and Jay Lynch could review the bills. It was noted that a review was needed to verify the work being done and to determine the breakdown per unit as to what amount of the bill if any would be assessed to the unit owners for damage caused by their actions.

NEW BUSINESS

Discussion was held with regard to the eventual removal of the dying trees along the Saybrook wall. The Board reviewed bids from El Camino Paving and Bandy Landscape to widen the planter along the tree line at the street along Forest Hills, and add trees. The idea would be to allow the new trees more room to grow, (avoiding root damage to the wall) and once matures, remove the existing diseased trees. The Board tabled the bid for now.

X The Board reviewed bids from Bandy Landscape and Great Scott Tree Service for the removal of the large pines at the corner of Racquet Club and Forest Hills. The Board approved the bid from Bandy to remove the trees. It was noted that the trees would only be removed when we were able to confirm that the birds were gone from the nests.

if completed on racquet club & Forest Hills

The Board approved the 2006-07 budget without an increase in the dues amount. The Board noted that a letter would be sent to the owners informing them that the dues would not be raised and informing them that they will be discussing the

June 2

I have a message from Alan that he would put his name in the hat for next year now that his job situation is stabilized so we should be in good position with a full slate. Dan Schultz has also said he would be willing to serve, so there are voting choices.

Now, for the record, I want to put my position in writing about the trees. I have talked with Jack to get his recap of conversation with Fish & Game, have talked with Laura Chee(?) directly and have a member from State Fish & Game to talk with yet. Ralph Bauer did call me, I returned his call and have not had a call back, however he has talked with Jack which has been related previously.

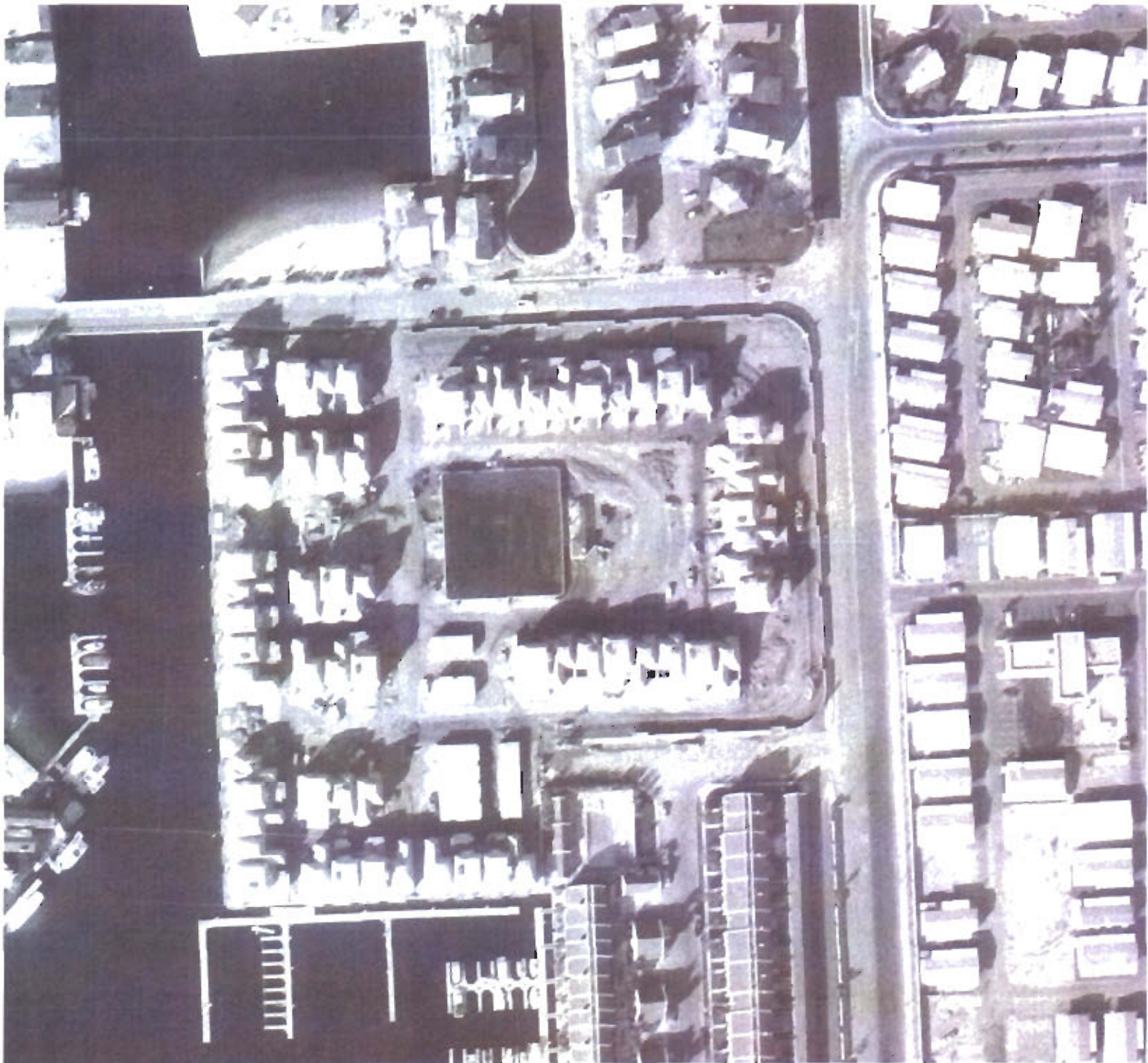
Laura Chee represents the US Dept. of Fish and from her standpoint, we have no problem as long as we confirm the nesting season is completely over. She emphasized that nesting includes the birds being completely able to fly away as they jump around in the trees before they can actually fly. She stated the problem with completely removing the other 4 trees is possible disturbing or damage to the remaining nest that could result in injury or death to the new birds and if that happened we would be in big trouble under the Migratory Bird Law. For that reason she asked that we stop until they are all gone. She stated that these birds only breed annually so once they are all gone, probably around July 1, they will not be active again until late fall so what we do in that time frame is our business.

For these reasons I think we should wait until the nesting is full complete and verified by her and then take out all the trees. I told her that this tree removal is not strictly to address the bird issue but that we, as an Association, have been updating our landscaping for the past 4 years and have removed many trees. We are specifically targeting trees near our exterior walls as we have had costly root damage from trees. Removing these particular trees is part of that overall program.

In her opinion we do not have a problem once the new birds are on their own as they have ample options to nest elsewhere during the next season.

You may hear of some ambitious reporters trying to make a story out of this and I encourage you to not discuss it with them as they would probably put their own spin on it.

Ron



**Large Limbs
Removed** **Entire Tree
Removed**



Subject Trees

Snowy Egret

**Snowy Egret
Nesting**

**Removed Limbs
Exposing Active Nest**





Snowy Egret in Nest

**Removed Limb Exposing
Active Nest**