

CALIFORNIA COASTAL COMMISSION

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



May 6, 2008

W 26a

ADDENDUM

To: Commissioners & Interested Persons

From: South Coast District Staff

Re: Commission Meeting of Wednesday May 7, 2007, Item W 26a, Revised Findings Huntington Beach LCP Amendment 1-06 (Parkside), Huntington Beach, Orange County.

A. Shea Homes Letter 5/1/08

On May 2, 2008 a letter from Shea Homes dated May 1, 2008 (attached) was received in the Commission's South Coast District Office. The letter identifies areas of dispute between the Revised Findings staff report prepared by Commission staff (dated April 24, 2008) and the property owner's (Shea Homes) interpretation of the Commission's November 14, 2007 action on Huntington Beach LCP amendment 1-06 (Parkside). Below is a discussion of the areas of dispute identified in Shea Homes' 5/1/08 letter.

1. Changes to April 24, 2008 Revised Findings Staff Report

On page 42, within the 4th paragraph under the sub heading "3. Eucalyptus ESHA", the following correction should be made in the note on the 5th line: 100 meters is 328 feet [not 338 feet].

The above change is necessary to correct a typographical error and to correctly reflect the equivalent number of feet in 100 meters.

And, on page 46, in the first paragraph under the sub heading "4. Density", the sentence beginning on line 8, should be corrected as follows:

The Commission's suggested modifications necessary to protect coastal resources would reduce the allowable development footprint from the proposed approximately 38 acres to approximately ~~49~~ **26.5** acres.

The above change is necessary to reflect the Commission's action. The revision was inadvertently omitted from the 4/24/08 revised findings staff report.

2. EPA Mitigation Area

On page 35 of the 4/24/08 Revised Findings staff report there is discussion regarding the EPA wetland and the need for mitigation due to its interim loss. In the 5/1/08 letter, the property owner argues that, in its action on 11/14/07, the Commission did not retain the findings that describe the need to mitigate the interim loss of the 4 acre EPA wetland area. However, as noted by the property owner, the motion to reject the EPA area as a wetland did not move forward for lack of a second. There was therefore no Commission discussion regarding whether the findings describing the need to mitigate the 4 acre EPA wetland area should be deleted. Thus, the findings as presented to the Commission in the November 2007 staff report were adopted. The sections of the hearing transcript cited by the property owner in the 5/1/08 letter in an effort to support their position, do not address EPA wetland mitigation but rather identify Commission discussion regarding the general area of the development footprint. In addition, in the 5/1/08 letter, the property owner cites the graphics referenced at the hearing as a basis to support deleting the findings regarding the requirement to mitigate the interim loss of the EPA wetland. Again however, the graphics referenced do not describe deletion of the mitigation requirement, but rather are used as a basis to identify buffer area and the general development footprint.

Finally, in support of their position, the property owner argues that in rejecting the “intermingled areas” described by staff in its November recommendation, the Commission also rejected findings describing the need to mitigate the interim loss of the EPA wetland. The 5/1/08 letter states: “The Commission rejected the concept of intermingled areas in an 11:1 vote. If a 4:1 mitigation were applied to the EPA wetland, it would require 16 acres of wetland, far exceeding the acreage of the intermingled areas (6.7 acres). The intermingled area was suggested by staff in part to provide an area for EPA area mitigation, so rejection of the intermingled areas implicitly, if not explicitly, implied that no additional mitigation area over and above 1:1 was required for the EPA area.” Shea Homes 5/1/08 letter, regarding EPA mitigation, further states: “Although exhibit NN 4th Revised correctly doesn’t reflect exhibit NN 3rd Revised (with WP and intermingled areas); if somehow the 4:1 mitigation ratio were applied, the development footprint remaining in exhibit NN 4th Revised would be far smaller in size than the development footprint in exhibit NN 3rd Revised. This is illogical and inconsistent with the action the Commission took at the November hearing.”

However, Shea’s argument that in rejecting the “intermingled areas” the Commission rejected mitigation requirements for the EPA wetland, assumes that the intermingled areas in staff’s November recommendation would have accommodated all the area necessary to accommodate a 4:1 mitigation requirement. However, the intermingled areas, as recommended by staff in the November recommendation, did NOT include enough area to accommodate all the area needed to accommodate a 4:1 mitigation ratio. The area recommended to be included in the OS-C designation identified as “intermingled area” in staff’s November 2007 recommendation totaled approximately 6.5 acres. The area identified in the findings as an appropriate area of mitigation (4:1) for the 4 acre EPA

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wetland area remains 16 acres. As previously recommended by staff at the November 2007 hearing, the intermingled areas could not have accommodated even half of the mitigation described in the findings. Thus, the Commission's rejection of the "intermingled areas" as a basis to also reject the findings describing a mitigation requirement for the EPA area is not supported by the hearing record.

3. Location of the NTS

On page 12 of the Revised Findings staff report, as part of suggested modification No. 5 (new sub-area 4-K to Table C-2), under the heading "Open Space – Conservation, Environmentally Sensitive Habitat Areas, Environmentally Sensitive Habitat Areas (ESHAs) Buffers, Uses allowed within the ESHA Buffer" at item No. 5, allows a water quality Natural Treatment System (NTS) to be located in the buffer area of the southern ESHA grove, as long as the NTS is located a minimum distance from the ESHA of 270 feet.

The property owner's 5/1/08 letter questions the basis to require a specific distance between the ESHA and the NTS.

Allowance of the NTS within the ESHA buffer is based on three specific exhibits presented to the Commission by the property owner at the November hearing. The three exhibits presented to the Commission by the property owner are [color copies are included in the Commissioners' addendum]:

- Buffer Concept with Consolidated Plan, dated 10/30/07, prepared by LSA (including "red lines");
- untitled, undated exhibit showing "red lines" and describing average, minimum and maximum distances between ESHA and development;
- Wetland Consolidation, Enhancement & Creation Plan: 6.85 Total Wetlands with No WP, dated 11/9/07, prepared for Shea Homes, prepared by Hunsaker & Associates).

All three exhibits depict a Natural Treatment System in the same location. The 10/30/07 exhibit is drawn to scale and shows a scale of one inch equal to 180 feet. Based on the scale provided on the exhibit created by the property owner, staff scaled the minimum distance between the location of the NTS and the southern grove ESHA and determined that the distance is 270 feet.

Because the allowance for the NTS within the ESHA buffer is based on the Commission's discussion and approval of portions of the exhibits provided by the property owner, staff based the revision to the suggested modification to allow an NTS in the ESHA buffer on those specific exhibits. The minimum distance of 270 feet memorializes what was specifically presented to the Commission at the November hearing.

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4. Remainder of Areas of Dispute Identified in 5/1/08 Letter

Shea Homes 5/1/08 letter identifies others areas of dispute with staff's Revised Findings staff report dated 4/24/08. However, after review, Commission staff has determined that the remainder of the disputed areas identified by the property owner are not supported by the record of the Commission's actions and discussion at the November 14, 2007 hearing and so are beyond the scope of changes that can appropriately be made at the revised findings stage.

B. Additional Correspondence Received

In addition to the letter discussed above, the following correspondence has been received in the Commission's South Coast District office. The letters are attached hereto. Also the attached Ex Parte disclosure forms have been received as of 5/5/08 in the South Coast District office.

Amigos de Bolsa Chica, letter dated 4/30/08
California Farm Bureau Federation, letter dated 5/1/08
Bolsa Chica Land Trust, letter dated 5/1/08
Bolsa Chica Land Trust, letter dated 5/5/08 responding to Shea 5/1/08 letter

C. Copies of Color Exhibits for Commissioners

Copies of the following exhibits, printed in color, are attached to the Commissioner's copy of the addendum:

- Buffer Concept with Consolidated Plan, dated 10/30/07, prepared by LSA (including "red lines");
- untitled, undated exhibit showing "red lines" and describing average, minimum and maximum distances between ESHA and development;
- Wetland Consolidation, Enhancement & Creation Plan: 6.85 Total Wetlands with No WP, dated 11/9/07, prepared for Shea Homes, prepared by Hunsaker & Associates).

Color copies of these exhibits are available to the public on the Commission's web site at <http://documents.coastal.ca.gov/reports/2008/5/W26a-5-2008.pdf>

SheaHomes

Caring since 1881

Our Vision ...to be the most respected builder in the country

May 1, 2008

Hon. Patrick Kruer, Chairman
Members of the Commission
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105

W26a

RE: Revised Findings for City of Huntington Beach Major Amendment Request 1-06
(Shea Homes/Parkside Estates)

Dear Chairman Kruer:

We are writing to object to the revised findings prepared by staff (April 24, 2008), and to explain why the revised findings do not accurately reflect the Commission's action on November 14, 2007 approving the above LCP Amendment. We have attached a redlined version of the revised findings which we believe accurately reflects the action taken by the Commission, along with explanatory notes. This letter contains an explanation of the reason for each of the changes we are proposing, along with supporting evidence from the Commission's November 2007 hearing.

We urge the Commission to adopt our redline version instead of the Staff's revised findings.

Purpose of Revised Findings and Suggested Modifications

The May 7, 2008 hearing's purpose is to adopt findings that state the basis for the Commission's actions, not the recommended findings your staff had before you in its November draft findings. As the Commission states in its standard agenda notice:

"Findings. Public hearing and vote to approve findings for a previous Commission action. The only issue is whether the findings adequately support the previous Commission action. The hearing is not to reargue the merits of the prior action." [Emphasis in the original]

A line-by-line review of the transcript and the exhibits referenced by the Commissioners demonstrates that the Commission clearly did not rule in several areas as the draft revised findings indicate, showing that the revised findings prepared by Staff are in effect "rearguing the merits of the prior action." We have carefully reviewed the transcripts and exhibits from

the November 14, 2007 hearing and have prepared revised findings that adequately and accurately support the Commission's actions.

EPA Area Mitigation

While we do not agree that the farmed EPA area should be classified as a wetland, we are not arguing herein against the Commission's decision regarding the EPA area; rather, we are only arguing against staff's unsupportable attempt to exact a 4:1 mitigation for loss of the EPA wetland, because it does not reflect the actions of the Commission.

1. The Transcript and Motion

In the transcript (pgs. 224-227), the motion by Commissioner Secord called for the rejection of the concept of intermingled areas. Director Douglas asked (p. 225) whether the Commission is changing "the line for the development footprint," and asked for clarification regarding where the line should be established. Commissioners Secord, Kruer, Wan and Reilly, and staff members Smeltzer and Sarb all agreed that the "line" would be a combination of Applicant's exhibits and staff's demarcation of the EPA area in NN 3rd Revised – with no discussion whatsoever of additional mitigation.

Director Douglas (p. 225): We need some clarification of what you mean, because getting rid of the intermingled area doesn't tell us what you are trying to do. You are trying to change the line for the development footprint? And if that is the case, could you just tell us which line you are trying to establish?

Commissioner Secord (p. 226): Well, on one of the charts that we have been presented, the area WP is surrounded by a rather large buffer, and the EPA wetland is surrounded by a very large buffer, and then there was discussion among the staff of more or less joining those two buffered areas, **that rendered a great deal of the middle part of this project unbuildable.** [¶] And it was my intention by this motion to try to focus the development where it could be done without particular controversy, and try to improve the status of that corridor where the eucalyptus trees are, and where the CP wetland is, focus on the west side of the property.

Commissioner Wan (p. 227): It, basically, I think what you are trying to say is that **it is basically this [Applicant's variable width buffer exhibit], except that it has the EPA area in it.**

Commissioner Reilly (p. 227-228): I just think that Commissioner Wan is right. I think that where we are at right now, **if we vote to approve this, is basically with the applicant's proposal, but still with the staff's designation of the EPA wetland.** (All emphasis added.)

Commissioner Secord, in describing the motion, said the staff recommendation rendered a great deal of the middle part of the project unbuildable, and his intent was to consolidate resources, therefore undoing the “unbuildability” of the middle part of the project. Both Commissioner Wan and Reilly agreed, saying the new land use plan would be the applicant’s plan, which showed no 4:1 mitigation, with only the addition of the staff’s demarcation of the modified 4.0-acre EPA wetland. This record does not support a conclusion that the Commission anticipated that additional wetland creation would be required and carved out of the buildable part of the project.

2. Graphics Referred to by Commissioners During Hearing

The Commission referred to three documents in making motions and deliberating: the applicant’s land use plan (November 9, 2007), the applicant’s variable width buffer exhibit and staff’s NN 3rd Revised. None of these exhibits showed any additional mitigation land.

3. Rejection of Intermingled Areas

The Commission rejected the concept of intermingled areas in an 11:1 vote. If a 4:1 mitigation were applied to the EPA wetland, it would require 16 acres of wetland, far exceeding the acreage of the intermingled areas (6.7 acres). The intermingled area was suggested by staff in part to provide an area for EPA area mitigation, so rejection of the intermingled areas implicitly, if not explicitly, implied that no additional mitigation area over and above 1:1 was required for the EPA area.

4. Approval of Applicant’s Specific Variable Buffer

The Commission approved a specific variable buffer as shown on the applicant’s exhibit in a 9-3 vote after considerable deliberation and requests for input from the applicant’s, the opponents’ and the staff’s biologists. Much of the deliberation focused on what the specific distance would be from the eucalyptus grove to the edge of development. Why would the Commission require 4:1 mitigation when it would make their approval of a variable width buffer moot and their discussion concerning it irrelevant?

5. No Loss of Habitat Value in the Farmed EPA

In the November Staff recommendation, Staff called for mitigation to compensate for “lost habitat value” (p. 36), but struck this language in the draft revised findings. It is undisputed that there is no “wetland habitat value” in the EPA, and therefore there is no basis for mitigation beyond 1:1 replacement, as the Commission concluded. This is a unique circumstance, which follows from the undisputed fact that the EPA has been farmed

continuously since well before the enactment of the Coastal Act.

6. Withdrawal of Commissioner Shallenberger's Motion

In determining the farmed 4.0-acre EPA area to be a wetland, the Commission declined to require additional wetland acreage. Following the vote to reject the intermingled areas, Commissioner Shallenberger made an amending motion for the creation of an additional five acres of wetland (transcript at 233:13). Commissioner Wan explained the motion at 233:22:

"The 5 acres that you are talking about for creation is within the area that is of the EPA? It is not additional acreage? Am I correct?"

And Chairman Kruer responded, "That is correct." With that clarification, Commissioner Shallenberger withdrew her motion. Therefore, the Commission required no additional wetland other than the restoration of the 4.0-acre modified EPA at its depicted location.

7. Staff's Graphic Accompanying Revised Findings

Exhibit NN 4th Revised is correct: It shows the EPA, wetland buffers and the specific variable width buffer approved by the Commission. It shows the deletion of the WP and the intermingled areas rejected by the Commission. And it correctly shows the Development Envelope as reflected by Commissioner Secord's motion.

Although exhibit NN 4th Revised correctly doesn't reflect exhibit NN 3rd Revised (with the WP and intermingled areas), if somehow the 4:1 mitigation ratio were applied, the development footprint remaining in exhibit NN 4th Revised would be far smaller in size than the development footprint in exhibit NN 3rd Revised. This is illogical and inconsistent with the action the Commission took at the November hearing.

8. Recommended Finding

We disagree that the EPA is a wetland for the reasons we explained at the November hearing. At most, however, the Commission required only protection of the modified EPA with the applicant's variable width buffer. The Commission did not require 4:1 mitigation, or any mitigation beyond the delineated modified EPA. Therefore, we ask that the Commission make the following finding, and that staff revise the draft revised findings accordingly:

The Commission finds that there has been no loss of habitat values in the EPA area, since the area has been farmed continuously since before the implementation of the Coastal Act, and that no habitat value has ever been defined on the site, so 1:1 restoration of the 4.0 acre modified EPA is required.

Potential Unpermitted Development

Responding to a question from Commission Reilly regarding unpermitted fill and pending violations, Director Douglas states on p. 175, line 5: “We have not established [that there is a violation] yet, because we don’t have the enforcement action going to the point of making that determination.” Therefore, the Commission did not find that unpermitted development occurred.

The Commission had no deliberations on the motion regarding the EPA area due to lack of a second, so there was no specific determination by the Commission that activities beyond normal farming activities occurred on the site. Further, there was considerable discussion by Commissioners at the hearing that activities on the site did not go beyond normal farming practices, and therefore did not constitute unpermitted development. (See Commissioner Firestone’s comments on pp. 188-189 and those of Commissioner Baird on pp. 199-200.) No Commissioners made definitive statements in support of staff’s position regarding what constitutes normal farming practices.

Location of the NTS

We question the basis for staff’s use of a specific distance, 270 feet, for the distance to the NTS from the southern ESHA buffer because the Commission’s actions made it clear it only needed to be placed outside the wetland buffer. The Commission never discussed specific distances when discussing the location of the NTS; rather, it discussed the parameters, i.e., outside the wetland buffer, but inside the ESHA buffer, as it was shown in our land use plan exhibit.

While we therefore believe no numeric specificity is required in the revised findings, we understand the Commission may find comfort in having a specific distance in the findings. In an ex parte on May 1, 2008, Commissioner Reilly suggested a 200-foot minimum could be specified to address those concerns. We are amenable to this, especially since it will allow greater flexibility in finalizing the Coastal Development Permit.

Draft Revised Findings on Density

In the draft revised findings on density (p. 46), the size of the development envelope is presented as 19 acres, unchanged from the November staff report, which included intermingled areas and the WP. The Commission’s actions rejecting the WP and intermingled areas, and accepting a 4.0-acre modified EPA and its 100-foot buffers results in a development envelope of approximately 26.5 acres, which includes 2.8 acres of park uses.

Chairman Patrick Kruer
California Coastal Commission
Huntington Beach Major Amendment Request 1-06

We are providing copies of our redline version of the draft revised findings and explanatory notes, along with this letter, to your fellow Commissioners and your Long Beach staff. Please let me know if you require any additional information.

Regards,
Shea Homes, LP

A handwritten signature in black ink, appearing to read "R. Metzler". The signature is stylized with a large, looped "R" and a cursive "Metzler".

Ron Metzler
Vice President, Entitlement & Development

cc: Commissioners, California Coastal Commission
Alternates, California Coastal Commission
Sherilyn Sarb
Karl Schwing
Meg Vaughn

Notes to Accompany Landowner's draft revisions to Staff's draft revised findings

Note #1: The Commission approved a development envelope with a section south of the modified EPA wetland that is not in the "eastern" portion of the site, so referencing exhibit NN (4th Revised) is more clear and specific.

Note #2: The Commission did not state a specific numeric distance for the NTS location; rather, they specifically cited the location shown on the applicant's land use plan. In our ex-parte discussions, one Commissioner suggested that a 200-foot minimum would provide the Commission with adequate comfort; we concur as this would provide flexibility at the time the CDP is considered.

Note #3: Staff has stated elsewhere in the draft revised findings that the Commission made this finding, e.g., page 27-28. For clarity, it should be stated here as well.

Note #4: Staff's draft revised findings present the history of the LCP only through April 2007. This addition is suggested to bring the LCP history up to present.

Note #5: Regarding the WP, see note #3. Regarding the former stable area, by rejecting the concept of Intermingled Areas, the Commission allowed development in the former stable areas; therefore, it found no wetland resources there.

Note #6: There were no deliberations on the motion regarding the EPA area, so there was no specific determination by the Commission that unpermitted fill occurred. Further, on pp. 173-176 of the transcript, the matter is discussed. Director Douglas states on p. 175, line 5: "We have not established [that there is a violation] yet, because we don't have the enforcement action going to the point of making that determination." Therefore, the Commission did not find that unpermitted development occurred.

Note #7: There were no deliberations on the motion regarding the EPA area, so there was no specific determination by the Commission that activities beyond normal farming activities occurred on the site. Further, there was considerable discussion by Commissioners at the November 14, 2007 hearing that activities on the site did not go beyond normal farming practices, and no Commissioners made definitive statements in support of staff's position regarding what constitutes normal farming practices. See Commissioner Firestone's comments on pp. 188-189 and Commissioner Baird on pp. 199-200.

Note #8: Regarding the changes made to references to unpermitted activities in the EPA area, see Note #7. Regarding changes in acreage removing calculations on a 4:1 mitigation, while we do not agree that the farmed EPA area should be classified as a wetland, we are not arguing herein against the Commission's decision regarding the EPA area; rather, we are only arguing against staff's unsupportable attempt to exact a 4:1 mitigation for loss of the EPA wetland, because it does not reflect the actions of the Commission. Our supporting comments follow:

The Transcript and Motion – In the transcript (pgs. 224-227), the motion by Commissioner Secord called for the rejection of the concept of intermingled areas. Director Douglas asked (p. 225) whether the Commission is changing “the line for the development footprint,” and asks clarification for where the line should be established. Commissioners Secord, Kruer, Wan and Reilly, and staff members Smeltzer and Sarb all agree that the “line” will be a combination of Applicant's exhibit and staff's demarcation of the EPA area in NN 3rd Revised – with no discussion whatsoever of additional mitigation.

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Commissioner Wan (p. 227): It, basically, I think what you are trying to say is that **it is basically this [Applicant's variable width buffer exhibit], except that it has the EPA area in it.**

Commissioner Reilly (p. 227-228): I just think that Commissioner Wan is right. I think that where we are at right now, **if we vote to approve this, is basically with the applicant's proposal, but still with the staff's designation of the EPA wetland.**

All emphasis added.

On p. 226, Commissioner Secord, in describing the motion, said the staff recommendation rendered a great deal of the middle part of the project unbuildable,

and his intent was to consolidate resources, therefore undoing the “unbuildability” of the middle part of the project. Both Commissioner Wan and Reilly agreed, saying the new land use plan would be the applicant’s plan, which showed no 4:1 mitigation with only the addition of the staff’s demarcation of the modified 4.0-acre EPA wetland. This record does not support a conclusion that the Commission anticipated that additional wetland creation would be required and carved out of the buildable part of the project.

Graphics Referred to by Commissioners During Hearing – The Commission referred to three documents in making motions and deliberating: the applicant’s land use plan (November 9, 2007), the applicant’s variable width buffer exhibit and staff’s NN 3rd Revised. All of these exhibits showed buffers, and none shows any additional mitigation land.

Rejection of Intermingled Areas – The Commission rejected the concept of intermingled areas in an 11:1 vote. If a 4:1 mitigation were applied to the EPA wetland, it would require 16 acres of wetland, far exceeding the acreage of the intermingled areas (6.7 acres). The intermingled area was suggested by staff in part to provide an area for EPA area mitigation, so rejection of the intermingled areas implicitly, if not explicitly, implied that no additional mitigation area over and above 1:1 was required for the EPA area.

Approval of Applicant’s Specific Variable Buffer – The Commission approved a specific variable buffer as shown on the applicant’s exhibit in a 9-3 vote after considerable deliberation and requests for input from the applicant’s, the opponents’ and the staff’s biologists. Much of the deliberation focused on what the specific distance would be from the eucalyptus grove to the edge of development. Why would the Commission require 4:1 mitigation when it would make their approval of a variable width buffer moot, and their discussion concerning it irrelevant?

No Loss of Habitat Value in the Farmed EPA – In the November Staff recommendation, Staff called for mitigation to compensate for “lost habitat value” (p. 36), but struck this language in the draft revised findings. It is undisputed that there is no “wetland habitat value” in the EPA, and therefore there is no basis for mitigation beyond 1:1 replacement, as the Commission concluded. This is a unique circumstance, which follows from the undisputed fact that the EPA has been farmed continuously since well before the enactment of the Coastal Act.

Withdrawal of Commissioner Shallenberger’s Motion – In determining the farmed 4.0-acre EPA area to be a wetland, the Commission declined to require additional wetland acreage. Following the vote to reject the intermingled areas, Commissioner Shallenberger made an amending motion for the creation of an additional five acres of wetland (transcript at 233:13). Commissioner Wan explained the motion at 233:22:

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And Chairman Kruer responded, “That is correct.” With that clarification, Commissioner Shallenberger withdrew her motion. Therefore, the Commission required no additional wetland other than the restoration of the 4.0-acre modified EPA at its depicted location.

Staff’s Graphic Accompanying Revised Findings – NN 4th Revised is correct: It shows the EPA, wetland buffers and the specific variable width buffer approved by the Commission. It shows the deletion of the WP and the intermingled areas rejected by the Commission. And it correctly shows the Development Envelope as reflected by Commissioner Secord’s motion.

Although NN 4th Revised correctly doesn’t reflect NN 3rd Revised (with the WP and intermingled areas), if somehow the 4:1 mitigation ratio were applied, the development footprint remaining in NN 4th Revised would be far less in size to the development footprint in NN 3rd Revised. This is illogical and inconsistent with the action the Commission took at the November hearing.

Note #9: Staff has referenced exhibit NN (4th Revised) elsewhere in the draft revised findings.

Note #10: The Commission’s action established a development footprint of approximately 26.5 acres, which includes 2.8 acres in park uses. Staff may wish to recalculate the housing counts in this paragraph to reflect the correct development envelope acreage.

CALIFORNIA COASTAL COMMISSION

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

**DRAFT**

April 24, 2008

TO: Commissioners and Interested Persons

FROM: Sherilyn Sarb, Deputy Director, South Coast District, Orange County
Teresa Henry, Manager, South Coast District
Karl Schwing, Supervisor, Regulation & Planning, Orange County Area
Meg Vaughn, Coastal Program Analyst

SUBJECT: **Revised Findings for Major Amendment Request No. 1-06** (Shea Homes/Parkside) to the City of Huntington Beach Certified Local Coastal Program Land Use Plan (For Public Hearing and Commission Action at the May 7-9, 2008 meeting in Marina del Rey).

SUMMARY OF HUNTINGTON BEACH LCP AMENDMENT REQUEST NO. 1-06

Request by the City of Huntington Beach to amend the Land Use Plan (LUP) portion of the Local Coastal Program (LCP). The proposed Local Coastal Program (LCP) amendment is a project-specific amendment designed to make possible a low density residential development on a vacant, approximately 50-acre site comprising two legal lots, most of which is currently in agricultural production. Of the total project area, approximately 45 acres have long been located within the City of Huntington Beach. The remaining 5 acres were, until 2004, located within unincorporated County of Orange jurisdiction, within the Bolsa Chica LCP area. However, with the recent annexation, the entire site is within the City of Huntington Beach. Of the 45 acre portion of the site, approximately 40 acres were deferred certification at the time the City's overall Local Coastal Program was certified and remains uncertified today. This LCP amendment would incorporate that 40 acres and the newly annexed area into the City's existing LCP and establish land use and zoning designations for those areas. The remaining five acre portion of the 45 acre area was certified at the time the City's overall LCP was certified as Open Space – Park (OS-P). The 40 acre area was originally deferred certification due in part to wetland issues.

The City's current amendment requests designation of approximately 38.5 acres as RL-7 (Low Density Residential – maximum 7 units per acre), approximately 8.2 acres as OS-P (Open Space – Park), and approximately 3.3 acres as OS-C (Open Space – Conservation).

SUMMARY OF COMMISSION ACTION

At the Commission hearing of November 14, 2007 the Commission reviewed the City of Huntington Beach Local Coastal Program Amendment 1-06. The Commission **approved with revised suggested modifications** the City's request to amend the LCP Land Use Plan as requested.

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Huntington Beach LCP Amendment 1-06 (Parkside)
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Public testimony and Commission discussion included concerns regarding the extent of wetland on site, the appropriate distance for ESHA buffer areas and appropriate uses allowed within ESHA buffer areas. The Commission found that the area referred to as the Wintersburg Pond (WP) was not wet enough to develop a preponderance of wetland vegetation or wetland soils; that the area known as the EPA wetland was wet enough to support a preponderance of wetland vegetation or soils in 1996 and that any changes in local hydrology that may have taken place since that time were unpermitted; a variable width buffer distance would be adequate to protect the eucalyptus grove ESHA; and that areas referred to as “intermingled areas” found between the areas identified as wetland, ESHA, and buffer areas should not be designated Open Space - Conservation.

The changes made by the Commission at the hearing are manifested in the staff report primarily through changes to Exhibit NN (now 4th revised) in that the areas of the site to be designated Open Space – Conservation and the areas to be designated as the development envelope (which allows either active park or residential development) have changed. In addition, the changes made by the Commission at the hearing result in changes to the suggested modification regarding the width of the ESHA buffer area and uses allowed within that buffer area. Also, there are changes to the wetland findings supporting the Commission’s determination that the WP area is not a wetland and to eliminate the discussion on the intermingled areas. Finally, changes are made in the ESHA findings to support the variable width ESHA buffer rather than the 100 meter ESHA buffer, and to allow a portion of a water quality Natural Treatment System as an allowable use within a portion of the outer ESHA buffer subject to restrictions.

COMMISSION VOTE: The Commissioners voting on the prevailing side were: **Burke, Clark, Hueso, Secord, Neely, Potter, Reilly, and Chair Kruer.**

SUMMARY OF STAFF RECOMMENDATION:

Staff is recommending that the Commission adopt the following revised findings in support of the Commission’s action on November 14, 2007, approving the proposed Huntington Beach Local Coastal Program Amendment 1-06 if modified. **The motion to accomplish this is found on page 4.** The more significant changes made to reflect the Commission’s action can be found on pages 11, 12, 13, 15, 26-28, 35, 36, 39, 40, 42-45.

STANDARD OF REVIEW

For the proposed Land Use Plan amendment, the standard of review is conformance with and satisfaction of the requirements of the Chapter 3 policies of the Coastal Act.

SUMMARY OF PAST ACTIONS ON THIS LCPA

At the May 2007 hearing in San Pedro, after presentations by staff, the applicant, and public testimony, the Commission voted to deny the subject Land Use Plan amendment, as submitted. A motion (i.e. the main motion) was made to approve the Land Use Plan

amendment with modifications, but, upon deliberation, the hearing was continued. The LCPA was subsequently scheduled for Commission action at its July 9-13, 2007 hearing. The LCP amendment originally proposed changes to both the Land Use Plan (LUP) and the Implementation Plan (IP). On July 3, 2007, the City withdrew the IP portion of the LCPA. The Commission recognized the withdrawal of the IP amendment at its July 11, 2007 hearing. Also at its July 11, 2007 hearing, the Commission postponed action on suggested modifications for the LUP portion of the LCPA. At the November 14, 2007 hearing, the Commission approved the proposed LUP amendment with suggested modifications as revised at that hearing.

SUMMARY OF PUBLIC PARTICIPATION

Section 30503 of the Coastal Act requires public input in Local Coastal Program development. During the preparation, approval, certification, and amendment of any local coastal program, the public, as well as all affected governmental agencies, including special districts, shall be provided maximum opportunities to participate. Prior to submission of a local coastal program for approval, local governments shall hold a public hearing or hearings on that portion of the program which has not been subjected to public hearings within four years of such submission. Prior to submittal of the LCPA to the Commission, the City held numerous public hearings on the proposed LCP amendment as shown on exhibit D.

All City staff reports were made available for public review in the Planning Department and in the Huntington Beach Public Library. Public hearing notices were mailed to property owners of record for the parcels that are the subject of the amendment as well as parcels within a 1,000 foot radius (including occupants), and notice of the public hearing was published in the Huntington Beach Independent, a local newspaper of general circulation.

ADDITIONAL INFORMATION

Copies of the staff report are available online on the Coastal Commission's website at www.coastal.ca.gov or at the South Coast District office located in the ARCO Center Towers, 200 Oceangate, Suite 1000, Long Beach, 90802. To obtain copies of the staff report by mail, or for additional information, contact Meg Vaughn in the Long Beach office at (562) 590-5071. The City of Huntington Beach contact for this LCP amendment is Scott Hess, Director of Planning, who can be reached at (714) 536-5271.

I. MOTION AND RESOLUTION

NOTE: Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the following motion.

Motion

"I move that the Commission adopt the following revised findings in support of the Commission's approval of the City of Huntington Beach LCP Land Use Plan amendment No. 1-06 if modified as suggested."

Staff recommends a **YES** vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the November 14, 2007 hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

The Commissioners voting on the prevailing side to approve the LUP amendment if modified were: Commissioners **Burke, Clark, Hueso, Secord, Neely, Potter, Reilly, and Chair Kruer.**

Resolution

The Commission hereby adopts the findings set forth below approving if modified as suggested, the City of Huntington Beach LCP Land Use Plan Amendment 1-06 on the grounds that the findings support the Commission's decision of November 14, 2007 and accurately reflect the reasons for it.

II. SUGGESTED MODIFICATIONS

Certification of City of Huntington Beach LCP Amendment Request No. 1-06 is subject to the following modifications.

The City's existing language is shown in plain text.

The City's proposed additions are shown in **bold text.**

The City's proposed deletions are shown in ~~plain text, strike out.~~

The Commission staff's original (November 2007) suggested additions are shown in **bold, italic, underlined text.**

The landowner's suggested revisions to staff's proposed revised findings are shown in red and/or blue.

The Commission staff's original (November 2007) suggested deletions are shown in ~~***bold, italic, underlined, strike out text***~~.

Additions to the November 2007 staff recommendation made by the Commission at the public hearing are shown in ***bold, italic, double underlined text***.

Deletions to the November 2007 staff recommendation made by the Commission at the public hearing are shown in ~~***bold, italic, double underlined, double strike out text***~~.

Staff Note: Three corrections are made where, due to typos, existing certified LUP language was left out. The corrections are: 1) replacing the word "residential" in suggested modification No. 1, 2) replacing the sub-section "Public" in the table in suggested modification No. 2, and, 3) inserting the hyphen in the land use category titles Open Space – Conservation and Open Space – Parks throughout.

LAND USE PLAN SUGGESTED MODIFICATIONS:

SUGGESTED MODIFICATION NO. 1

Sub-Area Descriptions and Land Use Plan

The City's certified and proposed Land Use Plan (LUP) language, on page IV-C-11, under the heading: Zone 2 – Bolsa Chica, shall be modified as follows:

Existing Land Uses

Inland (Pacific Coast Highway and areas north to the Coastal Zone boundary.)
The majority of Zone 2, the Bolsa Chica, is located outside the City's corporate boundary, within the County of Orange. The area is in the City's Sphere of Influence ... A ~~44~~ ***50*** acre area between ~~***Los Patos the residential development along Kenilworth Drive***~~ and the ***East Garden Grove*** Wintersburg Flood Control Channel ~~***is vacant and***~~ includes a small section of the Bolsa Chica bluffs.

Coastal (Seaward of Pacific Coast Highway)

...

Coastal Element Land Use Plan

Inland (Pacific Coast Highway and areas north to the Coastal Zone boundary.)

The Coastal Element does not present a land use plan for the Bolsa Chica. The land area north of the Bolsa Chica, within the City's corporate and Coastal Zone boundaries, is built out consistent with its Coastal Element designation of low density **residential**. The area west of the Bolsa Chica is also developed consistent with the Coastal Element Land Use designation of low density residential and multi-family residential. The vacant 44-acre area next to the Wintersburg Flood Control Channel retains its existing designation as an "Area of Deferred Certification." Prior to development of the site, an amendment to the City's Local Coastal Program will be required, subject to Coastal Commission approval; the amendment would take effect upon Commission certification. Portions of this zone are included in the Community District/Sub-area Schedule as sub-areas 4G and 4J. **The Coastal Element land use designation for the vacant 45-acre area next to the East Garden Grove-Wintersburg Flood Control Channel was recently certified as RL-7 (Low Density Residential) and OS-P (Open Space – Park). In addition, approximately 5 acres of land was annexed from the County of Orange into the City of Huntington Beach. This area is designated RL-7 (Low Density Residential) and OS-C (Open Space – Conservation).**

The fifty (50) acre area (including the 5 acre area annexed by the City in 2004) adjacent to and immediately north of the East Garden Grove/Wintersburg Flood Control Channel and adjacent to and immediately west of Graham Street is land use designated Residential and Open Space – Conservation. (See Figure C-6a)

There are wetlands, a Eucalyptus Grove that is an Environmentally Sensitive Habitat Area because it provides important raptor habitat, and buffer areas, and intermingled raptor foraging habitat at this site. These areas are designated Open Space – Conservation.

The Wintersburg Channel Bikeway is identified at this site on the north levee of the flood control channel in the Commuter Bikeways Strategic Plan, which is the regional bikeways plan for Orange County (See page IV-C-49 and figure C-14).

SUGGESTED MODIFICATION No. 2

The table titled Zone 2 – Land Use Designations, on page IV-C-11, shall be modified as follows:

Zone 2 – Land Use Designations	
Residential	RL- 7 or RM or RH
Open Space	OS-P OS-S <u>OS-C</u>
<u>Public</u>	<u>P</u>
"White Hole"	Area of Deferred Certification

Zone 2 – Specific Plan Areas	
None	
Zone 2 – General Plan Overlays	
4G, 4J, 4K	

SUGGESTED MODIFICATION NO. 3

Figure C-6 of the City's Land Use Plan shall be modified to reflect the change in the City's corporate boundary and to accurately reflect the correct areas of the certified land use designations (Residential and Open Space Conservation) for the area.

SUGGESTED MODIFICATION NO. 4

New Figure C-6a shall be added to the City's Land Use Plan, which shall be a land use plan of the Parkside site and shall depict the approved land use designations on the site as shown on ~~3rd~~ 4th revised exhibit NN.

SUGGESTED MODIFICATION NO. 5

Add new subarea 4-K to table C-2 (Community District and Subarea Schedule) as depicted below:

<u>Subarea</u>	<u>Characteristic</u>	<u>Standards and Principles</u>
<u>4-K</u>	<u>Permitted Uses</u>	<u>Categories: Residential (R-L or R-M)</u> <u>Open Space Conservation (OS-C)</u> <u>See Figure C-6a</u>
	<u>Density/Intensity</u>	<u>Residential</u> <u>Maximum of fifteen (15) dwelling units per acre.</u>
	<u>Design and Development</u>	<u>See Figure C-6a</u> <u>A development plan for this area shall concentrate and cluster residential units in the development envelope indicated on exhibit NN (4th Revised) northeastern portion of the site [SEE NOTE #1] and include, consistent with the land use designations and Coastal Element policies, the following required information (all required information must be prepared or updated no more than one year prior to submittal of a coastal development permit application):</u> <u>1. A Public Access Plan, including, but not limited to the following features:</u>

		<ul style="list-style-type: none"> ❖ <u>Class I Bikeway (paved off-road bikeway; for use by bicyclists, walkers, joggers, roller skaters, and strollers) along the north levee of the flood control channel. If a wall between residential development and the Bikeway is allowed it shall include design features such as landscaped screening, non-linear footprint, decorative design elements and/or other features to soften the visual impact as viewed from the Bikeway.</u> ❖ <u>Public vista point with views toward the Bolsa Chica and ocean consistent with Coastal Element policies C 4.1.3, C 4.2.1, and C 4.2.3.</u> ❖ <u>All streets shall be ungated, public streets available to the general public for parking, vehicular, pedestrian, and bicycle access. All public entry controls (e.g. gates, gate/guard houses, guards, signage, etc.) and restrictions on use by the general public (e.g. preferential parking districts, resident-only parking periods/permits, etc.) associated with any streets or parking areas shall be prohibited.</u> ❖ <u>Public access trails to the Class I Bikeway, open space and to and within the subdivision, connecting with trails to the Bolsa Chica area and beach beyond.</u> ❖ <u>Public access signage.</u> ❖ <u>When privacy walls associated with residential development are located adjacent to public areas they shall be placed on the private property, and visual impacts created by the walls shall be minimized through measures such as open fencing/wall design, landscaped screening, use of an undulating or off-set wall footprint, or decorative wall features (such as artistic imprints, etc.), or a combination of these measures</u> <p><u>2. Habitat Management Plan for all ESHA, wetland, and buffer areas and other areas designated Open Space-</u></p>
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	<p><u>Conservation that provides for their restoration and perpetual conservation and management. Issues to be addressed include, but are not limited to, methods to assure continuance of a water source to feed all wetland areas, enhancement of habitats and required buffer areas, restoration and enhancement of wetlands and environmentally sensitive habitats and required buffer areas, and fuel modification requirements to address fire hazard and avoid disruption of habitat values in buffers.</u></p> <p><u>3. Archaeological Research Design consistent with Policies C5.1.1, C5.1.2, C5.1.3, C5.1.4, and C5.1.5 of this Coastal Element.</u></p> <p><u>4. Water Quality Management Program consistent with the Water and Marine Resources policies of this Coastal Element. If development of the parcel creates significant amounts of directly connected impervious surface (more than 10%) or increases the volume and velocity of runoff from the site to adjacent coastal waters, the development shall include a treatment control BMP or suite of BMPs that will eliminate, or minimize to the maximum extent practicable, dry weather flow generated by site development to adjacent coastal waters and treat runoff from at least the 85th percentile storm event based on the design criteria of the California Association of Stormwater Agencies (CASQA) BMP handbooks, with at least a 24 hour detention time. Natural Treatment Systems such as wetland detention systems are preferred since they provide additional habitat benefits, reliability and aesthetic values.</u></p> <p><u>5. Pest Management Plan that, at a minimum, prohibits the use of rodenticides, and restricts the use of pesticides, and herbicides in outdoor areas, except necessary Vector Control conducted by the City or County.</u></p> <p><u>6. Landscape Plan for non-Open Space Conservation areas that prohibits the planting, naturalization, or persistence of invasive plants, and encourages low-water use plants, and plants primarily native to coastal</u></p>
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Orange County.

7. Biological Assessment of the entire site.

8. Wetland delineation of the entire site.

9. Domestic animal control plan that details methods to be used to prevent pets from entering the Open Space-Conservation areas. Methods to be used include, but are not limited to, appropriate fencing and barrier plantings.

10. Hazard Mitigation and Flood Protection Plan, including but not limited to, the following features:

- ❖ **Demonstration that site hazards including flood and liquefaction hazards are mitigated;**
- ❖ **Minimization/mitigation of flood hazard shall include the placement of a FEMA-certifiable, vegetated flood protection levee that achieves hazard mitigation goals and is the most protective of coastal resources including wetland and ESHA;**
- ❖ **Assurance of the continuance, restoration and enhancement of the wetlands and ESHA.**

Residential:

Residential development, including appurtenant development such as roads and private open space, is not allowed within any wetland, ESHA, or required buffer areas and area designated Open Space-Conservation.

Uses consistent with the Open Space-Parks designation are allowed in the residential area.

All development shall assure the continuance of the habitat value and function of preserved and restored wetlands and environmentally sensitive habitat areas within the area designated Open Space-Conservation.

Open Space-Conservation:

A. Wetlands:

Only those uses described in Coastal Element Policy C 6.1.20 shall be allowed within existing and restored wetlands.

All development shall assure the continuance of the habitat value and function of wetlands.

Wetland Buffer Area:

A buffer area is required along the perimeter of wetlands to provide a separation between development impacts and habitat areas and to function as transitional habitat. The buffer shall be of sufficient size to ensure the biological integrity and preservation of the wetland the buffer is designed to protect.

A minimum buffer width of 100 feet shall be established.

Uses allowed within the wetland buffer are limited to:

- 1) those uses allowed within wetlands per Coastal Element Policy C 6.1.20;**
- 2) a vegetated flood protection levee is a potential allowable use if, due to siting and design constraints, location in the wetland buffer is unavoidable, and the levee is the most protective of coastal resources including wetland and ESHA;**
- 3) No active park uses (e.g. tot lots, playing fields, picnic tables, bike paths, etc.) shall be allowed within 100 feet of wetlands preserved in the Open Space Conservation area.**

B. Environmentally Sensitive Habitat Areas:

Only uses dependent on the resource shall be allowed.

Environmentally Sensitive Habitat Areas (ESHA) Buffer Areas:

A variable width buffer area is required along the perimeter of the ESHA and is required to be of sufficient size to ensure the biological integrity and preservation of the ESHA the buffer is designed to protect.

A minimum buffer width of ~~100 meters (328 feet)~~ 297 to 650 feet shall be established between all residential development or active park use and raptor habitat within the eucalyptus groves.

Uses allowed within the ESHA buffer are limited to:

- 1) **uses dependent on the resource;**
- 2) **wetland and upland habitat restoration and management;**
- 3) **vegetated flood protection levee that is the most protective of coastal resources including wetland and ESHA;**
- 4) **within the northern grove ESHA buffer only – passive park use may be allowed if it is more than 150 feet from the ESHA, but only when it is outside all wetland and wetland buffer areas, and does not include any uses that would be disruptive to the ESHA. Uses allowed within the passive park areas shall be limited to:**
 - a) **nature trails and benches for passive recreation, education, and nature study;**
 - b) **habitat enhancement, restoration, creation and management.**

5) within the southern grove ESHA buffer only - a water quality Natural Treatment System may be allowed so long as it is located **outside all wetland and wetland buffers, as shown on applicant's land use plan dated November 9, 2007 in an area that is most protective of coastal resources and at least 270-200 feet from the ESHA. [SEE NOTE #2]**

56) In addition to the ~~100-meter~~ required ESHA buffer described above, grading shall be prohibited within 500 feet of an occupied raptor nest during the breeding season (considered to be from February 15 through August 31);

C. Other Areas Designated Open Space

		<p style="text-align: center;"><u>Conservation</u></p> <p><u>Uses allowed within areas designated Open Space Conservation other than wetland and ESHA areas and their buffers are limited to:</u></p> <p><u>1. Water Quality Natural Treatment System;</u> <u>2. Passive recreational uses such as trails and benches for education and nature study;</u> <u>3. Habitat enhancement, restoration, creation and management</u></p> <p><u>D.C. Habitat Management Plan shall be prepared for all areas designated Open Space-Conservation which shall include restoration and enhancement of delineated wetlands, wetland and habitat mitigation, and establishment of appropriate buffers from development.</u></p> <p><u>E.</u></p> <p><u>D. Protective Fencing: Protective fencing or barriers shall be installed along any interface with developed areas, to deter human and pet entrance into all restored and preserved wetland and ESHA buffer areas.</u></p>
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SUGGESTED MODIFICATION No. 6

On page IV-C-60 and IV-C-61, under the heading Visual Resources, The Bolsa Chica Mesas, revise to include visual resources within Parkside area as follows:

The northwestern side of the Bolsa Chica Ecological Reserve includes bluffs that rise to an upland area known as the Bolsa Chica Mesa. These bluffs are primarily under the County's jurisdiction (only a small part of the bluff lies in the City) but are within the City's Sphere of Influence for potential future annexation. The mesas constitute a significant scenic resource within the City's coastal Zone. **The 50 acre site (located west of and adjacent to Graham Street and north of and adjacent to the East Garden Grove Wintersburg Orange County flood Control Channel) known as the "Parkside" site affords an excellent opportunity to provide a public vista point. A public vista point in this location would provide excellent public views toward the Bolsa Chica and ocean. Use of the public vista point will be enhanced with construction of the Class I bike path along the flood control channel and public trails throughout the Parkside**

site.

SUGGESTED MODIFICATION NO. 7

On page IV-C-70 add the following language in the first paragraph under the heading Environmentally Sensitive Habitats, to include reference to the wetland and Eucalyptus ESHA on the Parkside site:

... The City's Coastal Element identifies ~~two~~ **three** "environmentally sensitive habitat areas" within the City: 1) the Huntington Beach wetland areas, and 2) the California least tern nesting sanctuary, **and 3) the wetlands and Eucalyptus ESHA on the Parkside site.** (See Figure C-21 **for location of No. 1 and 2.** The Coastal Element includes policies to protect and enhance environmentally sensitive habitat areas in accordance with the Coastal Act.

Also, on page IV-C-72 add the following new section describing the Eucalyptus ESHA and wetlands on the Parkside site, after the paragraph titled California Least Tern Nesting Sanctuary:

Parkside Eucalyptus ESHA and Wetlands (See Figure C 6a)

Historically, this site was part of the extensive Bolsa Chica Wetlands system and was part of the Santa Ana River/Bolsa Chica complex. In the late 1890s the Bolsa Chica Gun Club completed a dam with tide gates, which eliminated tidal influence, separating fresh water from salt water. In the 1930s, agricultural ditches began to limit fresh water on the site, and in 1959, the East Garden Grove-Wintersburg Flood Control Channel isolated the site hydrologically. Nevertheless, wetland areas remain present at the site. There are existing and previously delineated wetlands, and areas that have been filled without authorization and are capable of being restored. These areas as well as their buffer areas are designated Open Space-Conservation, and uses allowed within these areas are limited.

In addition, on the site's southwestern boundary, at the base of the bluff, is a line of Eucalyptus trees that continues offsite to the west. These trees are used by raptors for nesting, roosting, and as a base from which to forage. The trees within this "eucalyptus grove" within or adjacent to the subject site's western boundary constitute an environmentally sensitive habitat area (ESHA) due to the important ecosystem functions they provide to a suite of raptor species. The Eucalyptus trees along the southern edge of the Bolsa Chica mesa are used for perching, roosting, or nesting by at least 12 of the 17 species of raptors that are known to occur at Bolsa Chica. Although it is known as the "eucalyptus grove", it also includes several palm trees and pine trees that are also used by raptors and herons. None of the trees are part of a native plant community. Nevertheless, this eucalyptus grove has been recognized as ESHA by multiple agencies since the late 1970's (USFWS, 1979; CDFG 1982, 1985) not because it is part of a native ecosystem, or because the trees

in and of themselves warrant protection, but because of the important ecosystem functions it provides. Some of the raptors known to use the grove include the white tailed kite, sharp-shinned hawk, Cooper's hawk, and osprey. Many of these species are dependent on both the Bolsa Chica wetlands and the nearby upland areas for their food. These Eucalyptus trees were recognized as ESHA by the Coastal Commission prior to its 2006 certification of this section of this LCP, most recently in the context of the Coastal Commission's approval of the adjacent Brightwater development (coastal development permit 5-05-020).

The Eucalyptus grove in the northwest corner of the site, although separated from the rest of the trees by a gap of about 650 feet, provides the same types of ecological functions ~~services~~ as do the rest of the trees bordering the mesa. At least ten species of raptors have been observed in this grove and Cooper's hawks, a California Species of Special Concern, nested there in 2005 and 2006. Due to the important ecosystem functions of providing perching, roosting and nesting opportunities for a variety of raptors, these trees also constitute ESHA. These areas as well as their buffer areas ~~and intermingled foraging areas~~ are designated Open Space-Conservation, and uses allowed within these areas are limited.

The wetlands, Eucalyptus ESHA areas, and buffer areas ~~and intermingled raptor foraging areas~~, are designated Open Space-Conservation to assure they are adequately protected.

SUGGESTED MODIFICATION NO. 8

Add the following policy to the certified Land Use Plan, on page IV-C-100 as new policy C 1.1.3a:

C 1.1.3a

The provision of public access and recreation benefits associated with private development (such as but not limited to public access ways, public bike paths, habitat restoration and enhancement, etc.) shall be phased such that the public benefit(s) are in place prior to or concurrent with the private development but not later than occupation of any of the private development.

SUGGESTED MODIFICATION NO. 9

Add the following policy to the certified Land Use Plan, on page IV-C-105 as new policy C 2.4.7:

C 2.4.7

The streets of new residential subdivisions between the sea and the first public road shall be constructed and maintained as open to the general public

for vehicular, bicycle, and pedestrian access. General public parking shall be provided on all streets throughout the entire subdivision. Private entrance gates and private streets shall be prohibited. All public entry controls (e.g. gates, gate/guard houses, guards, signage, etc.) and restrictions on use by the general public (e.g. preferential parking districts, resident-only parking periods/permits, etc.) associated with any streets or parking areas shall be prohibited.

SUGGESTED MODIFICATION NO. 10

Modify the following existing LUP Water and Marine Resources policies as follows:

C 6.1.6

(modify third and fourth paragraph)

The City shall require that new development and redevelopment, as appropriate, employ nonstructural Best Management Practices (BMPs) and structural BMPs designed to minimize the volume, velocity and pollutant load of stormwater runoff, prior to runoff discharge into stormwater conveyance systems, receiving waters and/or other sensitive areas. **All development shall include effective site design and source control BMPs. When the combination of site design and source control BMPs is not sufficient to protect water quality, structural treatment BMPs along with site design and source control measures shall be required.** BMPs should be selected based on efficacy at mitigating pollutants of concern associated with respective development types.

To this end, the City shall continue implementation of the Municipal **Non-Point Source Stormwater** National Pollution Discharge Elimination System (NDPES) **standards program permit (Santa Ana Regional Water Quality Control Board Order No. R8-2002-0010, dated January 18, 2002, or any amendment to or re-issuance thereof)** of which the City is a co-permittee with the County of Orange through the Santa Ana Regional Water Quality Control Board. Per program parameters, continue to require a Water Quality Management Plan for all applicable new development and redevelopment in the Coastal Zone, ...

C 6.1.16

Encourage the Orange County Sanitation District to accept dry weather nuisance flows into the sewer treatment system prior to discharge. **New developments shall be designed and constructed to minimize or eliminate dry weather nuisance flows to the maximum extent practicable.**

C 6.1.25

Require that new development and redevelopment minimize the creation of impervious areas, **especially directly connected impervious areas**, and, where feasible, reduce the extent of existing unnecessary impervious areas, and incorporate adequate mitigation to minimize the alteration of natural streams and/or interference with surface water flow. **The use of permeable materials for roads, sidewalks and other paved areas shall be incorporated into new development to the maximum extent practicable.**

Add new policy C 6.1.30

Natural or vegetated treatment systems (e.g. bio-swales, vegetative buffers, constructed or artificial wetlands) that mimic natural drainage patterns are preferred for new developments over mechanical treatment systems or BMPs (e.g. water quality treatment plants, storm drain inlet filters).

SUGGESTED MODIFICATION NO. 11

Add the following policy to the certified Land Use Plan, on page IV-C-123, as new policy C 7.2.7

Any areas that constituted wetlands or ESHA that have been removed, altered, filled or degraded as the result of activities carried out without compliance with Coastal Act requirements shall be protected as required by the policies in this Land Use Plan.

III. FINDINGS FOR APPROVAL OF THE LAND USE PLAN AMENDMENT WITH SUGGESTED MODIFICATIONS

The following findings support the Commission's action of November 14, 2006 approving Land Use Plan amendment 1-06 if modified as suggested. Changes to the findings contained in the staff recommendation dated November 1, 2007 necessary to reflect the Commission's action are indicated as follows:

Language added as a result of the Commission's action is shown in **bold, italic, double underline**.

Language deleted as a result of the Commission's action is shown in **bold, italic, strike through**.

The landowner's suggested
and/or blue.

[Type a quote from the document or the summary of an interesting point. You can position the text box anywhere in the document. Use the Text Box Tools tab to change the formatting of the pull quote text box.]

findings are shown in red

The Commission hereby fin

A. Land Use Plan Amendment Description

The proposed Local Coastal Program (LCP) amendment is a project-specific amendment designed to make possible a low density residential development up to a maximum 7 dwelling units per acre (dua) on a vacant, approximately 50-acre site comprising two legal lots, most of which is currently in agricultural production. Most of the site is currently uncertified, and the proposed LUP amendment would incorporate those areas into the City's existing LUP and establish land use designations for those areas as well as for the currently certified parts of the site.

The geographic area that is the subject of this proposed LUP amendment can be divided into three areas. See Exhibit C4. The largest section is an area of the City that was deferred certification by the Commission at the time the City's Land Use Plan (LUP) was originally certified, in 1982, and that deferral carried through to the eventual LCP certification in 1985. The area of deferred certification (ADC) is approximately 40 acres.¹ This amendment request proposes to certify this area by bringing it within the City's existing LUP and applying land use designations to the area. Just northwest of the ADC is a 5 acre area that is currently certified (see footnote 1) and designated Open Space-Parks. The City has resubmitted this area for certification with the same designations. Finally, there is a five acre area southwest of the ADC that was under the jurisdiction of the County of Orange until it was annexed by the City in 2004. Like the ADC, the City proposed to certify that area by bringing it within the broader City LUP, and land use designations are proposed for this area as well. The proposed amendment would allow the majority of the site to be developed with low density residential development, and would also set aside a portion of the site for open space uses including parks and conservation.

The amendment does not propose to create any new land use designations that are not already used in the existing LUP. Each of the land use designations proposed already exist within the certified Land Use Plan (LUP). The land use designations that are proposed to be applied at the subject site have been applied elsewhere within the City's certified LUP. However, because the site is an area of deferred certification or was recently annexed, no land use designation has ever been approved by the Commission at the subject site (with the exception of the 5 acre area designated and zoned Open Space-Parks). The current zoning of approximately 38 acres of the site is Residential Low Density, which has not been certified by the Commission.

Specifically, the amendment request proposes the following land use designations (see

¹ The staff report and Commission findings from the 1982 LUP certification are not entirely clear about how much area was deferred certification. However, the City has clearly depicted the area subject to this LCP amendment (through the exhibit to its resolution) and clearly "resubmitted" any portions of that area that may currently be certified. For purposes of this staff report, we refer to the uncertified area as being 40 acres, and the acreage of the other areas subject to this LUP amendment are calculated accordingly. However, if the City does not accept the Commission's certification with suggested modifications, and the current *status quo* remains, the Commission does not, by these descriptions, take any position on the issue of what area is currently certified and what area is ADC.

exhibit C):

Land Use		Acres
RL - 7	Low Density Residential-Maximum 7 units per acre	38.4 acres
OS-P	Open Space-Park	8.2 acres
OS-C	Open Space-Conservation	3.3 acres

As stated, the area of deferred certification is forty acres and the former County parcel is five acres. In addition to the 45 acre area, the City has also included in this amendment the five acre area that was not deferred certification. The certified area totals approximately 5 acres and is land use designated and zoned Open Space – Parks. Most of the certified five acre parcel is slope area and not usable as an active park area. The proposed amendment would retain that land use, and would expand that designation into the formerly deferred area, for a total of 8.2 acres of Open Space – Parks. This five acre segment brings the total size of the subject site to 50 acres (40 acre ADC, 5 acre former County parcel, 5 acre certified area).

Of the approximately 5 acre former County area, 1.7 acres are proposed to become low density residential and 3.3 acres are proposed to become Open Space – Conservation (these figures are included within the totals in the chart above).

In addition to establishing land use designations for the subject site, the amendment also proposes text changes to the LUP. The certified LUP includes a section of area-by-area descriptions. In this section of the LUP, the acreage figure is proposed to be changed to reflect the annexation of the former County parcel (from the current 44 acre figure to the proposed 50 acre figure). In addition, language describing the area as vacant and an area of deferred certification is proposed to be replaced with the following language:

The Coastal Element land use designation for the vacant 45 acre area next to the East Garden Grove-Wintersburg Flood Control Channel was recently certified as RL-7 (Low Density Residential) and OS-P (Open Space – Park). In addition, approximately 5 acres of land was annexed from the County of Orange into the City of Huntington Beach. This area is designated RL-7 (Low Density Residential) and OS – C (Open Space – Conservation).

The subject area is currently comprised of two parcels: one 45 acre parcel (historic City parcel) and one 5 acre parcel (former County parcel).

B. Site Description and History

The site address is 17301 Graham Street, Huntington Beach, Orange County. It is bounded by Graham Street to the east, East Garden Grove Wintersburg Flood Control

Channel (EGGWFC) to the south, unincorporated Bolsa Chica area to the west, and existing residential uses to the north (along Kenilworth Drive). The development to the north is located within the City. The land to the north and to the east of the project is located outside the coastal zone. The areas located east of Graham Street, south of the EGGWFCC, and immediately north of the subject site along Kennilworth Drive are all developed with low density residential uses. To the northwest, a multi-family condominium development, Cabo del Mar, exists. To the west of the subject site, are undeveloped properties known as the Goodell property and Signal Landmark property. To the southwest of the subject site lies the Bolsa Chica wetlands restoration area. The 3.3 acre area on the subject site proposed to be land use designated Open Space-Conservation is adjacent to the wetlands restoration area. West of the Goodell property is the site of the recently approved Brightwater development for 349 residential units (coastal development permit 5-05-020). The Brightwater site, the Goodell property, and the Signal Landmark property are located on the Bolsa Chica mesa.

The majority of the subject site has been more or less continuously farmed since at least the 1950s.

The majority of the site is roughly flat with elevations ranging from about 0.5 foot below mean sea level to approximately 2 feet above mean sea level. The western portion of the site is a bluff that rises to approximately 47 feet above sea level. Also, generally near the mid-point of the southerly property line is a mound with a height of just under ten feet. The EGGWFCC levee at the southern border is approximately 12 feet above mean sea level.

Historically, the site was part of the extensive Bolsa Chica Wetlands system. In the southwest corner of the site, on the former County parcel, the City, property owner and Commission are in agreement that an approximately 0.45 acre wetland is present. In the 1980s, as part of the review of the County's proposed LUP for the Bolsa Chica, the Department of Fish and Game (CDFG) in the document titled "Determination of the Status of Bolsa Chica wetlands" (as amended April 16, 1982), identified this area as "severely degraded historic wetland – not presently functioning as wetland", and considered it within the context of the entire Bolsa Chica wetland system.

Also, in 1989, the U.S. Environmental Protection Agency (EPA) published its delineation of an approximately 8 acre wetland area in the northwest area of the site, near the base of the bluff. At the time of the EPA delineation, the area was being farmed. The topography of the agricultural field has been significantly altered since about 1998. As a result, the area delineated by EPA no longer is inundated or saturated for long periods except during exceptionally wet years. Water now tends to inundate an area near the flood control channel (designated "WP") and an area at the base of the western bluff (designated "AP"), both of which ~~were have been~~ identified as wetlands by the Commission's staff ecologist. However, the Commission found at its November 14, 2007 meeting that the WP is not wet enough long enough to result in the formation of hydric soils and does not exhibit sufficient hydrology that would support a predominance of hydrophytes in most years. The City and property owner do not contest designation of the AP as wetland. [SEE NOTE #3]

In addition, on the site's western boundary, generally along the base of the bluff, are two groves of Eucalyptus trees. The trees are used by raptors for nesting, roosting, and as a base from which to forage.

At the time the City's LUP was first considered for certification, in 1981, the Commission denied certification, in part because the City proposed low density residential land use designation for the site that is the subject of the present amendment request and the Commission found the site to contain wetlands. The City re-submitted the LUP in 1982, but it made no change to the proposed low density residential land use designation for the subject site. Once again, the Coastal Commission in its action on the City's proposed Land Use Plan, denied the certification for the MWD site (as the subject site was previously known), finding that it did contain wetland resources and that the designation of this parcel was an integral part of the ultimate land use and restoration program for the Bolsa Chica. The Commission findings for denial of the LUP for this area note the importance of this area in relation to the Bolsa Chica LCP. Of the 3.3 acres proposed to be Open Space – Conservation, none is located within the 40 acre area that was deferred certification. The site was being farmed at the time of the Commission's denial of the low density residential land use designation for the subject site.

A related coastal development permit application had been submitted for the subject site, 5-06-327 Shea Homes, but that application has since been withdrawn similar to prior applications (previously submitted and then withdrawn were application Nos. 5-06-021, 5-05-256 and 5-03-029 for the same development proposal), as well as an appeal of a City permit for the certified area (A-5-HNB-02-376). The appealed action remains pending, but the applicant waived the deadline for the Commission to act on the appeal. The Commission anticipates acting on the appeal in conjunction with a future permit application. The permit application and appeal request subdivision of the site to accommodate 170 single family residences, construction of the residences and associated infrastructure, preservation of the wetland identified on the former County parcel, and dedication and grading of active public park area.

C. LCP History

The LCP for the City of Huntington Beach, minus two geographic areas, was effectively certified in March 1985. The two geographic areas that were deferred certification were the bulk of the subject site (known at that time as the MWD site – see footnote 1), and an area inland of Pacific Coast Highway between Beach Boulevard and the Santa Ana River mouth (known as the PCH ADC). The subject site is northeast of the Bolsa Chica LCP area. At the time certification was deferred, the subject area was owned by the Metropolitan Water District (MWD). The site has since been sold by MWD and is currently owned by Shea Homes. Both of the ADCs were deferred certification due to unresolved wetland protection issues. Certification of the subject site was also deferred due to concerns that it might be better utilized for coastal-dependent industrial facilities, since MWD at that time had a "transmission corridor" parcel within the Bolsa Chica Lowlands

that it indicated could be used to connect seawater intake facilities located offshore to facilities located on its switchyard parcel in the City of Huntington Beach, through the subject parcel. This is no longer a possibility, since the State has taken over the lowlands, and given the development of the areas surrounding the subject parcel since 1982 (and pending development that has already been approved), this site is no longer appropriate for coastal dependent industry.

The PCH ADC was certified by the Commission in 1995. The wetland areas of that former ADC are land use designated Open Space – Conservation and zoned Coastal Conservation. No portion of the former PCH ADC is part of the current amendment request.

A comprehensive update to the City's LUP was certified by the Commission on June 14, 2001 via Huntington Beach LCP amendment 3-99. The City also updated the Implementation Plan by replacing it with the Zoning and Subdivision Ordinance (while retaining existing specific plans for areas located within the Coastal Zone without changes). The updated Implementation Plan was certified by the Coastal Commission in April 1996 via LCP amendment 1-95. Both the LUP update and the IP update maintained the subject site as an area of deferred certification.

This LCP amendment was originally submitted as LCPA No. 2-02. LCPA 2-02 was subsequently withdrawn and re-submitted as LCPA 1-05. LCPA 1-05 was also withdrawn and re-submitted. The current amendment, LCPA 1-06 is the most recent submittal of the same amendment. No changes have been made to the amendment proposal during any of the withdrawal and re-submittals. The withdrawal and re-submittals were done in order to provide the property owner additional time to prepare and submit additional information regarding the presence of wetlands on-site and the use of the eucalyptus grove by raptors, and to allow Commission staff adequate time to review the additional information. LCPA 1-06 was received on April 13, 2006. On June 13, 2006, the Commission granted an extension of the time limit to act on LCPA No. 1-06 for a period not to exceed one year.

The deadline for Commission action on LCPA No. 1-06 is July 12, 2008. On May 10, 2007, the Commission voted to deny the subject Land Use Plan amendment, as submitted. A motion (i.e. the main motion) was made to approve the Land Use Plan amendment with modifications, but, upon deliberation, the hearing was continued. The LCPA was subsequently scheduled for Commission action at its July 9-13, 2007 hearing. The LCP amendment originally proposed changes to both the Land Use Plan (LUP) and the Implementation Plan (IP). On July 3, 2007, the city withdrew the IP portion of the LCPA. The Commission recognized the withdrawal of the IP amendment at its July 11, 2007 hearing. Also at its July 11, 2007 hearing, the Commission postponed action on suggested modifications for the LUP portion of the LCPA. At its November 14, 2007 meeting, the Commission approved the LUP amendment with suggested modifications. On April 10, 2008, the Commission granted an extension of the time limit for the City to act on suggested modifications to the LCPA. [See Note #4]

D. Land Use Plan Format

The City's certified Land Use Plan includes a section of Goals, Objectives and Policies. These are organized by specific resources, including headings such as Land Use, Shoreline and Coastal Resource Access, and Recreational and Visitor Serving Facilities, among many others. These are the certified policies that apply City-wide within the coastal zone. Another section of the certified LUP is the Technical Synopsis. The Technical Synopsis is an area-by-area description of each segment of the City's coastal zone. This section includes the descriptions of the existing land use designations. It also includes, after a narrative description of the sub-areas, Table C-2. Table C-2 is titled "Community District and Sub-area Schedule" and it provides greater specificity of what is allowed and encouraged within each subdistrict. This greater level of specificity provides a more detailed, site specific description than would be provided if the land use designation or general policies were considered alone. Table C-2 provides language on how general policies and designations would apply to specific sub areas of the coastal zone. Taken all together, these work well as the standard for development in the coastal zone.

The format of the suggested modifications applies this same structure to the amendment site. Many of the issues addressed by suggested modifications would be required by the general LUP policies, but, consistent with the format of the LUP, the suggested modifications are intended to provide a greater level of detail that applies to the specific circumstances of the subject site. For example, although the City's public access policies may be adequate to require a bike path along the EGGWFCC levee, the LUP format calls the reader's attention to the fact that, at this particular site, a bike path is appropriate and is therefore being required in this amendment. If one were working from the policies alone, some opportunities at certain sites may not be recognized. The LUP's existing format significantly maximizes the protection of resources within the coastal zone. The suggested modifications carry out that same format in order to assure protection of resources at the amendment site.

E. Approval of the Land Use Plan Amendment if Modified

1. Incorporation of Findings for Denial of Land Use Plan as Submitted

The findings for denial of the Land Use Plan as submitted are incorporated as if fully set forth herein. The Commission denied the LUPA as submitted at the Commission's May 10, 2007 hearing. The findings for denial of the LUPA as submitted that were provided in the May 2007 recommendation are found in Appendix Attachment A, attached to this staff report ~~(those findings may need revision to reflect the Commission's action in May 2007). Any required revised findings will be presented to the Commission for adoption at a later hearing.~~

2. Wetland

The proposed amendment includes an Open Space Conservation designation on a 3.3 acre area within the former County parcel. The 3.3 acre area includes an undisputed

wetland area (see 3rd revised exhibit NN). The proposed Conservation designation is appropriate for this area. However, additional wetland areas exist at the subject site that are not proposed to be protected with the Open Space Conservation (OSC) designation and are addressed in the following findings.

Wetlands often provide critical habitat, nesting sites, and foraging areas for many species, some of which are threatened or endangered. In addition, wetlands can serve as natural filtering mechanisms to help remove pollutants from storm runoff before the runoff enters into streams and rivers leading to the ocean. Further, wetlands can serve as natural flood retention areas.

Another critical reason for preserving, expanding, and enhancing Southern California's remaining wetlands is because of their scarcity. As much as 75% of coastal wetlands in southern California have been lost, and, statewide up to 91% of wetlands have been lost.

Section 30121 of the Coastal Act states:

“Wetland” means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens.

The Commission has further specified how wetlands are to be identified through regulations and guidance documents. Section 13577(b)(1) of the Commission's regulations states, in pertinent part:

Wetlands shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes ... For purposes of this section, the upland limit of a wetland shall be defined as:

- (A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
- (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not*

Section 30231 of the Coastal Act states, in pertinent part:

The biological productivity and the quality of ... wetlands ... appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, ... preventing depletion of ground water supplies and substantial interference with surface water flow, maintaining natural vegetation buffer areas that protect riparian

habitats, ...

Section 30233(a) of the Coastal Act states:

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- 1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- 2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- 3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- 4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- 5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- 6) Restoration purposes.*
- 7) Nature study, aquaculture, or similar resource dependent activities.*

Section 30250 of the Coastal Act states, in pertinent part:

(a) New residential ... development ... shall be located ... where it will not have significant adverse effects, either individually or cumulatively, on coastal resources.

In addition, the City's LUP includes Policy C 6.1.20, which limits filling of wetlands to the specific activities outlined in Section 30233 of the Coastal Act. And LUP policy C 7.1.4 states, in pertinent part: *"Require that new development contiguous to wetlands or environmentally sensitive habitat areas include buffer zones."*

The Coastal Commission staff ecologist has reviewed considerable amounts of information regarding the extent of wetlands at the site, much of which are listed in his memorandum which is attached as Exhibit K. The property owner has submitted numerous documents intended to demonstrate that there are no wetlands on site, beyond the wetlands recognized on the former County parcel (i.e. the CP wetlands). Local citizens have submitted documents intended to demonstrate that there are significantly more wetlands on site than that recognized in the CP wetlands. These citizens are concerned by the prospect that development may be allowed to occur within wetlands at the site if the LUP

amendment were approved as submitted (and as reflected in the related coastal development permit application 5-06-327, Shea Homes, and appeal A-5-HNB-02-376). In addition, the staff ecologist has reviewed historical information regarding the subject site and surrounding area. All this information has been reviewed by the staff ecologist and is considered in his memoranda attached as Exhibits K, LLL, and QQQ to this staff report and are hereby incorporated into these findings in their entirety.

The Commission's Mapping/GIS Program Manager has also reviewed numerous historic and more recent aerial photographs and topographical information. The purpose of the Mapping/GIS Program Manager's review was to identify changes due to landform alterations such as grading and filling, and to attempt to delineate disturbed areas dating from the time the Coastal Commission's jurisdiction began at the project site (1/1/77). The results of his review are reflected in his memoranda dated 7/2/07 and 10/25/07, attached as exhibits MMM and RRR of this staff report and which are hereby incorporated into these findings in their entirety.

In brief summary, results of the review of the aerial photos and topographic maps indicates that topography has changed on site, particularly in the area delineated by the EPA as wetlands in their 1989 publication (generally in the northwest area of the site). Changes are also identified in the area of the former equestrian facility (generally in the southwestern portion of the site between the CP and WP wetland areas). However, at its November 14, 2007 hearing, the Commission found, based on evidence presented, that no wetlands exist in the former stable or WP areas. [SEE NOTE #5]

In the aerial photo taken on May 21, 1970, the western extension of Slater Avenue is visible just north of the flood control channel embankment on the subject property. The 1970 photo establishes a pre-Proposition 20, pre-Coastal Act baseline for gauging the extent of land alterations and other changes that occurred later (post Coastal Act, 1/1/77).

A clearly distinguishable topographic depression in the area of the EPA wetlands is depicted on topographic maps from 1970, 1980, and 1996. However, by 2005 that depression was no longer present in the same configuration. The lowest area had been displaced to the west abutting the base of the mesa and the historic EPA wetland area had been relatively flattened. In the area of the former equestrian facility, the aerial photos and topographic maps also show disturbance. In the images from 1981 on, fill is evident in the area that was developed as an equestrian facility. It appears that fill first appears in conjunction with establishment of the equestrian facility, with additional fill being placed over the life of the facility. The extent of fill has migrated, primarily to the north, but also, to some extent, to the southwest.

~~Existing~~ WP and AP Areas ~~Wetlands~~

With regard to existing wetlands, based on his review of the available data, the Commission's staff ecologist determined that additional wetland areas exist at the subject site. The Commission's staff ecologist considered first questions of whether additional

wetland areas exist at two specific areas of the subject site. The results of the staff ecologist's review regarding the presence of additional wetland at the two specific sites (described below as areas AP and WP) are reflected in his Memorandum, dated 7/27/06, attached as exhibit K to this staff report. For the reasons listed in that memorandum and below, the Commission concurs and adopts its ecologist's conclusions with regard to the area known as the Agricultural Pond (AP) ~~these two specific areas of additional wetlands. The~~ Two specific areas of were evaluated for the presence of additional wetland ~~area. at~~ area. ~~at~~ The ~~two~~ two sites are referred to as the Wintersburg Pond or WP, which is adjacent to the East Garden Grove Wintersburg Flood Control Channel (EGGWFC) levee along the southern edge of the site; and the Agricultural Pond or AP, located near the base of the bluff along the western edge of the property. The proposed LUP amendment would designate these wetland areas Low Density Residential and Open Space-Parks. These land use designations allow grading, and the construction of houses, roads, and active parks, which ~~wc~~ could necessitate the dredging and filling of the wetlands if wetlands are present in these areas. Such uses within wetlands are inconsistent with Section 30233 of the Coastal Act and with LUP Policy C 6.1.20 which limits filling of wetlands to the specific activities outlined in Coastal Act Section 30233.

The memorandum dated July 27, 2006 from the Commission's staff ecologist states: "The available data suggest that portions of the agricultural field ... are inundated or saturated at a frequency and duration sufficient to support a preponderance of wetland plant species ... Such areas meet the definition of wetlands under the Coastal Act and the Commission's Regulations."

There are three factors or "parameters" that are used to determine whether or not a wetland exists: the presence of hydrophytic vegetation, the presence of hydric soils, and the presence of wetland hydrology. The Commission finds an area to be wetland if any one of the three parameters is present. Usually, the presence or absence of hydrophytes or hydric soils is sufficient to determine whether a wetland exists. However, those two indicators are not necessary, as they do not actually define a wetland. Rather, an area is defined as a wetland based on whether it is wet enough long enough that it would support either of those two indicators. Therefore, the removal of vegetation by permitted activities does not change a wetland to upland.

Section 30121 of the Coastal Act provides the statutory definition of wetlands: "...lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes ..." Section 13577(b)(1) of the California Code of Regulations provides the regulatory definition of wetlands: "... land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes" Thus, the Coastal Act and the Regulations provide that a determination of the presence of wetlands may be made based on whether an area demonstrates the presence of sufficient water to promote hydric soils or to support hydrophytes, whether or not the soils and vegetation are present under existing conditions.

Because this area was historically a salt marsh and because the site has been historically farmed and continues to be farmed as of the adoption of these findings, the typically used field indicators cannot be relied upon. The grading and repeated discing and plowing associated with the existing agricultural use destroys hydric soil features and prevents the development of natural vegetation. ~~Nevertheless, t~~ The evidence presented in the ecologist's memo and summarized below indicates suggests that the AP and WP areas are wet enough long enough to "support the growth" of hydrophytes. ~~Thus~~ If so, the WP and AP areas would meet~~s~~ the definition of wetlands contained in the Commission's regulations. ~~Furthermore~~ The WP and AP would also meet the Coastal Act definition of wetlands if they are in that it is "periodically covered in shallow water." However, based on all the evidence presented (including the memoranda prepared by Commission staff, information submitted by the City, the property owner, the public, and public testimony) the Commission found that the area of the WP is not wet enough long enough or frequently enough for the development of a preponderance of hydrophytic vegetation or hydric soils. Therefore, the Commission finds that the area known as WP is not a wetland.

The wetland conclusion is based on two lines of evidence: (1) an examination of the vegetation at a nearby location that is similar in history, physical characteristics, and hydrology to the depressions in the agricultural field,² and (2) an informed estimate of the frequency and duration of continuous inundation for long duration (at least 7 days) at various sites.

Areas WP and AP were matched by the Commission's staff ecologist, with wetland areas on the County parcel that were similar in elevation and topography. Inundation in the agricultural pond (AP) areas and at the reference wetlands was similar in pattern, further suggesting that the latter is a good proxy for the former. Therefore, since the dominant vegetation at the reference areas is mostly comprised of wetland species, it is reasonable to expect that the agricultural areas ~~s WP and~~ AP would also support a predominance of hydrophytes in the absence of farming (i.e. that they are it is wet enough long enough and frequently enough to support such vegetation).

Although, prior to about 1990, inundation hadn't been apparent in the depression adjacent to the EGGWFCC (WP area) and inundation occurred there less frequently than in the area of the AP; in recent years, ample the Commission considered evidence information regarding whether the exists to show that WP is inundated for long

² In the second to last footnote in Dr. Dixon's memo, he notes that the topography of the reference site is actually similar to that of WP as it existed in 2003, not at present. More recently a box plough was used to fill area WP, which is apparent in 2006 topographic maps. The box plough fill is under investigation by Commission staff as an alleged violation. Accordingly, relying on the topography prior to the alleged violation yields the appropriate comparison. Additionally, the hydrology section of Dr. Dixon's memo states that LSA biologists stated that WP didn't pond until after about 1973. However, if this is due to changes in topography that occurred before 1973, it is again appropriate to focus on the post-1973 topography, as that represents current conditions. Conditions prior to 1973 may be irrelevant if topographical conditions changed prior to 1973, as such changes were pre-Coastal Act and therefore not Coastal Act violations.

duration following significant rainfall. **Weighing the conflicting information submitted, the Commission found that the WP was not inundated for long duration following significant rainfall.**

Establishing the extent of wetlands at the site, given its history of farming and disturbance, is not straightforward. The best approach for this site regarding WP and AP known to the Commission at this time is to base the wetland boundary on current conditions as inferred from recent topography and the available photographs of recent inundation.

EPA Delineated Wetland (1989)

Prior to about 1990, it appears from aerial photographs that significant inundation was generally confined to the area delineated as wetland (just east of the area of the AP) by the EPA in its 1989 publication. Based on analysis of aerial photographs dating from 1958 to 1985, the property owner's biological consultant concluded that inundation in that area tended to have a different footprint in different years and, based on this observation, he argued that no particular area should be identified as a wetland. However, all his estimated wetland polygons in the western portion of the agricultural field appear to fall within the area delineated by the EPA. In the absence of wetland vegetation, the drawing of wetland boundaries is an approximate exercise based on a small and haphazard collection of aerial photographs or ground observations and estimates of topography. Given the approximate nature of such delineations, it appears the consultant's results are actually additional evidence that the EPA delineation was reasonable at the time it was made. However, it appears that the area of the EPA delineation (8.3 acres) was based on extra-normal site circumstances. As described in the October 25, 2007 memorandum prepared by the Commission's staff ecologist, the 8.3 acre estimate of the wetland size appears to have been based largely on observations made during the period when increased runoff from off-site was temporarily directed onto the subject site. This appears to have occurred during the construction of the Cabo del Mar condominiums on the adjacent property from sometime after 1978 until sometime before 1986. If one considers the area delineated by EPA under normal conditions (i.e. no excess off site drainage directed on-site), a more likely estimate for the wetland area can be made. Based on the Bilhorn (1987) and EPA (1989) estimates of wetland area during the period of construction of the Cabo del Mar condominiums, estimates of water availability during the period of interest, and the estimated size of ponded areas in available photographs, a reasonable estimate of the average area that ponded is 4.0 acres. The 1987 and 1989 studies by Bilhorn and EPA were based on field work done prior to 1987. The October 25, 2007 memorandum is attached to this staff report as exhibit QQQ and is hereby incorporated by reference as though fully set forth herein.

As discussed in detail below, the EPA wetland is no longer present.

Existing CP Wetland

Substantial evidence suggests that the wetland area of the CP is larger than what has

been recognized in the LCP amendment submittal. The wetland area recognized by the City and property owner on what is known as the former County parcel totals 0.45 acres. However, additional CP area should be included in the CP wetland acreage. This wetland area was filled without authorization from the Commission. In a letter dated 9/7/82 from the Department of Fish and Game (DFG) to Coastal Commission staff, the DFG determined the area, prior to placement of the unpermitted fill, to be wetlands, and recommended removal of the fill and revegetation (see exhibit BBB). Pursuant to Coastal Development Permit No. 5-82-278, the unpermitted fill was to have been removed and the area revegetated.

Based on comparison of topographic (1980) and vegetation maps (Vegetation Communities, Exhibit 26 of the Bolsa Chica Land Use Plan, dated January 1982) created before the unpermitted fill was placed, with topographic maps (1986 and 1982) created subsequent to the time the fill was placed, the elevation of the subject area was increased by at least 2 feet. Because of the unpermitted fill, the pickleweed within the filled area was no longer viable. Development approved pursuant to Coastal Development Permit 5-82-278 included removal of the unpermitted fill to an elevation of approximately three inches below the grade of the existing adjacent pickleweed stand [area of the recognized CP wetland] and revegetation of the area with one or more of the following species: pickleweed, spiny rush, frankenia, sea lavender, and shoregrass. However, elevations in the fill area are not consistent with pre-fill elevations. Rather, topographic maps prepared subsequent to the unpermitted fill and subsequent to the issuance of Permit 5-82-278 depict the fill area at an elevation at least two feet above the adjacent CP wetland. This leads to the conclusion that removal of the fill and revegetation never occurred. Were it not for this unpermitted development, the area would have remained wetlands area. Unpermitted development cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, such development would not be allowed. Thus, consideration of appropriate land use designation must consider site conditions as if the unpermitted development had not occurred. Therefore, this area is considered a wetland. As proposed, the amendment would allow land uses like residential and related uses, like roads, within wetland areas. Thus, the proposed land use designation is not consistent with Section 30233 of the Coastal Act.

Potential Unpermitted Development

Unpermitted development cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, such development would not be consistent with the requirements of the Coastal Act. The site, as has been mentioned, has historically been farmed. Discerning changes in topography on the order of a few feet to fractions of a foot over the course of 30 years and ascertaining that such changes are not due to normal farming activities at a site where farming activities are on-going is problematic. Nevertheless it is important to assure that if wetland areas have been eliminated due to unpermitted activity, that those areas are considered as if the unpermitted activity had not occurred. Thus, if areas that would have met the Commission's definition of a wetland have been altered such that they no longer meet that

definition only due to unpermitted activity, that area must be afforded the same protection as would be required had the unpermitted activity not illegally altered the wetlands.

It has been suggested that the land alterations in the area of the EPA delineated wetland were the result of “normal farming activity” and so could not be considered unpermitted development in terms of the need for a coastal development permit. However, any activities, whether normal farming activities or other, that would result in the fill of wetlands cannot be exempt from the need to obtain approval of a coastal development permit. Regarding “leveling of land as a normal farming activity”, a joint EPA and Department of the Army memorandum³ states: “grading activities that would change any area of water of the United States, including wetlands, into dry land is not exempt.” Furthermore, Section 323.4(a)(1)(iii)(D) of the Army Corps of Engineers regulations pertaining to discharge of dredged or fill material into the waters of the United States, states that the term plowing “does not include the redistribution of soil, rock, sand or other surficial material in a manner which changes any area of the water of the United States to dry land.” The Commission agrees and finds that if a wetland is filled and no coastal development permit has been obtained, the fill activity constitutes unpermitted development.

The Commission makes no determination at this time whether the fill activity constitutes unpermitted development. Regardless of the precise nature of the long-time farming activity, because the LCPA proposes allowing non-farming uses such as the proposed residential and park uses outside of the modified wetland and buffer area, and requires restoration of a 4.0-acre modified EPA wetland, along with establishment of a 100-foot buffer adjacent, the Commission finds that the modified EPA wetlands is protected as a wetland under the Coastal Act, [SEE NOTE #6]

In a letter dated July 9, 2007 submitted to the Commission at its July 2007 hearing from the California Farm Bureau Federation (see exhibit XXX), raises three issues regarding the LCPA staff report: 1) staff’s recommendation relies on an EPA study, but there may no longer be any federal jurisdiction authority based on more recent EPA guidance documents; 2) the subject site’s status of “prior converted cropland”; and 3) what constitutes “normal farming activities.”

Regarding more recent EPA guidance documents the letter states: “In light of new USEPA and USACOE memorandums and the Staff Report’s reliance on these agencies’ findings, there may no longer be any federal jurisdictional authority over the disputed wetlands. In turn, this may alter key conclusions in the staff report.” The documents referenced describe procedures to be followed in determining when the EPA/USACE have jurisdiction in implementing the Clean Water Act. The guidance documents assist only in determining when a Section 404 permit is necessary from the EPA and have no bearing on a past wetland delineation and cannot be interpreted as negating a past delineation. Furthermore, one of the referenced documents (Memorandum: Clean Water Act Section

³ Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities; United States EPA and United States Department of the Army, May 3, 1990

404 Regulatory Programs and Agricultural Activities) states: "For example, if a farmer has been plowing, planting and harvesting in wetlands, he can continue to do so without the need for a Section 404 permit, **so long as he does not convert the wetlands to dry land** [emphasis added]." Thus, even by the standards cited by the Farm Bureau, farming that converts a wetland to dry land is not exempt from the requirement to obtain Section 404 review.

Furthermore, the 1989 EPA wetland delineation assessed the presence of wetlands and found that wetlands did exist at the site. Commission staff have reviewed that study as well as a great deal of other information (as cited in the Commission staff memoranda) and, as is outlined in the staff memoranda, found the EPA wetland delineation valid (with adjustments as described elsewhere). A change in other agencies' guidance documents has no bearing on the results of the earlier wetland delineation.

The letter also raises the question of whether the subject site should be considered "prior converted cropland". The Farm Bureau letter states: "Farm Bureau also believes that the Coastal Commission should apply and document the site specific facts of this issue against USACOE RGL 90-7 and USEPA's applicable regulations and guidance documents regarding prior converted cropland." The letter further states: "However, attention should be given to the disputed area's present and recent past characteristics and use as prior converted crop land." The letter refers to a November 20, 1998 letter from the Natural Resource Conservation Service designating the subject site as prior converted cropland. That November 20, 1998 Natural Resource Conservation Service letter states that it based its determination that the site is "prior converted cropland" on two factors: 1) the site has been farmed prior to 1985, and, 2) designation of the property as "Prior Converted Cropland" by the Army Corps of Engineers in 1992, review of their designation in 1998 and an independent report from Lisa Kegarice of Tom Dodson and Associates in December of 1997 have determined that this property meets the criteria for Prior Converted Cropland." However, the Commission's staff ecologist's memo dated July 27, 2006 (exhibit K) includes review of the Natural Resource Conservation Service's 1998 letter (among many other documents) and addresses the issue of "prior converted cropland" at length. As described in greater detail in the Commission ecologist's 7/27/06 memo, the decision to dismiss the site from regulation under the Clean Water Act, was based on the faulty work contained in the Kegarice report of 1997 and the fact that errors in that report have been perpetuated without challenge until now. Furthermore, designation of a site as prior converted cropland simply allows on-going farming to continue. The proposed LUP amendment would not continue farming at the site, so that designation, even if it had been accurately applied, is moot when considering allowing non-farming uses such as the proposed residential and active park uses.

Finally, the Farm Bureau letter questions Commission staff's assessment that activities that have occurred on site are not normal farming activities. On-going farming activities, such as plowing and discing, that are consistent with the continuance of existing wetlands constitute normal farming activities. However, methods, such as grading, that result in the loss and/or fill of wetlands where Waters of the U.S. exist, and typically do not constitute

normal farming activities.

Moreover, members of the public have also presented evidence to suggest that activities that are employed at the site do not constitute normal farming activities. And, they have argued, those activities have, over time, substantially reduced the presence and extent of areas that would otherwise have met the Coastal Act definition of wetland. Such activities include, but may not necessarily be limited to, use of a bulldozer and a box plough to move earth in the area of the agricultural field. The Commission concurs that use of such earth moving equipment, particularly when it results in the fill of wetlands, is not typically associated with normal farming activities. Development, including earth movement on a scale that requires a bulldozer or box plough, in an area of known wetland presence (i.e. 1989 EPA wetland delineation; Commission's 1982 and 1984 actions deferring certification of the site; DFG Study of Wetlands at Bolsa Chica), without an approved coastal development permit ~~constitutes~~ may constitute unpermitted development.—[SEE NOTES #6 AND #7]

Also, other non-farming activities have historically occurred on the site. In 1982 the Commission approved the above mentioned coastal development permit No. 5-82-278. The approved development was located near the southwest corner of the site, straddling the former City/County boundary (see exhibit BBB). Fill (1,500 to 3,000 cubic yards) for an expanded parking area was explicitly approved as part of that coastal development permit. Evidence shows that only the area of the expanded parking lot that was explicitly described in the approved permit was approved for placement of fill under that coastal development permit approval. If so, any additional fill in the area of the remaining equestrian facility ~~would~~ may constitute unpermitted fill. [SEE NOTES #6 AND #7]

The development described in the application for the coastal development permit requests the following: placement of mobile home as a caretaker facility; **additional** stable facilities [emphasis added]; grading and fill of a parking facility for approximately 50 cars; removal of fill and revegetation [described previously]; and placement of a fence around the revegetated area. The City's 1981 Conditional Use Permit for the project (CUP No. 81-13) refers to a request to **expand** [emphasis added] an existing horse facility. The City's CUP staff report states: "The **existing** [emphasis added] temporary horse stable on the site has been in operation since 1966." and "According to the applicant most of the **existing** [emphasis added] facilities were installed prior to 1977. These characterizations of portions of development existing prior to the Commission's jurisdiction in the area (which began on 1/1/77) were carried over into the Coastal Commission staff report for 5-82-278. However, review of aerial photos indicates that the equestrian facility was not present until 1978, after the Commission's jurisdiction in the area began. Both the City and County of Orange planning staff have reviewed their records for permits for the stable facility that predate 1978, but have found no permits earlier than 1981⁴.

⁴ The County approved CUP No. 80-92 to permit the establishment of a commercial stable on the County portion of the site on 2/26/81.

Regardless of whether or not any portion of the equestrian facility pre-dates the Coastal Act, review of historic aerial photos and topographic maps indicate subsequent actions at the subject site have resulted in fill beyond the footprint and/or at higher elevations than what was approved under coastal development permit 5-82-278. Any fill placed on the site, other than that specifically approved for the 50 space parking area approved under cdp 5-82-278, ~~is~~ may be unpermitted. [SEE NOTES #6 AND #7]

It should be noted that a coastal development permit application was submitted in 1993, 5-93-376 (Hole in the Wall Stable). The 1993 application requested approval of continued use of the existing equestrian facility (formerly Smokey's Stables). At that time Commission staff determined the request was exempt from the need for a coastal development permit because it simply requested continued use of an existing facility, no construction or grading/fill was proposed (see exhibit DDD). It appears the request was mischaracterized in that the equestrian facilities present in 1993 were larger still than even those requested in 1982.

In addition, at the direction of Commission staff, the current property owner submitted a coastal development permit application for discing the site in 1999 (5-99-303, Shea Homes). In response to that application, staff informed the applicant at that time that no permit was needed "based on the property's prior usage for agricultural purposes." (see exhibit NNN). However, staff's determination that no permit was necessary was based on a 1998 letter from CDFG (Exhibit YYY), stating that, based on a consultant's report, no wetlands were present and the likelihood of wetland restoration on site was slim. But that CDFG assessment relied, not on an actual wetland delineation by CDFG, but rather on the flawed analysis contained in a wetlands assessment of the site conducted by Tom Dodson and Associates (Kegarice, 1997)⁵. Thus, staff's determination that no permit was needed was in error, based on faulty information prepared by others.

Furthermore, staff's determination that no permit was necessary was also based on the characterization by the applicant (Shea Homes) that the development requested was discing of the site. The letter from staff indicating no permit was necessary responded only to the request to continue shallow discing of the farmed area. However, the site has been subjected to farming practices that may go beyond what can be considered "normal farming activities" and which were not described as part of the project description in the permit application. Supporting this conclusion are recently documented incidents at the site that include use of a bulldozer and a box plough. In addition, in his memorandum dated 7/2/07 (exhibit MMM), regarding the history of the EPA wetland area, the Commission's Mapping/GIS Program Manager concludes dramatic changes have occurred in this decade. The 7/2/07 memorandum states "Although agriculture has gone on in this area since the 1930's, the elevations have consistently indicated a topographic depression here. Aerial photography shows repeated instances of ponding in the area. In this decade the topography has changed dramatically, with the obliteration of the

⁵ See exhibit K, Memo from the Commission's staff ecologist explaining why that analysis is flawed and does not reflect actual site conditions.

depression in its original location and the creation of a smaller, narrower depression at the western margin of the agricultural field.” [SEE NOTES #6 AND #7]

However, other than permit 5-82-278 and the two circumstances mentioned above, no other permit history for the site has been discovered. The question of whether development occurred without benefit of an approved coastal development permit is particularly important due to the history of wetlands on site. There is evidence to suggest that areas where topography has been modified may have supported wetlands. If wetlands were present at the time of past development, the Coastal Act requires that those wetlands be protected. Review of historic aerial photos of the site, comparison of various historic and recent topographic maps of the site, photos of earth moving equipment not normally associated with farming activities, and earth moving in the area of previously delineated wetlands (i.e. EPA) also raise significant questions as to whether the site has been altered in ways that would have required a coastal development permit.

Construction of the Cabo del Mar condominiums – outside the coastal zone, but adjacent to the subject site – appears to have included development that extended onto the subject site and thus, within the coastal zone. Prior to the development of the Cabo del Mar condominiums (c. 1983 – 1985), a portion of the runoff from the approximately 22-acre site drained onto the Parkside property and contributed to the hydrology of the wetland mapped by EPA. At some point after the Cabo del Mar construction, the drainage was directed to new drain pipes that were installed across the subject site. Section 30231 of the Coastal Act requires that all wetlands be maintained by preventing substantial interference with surface water flow. Construction of the drainage pipes impacted one source of water that fed the EPA wetland, inconsistent with Section 30231 of the Coastal Act. Such development would have required a coastal development permit from the Coastal Commission. However, no such permit was obtained.

Regarding the EPA wetland area, evidence suggests that this wetland relied on surface water rather than groundwater. Any loss of runoff would have a negative effect on the wetland that was historically present in the EPA area and on the wetlands that are currently present.

Open Space Conservation Area

In summary, in order to be most protective of wetlands, the additional wetland area, beyond what is proposed to be designated Open Space-Conservation, must be recognized and appropriately designated under this LUP amendment. At a minimum, that would include the AP, WP and expanded CP areas, and portions of the wetland area identified by the EPA in a document published in 1989. Although it is very likely the area between the former equestrian facility and the WP would be considered wetland area now were it not for unpermitted development, that determination cannot be conclusively made.

~~**Nevertheless, the AP, WP, expanded CP and the 4 acre area within the EPA delineated area and their respective buffers, when taken together with the area to be designated Open Space Conservation due to ESHA resources, the required buffer,**~~

~~and raptor foraging area, increase the area that must be designated Open Space Conservation.~~

The area delineated by the EPA as wetland totaled approximately 8.3 acres. However, as described in the October 25, 2007 memorandum prepared by the Commission's staff ecologist, the 8.3 acre figure appears to have been based on observations during a period when construction activities on an adjacent property resulted in a temporary direction of excess off-site drainage onto the subject site. Several lines of evidence suggest that a reasonable estimate for the size of the wetland before and after the construction is about 4.0 acres. ~~Unpermitted development~~ Long-time farming activities resulted in the loss of the 4-acre EPA wetland area. Section 30233 of the Coastal Act requires that loss of wetlands due to fill must be mitigated. The Commission typically requires mitigation at a ratio of 4:1 (area of mitigation to wetland area lost). The Commission finds that the loss of 4.0-acre modified EPA wetland due to unpermitted activity must be mitigated restored. However, the ~~unpermitted land manipulations activities~~ that resulted in the loss of the EPA wetland area also contributed to the creation of wetlands in the area of the ~~WP and AP~~. Thus, it would be appropriate to ~~allow preserve the area of the WP (0.95 acres) and the area of the AP (0.61 acres) to be applied toward the total area of wetland creation necessary to and~~ mitigate the loss of the 4-acre EPA wetland area through restoration of the 4.0-acre modified EPA wetland, as delineated by the Staff Ecologist. ~~(4 acres lost x 4 = 16 acres of wetland area to be created; 0.95 acres [WP] + 0.61 acres [AP] = 1.56 acres; 16 - 0.61 1.56 acre = 15.39 14.44 acres of wetland area still to be created).~~ Therefore, in addition to the ~~area of WP and AP~~, an additional 14.44 15.39 4.0 acres of ~~wetland restoration creation~~ on site surrounded by a 100-foot buffer would be required to ~~mitigate address~~ the loss of the 4-acre EPA wetland. [SEE NOTE #8]

Thus, area that must be preserved on site includes the AP, ~~WP and~~ expanded CP areas, modified 4.0-acre EPA wetland area (as adjusted and mitigated), ESHA areas, wetland and ESHA buffer area, ~~and raptor foraging mitigation area~~. Preservation and/or restoration of the AP, ~~WP~~, expanded CP and restored 4.0-acre and mitigated EPA wetlands may require supplemental water. [SEE NOTE #8]

~~The Commission finds the designation should apply across the western portion of the subject site to adequately protect the significant coastal resources present on-site and downstream of the subject property. More specifically, the Open Space Conservation designated area would extend from the southern property line along the EGGWFCC from a point east of the necessary buffer for the WP area, across the site to the northern property line at a point east of the necessary buffer for the EPA delineated wetlands and east of the necessary buffer for the northern Eucalyptus grove.~~ The area to be designated Open Space Conservation is depicted on 3rd 4th revised Exhibit NN.

~~Although there are pockets of land within the area the Commission finds must be designated OS-C that are not wetland, ESHA or their necessary buffer areas, they are isolated fragments that could not reasonably be developed for residential or~~

~~active park uses without significant disturbance to the other resource areas nearby. These intermingled areas were known to be wetlands in the 19th and early half of the 20th century and there remains some unresolved question as to whether some of that area would have delineated as wetland more recently if more data were available and/or past land alteration hadn't occurred. Furthermore, taken together with the area that must be designated OS-C to protect ESHA, wetland and their buffers, as well as area necessary for raptor foraging mitigation, there is really no developable area within the area to be designated OS-C. Therefore, that entire area is most appropriately designated as OS-C.~~

~~In addition, substantial evidence suggests that other wetland areas existed on site prior to what appears to have been unpermitted development. The Commission typically requires mitigation for wetland impacts, generally at a ratio of 4:1. If wetland areas beyond those specifically described above on site were lost due to unpermitted activity, not only would the wetland areas need to be protected and restored, but mitigation for the interim loss of habitat values would be required. The amount of wetland impact and the need for mitigation would most appropriately be determined at the time a coastal development permit for the site is considered. However, it is imperative that land use designations approved under this LCP amendment not preclude appropriate wetland preservation, restoration and mitigation on site. To that end, it is important to assure that adequate area is land use designated so that such activities/uses (i.e. preservation and mitigation) are viable and in no way precluded. The most appropriate land use designation for wetland preservation, restoration, and mitigation is Open Space Conservation. In order to assure that enough area is set aside for all required future wetland preservation, restoration, and mitigation (as well as the area necessary to protect on site ESHA resources described elsewhere) †~~ The Commission finds that only if modified consistent with the land use designations depicted on ~~3rd~~ ^{4th} revised exhibit NN, can the proposed LUP amendment be found to be consistent with Sections 30233 and 30231 of the Coastal Act which require protection of wetlands.

Moreover, the entire area was originally deferred certification due to the historic presence of wetland on site. In deferring certification originally, the Commission found:

*North Properties of the Bolsa Chica (Between Wintersburg Channel & base of Bluffs)
(MWD Site #1 [virtually identical to the subject site of current LCP amendment⁶])*

The LUP designates this site for low density residential uses. No modifications were made in the LUP from the previous denial by the Commission.

⁶ As indicated in footnote 1, the boundaries of the MWD site at the time of the 1982 staff report were not entirely clear. However, the site clearly covered what is now the 40-acre ADC and may have covered the former County parcel and some of the 5-acre certified area as well. Moreover, it did not extend south of the flood control channel, so the observations recounted here are definitely applicable to the site that is the subject of the current application.

The Commission found in its "Preliminary Wetlands Determination for the Bolsa Chica Local Coastal Plan, March 11, 1980, that all available information demonstrated that the vast majority of the Bolsa Chica low lands exhibit all the characteristics set forth for the identification of wetlands pursuant to Section 30121 of the Coastal Act and concluded that the information supported a preliminary determination that areas identified on Exhibit J of the "Preliminary Determination" are wetland for the purposes of the Coastal Act. The Commission had also previously found in its denial of the City's LUP that this area contained wetland resources.

Since that action and the previous review of the City's LUP, the Commission and staff have examined additional information concerning the Bolsa Chica wetlands system. As part of the review of the Bolsa Chica LUP the Dept. of Fish and Game in the document "Determination of the Status of Bolsa Chica wetlands (as amended April 16, 1982) identified this area as "severely degraded Historic wetland – Not Presently Functioning as Wetland" and considered it within the context of the entire Bolsa Chica wetland system. The DFG determined that this area is part of a 1,000 acre degraded wetland system in the area outside State ownership which is capable of being restored. The DFG report noted:

"The 440 acres of historic wetland which no longer function viably as wetland consists of approximately 250 acres of roads, and pads, 70 acres of agricultural land [including the subject site], and about 120 acres of viably functioning upland habitat. The roads and fill areas presently function as resting substrate for wetland-associated wildlife, and form narrow ecotones which add to and enhance the diversity of habitat available to wildlife. The 120 acres of upland habitat, considered in union, may be considered environmentally sensitive because of their special role in the Bolsa Chica wetland ecosystem. Were it not for the involvement of dikes, roads and relatively shallow fills, these 440 acres would be viably functioning wetlands.

The entire 1,324 acre study area, including 1,292 acres of historic wetland (in which 852 acres still function viably as wetlands [sic] constitutes a fundamentally inseparable wetland system of exceptional value to wildlife."

The DFG also discussed potential restoration of these areas and noted that the amount of acreage and location of wetlands to be restored will be dependant on the amount of fill and existing wetlands which could be consolidated to allow some development in the lowlands.

Thus, when the Commission originally deferred certification of the subject site, it did so based on the presence of wetlands. The Commission found that the site contained wetlands, even though the wetland functions were impaired, as is the case today. Moreover, farming was on-going at the time certification was deferred. Thus, the area was

deferred certification even though the wetlands were impaired and farming was on-going. No change to those conditions have occurred in the intervening years. Thus, one cannot argue today that the site does not contain wetlands due to on-going farming activities or due to the impaired condition of the wetlands. Furthermore, unpermitted activities cannot be used as a basis to say that wetlands no longer exist at the site.

In addition, in deferring certification of the site the Commission recognized that the site was an integral part of the overall Bolsa Chica wetland system and could feasibly be restored. If the site were to be restored it would be a valuable addition to the Bolsa Chica wetlands restoration project. Sources to feed a restored wetland at the site would come from rainfall and possibly from the adjacent EGGWFCC, as well as urban runoff. And perhaps also from re-establishing the site as the location to accept runoff from the Cabo del Mar condominiums. In any case, restoration of the site as a freshwater wetland would be consistent with the historic wetland system which would typically have included a freshwater component, albeit significantly inland of the subject site. The addition of freshwater habitat to the Bolsa Chica wetlands restoration would greatly increase the biodiversity of the overall restoration project. In addition, taken with the preservation of the eucalyptus grove, described below, the area would provide significant habitat benefits.

In addition to protecting the wetland area itself, it is important to establish buffer areas between the wetland and development. Buffers, by separating development from wetlands, minimize the adverse effects of development on wetlands, thereby avoiding significant adverse effects to resources. Buffers also provide transitional habitat and upland area necessary for survival of various animal species. The Commission has typically found that a minimum 100-foot buffer, or larger, is necessary to protect wetlands. Without the establishment of a minimum buffer size, projects could be approved with an inadequate buffer, jeopardizing the continuing viability of the wetland. Section 30250 of the Coastal Act requires that new development be located where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. Wetlands constitute a coastal resource. In addition, Section 30231 of the Coastal Act requires that all wetlands be maintained by providing natural vegetation buffer areas. The City's certified LUP includes Policy C 7.1.4, which requires buffers around wetlands. This policy would apply to the subject site, but it allows a lesser buffer area if existing development or site configuration preclude a full 100 feet. In this case, such circumstances do not apply because the site is 50 acres in size and is not constrained by the site configuration or by existing development. A buffer less than 100 feet from all on-site wetlands is not adequately protective of the wetland. The proposed amendment does not recognize all wetland areas present on site and does not provide any buffer requirements specific to the site. Thus, as proposed, the amendment could result in locating development too close to the wetland, threatening the survival of the resource, inconsistent with Section 30250 which requires that the location of development avoid significant adverse effects on coastal resources such as wetlands and Section 30231 which requires natural vegetation buffer areas.

The extent of wetlands on site over the last 30 years, and past activities on the site that

may have impacted those wetlands are difficult to determine with certainty. The Commission is charged with protecting wetlands, and limiting uses allowed within wetlands, as well as assuring that any allowable use is the least environmentally damaging alternative and that adequate mitigation is provided. The Commission must also assure that the quality of wetlands is maintained by, among other things, preventing substantial interference with surface water flow. In order to achieve these requirements, the Commission must review the evidence available to it, even when that evidence may conflict or be incomplete, and arrive at a conclusion that is most protective of wetlands. In this case, the Commission, after reviewing available evidence, finds that on balance there is stronger evidence to support the conclusion that there are significantly more wetlands at the site than has been recognized in the LUPA request. At a minimum, the additional wetland area includes the ~~WP~~ AP, expanded CP, the area delineated by the EPA in 1989 (as adjusted) ~~and, very likely, the area near the former equestrian facility.~~

Any wetland delineation prepared for the subject site must recognize that the site is both a 'difficult site to delineate' (i.e. an area where conditions make the use of standard field indicators of wetland parameters difficult [e.g. soils formed under hydric conditions associated with tidal inundation that is no longer present]) and 'atypical' because human activities (i.e. farming) have resulted in the lack of positive indicators of one or more wetland parameters. The wetland delineation must account for circumstances where indicators are absent or difficult to interpret but other evidence demonstrates that the component(s) recognized by the Commission that comprise a wetland are present or would be present if not for the 'difficult' or 'atypical' situation. For example, the wetland delineation must recognize and account for circumstances where vegetation indicators cannot be expected; hydric soil indicators may be artifacts of prior conditions; the soil surface is frequently disturbed, which removes indicators of recent inundation; plowing may drastically alter the soil profile; irrigation might confound the interpretation of the presence of recruiting wetland plants and the presence of indicators of recent hydric conditions. Because the site historically has been, more or less continuously farmed, these indicators may be lacking even though the area may be "wet enough, long enough" that wetland features would develop. It is critical that future wetland delineations of the site recognize this protocol and that, consequently, even if the usual wetland indicators are not observable, wetland areas must still be identified if those areas meet Coastal Commission criteria. Wetland delineations must be sufficiently current to represent present site conditions. As proposed, the LUP amendment does not include this clarifying information. Therefore a modification is suggested to specifically incorporate this standard into the site specific section of the LUP.

It should be noted that construction of a flood protection levee within the wetland buffer area, provided it is the least environmentally damaging alternative, would not be incompatible with the continuance of the wetland. In order to be the least environmentally damaging alternative, the flood protection levee should be placed outside the buffer wherever possible, and as close to land designated for residential and/or active park uses as much as possible. According to the related coastal development permit application for the subject site and the project proponent, the type of flood protection levee to be

constructed would be a vegetated flood protection feature (VFPP), essentially vegetated earthen berm with an internal sheet pile wall. The VFPP would not be expected to adversely impact the wetland because 1) there would only be temporary construction-related impacts, 2) once constructed, the VFPP would be planted to provide upland habitat that complements the wetland vegetation, and, 3) the VFPP would not require maintenance once constructed, thus intrusions into the buffer would be limited only to those necessary during construction. For these reasons locating a flood protection levee such as the one described above within the wetland buffer would be consistent with Sections 30233 and 30250 of the Coastal Act regarding wetland protection.

~~If, at the time a coastal development permit is proposed, the applicant presents conclusive evidence that a substantial area that has been designated Open Space Conservation did not support wetlands prior to unpermitted activity, or that no unpermitted activity occurred that effected wetlands, that evidence will be considered at the time the coastal development permit application is reviewed. If it is conclusively demonstrated by the evidence that residential or active park uses could be accommodated within the OS-C designated area without adversely impacting any coastal resources, it may be appropriate to evaluate whether an LCP amendment to address such evidence is suitable. However, the Commission must be most protective of coastal resources and in order to do so, based on the evidence currently available, it designates all area described above and as shown on 3rd revised exhibit NN Open Space Conservation.~~

Furthermore, Section 30250 of the Coastal Act requires that new development be located where it will not have adverse effects on coastal resources. Wetlands constitute a coastal resource. Section 30231 of the Coastal Act requires that all wetlands be maintained and where feasible restored, by preventing depletion of ground water supplies and substantial interference with surface water flow and by maintaining natural vegetation buffer areas. Based on information submitted with the related coastal development permit application, a significant amount of earthwork would be necessary to prepare the site for residential development. It is essential that any earthwork undertaken on the site not interfere with the continuance of all on-site wetlands. No grading is allowed within the wetland and its buffer area under the Coastal Act (unless the grading is for the express purpose of wetland restoration). Grading, outside of the wetland, ESHA and necessary buffers, could only be considered if no adverse impacts to the wetlands resulted. If grading redirected groundwater and/or surface water flow such that water from the site no longer fed the wetlands, it would create an adverse effect on the wetland, which is a coastal resource, inconsistent with Sections 30231 and 30250 of the Coastal Act. The proposed amendment does not include any requirements that other site development, including earthwork, assure that no adverse effect occur to the wetlands. Thus, even if no grading were to occur within the wetlands and buffer areas, adverse impacts to on-site wetlands might result from the LUP amendment as proposed. However, if the amendment is modified to include language that requires the protection of the wetlands from all development on-site, the amendment could be found to be consistent with Section 30250 of the Coastal Act which requires no adverse effects to coastal resources occur.

In addition to the modifications suggested above, additional measures must be incorporated into the LUP amendment for the subject site to assure that future development adjacent to the wetland and buffer areas and throughout the site does not adversely impact the wetland. For example, if no restrictions were placed on landscaping throughout the site, invasive plants within the residential areas could invade the wetland areas, potentially displacing the wetland plants. In addition, pets from the residential development, if unrestricted, may enter the wetland area causing disruption. As proposed the LUP amendment does not include any site specific restrictions regarding potential impacts to continuation of the wetland, inconsistent with Section 30250 of the Coastal Act. However if modified to include a prohibition on invasive plants throughout the site, and a requirement for a domestic animal management plan, and fencing along the buffer/development interface, as part of the site specific LUP language, the amendment could be found consistent with Section 30250 of the Coastal Act. Specific suggested modifications to accomplish this are necessary to bring the proposed amendment into conformance with the Coastal Act.

Members of the public have raised concerns that unpermitted development has taken place on the property that is the subject of this amendment, and that such unpermitted development has affected the extent of wetlands on the site. Unpermitted development cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, such development would not be allowed. This is true whether there is a specific policy reflecting this in the LUP or not. In this case, however, ~~due to the fact that the Commission has established there is an ongoing controversy over the extent of wetlands on the property and a development envelope, the Commission wishes to ensure that the potential unpermitted development at the site is appropriately evaluated when a coastal development permit for this site is considered. Because this is a live controversy, the Commission suggests a modification of the proposed amendment to include an LUP policy that makes it clear that unpermitted development does not provide the standard for "existing" conditions and that any development proposal must be considered as if the unpermitted development had not occurred. [SEE NOTE #6]~~

The Commission finds that only if modified as suggested indicated on staff exhibit NN (4th Revised) can the proposed land use plan amendment be found to be consistent with and adequate to carry out Sections 30233 and 30250 of the Coastal Act regarding wetlands. [SEE NOTE #9]

3. Eucalyptus ESHA

The subject site contains environmentally sensitive habitat areas (ESHA). The trees within the "eucalyptus grove," within and adjacent to the subject site's western boundary are ESHA due to the important ecosystem functions they provide to a suite of raptor species.

Section 30240 requires that ESHA be protected from significant disruption and that only uses dependent upon the resource are allowed within ESHA. In addition, Section 30240

requires development adjacent to ESHA be sited and designed to prevent impacts which would significantly degrade those areas. Section 30240 further requires that development be compatible with the continuance of the habitat area. This policy is carried over into the City's certified LUP ESHA policies.

In order to assure the ESHA is not significantly degraded and is protected and remains viable, in addition to precluding non-resource dependent development within the ESHA, a buffer zone around the ESHA must be established. A buffer zone would require that development adjacent to the ESHA be set back an appropriate distance from the ESHA. The setback is intended to move the development far enough away from the ESHA so as to reduce any impacts that may otherwise accrue from the development upon the ESHA and that would significantly degrade the ESHA or be incompatible with its continuance. The distance between the ESHA and development, the buffer zone, must be wide enough to assure that the development would not degrade the ESHA and also would be compatible with the continuance of the ESHA.

The property owner has suggested a "variable width buffer" as a means of protecting the ESHA (see Attachment C, exhibits 1 and 2). A variable width buffer would be appropriate. The variable width buffer proposed by the property owner would establish a minimum distance of 297 feet between the ESHA and residential or active park development (note: 100 meters is ~~338~~ 328 feet) The variable width buffer proposed by the property owner would establish a maximum buffer distance of at least 650 feet between the ESHA and residential or active park development.. In some areas of the site, the effective width of the buffer area would substantially exceed 100 meters due to the relative location of the EPA wetland area and buffer and the AP wetland and buffer. The area occupied by EPA and AP wetlands and their buffers would provide appropriate ESHA buffer in that development with the related noise and activities would not occur within them and also those areas would remain viable as raptor foraging area.

The property owner's proposed variable width ESHA buffer includes a water quality Natural Treatment System (NTS) as an allowable use within the ESHA buffer near the southern grove (see Attachment C, exhibits 1 and 2). The NTS as proposed by the property owner is setback a minimum of ~~270~~ 200 feet from the ESHA located outside any wetland or wetland buffer. Portions of a Natural Treatment System (NTS), would be appropriate within the ESHA buffer as long as it is located as shown on Attachment C, exhibits 1 and 2. An NTS within the ESHA buffer, ~~subject to the setback positioned as~~ described above, would be acceptable because it would occupy only a very small portion of the overall buffer area. Furthermore, the NTS itself will provide some habitat value. The shallow water habitat will increase the variety of habitats within the buffer area. For these reasons, allowing an NTS type system within the outer ESHA buffer as shown on Attachment C, exhibits 1 and 2 would not be expected to degrade the ESHA and would be compatible with its continuance. [SEE NOTE #2]

As proposed by the property owner, the variable width ESHA buffer would prevent development that is not compatible with the continuance of the ESHA from occurring in a location where it would disrupt the ESHA and disrupt it. Therefore, the Commission finds the variable width buffer proposed by the property owner will adequately protect the entire ESHA.

The buffer should not be measured from myoporum. It is important to note, however, that the “eucalyptus” ESHA is an area that includes several species of non-native trees that provide important habitat for a large suite of raptors. These trees are predominantly eucalyptus, but also include pines and palms. Using aerial photographs, staff has drawn the boundaries of the ESHA by connecting the apparent drip lines of the outmost trees. It has been suggested that this has resulted in including a clump of myoporum, an invasive exotic that probably is not important to raptors. Although, it is appropriate to ignore the myoporum when drawing the boundary, if other nearby trees are species that provide habitat for raptors, the latter should be included within the ESHA boundary even if that results in some myoporum being present within the ESHA.

The property owner’s consultant (Homrighausen, 2007) has indicated that such a variable width buffer would average 334 feet (see Figure 8 of Commission’s staff ecologist’s 7/25/07 Memorandum, Exhibit QQQ). However, this result appears to have been obtained by averaging the development setback from both the southern grove of Eucalyptus trees and the northern grove, and by including the active park area with the buffer. It is obvious that the proposed development, which includes the park, is effectively less than 164 feet (50 meters) from the northern Eucalyptus trees that provide raptor habitat rather than the claimed 334 feet. As described in greater detail in the findings for denial of the LUPA as submitted (see Appendix A), a buffer area less than 100 meters is inadequate to protect the ESHA as required by Section 30240(b) of the Coastal Act.

As proposed, ESHA area would be land use designated Open Space Parks, which would allow active park uses within the ESHA. In order to assure the ESHA is protected, in addition to precluding development within the ESHA, a buffer zone around the ESHA must be established. As proposed, the LUP amendment designates necessary buffer area Open Space Parks and Low Density Residential. The proposed designations would allow residential and park uses within the required buffer areas. Residential and park uses within ESHA and its buffer are inconsistent with Section 30240 of the Coastal Act. The land use designation that protects ESHA by limiting uses within ESHA to those allowed under Section 30240, and that prevents disruption of the habitat is Open Space Conservation. In order to assure that development adjacent to the ESHA does not significantly degrade or impair the continuance of the ESHA, the appropriate land use designation for both the ESHA and its buffer area is Open Space Conservation.

Uses allowed within the ESHA buffer for the southern grove are limited to resource dependent uses, habitat restoration, and VFPF (described below). In addition,

within the northern grove ESHA buffer passive park use may be allowed if it is located more than 150 feet from the ESHA but the uses within the passive park are limited to nature trails, benches for passive use, and habitat enhancement, restoration, creation and management. Such uses are acceptable within the ESHA buffer because they are compatible with the continuance of the ESHA.

It is also worth noting that California gnatcatchers (*Poliophtila californica californica*), a species listed as “threatened” under the Endangered Species Act, are known to frequent the subject site, especially the western portion. Also, Southern tarplant (*Centromedia parryi* ssp. *Australis*), a California Native Plant Society “1b.1” species (seriously endangered in California), also exists at the site. However, the Southern tarplant exists in scattered areas on the site. A focused survey documented the presence of 42 individuals, distributed in 6 locations. The Commission’s staff ecologist, in a memo dated 12/19/06 (see exhibit N), concludes that neither the seasonal gnatcatcher foraging habitat nor the Southern tarplant on the subject site meet the Coastal Act definition of ESHA. Nevertheless, regarding gnatcatcher habitat on-site, the staff ecologist’s memo states, “it is worth noting that the areas of marginal habitat where gnatcatchers have been observed are not proposed for development.” Regarding the Southern tarplant, the memo states: “In contrast to the habitats on the Bolsa Chica mesa, the scattered areas containing southern tarplant on the Parkside property do not appear to be significant habitat for this species, and it is my opinion that these areas do not meet the definition of ESHA under the Coastal Act. In any case, if the amendment is modified as suggested, the gnatcatcher’s habitat and the southern tarplant on site will be retained within the Open Space-Conservation designation.

The land use designations within the ESHA must be limited to the designation that allows only those uses dependent upon the ESHA. In addition, the land use designation within the buffer zone must be the designation that allows only those uses compatible with the continuance of the ESHA, and that will not degrade the ESHA. Furthermore, it is important to assure the continuance of the raptor community by reserving adequate foraging area. In fact, the California Department of Fish and Game (CDFG) provided statements to this effect in a letter to the City dated June 15, 1998 commenting on the Draft Environmental Impact Report for the Parkside project (see Exhibit ZZZ). In that letter, CDFG states that “...[a]gricultural areas, grasslands and wetlands are of seasonal importance to several species of raptors in Orange County by providing important, if not vital, staging and wintering habitat. These habitats also provide foraging areas for resident breeding raptors.” CDFG goes on to express concern about the loss of raptor foraging areas within the project site and vicinity and the impacts such loss may have on the adjacent Bolsa Chica Ecological Reserve. However, CDFG didn’t suggest any specific mitigation for this loss in this letter. **The wetland areas, their buffers as well as the ESHA buffers will provide some raptor foraging area. However, in recent years, CDFG has routinely recommended a mitigation ratio of 0.5:1 (preservation area to foraging area lost). Were this ratio applied at the subject site, about 17 acres of the subject site would need to be designated Open Space Conservation just to mitigate the loss of foraging habitat of raptors.** As proposed, the LUP amendment would not preserve all

ESHA areas ~~and would not reserve adequate foraging area~~ or provide required buffers and thus is not consistent with Section 30240 of the Coastal Act. In addition, because the proposed land use designations within and adjacent to ESHA do not limit the uses to those consistent with Section 30240 of the Coastal Act, the proposed LUPA is inconsistent with this Coastal Act requirement to protect ESHA. Therefore the amendment must be denied as proposed. However, if the proposed amendment were modified to land use designate all ESHA and necessary ~~foraging and~~ buffer area Open Space-Conservation as depicted on ~~3rd 4th~~ revised exhibit NN, the amendment would be consistent with Section 30240 of the Coastal Act.

The above referenced exhibit depicts all areas on site that are recommended for designation as Open Space-Conservation (OS-C). The recommended OSC area encompasses all known wetland areas on site and necessary buffer ~~and mitigation~~ area, all ESHA on site and the required buffers, ~~and includes the intermingled raptor foraging area~~. By retaining adequate area on site as OS-C, a Residential designation on the remainder of the site could be found compatible with continuance of the ESHA.

~~Within the area that is recommended to be designated OSC, but that does not fall within existing or filled wetland, ESHA, or required buffer or mitigation area, a water quality natural treatment system (or equivalent) would be appropriate. An NTS would be appropriate in this area because it would provide habitat value, including raptor foraging area. The shallow water habitat would increase the variety of habitats within the OSC area, potentially contributing to biodiversity of the site.~~

It should be noted that construction of a flood protection levee within the ESHA buffer, provided it is the least environmentally damaging alternative, would not significantly degrade the ESHA. Alternatives that minimize encroachment into buffer area are preferred. According to the related coastal development permit application for the subject site and the project proponent, the type of flood protection levee to be constructed would be a vegetated flood protection feature (VFPP), essentially a vegetated earthen berm with an internal sheet pile wall. The VFPP would not be expected to degrade the ESHA because 1) there would only be temporary construction-related impacts, 2) once constructed, the VFPP would be planted, thus providing habitat, and, 3) the VFPP would not require maintenance once constructed, thus intrusions into the ESHA buffer due to the VFPP would be limited only to those necessary during construction. For these reasons locating a flood protection levee such as the vegetated flood protection levee described above within the ESHA buffer would be consistent with Section 30240 of the Coastal Act regarding protection of ESHA. The actual design and construction of the flood protection levee would depend on its location.

In addition to land use designating all ESHA area and necessary buffer and mitigation areas Open Space-Conservation, additional measures must be incorporated into the LUP amendment for the subject site to assure that future development does not adversely impact the ESHA. For example, fuel modification requirements necessary to protect future development from fire hazard must be addressed to assure habitat values within the ESHA

and required buffer areas are not adversely affected. In addition, if no restrictions were placed on landscaping throughout the site, invasive plants within the residential areas could invade the ESHA areas, potentially displacing the ESHA plants. In addition, pets from the residential development, if unrestricted, may enter the ESHA area causing disruption. As proposed, the LUP amendment does not include any site development restrictions intended to eliminate the site development's potential disruptions to the ESHA, inconsistent with Section 30240 of the Coastal Act. However if modified to include a prohibition on invasive plants throughout the site, and a requirement for a domestic animal management plan, and fencing as part of the site specific LUP language, the amendment can be found consistent with Section 30240 of the Coastal Act. Specific suggested modifications to accomplish this are necessary to find the proposed amendment consistent with the Coastal Act.

Therefore, the Commission finds that only as modified can the proposed amendment be found to be consistent with Section 30240 of the Coastal Act.

4. Density

As proposed the amendment would allow a density of up to 7 dwelling units per acre on approximately 38 acres of the 50 acre site which would yield a maximum of 266 units on the area proposed to be designated residential. However, the related coastal development permit application contemplates just 170 detached single family homes on relatively large lots. The City has proposed a residential land use designation of RL (Residential Low, maximum of 7 units per net acre). However, the City's certified LUP includes a residential land use designation of RM (Residential Medium, from 7 to a maximum of 15 units per net acre). The Commission's suggested modifications necessary to protect coastal resources would reduce the allowable development footprint from the proposed approximately 38 acres to approximately 19 26.5 acres, which includes the 1.1-acre Active Park and the 1.7-acre Paseo Park. If developed at the maximum allowed under RL, a total of 119 units would be the maximum number possible. This would still provide a viable use of the site. However density consistent with the RM designation would also be acceptable within the allowable development footprint. If the RM designation were applied to the site, the maximum total number of units possible would be 255 units, significantly more than the number currently contemplated by the property owner's development plan. Although 255 units are not guaranteed under the RM designation, the ability to establish more units under RM leaves the property owner with greater flexibility in determining the best use of its property. [SEE NOTE #10]

It is worth noting that, although the project site abuts a low density, single family detached residential development to the north (along Kenilworth Drive and Greenleaf Avenue), there are also higher density multi family residential developments adjacent to and nearby the project site. The previously described Cabo del Mar condominium complex is adjacent to the subject site. Immediately to the north and west of Cabo del Mar are additional multi family residential developments. Thus developing at a higher density at the subject site would not be out of the scale or character of the surrounding development.

In addition, Section 30250 of the Coastal Act encourages residential development to be concentrated in areas able to accommodate it. The higher residential density allowed under the RM designation would allow development at the site to be concentrated in the northeast portion of the site, consistent with this Coastal Act requirement. Thus, a modification is suggested which would allow the City, at the time it considers accepting the suggested modifications recommended herein, to apply either the RL or the RM designation.

5. Water Quality

Section 30230 of the Coastal Act requires that marine resources be maintained, enhanced, and where feasible, restored. Section 30231 of the Coastal Act requires that the biological productivity and quality of coastal waters be protected. The City's certified LUP includes policies that reflect the requirements of 30230 and 30231 of the Coastal Act.

Development has the potential to adversely impact coastal water quality through the removal of native vegetation, increase of impervious surfaces, increase of runoff, erosion, and sedimentation, introduction of pollutants such as petroleum, sediments, metals, cleaning products, pesticides, and other pollutant sources.

The 50 acre project site is currently undeveloped, with the exception of farming activities. Under existing conditions, no runoff leaves the site during most rainfall events. However, installation of impervious surfaces and activities associated with residential development and related hardscape represent a potentially significant impact to water quality downstream of the project, which include the Inner and Outer Bolsa Bay, Muted Tidal Pocket wetlands, Huntington Harbour, and Anaheim Bay Wildlife Refuge. These downstream areas are likely to suffer increases in water quality impairment when site development produces greater volumes and velocities of runoff as well as introducing increased pollutant loads.

It is important that LUP language for the subject site clearly address potential adverse impacts arising due to post development runoff into the channel and significant water bodies downstream. This is especially true because little or no runoff currently leaves the site during most rainfall events. However, the proposed amendment does not include such language. Without such language the LUP amendment is not consistent with the water quality policies of the Coastal Act.

The subject site represents an excellent opportunity to incorporate a natural treatment system, such as a wetland detention system. There are multiple benefits from natural treatment systems such as pollutant removal, groundwater recharge, habitat creation, and aesthetics. Furthermore, maintenance needs are typically more apparent and less frequent with natural/vegetative treatment systems and thus are more likely to remain effective than mechanical systems such as storm drain inserts and the like which can become clogged and otherwise suffer mechanical difficulties. If mechanical treatment

control BMPs are not continually maintained they will cease to be effective, and consequently water quality protection would not be maximized.

Incorporating a natural treatment system, such as wetland detention pond system is feasible at the site. The site is an appropriate candidate for a natural treatment system because it is a large site unconstrained by existing development, limited lot size or limited by topography. There is plenty of space on the site to accommodate a wetland detention or similar type system while still allowing a reasonable development footprint. Moreover, because little or no drainage currently leaves the site, it is important that development of the site not result in creation of new adverse water quality impacts such as would result from increased runoff leaving the site. In order to achieve the goal of not creating new adverse water quality impacts, all dry weather flow would need to be retained on site to the maximum extent practicable. The best way to accomplish retention of dry weather flow on site typically is some type of natural treatment system. Furthermore, in order to protect water quality year round it is appropriate to impose a standard that any runoff that leaves the site must meet. The generally accepted standard for stormwater runoff is a requirement to treat at least the 85th percentile storm event, with at least a 24-hour detention time. If dry weather runoff cannot be retained on site, it should be treated (e.g., detained for at least 48 hours and where practicable for seven days in a natural treatment system). The current LUP amendment does not require these site-specific water quality measures and standards. Therefore, there is no assurance that water quality will be protected. Consequently the amendment is not consistent with the water quality policies of the Coastal Act and must be denied.

In addition, although the existing LUP includes policies that require projects to incorporate water quality BMPs, none of the existing LUP policies express a preference for types of treatment control BMPs. The preferred option for treatment control BMPs is, first, a natural treatment system (e.g. bio-swales, vegetative buffers, constructed or artificial wetlands), then, second, a combination of natural treatment and mechanical systems or BMPs, and last, use of mechanical treatment systems or BMPs alone (e.g. site-specific water quality treatment plants, storm drain filters and inserts). In addition, application of appropriate site design and source control BMPs reduces the amount of runoff that would need treatment control measures. Thus, site design and source control BMPs should be considered first in order to adequately size any necessary treatment control BMPs.

In addition, the LUP does not contain any policy citing a hierarchy of preference for different types of BMPs. Without such an LUP policy, there is no guarantee they will be incorporated into projects when it is feasible to do so. Natural treatment systems, for the reasons described above, provide better water quality protection, among other benefits. Consequently the amendment is not consistent with the water quality policies of the Coastal Act and must be denied. However, if the amendment is modified as suggested to include this in LUP policy language, it would be consistent with the water quality policies of the Coastal Act.

The use of permeable materials for paved areas in new developments is a site design and

source control measure which can reduce the rate and volume of the first flush of stormwater runoff and can help to minimize or eliminate dry weather flow. The proposed amendment does not include any discussion on the benefits of incorporating permeable materials into the design of future projects. However, if the amendment is modified as suggested to include this in LUP policy language, it would be consistent with the water quality policies of the Coastal Act.

In addition, as proposed, the amendment does not include any requirements to minimize or eliminate dry weather flows through the use of site design and source control BMPs. Consequently, adverse water quality impacts due to dry weather flows are not minimized. However, if the amendment were modified as suggested to incorporate policy language addressing this measure, the amendment would be consistent with the water quality policies of the Coastal Act.

The current City of Huntington Beach LCP Policy 6.1.6 (paragraph 4) states that, the City shall continue implementation of the Municipal Non-Point [sic] Source National Pollution Discharge Elimination System (NPDES) standards program which is required by an order of the Santa Ana Regional Water Quality Control Board. The policy also states that the City will continue to require a Water Quality Management Plan for all applicable new development and redevelopment in the Coastal Zone. The Commission finds this policy should be modified to include the correct name and date of the permit and to incorporate this permit by reference into the Local Coastal Program. Updates to the NPDES permit (such as the update expected in 2007) should be submitted to the Executive Director for an LCP amendment.

While the Commission recognizes that the City's existing policies address water quality protection and improvement within the City, it also recognizes that there are additional, more specific steps that could be taken to further protect, restore and/or enhance the water quality of downstream sites (EGGW flood control channel, Bolsa Chica wetlands restoration area, Huntington Harbour, and Anaheim Bay Wildlife Refuge) that will be effected by runoff generated by development of the site. The proposed amendment could not be found consistent with Sections 30230 and 30231 of the Coastal Act, if feasible measures known to positively impact water quality were not included in language specific to the subject site as part of the current amendment proposal. The Commission's standard of review, which requires the preservation, protection, and enhancement of coastal resources including water quality, necessitates that the additional measures, outlined above, be imposed. Thus, the Commission finds that only if modified as suggested is the proposed amendment consistent with Sections 30230 and 30231 of the Coastal Act regarding water quality.

6. Public Access and Recreation

Section 30210 of the Coastal Act states:

In carrying out the requirement of Section 4 of Article X of the California

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

Section 30252 of the Coastal Act states, in pertinent part:

The location and amount of new development should maintain and enhance public access to the coast by ... (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, ... (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

Coastal Act Section 30212.5 states:

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

Coastal Act Section 30213 states, in pertinent part:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Coastal Act Section 30223 states:

Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.

In addition, the City's certified LUP contains the following policies regarding public access:

Provide coastal resource access opportunities for the public where feasible and in accordance with the California Coastal Act requirements.

Encourage the use of City and State beaches as a destination point for bicyclists, pedestrians, shuttle systems and other non-auto oriented transport.

*Encourage the utilization of easements and/or rights-of-way along **flood control channels**, public utilities, railroads and streets, wherever practical, for the use of bicycles and/or pedestrian (emphasis added).*

Maintain existing pedestrian facilities and require new development to provide pedestrian walkways and bicycle routes between developments.

Link bicycle routes with pedestrian trails and bus routes to promote an interconnected system.

Develop a riding and hiking trail network and support facilities that provide linkages within the Coastal Zone where feasible and appropriate.

Balance the supply of parking with the demand for parking.

Maintain an adequate supply of parking that supports the present level of demand and allow for the expected increase in private transportation use.

Maintain and enhance, where feasible, existing shoreline and coastal resource access sites.

Promote and provide, where feasible, additional public access, including handicap access, to the shoreline and other coastal resources.

Promote public access to coastal wetlands for limited nature study, passive recreation and other low intensity uses that are compatible with the sensitive nature of these areas.

Maintain and enhance, where necessary, the coastal resource signing program that identifies public access points, bikeways, recreation areas and vista points throughout the Coastal Zone.

Preserve, protect and enhance, where feasible, existing public recreation sites in the Coastal Zone.

Ensure that new development and uses provide a variety of recreational facilities for a range of income groups, including low cost facilities and activities.

Encourage, where feasible, facilities, programs and services that increase and enhance public recreational opportunities in the Coastal Zone.

Promote and support the implementation of the proposed Wintersburg Channel Class I Bikeway.

The provision of public access in new development proposals is one of the main tenets of the Coastal Act. This emphasis has been carried over into the City's certified LUP. In certifying the LUP, the Commission recognized, via the approved LUP policies, the importance of including measures such as providing and enhancing public access to the

sea and other coastal resources, adequate parking and alternate means of transportation, low cost recreational uses, and public access signage, with new development.

The 50-acre site is located in close proximity to the Bolsa Chica wetlands restoration area (see exhibit BBBB). The Bolsa Chica Wetlands, at approximately 1,000 acres, is the largest remaining wetland in Southern California. Because it is tidally influenced, the Bolsa Chica wetlands constitute “sea” according to the Coastal Act definition (Section 30115). Because there is no public road between the subject site and the Bolsa Chica wetlands, the site is between the sea and the first public road. As such, the area is given special significance with regard to the requirement for the provision of public access. Given the prominence of the adjacent Bolsa Chica wetlands, appropriate public access and passive recreational opportunities must be provided and conspicuously posted. Further, the Coastal Act gives priority to land uses that provide opportunities for enhanced public access, public recreation and lower cost visitor recreational uses.

Beyond the Bolsa Chica wetlands restoration area is the Pacific Ocean and its sandy public beaches. Thus, public access across the subject site to the Bolsa Chica area would, in turn, facilitate public access, via alternate means of transportation (bicycle and pedestrian), to the ocean beach beyond.

It is also worth noting that the visitor serving uses available within the Bolsa Chica reserve (such as walking, nature study, or bird watching) are served by only two small parking areas. One located at the Interpretive Center at the corner of Warner Avenue and Pacific Coast Highway, and the second at about the midway point along the reserve’s Pacific Coast Highway frontage. There is no public parking available along Pacific Coast Highway adjacent to the reserve. Thus, the benefits of providing alternate forms of transportation to access the area, such as biking or hiking from inland areas, are substantially increased. The lack of adequate parking to serve the reserve area is also a limiting factor in maximizing public use of the reserve’s amenities. Assuring that any future streets within the subject site are public and provide public parking is critical to maximizing public access in the area.

It is also important to note that the Brightwater residential development, approved by the Coastal Commission under Coastal Development Permit No. 5-05-020 (Brightwater), is located less than one half mile west of the subject site. That development was originally proposed as a private, guard gated community. However, as approved by the Commission the development will be open to general public vehicular and pedestrian access, also allowing public parking on all subdivision streets. Also, as approved by the Commission the development will include a public trail along the bluff edge of the development, with public paseos and pocket parks throughout (see exhibit BBBB). The Commission’s approval also required public access signage.

In approving the Brightwater development the Commission found:

“The provision of public access in new development proposals is one of the main tenants [sic] of the Coastal Act, especially in conjunction with new development located between the sea and the first public road, such as the subject project. The 225-acre Bolsa Chica Mesa is located between the first public road and the mean high tide of the sea. At roughly 50 ft. above mean sea level, spectacular views of the wetlands and the associated wildlife and uninterrupted views of the Bolsa Chica State Beach and Pacific Ocean are available from the upper bench of the Bolsa Chica Mesa. Santa Catalina Island is also often visible from the project site. The Bolsa Chica Wetlands at approximately 1,000 acres is the largest remaining wetland in Southern California. Following the 1997 State acquisition of most of the remaining wetlands that were under private ownership, a comprehensive Bolsa Chica wetlands restoration effort is now underway. Given the prominence of the adjacent Bolsa Chica wetlands, appropriate public access and passive recreational opportunities must be provided and conspicuously posted. Further, the Coastal Act gives priority to land uses that provide opportunities for enhanced public access, public recreation and lower cost visitor recreational uses.”

A trail connection between the Brightwater trail system and the East Garden Grove Wintersburg Flood Control Channel levee trail is also anticipated in the future and shown on the approved public access plan for the Brightwater development. The public access trails of the approved Brightwater project link to the trail system along the Bolsa Chica wetlands and beyond. These trails, in addition to providing recreational opportunities also provide significant opportunities for nature study and views of the wetlands and ocean beyond. The Bolsa Chica Ecological Reserve public trail system is a public access resource of regional significance. Members of the general public come from throughout the entire County of Orange and beyond to bird watch, hike, or bike the trail system. As the largest remaining wetland in Southern California, the public trail system leading to and within the Bolsa Chica area constitutes a resource of statewide significance. Further, Bolsa Chica State Beach, located across Pacific Coast Highway from the Bolsa Chica wetland area, can be accessed via this trail system.

The proposed LUP amendment contains no language to assure public access will be provided throughout the site in conjunction with future site development. Although the certified LUP includes (as listed above) strong public access policies, the proposed LUP amendment does not include any public access language specifically addressing public access needs appropriate for the site, taking into consideration the recreational needs of both the new residents and other users of the adjacent public recreational resources. Specifically identifying the necessity of these provisions in the LUP is especially important at the subject site due to its unique position to link with and expand the very significant public trail systems within the Bolsa Chica Ecological Reserve, the Brightwater development, and the public beaches beyond. In order to assure that access is maximized at the time of future site development, specific language addressing access in the site specific section of the LUP is necessary. As proposed, no such language is included in the LUP amendment. Some specific methods for assuring the provision of public access at the subject site are described further below.

a) Bicycle Path

The subject site is immediately adjacent to the north levee of the East Garden Grove Wintersburg Flood Control Channel (EGGWFCF). The County's Commuter Bikeways Strategic Plan (the regional bikeways plan for Orange County) identifies a Class I bikeway along the flood control channel. This is also reflected in the City's certified LUP. Figure C-14, Trails and Bikeways Map in the certified LUP identifies a proposed bikeway along the EGGWFCC adjacent to the site. A letter from the County's Public Facilities & Resources Department dated January 8, 1998 (exhibit J) states:

“Regarding the City's proposal to continue the Class I bikeway northerly along the Wintersburg Channel to Graham Street: The County supports this. It would provide an excellent bikeway connection between the City's road system and the off-road wetlands perimeter route. (We suggest referring to this entire route – between Graham Street and PCH – as the Bolsa Chica Bikeway).”

In addition, a letter from the County's Public Facilities & Resources Department, dated February 13, 1998 (exhibit J) commenting on a proposed tentative tract map for the subject site, states:

“A bicycle trail along the CO5 [East Garden Grove-Wintersburg Channel] north levee maintenance road will be required.”

A bike route in this area would provide substantial public access benefits. It is encouraged in existing LUP policies. It would provide a connection between existing inland routes and the Bolsa Chica area and is expected to be extended in the future along the remainder of the EGGWFCC levee adjacent to the Bolsa Chica Restoration area. When such an extension occurs (as is anticipated in the City's LUP and by the County Public Facilities & Resources Department), the bike route would eventually link to the coast. An off road bicycle path already exists along the entire length of the City's ocean fronting beach. A bike path at the subject site and along the remainder of the EGGWFCC would provide a new connection from inland bicycle paths to this coastal path. Not only would such a bicycle path provide substantial public recreational benefits, but it would also improve public access opportunities by providing alternate means of transportation to get to the coast and to the trails within the Bolsa Chica area. The City and the County have both indicated that a bicycle path in this location is desirable and appropriate. However, the proposed LUP amendment does not include any language specific to this site assuring that implementation of the bicycle trail will occur prior to or concurrent with site development. Current LUP policy merely states “promote” and “encourage” the bicycle path's implementation. Therefore there is no assurance that it will be built in a timely manner, or perhaps that it will be built at all. Thus, the amendment as proposed cannot be found to be consistent with Sections 30210, 30213 and 30252 of the Coastal Act regarding maximizing public access.

b) Public Streets and Parking

In addition, if the residential development that the proposed land use designation would allow were to be a private and/or gated development, public access would not be maximized or enhanced, inconsistent with Sections 30210, 30212.5, 30223 and 30252 of the Coastal Act. All public entry controls such as gates, gate/guard houses or other guarded entry, signage that discourages access and any other restrictions on the general public's entry by and use of any streets or parking areas (e.g. private streets, preferential parking districts, resident-only parking periods/permits, etc.) would constrain the public's ability to access the area proposed as public park as well as the public's ability to access the public bike path along the EGGWFCC levee. In turn, public access to the Bolsa Chica area and ocean beyond would also not be provided. As stated previously, the site is between the first public road and the sea (in this case the Bolsa Chica wetlands). The provision of public parking within the area would allow visitors to begin a bike ride or walk along the levee, through the Bolsa Chica area, and on to the ocean front. Public streets and public parking within the residential area would not only support public recreational use in the vicinity of the subject site but also allow visitors from beyond the immediate vicinity to use the park area, and public recreational and open space resources in the Bolsa Chica area.

In addition, ungated public streets would facilitate the use of interior public trails within the development. Interior trails would further maximize, support and enhance public access opportunities. Public trails could be established leading from Graham Street to the outer edge of the area recommended to be designated Open Space conservation, and from within the development back onto the bike way along the north levee of the EGGWFCC. Establishing such trails would provide an excellent public access experience consistent with the requirements of Sections 30210, 30212.5, 30213, 30223 and 30252 to maximize and enhance lower cost public recreational and public access opportunity with new development and assure adequate support facilities are provided. The provision of interior trails within a future development at the site would be especially consistent with Section 30252's requirement that non-automobile circulation be provided within the new development.

In order to assure that this aspect of public access (the provision of public parking within an ungated residential area with public streets and interior trails) is provided at the time the site is developed, language reflecting this must be incorporated into the LUP. However, no such language is proposed as part of the LUP amendment. Thus the amendment cannot be found to be consistent with Sections 30210, 30212.5, 30213, 30223 and 30252 of the Coastal Act regarding maximizing and enhancing public access.

c) Provision of Recreation and Public Access Benefits

Residential development of the subject site that would occur pursuant to the proposed amendment would have adverse impacts on public access and recreation unless the above described measures are incorporated into the design of a future project. In order to

assure maximum public benefit, the public recreation and access measures would need to be provided in a timely manner. However, nothing in the proposed amendment or in the City's LUP currently requires that lower priority developments (such as residential) be phased to assure the provision of those uses that are a higher priority under the Coastal Act (such as public trails, parks, and parking) occur prior to or concurrent with the lower priority development. Without such a phasing requirement, it is difficult to assure that necessary public benefits would occur in a timely manner, or possibly even at all. Thus, as proposed, the amendment is inconsistent with Sections 30210, 30212.5, 30213 and 30252 of the Coastal Act regarding maximizing and enhancing public recreation and access.

Coastal Act Section 30210 requires that public coastal access be maximized. Coastal Act Section 30252 requires that public access be maintained and enhanced through the provision of nonautomobile circulation within the development, adequate parking, and adequate recreational opportunities. These requirements are carried over and re-emphasized in the City's Land Use Plan public access policies. As proposed the LUP amendment would allow significant residential development to occur with no corresponding requirement for public access specific to the site. The site is located between the sea and the first public road.

Although a portion of the site is proposed to be designated park, nothing in the proposed amendment would assure that it would be available to the general public via public streets and trails. The certified LUP identifies a Class I bicycle path along the flood control channel levee at the subject site. However, the proposed amendment makes no reference to the suitability of a bicycle path at the subject site. If a future residential development at the site included gates or private streets, a significant public access opportunity would be lost. In addition, public parking in the area would increase public access opportunities to public resources including the park area, the bicycle path, the public trails of the Brightwater development and to the Bolsa Chica area beyond, as well as, ultimately, to the coast. However, there is nothing in the LUP amendment that would require the residential streets to be open and available to the public. Nor is there any requirement for interior trail connections between Graham Street, any future public park areas, and the bicycle path to areas within the development and beyond. In addition, nothing in the proposed amendment or in the City's LUP requires that lower priority developments (such as residential) be phased to assure provision of associated recreation and public access (such as public trails, parks, and parking) occur prior to or concurrent with the lower priority development. Without such a phasing requirement, it is difficult to assure that Coastal Act high priority uses would occur in a timely manner, or possibly even at all.

However, the proposed amendment could be modified such that site specific language in the LUP include reference to the Class I bicycle path along the flood control channel levee, interior trail connections, public parking and access on residential streets. This would allow direct public access throughout the site, the public trails within the Brightwater development and the Bolsa Chica area and to the beach beyond. Furthermore, the proposed amendment could be modified to incorporate a policy requiring phasing of recreation and public access uses prior to or concurrent with lower priority uses.

Modifications to accomplish these goals would bring the proposed amendment into conformity with Coastal Act Sections 30210, 30212.5, 30213, 30223 and 30252 which require that public access and recreation be maximized and enhanced. Therefore, the Commission finds that only if modified as suggested is the proposed amendment consistent with Sections 30210 and 30252 of the Coastal Act.

7. Visual Resources

Section 30251 of the Coastal Act requires that the scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. The subject site offers the opportunity to provide public views from the site to the Bolsa Chica wetlands area and toward the ocean beyond. The VFPS would provide an excellent opportunity to provide public views to and along the coast and scenic areas, as required by Section 30251. However, the proposed LUP amendment does not include any discussion regarding provision of public view points in association with development of the site.

Future residential development of the site is expected to include a wall separating residential development adjacent to the flood control levee from the anticipated public bicycle path along the top of the levee. If such a wall is proposed in the future, it could create adverse impacts to public views along the bicycle path. However, adverse impacts could be minimized by incorporating measures such as open fencing/wall, landscaped screening, use of an undulating or off-set wall footprint, or decorative wall features (such as artistic imprints, etc.), or a combination of these measures. In addition, any such wall should be located upon the private property for which it is intended to provide privacy.

The proposed amendment does not provide language to address site specific visual impacts and does not assure that potential visual resources will be protected at the time the site is proposed for development. Therefore the proposed amendment is inconsistent with Section 30252 of the Coastal Act regarding protection of visual resources within the coastal zone and must be denied. However, if the amendment were modified to incorporate measures specific to the site that protect and enhance public views, the amendment would be consistent with Section 30252 of the Coastal Act regarding protection of public views.

8. Archaeological Resources

Coastal Act Section 30244 requires that any impacts to significant archaeological resources be reasonably mitigated. The City's certified LUP includes policies which require, among other things, identification of resources and mitigation of any impacts. Significant archaeological resources are known to exist in the project vicinity, and may occur on the subject site.

However, the proposed LUP amendment does not include a specific requirement to avoid and/or mitigate archaeological impacts, even though the site is known to be in a potentially significant archaeological area. Without a cross reference in the site specific area

discussion of the proposed LUP amendment to the archaeological policies in the LUP, there is no assurance that the potential for archaeological resources to occur on the site will be recognized in conjunction with future development proposals. If the potential for archaeological resources at the site is not recognized in the proposed LUP amendment for the site, application of the policies cited above may be overlooked. The proposed LUP amendment, which specifically addresses the subject site, provides the appropriate opportunity to make clear that archaeological resources may be present on this site, and therefore these specific policies must be applied.

If the amendment were modified to include a cross reference to the archaeological policies of the LUP, adverse impacts may be avoided and reasonable mitigation for unavoidable impacts could be implemented in conjunction with future site development, consistent with Section 30244 of the Coastal Act. Therefore, the Commission finds that only if modified as suggested, is the proposed amendment consistent with Section 30244 of the Coastal Act which requires that reasonable mitigation be required for adverse impacts to archaeological resources.

9. Hazards

Coastal Act Section 30253 state, in pertinent part:

New Development shall:

- (2) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
- (3) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

The proposed LUP amendment would designate much of the subject site for residential development land use. The Commission's staff geologist has reviewed a great deal of technical information submitted in conjunction with the proposed LUP amendment and related coastal development permit application. Potential geotechnical and hydrological issues are identified in the staff geologist's memo. The staff geologist's memo is attached as exhibit I, and is hereby incorporated by reference as if fully set forth herein.

Residential development of the site carries with it certain risks. Although information submitted relative to the related coastal development permit application indicates there are feasible mitigation measures available to minimize the level of risk involved with site development, there is no specific requirement in the proposed amendment to assure that measures necessary for risk reduction would be incorporated into future site development. Without such requirements in the amendment, there is no assurance that risks will be minimized as required by Section 30253 of the Coastal Act. However, if the amendment

were modified to include such a requirement, it would be consistent with Section 30253 of the Coastal Act.

The subject site and much of the surrounding area are susceptible to tidal flooding. Tidal flooding could occur when extreme high tides occur concurrently with storm surge events. According to some studies, the existing tidal flooding risk was increased with the opening of the ocean inlet into the Bolsa Chica Restoration area. Regardless of the cause of the flooding, high tides and storm surge will create tidal flooding. The worst case scenario would occur when high tide and storm surge occurs during failure of the levees of the lower reaches of the East Garden Grove Wintersburg Flood Control Channel (EGGW FCC) (which is possible as the levees are not FEMA certified). Under any of these scenarios, up to 170 acres of inland developed area would be flooded. Consequently, contemplation of any development of the subject site must address this flooding issue.

With or without development of the subject site, the inland 170 acres of existing development must be protected from flood hazard. The path the tidal flooding would follow unavoidably crosses the subject site. The only way to adequately insure protection of the inland 170 acres of existing development is to install a flood protection levee (a.k.a. VFPP) on the subject site or to the southwest of the subject site within the Bolsa Chica "Pocket Wetlands" between the EGGWFCC and the Bolsa Chica mesa. Protection of the inland 170 acres would also protect the 50 acre subject site from flooding.

The property owner has indicated, in documents submitted with the related coastal development permit application, that a vegetated flood protection feature (VFPP) is proposed. The EGGWFCC is approximately 11 feet above sea level and the bluff at the western site boundary raises some 40 feet above sea level. A flood protection levee at this site could effectively capture tidal floods if it is constructed to an elevation above the expected flood flow. The existing EGGWFCC levee in the area adjacent to the subject site is expected to be reconstructed to meet FEMA certification standards and would have an elevation of 11 feet above sea level (the existing levee's elevation is also 11 feet above sea level). If a flood protection levee were constructed to the same elevation, flood waters would be prevented from flooding the subject site as well as the additional 170 inland acres. With or without development of the proposed site, some form of flood protection is necessary to minimize risks to life and property in areas of high flood hazard and to assure stability and structural integrity, and not contribute significantly to destruction of the surrounding area. As it happens, the subject site provides the optimum location for the flood protection levee necessary to minimize risk to life and property in the 170 developed acres inland of the subject site.

Construction of some type of flood protection levee would be necessary with development of the subject site. However, such a feature would be necessary even without site development. The flood protection levee, expected to be constructed as an earthen levee with an internal sheet pile wall, would serve an important function. Without construction of the flood protection levee, even with reconstruction of the north levee of the EGGWFCC along the subject site, flooding of 170 inland acres (including the subject site) would result,

during either a tidal surge or a levee failure downstream of the subject site. The 170 acre inland area is developed with approximately 800 homes. Floodwater depth in some homes, it is estimated, would be at least two feet.

However, construction of a flood protection levee on the site would be adequate to assure structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area. In addition, construction of the flood protection levee would minimize risks to life and property from flood hazard. In order for the flood protection levee to function effectively, it would have to be placed within the site's necessary buffer areas. However, as described previously, a flood protection levee in the ESHA or wetland buffer area may be an allowable use within a buffer provided it is the least environmentally damaging feasible alternative.

Furthermore, the construction of the flood protection levee may eliminate the need for the flood control levee downstream of the flood wall. If the flood control levee downstream of the flood wall is not reconstructed, potential impacts to wetlands in the CP wetland area can be avoided. The appropriateness of reconstructing the downstream levee area will be considered when the related coastal development permit is processed. It should be noted that an emergency coastal development permit was issued to the County of Orange to install sheet pile within the north levee of the flood control channel adjacent to the subject site. However, the County has indicated it is willing to consider alternatives that limit changes to the levee downstream if such an alternative is deemed feasible and environmentally desirable. Construction methods proposed by the County to install the sheetpiles will not involve any wetland fill. Impacts to coastal resources may occur which will be addressed in the follow-up permit.

The question of whether the bluff along the western edge of the property should be considered a "coastal bluff" has been raised. The Commission's staff geologist has evaluated the bluff's status. The staff geologist's evaluation is contained in a memorandum attached as exhibit P. The subject bluff was carved by the ancestral Santa Ana river as it meandered across the Bolsa Chica lowlands. Assertions have been made that the bluff was subject to marine erosion within the past 200 years based on an 1873 T-sheet that shows tidal channels adjacent to the toe of the bluff. The staff geologist's response to these assertions is: "I concur that there is strong evidence that there were tidal wetlands in the Bolsa Chica lowlands prior to dike construction in the early twentieth century, but tidal wetlands generally are not the site of extensive marine erosion. Indeed, they are commonly depositional, not erosional, and serve as an efficient buffer from marine erosion." The staff geologist concludes: "In summary, I believe that the bluff at the Shea Home property is best described as a river bluff and is not a coastal bluff in a genetic or geomorphic sense." Thus, the Commission finds that the bluff on the subject site is not a "coastal bluff."

For the reasons described above, the Commission finds that only if modified can the proposed amendment be found to be consistent with Section 30253 of the Coastal Act which requires that risks to life and property be minimized and that development assure

stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area.

10. Priority of Use

Section 30222 of the Coastal Act states:

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

The LUP amendment does not propose to designate any portion of the site visitor serving commercial. Generally, in the City of Huntington Beach, the areas recognized as best for visitor serving commercial development are the areas along Pacific Coast Highway, and adjacent to and inland of the pier, and areas within and around Huntington Harbour. The subject site is surrounded on three sides by existing single family residences, and does not lend itself to visitor serving commercial development. Moreover, the LUP amendment as proposed and as amended will provide a Class I bicycle path, a public view area, public park area, and interior trails as well as public parking along the residential streets. Such uses constitute lower cost visitor serving recreational uses. As modified the recreational and public access provisions will be constructed prior to or concurrent with the residential uses. Therefore, the Commission finds that the proposed LUP amendment is consistent with Sections 30213 and 30222 of the Coastal Act which requires visitor serving commercial recreational facilities have priority over residential development and encourages provision of lower cost public recreational facilities.

11. Conclusion

As proposed, the Land Use Plan amendment contains significant deficiencies with regard to consistency with the Coastal Act. As proposed, the amendment cannot be found consistent with Sections 30210 and 30252 regarding maximizing and enhancing public access, 30251 regarding protection of public views, 30233 and 30250 regarding wetlands, 30240 regarding ESHA, 30244 regarding archaeological resources, and 30230 and 30231 regarding water quality of the Coastal Act. However, if the proposed amendment were modified as suggested in Section II of this staff report, the amendment would be consistent with the Chapter 3 policies of the Coastal Act. Therefore, the Commission finds that only if modified is the proposed amendment consistent with the Chapter 3 policies of the Coastal Act.

IV. CALIFORNIA ENVIRONMENTAL QUALITY ACT

Section 21080.9 of the California Public Resources Code – within the California

Environmental Quality Act (CEQA) - exempts local governments from the requirement of preparing an environmental impact report (EIR) in connection with its activities and approvals necessary for the preparation and adoption of a local coastal program (LCP). Instead, the CEQA responsibilities are assigned to the Coastal Commission. However, the Commission's LCP review and approval program has been found by the Resources Agency to be functionally equivalent to the EIR process. Thus, under Section 21080.5 of CEQA, the Commission is relieved of the responsibility to prepare an EIR for each LCP. Nevertheless, the Commission is required in approving an LCP submittal to find that the LCP does conform with the provisions of CEQA, including the requirement in CEQA section 21080.5(d)(2)(A) that the amended IP LUP will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. 14 C.C.R. Sections 13542(a), 13540(f), and 13555(b). The City of Huntington Beach LCP amendment 1-06 consists of an amendment to both the Land Use Plan (LUP) only and the Implementation Plan (IP).

As outlined in this staff report, the LUP amendment is not consistent with the Chapter 3 policies of the Coastal Act regarding public access and recreation, wetland, ESHA, marine resources, and land resources, as proposed. ~~And also as outlined in this staff report, the proposed IP amendment is inconsistent with the wetland and ESHA protection policies of the certified Land Use Plan as modified.~~ However, if modified as suggested, the amendment will be consistent with the public access and recreation, wetland, ESHA, marine resource, and land resource policies of the Coastal Act and the Land Use Plan, as amended. Thus, the Commission finds that the proposed LUP amendment, as modified, meets the requirements of and conforms with the Chapter 3 policies of the Coastal Act. ~~In addition, the Commission finds that the IP amendment, if modified as suggested, is in conformity with and adequate to carry out the land use policies of the certified LUP.~~ Therefore, the Commission finds that approval of the LCP LUP amendment as modified will not result in significant adverse environmental impacts under the meaning of CEQA. Therefore, the Commission certifies LCP LUP amendment request 1-06 if modified as suggested herein.



CALIFORNIA FARM BUREAU FEDERATION

NATURAL RESOURCES AND ENVIRONMENTAL DIVISION

2300 RIVER PLAZA DRIVE, SACRAMENTO, CA 95833-3293 • PHONE (916) 561-5665 • FAX (916) 561-5691

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South Coast Region

MAY - 2 2008

CALIFORNIA
COASTAL COMMISSION

May 1, 2008

W26a

Via Fed Ex

Trk # 7910 5801 1213

Sherilyn Sarb, Deputy Director
South Coast District Office
CALIFORNIA COASTAL COMMISSION
200 Oceangate, 10th Floor, Suite 1000
Long Beach, CA 90802-4416

Re: *Revised Findings for Major Amendment Request No. 1-06 (Shea Homes/ Parkside) to the City of Huntington Beach Certified Local Coastal Program Land Use Plan (For Public Hearing and Commission Action at the May 7-9, 2008 meeting in Marina Del Rey); Agenda Item No. W26a.*

Dear Director Sarb:

The California Farm Bureau Federation ("Farm Bureau") is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the State of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing approximately 91,000 members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau appreciates the opportunity to provide comments on the Coastal Commission's revised findings and staff report ("staff report") concerning the Commission's classification of the project site. These comments supplement our previous comments submitted on July 9, 2007. Farm Bureau is still concerned regarding a possible misapplication of existing rules and regulations and the application of the Coastal Commission's regulatory authority with respect to historically farmed agricultural land. As a general matter, Farm Bureau does not agree with the notion that a permit is required for either actions taken on prior converted farmland or "normal farming activities" on lands within the Coastal Commission's jurisdiction.

A stylized, handwritten signature in black ink, possibly reading "C. Sarb".

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May 1, 2008

Sherilyn Sarb / CCC

Agenda Item No W26a

1. Project Site Wetland Determination

Upon review of the staff report and file documents, Farm Bureau is troubled with the historical use of the project site for agriculture and wavering determinations regarding the presence of wetlands. The project site has been subjected to many studies regarding the presence of wetlands and a majority of the studies have determined that there is no evidence of wetland conditions on the site. (See, e.g., California Coastal Commission, Revised Findings for Major Amendment Request No. 1-06 (April 24, 2008) (hereinafter "staff findings"); Dixon, Wetlands at Shea Homes Parkside (July 27, 2006) p. 24 (Exhibit K).)

As reiterated through the staff report and file documents, the project site has been used for agricultural purposes, particularly farming, since the 1930's. (Staff Report, supra, at pp. 30, 34.) As stated by the United States Army Corps of Engineers ("USACOE"), agricultural lands are:

[L]ands intensively used and managed for the production of food or fiber to the extent that the natural vegetation has been removed and cannot be used to determine whether the area meets applicable hydrophytic vegetation criteria in making a wetland delineation. Areas that meet this definition may include intensively used and managed cropland, hayland, pasture land, orchards, vineyards and areas which support wetland crops (e.g., cranberries, taro, watercress, rice). Agricultural lands do not include range lands, forest lands, wood lots or tree farms.

(USACOE, Wetlands and Agriculture: Section 404 and the Clean Water Act, available at <http://www.mvm.usace.army.mil/regulatory/regulations/clean_water.htm> (hereinafter "USACOE Wetlands".) Given that the project site is and has been intensively used as cropland prior to the existence of the Coastal Commission, the Commission must give weight and attention to the continual and ongoing changes to the hydrophytic vegetation, soil structure, and existence and presence of water on the project site when making a wetland delineation.

2. Prior Converted Cropland

Farm Bureau continues to believe that the Coastal Commission should reexamine USEPA and USACOE's regulations, previous determinations, and guidance regarding prior converted cropland.

The fact that an area designated as prior converted cropland can lose its status if abandoned does not equate to an erroneous determination or lessen the importance of the determination as suggested by Mr. Dixon in his memo dated July 27, 2006. Mr. Dixon is correct in stating that, "[Once] an agricultural area is designated as 'prior converted cropland,' the lack of wetland vegetation is automatically treated as the 'normal situation' and thus renders the area not subject to Corps regulation...if prior converted cropland is abandoned and wetland conditions return, the area is again jurisdictional." (Dixon, Wetlands at Shea Homes Parkside (July 27, 2006) p. 24

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(Exhibit K.) However, Mr. Dixon's conclusion that "the process of designating an area as prior converted cropland is subject to error" simply because abandoned cropland can revert to wetland conditions is without merit. (Ibid.)

In order to be abandoned, the prior converted cropland must not be planted with an agricultural commodity for more than five consecutive years. (USACOE Wetlands, *supra*.) In addition, the wetland characteristics must return. (Ibid.) At this point, the cropland is considered abandoned and then becomes a wetland subject to regulation under Section 404 of the Clean Water Act. (Ibid.) Given the fact that the project site has not experienced a period of abandonment, the designation of "prior converted cropland" is both applicable and valid if wetlands are determined to have existed on the site since the initiation of farming. Farm Bureau urges the Coastal Commission to reexamine the wetland determination and applicability of "prior converted cropland."

3. Normal Farming Activities

Farm Bureau respects and supports the underlying purposes of the Clean Water Act regarding the exemption from Section 404 permitting requirements for "normal farming activities." The exemptions, Section 404(f) of the Clean Water Act, recognize that American agriculture fulfills the vitally important public need for supplying abundant and affordable food and fiber and it is our intent to assure that the exemptions are appropriately implemented.

The Clean Water Act exempts from the Section 404 program normal farming operations, which "include cultivating, harvesting, minor drainage, plowing, and seeding. While these terms all have common, everyday definitions, it is important to recognize that these terms have specific, regulatory meanings in relation to the Section 404(f) exemptions. For example, plowing that is exempt under Section 404(f) means all mechanical means of manipulating soil including land leveling, to prepare it for the planting of crops." (USEPA, Memorandum: Clean Water Act Section 404 Regulatory Program and Agricultural Activities (May, 1990, p. 3.)

Without going into detail, the staff report concludes that the project "site has been subjected to farming practices that go beyond what can be considered 'normal farming activities.'" (Staff Report, *supra*, at p. 34.) In addition, the staff report refers to an instance in which a bulldozer and a box plough were used on the project site in aiding in their determination that the farming practices are not "normal." (Ibid.) "Normal farming activities" can include the use of large equipment. The size of the machine does not dictate the activity and whether or not it falls under the exemption for normal activities. For example, plowing is defined in USEPA and USACOE regulations, 40 C.F.R. § 230 and 33 C.F.R. § 320, as "all forms of primary tillage ... used ... for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops." (40 C.F.R. § 232.3(d)(4).) In certain circumstances, heavy machinery is necessary in order to break up the soil. In addition, USEPA and USACOE have determined that deep-ripping and

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Sherilyn Sarb / CCC

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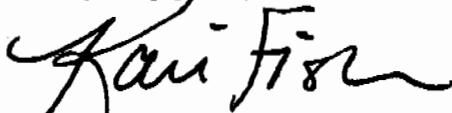
related activities, as distinguished from plowing, discing, harrowing, etc, are allowed in wetlands as part of an established ongoing agricultural operation. (USEPA and USACOE, Regulatory Guidance Letter 96-02: Applicability of Exemptions under Section 404(f) to "Deep-Ripping" Activities in Wetlands (1996), pp. 3-4, (herein attached as Exhibit A).)

The very narrow view of normal farming activities evidenced in the staff report could have serious impacts on the operational flexibility of California's coastal farmers, and for this reason, Farm Bureau asks the Coastal Commission to carefully review its determination in this regard.

Conclusion

Farm Bureau believes that the Coastal Commission needs to reevaluate the respective provisions of law recommended above prior to making a determination affecting agriculture and wetlands. Thank you for the opportunity to provide our comments and concerns. We look forward to further involvement and discussion with the Commission on this issue.

Very truly yours,



Kari E. Fisher
Associate Counsel

KEF:mmm
Encl.

cc: Orange County Farm Bureau

26a

(CFBF)

Regulatory Guidance Letter 96-02

**SUBJECT: Applicability of Exemptions under Section
404(f) to "Deep-Ripping" Activities in
Wetlands**

DATE: 12 December 1996**EXPIRES: 31 December 2001**

**Department of the Army, U.S. Army Corps of
Engineers**

United States Environmental Protection Agency

MEMORANDUM TO THE FIELD

**SUBJECT: Applicability of Exemptions under Section 404(f) to "Deep-Ripping"
Activities in Wetlands**

PURPOSE: The purpose of this memorandum is to clarify the applicability of exemptions provided under Section 404(f) of the Clean Water Act (CWA) to discharges associated with "deep-ripping" and related activities in wetlands.¹

¹ As this guidance addresses primarily agricultural-related activities, characterizations of such practices have been developed in consultation with experts at the U.S. Department of Agriculture (USDA), Natural Resources Conservation Service.

BACKGROUND:

1. Section 404(f)(1) of the CWA exempts from the permit requirement certain discharges associated with normal farming, forestry, and ranching practices in waters of the United States, including wetlands. Discharges into waters subject to the Act associated with farming, forestry, and ranching practices identified under Section 404(f)(1) do not require a permit except as provided under Section 404(f)(2).

2. Section 404(f)(1) does not provide a total automatic exemption for all activities related to agricultural silvicultural or ranching practices. Rather, Section 404(f)(1) exempts only those activities specifically identified in paragraphs (A) through (F), and "other activities of essentially the same character as named" [44 FR 34264]. For example, Section 404(f)(1)(A) lists discharges of dredged or fill material from "normal farming, silviculture and ranching activities, such as plowing, seeding, cultivating, minor drainage,

harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices."

3. Section 404(f)(1)(A) is limited to activities that are part of an "established (i.e., ongoing) farming, silviculture, or ranching operation." This "established" requirement is intended to reconcile the dual intent reflected in the legislative history that although Section 404 should not unnecessarily restrict farming, forestry, or ranching from continuing at a particular site, discharge activities which could destroy wetlands or other waters should be subject to regulation.

4. EPA and Corps regulations [40 CFR 230 and 33 CFR 320] and preamble define in some detail the specific "normal" activities listed in Section 404(f)(1)(A). Three points may be useful in the current context:

a. As explained in the preamble to the 1979 proposed regulations, the words "such as" have been consistently interpreted as restricting the section "to the activities named in the statute and other activities of essentially the same character as named," and "preclude the extension of the exemption ... to activities that are unlike those named." [44 FR 34264].

b. Plowing is specifically defined in the regulations not to include the redistribution of surface material in a manner which converts wetlands areas to uplands [See 40 CFR 233.35(a)(1)(iii)(D)].

c. Discharges associated with activities that establish an agricultural operation in wetlands where previously ranching had been conducted, represents a "change in use" within the meaning of Section 404(f)(2). Similarly, discharges that establish forestry practices in wetlands historically subject to agriculture also represent a change in use of the site (Sec 40 CFR 233.35(c)).

5. The statute includes a provision at Section 404(f)(2) that "recaptures" or reestablishes the permit requirement for those otherwise exempt discharges which:

a. convert an area of the waters of the U.S. to a new use, and

b. impair the flow or circulation of waters of the U.S. or reduce the reach of waters of the U.S.

Conversion of an area of waters of the U.S. to uplands triggers both provisions (a) and (b) above. Thus, at a minimum any otherwise exempt discharge that results in the conversion of waters of the U.S. to upland is recaptured under Section 404(f)(2) and requires a permit. It should be noted that in order to trigger the recapture provisions of Section 404(f)(2), the discharges themselves need not be the sole cause of the destruction of the wetland or other change in use or sole cause of the reduction or impairment of reach, flow, or circulation of waters of the U.S. Rather, the discharges need only be "incidental to" or "part of" an activity which is intended to or will foreseeably bring about that result. Thus, in applying Section 404(f)(2), one must consider discharges in context, rather than isolation.

ISSUE:

1. Questions have been raised involving "deep-ripping" and related activities in wetlands and whether discharges associated with these actions fall within the exemptions at Section 404(f)(1)(A). In addition, the issue has been raised whether, if such activities fall within the exemption, they would be recaptured under Section 404(f)(2).

2. "Deep-ripping" is defined as the mechanical manipulation of the soil to break up or pierce highly compacted, impermeable or slowly permeable subsurface soil layers, or other similar kinds of restrictive soil layers. These practices are typically used to break up these subsoil layers (e.g., impermeable soil layer, hardpan) as part of the initial preparation of the soil to establish an agricultural or silvicultural operation. Deep-ripping and related activities are also used in established farming operations to break up highly compacted soil. Although deep-ripping and related activities may be required more than once, the activity is typically not an annual practice. Deep-ripping and related activities are undertaken to improve site drainage and facilitate deep root growth, and often occur to depths greater than 16 inches and, in some cases, exceeding 4 feet below the surface. As such it requires the use of heavy equipment, including bulldozers, equipped with ripper-blades, shanks, or chisels often several feet in length. Deep-ripping and related activities involve extending the blades to appropriate depths and dragging them through the soil to break up the restrictive layer.

3. Conversely, plowing is defined in EPA and Corps regulations [40 CFR 230 and 33 CFR 320] as "all forms of primary tillage ... used ... for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops" [40 CFR 232.3(d)(4)]. As a general matter, normal plowing activities involve the annual or at least regular, preparation of soil prior to seeding or other planting activities. According to USDA, plowing generally involves the use of a blade, chisel or series of blades, chisels, or discs, usually 8-10 inches in length pulled behind a farm vehicle to prepare the soil for the planting of annual crops or to support an ongoing farming practice. Plowing is commonly used to break up the surface of the soil to maintain soil tilth and to facilitate infiltration throughout the upper root zone.

DISCUSSION:

1. Plowing in wetlands is exempt from regulation consistent with the following circumstances:

- a. it is conducted as part of an ongoing, established agricultural, silvicultural or ranching operation; and
- b. c. the plowing is not incidental to an activity that results in the immediate or gradual conversion of wetlands to non-waters.

2. Deep-ripping and related activities are distinguishable from plowing and similar practices (e.g., disking, harrowing) with regard to the purposes and circumstances under

which it is conducted, the nature of the equipment that is used, and its effect, including in particular the impacts to the hydrology of the site.

a. Deep-ripping and related activities are commonly conducted to depths exceeding 16 inches, and as deep as 6-8 feet below the soil surface to break restrictive soil layers and improve water drainage at sites that have not supported deeper rooting crops. Plowing depths, according to USDA, rarely exceed one foot into the soil and not deeper than 16 inches without the use of special equipment involving special circumstances. As such, deep-ripping and related activities typically involve the use of special equipment, including heavy mechanized equipment and bulldozers, equipped with elongated ripping blades, shanks, or chisels often several feet in length. Moreover, while plowing is generally associated with ongoing operations, deep-ripping and related activities are typically conducted to prepare a site for establishing crops not previously planted at the site. Although deep-ripping may have to be redone at regular intervals in some circumstances to maintain proper soil drainage, the activity is typically not an annual or routine practice.

b. Frequently, deep-ripping and related activities are conducted as a preliminary step for converting a "natural" system or for preparing rangeland for a new use such as farming or silviculture. In those instances, deep ripping and related activities are often required to break up naturally-occurring impermeable or slowly permeable subsurface soil layers to facilitate proper root growth. For example, for certain depressional wetlands types such as vernal pools, the silica-cemented hardpan (duripan) or other restrictive layer traps precipitation and seasonal runoff creating ponding and saturation conditions at the soil surface. The presence of these impermeable or slowly permeable subsoil layers is essential to support the hydrology of the system. Once these layers are disturbed by activities such as deep-ripping, the hydrology of the system is disturbed and the wetland is often destroyed.

c. In contrast, there are other circumstances where activities such as deep-ripping and related activities are a standard practice of an established on-going farming operation. For example, in parts of the Southeast, where there are deep soils having a high clay content, mechanized farming practices can lead to the compaction of the soil below the sod surface. It may be necessary to break up, on a regular although not annual basis, these restrictive layers in order to allow for normal root development and infiltration. Such activities may require special equipment and can sometimes occur to depths greater than 16 inches. However, because of particular physical conditions, including the presence of a water table at or near the surface for part of the growing season, the activity typically does not have the effect of impairing the hydrology of the system or otherwise altering the wetland characteristics of the site.

CONCLUSION:

1. When deep-ripping and related activities are undertaken as part of an established ongoing agricultural silvicultural or ranching operation, to break up compacted soil layers and where the hydrology of the site will not be altered such that it would result in

conversion of waters of the U.S. to upland, such activities are exempt under Section 404(f)(1)(A).

2. Deep-ripping and related activities in wetlands are not part of a normal ongoing activity, and therefore not exempt, when such practices are conducted in association with efforts to establish for the first time (or when a previously established operation was abandoned) an agricultural silvicultural or ranching operation. In addition, deep-ripping and related activities are not exempt in circumstances where such practices would trigger the "recapture" provision of Section 404(f)(2):

a) Deep-ripping to establish a farming operation at a site where a ranching or forestry operation was in place is a change in use of such a site. Deep-ripping and related activities that also have the effect of altering or removing the wetland hydrology of the site would trigger Section 404(f)(2) and such ripping would require a permit.

b) Deep-ripping a site that has the effect of converting wetlands to non-waters would also trigger Section 404(f)(2) and such ripping would require a permit.

3. It is the agencies' experience that certain wetland types are particularly vulnerable to hydrological alteration as a result of deep-ripping and related activities. Depressional wetland systems such as prairie potholes, vernal pools and playas whose hydrology is critically dependent upon the presence of an impermeable or slowly permeable subsoil layer are particularly sensitive to disturbance or alteration of this subsoil layer. Based upon this experience, the agencies have concluded that, as a general matter, deep-ripping and similar practices, consistent with the descriptions above, conducted in prairie potholes, vernal pools, playas, and similar depressions wetlands destroy the hydrological integrity of these wetlands. In these circumstances, deep-ripping in prairie potholes, vernal pools, and playas is recaptured under Section 404(f)(2) and requires a permit under the Clean Water Act.

Robert H Wayland III
Director
Office of Wetlands, Oceans and Watersheds
U.S. Environmental Protection Agency

Daniel R Burns, P.E.
Chief, Operations, Construction and Readiness Division
Directorate of Civil Works
U.S. Army Corps of Engineers



Amigos de Bolsa Chica

P.O. Box 1563 Huntington Beach, CA 92647

Phone / Fax 714 840 1575 info@amigosdebolsachica.org www.amigosdebolsachica.org

Agenda Item **W 26a**

April 30, 2008

Mr. Patrick Kruer, Chair
Members of the Commission
California Coastal Commission
200 OceanGate - 10th Floor
Long Beach, CA 90802-4416

Via FAX (562) 590-5084

RE: Item W 26a. Revised Findings for Major Amendment Request No. 1-06 (Shea Homes/Parkside) to the City of Huntington Beach Certified Local Coastal Program Land Use Plan

This letter is in support of the staff recommendations for this item with the following reservations.

We find that provisions for public access to the adjacent Bolsa Chica wetland to be inadequate. While the Bolsa Chica wetland is enormously popular with the public, access to it is limited to two points, the Warner Avenue parking lot and the south parking lot. During certain times of the week, especially when special events are being conducted at the Warner lot, the lots are full and visitors must be turned away. The parking lot at the state beach across from the south lot cannot be used by Bolsa Chica visitors, even if they agree to pay the \$10 entrance fee, because it is unlawful for pedestrians to cross Pacific Coast Highway. Thus the only other point of access to the Bolsa Chica wetland is the Wintersburg flood control channel levees. This route to the Bolsa Chica has been used by hundreds of citizens for many years, but recently the flood control district has announced that it plans to close the levees to the public. This situation is contrary to the provisions of Section 30210 of the Coastal Act, which requires maximum public access to our coastal recreational resources. We would like to see stronger language in the amendment requiring the city of Huntington Beach and the developer to negotiate with the flood control district to see that the bike and hiking trail planned for per the county's Commuter Bikeways Strategic Plan is built.

We are disappointed that the area known as WP (Wintersburg Pond) that was designated as a wetland earlier by the commission's scientists has suddenly lost that distinction. What is disturbing is that the loss of the section's wetland designation was made by non-scientists. This flies in the face of coastal wetland protection as required by the Coastal Act.

Sincerely,

David Carlberg, President



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South Coast Region

MAY - 2 2008

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ENDORSEMENTS

Amigos de Bolsa Chica
Algalita Marine Research
Foundation
Anza Borrego Foundation
Balkona Wetlands Land
Trust
City of Huntington Beach
Friends of Harbors,
Beaches and Parks
Huntington Beach
Wetlands Conservancy
Huntington Beach Tomorrow
Orange Coast League of
Women Voters
Orange County
Coastkeeper
Peninsula Open Space Trust
Sea and Sage Audubon
Sierra Club
Angeles Chapter
Surfrider Foundation

May 1, 2008

Honorable Chairman Patrick Kruer and Members of the Coastal
Commission
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

Subject: City of Huntington Beach LCP Amendment No. HNB-MAJ-1-06
(Parkside)

Dear Commissioners:

The Bolsa Chica Land Trust remains committed to the preservation,
protection, and restoration of coastal resources at Bolsa Chica. To that end,
the Land Trust requests further information regarding restoration and
mitigation requirements for unpermitted fill activities in the EPA wetland.

Page 17-18 of the November 1, 2007, Coastal Commission staff report
contained Suggested Modification No. 11, which was unaltered by the
Commission and thus incorporated in the April 24, 2008 revised findings
version (pg. 17):

SUGGESTED MODIFICATION NO. 11

Add the following policy to the certified Land Use Plan, on page IV-C-
123, as new policy C 7.2.7 Huntington Beach LCP Amendment 1-06
(Parkside)

***Any areas that constituted wetlands or ESHA that
have been removed, altered, filled or degraded as the
result of activities carried out without compliance***

with Coastal Act requirements shall be protected as required by the policies in this Land Use Plan.

Further, as noted on Page 35 of the November 1, 2007, Coastal Commission staff report:

Unpermitted development resulted in the loss of the 4-acre EPA wetland area. Section 30233 of the Coastal Act requires that loss of wetlands due to fill must be mitigated. The Commission typically requires mitigation at a ratio of 4:1 (area of mitigation to wetland area lost). The loss of EPA wetland due to unpermitted activity must be mitigated. However, the unpermitted land manipulations that resulted in the loss of the EPA wetland area also contributed to the creation of wetlands in the area of the WP and AP. Thus, it would be appropriate to allow the area of the WP (0.95 acres) and the area of the AP (0.61 acres) to be applied toward the total area of wetland creation necessary to mitigate the loss of the 4-acre EPA wetland area ... Therefore, in addition to the area of WP and AP, an additional 14.44 acres of wetland creation on site would be required to mitigate the loss of the 4-acre EPA wetland.

The transcript of the November 14, 2007 public hearing verifies that the Commission eliminated the wetland status of WP; however, no similar vote was taken on eliminating AP's or EPA's wetland status, and no vote was taken to eliminate or alter the 4:1 on site mitigation requirement. Thus, per the April 24, 2008, Commission staff report with revised findings (p.35), the WP area is no longer proposed for preservation as wetlands, resulting in a requirement for an additional 15.39 acres of wetland creation on site to mitigate the illegal, unpermitted fill activities.

Exhibit NN 4th revision to the April 24, 2008, Commission staff report does not appear to identify a specific location for the required 15.39 acres of wetland creation on site. We ask that the Commission provide that information to us as soon as it is available by contacting our Executive Director Flossie Horgan at 714-846-1001, cell 714-335-7711, or bclandtrust@verizon.net.

Furthermore, based on a review of ex parte communications, it appears that the property owner intends to submit their own version of proposed revised findings for the Commission's consideration. We again request that Flossie Horgan be notified by telephone or e-mail as soon as any such revised findings or other communications from the property owner are received by the Commissioners or Commission staff.

Thank you for your assistance in this matter.

Respectfully,



Gerald Chapman, President
Bolsa Chica Land Trust



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Amigos de Bolsa Chica
Algalita Marine Research
Foundation
Anza Borrego Foundation
Ballona Wetlands Land
Trust
City of Huntington Beach
Friends of Harbors,
Beaches and Parks
Huntington Beach
Wetlands Conservancy
Huntington Beach Tomorrow
Orange Coast League of
Women Voters
Orange County
Coastkeeper
Peninsula Open Space Trust
Sea and Sage Audubon
Sierra Club
Angeles Chapter
Surfrider Foundation

May 5, 2008

Honorable Chairman Patrick Kruer and Members of the Coastal
Commission
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

Subject: Shea Homes' May 1, 2008 letter to the Commission, re:
Revised Findings for City of Huntington Beach Major Amendment
Request 1-06 (Shea/Parkside)

Dear Commissioners:

The Bolsa Chica Land Trust has reviewed Shea Homes' May 1, 2008
letter to the Coastal Commission presenting redlined revised findings and
their arguments thereto, and we believe a response and clarification is in
order.

I. EPA Area Mitigation

1. The Transcript and Motion

Shea argues that because the Commissioners did not discuss wetlands
mitigation ("with no discussion whatsoever of additional mitigation"
(Shea 5/1/08, pg. 2)), it should not be part of the revised findings.

Lack of discussion is not a valid justification for removing findings.
There are other items the Commissioners did not discuss; for example,
public access. Should staff have removed those recommendations from
the revised findings simply because the Commissioners didn't discuss
them?

Executive Director Peter Douglas made it a point to clarify what the main motion was that the Commission was approving (November 14, 2007 transcript, pages 234-235):

CHAIR KRUEER: Okay, thank you, very much.

Main motion, there is a motion now, and a "second" on the main motion, both the maker and the "seconder" are asking for a "Yes" vote, and passage of this motion will result in the certification of the Land Use Plan Amendment.

EXECUTIVE DIRECTOR DOUGLAS: With the modifications.

CHAIR KRUEER: With the modifications that we have -- that is correct.

EXECUTIVE DIRECTOR DOUGLAS: That you have made, and that staff is recommending --

CHAIR KRUEER: That is right.

EXECUTIVE DIRECTOR DOUGLAS: -- that survive.

CHAIR KRUEER: That is correct, okay.

Mr. Douglas emphasized that aside from what the Commissioners had changed ("that you have made"), all other staff recommendations ("that survive") would be approved in the main motion **whether or not they had been discussed.**

2. Graphics Referred to by Commissioners During Hearing

Shea argues that because three specific documents used by the Commissioners for reference did not map any additional mitigation land (one of which was the staff's own Exhibit NN 3rd revision with the other two Shea's own proposals), mitigation should not be required. Staff's 4th revision of NN also does not map the mitigation area, which is supposed to incorporate all of the Commission's findings. The Bolsa Chica Land Trust has written to the Commission asking for clarification regarding location of the mitigation discussed in the current, April 2008 staff report as well as the November 2007 staff report.

The Bolsa Chica Land Trust does appreciate that deferring designation of a specific location for the required mitigation until the Coastal Development Permit stage would provide greater flexibility for the applicant.

3. Rejection of Intermingled Areas.

Shea argues that "rejection of the intermingled areas implicitly, if not explicitly, implied that no additional mitigation area over and above 1:1 was required for the EPA" wetland (Shea 5/1/08, pg. 3).

Mitigation at a 4:1 ratio is referenced twice in the November 2007 staff report. The first instance is in the discussion on the EPA wetland (pg. 35); the second is during the discussion on

intermingled areas (pg. 36). **The Commissioners specifically voted to reject the intermingled areas concept but did not reject the EPA wetland. During the deliberations of both topics, there was never an implicit or explicit rejection of—or change to—staff's recommendation of 4:1 mitigation for lost wetlands.**

4. Approval of Applicant's Specific Variable Buffer

Shea asks, "Why would the Commission require 4:1 mitigation when it would make their approval of a variable width buffer moot and their discussion concerning it irrelevant?" (Shea 5/1/08, pg. 3)

Wetlands (Coastal Act Section 30233) are a separate issue from ESHA (Coastal Act Section 30240). **A decision on one does not automatically cancel out the other, nor make that decision irrelevant.**

5. No Loss of Habitat Value in the Farmed EPA

Shea argues that because there is not wetland habitat value to EPA that there is "no basis for mitigation beyond 1:1 replacement, as the Commission concluded. This is a unique circumstance, which follows from the undisputed fact that the EPA has been farmed..." (Shea 5/1/08, pg. 3)

Shea is completely ignoring Suggested Modification No. 11, which the Commission left as-is:

Any areas that constituted wetlands or ESHA that have been removed, altered, filled or degraded as the result of activities carried out without compliance with Coastal Act requirements shall be protected as required by the policies in this Land Use Plan.

Despite this diversion as to how and why the EPA wetland was filled, this much is known: EPA was delineated in 1989 and existed until about 2002, when AP was created (staff Exhibit MMM). One wetland disappeared, and another appeared close by, without benefit of a Coastal Development Permit. The Commission has agreed that EPA is, indeed, a wetland. **The destruction or creation of wetlands is considered "development" in the Coastal Zone, regardless of the means used to accomplish that development.**

The Commission typically requires 4:1 mitigation for loss of wetlands (staff report, November 2007). It has been used previously for a Malibu LUP (2002), Carlsbad LUPA (2003), Monterey County LCP (2004), and Newport Beach LUPA (2005), among others. The City of Huntington Beach (and Shea by extension) is not being treated any differently than those other locations.

6. Withdrawal of Commissioner Shallenberger's Motion

Shea tries to argue that Commissioner Shallenberger's amending motion "to accept Shea's offer to create an additional 5 acres of new wetlands" (transcript, pg. 229), and her subsequent withdrawal of that motion, somehow signifies that "the Commission required no additional wetland other than the restoration of the 4.0 acre modified EPA at its depicted location." (Shea 5/1/08, pg. 4)

On the contrary, Commissioner Shallenberger's motion was to accept Shea's offer of so-called "additional" wetlands. She withdrew the motion when it was pointed out that Shea's offer was contingent upon the absence of WP *and* EPA. Because the Commissioners let EPA stand as a wetland, the Commissioners effectively turned down the offer of 1:1 mitigation (4 acres of no EPA wetland and .5 acres of no WP wetland in exchange for 5 "new" wetland acres elsewhere). Mr. Metzler himself pointed this out (transcript, pg. 231):

MR. METZLER: Ron Metzler, again, with Shea Homes.

The plan was provided was a package plan, contingent upon the absence of EPA, contingent upon the absent of WP.

COMMISSIONER SHALLENBERGER: So, it was an all or nothing? just take it or leave it? That is not my idea of a a reasonable compromise

Thus, there was no longer an "offer" available to accept, and it made sense to withdraw the motion. **The withdrawal signified the absence of a "deal," *not* the absence of required additional wetlands.**

7. Staff's Graphic Accompanying Revised Findings.

Shea argues that "if somehow the 4:1 mitigation ratio were applied, the development footprint remaining in exhibit NN 4th Revised would be far smaller in size than the development footprint in exhibit NN 3rd Revised." (Shea 5/1/08, pg. 4)

Shea is wrong. The 4:1 mitigation does not appear on *either* version of Exhibit NN. **The 4th revision actually maps a *larger* development footprint than the 3rd revision because the Intermingled Areas and WP have been removed.** As noted previously, the Bolsa Chica Land Trust has written to the Commission asking for clarification of the lack of mitigation mapped on the 4th revision.

8. Recommended Finding

Shea states that the "Commission did not require 4:1 mitigation, or any mitigation beyond the delineated modified EPA" (Shea 5/1/08, pg.4) and asks that the staff's version of revised findings be rewritten to include that line of thinking.

This is a similar complaint to #1, except that this time Shea is trying to rewrite history by changing the Commission's vote and removing the 4:1 mitigation requirement.

Again, Mr. Douglas clarified before the final vote that the LUPA was being certified with both the Commissioners' changes and the staff recommendations that survived the Commissioner's edits. The Commissioners were quite specific in the parts of the staff report they wanted removed or altered, as moved by Commissioner Secord and seconded by Commissioner Hueso:

- ◆ Reject the 7-day ponding "standard" (transcript, pg. 204)
- ◆ Reject the WP area as a wetland (transcript, pg. 204)
- ◆ Reject the 100-meter ESHA buffer, and accept the variable width ESHA buffer, and also include the city's agreement to make the park passive (transcript, pg. 222)
- ◆ Reject the concept of "intermingled areas" (transcript, pg. 224)

In fact, Commissioner Shallenberger twice questioned what the vote on rejecting the 7-day ponding "standard" would accomplish, and was told both times that it would remove the language from the staff report:

Transcript, pg. 211:

COMMISSIONER SHALLENBERGER: So, is the effect of -- I am trying to see what we are actually -- I mean, maybe counsel can help here? I don't actually know what this means, in terms of what it will look like, when it comes back to us to adopt findings? will it just the language which says including 7-days ponding be deleted, or what?

CHIEF COUNSEL SMELTZER: Yes, that language would be deleted in Suggested Modifications 3 and 4, which would reflect the change in the mapping.

Transcript, pg. 212:

COMMISSIONER SHALLENBERGER: But, just saying -- but deleting a standard that doesn't exist is not a finding that it is not a wetland. You can leave it that way.

CHAIR KRUEER: Well, that is the -- they are trying to get it out of the staff report, based on the findings.

In response to the Commission's vote, those items listed above which the Commission voted to reject or modify have been crossed out or rewritten in the staff's April 28, 2008 revised findings report.

On the other hand:

- ◆ *No vote* was taken by the Commission to eliminate or change Suggested Modification No. 11 concerning the loss of wetlands; and

- ◆ *No vote* was taken by the Commission to eliminate or change the recommendation of 4:1 on-site mitigation for the loss of EPA; and
- ◆ *No vote* was taken by the Commission to reject EPA as a wetland

Had the Commissioners wanted to get the 4:1 mitigation “out of the staff report,” they had every opportunity to make a specific vote on that issue.

II. Potential Unpermitted Development

Shea states that “the Commission did not find that unpermitted development occurred” (Shea 5/1/08, pg. 5). Perhaps that is because the current issue is a Land Use Plan, not a development permit or enforcement action. As explained by staff:

Transcript, pg. 174:

DISTRICT DIRECTOR SARB: Yes, Commissioner Reilly, through the Chair.

We are just assigning land use designations at this time. It is not that we are approving development on the site, and so I think that we are considering the unpermitted development in that realm, and preserving the wetlands as if they existed and were protected under the policies of the Coastal Act.

Transcript, pg. 175:

EXECUTIVE DIRECTOR DOUGLAS: No, my understanding is, first of all, we have evidence that there appears to have been a violation. We have not established that yet, because we don't have the enforcement action going to the point of making that determination.

Until the vote in November, EPA was not formally recognized by the Commission as a wetland. With the Commission's finding that EPA is, indeed, a wetland, there is a basis for proceeding with enforcement because staff Exhibit MMM determined that this wetland was effectively “obliterated” by Shea.

Shea repeatedly states that all they're doing on their property is “normal farming operations.” There was a lengthy discussion on this topic at the November hearing, with no conclusion reached. However, Coastal Act Section 30233 lists only seven allowable wetland fill reasons—and farming is not one of them. **Between Exhibit MMM, the Commission's acceptance of EPA's wetland status, and Section 30233, an official finding of unpermitted development at the CDP phase becomes far more likely and explains why Shea is fighting the 4:1 mitigation requirement so vigorously even though it is commonly used by the Commission.**

**FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATION**

RECEIVED

APR 29 2008

**CALIFORNIA
COASTAL COMMISSION**

Date and time of communication:
(For messages sent to a Commissioner by mail or facsimile or received as a telephone or other message, date time of receipt should be indicated.)

Tuesday, April 29, 2008; 10:30 AM

Location of communication:
(For communications sent by mail or facsimile, or received as a telephone or other message, indicate the means of transmission.)

La Jolla

Person(s) Initiating communication:

Ron Metzler, Donna Andrews, Susan McCabe, Nanoy Lucast

Person(s) receiving communication:

Patrick Kruer

Name or description of project:

Revised Findings for Huntington Beach LCPA 1-06
(May, 2008, Wed, 26.a)

Detailed substantive description of content of communication:

(If communication included written material, attach a copy of the complete text of the written material.)

- Property owner recalled the original staff recommendation from the November, 2007 meeting.
- Then contrasted the City's/property owner's proposal from the same meeting.
- He then reviewed the Commission's action, according to the record (the record being the transcript and the video of the meeting).
- He recounted a 3-12-08 meeting between Commission staff and City and property owner representatives, and the differences in interpretation of the nature of the Commission's action on the LCPA at the Nov., 2007 hearing.
- He detailed how the City and property owner prepared a detailed response to staff citing the transcript and video as support.
- He recounted a subsequent telephone conversation between CCC staff (Schwing) and City staff indicating that CCC staff were persuaded by the evidence and that the revised suggested modifications and findings would reflect agreement.
- He then expressed surprise upon receipt of the staff report on revised findings, that they raised a new issue that had not even been discussed at the Nov. 07 public hrg - a 4:1 mitigation requirement for, so-called, illegal farming activities in the EPA area.
- Such a requirement would result in an allowable building footprint far smaller than the footprint recommended by staff at the Nov 2007 hearing.
- He claimed that this is a complete mischaracterization of the CCC's decision.

- He expressed grave concern that the CCC staff could use the revised findings process, which is supposed to memorialize the CCC's original action, to raise new issues and alter the CCC's decision.
- He indicated that his team would produce a redline version of staff's recommended revised findings at or (hopefully) prior to the public hearing with the hope that the CCC would approve that version in lieu of staff's recommendation.

4/29/08
Date


Signature of Commissioner

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used, such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication.

May 05 08 08:48a

Drs. Dan & Mary Secord

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FORM FOR DISCLOSURE OF EX PARTE COMMUNICATION

Date and time of communication:
(For messages sent to a Commissioner
by mail or facsimile or received as a
telephone or other message, date
time of receipt should be indicated.)

Saturday, May 3, 2008: 3:00 PM

Location of communication:
(For communications sent by mail or
facsimile, or received as a telephone
or other message, indicate the means
of transmission.)

Santa Barbara

Person(s) initiating communication:

Ron Metzler, Tony Bomkamp, Nancy Lucast (via
phone), Susan McCabe

Person(s) receiving communication:

Dr. Dan Secord

Name or description of project:

Revised Findings for Huntington Beach LCPA 1-06
(May, 2008, Wed, 26.a.) (Shea Homes, Parkside)

Detailed substantive description of content of communication:

(If communication included written material, attach a copy of the complete text of the written
material.)

1. The assembled masses reviewed the documentation prepared, based on the transcript and video of the CCC November, 2007 meeting, and presented to CCC staff at a March 12, 2008 meeting (all provided to me as having previously been provided to staff).
2. They contrasted the staff's conclusion of the Commission's action at the same meeting, and noted the differences.
3. They noted the developer team's effort to go back and painstakingly document the record for staff's benefit (delivered to staff on 4-16-08).
4. Then the subsequent call from CCC staff to the City that CCC staff and the City/property owner were in agreement.
5. Then the receipt of the actual staff report which raised new surprises, namely:
 - o A 4:1 mitigation requirement for so-called unpermitted development activities in the EPA area (a 16 acre mitigation area + buffer---such a requirement would result in a development footprint FAR smaller than the footprint recommended by staff at the Nov 2007 hearing).
 - o A requirement that the NTS be located 270' from the Eucalyptus ESHA. No which of dimension was discussed at the public hearing in November
 - Etc.
6. Metzler expressed both exasperation with, and appreciation for, staff's willingness to accede to the record (exasperation that they had access to the same data the

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Drs. Dan & Mary Secord

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City/Shea team did, but didn't initially use it, but appreciation that eventually they did).

7. Metzler and Lucast indicated that the City/Shea team hoped to work further with staff, and to produce a redline version of staff's proposed revised findings, to the extent issues continued to separate, at the public hearing.
8. It is the City and Property Owner's understanding that the staff's final recommendation, in the form an "addendum," that will not be available until Tues, PM, May 6, 2008 (if lucky) or the morning of Wed, May 7, the day of the hearing. Ergo, the City and property owner may be forced into providing a late response.

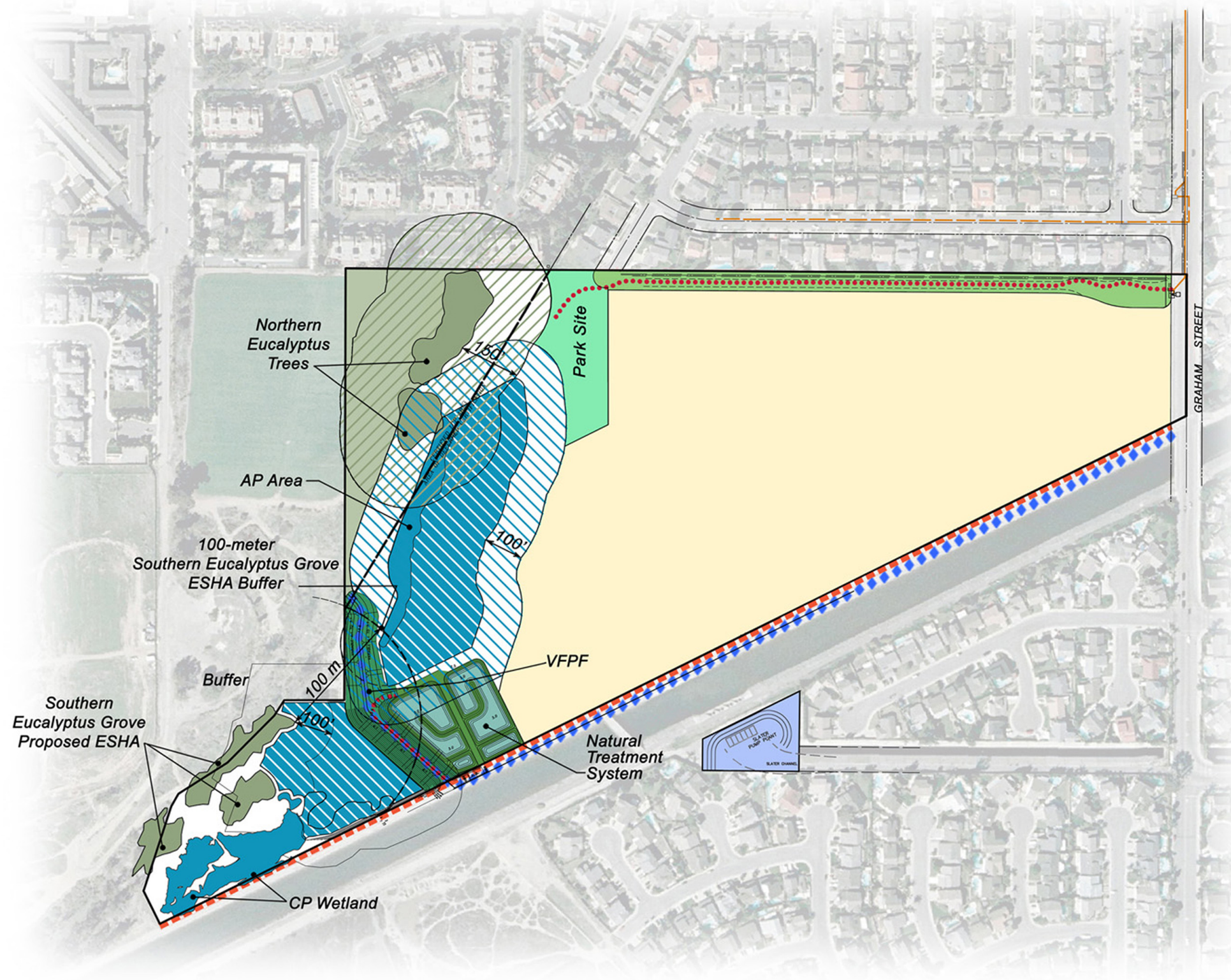
Date


Signature of Commissioner

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HUNTINGTON BEACH LCPA 1-06 PARKSIDE ESTATES

Wetland Consolidation, Enhancement & Creation Plan: 6.85 Total Wetlands With No WP