

## CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA  
 7575 METROPOLITAN DRIVE, SUITE 103  
 SAN DIEGO, CA 92108-4402  
 (619) 767-2370



# Th15a

## Addendum

[Click here to go to the original staff report.](#)

February 8, 2011

To: Commissioners and Interested Persons

From: California Coastal Commission  
 San Diego Staff

Subject: Addendum to **Item Th15a**, Coastal Commission Permit Application #**A-6-ENC-09-050 (Westbridge Financial)**, for the Commission Meeting of February 10, 2011

Staff recommends the following changes be made to the above-referenced staff report:

1. On Page 1 of the staff report, the "SUMMARY OF STAFF RECOMMENDATION" shall be revised as follows:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed. Specifically, the local government decision, which involves impacts to 0.05 acres of riparian wetlands and approximately 10 acres of native habitat, 3.77 acres of which are environmentally sensitive habitat area (ESHA), raises a substantial issue with regard to the project's consistency with the sensitive resource and visual protection policies of the certified Encinitas LCP.

Commission staff recommends **denial** of the application on de novo. The proposed project will result in adverse impacts to environmentally sensitive habitat areas (ESHA), adverse impacts to wildlife corridors, adverse impacts to wetlands, and adverse impacts to visual resources. In particular, this project will impact approximately 10 acres of native habitat, 3.77 acres of which are ESHA, which includes coastal sage scrub, ~~coyote brush scrub~~, southern maritime chaparral, southern mixed chaparral, and scrub oak chaparral. Additionally, the project will impact 0.05 acres of [...]

2. On Page 6 of the staff report, the second complete paragraph shall be revised as follows:

Because A portion of the development site is located between the sea (Batiqitos Lagoon) and the first coastal roadway (La Costa Ave), ~~the project lies within the~~

~~Commission's appellate jurisdiction.~~ In addition, the project site lies within 100 ft. of wetlands and also appears to lie within 100 ft. of a stream, which also identifies it as being subject to the Commission's appellate jurisdiction. Because the proposal is for a subdivision, which affects all portions of the lot, the Commission retains appeals jurisdiction over the entire subdivision. The subject review is an appeal of a City approved coastal development permit. As such, the standard of review is the certified Encinitas LCP and the public access and recreation policies of the Coastal Act.

3. On Page 11 of the staff report, the first incomplete paragraph shall be revised as follows:

[...] scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral supporting Nuttall's scrub oak, and 1.20 acres of annual non-native grassland will be impacted. In approving these impacts, the City required mitigation ratios ranging from 0.05:1 to 3:1, through on-site conservation. The total impact of the proposed project to these native plant communities is approximately 10 acres. According to the Commission's staff ecologist, after a site visit and review of the biology report for the project, the subject coastal sage scrub, ~~coyote brush scrub~~, southern maritime chaparral, southern mixed chaparral, and scrub oak chaparral are considered to be environmentally sensitive habitat areas (ESHA) due to their close proximity to Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas. Multiple sections of the LCP policies cited above serve to protect and to minimize a project's adverse impacts to ESHA. The proposed project will impact approximately 10 acres of native habitat, of which 3.77 acres are ESHA, through direct construction and fuel modification requirements for future residential construction, inconsistent with the above cited provisions of the certified LCP. A reduction in the size of the project would enable the applicant to avoid or at least to greatly minimize impacts to ESHA, and thus to be consistent with the LCP.

4. On Page 12 of the staff report, the first complete paragraph shall be revised as follows:

Additionally, the proposed mitigation for impacts to ESHA is on-site preservation of existing habitat. In other words, the proposed mitigation is to conserve areas on-site that cannot be developed anyway due to physical constraints and because it is ESHA; because these areas already cannot be developed, they do not qualify as mitigation. There is no component of the mitigation that involves creation of ESHA to replace the impacted ~~40~~ 3.77 acres of habitat. Therefore, the project as approved by the City represents a net-loss of ESHA. [...]

5. On Page 26 of the staff report, the third complete paragraph shall be revised as follows:

As approved by the City, the proposed subdivision (future residences and resulting fuel modification requirements) will result in direct impacts to approximately 10 acres

of coastal sage scrub, coyote brush scrub, southern maritime chaparral, southern mixed chaparral, and scrub oak chaparral. According to the Commission's staff ecologist, after a site visit and review of the biology report for the project, the subject coastal sage scrub, ~~coyote brush scrub~~, southern maritime chaparral, southern mixed chaparral, and scrub oak chaparral are considered to be an environmentally sensitive habitat area (ESHA) due to their close proximity to Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas. [...]

6. On Page 32 of the staff report, the third paragraph shall be revised as follows:

Multiple sections of the LCP policies cited above serve to protect and to minimize a project's adverse impacts to ESHA. While LCP Policy 10.1 does call for protection of ESHA on steep slopes, it is clearly not the only LCP policy that applies to ESHA. LCP Goal 10 calls for the protection of ESHA in lagoons and their uplands and coastal sage scrub and coastal mixed chaparral habitats. LCP Policy 10.5 mandates protection of environmentally sensitive Coastal Mixed Chaparral and Coastal Sage Scrub habitats and LCP Policy 10.9 prohibits actions that adversely affect existing wildlife habitats around Batiquitos Lagoon and its adjacent uplands. The proposed project will impact approximately ~~40~~ 3.77 acres of ESHA through construction and fuel modification zones. It therefore is inconsistent with the above cited resource protection policies of the LCP. For example, the proposed project fails to preserve the integrity, function, productivity and long term viability of ESHA, it does not minimize fragmentation of natural areas, it does not preserve existing wildlife habitats, and it fails to conserve coastal mixed chaparral or coastal sage scrub.

7. On Page 32 of the staff report, the third sentence of the fourth paragraph shall be revised as follows:

There is no component of the mitigation that involves creation of ESHA to replace the impacted ~~40~~ 3.77 acres of habitat.

8. On Page 35 of the staff report, the third complete paragraph shall be revised as follows:

The project EIR states that the project parcel would not function as a regional corridor or linkage due to 'dense urbanization' in surrounding areas. However, the parcel is part of a large north to south wildlife corridor that connects to Batiquitos Lagoon and is part of a large east to west corridor along the south side of Batiquitos Lagoon. The Lagoon is in turn connected to other open space areas that could potentially function as wildlife corridors. Therefore, it appears that the proposed parcel could function as a regional wildlife corridor. ~~Although, an existing public trail that parallels the eastern edge of the proposed development parcel and currently has chain link fences on each side of it, probably inhibits movement of some wildlife at the current time, the fences could be removed in the future or sections of the fence could be taken out~~ An existing public trail parallels the eastern edge of the proposed development parcel and currently has 3 foot chain link fences on each side of it which likely inhibits movement of some wildlife at the current time. The public trail was a special condition of a previous CDP

approved by the Commission (CDP # 6-96-018). The 3 foot fencing was a requirement of the wildlife agencies in order to dissuade people from creating homeless encampments in the open space. Since the time of installation of the fence, the surrounding areas have been more fully developed and the risk of encampments has decreased. The wildlife agencies have stated that the chain link fences could be replaced with a split rail fence in the future in order to facilitate wildlife movement. Therefore, the proposed development is inconsistent with the certified LCP requirements pertaining to preserving important wildlife corridors and must be denied.

Th 15a

FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS

Date and time of communication: February 02, 2011, 8:08 a.m.

Location of communication: Received a forwarded e-mail from Fortuna City Hall  
(If communication was sent by mail or  
facsimile, indicated the means of transmission.)

Identity of person(s) initiating communication: Anne Blemker

Identity of person(s) receiving communication: Kenneth E. Zanzi

Name or description of project: Representing multiple applicants

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

*Requesting an hour ex parte discussion per attached e-mail.*

January 8, 2011  
Date

*Signature on file*

*Signature of Commissioner*

If communication occurred seven (7) 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 (7) 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 (7) 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.

**From:** Anne Blemker [mailto:ablemker@mccabeandcompany.net]  
**Sent:** Tuesday, February 01, 2011 5:33 PM  
**To:** k zanzl  
**Subject:** RE: February Briefing Request

Commissioner Zanzl,

Just following up to see if you'd be available for a briefing on any of the items listed below. Thanks for your time.

Anne

**From:** Anne Blemker  
**Sent:** Thursday, January 27, 2011 9:35 AM  
**To:** Ken Zanzl (kzanzl@cl.fortuna.ca.us)  
**Cc:** Susan McCabe  
**Subject:** February Briefing Request

Good Morning, Commissioner Zanzl;

We're representing multiple applicants at the upcoming February hearing and would appreciate an opportunity to brief you on the following items:

- **WBa:** Poseldon Resources, Condition Compliance for Marine Life Mitigation Plan
- **W14a:** Shea Homes-Parkside, CDP for geologic testing w/archaeological and Native American monitoring
- **Th14a:** City of San Diego LCPA Resubmittal, Pt. Loma Townhomes
- **Th15a:** Westbridge, Appeal of residential subdivision approved by City of Encinitas
- **F19a:** Seaworld, Construction of new manta ray ride/attraction

Due to the number of items we've got up, we'll probably need about an hour to discuss them all. We could either do that all in one briefing or break it into two separate calls. Please let me know your preference and availability.

Additionally, Susan suggested I arrange a separate time to get together aside from the ex parte

Page 2 of 2

briefings. If you're getting into San Diego on Tuesday evening before the hearing, perhaps we could all meet for coffee or drinks. Let me know if that might work for you.

Thank you,  
Anne

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Th15a

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February 3, 2011

File No. 50160

**VIA OVERNIGHT DELIVERY**

California Coastal Commission  
7575 Metropolitan Drive, Suite 103  
San Diego, CA 92108-4402

FEB 04 2011

**Re: Appeal Number A-6-ENC-09-050  
Hearing date: February 10, 2011  
Agenda Item No. Th15a  
La Costa Avenue, City of Encinitas**

Dear Chairperson Wan and Members of the Commission:

We represent Westbridge Financial, the applicant for the coastal development permit ("CDP") which is the subject of this appeal.

Westbridge proposes to subdivide a 56.94 acre parcel into two open space lots totaling 37.48 acres, 19 single family residential home lots totaling 6.79 acres, a private street lot totaling 2.27 acres and a 9.13 acre "not a part" lot located within the City of Carlsbad (the "Project"). Of the 47.81 acres within the City of Encinitas, 78 percent will be preserved as open space. The proposed residential lots would be located on the flatter, easterly portion of the property.

In approving the Project, the City found that the Project complied with all LCP policies with the exception of policies relating to filling of wetlands. However, it is undisputed that the only feasible access to the Property is to build a road which crosses the wetlands. Therefore, the City found that the strict application of the LCP's wetland policy would preclude any development and would result in a taking. However, the City conditioned the Project to reduce the impact on wetlands as much as possible: only 0.05 acres of wetlands will be impacted. Westbridge will mitigate these impacts on-site at a 7-1 ratio.

The staff report recommendation of denial is not supported by the facts or the law and is contrary to the plain language of the LCP. The staff report is based on policies, including policies relating to Environmentally Sensitive Habitat Area ("ESHA"), which conflict with the City's certified LCP. The Commission has no power to add or alter the LCP policies on appeal of a CDP.<sup>1</sup>

<sup>1</sup> It is important to note that the project site is outside of the appellate jurisdiction of the Coastal Commission. The only reason why this Project is subject to Commission review is because the Project is adjacent to a wetland. However, rather than confining its review to wetland-related issues,

**Letter from Applicant's  
Representative  
(with attachment)**

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(*Security National Guaranty Co. v. California Coastal Commission* (2008) 159 Cal.App.4th 402, 419-420.) The LCP controls exclusively. (*Id.*)

The denial of the CDP will result in an unconstitutional taking. The number of units cannot be reduced. The City commissioned a feasibility study which concluded that a four lot alternative resulted in a negative residual land value. In other words, it would deny Westbridge any economically viable use of its property.

As the Project complies with the LCP, my client urges the Commission to deny the appeal.

**1. The Project Complies With All ESHA Protections in the LCP.**

The City determined that the Project complied with all LCP policies relating to ESHA. RM Policy 10.1 states that “[t]he City will minimize development impacts on coastal mixed chaparral and coastal sage scrub environmentally sensitive habitats by preserving within the inland bluff and hillside systems, all native vegetation on natural slopes of 25% grade and over other than manufactured slopes.” In other words, the LCP protects ESHA by prohibiting development of native vegetation on natural slopes of 25% grade or more. The Project complies with this policy.

Furthermore, the City imposed measures to mitigate any impacts to native vegetation. The Project will impact 0.05 acres of southern willow scrub (which is also discussed in section 2 regarding wetlands), 0.18 acres of coyote brush scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral, and 1.20 acres of non-native grassland. The southern willow scrub will be mitigated at 7:1 ratio. The coyote brush scrub, disturbed coyote brush scrub, coastal sage scrub, and disturbed coastal sage scrub will be mitigated at a 2:1 ratio.<sup>2</sup> The southern maritime chaparral will be mitigated at a 3:1 ratio. The southern mixed chaparral and scrub oak chaparral will be mitigated at a 1:1 ratio. The non-native grassland will be mitigated at a .5:1 ratio.<sup>3</sup> The mitigation ratios are supported by the LCP and the findings in the EIR.

The City’s determination is supported by the facts and the language of the LCP and the Commission should respect the City’s reasoned interpretation. “[T]he Coastal Act expressly vests in local governments, rather than the Commission, the responsibility for determining the

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the staff report has raised a host of other issues which are more appropriately left to the discretion of the City.

<sup>2</sup> Of the 19.22 acre requirement, 12.89 acres of new coastal sage scrub habitat will be on on-site. The remaining 6.33 acres will be provided by preserving a higher tier of habitat and utilizing 6.33 acres of southern maritime chaparral as an on-site mitigation credit.

<sup>3</sup> Of the .60 acre requirement, .50 acres will be provided on site and the remaining .10 acres will be provided by preserving .10 acres of southern maritime chaparral, a higher-tier habitat type.

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content of their LCP's." (*Security National Guaranty Co. v. California Coastal Commission* (2008) 159 Cal.App.4th 402, 419-420.) The Coastal Act "leaves wide discretion to a local government not only to determine the contents of its land use plans, but to choose how to implement these plans." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 573.) "After certification, the local government has discretion to choose what actions it will take to implement its LCP." (*Id.* at 42; citing *Yost, supra*, 36 Cal.3d at 572-573.)

The Commission has no authority to make changes in the LCP as part of the appeal of the CDP. (*Security National, supra*, 159 Cal.App.4th at 422.) The Coastal Act limits the grounds for a CDP appeal "to an allegation that the development does not conform to the standards set forth in the certified local coastal program...." (Pub. Res. Code § 30603 (b)(1); *Security National, supra*, 159 Cal.App.4th at 421.)

The staff report states that the property is located in the Special Study Overlay Zone, Cultural/Natural Resource Overlay Zone and that a portion of the property is located in the Natural Resource Management High Sensitivity Area. (Staff Report, p. 30.) However, none of these overlays designate the property to be ESHA. As a recent court decision held, an LCP's designation of "potentially sensitive areas" subject to further study does not mean that they are ESHAs. (See *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 842, 844.)

The staff report states that "according to the Commission's staff ecologist, the vegetation on the site is sensitive and significant portions of the site are considered to be ESHA due to their close proximity to the Batiqutos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas." (Staff Report, p. 32.) However, the only relevant consideration for determining what is protected under the LCP is whether there is "native vegetation on natural slopes of 25% grade and over" on the property. (RM Policy 10.1.) The applicant does not intend to develop those portions of the site. The LCP does not have any policies which require the preservation of vegetation on slopes less than 25% grade and the other considerations listed in the staff report not included in the LCP. The law is clear that the Commission may not alter the terms of the LCP or unilaterally designate ESHA which was not specified in the LCP upon appeal to the Commission. (*Security National, supra*, 159 Cal.App.4th at 421-422.)

The staff report claims that the mitigation for ESHA is inadequate. (Staff Report, p. 32.) As explained above, the City imposed mitigation measures will greatly enhance the native habitat on the site. The City approved this plan in conformance with the LCP requirements. The LCP controls how ESHA and other habitat types should be treated. (*Hines v. California Coastal Commission, supra*, 186 Cal.App.4th at 841-843.) The *Hines* decision also makes it clear that the LCP, not the Coastal Act, determines how various types of habitats should be mitigated. (*Id.*) Here, the staff report concedes that the LCP does not contain specific mitigation ratios. (Staff Report, p. 32.) The Project cannot be inconsistent with a LCP policy that does not exist.

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**2. There Is No Alternative to Impacting 0.05 Acres of Wetlands.**

It is undisputed that the only way the property can be developed is by having the access road in its proposed location, which is the historic access for the site. The staff report does not claim otherwise. The construction of this road will impact a very small amount of wetlands (0.05 acres), which the applicant proposes to mitigate on-site at a 7:1 ratio.

Prior to the issuance of the staff report, Westbridge understood that this issue was resolved with staff and would be dealt with by appropriate mitigation measures.

The City requires a 20-foot wide access road for a subdivision of more than 4 lots and a 16-foot wide road for up to four units. The staff report states that the City did not choose the less environmentally damaging alternative by limiting the Project to four lots. (Staff report, p. 41.) However, the City examined such an alternative as the Environmentally Superior Alternative. Nonetheless, it concluded, based on a July 7, 2008 expert feasibility study from Arens Group, Inc. that a 4-lot alternative results in a negative residual land value (-\$666,679) considering construction costs and other expenses required to develop the lots. It is important to note that this study is extremely conservative and does not take into account all costs of the Project, such as original purchase price and taxes. When those costs, including the \$3 million purchase price are taken into account, the residual land value would be even less.

Based on this evidence, the City concluded that a four-unit project was not financially feasible, would deprive Westbridge of any beneficial use of its property, and would result in an unconstitutional taking. Therefore, as explained further in section 5 below, the City permitted the minor impacts to wetlands because the City's LCP and the Coastal Act cannot be construed to result in a taking. (Pub. Res. Code, § 30010.)

**3. The Constraints of the Site Make it Impossible to Redesign the Project.**

The staff report states that the site includes an area which is not ESHA which "is large enough to accommodate several homes." The staff report attaches Exhibit 8, which depicts the non-ESHA areas of the property. However, as the attached Exhibit A shows, the site is very constrained and the staff report's exhibit does not take into account the 100 foot fuel buffer setback and 50 foot wetland setback. When those buffers are taken into account, the remaining buildable area is only 1.4 acres.

**4. There Is No Support for Denying the Project on Any Other Basis.**

Westbridge has been working with staff to address their concerns and understood that, other than the ESHA and takings issues, all other issues could be dealt with by the Commission imposing appropriate conditions. Therefore, Westbridge was disappointed to see that these issues have been raised in the staff report as grounds to deny the CDP.

The staff report states that the Project is inconsistent with the visual resource policies of the LCP. (Staff Report, p. 44-45.) However, the City found the project to be consistent with

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those policies and imposed appropriate mitigation measures. The staff report only specifies one policy that it claims the Project is inconsistent with: RM Policy 4.9 which requires the use of natural colors, materials and landscaping. However, as the staff report concedes, the Project can be conditioned to require natural colors and native landscaping. This is not a basis to deny the CDP.

The staff report states that the property *could* function as a wildlife corridor. (Staff Report, p. 35.) This is inconsistent with the conclusions in the EIR, which stated that it does not and could not function as a wildlife corridor. More importantly, existing fences inhibit wildlife movement, which the staff report concedes. This is an existing condition which is not a result of the proposed project. The Commission has no authority to impose conditions to remedy an existing condition that the Project does not create. (See *Liberty v. California Coastal Commission* (1980) 113 Cal. App. 3d 491, 504.) To do so would be an illegal taking.

The staff report states that the Project does not provide an adequate fuel modification buffer in some areas. (Staff Report, p. 36.) However, as the staff report concedes, the Encinitas Fire Marshall approved the proposed limited buffer in some areas of the Project because of other measures incorporated into the Project such as restrictive design and materials that provide sufficient fire protection. Furthermore, the whole reason for a smaller buffer was to minimize impacts to native habitat. In any event, the staff report concedes that the issue could be addressed through appropriate conditions. It is not a basis to deny the CDP.

#### 5. Denial of the CDP Would Result In An Unconstitutional Taking.

The Coastal Act is clear that it cannot be construed to cause a taking of property without just compensation. (Pub. Res. Code, § 30010.) Thus, where a restriction would require the denial of a permit, and the denial would, in turn, deprive an owner of the economic benefit or productive use of his or her land, the Commission must grant the permit with conditions that mitigate the impacts that limitations were designed to prevent, but also allow a property owner a constitutionally reasonable economic use of his or her property. (See *McAllister v. California Coastal Commission* (2008) 169 Cal.App.4th 912, 939.)

This rule applies to both the ESHA and wetlands constraints on the Property. In other words, irrespective of the language of the LCP or the Coastal Act, the Commission may not apply ESHA and wetland policies in a way which would deny Westbridge any economic benefit or productive use of the land.

With respect to wetlands, the only way that the property can be developed is by impacting 0.05 acres of wetlands, which the applicant proposes to mitigate on-site at a 7:1 ratio. It is undisputed that the location of the proposed access road is the only place where the access road to the Project can be located and is the historic access to the site. As explained above, the City requires a 20-foot wide access road for a subdivision of more than four lots and a 16-foot wide road for up to four units. The City rejected the four-lot alternative because, based on substantial evidence in the record, including Arens Group, Inc.'s feasibility study, a four-lot alternative would deprive an owner of the economic benefit or productive use of the Property, and, therefore, restricting the applicant to four lots would be a taking.

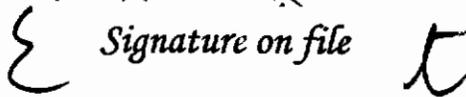
With respect to ESHA, the staff report also mentions the four-lot alternative as an Environmentally Superior Alternative which would reduce impacts to ESHA. (Staff Report, p. 33.) It also states that a one-lot alternative should be considered. However, the City concluded a four-lot alternative would deprive the property owner of all economic benefit or productive use of the Property. It goes without saying that a one-lot alternative would be even worse.

The staff report ESHA discussion states that the Commission's staff ecologist provided the applicant with an exhibit showing the non-ESHA areas of the property and that those areas are large enough to accommodate several homes. (Staff Report, p. 33) However, as explained above in section 3 and depicted on Exhibit A, there are other constraints on the site, including mandated buffers, which make the development of a large part of the non-ESHA area impossible. In fact, taking required buffers into account, only 1.4 acres would remain buildable.

Simply put, denying the CDP by applying ESHA and wetland policies in the manner suggested in the staff report will result in a taking of Westbridge's property. This conclusion is supported by substantial evidence in the record before the City and the Coastal Commission, including the expert feasibility study from Arens Group, Inc., the EIR and the City's findings. There is no evidence whatsoever, let alone substantial evidence, to support the position in the staff report that a less than 19-lot subdivision is economically feasible.

There is no basis to deny Westbridge's project based on the policies in the LCP. Westbridge respectfully requests that the Commission deny the appeal.

Very truly yours,

 *Signature on file*  
Edward C. Dygert

ECD/mkr

Exhibit A (will be sent under separate cover)

cc: Coastal Commission Staff/San Diego

50160\4055121v5



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February 7, 2011

File No. 50160

**VIA OVERNIGHT DELIVERY**

California Coastal Commission  
7575 Metropolitan Drive, Suite 103  
San Diego, CA 92108-4402

**RECEIVED**

**FEB 08 2011**

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

**Re: Appeal Number A-6-ENC-09-050  
Hearing date: February 10, 2011  
Agenda Item No. Th15a  
La Costa Avenue, City of Encinitas**

Dear Chairperson Wan and Members of the Commission:

We represent Westbridge Financial, the applicant for the coastal development permit ("CDP") which is the subject of this appeal.

Pursuant to my letter dated February 3, 2011, enclosed please find Exhibit A (25 copies per your request). I look forward to meeting you at Thursday's hearings.

Very truly yours,

*Signature on file*  
Edward C. Dygert

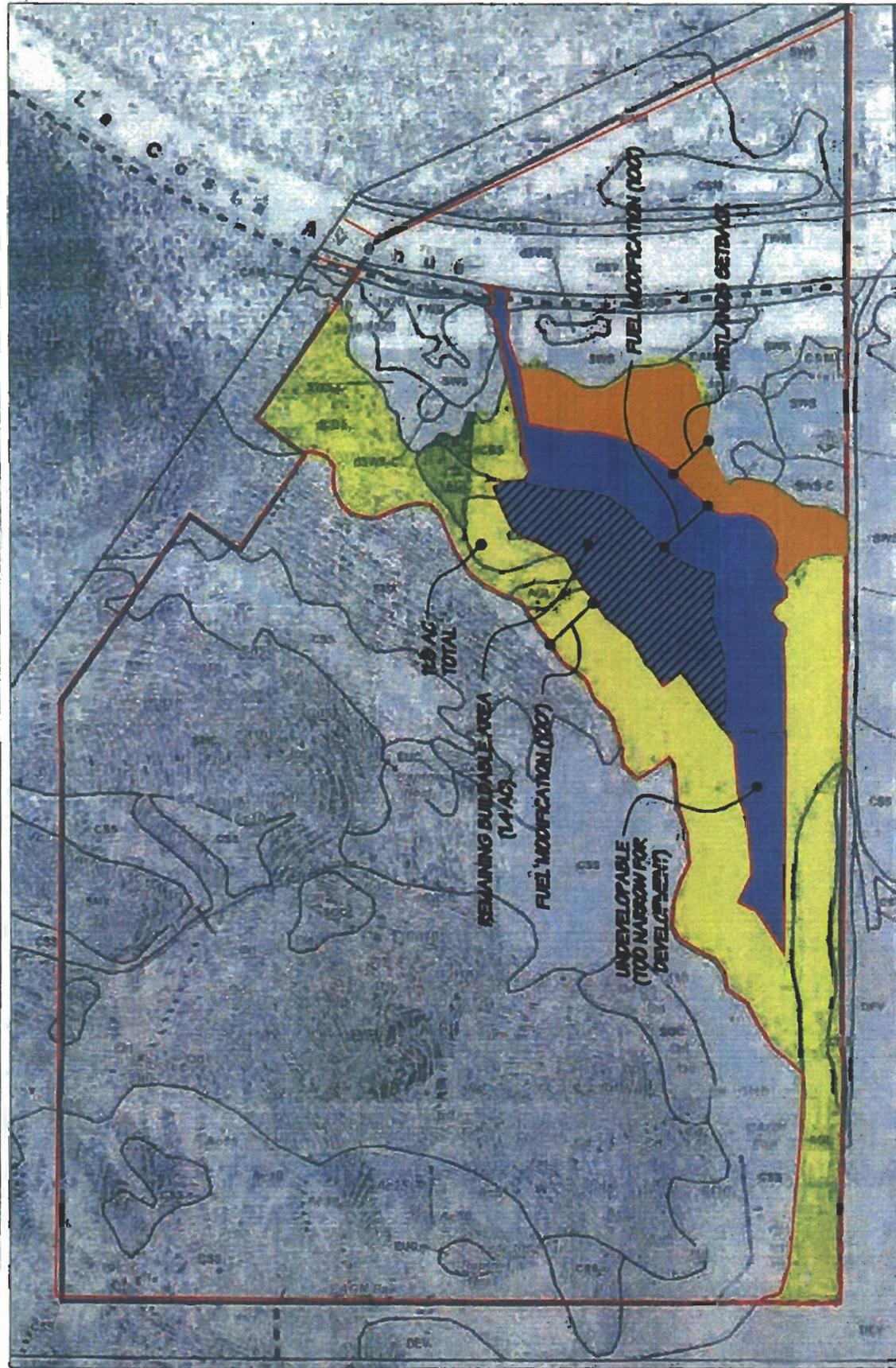
ECD/mkr

Enclosure (Exhibit A)

50160\4055121v6

cc: Coastal Commission Staff/San Diego (w/encl.)

29



Civil Engineering • Environmental • Land Use Planning  
 2545 Second Avenue  
 San Diego, CA 92101  
 (619) 522-6200 (619) 522-4210 Fax

Consultants, Inc.



(NO SCALE)



Th 152

FRIENDS OF BATIQUITOS LAGOON

P.O. BOX 2736, LEUCADIA, CALIFORNIA 92024

January 27, 2011

California Coastal Commissioners  
California Coastal Commission  
San Diego Area  
7575 Metropolitan Drive, Suite 103  
San Diego CA 92108-4421

RECEIVED

FEB 07 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

RE: APPEAL NO.: A-6-ENC-09-050

Dear Commissioners,

Thank you for this opportunity to comment.

The Friends of Batiquitos Lagoon apologize for having let the zoning of this small piece of sensitive habitat slip by unnoticed rather than our being diligent in securing it as natural open space and a piece of the Habitat Conservation Plans of Carlsbad and Encinitas. We should have been more alert.

Nevertheless, Coastal Commission staff has performed their duty admirably and we thoroughly support the staff recommendation of DENIAL.

In every way, this property signals the need for habitat protection. It is surrounded by protected lands, shelters threatened and endangered species, contains wetlands, southern maritime chaparral, coastal sage scrub and violates the Local Coastal Plan. We do not know what city personnel were thinking to allow this property to get so far along in the process. None of us have paid good attention, and again we thank Coastal Commission Staff for their lawful and responsible performance of their mandate.

Just today Friends of the Lagoon viewed the property from the fenced retirement development on its borders. The retirement complex is fenced off and residents cannot approach the protected areas. A fenced and guarded trail follows the border between the properties, further protecting wildlife. There is no access from surrounding development.

We ask you to support your staff recommendation for all the reasons in their report and vote for denial of this project.

Signature

*Signature on file*

Dolores Welty  
Chairperson

LETTERS IN SUPPORT OF  
STAFF RECOMMENDATION

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Th 15 a

Martha McCarter  
2023 Lemonberry Lane  
Carlsbad, CA 92009

RECEIVED

FEB 07 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

California Coastal Commission  
Baticuitos Bluffs Project  
Metropolitan Dr. - Suite 103  
San Diego, DA 92108

Dear California Coastal Commission,

You will be considering the Baticuitos Bluffs Project on February 10<sup>th</sup>. Unfortunately I will be out of town at least until the 9<sup>th</sup> so I am writing my objections to this project. I realize that there are different rules in different districts. I am somewhat familiar with the Rancho Santa Fe Fire district because my husband was on the Board there. I was on the San Dieguito Planning Group for ten years and we considered cases where access was important. My immediate reaction that is that it would be dangerous for the people who would be living there to have on one access to the houses. This will be even more important when you realize that anyone coming out of that development would have to turn right because you can't cross La Costa right there.

I talked to a man at the Encinitas Fire Department and he is going to e-mail the present ruling on that subject. I gather that the access permit may be different under a later Fire Code which evidently is not yet in effect. I will send you what he is going to e-mail.

Meantime I am opposed to approving this development unless there are two entrances and exits.

Sincerely yours,

*Signature on file* *ar ter*

**Subject: FW: Question response!**  
**Date:** Thursday, February 3, 2011 4:50 PM  
**From:** George McNeley <GMcNeley@ci.encinitas.ca.us>  
**To:** <mjmccarter@lcglen.com>

**RECEIVED**

FEB 07 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

Here is the document that I had talked to you about on the phone earlier today. Section 503.1.2 below is a section out of the 2010 Fire Code which has been amended locally by the City of Encinitas. A code can be amended locally to be more restrictive than that which has been adopted by the State. As I stated on the telephone, this would be the requirements for a project that has is being submitted for plan check today based on the 2010 California Fire Code amended locally and approved by council vote as stated below. For projects that have been submitted prior to January 1, 2010 they would fall under the 2007 California Fire Code with any amendments applicable to any section that were adopted by the City of Encinitas through council vote.

I hope this helps to answer your question pertaining to a single access road into a residential project. Should you have any additional questions please feel free to contact me directly at the number listed below.

**Section 503.1.2 Additional Access**

The fire code official is authorized to require more than one fire apparatus access road based on the potential for impairment of a single road by vehicle congestion, condition of terrain, climatic conditions or other factors that could limit access.

The Chief may require one or more secondary means of access to a project: development or area where he deems that such access is necessary for emergency operations and/or evacuation. The maximum length of a dead-end road, including all dead-end roads accessed from that dead-end road, shall not exceed the following cumulative lengths, regardless of the number of parcels served:

Parcels zoned for less than 1 acre	800 feet
Parcels zoned for 1 acre to 4.99 acres	1,320 feet
Parcels zoned for 5 acres to 19.99 acres	2,640 feet
Parcels zoned for 20 acres or larger	5,280 feet

These requirements may be modified when in the opinion of the Chief conditions warrant. All lengths shall be measured from the edge of the roadway sizes, requiring different length limits, the shortest allowable length shall apply.

Section 503.2.1 Dimensions Fire apparatus access roads shall have an unobstructed improved width of not less than 24 feet, except for single-family residential driveways; serving no more than two single-family dwellings, shall have a minimum of 16 feet of unobstructed improved width.

**33**

1. Fire access roadways, gated entrances with card readers, guard stations or center medians, which have separated lanes of one-way traffic, shall be not less than 14 feet wide per lane.

*George McNeley, CET*

Deputy Fire Marshal II  
City of Encinitas  
505 S. Vulcan  
Encinitas, CA 92024  
(760) 633-2823 Office  
(760) 943-2226 Fax

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FEB 02 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

Harry & Betty Fund  
2008 Mesquite Court  
Carlsbad, CA 92009

January 30, 2011

California Coastal Commission  
7575 Metropolitan Drive  
Suite 103  
San Diego, CA 92108

BATAQUITOS BLUFFS PROJECT

Ladies and Gentlemen of the Commission, this Project is an absolute abomination. It is greed incarnate, and an insult to all Californians who wish to protect those few beautiful and natural pieces of wild land left near our ocean.

For a mile going East from I-5 to Camino Real, this land is a singular, uninterrupted piece of absolutely natural greenery and wildlife. That it faces the Lagoon adds even more grandeur and serenity for those of us fortunate to have this marvelous landscape in our life.

You will no doubt have received many comments as to its traffic implications; we leave that to the experts. But to allow these folks to snatch off a corner of this magnificent piece of land for the purpose of 18 homes would be unforgiveable!

We are as mindful and respectful of the rights of business to advance and prosper. But we are equally of the mind that when such business so nakedly sneers at the rights of thousands of citizens who day in, and day out, are refreshed and awed by such natural beauty, then such a project is not deserving of consideration by this Commission.

We respectfully urge the Commission to once and for all deny this application.

*df*

*Signature on file*

*Signature on file*

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ES



# Batiquitos Lagoon Foundation

*Preserve, Protect, and Enhance*

**RECEIVED**

FEB 04 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

January 31, 2011

California Coastal Commission  
Batiquitos Bluffs Project Appeal  
7575 Metropolitan Drive, Suite 103  
San Diego, CA 92108-4402

**Subject: Appeal No. A-6-ENC-09-50 (Westbridge Financial, Encinitas),  
Batiquitos Bluffs Project**

TO WHOM IT MAY CONCERN:

The Batiquitos Lagoon Foundation (BLF) is a non-profit organization devoted to *preserving, protecting and enhancing* Batiquitos Lagoon and its associated watershed and adjacent habitat since 1983. We appreciate this opportunity to strongly support your staff's recommendation concerning **Appeal No. A-6-ENC-09-50 (Westbridge Financial, Encinitas), Batiquitos Bluffs Project.**

We strongly support the appellants position that *the City of Encinitas' (City) decision is inconsistent with several provisions of the City's LCP related to protection of environmentally sensitive habitat areas (ESHA), wetlands, visual resources, biological corridors, and size and extent of required buffers. In particular, the appellants allege that the development is inconsistent with the LCP provisions that (1) limit the fill of wetlands to specific uses and only if there is no less environmentally damaging alternative, (2) require that all on-site wetlands and buffer areas be protected by the application of an open space easement, (3) require preservation of Batiquitos Lagoon and its adjacent upland areas by prohibiting activities that adversely affect wetlands or wildlife habitat, (4) require preservation of coastal sage scrub habitat and coastal mixed chaparral habitat, (5) require maintenance and enhancement of scenic highways/visual corridor view sheds, (6) require conservation of biological corridors, (7) require that consultation and great weight be given to the comments of the wildlife resource agencies, (8) require adequate wetland and fuel modification buffers, and (9) require adequate mitigation for impacts to ESHA.*

Accordingly, the BLF strongly recommends that the Commission makes the determination that substantial issues exist and that you deny the application on de novo. The BLF feels that the proposed project will result in adverse impacts to environmentally sensitive habitat areas (ESHA), adverse impacts to wildlife corridors, adverse impacts to wetlands, and adverse impacts to visual resources.

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In particular, this project will impact approximately 10 acres of ESHA, which includes coastal sage scrub, coyote brush scrub, southern maritime Chaparral and scrub oak chaparral. Additionally, the project will impact 0.05 acres of southern willow scrub wetland. These adverse impacts cause the proposed project to be inconsistent with the certified Local Coastal Program (LCP) and with Chapter 3 policies of the Coastal Act and it must be denied.

The BLF appreciates the opportunity to provide input on the appeal of the proposed project.

*Signature on file*

*F* Fred C. Sandquist  
President

Th 15a

La Costa Glen February 2, 2011

Mary Hanson Hirsch  
7831 Rush Rose Drive, Oak 318  
Carlsbad, CA 92009

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FEB 08 2011

CALIFORNIA  
COASTAL COMMISSION  
SAN DIEGO COAST DISTRICT

Gentlemen of the Coastal Commission,

This is to urge you to deny the permit under consideration regarding the Batiquitos Bluffs Project.

Overall it would be a setback to the recovery process of the sites and later for Southern California lagoons and estuaries.

The evidence is before one's eyes regarding the area. In the last decade I studied with Dr. David Suttou at the University of Florida Research and Education Center, Fort Lauderdale. For 5 1/2 years I concentrated on graduate courses in Environmental Horticulture with the specialty of wetlands, was published in

**2**

Aquatics journal, and received  
a scholarship to continue the  
study. As you can imagine,  
the Everglades are of high  
concern in that state, so there  
is much to observe, study, and  
fight for correcting and then  
preserving. It is so easy  
to backslide and to lose  
hard work and hard-won  
progress.

For me, it seems that no  
possible good could be  
obtained by going forward  
with the project to any degree.  
"Love the Earth, and let it be"  
is more than a quaint saying.

Sincerely,

Signature on file

Signature on file



## CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA  
7575 METROPOLITAN DRIVE, SUITE 103  
SAN DIEGO, CA 92108-4421  
(619) 767-2370



# Th15a

Filed: August 25, 2009  
49th Day: Waived  
Staff: EStevens-SD  
Staff Report: January 20, 2011  
Hearing Date: February 9-11, 2011

## STAFF REPORT AND RECOMMENDATION ON APPEAL

LOCAL GOVERNMENT: City of Encinitas

DECISION: Approved with Conditions

APPEAL NO.: A-6-ENC-09-050

APPLICANT: Westbridge Financial, Attn Peter Wenner

PROJECT DESCRIPTION: Subdivision of a 56.94 acre lot into 2 open space lots, 19 lots for single-family residential development, a private street lot and a 9.13 acre "Not A Part" lot located in the City of Carlsbad.

PROJECT LOCATION: South and north sides of La Costa Avenue, approximately 0.25 miles west of El Camino Real, Encinitas and Carlsbad, San Diego County  
APN: 216-122-38 & 216-122-25

APPELLANTS: Commissioner Sara Wan and Commissioner Patrick Kruer, Dolores Welty, Russ Whitman, Joan Herskowitz and Dave Grubb

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### SUMMARY OF STAFF RECOMMENDATION:

The staff recommends that the Commission, after public hearing, determine that substantial issue exists with respect to the grounds on which the appeal has been filed. Specifically, the local government decision, which involves impacts to 0.05 acres of riparian wetlands and approximately 10 acres of environmentally sensitive habitat area (ESHA), raises a substantial issue with regard to the project's consistency with the sensitive resource and visual protection policies of the certified Encinitas LCP.

Commission staff recommends denial of the application on de novo. The proposed project will result in adverse impacts to environmentally sensitive habitat areas (ESHA), adverse impacts to wildlife corridors, adverse impacts to wetlands, and adverse impacts to visual resources. In particular this project will impact approximately 10 acres of ESHA, which includes coastal sage scrub, coyote brush scrub, southern maritime chaparral, and scrub oak chaparral. Additionally, the project will impact 0.05 acres of

southern willow scrub wetland. These adverse impacts cause the proposed project to be inconsistent with the certified LCP and with Chapter 3 policies of the Coastal Act and it must be denied.

#### STAFF NOTES:

Following the filing of the appeals to the Coastal Commission, the applicant waived its rights to a hearing within the prescribed 49 days of filing in order to facilitate the hearing of both substantial issue and, potentially, the de novo agenda items at the same Commission hearing. In addition, the subject staff recommendation includes both the Substantial Issue and De Novo Staff Reports.

Standard of Review: Certified Encinitas LCP and the public access and Recreation policies of the Coastal Act.

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**SUBSTANTIVE FILE DOCUMENTS:** Certified City of Encinitas Local Coastal Program (LCP), City of Encinitas Final Resolution Nos. PC 2009-20 and 2009-21 received August 10, 2009, Final EIR dated May 21, 2009 by T&B Planning Consultants, Inc.; Appeal applications from Commissioners Wan and Kruer dated August 24, 2009, Dolores Welty dated August 20, 2009, Russ Whitman dated August 24, 2009, Joan Herskowitz and Dave Grubb dated August 20, 2009. Letters from the Applicant dated August 3, 2010 and October 15, 2010. Least Bell's Vireo Surveys at Selected Drainages in San Diego County, California, 2008 Data Summary received August 24, 2009, Feasibility Discussion of Four-Lot Residential Development dated July 7, 2008.

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#### I. Appellants Contend That.

The appellants contend that the City of Encinitas' (City) decision is inconsistent with several provisions of the City's LCP related to protection of environmentally sensitive habitat areas (ESHA), wetlands, visual resources, biological corridors, and size and extent of required buffers. In particular, the appellants allege that the development is inconsistent with the LCP provisions that (1) limit the fill of wetlands to specific uses and only if there is no less environmentally damaging alternative, (2) require that all on-site wetlands and buffer areas be protected by the application of an open space easement, (3) require preservation of Batiquitos Lagoon and its adjacent upland areas by prohibiting activities that adversely affect wetlands or wildlife habitat, (4) require preservation of coastal sage scrub habitat and coastal mixed chaparral habitat, (5) require maintenance and enhancement of scenic highways/visual corridor viewsheds, (6) require conservation of biological corridors, (7) require that consultation and great weight be given to the comments of the wildlife resource agencies, (8) require adequate wetland and fuel modification buffers, and (9) require adequate mitigation for impacts to ESHA.

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## II. Local Government Action.

The Coastal Development Permit was approved by the Encinitas Planning Commission on July 23, 2009. Specific conditions were attached which, among other things, require a maximum 20 ft. wide access road, 1 affordable housing unit, 18 ft. maximum home heights, 2 connections to the City of Carlsbad public trail located directly east of the proposed development, recordation of a perpetual biological conservation easement over the sensitive habitat that is to be avoided/preserved on-site, hand thinning for all brush management activities, on-site mitigation for impacts to 0.05 acres of southern willow scrub at a minimum 7:1 ratio (1.4:1 for habitat enhancement and 5.6:1 for habitat creation), on-site mitigation for impacts to 0.18 acres of coyote brush scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, and 0.07 acres of disturbed coastal sage scrub at a 2:1 ratio (preservation of 12.89 acres of coastal sage scrub habitat and 6.33 acres of southern maritime chaparral habitat on-site), on-site mitigation for impacts to 0.11 acres of southern maritime chaparral at a 3:1 ratio, on-site mitigation for impacts to 0.27 acres of southern mixed chaparral and 0.40 acres of scrub oak chaparral at a 1:1 ratio through preservation on-site, and on-site mitigation for impacts to 1.20 acres of annual non-native grassland at a 0.05:1 ratio (preserving 0.05 acres of non-native grassland habitat and 0.10 acres of southern maritime chaparral). The Coastal Development Permit was not appealed to the City Council.

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## III. Appeal Procedures.

After certification of a municipality's Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permit applications. One example is that the approval of projects within cities and counties may be appealed if the projects are located within mapped appealable areas. The grounds for such an appeal are limited to the assertion that "development does not conform to the standards set forth in the certified local coastal program or the [Coastal Act] public access policies." Cal. Pub. Res. Code § 30603(b)(1).

After the local government has taken final action on an appealable project, it must send a notice of that final action (NOFA) to the Commission. Cal. Pub. Res. Code § 30603(d); 14 C.C.R. § 13571. Upon proper receipt of a valid NOFA, the Commission establishes an appeal period, which runs for 10 working days. Cal. Pub. Res. Code § 30603(c); 14 C.C.R. § 13110 and 13111(b). If an appeal is filed during the appeal period, the Commission must "notify the local government and the applicant that the effective date of the local government action has been suspended," 14 C.C.R. § 13572, and it must set the appeal for a hearing no later than 49 days after the date on which the appeal was filed. Cal. Pub. Res. Code § 30621(a).

Section 30625(b)(2) of the Coastal Act requires the Commission to hear an appeal of the sort involved here unless the Commission determines that no substantial issue is raised by the appeal. If the staff recommends "substantial issue" and no Commissioner objects, the

Commission will proceed directly to the de novo portion of the hearing on the merits of the project then, or at a later date.

If the staff recommends “no substantial issue” or the Commission decides to hear arguments and vote on the substantial issue question, proponents and opponents will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If a substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project either immediately or at a subsequent meeting. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable test for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program.

In addition, for projects located between the sea and the first public road paralleling the sea, Sec. 30604(c) of the Coastal Act requires that, for a permit to be granted, a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act.

The only persons qualified to testify before the Commission at the “substantial issue” stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

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#### IV. Staff Recommendation On Substantial Issue.

The staff recommends the Commission adopt the following resolution:

**MOTION:**        *I move that the Commission determine that Appeal No. A-6-ENC-09-050 raises **NO** substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.*

#### **STAFF RECOMMENDATION:**

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

**RESOLUTION TO FIND SUBSTANTIAL ISSUE:**

The Commission hereby finds that Appeal No. *A-6-ENC-09-050* presents a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

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**V. Findings and Declarations.**

The Commission finds and declares as follows:

**1. Project Description.** The coastal permit, as approved by the City of Encinitas (City), allows for the subdividing of a single 56.94 acre parcel into 2 open space lots totaling 37.48 acres, 19 single family residential home lots totaling 6.79 acres, a private street lot totaling 2.27 acres and a 9.13 acre “Not a Part” lot located within the City of Carlsbad. The project also includes the construction of the access road, streets, grading for the building sites and drainage improvements (see Exhibit #2). Construction of the residences is not proposed as part of the subject permit request and will require additional coastal development permitting for their construction.

The proposed development is located approximately 2.5 miles east of the shoreline in the Cities of Encinitas and Carlsbad. The majority of the parcel (47.81 acres) is located in the City of Encinitas, with 9.13 acres located in the City of Carlsbad (see Exhibit #1). The parcel straddles La Costa Avenue, an east/west coastal access road that connects to El Camino Real, which is a major north/south arterial road approximately 0.25 miles east of the site. Batiquitos Lagoon lies directly north of the proposed development site. The project site is also located in the Hillside/Inland Bluff Overlay Zone, the Scenic/Visual Corridor Overlay Zone, the Floodplain Overlay Zone, and the Cultural/Natural Resources Overlay Zone as identified in the certified City of Encinitas LCP.

The 56.94 acre project site is located just south of the southwest corner of Batiquitos Lagoon; 47.81 acres are located to the south of La Costa Avenue and 9.13 acres are located within and to the north of La Costa Avenue. The 9.13 acre northern portion of the parcel is located within the City of Carlsbad and is zoned as open space. The Carlsbad portion of the parcel is relatively flat and consists of 6.1 acres of right-of-way (ROW) for La Costa Avenue and 3.03 acres of wetland areas and a thin strip of disturbed coastal sage scrub along its border with La Costa Avenue. The Carlsbad portion of the parcel is bounded by open space associated with Batiquitos Lagoon to the north, east, and west, and La Costa Avenue to the South. The 47.81 acre southern portion of the parcel is located within the City of Encinitas, in the community of Leucadia. The Encinitas portion consists of a small strip of disturbed coastal sage scrub along the border with La Costa Avenue, 3.42 acres of wetland areas stretching along the entire northern portion of the property, 19.34 acres of lands with slopes in excess of 25% grade on the southwestern half of the site, and gently to moderately sloping terrain in the central and northeastern portions of the site (see Exhibit #3). The site is densely vegetated with native upland

communities, native wetland communities, and non-native grassland. Additionally, six plant species considered sensitive by the California Native Plant Society occur on-site (see Exhibit #4). The Encinitas portion of the parcel is bounded by developed land and preserved open space to the east and south, several natural bluffs and open space land uses border the site to the west and southwest, and La Costa Avenue to the north. The east side of the parcel is also adjacent to Encinitas Creek, which is conserved as natural open space. An unimproved access road is currently used to access the Encinitas portion of the parcel.

A proposed 20 ft. wide access road with a soft bottom culvert, located in the same location as the existing smaller unimproved access road, would impact 0.05 acres of southern willow scrub wetland habitat (see Exhibit #5). The wetland impacts are proposed to be mitigated on-site at a ratio of 7:1. The lots for single family homes would be adjacent to wetland habitat on the north edge of the development. Although the EIR approved by the city states that 50 ft. wetlands buffers would be in place, the submitted exhibits appear to allow for wetlands buffers of less than 50 ft. in width in some areas. In addition, as approved by the City, the proposed subdivision (future residences and resulting fuel modification requirements) will result in direct impacts to approximately 0.18 acres of coyote brush scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral, and 1.20 acres of annual non-native grassland. The project has been conditioned by the City to require mitigation for the impacts to sensitive habitat at ratios ranging from 0.05:1 to 3:1. The project site is located in the Rural Residential 1 (RR-1) zone, which allows residential development with a maximum density of 1.0 unit per net acre. Subdivisions resulting in the creation of five lots or greater are also required to comply with the mid-range density of 0.75 units per net area. Lot averaging was used to cluster the houses into a smaller area in order to impact fewer wetland resources, steep slopes, and other sensitive habitat.

Because the development site is located between the sea (Batiquitos Lagoon) and the first coastal roadway (La Costa Ave), the project lies within the Commission's appellate jurisdiction. In addition, the project site lies within 100 ft. of wetlands and also appears to lie within 100 ft. of a stream, which also identifies it as being subject to the Commission's appellate jurisdiction. The subject review is an appeal of a City approved coastal development permit. As such, the standard of review is the certified Encinitas LCP and the public access and recreation policies of the Coastal Act.

**2. Protection of Environmentally Sensitive Habitat (ESHA).** The appellants also contend that approval of the project by the City is inconsistent with provisions of the City's certified LCP concerning preservation of environmentally sensitive habitat area (ESHA). Specifically, appellants contend that the City permit is inconsistent with LCP policies concerning impacts to ESHA, mitigation for impacts to ESHA, choosing the least environmentally adverse alternative, consistency with the Natural Communities Conservation Plan (NCCP), biological corridor fragmentation, and fuel modification zones. The following LCP policies are relevant to the subject appeal:

Section 30.34.050 of the certified Implementation Plan:

[. . .]

2. Biotic Resources. For proposed projects within the C/NRO (Cultural/Natural Resources Overlay) Zone which involve parcels containing ecologically sensitive plant and animal habitats, a survey by a qualified professional biologist shall be submitted by the project applicant to determine the significance of the habitats and the need for project impact mitigation by reservation, reestablishment, or other methods.

The following LUP policies relate specifically to protection of lagoons and their up-lands, coastal sage scrub habitats and coastal mixed chaparral habitats:

RM Goal 10:

The City will preserve the integrity, function, productivity, and long term viability of environmentally sensitive habitats throughout the City, including kelp-beds, ocean recreational areas, coastal water, beaches, lagoons and their up-lands, riparian areas, coastal strand areas, coastal sage scrub and coastal mixed chaparral habitats. (Coastal Act/30230/30231/30240)

Public Safety Policy 1.13:

In areas identified as susceptible to brush or wildfire hazard, the City shall provide for construction standards to reduce structural susceptibility and increase protection. Brush clearance around structures for fire safety shall not exceed a 30-foot perimeter in areas of native or significant brush, and as provided by Resource Management Policy 10.1.

RM Policy 10.1:

The City will minimize development impacts on coastal mixed chaparral and coastal sage scrub environmentally sensitive habitats by preserving within the inland bluff and hillside systems, all native vegetation on natural slopes of 25 % grade and over other than manufactured slopes. A deviation from this policy may be permitted only upon a finding that strict application thereof would preclude any reasonable use of the property (one dwelling unit per lot). This policy shall not apply to construction of roads of the City's circulation element, except to the extent that adversely impacts on habitat should be minimized to the degree feasible. Encroachments for any purpose, including fire break brush clearance around structures, shall be limited as specified in Public Safety Policy 1.2. Brush clearance, when allowed in an area of sensitive habitat or vegetation, shall be conducted by selective hand clearance. (Coastal Act/30240/30250/30251/30253)

### Public Safety Policy 1.2:

Restrict development in those areas where slope exceeds 25% as specified in the Hillside/Inland Bluff overlay zone regulations of the zoning code. Encroachment into slopes as detailed in the Hillside/Inland Bluff overlay may range from 0 percent to a maximum of 20 percent, based on a sliding scale of encroachment allowances reflective of the amount of the property within steep slopes, upon the discretionary judgment that there is no feasible alternative siting or design which eliminates or substantially reduces the need for such encroachment, and it is found that the bulk and scale of the proposed structure has been minimized to the greatest extent feasible and such encroachment is necessary for minimum site development and that the maximum contiguous area of sensitive slopes shall be preserved. Within the Coastal Zone and for the purposes of this section, “encroachment” shall constitute any activity which involves grading, construction, placement of structures or materials, paving, removal of native vegetation including clear-cutting for brush managing purposes, or other operations which would render the area incapable of supporting native vegetation or being used as wildlife habitat. Modification from this policy may be made upon the finding that strict application of this policy would preclude any reasonable use of property (one dwelling unit per legal parcel)...

### RM Policy 10.4:

The City will develop a program to acquire or preserve the entire undeveloped riparian corridor within the City that drains into the San Elijo Lagoon and Batiquitos Lagoon... (Coastal Act/30231/30240)

### RM Policy 10.5:

The City will control development design on Coastal Mixed Chaparral and Coastal Sage Scrub environmentally sensitive habitats by including all parcels containing concentrations of these habitats within the Special Study Overlay designation. The following guidelines will be used to evaluate projects for approval:

- conservation of as much existing contiguous area of Coastal Mixed Chaparral or Coastal Sage Scrub as feasible while protecting the remaining areas from highly impacting uses;
- minimize fragmentation or separation of existing contiguous natural areas.
- connection of existing natural areas with each other or other open space areas adjacent to maintain local wildlife movement corridors;
- where appropriate, based on community character and design, clustering of residential or other uses near the edges of the natural areas rather than dispersing such uses within the natural areas;

- maintenance of the broadest possible configuration of natural habitat area to aid dispersal of organisms within the habitat;
- where significant, yet isolated habitat areas exist, development shall be designed to preserve and protect them;
- conservation of the widest variety of physical and vegetational conditions on-site to maintain the highest habitat diversity;
- design of development, with adjacent uses given consideration, to maximize conformance to these guidelines; and
- preservation of rare and endangered species on-site rather than by transplantation off site. (Coastal Act/30240/30250)

In addition, all new development shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the Statewide Natural Communities Conservation Plan (NCCP) Act. Compliance with these goals shall be implemented in consultation with the United States Fish and Wildlife Service and California Department of Fish and Game.

#### RM Policy 10.9:

The City will encourage the function of San Elijo Lagoon and Batiquitos Lagoon and their adjacent uplands as viable wetlands, ecosystems and habitat for resident and migratory wildlife, by prohibiting actions (subject to the detailed provisions of RM policy 10.6) which:

- involve wetland fill or increased sedimentation into wetlands;
- Adversely decrease stream flow into the wetlands;
- Reduce tidal interchange;
- Reduce internal water circulation; or
- Adversely affect existing wildlife habitats.  
(Coastal Act/30231)

#### Special Study Overlay Zone:

...While not all Special Studies Overlay Zones will be expressly used for preserving environmentally significant areas, they will be effective in indicating those areas where development standards may be more stringent to minimize any potentially adverse impacts from development...

Natural Resource Management High Sensitivity Area:

...portions of the Planning Area that are judged to be ecologically significant by biologists and naturalists...appropriate modifications to the site plan, development densities, etc., may be required to mitigate any potential adverse impacts.

The Land Use Policy and Resource Management Policy 13.6:

Establish and preserve wildlife corridors. (Coastal Act/30231/30240)

The Environmental Impacts from New Development Policy 14.1:

The best strategy to reduce erosion and sedimentation is to reduce to the maximum extent feasible, grading and removal of vegetation. It is the policy of the City that, in any land use and development, grading and vegetation removal shall be limited to the minimum necessary. (Coastal Act/30240/30250)

As identified above, the Encinitas LCP contains several policies that provide for the protection of coastal sage scrub, southern mixed chaparral and other types of environmentally sensitive habitat. The purpose of the above cited policies is to preserve environmentally significant areas and minimize adverse impacts from new development. The subject property is located within the Special Study Overlay Zone, the Cultural/Natural Resources Overlay Zone, and portions of it are also within the Natural Resource Management High Sensitivity Area, so that development is constrained by the additional requirements that apply to these areas. The Special Study Overlay Zone is used to indicate those areas where development standards may be more stringent to minimize any potentially adverse impacts from development. The Natural Resource Management High Sensitivity Area consists of portions of the Encinitas Planning Area that are judged to be ecologically significant by biologists and naturalists.

The applicant's biology report states that the project site currently supports a thick growth of brush and trees with no active uses occurring on the property and that the area previously supported a walnut orchard, a residence, and several ancillary structures. The site straddles La Costa Avenue, a coastal access roadway (all associated development is proposed in the portion of the site to the south of La Costa Avenue). An unimproved road currently provides access to the site from La Costa Avenue. Existing residential development occur on the parcel adjacent to the southeast corner of the subject site (La Costa Glen, a senior housing community). However, the majority of the area directly adjacent to the subject site is in a natural state. To the north of the site is open space and Batiquitos Lagoon. Immediately to the east of the site is the Encinitas Creek, which is conserved as natural open space. The floodplain of Encinitas Creek exists within the project boundaries adjacent to La Costa Avenue. Finally, to the south and west of the proposed site are natural bluffs and preserved open space land.

In approving the proposed subdivision, which includes delineation of the 19 proposed building envelopes, the City has identified that approximately 0.18 acres of coyote brush

scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral supporting Nuttall's scrub oak, and 1.20 acres of annual non-native grassland will be impacted. In approving these impacts the City required mitigation ratios ranging from 0.05:1 to 3:1, through on-site conservation. The total impact of the proposed project to these native plant communities is approximately 10 acres. According to the Commission's staff ecologist, after a site visit and review of the biology report for the project, the subject coastal sage scrub, coyote brush scrub, southern maritime chaparral, and scrub oak chaparral are considered to be environmentally sensitive habitat areas (ESHA) due to their close proximity to Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas. Multiple sections of the LCP policies cited above serve to protect and to minimize a project's adverse impacts to ESHA. The proposed project will impact approximately 10 acres of ESHA through direct construction and fuel modification requirements for future residential construction, inconsistent with the above cited provisions of the certified LCP. A reduction in the size of the project would enable the applicant to avoid or at least to greatly minimize impacts to ESHA, and thus to be consistent with the LCP.

During focused protocol surveys for the on-site presence of the California Gnatcatcher that were conducted by Dudek Consulting in 2005, two pairs of Gnatcatchers were detected. The EIR states that Gnatcatcher territory will be slightly impacted, but is expected to persist. No Least Bell's Vireos were detected in 2005. However, a 2008 survey conducted by the U.S. Geological Survey, Western Ecological Research Center, detected Least Bell's Vireos in close proximity to the east of the proposed site. During the 2005 survey, no state- or federally-listed plant species were observed on-site. As described in the Biological Resources Technical Report, however, six species that are listed by the California Native Plant Society in categories ranging from its watch list to its list of rare, threatened or endangered species are found on the site.

The LCP also requires that new development be consistent with multi-species and multi-habitat preservation goals and requirements and that these goals shall be implemented in consultation with the wildlife agencies. The U.S. Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies) do not believe that the proposed development will prevent impacts to sensitive plant species. Plants within the proposed fuel modification zone (FMZ) that have the potential to be impacted include a summer holly and 20 Del Mar sand asters. The City permit mandated that all brush clearance around the Del Mar sand aster plants be accomplished through hand-thinning between May and September, and under the supervision of a qualified biologist; and that the remainder of the FMZ be hand-thinned between September 1 and February 29 under the supervision of a qualified biologist. Additionally, the monitoring biologist shall survey the area 10 days prior to planting and flag and photograph all Del Mar sand aster and summer-holly plants and the biologist will train all landscape contractor personnel to avoid the sensitive plants. However, the November 6<sup>th</sup> 2007, draft EIR comment letter from the Wildlife Agencies states, "...based on our knowledge of the difficulty of

successfully applying such restrictions within FMZs, the Wildlife Agencies would consider all the habitat within the FMZ as impacted...” Although the proposed development has involved input from the Wildlife Agencies, they disagree with many of the EIR findings for the subject development, and thus the applicant does not appear to be implementing the multi-species and multi-habitat preservation goals in consultation with these agencies. Therefore, the City’s approval raises substantial issue related to its consistency with RM Policy 10.5.

Additionally, the proposed mitigation for impacts to ESHA is on-site preservation of existing habitat. In other words, the proposed mitigation is to conserve areas on-site that cannot be developed anyway due to physical constraints and because it is ESHA; because these areas already cannot be developed they do not qualify as mitigation. There is no component of the mitigation that involves creation of ESHA to replace the impacted 10 acres of habitat. Therefore, the project as approved by the City represents a net-loss of ESHA. While the City’s LCP does not contain specific mitigation ratios, the Commission has typically required a 3:1 ratio and that at least 1 component of ESHA mitigation involve the creation of habitat to help assure no net loss of habitat. Resource management Goal 10 requires the City to “preserve the integrity, function, productivity, and long term viability of environmentally sensitive habitats throughout the City.” Because the proposed mitigation represents a net-loss of ESHA, the proposed development would adversely affect existing wildlife habitats adjacent and upland of Batiquitos Lagoon which is inconsistent with the requirement of RM Policy 10.9. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to adequate mitigation for ESHA impacts.

The City approved EIR for the subject development identified an “Environmentally Superior Alternative” to the proposed 19-lot subdivision, which involved a 4-lot subdivision (see Exhibit #6 and #7). The Environmentally Superior Alternative would reduce the impact from the access road to 0.04 acres and would substantially reduce impacts to ESHA. Implementation of this alternative would avoid significant direct impacts to Del Mar sand aster, Nutall’s scrub oak, and summer-holly plants. The City found this alternative to be environmentally preferable, but discarded it due to its financial implications for the developer. The City also neglected to consider a 1-home alternative, (RM Policy 10.1 recognizes that reasonable use is one dwelling unit per lot) which would have eliminated or greatly reduced impacts to ESHA. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to protection of habitat through selection of the least environmentally adverse project.

Appellants also contend that the project, as approved by the City, fragments important existing contiguous natural areas. RM Policy 10.5 is intended to minimize fragmentation or separation of existing contiguous natural areas located in the Special Study Overlay Designation Zone and states that all new development shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the statewide NCCP Act. The vast majority of the property directly south of La Costa

Avenue, from El Camino Real to I-5, excluding the subject site and one other site is conserved permanently as open space (see exhibit 9). The one other site that is not conserved permanently as open space is located at the southeast corner of Saxony Road and La Costa Avenue and currently supports a residential home and an agricultural farm stand; the site has very limited additional development potential due to the presence of steep slopes and sensitive habitat. The project EIR states:

“...The proposed project site has been identified by the MSCP as a Biological Core Linkage Area (BCLA) and is situated within the La Costa Softline Focused Planning Area (FPA) which requires site-specific planning to maximize preserve design by ensuring connectivity to adjacent open space in the FPA. The area has potential to serve as a local wildlife corridor or linkage connecting Batiquitos Lagoon to the undeveloped slopes and riparian habitat associated with the project site, adjoining parcels, and Encinitas Creek...”

According to the Final North County Multiple Habitat Conservation Program, the biological core and linkage area (BCLA) encompasses the best remaining habitat areas within MHCP boundaries. The BCLA includes the largest remaining blocks of habitat and critical linkages between them, based on natural vegetation communities, sensitive species, topographic connectivity, and other biological considerations. The proposed development parcel is adjacent to Encinitas Creek to the east, Batiquitos Lagoon to the north and coastal sage scrub and maritime chaparral covered bluffs to the south and west. The proposed development could adversely impact the existing east to west wildlife corridor between the Hardline Reserve of Encinitas Creek to the east of the site and the coastal sage scrub and maritime chaparral covered bluffs to the south and west of the site. The east to west wildlife corridor is especially important, and a solid line of development or streets would impede the movement of wildlife. The project, as proposed, does not appear to be consistent with the guidelines of the MHCP. It does not conserve existing habitat and does not maximize preserve design and connectivity. Additionally, the US Fish and Wildlife Service and the California Department of Fish and Game in a joint comment letter on the Draft EIR dated November 6, 2007, state that they do not agree that habitat loss has been minimized to the maximum extent practicable in accordance with Section 4.3 of the NCCP Guidelines. If fewer homes were constructed on the project site, the rear of the property could be left open and could allow for east to west wildlife passage.

The EIR states that the project site would not function as a regional corridor or linkage due to ‘dense urbanization’ in surrounding areas. However, the site is part of a large north to south wildlife corridor that connects to Batiquitos Lagoon and is part of a large east to west corridor along the south side of Batiquitos Lagoon. The Lagoon is in turn connected to other open space areas that could potentially function as wildlife corridors. Therefore, it appears that the proposed site could function as a regional wildlife corridor. Although an existing public trail that parallels the eastern edge of the proposed development site currently has chain link fences on each side of it, probably inhibiting movement of some wildlife at the current time, the fences could be removed in the future or sections of the fences could be taken out in order to facilitate wildlife movement.

The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to preserving important wildlife corridors.

Appellants also contend the project does not provide an adequate fuel modification buffer in some areas of the project site. RM Policy 10.1 states that the City will minimize impacts to sensitive habitat, including impacts from brush clearance. Public Safety Policy 1.2 states that brush clearance shall not exceed a 30 foot perimeter in areas of native or significant brush. The City of Encinitas and the Commission traditionally require a fuel modification zone of at least 100 feet, especially in areas such as the subject site that include large stands of native scrub habitat. Despite this, the proposed fuel modification zone to the east of the proposed development footprint is substantially less than 100 feet (see Exhibit #10). The Encinitas City Fire Marshall has found that this limited fuel modification zone is appropriate because the applicant has agreed to employ ignition resistive building design and materials, prohibit wood decks or structures in the rear yard and at least one of the lots is adjacent to a concrete drainage ditch and public trail system, which is expected to reduce the need for an increased fuel modification zone in the future. While this limited fuel zone may seem sufficient at this time, the Commission has found that once structures are built, applicants frequently create larger fuel modification zones, particularly in years with high fire danger. Once a structure is built, it is difficult to deny a homeowner the ability to establish an adequate fuel modification zone, even if it is larger than originally anticipated and would result in the destruction of sensitive habitat. The Commission has found that to prevent such a situation, the LCP requires adequate planning for fuel modification zones when developments are proposed. In this way both habitat and structures are protected in the long run. For this reason, the limited fuel modification zone proposed adjacent to ESHA is insufficient. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to adequate fuel modification zones.

In summary, the proposed development is inconsistent with the City's LCP pertaining to protection of ESHA in that the city did not afford great weight to the opinions of the wildlife agencies, impacts to ESHA have not been avoided or minimized, mitigation for impacts to ESHA is inadequate, the 19 lot residential subdivision and associated improvements is not the least environmentally damaging alternative, does not adequately preserve the existing wildlife corridors, and adequate fuel modification zones are not provided. The proposed development is not only inconsistent with the City's LCP but, because sensitive upland habitat is a significant resource, the City's action of approving a project with such substantial impacts would establish an adverse precedent for future developments. For these reasons, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

**3. Wetlands.** The appellants contend that approval of the project by the City is inconsistent with provisions of the City's certified LCP pertaining to permitted uses within wetlands, choosing the least environmentally adverse alternative, adequate drainage, appropriate wetland buffers, appropriate mitigation standards for wetland

impacts, and the preservation of wetland resources. Appellants cite the City staff report, which states “[t]he proposed project would require development within the wetlands area that will not be consistent with the allowed project types delineated in RM Policy 10.6.” The City's LCP includes several provisions pertaining to the protection of wetlands. The following are relevant to the subject appeal.

Resource Management (RM) Policy 10.6:

The City shall preserve and protect wetlands within the City's planning area. "Wetlands" shall be defined and delineated consistent with the definitions of the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, the Coastal Act and the Coastal Commission Regulations, as applicable, and shall include, but not be limited to, all lands which are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water.

There shall be no net loss of wetland acreage or resource value as a result of land use or development, and the City's goal is to realize a net gain in acreage and value whenever possible.

Within the Coastal Zone, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted 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 newly permitted uses and activities:

- a. Incidental public service projects.
- b. Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
- c. Restoration purposes.
- d. Nature study, aquaculture, or other similar resource dependent activities.

Identification of wetland acreage and resource value shall precede any consideration of use or development on-sites where wetlands are present or suspected. With the exception of development for the primary purpose of the improvement of wetland resource value, all public and private use and development proposals which would intrude into, reduce the area of, or reduce the resource value of wetlands shall be subject to alternatives and mitigation analyses consistent with Federal E.P.A. 404(b)(1) findings and procedures under the U.S. Army Corps permit process. Practicable project and site development alternatives which involve no wetland intrusion or impact shall be preferred over alternatives which involve intrusion or impact. Wetland mitigation, replacement or compensation shall not be used to offset impacts or intrusion avoidable through other practicable project or site development

alternatives. When wetland intrusion or impact is unavoidable, replacement of the lost wetland shall be required through the creation of new wetland of the same type lost, at a ratio determined by regulatory agencies with authority over wetland resources, but in any case at a ratio of greater than one acre provided for each acre impacted so as to result in a net gain. Replacement of wetland on-site or adjacent, within the same wetland system, shall be given preference over replacement off-site or within a different system.

The City shall also control use and development in surrounding area of influence to wetlands with the application of buffer zones. At a minimum, 100-foot wide buffers shall be provided upland of salt-water wetlands, and 50-foot wide buffers shall be provided upland of riparian wetlands. Unless otherwise specified in this plan, use and development within buffer areas shall be limited to minor passive recreational uses with fencing, desiltation or erosion control facilities, or other improvements deemed necessary to protect the habitat, to be located in the upper (upland) half of the buffer area when feasible.

All wetlands and buffers identified and resulting from development and use approval shall be permanently conserved or protected through the application of an open space easement or other suitable device.

The City shall not approve subdivisions or boundary line adjustments which would allow increased impacts from development in wetlands or wetland buffers. (Coastal Act/30231)

#### RM Policy 10.9:

The City will encourage the function of San Elijo Lagoon and Batiquitos Lagoon and their adjacent uplands as viable wetlands, ecosystems and habitat for resident and migratory wildlife, by prohibiting actions (subject to the detailed provisions of RM policy 10.6) which:

- involve wetland fill or increased sedimentation into wetlands;
- Adversely decrease stream flow into the wetlands;
- Reduce tidal interchange;
- Reduce internal water circulation; or
- Adversely affect existing wildlife habitats.  
(Coastal Act/30231)

## Section 30.34.040:

A. **Applicability.** The Floodplain Overlay Zone regulations shall apply to all areas within the Special Study Overlay Zone where site-specific analysis of the characteristics of a parcel of land indicate the presence of a flood channel, floodplain, or wetland; and to all areas identified as flood channels and floodplains on maps...

[ . . . ]

b. Channelization or other substantial alteration of rivers or streams shall be limited to the following;

(1) Necessary water supply projects;

(2) Flood control projects where no feasible method for protecting existing public or private structures exists and where such protection is necessary for public safety or to protect existing development;

(3) Other development which has a primary element the improvement of fish and wild life habitat.

## Section 30.34.040:

[ . . . ]

2. **Floodplain.** Within the 100-year floodplain, permanent structures and/or fill for permanent structures, roads and other public improvements consistent with the Land Use Element will only be allowed if the applicant can demonstrate the following:

[ . . . ]

b. Existing environmentally sensitive habitat areas will not be significantly adversely affected.

c. The development will not result in a net reduction of existing riparian habitat areas within the floodplain.

[ . . . ]

3. **Wetlands**

[ . . . ]

All buildings or other improvements proposed to be placed or erected, and all grading activities proposed to be undertaken adjacent to a wetland shall be located so as not to

contribute to increased sediment loading of the wetland, cause disturbance to its habitat values, or otherwise impair the functional capacity of the wetland. (emphasis added)

RM Policy 10.10:

The City will encourage and cooperate with other responsible agencies to plan and implement an integrated management plan for the long-term conservation and restoration of wetlands resources at San Elijo Lagoon (and where it applies, Batiqitos Lagoon), Escondido and Encinitas Creeks and their significant upstream feed creeks, according to the following guidelines:

[ . . . ]

Wildlife corridors between the wetland shoreline and important upland areas and upstream riparian areas should be maintained and enhanced;

Adequate buffer zones should be utilized when development occurs adjacent to the floodplain and sensitive habitats; 100 foot wide buffers should be provided adjacent to all identified wetlands, and 50 foot wide buffers should be provided adjacent to riparian areas. In some cases, smaller buffers may be appropriate when conditions of the site as demonstrated in a site specific biological survey, the nature of the proposed development, etc., show that a smaller buffer would provide adequate protection; and when the Department of Fish and Game has been consulted and their comments have been accorded great weight.

In review of the project by the City, it was determined that wetlands, as defined in the LCP, are present on the site (approximately 6.4 acres of wetlands) and that the proposed development would permanently fill approximately 0.05 acres of wetland habitat (southern willow scrub) with the construction of a 20 ft. wide access road with a soft bottom culvert to access the proposed development. The applicant proposes to mitigate the wetland impact through enhancement of southern willow scrub on-site at a 1.4 to 1 ratio and creation of southern willow scrub on-site at a 5.6 to 1 ratio, totaling no less than 0.35 acres (7 to 1 ratio). Both the enhancement and creation will take place on-site, adjacent to Encinitas Creek on the south side of La Costa Avenue. Creation will consist of conversion of current ruderal and/or disturbed upland habitat types to wetlands, via excavation and grading to achieve appropriate planting elevations. Enhancement of existing disturbed southern willow scrub will consist of removal of exotics/invasive species and replanting and seeding with appropriate native wetland vegetation. Additionally, the applicant proposes to remove weeds and exotics from the wetland buffer zone along the edge of the development and seeding with appropriate native transitional species.

As cited, the fill of wetlands within the City's Coastal Zone is limited to only four types of newly permitted uses and activities. These include nature study, restoration projects, incidental public service projects and mineral extraction. The proposed residential subdivision is not one of the identified permitted uses and as such, the project is

inconsistent with RM Policy 10.6 cited above. The proposed restoration and enhancement of wetland habitat on-site would not negate the fact that wetland habitat would be lost as a result of a non permitted use. Appellants also contend that this project would consist of development within the 100 year floodplain. The part of the proposed project within the 100 year floodplain would be a small portion of the road necessary to access the site. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to permitted uses within wetlands and development within the 100 year floodplain.

The appellants also contend that the proposed project is not the least environmentally damaging alternative, as required by LCP policies and ordinances. Specifically, the proposed project will fill approximately 0.05 acres of wetlands to accommodate a 20 foot wide access road to the proposed subdivision. According to the City, in order to accommodate necessary fire department access, a 20 foot access road is the minimum necessary width for a subdivision of more than 4 lots. The City, in its review, failed to choose an alternative that would reduce the amount of wetland fill. The City found that a 16 foot access road that would impact 0.04 acres of wetland habitat is necessary for even the minimum development of one unit, thus the City determined that an additional 0.01 acres of impact to wetland would be 'small' and is properly mitigated. The City did not choose the less environmentally damaging alternative, as called for in the Encinitas LCP. There is therefore a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to the least environmentally damaging project within wetlands.

Additionally, the appellants contend that the City's decision did not include provisions for appropriate wetland buffers. The above cited LCP policies and ordinances require that a minimum 50 foot buffer be established between any development and riparian wetlands, although the width may be reduced if resources are protected and the Dept. of Fish and Game concurs. The City's LCP limits buffers to minor passive recreational uses and construction of improvements deemed necessary to protect the habitat. All such improvements, however, are to be located in the upper half of the buffer, as feasible. The City's decision permits the fuel modification zone to encroach into the 50 ft. wetlands buffer in some areas. Therefore, the buffer will not function as a true buffer which should remain natural and undeveloped so as to minimize the effects of erosion and sedimentation and to allow for a transitional habitat zone between wetlands and uplands. According to the Commission's wetlands ecologist, ongoing fuel modification within a wetlands buffer will adversely impact the viability and effectiveness of a wetlands buffer.

The City is also not requiring preservation or protection of the 3.03 acres of freshwater/salt marsh wetlands located on the north side of La Costa Avenue within the City of Carlsbad, which is inconsistent with the requirements of RM Policy 10.6. Because of its environmental importance and connection to the resources of Batiquitos Lagoon, the City should have required the applicant to process an application with the City of Carlsbad to preserve this part of the subject property within open space. Because the City failed to do so, the development potential of the property has not been extinguished or controlled such that future impacts to the 3.03 acres of wetlands, which

could become a separate lot as the result of the proposed subdivision, will be avoided. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to minimum wetlands buffers.

An appellant contends that the proposed accessway would cross fresh water marsh and not southern scrub willow, as approved by the city. Based on the exhibits submitted by the applicant it appears that the accessway will cross close to the eastern edge of the delineated fresh water marsh, but will not be located within it.

Another appellant also contends that the 180-foot deceleration lane to the west of the proposed development that is planned to ensure safe entrance to the site would impact wetland habitat located at the base of the slope that accommodates the present roadway. The figure depicting the deceleration lane in the Biological Resources Technical report, which was based on a 2005 exhibit, shows that the deceleration lane appears to be very close to fresh water marsh habitat. A more detailed exhibit submitted to the Commission on October 18, 2010 appears to show that the deceleration lane will not directly impact the wetland habitat to the south of La Costa Avenue (see Exhibit #5). Thus, these competing exhibits create some ambiguity as to the extent of expected wetland impacts caused by the deceleration lane. The City states, however, that the deceleration lane would be necessary for safety purposes, even if only one home were constructed on the property. Thus, these wetland and/or ESHA impacts would occur as the result of any residential development on this parcel.

The appellants contend that the project is proposed with an inadequate drainage plan that may adversely affect wetland resources. The appellants also contend that the construction of 19 homes with associated hardscape and circulation elements will increase the quantity and adversely affect the quality of storm water runoff. Currently, the project site drains in a northerly direction through an existing triple box culvert (directly east of the site) or through 2 existing 24" RCP pipes (one on-site and one directly west of the site), all of which extend beneath La Costa Avenue and then discharge into Batiquitos Lagoon. Post project implementation, runoff will be conveyed via grass-lined swales to permeable landscaped areas on-site. Any runoff that is not absorbed by landscaped areas on-site would be conveyed via a series of grassy swales located adjacent to the proposed on-site roadways and would discharge into either the existing concrete brow ditch located along the eastern project boundary or the existing bladed swale located adjacent to La Costa Avenue in the north-central portion of the site. Energy dissipaters (riprap) would be placed at drainage outfalls to reduce flow velocities and prevent erosion. Runoff would then flow through the existing triple box culvert or through the 2 existing 24" RCP pipes.

The project EIR states "Urban pollutants would be washed off the site's impervious surfaces during rainfall events...This runoff, typical of urban use, could contribute to the incremental degradation of downstream water quality." To address degradation of downstream water quality the applicant proposes to direct runoff through grass-lined swales as well as Hydro Cartridge filters at all catch basins to filter urban pollutants from

stormwater. The project EIR also states "...the project would increase peak runoff flows on-site...peak runoff flows from Drainage Node L would increase by 5.41 cfs (82.92 cfs to 88.33 cfs) and peak runoff from Drainage Node J would increase by 1.29 cfs (43.41 cfs to 44.70 cfs)..." To address the increased runoff flows at Drainage Node L the applicant proposes to install an underground detention system to attenuate the increased flows. The underground detention system would consist of underground devices such as double chamber inlets and perforated/wrapped storm drain pipes and would reduce flows at Drainage Node L to pre-development levels. However, the applicant does not propose any mitigation for the increase in runoff from Drainage Node J and the EIR merely states that increased drainage at Drainage Node J would be transported offsite via the existing 24" pipe to Batiquitos Lagoon. The project, as approved by the City, mandates that detention basins will be installed and designed such that runoff from runoff resulting from a 100-year frequency storm under developed conditions is equal to or less than runoff from a storm of the same frequency and duration under existing conditions. Though, it is unclear if the project will address the specific 1.29 cfs peak runoff increase at Drainage Node J. Appellants contend that these measures could become overloaded during storm events and discharge directly into wetland habitat and Batiquitos Lagoon. Appellants additionally contend that the EIR does not indicate who will monitor the detention system and Hydro Cartridge filters to insure their continued effectiveness.

In summary, the proposed development raises a substantial issue of conformity with the City's LCP policies pertaining to protection of wetland resources in that the proposed 19 lot residential subdivision is not a permitted use within a wetland, is not the least environmentally damaging alternative, does not provide adequate wetland buffers, potentially does not provide adequate drainage and does not adequately preserve the 3.03 acres of wetland north of La Costa Avenue. The proposed development is not only inconsistent with the City's LCP but, because wetlands are a significant resource, the City's action of approving a nonallowable fill of wetland would establish an adverse precedent for future developments. For these reasons, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

**4. Protection of Visual Resources.** The appellants assert that the development, as approved by the City, fails to adequately address the protection of public views. The project site is located on a 56.94 acre parcel consisting of a naturally vegetated upland hillside overlooking Batiquitos Lagoon. Immediately to the east of the proposed site is Encinitas Creek, which is conserved as open space in the City of Carlsbad. To the west and southwest of the proposed development site are additional upland hillsides and naturally vegetated open space areas. Public views of the 10 acres of native vegetated areas that will be impacted at the proposed site are available from trails located within Batiquitos Lagoon preserve as well as along La Costa Avenue. Development of the site could have a significant adverse visual impact to the visual resources of the area. The City's LCP contains several provisions that address protection of scenic visual resources. Specifically, the Resource Management Element of the LUP includes:

**RM GOAL 4:**

The City, with the assistance of the State, Federal and Regional Agencies, shall provide the maximum visual access to coastal and inland views through the acquisition and development of a system of coastal and inland vista points. (Coastal Act/30251)

**RM Policy 4.4:**

The system of Vista Points will provide for the differing needs of automobile, bicycle, and pedestrian users, and will recognize as a recreational resource, the function of Vista Points as facilities for the passive, and occasionally remote enjoyment of the coastal and inland view. (Coastal Act/30251/30212.5/30210)

**RM Policy 4.5:**

The City will designate “Scenic/Visual Corridor Overlay” areas within which the character of development would be regulated to protect the integrity of the Vista Points according to the following criteria:

[ . . . ]

-development within the critical viewshed area should be subject to design review based on the following:

-Building height, bulk, roof line and color and scale should not obstruct, limit or degrade the existing views;

-Landscaping should be located to screen adjacent undesirable views (parking lot areas, mechanical equipment, etc.) (Coastal Act/30251/30253)

**RM Policy 4.6:**

The City will maintain and enhance the scenic highway/visual corridor viewsheds (Coastal Act/30251)

**RM policy 4.7:**

The City will designate the following view corridors as scenic highway/visual corridor viewsheds:

[ . . . ]

- La Costa Ave. from just west of I-5 to El Camino Real

[ . . . ]

RM Policy 4.8:

The City will designate Scenic/Visual Corridor Overlay and scenic highway viewshed areas as illustrated on the Visual Resource Sensitivity Map (Figure 3). (Coastal Act/30251).

RM Policy 4.9:

It is intended that development would be subject to the design review provisions of the Scenic/Visual Corridor Overlay Zone for those locations within Scenic View Corridors, along scenic highways and adjacent to significant viewsheds and vista points with the addition of the following design criteria:

[ . . . ]

Development Design

- Building and vegetation setbacks, scenic easements, and height and build restrictions should be used to maintain existing views and vistas from the roadway.

[ . . . ]

- Development should be minimized and regulated along any bluff silhouette line or on adjacent slopes within view of the lagoon areas and Escondido Creek.
- Where possible, development should be placed and set back from the bases of bluffs, and similarly, set back from bluff or ridge top silhouette lines; shall leave lagoon areas and floodplains open, and shall be sited to provide unobstructed view corridors from the nearest scenic highway.
- Development that is allowed within a viewshed area must respond in scale, roof line, materials, color, massing, and location on-site to the topography, existing vegetation, and colors of the native environment. (Coastal Act/30251/30253)

In approving the 19-lot subdivision, the appellants contend that the City failed to adequately protect the visual resources surrounding Batiquitos Lagoon and along La Costa Avenue, a designated scenic highway. According to the EIR (page 4-107) “[t]he portions of the project site that are proposed for development would be visible to traffic along La Costa Ave., along the street frontage and for a short distance east and west of the site.” The EIR makes no mention of the scenic view from the north side of Batiquitos Lagoon and/or the public trails in the Batiquitos Lagoon preserve. In 2008, the Batiquitos Lagoon Foundation purchased what is known as the Mitushi Property,

consisting of a disturbed bluff that the Foundation is in the process of restoring and adding public trails to. This area overlooks the entire western basin of the lagoon from the north. Appellants contend that allowing the proposed development to be built would compromise the sweeping view from this future public viewpoint.

While no residential construction is proposed with this application, the City attempted to address visual resources through development restrictions on future residential development, but the appellants contend that the City's conditions are not adequate. The City resolution of approval limited future residential development to only one story homes to ensure visual and aesthetic compatibility with the surrounding natural habitat areas. Appellants contend that the City could have reduced the number of lots and the size of the lots created by this subdivision, which would have limited the future development in size and scope to minimize the visual impacts to the naturally vegetated areas and should have required more substantial mitigation to address its visual impacts. RM Policy 4.9 as cited above requires that the viewshed be protected by the use of natural colors, materials and landscaping for the development. In approving the project, appellants contend that the City failed to require the use of natural colors and materials and landscaping for the future homes that will be built within the subdivision. In addition, because of the on-site ESHA and proximity to Batiquitos Lagoon, the City should have required that all landscaping for the subdivision and any future homes be native, drought-tolerant and non-invasive. The City should have included such conditions as part of the subdivision approval so that future design and permitting of homes could anticipate those requirements. The appellants have therefore raised a substantial issue regarding the consistency of the proposed development with the certified LCP requirements pertaining to protection of visual resources.

In summary, the project as approved by the City is inconsistent with many resource protection policies of the LCP. The proposed subdivision is not a permitted use within a wetland, is not the environmentally preferable alternative, does not provide adequate riparian wetland buffers, and does not include the protection of wetlands and their associated buffers through the application of an open space easement for the Carlsbad portion of the property. The project does not avoid or minimize impacts to ESHA and does not properly mitigate the impacts to approximately 10 acres of ESHA that are proposed to be impacted and may result in the fragmentation of an important biological corridor. Finally, the project could result in adverse impacts to public views from trails within the Batiquitos Lagoon Reserve and La Costa Avenue. Because each of these impacts appear to be inconsistent with the previously cited LCP Policies, the Commission finds that a substantial issue exists with respect to the project's consistency with the City's certified LCP.

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## **I. STAFF RECOMMENDATION ON THE COASTAL PERMIT**

The staff recommends the Commission adopt the following resolution:

**MOTION:**     *I move that the Commission approve Coastal Development Permit No. A-6-ENC-09-050 for the development proposed by the applicant.*

### **STAFF RECOMMENDATION OF DENIAL:**

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

### **RESOLUTION TO DENY THE PERMIT:**

The Commission hereby denies a coastal development permit for the proposed development on the ground that the development will not be in conformity with the adopted Local Coastal Program and the public access and recreation policies of the Coastal Act. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

## **II. Findings and Declarations.:**

**1. Project Description.** On July 23, 2009, the City of Encinitas (City) approved a coastal development permit allowing for the subdividing of a single 56.94 gross acre parcel located in Encinitas and Carlsbad into 19 single family residential home lots totaling 6.79 acres, 2 open space lots totaling 37.48 acres, private streets on 2.27 acres, 1.27 acres of easements and public-right-of-way, and a “Not a Part” lot on 9.13 acres in the City of Carlsbad (see exhibit #2). The project, as approved by the City, proposes grading of approximately 19,000 cubic yards of soil, construction of the access road, streets, and drainage improvements. Construction of the residences is not proposed as part of the subject subdivision request and will require additional coastal development permitting for their construction.

The project parcel is located approximately 2.5 miles east of the shoreline in the Cities of Encinitas and Carlsbad. The majority of the parcel (47.81 acres) is located in the City of Encinitas, with 9.13 acres located in the City of Carlsbad. The parcel straddles La Costa Avenue an east/west coastal access road that connects to El Camino Real, which is a major north/south arterial road approximately 0.25 miles east of the site. Batiquitos Lagoon lies directly north of the proposed development parcel (see Exhibit #1). The project parcel is located in the Hillside/Inland Bluff Overlay Zone, the Scenic/Visual Corridor Overlay Zone, the Floodplain Overlay Zone, the Cultural/Natural Resources Overlay Zone, the Special Study Overlay Zone, the Natural Resource Management High

Sensitivity Area, and the Biological Core Linkage Area (BCLA), as identified in the certified City of Encinitas LCP.

The 9.13 acre northern portion of the parcel is located within and north of La Costa Avenue, within the City of Carlsbad and is zoned as open space. The Carlsbad portion is relatively flat and consists of 6.1 acres of right-of-way (ROW) for La Costa Avenue and 3.03 acres of wetland areas and a thin strip of disturbed coastal sage scrub along its border with La Costa Avenue. The Carlsbad portion of the project parcel is bounded by open space associated with Batiquitos Lagoon to the north, east, and west, and La Costa Avenue to the South.

The 47.81 acre southern portion of the parcel is located within the City of Encinitas, in the community of Leucadia, and is zoned as rural residential (RR-1). It includes a small strip of disturbed coastal sage scrub along the border with La Costa Avenue, 3.42 acres of wetland areas stretching along the entire northern portion of the property, 19.34 acres of lands with slopes in excess of 25% grade on the southwestern half of the parcel, and gently to moderately sloping terrain in the central and northeastern portions of the parcel (see Exhibit #3). The parcel is densely vegetated with native upland communities, native wetland communities, and non-native grassland. Additionally, six plant species considered sensitive by the California Native Plant Society occur on-site (see Exhibit #4). The Encinitas portion of the project parcel is bounded by developed land to the southeast, natural bluffs and open space land to the west and southwest, and La Costa Avenue to the north. The east side of the parcel is adjacent to Encinitas Creek, which is conserved as natural open space. An unimproved access road is currently used to access the Encinitas portion of the parcel.

As approved by the City, the proposed subdivision (future residences and resulting fuel modification requirements) will result in direct impacts to approximately 10 acres of coastal sage scrub, coyote brush scrub, southern maritime chaparral, and scrub oak chaparral. According to the Commission's staff ecologist, after a site visit and review of the biology report for the project, the subject coastal sage scrub, coyote brush scrub, southern maritime chaparral, and scrub oak chaparral are considered to be an environmentally sensitive habitat area (ESHA) due to their close proximity to Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas. Specifically, the project would impact 0.18 acres of coyote brush scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral, and 1.20 acres of annual non-native grassland. The project has been not been conditioned by the City to require any ESHA creation as mitigation for the impacts to sensitive habitat, requiring, instead, only on-site conservation.

A proposed 20 ft. wide access road, located in the same location as the existing smaller unimproved access road, would impact 0.05 acres of southern willow scrub wetland habitat (see Exhibit #5). The wetland impacts are proposed to be mitigated on-site at a minimum ratio of 7:1. The lots for single family homes and a proposed cul-de-sac would

be adjacent to wetland habitat on the north edge of the development. Although the EIR approved by the city states that 50 ft. wetlands buffers would be in place, the submitted exhibits appear to allow for wetlands buffers less than 50 ft. in width in some areas.

The southern portion of the project parcel within Encinitas (where all development is proposed) is located in the Rural Residential 1 (RR-1) zone, which allows residential development with a maximum density of 1.0 unit per net acre but subdivisions resulting in the creation of five lots or greater are also required to comply with the mid-range density of 0.75 units per net area. Lot averaging was used to cluster the houses into a smaller area in order to impact fewer wetland resources, steep slopes, and other sensitive habitat.

**2. Protection of Environmentally Sensitive Habitat Area (ESHA).** The proposed project is inconsistent with provisions of the City's certified LCP concerning preservation of environmentally sensitive habitat area (ESHA). Specifically, the proposed project is inconsistent with LCP policies concerning impacts to ESHA, mitigation for impacts to ESHA, choosing the least environmentally adverse alternative, consistency with the Natural Communities Conservation Plan (NCCP), biological corridor fragmentation, and fuel modification zones. The following LCP policies are relevant to the subject development:

Section 30.34.050 of the certified Implementation Plan:

[. . .]

2. Biotic Resources. For proposed projects within the C/NRO (Cultural/Natural Resources Overlay) Zone which involve parcels containing ecologically sensitive plant and animal habitats, a survey by a qualified professional biologist shall be submitted by the project applicant to determine the significance of the habitats and the need for project impact mitigation by reservation, reestablishment, or other methods.

The following LUP policies relate specifically to protection of lagoons and their up-lands, coastal sage scrub habitats and coastal mixed chaparral habitats:

RM Goal 10:

The City will preserve the integrity, function, productivity, and long term viability of environmentally sensitive habitats throughout the City, including kelp-beds, ocean recreational areas, coastal water, beaches, lagoons and their up-lands, riparian areas, coastal strand areas, coastal sage scrub and coastal mixed chaparral habitats. (Coastal Act/30230/30231/30240)

Brush clearance around structures for fire safety shall not exceed a 30-foot perimeter in areas of native or significant brush, and as provided by Resource Management Policy 10.1.

**RM Policy 10.1:**

The City will minimize development impacts on coastal mixed chaparral and coastal sage scrub environmentally sensitive habitats by preserving within the inland bluff and hillside systems, all native vegetation on natural slopes of 25 % grade and over other than manufactured slopes. A deviation from this policy may be permitted only upon a finding that strict application thereof would preclude any reasonable use of the property (one dwelling unit per lot). This policy shall not apply to construction of roads of the City's circulation element, except to the extent that adverse impacts on habitat should be minimized to the degree feasible. Encroachments for any purpose, including fire break brush clearance around structures, shall be limited as specified in Public Safety Policy 1.2. Brush clearance, when allowed in an area of sensitive habitat or vegetation, shall be conducted by selective hand clearance. (Coastal Act/30240/30250/30251/30253)

**RM Policy 10.4:**

The City will develop a program to acquire or preserve the entire undeveloped riparian corridor within the City that drains into the San Elijo Lagoon and Batiquitos Lagoon... (Coastal Act/30231/30240)

**RM Policy 10.5:**

The City will control development design on Coastal Mixed Chaparral and Coastal Sage Scrub environmentally sensitive habitats by including all parcels containing concentrations of these habitats within the Special Study Overlay designation. The following guidelines will be used to evaluate projects for approval:

- conservation of as much existing contiguous area of Coastal Mixed Chaparral or Coastal Sage Scrub as feasible while protecting the remaining areas from highly impacting uses;
- minimize fragmentation or separation of existing contiguous natural areas.
- connection of existing natural areas with each other or other open space areas adjacent to maintain local wildlife movement corridors;
- where appropriate, based on community character and design, clustering of residential or other uses near the edges of the natural areas rather than dispersing such uses within the natural areas;
- maintenance of the broadest possible configuration of natural habitat area to aid dispersal of organisms within the habitat;
- where significant, yet isolated habitat areas exist, development shall be designed to preserve and protect them;

- conservation of the widest variety of physical and vegetational conditions on-site to maintain the highest habitat diversity;
- design of development, with adjacent uses given consideration, to maximize conformance to these guidelines; and
- preservation of rare and endangered species on-site rather than by transplantation off site. (Coastal Act/30240/30250)

In addition, all new development shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the Statewide Natural Communities Conservation Plan (NCCP) Act. Compliance with these goals shall be implemented in consultation with the United States Fish and Wildlife Service and California Department of Fish and Game.

#### RM Policy 10.9:

The City will encourage the function of San Elijo Lagoon and Batiquitos Lagoon and their adjacent uplands as viable wetlands, ecosystems and habitat for resident and migratory wildlife, by prohibiting actions (subject to the detailed provisions of RM policy 10.6) which:

- involve wetland fill or increased sedimentation into wetlands;
- Adversely decrease stream flow into the wetlands;
- Reduce tidal interchange;
- Reduce internal water circulation; or
- Adversely affect existing wildlife habitats.  
(Coastal Act/30231)

#### Special Study Overlay Zone:

...While not all Special Studies Overlay Zones will be expressly used for preserving environmentally significant areas, they will be effective in indicating those areas where development standards may be more stringent to minimize any potentially adverse impacts from development...

#### Natural Resource Management High Sensitivity Area:

...portions of the Planning Area that are judged to be ecologically significant by biologists and naturalists...appropriate modifications to the site plan, development densities, etc., may be required to mitigate any potential adverse impacts.

The Land Use Policy and Resource Management Policy 13.6:

Establish and preserve wildlife corridors. (Coastal Act/30231/30240)

The Environmental Impacts from New Development Policy 14.1:

The best strategy to reduce erosion and sedimentation is to reduce to the maximum extent feasible, grading and removal of vegetation. It is the policy of the City that, in any land use and development, grading and vegetation removal shall be limited to the minimum necessary. (Coastal Act/30240/30250)

Public Safety Policy 1.13:

In areas identified as susceptible to brush or wildfire hazard, the City shall provide for construction standards to reduce structural susceptibility and increase protection.

Public Safety Policy 1.2:

Restrict development in those areas where slope exceeds 25% as specified in the Hillside/Inland Bluff overlay zone regulations of the zoning code. Encroachment into slopes as detailed in the Hillside/Inland Bluff overlay may range from 0 percent to a maximum of 20 percent, based on a sliding scale of encroachment allowances reflective of the amount of the property within steep slopes, upon the discretionary judgment that there is no feasible alternative siting or design which eliminates or substantially reduces the need for such encroachment, and it is found that the bulk and scale of the proposed structure has been minimized to the greatest extent feasible and such encroachment is necessary for minimum parcel development and that the maximum contiguous area of sensitive slopes shall be preserved. Within the Coastal Zone and for the purposes of this section, "encroachment" shall constitute any activity which involves grading, construction, placement of structures or materials, paving, removal of native vegetation including clear-cutting for brush managing purposes, or other operations which would render the area incapable of supporting native vegetation or being used as wildlife habitat. Modification from this policy may be made upon the finding that strict application of this policy would preclude any reasonable use of property (one dwelling unit per legal parcel)...

As identified above, the Encinitas LCP contains several policies that provide for the protection of coastal sage scrub, southern mixed chaparral and other types of ESHA. The purpose of the above cited policies is to preserve environmentally significant areas and minimize adverse impacts from new development. The subject property is located within the Special Study Overlay Zone and the Cultural/Natural Resources Overlay Zone. Additionally, portions of the project parcel are also within the Natural Resource Management High Sensitivity Area, so that development is constrained by the additional requirements that apply to these areas. The Special Study Overlay Zone is used to indicate those areas where development standards may be more stringent to minimize any

potentially adverse impacts from development. The Natural Resource Management High Sensitivity Area consists of portions of the Encinitas Planning Area that are judged to be ecologically significant by biologists and naturalists.

The applicant's biology report states that the project parcel currently supports a thick growth of brush and trees with no active uses occurring on the property and that the area previously supported a walnut orchard, a residence, and several ancillary structures. The parcel straddles La Costa Avenue, a coastal access roadway (all associated development is proposed in the portion of the parcel to the south of La Costa Avenue). An unimproved road currently provides access to the parcel from La Costa Avenue. Existing residential development occurs on the parcel adjacent to the southeast corner of the subject parcel (La Costa Glen, a senior housing community). However, the majority of the area directly adjacent to the subject parcel is in a natural state. To the north of the parcel is open space and Batiquitos Lagoon. Immediately to the east of the parcel is the Encinitas Creek, which is conserved as natural open space. The floodplain of Encinitas Creek exists within the project boundaries adjacent to La Costa Avenue. Finally, to the south and west of the proposed parcel are natural bluffs and preserved open space land.

As noted above, the subject site is located adjacent to Batiquitos Lagoon and, in fact, includes a small portion of the lagoon and its associated salt marsh habitat within the property boundaries. Batiquitos Lagoon is an environmentally sensitive habitat area that is managed by the California Department of Fish and Game and is one of the 19 priority wetlands listed by the State Department of Fish and Game for acquisition. Batiquitos Lagoon was fully tidal until the 1881 construction of the railway line and the construction of Pacific Coast Highway (Coast Highway 101) in 1912. In March of 1990, the Commission approved the restoration of Batiquitos Lagoon, including the permanent opening of the lagoon mouth (Ref. CDP 6-90-219/City of Carlsbad). The creation of the open mouth restored continuous tidal action and the former marine ecosystem, without significant adverse impacts to established habitat values within the project limits. The lagoon provides habitat for at least four State or Federal-listed threatened or endangered birds that include the California least tern, the light-footed clapper rail, Belding's savannah sparrow, and the western snowy plover. As such, the potential adverse impacts on sensitive resources as a result of activity in or adjacent to the lagoon could be significant.

During focused protocol surveys for the on-site presence of the California Gnatcatcher that were conducted by Dudek Consulting in 2005, two pairs of Gnatcatchers were detected. The EIR states that Gnatcatcher territory will be slightly impacted, but is expected to persist. No Least Bell's Vireos were detected in 2005. However, a 2008 survey conducted by the U.S. Geological Survey, Western Ecological Research Center, detected Least Bell's Vireos in close proximity to the east of the proposed site. During the 2005 survey, no state- or federally-listed plant species were observed on-site. As described in the Biological Resources Technical Report, however, six species that are listed by the California Native Plant Society in categories ranging from its watch list to its list of rare, threatened or endangered species are found on the site.

According to the Commission's staff ecologist, after a site visit and review of the biology report for the project, the subject coastal sage scrub, coyote brush scrub, southern maritime chaparral, and scrub oak chaparral on the parcel are considered to be ESHA due to their close proximity to Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas.

The proposed project, which includes delineation of the 19 proposed building envelopes, will impact 0.18 acres of coyote brush scrub, 6.44 acres of disturbed coyote brush scrub, 2.92 acres of coastal sage scrub, 0.07 acres of disturbed coastal sage scrub, 0.11 acres of southern maritime chaparral, 0.27 acres of southern mixed chaparral, 0.40 acres of scrub oak chaparral supporting Nuttall's scrub oak, and 1.20 acres of annual non-native grassland. In approving these impacts the City required mitigation ratios ranging from 0.05:1 to 3:1, exclusively through on-site conservation. The total impact of the proposed project to these native plant communities is approximately 10 acres. As noted above, according to the Commission's staff ecologist, the vegetation on the site is sensitive and significant portions of the site are considered to be ESHA due to their close proximity to the Batiquitos Lagoon, potential to provide habitat for the endangered California gnatcatcher and for the endangered Least Bell's Vireo, and slopes greater than 25% in some areas.

Multiple sections of the LCP policies cited above serve to protect and to minimize a project's adverse impacts to ESHA. The proposed project will impact approximately 10 acres of ESHA through construction and fuel modification zones. It therefore is inconsistent with the above cited resource protection policies of the LCP. For example, the proposed project fails to preserve the integrity, function, productivity and long term viability of ESHA, it does not minimize fragmentation of natural areas, it does not preserve existing wildlife habitats, and it fails to conserve coastal mixed chaparral or coastal sage scrub.

Additionally, the proposed mitigation for impacts to ESHA is on-site preservation of existing habitat. In other words, the proposed mitigation is to conserve areas on-site that cannot be developed anyway due to physical constraints and because it is ESHA; because these areas already cannot be developed consistent with the certified LCP, their preservation does not qualify as mitigation. There is no component of the mitigation that involves creation of ESHA to replace the impacted 10 acres of habitat. Therefore, the project as approved by the City represents a net-loss of ESHA. While the City's LCP does not contain specific mitigation ratios, the Commission has typically required a minimum of a 3:1 ratio and that at least 1 component of ESHA mitigation should involve the creation of habitat to help assure a no net-loss of habitat. Resource management Goal 10 requires the City to "preserve the integrity, function, productivity, and long term viability of environmentally sensitive habitats throughout the City." Because the proposed mitigation represents a net-loss of ESHA, the proposed development would adversely affect existing wildlife habitats adjacent and upland of Batiquitos Lagoon. The proposed project is therefore inconsistent with the certified LCP requirements pertaining to adequate mitigation for ESHA impacts and must be denied.

The EIR for the subject development identified an “Environmentally Superior Alternative” to the proposed 19-lot subdivision, which involved a 4-lot subdivision (see Exhibit #6). The “Environmentally Superior Alternative” would reduce the impact from the access road to 0.04 acres and would substantially reduce impacts to ESHA. Implementation of this alternative would also avoid significant direct impacts to Del Mar sand aster, Nutall’s scrub oak, and summer-holly plants. In addition, the EIR neglected to consider a 1-home alternative, which would have greatly reduced impacts to ESHA. The applicant has submitted documentation that claims that the “Environmentally Superior Alternative”, and thus a 1-home alternative as well, would result in a financial loss. The City approved the 19-lot subdivision (see Exhibit #7) rather than the “Environmentally Superior Alternative” so as not to:

...take or damage private property without just compensation... To deny the project based upon the strict application of RM Policies 10.6 and 10.9 and Coastal Act Section 30240(a) would deny the applicant the ability to develop the property and could be construed by a court of law as a taking of property in violation of the property owner’s rights under the laws of the State of California and the United States.

Contrary to the City’s finding, however, there are development alternatives available that would allow the applicant to create residential uses on this parcel while still protecting ESHA, consistent with the LCP. In an effort to work with the applicant on one such alternative, the Commission’s staff ecologist provided the applicant with an exhibit showing the areas of the project parcel that are not considered ESHA and would be appropriate for development (see Exhibit #8). The area on the exhibit not considered ESHA is large enough to accommodate several homes; however the applicant was not interested in working with Commission staff on an alternative design that would limit residential development to the portions of the lot that were outside of ESHA, stating that such an alternative design would result in a financial loss.

While a 19 lot subdivision would likely provide the applicant with a larger return on its investment than a smaller subdivision would, financial considerations are not part of the standard of review for this project. The applicant purchased a single highly-constrained parcel. The zoning code describes maximum densities for development, but development must also be consistent with other aspects of the zoning code and the LCP. The subject property is located within seven overlay zones that provide more stringent resource protection policies than development that is not similarly included within such overlays. Given these constraints, it was not reasonable to conclude that development on this one parcel could be both consistent with the LCP and include the maximum number of potential residential sites. Neither the loss of the highest and best use of property nor application of regulations that results in the diminution in value of property constitutes, in and of themselves, a taking of private property without just compensation. *MacLeod v. County of Santa Clara*, (1984) 749 F.2d 541, 547-548, *cert. denied*, 472 U.S. 109 (1985) (holding that denial of a permit that prevented the landowner from “pursuing the highest and best use of his property” did not constitute a taking); *William C. Haas v. City and*

*County of San Francisco* (9<sup>th</sup> Cir. 1979) 605 F.2d 1117 (diminution of property's value by 95% not a taking); *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347 (applying *Penn Central*, court finds that diminution of property's value by 91% not a taking). There are environmentally superior development alternatives available for this parcel, thus, as proposed, the project is inconsistent with the certified LCP requirements pertaining to protection of habitat through selection of the least environmentally adverse project and must be denied.

The LCP requires that new development be consistent with multi-species and multi-habitat preservation goals and requirements and that these goals shall be implemented in consultation with the wildlife agencies. The U.S. Fish and Wildlife Service and the California Department of Fish and Game (Wildlife Agencies) do not believe that the proposed development will prevent impacts to sensitive plant species. Plants within the proposed fuel modification zone (FMZ) that have the potential to be impacted include a summer holly and 20 Del Mar sand asters. The City permit mandated that all brush clearance around the Del Mar sand aster plants be accomplished through hand-thinning between May and September, and under the supervision of a qualified biologist; and that the remainder of the FMZ be hand-thinned between September 1 and February 29 under the supervision of a qualified biologist. Additionally, the monitoring biologist shall survey the area 10 days prior to planting and flag and photograph all Del Mar sand aster and summer-holly plants and the biologist will train all landscape contractor personnel to avoid the sensitive plants. However, the November 6<sup>th</sup>, 2007, draft EIR comment letter from the Wildlife Agencies states, "...based on our knowledge of the difficulty of successfully applying such restrictions within FMZs, the Wildlife Agencies would consider all the habitat within the FMZ as impacted..." Although the proposed development has involved input from the Wildlife Agencies, they disagree with many of the EIR findings for the subject development, and thus the project does not implement the multi-species and multi-habitat preservation goals in consultation with these agencies, inconsistent with the certified LCP.

The proposed project also fragments important existing contiguous natural areas. RM Policy 10.5 is intended to minimize fragmentation or separation of existing contiguous natural areas in the Special Study Overlay Designation Zone and states that all new development shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the statewide NCCP Act. The vast majority of the property directly south of La Costa Avenue, from El Camino Real to I-5, excluding the subject parcel and one other parcel is conserved permanently as open space (see Exhibit #9). The one other parcel that is not conserved permanently as open space is located at the southeast corner of Saxony Road and La Costa Avenue and currently supports a residential home and an agricultural farm stand; the parcel has very limited additional development potential due to the presence of steep slopes and sensitive habitat. The project EIR states:

...The proposed project site has been identified by the MSCP as a Biological Core Linkage Area (BCLA) and is situated within the La Costa Softline Focused Planning Area (FPA) which requires site-specific planning to maximize preserve

design by ensuring connectivity to adjacent open space in the FPA. The area has potential to serve as a local wildlife corridor or linkage connecting Batiquitos Lagoon to the undeveloped slopes and riparian habitat associated with the project site, adjoining parcels, and Encinitas Creek...

According to the Final North County Multiple Habitat Conservation Program, the biological core and linkage area (BCLA) encompasses the best remaining habitat areas within MHCP boundaries. The BCLA includes the largest remaining blocks of habitat and critical linkages between them, based on natural vegetation communities, sensitive species, topographic connectivity, and other biological considerations. The proposed development parcel is adjacent to Encinitas Creek to the east, Batiquitos Lagoon to the north and coastal sage scrub and maritime chaparral covered bluffs to the south and west. The proposed development could adversely impact the existing east to west wildlife corridor between the hardline reserve of Encinitas Creek to the east of the site and the coastal sage scrub and maritime chaparral covered bluffs to the south and west of the site. The east to west wildlife corridor is especially important, and a solid line of development or streets would impede the movement of wildlife. The project, as proposed, does not appear to be consistent with the guidelines of the MHCP. It does not protect existing habitat and does not maximize preserve design and connectivity. Additionally, the US Fish and Wildlife Service and the California Dept. of Fish and Game in a joint comment letter on the Draft EIR dated November 6, 2007 state:

Implementation of the project, as proposed, would conflict with the standards set forth in the final MHCP and the City's SAP, as stated in our concerns above. Specifically, adequate FMZs and wetland buffers need to be provided by the project, and impacts to narrow endemic species should be reduced. The project should be designed to accommodate these standards. We do not agree that habitat loss has been minimized and mitigated to the maximum extent practicable in accordance with Section 4.3 of the NCCP Guidelines. The Alternative Analysis presented in the draft EIR inadequately examined other options for the project that would reduce or avoid impacts to wetlands and sensitive upland habitats, and minimize impacts to narrow endemic species.

The project EIR states that the project parcel would not function as a regional corridor or linkage due to 'dense urbanization' in surrounding areas. However, the parcel is part of a large north to south wildlife corridor that connects to Batiquitos Lagoon and is part of a large east to west corridor along the south side of Batiquitos Lagoon. The Lagoon is in turn connected to other open space areas that could potentially function as wildlife corridors. Therefore, it appears that the proposed parcel could function as a regional wildlife corridor. Although, an existing public trail that parallels the eastern edge of the proposed development parcel and currently has chain link fences on each side of it, probably inhibits movement of some wildlife at the current time, the fences could be removed in the future or sections of the fence could be taken out in order to facilitate wildlife movement. Therefore, the proposed development is inconsistent with the certified LCP requirements pertaining to preserving important wildlife corridors and must be denied.

If fewer homes were constructed on the project parcel, the rear of the property could be left open to allow for east to west wildlife passage. Therefore, this project is inconsistent with the certified LCP requirements that all new development shall be designed to be consistent with multi-species and multi-habitat preservation goals and requirements as established in the Statewide Natural Communities Conservation Plan (NCCP) Act in consultation with the United States Fish and Wildlife Service and California Department of Fish and Game and must be denied.

Additionally, the project does not provide an adequate fuel modification buffer in some areas of the project site. RM Policy 10.1 states that the City will minimize impacts to sensitive habitat, including impacts from brush clearance. Public Safety Policy 1.2 states that brush clearance shall not exceed a 30 foot perimeter in areas of native or significant brush. The City of Encinitas and the Commission traditionally require a fuel modification zone of at least 100 feet, especially in areas such as the subject site that include large stands of native scrub habitat. Despite this, the proposed fuel modification zone to the east of the proposed development footprint is substantially less than 100 feet (see Exhibit #10). The Encinitas City Fire Marshall has found that this limited fuel modification zone is appropriate because the applicant has agreed to employ ignition resistive building design and materials, prohibit wood decks or structures in the rear yard and at least one of the lots is adjacent to a concrete drainage ditch and public trail system, which is expected to reduce the need for an increased fuel modification zone in the future. While this limited fuel zone may seem sufficient at this time, the Commission has found that once structures are built, applicants frequently create larger fuel modification zones, particularly in years with high fire danger. Once a structure is built, it is difficult to deny a homeowner the ability to establish an adequate fuel modification zone, even if it is larger than originally anticipated and would result in the destruction of sensitive habitat. The Commission has found that to prevent such a situation, the LCP requires adequate planning for fuel modification zones when developments are proposed. In this way both habitat and structures are protected in the long run. For this reason, the limited fuel modification zone proposed adjacent to ESHA is insufficient. The Commission would typically impose conditions on the project to specifically require that 100 ft. fuel modification zones be imposed around the entire development. However, because the project must be denied due to other significant concerns related to protection of ESHA, no such condition has been added.

In summary, the proposed development is inconsistent with the City's LCP policies. Specifically, the proposed project impacts a large amount of ESHA, provides inadequate mitigation for impacts to ESHA, does not choose the least environmentally adverse alternative, is inconsistent with the NCCP, fragments an important biological corridor, and does not provide adequate fuel modification zones. The proposed development is not only inconsistent with the City's LCP but, because sensitive upland habitat is a significant resource, the approval of a project with such substantial negative impacts would establish an adverse precedent for future developments. For these reasons, the Commission finds that this project as proposed is inconsistent with the City's certified LCP and must be denied.

**3. Protection of Wetland Habitat.** The project, as proposed, is inconsistent with the City's certified LCP pertaining to permitted uses within wetlands, choosing the least environmentally adverse alternative, adequate drainage, appropriate wetland buffers, appropriate mitigation standards for wetland impacts, and the preservation of wetland resources. The City of Encinitas' staff report for this project states "[t]he proposed project would require development within the wetlands area that will not be consistent with the allowed project types delineated in RM Policy 10.6." The City's LCP includes several provisions pertaining to the protection of wetlands. The following are relevant to the proposed project.

Resource Management (RM) Policy 10.6:

The City shall preserve and protect wetlands within the City's planning area. "Wetlands" shall be defined and delineated consistent with the definitions of the U.S. Fish and Wildlife Service, U.S. Army Corps of Engineers, the Coastal Act and the Coastal Commission Regulations, as applicable, and shall include, but not be limited to, all lands which are transitional between terrestrial and aquatic systems where the water table is usually at or near the surface or the land is covered by shallow water.

There shall be no net loss of wetland acreage or resource value as a result of land use or development, and the City's goal is to realize a net gain in acreage and value whenever possible.

Within the Coastal Zone, the diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted 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 newly permitted uses and activities:

- a. Incidental public service projects.
- b. Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
- c. Restoration purposes.
- d. Nature study, aquaculture, or other similar resource dependent activities.

Identification of wetland acreage and resource value shall precede any consideration of use or development on-site where wetlands are present or suspected. With the exception of development for the primary purpose of the improvement of wetland resource value, all public and private use and development proposals which would intrude into, reduce the area of, or reduce the resource value of wetlands shall be subject to alternatives and mitigation analyses consistent with Federal E.P.A.

404(b)(1) findings and procedures under the U.S. Army Corps permit process. Practicable project and parcel development alternatives which involve no wetland intrusion or impact shall be preferred over alternatives which involve intrusion or impact. Wetland mitigation, replacement or compensation shall not be used to offset impacts or intrusion avoidable through other practicable project or parcel development alternatives. When wetland intrusion or impact is unavoidable, replacement of the lost wetland shall be required through the creation of new wetland of the same type lost, at a ratio determined by regulatory agencies with authority over wetland resources, but in any case at a ratio of greater than one acre provided for each acre impacted so as to result in a net gain. Replacement of wetland on-site or adjacent, within the same wetland system, shall be given preference over replacement off-site or within a different system.

The City shall also control use and development in surrounding area of influence to wetlands with the application of buffer zones. At a minimum, 100-foot wide buffers shall be provided upland of salt-water wetlands, and 50-foot wide buffers shall be provided upland of riparian wetlands. Unless otherwise specified in this plan, use and development within buffer areas shall be limited to minor passive recreational uses with fencing, desiltation or erosion control facilities, or other improvements deemed necessary to protect the habitat, to be located in the upper (upland) half of the buffer area when feasible.

All wetlands and buffers identified and resulting from development and use approval shall be permanently conserved or protected through the application of an open space easement or other suitable device.

The City shall not approve subdivisions or boundary line adjustments which would allow increased impacts from development in wetlands or wetland buffers. (Coastal Act/30231)

#### RM Policy 10.10:

The City will encourage and cooperate with other responsible agencies to plan and implement an integrated management plan for the long-term conservation and restoration of wetlands resources at San Elijo Lagoon (and where it applies, Batiquitos Lagoon), Escondido and Encinitas Creeks and their significant upstream feed creeks, according to the following guidelines:

[ . . . ]

Wildlife corridors between the wetland shoreline and important upland areas and upstream riparian areas should be maintained and enhanced;

Adequate buffer zones should be utilized when development occurs adjacent to the floodplain and sensitive habitats; 100 foot wide buffers should be provided adjacent to all identified wetlands, and 50 foot wide buffers should be provided adjacent to

riparian areas. In some cases, smaller buffers may be appropriate when conditions of the site as demonstrated in a site specific biological survey, the nature of the proposed development, etc., show that a smaller buffer would provide adequate protection; and when the Department of Fish and Game has been consulted and their comments have been accorded great weight.

Section 30.34.040:

A. Applicability. The Floodplain Overlay Zone regulations shall apply to all areas within the Special Study Overlay Zone where site-specific analysis of the characteristics of a parcel of land indicate the presence of a flood channel, floodplain, or wetland; and to all areas identified as flood channels and floodplains on maps...

[ . . . ]

b. Channelization or other substantial alteration of rivers or streams shall be limited to the following;

(3) Necessary water supply projects;

(4) Flood control projects where no feasible method for protecting existing public or private structures exists and where such protection is necessary for public safety or to protect existing development;

(3) Other development which has a primary element the improvement of fish and wild life habitat.

Section 30.34.040:

[ . . . ]

2. Floodplain. Within the 100-year floodplain, permanent structures and/or fill for permanent structures, roads and other public improvements consistent with the Land Use Element will only be allowed if the applicant can demonstrate the following:

[ . . . ]

b. Existing environmentally sensitive habitat areas will not be significantly adversely affected.

c. The development will not result in a net reduction of existing riparian habitat areas within the floodplain.

[ . . . ]

### 3. Wetlands

[ . . . ]

All buildings or other improvements proposed to be placed or erected, and all grading activities proposed to be undertaken adjacent to a wetland shall be located so as not to contribute to increased sediment loading of the wetland, cause disturbance to its habitat values, or otherwise impair the functional capacity of the wetland.

Approximately 6.4 acres of wetlands, as defined in the LCP, are present on the parcel and the proposed development would permanently fill approximately 0.05 acres of this wetland habitat (southern willow scrub) with the construction of a 20 ft. wide access road with a soft bottom culvert to access the proposed development. The applicant proposes to mitigate for the wetland impacts through enhancement of southern willow scrub habitat on-site at a 1.4:1 ratio and creation of southern willow scrub on-site at a 5.6:1 ratio, totaling no less than 0.35 acres (7:1 ratio). Both the enhancement and creation will take place on-site, adjacent to Encinitas Creek on the south side of La Costa Avenue. Creation will consist of conversion of current ruderal and/or disturbed upland habitat types to wetlands, via excavation and grading to achieve appropriate planting elevations. Enhancement of existing disturbed southern willow scrub will consist of removal of exotics/invasive species and replanting and seeding with appropriate native wetland vegetation. Additionally, the applicant proposes to remove weeds and exotics from the wetland buffer zone along the edge of the development and to seed with appropriate native transitional species.

The fill of wetlands within the City's Coastal Zone is limited to only four types of newly permitted uses and activities. These include nature study, restoration projects, incidental public service projects and mineral extraction. The proposed residential subdivision is not one of the identified permitted uses and as such, the project is inconsistent with RM Policy 10.6 and RM Policy 10.9, as cited above. The proposed restoration and enhancement of wetland habitat on-site would not negate the fact that wetland habitat would be lost as a result of a non permitted use. This project would also consist of development within the 100 year floodplain. The part of the proposed project within the 100 year floodplain would be a small portion of the road necessary to access the parcel. Although residential development is not one of the permitted uses for wetland fill, the applicant has shown that there is no other available entryway to the property. The property owner to the southeast of the proposed development has denied entry through his property and alternative entry locations from other directions are not feasible due to steep terrain to the west and preserved open space to the east. Therefore, even with a one home alternative, there must be some loss of wetland habitat and some development within the floodplain to provide access to the parcel. While any loss of wetlands for residential development is inconsistent with the Encinitas LCP, some loss may be necessary to allow development of the parcel.

The proposed project, however, is not the least environmentally damaging alternative, as required by LCP policies and ordinances. Specifically, the proposed project will fill

approximately 0.05 acres of wetlands to accommodate a 20 foot wide access road to the proposed subdivision. In order to accommodate necessary fire department access, a 20 foot access road is the minimum necessary width for a subdivision of more than 4 lots. However, a development of 1-4 units would only necessitate a 16 foot wide access road, which would impact 0.04 acres of wetland habitat. Thus, the proposed project is not the least environmentally damaging alternative, and is therefore inconsistent with the Certified LCP.

Additionally, even if the wetland fill could be found consistent, the proposed project does not include adequate wetland buffers for the existing wetlands on-site and the proposed created/enhanced wetlands on-site. The above cited LCP policies and ordinances require that a minimum 50 foot buffer be established between any development and riparian wetlands, although the width may be reduced if resources are protected and the California Dept. of Fish and Game concurs. The City's LCP limits uses in buffers to minor passive recreational uses and improvements deemed necessary to protect the habitat. All such improvements, however, are to be located in the upper half of the buffer, as feasible. The exhibits that the applicant has submitted show that the fuel modification zone will encroach into the 50 ft. wetlands buffer in some areas. Therefore, the buffer will not function as a true buffer which should remain natural and undeveloped so as to minimize the effects of erosion and sedimentation and to allow for a transitional habitat zone between wetlands and uplands. According to the Commission's staff ecologist, ongoing fuel modification within a wetlands buffer will adversely impact the viability and effectiveness of a wetlands buffer. The Commission would typically impose conditions on the project to specifically require that there be 50 ft. minimum riparian wetland buffers. However, because the project must be denied due to other significant concerns related to protection of ESHA, no such condition has been added.

Finally, the City is not requiring preservation or protection of the 3.03 acres of freshwater/salt marsh wetlands located on the "Not A Part" portion of the site on the north side of La Costa Avenue within the City of Carlsbad, which is inconsistent with the requirements of RM Policy 10.6. Because of its environmental importance and connection to the resources of Batiquitos Lagoon, the City should have required the applicant to process an application with the City of Carlsbad to preserve this part of the subject property within open space. As a result, the development potential of the property has not been extinguished or controlled such that future impacts to the 3.03 acres of wetlands have not been reconciled – it appears this subdivision could be creating a separate lot. The Commission would typically impose conditions on the project to specifically require that all wetlands and buffers identified and resulting from development and use approval shall be permanently conserved or protected through the application of an open space easement or other suitable device. However, because the project must be denied due to other significant concerns related to protection of ESHA, no such condition has been added.

The project is proposed with an inadequate drainage plan that may adversely affect wetland resources. The construction of 19 homes with associated hardscape and

circulation elements has the potential to increase the quantity and adversely affect the quality of storm water runoff.

Currently, the Encinitas portion of the project parcel drains in a northerly direction through an existing triple box culvert (directly east of the parcel) or through 2 existing 24" RCP pipes (one on-site and one directly west of the parcel), all of which extend beneath La Costa Avenue and then discharge into Batiquitos Lagoon. Post project implementation, runoff will be conveyed via grass-lined swales to permeable landscaped areas on-site. Any runoff that is not absorbed by landscaped areas on-site would be conveyed via a series of grassy swales located adjacent to the proposed on-site roadways and would discharge into either the existing concrete brow ditch located along the eastern project boundary or the existing bladed swale located adjacent to La Costa Avenue in the north-central portion of the parcel. Energy dissipaters (riprap) would be placed at drainage outfalls to reduce flow velocities and prevent erosion. Runoff would then flow through the existing triple box culvert or through the 2 existing 24" RCP pipes.

The project EIR states "[u]rban pollutants would be washed off the site's impervious surfaces during rainfall events... This runoff, typical of urban use, could contribute to the incremental degradation of downstream water quality." To address degradation of downstream water quality, the applicant proposes to direct runoff through grass-lined swales as well as to install Hydro Cartridge filters at all catch basins to filter urban pollutants from stormwater. The project EIR also states "...the project would increase peak runoff flows on-site... peak runoff flows from Drainage Node L would increase by 5.41 cfs (82.92 cfs to 88.33 cfs) and peak runoff from Drainage Node J would increase by 1.29 cfs (43.41 cfs to 44.70 cfs)..." To address the increased runoff flows at Drainage Node L, the applicant proposes to install an underground detention system to attenuate the increased flows. The underground detention system would consist of underground devices such as double chamber inlets and perforated/wrapped storm drain pipes and would reduce flows at Drainage Node L to pre-development levels. However, the applicant does not propose any mitigation for the increase in runoff from Drainage Node J and the EIR merely states that increased drainage at Drainage Node J, would be transported off-site via the existing 24" pipe to Batiquitos Lagoon. The project, as approved by the City, mandates that detention basins will be installed and designed such that runoff resulting from a 100-year frequency storm under developed conditions is equal to or less than runoff from a storm of the same frequency and duration under existing conditions. Although it is still unclear whether the project would address the specific 1.29 cfs peak runoff increase at Drainage Node J, the Commission would typically impose conditions on the project to specifically require that there be no increase in runoff to Batiquitos Lagoon. However, because the project must be denied due to other significant concerns related to protection of ESHA, no such condition has been added.

In summary, the proposed development is inconsistent with the City's LCP pertaining to protection of wetland resources in that the proposed 19 lot residential subdivision is not a permitted use within a wetland, is not the least environmentally damaging alternative, does not provide adequate wetland buffers, potentially does not provide adequate

drainage, and does not adequately preserve the 3.03 acres of wetland north of La Costa Avenue. The proposed development is not only inconsistent with the City's LCP but, because wetlands are a significant resource, the City's action of approving a nonallowable fill of wetland would establish an adverse precedent for future developments. For these reasons, the Commission finds that the proposed project is inconsistent with the City's certified LCP and must be denied.

**4. Protection of Visual Resources.** The project, as proposed, fails to adequately address the protection of public views. The project site is a 56.94 acre naturally vegetated upland hillside overlooking Batiquitos Lagoon. Immediately to the east of the proposed parcel is Encinitas Creek, which is conserved as open space in the City of Carlsbad. To the west and southwest of the proposed development parcel are additional upland hillsides and naturally vegetated open space areas. Public views of the 10 acres of native vegetated areas that would be impacted by development of the proposed parcel are available from trails located within Batiquitos Lagoon preserve as well as along La Costa Avenue. Development of the parcel could have a significant adverse visual impact to the visual resources of the area. The City's LCP contains several provisions that address protection of scenic visual resources. Specifically, the Resource Management Element of the LUP includes:

**RM GOAL 4:**

The City, with the assistance of the State, Federal and Regional Agencies, shall provide the maximum visual access to coastal and inland views through the acquisition and development of a system of coastal and inland vista points. (Coastal Act/30251)

**RM Policy 4.4:**

The system of Vista Points will provide for the differing needs of automobile, bicycle, and pedestrian users, and will recognize as a recreational resource, the function of Vista Points as facilities for the passive, and occasionally remote enjoyment of the coastal and inland view. (Coastal Act/30251/30212.5/30210)

**RM Policy 4.5:**

The City will designate "Scenic/Visual Corridor Overlay" areas within which the character of development would be regulated to protect the integrity of the Vista Points according to the following criteria:

[ . . . ]

-development within the critical viewshed area should be subject to design review based on the following:

-Building height, bulk, roof line and color and scale should not obstruct, limit or degrade the existing views;

-Landscaping should be located to screen adjacent undesirable views (parking lot areas, mechanical equipment, etc.) (Coastal Act/30251/30253)

RM Policy 4.6:

The City will maintain and enhance the scenic highway/visual corridor viewsheds (Coastal Act/30251)

RM policy 4.7:

The City will designate the following view corridors as scenic highway/visual corridor viewsheds:

[ . . . ]

- La Costa Ave. from just west of I-5 to El Camino Real

[ . . . ]

RM Policy 4.8:

The City will designate Scenic/Visual Corridor Overlay and scenic highway viewshed areas as illustrated on the Visual Resource Sensitivity Map (Figure 3). (Coastal Act/30251).

RM Policy 4.9:

It is intended that development would be subject to the design review provisions of the Scenic/Visual Corridor Overlay Zone for those locations within Scenic View Corridors, along scenic highways and adjacent to significant viewsheds and vista points with the addition of the following design criteria:

[ . . . ]

Development Design

- Building and vegetation setbacks, scenic easements, and height and build restrictions should be used to maintain existing views and vistas from the roadway.

[ . . . ]

- Development should be minimized and regulated along any bluff silhouette line or on adjacent slopes within view of the lagoon areas and Escondido Creek.
- Where possible, development should be placed and set back from the bases of bluffs, and similarly, set back from bluff or ridge top silhouette lines; shall leave lagoon areas and floodplains open, and shall be sited to provide unobstructed view corridors from the nearest scenic highway.
- Development that is allowed within a viewshed area must respond in scale, roof line, materials, color, massing, and location on-site to the topography, existing vegetation, and colors of the native environment. (Coastal Act/30251/30253)

The 19-lot subdivision fails to adequately protect the visual resources surrounding Batiquitos Lagoon and along La Costa Avenue, a designated scenic highway. According to the project EIR “[t]he portions of the project site that are proposed for development would be visible to traffic along La Costa Ave., along the street frontage and for a short distance east and west of the site.” The EIR makes no mention of the scenic view looking east from the north side of Batiquitos Lagoon and/or the public trails in the Batiquitos Lagoon preserve. Additionally, the proposed subdivision would be clearly visible from the La Costa Glen public trail along the eastern perimeter (see Exhibit #11). In 2008, the Batiquitos Lagoon Foundation purchased what is known as the Mitushi Property, consisting of a disturbed bluff that the Foundation is in the process of restoring and adding public trails to. This area overlooks the entire western basin of the lagoon from the north. Approval of the proposed development could compromise the sweeping view from this future public viewpoint.

While no residential construction is proposed with this application, the city attempted to address visual resources through development restrictions on future residential development. The project, as proposed, is limited to only one story homes to ensure visual and aesthetic compatibility with the surrounding natural habitat areas. However, the City could have reduced the number of lots and the size of the lots created by this subdivision, which would have limited the future development in size and scope to minimize the visual impacts to the naturally vegetated areas and should have required more substantial mitigation to address its visual impacts. RM Policy 4.9 as cited above requires that the viewshed be protected by the use of natural colors, materials and landscaping for the development. The project fails to propose the use of natural colors and materials and landscaping for the future homes that will be built within the subdivision. In addition, because of the on-site ESHA and proximity to Batiquitos Lagoon, all landscaping for the subdivision and any future homes should be native, drought-tolerant and non-invasive. Including these conditions as part of the subdivision proposal would ensure that future design and permitting of homes can anticipate these requirements. The Commission would typically impose conditions on the project to specifically require that all future development use responding natural colors, materials

and landscaping. However, because the project must be denied due to other significant concerns related to protection of ESHA, no such condition has been added.

**5. Public Access.** The project parcel is located between the sea (Batiqitos Lagoon) and the first public roadway (La Costa Avenue). Pursuant to Section 30.80.090 of the City's LCP, a public access finding must be made that such development is in conformity with the public access and public recreation policies of the Coastal Act.

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.

In addition, Section 30212 of the Act is applicable and states:

- (a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:
  - (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources,
  - (2) adequate access exists nearby....

There currently exists no public access trails on the subject parcel. The proposed project, as conditioned by the City, is required to provide two connections to the adjacent Carlsbad trail system. The development as conditioned by the City would not adversely affect public access to the shoreline. Therefore, the proposed development could be found consistent with the public access and recreation policies of the Coastal Act.

**6. Local Coastal Planning.** The City of Encinitas received approval of its LCP in November of 1994 and began issuing coastal development permits on May 15, 1995. The City of Encinitas Planning Commission approved the subject development on July 23, 2009. The local decision was not appealed to the City Council. Because the development is located between the sea (San Elijo Lagoon) and the first coastal roadway, it falls within the Commission's appeals jurisdiction. On August 20, 2009 and August 24, 2009, the development approval was appealed to the Coastal Commission. The standards of review are the policies and ordinances of the certified LCP and the public access and recreation policies of the Coastal Act.

As noted previously, the proposed development is inconsistent with several policies of the City's certified LCP. The project as approved by the City is inconsistent with many resource protection policies of the LCP. The proposed subdivision impacts a large amount of ESHA, provides inadequate mitigation for impacts to ESHA, does not choose

the least environmentally adverse alternative, is inconsistent with the NCCP, fragments an important biological corridor, and does not provide adequate fuel modification zones. Additionally, the proposed project is not a permitted use within a wetland, does not provide adequate wetland buffers, does not provide adequate drainage, and does not adequately preserve the 3.03 acres of wetland north of La Costa Avenue. Finally, the project results in adverse impacts to public views from trails within the Batiquitos Lagoon Reserve and La Costa Avenue. Because each of these impacts is inconsistent with the previously cited LCP policies, the proposed development must be denied. The Commission finds that approval of the subject proposal would prejudice the City's ability to continue to implement its certified LCP.

**7. California Environmental Quality Act (CEQA).** Section 13096 of the California Code of Regulations requires Commission approval of a coastal development permit to be supported by a finding showing the permit to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

As stated previously, the development as proposed would result in impacts to environmentally sensitive habitat areas. In addition, there are feasible alternatives to the proposed development which would lessen its adverse effect. Thus, the proposed development is not the least environmentally damaging alternative and cannot be found consistent with the requirements of the City of Encinitas LCP, nor with the applicable CEQA requirements. Thus, the proposed project must be denied.

# Project Location

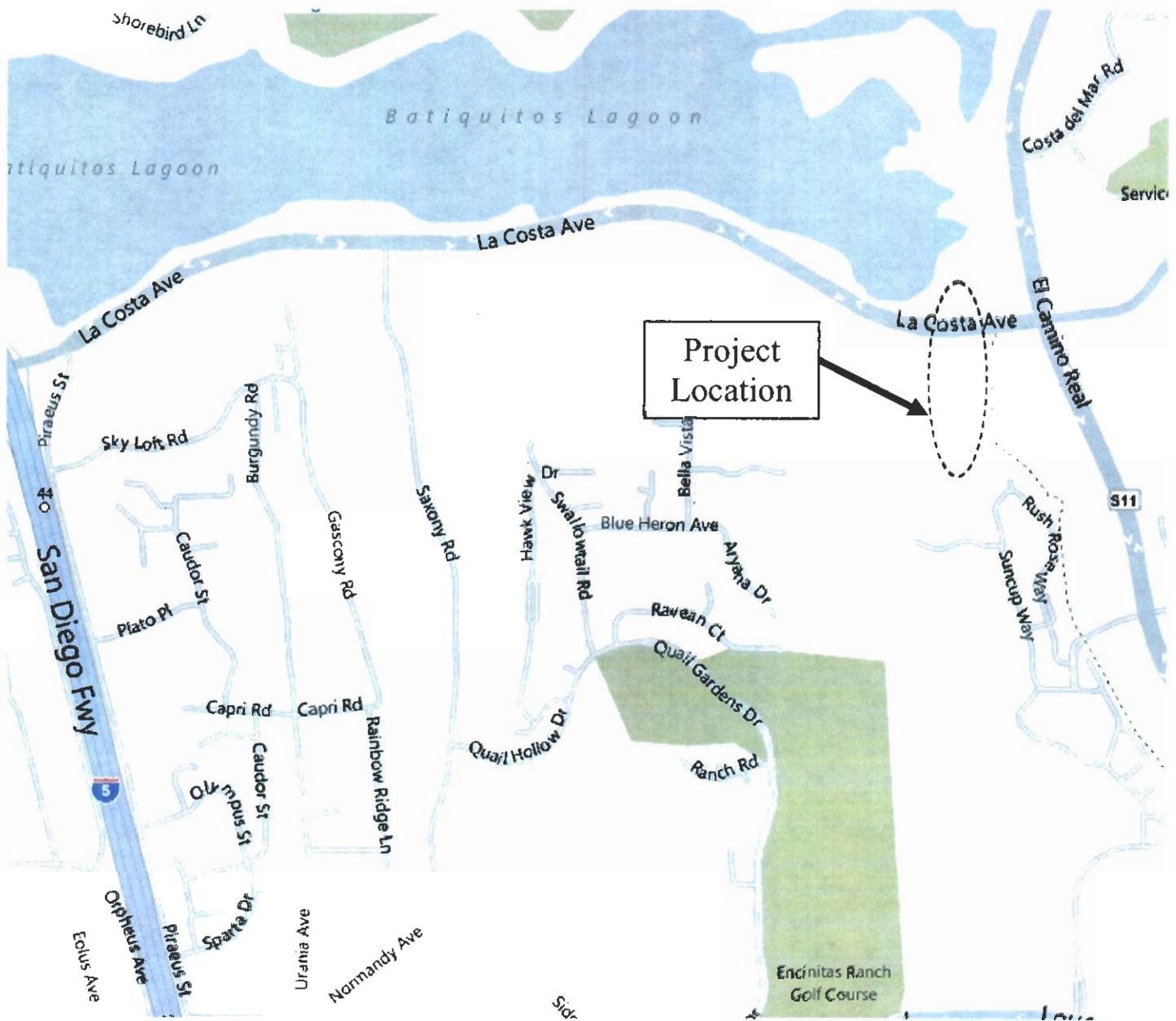
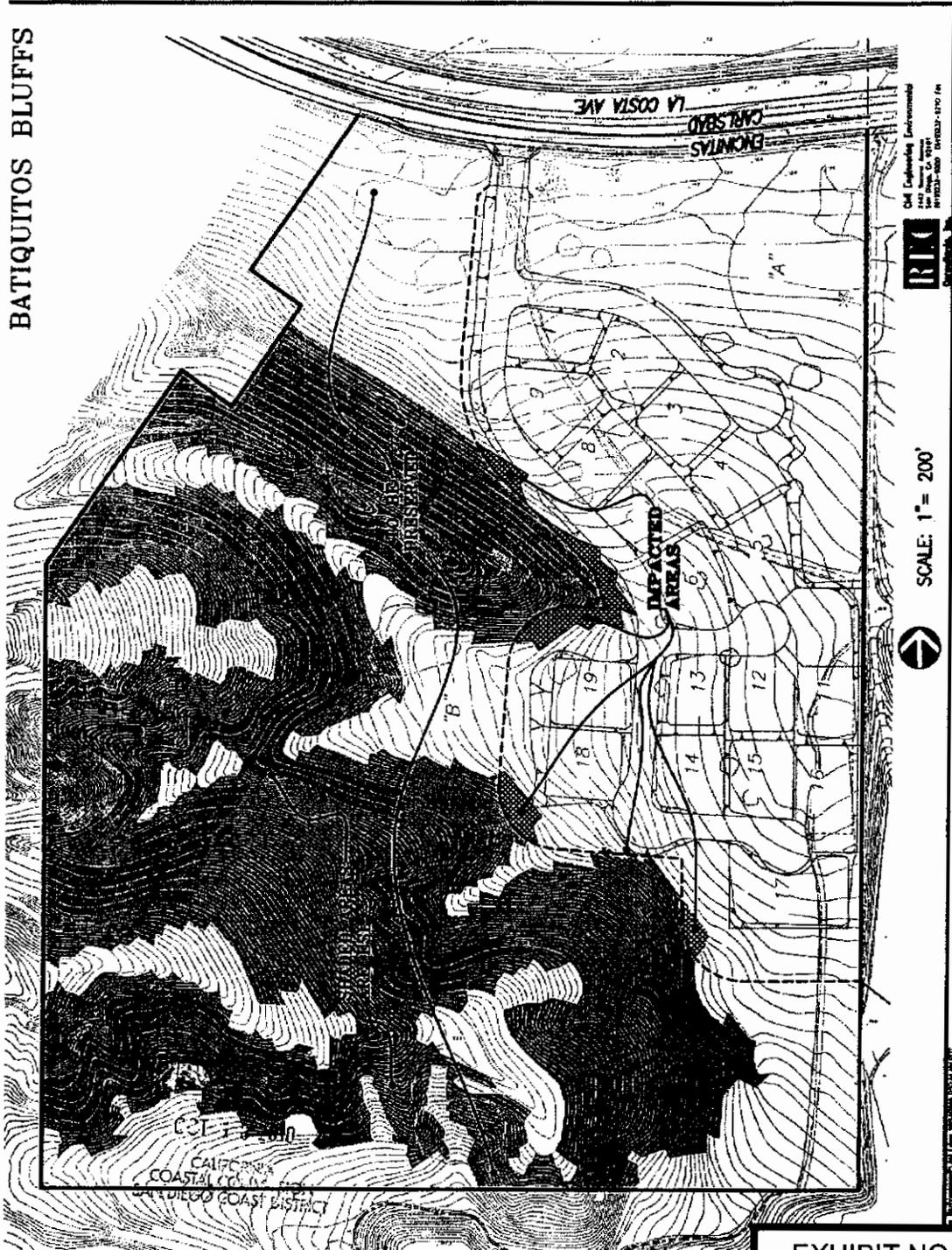


EXHIBIT NO. 1
APPLICATION NO.
<b>A-6-ENC-09-050</b>
Project Location
 California Coastal Commission



**Areas of parcel with slope greater than 25%  
 (exhibit does not show Carlsbad portion of parcel)**



Dark shaded areas represent slopes greater than 25%



EXHIBIT NO. 3
APPLICATION NO. A-6-ENC-09-050
Steep Slopes
California Coastal Commission

RIK  
 Civil Engineering, Environmental  
 Surveying, and Planning  
 10000 Camino del Rio South, Suite 100  
 San Diego, CA 92108  
 (619) 594-1100

SCALE: 1" = 200'

## **Sensitive Plant Species**

3 species on the California Native Plant Society list of rare, threatened or endangered species in California and elsewhere were observed:

- Nuttall's scrub oak
- Del Mar sand aster
- Summer-holly

2 species on the California Native Plant Society list of rare, threatened or endangered species in California but more common elsewhere were observed:

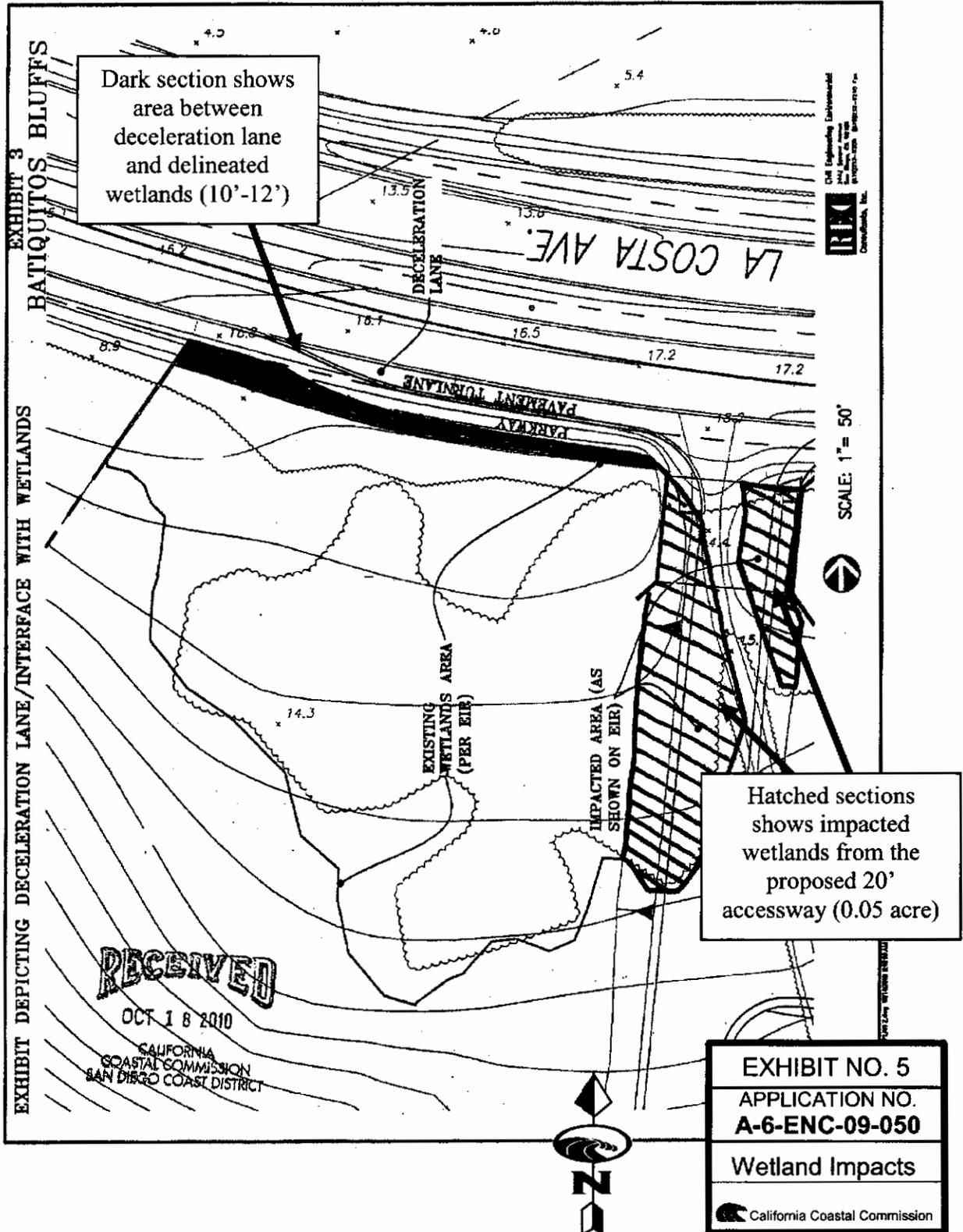
- California adolphia
- Wart-stemmed ceanothus

1 species on the California Native Plant Society list of species on the watch list due to limited distribution:

- Southwestern spiny rush



# Impact on Wetland Habitat



# Environmentally Superior Alternative

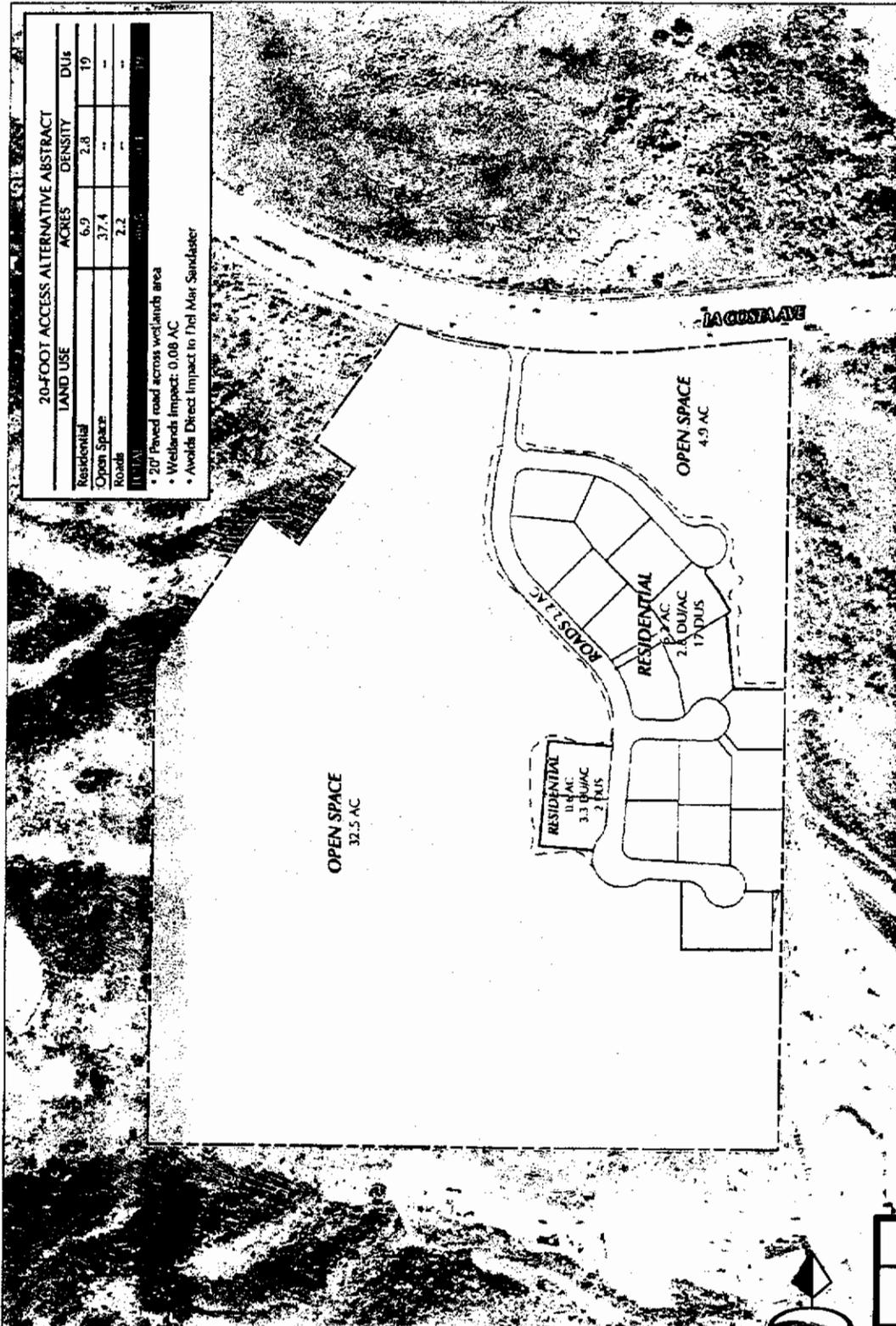
REDUCED FOOTPRINT ALTERNATIVE ABSTRACT

LAND USE	ACRES	DENSITY	DUF
Residential (Leased Area)	1.5	2.6	4
Private Roadway	0.7	--	--
Open Space	45.6	--	--
			47.8



EXHIBIT NO. 6
APPLICATION NO. A-6-ENC-09-050
EIR Alternative
California Coastal Commission

# Proposed Project



**20-FOOT ACCESS ALTERNATIVE ABSTRACT**

LAND USE	ACRES	DENSITY	DUs
Residential	6.9	2.8	19
Open Space	37.4	--	--
Roads	7.2	--	--
<b>TOTAL</b>	<b>51.5</b>	<b>1</b>	<b>19</b>

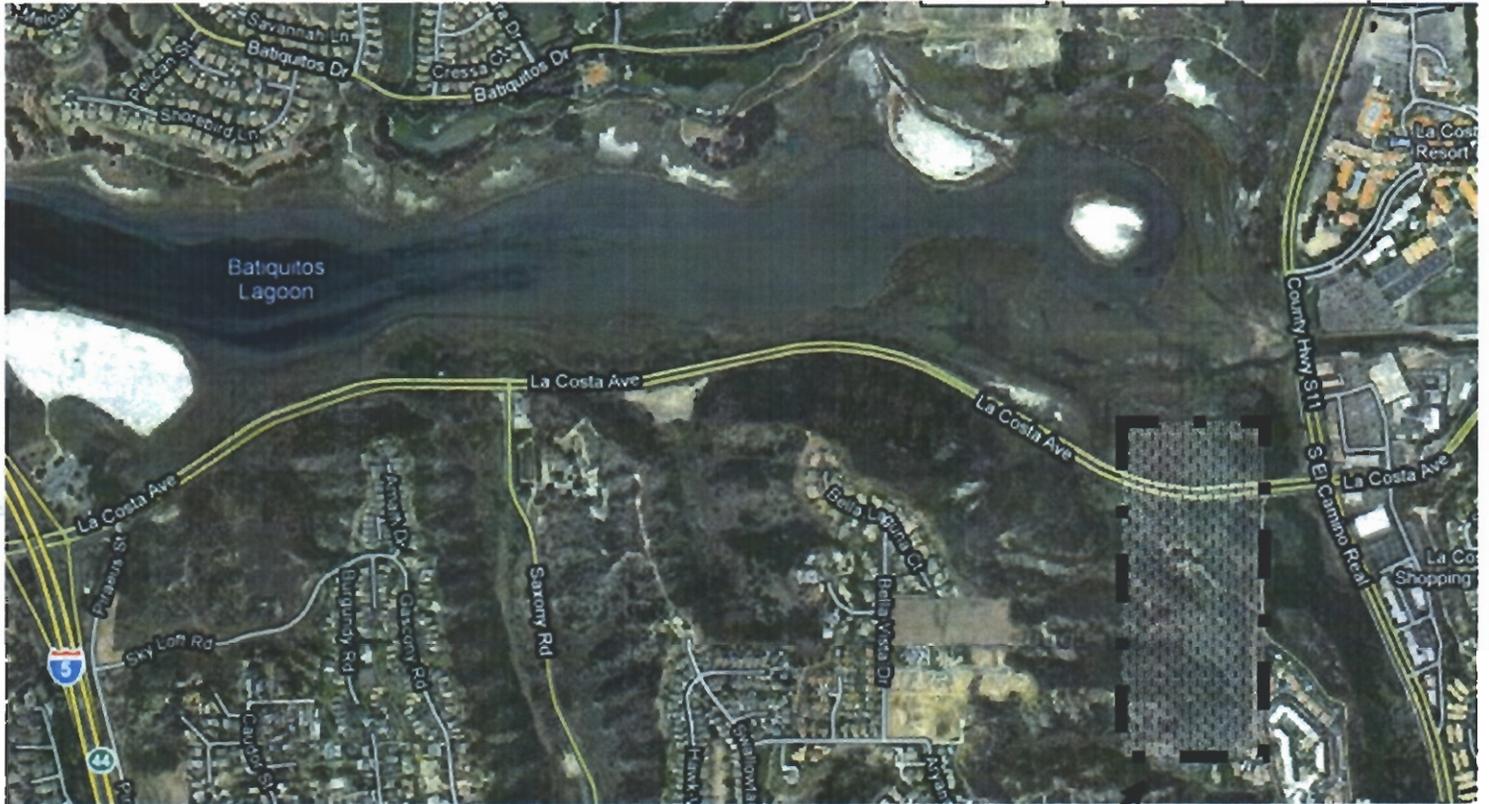
- 20' Paved road across wetlands area
- Wetlands Impact: 0.08 AC
- Avoids Direct Impact to Tidal Mar Sandlaster



<b>EXHIBIT NO. 7</b>
<b>APPLICATION NO.</b>
<b>A-6-ENC-09-050</b>
<b>Project</b>
California Coastal Commission



## Biological Corridor to the South of La Costa Ave

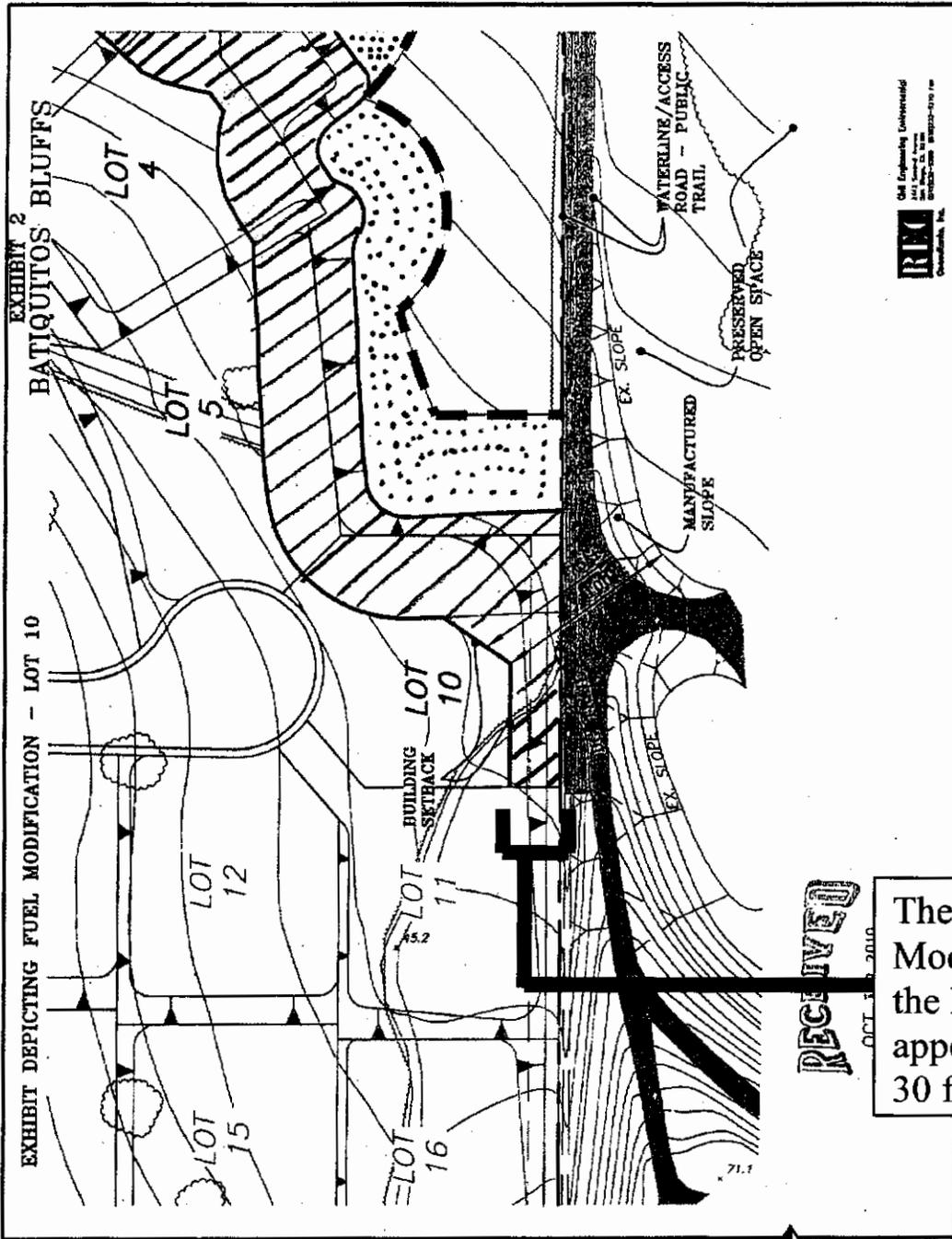


Rectangle represents approximate project location in relation to surrounding development



EXHIBIT NO. 9
APPLICATION NO. A-6-ENC-09-050
Biological Corridor
 California Coastal Commission

# Fuel Modification Zone East Side




 RMC  
 Civil Engineering/Underground  
 2000 S. Main St., Suite 200  
 San Mateo, CA 94401-1000  
 (650) 352-1100

RECEIVED  
 OCT 13 2010  
 The proposed Fuel Modification Zone to the East of Lot 10 appears to be less than 30 ft.

	Wetland Buffer
	Fuel Modification Zone



EXHIBIT NO. 10
APPLICATION NO. <b>A-6-ENC-09-050</b>
FMZ East Side
 California Coastal Commission

# La Costa Glen Trail-Visual Impact

## La Costa Glen Trails Map



Encircles portion of La Costa Glen Trail that would have visual impacts from the construction of the proposed project



EXHIBIT NO. 11
APPLICATION NO. A-6-ENC-09-050
Visual Impact
 California Coastal Commission