

**CALIFORNIA COASTAL COMMISSION**

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# Th20b

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## STAFF REPORT: REGULAR CALENDAR

**Application No.:** 6-16-0500

**Applicant:** Amy and Jeff Szekeres

**Agent:** Jonathan Corn

**Location:** 525 San Julio Road, Solana Beach, San Diego County  
(APN 298-371-27)

**Project Description:** Construction of a 2-story, 5,141 sq. ft. single-family residence and a 705 sq. ft. attached garage on a vacant 0.32-acre lot.

**Staff Recommendation:** Approval with Conditions

### SUMMARY OF STAFF RECOMMENDATION

Staff is recommending approval of the proposed residence, with revisions to accommodate a revised development envelope that incorporates a 50-foot wide buffer to protect the environmentally sensitive habitat area that occurs adjacent to the subject site.

The primary Coastal Act issues raised by this project relate to the protection of the biological resources adjacent to the subject site. Though no environmentally sensitive plant or animal species occur within the subject site, southern maritime chaparral habitat, which the Commission's ecologist has determined is an Environmentally Sensitive Habitat Area (ESHA), is located immediately adjacent to the southwestern and southeastern property lines ([Exhibit 3](#)). The applicant is proposing a 20 – 31 ft. buffer from the ESHA consisting of native landscaping. As required by the City of Solana Beach's Fire Department, the applicant is proposing a 30 ft. wide brush management zone that includes hardscaping, turf, a retention basin, and non-native

landscaping in the area between the proposed ESHA buffer and the proposed residence ([Exhibit 3](#)).

In October 2015, Commission staff provided staff at the City of Solana Beach comments identifying the proposed project's inconsistencies with the City's LUP policies ([Exhibit 11](#)). Specifically, a portion of the subject site itself is identified as ESHA in the City's certified LUP maps, which requires a LUP amendment if any adjustments are necessary; the project does not provide a 100 to 50-foot wide buffer from ESHA that contains only native habitat; and the development does not protect all of the areas that should have been protected in an open space deed restriction required by the Commission at the time the subdivision was approved. Commission staff asked the City to identify and evaluate a buildable area on the site that would allow for construction of a home consistent with these LUP requirements.

However, the proposed project was not revised to conform to the habitat protection policies of the Coastal Act or the certified LUP. The Commission's staff ecologist and the California Department of Fish and Wildlife have reviewed the project and determined that a 20 – 31 ft. ESHA buffer will not adequately protect the adjacent ESHA, and a 50-foot wide buffer is required. In order to preserve the habitat values of the ESHA, it is important that no development other than the restoration and maintenance of native plants be permitted in the ESHA buffer. Therefore, **Special Condition 1** establishes a development envelope that incorporates a 50 ft. wide buffer from the delineated ESHA on the southwestern property line, in which no development, including brush management and water quality BMPs, is permitted. Outside of this buffer area, all development, including the required 30 foot brush management zone and construction of the residence, can occur.

There is sufficient area on the subject site to construct a reasonably sized residence and accommodate the required minimum ESHA buffer. An alternatives analysis submitted by the applicant estimated that an approximately 1,905 sq. ft. home including a 1-car garage could be constructed on this site by moving the proposed home approximately 30-19 feet further from the ESHA. However, there are other alternatives available that would allow the applicant to build a larger structure on the site, including reducing the front and side yard setbacks and building a taller home. Both the certified LUP and the HOA restrictions for the site contain specific provisions allowing such accommodations where necessary to avoid environmental impacts.

As conditioned, the 30-foot wide brush management zone required by the City would also be accommodated. Although a 30-foot wide zone is fairly narrow for a residence on top of a slope containing native vegetation, and is less than the 100-feet required for new development in the City's LUP, the Fire Department determined that a 30 ft. fire break would be sufficiently protective of the proposed development, provided the applicant incorporates fire resistive construction methods that meet all wildland/urban interface standards to the satisfaction of the Fire Department. Therefore, staff recommends **Special Condition 2**, which requires the use of these alternative methods as well as prohibiting vegetation removal or thinning outside of the fire break, and the submittal of a final landscape plan which utilizes only native, southern maritime chaparral species within the 50 ft. ESHA buffer.

To avoid any adverse impacts to water quality, **Special Condition 3** requires implementation of a suite of water quality best management practices during and post-construction.

**Special Condition 4** requires that the ESHA buffer is placed into an open space restriction to prevent future development in the buffer area, and **Special Condition 6** requires the permit to be recorded as a restriction against the deed of the site, which will ensure that future owners are aware of the permit conditions and restrictions.

Given the proximity of the site to ESHA, staff also recommends **Special Condition 5**, which requires a pre-construction survey for active bird nests prior to the commencement of construction activities to avoid any potential, adverse impacts to sensitive species. As conditioned, no significant impacts to coastal resources are anticipated.

Due to Permit Streamlining Act requirements, the Commission must act on this application at the May 2017 hearing, unless a 90-day extension is granted by the applicant.

Commission staff recommends **approval** of coastal development permit application 6-16-0500 as conditioned.

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### **EXHIBITS**

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## I. MOTION AND RESOLUTION

### Motion:

*I move that the Commission **approve** Coastal Development Permit Application No. 6-16-0500 subject to the conditions set forth in the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in conditional approval 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:

*The Commission hereby approves coastal development permit 6-16-0500 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

### III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

1. **Revised Final Plans. PRIOR TO THE ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT,** the applicant shall submit for review and written approval by the Executive Director, the following revised final plans, modified as required below. Said plans shall be stamped approved by the City of Solana Beach and the Fire Department and be in substantial conformance with the plans submitted by the applicant, date stamped as received on May 26, 2016, except they shall be revised to reflect the following:

- (a) A 50 ft. wide buffer from the delineated ESHA on the southwestern property line shall be established. Within this buffer, no development shall be permitted except for restoration and maintenance of native plants.
- (b) Water quality BMPs, including but not limited to bioretention/detention basins shall be located outside the 50-ft wide ESHA buffer.
- (c) A minimum 30 ft. wide brush management zone located on the property inland (northeast) of the ESHA buffer.

The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director determines that no amendment is legally required for any proposed minor deviations.

2. **Landscaping and Fuel Modification Plans. PRIOR TO THE ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT,** the applicant shall submit, in a form and content acceptable to the Executive Director, full size sets of final landscaping and fuel modification plans, prepared by a licensed landscape architect or a qualified resource specialist. Said plans shall be stamped and approved by the City of Solana Beach and the Fire Department. The consulting landscape architect or qualified landscape professional shall certify in writing that the final landscape and fuel modification plans are in conformance with the following requirements:

- (a) Final landscape plans shall include the following:
  - i. No brush clearing or fuel modification shall occur within the 50 ft. ESHA buffer.
  - ii. Identification of native plant species that are present within the required 50 ft. ESHA buffer and a note on the plans indicating these species will be flagged for avoidance. Disturbance to root zones of native species within the required 50 ft. ESHA buffer shall be avoided. If a native species must be disturbed, the

individuals shall either be trimmed to allow access, but the roots shall remain intact to allow the individuals to resprout.

- iii. Restoration activities within the required 50 ft. ESHA buffer shall consist of entirely of native, southern maritime chaparral species, and if available, obtained from local stock.
- iv. The applicant shall submit to the Executive Director for review and approval a list of species to be planted and seeded within the ESHA buffer. The species list shall not contain any invasive, exotic species.
- v. All non-native species within the buffer would be removed and replaced with native species.
- vi. The type, size, extent, and location of all trees and shrubs on the site, including the proposed irrigation system and other landscape features.
- vii. All cut and fill slopes shall be stabilized with planting at the completion of final grading. Such planting shall be adequate to provide 90 percent coverage within two (2) years. All disturbed soils shall be planted to provide 90 percent coverage within two (2) years.
- viii. To minimize the need for irrigation all landscaping shall consist of primarily native drought tolerant plants, as listed by the California Native Plant Society. (See <http://www.cnps.org/cnps/grownative/lists.php>.) Some non-native drought tolerant non-invasive plants may be used within 30 feet of habitable structures. No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California, shall be employed or allowed to naturalize or persist on the site. No plant species listed as a “noxious weed” by the State of California or the U.S. Federal Government shall be shall be planted or allowed to naturalize or persist on the site.
- ix. All irrigation systems shall limit water use to the maximum extent feasible. Use of reclaimed water for irrigation is encouraged. If permanent irrigation systems using potable water are included in the landscape plan, they shall use water conserving emitters (e.g., microspray) and drip irrigation only. Use of reclaimed water (“gray water “systems) and rainwater catchment systems is encouraged. Other water conservation measures shall be considered, including use of weather based irrigation controllers.
- x. The use of rodenticides containing any anticoagulant compounds (including, but not limited to, Warfarin, Brodifacoum, Bromadiolone or Diphacinone) is prohibited.

- xi. A planting schedule that indicates that the planting plan shall be implemented within 60 days of completion of construction.
- xii. A written commitment by the applicant that all landscaped areas on the project site shall be maintained in a litter-free, weed-free, and healthy growing condition throughout the life of the project and, whenever necessary, shall be replaced with new plant materials to ensure continued compliance with applicable landscape requirements.

(b) Fuel modification plans shall include the following:

- i. Vegetation removal, hardscape and the construction of accessory structures may occur within 30 feet of the approved residence consistent with the City of Solana Beach Fire Department requirements. Such development shall not occur within the 50-foot ESHA buffer.
- ii. Landscaping planted within the 30-foot radius of the proposed residence shall be selected from the most fire-resistant, drought-tolerant species or subspecies available.
- iii. Indication of compliance with Building Code and Fire Code Requirements for projects located in the Wildland Urban Interface including the type and location of alternative fire risk abatement methods.

(c) Turf Management Plan to include the following:

- i. Use of turf irrigated with potable water shall be minimized.
- ii. A Turf Management Plan shall be prepared that gives precedence to the use of non-chemical strategies instead of chemical strategies for managing weedy species and pests on site.
- iii. Turf management practices shall follow state-of-the-art environmental methods (such as Integrated Pest Management) to minimize water use, fertilizer and herbicide application, and chemical pesticide use, to the maximum extent feasible.
- iv. Chemical pest control strategies may be employed only after all other non-chemical strategies have proven ineffective.

The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director determines that no amendment is legally required for any proposed minor deviations.

**3. Construction and Post-Construction Best Management Practices. PRIOR TO THE ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT,** the applicant shall submit to the Executive Director for review and written approval a construction pollution prevention plan and a drainage and runoff control plan approved by the City of Solana Beach, documenting that

the runoff from the roof, driveway, and other impervious surfaces of the existing and proposed structures will be collected and directed into the retention basin for infiltration or percolation prior to being discharged off site in a non-erosive manner.

- (a) Construction Pollution Prevention Plan (CPPP) prepared under the guidance of a certified erosion control specialist or similarly qualified professional. At a minimum, the CPPP shall demonstrate that the development complies with the following requirements:
- i. The limits of work shall be clearly delineated with use of staking, flagging, or silt fences, and shall be verified by a qualified biologist.
  - ii. During construction, development shall minimize site runoff and erosion through the use of temporary BMPs, and shall minimize the discharge of sediment and other potential pollutants resulting from construction activities (e.g., chemicals, vehicle fluids, petroleum products, cement, debris, and trash).
  - iii. Development shall minimize land disturbance during construction (e.g., clearing, grading, and cut-and-fill). Development shall minimize soil compaction due to construction activities, to retain the natural stormwater infiltration capacity of the soil.
  - iv. Development shall minimize the damage or removal of non-invasive vegetation (including trees, native vegetation, and root structures) during construction.
  - v. Development shall implement soil stabilization BMPs (such as mulching, soil binders, erosion control blankets, or temporary re-seeding) on graded or disturbed areas as soon as feasible during construction, where rainfall is predicted or there is a potential for soil erosion.
  - vi. During construction, the applicant shall use temporary erosion and sediment control products such as fiber rolls, erosion control blankets, mulch control netting straw wattles, and silt fences that avoid plastic netting (such as polypropylene, nylon, polyethylene, polyester, or other synthetic fibers), in order to minimize wildlife entanglement and plastic debris pollution.
  - vii. Tracking controls or street sweeping shall be used to prevent off-site movement of sediment.
  - viii. Fueling and maintenance of construction equipment and vehicles shall take place off site if feasible. Any fueling and maintenance conducted on site shall take place at a designated area located at least 50 feet from coastal waters, drainage courses, and storm drain inlets, if feasible, unless these inlets are blocked to protect against fuel spills. The fueling and maintenance area shall be designed to fully contain any spills of fuel, oil, or other contaminants.

- ix. Trash and construction debris shall be removed from the site weekly, at a minimum, and the site shall be maintained in an organized manner with a neat appearance.

(b) Post-Development Runoff Plan, including a map, drawn to scale, showing the property boundaries, building footprint, runoff flow directions, relevant drainage and water quality features, impervious surfaces, permeable pavements, and landscaped areas. The PDRP shall demonstrate that the project:

- i. Minimizes disturbance of coastal waters and natural drainage features; minimizes removal of native vegetation; and avoids, to the extent feasible, covering or compaction of highly permeable soils.
- ii. Preferentially uses Low Impact Development (LID) techniques to retain and disperse runoff on site.
- iii. Uses infiltration to the greatest extent feasible to retain runoff; minimize the addition of impervious surfaces; and disconnect impervious surfaces from the storm drain system by interposing strategically-located pervious areas. Where infiltration is not appropriate or feasible, uses alternative BMPs to minimize changes in the runoff flow regime (e.g., direct roof runoff into rain barrels or cisterns for later use, evaporate roof runoff, employ a green roof, construct a rain garden, or plant trees).
- iv. Minimizes pollutants associated with landscaping and building materials.
- v. Directs drainage from all parking areas and driveways, roofs, walkways, patios, and other impervious surfaces to, in order of priority, a) landscaped areas or open spaces capable of infiltration, b) earthen-based infiltration BMPs, c) flow-through biofiltration BMPs designed to treat, at a minimum, twice the 85<sup>th</sup> percentile one-hour storm event volume, accompanied by supporting calculations, d) proprietary filtration systems designed to treat, at a minimum, twice the 85<sup>th</sup> percentile one-hour storm event volume, accompanied by supporting calculations and product documentation.
- vi. Provide that any Water Quality BMPs sited within ESHA buffers enhance the protection afforded to the ESHA.
- vii. Conveys excess runoff off-site in a non-erosive manner.
- viii. Where flow-through BMPs are used, includes supporting calculations and product documentation.
- ix. Includes all maintenance and operating procedures that will be conducted to keep the water quality provisions effective for the life of the development.

The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director determines that no amendment is legally required for any proposed minor deviations.

**4. Open Space and Conservation Deed Restriction.**

- (a) No development, as defined in Section 30106 of the Coastal Act, shall occur in the open space area depicted in [Exhibit 10](#), except for southern maritime chaparral vegetation restoration, including planting, maintenance, and temporary irrigation.
- (b) **PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, reflecting the above restrictions on development in the designated open space area. The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the designated open space area prepared by a licensed surveyor based on an on-site inspection of the open space area.
- (c) The deed restriction shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed.
- (d) The deed restriction shall run with the land in favor of the People of the State of California, binding successors and assigns of the landowner in perpetuity.

**5. Sensitive Species Monitoring. PRIOR TO COMMENCEMENT OF ANY CONSTRUCTION ACTIVITIES** during bird nesting season (February 1<sup>st</sup> through September 15<sup>th</sup>), a qualified biologist shall conduct a site survey for active nests no more than 72 hours prior to any development. If an active nest of a special-status species or species protected by the federal Migratory Bird Treaty Act (MBTA) or the California Fish and Game Code is located, then a qualified biologist shall monitor the nest daily until project activities are no longer occurring within a distance of the nest appropriate to the sensitivity of the species and determined in consultation with the California Department of Fish and Wildlife (typically 300 feet for most species, up to 500 feet for raptors), or until the young have fledged and are independent of the adults or the nest is otherwise abandoned. Limits of construction around active nests shall be established in the field with flagging, fencing, or other appropriate barriers and construction personnel shall be instructed on the sensitivity of nest areas. The monitoring biologist shall halt construction activities if he or she determines that the construction activities may be disturbing or disrupting the nesting activities. The monitoring biologist shall make practicable recommendations to reduce the noise or disturbance in the vicinity of the active nests or birds. This may include recommendations such as (i) turning off vehicle engines and other equipment whenever possible to reduce noise, (ii) working in other areas until the young have fledged, and (iii) utilizing alternative construction methods and technologies to reduce the noise of construction machinery. The monitoring biologist shall review and verify compliance with these avoidance boundaries and shall verify that the nesting effort has finished in a written report. Unrestricted construction activities may resume when the biologist confirms no active nests are found.

**6. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the landowner has executed and recorded against the parcel(s) governed by this permit a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property; and (2) imposing the Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The deed restriction shall include a legal description of the entire parcel or parcels governed by this permit. The deed restriction shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the terms and conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes, or any part, modification, or amendment thereof, remains in existence on or with respect to the subject property.

#### **IV. FINDINGS AND DECLARATIONS**

##### **A. PROJECT DESCRIPTION/PERMIT HISTORY**

###### Project Description

The proposed project is construction of a 5,141 sq. ft. single-family residence with a 705 sq. ft., 3-car garage, on a vacant, 13,871 sq. ft. lot east of Interstate 5 in the City of Solana Beach. Also proposed is approximately 240 cubic yards of cut and 50 cubic yards of fill for a total export of 190 cubic yards of material off-site outside of the Coastal Zone.

The subject site is located at the top of a slope on the west side of San Julio Road, a cul-de-sac that terminates approximately 75 feet northwest of the site. The subject parcel is part of a 7.85-acre, 10-unit, gated planned residential development (PRD) approved by the Commission in December 1988 that created the subject site and included grading, site preparation, and planned construction of ten 3-story, 5 bedroom, 4,000 sq. ft. residences (CDP #6-88-514/Solana Hills Estates). Eight of the residential development pads, including the subject site, are located on the mesa top off of San Julio Road, and two lots are located at the base of the slope off of Solana Drive ([Exhibit 4](#)).

The subject lot consists of several previously graded flat pad areas that step down from the street, beyond which the topography slopes steeply down to the southwest approximately 100 feet, to a separate, vacant lot at the base of the slope that takes access from Solana Drive ([Exhibit 2](#)). The flat area immediately adjacent to the street has been planted with grass, while the rest of the site contains mostly non-native plants or is unvegetated. However, the southwestern and southeastern edges of the property do contain various scattered, native plant species. The slope beyond the subject lot is owned by the homeowner's association, and is vegetated with southern maritime chaparral. The proposed house would be constructed on the two existing pads closest to the street, stepping down such that the house would be one-story next to the street, and two stories on the western side of the structure.

The southwestern most portion of the site, approximately 25 feet inland of the western property line, roughly where the third graded area begins, falls within the area mapped and designated as southern maritime chaparral and Environmentally Sensitive Habitat Area (ESHA) in the certified Solana Beach Land Use Plan (LUP), as does the adjacent off-site slope area ([Exhibit 8](#)). However, as discussed in detail below under Section B. Biological Resources, a site-specific study conducted on the property determined that there is little to no ESHA on the lot itself, but that the area immediately adjacent to the lot is ESHA. The site is also located within the Hillside/Coastal Bluff Overlay zone in the City's LUP.

As proposed, the residence would be sited between approximately 40 and 60 feet north of the southwestern property line ([Exhibit 3](#)). Adjacent to the house, a 30-foot firebreak area is proposed, as required by the City of Solana Beach Fire Marshal. The applicant is proposing to plant non-native vegetation, construct hardscape improvements, and install a retention basin in this area. The remaining area between the development and the property line ranges in width from 20 to 31 feet, and would be planted with native vegetation to create a buffer between the proposed development and the ESHA.

The project site is located within the City of Solana Beach, which has a certified Land Use Plan, but does not yet have a certified Local Coastal Program. As such, the standard of review for the proposed development is Chapter 3 of the Coastal Act, with Solana Beach's certified Land Use Plan used for guidance.

#### Permit History

The subject parcel has previously been the subject of several coastal development permits, starting with CDP #6-83-652 for construction of a 15-unit PRD, CDP #6-86-249 for construction of 15 condominium units, and CDP #6-87-246 for construction of a 15-unit PRD. However, each of these three permits was allowed to expire without any development occurring. Subsequently, development on the site did occur through CDP #6-88-514, which divided the parcel into 10 residential lots, including the subject Lot 7. This CDP also approved grading, site preparation, and the planned construction of ten 4,000 sq. ft., 3-story, 5-bedroom residences. However, of the eight existing homes in the subdivision, six were approved by the Commission through separate, individual permits, because the proposed homes were substantially different than the structures approved under CDP #6-88-514.

A condition of CDP# 6-88-514 was the recordation of an open space deed restriction, designed to protect native vegetation and steep slopes that followed a contour line ([Exhibit 4](#)). However, as individual permit applications were reviewed, comparisons of the plans approved by CDP# 6-88-514 and the as-built plans for individual lots revealed that some development was occurring within the open space area.

During the review and analysis of previous development applications, Commission staff contacted the City of Solana Beach in order to determine the City's records of open space deed restrictions on various sites throughout the PRD. The City stated that their records show that the open space deed restriction for the subdivision that was recorded pursuant to CDP# 6-88-514 was subsequently revised without the Commission's approval, but with the approval of the City. The revised open space map does not follow the previously identified undulating contour line, but is instead straight lines located in roughly the same location at the property lines ([Exhibit 5](#)).

It is unknown why or how the boundaries of the open space area were revised other than the fact that the revision was never approved by the Commission. Given the multiple ownerships involved and the specific circumstances of the resources on each site, rather than having the original deed restriction re-recorded, the Commission has been evaluating the impacts of new development on the sensitive resources identified on a site-by-site basis as particular lots request permits.

In the case of the subject lot, CDP #6-88-514 required portions of land on the northwestern and southwestern edges of the property to be included in the open space restriction, per the existing contour lines and steep slopes on the site. However, the City-approved open space deed restriction does not include these areas ([Exhibits 4 and 5](#)). The potential impacts to coastal resources as a result of this inconsistency are discussed in detail below under Section B. Biological Resources.

## **B. BIOLOGICAL RESOURCES**

Section 30240 of the Coastal Act states:

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

*(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Solana Beach's certified LUP also contains applicable policies:

### **Policy 3.7**

*If a site-specific biological study contains substantial evidence that an area previously mapped as ESHA does not contain habitat that meets the definition of ESHA for a reason other than those set forth in Policy 3.1, the City Community Development Director shall review all available site-specific information to determine if the area in question should no longer be considered ESHA and not subject to the ESHA protection policies of the LUP. If the area is determined to be adjacent to ESHA, LUP ESHA buffer policies shall apply. The Community Development Director shall provide recommendations to the applicable decision-making body (Planning Director, Planning Commission, or City Council) as to the ESHA status of the area in question. If the decision-making body finds that an area previously mapped as ESHA does not meet the definition of ESHA, a modification shall be made to the LUP ESHA Maps, as part of a map update. If an area is not ESHA or ESHA buffer, LCP policies and standards for protection of ESHA and ESHA buffer shall not apply and development may be allowed (consistent with other LCP requirements) even if the ESHA map has not been amended.*

Policy 3.8

*ESHA shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas.*

Policy 3.10

*If the application of the policies and standards contained in this LCP regarding use of property designated as ESHA or ESHA buffer, including the restriction of ESHA to only resource-dependent use, would likely constitute a taking of private property without just compensation, then a use that is not consistent with the ESHA provisions of the LCP shall be allowed on the property, provided such use is consistent with all other applicable policies of the LCP, the approved project is the alternative that would result in the fewest or least significant impacts, and it is the minimum amount of development necessary to avoid a taking of private property without just compensation. In such a case, the development shall demonstrate the extent of ESHA on the property and include mitigation, or, if on-site mitigation is not feasible, payment of an in-lieu fee, for unavoidable impacts to ESHA or ESHA buffers from the removal, conversion, or modification of natural habitat for new development, including required fuel modification and brush clearance per Policy 3.12. Mitigation shall not substitute for implementation of a feasible project alternative that would avoid adverse impacts to ESHA.*

Policy 3.11

*New development shall be sited and designed to avoid impacts to ESHA. For development permitted pursuant to Policy 3.10, if there is no feasible alternative that can eliminate all impacts, then the alternative that would result in the fewest or least significant impacts shall be selected. Impacts to ESHA that cannot be avoided through the implementation of siting [siting] and design alternatives shall be fully mitigated, with priority given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site or where off-site mitigation is more protective. Mitigation shall not substitute for implementation of the project alternative that would avoid impacts to ESHA. Mitigation for impacts to ESHA shall be provided at a 3:1 ratio.*

Policy 3.22

*Development adjacent to ESHAs shall minimize impacts to habitat values or sensitive species to the maximum extent feasible. Native vegetation buffer areas shall be provided around ESHAs to serve as transitional habitat and provide distance and physical barriers to human intrusion. Buffers shall be of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect. All buffers around (non-wetland) ESHA shall be a minimum of 100 feet in width, or a lesser width may be approved by the Planning Department and Fire Marshal as addressed in Policy 3.65. However, in no case can the buffer size be reduced to less than 50 feet.*

Policy 3.24

*New development, including, but not limited to, vegetation removal, vegetation thinning, or planting of non-native or invasive vegetation shall not be permitted in required ESHA or park buffer areas. Habitat restoration and invasive plant eradication may be permitted within required buffer areas if designed to protect and enhance habitat values.*

Policy 3.26

*Modifications to required development standards that are not related to ESHA protection (street setbacks, height limits, etc.) shall be permitted where necessary to avoid or minimize impacts to ESHA.*

Policy 3.27

*Protection of ESHA and public access shall take priority over other development standards and where there is any conflict between general development standards and ESHA and/or public access protection, the standards that are most protective of ESHA and public access shall have precedence.*

Policy 3.28

*Permitted development located within or adjacent to ESHA and/or parklands that can adversely impact those areas shall include open space or conservation restrictions or easements over ESHA, ESHA buffer, or parkland buffer in order to protect resources.*

Policy 3.29

*Landscaping adjacent to ESHA must consist entirely of native, non-invasive drought tolerant, salt-tolerant and fire resistant species; however, the use of ornamental species may be allowed provided they are fire-resistant, drought-tolerant, and noninvasive as a small component for single-family residences.*

Policy 3.65

*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. In such cases, the CDFW must be consulted and agree that a reduced buffer is appropriate and the City, or Commission on appeal, must find that the development could not be feasibly constructed without a reduced buffer. However, in no case shall the buffer be less than 50 feet.*

Policy 4.72

*All discretionary permit applications for projects shall be reviewed by the City's Fire Marshal to determine if any thinning or clearing of native vegetation is required. The Fire Marshal may reduce the 100' fuel management requirement for existing development, when equivalent methods of wildfire risk abatement are included in project design.*

Policy 4.73

*Equivalent methods of fire risk reduction shall be determined on a case-by case basis by the Fire Marshal and may include the following, or a combination of the following, but are not limited to:*

- *Compliance with Building Code and Fire Code requirements for projects located in the WUI (State Fire Code Chapter 7A);*
- *Installation of a masonry or other non-combustible fire resistant wall up to six feet in height;*
- *Exterior sprinklers to be used in an emergency for fire suppression;*

- *Boxed eaves;*
- *Reduced landscaping that is compliant with the County of San Diego fire hazard risk reduction plant list and planting guidelines;*
- *Other alternative construction to avoid the need for vegetation thinning, pruning or vegetation removal.*

Policy 4.79

*Fuel Modification Requirements for New Development – New development, including but not limited to subdivisions and lot line adjustments shall be sited and designed so that no brush management or the 100 ft. fuel modification encroaches into ESHA.*

Policy 4.80

*For 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 management purposes, or other operations which would render the area incapable of supporting native vegetation or being used as wildlife habitat, including thinning as required in Zone 2. Modification from Policy 4.79 may be made upon the finding that strict application of this policy would result in a taking of private property for public purposes without just compensation.*

Policy 6.13

*New development, including a building pad, if provided, shall be sited on the flattest area of the project site, except where there is an alternative location that would be more protective of scenic resources or ESHA.*

**Land Use Plan ESHA Designation**

As noted above, the southwestern portion of the site is designated in the Solana Beach LUP as southern maritime chaparral Environmentally Sensitive Habitat Area (ESHA) ([Exhibit 8](#)). Section 30240 of the Coastal Act and numerous policies of the certified LUP require that ESHA be protected against any significant disruption of habitat values, that only uses dependent on the resources be allowed within ESHA, and that development in areas adjacent to ESHA be sited and designed to prevent impacts to ESHA.

As described in the above-cited policies, protecting ESHA requires not only avoiding any direct encroachment into the habitat, but also providing a native vegetation buffer around the ESHA to serve as transitional habitat and provide distance and physical barriers to human intrusion. The City's LUP requires that buffers must be of a sufficient size to ensure the biological integrity and preservation of the ESHA they are designed to protect; typically 100 feet, although these may be reduced to no less than 50 feet if approved by the California Department of Fish & Wildlife (CDFW). Uses in the buffer must not include structures or vegetation removal, thinning, or the planting of non-native vegetation.

The City of Solana Beach approved the project as proposed, finding that the project is consistent with the certified LUP because the applicant is providing "the required 50-foot buffer between the proposed residence and mapped Environmentally Sensitive Habitat Area (ESHA) per the City of Solana Beach Local Coastal Program (LCP) Land Use Plan (LUP)." However, based on

the LCP maps, the proposed project would result in several significant inconsistencies with the above-cited LUP policies. The proposed 30-foot wide fire clearance zone around the proposed residence would occur in the area mapped as ESHA in the certified LUP, as would the hardscape, retention basin and non-native landscaping proposed within the fire break. There would be no buffer provided between the development and the mapped ESHA.

### ESHA Determination

However, after review of two site-specific studies performed by the applicant, there appears to be a discrepancy between the resources actually present on the site, and the certified LUP ESHA map. The LUP ESHA maps were adopted when the City's LUP was first certified by the Commission in 2012. The maps were developed on a large scale without the benefit of a site-by-site survey to verify the accuracy of such mapping. The first biological report by Helix Environmental Planning, Inc. (Helix) dated August 17, 2015 evaluating the subject site was submitted to the Coastal Commission prior to submittal of the application, and this report indicated the presence of southern maritime chaparral located on the subject site. However, a second report, created by Helix and dated November 23, 2015, was submitted with the application indicating that while some isolated native species were observed on the property, they concluded these did not constitute ESHA, but southern maritime chaparral and Diegan coastal sage scrub habitats are present immediately adjacent to the southwestern property line and within the vicinity of the property, respectively. Furthermore, five wart-stemmed ceanothus (*Ceanothus verrucosus*) shrubs, which are a sensitive species with a California Native Plant Society (CNPS) rare plant ranking of 2B.2, were documented just south of the property. The second report did not explain the discrepancy between the first and second reports.

The Commission's staff ecologist has reviewed both of these reports and after conducting a site visit on February 16, 2017, determined that there are some scattered, native plants on-site, and these include chamise (*Adenostoma fasciculatum*), laurel sumac (*Malosma laurina*), lemonadeberry (*Rhus integrifolia*), black sage (*Salvia mellifera*), flat-topped buckwheat (*Eriogonum fasciculatum*), and toyon (*Heteromeles arbutifolia*). Of these plants, chamise is a characteristic southern maritime chaparral species, as is laurel sumac. Additional species include ice plant, some landscaped succulents, and non-native grasses. These species occur within the boundaries of the property along the southern property edge. The native species on the site are scattered, but not necessarily isolated from the adjacent habitat. Though the existing native plants on the subject site are somewhat fragmented, that type of fragmentation is characteristic of a habitat's edge. These native plants are important as they contain habitat value; however, the Commission's ecologist agrees the vegetation on the subject property itself, given its patchy, isolated nature, does not rise to the level of ESHA.

In contrast, southern maritime chaparral habitat has been identified immediately adjacent to the southwestern property boundary line. This is identified as a rare plant community by the California Department of Fish and Wildlife (CDFW). This habitat is characterized by nutrient-poor, well-drained, sandy or gravelly soils. Chaparral species often require fire for seeds to sprout or resprout, and ash formed during fires improves both organic and inorganic nutrient levels in the soil, while removal of living plants increases light penetration and removes competition for new seedlings and sprouts. While maritime chaparral in general is considered rare, the southern region has been the hardest hit, having lost 82-93% of its original range due to

development pressures. High rates of urban development along the California Coast have resulted in direct loss of large areas of maritime chaparral habitat, with losses especially significant in southern California. Maritime chaparral has proven highly susceptible to disturbance and removal by human activity and development.

Maritime chaparral often meets the Coastal Act definition of ESHA due to the rarity of the habitat and because of its ecosystem role of supporting individual rare plant species (those listed by the state or federal government as threatened or endangered or plants designed “1B” or “2” by the California Native Plant Society). In this case, the southern maritime chaparral habitat adjacent to the subject site qualifies as ESHA and supports wart-stemmed ceanothus (*Ceanothus verrucosus*), which is listed as a sensitive species by the City of Solana Beach and the California Native Plant Society. Further, the adjacent ESHA connects to a much larger swath of ESHA, as can be seen in [Exhibit 8](#). The Commission’s staff ecologist has provided more detailed information in a Biological Memo included as [Exhibit 9](#).

It is important to note that in May 2008, the Commission approved CDP #6-07-112, for the construction of a new approximately 5,000 sq. ft., 3-level plus subterranean garage/basement, single-family residence on Lot 10, which is located at the base of the slope below the subject project. That project, as approved, encroached into 240 sq. ft. of southern maritime chaparral habitat located on the lot. (The development was never constructed and the permit has since expired). At that time, the Commission’s staff ecologist determined that the relatively small, isolated area of southern maritime chaparral on the lot and immediately surrounding it was not ESHA due to its location between residential dwellings, its isolation, fragmentation, and degradation. However, since that time, more recent analyses have reevaluated the status of the habitat on this hillside, including the certified Solana Beach LUP, which identifies the hillside as ESHA, and the above-cited evaluation from the Commission’s staff ecologist, as well as an evaluation by the California Department of Fish and Wildlife (discussed below). The Commission typically requires that biological analyses be updated no less frequently than every 5 years, specifically because habitat does change over time. In the case of the habitat on this swath of hillside, the area adjacent to the subject lot has been determined to be ESHA under the definition of the Coastal Act.

The certified LUP specifically addresses how to proceed when an area mapped as ESHA in the LUP may not be (or may no longer be) ESHA. As cited above, Policy 3.7 states that if a site-specific biological study contains substantial evidence that an area mapped as ESHA, as is a portion of the subject site, does not contain habitat that meets the definition of ESHA, an amendment to the certified LUP ESHA maps is required in order to determine that the area should no longer be considered ESHA and not subject to the ESHA protection policies of the LUP. The intent of this policy was to ensure that the determination of ESHA made when the LUP was certified would not be removed lightly, without serious consideration and input from both local and state decision makers. However, in this case, the City approved the proposed project without processing an amendment to the LUP. This puts the applicant in a somewhat difficult position, as there is agreement that there is no ESHA on the site itself, but the City has not requested an LUP amendment to formalize the removal of ESHA designation on the site.

Until the City's LCP is effectively certified, the standard of review for development in Solana Beach is the chapter 3 policies of the Coastal Act, with the certified LUP policies as guidance. In the case of the proposed project, while the City did not follow the procedure outlined in the LUP, the Commission's staff ecologist has determined that the ESHA does not encroach on the site itself. Thus, the Commission has reviewed the project based on the potential impacts to coastal resources as they exist on the ground. However, in order to effectively administer the LUP and eventually a certifiable LCP, the City should update the City's ESHA maps either on an individual or comprehensive basis to ensure that ESHA in Solana Beach is protected consistent with the Coastal Act mandates.

### **Protection of Adjacent ESHA**

Having established that there is ESHA located immediately adjacent to the subject site, the Coastal Act and LUP require that development be sited and designed to prevent impacts which would significantly degrade those areas and that development be compatible with the continuance of habitat values. As proposed, the residence would be located approximately 50 feet from the property line and the adjacent ESHA; however, other development is proposed as close as approximately 20 feet to the ESHA, including structures and brush management.

The November 23, 2015 biology report prepared by Helix concludes that no ESHA occurs on the property and therefore no direct impacts would occur to ESHA as part of the project construction. The report states that no off-site fuel modification activities are being required for this project and therefore, no direct impacts to ESHA would occur from development of the property. However, the City is requiring the project incorporate a 30 ft. "fire break," in which no native vegetation can occur, and under the proposed project this would be within the ESHA buffer. Further, the report states that development of the property has the potential to indirectly impact the adjacent ESHA. Potential impacts include water quality, night lighting, noise, and invasive plant species. The applicant is proposing the following mitigation measures contained in the City's report:

- Scattered native species that are present within the proposed buffer will be flagged for avoidance (to the extent feasible).
- Disturbance to root zones of native species within the buffer will be minimized to the extent feasible by avoiding grading in the buffer. If a native species needs to be disturbed, the individuals would either be trimmed to allow access or driven over, but the roots would remain intact to allow the individuals to resprout.
- All non-native species within the buffer would be removed and replaced with native species. Planting and seeding of native species (shrubs and annuals) would occur to enhance the buffer area between the ESHA and development.
- The applicant shall submit to the City for review and approval a list of species to be planted and seeded within the ESHA buffer. The species list shall not contain any invasive, exotic species.
- Appropriate erosion control measures and Best Management Practices (BMP's), such as the installation of silt fencing and straw wattles would be utilized during construction.
- All exterior night lighting shall be minimized, restricted to low-intensity fixtures, shielded, and directed away from ESHA.
- Initial clearing and grading of the property should be conducted outside of the avian breeding season (February 1 through August 31). If clearing of habitat, grading, or other

ground disturbance activities cannot be conducted outside the avian breeding season, a qualified biologist should conduct a pre-construction survey for sensitive bird species and raptors within the proposed project area and a 500 foot buffer of the project site no more than 2 weeks prior to the start of work in accordance with City Policy 3.32. Sensitive bird species are defined by Policy 3.32 as “those species designated 'threatened' or 'endangered' by state or federal agencies, California Species of Special Concern, California Fully Protected Species, raptors, and large wading birds.” Additionally, surveys should be conducted every two weeks for sensitive nesting birds during the breeding season while clearing of habitat, grading, or other ground disturbance activities are occurring. Nesting bird surveys would not need to be conducted during home construction since noise levels generated from general construction activities would not constitute a significant level of disturbance to potential nesting birds adjacent to the property. If nesting sensitive birds are detected at any time during the breeding season, the CDFW shall be notified and an appropriate disturbance set-back will be determined and imposed until the young-of-the-year are no longer reliant upon the nest. The set-back or buffer shall be no less than 100 feet or may be reduced to an appropriate, lesser buffer based on the species, its tolerance for the construction activities, and approval from the applicable agencies. The results of the pre-construction survey should be provided to the City in the form of a letter report.

- The limits of work shall be clearly delineated with use of staking, flagging, or silt fence and verified by a qualified biologist.

These measures are important to protect the adjacent habitat, and as such, have been substantially incorporated into the project through **Special Conditions 2, 3, and 5** as outlined above. **Special Condition 2** prohibits activities other than restoration activities within the required ESHA buffer and requires identification and avoidance of impacts to native plant species within the required ESHA buffer. **Special Condition 3** requires the use of Best Management Practices during and post-construction, including delineating the limits of work by staking, flagging, or installing silt fences. Staff also recommends **Special Condition 5**, which requires a pre-construction survey for active bird nests prior to the commencement of construction activities to avoid potential impacts to sensitive species. The incorporation of these two conditions will ensure the protection of sensitive species.

Although each of these measures is important, the proposed project includes only a 20-31-foot wide ESHA buffer, which is inconsistent with the City of Solana Beach’s certified LUP requirement for 100-foot buffers, which may be reduced to no less than 50 feet if approved by CDFW, as cited above. The LUP policies are designed to ensure that ESHA is protected and that development adjacent to ESHA is sited and designed to prevent impacts to the habitat as required by the Coastal Act. More importantly, in this context, Coastal Act section 30240(b) requires that development adjacent to ESHA be sited and designed to prevent impacts that would substantially degrade those areas and that it be compatible with the continuance of the adjacent ESHA. Staff at CDFW were consulted and visited the subject site. After evaluating the habitat, CDFW provided a determination that a biologically appropriate buffer sufficient to prevent impacts that would substantially degrade the ESHA should be a minimum of 50 feet in width, and should contain no built or maintainable structures (as these require periodic maintenance inconsistent with an undisturbed setting), no ornamental or non-native vegetation, and all plantings should consist of native vegetation appropriate for the adjacent ESHA ([Exhibit 7](#)). No brush management should

be allowed with the 50-foot buffer. In addition, the Commission's staff ecologist has reviewed the project and also determined that a minimum 50 ft. ESHA buffer consisting entirely of native plant species, with no thinning of vegetation or structures or hardscape, is needed to protect the adjacent ESHA and be compatible with the continuance of the habitat.

Southern maritime chaparral habitat is very rare and especially vulnerable to degradation. A 50 ft. ESHA buffer is needed to protect the adjacent habitat from impacts associated with new development both during the construction phase and over the life of the development. Impacts from noise, shade, domestic animals, excessive irrigation, altered drainage patterns, artificial lighting, etc. can degrade the ESHA over time, facilitate species invasion, divert wildlife from using the habitat and ultimately lead to extirpation of the vegetation community. The applicant has suggested that the retention basin, which is proposed to be located between 20 – 25 ft. from the ESHA, is a compatible use in an ESHA buffer. However, the creation of a retention basin will require grading and importing significant amounts of solid material and different soil types. It will also necessitate periodic maintenance, which may require foot traffic and equipment in the ESHA buffer and adversely impact the habitat values. Further, southern maritime chaparral habitat only persists in very dry environments. A retention basin located within an ESHA buffer will increase the likelihood that invasive species will out-compete the native habitat.

In addition to the required ESHA buffer, the Solana Beach Fire Marshal has required a 30-foot brush management zone around the proposed structure which cannot contain any native vegetation (and thus must be in addition to the ESHA buffer which must contain native vegetation). Thirty feet is considerably smaller than the 100-foot fuel modification zone typically required in Solana Beach, particularly for a structure located at the top of a slope. As cited above, the LUP allows reductions in the 100-foot fuel management requirement for existing development, but requires that new development be sited and designed so that no brush management or the 100-foot fuel modification encroaches into ESHA. The LUP does allow for modifications of the 100-foot fuel management zone upon the finding that strict application of the policy would result in a taking of private property.

The subject site is approximately 120 feet in width at its widest point. Thus, it would not be possible to accommodate a residence on the site with both a 50-foot ESHA buffer and a 100-foot wide brush management zone. Moreover, although the proposed residence is new development, it is an infill project; there are existing residences on both sides of the lot, an existing home approximately 100 feet from the subject lot at the base of the slope, and a currently vacant but previously approved development site also located at the base of the slope approximately 100 feet from the subject site, all of which could be subject to brush management requirements. The City Fire Marshal looked at the particular circumstances of this site and determined that if the project incorporates fire risk abatement methods including the use of fire resistive construction methods that meet all wildland/urban interface standards to the satisfaction of the Fire Department, such as installation of fire sprinklers, use of fire resistive construction requirements, installation of a Class "A" Roof, etc. a 30 ft. fire break would be sufficiently protective of the proposed development. Thus, **Special Condition 2** requires that the proposed residence comply with the Building Code and Fire Code requirements for projects located in the wildland/urban interface. Thus, in this particular case, reducing the required fire break to 30 feet is not expected to result in any adverse impacts to coastal resources.

Because the project as proposed would only provide a 20-31-foot wide buffer from the ESHA, and there is not sufficient room on the site to move the proposed 5,141 sq. ft. home and 705 sq. ft. garage an additional 50-60 feet away to provide the required 50-foot buffer and 30 foot brush management zone, Commission staff asked the applicant for an alternatives analysis looking at site designs that would accommodate a 50-foot wide setback from the ESHA that contains only native vegetation, and a 30-foot wide brush management zone around the structure. [Exhibit 6](#) shows the area available to construct a home with a 50-foot setback and 30-foot fire break. The applicant has estimated that an approximately 1,905 sq. ft. home including a 1-car garage could be constructed on this site ([Exhibit 6](#)). Thus, there is clearly room on the site to build a residence and protect the adjacent ESHA, albeit one much smaller than the proposed home.

However, there are other alternatives that would allow the applicant to build a larger structure on the site. The City of Solana Beach has already granted a variance for the project to allow a small portion of the residence to encroach approximately 8 ft. into the required 25-foot front-yard setback. (Without this variance, the proposed residence would be as close as 40 feet from the ESHA, and the ESHA buffer would only be approximately 10 feet in width in some areas). If the front yard setback were further reduced, for example, to 10 feet, and an encroachment into the side yard were permitted, additional floor area could be accommodated. Another alternative would be to design the house with an additional story, for example, one that was two stories high on the street side and three on the slope side, which would allow for an increase in total floor area while still maintaining the required setback from the ESHA.

Furthermore, a small encroachment into the side yard setback or a further decrease in the front yard setback could accommodate a two-car garage, while still incorporating a 50 ft. ESHA buffer and a 30 ft. fire break. (The alternative provided by the applicant includes an approximately 306 sq. ft., 1-car garage, but the Solana Beach Off-Street Parking Design Manual allows a two-car garage to be as small as 342 sq. ft.). The Solana Beach Off-Street Parking Design Manual also allows tandem parking and parking in side yard setbacks in some instances to meet parking requirements. Furthermore, Section 17.52.030 of the Solana Beach Municipal Code specifically allows the director to waive or modify parking requirements when practical difficulties make their strict application infeasible.

The applicants have argued that none of these alternatives or combination of alternatives—a smaller home; reduced setbacks; a 1-car garage; or an additional story—are feasible because of City and Homeowners Association restrictions. ([Exhibit 13](#).) Staff at the City of Solana Beach have commented on the project, stating that that they will not be supportive of further encroachments into the front-yard setback or any encroachments into required side-yards ([Exhibit 12](#)), and the City's Municipal Code requires two off-street parking spaces.

However, LUP Policy 3.26 specifically allows modifications to development standards such as street setbacks, height limits, etc. where necessary to avoid or minimize impacts to ESHA. Furthermore, the City's Municipal Code allows parking standards to be waived or modified with a finding that the waiver or modification is consistent with the purpose and intent of the Off-Street Parking Design Manual, which would also allow for a reduced parking requirement, parking within setbacks, and/or alternative designs such as tandem parking. As discussed in greater detail below under D. Public Access and E. Visual Resources, there are no potential impacts to public access or public views that could result from a project redesign that reduces

setbacks, allows for increased height, or reduced parking requirements. Thus, the City may reduce these setbacks or waive parking requirements, although it is within the City's discretion whether it will do so. Even if the City chooses not to allow these modifications, a home of nearly 2,000 square feet could be constructed on-site, consistent with the City's approval and with the ESHA protection policies of the Coastal Act.

Similarly, the applicants submitted a request to the Homeowners Association (HOA) that covers the subject property for construction of a smaller home, but the HOA indicated it will not approve a residence any smaller in square footage than what is currently proposed. The HOA's Covenants, Conditions, and Restrictions (CC&R's) Section 5.15 (k) indicate that variances may be granted for any architectural standard, including the size of the house, to account for environmental considerations. The HOA hired Busby Biological Services (Busby) to conduct a peer review of the second Helix report. However, since the Helix report and Busby concluded that the project, as proposed, would not directly or indirectly impact the adjacent ESHA, the HOA indicated that it would not be supportive of a reduction in the size of the residence. As discussed herein, the Commission and State Fish and Wildlife staff have determined that the project as proposed would result in significant environmental impacts. Thus, through these findings, the CC&R's would allow for approval of a smaller residence. More importantly, the Commission must review this development for consistency with the Chapter 3 policies of the Coastal Act. It may not authorize development inconsistent with Coastal Act section 30240 based on the requirements of an individual HOA's CC&Rs. In any case, regardless of the particular design option chosen, it is clear that reasonable use of the site can be feasibly achieved in a manner that accommodates the setback necessary to protect the ESHA.

The applicants have suggested that in lieu of providing the required 50-foot wide ESHA buffer, the ESHA adjacent to the property could be enhanced to help offset the loss of the buffer. The Busby review concluded that the ESHA adjacent to the property is relatively small and isolated, containing both invasive and non-native, weedy plant species. Therefore, the applicant has suggested that enhancing the ESHA adjacent to the property would be a practical and superior alternative to incorporating a 50 foot wide ESHA buffer. However, the commission's staff ecologist believes that the adjacent habitat should not be characterized as degraded or poor quality. As described above, the habitat is not isolated and is contiguous with a large block of high quality southern maritime chaparral, which enlarges the habitat area available as a whole and supports key ecological functions, such as an increased seed and pollen source for plant dispersal, diversity maintenance, and elevated species occupancy. Regardless, once designated as ESHA, an area's particular condition is irrelevant. As stated in *Bolsa Chica Land Trust v. Superior Court*,

*....if.... application of section 30240's otherwise strict limitations also depends on the relative viability of an ESHA, developers will be encouraged to find threats and hazards to all ESHAs located in economically inconvenient locations. The pursuit of such hazards would in turn only promote the isolation and transfer of ESHA habitat values to more economically convenient locations. Such a system of isolation and transfer based on economic convenience would of course be completely contrary to the goal of the Coastal Act, which is to protect all coastal zone resources and provide heightened protection to ESHA's.*

((1999) 71 Cal.App4th 493, 508.) Section 30240 requires that development adjacent to ESHA be sited and designed to prevent impacts and to be compatible with the continuance of the ESHA. In this case, the proposed project must be sited and designed to provide a sufficient buffer from the ESHA to meet these requirements, consistent with both the Coastal Act and the City of Solana Beach's certified LUP.

The applicant has argued that the incorporation of a 50 ft. ESHA buffer on the subject site is inconsistent with past Commission action, as none of the neighboring residences have been required to incorporate ESHA buffers into their projects. However, the existing neighboring development occurred almost 25 years ago, in the early 1990's and before certification of the LUP maps; therefore Commission staff does not now know the extent of ESHA on the properties at the time of permitting. In addition, since that time, the Coastal Commission's understanding of environmental protection has evolved, so it has a better understanding of the measures necessary to prevent impacts to ESHA. Additionally, the City of Solana Beach now has a certified LUP, which was created to bring certainty to the development process, protect the environment, and locally implement development policies that comply with the requirements of the Coastal Act. A 50-foot ESHA buffer in this case represents the minimum necessary to implement the resource protection policies of the Coastal Act, and it is also consistent with the City's LUP. Almost all LCPs require ESHA buffers, with these buffers typically ranging from 50 - 100 feet. Indeed, most LUPs and LCPs that have been recently certified require a 100 ft. ESHA buffer, which can be reduced to no less than 50 feet - as does the City of Solana Beach. Other jurisdictions that require a minimum 100 ft. ESHA buffer include Pacifica, Mendocino County, and Malibu-Santa Monica Mountains. The cities of Newport Beach, Seaside and Half Moon Bay require at least 50-foot wide buffers. On the low end, the City of Carmel-by-the-Sea requires a 30 ft. minimum ESHA buffer and the City of Carlsbad requires a 20 ft. minimum ESHA buffer. Many of the LUPs and LCPs that were certified in the 1980's and 1990's require an "appropriate ESHA buffer," but do not give a set, minimum standard. The City of Encinitas requires adequate buffer zones 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. The City of San Diego requires 100 foot wide ESHA buffer for wetlands, 40 foot wide setbacks from coastal bluff edges, and requires a site-specific impact analysis for all development occurring in sensitive biological resources to determine protection and management requirements and corresponding mitigation, where appropriate. Requiring a 50-foot wide buffer from ESHA for this project is entirely consistent with past and current policies for the protection of ESHA.

Solana Beach's LUP policies are clear that 100 ft. ESHA buffers are required for new development adjacent to ESHA, but that a buffer can be reduced to no less than 50 ft. However, regardless of the LUP requirements, per Section 30240 of the Coastal Act, the project must be compatible with the continuance of the adjacent habitat. In the case of the proposed project, as previously described, the Commission's staff ecologist and CDFW concur that a 50 ft. ESHA buffer is required to provide a biologically appropriate buffer to satisfy the Chapter 3 policies of the Coastal Act. Even with a 50-foot wide buffer, the project may result in some minor impacts to native habitat, since, as noted, there are some native plants scattered around the site. However, the majority of these plants located on the southwestern side of the site would be preserved within a 50-foot ESHA buffer. Thus, the 50-foot buffer is not only important to protect the adjacent ESHA, but to preserve the habitat value of the native plants on the site.

Furthermore, because there is one more lot in this subdivision that has not yet been constructed, Lot 10, located at the bottom of the slope below the subject site, it is important that all new construction provides the required minimum buffers and setbacks on a site where it is feasible to do so, so as not to set a precedent allowing impacts to ESHA elsewhere in the subdivision.

The applicant has similarly noted that the existing neighboring residences were not previously required to incorporate fire breaks into their projects. The Fire Marshal for the cities of Encinitas, Solana Beach, and Del Mar, reviewed the history of the subject subdivision with Commission staff and explained that the fire department looks at each property, its proximity to slopes, the density of the vegetation onsite, and a variety of other factors to ensure that development is sited and designed to reduce its fire risk. As the Fire Department's understanding of fire suppression evolves, new development is required to incorporate fire risk abatement measures that previous development may not have been subject to. As discussed above, the City of Solana Beach and the Solana Beach LUP typically require a 100 ft. brush management zone around structures to ensure their safety during a fire event. The Fire Marshal may reduce the extent of the required fuel management area if equivalent methods of fire risk reduction are employed that meet the intent of providing adequate fire safety and also lessen impacts to ESHA. In this case, the Fire Department has determined that a minimum 30 ft. fire break is sufficiently protective for the proposed development, provided the applicant incorporates fire resistive construction methods that meet all wildland/urban interface standards to the satisfaction of the Fire Department. Thus, the Fire Department is requiring a 30-foot brush management setback for the proposed new residence.

Therefore, **Special Condition 1** requires revised plans reflecting a redesign of the proposed project in order to prevent impacts to the adjacent ESHA. This includes establishing a development envelopment that incorporates a 50 ft. wide buffer from the delineated ESHA on the southwestern property line in which no development, including brush management and water quality BMPs, other than restoration, is permitted. Upland of the buffer, a 30 foot-wide brush management zone is permitted. **Special Condition 2** requires submittal of landscape and fuel modification plans reflecting that only restoration activities can occur within the 50 ft. ESHA buffer, and requiring that landscaping planted within the 30-foot radius of the proposed residence be fire resistant and drought tolerant, and that the use of water, fertilizers, herbicides, and chemical pest controls be minimized.

#### Consistency with Past Commission Action

The applicant has argued that applying a 50-ft. ESHA buffer is inconsistent with past commission action, specifically CDPs #6-14-0734, #6-02-019, and #4-12-076. Development must be sited and designed to avoid impacts to ESHA, a determination that the Commission makes on a case-by-case basis. Though there are instances when ESHA buffers have been reduced to less than 50 feet, these instances are atypical, and based on site-specific circumstances such that the reduced ESHA buffers remain consistent with the Coastal Act, as outlined below. In addition, regardless of the Commission's prior actions, its obligation in reviewing this project is to determine whether this particular project at this particular location is consistent with Chapter 3 of the Coastal Act.

- CDP #6-14-0734 is an administrative permit approved by the Coastal Commission in September 2014 for the demolition of an existing single-family residence and construction of a new single-family residence at 734 North Granados Avenue, Solana Beach. Though the site itself does not contain ESHA, the eastern side of the property is adjacent to the San Elijo Lagoon Reserve and ESHA. However, that project received concurrence from CDFW that the proposed development would not result in any adverse impacts to sensitive habitat. The existing home was originally set back from the eastern property line approximately 51 feet, and as approved, the home is now set back approximately 55 feet from the eastern property line. Thus, the project resulted in the line of development being moved further away from the adjacent ESHA. This site was previously fully developed, unlike the applicant's vacant lot, and the existing structures adjacent to the above-referenced site had brush management clearance requirements that impacted the ESHA buffer, including most of the area in between the existing residence and the property line.
- CDP #6-02-019 is a permit approved by the Coastal Commission in April 2002 for the demolition of an existing single-family residence and the construction of a new single-family residence at 774 North Granados Ave, Solana Beach. This permit was approved prior to certification of the City's LUP. The northern side of the property is adjacent to the San Elijo Lagoon. The existing home was set back a minimum of 19 ft. from the northern property line, and as approved, the home is now set back a minimum of 25 ft. from the northern property line; thus, although the new structure was not set back 50 feet from ESHA, the project resulted in the line of development being moved further away from the adjacent ESHA. This site was previously fully developed, unlike this applicant's vacant lot, and the existing structures adjacent to the above-referenced site had brush management clearance requirements that impacted the ESHA buffer and most of the area in between the existing residence and the property line.
- CDP# 4-12-076 is a 2012 permit request for after-the-fact approval of an existing, unpermitted concrete, asphalt, and aggregate recycling facility including a vehicle scale stockpile area, storage, crushing operation area, screening plant, and radial stacker equipment in the City of Goleta. The project was withdrawn prior to being brought to the Commission, but the same project was resubmitted as CDP #4-15-0692. Contrary to the applicant's assertion, the project was approved with a 50 ft. wide buffer from the adjacent riparian area.

### Vested Rights

The applicants have argued that they have a vested right in the graded pads on Lot 7. In order to establish a vested right under the Coastal Act, however, applicants must submit a vested rights application to the Commission in which several factors not considered here would need to be analyzed.<sup>1</sup> Even if one were to assume that the applicants were correct and that they do have a vested right to the graded pads, this does not amount to a right to build a home of a particular size. Any development proposed on the graded pads must still be consistent with the Coastal Act. The width of the buffer imposed here derives directly from what is required under Section 30240 to ensure that development adjacent to ESHA does not significantly disrupt the ESHA.

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<sup>1</sup> See e.g., *Avco Community Developers, Inc. v. South Coast Regional Commission* ((1976) 17 Cal.3d 785, 791). One must have performed substantial work and incurred substantial liabilities to establish a vested right. *Avco's* vested right was denied in that case despite two million dollars of investment.

The applicants claim that requiring a 50 foot ESHA buffer despite the existence of the graded pads is inconsistent with the Commission's action in Eucalyptus Ranch (CDP No. 4-13-1397, p. 42). The proposed buffer is, however, entirely consistent with that permit. In the first instance, the standard of review for Eucalyptus Ranch was the newly-certified Santa Monica Mountains LCP, which includes unique ESHA protection measures. In that case, although the Commission found that the applicant's graded pad was vested, it still required a reduction in the size of the building site on the graded pad. This modification was necessary to ensure that the development was consistent with the LCP, even though it meant that the building site was smaller than the graded pad. The Commission allowed other improvements on the graded pads in Eucalyptus Ranch that did not require fuel modification but only because such improvements would not impact ESHA. Here, too, the Commission is not requiring modifications of the existing graded pads; it is, however, requiring a smaller building site than the footprint of the graded pad, in order to prevent adverse impacts to ESHA, as required by Section 30240.

#### Open Space Area

As previously described, the subject site is part of a 10-unit PRD which was approved by CDP #6-88-514 and included recordation of an open space deed restriction over the portion of the lot containing steep slopes and native vegetation. However, the open space restriction recorded in compliance with that permit was later revised, with approval of the City of Solana Beach, but without the Commission's approval. That revision was therefore flawed and the originally recorded deed restriction applies to the property. In the case of the subject lot, the revised deed restriction does not cover an area on the northwest side of the lot and another on the southwest side of the lot that was identified in the original deed restriction. However, the area covered in the original deed restriction will be covered by the required 50 ft. ESHA buffer. **Special Condition 4** requires the ESHA buffer be placed under an open space restriction to ensure no development occurs within the buffer, except restoration activities, and requires the permit to be recorded as a deed restriction against the property to ensure future owners will be aware of the permit conditions.

#### Conclusion

As proposed, the project is inconsistent with the resource protection policies of the Coastal Act and the policies of the certified LUP, as the proposed 20 – 31 foot wide setback from the ESHA adjacent to the site will not adequately protect or preserve the sensitive habitat. The Commission's staff ecologist and staff at the California Department of Fish and Wildlife have reviewed the project and the subject site and determined that a minimum of 50 feet of undeveloped buffer area, planted with native vegetation, is required to prevent impacts to the ESHA, which is also the setback required under the LUP. Thus, special conditions establish a development envelope for the site that includes incorporation of a 50 ft. ESHA buffer consisting only of native vegetation, and the relocation of the proposed retention basin, hardscape, and the required 30 ft. fire break outside of the 50 ft. ESHA buffer. The use of a 50 ft. ESHA buffer is consistent with past Commission action, and will allow adequate room on the site to build a reasonably sized home, particularly as the City's LUP and CC&Rs for the HOA that apply to the site specifically allow for modifications to setbacks, heights, and other architectural features when necessary to protect habitat, as is the case on this site. Therefore, as conditioned, the project is consistent with the biological resource protection policies of the Coastal Act.

## C. WATER QUALITY

Section 30231 of the Coastal Act addresses water quality and states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

The subject site is part of 10-unit planned residential development, and is one of eight lots sited on top of a mesa. The site slopes from northeast to southwest, and the plans indicate that water drains on the site from the north to south. The southwestern portion of the site contains undeveloped slopes, of which, a small portion are steep slopes. To mitigate the increase in runoff from the proposed development, the applicant is proposing a retention basin within a previously graded pad in the southwestern portion of the backyard area and an earthen berm along the edge of the retention basin to mimic the existing sheet flow conditions on the site. The applicant is also proposing the installation of turf, as well as 240 cubic yards of cut and 50 cubic yards of fill, for a total net export of 190 cubic yards of material. The proposed turf, grading, and increase of impervious surface area could increase the amount of discharge and runoff from the site, and thus, has the potential to adversely impact coastal waters.

The Coastal Act mandates the protection of coastal waters, and though the applicant is proposing a number of BMPs, the project has the potential to adversely impact the quality of coastal waters both during construction and post-construction through erosion and sedimentation, runoff, and drainage. The applicant is already proposing to incorporate drainage inlets, sand bags, silt fences, etc. during construction as well as a retention basin and earthen berm to ensure water quality is protected post-construction. However, as outlined above, in order to protect the ESHA adjacent to the lot, **Special Condition 1** requires the retention basin to be relocated outside of the 50-ft. ESHA buffer. **Special Condition 3** requires a final construction pollution prevention plan (CPPP), a post-development runoff plan (PDRP), and a turf management plan. The CPPP includes additional short-term BMPs such as fueling construction equipment off-site, removing trash and construction debris from the site, minimizing soil compaction from construction activities, and minimizing the discharge of sediment and other potential pollutants from construction activities. The PDRP requires that Low Impact Development techniques are prioritized to retain and disperse runoff from the site, that natural drainage features are minimally disturbed, and the preservation of natural flow volumes and patterns.

Therefore, as conditioned, no impacts to water quality will result from the proposed project, consistent with Section 30231 of the Coastal Act.

## **D. PUBLIC ACCESS**

Section 30210 of the Coastal Act states:

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

Section 30211 of the Coastal Act states:

*Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first lone of terrestrial vegetation.*

Section 30253 states, in part:

*The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing nonautomobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisitions and development plans with the provision of onsite recreational facilities to serve the new development.*

The subject site is located on San Julio Road, which is a gated, cul-de-sac in the City of Solana Beach, and is part of a 10-unit PRD that was approved by the Coastal Commission in 1988. Neither the subdivision nor the subject site is near any public recreational or public access areas. Even if the two space off-site parking requirement are reduced to one space for this development, as discussed above in Section B. Biological Resources, there is no potential that "spillover" parking from this single-family residence could adversely impact public access. The proposed development is consistent with the existing development in the area and will not have any adverse effects individually or cumulatively on public access, as there is no direct or indirect coastal access from the site. Therefore, the project, as proposed, is consistent with the public access policies of the Coastal Act.

## **E. VISUAL RESOURCES**

Section 30251 of the Coastal Act addresses visual resources and states:

*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration*

*of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.*

Solana Beach's certified LUP also contains applicable policies:

**Policy 3.26:**

*Modifications to required development standards that are not related to ESHA protection (street setbacks, height limits, etc.) shall be permitted where necessary to avoid or minimize impacts to ESHA.*

**Policy 6.3**

*Public views to the beach, lagoons, and along the shoreline as well as to other scenic resources from major public viewpoints, as identified in Exhibit 6-1 shall be protected. Development that may affect an existing or potential public view shall be designed and sited in a manner so as to preserve or enhance designated view opportunities. Street trees and vegetation shall be chosen and sited so as not to block views upon maturity.*

**Policy 6.9**

*The impacts of proposed development on existing public views of scenic resources shall be assessed by the City prior to approval of proposed development or redevelopment to preserve the existing character of established neighborhoods. Existing public views of the ocean and scenic resources shall be protected.*

**Policy 6.10**

*New development shall be sited and designed to minimize adverse impacts on scenic resources visible from scenic roads or major public viewing areas. If there is no feasible building site location on the proposed project site where development would not be visible then the development shall be sited and designed to minimize impacts on scenic areas visible from Scenic Roads or major public viewing areas, through measures including, but not limited to, siting development in the least visible portion of the site, breaking up the mass of new structures, designing structures to blend into the natural hillside setting, restricting the building maximum size, reducing maximum height standards, clustering development, minimizing grading, incorporating landscape elements, and where appropriate berming.*

**Policy 6.13**

*New development, including a building pad, if provided, shall be sited on the flattest area of the project site, except where there is an alternative location that would be more protective of scenic resources or ESHA.*

**Policy 6.14**

*All new structures shall be sited and designed to minimize impacts to scenic resources by:*

- *Ensuring visual compatibility with the character of surrounding areas.*

- *Avoiding large cantilevers or under stories.*
- *Setting back higher elements of the structure toward the center or uphill portion of the building.*

The subject site is located on a mesa top off of San Julio Road, surrounded by existing development, and east of I-5 in the City of Solana Beach. The site is not visible from I-5 and there are no public views or public vantage points on-site or from nearby or adjacent areas. From the centerline of San Julio Road, the proposed residence would reach a height of approximately 17 ft., which is comparable in height to adjacent homes and within the City's height limits. However, as described above, the residence in its proposed size and location would not be consistent with the biological resource protection policies of the Coastal Act, and must be revised. One way in which the project could be revised to retain some of the desired house size would be to make the structure taller (e.g., two stories) on the street side of the structure. This could potentially impact some of the neighbors' private views across the site; however, it would not impact any public views protected under the Coastal Act.

A single house three stories high (two as viewed from the adjacent private street) would not have any impact on public views or community character. Although all of the houses constructed in this development are two stories, the Commission approved the original permit for the subdivision, CDP #6-88-514, allowing for residences that would be approximately 4,000 square feet and three stories in height. Though now expired, the Commission also approved CDP #6-07-112 for a 3-story (plus subterranean garage/basement) single-family residence located in the same subdivision at the base of the bluff, finding that a 3-story structure in that location would not adversely impact community character.

Reductions in the front and side yard setbacks are the kinds of minor deviations from typical development requirements allowed by LUP Policy 3.26 to protect ESHA. These deviations would also allow the applicant to design a larger home. Though staff's recommendation will result in a smaller house than the applicant is proposing, all but one of the other houses in this subdivision have already been constructed and range in size from 3,585 sq. ft. to 6,174 sq. ft. A well designed home at the lower end of this range will not have a noticeable or negative impact on the community, nor is it likely to substantially change community quality or character. As conditioned, the project would not have any adverse impact on the visual quality of the Coastal Zone, consistent with the Coastal Act and the certified LUP.

## **F. TAKINGS**

Throughout the application process as well as development of the staff report, the applicants have repeatedly argued that reduction of the square footage of the home would constitute a taking. The applicants propose a 5,141 square foot home, and to meet all requirements of the Coastal Act for the required ESHA buffers, staff proposes a reconfiguration that by the applicant's estimate, results in a home of 1,905 square feet at the minimum. As detailed below, because, as conditioned, this permit would still allow construction of a single family residence on a lot designated for a single family residence, albeit a smaller residence than proposed, the Commission's action is not likely to constitute a taking of private property without just compensation.

### **The Coastal Act**

Denial of all or substantially all economic use of a parcel without just compensation may result in an unconstitutional “taking” of an Applicant’s property. Coastal Act Section 30010 expressly forbids this result:

*The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission... to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore.*

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its denial of an application would constitute a taking of private property without just compensation, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking. If the Commission concludes that its action likely does not constitute a taking, then it may deny the project on finding that its actions are consistent with Section 30010. If the Commission determines that its action likely would constitute a taking, then it applies Section 30010 to consider how the project may be approved. In the latter situation, the Commission may propose modifications to the development to minimize any Coastal Act inconsistencies, while still allowing the minimum amount of development required to avoid a taking.

### **Takings Case Law**

Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation... has first been paid to, or into court for, the owner.” The Fifth Amendment of the United States Constitution similarly provides that private property shall not be taken for public use without just compensation. Once used solely for condemnation cases, the Fifth Amendment is now used to require compensation for other kinds of government actions. (See *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393.) Since *Pennsylvania Coal*, most takings cases have fallen into two categories. First, there are the cases in which government authorizes a physical occupation of property. (See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.) Second, there are the cases in which government regulates the use of property. (*Yee v. Escondido* (1992) 503 U.S. 519, 522-523). Because there is no physical occupation of the land at stake, the reduction of the size of the home here would be evaluated under the standards for a regulatory taking.

The U.S. Supreme Court has identified two types of regulatory takings. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* ((1992) 505 U.S. 1003, 1014.) In *Lucas*, the Court held, without examining the related public interest, that regulation that denied all economically viable use of property was a taking. (*Id.* at p. 1014.) The *Lucas* Court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless.” (*Id.* at pp. 1016-1017; see also *Riverside Bayview Homes* (1985) 474 U.S. 121, 126 [regulatory takings occur only under “extreme circumstances”].) Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is,

background principles of state property and public nuisance law would have allowed government to achieve the results sought by the regulation. (*Lucas*, supra, 505 U.S. at pp. 1028-1036.)

In this case, reducing the size of the home would not amount to the “total wipeout” that usually constitutes a taking under *Lucas*. The economic use of the land would remain intact. (See *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 616 [rejecting the *Lucas* categorical test where property retained value following regulation, but remanding for further consideration under the *Penn Central* test].) Even if the applicants are correct that the largest house that they could construct on this site, given the required ESHA buffer, is 1,905 square feet, there is significant economic value in a nearly 2,000 square foot home.

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104, 124 (“*Penn Central*”). Under the *Penn Central* test, a takings analysis considers the economic impact of the regulation, the interference, if any, with reasonable or “distinct” (actual) investment-backed expectations, and the character of the government action. (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005.) Because this test examines something lesser than a complete economic deprivation, it is appropriate to consider if requiring the reconfiguration of the home could constitute a taking under the *Penn Central* factors.

## Analysis

### *Economic Impact*

The first prong of the *Penn Central* analysis requires an assessment of the economic impact of the regulatory action on the applicant’s property. Although a landowner is not required to demonstrate that the regulatory action destroyed all of the property’s value, the landowner must demonstrate that the value of the property has been very substantially diminished (see *Tahoe-Sierra Pres. Council, Inc., v. Tahoe Regional Planning Agency* 535 U.S. 302, 319, fn. 15 [citing *William C. Haas & Co. v. City and County of San Francisco* (9th Cir. 1979) 605 F.2d 1117, 1120 (diminution of property’s value by 95% not a taking)]; *Rith Energy v. United States* (Fed.Cir. 2001) 270 F.3d 1347, 1349 [applying *Penn Central*, court finds that diminution of property’s value by 91% not a taking]).

Staff is recommending a reconfiguration of the proposal that nevertheless allows construction of a home of comfortable size; by the applicant’s estimate, a home of at least 1,905 square feet. The home at 522 San Julio Rd., which is 3,585 square feet and was built in 1993, has an estimated value on Zillow.com of approximately \$1.8 million. Although outside of the gated PRD, homes at 628 San Julio Rd. and 612 San Julio Rd., both approximately 2,200 square feet and constructed in 1977, have estimated values of approximately \$1.3 million on Zillow.com. Thus, a brand new home on the subject lot, within the gated PRD, even at 1,905 square feet, could be expected to be worth at least as much as (and likely more than) the similarly-sized homes on the same street that were built in 1977. Thus, construction of a home on this lot, even one smaller than proposed, is still expected to increase the value of the property. Thus, this prong of the *Penn Central* test does not support a conclusion that the CDP, as conditioned, will take private property without just compensation.

*Investment-Backed Expectations*

The Supreme Court has clarified that for distinct, investment-backed expectations to be considered as a factor in the *Penn Central* test, those expectations must also have been “reasonable,” and the absence of a reasonable investment-backed expectation is usually dispositive of a taking claim under the *Penn Central* standards (*Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005, 1008- 1009). As an initial matter, it is important to recognize that any restrictions on the applicants’ abilities to develop this lot based on the Coastal Act were in effect already at the time the applicants purchased the subject property. The Coastal Act had been in effect for decades prior to the applicants’ purchase, and the Solana Beach LUP, which identifies this site as containing ESHA, was also certified before the applicants purchased their property.

According to RealQuest, the applicants bought the property on July 10, 2014 for an investment of \$992,000. The latest assessor’s report estimates the land is now valued at \$1,007,128; thus, the land has increased in value during the past few years. The lot is zoned for a single family residence, so the applicants reasonably could expect to construct a home on this lot. However reasonable the applicants’ expectations may have been to build a home, however, their investment did not buy a particular home nor a particular configuration; they invested nothing in improvements when they purchased the property. In addition, a reasonable investor would not have expected to be able to construct a new home without regard to the ESHA protection requirements of the Coastal Act, or the City’s newly certified LUP. The LUP not only identifies a portion of this lot as ESHA, but it also requires a minimum 50 foot buffer from such ESHA. Thus, under the LUP, an even smaller building site would be required. Even after imposition of the conditions of approval for this CDP, the applicants will still be able to construct a home, just not the home that they are proposing. This prong therefore weighs in favor of a determination that approval of this permit, as conditioned, is not a taking.

*Character of the Government Action*

This final prong of the *Penn Central* test addresses the purpose of the government action. While important that the government action be for a public purpose, this factor has been downplayed in recent years. (See, e.g. *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 529 [governmental action that substantially advances a public purpose alone does not insulate the government from a takings claim]).<sup>2</sup> Suffice to say that whatever the weight of this factor, the Coastal Commission advances a legitimate public interest when it regulates various uses according to the Chapter 3 policies of the Coastal Act, and as here, with guidance from the certified Solana Beach LUP, in order to protect ESHA. The policy supporting such protection is clearly stated in the Coastal Act, where the Legislature found that the permanent protection of the state’s natural resources is a “paramount” concern. (Coastal Act, § 30001(b).)

*Conditions of Approval Do Not Constitute a Taking*

The Commission finds that reconfiguration of the proposed home, even if it drastically reduces the size the applicants had in mind, is not likely to constitute a taking under the *Penn Central* factors.

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<sup>2</sup> See also Lewyn, Michael, *Character Counts: The “Character of the Government Action” In Regulatory Takings Actions*, 40 Seton Hall L. Rev 597, 599 (2010) stating that *Lingle* holds that the existence of a valid public purpose *standing alone* may not justify an otherwise problematic regulation (emphasis in original).

Whenever approving a project that allows the owners reasonable economic use of the land, the Commission must consider alternatives or set conditions that avoid or minimize impacts on coastal resources. Setting conditions of approval does not constitute a regulatory taking, even when they cause some loss of value. (See *Penn Central*, supra, 438 U.S. at p. 130 [finding claim “untenable” that interference with an undeveloped property interest, while viable economic uses continued, constituted a taking].) Section 30010 instructs the Commission to construe the applicable Coastal Act policies in a manner that will avoid a taking of property; it does not eviscerate the ESHA policies of the Coastal Act or the Solana Beach LUP. In this case, the development may be approved only subject to several conditions, including a configuration that allows the minimum buffer to ESHA, provides the required buffer for fire protection, protects species, and records restrictions on the property specifically to protect ESHA and more generally to inform the public of all the CDP’s conditions.

## **G. LOCAL COASTAL PLANNING**

Section 30604(a) also requires that a coastal development permit shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. In this case, such a finding can be made, only if the project is approved with the recommended special conditions.

The location of the proposed residential project is designated for Estate-Residential 2 (ER-2) and required a Variance (to reduce the front yard setback) and a Development Review Permit (DRP) and Structural Development Permit (SDP) from the City of Solana Beach. The project is consistent with the type of allowed use on the site, but as described above in detail under Section B., Biological Resources, the project is not consistent with the resource protection policies of the LUP. Thus, there is a concern that approval of the subject project as proposed could prejudice the ability of the City to certify its LCP. However, as conditioned, the project will not have any significant adverse impacts on coastal resources, making it consistent with Chapter 3 of the Coastal Act. Therefore, the Commission finds that the proposed development, as conditioned, will not prejudice the ability of the City of Solana Beach to complete a certifiable local coastal program. However, the City should develop a process through which the City’s ESHA maps are updated either on an individual site or comprehensive basis to ensure that ESHA in Solana Beach is protected consistent with the Coastal Act mandates.

## **H. CALIFORNIA ENVIRONMENTAL QUALITY ACT**

Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, as conditioned, 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.

The City of Solana Beach found the project categorically exempt from CEQA requirements as a single-family residence under Class 3, Section 15303(a). The proposed project has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. Mitigation measures, including conditions addressing biological resources and water quality will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project is the least environmentally-damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

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APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- City of Solana Beach’s Certified Land Use Plan
- City of Solana Beach’s Municipal Code
- City of Solana Beach’s Off-Street Parking Design Manual
- CDP #4-13-1397
- CDP #4-12-076
- CDP #4-15-0692
- CDP #6-83-652
- CDP #6-87-246
- CDP #6-88-514
- CDP #6-92-79/W #1237
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