

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
301 E. Ocean Blvd. Suite 300
Long Beach, CA 90802
(562) 590-5071



W26a

June 27, 2019

TO: Commissioners and Interested Persons

FROM: Karl Schwing, Deputy Director, South Coast District
Amber Dobson, District Manager
Liliana Roman, Coastal Program Analyst

RE: Amendment Request No. 4-17 Part D (LCP-5-NPB-17-0084-1) to the City of Newport Beach Local Coastal Program (LCP), for Commission Action at its July 10, 2019 meeting in San Luis Obispo

SUMMARY OF LCP AMENDMENT REQUEST NO. 4-17 PART D

The City of Newport Beach is requesting that the Commission certify an amendment to both the Land Use Plan (LUP) and the Implementing Plan (IP) portions of the Newport Beach certified Local Coastal Program (LCP). The LCP amendment would modify LUP Chapter 3 Public Access and Recreation Section 3.1.3 Beach Encroachments Policies 3.1.3-3 through 3.1.3-9 to expand the allowable beach encroachments zone. The LCP amendment would also modify IP Appendix C – Oceanfront Encroachment Policy Guidelines for the same purpose.

The Coastal Commission certified the City of Newport Beach LCP on January 13, 2017. Amendment Request No. 4-17 Part D is a major LCP amendment that would modify existing LUP policies pertaining to residential oceanfront encroachments and incorporate new regulations and provisions in the IP. The Newport Beach Planning Commission held a public hearing on May 4, 2017 and recommended approval of the proposed amendments to the City Council. The Newport Beach City Council held a public hearing on July 25, 2017, and passed City Council Resolution No. 2017-50 (**Exhibit #1**) authorizing City staff to submit the LCP amendment to the Coastal Commission. On December 4, 2017 the City submitted the LCP amendment request for Coastal Commission certification. Amendment Request No. 4-17 was deemed by staff to be complete on May 3, 2018 and the Commission granted a one-year time extension at its June 8, 2018 meeting. The City's submittal is consistent with the procedural requirements of the Coastal Act and the regulations which govern such proposals (Sections 30501, 30510 and 30514 of the Coastal Act, and Sections 13551, 13552 and 13553 of Title 14 of the California Code of Regulations).

SUMMARY OF STAFF RECOMMENDATION

The subject LCP amendment involves both the Land Use Plan (LUP) and Implementation Plan (IP) portions of the certified LCP. Staff recommends that the Commission, after public hearing, **deny** Amendment Request No. 4-17 Part D as submitted. The Commission finds that the proposed LUP amendment does not conform to the Coastal Act Chapter 3 public access policies and, thus, the City's IP Ordinances do not conform with, or are adequate to carry out, the requirements of the certified LUP. In addition, the IP amendment is not consistent with the current public access and recreation policies of the LUP.

A number of violations exist in the project area, including but not limited to, unpermitted encroachments on the public sandy beach. The City proposes to amend its LCP in order to allow a portion of these encroachments to remain. In 2012, Commission enforcement staff sent Notice of Violation (NOV) letters to the most egregious violations and in June 2019 staff sent additional NOV letters to address the unpermitted development (encroachments) at issue.

The City is requesting an LCP amendment (both LUP and IP) as an attempt to resolve unpermitted development by over fifty-five (55) single-family residential property owners with unpermitted encroachments on the public sandy beach. The unpermitted development encroachments are in a beach area located along the oceanfront side of Balboa Peninsula between F-Street and Channel Road along Peninsula Point in the City of Newport Beach (see **Exhibit #3**). Existing encroachments along Peninsula Point consist mostly of private landscaping elements (i.e., shrubbery, ground cover, irrigated lawns, walkways and paths, patio furniture). In total, approximately 70,793 sq. ft. or 1.625 acres of public sandy back beach area is occupied by unpermitted landscaping associated with private residential development. The area of encroachment varies from property to property; some hardscape encroachments extend 5-10 feet beyond oceanfront private property line and landscape encroachments extend 60-80 feet beyond private property lines and have been developed over several decades. In addition to ornamental plantings, vegetation also consists of ice plant, typically previously planted in coastal areas for erosion control purposes and now identified as a highly invasive exotic species.

The City has noted that the existing section of the IP (Page C-2 of IP Appendix C, Section C) prohibits encroachments but gives an exception to landscaping trees and groundcover installed prior to 1991. The existing ground cover and non-native vegetation on the public beach was not permitted by the Commission at any point in time (the beach area is within the Commission's retained permitting jurisdiction), and as such the exception that allows landscaping to remain does not apply if the installation of the landscaping itself was done without a permit. Any impact to the adjacent public beach sand and ESHA would not have been exempt from permitting requirements. Section 13250 of the Commission's regulations, subsection b(1), states that a permit is required for: any improvement to a single-family (which includes landscaping) if located on a beach or in an environmentally sensitive habitat area, and subsection b(2) states that a permit is required for: any significant alteration of land form including removal or placement of vegetation on a beach or a sand dune or in an environmentally sensitive habitat area.

In addition, the existing section of the IP that provides an exception for landscaping encroachments in this particular area of the Peninsula is not consistent with the LUP policies that specify treatment of the dune habitat for this area (Chapter 4.1.5 of the LUP) and requires removal of non-native

vegetation and the restoration of dune habitat (Policy 4.1.5-1). In cases where the IP conflicts with the policies of the LUP, the LUP takes precedence over an IP as argued in cases concerning general plans and zoning codes (the analogs to LUPs and IPs outside of the coastal zone, respectively) (*Napa Citizens for Honest Gov't v. Napa County Bd. Of Sup.* (2001) 91 Cal.App.4th 342, 389 and *McAllister v. Cal. Coastal Com'n* (2008) 169 Cal.App.4th 912, 930). In this case, the LUP policies that require the protection and restoration of dune habitat would prevail over the IP section that allows for an exception to the prohibition on encroachments.

The Coastal Act contains strong policies in favor of protecting *maximum* public access (Section 30210) and prohibiting development from interfering with the public right of access, including use of the beach (Section 30211). Coastal Act Section 30221 requires that oceanfront land suitable for recreational use be protected for recreational use, unless demand for such a use is or likely will be provided elsewhere in the area. With expected future sea level rise and resulting coastal erosion, it is likely that future demand for public recreational activities, such as use of the sandy beach, will need to be accommodated on smaller, narrower beaches. In addition, the population is expected to continue to increase. And so, regionally, the area of sandy beach will decrease while the demand for remaining sandy beach areas will only increase. As the beach narrows as it is expected to do, demands on the public beach will increase significantly, concentrating the public area increasingly closer to the public/private border.

The City's certified LUP states in Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula and that several natural communities, including southern dune scrub that occur in Newport Beach are designated rare by the California Department of Fish and Wildlife and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. Areas within the City of Newport Beach containing such habitat are presumed to be ESHA, unless there are strong site-specific reasons to rebut that presumption. The City did not submit any site-specific biological surveys or analysis that indicated that the vegetation or the sand morphology here is not in fact ESHA. Because the encroachment program would overlap or be adjacent to areas presumed to be ESHA per the LUP, the program proposed by the LUP amendment would not be consistent with Section 30240 of the Coastal Act.

Additionally, Western snowy plover, a bird federally listed as threatened under the Endangered Species Act of 1973 has been documented as present in the vicinity of Peninsula Point. Balboa Peninsula is one of seven primary wintering sites for snowy plovers in Orange County and occasionally supports nesting. In June 2012, the U.S. Fish and Wildlife Service (USFWS) declared 25 acres of beach critical habitat for Western snowy plover in an area southeast of Balboa Pier from B Street to G Street between the paved Oceanfront Boardwalk and the mean high tide line (**Exhibit #4**). Western snowy plover has been documented as present in other areas (outside the designated critical habitat area) and have been observed roosting on the East Peninsula east of the critical habitat, from G-Street to the eastern edge of Peninsula Point at the Wedge.

The proposed LCP Amendment would authorize private landowners adjacent to the public beach to use portions of the beach for their own private purposes, essentially privatizing part of the beach where encroachments would be permitted. Additionally, allowing a few coastal property-owners exclusive use of public beach areas is antithetical to environmental justice principles, burdening non-coastal communities that already face numerous barriers to accessing the coast by limiting areas of

City of Newport Beach
LCP Amendment No. 4-17 Part D (Major)

the beach available to the general public for recreation. The burdens of restricted coastal access, which are disproportionately borne by low-income and minority communities, will worsen as public beaches narrow over time due to sea level rise and less and less beach area is available for public recreation as described in the section above. Approving the LCP amendment request would condone continued privatization of the public beach to the detriment of the general public and, in essence, reward property owners who for years have disregarded Coastal Act/LUP requirements despite warnings from Coastal Commission staff to remove the unpermitted encroachments.

For these reasons, the proposed LCP amendment raises significant Coastal Act issues. The proposed policy changes will adversely impact coastal access and public recreation by effectively privatizing portions of the beach along Peninsula Point. The proposed LCP amendment also has the potential to impact biological resources and sensitive habitat. The Commission finds that the proposed policy changes are not in conformance with the public access policies of Chapter 3 of the Coastal Act, including Section 30210, 301211, 30212 and 30213 and the ESHA protection requirements of Section 30240.

The resolutions and motions begin on **Page 7**. The findings for denial of the LUP portion of the LCP amendment begin on **Page 12**. The findings for denial of the IP portion of the LCP amendment begin on **Page 22**.

TABLE OF CONTENTS

I. PROCEDURAL ISSUES	6
A. STANDARD OF REVIEW	6
B. PUBLIC PARTICIPATION	6
C. PROCEDURAL REQUIREMENTS	6
D. DEADLINE FOR COMMISSION ACTION	6
II. MOTIONS AND RESOLUTIONS.....	7
A. DENY THE LUP AMENDMENT AS SUBMITTED	7
B. DENY THE IP AMENDMENT AS SUBMITTED	7
III. FINDINGS AND DECLARATIONS	8
A. DESCRIPTION OF THE LCP (LUP AND IP) AMENDMENT REQUESTS	8
B. DENY THE LUP AMENDMENT REQUEST AS SUBMITTED	12
C. DENY THE IP AMENDMENT REQUEST AS SUBMITTED	22
E. UNPERMITTED DEVELOPMENT.....	26
F. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)	27

EXHIBITS

1. City Council Resolution No. 2017-50
2. Vicinity Map
3. Peninsula Point Beach Encroachments and Proposed 15-Ft. Oceanfront Encroachment Area
4. Western Snowy Plover Critical Habitat Map
5. Letter from City of Newport Beach dated April 5, 2019
6. Sample Notice of Violation (NOV)
7. CoSMoS Modeling of Shoreline Position at Peninsula Point

I. PROCEDURAL ISSUES

A. STANDARD OF REVIEW

The standard of review for the proposed amendment to the Coastal Land Use Plan (CLUP), pursuant to Section 30512(c) and 30514(b) of the Coastal Act, is whether the proposed LUP amendment meets the requirements of, and is in conformance with, the Chapter 3 policies of the Coastal Act. The standard of review for the proposed amendment to the LCP Implementing Ordinances (IP), pursuant to Sections 30513 and 30514(b) of the Coastal Act, is whether the proposed IP amendment conforms with, and is adequate to carry out, the provisions of the certified Land Use Plan (LUP).

B. PUBLIC PARTICIPATION

Section 30503 of the Coastal Act requires public input in LCP development. It states: “During the preparation, approval, certification, and amendment of any LCP, the public, as well as all affected governmental agencies, including special districts, shall be provided maximum opportunities to participate. Prior to submission of an LCP for approval, local governments shall hold a public hearing or hearings on that portion of the program, which has not been subjected to public hearings within four years of such submission.”

Section 30503 of the Coastal Act requires local governments to provide the public with the maximum amount of opportunities to participate in the development of the LCP amendment prior to submittal to the Commission for review. The City has held Planning Commission and City Council public hearings with regard to each of the proposed IP changes and the LUP change which comprise the subject amendment request. All of those local hearings were duly noticed to the public. Notice of the subject amendment has been distributed to all known interested parties.

C. PROCEDURAL REQUIREMENTS

Pursuant to Section 13551(b) of Title 14 of the California Code of Regulations, the City resolution for submittal may specify that an LCP Amendment will either require formal local government adoption after the Commission approval, or that it is an amendment that will take effect automatically upon the Commission's approval pursuant to Public Resources Code Sections 30512, 30513, and 30519. Should the Commission deny the LCP amendment, as submitted, without suggested modifications, no further action is required by either the Commission or the City, and the LCP amendment is not effective. Should the Commission deny the LCP amendment, as submitted, but then approve it with suggested modifications, then the City Council may consider accepting the suggested modifications and submitting them by resolution to the Executive Director for a determination that the City's acceptance is consistent with the Commission's action. The modified LCP amendment will become final at a subsequent Commission meeting if the Commission concurs with the Executive Director's Determination that the City's action in accepting the suggested modifications approved by the Commission for LCP Amendment 4-17 Part D is legally adequate. If the City does not accept the suggested modifications within six months of the Commission's action, then the LCP amendment remains uncertified and not effective within the coastal zone.

D. DEADLINE FOR COMMISSION ACTION

The City submitted the LCP amendment request on December 4, 2017. After a request for additional information, the amendment request was deemed by staff to be complete on May 3, 2018 and the Commission granted a one-year extension at its June 8, 2018 meeting. As such, the last date for

Commission action on this item is August 1, 2019. (See Pub. Res. Code § 30511(a).)

FOR ADDITIONAL INFORMATION

The LCP Amendment file is available for review at the South Coast District office located at 301 E. Ocean Blvd., Suite 300, Long Beach, 90802. The staff report can be viewed on the Commission's website: www.ca.coastal.ca.gov. For additional information, contact Liliana Roman or Amber Dobson in the South Coast District office at (562) 590-5071.

II. MOTIONS AND RESOLUTIONS

A. DENY THE LUP AMENDMENT AS SUBMITTED

Motion I: *I move that the Commission **certify** the Land Use Plan Amendment No.4-17 Part D for the City of Newport Beach as submitted.*

Staff recommends a **NO** vote. Failure of this motion will result in denial of the Land Use Plan amendment as submitted and adoption of the following resolution. The motion to certify as submitted passes only upon an affirmative vote of a majority of the appointed Commissioners present.

Resolution to Deny the LUP Amendment as Submitted:

The Commission hereby denies certification of Land Use Plan Amendment No. 4-17 Part D as submitted by the City of Newport Beach and adopts the findings set forth below on grounds that the amendment, as submitted, does not meet the requirements of, and is not in conformity with, the policies of Chapter 3 of the Coastal Act. Certification of the Land Use Plan Amendment would not comply with the California Environmental Quality Act because there are feasible alternatives or mitigation measures which could substantially lessen any significant adverse impact which the Land Use Plan Amendment may have on the environment.

B. DENY THE IP AMENDMENT AS SUBMITTED

Motion II: *I move that the Commission **reject** the Implementation Plan Amendment No.4-17 Part D for the City of Newport Beach as submitted.*

Staff recommends a **YES** vote. Passage of this motion will result in rejection of the Implementation Plan Amendment and adoption of the following resolution and findings. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

Resolution to Deny as Submitted:

The Commission hereby denies certification of Amendment No. 4-17 Part D to the Implementation Plan for the City of Newport Beach certified LCP as submitted by the City of Newport Beach and adopts the findings set forth below on grounds that the Amendment to the Implementation Plan as submitted does not conform with and is not adequate to carry out the provisions of the certified Land Use Plan. Certification of the Amendment to the

Implementation Program would not meet the requirements of the California Environmental Quality Act as there are feasible alternatives and mitigation measures that would substantially lessen the significant adverse impacts on the environment that will result from certification of the Amendment to the Implementation Program as submitted.

III. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. DESCRIPTION OF THE LCP (LUP AND IP) AMENDMENT REQUESTS

Amendment Request No. 4-17 Part D would modify Policy 3.1.3-3 to Chapter 3 (Public Access and Recreation) of the LUP to allow the expansion of the existing beach encroachment area to include new portions of the public beach adjacent to residential development between 1400 East Oceanfront and Channel Road along the City's Balboa Peninsula; and add "transportation alternatives" to the list of allowable beach access mitigation per Policy 3.1.3-9. Amendment Request No. 4-17 Part D would also modify the IP Appendix C – Oceanfront Encroachment Policy Guidelines to establish the proposed new beach encroachment area on public beach between 1400 East Oceanfront and Channel Road; and establish an East Oceanfront Mitigation Plan to mitigate any beach access resulting from the new encroachment area.

LUP Amendment Request

The LUP amendment would modify language to LUP Policy 3.1.3-3 and Policy 3.1.3-9. Proposed language to be deleted is shown in ~~strike through~~ and proposed language to be added is shown in underline as follows:

Policy 3.1.3-3 Limit the maximum oceanward extent of encroachments to the following encroachment zones:

- A. Santa Ana River to 52nd Street. A maximum of 15 feet oceanward of the rear (ocean facing) property line within the oceanward prolongation of the side property lines.
- B. 52nd Street to 36th Street. A maximum of 10 feet oceanward of the rear (ocean facing) property line within the oceanward prolongation of the side property lines.
- C. 36th Street to E Street. Between A Street and a point 250 feet southeast of E Street, up to the inland edge of the Oceanfront Boardwalk (7 to 8 feet oceanward of the rear property line) and within an oceanward prolongation of the side property lines.
- D. E Street to ~~Channel Road~~ 107 G Street. No encroachments are permitted from a point 250 feet southeast of E Street to ~~Channel Road~~ and including 107 G Street, with the exception of

landscaping trees existing prior to October 22, 1991 and groundcover.

- E. 1400 East Oceanfront to Channel Road. A maximum of 15 feet oceanward of the rear (ocean facing) property line within the oceanfront prolongation of the side property lines.

Policy 3.1.3-9 As mitigation for any impact on beach access resulting from the encroachments:

- A. Maintain 33 street ends between 36th Street and Summit to provide an average of 2 parking spaces per street, and additional spaces where feasible.
- B. Meter West Newport street end parking spaces in the same manner as the West Newport Park in order to encourage public use of the spaces.
- C. Maintain a hard surface walkway perpendicular to Seashore Drive at Orange Avenue. The walkway shall extend oceanward a sufficient distance to allow a view of the surfline by an individual seated in a wheelchair. At least one handicapped parking space shall be designated at the Orange Avenue street end and at least one other handicapped parking space at one other West Newport street end.
- D. Require a minimum of 85 percent of the fees generated by encroachments will be used for the construction and maintenance of improvements which directly benefit the beach-going public such as parking spaces, transportation alternatives, restrooms, vertical or lateral walkways along the beach and similar projects.

IP Amendment Request

The City's proposed IP amendment as fully outlined in City Resolution No. 2017-50 (**Exhibit 1**) would change the language of the IP Appendix C – Oceanfront Encroachment Policy Guidelines. Proposed language to be deleted is shown in ~~striketrough~~ and proposed language to be added is shown in underline as follows:

On Page C-2 of IP Appendix C:

B. Encroachment Zones.

Subject to compliance with the provisions of this policy:

City of Newport Beach
LCP Amendment No. 4-17 Part D (Major)

1. The owner of any ocean front residential parcel between the Santa Ana River and 52nd Street may install improvements on the oceanside of the parcel up to a maximum of 15 feet oceanward of the private property line and within an oceanward prolongation of the property lines on the side of the parcel.
2. The owner of any oceanfront residential parcel between 52nd Street and 36th Street may install improvements on the ocean side of the parcel up to a maximum of 10 feet oceanward of the private property line and within an oceanward prolongation of the property lines on the side of the parcel.
3. The owner of any oceanfront residential parcel between A Street and a point 250 feet southeast of E Street may install improvements up to the inland edge of the Oceanfront Boardwalk and within an oceanward prolongation of the property lines on the side of the parcel.
4. The owner of any oceanfront residential parcel between and including 1400 East Ocean Front and Channel Road may install improvements on the oceanside of the parcel up to a maximum of 15 feet oceanward of the private property line and within an oceanward prolongation of the property lines on the side of the parcel.

C. Prohibited Encroachments.

1. Encroachments and improvements are prohibited oceanward of private property between 36th Street and A Street.
2. Encroachments and improvements are prohibited oceanward of any ocean front parcel from a point 250 feet southeast of E Street to ~~Channel Road~~ and including 107 G Street, with the exception of landscaping trees existing prior to October 22, 1991, and groundcover.

And on Page C-8 of IP Appendix C, Section M.3:

M. Mitigation Plan.

3. Subsequent to the reconstruction of all West Newport street ends, at least eighty-five percent (85%) of the fees generated by encroachments will be used for the construction of improvements which directly benefit the beach going public such as parking spaces, transportation alternatives, rest rooms, vertical or lateral walkways along the beach and similar projects.

Background Information

Balboa Peninsula is a five mile stretch of beach from the mouth of the Santa Ana River to Peninsula Point at the Harbor entrance, where Newport Harbor is on one side of the peninsula and the Pacific Ocean on the other. Balboa Peninsula is a popular beach destination with visitor serving uses surrounding the Newport Pier and the Balboa Pier. The paved Ocean Front Boardwalk runs along the beach in front of residential development for approximately three miles from 36th Street in West Newport to F-Street on the east side of the Peninsula (within an existing 15-ft. Ocean Front right-of-way currently designated as PR, Parks and Recreation in the certified LUP). The area from F-Street to Channel Road at the east end of the Peninsula is referred to as Peninsula Point. The subject area

of the proposed LCP amendment is the oceanfront side of Peninsula Point (**Exhibit #2**). This area is characterized by single family residences and a wide beach with a coastal dune ecosystem. The East Ocean Front City 15-ft. right-of-way currently designated as PR, Parks and Recreation continues in this area, however is not a paved boardwalk as in other areas of the Peninsula. The beach of the Peninsula is within the Commission's retained permitting jurisdiction because it is filled tidelands.

The City is requesting an LCP amendment (both LUP and IP) as an attempt to resolve unpermitted development by over fifty-five (55) single-family residential property owners with unpermitted encroachments onto the public sandy beach. The unpermitted development encroachments are in a beach area located along the oceanfront side of Balboa Peninsula between F-Street and Channel Road along Peninsula Point in the City of Newport Beach (see **Exhibit #3**). Existing encroachments along Peninsula Point consist mostly of private landscaping elements (i.e., shrubbery, ground cover, irrigated lawns, walkways and paths, patio furniture). In total, approximately 70,793 sq. ft. or 1.625 acres of public sandy back beach area is occupied by unpermitted private residential development. According to information provided by the City, the area of encroachment varies from property to property; some encroachments extend 5-10 feet beyond oceanfront private property line and others extend 60-80 feet beyond private property lines and have been developed over several decades. In addition to ornamental plantings, vegetation also consists of iceplant, an invasive exotic species typically planted in coastal areas for erosion control purposes (**Exhibit #3**). The City has noted that the existing section of the IP (Page C-2 of IP Appendix C, Section C) prohibits encroachments but gives an exception to landscaping trees and groundcover installed prior to 1991. The existing ground cover and non-native vegetation on the public beach was not permitted by the Commission at any point in time (the beach is within the Commission's retained permitting jurisdiction), and as such the exception that allows landscaping to remain does not apply if the installation of the landscaping itself was done without a permit. Any impact to the adjacent public beach sand and ESHA would not have been exempt from permitting requirements. Section 13250 of the Commission's regulations, subsection b(1), states that a permit is required for: any improvement to a single-family (which includes landscaping) if located on a beach or in an environmentally sensitive habitat area, and subsection b(2) states that a permit is required for: any significant alteration of land form including removal or placement of vegetation on a beach or a sand dune or in an environmentally sensitive habitat area.

The ecosystem of the beach fronting these encroachments is that of coastal dunes. The coastal dune ecosystem is one of the most sensitive and declining habitat types on the coast of California, which has been impacted by development and by introduction of invasive, non-native species, and in this case, by landscaping encroachments along the back beach. Additionally, Western snowy plover, a bird federally listed as threatened under the Endangered Species Act of 1973 has been documented as present in the vicinity of Peninsula Point. Balboa Peninsula is one of seven primary wintering sites for snowy plovers in Orange County and occasionally supports nesting. In June 2012, the U.S. Fish and Wildlife Service (USFWS) declared 25 acres of beach critical habitat for Western snowy plover in an area southeast of Balboa Pier from B-Street to G-Street between the paved Oceanfront Boardwalk and the mean high tide line (**Exhibit #4**). Western Snowy Plover has been observed roosting on the Peninsula east of the critical habitat, from G-Street to the end of Balboa Peninsula, the beach at the end of the peninsula is also known as 'the Wedge.'

Unpermitted Development

In 2012, the Coastal Commission issued Notices of Violation (NOVs) to fifteen property owners

with the most egregious encroachments onto public beach alleging unpermitted development under the Coastal Act. In response to property owner concerns regarding erosion and sand movement from natural processes such as wind, and flooding during high tides and storm events that may occur should the unpermitted landscaping be removed, the City proposed to resolve the issue through establishment of the proposed 15-foot encroachment zone (within an existing 15-ft. City right-of-way currently designated as PR, Parks and Recreation). The encroachment zone is proposed to be extended in Peninsula Point as requested in the LCP amendment, and the City states that it will pursue the removal of the private encroachments on the public beach beyond the 15-ft. right-of-way area, restore the area to sandy beach, and plant vegetation appropriate for the coastal strand.

In 2013, the City developed an “Encroachment Removal and Replacement Plan” prepared by Glenn Lukos Associates, Inc. outlining a strategy to perform the encroachment removals beyond the proposed 15-ft. encroachment zone in several phases/stages over a three-year period and introduce appropriate native ground cover in removal areas such that large areas of sand are not left completely unvegetated. Commission staff has reviewed the “Encroachment Removal and Replacement Plan” prepared by Glenn Lukos Associates and generally agrees with its methods, although the City would need to apply to obtain a CDP to conduct the plan, which it may do at any time; an LCP amendment is not required for the City to remove unpermitted development on City property. The City has already quantified the encroachment area and cost of the three-year removal plan per private property parcel and has the power to remove the unpermitted development and charge adjacent private property owners for the costs. Because the encroachments occur on City property, the City at any point over the past 6 years, or at any point in the future, could apply to the Commission for removal of the encroachments and restoration of the dune habitat in order to remove the encroachments from the public beach.

Most recently, the Commission gained the ability to impose fines for violations impacting public access; thus, in June of this year, the Commission’s Enforcement Division issued renewed NOV’s to Peninsula Point property owners with unpermitted beach encroachments (**Exhibit #6**).

B. DENY THE LUP AMENDMENT REQUEST AS SUBMITTED

Under Sections 30512(c) and 30514(b), the Commission shall certify a land use plan amendment that meets the requirements of, and is in conformance with, the relevant Chapter 3 policies of the Coastal Act.

Section 30210 of the Coastal Act states in relevant part:

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 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 in relevant part:

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 line of terrestrial vegetation.

Section 30212.5 of the Coastal Act states, in relevant part:

Wherever appropriate and feasible, public facilities, including parking areas or facilities,

shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

Section 30213 of the Coastal Act states, in relevant part:

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

The City is requesting an LCP amendment (both LUP and IP) in an effort to facilitate retention of unpermitted development undertaken by over fifty-five (55) single-family residential property owners with unpermitted private landscaping (i.e., shrubbery, ground cover, irrigated lawns, walkways and paths, patio furniture) encroachments onto public sandy beach, some landscape encroachments extend 5-10 feet beyond the oceanfront private property line and others extend as much as 65-70 feet beyond private property lines. Some sites have unpermitted hardscape development encroaching onto the public beach, for example, property owners at 1504, 1510, 1514, 1516 and 1520 East Ocean Front have constructed concrete/or brick paved patios and garden walls encroaching 200-245 sq. ft. and then have landscaping encroachments extending 30 – 45 feet onto the public sandy beach. In total, approximately 70,793 sq. ft. or 1.625 acres of public sandy back beach area is occupied by unpermitted private residential development. The City proposes to create a new Oceanfront Encroachment area allowing hardscape or landscape encroachments within a 15-ft. right-of-way located adjacent to the oceanfront private property boundary lines and to remove all other encroachments beyond the 15-ft. area. However, the 15 foot area where encroachments are proposed to be retained is designated as a right-of-way which could be used as a public walkway or trail – or returned to its natural condition as sandy beach area available for public use and potential habitat functions.

Previous Commission Action in the Subject Area

In 1990, the City requested LUP Amendment 90-1 to add a policy to the LUP allowing encroachments on public land by beachfront residential owners on the Balboa Peninsula subject to conditions and restrictions. At that time, the policies were proposed in response to unpermitted oceanfront encroachments in West Newport and in the Pier area, some of which may have been pre-Coastal Act. In January 1991, the Commission denied the LUP amendment request as submitted and approved it with suggested modifications. Regarding Peninsula Point (the location of the subject LCP amendment request), in 1990 the City proposed to prohibit encroachments except for landscaping. At the January 1991 hearing, the Commission's suggested modifications regarding Peninsula Point included placing a limit to the area of permitted landscape encroachments to *"5-feet of landscaping, specifically ice plant seaward of the property line to act as a privacy buffer for the residents, provided the property owner obtains an encroachment permit. The owners are required to maintain the plantings so that they do not extend beyond the permitted buffer zone."*

Commission findings in support of the suggested modification were as follows:

"The City's justification for the landscaping in the Point area is that it will have no impact on public access and will be attractive. The typical landscaping that would be allowed is ice plant. Ice plant stabilizes the sand and builds dunes over time. This kind of improvement can and does block public access. Although landscaping with ice plant may look attractive to some members of the public it displaces sandy beach area and creates an impediment to access. Landscaping, especially uncontrolled landscaping, is encroachment as much or more than

hardscape improvements as it adversely affects public access over large areas even if it is not perceived by some to be private development.

Although the proposed encroachment policy appears to limit the extent and nature of hardscape development in the other two segments along the beach, no explicit policy regarding landscaping is proposed. With uncontrolled landscaping permitted, because landscaping is not considered encroachment by the City in the proposed policy, the homeowners in the West Newport area as well as the Peninsula Point area could create wide buffer zones that the public must skirt, further diminishing the usable beach are significantly without technically violating the encroachment policy.”

The Commission initially voted to deny LUP Amendment 90-1 in January 1991 and continued the suggested modification portion of the hearing; directing Commission staff and City staff to work together to reach an agreement on new wording for the amendment, as the suggested modification to require an encroachment permit limited to a 5-foot landscaping encroachment zone, and other suggested modifications which required a mitigation for public access impacts were not acceptable to the City. Then in June 1991, the Commission approved LUP Amendment 90-1 with suggested modifications relating to the inclusion of a mitigation plan for public access impacts, reducing the amount of encroachment allowed in the West Newport area, reserving the City’s right to use the public right-of-way for construction of public access ways, restricting seawalls to the private property, and ensuring that fees collected will be used for public access enhancement per the mitigation plan, however, suggested modifications relating to ice plant vegetation encroachments in the East Balboa Peninsula area recommended by staff were not adopted by the Commission. The City accepted all suggested modifications in the June 1991 adoption of Resolution 91-80. Per the final City adopted Resolution 91-80, no encroachments are permitted on Peninsula Point, however, the City still did not consider ground cover such as ice plant to be an encroachment. The City also adopted City Council Policy L-12 which was intended to implement the LUP Amendment by establishing a procedure for approval of permitted encroachments, removal of prohibited encroachments, limiting the extent of encroachments, and clarification of improvements permitted within each encroachment zone. It was in this City Council Policy L-12 in which the City clearly stated:

“Encroachments and improvements are prohibited oceanward of any ocean front parcel from a point 250 feet southeast of E Street to Channel Road, provided existing trees which have been planted and maintained in conformance with City Council policy, and ground cover such as ice plant or indigenous plants are not to be considered an encroachment, and will not require a permit pursuant to this policy, but the City reserves the right to remove, trim or otherwise, control the type and extend of any such landscaping.”

Over the years, the City amended this City Council Policy approximately ten times and the latest version was certified by the Commission as part of the LCP’s Implementation Plan in 2017 as Appendix C – Oceanfront Encroachment Policy Guidelines. The language of the IP currently reads:

“Encroachments and improvements are prohibited oceanward of any oceanfront parcel from a point 250 feet southeast of E Street to Channel Road, with the exception of landscaping trees existing prior to October 22, 1991 and groundcover.”

However, the City has taken no enforcement actions to curb the expansion of landscaping encroachments planted and maintained by homeowners and thus, the landscaping encroachments in Peninsula Point have increased in size and go well beyond landscaping trees existing prior to October 22, 1991 and groundcover (i.e., ice plant and indigenous plants). **Exhibit #3** provides photographs of the subject landscaping encroachments in front of these single family residences. Furthermore, any landscaping installed on the beach without a permit cannot be allowed to remain in place, regardless of the IP encroachment policy guidelines, because of the impacts to public beach access and if the landscaping has or had an impact on the dune habitat it would be inconsistent with both Chapter 3 policies and LUP Policies the require the protection of ESHA.

The City's LCP does allow for and issues annual encroachment permits for limited encroachments within the City's Oceanfront right-of-way in other areas of the Peninsula. In West Newport, between Santa Ana River and 36th Street, the City has no paved pedestrian/bike boardwalk along the 15-ft. Oceanfront right-of-way, encroachments 15 to 10 feet deep are allowed in this area. The paved Oceanfront Boardwalk runs from 36th Street east to E Street, in this Central Pier area, encroachments are permitted up to the inland edge of Oceanfront Boardwalk (typically 7-8 feet oceanward of the rear private property lines). As noted in the section above, the existing Oceanfront Encroachment Policy permitting encroachments in this area was in response to resolve unpermitted oceanfront encroachments in Balboa Peninsula's West Newport and Central Pier areas, some of which may have been pre-Coastal Act. The paved Oceanfront Boardwalk provides easy recreational lateral public access across the beach; and no beach habitat is known to occur seaward of the Oceanfront Boardwalk within this Central Pier area popular with beachgoers. The paved right-of-way stops at E Street and does not continue to end of Balboa Peninsula.¹ In contrast, the proposed expansion of the encroachment program to the East Balboa Peninsula into the unpaved Oceanfront right-of-way would have adverse impacts to public access and sensitive habitat, and would be inconsistent with the existing certified LUP policies that require protection of these resources.

Public Access Impacts

As reflected in the Sections cited above, the Coastal Act contains strong policies in favor of protecting *maximum* public access (30210) and prohibiting development from interfering with the public right of access, including use of the beach (30211). Coastal Act Section 30221 requires that oceanfront land suitable for recreational use be protected for recreational use, unless demand for such a use is or likely will be provided elsewhere in the area. With expected future sea level rise and resulting coastal erosion, it is likely that future demand for public recreational activities, such as use of the sandy beach, will need to be accommodated on smaller, narrower beaches. In addition, the population is expected to continue to increase. And so, regionally, the area of sandy beach will decrease while the demand for remaining sandy beach areas will only increase. As the beach narrows as it is expected to do, demands on the public beach will increase significantly, concentrating the public area increasingly closer to the public/private border.

Section 30214 of the Coastal Act recognizes the inherent conflicts likely to arise when private property abuts public use areas, but the Act prioritizes public access needs. This means that the private property owner's need for privacy is rightly accommodated on the private property itself, not

¹ There is no City owned right-of-way between E Street and G Street. The City owned right-of-way continues unpaved from G Street to Channel Road.

by burdening the increasingly limited public beach area. When such conflicts are not addressed at the planning/permitting stage of development, and adjacent residential development is allowed too close to public beach areas, the resulting lack of privacy could lead to future demands by residents to curtail public use of the public area in order to afford privacy. Along Peninsula Point, the City requires a minimum 10-ft. structural setback from the oceanfront property line for new development; the City considers this to be an adequate setback in this area to minimize conflicts between private property and public use areas. The subject landscape encroachments effectively privatize the public beach in front of these residences; the perceived public/private boundary moves even further seaward, effectively reducing usable public beach area. Moreover, generally, members of the public are uncomfortable congregating in areas too close to private residential development or perceived private patio area, effectively creating self-imposed buffer distances even though the entire area in question is public. While it may be that some beach-goers prefer to congregate closer to the ocean, as the beach narrows, which it will do with future sea level rise, beach-goers will be forced closer inland and closer to private development. The proposed LCP amendment would allow hardscape paved patio slabs and perimeter walls and/or fences 3-ft. above existing natural grade that would further increase conflicts between private property and public use areas and making the upper beach areas less desirable for recreating by the public.

Although the sandy beach in this area is currently a wide beach, the beach is expected to become more and more narrow as the sea rises. The best available regional sea level rise modeling tool for this area is USGS's CoSMoS. As reflected in the CoSMoS modeling, Newport Beach is very vulnerable to impacts of sea level rise. Review of CoSMoS modeling in the immediate project vicinity indicates the currently wide sandy beach will narrow over the next 75-100 years. Even though, at this time, it appears that the greatest and earliest flooding threat to existing development in Newport Beach may come from the harbor inland of the subject area rather than the ocean, the threat to the size and extent of the public sandy beach from the ocean is significant. Generally, the beach along Balboa Peninsula ranges in width from approximately 300 to 500 feet. At the subject Peninsula Point area, the beach width is approximately 400 to 500 feet (not accounting for the existing unpermitted encroachments). The exact extent of loss of sandy public beach is not known with certainty, but CoSMoS modeling indicates that the shoreline position of the beach at Peninsula Point will migrate inland approximately 200 ft. with 2.5 feet of sea level rise and will migrate approximately 300 feet with 6.6 feet of sea level rise, and includes significant flooding from the harbor side of the peninsula (**Exhibit #7**). Thus, as the beach width narrows with sea level rise, greater pressure will be put on the limited area of public sandy beach that does remain, especially when taken together with expected continued population growth. Permitting encroachments onto the public sandy beach area, as proposed by the LCP amendment would have the effect of further constraining areas of sandy beach available for public use. This reinforces the need to maximize public use of remaining sandy beach area available to the public for as long as possible as the beach narrows due to sea level rise.

The impact of sea level rise on public recreational use of sandy beach areas will occur not only at Newport Beach, but at virtually all sandy beach areas, further aggravating the loss of public recreational opportunities and the ability of the public to enjoy sandy public beaches as these areas will also be necessary to support biological resources throughout the state. Sea level rise and erosion that results in loss of public beach areas will occur gradually, meaning that protecting existing sandy beach areas and not permitting expansion of areas where beach encroachments are allowed would minimize

the loss of public beach due to sea level rise and would allow for meaningful public access for years if not decades longer than would otherwise be the case.

Habitat Impacts

Section 30107.5 of the Coastal Act states:

“Environmentally sensitive area” means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and development.

Section 30240(b) of the Coastal Act states:

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.

The LUP describes the habitat along this stretch of beach as a southern Coastal Fore-dune habitat and describes the presence of the existing encroachments:

*In Newport Beach, southern coastal fore-dune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula. The vegetation in this community is generally sparse with overall cover ranging from 20 to 70 percent in some areas, while other areas are completely devoid of vegetation. Areas of open sand fragment this habitat. Dominant plant species include non-native species such as purple sand-verbena (*Abronia umbellata*), sea rocket (*Cakile maritima*), beach evening primrose (*Camissonia cheiranthifolia*), sea-fig (*Carpobrotus chiliensis*), hottentot fig (*Carpobrotus edulis*), beach morning glory (*Calystegia soldanella*), and beach bur (*Ambrosia chamissonis*). Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal fore-dune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes. Many areas are almost completely covered by sea-fig and hottentot fig. If dune habitat losses cannot be avoided, then mitigation programs to restore dune habitat within Newport Beach should be implemented.*

The LUP contains a list of Environmentally Sensitive Habitat Areas (ESHA) that occur throughout Newport Beach, stating: *The following terrestrial (non-marine) natural communities are known to occur within the coastal zone in Newport Beach and the City’s sphere of influence: Dune habitats, including southern coastal fore-dunes and southern dune scrub.*

Further, the LUP states that dune habitat is presumed to be ESHA unless demonstrated otherwise:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. These include southern dune scrub... Areas within the City of Newport Beach that are dominated by one of the habitats discussed above are presumed to be ESHA, unless there are strong site-specific reasons to rebut that presumption. Where the habitats discussed above occur in the City of Newport Beach the presumption is that they are ESHA and the burden of proof is on the property owner or project proponent to demonstrate that that presumption is rebutted by site-specific evidence.

Chapter 4.1.5 of the LUP acknowledges the presence of the coastal foredune habitat on the Peninsula and has the following policies for protection of the habitat:

4.1.5-1. Require the removal of exotic vegetation and the restoration of native vegetation in dune habitat.

4.1.5-2. Direct public access away from dune habitat areas through the use of well-defined footpaths, boardwalks, protective fencing, signage, and similar methods.

4.1.5-3. Design and site recreation areas to avoid impacts to dune habitat areas.

4.1.5-4. Require a coastal development permit for earthmoving beach sand in dune habitat areas.

4.1.5-5. Limit earthmoving of beach sand in dune habitat areas to projects necessary for the protection of coastal resources and existing development.

The summary of the habitat along the Balboa Peninsula, above, suggests that activities and development that impact the dune habitat should be avoided, and that the existing patio and vegetation encroachments that contain non-native plantings are not consistent with the perpetuation of the coastal dune habitat.

The dunes along this stretch of the Balboa Peninsula are a component of beach ecosystems². The sandy beach lies between foredunes and the ocean and the amount of sand between the ocean and dunes varies and depends on several factors including sand supply, exposure and topography, wind and wave patterns, and presence of artificial features such as seawalls, rock revetments, and groins. Embryo dunes, also known as coastal strand habitat, are found at the seaward base of foredunes and are often initiated by kelp wrack which traps sand and seeds³. On open coasts, coastal strand vegetation is important in the formation of hummocks that can become foredunes. Dune-backed beaches account for roughly a quarter of California's shoreline but together, beach-dune complexes

² Barbour, M.G. T. Keeler-Wolf and A.A. Schoenherr. 2007. Terrestrial Vegetation of California. University of California Press, Berkeley, CA. 712 pp.

³ Pickart, A.J., and J.O. Sawyer. 1998. Ecology and restoration of northern California coastal dunes. California Native Plant Society. Sacramento, CA.

constitute only 2-3% of the State's landmass (Pickart & Barbour 2007), making them one of the rarest landscapes.

Dunes systems, one of the most dynamic habitat types on earth, are dependent upon, and highly influenced by, wind and wave action. These forces cause sand accretion or erosion, depending on their strength, which tends to follow seasonal patterns. Dunes form parallel to the prevailing winds and perpendicular to the coastline and support an array of native plants and animals uniquely adapted to this transition zone between land and sea. In addition to their habitat and aesthetic values, dune ecosystems are recognized for providing important protection to inland structures and lands from storm events.

The California Department of Fish and Wildlife (CDFW) September 2010 Natural Communities list identifies southern foredunes as having a rarity ranking of G1 S1.2, a 'critically imperiled' rare habitat type⁴. The second volume of the Manual of California Vegetation⁵ defines southern foredune vegetation as a series of species alliances. The *Abronia latifolia-Ambrosia chamissonis* (Sand Verbena-Beach Bur) Herbaceous Alliance, that has a rarity ranking of G3 S3⁶, is typical of southern foredune vegetation Section 30107.5 of the Coastal Act defines environmentally sensitive habitat (ESHA) as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." The "Encroachment Removal and Replacement Plan" dated November 18, 2013 prepared by Glenn Lukos Associates, Inc. only identifies coastal strand/coastal beach as an existing native plant community and makes no determination regarding southern dune habitat in this area of East Balboa Peninsula. The Plan proposes removal of ice plant and planting of pink sand verbena (*Abronia umbellata*), beach evening primrose (*Cammisoniopsis cheiranthifolia*), sand bur (*Ambrosia chamissonis*), and saltgrass (*Distichlis spicata*), all typical coastal strand and southern fore dune plants. The City did not submit any site-specific biological surveys or analysis that indicated that the vegetation or the sand morphology here is not in fact ESHA. Because the encroachment program would overlap or be adjacent to areas presumed to be ESHA per the LUP the program proposed by the LUP amendment would not be consistent with Section 30240 of the Coastal Act. The existing unpermitted beach encroachments could be located within or may be adjacent to potential ESHA foredune habitat areas and therefore are not consistent with the LUP policies or Chapter 3 of the Coastal Act.

Additionally, Western snowy plover, a bird federally listed as threatened under the Endangered Species Act of 1973 has been documented as present in the vicinity of Peninsula Point. Balboa Peninsula is one of seven primary wintering sites for snowy plovers in Orange County and occasionally supports nesting. In June 2012, the U.S. Fish and Wildlife Service (USFWS) declared 25 acres of beach critical habitat for Western snowy plover in an area southeast of Balboa Pier from

⁴ Global and State Level 1 communities or species are identified as "critically imperiled - at very high risk of extinction due to extreme rarity (often ≤ 5 populations), very steep declines, or other factors" (<http://www.natureserve.org/conservation-tools/conservation-status-assessment>).

⁵ Sawyer, J.O., T. Keeler-Wolf, and J.M. Evens. 2009. A Manual of California Vegetation, Second Edition. California Native Plant Society Press, Sacramento, CA. 1300 pgs.

⁶ Global and State Level 3 communities and species are identified as "vulnerable - at moderate risk of extinction due to a restricted range, relatively few populations (often ≤ 80), recent and widespread declines, or other factors" (<http://www.natureserve.org/conservation-tools/conservation-status-assessment>).

B-Street to G-Street between the paved Oceanfront Boardwalk and the mean high tide line (**Exhibit #4**). Critical habitat is a term in the Endangered Species Act that identifies geographic areas containing features essential for the conservation of a threatened or endangered species and may require special management considerations or protection. Thus, Western snowy plover has been documented as present in other areas (outside the designated critical habitat area) of Balboa Peninsula. Western snowy plover has been observed roosting on the Peninsula east of the critical habitat, from G-Street to Peninsula Point and the Wedge⁷.

The Western snowy plover nesting season is generally from March 1 thru September 30 and occurs on dune-backed beaches and coastal sandspits in barren to sparsely vegetated sand areas. The non-breeding season, also known as “wintering” season occurs from September thru February. Overwintering habitat is provides connectivity for dispersal between nesting sites and provides resouces that allow birds to build fat reserves necessary for spring migration and the next nesting season. Western snowy plover are known to return to the same beaches every year for overwintering. Winter roosts have been documented southeast of Balboa Pier to the eastern end of the Peninsula at the rock jetty, with a maximum of 149 individual birds. Year round surveys are conducted, counts are variable but the majority of Western snowy plover observed in the area is during the wintering season. Although the beach area east of G-Street to the Wedge in front of the subject oceanfront encroachments is not officially designated as critical habitat, it has been observed to be used by Western snowy plovers for overwintering, provides adequate conditions for winter roosting and foraging and could potentially function as future nesting locations and thus may also rise to the level of ESHA in the future.

Thus, while it is not clear what the extent and exact location of ESHA on the beach area would be affected by the LCP amendment, sensitive species and habitat do occur throughout the beach, and could be affected by a policy to allow encroachments to extend onto the public beach, particularly over time as the beach width narrows with sea level rise and greater pressure is put on the limited area of public sandy beach that does remain, especially when taken together with expected continued population growth. Allowing encroachments onto the public sandy beach area, as proposed by the LCP amendment, would have the effect of further constraining areas of sandy beach available for public recreational uses and for habitat uses, and thereby also increase potential conflict between these uses. The impact of sea level rise on biological resources of sandy beach areas will further aggravate the loss of habitat for threatened species and habitat communities throughout the state. Sea level rise and erosion resulting in loss of habitat areas will be a gradual process, thus, protecting existing and potential habitat areas by not permitting residential encroachments onto the beach would minimize the loss of beach resulting from sea level rise and would allow greater beach areas for future preservation of ESHA.

City Proposed Mitigation Measures

In a letter dated April 5, 2019, the City staff provided the Commission suggested modification language they are willing to accept which includes commitments to apply for a CDP within two years for the removal of unpermitted landscape encroachments within the East Ocean Front right-of-way and on State Tidelands and to authorize development consistent with the amended LCP; to use of 100% of fees collected from newly authorized encroachments to fund construction of specific

⁷ *Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, CA* prepared by Dudek, June 2018

mitigation projects (i.e., bike racks, trash cans, lifeguard vehicle and ADA access improvements at street-ends in Peninsula Point and new lifeguard tower at North Bay Beach); and after construction of these specific mitigation projects, to use 85% of fees collected to fund construction and maintenance of improvements, and/or fund programs ‘to benefit the beach-going public and visitors to the coastal zone’ (**Exhibit #5**). While these are worthwhile projects that would benefit public access to the beach, Coastal Act public access policies require maximum public access (Section 30210) and prohibit development from interfering with the public’s right of access to the sea, including use of the sandy beach (Section 30211). The Coastal Act’s emphasis on public access strongly discourages policies that grant certain private individuals exclusive use of public beach spaces, particularly when coastal beaches are expected to diminish considerably over time as a result of sea level rise.

In addition, these features can and should be constructed utilizing other public funds including fees collected by the current encroachment program along other sections of Balboa Peninsula. An expansion of the area of permitted oceanfront encroachments to the East Balboa Peninsula is not necessary to construct bicycle or ADA access improvements in that area. According to information provided by the City, current beach encroachment permit fees are being used to fund a summertime trolley in Balboa Peninsula and to pay for summertime beach lifeguards and could just as well be used for installation of bicycle racks and trash cans at all street-ends and other street-end improvements. The City could also identify other funding sources for new trash cans, beach maintenance, enhanced bicycle facilities and ADA access improvements, which is a common function of local government. Finally, the Commission is not bound by past decisions that do not stand up under current information and conditions, there is no valid reason to approve a beach encroachment program simply because it has been allowed in the past.

Environmental Justice

The Commission adopted an environmental justice policy in March 2019 committing to consider environmental justice principles, consistent with Coastal Act policy 30013, in the agency’s decision-making process. In approving the policy, the Commission recognized that equitable coastal access is encompassed in, and protected by, the public access policies in Chapter 3 of the Coastal Act by finding that:

The Commission reaffirms its long-standing commitment to identifying and eliminating barriers, including those that unlawfully privatize public spaces, in order to provide for those who may be otherwise deterred from going to the beach or coastal zone. The coast belongs to everyone, and access cannot be denied or diminished on the basis of race, ethnicity, income socio-economic status, or place of residence or other factors listed in the Policy Statement.

The proposed LCP Amendment would authorize private landowners adjacent to the public beach to use portions of the beach for their own private purposes, essentially privatizing part of the beach where encroachments would be permitted. Allowing a few coastal property-owners exclusive use of public beach areas is antithetical to environmental justice principles, burdening non-coastal communities that already face numerous barriers to accessing the coast by limiting areas of the beach available to the general public for recreation. The burdens of restricted coastal access, which are disproportionately borne by low-income and minority communities, will worsen as public beaches narrow over time due to sea level rise and less and less beach area is available for public recreation as described in the section above. Approving the LCP amendment request would condone continued privatization of the

public beach to the detriment of the general public and, in essence, reward property owners who for years have disregarded Coastal Act/LUP requirements despite warnings from Coastal Commission staff to remove the unpermitted encroachments.⁸

Again, no LCP amendment is required for the City to obligate property owners to remove unpermitted development on the public beach. Approval of the subject LCP amendment request would not correct a pattern of unpermitted beach encroachments along Peninsula Point, which if allowed to continue, will likely lead to significant disparities in who is able to recreate on this beach. Therefore, the Commission finds that consideration of environmental justice principles further supports denial of expansion of permitted oceanfront encroachments to a new beach area where such encroachments are currently prohibited.

Conclusion

The proposed LUP amendment raises significant Coastal Act issues. The proposed policy changes will adversely impact coastal access and public recreation by effectively privatizing portions of the beach along Peninsula Point. The proposed LUP amendment also has the potential to impact biological resources and sensitive habitat. The Commission finds that the proposed policy changes are not in conformance with the public access policies of Chapter 3 of the Coastal Act, including Section 30210, 301211, 30212 and 30213 and the ESHA protection requirements of Section 30240.

C. DENY THE IP AMENDMENT REQUEST AS SUBMITTED

Under Sections 30513 and 30514(b) of the Coastal Act, the Commission shall certify a proposed amendment to an IP unless it does not conform with, or is inadequate to carry out, the provisions of the certified LUP. Thus, the standard of review for amendment to the IP is the LUP. The proposed IP amendment must conform with, and be adequate to carry out, the provisions of the certified LUP.

The proposed IP amendment is necessary to implement the proposed changes to the certified LUP, specifically to LUP Policy 3.1.3-3 and LUP Policy 3.1.3-9 pertaining to permitted oceanfront encroachment zones. This IP amendment request would modify IP Appendix C – Ocean Front Encroachment Policy Guidelines to allow the owner of any oceanfront residential parcel between and including 1400 East Ocean Front and Channel Road to install improvements on the oceanside of the parcel up to a maximum of 15 feet oceanward of the private property line and within an oceanward prolongation of the property lines on the side of the parcel. Encroachments and improvements would continue to be prohibited oceanward of any ocean front parcel on a smaller area from a point 250 feet southeast of E Street to 107 G Street, with the exception of landscaping trees existing prior to October 22, 1991, and groundcover. Finally, the proposed IP amendment includes a minor addition to language in the Mitigation Plan portion of the IP Appendix C – Ocean Front Encroachment Policy Guidelines to include ‘transportation alternatives’ to the list of improvements which directly benefit

⁸ The City asserts in its April 5, 2019 letter that if the proposed LCP Amendment is approved, and a 15-foot encroachment area is authorized onto this public beach area where, currently, numerous property owners have erected unpermitted development on the City’s right-of-way and the public beach, the City will remove unpermitted development beyond the proposed 15-ft. encroachment area within the City right-of-way. However, nothing is preventing the City from enforcing the current LCP provisions that prohibit encroachments onto this beach (an LCP amendment is not required to do so) by applying for a permit to remove the encroachments on City property; yet, the City has declined to enforce its current LCP.

the beach going public (current language lists rest rooms, vertical or lateral walkways along the beach and similar projects) for use of fees generated from beach encroachment permit fees.

As previously stated, the City proposes to modify certified LUP **Policy 3.1.3-3** in order to expand the geographic area where oceanfront encroachments are permitted. This policy is contained in the City's LUP Chapter 3.0 – Public Access and Recreation. This LUP chapter contains many other policies aimed protecting and enhancing public access to and along the shoreline and to beaches, coastal parks, trails, or bluffs. Policies such as:

Policy 3.1.1-1 Protect, and where feasible, expand and enhance public access to and along the shoreline and to beaches, coastal waters, tidelands, coastal parks, and trails.

Policy 3.1.1-4 Identify and remove all unauthorized structures, including signs and fences, which inhibit public access.

Policy 3.1.1-11 Require new development to minimize impacts to public access to and along the shoreline.

Policy 3.1.1-12 Implement building design and siting regulations to protect public access through setback and other property development regulations of the Zoning Code that control building placement.

Policy 3.1.5-1 Prohibit new development that incorporate gates, guardhouses, barriers or other structures designed to regulate or restrict access where they would inhibit public access to and along the shoreline and to beaches, coastal parks, trails, or bluffs.

Policy 3.1.5-2 Prohibit new private streets, or the conversion of public streets to private streets, where such a conversion would inhibit public access to and along the shoreline and to beaches, coastal parks, trails, or coastal bluffs.

In addition, the proposed IP amendment would be inconsistent with other policies of the LUP that protect beaches for public uses:

Policy 2.3.2-1. Continue to use public beaches for public recreational uses and prohibit uses on beaches that interfere with public access and enjoyment of coastal resources.

Policy 2.3.3-5. Continue to provide and protect public beaches and parks as a means of providing free and lower-cost recreational opportunities.

Policy 2.4.2-1. Continue to designate lands for coastal-dependent/related educational and recreational uses.

2.7-1. Continue to maintain appropriate setbacks and density, floor area, and height limits for residential development to protect the character of established neighborhoods and to protect coastal access and coastal resources.

2.9.2-1. Maintain, expand, and encourage the use of bikeways and trails as alternative circulation routes.

4.4.1-11. Restrict development on sandy beach areas to those structures directly supportive of visitor-serving and recreational uses, such as lifeguard towers, recreational equipment, restrooms, and showers. Design and site such structures to minimize impacts to public coastal views. (Visual Resources Policy)

As previously discussed, the proposed encroachment program would impact a total of approximately 1.5 acres of sandy beach area, which would not be consistent with the above LUP polices that protect sandy beach area for public recreational use. Particularly, the encroachment program proposed by the LCP amendment would occupy a right-of-way owned by the City of Newport Beach that could, in the future, support development of a beach trail, consistent with other trails that provide lateral access along the Peninsula.

As discussed in the findings for denial of the LUP portion of the proposed LCP amendment, the East Balboa Peninsula Beaches, specifically the area east from G Street to the end of the Peninsula at the Wedge has been observed as a roosting and overwintering site for Western Snowy Plover, a federally listed species. The Newport Beach LUP Chapter 4.0 – Coastal Resource Protection also contains many policies aimed at protecting environmentally sensitive habitat areas. Policies such as:

3.1.1-5. Allow public access improvements in environmentally sensitive habitat areas (ESHA) when sited, designed, and maintained in a manner to avoid or minimize impacts to the ESHA.

4.1.1-1. Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:

4.1.1-2. Require a site-specific survey and analysis prepared by a qualified biologist as a filing requirement for coastal development permit applications where development would occur within or adjacent to areas identified as a potential ESHA. Identify ESHA as habitats or natural communities listed in Section 4.1.1 that possess any of the attributes listed in Policy 4.1.1-1. The ESA's depicted on Map 4-1 shall represent a preliminary mapping of areas containing potential ESHA.

4.1.1-4. Protect ESHAs against any significant disruption of habitat values.

4.1.1-6. Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.

4.1.1-7. Limit uses within ESHAs to only those uses that are dependent on such resources.

4.1.1-8. Limited public access improvements and minor educational, interpretative and research

activities and development may be considered resource dependent uses. Measures, including, but not limited to, trail creation, signage, placement of boardwalks, and fencing, shall be implemented as necessary to protect ESHA.

4.1.1-9. Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation.

4.1.1-10. Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible. Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance.

4.1.1-11. Provide buffer areas around ESHAs and maintain with exclusively native vegetation to serve as transitional habitat and provide distance and physical barriers to human and domestic pet intrusion.

4.1.1-12. Require the use of native vegetation and prohibit invasive plant species within ESHAs and ESHA buffer areas.

Chapter 4.1.5 of the LUP acknowledges the presence of the coastal foredune habitat on the Peninsula and has the following policies for protection of the habitat:

4.1.5-1. Require the removal of exotic vegetation and the restoration of native vegetation in dune habitat.

4.1.5-2. Direct public access away from dune habitat areas through the use of well-defined footpaths, boardwalks, protective fencing, signage, and similar methods.

4.1.5-3. Design and site recreation areas to avoid impacts to dune habitat areas.

4.1.5-4. Require a coastal development permit for earthmoving beach sand in dune habitat areas.

4.1.5-5. Limit earthmoving of beach sand in dune habitat areas to projects necessary for the protection of coastal resources and existing development.

The existing section of the IP that provides an exception for landscaping encroachments in this particular area of the Peninsula is not consistent with the LUP policies that specify treatment of the dune habitat for this area (Chapter 4.1.5 of the LUP) and requires removal of non-native vegetation and the restoration of dune habitat (Policy 4.1.5-1). In cases where the IP conflicts with the policies of the LUP, the LUP takes precedence over an IP as argued in cases concerning general plans and zoning codes (the analogs to LUPs and IPs outside of the coastal zone, respectively) (*Napa Citizens for Honest Gov't v. Napa County Bd. Of Sup.* (2001) 91 Cal.App.4th 342, 389 and *McAllister v. Cal. Coastal Com'n* (2008) 169 Cal.App.4th 912, 930), which concluded that a the general plan is the

charter to which the ordinance must conform. When a certified LUP provision conflicts with a certified IP provision, the certified LUP provision controls (and the conflicting IP provision must be brought into conformity with the certified LUP).

In this case, the LUP policies that require the protection and restoration of dune habitat would prevail over the IP section that allows for an exception to the prohibition on encroachments. Any changes to the IP that present or increase inconsistency with the LUP policies must be denied (or modified) because an IP must be consistent with and adequate to carry out the policies of the land use plan.

For many of the same reasons that the proposed LUP amendment does not conform to the Coastal Act public access/recreation policies, and habitat protection policies, the proposed IP amendment does not conform to or carry out the certified LUP policies – the proposal to condone private encroachments on public beach areas at Peninsula Point is not consistent with the LUP’s emphasis on protecting public access, and the protection of coastal foredune habitat on Balboa Peninsula particularly in light of impacts of sea level rise which will diminish the beach over time. The above findings supporting denial of the LUP amendment portion of this LUP amendment are incorporated herein by reference. Therefore, the findings for denial of the LUP amendment portion of this LCP amendment are hereby incorporated by reference into the findings for denial of the IP portion of this LCP amendment. As explained in the findings for denial of the LUP amendment portion of this staff report, the existing unpermitted beach encroachments may be adjacent to ESHA areas. The proposed IP amendment is not consistent with the above LUP policies for the protection of ESHA, nor would the residential encroachments be consistent with a “resource dependent use,” and the encroachments would likely not be consistent with the above mentioned buffer policies.

Thus, the proposed IP amendment as submitted, does not conform with, and/or does not adequately carry out, the policies of the LUP pertaining to public access and must be denied pursuant to Section 30513 of the Coastal Act.

E. UNPERMITTED DEVELOPMENT

Just like in 1990, this LCP amendment is once again in response to development that has occurred on the City public beach areas of Balboa Peninsula without benefit of the required coastal development permit. All work has occurred seaward of private property lines encroaching onto public beach areas.

Staff has confirmed the existence of unpermitted encroachments associated with single family residences between E Street and Channel Road on the Balboa Peninsula. Commission staff sent NOV letters to several property owners in February 2012. In 2014, the Commission gained the ability to impose administrative penalties under Section 30821 of the Coastal Act for violations impacting public access. Thus, in June of this year, Commission enforcement staff sent additional NOV letters to Peninsula Point property owners with unpermitted beach encroachments advising them of possible exposure to penalties pursuant to Section 30821.

Denial of this LCP amendment pursuant to the staff recommendation could necessitate removal of unpermitted encroachments and restoration of the beach through the enforcement process, which

could include resolution of this matter through cease and desist and restoration orders, if the violations remain unresolved. If this is the case, Commission enforcement staff will consider appropriate actions to address violations of the Coastal Act, including but not necessarily limited to action pursuant to Coastal Act Section 30821, which authorizes the Commission to impose civil penalties for violations of the Coastal Act's public access provisions, with certain exceptions that do not apply here.

Although development has taken place prior to submission of this LCP amendment, consideration of the amendment by the Commission has been based solely on the consistency with the policies of Chapter 3 of the Coastal Act (for the LUP portion of the proposed amendment) and with the certified LUP (for the IP portion of the proposed amendment).

F. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

As set forth in Section 21080.9 of the California Public Resources Code, the California Environmental Quality Act (CEQA) exempts local governments from the requirement of preparing an environmental impact report (EIR) in connection with its activities and approvals necessary for the preparation and adoption of a local coastal program (LCP). The Commission's LCP review and approval program has been found by the Resources Agency to be functionally equivalent to the EIR process. (14 CCR § 15251(f).) Nevertheless, the Commission is required in approving an LCP submittal to find that the LCP conforms with the provisions of CEQA, including the requirement in CEQA section 21080.5(d)(2)(A) that the amended LCP will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment.

The Commission finds that, for the reasons discussed in this report, the proposed LUP amendment, is not in conformity with the Chapter 3 policies of the Coastal Act. The Commission finds that, for the reasons discussed in this report, the proposed IP amendment, is not in conformity with, or adequate to carry out the land use policies of the certified LUP. The Commission finds that approval of the LCP Amendment with suggested modifications will result in significant adverse environmental impacts within the meaning of CEQA.