

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
 301 E. Ocean Boulevard, Suite 300
 Long Beach, CA 90802 4302
 (562) 590 5071

**Th15a**

Filed:	9/5/19
180th Day:	3/3/20
Staff:	F. Sy-LB
Staff Report:	1/30/20
Hearing Date:	2/13/20

STAFF REPORT: PERMIT AMENDMENT

Application No.: 5-02-101-A5

Applicant: Mitchell Land and Improvement Co., LLC

Agent: Planning Systems, Attention Paul Klukas

Location: 24981 Dana Point Harbor Drive, City of Dana Point (County of Orange)

Description of Project Previously Approved Pursuant to A-120-81: Mixed use development and subdivision of 75-acre parcel; construction of 112 townhouse condominium units, construction of a commercial/office complex, development of 46 single-family residential lots, development of two public recreation areas/parks and conceptual approval of two hotel complexes.

Description of Project Previously Approved Pursuant to A-120-81-A1: Increase the size of the hotel in Area "G" to 350 rooms, eliminate the 60-room hotel on Area "E" and replace it with visitor-serving commercial uses, including 50% restaurant uses.

Description of Project Previously Approved Pursuant to A-120-81-A3: Eliminate the deed restriction requiring 50% restaurant use of commercial square footage in Area "E", designate six (6) existing parking spaces for public use, and install a visitor information kiosk and public access signage.

Description of Project Previously Approved Pursuant to A-120-81-A4: Conversion of two parking spaces into one enclosed 323 square foot parking space. Post project there will be a total of 304 parking spaces onsite.

Description of Pending Amendment: Request to amend Special Condition No. 2(b) to allow specific non-visitor-serving uses above the ground floor of commercial buildings.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The project involves modifying Special Condition No. 2(b) of the underlying Coastal Development Permit 5-02-101 (formerly Coastal Development Permit No. A-120-81) to allow specific non-visitor-serving uses above the ground floor of commercial buildings at the site. Modification of this

special condition would necessitate recording of a new deed restriction (supersede and replace) to ensure that the title to the property correctly reflects the allowance of the currently prohibited uses in Area “E.” The major issues raised by the amendment request are adequate provisions of visitor-serving commercial uses and consistency with the Local Coastal Program (LCP). Commission Staff recommends **approval** of the amendment request to modify Special Condition No. 2(b) of the underlying permit to allow specific non-visitor-serving uses above the ground floor of commercial buildings; and recordation of an updated deed restriction (supersede and replace).

The proposed project is located in the City of Dana Point, which has a Certified LCP. Therefore, the standard of review for the proposed amendment is the City’s LCP.

PROCEDURAL NOTE: The Commission's regulations provide for referral of permit amendment requests to the Commission if:

- 1) The Executive Director determines that the proposed amendment is a material change; or
- 2) An objection is made to the Executive Director's determination of immateriality, and at least three Commissioners object to the executive directors’ designation of immateriality at the next Commission meeting, or the Executive Director determines that the objection raises an issue of conformity with the Coastal Act or certified LCP.

In this case, the Executive Director has determined that the proposed amendment is a material change that affects conditions required for the purpose of protecting a coastal resource or coastal access.

Section 13166(a) of the Commission’s Regulations also calls for the Executive Director to reject a permit amendment request if it would lessen or avoid the intended effect of the previously approved permit.

The proposed amendment would not lessen the intended effect of Coastal Development Permit No. 5-02-101 envisioned in the Commission’s April 1981 action approving the project with conditions. Therefore, the Executive Director accepted the amendment request.

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EXHIBITS

Exhibit No. 1 – Project Location

Exhibit No. 2 – Area “E”

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** the proposed amendment to Coastal Development Permit No. 5-02-101, pursuant to the staff recommendation.*

Staff recommends a **YES** vote. Passage of this motion will result in approval of the amendment as conditioned 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 the coastal development permit amendment on the ground that the development as amended and subject to conditions, will be in conformity with the certified Local Coastal Program. Approval of the permit amendment 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 amended development on the environment, or 2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the amended development on the environment.

II. SPECIAL CONDITIONS

Unless specifically altered by this amendment, all regular and special conditions attached to Coastal Development Permit 5-02-101 (formerly Coastal Development Permit No. A-120-81), as amended up through amendment number 5-02-101-A5 and reflected in Appendix B, remain in effect.

2. Modification of Special Condition No. 2(b) of Underlying Permit

Special Condition No. 2(b) of the original permit, Coastal Development Permit No. A-120-81, (which was previously modified by Special Condition No. 1 of the 1984 amendment and Special Condition No. 2 of the 2004 amendment), shall be modified as indicated below. Language to be deleted is shown in ~~strike-out~~ and new language is shown in **bold, underlined italics**.

2(b). Allowable uses of "Area E" as designated on the Area Plan/Conceptual Site Plan, shall be limited to visitor-serving uses, as defined in the City of Dana Point Certified LCP, and shall exclude condominiums and general purpose commercial, **except that the specific non-visitor-serving uses listed in the next sentence may be allowed above the ground floor, subject to approval of a conditional use permit issued by the City of Dana Point. Non-visitor-serving uses that may be allowed include: administrative and professional offices; personal services oriented to the daily needs of the immediate neighborhood; banks and savings and loan association branches; and optometry and dental offices.**

8. Replacement of Special Condition No. 8 of Underlying Permit

Special Condition No. 8, as added to the original permit through Special Condition No. 4 of the 2004 amendment (Coastal Development Permit Amendment No. 5-02-101-A3) shall be replaced with the new condition provided below. Language to be deleted is shown in ~~strike-out~~ and new language is shown in **bold, underlined italics**.

PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT

AMENDMENT (5-02-101-A3), the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel governed by this permit amendment, referred to as "Area E," a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, as amended, 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 amended, 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 governed by this permit amendment. 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, as amended, 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. This deed restriction shall supersede and replace the deed restriction recorded per Special Condition 1 of the amendment to Coastal Development Permit #A-120-81 that was approved on May 8, 1984, limiting the use of Area E to visitor-serving uses only, including 50 percent restaurant use, which deed restriction is recorded as Instrument No. 84-262189 in the Official Records of Orange County.

PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT

AMENDMENT (5-02-101-A5), the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit amendment a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, as amended, 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 amended, 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 amendment. 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, as amended, 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. This deed restriction shall supersede and replace the deed restriction recorded pursuant to Special Condition No. 8 of Coastal Development Permit Amendment 5-02-101-A3, approved on January 15, 2004, which deed restriction(s) is recorded as Instrument No. 2004000329057 in the official records of Orange County.

III. FINDINGS AND DECLARATIONS

A. PROJECT LOCATION, BACKGROUND AND DESCRIPTION

Project Location

The subject site is a shopping center (Dana Marina Plaza) located at 24981 Dana Point Harbor Drive in the City of Dana Point, Orange County (**Exhibit No. 1**). The site is not located between the first public road and the sea; but is located immediately inland of Dana Point Harbor. The location of the subject site, referred to as Area “E,” is a 4.9-acre commercial development (**Exhibit No. 2**). The commercial complex was approved as part of a larger project previously approved under Coastal Commission CDP No. A-120-81, as will be discussed in the subsequent section.

The subject site is located in the City of Dana Point subject to the City’s Dana Point Specific Plan Local Coastal Program (LCP), also commonly referred to as the “1986 LCP”. The subject site is designated as “*Tourist Recreation/Commercial*” in the Land Use Plan (LUP) component of the LCP and this designation is carried out by the “*Coastal Visitor Commercial (C-VC)*” District standards contained in the Implementation Plan (IP) portion of the LCP.

Past Commission Actions at Subject Site

Coastal Development Permit No’s. P-81-7144 and A-120-81

On April 13, 1981, the South Coast Regional Commission approved CDP No. P-81-7144 for development and subdivision of a 75-acre parcel, including construction of a commercial/office complex, development of 46 single-family residential lots, development of two public recreational areas/parks and conceptual approval of two hotel complexes. The decision was appealed to the State Commission. On May 20, 1981, the State Commission approved CDP No. A-120-81 for development and subdivision of the 75-acre site subject to six (6) special conditions. Special Condition No. 2 contained land use restrictions specifying that Area “E”, the subject site, be designated for “*hotel, visitor serving commercial restaurant, and park use only.*” Special Condition No. 2 (“*Hotels*”) is currently proposed to be modified by this amendment request.

Coastal Development Permit No. A-120-81-A1

On May 8, 1984, the Commission approved an amendment to CDP No. A-120-81 to allow an increase in hotel rooms in Area “G” to 350 rooms and to eliminate a proposed 60 room hotel on Area “E”, which would be replaced by visitor-serving commercial uses, including 50% restaurant use subject to two (2) special conditions of approval. The Commission found that approval of the proposed amendment request “*would not alter the overall balance of the project*” in a way that would make the site violate Chapter 3 requirements for visitor-serving and recreational uses and would still be “*highly likely to serve a variety of economic sectors of the population.*” Special Condition No. 1 required recordation of a deed restriction limiting the use of Area “E” to “*visitor-serving uses only, including 50 percent restaurant use.*” Special Condition No. 2 specified that all prior conditions remained in effect.

Coastal Development Permit No. 5-02-101-A2

On March 29, 2002, the applicant submitted a second request to amend CDP No. A-120-81 again, this time to remove the restaurant use deed restriction. The amendment request was renumbered CDP No. 5-02-101-A2 in order to conform to the Commission's modern numbering system. Issues were raised concerning whether or not the proposed amendment would lessen the intended effect of the condition. Staff requested information regarding any changed circumstances and efforts by the applicant to market the site for restaurant use. The application was deemed incomplete for over six months and was returned to the applicant on December 10, 2002.

Coastal Development Permit No. 5-02-101-A3

On January 15, 2004, the Commission approved CDP Amendment No. 5-02-101-A3 to eliminate the deed restriction requiring 50% restaurant use of commercial square footage in Area "E", to designate six (6) existing parking spaces for public use, and install a visitor information kiosk and public access signage. Subsequently (on April 19, 2004), as required by Special Condition No. 4 of this amendment, an amended Deed Restriction was recorded against this portion of the property, reflecting the new requirements applicable to the site, as a result of the original permit, prior amendments, and this amendment.

Coastal Development Permit No. 5-02-101-A4

On October 6, 2016, the Commission approved CDP Amendment No. 5-02-101-A4 to convert two parking spaces into one enclosed 323 square foot parking space. Post project there would be a total of 304 parking spaces onsite.

Proposed Amendment Description: Coastal Development Permit No. 5-02-101-A5

Through the currently proposed amendment (CDP No. 5-02-101-A5), the applicant is requesting that the underlying CDP be amended to modify Condition #2(b), which restricts all uses on the property to visitor-serving and prohibits all general purpose commercial uses (as reflected in the deed restriction recorded against the property pursuant to Special Condition No. 8 of the permit, as amended). The applicant is requesting that Special Condition #2(b) be modified to allow specific non-visitor-serving uses above the ground floor, including general commercial uses. The proposed amendment would necessitate a conforming update to the deed restriction that was recorded pursuant to Special Condition No. 8. The new deed restriction would supersede and replace the existing deed restriction in order to ensure that the title to the property correctly reflects the allowance of the currently prohibited uses in Area "E." The applicant has provided evidence that numerous second-story suites have remained vacant and suggested that there is little demand for the uses allowed under Special Condition No. 2(b) for second-story commercial spaces.

The proposed revised wording of Special Condition #2(b) would be consistent with the recently approved Dana Point LCP Amendment (LCPA) 1-17, approved by the Coastal Commission on May 10, 2019. This LCP Amendment modified the Dana Point Coastal Visitor Commercial District (C-VC) zoning text to allow a number of additional, specific, non-visitor-serving uses within the C-VC zoning district, only above the ground floor and subject to approval of a conditional use permit. The Dana Marina Plaza property is within the C-VC Zone and thus is subject to this Zoning Code revision.

B. STANDARD OF REVIEW

The Commission's standard of review for the proposed amendment is the Dana Point Specific Plan Local Coastal Program/1986 LCP, pursuant to Section 30604(b) of the Coastal Act.

C. PUBLIC ACCESS

Dana Point Specific Plan Local Coastal Program/1986 LCP – Land Use Plan (LUP)

II./Land Use Plan/Access Component/Definitions/Policy II.D.4 (j) states:

Visitor-Serving Facilities: Visitor-serving facilities are public and private developments that provide accommodations, food, and services for tourists.

II./Land Use Plan/New Development Component/Recreation/Policy II.E.2 (a) 4 states, in pertinent part:

The “tourist recreation/commercial” (5.31) subcategory is applicable to areas which, because of unique natural or man-made amenities on or near the site, facilitate maximum conservation of the amenities through comprehensive site planning involving a mix of uses emphasizing recreation orientated commercial activities, open space preservation and conservation of significant natural features. Typical uses to be encouraged include public or private recreational, cultural, social, and educational facilities; gift and specialty shops; food and drink establishments; hotels and other permanent overnight accommodations; limited residential development; and required parking facilities. Camping and recreational vehicle facilities are not included in this designation but are to be provided for in the (5.3) recreation category.

Dana Point Specific Plan Local Coastal Program/1986 LCP – Implementation Plan (IP)

III./Implementation/Coastal Land Use District Regulations/6. C-VC outlines the purpose and intent of the “Coastal Visitor Commercial” District, lists the permitted uses and provides site development standards. The intent is to “provide the regulations which will permit the development and maintenance of a commercial area that will supply the needs of tourists and other visitors to the coast while preserving the unique natural features of the environment.”

In 2019, the City of Dana Point requested Commission action on Local Coastal Program Amendment (LCPA) 1-17 which only affected the Implementation Plan of the Dana Point Specific Plan Local Coastal Program/1986 LCP. On May 10, 2019, the Commission approved the LCPA as submitted. The proposed change modified the Coastal Visitor Commercial District (C-VC) zoning designation to add Subsection 5. *Permitted Uses Above Ground Floor* to Chapter E. *District Regulations*, Subsection 6. *C-VC Coastal Visitor Commercial District* of the Implementation Plan (Dana Point Specific Plan/1986 LCP). Subsection 5 allowed the following non-visitor-serving uses above the ground floor level within District 6 C-VC Coastal Visitor Commercial: administrative and professional offices; personal services oriented to the daily needs of the immediate neighborhood, such as beauty shops, barber shops, and dry cleaners; banks and savings and loan association branches; and optometry and dental offices. These uses would be subject to approval of a Conditional Use Permit (in addition to any required CDP). Previously, only visitor-serving uses and uses accessory to those uses were allowed within this district.

The wording of Subsection 5 is as follows:

6. *Coastal Visitor Commercial District*

b. *Land Uses*

5. *Permitted Uses above the Ground Floor – The following uses are permitted on floors that are above the ground floor, in compliance with the site development standards contained in subsection “C” below and subject to the provisions of a Coastal Development Permit approved in compliance with the CD District Regulations, and a Conditional Use Permit (CUP), except for permitted uses as specified in subsection b1 and b2 above area allowed without a Conditional Use Permit (CUP). Approved CDP’s are subject to appeal to the Coastal Commission.*

- a) *Administrative and professional offices.*
- b) *Personal services oriented to the daily needs of the immediate neighborhood, beauty shops, barber shops, and dry cleaners.*
- c) *Banks and savings and loan association branches.*
- d) *Optometry or Dental offices.*

The Dana Point LCP zone designation “*Coastal Visitor Commercial District (C-VC)*” implements the Dana Point Specific Plan LUP land use designation “*Tourist Recreation/Commercial*” (5.31 on the Land Use Element map). The LUP describes uses within this designation as: “*Typical uses to be encouraged include public or private recreational, cultural, social and educational facilities; gift and specialty shops; food and drink establishment; hotels and other permanent overnight accommodations; limited residential development; and required parking facilities.*”

In support of this, the LUP *Tourist Recreation/Commercial* designation Guidelines encourage, among other things:

- *To encourage multi-use developments combining the above uses and any others which achieve the intent of this designation.*
- *To provide for a mix of uses which will facilitate both seasonal and year-round activities.*
- *To vary the uses from site to site so as to capitalize on the particular location, size, and uniqueness of each area.*

The “*Tourist Recreation/Commercial*” land use designation and the “*Coastal Visitor Commercial District*” zone applies to the subject site, Area “E”. The proposed amendment would amend Special Condition No. 2(b) to allow specific non-visitor-serving uses above the ground floor of commercial buildings consistent with the changes allowed under the recent LCPA 1-17 to the Coastal Visitor Commercial District (C-VC) zoning designation. The applicant states that this change would assist in leasing numerous second-story suites that are currently vacant.

The certified LUP encourages visitor-serving uses within the *Tourist Recreation/Commercial* land use designation and this higher priority is also reflected in the *Coastal Visitor Commercial District* zone, by the uses that are allowed within the zone. These uses include hotels, motels and restaurants, bicycle and surfboard shops and rentals, and retail and service businesses associated with the needs of visitors and tourists, among other permitted uses. While the certified LUP encourages visitor-serving uses, it also recognizes that allowing limited, non-visitor-serving uses within the *Coastal Visitor Commercial District* can provide benefits as well, which are reflected in

the LUP policies cited above, which promote multiple use developments, and a varied mix of uses that would facilitate both seasonal and year-round activities. Visitor and non-visitor-serving uses can coexist since oftentimes the non-visitor-serving uses have a different peak use period than the visitor uses. For example, office use typically involves daytime hours whereas, depending upon the type of restaurant, restaurant use typically peaks during evening hours. Providing limited non-visitor-serving uses within a visitor-serving complex helps support the continued viability of the visitor-serving uses during the off-peak seasons as patrons of an office or service use may be drawn to use of the restaurant or retail uses at the site, but may not otherwise have visited the location were it not for the non-visitor-serving purpose (office, service uses).

As part of LCPA 1-17, the owner of Dana Marina Plaza, who is also the applicant for the proposed amendment, commissioned a survey of visitor-serving uses in the area that compares uses available now to those available in 1984 (when the Dana Marina Plaza was approved). According to the survey, the number of hotels has increased from two to four, providing a total of 474 additional guest rooms. The number of restaurants has increased from 43 to 51; and other visitor-serving uses have also increased: one new interpretive center, one new art gallery, two new surf rental shops, and one new bike rental shop. This survey concluded that the number visitor-serving uses within the Dana Harbor survey area had increased between 1984 and 2017 (when the survey was conducted). Thus, the demand for visitor-serving uses has been accommodated. The proposed amendment will still prioritize visitor-serving uses in order to meet future demands, since visitor-serving uses will be allowed outright (subject to any required CDP) above the ground floor, whereas non-visitor-serving uses will be subject to approval of a conditional use permit and all ground floor areas will still be limited to visitor-serving uses only. However, the proposed amendment will allow for flexibility to provide other commercial uses (subject to a conditional use permit by the City) for spaces above the ground floors. In addition, all uses proposed on this site (ground floor and above the ground floor) must still comply with all other requirements of the LCP. The proposed amendment makes no change to the current parking requirements. For all the reasons described, the Commission finds that the proposed amendment would still prioritize visitor-serving uses onsite subject to the following conditions.

Modification of Special Condition No. 2(b) of Underlying Permit

The project affects previously imposed Special Condition No. 2(b) of Coastal Development Permit A-120-81, because the applicant proposes to modify the use restriction special condition to allow specific non-visitor-serving uses above the ground floor consistent with the recent LCPA 1-17 that allowed such uses. As such, the Commission proposes modification to Special Condition No. 2(b) of A-120-81, as amended in 1984 and 2004, to include language that allows specific non-visitor-serving uses above the ground floor.

Replacement of Condition No. 8 of Underlying Permit

The amendment will change the language of a condition that is currently recorded against title to the property. As such, this requires the recordation of an updated deed restriction to supersede and replace the deed restriction recorded in 2004. Consistent with the Commission's current practice, the Commission requires a single updated deed restriction referencing all of the special conditions of the permit. As such, the Commission proposes the replacement of Special Condition No. 8, which required recordation of an updated deed restriction based on a prior amendment.

The proposed development will not adversely impact visitor-serving opportunities, which provide public access and recreation opportunities. Therefore, as conditioned, the proposed development conforms with the visitor-serving and public access and recreation policies of the Dana Point LCP.

D. DEED RESTRICTION

To ensure that any prospective future owners of the property are made aware of the applicability of the conditions of this permit, the Commission imposes **Special Condition No. 8**, which requires the property owner record an updated deed restriction (supersede and replace) against the property, referencing all of the above special conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the property. Thus, as conditioned, any prospective future owner will receive notice of the restrictions and/or obligations imposed on the use and enjoyment of the land including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability.

E. LOCAL COASTAL PROGRAM (LCP)

The Commission certified the Dana Point Specific Plan/1986 LCP on September 13, 1989. For the reasons stated in this report, the proposed development is consistent with the Dana Point Specific Plan/1986 LCP. In this case, that finding can be made since the proposed project, as conditioned, is consistent with the visitor-serving and public access and recreation policies of the Dana Point Specific Plan/1986 LCP. Therefore, the Commission approves the Coastal Development Permit Amendment.

F. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications, and amendments, to be supported by a finding showing the application, as conditioned by any conditions of approval, 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.

In this case, the City of Dana Point Planning Division is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Dana Point Planning Division made a determination that the proposed development is Categorically Exempt pursuant to Section 15301 (Existing Facilities). As a responsible agency under CEQA, the Commission has determined that the proposed project, as conditioned, is consistent with the City's certified Dana Point Specific Plan/1986 LCP. 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 can be found consistent with the requirements of the Coastal Act to conform to CEQA.

APPENDIX A: Substantive File Documents

Dana Point Specific Plan Local Coastal Program/1986 LCP; Coastal Development Permit No. P-81-7144; Coastal Development Permit No. A-120-81; Coastal Development Permit No. A-120-81; Coastal Development Permit No. A-120-81-A1; Coastal Development Permit No. 5-02-101-A3; ; Coastal Development Permit No. 5-02-101-A4; City of Dana Point Local Coastal Program Amendment (LCPA) 1-17; City of Dana Point Planning Division Approval in Concept dated June 21, 2019; and Letter to Commission staff from Planning Systems dated August 6, 2019.

APPENDIX B: Standard and Special Conditions pursuant to CPD No. 5-02-101 through CDP Amendment No. 5-02-101-A5

Note: This Appendix B provides a list of all standard and special conditions imposed pursuant to Coastal Development Permit 5-02-101, as approved by the Commission in its original action and as modified and/or supplemented by all subsequent amendments up through amendment number 5-02-101-A5. Any changes, pursuant to amendment A5, from the previously approved special conditions are shown in **bold**. Thus, this Appendix B provides an aggregate list of all currently applicable adopted special conditions.

STANDARD CONDITIONS AND SPECIAL CONDITIONS

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 this permit is reported to the Commission. 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 or 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 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.

SPECIAL CONDITIONS:

1. Evidence of Compliance Prior to the occupancy of any of the commercial or condominium/townhouse units, the applicant shall submit, for the review and approval of the Executive Director, evidence of compliance with the County of Orange conditions of approval attached as Exhibit A.
2. Hotels

a. Prior to the issuance of a permit, the Executive Director shall certify that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission limiting the use of "Area G", as designated on the Area Plan/Conceptual Site Plan, for a hotel and its ancillary uses, tennis club, and park uses only. Such covenant shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect such deed restriction. The covenant shall run with the land in favor of the People of the State of California, binding successors and assigns of the applicant or landowner.

b. Allowable uses of "Area E" as designated on the Area Plan/Conceptual Site Plan, shall be limited to visitor-serving uses, as defined in the City of Dana Point Certified LCP, and shall exclude condominiums and general purpose commercial, **except that the specific non-visitor-serving uses listed in the next sentence may be allowed above the ground floor, subject to approval of a conditional use permit issued by the City of Dana Point. Non-visitor-serving uses that may be allowed include: administrative and professional offices; personal services oriented to the daily needs of the immediate neighborhood; banks and savings and loan association branches; and optometry and dental offices.**

Prior to occupancy of any of the structures covered by this permit, the applicant shall develop both hotel sites for interim use as public park. The applicant shall not be required to improve such areas other than by grading, and, providing minimal landscaping and irrigation systems. The applicant shall maintain such areas in public park use until such time as the applicant has received a permit or permits to develop such areas. The use of the hotel sites as interim public park shall not create any rights in the public to have such or any other rights continue after the applicant has received a permit or permits to develop such areas and the applicant shall not be required to obtain any other permit to discontinue such use other than the permit or permits to develop such areas.

3. Coastal Parks

a. Prior to the issuance of a certificate of use and occupancy for any of the commercial or condominium/townhouse units, the applicant shall enter into an agreement with the California Coastal Commission to improve Area D Park and Area F Park to the standards of County of Orange Harbor, Beaches and Park District.

b. Prior to the issuance of a permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, irrevocably offering to dedicate "Area D Park", as designated on the Area Plan/Conceptual Site Plan, to the County of Orange, the Coastal Conservancy, or any other public agency or private non-profit association willing to accept the dedication and willing to insure public access and maintenance. Such offer shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect the interest being conveyed. The offer shall run with the land in favor of the People of California, binding successors and assigns of the applicant or landowner. The offer of dedication shall be irrevocable for a period of twenty-one (21) years, such period running

from the date of recording.

c. Prior to the issuance of a permit, the Executive Director shall certify in writing that the following condition has been satisfied. The applicant shall execute and record a document, in a form and content approved in writing by the Executive Director of the Commission, which binds the applicant to maintain "Area F Park", as designated on the Area Plan/Conceptual Site Plan, to the standards of the County of Orange Harbor, Beaches and Park District and to keep such park open to the public until such time as it is purchased by the County of Orange, Coastal Conservancy or any other public agency or private non-profit association willing to maintain the area and to insure public access to the area as a public park. Such covenant shall be recorded free of prior liens except for tax liens and free of prior encumbrances which the Executive Director determines may affect such deed restriction. The covenant shall run with the land in favor of the People of California, binding successors and assigns of the applicant or landowner.

d. Prior to improvement, the applicant shall submit plans to the Executive Director of the Commission for approval, showing the proposed improvements and developments within the parks to demonstrate compliance with recommended uses. The parks shall be primarily oriented toward passive recreation uses. Minimal public facilities shall be provided. Commercial/vending space may be provided, but the majority of this use should be directed to the hotel sites.

e. Any proposed alterations to the final approved plans of the park layout or facilities shall require an additional coastal development permit.

4. Housing

1. Low and Moderate Income Housing. Prior to the issuance of a permit, the applicant shall enter into an agreement with the California Coastal Commission providing for one of the following alternatives. This agreement shall bind the applicant and any successors in interest to the real property being developed and shall be recorded as a covenant to run with the land free of prior liens and encumbrances other than tax liens, in a form approved by the Executive Director.

The applicant will comply with (a), (b) or (c) below:

a. Rental Units. 40 units shall be rented at the Fair Market rent for existing housing as established by the Department of Housing and Urban Development (HUD) either to: (1) persons who meet the standards established by HUD for rent subsidy under Section 8 of the Housing Act of 1937, as amended, or as it may subsequently be amended, and applicable regulations; or (2) to persons who meet the requirements of any other rent subsidy or funding program that provides rental housing for low-income households. The agreement with the Coastal Commission shall be for a period extending 30 years from the date the agreement is recorded.

In the event that Section 8 or comparable maximum rental levels are no longer published by the Federal government or by local government agencies, maximum rental levels shall be a base rent established by the last rental ceiling published for the Section 8

program adjusted by a percentage to reflect the percentage increase or decrease in the median household income as determined by HUD for the Standards Metropolitan Statistical Area in which it is located, adjusted for family size.

b. Sale Units. 40 units shall be sold at prices affordable to persons of moderate income. The units shall be affordable to permits earnings 80% of the median income.

In computing affordable process, the following formula shall be used:

$$\text{Sales Price} = \frac{0.30 \times \text{median income} \times \text{family size adjustment} \times \text{income range} - \text{homeowners assn. fees} + \text{insurance}}{(\text{Debt Service Constant Percent} \times .8) + (\text{Real Estate Tax Percent})}$$

Median income shall be for a family of four as adjusted for family size as determined by HUD for this SMSA. The price shall be adjusted for family size by 0.7 for studio units, 0.8 for one bedroom units, .95 for two bedroom units, 1.085 for three bedroom units and 1.22 for four bedroom units, as provided for in the Commission Guidelines.

The agreement shall include the following conditions:

(1) The applicants, their successors, and any subsequent purchases shall give to a governmental or non-profit agency, subject to the approval of the Executive Director of the Commission, as option to purchase the units.

The agency or its designee may assign these options to individual private purchasers who qualify as low- and moderate-income persons in substantially the same income range as the persons for whom the initial sales price was intended to provide a housing opportunity.

(2) Whenever the applicants or any subsequent owners of the unit wish to sell that unit, they shall notify the agency holding the option on the unit or that agency's designee of their intent to sell. The agency, its designee, or its assignee shall have the right to exercise the option within 180 days, in the event of the initial sale of the unit by the applicants or within 90 days for subsequent sales. Following the exercise of the option, escrow shall be opened and closed within 90 days after delivery of the notice of exercise of the option.

(3) Following the notice of intent to sell the unit, the agency or its designee shall have the right to inspect the premises to determine whether repair or rehabilitation beyond the requirements of normal maintenance ("deferred maintenance") is necessary. If such repair or rehabilitation is necessary, the agency or its designee shall determine the cost of repair, and such cost shall be deducted from the purchase price and paid to the agency, its designee, or such contractors as the agency shall choose to carry out the deferred maintenance and shall be expended in making such repairs.

(4) The agency or its designee may charge a fee, to be deducted from the purchase price paid by the assignee, for its reasonable costs of qualifying and counseling purchasers, exercising the option and administering this resale control program.

(5) The option price to be paid by the agency, its designee, or assignee shall be the original sales price of the unit plus an amount to reflect the percentage of any increase in the median income since the time of the original sale.

(6) The purchaser shall not sell, lease, rent, assign, or otherwise transfer the premises without the express written consent of the agency or its designee. This provision shall not prohibit the encumbering of title for the sole purpose of securing financing; however, in the event of foreclosure or sale by deed of trust or other involuntary transfer, title to the property shall be taken subject to this agreement.

(7) In the event that the unit which is subject to sale to moderate-income persons is not sold, the applicant or the applicant's successor in interest may sell the unit at a market price, and shall place in a trust fund to be administered by the local housing authority the difference between the market price of the unit and the option price of the units. The trust fund shall be used exclusively to provide housing opportunities for low- and moderate-income persons.

(8) Such other conditions as the Executive Director determines are necessary to carry out the purpose of this agreement.

The affordable units shall be constructed and offered for sale prior to or simultaneously with the market rate units.

Prior to the issuance of a permit, the applicant shall enter into an agreement with a local housing authority or other local agency acceptable to the Executive Director, providing administration of the affordability (resale) controls required in this permit. The form and content of this agreement shall be subject to the review and approval of the Executive Director of the Commission and shall be recorded with a sample resale control as an attachment to the agreement the applicant shall make with the Coastal Commission.

c. Off-site Alternative. 40 units may be provided off-site for low- and moderate-income housing, within the coastal zone in Dana Point, said location subject to the review and approval of the Executive Director.

5. Parking for Parks: Prior to improvements, the applicant shall submit plans to the Executive Director of the Commission, showing site/sites for public parking not to exceed 1.1 acres, which is 5% of the parks site area. This will be designed for additional parking conforming with the size/design requirement of the Orange County Interpretive Guidelines, Parking Criteria, and shall be provided adjacent to the area or in connection with parking for the hotels. Required plans shall also show trail linkages between the coastal parks, hotels, parking and commercial areas.
6. Overall Conditions: Final architectural conceptual plans shall be submitted to the Executive Director prior to the commencement of any phase of construction; said plans shall be accompanied by an Architect's Certificate certifying that final architectural conceptual plans are in substantial conformance with the plans approved by the Executive Director

pursuant to the above conditions. All development shall be in strict conformance with those plans.

7. Public Amenities

The applicant shall provide and maintain public amenities at the subject site, referred to as "Area E," including installation of a new public information kiosk and informational signage and designation of six (6) existing parking spaces for public use, as proposed in the *Public Information Signage and Improvements Program* received November 6, 2003, attached as Exhibit 2.

8. Deed Restriction

PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT AMENDMENT (5-02-101-A5), the applicant shall submit to the Executive Director for review and approval documentation demonstrating that the applicant has executed and recorded against the parcel(s) governed by this permit amendment a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, as amended, 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 amended, 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 amendment. 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, as amended, 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. This deed restriction shall supersede and replace the deed restriction recorded pursuant to Special Condition No. 8 of Coastal Development Permit Amendment 5-02-101-A3, approved on January 15, 2004, which deed restriction(s) is recorded as Instrument No. 2004000329057 in the official records of Orange County.