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# W18b

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Staff: M. Alvarado-LB  
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Hearing Date: 6/09/2021

**STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE**

<b>Appeal No.:</b>	<b>A-5-HNB-21-0031</b>
<b>Applicant:</b>	<b>Signal Landmark</b>
<b>Local Government:</b>	City of Huntington Beach
<b>Local Decision:</b>	Approval with Conditions
<b>Appellants:</b>	Commissioners Caryl Hart and Donne Brownsey; and Adrian Morales
<b>Project Location:</b>	2.5-acre vacant site at 17202 Bolsa Chica Street (east side of Bolsa Chica St., south of Los Patos Ave) (APN: 163-361-10)
<b>Project Description:</b>	Appeal of City of Huntington Beach Coastal Development Permit 20-016 for archaeological grading and monitoring activities at a 2.5-acre vacant site.
<b>Staff Recommendation:</b>	Find that a substantial issue exists.

**SUMMARY OF STAFF RECOMMENDATION**

The subject site is a 2.5-acre vacant site located within a 5-acre property (Windward Property) at 17202 Bolsa Chica Street. The City of Huntington Beach's action on Local CDP No. 20-016 authorized archaeological grading activities required in mitigation measures of a Mitigated Negative Declaration.

Two appeals of the City's action were filed, challenging the consistency of the proposal with the City's certified local coastal program. Both appeals allege that the City's approval is inconsistent with LCP policies that protect archeological resources, and did not consider biological and visual resources. Staff recommends that the Commission determine that a

**substantial issue exists** with respect to the grounds on which appeal number A-5-HNB-21-0031 has been filed because the locally approved development raises issues of consistency with the certified Huntington Beach Local Coastal Program (LCP) cultural resources, biological resources, and visual resources protection policies. A summary of the appellants' contentions may be found on page 4 of this report. The complete appeals are included as **Exhibits 3 & 4**.

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**IMPORTANT HEARING PROCEDURAL NOTE:** The Commission will not take public testimony during the "substantial issue" phase of the appeal hearing unless at least three Commissioners request it. The Commission may ask questions of the applicant, any aggrieved person, the Attorney General or the executive director prior to determining whether or not to take testimony regarding whether the appeal raises a substantial issue. (14 CCR § 13115(d).) If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony.

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PLEASE NOTE THAT THIS WILL BE A VIRTUAL MEETING. As a result of the COVID-19 emergency and the Governor's Executive Orders N-29-20 and N-33-20, this Coastal Commission meeting will occur virtually through video and teleconference. Please see the Coastal Commission's Virtual Hearing Procedures posted on the Coastal Commission's webpage at [www.coastal.ca.gov](http://www.coastal.ca.gov) for details on the procedures of this hearing. If you would like to receive a paper copy of the Coastal Commission's Virtual Hearing Procedures, please call 415-904-5202.

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## EXHIBITS

Exhibit 1 – Project Location

Exhibit 2 – Plans

Exhibit 3 – Appeal filed by Commissioners Hart and Brownsey

Exhibit 4 – Appeal filed by Adrian Morales

Exhibit 5 – Local CDP No. 20-016

Exhibit 6 – PCAS 1980 National Register Boundaries of CA-ORA-83

Exhibit 7 – 2001 SRS Grid and Auger Program on CA-ORA-86

## I. MOTION AND RESOLUTION – SUBSTANTIAL ISSUE

**Motion:** I move that the Commission determine that Appeal No. A-5-HNB-21-0031 raises NO Substantial Issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act.

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

### Resolution I:

The Commission hereby finds that Appeal No. **A-5-HNB-21-0031** presents a **SUBSTANTIAL ISSUE** with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access policies of the Coastal Act.

## II. APPELLANTS' CONTENTIONS

On May 3, 2021, Coastal Commissioners Caryl Hart and Donne Brownsey filed an appeal, and on May 5, 2021, Adrian Morales filed an appeal during the ten (10) working day appeal period (**Exhibits 3 & 4**). No other appeals were received. Adrian Morales provided written comments prior to the City's decision (and the local government changes a fee to appeal) and thus qualifies as and "aggrieved person" pursuant to Coastal Act Section 30801 and Title 14, California Code of Regulations, Section 13111. The appellants contend that the City's approval is not consistent with the City's certified LCP. More specifically, they raise the following concerns with the proposed development:

1. The City-approved project misrepresents the extent of grading and the AMMP description of the grading area is inaccurate.
2. The City-approved AMMP does not address the potential impacts of the project on a site that is considered significant, nationally registered, and sacred lands, and cumulative impacts must be considered.
3. The City-approved AMMP raises questions regarding adequate mitigation and preservation measures and consistency with LCP policies which require mitigation of impacts to existing cultural resources and efforts to protect existing cultural resources in situ or in permanent open space.
4. The City's approval leaves questions regarding adequate consultation with affected Native American Tribes on treatment and mitigation plan for the sacred lands, as required by the LCP.
5. The City's approval does not address the project's consistency with other resource protection policies of the LCP that prevent landform alteration, visual impacts, and protection of sensitive biological resources (which are policies that may also be relevant to the site as a sacred landscape).

### **III. LOCAL GOVERNMENT ACTION**

On May 20, 2018, the City of Huntington Beach's City Council approved the Windward Specific Plan specifically for the five-acre Windward Property at 17202 Bolsa Chica Street. Once operative, the Windward Specific Plan allows for residential development on 2.5 acres of the five-acre property, with the remaining 2.5 acres designated as open space.

On April 19, 2021, the zoning administrator of the City approved Coastal Development Permit No. 20-016 to permit archaeological grading and monitoring activities as proposed by the AMMP (archeological mitigation and monitoring plan) on a vacant 2.5-acre portion of the approximately 5-acre Windward property, which are required in mitigation measures CR-1 through CR-6 of Mitigated Negative Declaration No. 16-003 (adopted by the City Council on May 20, 2018 in conjunction with the Windward Specific Plan).

No local appeal was filed. On April 21, 2021, the Commission received the City's Notice of Final Action for the approval of the local CDP and opened a 10-working-day appeal period. On May 3, 2021, Coastal Commissioners Caryl Hart and Donne Brownsey, and on May 5, 2021, Adrian Morales filed an appeal during the appeal period. No other appeals were received by the Commission.

### **IV. APPEAL PROCEDURES**

After certification of an LCP, the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on CDP applications. Development approved by cities or counties may be appealed if located within certain geographic appealable areas, such as development located between the sea and the first public road paralleling the sea, or within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of a coastal bluff. Furthermore, developments approved by counties may be appealed if they are not a designated "principal permitted use" under the certified LCP. Finally, any local government action on a proposed development that would constitute a major public work or a major energy facility may be appealed, whether approved or denied by the city or county [Coastal Act Section 30603(a)].

Section 30603 of the Coastal Act states in relevant part:

- (a) After certification of its Local Coastal Program, an action taken by a local government on a Coastal Development Permit application may be appealed to the Commission for only the following types of developments:

...

- (1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.
- (2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.

Section 30603(a)(1) of the Coastal Act establishes the project site as being in an appealable area because it is located between the sea and the first public road paralleling the sea (the channel is tidally influenced). The issues raised in the subject appeal apply to proposed development located in the appeals area.

### **Grounds for Appeal**

The grounds for appeal of an approved local CDP in the appealable area are stated in Section 30603(b)(1):

(b)(1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Program or the public access policies set forth in this division.

Section 30625(b)(2) of the Coastal Act requires the Commission to conduct a de novo review of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603(a) of the Coastal Act. If Commission staff recommends a finding of substantial issue, and there is no motion from the Commission to find no substantial issue, the substantial issue question will be considered presumed, and the Commission will proceed to the de novo review on the merits of the project. A de novo review on the merits of the project uses the certified LCP as the standard of review. (Section 30604(b).) In addition, for projects located between the first public road and the sea, a specific finding must be made at the de novo stage of the appeal that any approved project is consistent with the public access and recreation policies of the Coastal Act. (Section 30604(c).) Sections 13110-13120 of Title 14 of the California Code of Regulations further explain the appeal hearing process.

### **Qualifications to Testify before the Commission**

If the Commission, by a vote of three or more Commissioners, decides to hear arguments and vote on the substantial issue question, proponents and opponents will have an opportunity to address whether the appeal raises a substantial issue. The time limit for public testimony will be set by the chair at the time of the hearing. As noted in Section 13117 of Title 14 of the California Code of Regulations, the only persons qualified to testify before the Commission at the substantial issue portion of the appeal process are the applicants, persons who opposed the application before the local government (or their representatives), and the local government. In this case, the City's record reflects that Mr. Adrian Morales opposed via written comments for the local hearing. Testimony from other persons must be submitted in writing.

Upon the close of the public hearing, the Commission will vote on the substantial issue matter. It takes a majority of Commissioners present to find that no substantial issue is raised by the local approval of the subject project. If the Commission finds that the appeal raises a substantial issue, the de novo phase of the hearing will follow at a later date during which the Commission will take public testimony.

## **IV. FINDINGS AND DECLARATIONS – SUBSTANTIAL ISSUE**

### **A. PROJECT LOCATION AND DESCRIPTION**

The subject site is a 2.5-acre site located within a 5-acre vacant property (Windward Property) at 17202 Bolsa Chica Street (**Exhibit 1**). The current land use designation for the Windward Property is Open Space Parks, and the current zoning of the property zoned Residential Agricultural (RA) in the certified LCP.

The City of Huntington Beach's action on Local CDP No. 20-016 authorized archaeological grading and monitoring activities (**Exhibit 2**). The locally approved archeological grading would consist of using mechanized equipment where the subsurface soils are removed in approximately two-centimeter-depth increments by a mechanical scraper under the supervision of the Archaeological Principal Investigator/site supervisor in coordination with Native American Monitors. This archeological grading would continue until sterile soils are reached. Grading operations would be split in half and into two phases, so that grading would occur on the western side, and materials will be stockpiled on the eastern side, and then vice versa. The proposed grading would take approximately 30-60 days. If resources are found, grading operations would be halted until an assessment is made regarding the status of the resource.

### **B. LOCAL COASTAL PROGRAM CERTIFICATION**

The City of Huntington Beach Local Coastal Program was certified by the Commission in March 1985. The City's Coastal Element makes up the Land Use Plan portion of the certified LCP. The City's Zoning and Subdivision Ordinance, including a number of Specific Plans, comprises the Implementation Plan portion of the certified LCP. The standard of review for the proposed development is the City's certified Local Coastal Program (LCP) and the public access and recreation policies of the Coastal Act.

### **C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS**

Section 30625(b)(2) of the Coastal Act requires de novo review of the appealed project unless the Commission determines that no substantial issue exists with respect to the grounds on which the appeal has been filed pursuant to Section 30603(a). Section 13115(c) of the Commission regulations provides that the Commission may consider the following five factors when determining if a local action raises a substantial issue:

1. The degree of factual and legal support for the local government's decision that the development, as approved, is consistent with the applicable standard of review;
2. The extent and scope of the development as approved or denied by the local government;
3. The significance of the coastal resources affected by the decision;
4. The precedential value of the local government's decision for future interpretations of its LCP; and,
5. Whether the appeal raises local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to any factor. Staff is recommending that the Commission find that substantial issue exists with respect to the grounds on which this appeal has been filed pursuant to Section 30603(a) of the Coastal Act.

#### **D. SUBSTANTIAL ISSUE ANALYSIS**

As stated in Section IV of this report, the grounds for an appeal of a CDP issued by the local government are the project's non-conformity with the policies of the LCP (or the public access policies of the Coastal Act). The subject coastal development permit is appealable to the Commission because the subject site is located between the sea and the first public road paralleling the sea (the channel is tidally influenced). The appellants' grounds for appeal are attached as **Exhibits 3 & 4**.

The locally approved project consists of archeological grading and monitoring activities, which are effectuated by a City-approved document titled the Windward Residential Project Archaeological Mitigation and Monitoring Plan (AMMP) and Paleontological Resource Mitigation and Monitoring Plan, prepared by Nancy Anastasia Wiley ND and Joe D. Stewart, PhD, Chief Paleontologist, dated April 2021. The AMMP is intended to establish the procedures to conduct controlled archeological grading across the western half (2.5 acres) of the subject vacant 5-acre property (Windward Property). The proposed archeological grading and monitoring are precursors to more significant grading to accommodate residential development at the site.

It should be noted, however, that while the subject 2.5 acres could potentially be allowed to support residential development under the Windward Specific Plan (approved by the Commission in December 2018), such development at the site can only be allowed once the specific plan becomes operative (as that term is defined in the specific plan).<sup>1</sup> However, the WSP has not yet become operative. As such, the standard of review for the subject site is the City's certified LCP, but not including the WSP. Because the WSP is not yet operative, residential development is not currently allowed at the subject site at this time under the specific plan (the certified LCP's land use designations and zoning do not currently support residential uses). Therefore, the proposed archeological grading is unnecessary until or unless the specific plan becomes operative. In order for the Windward Specific Plan to become operative, there must be an irrevocable offer to dedicate 8.7 acres of open space to a non-profit or similar agency for conservation uses. Without an offer to dedicate, there is no residential development potential, and the standard of review remains the Huntington Beach LCP, and not the specific plan. The certified LCP and current site conditions do not prevent or preclude the dedication from occurring at this point.

In April 2016, the landowner entered into an option agreement with the Trust for Public Land (TPL) to acquire the 2.5 acres on the eastern side of the 5-acre Windward Property and the neighboring 8.7-acre Goodell Family Trust property for open space/conservation purposes. The TPL's option on the property expired in April 2019 without the property having been

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<sup>1</sup> The Windward Specific Plan defines "operative" as: "...refers to the time at which a Required Approval or an Implementation Document may be exercised, used, or implemented. For purposes of this Specific Plan/LCPA, Required Approvals and Implementation Documents may specify a later "operative" date subsequent to the "effective" date."



acquired. The 2019 findings of the Windward Specific Plan approval state: “In the event the Windward Specific Plan does not become operative as described in that document, the uses permitted in Subsection 4M [the subject Windward site] shall be limited to Open Space-Parks and/or Open Space Conservation....Thus, the 2.5 acres of residential development that would be allowed under the Specific Plan’s Development Alternative could be implemented *only after preservation of 8.7 acres of land for open space conservation uses is assured.*”

Following is a discussion of issues raised by the appellants and the areas where the City approved permit is potentially inconsistent with the specific LCP policies listed below.

The City's certified Land Use Plan Coastal Element contains the following applicable policies regarding cultural resources:

C 5 states:

Promote the preservation of significant archaeological and paleontological resources in the Coastal Zone.

C 5.1 states: Identify and protect to the maximum extent feasible, significant archaeological, paleontological and historic resources in the Coastal Zone.

C 5.1.1 states: Coordinate with the State of California Historic Preservation Office to ensure that archaeological and paleontological and historically significant resources within the Coastal Zone are identified.

C 5.1.2 states: Where new development would adversely impact archaeological or paleontological resources within the Coastal Zone, reasonable mitigation measures to minimize impacts shall be required.

C 5.1.3 states: In the event that any Native American human remains are uncovered, the County Coroner, the Native American Heritage Commission, and the Most Likely Descendants, as designated by the California Native American Heritage Commission, shall be notified. The recommendations of the Most Likely Descendants shall be obtained prior to the disposition of any prehistoric Native American human remains.

C 5.1.4 states: A completed archaeological research design shall be submitted along with any application for a coastal development permit for development within any area containing archaeological or paleontological resources. The research design shall determine the significance of any artifacts uncovered and make recommendations for preservation. Significance will be based on the requirements of the California Register of Historical Resources criteria and prepared based on the following criteria:

- a) Contain a discussion of important research topics that can be addressed; and
- b) Be reviewed by at least three (3) County-certified archaeologists (peer review committee).
- c) The State Office of Historic Preservation and the Native American Heritage Commission shall review the research design.

- d) The research design shall be developed in conjunction with affected Native American groups.
- e) The permittee shall comply with the requirements of the peer review committee to assure compliance with the mitigation measures required by the archaeological research design.

C 5.1.5 states: A County-certified paleontologist/archaeologist, shall monitor all grading operations where there is a potential to affect cultural or paleontological resources based on the required research design. A Native American monitor shall also monitor grading operations. If grading operations uncover paleontological/archaeological resources, the paleontologist/archaeologist or Native American monitor shall suspend all development activity to avoid destruction of resources until a determination can be made as to significance of the paleontological/archaeological resources. If found to be significant the site(s) shall be tested and preserved until a recovery plan is completed to assure the protection of paleontological/archaeological resources.

The City's certified Implementation Plan (IP) Zoning Code also provides standards for Archaeological/Cultural Resources, in Section 230.82.E Archaeological/Cultural Resources.

Section 230.82.E of the certified IP states, in relevant part (**emphasis added**):

...

Mitigation Plan. The ARD [Archaeological Research Design] **shall include appropriate mitigation measures to ensure that archaeological/cultural resources will not be adversely impacted.** These mitigation measures shall be contained within a Mitigation Plan. **The Mitigation Plan shall include an analysis of a full range of options from in-situ preservation, recovery, and/or relocation to an area that will be retained in permanent open space. The Mitigation Plan shall include a good faith effort to avoid impacts to archaeological/cultural resources through methods such as, but not limited to, project redesign, capping, and placing an open space designation over cultural resource areas.**

...

The subsequent mitigation shall be prepared in consultation with the Native American Heritage Commission (NAHC), Native American tribal group(s) that have ancestral ties to the area as determined by the NAHC, and the State Historic Preservation Officer, subject to peer review...

### **Appellants' Argument 1: The City-approved project misrepresents the extent of grading, and the AMMP description of the grading area is inaccurate.**

The appellants assert that the City-approved project misrepresents the extent of grading and that the AMMP description of the grading area is inaccurate. The AMMP states: "the current Controlled Archaeological Grading is limited to areas along the western edge of

ORA-86 in what [Archaeological Research, Inc.] described as “periphery areas (outside the nominated area) containing only scattered artifacts and very little undisturbed surface material” (PCAS 1980).” However, the appellants contend that this does not appear to be the case. The AMMP does not include an exhibit showing the proposed grading area overlaid/superimposed onto the site boundaries of the national listing (Listing of National Register of Historic Places). The locally approved grading appears to be proposed well within the area nominated for the national registry, as shown in **Exhibit 6**, and is not limited to the periphery areas, as quoted above. The area representing the subject site (CA-ORA-86) on **Exhibit 7** was taken from the boundaries established by Dr. Hal Eberhart (CSULA with the Pacific Coast Archaeological Society (PCAS)) and Alika Herring (amateur archaeologist) in the 1960s, and the AMMP ignores the areas and boundaries listed on the national registry in 1980 (which covers CA-ORA-83 and CA-ORA-86 and more). This point was brought up to the City in a consultation with Native American tribal members. The absence of such an exhibit or of a more thorough analysis of the boundaries is a substantial issue as there may be elements of the proposed development that do not comply with the certified LCP and the project must be modified and/or conditioned to address such issues, or be denied if the issues cannot be addressed through modification or conditions.

**Appellants’ Argument 2: The City-approved AMMP does not address the potential impacts of the project on a site that is considered significant, nationally registered, and sacred lands.**

The appellants contend that the City-approved AMMP does not address the potential impacts of the project on a site that is considered significant, nationally registered, and sacred lands. Some tribal representatives have suggested that the exposure of these tribal resources through grading, and their possible excavation, is destruction of the sacred landscape. The appellants assert that the Bolsa Chica Mesa has already been determined to support significant resources (over the past 60 years) and is already listed on the national registry of historic properties and has been listed since 1980. The listing in 1980 included the subject site (CA-ORA 86) in addition to the cogged-stone site (CA-ORA 83), located on the Bolsa Chica Mesa less than 100 yards from the subject site. When the site was listed on the National Register in 1980, CA-ORA 83 included the subject site (CA-ORA-86) and was described as (**emphasis added**):

“The Cogstone Site, CA-Ora-83, is a highly unique and significant archaeological resource. The site is unique for its tremendous yield of cogstones, over three hundred (300) have been recovered from ORA-83 totals more than the sum of all other cogstones found in Southern California, the primary (and assumed to be only) area in the United States where they are found in great quantities. These objects, long considered to have ceremonial significance (Eberhart 1971), indicate by their sheer volume, that CA-Ora-83 could have been the ceremonial center where, in all probability, most if not all, of the cogstones in southern California were produced....The boundaries of CA-Ora-83, as shown on the attached maps, were determined to be the limits of the most concentrated and least disturbed area of the site as well as the most significant by the research of Butzbach (1975) and Carter and Howard (1975). The designated area appears to be the primary locus of the Cogstone Complex with periphery areas (**outside of the nominated area**)

containing only scattered artifacts and very little undisturbed subsurface material.” (PCAS 1980).

In 1994, the boundaries of the village site complex as listed in the Native American Heritage Commission’s sacred lands file (SLF) were expanded beyond the national registry area to include the entire Bolsa Chica Mesa. The site has been subject to several archeological investigations in the past, and each one has yielded significant archeological resources, such that the site is considered of local, national, and international significance. The site has been documented to support a village, and a regional religious area that predates the Egyptian pyramids and shows more than 9,000 years of continuous settlement. While these past investigations have unfortunately removed human remains, burial sites, and extremely rare and valuable ceremonial objects, the site is still considered a significant and sacred site. It is considered a sacred landscape by Native American tribes, regardless of the presence or absence of underground archeological deposits.

There are 11 documented pre-historic areas of archeological deposits on the Bolsa Chica Mesa, suggesting that the prehistoric village and ceremonial site was vast, and that there are connections between these deposits. The AMMP summarizes:

“The eleven Bolsa Chica Mesa sites present a full range of activity areas including short and long-term residential bases and limited use areas from the Millingstone through the very early Late Prehistoric Horizons (Wallace 1955). They are not single period, single use sites associated with the Cogged Stone Site but rather provide a richer, more complex view of life on Bolsa Chica Mesa from about 9,500 to 1,200 years ago. Collectively, these sites provide a picture of environmental, economic, and social change on Bolsa Chica Mesa over at least an 8,000-year period.”

Historic topographic maps indicate that the Bolsa Chica Mesa stretches across the Windward Property, overlooking the wetlands. This is important because the local Native American tribes have provided ethnographic evidence (through Coastal Commission Tribal Consultation processes) that indicates that religious sites were commonly placed on the tops of bluffs overlooking water. The Windward site, as is known from past project impacts, contained about 160 human burials on the eastern side of this mesa. The western side of the Windward Property (the current subject of this grading CDP) is a continuation of the mesa overlooking the water. While it is true that significant archeological excavation has taken place in the past, the fact that some ancestors are no longer located on the site (and human burials were reburied elsewhere) does not change the fact that the site is sacred.

Cumulative impacts should be considered. Significant excavation of burials on the mesa occurred from 1990-1993, again from 1999-2002, and again from 2006-2007. In 1992, the archeologist representing the developer of the Bolsa Chica Mesa at the time provided a letter indicating that excavation of CA-ORA-85 was complete, only to find 32 human burials several years later (in 2006). Again, in 2004 the archeologist representing the developer provided a letter indicating that excavation of CA-ORA-83 was 97% complete, only to find an additional 40 human burials between 1999-2002. The housing development at the cogged-stone site (Hearthside homes, today known as Brightwater) was approved in 2005 (CDP 5-05-020) and during additional grading in 2006, an additional 75 human burials

were found and excavated. The archeologist stated that this occurred because the boundaries of CA-ORA-83 had not been properly mapped during initial investigations, and the boundary was revised three or more times over the years, enlarging the area known as CA-ORA-83. (In 2006, 70% of the burials were found outside of the CA-ORA-83 boundaries.) It is important to note that further archeological studies did not define the eastern boundary of ORA-83, which may or may not extend onto the subject site.

In total, approximately 160 human burials were found, most no more than 100 yards from the project site. Because the site boundaries of CA-ORA-83 were not clear prior to grading and excavation, it is reasonable that burials could extend onto the subject project site of the mesa because CA-ORA-86 boundaries may not have been adequately defined, and there is a potential the ceremonial areas could be far larger than the 1980 National Register listing anticipated. (It should be noted that initial investigations of CA-ORA-86 and auger holes were limited to 100 centimeters in depth. Sterile soils can be as deep as 152 centimeters in depth in this area. The proposed grading project would expose sterile soils down to a maximum depth of about 152 cm; however, a cultural depression and cultural resources in this area were located 9 meters below the ground surface, about 13 times deeper than initial investigations.)

The AMMP states (**emphasis added**): “Archaeological site CA-ORA-86 is a younger northeastern extension of National Register eligible site CA-ORA-83, The Cogged Stone Site. The site was used approximately 2,000 years ago, while the Cogged Stone Site was settled nearly 10,000 years ago ... Due to this association, any remnants of the younger site are significant and unique archaeological resources. In addition, the Cogged Stone Site and associated Bolsa Chica Mesa sites are listed as ‘Sacred Lands’ by the Native American Heritage Commission (NAHC) and are considered ‘Tribal Cultural Resources’ (TCRs). **Exemplary efforts are therefore being taken to insure that if portions remain of the original site which were previously undetected, then these will be located through Controlled Archaeological Grading prior to issuance of a project grading permit (CR-2).**”

The AMMP suggests that the controlled grading itself will protect the Tribal Cultural Resources as sacred lands and will protect the Nationally Registered areas containing CA-ORA-86. In past Commission consultations, affected Native American Tribes have indicated that grading and further disturbance of archeological deposits on the site is detrimental to the protection of the lands as sacred lands. This point was made by Tribal members to the City in communications, “As relayed in the prior comments, the proposed grading excavations will cause a severe adverse effect on a NRHP (Nationally Registered Historic Property) site” (Morales email to the City, 2.22.21).

The submitted AMMP and the City staff reports do not consider the project impacts to the sacred land, and do not consider the proposed project’s impact to the nationally registered site (already documented as significant resources, which is not consistent with the resource protection policies of the LCP, which specifically require the preservation of significant archaeological and paleontological resources in the Coastal Zone and the protection to the **maximum extent feasible**, significant archaeological, paleontological and historic resources in the Coastal Zone. (Land Use Plan, Coastal Element Section C.5,

Historic and Cultural Resources.) Because the site is listed on the National Register, it is considered **both** a significant archeological site **and** a historic resource.

The City acknowledged this fact and stated: “It should be noted that ORA-83 was also nominated and deemed eligible for listing on the National Register of Historic Places at the time the archaeological grading occurred. The nomination does not preclude implementation of this mitigation program on the site.” While the nomination does not preclude implementation of development or grading, approval of the project is not consistent with LCP Policies (C.5 (C.5.1.1 - C.5.1.5)) that do require protection, to the maximum extent feasible, of both archeological and historic resources that are significant. The point of the national register listing is that the resources have already been demonstrated to be significant, and while CA-ORA-83 was largely destroyed during grading and development and impacts to CA-ORA-86 occurred without a coastal development permit, that does not necessitate approval of removal or destruction of the remaining portions of the national registered historic property, when the LCP requires preservation. Further, the LCP requires preservation of *cultural and historic resources*, which includes the sacred lands and Tribal cultural landscape. The AMMP does not address the protection of the sacred lands as a Tribal Cultural Resource, and the City approved project does not require mitigation for these proposed impacts, consistent with policy C.5.1.2, which requires that reasonable mitigation measures to minimize impacts where new development would adversely impact archaeological or paleontological resources.

The Environmental Impact Report (EIR) adopted by the City in 2017 (Mitigated Negative Declaration No. 16-003) indicated that the project would cause a substantial adverse change in the significance of a historical resource as defined in §15064.5 and cause a substantial adverse change in the significance of an archaeological resource pursuant to §15064.5. The project could also possibly disturb human remains, but some measures could mitigate these impacts. The EIR proposed mitigation measures to address these impacts, which include development of the subject AMMP, monitoring, and controlled grading, among other measures. The EIR was intended to address the impacts that a residential housing project would have on the site, and as such, controlled grading was proposed as a mitigation measure; however, to date there has been no analysis of the impacts that the controlled grading will have on the site as a significant historic resource and a significant archeological resource. The proposed project has the potential to cause a substantial adverse change in the significance of the historical resource that cannot be mitigated adequately through the proposed mitigation measures and may require additional mitigation or preservation methods. Therefore, this contention raises a substantial issue.

**Appellants’ Argument 3: Inadequate mitigation and preservation measures and potential inconsistency with LCP policies which require mitigation of impacts to existing cultural resources and efforts to protect existing cultural resources in situ or in permanent open space.**

The appellants assert that the City-approved AMMP raises questions regarding adequate mitigation and preservation measures and consistency with LCP policies that require mitigation of impacts to existing cultural resources and efforts to protect existing cultural resources in situ or in permanent open spaces. One appellant contends that it is not clear

that preservation in situ is the preferred alternative for any significant resources present on the site. The 2018 staff report for the Windward Specific Plan states: “Given the rich cultural heritage of the Bolsa Chica Mesa, it becomes clear that any residential use at the site must not be allowed if it would adversely impact any culturally significant resources that remain on the site. Typically, an open space designation is most protective of a cultural resource area.”

The AMMP is dismissive of CA-ORA-86’s status as a nationally registered site, stating that it may represent a later period of occupation. However, resources from a later period of occupation may still represent a significant resource, according to an AMMP peer reviewer: “Importantly, this last CA-ORA-86 site area seemingly represent the unique archaeological remnants of the C-14 dated use (or very brief occupation) of the mesa only about 2,000-1,200 years ago. It is the only area of the mesa recognized with any archaeology heritage remnants of the “Late Prehistoric” culture era. (Indeed, this may represent a uniquely early moment represented with the “Shoshonean Intrusion Theory,” when proto-Tongva/Juaneno/Luiseno speakers of the Shoshonean language family first came west to occupy the region and split apart the [prior occupying] proto-Chumash/Kumeyaay speakers of an Hokan language family.”).

The appellants contend that while the AMMP describes the two ORAs (83 and 86) as separate, and they may be, that does not change the fact that a large portion of the Windward site is already considered significant for archeological resources and is already listed on the National Register. As such, the portions of the site that are within the CA-ORA-86 boundaries as identified in 1960 and within the boundaries of the national registered site as listed in 1980, should already be subject to the protection policies of the LCP, such as Section 230.82.E, which requires appropriate mitigation measures to ensure that archaeological/cultural resources will not be adversely impacted and states, in relevant part (**emphasis added**):

...These mitigation measures shall be contained within a Mitigation Plan. **The Mitigation Plan shall include an analysis of a full range of options from in-situ preservation, recovery, and/or relocation to an area that will be retained in permanent open space. The Mitigation Plan shall include a good faith effort to avoid impacts to archaeological/cultural resources through methods such as, but not limited to, project redesign, capping, and placing an open space designation over cultural resource areas.**

The good-faith effort to preserve these resources in-place through an open-space designation is already applicable, and further efforts including capping the remainder of the site considered significant or a dedication of open space may not have been appropriately considered.

The AMMP allows for insignificant resources (or degraded or damaged resources) to be excavated and reburied off-site, while it would protect resources that are found in-situ and determined to be significant. Primarily of concern, the AMMP specifies that human remains found in-situ would be considered significant and would be protected in place; however, the site is disturbed due to past site investigations and farming, and according the AMMP any human remains found on the site that were not in-situ would therefore not be protected in place. Additionally, any ceremonial or religious artifacts found but associated with human

remains would not be considered for protection in place (or if these types of items are to be preserved in place, that is not made clear in the AMMP). The AMMP states:

“Should the resource be determined to be significant, avoidance and preservation in place shall be the preferred treatment. In situ preservation procedures for types of archaeological resources which may be discovered include known significant items such as:

- in situ human remains; house pits, hearths, artifact caches, and midden deposits
- ceremonial or religious artifacts if associated with human remains such as:
- cogged stones, pipes, crystals, pigments, incised stone, beads, bone/shell ornaments”

One Peer reviewer suggests (**emphasis added**): “possession is not illegal if it is allowed by an agreement reached pursuant to subdivision (l) of PRC Section 5097.94 or pursuant to Section 5097.98. The agreement is a treatment and reburial plan that is signed by the Most Likely Descendant, the archaeologist, and the landowner. **The Plan should state that if human remains are found, a treatment and reburial plan will be negotiated and implemented.**”

If human remains are found, a treatment and reburial plan may not be desired by the affected Native American Most Likely Descendant (MLD) and would be in contrast to the policies of the LCP which require “Good Faith Efforts” to maintain and protect resources in place. Therefore, the AMMP should **not** state that if human remains are found, a treatment and reburial plan will be implemented.

There is no discussion in the AMMP of what will occur when or if there are conflicting opinions of the consulting Native American Tribes regarding treatment methods. If preservation and protection of the resources is the preferred alternative, it is uncertain whether the treatment method be pre-determined to be preservation in place in the absence of a consensus. Furthermore, the AMMP does not discuss the requirements for Native American monitoring of the site. There is uncertainty about how the monitoring schedule will be developed to include the three Tribal groups, and whether there be a fair and equitable rotation schedule between the Tribal groups or whether there will be a minimum of one monitor per group be present on the site each day of grading. In addition, the City’s findings fail to provide an adequate degree of factual and legal support for its decision to approve the proposed development and grant a Local CDP. Further information is required to determine whether or not the project is consistent with all the applicable policies of the LCP. Therefore, the Commission finds that the project does raise a substantial issue with respect to this issue raised by the appeal.

#### **Appellants’ Argument 4: Questions regarding adequate consultation with affected Native American Tribes on treatment and mitigation plan for the sacred lands.**

The appellants contend that the City’s approval raises questions regarding adequate consultation with affected Native American Tribes concerning the treatment and mitigation plan for the sacred lands, as required by the certified LCP.



Section 230.82.E of the certified IP states, in relevant part (**emphasis added**):

**...The subsequent mitigation shall be prepared in consultation** with the Native American Heritage Commission (NAHC), **Native American tribal group(s) that have ancestral ties to the area** as determined by the NAHC, and the State Historic Preservation Officer, subject to peer review...

The AMMP states: “The document is further intended to conform with requirements of the 201[8] CCC Tribal Consultation Policy.” The Coastal Commission’s Tribal Consultation Policy allows for the Commission to conduct an independent review and not rely on other agencies’ conclusions, including review of projects on appeal. The 2018 Tribal Consultation Policy acknowledges that Tribal Cultural Resources can be more apparent or more broad than just archeological deposits: “Tribal Cultural Resources will qualify as archeological, paleontological, visual, biological, or other resources that the Commission is tasked with protecting pursuant to the Coastal Act.” In this case, consultation with Native American Tribal members indicated that concerns were raised regarding the project’s potential to impact Tribal Cultural Resources associated with the sacred landscape, beyond the potential for further undiscovered archeological deposits.

The Tribal comments received from each group were not attached to the City’s record. It is not clear if all Tribal concerns have been adequately addressed based on the City’s record. However, it is clear that some consultation took place. Other than copies of emails from the City and the Archeologist reaching out to the affected Tribes, there is no summary of the concerns raised during verbal consultation or if the consultation included discussion of issues beyond providing comments on the AMMP. There is a formal response attached to the AMMP to the concerns raised by the Gabrielino-Tongva Band of Mission Indians, in which the City comments and the AMMP still do not address the concern of impacts to the sacred landscape as a result of the grading.

The conclusion of consultation generally occurs when: “The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists to a tribal cultural resource; or A party, acting in good faith and after reasonable effort, concludes that mutual agreement cannot be reached. (Pub. Resources Code § 21080.3.2, subd. (b)).” There is no determination in the AMMP or the City’s response that this point was reached after the Gabrielino-Tongva Band of Mission Indians requested additional consultation to discuss alternatives to grading and mitigation measures for Tribal Cultural Resources in February 2021. The Tribal concern regarding the proposed controlled grading impacts to Tribal Cultural Resource as sacred lands and a Nationally Registered site does not appear to have been addressed prior to the conclusion of consultation. It is not clear if the point of conclusion of the consultation (the point where parties agree to measures to mitigate or avoid a significant effect or a conclusion that a mutual agreement cannot be reached) was reached, as there is no discussion in the AMMP regarding the impacts to the sacred land and there are no additional proposed mitigation measures to address the impacts on the sacred land. As such, this contention raises a substantial issue.

**Appellants’ Argument 5: The City’s approval does not address consistency/inconsistency with other resource protection policies of the certified LCP.**

The appellants assert that the City's approval does not address the project's consistency with other resource protection policies of the certified LCP that prevent landform alteration, visual impacts, and require the protection of sensitive biological resources (which are policies that are relevant to the site as a sacred landscape).

The City's certified Land Use Plan Coastal Element contains the following applicable policies regarding biological and visual resources:

C 4 states:

Preserve and, where feasible, enhance and restore the aesthetic resources of the City's coastal zone, including natural areas, beaches, harbors, bluffs and significant public views.

C 4.1.1 states:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect public views to and along the ocean and scenic coastal areas. (J-C 7, 1-C 8, 1-C 14)

C 7 1.3 incorporates the same requirement as Coastal Act Section 30240: that development adjacent to ESHA be sited and designed to prevent impacts which would significantly degrade the ESHA and that the development be compatible with the continuance of the ESHA.

The City's approval does not address the visual qualities of the open space area and does not address the proposed project's potential impacts to the visual qualities of the area.

In addition, the submitted plans show that there is a line of established trees along the western side of the Windward site. Some of these trees will be protected in place, and some will be removed during the proposed grading. There is no discussion of the trees' potential to support habitat in the City's approval. It is not clear that a biological survey was conducted assessing the potential habitat. There are no conditions for appropriate habitat buffers, construction periods outside of the nesting season, impacts of the construction noise on nesting birds, etc. This is relevant as a line of trees to the East of the Windward site containing Eucalyptus trees is considered ESHA in the Windward Specific Plan, "abundant habitat is present in the vicinity including wetlands and important groves of eucalyptus trees used by raptors for nesting and roosting which have been identified as environmentally sensitive habitat areas (ESHAs)." Regarding the line of trees along the western side of Windward, there was no assessment of the status of the trees as ESHA in the findings of the City's approval.

Additionally, the specific plan requires specific assessments of potential burrowing owl habitat and southern tar plant prior to construction or grading, which are habitats that would rise to the level of ESHA. The City's findings do not address these biological resources and do not address the potential impacts.

Controlled grading would destroy burrowing owl habitat (if present on the site) and would

completely destroy the tar plant vegetation (if present on the site). There are no conditions to avoid these resources or provide mitigation if impacts cannot be avoided in the City's approval.

Additional information about potential coastal resource issues on the site, such as a biological assessment, is necessary to inform a decision about whether the proposed project could harm coastal resources protected by the LCP. The staff report lacks analysis of potential impacts, which prevents an informed, reasonable decision about the appropriateness of the proposed project. Therefore, the City's findings fail to provide an adequate degree of factual and legal support for its decision to approve the proposed development and grant a Local CDP.

For the foregoing reasons, the Commission finds that a substantial issue exists with respect to the grounds on which the appeal was filed pursuant to section 30603 of the Coastal Act as to this specific issue.

#### **SUBSTANTIAL ISSUE FACTORS:**

The Commission typically applies five factors in making a determination whether an appeal raises a substantial issue pursuant to Section 30625(b)(2).

##### **1. The degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP.**

The City did not substantially support its approval of the project's consistency with all of the applicable policies of the certified LCP (specifically the archeological, biological, and visual resource policies). Therefore, there is a low degree of factual and legal support for the local government's decision, and this factor supports a substantial issue finding.

##### **2. The extent and scope of the development as approved or denied by the local government.**

The local government granted a local CDP for archaeological grading and monitoring activities. The record does not consider that the project may be improperly proposed at this time, as the LCP standard of review does not allow this grading project for protection of the resources that are already protected in the current open space. Therefore, it is not possible at this time to determine how the extent and scope of the project compares to the allowable scope of development at this site, and this factor supports a finding of substantial issue.

##### **3. The significance of the coastal resources affected by the decision.**

California's archeological, biological, and visual resources are significant resources which California citizens and governments have historically sought to preserve. The LCP and the Coastal Act include special protections for such resources. This factor supports a finding of substantial issue.

##### **4. The precedential value of the local government's decision for future interpretations of its LCP.**

If the subject local CDP is found to be consistent with the LCP based on the current record, there is a potential that future applicants, especially within the vicinity, will reference this permit if they wish to develop other nationally registered sites and sacred

lands. Without adequate information, allowing the City's local CDP approval to stand would result in adverse precedent regarding application of the LCP's various resource protection policies. This factor supports a finding of substantial issue.

**5. Whether the appeal raises local issues, or those of regional or statewide significance.**

Archeological, biological and visual resources are issues of statewide significance, not just in Huntington Beach. Adequate Tribal consultation and the protection of Tribal Cultural Resources are statewide issues of utmost concern. Requiring consistency with a certified LCP is significant to all the people of California. Unsubstantiated and erroneous application of these policies could have regional or statewide ramifications regarding other similar LCPs and LCP policies. This factor supports a finding of substantial issue.

**Conclusion**

In conclusion, staff recommends that the Commission find that a substantial issue exists with respect to whether the local government action conforms with the policies of the City's certified LCP.