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# W18a

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## STAFF REPORT: APPEAL – SUBSTANTIAL ISSUE

**Appeal No.:** A-5-HNB-21-0031

**Applicant:** Signal Landmark

**Local Government:** City of Huntington Beach

**Local Decision:** Approval with Conditions

**Appellants:** Commissioners Caryl Hart and Donne Brownsey; and Adrian Morales

**Project Location:** 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)

**Project Description:** Appeal of City of Huntington Beach Coastal Development Permit 20-016 for archaeological grading and monitoring activities at a 2.5-acre vacant site.

**Staff Recommendation:** Find that a substantial issue exists.

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### SUMMARY OF STAFF RECOMMENDATION

The subject site is a 2.5-acre vacant site located within a 5-acre property (the “Windward Property”) located at 17202 Bolsa Chica Street. The City of Huntington Beach’s action on Local CDP No. 20-016 authorized archaeological grading activities across the entire 2.5 acres, as required by mitigation measures CR-1 through CR-6 of Mitigated Negative Declaration No. 16-003 (adopted by the City in conjunction with the Windward Specific Plan).

Two appeals of the City’s approval were filed, challenging the consistency of the proposal with the City’s certified local coastal program. Both appeals allege that the City’s approval

A-5-HNB-21-0031 (Signal Landmark)  
Appeal – Substantial Issue

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 LCP cultural resources and biological 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.

## TABLE OF CONTENTS

I. MOTIONS AND RESOLUTIONS .....	4
II. APPELLANTS’ CONTENTIONS.....	4
III. LOCAL GOVERNMENT ACTION .....	5
IV. APPEAL PROCEDURES .....	5
IV. FINDINGS AND DECLARATIONS – SUBSTANTIAL ISSUE.....	7
A. PROJECT LOCATION AND DESCRIPTION .....	7
B. LOCAL COASTAL PROGRAM CERTIFICATION.....	8
C. FACTORS TO BE CONSIDERED IN SUBSTANTIAL ISSUE ANALYSIS .....	8
D. SUBSTANTIAL ISSUE ANALYSIS.....	8

### **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 review of the application, and adoption of the following resolution and findings. Conversely, 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, both 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 Archeological Mitigation and Monitoring Plan (AMMP)<sup>1</sup> does not address the potential impacts of the project on a site that is considered significant, nationally registered, and sacred lands, and fails to consider necessary mitigation measures to address impacts to the site.
2. The City-approved AMMP raises questions regarding adequate 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.
3. The City-approved project misrepresents the extent of grading and the AMMP description of the grading area is inaccurate.
4. The City's approval does not address the project's consistency with biological resource protection policies of the LCP.

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<sup>1</sup> Archaeological Mitigation and Monitoring Plan (AMMP) was prepared by Nancy Anastasia Wiley ND and Joe D. Stewart, PhD, Chief Paleontologist in April 2021. The AMMP is intended to establish the procedures to conduct controlled archaeological grading across the western half (2.5 acres) of the subject vacant five-acre Windward Property. The proposed archeological grading and monitoring are envisioned, in the Windward Specific Plan (WSP), as precursors to more significant grading to accommodate residential development at the site.

5. The City’s approval does not address consistency/inconsistency with other resource policies of the certified LCP that prevent landform alteration and visual impacts.
6. 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.

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

On May 20, 2018, the City of Huntington Beach’s City Council approved the Windward Specific Plan (“WSP”) for the five-acre Windward Property at 17202 Bolsa Chica Street. Chapter 5 of the WSP includes complicated sequencing provisions that state that the plan does not become operative until certain events occur. Once operative, the Windward Specific Plan provides requirements 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 described in the AMMP (Archeological Mitigation and Monitoring Plan) on a vacant 2.5-acre portion of the approximately 5-acre Windward property. Controlled grading across the Windward Residential Parcel is one of the 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 adoption of 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 East Garden Grove Wintersburg 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 (the “Windward Residential Parcel”) located within a 5-acre vacant property (the “Windward Property”) at 17202 Bolsa Chica Street, located southeast of the intersection Los Patos Avenue and Bolsa Chica Road ([Exhibit 1](#)). The Windward Property is located on the Bolsa Chica Mesa, which rises above and to the north of the Bolsa Chica Ecological Reserve and wetlands complex. The current land use designation for the Windward Property is Open Space-Parks, and the current zoning of the property is Residential Agricultural (RA) in the certified LCP. The RA zoning designation is not consistent with the Open Space-Parks land use designation and would allow limited residential use (one dwelling unit per five acres; or just one dwelling on the Windward Property). The Windward Property has historically been farmed and used for agriculture, and more recently served as the construction staging area for the adjacent Brightwater development. The Windward site is owned by Signal Landmark Company, the former owners and developers of the Sandover (City of Huntington Beach CDP 98-17, Signal Landmark Company Landmark) and Brightwater (CDP 5-05-020, Signal Landmark Company Landmark) developments. The Windward site is south and east of existing multi-family residential development. It is west of the Parkside residential development and immediately adjacent to/west of the Parkside wetlands, ESHA and restored habitat that are designated Open Space Conservation and zoned Coastal Conservation. Immediately south of the subject site is a 6.2-acre parcel, located in unincorporated Orange County, known as the Goodell Property. The Goodell Property is an unincorporated County “island” surrounded by the City of Huntington Beach. The City began incorporating the Goodell site into the City’s corporate boundary in approximately 2010, but that process was suspended at the request of the Goodell property owner.

The City of Huntington Beach’s action on Local CDP No. 20-016 authorized archaeological grading and monitoring activities on the Windward Residential Parcel (western 2.5-acre area of Windward Property) ([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. The archeological 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, the archeological 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 this appeal is whether the grounds listed for the appeal raise substantial issues regarding the local approval's consistency with the City's certified LCP or the public access policies of the Coastal Act. The applicant disagrees with this standard of review and suggests that the standard of review in this case should be the approved, but not yet operative, specific plan for the Windward site, to be discussed in more detail later.

### **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 issues 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 permissible grounds for an appeal of a CDP issued by the local government are the project's non-conformity with the policies of the LCP and 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 East Garden Grove Wintersburg 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 (described in greater detail in Section IV.A of this staff report), which are discussed in 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 five-acre Windward Property. The proposed archeological grading and monitoring are envisioned, in the Windward Specific Plan (WSP), as precursors to more significant grading to accommodate residential development at the site.

It should be noted, however, that the WSP makes an explicit and critical distinction between two potentially separate stages in the approval of entitlements. It refers to the first as when an approval becomes “effective” and the second as when it becomes “operative.” Section 5.2.b of the WSP explains that an approval (including the approval of the WSP itself) is considered “effective” when it “becomes final in the ordinary course of the administrative process for that approval as set forth in the applicable local and/or state law.” However, such an approval may not become “operative” until some time later, and section 5.2.c. explains that until an approval is “operative,” it may not be “exercised, used, or implemented.” The WSP also includes complicated sequencing provisions that state that the plan itself does not become operative until certain events occur.

As applicable to this appeal, the WSP does not discuss when archeological grading would be given a coastal development permit (CDP) or guarantee that it would be granted a CDP. The archeological grading was explored as a mitigation measure in the CEQA document for potential impacts of residential development. While the subject 2.5 acres could potentially be allowed to support a residential development alternative for which archeological grading may be necessary pursuant to the WSP (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). However, such development can only be allowed once the WSP becomes operative. As defined in the WSP, the word “operative” means “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’.” The WSP as a whole has not yet become operative. The approval of the WSP by the Commission was/is effective and the land use designations and policies are “effective,” but not “operative.” More importantly, with the WSP not yet being operative, the standard of review for *any* development at the subject site (including the development whose approval is being appealed in this action) is the City’s certified LCP, but not including the WSP.

In a letter dated June 4, 2021, the applicant’s attorney maintains that the WSP is the standard of review. However, the WSP itself is specifically listed as one of what the WSP refers to as the “Required Approvals” (pursuant to section 5.3.a of the WSP), and therefore it (along with all the other Required Approvals) does not become operative until certain enumerated events occur, which have not yet occurred (pursuant the last sentence of the

first paragraph of section 5.4.1 of the WSP; and see also 5.2.c of the WSP). The structure of the WSP requires completion of certain tasks, such as dedications of open space parcels and recordation of deed restrictions, prior to the specific plan becoming “operative”. Therefore, the WSP is not yet the standard of review. The Commission and the City cannot apply a standard of review (policies or land use designations) that are not currently operative.

The current land use designation for the Windward Property is Open Space-Parks, and the current zoning of the property is Residential Agricultural (RA) in the certified LCP. Because the WSP is not yet operative, and without it, the land use designation remains open space. The certified LCP’s land use designation and zoning do not currently support residential uses and the LCP policies do not support archeological grading. The WSP prioritizes a land preservation alternative prior to the residential development alternative. Additionally, the proposed archeological grading, which explores resources on the site prior to potential development, is unwarranted until or unless the WSP becomes operative. As the land use designations currently stand, the archeological grading is not necessary for the resources to be protected within the open space, because they are already protected from development via the open space land use designation. In order for the WSP 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. The Specific Plan provides contingencies that, even after the WSP has (i) been certified, (ii) become effective, and (iii) become final, the WSP’s residential land use designation for the Windward Property shall not become operative unless and until both the Windward Open Space Parcel (eastern 2.5-acre area of Windward Property) and the Goodell Parcel have been deed restricted to open space and resource conservation uses and either conveyed or offered for conveyance to a public agency or a non-profit organization approved by the City. The WSP identifies specific steps that must take place to preserve open space BEFORE the Open Space-Parks land use designation is changed for the Windward Residential Parcel (western 2.5-acre area of Windward Property), as described in the findings of the staff report for the certification of the WSP. The WSP includes general regulations which would apply to the regulation of the Windward Residential Parcel (Section 3.4) and outlines mitigation measures of the City’s Mitigated Negative Declaration No. 16-003, which requires submittal of an AMMP. According to the Page 311 of the WSP, “the AMMP shall: a. Specify that controlled archaeological grading shall occur across the entire Windward Specific Plan area where any project grading or earthwork of any kind will occur. All site grading, including archaeological grading, shall require approval of a coastal development permit and a City grading permit. The required archaeological grading shall occur prior to issuance of a precise grading permit for residential development of the project site.” The WSP does not specify if archeological grading should occur before or after the Specific plan becomes operative. However, the WSP notes that a CDP would be necessary for all site grading including archeological grading that must conform to the LCP.

The specific plan is “effective,” but because the required land has not yet been dedicated (the Goodell site and the eastern half of Windward), the residential designation on the western half of the Windward Site is not yet “operative” (i.e., it cannot be “exercised, used, or implemented”). Therefore, archeological grading is premature at this time. Pages 1-6 and 1-7 of the WSP state that Signal Landmark may pursue “entitlements for residential

development on the approximately 2.5-acre westerly portion of the Windward Property adjacent to Bolsa Chica Street (Windward Residential Parcel), only when the Windward Open Space Parcel and the Goodell Property have been restricted and conveyed for open space and resource conservation uses only (Development Alternative).” In the event the WSP does not become operative, the permitted uses shall be limited to Open Space-Parks and/or Open Space-Conservation. Without an offer to dedicate or conveyance of fee title of both the Windward Open Space Parcel and the Goodell Property, there is no residential development potential, and the standard of review remains the Huntington Beach LCP, not the specific plan. The certified LCP and current site conditions do not prevent or preclude the dedication from occurring at this point, and in fact the WSP states the applicant can make these dedications contingent/active upon the Required Approvals in Section 5.4.2 (Assurances to Windward Owner): “To assure that the Windward Owner is not required to deed restrict and convey the Windward Open Space Parcel and, pursuant to the Windward DA, deed restrict and convey the Goodell Property as set forth above without having the right to develop the Windward Residential Parcel, the Implementation Documents specified in Section 5.4.1 shall contain language that each respective Implementation Document does not become operative until: a. All of the Required Approvals have been approved and have become effective; and b. Either the time for legal challenges to each of the Required Approvals has expired and/or legal challenges which have been made have terminated or resolved with all Required Approvals remaining intact and effective.”

Once the proposed Windward Specific Plan does become operative, it would allow for 2.5 acres of residential development (the Windward Residential Parcel) and 8.7 acres of preserved open space (the Windward Open Space Parcel and the Goodell property).

In addition, even if the Windward Open Space Parcel and the Goodell Parcel are not acquired, the WSP provides for a second alternative, which would result in open space preservation of half of the subject site as well as the neighboring 6.2-acre Goodell property.

In April 2016, the landowner entered into an option agreement with the Trust for Public Land (TPL)<sup>2</sup> 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. On page 16, the WSP states if the acquisition alternative is successful and becomes effective, this WSP will not be effective and will be moot. The TPL's option on the property expired in April 2019 without the property having been 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.*” The other option to make the WSP "operative" would be to dedicate the property regardless of the expired option to purchase.

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<sup>2</sup> TPL is a nationwide non-profit organization that acquires land from private owners and conveys it into public or non-governmental organization ownership for conservation or public park purposes.

The applicant's attorney has expressed that given Commission staff's review and involvement in the AMMP over the last two years, it is disappointing that the Coastal Commission has filed an appeal questioning the AMMP and its consistency with the applicable LCP policies. While it is true that Commission staff reviewed the AMMP twice, and that the applicant accepted staff recommendations, Commission staff did not comment on the larger effort of the archeological grading CDP application and whether or not the timing of this application is appropriate, or discuss the proper standard of review or do any analysis of the AMMP's consistency with the LCP/WSP, as that review and analysis is usually done in the CDP application or appeal context. Commission staff simply reviewed the draft AMMP, pursuant to the applicant's request. Review of the draft AMMP does not imply that Commission staff agrees that the archeological grading project is consistent with the LCP and does not prevent others from filing project appeals.

The applicant's attorney alleges that Commission staff's end goal appears to be full protection of the property, which would violate the California Constitution, Coastal Act, and other laws, and this would constitute a taking. Commission staff denies this allegation. However, staff's motivations are not relevant in any case. The Commission must apply the proper standard of review and policies to any development and/or changes in land use contemplated for the Windward site. Furthermore, takings claims are not ripe at this stage of the permitting process.

The Acquisition Alternative is clearly spelled out in the WSP as the first alternative, and in the absence of an operative specific plan, the site supports Open Space per the certified LCP. The Commission is following the current land use designations and policies that apply to the site. Additionally, the foregoing reasons detailed above support a no-takings argument. There are multiple outcomes possible here, including but not limited to: 1. The landowner may have the right to continue agricultural practices; 2. The 8.7 acres of open space is dedicated and restricted, the specific plan becomes operative and, therefore, the City can legally issue a CDP for the archeological grading and residential development, with the WSP as the standard of review with revised AMMP and additional mitigation measures; 3. The City approves a CDP for a project on the site that *is* consistent with the Huntington Beach LCP.

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 LCP standards require protection of cultural resources and reasonable mitigation for unavoidable impacts. The presence of significant cultural resources has been documented throughout the Bolsa Chica Mesa, including on the subject site and adjacent Goodell Property. 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 AMMP does not address the potential impacts of the project on a site that is considered significant, nationally registered, and sacred lands, and fails to consider necessary mitigation measures to address impacts to the site.**

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 Register of Historic Places (NRHP).

In 1980, CA-ORA-86 and the coggled-stone site CA-ORA-83, located on the Bolsa Chica Mesa less than 100 yards from the subject site, were *nominated* by the Pacific Coast Archeological Society (PCAS) for listing on the National Register of Historic Places, but were not officially listed. The reason the site was not actually listed on the NRHP is because the landowner objected to the listing. The site cannot be listed if the landowner objects; however, it does not change the significance of the site. Under federal law, the listing of a property in the National Register places no restrictions on what a non-federal owner may do with their property up to and including destruction, unless the property is involved in a project that receives federal assistance, usually in the form of funding or licensing/permitting. Benefits of listing a site mainly concern tax benefits, but the effects of the listing in the National Register may result in restrictions, such as design review, imposed locally pursuant to the California Environmental Quality Act (CEQA) or through local zoning and land use planning regulations.

A site listed on the NRHP would automatically be listed with SHPO (the State Office of Historic Preservation).

Although these sites are not listed, they are eligible for listing and are still considered significant resources. When the site was nominated to be 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).

A Traditional Cultural Property (TCP) is considered by the National Register: 1) to be a type of significance (cultural, aesthetic, religious, etc.) rather than a property type, 2) determined based on a set of specific criteria, and 3) can contain and often does contain a complex or a district of one or several archeological sites. In the context of eligibility determination or nomination to the National Register, intrusions, if severe enough, may compromise the property's integrity. In planning subsequent to nomination or eligibility determination, the Advisory Council on Historic Preservation's regulations define "isolation of the property from or alteration of the character of the property's setting" as an adverse effect "when that character contributes to the property's qualification for the National Register" (36 CFR 800.9(b)(2)). Similarly, the Council's regulations define as adverse effects "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" (36 CFR 800.9(b)(3)). To assist in determining whether a given activity outside the boundaries of a Traditional Cultural Property may constitute an adverse effect, it is vital that the eligibility documentation evaluate those qualities of a property's visual, auditory, and atmospheric setting that contribute to its significance, including those qualities the expression of which extend beyond the boundaries of the property into the surrounding environment. Traditional Cultural Property attributes that may be protected can include a site's viewshed, sense of feelings (wind, cool air, vegetation smells, overall presence of the site), and sounds (wildlife sounds, the lack of noise from urban life such as cars on the roadways, the sounds of ocean waves, and more).

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 eligible 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 disturbed and 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 sited on the tops of bluffs overlooking water. The Bolsa Chica Mesa contained about 160 human burials on the eastern side of the mesa. The western side of the Windward Property (the site subject to this archeological 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.

Additionally, 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.

To date, approximately 160 human burials have been found in the Bolsa Chica Mesa, 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 that the ceremonial areas could be far larger than the 1980 National Register nomination described. (It should be noted that initial investigations of CA-ORA-86 and auger holes were limited to 100 centimeters in depth. Sterile soils can begin as deep as 152 centimeters below ground surface in this area. The proposed archeological 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 ensure that if portions remain of the original site which were previously undetected, then these will be located through Controlled Archeological 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 is detrimental to the protection of sacred lands. This point was made by Tribal members to the City in communications: “As relayed in the prior comments, the proposed archeological 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 lands, which are already documented as significant resources. This is not consistent with the resource protection policies of the City’s LCP, which specifically require the preservation of significant archaeological and paleontological resources in the Coastal Zone and the protection to the **maximum extent feasible** of 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 eligible for listing 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 alternative that would be most protective of archeological and historic resources is to not subject these resources to excavation or additional grading impacts and simply leave them in place. The point of the national register nomination or listing is that the resources have already been demonstrated to be significant. While CA-ORA-83 was largely destroyed during grading and development and impacts to CA-ORA-86 occurred without a coastal development permit, that destruction does not allow for easier approval of removal or destruction of the remaining portions of the NRHP eligible site. 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 reasonable mitigation measures to minimize impacts where new development would adversely impact archaeological or paleontological resources. The impact to sacred lands would happen the moment the site is disturbed (including disturbance by archeological grading), and potential impacts to cultural resources could happen during excavation work. The City-approved project is described as a mitigation program for CEQA purposes but the project itself would result in impacts to the subject sacred land that would need to be mitigated pursuant to the certified LCP, and the AMMP does not address this issue. Similar to what is most protective of archeological and historic resources, the alternative that would be most protective of the sacred landscape and Tribal Cultural Resources is to not subject these resources to excavation or additional grading impacts and simply leave them in place.

The project site is within registered Sacred Lands, according to the Native American Heritage Commission. Cultural resources are not confined to the boundaries of archaeological sites, but instead can encompass landscapes that are significant to Native American tribal groups because of prehistoric habitation or use for current cultural practices. Sacred Lands as designated by the Native American Heritage Commission are registered for their significance and are usually nominated by a local tribal government. Through the City’s Tribal Consultation process, and directly to the Commission during the appeal period on the subject project, one tribal government expressed opposition to the project because the development will have an impact on the sacred land. In this case, pursuant to 30604(h) the Commission must consider the project’s impact to the sacred lands and consider relevant environmental justice questions. Where a local government does not consider environmental justice when evaluating a proposed development that has the potential to adversely or disproportionately affect a historically disadvantaged group’s ability to reach and enjoy the coast, that may be the basis for an appeal to the Coastal Commission and the Commission may consider environmental justice access or recreational issues when considering an appeal. As stated in the Commission’s Environmental Justice Policy, “the Commission respectfully acknowledges the painful history of genocide against Native American Tribes and honors the efforts of California’s coastal tribes to rebuild thriving, living cultures based on traditional knowledge,

languages, and practices. The Commission commits to regular and meaningful partnership to ensure that tribes are valued and respected contributors to the management of California's coast. In addition to the requirements of the Commission's formal Tribal Notification and Consultation Policy, the Commission will work collaboratively with tribes to better understand the significance of local and regional cultural concerns. This includes the application of traditional ecological knowledge, *as well as access to and protection of areas of cultural significance*, ethnobotanical resources, traditional fishing and gathering areas, *and sacred sites.*"

Like any other types of historic properties, a property that once had traditional cultural significance and is considered a sacred site can lose such significance through physical alteration of its location, setting, design, or materials. In some cases, a sacred site can also lose its significance through alteration of its setting or environment. For example, a location used by a Native American group for traditional spiritual purposes is unlikely to retain its significance for this purpose if it has come to be surrounded by intense housing development or busy commercial shopping areas. The Native American tribe that is appealing the project believes that the activity of archeological grading would expose religious artifacts and buried ancestors that are well protected now by being left in place and destroy the character of the landscape and would threaten the cultural and religious significance of the property.

The Environmental Impact Report (EIR) adopted by the City in 2017 (Mitigated Negative Declaration No. 16-003) indicated that a residential project would cause a substantial adverse change in the significance of a historical resource as defined in the State CEQA Guidelines, Section 15064.5, and cause a substantial adverse change in the significance of an archaeological resource pursuant to §15064.5. A residential project could also possibly disturb human remains, but some measures could mitigate those impacts. The MND proposed mitigation measures to address these impacts, which include development of the subject AMMP, monitoring, and controlled archeological grading, among other measures. The MND was intended to address the impacts that a residential housing project would have on the site, and as such, controlled archeological grading was proposed as a mitigation measure; however, to date there has been no analysis of the impacts that the archeological 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. In addition, the project could have adverse impacts that may only be allowable pursuant to the LCP policies if these impacts are offset by the protection of the surrounding open space. Therefore, this contention raises a substantial issue.

**Appellants' Argument 2: Inadequate 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 current land use designation for the Windward Property is Open Space-Parks in the certified LCP.

The AMMP is dismissive of CA-ORA-86’s significance, 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 the Bolsa Chica Mesa (including the Windward site) is already considered significant for archeological resources and is eligible for listing 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 site nominated for listing on the National Register 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. Section 230.82.E 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 to the AMMP any human remains found on the site that were not in-situ would therefore not be protected in place. In short, there is a difference between remains found in situ and those not in situ. 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, while the AMMP touches on 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 ensure that monitoring responsibilities are divided fairly among the tribal governments, 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 the archeological 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 3: The City-approved project misrepresents the extent of archeological grading, and the AMMP description of the grading area is inaccurate.**

The appellants assert that the City-approved project misrepresents the extent of archeological grading and that the AMMP description of the archeological 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(s) showing the proposed archeological grading area overlaid/superimposed onto the site boundaries nominated for Listing of National Register of Historic Places. The applicant's attorney states that the AMMP clarifies that ORA-86 on the Windward Site is not an extension of ORA-83 but is its own unique site and should be separated out from ORA-83. However, this is an over-simplification as it requires numerous exhibits to properly show boundaries. The locally approved archeological 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 nominated for listing 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 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 4: The City's approval does not address consistency/inconsistency with biological resource protection policies of the certified LCP.**

The appellants assert that the City's approval does not address the project's consistency with biological resource protection policies of the certified LCP.

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

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 submitted plans show that there is a linear grove 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 archeological grading. There is no discussion of the trees' potential to support habitat in the City's approval. There are no conditions for appropriate habitat buffers during archeological grading, construction periods outside of the nesting season, impacts of the construction noise on nesting birds, etc. This is relevant as a linear grove 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 City's findings. The extent of continuing use of the eucalyptus ESHA by the raptors is directly related to the amount of viable foraging area available from the ESHA trees. 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.

The specific plan requires specific assessments of potential burrowing owl habitat and southern tarplant prior to construction or grading, which are habitats that would rise to the level of ESHA. In September 2020, surveys for southern tarplant (*Centromadia parryi* ssp. *Australis*) and burrowing owl (*Athene cucularia*) were completed for the city-approved project. No southern tarplant individuals or burrowing owls were observed at the subject site. The City's CDP approval report does not address these species. Reports on tarplant and the burrowing owls were submitted to Commission staff after postponement of the first SI hearing. Adverse impacts to southern tarplant and burrowing owls are not anticipated. But because the City's decision does not provide an adequate degree of factual and legal support regarding the stand of trees mentioned above, this contention raises a substantial issue.

**Appellants' Argument 5: The City's approval does not address consistency/inconsistency with other resource policies of the certified LCP that prevent landform alteration and visual impacts.**

The appellants assert that the City's approval does not address the project's consistency with visual resource protection policies of the certified LCP that prevent visual resource impacts and landform alteration (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 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)

However, the applicant asserts that the city-approved project will not change the visual qualities of the adjacent areas designated for open space because the project will not result in structural development and will not change the visual appearance of the Windward Site. The applicant further states that locally approved archeological grading will be limited to the excavation of 2.5 acres of the Windward Site using mechanical equipment, and once completed, the soil layers, once examined, will be placed back onto the Windward Site. The appearance of the site will be restored as it looked prior to any archeological grading and, therefore, there will be no damage to the scenic and visual qualities of the site. The applicant also contends that no public views to and along the ocean and scenic coastal areas will be affected.

Based on this information, it is not anticipated that the locally approved project will adversely impact visual resources on the site. Therefore, this contention does not raise a substantial issue.

**Appellants' Argument 6: City's approval raises 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 2017 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 (not 2017) 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 discovery of archeological deposits.



In June 2021, the Commission’s South Coast District Office received a comment letter dated June 4, 2021 from City of Huntington Beach describing that the process “involved significant collaboration with Commission staff, an extensive consultation effort with relevant Tribal agencies, and outreach to appropriate public agencies...” The letter also includes a timeline of the City’s tribal consultation. The City indicates that the consultation process also included outreach to the State Historic Preservation Office’s Tribal Liaison, and an update discussion with the Native American Heritage Commission. Commission staff did receive communications from one affected Tribal Government that consultation was not properly conducted and concluded; however, it is clear that some consultation concerning the AMMP did take place. Therefore, this contention does not raise a substantial 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 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 archeological grading project for protection of the resources that are already protected in the current open space. The scope of the project is 2.5 acres of an 11.2-acre<sup>3</sup> vacant Tribal Cultural Landscape. 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 Tribal, archeological and biological 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

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<sup>3</sup> 8.7 acres of open space + 2.5-acre Windward Residential Parcel = 11.2 acres vacant Tribal Cultural Landscape.

lands. Without adequate supporting evidence in the City's findings, upholding the City's local CDP approval 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, Commission finds that a substantial issue exists with respect to whether the local government action conforms with the policies of the City's certified LCP.