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 Hearing Date: 11/17/2023

STAFF REPORT AND RECOMMENDATION ON APPEAL SUBSTANTIAL ISSUE DETERMINATION

Local Government:	City of Del Mar
Decision:	Approved with Conditions
Appeal Number:	A-6-DMR-22-0020
Applicant:	Watermark DM, L.P.
Location:	Southeast corner of Jimmy Durante Blvd. and San Dieguito Drive, Del Mar, San Diego County. (APNs: 299-100-47-00, 299-100-48-00)
Project Description:	Construction of a new 4-story, approximately 48-foot high, 132,894 sq. ft. multi-family residential development comprised of three residential levels (totaling 50 units, including 10 affordable units) over a podium parking garage, associated site improvements, and consolidation of two lots on a 2.37-acre site.
Appellants:	Del Mar Hillside Community Association, Jill Schulz
Staff Recommendation:	No Substantial Issue

IMPORTANT HEARING PROCEDURE NOTE

This is a substantial issue only hearing. Testimony will be taken only on the question of whether the appeal raises a substantial issue. Generally and at the discretion of the

Chair, testimony is limited to 3 minutes total per side. Please plan your testimony accordingly. Only the applicant, persons who opposed the application before the local government (or their representatives), and the local government shall be qualified to testify. Others may submit comments in writing. If the Commission determines that the appeal does raise a substantial issue, the de novo phase of the hearing will occur at a future Commission meeting, during which it will take public testimony.

SUMMARY OF STAFF RECOMMENDATION

Staff recommends that the Commission, after public hearing, determine that NO substantial issue exists with respect to the grounds on which the appeal has been filed.

The appellants contend that the project as approved by the City does not conform to the City of Del Mar's certified Local Coastal Program (LCP) with regard to permitting requirements, zoning requirements, and resource protection, nor with the Coastal Act in regards to public access. First, the appellants cite the loss of existing on-site parking as a significant negative effect on public access, including access to lower cost visitor and recreational facilities. Regarding biological resources on-site, the appellants also allege that the on-site wetland was not properly delineated, that the project is inconsistent with LCP policies regarding wetland buffers, that the site was insufficiently investigated for sensitive habitat, and that nesting and foraging habitat for bird species will be lost as a result of the approved project. The appellants contend that the project does not comply with LCP policies regarding steep slope encroachments and flooding. The two appeals also allege that the City did not obtain the local discretionary permits required for the project (i.e. those required for development in the floodplain and encroachment into steep slopes). Finally, the appellants allege that the height, lot coverage, and floor-area-ratio of the project exceeds the maximums allowed by the LCP, that the proposed residential use is inconsistent with the site's zoning and density, and the approved project will visually degrade the area and obstruct views of the existing bluff system.

The subject site has an extensive history in regard to providing affordable housing. The California Department of Housing and Community Development (HCD) reviews every local government's housing element to determine whether it complies with state law. Each city or county is allocated a specific number of housing units that it must plan for based on regional population projections. During their 4th Cycle Housing Element, the City failed to take action to create adequate sites at sufficient density (allowing at least 20 dwelling units per acre) and provide the units as required. As a result, HCD imposed a requirement that the City, as part of its 5th Cycle Housing Element, rezone to allow housing "by-right" at a density of 20-25 dwelling units per acre on the two subject parcels. This 5th Cycle Housing Element Program is specifically tied to these two parcels because they were identified by the City as its "adequate sites" to support the development of affordable housing in the prior 4th Cycle Housing Element, although no action was taken by the City at that time to implement the housing program on those sites or to otherwise identify and process approval of an equivalent replacement with sufficient density. With a density of approximately 21 dwelling units per acre and 20% of

the units marked as affordable, the approved CDP would facilitate development of affordable housing consistent with these requirements.

Regarding the appellant's contentions on public access, while the site has provided paid parking for summer events at the Fairgrounds for decades, the 100-120 parking spaces are located on a privately-owned lot and provide parking opportunities for people accessing specific seasonal events at the Fairgrounds, and do not provide general coastal access. Outside of the seasonal events put on by the Fairgrounds, the parking lot is closed. Further, the site is located in the North Commercial Zone, which does not include public parking as an allowable use. The project as approved by the City will provide adequate parking for the residential development according to the requirements of the City's Implementation Plan (IP). Therefore, this contention does not raise a substantial issue.

The appellants contend that the approved project is inconsistent with the biological resource protection policies of the City's LCP in regards to delineation of the on-site wetlands, provision of an adequate wetland buffer, preservation of environmentally sensitive habitat areas (ESHA), and conditional use permit requirements.

Hamilton Biological (Hamilton) conducted a review of the applicant's biological reports on behalf of the Del Mar Hillside Association appellant, and asserts that an atypical wetland delineation methodology should have been conducted due to the extensive human modification and ongoing disturbance to the site that has removed or obscured relevant wetland indicators and flattened the site topography. Hamilton also maintains that the gravel fill placed on the site to support its use as a parking lot constitutes fill in a potential wetland and that other portions of the site should have been more thoroughly investigated as potential wetlands. While the Commission ecologist concurs with Hamilton that numerous activities have occurred on the site, after reviewing numerous reports, aerial imagery, and other resources, as well as conducting a site visit, the Commission ecologist concludes that the location of natural resources on the site, including the coastal brackish marsh, have not changed significantly since the 1950s and the applicant's delineated boundaries are accurate. Therefore, the results of an atypical wetland delineation are irrelevant for the current proposed development. The Commission ecologist concludes that the wetland boundaries have been accurately delineated by the applicant and that the appellants' contentions do not raise a substantial issue.

The appellants also allege that the project is inconsistent with the protection of wetland buffers, contending that the site is both part of a wetland buffer for the San Dieguito Lagoon (where only those activities allowable per the LCP should take place) as well as that the on-site wetland has an inadequate buffer. In the case of the first allegation, the project area is located outside of the 100-foot boundary of the San Dieguito Lagoon and is therefore not part of the 100-foot buffer for any wetland habitat located on the shores of the Lagoon. Regarding the on-site wetland, the applicant has proposed a 50-foot buffer. Per the LCP, a buffer of less than 100 feet is allowed under certain circumstances and based on site-specific factors, including a recommendation from the California Department of Fish and Wildlife (CDFW) that a reduced 50-foot buffer is

acceptable. The project as approved by the City includes enhancement of the wetland buffer through removal of invasive plants, planting of southern coastal bluff scrub plants, and a 5-year monitoring plan. These activities are consistent with the allowable activities in a wetland or wetland buffer and meet the requirements for a reduced wetland buffer. In accordance with the LCP, an open space easement will also be recorded to protect the wetland and its buffer. The CDFW has also affirmed their support of a 50-foot wetland buffer for the on-site marsh. The Commission ecologist concurs with CDFW and concludes that a 50-foot buffer is protective of the wetland resources on the subject property based on the site physical constraints, building standards to protect wildlife and habitats, and the restoration and monitoring plans for the wetland and native plant communities on the site. Therefore the appellants' contentions regarding the provisioning of wetland buffers do not raise a substantial issue.

Regarding the appellants' concerns with preservation of ESHA, the Commission ecologist finds that there is ESHA present on site due to the rarity of the special status species present, including Torrey pines, Del Mar sand aster, and sea dahlia. As a result, the bluff area where these plants reside constitutes ESHA. In this case the ESHA is currently topographically elevated from the project footprint at least 15-20 feet, with plants on the upper bluff elevated approximately 60 feet above the toe of the bluff. As a result, an ESHA buffer of 10-60 lateral feet will adequately protect the special status plants from impacts related to development. The applicant has detailed plans for addressing temporary impacts to biological resources as well as significant restoration to ESHA and the ESHA buffer on-site in their mitigation plans. The City's special conditions include provisions for reducing pollution caused by grading, erosion, and night lighting, in addition to plans preserving Torrey pines and Del Mar sand aster in place on-site. The approved project includes enhancement or restoration and monitoring of the remaining 0.91 acres of the site that is outside of the building impact area. The applicant has also agreed to apply an open space deed restriction across the restored bluff area in addition to the wetland and 50-foot wetland buffer. Together, these actions are compatible with the ESHA determination and there is no substantial issue with the appealed project.

In the same vein, the appellants contend that the project site contains nesting habitat for passerine species and foraging roosts for raptors, and that the project may have significant impacts on bird species. According to the applicant's biology reports, the onsite resources are too small and limited in productivity to serve as a primary territory or foraging grounds for any sensitive bird species and are instead likely to be used as dispersal grounds while moving to and from higher quality habitat associated with the lagoon or larger habitat areas. However, because there is still a possibility that the project could result in impacts to bird nests, the project will implement a mitigation measure to avoid impacts to nesting migratory birds (including raptors), ensuring that all clearing, grubbing, and/or grading of vegetation that has a potential to support active nests should not take place from January 15th through September 15th (general migratory breeding season). If avoidance of this time frame is not feasible, a qualified biologist will conduct a focused survey for active nests 72 hours prior to work in the area. If active bird nests are found, all construction activities undertaken for the project must comply with regulatory requirements of the federal Migratory Bird Treaty Act and

California Fish and Game Code Sections 3503 and 3513, which would require protection of the nest, eggs, chicks, and adults until such time as the nestlings have fully fledged and are no longer dependent upon the nest site. Additionally, the applicant's project requires night lighting that, when necessary, is downcast, fully shielded, and directed away from adjacent habitat. Given these construction and design considerations, the project does not present a significant issue concerning the protection of bird species.

Finally, the appellants contend that the project requires a locally-issued Conditional Use Permit (CUP), as development is typically required when located in the Lagoon Overlay Zone and not found exempt. However, the CUP is a City-issued permit that is not subject to review on appealable projects as the locally issued Coastal Development Permit is. Therefore, it does not raise a substantial issue.

Regarding the approved steep slope encroachment, the appellants contend that the project does not conform to the landform alteration and steep slopes protection policies of the certified LCP, including that the applicant did not demonstrate there was no feasible alternative siting that would reduce or eliminate the encroachment. The LCP allows up to 10% encroachment on this site if there is no feasible alternative siting or design which eliminates or substantially reduces the need for such construction or grading, including that the development has been clustered to maximize the amount of undeveloped open space and is concentrated on the flat portion of the site. The applicant requested and was granted a waiver under state density bonus law for an allowance of up to 10% encroachment into steep slopes. Consistent with LCP requirements, the majority of the project will be constructed on the flat, developed portion of the site in accordance with the clustering approach. While some steep slope encroachment was approved, the site has a number of environmental constraints, including the marsh, the marsh buffer, and sensitive plant species. Without the ability to encroach into the steep slopes, the applicant states that accommodating the same amount of residential units and parking would require the construction of a subterranean parking level, resulting in extensive landform alteration, or constructing an additional story, which would eliminate public views of the sandstone bluff and ridgeline Torrey Pines and further increase the structure's bulk and scale. Therefore, the appellants' contentions do not raise a substantial issue and the project as approved is consistent with the LCP policies regarding steep slopes.

Regarding the appellants' contention that the project is inconsistent with LCP protections for the floodplain, the project as approved by the City has been designed to address flooding hazards and conditioned to ensure compliance with the relevant policies of the Floodplain Overlay Zone as found in the LCP. The City's approved CDP requires that prior to issuance of building permits, the project must comply with all requirements of the City's Floodplain Overlay Zone as well as Federal Emergency Management Agency (FEMA) regulations, subject to the review and approval of the City Engineer and Planning and Community Development Department Director. Special conditions of the City's CDP reflect specific requirements of the Floodplain Overlay Zone, such as the prohibition of electrical equipment below the Base Flood Elevation (BFE) and that any walls of an enclosed area below the BFE be constructed and flood-

proofed to FEMA standards. Regarding hazards due to future flooding, the site has been designed so that its lowest floor of first-level dwelling units is not only located above the BFE, but also incorporates a safety factor of 5.5 feet above the BFE. At this height, the parking garage would allow flood waters to move freely in and out of the garage if flooding occurs, and residences will not be affected. The Commission's engineer has reviewed the project and the City of Del Mar's Sea Level Rise Vulnerability Assessment, which considers flooding from the San Dieguito River and the potential for increased flood levels as a result of sea level rise, and determined that the proposed development's 5.5 feet safety factor would account for increases in the 100-year flood levels with 5.5 feet of sea level rise. Therefore, because the project addresses current and future flooding concerns in its design, the development does not raise a substantial issue in regard to floodplain protections.

The two appeals also allege that the City did not grant all of the local discretionary permits required for the project, including a Conditional Use Permit (CUP) for encroachment into steep slopes and a Floodplain Development Permit for development in a floodplain. However, both of these permits are City-issued discretionary permits that are not subject to review on appeal by the Commission like the City-issued CDP.

The appellants assert that the project does not conform to the certified LCP in regard to the zoning, height, lot coverage and floor area ratio (FAR). In particular, the appellants point to the project's height of 47.5 feet when the LCP allows for buildings up to 14 feet tall; that the project is four stories where a maximum of two stories are allowed; that multi-family residential uses are not allowed in the North Commercial (NC) zone; that the approved lot coverage of 51% exceeds the allowable maximum of 40%; and that the project FAR of 1.29 exceeds the maximum allowance of 0.3 for the underlying zoning. The appellants also assert that the project will block public views of the inland bluff and visually degrade an entrance into the City of Del Mar from the north along Jimmy Durante Blvd.

At the time of the City's approval of the subject CDP in April 2022, "multiple dwelling unit residential" was not yet an allowable use within the LCP. The LCP amendment for the NC Zone, which added multiple dwelling unit residential as a permitted use, provided that the project include an affordable housing component, was certified on May 11, 2022. While this discrepancy is notable, the LCP amendment had been approved by the Commission as consistent with the Coastal Act (with suggested modifications) at the time the City approved the subject CDP, and the amendment modifications had already been adopted by the City through Ordinance No. 987 on March 21, 2022. The only pending action was Executive Director certification by the Commission, which occurred two days after the City approved the subject CDP. While multi-family housing was not technically an allowed use on the day the project was approved by the City, the Commission finds there is no substantial coastal resource impact associated with allowing this use in the NC Zone. The LCP amendment has now been fully certified and multiple dwelling residential is an allowed use per today's standards.

Regarding the exceedance of the maximum allowable lot coverage of 40% and a maximum floor area ratio (FAR) of 0.3, the applicant requested and was granted a

concession and a waiver, respectively, for the project increases to 51% lot coverage and 1.29 FAR. The applicant was also granted a waiver for an increase in the maximum number of stories from two to four. The exceptions were made as part of allowances under state density bonus law. Although exceedance of these development standards is not consistent with the certified LCP, there is no substantial coastal resource impact associated with the project's additional lot coverage, FAR, or height, and finds that the appellants' contention regarding the consistency of the project with these development standards does not raise a substantial issue. By increasing the lot coverage, FAR and height, the applicant avoided the necessity of constructing a subterranean parking garage and a fourth story of residences, resulting in identifiable project cost reductions and facilitating the ability of the applicant to provide 10 affordable units, as well as preserving views of the ridgeline behind the development, and minimizing the amount of grading and site alteration near sensitive coastal bluffs and steep slopes.

In terms of public views, the project will not impact any ocean views or views of the San Dieguito Lagoon from within the City or from the I-5 Freeway. The project has been designed to preserve views of the sandstone bluffs above the wetlands at the site, as well as the Torrey pines trees that define the top of slope behind and above the project's structures. The project also includes features to improve the aesthetics of the area, including undergrounding utility lines, sidewalk and pedestrian improvements, and landscaping. The project will utilize earth-toned materials and colors to blend with the surrounding natural features. Because of these factors, no substantial impact to public views will take place as a result of this project.

There is a critical shortage of housing—and particularly affordable housing—in California. The Legislature enacted state density bonus law and other state housing laws to help promote construction of additional housing, including affordable units. As part of its response to the crisis, the Commission certified the 5th Cycle Housing Element LCPA (LCP-6-DMR-21-0035-1) and housing overlay in this zone (LCP-6-DMR-20-0079-3) in order to help the City of Del Mar reach its housing goals. Additionally, under the development control provisions of the Coastal Act, the Commission shall encourage housing for persons of low or moderate income. Projects such as this that use incentives provided under the state density bonus law are nevertheless required to be consistent with relevant resource protection policies of the LCP. However, in analyzing whether to find substantial issue on appeals, the Commission may consider whether inconsistencies raise a substantial issue that calls for further protection of coastal resources. For this project, the inconsistencies are not significant enough to warrant a finding of substantial issue.

Because there are no identified significant inconsistencies with the LCP and the Coastal Act, staff recommends that the Commission determine that the project raises no substantial issue regarding conformance with the certified LCP and the public access policies of the Coastal Act.

Standard of Review: Certified City of Del Mar Local Coastal Program and public access and recreation policies of Chapter 3 of the Coastal Act.

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EXHIBITS

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[Exhibit 2 – Site Location](#)

[Exhibit 3 – Site Plan](#)

[Exhibit 4 – Building Sections](#)

[Exhibit 5 – Appeals](#)

[Exhibit 6 – City Notice of Final Action](#)

[Exhibit 7 – ESHA and Wetland Map](#)

[Exhibit 8 – Steep Slope Encroachment Area](#)

[Exhibit 9 – FEMA Floodplain Imagery](#)

[Exhibit 10 – Public View Analysis](#)

I. APPELLANTS CONTEND

The appellants contend that the project as approved by the City does not conform to the City of Del Mar's certified Local Coastal Program (LCP) with regard to permitting requirements, zoning requirements, and resource protection, nor the Coastal Act with regard to public access.

Specifically, the appeal brought forth by Jill Schulz states that the project site is not correctly zoned for the use proposed by the project, that the project requires a locally-issued Conditional Use Permit (CUP) and a Floodplain Development Permit, that the height, lot coverage, and floor-area-ratio (FAR) of the project exceeds the maximum allowable height of the zone, and that the project does not comply with LCP policies regarding wetland buffers and steep slope encroachments. The appeal also cites impacts to nesting habitat for passerine species and foraging roosts for raptors as well as view blockage and visual degradation. Finally, the appeal cites the loss of existing on-site parking as a significant negative effect on public access, including access to lower cost visitor and recreational facilities in violation of Coastal Act Sections 30211, 30212, 30212.5, and 30213.

The appeal brought forth by the Del Mar Hillside Community Association broadly states that the project is inconsistent with the protections of coastal lagoons and wetland resources, is inconsistent with the protections for steep slopes and inland bluffs, and is inconsistent with protections for floodplain zones and the public access provisions of the Coastal Act. Notably, the appeal includes two letters from Hamilton Biological dated November 13, 2017, and November 24, 2021 commenting on the project, including numerous alleged deficiencies in how the wetland delineation was conducted and that the site was insufficiently investigated.

II. LOCAL GOVERNMENT ACTION

The project was approved with conditions by the Director of Planning and Community Development on April 19, 2022.

III. APPEAL PROCEDURES

After certification of a Local Coastal Program (LCP), the Coastal Act provides for limited appeals to the Coastal Commission of certain local government actions on coastal development permits.

Section 30603(b)(1) of the Coastal Act states:

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.

Coastal Act Section 30625(b) states that the Commission shall hear an appeal unless it determines:

With respect to appeals to the commission after certification of a local coastal program that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

If the staff recommends "substantial issue" and no Commissioner objects, the Commission will proceed directly to the de novo portion of the hearing on the merits of the project, then, or at a later date. If the staff recommends "no substantial issue" or the Commission decides to hear arguments and vote on the substantial issue question, those allowed to testify at the hearing will have 3 minutes per side to address whether the appeal raises a substantial issue. It takes a majority of Commissioners present to find that no substantial issue is raised. If substantial issue is found, the Commission will proceed to a full public hearing on the merits of the project then, or at a later date, reviewing the project de novo in accordance with sections 13057-13096 of the Commission's regulations. If the Commission conducts the de novo portion of the hearing on the permit application, the applicable standard of review for the Commission to consider is whether the proposed development is in conformity with the certified Local Coastal Program (LCP).

In addition, for projects located between the sea and the first public road paralleling the sea, Section 30604(c) of the Act requires that a finding must be made by the approving agency, whether the local government or the Coastal Commission on appeal, that the development is in conformity with the public access and public recreation policies of Chapter 3 of the Coastal Act. In other words, in regard to public access questions, the Commission is required to consider not only the certified LCP, but also applicable Chapter 3 policies when reviewing a project on appeal.

The only persons qualified to testify before the Commission at the "substantial issue" stage of the appeal process are the applicant, persons who opposed the application before the local government (or their representatives), and the local government. Testimony from other persons must be submitted in writing. At the time of the de novo portion of the hearing, any person may testify.

The Coastal Act requires that the Commission shall hear an appeal unless no substantial issue exists with respect to the grounds on which the appeal was filed under Section 30603. (§ 30625(b)(2).) 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 significant issue:

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;

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 only local issues, or those of regional or statewide significance.

The Commission may, but need not, assign a particular weight to a factor.

Even when the Commission chooses not to hear an appeal, appellants nevertheless may obtain judicial review of the local government's coastal permit decision by filing a petition for a writ of mandate pursuant to the Code of Civil Procedure, section 1094.5.

The City of Del Mar has a certified Local Coastal Program (LCP), and the subject site is located in an area where the Commission retains appeal jurisdiction because it is located between the first public road and the sea. Therefore, before the Commission considers the appeal de novo, the appeal must establish that a substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603. In this case, for the reasons discussed further below, the Commission exercises its discretion to determine that the development approved by the City does not raise a substantial issue with regard to the appellant's contentions regarding coastal resources.

IV. SUBSTANTIAL ISSUE MOTION AND RESOLUTION

Motion:

I move that the Commission determine that Appeal No. A-6-DMR-22-0020 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 **YES** vote. Passage of this motion will result in a finding of No Substantial Issue and adoption of the following resolution and findings. If the Commission finds No Substantial Issue, the Commission will not hear the application de novo and the local action will become final and effective. The motion passes only by an affirmative vote by a majority of the Commissioners present.

Resolution:

The Commission hereby finds that Appeal No. A-6-DMR-22-0020 does not present a substantial issue with respect to the grounds on which the appeal has been filed under § 30603 of the Coastal Act regarding consistency with the certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

V. NO SUBSTANTIAL ISSUE FINDINGS AND DECLARATION

A. Project Description and Background

The locally approved project is the construction of a new 4-story, 48-foot high, 132,894 sq. ft. multi-family residential development comprised of three residential levels, and a podium parking garage. The project would be 50 units total, and 10 of them would be earmarked as affordable. Two lots would be consolidated for a total site size of 2.37 acres ([Exhibit 3](#)).

The site is located southeast of the intersection of Jimmy Durante Boulevard and San Dieguito Drive. It is approximately 140 feet south of the San Dieguito Lagoon. The areas to the southwest and southeast include low-density and very low-density residential areas. The areas across Jimmy Durante Boulevard and San Dieguito Drive contain commercial establishments that extend north to the San Dieguito Lagoon ([Exhibit 2](#)).

The site has a history of disturbance, although continued disturbance is limited to the western, northern, and central portions of the site that have been used as seasonal Fairgrounds parking. Based on the applicant's analysis of historic aerial photographs, minor alterations to the toe of the onsite bluff appear to begin between 1953 and 1964. Beginning in 1966, the southern side of the site was significantly graded, apparently for sand mining, and in later years, the northeastern portion of the site was also graded, resulting in exposure of the sandstone bluffs and terracing. Based on aerial imagery, it appears that the mining operations ended in the early 1990s and possible revegetation may have occurred on the southeastern terraces. According to the City, the site has also been used for seasonal paid parking for events at the Fairgrounds since the 1940s. The applicant has continued this use into the present day. Operations of the parking lot have included intermittent dumping of gravel on the site as a form of dust control and to maintain parking conditions. The applicant has stated that while it did not receive a Coastal Development Permit (CDP) for the gravel placement from the City, gravel placement avoided the onsite coastal brackish marsh. In 2016, the City issued an Administrative Design Review permit for the installation of parking pay machines on the site. The City determined that installation of these machines was exempt from CDP requirements. As part of the site development, the gravel and parking machines will be removed, and the wetland buffer will be restored as described below.

The northern portion of the site is primarily unvegetated and is relatively level. The southern portion of the site is comprised of sandstone bluff supporting a mix of native and non-native vegetation on terraced to steep slopes. A coastal brackish marsh also exists at the toe of the nearly vertical bluff near San Dieguito Drive. According to the applicant's biologist, there is approximately 0.14 acre of coastal brackish marsh on-site as well as 0.01 acre disturbed coastal brackish marsh, 0.04 acre of southern coastal bluff scrub, 0.41 acre disturbed southern coastal bluff scrub, 0.67-acre non-native vegetation, 1.30 acre disturbed habitat, and 0.11 acre urban/developed. The project will permanently impact 0.05 acre of disturbed southern coastal bluff scrub, 0.47-acre non-

native vegetation, 1.09 acre of disturbed habitat, and 0.02 acre of urban/developed land.

As approved by the City, the project design includes preservation of approximately 0.91 acres, including the wetland, wetland buffer, and upland habitat on steep slopes. These preserved areas would be designated as open space and protected in-place through a deed restriction or similar protective device, as well as removal of invasive species and replacement with native plants. The 50-foot wetland buffer is currently composed of a mix of non-natives/invasives and southern coastal bluff scrub. The project would include protection and enhancement of the buffer area through removal of invasive plants on 0.026 acre and installation of native southern coastal bluff plants on 0.18 acre. The area would also be subject to a 5-year monitoring plan to ensure plant establishment of seventy-five percent, followed by a long-term management program.

The impacted disturbed coastal bluff scrub (0.05 acre) will be mitigated at a 3:1 ratio for a total of 0.15 acre via acquisition of Tier 1 habitat from a mitigation bank. The applicant purchased 1.1 acres (i.e. credits) of southern maritime chaparral mitigation (Tier 1 community) from Manchester Avenue Conservation Bank on May 2, 2017. The remaining 0.95 acre of purchased credits will be used for other projects.

Site History/Housing Background

The California Department of Housing and Community Development (HCD) reviews every local government's housing element to determine whether it complies with state law and then submits written findings back to each local government. HCD's approval is required before a local government can adopt its housing element as part of its overall General Plan. Jurisdictions can opt to update their housing elements every five years or every eight years.

The number of housing units each city and county must plan for is determined by HCD every five to eight years, with the determinations referred to as housing "cycles." The California Department of Finance (DOF) as well as HCD forecast the need for housing within each region based on population projections. This process is called the Regional Housing Needs Assessment (RHNA). The regional planning agency for each region, which in this case is the San Diego Association of Governments (SANDAG), then distributes the projected housing among its member local jurisdictions. To date, there have been five previous housing element update cycles. California is now in its sixth housing-element update cycle.

During the 4th Housing Element Cycle (adopted to cover planning years 2005 to 2010), SANDAG assigned the City of Del Mar a RHNA total of 25 units (6 very low income, 4 low income, 5 moderate income, and 10 above moderate income). However, the City failed to take action to create adequate sites at sufficient density (allowing at least 20 dwelling units per acre) and provide the units as required. As a result, HCD imposed a requirement, Government Code Section subdivisions 65583.2(h) and (i), that required the City, as part of the 5th Cycle Housing Element, to rezone to allow housing "by-right" at a density of 20-25 dwelling units per acre on two parcels (APNs 299-100-47-00 and

299-100-48-00) located at the southeast corner of Jimmy Durante Blvd and San Dieguito Drive, in order to create adequate sites at sufficient density (allowing at least 20 dwelling units per acre). These two parcels make up the subject site. The 5th Cycle Housing Element Program “2-G” is specifically tied to these two vacant parcels because they were identified by the City as its “adequate sites” to support the development of affordable housing in the prior 4th Cycle Housing Element, although no action was taken by the City at that time to implement the housing program on those sites or to otherwise identify and process approval of an equivalent replacement with sufficient density.

During the 5th Cycle, a Watermark Specific Plan was in process via a development application that would have satisfied the 5th Cycle Program 2-G rezone requirement. However, on September 8 and October 5, 2020, the City Council voted to deny approval of a Community Plan Amendment for North Commercial designed properties (including the subject site) that would have made multi-family residential an allowable use within the zone. Consequently, the applicant decided to withdraw the Specific Plan application and pursue a permit application pursuant to Senate Bill (SB) 330 (Chapter 654, Statutes of 2019). SB 330 became effective on January 1, 2020, and among other requirements, generally “locks in” the development standards for a project based on the date the applicant submits a qualifying preliminary application.¹ In this case, the applicant submitted a preliminary application to the City on November 24, 2020 that was deemed complete on February 18, 2022. After an expedited review process, the City of Del Mar approved a CDP for the Watermark project on April 19, 2022. The project was appealed to the Commission on May 9, 2022.

In accordance with their 5th Cycle Housing Element, the City still had a legal obligation to fulfill Program 2-G and rezone the subject parcels. Closely following the approval of the Watermark project, two LCP amendments (LCPA) were certified by the Commission. One amendment (LCPA No. LCP-6-DMR-20-0079-3 (North Commercial and Professional Commercial Land Use and Zone Amendment)) was certified on May 11, 2022, and added multiple dwelling unit residential uses at a density of up to 20 dwelling units per acre as a permitted use in the two zones provided that they include an affordable housing component. A second amendment (LCPA No. LCP-6-DMR-21-0035-1 (5th Cycle Housing Element)) was certified by the Commission on July 13, 2022 and created a new Housing Element Implementation Overlay Zone to facilitate implementation of housing rezone projects, including the Watermark parcels, through a “by-right” (i.e. ministerial) approval process for multiple dwelling unit residential use at a density of 20-25 dwelling units per acre with 20% of units earmarked as affordable. While these new amendments are currently in place and fulfill the legal requirements of Program 2G, they had not been certified and thus had not yet taken effect when the City approved the project.

¹ Gov. Code § 65589.5, subd. (e), added by SB 330, also states that nothing in it shall be construed to relieve a local agency from complying with the Coastal Act.

State density bonus law (Government Code Section 65915 et seq.) allows housing development projects of five or more units to exceed local development standards in exchange for incorporating residential units for specific demographics into the project. As relevant here, state density bonus law grants exceptions for housing development projects that include affordable units for moderate-, lower-, and very-low-income residents. Cities and counties are required to grant a “density bonus,” which is an exceedance of the otherwise allowable project density, if a housing project would include affordable units for one or more of these demographics. The amount of the density bonus is codified as a sliding scale based on the percentage of affordable units provided and the demographics targeted. In addition to providing a density bonus, state density bonus law requires a city or county to provide up to four “incentives” or “concessions” to any project that qualifies for a density bonus, depending on the percentage of affordable units provided. Incentives or concessions can generally be described as a deviation from local land use standards that enhances the financial viability of the project. A project applicant may request, and a city or county is required to grant, a waiver or reduction of any development standard that is deemed necessary to accommodate the density bonus and incentive(s)/concessions(s) to which a project proponent is entitled.

The Del Mar Municipal Code (DMMC) Section 30.90.040 provides for a density bonus of 35% additional market rate units with the provision of 20% low-income affordable units, as is proposed for the Watermark Project. With this density bonus, between 65 and 81 units could be built on the site (utilizing the range of 20-25 du/ac). It should be noted, utilizing net developable acreage (1.52 ac) for base density would yield 38 units at 25 du/ac. With a 35% density bonus, the total allowed units would be 51.3, which rounds up to 52 units. The approved project design includes studio, one, two, and three-bedroom configurations for a total of 50 units. Consistent with DMMC section 24.21.030, six of the units (will be designated affordable in the “low” category (51-80% Area Median Income [AMI]), two units in the “Very Low” category (31-50% AMI), and two units in the “Extremely Low” category (less than 30% AMI). Pursuant to the DMMC, the AMI is the median income for San Diego County as determined by HCD. These 10 units will be designated as affordable for no less than 55 years. The remaining 40 units will be market rate long-term rentals.

As approved by the City, the Watermark project designates 20% of its base density units for “lower” income households. Under state density bonus law, a project with this percentage of affordable units is entitled to two concessions or incentives. The applicant requested and was granted a concession for an increase in maximum lot coverage from 40% to 51%. The applicant was also granted a concession for reduction in wetland buffer from 100 feet to 50 feet. To accommodate the granted concessions, the applicant requested and was granted four waivers. Two of the waivers relate to project height, including an increase in the maximum number of stories permitted from two to four, as well as a waiver for an increase in maximum height from 14 feet to 47 feet and 6 inches. The applicant also requested and was granted a waiver for increase in max floor area ratio from 0.3 to 1.29 (0.52 for garage and 0.77 for habitable floors) as well as a waiver for up to 10% encroachment into steep slopes (i.e., slopes that are greater than or equal to a 25% grade per the Bluff, Slope, and Canyon Overlay Zone of the certified LCP).

There is a critical shortage of housing—and particularly affordable housing—in California. In San Diego County, HCD estimates that the median rental cost is almost \$1,700 per month and that over 56% of renter households are cost-burdened by housing costs.² HCD estimates that over 70% of low-income households in San Diego County have unmet housing needs.³ The Legislature enacted state density bonus law and other state housing laws to help promote construction of additional housing, including affordable units. As part of its response to the crisis, the Commission certified the 5th Cycle Housing Element LCPA (LCP-6-DMR-21-0035-1) and housing overlay in this zone (LCP-6-DMR-20-0079-3) in order to help the City of Del Mar reach its housing goals. Additionally, under the development control provisions of the Coastal Act, the Commission shall encourage housing for persons of low or moderate income. Projects such as this that use incentives provided under the state density bonus law are nevertheless required to be consistent with relevant resource protection policies of the LCP. However, in analyzing whether to find substantial issue on appeals, the Commission may consider whether inconsistencies raise a substantial issue that calls for further protection of coastal resources. For this project, the inconsistencies are not significant enough to warrant a finding of substantial issue.

Standard of Review

The site is within the City of Del Mar's permit jurisdiction and is appealable to the Coastal Commission due to the property being located between the first public road and the sea (§30603(a)(1)) ([Exhibit 1](#)). The Del Mar Local Coastal Program is the standard of review and as well as the public access and recreation policies of Chapter 3 of the Coastal Act. The appellant Jill Schulz cites numerous Coastal Act sections for biological resources, public views, and steep slopes in her appeal; however, the Coastal Act is not the standard of review for these claims.

B. Public Access and Recreation

Section 30210 of the Coastal Act states:

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

² HCD California Statewide Housing Plan, Data Dashboard, <https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/statewide-housing-plan-dashboard>.

³ *Ibid.*

Section 30212 of the Coastal Act states:

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or, (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

[...]

Section 30212.5 of the Coastal Act states:

Wherever appropriate and feasible, public facilities, including parking areas or facilities, shall be distributed throughout an area so as to mitigate against the impacts, social and otherwise, of overcrowding or overuse by the public of any single area.

Section 30213 of the Coastal Act states:

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

[...]

(Amended by Ch. 1191, Stats. 1979; Ch. 1087, Stats. 1980; Ch. 1007, Stats. 1981; Ch. 285, Stats. 1991.)

Goal IV-A of the certified LCP states

Provide physical and visual access to coastal recreation areas for all segments of the population without creating a public safety concern, overburdening the City's public improvements, degrading the City's natural resources, or causing substantial adverse impacts to adjacent private properties.

Goal IV-D of the certified LCP states:

Maximize the opportunity for access to beach areas by minimizing competition for public on-street parking spaces.

Both appellants allege that the project is inconsistent with the public access provisions of the Coastal Act (including Section 30211 regarding prescriptive rights) because it would result in a loss of public parking, thereby allegedly hindering the public's ability to access the coast. They cite that the project area has been used as public parking for access to events at the Fairgrounds for the past 15 years and that the site provides parking for the Coast to Crest Trail and the beach as well ([Exhibit 5](#)).

The applicant has confirmed that the site has provided paid parking for summer events at the Fairgrounds (i.e. the County Fair and horse races) since approximately 2003, while the City of Del Mar identified a history of parking on-site for summer Fairgrounds events dating as far back as 1947. A current tenant report states there are approximately 100 to 120 stalls on the site. The remainder of the year outside of Fairgrounds events, the entry at the entrance drive on San Dieguito Road is locked, chained, and posted with a no trespassing sign that warns violators will be towed.

The appellants allege that the conversion of this private parking lot to residential development will adversely impact public access. However, the project as proposed does not significantly impact public access to the coast. For one, the 100-120 parking spaces are located on a privately-owned lot and are meant to provide parking opportunities for people accessing specific seasonal events at the Fairgrounds, and do not supply coastal access. Outside of these Fairground events, the parking lot is closed. Additionally, this parcel is zoned as North Commercial, which does not include public parking as an allowable use.

Furthermore, the project as approved by the City provides adequate parking. The project will provide 105 parking stalls, including guest parking, and will conform to the parking requirements of the City's Implementation Plan (IP). The project will provide garage access on Jimmy Durante Blvd. and San Dieguito Drive, and there will also be two pedestrian entrances that will connect to existing public sidewalks.

Thus, while the project will no longer provide paid seasonal parking for Fairgrounds events, the project itself is designed to have adequate parking in accordance with the City's IP and the project does not raise a substantial issue in regard to public access to the coast.

C. Biological Resources

Goal VI-B of the certified LCP states:

Preserve, protect and, where feasible, enhance the wetland areas of Del Mar.

Section 30.53.010 of the certified IP states:

This overlay zone is composed of properties which are located directly in, or in proximity to, the Los Peñasquitos and San Dieguito Lagoons. The purpose of this Lagoon Overlay Zone is to protect the wetland resources of these lagoon areas and their sensitive upland habitats by requiring that all development activities taking place in the zone are designed and implemented in a manner that is consistent with wetland habitat protection and enhancement.

Section 30.53.030(A)(2) of the certified IP states:

Wetland Buffer shall mean lands which provide a buffer between human development activity and wetland areas and which serve to protect the environmental and functional habitat values of the wetland, and/or lands which

are integrally important in supporting the full range of the wetland and adjacent upland biological community through their function as upland transitional habitat.

Section 30.53.070 of the certified IP states:

Unless otherwise exempted by this Title, no building, improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered, or enlarge; nor shall any lot or premises be subject to excavation, grading or clearance of vegetation; nor shall any subdivision occur until both a Conditional Use Permit and Coastal Development Permit are obtained from the Planning Commission. In reviewing the applications for Conditional Use Permits and Coastal Development Permits, the Planning Commission shall apply the standards of review contained in the underlying zone as well as those contained in this Chapter.

Section 30.53.090 (Permitted Uses in Wetland Buffer areas) of the certified IP States:

- A. Permitted uses and activities in wetland buffer areas shall be limited to the following:
1. Passive recreational access paths and viewpoints when designed to ensure no adverse impacts to adjacent wetland areas, and when designed in conformance with the provisions of the certified Local Coastal Program Land Use Plan.
 2. The placement of improvements necessary to provide protection, preservation, or enhancement of adjacent wetland areas. Such improvements may include, but are not limited to, construction of fencing, creation of landscape berms, and placement of signage related to scientific, educational, or recreational uses.
 3. All uses permitted in wetland areas.

Section 30.53.100 (Provision of Wetland Buffers) of the certified IP states:

- A. To protect wetland areas, all new development projects, which are located on property which includes or lies in proximity to wetland habitat, as defined in this Chapter, shall include the provision of a continuous wetland buffer. Unless otherwise specified herein, the wetland buffer shall be a minimum of 100 feet in width. The wetland buffer shall be measured landward from the boundary of wetlands as delineated on plans required pursuant to the application submittal requirements of this Chapter.
- B. A wetland buffer of less than 100 feet in width shall be allowed only with the concurrence of the California Department of Fish and Game and when the Planning Commission makes the following findings:
1. That the physical characteristics of the site, such as the size and dimensions of the property are adequate to protect the resources of the adjacent wetlands, based on site-specific factors.
 - a. When making such a finding, the Planning Commission shall, in consultation with the California Department of Fish and Game, consider site-specific factors such as the type and size of the development proposed; the mitigation measures provided (such as

- planting of vegetation or construction of fencing); elevation differentials which may exist between the proposed development and wetland areas; the need for upland transitional habitat; or other similar factors which will serve to contribute to the purposes of a wetland buffer area.
- b. When making a finding regarding the use of a buffer of less than 100 feet in width, the Planning Commission shall consider any recommendations provided by representatives of the California Department of Fish and Game.
 - C. In no event shall a wetland buffer be reduced to a width of less than 50 feet
 - D. Authorization which has been granted by the Planning Commission to provide a wetland buffer of less than 100 feet for one aspect of a development proposal, shall not be construed as an authorization to provide a buffer of less than 100 feet in width for other aspects of the proposal unless such authorization has been specifically enumerated in the findings required pursuant to this Section.

Section 30.53.130 (Retained Open Space/Conditions of Development) of the certified IP states:

- A. Wetland areas and wetland buffer areas to be retained in, or restored to, their natural state pursuant to the application of these Lagoon Overlay Zone regulations shall be subject to conditions to ensure the future protection of the designated area(s) from encroachment, disturbance, or degradation. Said conditions shall include the recordation of an open space deed restriction, conservation easement, or open space easement over the protected wetland and/or wetland buffer area(s) to ensure their protection and to serve notice to the property owner, subsequent owners or interested parties of the restrictions in effect on such property.
- B. The transfer of fee title of wetland areas to an appropriate public agency shall also serve to satisfy the requirements of this Section.

Section 30.75.030(BB) of the certified IP states:

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

The appellants contend that the approved project is inconsistent with the biological resource protection policies of the City's LCP regarding delineation of the on-site wetlands, provision of an adequate wetland buffer, preservation of environmentally sensitive habitat areas (ESHA), and conditional use permit requirements.

Wetland

The appellants allege that the project is inconsistent with the protections of coastal lagoon areas and wetland resources, and that the on-site wetland has not been adequately protected or delineated ([Exhibit 5](#)). The biologist reviewing the project on behalf of the Del Mar Hillside Association appellant, Hamilton Biological (Hamilton),

prepared two letters in November 2017 and November 2021, respectively, describing the issues with the delineation as performed by the applicant's biologists, Merkel and Associates, and Cummings and Associates. The 2017 letter was written to address concerns related to the Draft Environmental Impact Report (DEIR) for the Watermark Specific Plan. As described in the Site History section above, the Watermark Specific Plan was withdrawn by the applicant in November 2020, and the project was resubmitted for City review pursuant to the application processing requirements of SB 330. Accordingly, the concerns in Hamilton's 2017 letter address the development envisioned by the Specific Plan and do not necessarily apply to the subject project. The 2021 letter, largely encapsulating and expanding upon the same points from the 2017 letter, is a more focused critique of the wetland delineations performed by Merkel and Associates in 2018 and 2020, as well as the historical delineations dating back to 2000.

For one, Hamilton asserts that the wetland delineation should have used the atypical method because the delineation was taking place during drought conditions in a disturbed area that lacks field indicators. Hamilton asserts that the site should be classified as "atypical" per the United States Army Corps of Engineers 1987 Wetland Delineation Manual due to extensive human modification and ongoing disturbance, which has removed or obscured relevant wetland indicators and flattened the site topography. Hamilton also points to the presence of gravel-amended soils as further proof that the wetland delineation was not routine and that the site's hydrology has been altered. Hamilton points more specifically to an area along the shoulder of San Dieguito Drive that he asserts the applicant failed to investigate and characterize as wetland despite the presence of wetland plants and standing water. A local resident associated with the appeal has also reported seeing dark, moist soil across large patches of the northern part of the site during high tides, leading the appellant to believe the site's hydrology may be tidally influenced and further exploration of the role of groundwater at the site is warranted.

Site History

The Watermark site is located south of San Dieguito Lagoon, which is across San Dieguito Road and several lagoon-side commercial parcels. At its closest, the shoreline of the lagoon is approximately 160 feet to the northeast of the site near the Jimmy Durante Boulevard bridge and areas of the property identified as supporting wetlands are located approximately 230 feet from the lagoon. The elevation of the site ranges from a high of approximately 90 feet above mean sea level at the top of the bluff to 12 feet above mean sea level at the toe of the slope near Jimmy Durante Boulevard. The project is located in the Lagoon Overlay Zone of the LCP and is therefore subject to special design considerations to protect the Los Peñasquitos and San Dieguito Lagoons as well as their upland buffer areas. The relevant requirements of the Lagoon Overlay Zone are found in the cited sections of the Implementation Plan above as well as repeated in the Wetland Preservation Regulations of Policy VI-3 in the Land Use Plan.

To evaluate the wetland boundary on the Watermark Project site established by Merkel & Associates, the Commission ecologist reviewed four reports provided by the applicant: a Jurisdictional Resources Delineation Report and Environmentally Sensitive

Habitat Area (ESHA) Evaluation, December 2018 written by Merkel & Associates, two addenda to this report provided in March 2020 and November 2021, respectively, and a groundwater and geologic investigation by Geocon Incorporated titled: Groundwater Consultation [for the] Watermark Del Mar Southeast Corner of Jimmy Durante Boulevard and San Dieguito Drive, November 2018. The Commission ecologist also reviewed the two letters from Hamilton Biological provided by the appellant as described above.

Merkel & Associates (“Merkel”) (2018) described the Watermark Project site as follows:

The investigated site is vacant undeveloped lands with evidence of historic disturbance over much of the property but continued disturbance being limited to a reduced footprint. The northern portion of the site is comprised predominantly of unvegetated land (60% of the site) on relatively level terrain. The southern portion of the site is comprised of sandstone bluff supporting a mix of native and non-native vegetation (21% of the site) on terraced to steep slopes. The remaining portion of the site is comprised of non-native vegetation (10% of the site) along the southern boundary between existing dense residential development, coastal brackish marsh at the toe of the nearly vertical bluff near San Dieguito Drive (6% of the site), and urban/developed along Jimmy Durante Boulevard (3% of the site).

Merkel (2018) examined aerial images from 1953 through 2006 that show the unvegetated northern portion of the site and vegetated southern portion of the site have not changed substantially (see Figure 6, Merkel 2018). However, through the years several activities have occurred which have impacted the site including sand mining from the mid 1960’s to early 1990’s on the bluff on the south side of the site⁴, overflow parking for events at the Del Mar Fairgrounds (beginning as early as 1947), and other city activities in the northern flat unvegetated area of the site. Starting sometime in 2003 gravel, dust control additives⁵, and perimeter boulders were placed on the site and have since been maintained to facilitate parking for seasonal events at the Fairgrounds, and more recently City vector control program staging. Finally, a French drain system was installed by the City in 2013 as part of a vector habitat remediation program, the purpose of which was to drain accumulated surface water from the southern margin of San Dieguito Drive.

The brackish marsh on-site is said to have appeared after mining operations on the adjacent bluff in the 1960s resulted in seepage at the bluff toe. Merkel (2018) reported that the water feeding the brackish marsh at the toe of the bluff did not encroach into the site parking area until recently. New houses built on the bluff in 2016 and 2017 and

⁴ The southern bluff area mined and visible in Figure 6, Merkel 2018 photos 1966 and 1980 has since been colonized primarily by non-native invasive plants dominated by acacia.

⁵ Since approximately 2003, the level unvegetated areas on the site have been modified to include dust control to support parking use and address adjacent property owner complaints in both 2015 and 2017.

relaxation of landscape watering restrictions in 2017 are believed to have increased bluff seepage. At the same time the brackish marsh habitat has expanded up slope with the apparent increase in bluff seepage.

Previous Wetland Delineations

Numerous reports covering wetland resources on the subject site have been written over the past 23 years. The first three were reviewed in the Draft Environmental Impact Report (DEIR) that was done for a previous development concept for the Watermark site. The first wetland delineation discussed in the DEIR was conducted on April 19, 2000 (Merkel & Associates 2000). The second delineation was conducted on May 3, 2004 (Merkel & Associates 2004). The third delineation was conducted in August and October 2012 with updates made in October 2014 (Cummings & Associates 2012, revised 2014). The jurisdictional wetland delineation completed on September 27 and 28, 2018, by Merkel & Associates, followed by subsequent work reported in two addenda (2020 & 2021), comprise the most recent jurisdictional wetland delineation studies. Merkel (2018) states, and the Commission ecologist concurs, that the current delineation of a coastal brackish marsh on the eastern side of the property at the toe of the bluff is more extensive but largely consistent with the past wetland delineation reports reviewed in the DEIR (see Figure 9, Merkel 2018).

Most Recent Wetland Delineation

The Jurisdictional Wetland Delineations were conducted following the 1987 Army Corps of Engineers (ACOE) Wetland Delineation Manual's 2008 Arid West Regional Supplement. The ACOE requires three parameters, hydrology, hydrophytic vegetation, and hydric soils to identify wetland habitat whereas the Commission definition of a wetland only requires evidence of one wetland parameter to identify wetland habitat.

Hydrophytic Vegetation

On the eastern side of the site at the toe of the slope Merkel (2018) describes a 0.141 acre perennially saturated area of coastal brackish marsh that supports a predominance of southwestern spiny rush (FACW) and southern cattail (*Typha domingensis*) (OBL). Understory plant species present include marsh jaumea (*Jaumea carnosa*) (OBL), pickleweed (*Salicornia pacifica*) (OBL), and saltgrass (*Distichlis spicata*) (FACW) interspersed with non-native plant species including iceplant (*Carpobrotus edulis*) (UPL) and myoporum (*Myoporum laetum*) (FACU).

Merkel (2018) largely used observations of where there was a predominance of hydrophytic vegetation combined with samples indicating a lack of wetland parameters to identify a three-parameter coastal brackish marsh. They initially sampled six locations where they examined evidence for hydrology, hydrophytic vegetation, and hydric soil (see Figure 8, Merkel 2018) to determine wetland versus upland conditions for both three (ACOE) and one (CCC) parameter wetlands and found evidence of hydrophytic vegetation at data point 6. However, they point out in Table 3 (Merkel 2018), that based

on the one-parameter Commission wetland definition, data points 2, 5, & 6 are indicative of Commission wetland habitat.

To this point, Merkel (2018) further examined areas adjacent to the area they identified as three-parameter coastal brackish marsh that might meet the Commission one-parameter definition. Immediately west of the coastal brackish marsh they identified a narrow area of non-native vegetation at the toe of the bluff, dominated by giant reed (*Arundo donax*) (FACW) and iceplant as well as scattered clumps of southwestern spiny rush, saltgrass, and western ragweed (*Ambrosia psilostachya*) (FACU) that met the one-parameter Commission wetland definition. They also found that east of the coastal brackish marsh there was an area with scattered clumps of marsh associated plants including marsh jaumea among non-native iceplant that also met the one-parameter Commission wetland delineation. The two areas supporting marsh that met the Commission wetland definition total 0.032 acres in size (see Figure 8, Merkel 2018).

In response to appellant's criticism of early and more contemporary jurisdictional wetland delineations for the Watermark Project site, and also by Commission staff request, Merkel conducted additional wetland studies in 2020 and 2021. In 2020 Merkel sampled seven additional data points labeled A through G primarily in the contested parking lot area (see Figure 8, Merkel 2020). They found additional evidence of hydrophytic vegetation at data point G and determined that no changes to the wetland boundary delineations were warranted. The Commission ecologist reviewed Merkel's 2020 addendum and agreed that the wetland boundary remained the same based on the hydrophytic vegetation data.

In 2021 Merkel sampled another seven additional data points labeled H through N. They found evidence of hydrophytic vegetation at three of the seven points, I, J, and N. As a result of this additional work, they adjusted their three-parameter wetland delineation north by one to three feet over most of the area, such that the size of the three-parameter coastal brackish marsh increased in size to 0.151 acre and the one-parameter wetland area increased to 0.039 acre (see Figure 6, Merkel 2021). The Commission ecologist reviewed Merkel's 2021 addendum and supports the resulting wetland boundary adjustment.

Hydric Soil

In Merkel's (2018) initial six wetland delineation study samples they found evidence of hydric soil at data points 2, 5, & 6 but not at data points 1, 3, & 4 in their efforts to define a wetland boundary (see Figure 8, Merkel 2018). They point out in Table 3 that these data points, positive for hydric soil, are indicative of one-parameter Commission wetland habitat.

In 2020 Merkel sampled seven additional data points labeled A through G primarily in the contested parking lot area (see Figure 8, Merkel 2020). They found additional evidence of hydric soil at data point G and determined that no changes to the wetland boundary delineations were warranted. The Commission ecologist reviewed Merkel's

2020 addendum and agreed that the wetland boundary remained the same based on the hydric soil data.

In 2021 Merkel sampled another seven additional data points labeled H through N. They found evidence of hydric soil at two of the seven points, I and N. As a result of this additional work, they adjusted their three-parameter wetland delineation north by one to three feet over most of the area such that the size of the three-parameter coastal brackish marsh increased in size to 0.151 acre and the one-parameter wetland area increased to 0.039 acre (see Figure 6, Merkel 2021). The Commission ecologist reviewed Merkel's 2021 addendum and supports the resulting wetland boundary adjustment.

Hydrology

The recent set of wetland studies included groundwater and geologic investigations conducted by Geocon Inc. (2018) to identify the water source(s) influencing the site. Geocon's groundwater evaluation included seven borings and one monitoring well. They found that groundwater in the northeastern portion of the site was at a depth of approximately six feet below the existing grade. Geocon found that surface water is seeping from the bottom three to five feet of the base of the existing hillside and suggested the source is utilities or landscape irrigation from the houses on top of the bluff. Geocon concluded that the water supporting the wetland is from bluff face seepage, not groundwater.

In Merkel's (2018) initial six wetland delineation study samples they found evidence of hydrology at data points 2 & 6 but not at data points 1,3,4, & 5 in their efforts to define a wetland boundary (see Figure 8, Merkel 2018). They point out in Table 3 (Merkel 2018), that based on the one-parameter Commission wetland definition, data points 2, 5, & 6 are indicative of Commission wetland area.

In 2020 Merkel sampled seven additional data points labeled A through G primarily in the contested parking lot area (see Figure 8, Merkel 2020). They found additional evidence of hydrology at data point G and state that based on "follow-up evaluation of soils in 2020, the limit of jurisdictional resources is consistent with the ACOE wetland and ACOE water boundary depicted in Figure 8. No changes are warranted." The Commission ecologist reviewed Merkel's 2020 addendum and agreed that the wetland boundary remained the same based on the hydrology data.

In 2021 Merkel sampled another seven additional data points labeled H through N. They found evidence of hydrology at two of the seven points, J and N. As a result of this additional work they adjusted their three parameter wetland delineation north by one to three feet over most of the area (see Figure 6, Merkel 2021). The Commission ecologist reviewed Merkel's 2021 addendum and supports the resulting wetland boundary adjustment.

Commission Ecologist's Response to Appellant's Contentions

Hamilton Biological (2021) conducted a review of Merkel's biological reports and asserts that an atypical wetland delineation per the ACOE 1987 Wetland Delineation Manual's 2008 Arid West Regional Supplement should have been conducted due to the extensive human modification and ongoing disturbance to the site that has removed or obscured relevant wetland indicators and flattened the site topography. In addition, Hamilton believes placement of gravel for a vector control project and the apparent repeated dumping of gravel across the northern portion of the project site has "fundamentally changed the site's topography, drainage patterns, soil characteristics, and capacity to support vegetation". Hamilton also maintained that the gravel constitutes fill in a wetland and that the site has not been thoroughly investigated for additional indicators of wetland hydrology and wetland vegetation.

The Commission ecologist concurs with Hamilton that numerous activities have occurred on the site, including historic sand mining, Fairgrounds event parking, French drain installation, and intermittent dumping of gravel for parking. After reviewing the reports and addendums listed above, as well as other resources including the National Wetland Inventory (NWI), the Biogeographic Information and Observation System (BIOS), aerial photographs from Google Earth and the University of Santa Barbara's Framefinder database, and observations and notes from a site visit on August 16, 2023, the Commission ecologist determined that the majority of disturbance, before and after establishment of the Coastal Act, occurred on the northern flat portion of the site. However, the location of natural resources on the site, including the coastal brackish marsh, have not changed significantly, save the bluff area that was mined for sand, since the 1950s. This is supported by the evidence from all the sources just listed. While application of an atypical wetland delineation might reveal that wetland habitat may have established further into the northern portion of the site absent the history of site activities, numerous site activities have occurred, included those that were pre-Coastal and both permitted and unpermitted post-Coastal, making such atypical wetland delineation results irrelevant for the current proposed development.

As for the assertion that the site has been hydrologically altered, and may possibly be tidally influenced, the 2018 Geocon Inc. report found that the wetland on-site is seep-driven rather than groundwater-driven as described above and as follows:

The surface water is seeping from the bottom 3 to 5 feet of the base of the existing hillside. The water is not infiltrating into the dense Torrey Sandstone and Delmar Formations located near the surface. Based on geotechnical site conditions and our observations, we expect the seepage is associated with utilities or landscape irrigation from the existing residential neighborhood located to the south of the existing slope.

Commission Ecologist's Wetland Delineation Conclusion

After reviewing Merkel's 2018 jurisdictional wetland delineation work and subsequent 2020 and 2021 addendums, as well as the earlier wetland delineation study results

reviewed in the DEIR, and other resources including NWI, BIOS, and aerial photographs, the Commission ecologist concludes that the wetland boundaries for both the ACOE three-parameter and the CCC one-parameter coastal brackish marsh areas, totaling 0.151 acre and 0.039 acres, have been accurately delineated and the appellants' contentions do not raise a substantial issue ([Exhibit 7](#)).

Wetland Buffer

The appellants allege that the project is inconsistent with the protections of coastal lagoon areas and wetland resources. The Del Mar Hillside Community Association appeal states that the site is considered a wetland buffer due to its proximity to the San Dieguito Lagoon and that the project is not a permitted use in a wetland buffer according to the relevant sections of the LCP. The appeal also states that a development project sited in or in proximity to wetland habitat shall include a wetland buffer 100 feet in width, to be reduced only by special authorization per Section 30.53.100(A)-(B) of the certified IP. The appeal by Jill Schulz also states that the project does not comply with the required 100-foot buffer for wetlands and cites various sections of the certified Implementation Plan, including Sections 30.53.090(A)(1-3) on permitted uses in wetland buffer areas as well as Sections 30.53.100(A)-(B) on the provision of wetland buffers. Taken together, the appellants appear to be alleging that the site is both part of a wetland buffer for the San Dieguito Lagoon (where only those activities allowable per the LCP should take place) as well as that the onsite wetland has an inadequate buffer ([Exhibit 5](#)).

In response to the first allegation, the certified LCP states that a wetland buffer should be a minimum of 100 feet in length, as measured outward from the wetland boundary, unless special authorization is received for a reduced buffer. In the case of the subject site, the project area is located outside of the 100-foot boundary of the San Dieguito Lagoon and is therefore not part of the 100-foot buffer for any wetland habitat located on the shores of the Lagoon. Furthermore, there is intervening development in between the Watermark site and the Lagoon, including San Dieguito Drive, the Trailhead parking lot and a brewery/restaurant.

The onsite wetland is a 0.15-acre coastal brackish marsh, and the applicant has proposed a 50-foot buffer. According to the certified LCP, a buffer of less than 100 feet is allowed only when, due to physical constraints such as the size and dimensions of the property, a buffer of a lesser width may be allowed as long as it adequately protects the resources of the adjacent wetlands, based on site-specific factors. Such factors can include the type and size of the development proposed or mitigation measures provided, such as the planting of vegetation or consideration for transitional upland habitat. Proposals for reduced wetland buffers must be referred to representatives of the California Department of Fish and Wildlife (CDFW) for a recommendation and in no event should the buffer be less than 50 feet.

The Density Report for the project notes that Watermark properties were previously entitled with a commercial office development for which a 50 foot wide wetland buffer was approved. Subsequently, during the now-abandoned processing of entitlements for

a Watermark Specific Plan project with substantially the same footprint as the current proposal, CDFW agreed to support a 50-foot wetland buffer with the addition of various mitigation measures now incorporated into the current Watermark project (including fire protection policies and building standards, restoration of native vegetation to wetlands, and maintenance activities). CDFW reaffirmed their support that a reduced 50-foot buffer is adequate to protect the on-site wetland in January 2022 (see Substantive File). The Commission ecologist concurs with CDFW that a 50-foot buffer is protective of the wetland resources on the subject property based on the site physical constraints, building standards to protect wildlife and habitats, and the restoration and monitoring plans for the wetland and native plant communities on the site.

In addition to CDFW support for a reduced buffer, the project includes enhancement of the wetland buffer through removal of invasive plants, planting of southern coastal bluff scrub plants, and a 5-year monitoring plan. These activities are consistent with the allowable activities in a wetland or wetland buffer and meet the requirements for a reduced wetland buffer. The LCP also has policies stating that wetland areas and their buffers should be retained as open space. As required by Special Condition LCP-2 of the City's permit, the applicant is required to record an open space deed restriction against the property that will apply to the wetland and its 50-foot buffer. It prohibits the development and/or placement of structures or landscaping in those areas unless approved by the appropriate entity or the City of Del Mar. Finally, a 36-inch post and rail fencing will be erected at the 50-foot mark of the wetland buffer to separate the wetland buffer from the developed areas of the site ([Exhibit 6](#)). Therefore, the wetland buffer as approved is consistent with the City's LCP and the appellants' contentions do not raise a substantial issue.

Environmentally Sensitive Habitat (ESHA)

The appellants contend that there is environmentally sensitive habitat (ESHA) on-site that is not adequately protected by the project as approved. This includes two letters submitted by Hamilton on behalf of the appellant Del Mar Hillside Community Association. The first letter, dated November 2017, addresses concerns related to the DEIR for the Watermark Specific Plan. As described in the Site History section above, the Watermark Specific Plan was withdrawn by the applicant in November 2020, and resubmitted for City review pursuant to the application processing requirements of SB 330. Accordingly, the concerns in Hamilton's 2017 letter are not explicitly applicable to the subject project; however, concerns voiced within the letter regarding ESHA will be discussed for the purposes of clarification. Hamilton's 2021 letter is limited to the critique of the applicant's biological reports, including the wetland delineation contentions described above as well as the continued concern that the southern coastal bluff scrub (disturbed and undisturbed) and Torrey Pines are ESHA.

The definition of ESHA as found in Section 30.75.030(BB) of the City's certified IP matches that of Environmentally Sensitive Area in the Coastal Act, section 30107.5. No further interpretation or guidance is provided in the City's LCP for site-specific ESHA determinations; rather, the City's LCP was designed to broadly address ecologically sensitive areas through the use of overlay zones (i.e. Lagoon Overlay Zone, Bluff, Slope and Canyon Overlay Zone, and the Floodplain Overlay Zone). The overlay zones as

described in the certified LCP do not explicitly state specific mitigation or buffer widths for sensitive vegetative habitat and plant species as documented during the course of site-specific studies.

To inform an ESHA determination for the site, the Commission ecologist reviewed the Hamilton letters from 2017 and 2021 in addition to three documents provided by the applicant: a Jurisdictional Resources Delineation Report and Environmentally Sensitive Habitat Area (ESHA) Evaluation dated December 2018 and written by Merkel & Associates, and two addenda to this report provided in March 2020 and November 2021, respectively. Similar to the jurisdictional wetland delineation, the state of terrestrial biological resources on-site did not significantly change after the 2018 report. Here, staff reviewed and evaluated the biological data provided in the listed reports as well as external information, including the Biogeographic Information and Observation System (BIOS), California Rare Plant Ranks (CRPR) and ecological information provided by the California Native Plant Society (CNPS), NatureServe's Natural Community Conservation Ranks, aerial photographs from Google Earth and the University of Santa Barbara's Framefinder database, and observations and notes from a site visit on August 16, 2023.

As previously described, the parcel is surrounded by development on all sides. The parcel is bordered to the northwest and northeast with roadways lined with commercial development, and just beyond these businesses lie tributaries for San Dieguito Lagoon. Areas south and west of the parcel have residential development that has built up next to the parcel after sand mining ceased sometime in the 1990s. As a result, the parcel has minimal connectivity to contiguous open space. Merkel & Associates (2018) identified seven vegetation types on-site, of which two are of primary interest in ESHA evaluation: 0.41 acres of disturbed southern coastal bluff scrub and 0.04 acres of southern coastal bluff scrub ([Exhibit 7](#)). The 0.04 acres of southern coastal bluff scrub consists primarily of lemonade berry (*Rhus integrifolia*) and resides on a slope on the southwest section of the site, which is separated from the city-approved development by coastal brackish marsh habitat. The disturbed southern coastal bluff scrub is on the southern portion of the site on a steep slope ranging from approximately 30 feet to 80 feet in elevation above mean sea level. While this community has patches of native vegetation, including coastal California buckwheat (*Eriogonum fasciculatum* var. *fasciculatum*), California sagebrush (*Artemisia californica*), coyote brush (*Baccharis pilularis*), lemonade berry, and toyon (*Heteromeles arbutifolia*), it has also been invaded by non-native pampas grass (*Cortaderia selloana*) and has significant unvegetated patches of bare sandstone. Invasive iceplant (*Carpobrotus edulis*) surrounds this disturbed community at lower elevations and a large patch of mixed acacia (*Acacia* sp.) and eucalyptus (*Eucalyptus* sp.) borders the community on the upper, southeastern corner of the of the bluff.

However, the southernmost and more highly elevated part of this community also supports the highest number of special status plants. This bluff area includes 12 Torrey pines (*Pinus torreyana*), 24 Del Mar sand aster (*Corethrogyne filaginifolia* var. *linifolia*), and 3 sea dahlia (*Leptosyne maritima*; Merkel & Associates 2021). Eight immature Torrey pines were previously observed in this area (Merkel & Associates 2018). Torrey

pinos are critically imperiled globally and statewide. Del Mar sand aster is secure globally, likely due to continued investigations into its separation from the more common variety *C. filaginifolia* var. *filaginifolia*. However, it remains critically imperiled in California due to high risk of local extirpation. Both Torrey pines and Del Mar sand aster have a California Rare Plant Rank (CRPR) of 1B.1, or seriously endangered in California and rare, threatened, or endangered elsewhere. Sea dahlia is imperiled globally but critically imperiled in California and has a CRPR of 2B.2, or rare, threatened, or endangered in California but common elsewhere. The California Native Plant Society describes all three species as threatened by development and at this site they all reside entirely on the bluff ranging from approximately 45 to 80 feet in elevation above mean sea level. Other plants noted at the site among the reviewed reports, including Cooper's (chaparral) rein orchid (*Piperia cooperi*) and southwestern spiny rush (*Juncus acutus* ssp. *leopoldii*) were also noted at the site. While these species are indicative of the identified habitats on-site, they also share a CRPR of 4.2, which does not rise to the level of ESHA.

In describing the development as proposed under the Watermark Specific Plan, Hamilton contends in his 2017 letter that there is no detailed analysis to support whether the Torrey Pines on-site are native or planted and that the trees should not be removed or relocated. While the project has gone through several iterations before approval by the City, including the withdrawal of the Specific Plan, the project approved by the City does not include the removal or relocation of the Torrey Pines on-site. Conditions in the approved CDP require that prior to issuance of building permits or site grading/disturbance, whichever comes first, a temporary fence shall be placed around all Torrey Pines to be retained on-site. Any Torrey Pines that are irreparably damaged due to project construction will be replaced. The project approval issued by the City also requires that prior to issuance of the building permits or site grading/disturbance, whichever comes first, the applicant is required to submit a tree preservation plan for approval by the City's Planning and Community Development Director, to ensure that construction methodologies and construction-phase measures preserve the on-site Torrey Pines ([Exhibit 6](#)).

The 2017 letter from Hamilton also cites a concern with the relocation of the Del Mar sand asters on the site. Again, no translocation of the sand asters are proposed as part of the approved project. All identified sand asters on site are located in an area where approved work will be limited to removal of invasive species and planting of low-fuel native species. In a similar vein, the letter requests clarification on the presence of chaparral (Cooper's) rein orchid on the site and what measures are being taken to avoid impacting the sensitive plant. The one observance of chaparral (Cooper's) rein orchid was made in 2004, and was not expected in subsequent surveys due to seasonality. The documented location in 2004 is also within an area that the applicant intends to protect through an open space easement and restore through the removal of invasive species and replanting with native species.

While some of the specific concerns of Hamilton's 2017 letter are resolved through the current project design as approved through the City's CDP, Hamilton's 2021 letter continues to express concern regarding the potential ESHA on-site, including the

southern coastal bluff scrub and Torrey pines, as well as the other special status species on site. Accordingly, the Commission ecologist attended a site visit with district staff on August 16, 2023 and confirmed the presence and location of the terrestrial special status plants located on the bluff as well as the mapped vegetation communities provided in reports by Merkel & Associates. None of the special-status species will be impacted by the approved project.

The approved project includes substantial on and off-site mitigation for permanently impacting 0.05 acres of disturbed southern coastal bluff scrub. First is the application of 0.15 acres (3:1 for impacts) of southern maritime chaparral mitigation from the Manchester Avenue Conservation Bank, purchased as 1.1 acres on May 2, 2017 (Merkel & Associates 2021). In addition, the approved project includes enhancement or restoration and monitoring of the remaining 0.91 acres of the site that is outside of the building impact area. This includes the coastal brackish marsh, the 50-foot marsh buffer, as well as all areas of the bluff south and southwest of the planned development. The city-approved plan includes (1) invasive plant removal and native plant establishment detailed in a restoration plan submitted to the City for review, (2) a 5-year monitoring plan and long-term management plan for the wetland buffer, and (3) that this acreage also be designated as open space and not accessible to the public, allowing the native vegetation to flourish. Together, the proposed on-site restoration and off-site mitigation for permanently impacting 0.05 acres of disturbed southern coastal bluff scrub appears consistent with past interpretations of the City's LCP and can be found consistent with the City's LCP.

ESHA Determination and Conclusion

The City's definition of ESHA is synonymous with environmentally sensitive area in section 30107.5 of the Coastal Act, which states that "environmentally sensitive area" includes any area in which plant life are rare and could be easily disturbed or degraded by human activities or developments. The Commission ecologist finds that ESHA is present on this site due to the rarity of the special status Torrey pines, Del Mar sand aster, and sea dahlia. These plants are easily disturbed by human activities and developments. As a result, the bluff area where these plants reside constitutes ESHA. In this case, the ESHA is currently topographically elevated from the project impact area at least 15-20 feet, with plants on the upper bluff elevated approximately 60 feet above the toe of the bluff. As a result, an ESHA buffer of 10-60 feet measured horizontally from the ESHA will adequately protect the special status plants from impacts related to development ([Exhibit 7](#)).

The applicant has detailed plans for addressing temporary impacts to biological resources as well as significant restoration to ESHA and the ESHA buffer within the remaining 0.91 acre area outside of the building impact area, as well as an open space deed restriction. The City's special conditions include provisions for reducing pollution caused by landscaping plans, erosion, night lighting. Together, these actions are compatible with the ESHA determination and there is no substantial issue with the appealed project.

Protection for Birds

The appellant Jill Schulz alleges that the project site contains nesting habitat for passerine species and foraging roosts for raptors, and therefore the project may have significant impacts on biological resources in violation of the LCP ([Exhibit 5](#)).

According to the California Natural Diversity Database (CNDDDB) and surveys performed by Merkel & Associates, no special status wildlife species have been located on the site. While there are detections of Ridgway's rail (*Rallus obsoletus*), California least tern (*Sternula antillarum browni*), and Belding's savannah sparrow (*Passerculus sandwichensis beldingi*) within 500 feet of the survey area, only Belding's savannah sparrow is expected to nest within 500 feet of the project, with the closest potentially suitable habitat occurring approximately 160 feet away at the San Dieguito Lagoon and separated from the subject site by the existing restaurant. Due to the existing restaurant and commercial uses, construction noise is not expected to adversely affect the nesting success of the Belding's savannah sparrow, if present. The project site does likely support a small population of common avian fauna such as the common yellowthroat or raptor species such as Cooper's hawk and osprey (Merkel & Associates 2018). Merkel alleged that the onsite resources are likely too small and limited in productivity to serve as a primary territory or foraging grounds for these species and are instead likely to be used as dispersal grounds while moving to and from higher quality habitat associated with the lagoon or larger habitat areas.

Because there is still a possibility that the project could result in impacts to bird nests, the project will implement a mitigation measure to avoid impacts to nesting migratory birds (including raptors), ensuring that all clearing, grubbing, and/or grading of vegetation that has a potential to support active nests should not take place from January 15th through September 15th (general migratory breeding season). If avoidance of this time frame is not feasible, any clearing, grubbing, and/or grading of vegetation could proceed if a qualified biologist conducts a focused survey for active nests 72 hours prior to work in the area and determines the area to be free of nesting birds. If active bird nests are found, all construction activities undertaken for the project must comply with regulatory requirements of the federal Migratory Bird Treaty Act and California Fish and Game Code Sections 3503 and 3513, which would require protection of the nest, eggs, chicks, and adults until such time as the nestlings have fully fledged and are no longer dependent upon the nest site. Additionally, the applicant's project requires night lighting that, when necessary, is downcast, fully shielded, and directed away from adjacent habitat. Given these construction and design considerations, the project does not present a significant issue concerning the protection of bird species.

Conditional Use Permit

Section 30.53.070 of the certified IP states that unless found exempt, development within the Lagoon Overlay Zone requires a Conditional Use Permit (CUP) and Coastal Development Permit. The appellant Jill Schulz argues that because no CUP was issued for the project by the City, the project is not in substantial conformance with the certified

LCP ([Exhibit 5](#)). However, the CUP is a City-issued permit that is not subject to review on appealable projects as the locally issued Coastal Development Permit is.

Conclusion

While the site has a complex history of development, it continues to support coastal brackish marsh as well as sensitive plant species that the Commission ecologist considers ESHA. Based on review of the biological reports, supporting documentation, and historic aerials, the Commission ecologist supports the wetland delineation as performed by the applicant and approved by the City. The approved wetland buffer is also considered protective of the coastal brackish marsh by both the Commission ecologist and the CDFW, and will be enhanced and monitored as part of the approved project. The ESHA on the bluff area is topographically elevated from the project footprint with a resulting ESHA buffer of 10-60 feet from the project impact area. The ESHA buffer will adequately protect the special status plants from impacts related to development, along with the applicant's plans to significantly enhance and restore the steep slope area and protect all special status plant species in place through an open space easement. Similarly, the project will not impact sensitive bird species and has been conditioned to avoid the nesting bird season to the maximum extent feasible. Finally, the CUP typically required for projects in the Lagoon Overlay Zone is a City-issued permit not subject to review on appeal of the CDP. In conclusion, the project approved by the City can be found consistent with the City's LCP and the appellants' contentions do not raise a substantial issue.

D. Steep Slopes

Section II.C. (Land Use Development Goals and Policies – By District) of the certified LUP states:

8. North Hills District:

[...]

A large portion within this district is located on steep hillside areas above the San Dieguito Lagoon and its watershed. This area is designated for larger lot single family development at R1-40 (Very Low 1 du/acre). Much of the area is also within the Bluff, Slope and Canyon Overlay Zone. Accordingly, development within this area shall be designed to minimize the disruption of topography and to preserve the open space character of these highly visible and sensitive areas. All development shall be consistent with the Bluff, Slope and Canyon and Open Space Policies of this Land Use Plan, where applicable.

Section III.A.4 (Runoff and Slope Erosion) of the certified LUP states:

The policies of the Bluff, Slope and Canyon Overlay Zone (refer to Chapter VI) as well as other policies of this Land Use Plan serve to minimize the hazards of

erosion and sedimentation of downstream resources. The steep sloping hillsides and exposed sandstone escarpments within the City are natural elements which contribute to its character and beauty. The application of the policies of this Land Use Plan are also intended to preserve these visual resources. Further, many of the steep hillside areas lie adjacent and contiguous to the wetlands of San Dieguito and Los Peñasquitos Lagoons. As such, they provide the necessary upland habitat and wildlife corridors for the various species which inhabit the lagoon areas.

Section III-3 of the certified LUP states:

Control the development of properties within the Bluff, Slope and Canyon (BSC) Overlay Zone to protect the health, safety, and general welfare and to preserve scenic sandstone bluffs, related canyons, steep slopes and their downstream resources...

Goal VI-A of the certified LUP states:

Preserve Del Mar's steep sloping hillsides and downstream resources.

Policy VI-1 of the certified LUP states:

Preserve and protect sensitive slopes and associated bluff and canyon areas and their downstream resources through the application of the following Bluff, Slope and Canyon Overlay Zone Regulations

Bluff, Slope and Canyon Overlay Zone Regulations

[...]

E. Development Review. Within the BSC Overlay Zone, no building improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered, or enlarged, nor shall any lot or premises be excavated or graded for any purpose, including not limited to in-ground structures such as swimming pools or spas, or cleared of vegetation, unless in accordance with this Land Use Plan and the following:

[...]

3. Construction, grading or other encroachments of any kind on substantial slopes exceeding twenty-five percent grade, or within twenty feet of the top and ten feet of the bottom of substantial slopes exceeding twenty-five percent grade or the construction of structures which overhang such slopes or slope setbacks, shall be prohibited, except when specific encroachments are allowed in according with the following policies. For purposes of this section, "substantial slopes" shall mean: Any areas of slopes with a gradient of 25% or greater on a site where the total elevation differential within such slope areas themselves is 20 feet or more, or where such slopes on site

adjoin contiguous slopes of 25% or greater on adjoining property and together involve an elevation differential of 20 feet or more. "Substantial slopes" shall include smaller, isolated pockets of area with less than 25% grade when surrounded by contiguous "substantial slopes" located either entirely or partially on site.

4. Encroachments within the slope areas and steep slope setbacks specified above shall be allowed only when it is found that there is no feasible alternative siting or design which eliminates or substantially reduces the need for such construction or grading, and it is found that the bulk and scale of the proposed structure have been minimized to the greatest extent feasible commensurate with preserving the physical characteristics of the site. For purposes of this section, "encroachment" shall constitute any activity which involves grading, construction, placement of structures or materials, paving, removal of native vegetation (including clear-cutting for brush management purposes), or other operation which would render the area incapable of supporting native vegetation or being used as wildlife habitat. Any and all activities regulated through the subsequent paragraphs of this section, with the exception of paragraph 14, shall count toward the total steep slope encroachment allowance for a site. When clear-cutting on an existing undeveloped site is required by written order of the Del Mar Fire Department to protect an existing principal structure on an adjacent site, an exception to the encroachment allowances, not to exceed 30 feet from said principal structure, may be allowed.

Any encroachment into steep slope areas which is permitted pursuant to these findings shall be limited in extent by the following steep slope encroachment standards. The maximum allowable encroachment into slope areas, as specified below, shall not be considered as right but shall instead be allowed only when it has been determined, pursuant to these regulations, that there is no feasible alternative to slope encroachment.

Percentage of project site in steep slope areas.	Maximum allowable encroachment into steep slope areas.
100% to 96% -----	20%
95% to 91% -----	18%
90% to 86% -----	16%
85% to 81% -----	14%
80% to 76% -----	12%
75% or less -----	10%

["Steep slope areas" are those areas composed of slopes of a gradient of 25% or greater, as determined through the slope identification process prescribed in subsection D-1 of these Bluff, Slope and Canyon Overlay Zone Regulations.]

When encroachments into steep slope areas are allowed consistent with the findings and maximum limits established above, the quantity of cubic yards of earth to be moved and the change in elevation associated with the

proposed grading shall be subject to verification by the Planning Director in consultation with the City Engineer as being the least amount necessary to implement the project and provide services to the proposed structures.

[...]

8. In order to maximize and preserve natural open space, natural landforms and views, projects involving more than one dwelling unit on a lot shall be clustered on the flatter portions of the site, if determined to be practicable and desirable. "Clustering" in this context shall mean the siting of dwelling units in proximity to each other so as to maximize the amount of undeveloped open space. A clustered project within this overlay zone may disregard existing interior lot lines and is not bound to comply with the minimum lot size, width, depth and setback provisions of the underlying Del Mar Zoning Ordinance. A suitable site plan showing the clustered proposal shall be submitted for subdivisions and multiple unit construction projects in this overlay zone.

[...]

11. The protection of areas or vegetation designed for retention in their natural state shall be accomplished through the installation of protective temporary and/or permanent fencing around such designated areas prior to the commencement of grading and/or development activities on site. For protection of designated trees or other major vegetation, said fencing shall be placed so as to protect the root zones of the vegetation to be protected

[...]

- G. Retained Open Space/Conditions of Development. Areas to be retained in their natural state pursuant to the application of these Bluff, Slope and Canyon Regulations shall be subject to conditions to ensure the protection of the designated area(s) from future encroachment, disturbance or degradation. Said conditions shall include the recordation of an open space deed restriction, conservation easement or open space easement to assure protection of the designated area and to serve notice to the property owner, subsequent owners or interested parties of the restrictions in effect on such property.

[...]

Section 30.52.010(A) of the certified IP states:

The BSC Overlay Zone is designed to protect the health, safety, and general welfare, and to control the development of properties within the designated zone in order to preserve the scenic sandstone bluffs and related canyons and steep slopes which characterize the area within the zone. The overlay zone is also

intended to protect downstream resources from the adverse impacts of erosion and sedimentation. The unique landforms within the zone provide visual relief and diversity within the City, and they define and separate neighborhoods, enhance the overall quality of Del Mar's local coastal environment, and preserve the economic integrity of our visitor-oriented community.

Section 30.52.060(A) of the certified IP states, in relevant part:

Unless otherwise exempted by this Title no building, improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered or enlarged; nor shall any subdivision occur; nor shall any lot or premises be excavated or graded for any purpose [including, but not limited to, in-ground structures such as swimming pools or spas]; nor shall any lot be cleared of vegetation until a Conditional Use Permit and Coastal Development Permit are first obtained in accordance with the procedures set forth in this Code. Said Conditional Use Permit and Coastal Development Permit shall include, but not be limited to, provisions to ensure conformity with the development criteria applicable to the property as described in the Bluff, Slope and Canyon Element of the adopted Community Plan, as well as the following development criteria:

1. Construction, grading, or other encroachment of any kind on substantial steep slopes exceeding 25 percent grade, or within 20 feet of the top or 10 feet of the bottom of substantial steep slopes exceeding 25 percent grade, or the construction of structures which overhang such steep slopes or steep slope setbacks, shall be prohibited except where allowed in accordance with this Chapter.
 - a. Encroachments within the areas specified above shall be allowed only when the Planning Commission finds that there is no feasible alternative siting which eliminates or substantially reduces the need for such construction or grading, and it is found that the amount of encroachment into steep slope areas associated with the proposed development has been minimized to the greatest extent feasible commensurate with preserving the physical characteristics of the site.

[...]

3. In order to minimize the disturbance of natural landforms and habitat, projects involving more than one dwelling unit shall be clustered, if determined practicable and desirable by the Planning Commission. "Clustering" in this context shall mean the siting of dwelling units in proximity to each other to maximize the amount of undeveloped open space. A clustered project within this overlay zone may disregard existing interior lot lines and is not bound to comply with the minimize lot size, width, depth and setback provisions of the underlying zone.

The appellants contend that the project as approved by the City does not conform to the landform alteration and steep slopes protection policies of the certified LCP. The

appellant contends that the applicant has not submitted evidence showing an absence of feasible alternative siting that would eliminate or reduce the need for the encroachment, and that the project could be further minimized to preserve the steep slopes. The Del Mar Hillside Community Association appellant points out in its appeal that one possible alternative could include the clustering approach cited in Section 30.52.060(A)(3) of the LCP in order to minimize the disturbance to landforms and habitat. Another alternative would be to redesign the project to better fit within the site's natural characteristics so that specific units within the encroachment zone are reoriented or moved to the empty space located in the northwestern corner of the project area ([Exhibit 5](#)).

The elevation within the site ranges from a high of approximately 90 feet above mean sea level (MSL) at the top of the sandstone bluff, to 12 feet MSL at the toe of the slope near Jimmy Durante Blvd. Based on the applicant's steep slope analysis, approximately 15 percent of the site meets the definition of a substantial steep slope per the LCP, and the project area is found within the Bluff, Slope, and Canyon Overlay (BSC Overlay) of the LCP.

The applicant states that the City confirmed that because a significant portion of the bluff was graded pre-Coastal Act, and the bluffs are therefore not representative of their natural state due to mining operations beginning in the 1950s and 1960s, the slopes would not have been included in the BSC Overlay if the City had this information at the time the LCP Overlays were being developed. Nevertheless, the site is located in the BSC Overlay and is subject to its requirements. Given the site's inclusion within the Overlay, the applicant requested and was granted a waiver under state density bonus law for an allowance of up to 10% encroachment into steep slopes ([Exhibit 8](#)). Ten percent encroachment is the maximum allowable per the LCP, given that other findings are made regarding how there is no feasible alternative siting or design which eliminates or substantially reduces the need for grading or construction, and it is found that the bulk and scale of the proposed structure have been minimized to the greatest extent feasible commensurate with preserving the physical characteristics of the site.

The applicant states there is no feasible alternative to siting or design that would completely avoid at least some encroachment into steep slopes given the concessions granted for the project to accommodate the project density. As it stands, the site has a number of constraints, including the marsh, the marsh buffer, sensitive plant species, and steep slopes, in addition to concerns with providing adequate parking on-site. The steep slope area encroached upon will be used to construct the parking structure with the approved number of spaces, which fulfills the parking requirements of the LCP. Without the ability to encroach into the steep slopes, the applicant states that accommodating the same amount of parking would require the construction of a subterranean parking level, resulting in extensive topographical modification and landform alteration of the site. Thus, the applicant applied for a waiver for an allowance of up to 10% encroachment into steep slopes, which was granted under state density bonus law as an exception to development standards that would otherwise preclude the development of affordable housing as part of the overall project.

The encroachment into the steep slopes area is the maximum allowed for the site design per the LCP; however, the question becomes if the necessary findings have been made to allow for the encroachment. In this case, those findings would need to include that no feasible alternative siting or design which eliminates or substantially reduces the need for such construction or grading, and the bulk and scale of the proposed structure have been minimized to the greatest extent feasible to preserve the physical characteristics of the site. The LCP cites the use of a clustering approach to development within the BSC Overlay, which essentially recommends siting the dwelling units in proximity to each other by using the flatter portions of the site (if practicable and desirable) in order to maximize the amount of undeveloped open space.

In terms of bulk and scale, the project has been designed to mostly be constructed on the flat, developed portion of the project in accordance with the clustering approach. Notably, the LCP states that a clustered project is not bound to comply with the minimum lot size, width, and depth and setback provisions of the City's zoning ordinance. Previous iterations of the project had sited several units on the bluff face, but in working with the applicant, the project was redesigned to accommodate the units within the larger structure located on the eastern side of the site. With respect to the appellant's contention that residences would be better clustered on the northwestern side of the site, the applicant has noted that the outdoor amenity area was specifically placed in this location (rather than residential units) out of consideration for the potential impact of noise on immediate neighbors to the southeast and south, as well as greater conformance to the existing topography and the opportunity for aesthetic presentation at the intersection of Jimmy Durante Boulevard and San Dieguito Drive. Moreover, the applicant has confirmed that the portion of the slope being encroached into is part of the slope area that was historically altered by sand mining and is therefore no longer in its natural state. Finally, in utilizing the waiver for the steep slope encroachment, the applicant did not consider adding an additional story to the structure overall, which preserves the public view of the sandstone bluff and ridgeline Torrey Pines and reduces overall bulk and scale.

The applicant has addressed the environmental requirements of the Bluff, Slope, and Canyon Overlay by working with City and Commission staff to remove development from the bluff face and instead concentrate the development on the flatter portion of the site to the maximum extent feasible. While some steep slope encroachment was approved, the Commission finds there is no substantial coastal resource impact associated with the project's 10% encroachment, and finds that the appellants' contention regarding the consistency of the project with these standards does not raise a substantial issue.

Conditional Use Permit

Section 30.52.060(A) of the certified IP requires receipt of a Conditional Use Permit (CUP) for projects that would involve development in or near substantial steep slopes. The appellant Jill Schulz argues that because no CUP was issued for the project by the City, the project is not in substantial conformance with the certified LCP. However, the

CUP is a City-issued permit that is not subject to review on appealable projects as the City-issued Coastal Development Permit is.

Conclusion

In conclusion, the project approved by the City includes 10% encroachment into steep slopes, which is allowed per the certified LCP. Further, given the numerous constraints on this site (e.g., wetlands, ESHA, minimum density requirements, and parking requirements), as well as the project alternatives considered, this encroachment does not raise a substantial issue.

E. Flooding and Coastal Hazards

Goal III-A of the certified LUP states:

Establish a comprehensive program to protect shoreline areas susceptible to storm/flooding hazards

Policy III-2 of the certified LUP states:

Conserve the natural character of land, water, vegetative and wildlife resources within the community by ensuring that future development minimizes the disturbance of existing or natural terrain and vegetation, and does not create soil erosion, silting of lower slopes, slide damage, flooding problems and/or cutting or scarring, through application of the following policies:...

Goal III-D of the certified LUP states:

Minimize risks to life and property associated with flooding and flood waters

Policy III-12 of the certified LUP states:

Ensure that the development of real property which is subject to floodwaters will not obstruct flood flow; will not create a hazard to life, health, safety, or the general welfare; will reduce the need for the construction of flood control facilities that would be required if unregulated development occurs; and will minimize the cost of flood insurance to Del Mar residents. The following Floodplain (FP) Overlay Zone policies shall be applied to all applications for a Floodplain Development Permit.

[...]

Applications for Floodplain Development Permits shall be reviewed for consistency with the following requirements to be assured that new development will:

- a. Be anchored to prevent flotation, collapse, or lateral movement of the structure resulting from hydrodynamic and hydrostatic loads, including the effects of buoyancy;
- b. Be constructed with materials and utility equipment resistant to flood damage;
- c. Use methods and practices that minimize flood damage;
- d. Have the lowest floor (including basement) of any residential structure elevated to or above the base flood elevation;
- e. [...]
- f. When located in an area of shallow flooding (Zones AO and VO on the community's FIRM), have the lowest floor (including basement) elevated to or above the depth number indicated on the most current FIRM; or if there is no depth number indicated on the most current FIRM, be elevated at least two feet above the highest adjacent grade. As an alternative, nonresidential structures, together with attendant utility and sanitary facilities, may be flood-proofed to that level as specified in subsection "e" above;
- g. When located in Zones AO and AH on the FIRM, have adequate drainage paths around structures situated on sloping ground, to guide floodwaters around and away from said structures;
- h. [...]
- i. [...]
- j. [...]
- k. Have all electrical, heating, ventilation, plumbing, and air conditioning equipment and other service facilities designed and/or located so as to prevent water from entering or accumulating within the components during conditions of flooding;
- l. Have all fully enclosed areas below the lowest floor that are subject to flooding designed to automatically equalize hydrostatic flood forces on exterior walls by allowing for the entry and exit of floodwaters with designs certified by a registered professional engineer or architect; or have at least two openings no more than one foot above grade with a total net area of at least one square inch per square foot of flooded area.
- m. Not require the construction of flood protective works, including, but not limited to, artificial flood channels, revetments or levees.

Section 30.56.010 of the certified IP states:

This overlay zone is composed of those properties located within the 100-year floodplains of the San Dieguito River and the Los Peñasquitos Lagoon which have been identified by the Federal Insurance Administration as being subject to periodic inundation due to flooding. The purpose of the regulations of this Chapter is to promote the public health, safety and general welfare by ensuring that new development, as defined herein, is appropriately sited and constructed so as to avoid hazards to those who will occupy the development; and to avoid damage or hazards to the surrounding area. These regulations are also intended to ensure that development within the Floodplain Overlay Zone will not obstruct flood flow; will be designed to reduce the need for construction of flood control

facilities that would be required if unregulated development were to occur; and to minimize the cost of flood insurance to Del Mar residents.

In order to accomplish its purposes, this Chapter includes regulations that prohibit development that would result in increases in erosion or flood levels through the inappropriate placement of fill or barriers. The Chapter also includes regulations to prohibit or restrict uses, which would otherwise be incompatible with flood prone areas.

Section 30.56.045(A) of the certified IP states:

It shall be unlawful for any person to engage in the implementation of a project that involves new construction or the substantial improvement to any existing structure without first having obtained a Floodplain Development Permit, when such Permit is required pursuant to this Chapter.

The appellants contend that the project is inconsistent with protections for the floodplain because the applicant did not receive a Floodplain Development Permit in accordance with the certified LCP ([Exhibit 5](#)).

The northern parcel of the subject site is within the mapped Federal Emergency Management Agency (FEMA) 100-year floodplain of the San Dieguito River with smaller additional portions of both parcels occurring within the 500-year floodplain of the river (Zones AE and X, respectively, on [Exhibit 9](#)). Because it is located within the 100-year floodplain, the site is within the Floodplain Overlay Zone per the City's LCP.

Because the site is located within the 100-year floodplain, the site must have the lowest floor of its first-level dwelling units elevated above the Base Flood Elevation (BFE) (between 0-6 feet above existing grade) in order to comply with FEMA design standards. The BFE for the property is approximately 20 feet NAVD88 (or 18 feet NGVD29⁶). The project is designed with a podium elevation of 23.5 feet, which provides a 5.5 feet safety factor over the applicable BFE ([Exhibit 4](#)). At this height, the parking garage now would allow flood waters to move freely in and out of the garage if flooding occurs. Additionally, the parking garage includes a secondary access at its south end to allow for emergency egress that would not require passage through the Jimmy Durante Blvd./San Dieguito Drive roundabout. Finally, all critical building systems (such as the electrical room, elevator equipment, HVAC, and other building materials) are located at or above the 23.5 foot elevation.

Consistent with the Floodplain Overlay Zone, the City's approved CDP requires that prior to issuance of building permits, the project must comply with all of the requirements of the City's Floodplain Overlay Zone as well as FEMA regulations,

⁶ The North American Vertical Datum of 1988 (NAVD88) is the official vertical datum of the US Government. The National Geodetic Vertical Datum of 1929 (NGVD29) is an older datum commonly used in the City of Del Mar and is approximately 2.14 feet higher than NAVD88 in this area. The two datums are baseline elevations from which elevations are measured i.e., heights above NAVD88 or NGVD29.

subject to the review and approval of the City Engineer and Planning and Community Development Department Director ([Exhibit 6](#)). Special Condition FP-1 of the City's approved CDP states that no electrical equipment or machinery may be placed or constructed below BFE (of 18.00 feet NGVD) and that all interior wall, floor, and ceiling materials located below the BFE shall be unfinished and resistant to flood damage. The walls of an enclosed area below the BFE are required to be constructed in a manner to prevent flotation, collapse, and lateral movement of the structure. The walls of any enclosed area below the BFE shall be constructed and flood-proofed so as to be in conformance with FEMA regulations. Thus, while the project may not have received a Floodplain Development Permit, given the design of the project and the special conditions imposed upon the project through the CDP, the project conforms to the requirements of the Floodplain Overlay Zone and thus this concern does not raise a substantial issue.

Nevertheless, during extreme flow conditions (e.g., 100-year flow event considered by FEMA), portions of the site would be submerged by floodwaters from the San Dieguito River. Development in areas vulnerable to flooding, including as worsened by the effects of climate change, has been of particular concern to the Commission. For instance, during review of the Magnolia Tank Farm rezoning project (LCP-5-HNB-21-0057-1) in Huntington Beach, the Commission expressed concern with regards to the development of vacant lots in vulnerable areas that may worsen flood risk or foreclose future flood control or adaptation infrastructure that may be needed to avoid widespread flood risk. Such concerns have also been considered by the City of Del Mar during the development of its Sea Level Rise Vulnerability Assessment and Adaptation Plan. While neither document has been incorporated into the LCP, they provide relevant insights into the strategies the City will draw upon to face the challenges associated with sea level rise as well as envisioned adaptation strategies in the area.

The City of Del Mar's Sea Level Rise Vulnerability Assessment considered flooding from the San Dieguito River and the potential for increased flood levels as a result of sea level rise. The Assessment used a precautionary approach of increasing flood levels in the river linearly with sea level rise. Using this approach, the proposed development's 5.5 feet safety factor would account for increases in the 100-year flood levels with 5.5 feet of sea level rise. The project would also not rely on fill, and allow floodwaters to pass underneath the residences, avoiding significant impacts to flooding in surrounding areas. The City of Del Mar's Adaptation Plan also considered flood risk from San Dieguito River and evaluated a range of potential adaptation strategies including upgrading existing levees, pulling back levees in some areas and vacant lots to create more floodplain storage, and using "horizontal levees", a nature-based adaptation strategy which would also create transitional habitat for marshes that would otherwise be lost to coastal squeeze. The proposed project site is one of several vacant lots in the surrounding area, not immediately adjacent to the San Dieguito River, and would be consistent with the range of adaptation strategies considered by the City of Del Mar's Adaptation Plan. Because the project addresses sea level rise concerns in its design and within the overall context of the City's adaptation plans, the development does not raise a substantial issue in regard to future flood hazards.

F. Community Character

Goal II-A of the certified LUP states:

Preserve and enhance Del Mar's small town atmosphere with its harmonious blending of architecture, landscape and natural landforms in proximity to a beautiful shoreline.

Policy II-1 of the certified LUP states:

Maintain the existing small-scale character of the community and permit only one- and two-story, low intensity development with a maximum allowable height of 26 feet.

Policy II-2 of the certified LUP states:

Insure that future development, whether commercial or residential, retains the aesthetic quality of the community by protecting and preserving public views to the ocean and other significant natural resources; and by minimizing the disturbance of natural topography and vegetation.

Policy III-2 of the certified LUP states:

Conserve the natural character of land, water, vegetative and wildlife resources within the community by ensuring that future development minimizes the disturbance of existing or natural terrain and vegetation, and does not create soil erosion, silting of lower slopes, slide damage, flooding problems and/or cutting or scarring, through application of the following policies:...

Goal IV-C of the certified LUP states:

Preserve existing views and view corridors from public vantage points to the maximum extent possible without preventing reasonable use of private property.

Policy IV-26 of the certified LUP states:

Retain and enhance the views of San Dieguito Lagoon along Jimmy Durante Boulevard and San Dieguito Drive through the application of scenic view easements and related view preservation restrictions for any development proposals located along the sides of such roadways within scenic view corridors.

Policy VI-4 of the certified LUP states:

To protect the biological and visual resources of wetland areas, the City shall encourage the undergrounding of all new utility lines and new utility line extensions for projects within the Lagoon Overlay Zone when such undergrounding would not be detrimental to the wetlands or to the sensitive resources located in the upland areas adjacent to such wetlands.

Policy VI-6 of the certified LUP states:

The viewsheds of the San Dieguito and Los Peñasquitos Lagoons shall be preserved and protected through the application of the following criteria into the design of new and redevelopment projects within the viewshed area of the San Dieguito and Los Peñasquitos Lagoons, respectively.

- a. Compatibility of design with the existing and desired character of the surrounding area;
- b. Recognition of views, climate and the nature of outside activities in the design of exterior spaces;
- c. Design of buildings to be subservient to the natural terrain; and
- d. Consideration of views from the lagoon and the surrounding roadways in the landscape and structure design.

The review of projects within the specified viewsheds shall be conditioned to ensure continued conformity with the criteria listed herein. Such conditions shall include but are not limited to recorded view corridor easements or restrictions.

Goal VI-A of the certified LUP states:

Preserve Del Mar's steep sloping hillsides and downstream resources.

Policy VI-1 of the certified LUP states:

Preserve and protect sensitive slopes and associated bluff and canyon areas and their downstream resources through the application of the following Bluff, Slope and Canyon Overlay Zone Regulations

Bluff, Slope and Canyon Overlay Zone Regulations

[...]

E. Development Review. Within the BSC Overlay Zone, no building improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered, or enlarged, nor shall any lot or premises be excavated or graded for any purpose, including not limited to in-ground structures such as swimming pools or spas, or cleared of vegetation, unless in accordance with this Land Use Plan and the following:

1. In order to preserve viewsheds and the open space appearance of the area from a distance, no structure shall exceed a height of 14 feet as measured pursuant to the provisions of the Del Mar Municipal Code unless it is found that scenic viewsheds and the open space appearance of the area will be less affected by structures of a greater height.
2. New development shall be sited and designed to minimize grading and alteration of natural topography and shall be subservient to and complement the natural topography of the area. Protection of the natural values of the

surrounding topography and landscape shall take precedence over architectural values.

[...]

16. To protect the visual resources of hillside areas, the City shall encourage the undergrounding of all new utility lines and new utility line extensions for projects within the Bluff, Slope and Canyon Overlay Zone when such undergrounding would not be detrimental to the sensitive hillside areas or to themselves.

Section 30.52.080(A) of the certified IP states:

Unless otherwise exempted by this Chapter, no building, improvement, structure, or portion thereof shall be erected, constructed, converted, established, altered, or enlarged; nor shall any lot or premises be excavated or graded for any purpose including, but not limited to, in-ground structures such as swimming pools or spas, or cleared of vegetation, until a Design Review Permit is first obtained in accordance with the procedures set forth in this Code. In addition to the standards of the Design Review Ordinance (DMMC Chapter 23.08) and of the underlying zone, said Design Review Permit shall be reviewed by the Design Review Board under the following standards:

- A. In order to preserve view sheds and the open space appearance of the area from a distance, structures shall be designed to be subservient to the natural landforms on the site. In addition, no structure shall exceed a height of 14 feet as measured pursuant to the provisions of this Code, unless the Design Review Board finds that scenic view sheds and open space appearance will be less affected by higher structures.

The appellants assert that the project does not conform to the certified LCP in regards to the zoning, height, lot coverage and floor area ratio (FAR), which will be analyzed together broadly in this section as “community character.” In particular, the appellants point to the project’s height of 47.5 feet when the LCP allows for buildings up to 14 feet tall in the Bluff, Slope, and Canyon (BSC) Overlay Zone; that the project is four stories where a maximum of two stories are allowed; that multi-family residential uses are not allowed in the North Commercial (NC) zone; that the approved lot coverage of 51% exceeds the allowable maximum of 40%; and that the project FAR of 1.29 exceeds the maximum allowance of 0.3 for the underlying zoning. The appellants also assert that the project will block public views of the inland bluff and visually degrade an entrance into the City of Del Mar from the north along Jimmy Durante Blvd ([Exhibit 5](#)).

Zoning/Allowable Use

In their claim that the project is inconsistent with the zoning, the appellant Jill Schulz cites Section 30.24.030 of the certified IP, which states the allowable uses of the NC Zone. As described in the Background section of this report, an LCP amendment for the NC Zone was certified on May 11, 2022, and added multiple dwelling unit residential as a permitted use in the NC Zone provided that the project include an affordable housing

component (Ref: LCPA No. LCP-6-DMR-20-0079-3). At the time of the City's approval of the subject CDP, the amendment had not yet been certified and multiple dwelling unit residential was not yet an allowable use within the LCP. While this discrepancy is notable, the LCP amendment had been approved by the Commission as consistent with the Coastal Act (with suggested modifications) at the time the City approved the subject CDP, and the amendment modifications had already been adopted by the City through Ordinance No. 987, dated March 21, 2022. The only pending action was Executive Director certification by the Commission, which occurred two days after the City approved the subject CDP. The City's LCP amendment actions combined with the processing of the subject project indicate ongoing efforts to harmonize state housing law and City housing obligations with the Coastal Act. While multi-family housing was not technically an allowed use on the day the project was approved by the City, the Commission finds there is no substantial coastal resource impact associated with allowing this use in the NC Zone, consistent with the Commission's findings when certifying the LCP amendment that allowed this use. As the Commission found during the certification of the amendment, the NC Zone was identified as one of the only areas in the City with minimal physical and structural barriers to construction of new housing. The LCP amendment has now been fully certified and multiple dwelling residential is an allowed use per today's standards. This appeal contention also raises a unique circumstance unlikely to have regional or statewide significance and unlikely to impact the City's interpretation of its LCP going forward because this use is now allowed in the North Commercial Zone under the City's certified LCP.

Lot Coverage/Floor Area Ratio

Similarly, the appellant cites Sections 30.24.070.C.4 and 30.24.070.C.3 for the exceedance of the maximum allowable lot coverage of 40% and maximum floor area ratio of 0.3 (or 30%). While these development standards found in Chapter 30.24 are not part of the LCP, the LCP does include a Zoning Table listing limited development standards associated with each zone in the City. The standards listed in this Zoning Table for the NC Zone reflect the standards found in Chapter 30.24; namely, that maximum FAR is limited to 30% and maximum lot coverage is limited to 40%. In terms of the maximum lot coverage, the applicant requested and was granted a concession to allow for an increase in coverage to 51%. As documented in the applicant's Density Bonus Report, without this concession, the development of the properties consistent with the 40% maximum lot coverage would yield only 38 units total. This would not accommodate the concessions the applicant would be entitled to under state density bonus law and would not meet the required density of 20-25 dwelling units per acre required by the City's Housing Element. The applicant also requested and was granted a waiver for an increase in FAR from 0.3 to 1.29 (including 0.52 for garage and 0.77 for habitable floors). According to the Density Bonus Report, development of the project at 30% FAR with one story above existing grade and one story over the parking garage would yield only 16 units, making it impossible for the project to meet the required density of 20-25 dwelling units per acre. Although exceedance of the maximum allowable lot coverage and FAR is not consistent with the certified LCP, the Commission finds there is no substantial coastal resource impact associated with the project's additional lot coverage and FAR, and finds that the appellants' contention

regarding the consistency of the project with these development standards does not raise a substantial issue. By increasing the lot coverage and FAR, the project avoids significant grading and landform alteration that would be required to construct a subterranean parking garage, and better preserves views of the ridgeline at the top of the bluff that would be lost by an additional and 4th story of residences, while also resulting in identifiable project cost reductions and facilitating the ability of the applicant to provide 10 lower affordable units.

Height

The appellant Del Mar Hillside Community Association states that per Section 30.52.080(A) of the certified IP, a locally-issued Design Review Permit is required for the project and that the height of the development should be limited to 14 feet. Section 30.52.080(A), found within the BSC Overlay Zone regulations of the IP, references the Design Review Permit section of the City's Municipal Code (Chapter 23.08), which is not part of the certified IP. The appellant Jill Schulz also cites Section 30.86.110.A.1, which states that the maximum allowance for height is two stories; however, this Section is also not part of the certified IP. However, other sections of the LCP require all construction in the BSC Overlay Zone to be a maximum height of 14 feet unless it is found that scenic viewsheds and the open space appearance of the area will be less affected by structures of a greater height. In that case, 26 feet (i.e. two stories) would be the height limit. In the case of the approved project, the applicant requested and was granted a waiver for an increase in the maximum number of stories from two to four. According to the applicant's Density Bonus Report, a project that is only two stories in height above existing grade and 26 feet high results in 31 total units, making it infeasible for the project to meet the required density of 20-25 dwelling units per acre and accommodate the concessions the applicant is entitled to under state density bonus law. With the additional height to account for both the construction of the podium garage and the additional story of housing development, the increased height, along with the increased FAR and lot area, allows for the development of a project at the necessary density while also maximizing protection of on-site coastal resources and nearby public access.

As outlined above, the project as approved by the City does present some inconsistencies with the certified LCP in regards to allowable use, lot coverage, FAR, and height. In this case the bulk and scale of the project, while larger than those for neighboring properties on the inland bluff and as found in the LCP, does not present a coastal resource impact. As described in the sections above, the development has been designed to minimize impacts to the resources on-site and cluster development to the maximum extent possible while achieving the density required of the City's Housing Element. Moreover, the development will be located at an intersection currently comprised of local businesses and a brewery/restaurant, as well as a public trail, and the addition of the Watermark development will enhance the character and vibrance of the immediate area. A shorter project with the same number of units would have a larger footprint, thereby resulting in greater impacts to onsite resources such as the wetlands, steep slopes, etc. None of these waivers will result in significant adverse impacts on coastal resources and therefore do not raise a substantial issue.

Public Views

The appellants assert that the project will block public views of the inland bluff and visually degrade an entrance into the City of Del Mar from the north along Jimmy Durante Blvd. In terms of public views, the project will not impact any blue water views or views of the San Dieguito Lagoon when driving along Jimmy Durante Boulevard from the south. This is due to the presence of existing buildings on the banks of the lagoon as well as the flat topography of the area as well as the eastern bend in the road along Jimmy Durante Boulevard as one drives north. Similarly, driving south along Jimmy Durante Boulevard, no views of the lagoon will be blocked, and, as noted in the project's public view analysis from July 2021, the project has been designed to preserve views of the sandstone bluffs above the wetlands at the site, as well as the Torrey pines trees that define the top of slope behind and above the project's structures ([Exhibit 10](#)). Public views of the undisturbed coastal bluffs on the northeastern portion of the site, which comprise part of the overall background, will remain visible from and across the San Dieguito River. As part of the approved project, the overhead utility lines on the project site will be undergrounded, removing a visual impediment.

Sidewalk improvements will extend from the existing roundabout along the full length of the site's frontage on San Dieguito Drive and Jimmy Durante Boulevard. Within the parkway, streetscape landscaping will be provided that accentuates the architecture as well as enhances the area. Jimmy Durante Boulevard will include dense landscape treatments to screen the parking garage. A combination of natural materials such as brick and stone will be utilized in the project design, and a natural/rustic inspired color palette that includes many gray and neutral colors such as blue, green, and dark red. These materials and colors will not be visually obtrusive against the bluff and will blend with the surrounding natural features. Development of the disturbed site, coupled with the undergrounding of overhead power lines, will result in a net benefit to the overall view and perception of the North Commercial zone.

Policies II-2 and III-3 of the LUP emphasize the importance of minimizing impacts to natural topography and terrain to help in maintaining community character and preserving the City's natural resources. The project as approved does not block ocean views or disrupt existing views of the lagoon from within the City or from the I-5 Freeway. It is set against an inland bluff, but significant landform alteration will not take place as part of the development and views of the Torrey pines and coastal bluffs on the northeastern side of the site will remain visible. Because of these factors, no substantial impact to public views will take place as a result of this project.

In sum, although the project is not fully consistent with all the certified LCP development standards, the Commission finds there is no substantial coastal resource impact associated with the project's additional height, density, and FAR and finds that the appellants' contention regarding the consistency of the project with these development standards does not raise a substantial issue.

G. Substantial Issue Factors

In this case, the proposed development does not raise a substantial issue concerning public access, biological resources, steep slope encroachment, flooding, and community character, as explained and analyzed by staff in the above sections. The Commission considers five factors when evaluating whether a local government's action raises a substantial issue. The first is the degree of factual and legal support for the local government's decision that the development is consistent or inconsistent with the certified LCP. Due to the lack of a density bonus exemption within the certified LCP, the appellants correctly state that certain aspects of the approved project are inconsistent with the certified LCP. However, the inconsistencies are technical. Given the exceptions to development standards offered by density bonus law due to the lack of coastal resource impacts for those inconsistencies such as height, the resulting project does not create a substantial issue. Additionally, the applicant has changed the project several times in order to address environmental issues.

The second factor is the extent and scope of the development as approved or denied by the local government. The extent and scope of the development are considerable; in fact, as a housing development that offers affordable units and acts on the density bonus opportunities offered by the legislature, this factor supports the local approval.

The third factor is the significance of the coastal resources affected by the decision. The site has several important resources, most notably including the wetlands and ESHA. As explained in detail in the discussion of each resource, the project has avoided or mitigated impacts to the greatest extent feasible, including obtaining Coastal Commission and CDFW concurrence for a reduced wetland buffer upon inclusion of specific restoration and monitoring requirements; the protection of sensitive plant species upslope of the development and planting of natives to enhance the entire steep slope area where ESHA is found; the use of a clustering approach to minimize encroachment into steep slopes to the allowable amount as found in the LCP; elevation and floodproofing to protect residences from the threat of current and future flooding; and intentional design strategies to minimize alteration of the natural terrain and protect public views of the bluff ridge while not obstructing public views of the San Dieguito Lagoon. Thus, while the resources are significant, the assertions do not create a substantial issue.

The fourth factor is the precedential value of the local government's decision for future interpretations of its LCP. The Commission acknowledges that the permit approval and the LCPA zoning would have been better addressed in the proper order: LCPA, then permit approval. However, the permit approval and the effective certification of the zoning were days apart. Additionally, while the LCP lacks a density bonus provision that explicitly allows for certain allowances in development standards, the state's density bonus law nevertheless applied to this project. The Commission assigns a lesser weight to this factor but notes these issues for the City's future consideration.

The fifth factor is whether the appeal raises only local issues, or those of regional or statewide significance. The coastal resource issues raised by the appellants are not of

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statewide significance. However, the housing crisis is of statewide importance and therefore this factor supports the local approval.

Thus, the factors the Commission normally considers when evaluating whether a local government's action raises a substantial issue also do not support a finding of substantial issue.

APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- CDP No. 6-DMR-12-191 (issued by City of Del Mar)
- Letter from City of Del Mar to Randy Brown (Sowards and Brown Engineering). March 24, 2014. “Re: Review of Watermark Del Mar Property Steep Slope Analysis.”
- Letter from City of Del Mar to Tony Cassolato and Don Glatthorn (San Dieguito Land Partners, LLC). March 26, 2015.
- Environmental Science Associates (ESA). April 2016 (Updated July 2016). “Coastal Hazards, Vulnerability, and Risk Assessment.” Prepared for the City of Del Mar.
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