

**CALIFORNIA COASTAL COMMISSION**

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# W16a

CDP Approved: 2/8/24  
Staff: L. Roman-LB  
Staff Report: 4/25/24  
Hearing Date: 5/8/24

## STAFF REPORT REMANDED CDP ACTION REVISED FINDINGS

**Application No.:** 5-18-0930

**Applicant:** Graham Property Management, LLC.

**Agents:** Mark McGuire and Sherman Stacey

**Location:** 217 Vista Marina, San Clemente, Orange County  
(APN 692-252-01)

**Project Description:** Construction of a new three-level, 25-ft. tall above natural grade, 4,527 sq. ft. single-family residence, 862 sq. ft. of garage space (295 sq. ft. front garage and 567 sq. ft. back garage), 1,826 sq. ft. of terrace/deck areas, grading for the construction of the semi subterranean level, 20 caissons for stabilization of the building pad area, retaining wall/radiant heat barrier wall surrounding development, new cul-de-sac/fire truck turnaround with driveway cut-out, installation of a new fire hydrant at cul-de-sac, drainage improvements, new landscaping, and restoration of native vegetation on a vacant 34,784 sq. ft. coastal canyon lot.

**Commission Action:** Approved February 8, 2024

**Commissioners on Prevailing Side:** Chair Caryl Hart, Commissioners Dayna Bochco, Effie Turnbull-Sanders, Susan Lowenberg, Katie Rice,

Paloma Aguirre, Meagan Harmon, Roberto Uranga, and  
Dr. Justin Cummings

**Staff Recommendation:** Adopt Revised Findings

## STAFF NOTE

Staff recommends the Commission adopt the following revised findings in support of the Commission's February 8, 2024 approval of Coastal Development Permit application 5-18-0930. This report was generated by first integrating the February 7, 2024 addendum into the original (January 26, 2024) staff report, then adding revisions and additional findings to reflect the Commission's action at the February 8 hearing. These changes are shown in ~~strikethrough~~ (for deletions) and **bold underline** (for additions). Commissioners who are eligible to vote on the revised findings are those from the prevailing side who are also present at the February 8, 2024 Commission hearing. See page 11 for the motion to adopt the revised findings.

## SUMMARY OF ORIGINAL COMMISSION ACTION

On June 14, 2019, the Coastal Commission denied CDP application 5-18-0930 for the construction of a 5,165 square foot (plus 1,239 sq. ft. garage, 1,931 sq. ft. terrace/deck area, and retaining wall) home in Trafalgar Canyon in San Clemente. The Applicant subsequently sued the Commission over its action, claiming, among other things, hearing irregularities related to Commissioners' ex-parte communications and the disclosures thereof.

On September 16, 2022, the superior court granted the petition solely on the basis of "irregularities regarding undisclosed ex-parte communications." It issued no ruling on the merits of the Commission's substantive decision and action. On December 15, 2022, the superior court issued a writ of mandate directing the Commission to set aside and vacate its June 14, 2019 decision; hold a new hearing on CDP Application 5-18-0930; and approve, conditionally approve, or deny the application based upon the evidence presented at the new hearing.

In its original action, the Commission concluded that in order to avoid an unconstitutional taking of private property, it might have to allow some residential development on the site, even if that would be inconsistent with the resource protection policies in Chapter 3 of the Coastal Act. However, the Commission found that, given the procedural posture in which the application had come before the Commission, it was not necessary to approve the proposal at that time in order to avoid a taking or to comply with Section 30010 of the Coastal Act. In fact, the Commission found that it

would be premature to do so based on the current record at the time. In particular, Commissioners at the June 14, 2019 meeting recognized the complicated nature of the proposed development, open questions about what the City was willing to approve, and what they deemed significant deficiencies with the proposal, and the Commission found that further review of the project by the City at the local level would help clarify the scope of the final project that could be undertaken by the Applicant.

The Commission denied the project in order to allow the Applicant to go through the City's variance process to obtain local approval for its project (as the Commission's canyon edge determination meant that the entire project was within the coastal canyon, and the City code prohibits development within coastal canyons unless a variance is granted), recognizing that that variance process could alter the nature and scope of the project from the version presented for Commission action. Therefore, the Commission denied the coastal development permit application to allow for further review by the City.

### **SUMMARY OF STAFF RECOMMENDATION ON FEBRUARY 8, 2024**

The Applicant's site is developmentally constrained, as the entire lot consists of a coastal canyon slope, much of which is Environmentally Sensitive Habitat Area (ESHA). As a result, it presents significant challenges to any development. The Applicant has reduced the size of the proposal in recognition of these facts. However, **as of the beginning of 2024**, the Applicant **was** still proposing construction of a 4,527 sq. ft. residence and a combined 862 sq. ft. garage space (i.e., 295 sq. ft. front garage and 567 sq. ft. back garage), a radiant heat barrier wall/perimeter wall surrounding the residential development, a new cul-de-sac/fire truck turnaround and driveway on a generally flat terrace area on the slope of a coastal canyon. The subject lot is 34,784 sq. ft. Overall, the project had a development envelope (including new cul-de-sac and driveway) that utilized approximately 12,921 sq. ft. (37% of the lot), of which 8,761 sq. ft. of the site coverage lies inside the proposed radiant heat barrier wall/perimeter wall and includes the proposed residence, decks and terraces, landscaped areas, and a long driveway that also provides fire protection by creating a non-combustible zone between the residence and any potential flames from a brush fire. The remaining approximately 4,000 sq. ft., which is outside of the radiant heat barrier wall/perimeter wall, is for the cul-de-sac and driveway apron. The Applicant proposes **sd** to preserve and enhance (by means of invasive plant removal and additional planting of natives) the remaining 63% of the lot as open space and public trail. The project also includes **sd** grading of approximately 1,675 cubic yards of cut for the construction of the semi-subterranean level and stabilization of the development pad area with deepened caissons and an additional 275 cubic yards of fill. The proposed minimum-sized cul-de-sac/firetruck turnaround with new fire hydrant will benefit the proposed new development and the general public. As noted above, the Applicant also proposes **sd** a new public trailhead/ocean viewpoint along with the preservation of and improvements to an existing pioneered/unpaved trail. This unpaved trail provides a connection from the

Vista Marina street-end, through the subject private property, to the existing Trafalgar Canyon trail located at the bottom of the canyon that continues on to the beach.

The Applicant sited the development footprint on a relatively flat portion of the lot that supports a pre-dominance of non-native grasses and forbs, an area that has been subject to regular maintenance for fire hazard management purposes for decades. The Applicant argues this siting will avoid the direct displacement of native vegetation. However, patches of Giant Wild Rye are located within the proposed development envelope. The Commission's lead ecologist, Dr. Jonna Engel, has identified the patches of Giant Wild Rye on the site as ESHA. Furthermore, the proposed development envelope would be sited immediately adjacent to Lemonade Berry Scrub ESHA and other areas of Giant Wild Rye Grassland ESHA, providing no buffer area. As proposed, the project would have a direct impact on patches of Giant Wild Rye ESHA on the proposed development footprint and an indirect impact on the surrounding Lemonade Berry Scrub ESHA and other Giant Wild Rye ESHA located outside the proposed development footprint by providing no spatial buffer area between the proposed development and that ESHA. Thus, the development is inconsistent with Coastal Act Section 30240, which requires environmentally sensitive habitat areas to be protected against any significant disruption of habitat values, prohibits non-resource dependent development within ESHA, and requires a sufficient separation between development and ESHA to prevent impacts that would significantly degrade the ESHA. Furthermore, the certified LUP contains a default 100-foot buffer from ESHA, with the possibility of reducing the size of that buffer based on site-specific characteristics. Applying a 100-foot buffer, or even a reduced buffer of half that size (the Commission's lead ecologist has concluded that a minimum 50-foot buffer from ESHA would be appropriate here) would render the entire site completely undevelopable.

There is also the issue of past unpermitted native vegetation removal, which has occurred on the site, including in previous years prior to the Applicant's ownership, and is addressed in the Unpermitted Development section of the staff report. The Commission has to assess the impacts of any proposed development by treating the present (or baseline) condition of the site as the condition that would have existed were it not for any illegal development. The Applicant contends that the vegetation removal was not illegal because it was authorized by a municipal nuisance abatement order, rendering it exempt from the need for a coastal development permit; however, Commission staff believes the order did not authorize removal of Giant Wild Rye. Thus, the Commission would have to consider how such native vegetation would be distributed across the site had it not been removed. In this case, had the unpermitted vegetation removal not occurred, then Giant Wild Rye on the proposed development footprint would have persisted and spread, such that the proposed development must be treated as resulting in direct impacts to Giant Wild Rye ESHA.

Also, the proposed project is inconsistent with the City of San Clemente's certified Land Use Plan (LUP) policies, specifically LUP Canyon Setback Policy HAZ-47, which

prohibits new development or redevelopment from encroaching into coastal canyons. The LUP provides for three possible development setbacks along coastal canyons. These require either a minimum 15 ft. setback from the canyon edge, or a setback from the line of native vegetation, or in accordance with a stringline. Since the project has been identified to be located on the canyon slope/face by the Commission's staff geologist, it is unable to meet any of the LUP's setback requirements, no matter the size or siting of the proposed development.

The proposed project raises other coastal resource concerns that can be addressed via conditions, but because of the fundamental inconsistencies with policies in the LUP and Chapter 3 of the Coastal Act regarding impacts to ESHA, approval consistent with all of the LUP and Chapter 3 is not possible, even with conditions. The fact that the project cannot be made consistent with the standard of review ordinarily would result in a denial of the project. However, because almost any use of the property would face the same Chapter 3 inconsistencies, denial on this basis would effectively mean that no economically viable project could be approved on this site, and the property owner would be left with an unusable site. Therefore, consistent with the mandate of Coastal Act Section 30010, and since any economic use of the subject property would likely result in some degree of Coastal Act inconsistency, staff recommended approval of some residential development to provide for a reasonable use of the property to avoid a potential unconstitutional taking of private property for public use. Staff is recommending inged a reduced development footprint in order to minimize the inconsistencies with the ESHA protection policies while still providing enough space for a small home.

In terms of the Commission's previously stated interest in greater clarity as to what the City would approve, the City has recently stated that it stands by its original Approval-In-Concept (AIC), dated September 5, 2018, for the proposed single-family residence at 217 Vista Marina. The City acknowledged that the AIC was issued based, in part, on their understanding that the project complied with the minimum 15-foot canyon edge setback. The City does not believe that any new information has emerged since the City issued its AIC that calls that decision or the City's canyon edge determination into question, and it is not interested in reconsidering its approval based on Commission staff's canyon edge determination. The City understands that the Commission itself may approve the CDP application with a different canyon edge determination that would render the project out of compliance with LUP Canyon Setback Policy HAZ-47 and City Municipal Code Section 17.56.050(D)(2) (prohibiting development from encroaching into coastal canyons). However, the City indicated that even if the Commission were to do so, then the City would review and consider issuing a variance after the Commission's action, but not before. In any case, the City has sd made it clear that it is not interested in revising its approval ahead of this Commission's action, so there is no remaining ambiguity as to what the City is willing to approve, and the Commission has sd the clarity it was awaiting.

The Applicant's original 2018 CDP submittal was for construction of a 5,430 sq. ft. residence and a 1,439 sq. ft. garage. The Applicant ~~has~~ reduced the size of residence from 5,430 sq. ft. to 4,527 sq. ft. (a 903 sq. ft. reduction) and the garage from 1,439 sq. ft. down to 862 sq. ft. (a 577 sq. ft. reduction), and terraces/decks from 1,931 sq. ft. to 1,826 sq. ft. The area within the radiant heat barrier wall is reduced from approximately 9,000 sq. ft. down to 8,761 sq. ft. Staff and the Applicant ~~have~~ had numerous communications and meetings about the footprint of the development and adequacy of a setback from ESHA; however, the Applicant believes the project as proposed can be approved without a takings override, as in their opinion, the home has been designed to not substantially degrade the canyon's ESHA-designated areas.

Additionally, the Applicant ~~has~~ demarcated where it believes the canyon edge lies on the subject vacant parcel, and based on that location, the project would provide a 15-ft. canyon edge structural setback. The project received an Approval-in-Concept from the local government based on this canyon edge interpretation. However, this canyon edge demarcation is not consistent with the Commission staff geologist's understanding of the canyon topography. According to the Commission's analysis, the relatively flat pad where development is proposed more accurately reflects a step-like feature on the canyon slope (In other words, the development site is *on* the canyon slope, rather than being set back from it.). Because, under that interpretation, this site lies beyond the canyon edge, there is no canyon edge present on this site, and therefore, no development onsite could meet a 15-foot canyon edge setback.

Staff's recommendation recognizes~~s~~ that this is not a typical coastal canyon lot where the building site is a flat area at the canyon top inland of a clearly defined canyon top/edge, as is more common along San Clemente's coastal canyons. On the contrary, the subject lot is comprised entirely of a canyon slope (the lot is on the face of the canyon, beyond the canyon edge, such that there is no canyon edge on this lot) and much of which is Lemonade Berry Scrub ESHA with scattered patches of Giant Wild Rye Grassland ESHA. The Applicant's proposed siting of the development envelope takes into consideration direct avoidance of the Lemonade Berry Scrub ESHA patches within the canyon, minimization of visual impacts, and minimization of landform alteration; however, it remains that the *entire development footprint* lies within what would be either Giant Wild Rye ESHA or the appropriate ESHA buffer from other areas of Giant Wild Rye ESHA and the Lemonade Berry Scrub ESHA, which dominates the surrounding proposed development footprint, rendering the site undevelopable. Therefore, in this takings approval context, the Commission must consider an even further reduced development envelope than that proposed by the Applicant, taking into account the possibility of providing a 50-foot buffer from at least one patch of Lemonade Berry Scrub ESHA on the subject lot in order protect some of the ESHA in the canyon against any significant disruption of habitat values and to be as compatible as possible with the continuance of those habitat areas to the most viably extent possible.

**Exhibit 12** depicts a 50-foot buffer from the largest of the four patches of Lemonade Berry Scrub ESHA situated at the easternmost end of the lot (towards the interior end of the canyon), thereby identifying a development footprint that would minimize adverse impacts to ESHA to the greatest extent possible while still providing a reasonable economic use of the property. On January 26, 2024, in preparation for the February Commission meeting, Staff issued its staff report and recommendation, recommending that the application be approved, subject to conditions, to avoid a taking. The first of the recommended conditions required that the size of the house be reduced by prohibiting development within the 50-foot buffer depicted in Exhibit 12. However, on the Friday before the hearing, February 2, 2024, counsel for the applicant submitted a lengthy analysis arguing that when the applicant purchased the property, they had a reasonable, investment-backed expectation of being able to build a significantly larger house than the staff recommendation and the original proposal for Special Condition 1 (requiring revised plans providing a 50-foot buffer from the largest ESHA patch) would have allowed. In the Staff presentation at the hearing, Staff noted that if true, that could be another relevant factor in the takings analysis. This analysis is highly fact-intensive and somewhat subjective, but the applicant had proposed a compromise as depicted on a graphic titled Proposed Development Footprint by Glenn Lukos Associates dated 2/2/2024 Glenn Lukos Associates (included as Exhibit 18) that would involve additional development in only two very small areas, totaling about 350 sq. ft. Given the totality of the facts here, including the arguments laid out in the submittal on the prior Friday, staff concluded that allowing this minimal additional development would be warranted. Additionally, staff is recommending that mitigation be required for impacts to the remaining patches of ESHA that are not properly buffered from the proposed development and mitigation for past direct impacts (i.e., removed patches of Giant Wild Rye from the relatively flat portion of the lot).

The Commission staff lead ecologist provided a memorandum dated May 29, 2019, determining that Lemonade Berry Scrub on the site rises to the level of ESHA and provided an updated memorandum dated November 30, 2023, clarifying the boundaries of the Lemonade Berry Scrub ESHA patches and the minimum required ESHA buffers and existing Giant Wild Rye Grassland on the subject site as ESHA. Another updated memorandum dated January 23, 2024 further clarifies that the smaller patches of Giant Wild Rye Grassland interspersed among non-native forbs on the proposed development footprint are also considered ESHA (all memos are included as **Exhibit 16**). The certified LUP requires a 100-foot buffer around ESHA with an allowance for a narrower buffer where necessary due to site constraints. Previously, the Commission has required mitigation/restoration for indirect impacts to wetlands and ESHA by enhancing all portions of the remaining buffer area through invasive species removal, native

vegetation screening, native species planting, water quality improvements, and sound reduction. To ensure that potential indirect impacts to ESHA are avoided, the Commission typically requires a 100-foot buffer between development and ESHA. In some cases, however, a reduced buffer can be found consistent with Section 30240 because the proposed development with the reduced buffer will not “significantly degrade” the ESHA or prevent the continuation of the adjacent habitat. In this instance, the Commission’s lead ecologist has determined that a reduced 50-foot buffer may be deemed as adequate for this site because a 6-foot-tall perimeter wall is proposed between the residential development and the canyon habitat, which will also serve as a disturbance barrier from adverse anthropogenic impacts such as noise, artificial night lighting, fertilizers, pesticides, domestic animals, etc. However, as the proposed development would be sited immediately adjacent to several of the ESHA patches, it is not possible to provide even a reduced 50-foot buffer. Therefore, if approved to avoid a takings, the Applicant will be required to mitigate impacts from increased human activity in the area due to a lack of even a reduced 50-ft. buffer from much of the surrounding ESHA. As the required mitigation area is most likely larger than that available for on-site mitigation, mitigation will also be necessary off-site. Ideally off-site mitigation areas should be proximal to the site or in the project vicinity, preferably within Trafalgar Canyon and in-kind. The Applicant asserts, and the Executive Director agrees, that if there are no viable proximal off-site mitigation areas, the Applicant may pursue alternative but equivalent mitigation.

Furthermore, development has occurred on the subject site without benefit of the required coastal development permit. Staff confirmed that major vegetation removal has occurred on the site, including in previous years prior to the Applicant’s ownership, consisting of removal of patches of Giant Wild Rye on the generally flat pad on the central portion of the site (within the proposed development footprint). The removal of ESHA and major vegetation without a coastal development permit constitutes a violation of the Coastal Act. Vegetation can qualify as “major vegetation” based on its importance to coastal habitats. Giant Wild Rye is known to exist in the herbaceous layer of the scrub communities in the area (Lemonade Berry Scrub). In 2019, at the time the violation notice was issued by Commission enforcement staff, Giant Wild Rye was not identified as ESHA; however, it was considered major vegetation. After recent additional review, the Commission’s lead ecologist identified the native Giant Wild Rye Grassland in Trafalgar Canyon as ESHA, including the patches of Giant Wild Rye previously removed on the generally flat pad on the central portion of the site. It is the Commission’s understanding that the City issues nuisance abatement orders for vacant lots requiring removal of weeds, rubbish and refuse, including for the subject property, and that, according to representations of the Applicant, the City has on occasion undertaken vegetation removal on the property and on adjacent properties. However, these orders did not direct nor authorize removal of the Giant Wild Rye, the unpermitted



development at issue. In 2019, Commission staff also investigated reports that Coastal Lemonade Berry had likewise been recently removed from areas within the proposed development footprint and verified that no Lemonade Berry removal had occurred on the site. **Special Condition 2** requires the Applicant to quantify the area of impact from the previous major vegetation removal of Giant Wild Rye and mitigate for the direct loss impacts to Giant Wild Rye ESHA within the currently proposed development footprint through restoration at a 4:1 mitigation ratio; thus accounting for the typical 3:1 mitigation ratio required to effectively restore the removal of Giant Wild Rye ESHA and an additional 1:1 ratio providing additional restoration in order to fully resolve the alleged violation. Approval of this CDP application pursuant to the staff recommendation, issuance of the permit, and the Applicant's subsequent compliance with all terms and conditions of the permit will result in resolution of the above-described alleged violation.

In addition, the recommendation included a series of special conditions to address coastal hazards, public access, protect cultural resources, require construction BMPs to reduce impacts to water quality, require a post-construction drainage and runoff control plan, and conditions that require deed restrictions for the preservation of the remaining undeveloped open space and for a public trail through this private property lot for connection to a public trail at the bottom of the canyon. Staff believed that the project, as conditioned, ~~will~~ **would** allow a viable economic use of the property (on a site that would otherwise be unable to support a residential use) while still protecting coastal resources as much as possible in light of takings considerations, and appropriately responds to the unique circumstances and challenges of this case. The Applicant disagreed with the staff determination of what areas on or near the subject lot rise to the level of ESHA, what constitutes an adequate buffer area from ESHA in this case, the mitigation ratios for the impacts to ESHA due to a lack of buffer area, and what constitutes a fair residential development footprint allowing a reasonable beneficial use of the property. Again, staff ~~has~~ had numerous conversations with the Applicant to try to resolve these differences, but staff ~~does~~ **did** not see a path to doing so **prior to receiving the applicant's proposal on the Friday prior to the hearing.**

Thus, staff is recommending approval of the proposed coastal development permit with **nine (9)** special conditions addressing: 1) Submittal of Final Revised Final Plans; 2) Coastal Lemonade Berry Scrub and Giant Wild Rye Grassland Restoration and Monitoring Plan; 3) Open Space/Habitat Use Restrictions; 4) Public Access Deed Restriction; 5) Orange County Fire Authority Approval; 6) Cultural Resource Treatment and Monitoring Plan; 7) Construction BMPs; 8) Future Development; and 9) Assumption of Risk, Waiver of Liability.

## TABLE OF CONTENTS

<b>I. MOTION AND RESOLUTION .....</b>	<b>11</b>
<b>II. STANDARD CONDITIONS .....</b>	<b>12</b>
<b>III. SPECIAL CONDITIONS.....</b>	<b>12</b>
<b>IV. FINDINGS AND DECLARATIONS .....</b>	<b>23</b>
A. PROJECT LOCATION AND DESCRIPTION .....	23
B. STANDARD OF REVIEW .....	26
C. BIOLOGICAL RESOURCES.....	26
D. HAZARDS.....	35
E. PUBLIC ACCESS AND RECREATION .....	44
F. VISUAL RESOURCES.....	46
G. CULTURAL RESOURCES .....	49
H. WATER QUALITY .....	51
I. UNPERMITTED DEVELOPMENT .....	53
<b>J. PERMIT DETERMINATION CONCLUSION .....</b>	<b>54</b>
<b>K. TAKINGS .....</b>	<b>56</b>
<b>L. APPROVABLE PROJECT .....</b>	<b>63</b>
M. LOCAL COASTAL PROGRAM (LCP).....	70
N. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).....	71
 <b>APPENDIX A - SUBSTANTIVE FILE DOCUMENTS.....</b>	 <b>72</b>
 <b>APPENDIX B – CULTURAL RESOURCES SIGNIFICANCE TESTING PLAN PROCEDURES .....</b>	 <b>72</b>
 <b>EXHIBITS</b>	
<a href="#"><u>Exhibit 1 – Vicinity Map</u></a>	
<a href="#"><u>Exhibit 2 – Assessor’s Parcel Map</u></a>	
<a href="#"><u>Exhibit 3 – 2023 Updated Site Plan</u></a>	
<a href="#"><u>Exhibit 4 – 2023 Updated Architectural Plan</u></a>	
<a href="#"><u>Exhibit 5 – 2019 Landscaping Plan</u></a>	
<a href="#"><u>Exhibit 6 – 2019 Preliminary Grading Plan</u></a>	
<a href="#"><u>Exhibit 7 – 2023 Updated Geologic Map and Cross-Sections</u></a>	
<a href="#"><u>Exhibit 8 – 2018 Vegetation Map</u></a>	
<a href="#"><u>Exhibit 9 – 2023 Vegetation Map</u></a>	

[Exhibit 10 – LUP Figure 4-2-A, Potential Sensitive Habitat](#)

[Exhibit 11 – 50-foot ESHA Buffer Areas](#)

[Exhibit 12 – Allowable New Development Footprint](#)

[Exhibit 13 – Required Mitigation Area](#)

[Exhibit 14 - Proposed Trail Area](#)

[Exhibit 15 – 2019 Proposed Open Space Conservation Area](#)

[Exhibit 16 – Staff Memoranda: 217 Vista Marina ESHA Determination](#)

[Exhibit 17 – Staff Memoranda: 217 Vista Marina Canyon Edge Determination](#)

[Exhibit 18 - Proposed Development Footprint by Glenn Lukos Associates dated 2/2/2024](#)

## **I. MOTION AND RESOLUTION**

### **MOTION:**

I move that the Commission **adopt** the revised findings proposed by staff in support of the Commission's action on February 8, 2024, conditionally approving Coastal Development Permit Application 5-18-0930.

### **STAFF RECOMMENDATION TO ADOPT REVISED FINDINGS:**

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side who are also present at the revised findings hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

The Commissioners on the prevailing side eligible to vote are: Chair Caryl Hart, Commissioners Dayna Bochco, Effie Turnbull-Sanders, Susan Lowenberg, Katie Rice, Paloma Aguirre, Meagan Harmon, Roberto Uranga, and Dr. Justin Cummings.

## **RESOLUTION TO ADOPT REVISED FINDINGS:**

The Commission hereby adopts the findings set forth below for the approval of Coastal Development Permit 5-18-0930 on the ground that the findings support the Commission's decision made on February 8, 2024, and accurately reflect the reasons for it.

## **II. STANDARD CONDITIONS**

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittees to bind all future owners and possessors of the subject property to the terms and conditions.

## **III. SPECIAL CONDITIONS**

This permit is granted subject to the following special conditions:

1. **Final Revised Plans.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit Final Revised Plans for the Executive Director's review and approval. The Final Plans shall be prepared by a

licensed professional or professionals (i.e., architect, surveyor, geotechnical engineer, etc.), shall be based on current professionally surveyed and certified topographic elevations for the entire site, and shall include a graphic scale. The Final Plans shall clearly show the development's siting and design, including through elevation and site plan views and shall comply with the following requirements:

- a. **Development Footprint.** All proposed new development (including accessory development, e.g., driveway, patio, landscaping, etc.) on the subject property shall be located within the allowed development footprint as identified on [Exhibit 12](#) or **within the additional 348 square feet depicted on the graphic by Glenn Lukos Associates titled "Proposed Development Footprint" dated 2/2/2024**, except for development associated with the Trail Construction Plan per subsection j of this special condition. No development shall have direct impacts to the portions of Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA identified in [Exhibit 11](#).
- b. **Height.** Development shall not exceed the 25-ft. above existing (natural) grade City height limit.
- c. **Design.** All development shall incorporate architectural details and varied materials to reduce the apparent mass of the residence. Building facades should be broken up by varied rooflines, offsets and building elements in order to avoid a box-like appearance. Variations in wall planes, roof lines, detailing, materials and siding should be utilized to create interest and promote a small-scale appearance. All siding shall be natural, neutral, colors, white and black tones shall not be used. All windows and other surfaces shall be non-glare and non-reflective and all lighting shall be minimized to avoid light wash visible from public trails or public vantage points.
- d. **Conformance with Geotechnical Recommendations.** The Applicant shall provide evidence that an appropriately licensed professional has reviewed and approved all final design and construction plans including foundation and grading/drainage plans and certified that each of those final plans is consistent with all the recommendations contained in the geologic engineering investigations.
- e. **Exterior and Retaining Walls.** Exterior retaining walls/privacy barrier walls shall be colored/textured with earth tones that are compatible with the adjacent canyon vegetation.
- f. **Landscaping Plan.** All landscaping areas within the approved development footprint (see Special Condition 1(a) above) shall consist of

drought-resistant California native species. Any proposed irrigation systems shall limit water use to the maximum extent feasible, including using irrigation measures designed to facilitate reduced water use (e.g., micro-spray and drip irrigation). No plant species listed as problematic and/or invasive by the California Native Plant Society, the California Invasive Plant Council, or as may be so identified from time to time by the State of California, and no plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be planted or allowed to naturalize or persist on the site.

- g. **Lighting Plan.** Final revised plans shall include a lighting plan to protect the canyon open space from light generated by the project. The lighting plan shall be accompanied by an analysis of the lighting plan prepared by a qualified biologist documenting that the lighting plan is effective at preventing lighting impacts upon adjacent biological resources. All lighting shall be directed and shielded, no skyward-casting lighting shall be used. The lowest intensity outdoor lighting shall be used appropriate to the intended use of the lighting.
- h. **Drainage and Runoff Control Plan.** A post-construction drainage and runoff control plan shall be provided outlining a drainage control system sited and designed: to collect, filter, treat, and direct all site drainage and runoff in a manner intended to protect and enhance coastal resources as much as possible; to prevent pollutants, including increased sediments, from entering coastal waters as much as possible; to filter and treat all collected drainage and runoff to minimize pollutants as much as possible prior to infiltration or discharge from the site; to retain runoff from roofs, driveways, decks, and other impervious surfaces onsite as much as possible; to use low impact development (LID) best management practices (BMPs) as much as possible; to be sized and designed to accommodate drainage and runoff for storm events up to and including at least the 85th percentile 24-hour runoff event (allowing for drainage and runoff above that level to be likewise retained and/or conveyed in as non-erosive a manner as possible).
- i. **Public Access.** The Final Plans shall show the public access trail area required by **Special Condition 4** below and as generally described in **Exhibit 14**.
- j. **Trail Construction Plan.** The Applicant shall submit, for the review and written approval of the Executive Director, a detailed final trail plan, including a site plan that shows the alignment of the trail in conformance with the alignment shown in [Exhibit 14](#). The final trail plan shall show existing vegetation including sensitive habitat areas, and show all

proposed development including grading, staging, signage, structures (e.g., proposed bench and signage at trailhead), open space, and trail alignment, and shall be consistent with the following criteria:

- i. Trail Description (Trail Use, Alignment, Width, and Extents) – Trail Plan shall include a detailed description that includes intended use (i.e., pedestrian use) and how that use will be indicated, alignment, trail width (i.e., 4- foot wide trail in a 8-foot wide trail corridor), and trail extents (e.g. runs for length of xx feet, and extends from xx and to xx), and identify connections to trails or shoreline accessways on adjacent properties.
  - ii. Development Restrictions – No development, as defined in Section 30106 of the Coastal Act, shall occur within the trail easement identified on the final plans except for the following development: grading and construction necessary to construct and maintain the trail(s) and other development approved by this permit; maintenance of public access facilities and appurtenances (e.g., signs, benches), planting and removal of vegetation consistent with the special conditions of this permit, any permitted underground utilities, drainage devices, and erosion control and repair provided that any development that diminishes public access through any trail corridor shall be prohibited.
  - iii. Trail Surfacing Materials – Trail shall consist of an at-grade, decomposed granite footpath.
  - iv. Construction Timing – Construction of the trail shall be finalized at the conclusion of the construction for the proposed residential development on the subject lot.
  - v. Operations and Maintenance Plans – Operation and maintenance components of the Trail Plan shall specify that the trail is available for public pedestrian use during daylight hours, 7-days a week. Allowable maintenance activities shall be described, and improvements to support trail uses such as benches or other developments shall be indicated on the plan.
  - vi. Signage – Final Trail Plan shall identify the content and location of all signs and any other project elements intended to facilitate, manage and provide public access to and along the approved trail segment. Signs shall be sited and designed so as to provide clear information without impacting public views and site character.
- k. **Local Government Approvals.** The Applicant shall provide to the Executive Director a copy of an approval for the proposed development issued by the City of San Clemente, or letter of permission for construction on the proposed site, or evidence that no permit or permission is required. The Applicant shall inform the Executive Director of any changes to the

project required by the City of San Clemente. Such changes shall not be incorporated into the project until the Applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director issues a written determination that no amendment is legally required.

The Applicant shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this Coastal Development Permit unless the Executive Director determines that no amendment is legally required.

2. **Lemonade Berry Scrub and Giant Wild Rye Restoration and Monitoring Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit for review and written approval of the Executive Director, a detailed habitat enhancement/restoration and monitoring plan as proposed by the *“Biological Technical Report, 217 Vista Marina, San Clemente, Orange County, California”* prepared by Glenn Lukos Associates, dated July 2018. The plan shall quantify the area of impact for past occurrences of major vegetation/ESHA removal and the required restoration shall be at a minimum ratio of 4:1 (restoration to direct impact to Giant Wild Rye Grassland ESHA). The plan shall also quantify and mitigate at a 1.5:1 ratio for development impacts due to a lack of a minimum required 50-ft. buffer around Coastal Lemonade Berry Scrub ESHA patches and Giant Wild Rye Grassland ESHA patches from the allowable development footprint as generally depicted on **Exhibit 13 and within the additional 348 square feet to the development footprint as depicted on the graphic by Glenn Lukos Associates titled “Proposed Development Footprint” and dated 2/2/2024.** As the mitigation area is much larger than that available for on-site mitigation, mitigation will also be necessary off-site. Off-site mitigation areas should be in the project vicinity, preferably within Trafalgar Canyon, or as close to the impact area as possible. If the Applicant is able to demonstrate to the satisfaction of the Executive Director that viable off-site mitigation areas could not be found after using best efforts and after a 9-month period after Commission action on this CDP application, the Executive Director may allow the provision of alternative but equivalent mitigation.

A qualified biologist for restoration and monitoring of the restoration site shall design the restoration and monitoring program. The restoration and monitoring program shall at a minimum include the following:

1. Restoration plan including planting design, plant palette, source of plant material, plant installation, watering, erosion control, soil fertilization and weed abatement;



2. Final Success Criteria. The restoration will be considered successful if the overall species composition and the vegetative cover of the dominant perennial species are similar to relatively undisturbed vegetation of the same type in nearby reference areas. Species composition shall be considered similar if all the dominant species and at least 80% of the non-dominant species at the reference site are present at the restored site.
3. Provisions for monitoring and remediation of the restoration site in accordance with the approved final restoration program for a period of five years or until it has been determined that success criteria have been met or have failed to be met, whichever comes first.
4. Provisions for submission of annual reports of monitoring results to the Executive Director for the duration of the required monitoring period. Each report shall document the condition of the restoration with quantitative monitoring data and photographs taken from the same fixed points in the same directions. Each report shall also include a "Performance Evaluation" section where information and results from the monitoring program are used to evaluate the status of the restoration project in relation to the performance standards. The performance monitoring period shall either be five years or three years without maintenance or remediation, whichever is longer. The final report must be prepared in conjunction with a qualified biologist. The report must evaluate whether the restoration site conforms to the goals, objectives, and performance standards set forth in the approved final restoration program.
5. If the final report indicates that the restoration project has been unsuccessful, in part, or in whole, based on the approved performance standards, the Applicant shall submit within 90 days a revised or supplemental restoration program to compensate for those portions of the original program that were necessary to offset project impacts which did not meet the approved performance standards. The revised restoration program, if necessary, shall be processed as an amendment to this coastal development permit.

The permittee shall monitor and remediate the restoration area in accordance with the approved monitoring program, including any revised restoration program approved by the Commission or its staff. Any proposed changes to the approved monitoring program shall be reported to the Executive Director. No changes to the approved monitoring program shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**3. Open Space/Habitat Use Deed Restriction.** No development, as defined in Section 30106 of the Coastal Act, shall occur within the open space area within the subject property, as generally shown in Exhibit 13 of the staff report for CDP 5-18-0930, except for the following development: grading and construction of a public trail in accordance with **Special Condition 4**, and any of the habitat enhancement/restoration and monitoring that may be undertaken on-site as approved by the Executive Director in accordance with **Special Condition 2**. The lands identified in this restriction shall be maintained by the landowner(s) in perpetuity in accordance with the Coastal Lemonade Berry Scrub and Giant Wild Rye Restoration and Monitoring Plan approved by the Executive Director in accordance with **Special Condition 2**. If any of the mitigation required by **Special Condition 2** occurs on private property, the Applicant shall secure an analogous deed restriction over all such property.

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall execute and record a deed restriction in a form and content acceptable to the Executive Director, reflecting the above restrictions on development in the designated open space area. The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the designated open space area prepared by a licensed surveyor based on an on-site inspection of the open space area.

The deed restriction shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed.

The deed restriction shall run with the land in favor of the People of the State of California, binding successors and assigns of the Applicant or landowner in perpetuity.

- 4. Public Access Deed Restriction.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, and in order to implement the Applicant's proposal, the Applicant shall execute and record a document(s), in a form and content acceptable to the Executive Director, restricting the use and enjoyment of the parcel (APN: 692-252-01), and providing public access, recreational uses, and public amenities in perpetuity as generally depicted in [Exhibit 13](#).

The deed restriction shall reflect that the permittee shall provide public access for recreational uses along an 8-ft. wide corridor to allow for construction and maintenance of a 4-ft. wide trail within the trail corridor. The trail shall be constructed by the Applicant as part of this Coastal Development Permit and consist of a 4 ft. wide at-grade, decomposed granite footpath and provide for pedestrian access and a bench at the trailhead. The trail shall begin from the proposed new Vista Marina

cul-de-sac on the subject private property lot, traverse the property and connect to an existing trail at the toe of the canyon as generally depicted in [Exhibit 14](#).

No development, as defined in Section 30106 of the Coastal Act, shall occur within the public access area as generally shown on [Exhibit 13](#) of this staff report except for the following development authorized by this coastal development permit: Construction necessary to complete the public access 4-ft. wide at grade decomposed granite footpath, water station, invasive plant removal and planting in accordance with final Coastal Lemonade Berry Scrub Restoration and Monitoring Plan per **Special Condition 2**, and access signage consistent with the requirements of the approved Final Plans required pursuant to **Special Condition 1** of this coastal development permit. Management and maintenance of the approved trail within the public access restricted area shall be the responsibility of the property owner.

The recorded document(s) shall include a legal description and corresponding graphic depiction of the legal parcel(s) subject to this permit and a metes and bounds legal description and a corresponding graphic depiction, drawn to scale, of the perimeter of the public access area(s) prepared by a licensed surveyor based on an on-site inspection. The document shall also provide that access shall be uninterrupted at all times.

The deed restriction shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed. The deed restriction shall run with the land in favor of the People of the State of California, binding successors and assigns of the Applicant or landowner in perpetuity.

5. **Orange County Fire Authority Approval.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall provide to the Executive Director a copy of a Fuel Modification Plan/Permit issued by the Orange County Fire Authority (OCFA) or letter of permission, or evidence that no permit or permission is required to undertake the approved development. The Applicant shall inform the Executive Director of any changes to the project required by the OCFA review and comments and/or any inconsistencies with the conditions of approval contained herein. Changes required by OCFA shall not be incorporated into the project until the Applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.
6. **Cultural Resource Treatment and Monitoring Plan** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the Applicant shall submit for the review and approval of the Executive Director an archaeological/cultural resources monitoring plan prepared by a qualified professional, which shall incorporate the following measures and procedures:

1. The monitoring plan shall ensure that any prehistoric archaeological or paleontological or Native American cultural resources that are present on the site and could be impacted by the approved development will be identified so that a plan for their protection can be developed. The methods of protection of Tribal Cultural Resources shall be developed in consultation with the appropriate Native American tribal government, and in-situ preservation is the preferred option that can be accomplished through capping of the site or dedication of open space over the resource area. To this end, the cultural resources monitoring plan shall require that archaeological and Native American monitors be present during all grading operations and subsurface construction activity that has the potential to impact cultural resources. If the site is a shared prehistoric territory, one Native American monitor from each affected tribe shall be present during all ground disturbance.
2. There shall be at least one pre-grading conference with the project manager and grading contractor at the project site to discuss the potential for the discovery of archaeological/cultural or paleontological resources. Prior to grading operations, a copy of all archeological documents and reports shall be provided to the Native American monitors.
3. Archaeological monitor(s) qualified by the California Office of Historic Preservation (OHP) standards, Native American monitor(s) with documented ancestral ties to the area appointed consistent with the standards of the Native American Heritage Commission (NAHC), and the Native American most likely descendent(s) (MLD) when State Law mandates identification of an MLD, shall monitor all project grading and subsurface construction activity (such as trenching for utilities) that has the potential to impact cultural resources, as required in the approved cultural resources monitoring plan required above.
4. The permittee shall provide sufficient archaeological and Native American monitors to assure that all project grading and subsurface construction activities that have any potential to uncover or otherwise disturb cultural deposits are monitored at all times;
5. If any archaeological or paleontological, or cultural deposits, are discovered, including but not limited to skeletal remains and grave-related artifacts, artifacts of traditional cultural, religious or spiritual sites, or any other artifacts relating to the use or habitation sites, all construction shall cease within at least 50 feet of the discovery. Treatment of the discovery shall be determined by the appropriate monitor or the MLD. Significance testing may be carried out only if acceptable to the affected Native American Tribe, in accordance with the attached "Cultural Resources

Significance Testing Plan Procedures" (Appendix B). The permittee shall report all discovered resources as soon as possible, by phone or by email to the Executive Director. The permittee shall provide the significance testing results and analysis to the Executive Director, if applicable.

If the Executive Director determines that the discovery is significant or that the treatment method preferred by the affected Native American tribe is in conflict with the approved development plan, the permittee shall seek an amendment from the Commission to determine how to respond to the discovery and to protect both those and any further cultural deposits that are encountered. Development within at least 50 feet of the discovery shall not recommence until an amendment is approved, and then only in compliance with the provisions of such amendment.

7. **Construction Best Management Practices.** By acceptance of this permit, permittee shall comply with the following construction-related requirements and shall do so in a manner that complies with all relevant local, state and federal laws applicable to each requirement:

- (1) No construction materials, debris, or waste shall be placed or stored where it may be subject to wave, wind, rain, or tidal erosion and dispersion;
- (2) Any and all debris resulting from construction activities shall be removed from the project site within 24 hours of completion of the project;
- (3) Construction debris and sediment shall be removed from construction areas each day that construction occurs to prevent the accumulation of sediment and other debris which may be discharged into coastal waters;
- (4) Erosion control/sedimentation Best Management Practices (BMP's) shall be used to control dust and sedimentation impacts to coastal waters during construction. BMP's shall include, but are not limited to: placement of sand bags around drainage inlets to prevent runoff/sediment transport into coastal waters; and
- (5) All construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

Best Management Practices (BMP's) designed to prevent spillage and/or runoff of construction-related materials, sediment, or contaminants associated with construction activity shall be implemented prior to the onset of such activity.

Selected BMP's shall be maintained in a functional condition throughout the duration of the project. Such measures shall be used during construction:

- (1) The Applicant shall ensure the proper handling, storage, and application of petroleum products and other construction materials. These shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. It shall be located as far away from the receiving waters and storm drain inlets as possible;
- (2) The Applicant shall develop and implement spill prevention and control measures;
- (3) The Applicant shall maintain and wash equipment and machinery in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems. Washout from concrete trucks shall be disposed of at a location not subject to runoff and more than 50 feet away from a stormdrain, open ditch or surface water; and
- (4) The Applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during construction.

8. **Future Development.** This permit is only for the development described in Coastal Development Permit No. 5-18-0930. Pursuant to Title 14 California Code of Regulations Section 13250(b)(6), the exemptions otherwise provided in Public Resources Code Section 30610(a) shall not apply to the development governed by Coastal Development Permit No. 5-18-0930. Accordingly, any future improvements to the residence and garage, foundations and patio authorized by this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Section 30610(d) and Title 14 California Code of Regulations Sections 13252(a)-(b), shall require an amendment to Permit No. 5-18-0930 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government.

9. **Assumption of Risk, Waiver of Liability and Indemnity.** By acceptance of this permit, the Applicant acknowledges and agrees (i) that the site may be subject to hazards from slope instability, erosion, landslides, and earth movement; (ii) to assume the risks to the Applicant and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers,

agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards.

## **IV. FINDINGS AND DECLARATIONS**

The Commission hereby finds and declares:

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

#### **PROJECT LOCATION**

The proposed project site is a 34,784 sq. ft. (approximately .85 acres) vacant lot with a Land Use Plan (LUP) land use designation of RL (Residential Low Density) located within Trafalgar Canyon, northwesterly from the Vista Marina street-end in the City of San Clemente, Orange County ([Exhibit 1](#)). The lot extends approximately 420 feet inland (northeasterly) from Vista Marina and 60-120 feet northwesterly. The site is surrounded by single family residences atop the southeasterly coastal canyon slope at Calle Conchita and large multi-family residential development across the opposite coastal canyon slope at Pasadena Court.

#### **PROJECT DESCRIPTION**

The proposed project is the construction of a three-level, 25-ft. tall above grade, 4,527 sq. ft. single-family residence, with 1,067 sq. ft. garage space (i.e., 295 sq. ft. front garage and 567 sq. ft. back garage), 1,931 sq. ft. in terrace and deck areas, 1,675 cubic yards of cut for the construction of the semi subterranean level grading and 300 cubic yards of additional fill, 20 caissons for stabilization of the building pad area, a solid radiant heat barrier/privacy barrier wall surrounding the development, new cul-de-sac/firetruck turnaround (per Fire Authority requirements) and driveway apron, installation of a new fire hydrant at cul-de-sac, drainage improvements, connection to storm drain system, restoration of remaining open space and a trail segment connecting to an existing trail at the canyon bottom that provides beach access. The subject site is a vacant 34,784 sq. ft. lot designated as RL (Residential Low Density) Residential in the certified land use plan (LUP). Overall, the project has a development envelope (including new cul-de-sac and driveway) that utilizes approximately 12,921 sq. ft. (37% of the lot) of which, 8,761 sq. ft. lies inside the proposed radiant heat barrier wall/perimeter wall and includes the proposed residence, decks and terraces, landscaped areas, and a long driveway that also provides fire protection by creating a non-combustible zone between the residence and any potential flames from a brush fire. The Applicant proposes to preserve and enhance (by means of invasive plant removal and additional planting of natives) the remaining 63% of the lot as open space

and public trail. The project also includes grading of approximately 1,675 cubic yards of cut for the construction of the semi-subterranean level and stabilization of the development pad area with deepened caissons and an additional 275 cubic yards of fill. The proposed minimum-sized cul-de-sac/firetruck turnaround with new fire hydrant on the private lot will benefit the proposed new development and the general public. As noted above, the Applicant also proposes a new public trailhead/ocean viewpoint along with the preservation of and improvements to an existing pioneered/unpaved trail occupying approximately 2,370 sq. ft. This unpaved trail provides a connection from the Vista Marina street-end, through the subject private property, to the existing Trafalgar Canyon trail located at the bottom of the canyon along a municipal drainage easement that continues on to the beach.

[Exhibit 3](#) of the staff report is an updated Site Plan identifying the Applicant's proposed reduced development footprint, [Exhibit 4](#) includes proposed Architectural Plans from 2019, [Exhibit 5](#) is the proposed Landscaping Plan also from 2019 (and thus does not reflect recent proposed reductions to the size of the residence and garage) depicting both the areas inside the perimeter wall/radiant heat barrier wall and the open space areas outside the proposed development perimeter walls, [Exhibit 6](#) is the 2019 Preliminary Grading and Drainage Plan, [Exhibit 14](#) depicts proposed public trail areas and [Exhibit 15](#) depicts the proposed remaining undeveloped open space conservation area.

## **PROJECT HISTORY**

The Applicant submitted an application to the Commission for construction of a residence on September 21, 2018. Commission staff published a staff report on May 31, 2019, recommending that the Commission find that the project is inconsistent with Coastal Act policies regarding geologic hazards, protection of environmentally sensitive habitat areas (ESHA) and visual resources, but approve the project, with conditions to minimize impacts to coastal resources, in order to avoid an unconstitutional taking of private property pursuant to Section 30010 of the Coastal Act.

The Commission held a hearing on June 14, 2019, and received correspondence and testimony from members of the public both in favor of and against the staff recommendation of approval of the proposed residence, as well as from the Applicant. In particular, the neighborhood group Friends of Trafalgar Canyon disagreed that denial of the permit application would result in an unconstitutional taking of private property, noting that (among other reasons) the City of San Clemente improperly issued an "approval in concept" for the project and would need to approve a variance for the project if it was approved by the Commission, because City Municipal Code Section 17.56.050(D)(2) prohibits development from encroaching into coastal canyons. Friends of Trafalgar Canyon also stated they believed that alternative development on the site would lessen impacts on coastal resources.



When an application for a Coastal Development Permit also requires a discretionary permit from a city, the Applicant must at a minimum obtain preliminary local approvals, including any required variances or approvals of general uses and intensity of use as permitted by local regulations, or a waiver of said requirement, before seeking approval from the Coastal Commission (14 California Code of Regulations, sec. 13052). The City of San Clemente issued an Approval-in-Concept (AIC) on September 5, 2018, based on plans showing the proposed development sited at least 15 feet setback from the canyon edge, and stating that the proposal “conformed to site development standards, including height.” However, on June 7, 2019, after the Coastal Commission published a staff report on the proposed project indicating that, based on our canyon edge determination, the proposed development would be located on the canyon slope and, therefore, not setback at least 15 feet from the canyon edge, the City of San Clemente sent an email to Coastal Commission staff stating that based on the Commission’s interpretation of location of the canyon edge and siting of the proposed project, a local variance would be required.

In order to avoid an unconstitutional taking of private property, the Commission considered whether it might have to allow some residential development on the site that is inconsistent with Chapter 3. However, the Commission found that, based on the record before it at that time, it was not necessary to approve the proposal in order to avoid a taking, pursuant to Section 30010 of the Coastal Act, and that it would be premature to do so. Based on evidence presented at the June 14, 2019 meeting, Commissioners ascertained that the City of San Clemente had not completed its review of the proposed development and would need to issue a variance from municipal code requirements in order for the development to proceed (if approved by the Commission). Whether the City would issue the required variance, or whether the City might require modifications to the project, as part of that variance process, to minimize impacts to the coastal canyon or other coastal resources, was unclear at the time this matter was heard by the Commission. The Commission recognized the complicated nature of the proposed development, as well as what they deemed significant deficiencies with the proposal, and found that further review of the project by the City at the local level would help clarify the scope of the final project that could be undertaken by the Applicant and provide a clear record on which the Commission could base its decision to either approve or deny the project. Therefore, the Commission denied the coastal development permit application to allow for further review by the City.

The Commission denied the CDP application to allow for further local government review and did not make a final and authoritative decision about the extent of development it will permit or the allowable use of the property, thus the denial did not result in a “taking” of private property without just compensation.

The City has recently stated to Commission staff that it stands by its AIC for a proposed single-family residence at 217 Vista Marina. The City acknowledged that the AIC was issued with the understanding that the project complied with the minimum 15-foot

canyon edge setback and that the Applicant need not apply for any canyon setback variance. However, the City indicated that even if the Commission were to approve the CDP application with a different canyon edge determination, that would mean that the project would not be in compliance with LUP Canyon Setback Policy HAZ-47 and City Municipal Code Section 17.56.050(D)(2) (prohibiting development from encroaching into coastal canyons unless a variance is granted) and that if the Commission were to impose a special condition requiring a variance, then the City would consider issuing such a variance after such a Commission action, but not before.

## **B. STANDARD OF REVIEW**

The proposed development is within the City of San Clemente, an uncertified jurisdiction. Therefore, the Coastal Commission is the permit issuing authority, and the standard of review for the proposed project is Chapter 3 policies of the Coastal Act. The Commission certified the LUP for the City of San Clemente on May 11, 1988, and certified amendments in 1995 and 2019. The LUP serves as guidance to the permit issuing authority. The Commission “must have a good reason for ignoring a certified [LUP], such as a significant change of conditions.” *Douda v. California Coastal Commission* (2008), 159 Cal.App.4<sup>th</sup> 1181, 1194-95.

## **C. BIOLOGICAL RESOURCES**

Section 30240 of the Coastal Act states:

- (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

### **City of San Clemente LUP Policies**

**RES-75 Site-Specific Biological Surveys.** *Require a detailed site-specific biological survey prepared by a qualified biologist as a filing requirement for Coastal Development Permit applications for development on sites identified with a vegetation community on Figure 3-1 and Figure 3-2 of the Biological Inventory Report in Appendix A, beach areas, San Clemente State Beach inland bluffs, or where there is probable cause to believe that potential ESHA may exist. The biological resources study shall include, but not be limited to:*

- a. *Analysis of available literature and biological databases, to determine if any sensitive biological resources have been reported as historically*

*occurring in the proposed development project vicinity. At a minimum, the California Department of Fish and Wildlife's Natural Diversity Database (CNDDDB) must be used to determine if the site of the proposed project is known to support or has the potential to support sensitive habitat, vegetation communities, plants, and/or animals.*

- b. Review of current land use and land ownership within the proposed development project vicinity.*
- c. Assessment and mapping of vegetation communities present within the proposed development project vicinity.*
- d. General assessment of potential federal and state jurisdictional areas, including wetlands and riparian habitats*
- e. A base map that delineates topographic lines, parcel boundaries, and adjacent roads.*
- f. A vegetation map.*
- g. A description of the vegetation, including an estimate of the ground cover of the major species and a species inventory*
- h. A soils map that delineates hydric and non-hydric soils, if applicable.*
- i. An inventory of plant and animal species that indicates the potential existence of sensitive species.*
- j. A detailed map that shows the conclusions regarding the boundary, precise location and extent, or current status of ESHA based on substantial evidence provided in the biological studies.*

**RES-51 ESHA Designation.** *Environmentally Sensitive Habitat Area (ESHA) means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could easily be disturbed or degraded by human activities and developments as defined in Section 30107.5 of the Coastal Act. Three main elements must be met for an area or habitat to be considered ESHA.*

- a. The presence of individual rare plants or animals or the presence of a particular rare habitat. Plant and animal communities whose designation includes, but is not limited to rare, threatened or endangered by the State or federal governments such as those in the CDFW's California Natural Diversity Database (CNDDDB).*
- b. Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem.*
- c. Areas that could be easily disturbed or degraded by human activities and developments.*

**RES-54 ESHA Buffer.** *A 100-foot buffer, shall be provided around all ESHA, except where establishment of such a buffer is prevented by existing development. In those circumstances, the largest feasible buffer will be established. ESHA buffers less than 100 feet wide, may be allowed only where it can be demonstrated, through submittal of site-specific biological study that provides substantial evidence from qualified biologists, that the proposed narrower buffer would prevent impacts that would significantly degrade and/or disrupt the biological integrity and habitat values of the ESHA.*

**RES-58 Existing Development Within an ESHA Buffer.** *Existing development that was legally permitted and constructed prior to certification of this policy that is located in the required buffers identified in policy RES-54 is allowed to be maintained or remodeled so long as the remodel or maintenance is not considered a Major Remodel and the existing development does not increase the encroachment into the required setback/buffer from the ESHA. Any expansion or addition to existing development shall not increase the nonconformity and conform to the required setback.*

**RES-60 Development in ESHA.** *ESHA shall be protected against significant disruption of habitat values, and only uses dependent on such resources shall be allowed within such areas subject to approval of a Coastal Development Permit. Limited public access improvements, minor educational interpretative and research activities and restoration may be considered resource-dependent uses.*

**RES-62 ESHA Mitigation.** *Require mitigation in the form of habitat creation or substantial restoration for allowable impacts to ESHA and other sensitive resources that cannot be avoided through implementation of siting and design alternatives. Priority shall be given to on-site mitigation. Off-site mitigation measures shall only be approved when it is not feasible to fully mitigate impacts on-site. Mitigation shall not substitute for implementation of a project alternative that would avoid impacts to ESHA.*

**RES-67 Natural Areas.** *In natural areas that are undeveloped, or partially developed, the City shall require that development:*

- a. avoid significant impacts, including retention of sufficient natural space where appropriate;*
- b. retain watercourses, riparian habitat, and wetlands in their natural condition;*

- c. *maintain habitat linkages (wildlife corridors) between adjacent open spaces, water sources and other habitat areas and incorporate these into transportation projects and other development projects to maintain habitat connectivity;*
- d. *incorporate visually open fences, or vegetative cover to preserve views, ensure continued access and to buffer habitat areas, open space linkages or wildlife corridors from development, as appropriate;*
- e. *locate and design roads such that conflicts with biological resources, habitat areas, linkages or corridors are minimized;*
- f. *utilize open space or conservation easements when necessary to protect sensitive species or their habitats; and*
- g. *avoid the removal of native vegetation and the introduction of non-native vegetation and encourage the use of native plant species.*

*The City shall maintain an inventory of open space direct dedications, conservation easements, and offers-to-dedicate (OTDs) to ensure that habitat areas are known to the public and are protected through the coastal development permit process.*

**RES-68 Coastal Canyons.** *Development on coastal canyon lots shall maintain or improve the biological value, integrity and corridor function of the coastal canyons through native vegetation restoration, control of non-native species, and landscape buffering of urban uses and development.*

**RES-69 Coastal Canyon Areas Protection.** *Preserve coastal canyons as undeveloped areas intended to be open space through implementation of appropriate development setbacks.*

**RES-70 Coastal Canyon Resources.** *Protect and enhance coastal canyon resources by restricting the encroachment of development, incompatible land uses and sensitive habitat disturbance in designated coastal canyon areas. Prohibit development and grading that adversely alters the biological integrity of coastal canyons, the removal of native vegetation and the introduction of non-native vegetation.*

The City of San Clemente Certified LUP includes Trafalgar Canyon and adjacent vicinity as Potential Sensitive Habitat in Figure 4-2-B of the certified Land Use Plan, included as [Exhibit 10](#) to this staff report.

Furthermore, the LUP states,

*“Several natural communities designated rare by CDFW occur in the City of San*

*Clemente. Potential areas supporting sensitive habitat are shown on Figures 4-2 (A thru D). Development projects in or adjacent to these potential sensitive habitat areas will require site specific focused surveys to determine if ESHA exists, evaluate potential impacts, and determine appropriate setbacks. In the City, potentially sensitive habitat areas include, but are not limited to, the following:*

- a. Coastal scrub communities.*
- b. Coastal canyons and bluffs/coastal bluff scrub.*
- c. Native grasslands.*
- d. Creek/stream and associated riparian habitat.*
- e. Monarch butterfly aggregation sites, including autumnal and winter roost sites and related habitat areas.*
- f. Wetlands, including vernal pools and emergent wetlands.*

A large majority of San Clemente's coastal zone consists of urbanized lands with residential, commercial/industrial development with the exception of the San Clemente State Park Beach, small city parks, beaches and coastal canyons and bluffs. The coastal canyons of San Clemente have been disturbed by encroaching residential development over the years and therefore support varying degrees of disturbed and undisturbed native vegetation. Non-native, invasive species have invaded the canyons from ornamental residential backyards and continue to compromise the function and value of native habitat.

Preservation and enhancement of ESHA is a goal supported by both the environmental protection policies of the Coastal Act, specifically Section 30240 and those of the certified LUP. Encroachment into the canyon by structures and other appurtenances increases the potential for the introduction of non-native invasive plant species, predation of native species by domestic animals, destabilization of the canyon from excess irrigation, and size of fuel modification zones at the expense of native vegetation. Encroaching structures also threaten the visual quality of the canyons. The policies of the LUP were designed for habitat protection and enhancement; to minimize visual impacts and landform alteration; to avoid cumulative adverse impacts of the encroachment of structures into the canyon; and as a means to limit brush management necessary for fire protection.

Furthermore, San Clemente's certified LUP advocates preservation of native vegetation and discourages the introduction of nonnative vegetation in coastal canyons (See LUP Policies Res 68, 69, and 70 above). Coastal Act policies aim to prevent impacts which would significantly degrade coastal canyons areas which contain ESHA and ensure that development shall be compatible with the continuance of those habitat areas. Decreases in the amount of native vegetation along the coastal canyons due to displacement by development or introduction of non-native vegetation have resulted in cumulative adverse impacts upon the habitat value of the coastal canyons in San Clemente.

### Site Biological Surveys

In this case, the proposed development is located within Trafalgar Canyon. The Applicant's biologist, Glenn Lukos Associates (GLA) conducted biological surveys for the site on April 27 and May 29, 2018. GLA conducted general reconnaissance surveys for rare plants and animals and mapped the vegetation communities on the site according to "A Manual of California Vegetation: Second Edition" (MCV2)<sup>1</sup>. GLA observed one listed plant but no listed animal species on the site, and numerous common species of birds and coyote and raccoon tracks. The vegetation map from 2018 is provided by the Applicant is included as [Exhibit 8](#) of the staff report. Of the 0.789 acres total mapped area, 0.169 acre is native Lemonade Berry (*Rhus integrifolia*) Scrub, 0.035 acres of Giant Wild Rye (*Elymus condensatus*) Grassland, and 0.007 acres of Toyon (*Heteromeles arbutifolia*) Scrub. GLA mapped the remaining 0.578 acres as disturbed, ornamental, ruderal, and non-native vegetation areas. The generally flat pad area where the development is proposed to be sited was described as supporting a mosaic of non-native grasses and forbs that do not directly correspond with any of the alliances within the MCV2 and thus was characterized as "disturbed ruderal vegetation." The 2018 report states: "As part of the City's annual nuisance abatement program, the City's weed abatement contractor annually maintains this portion of the lot for fire prevention, Common species include non-native annual grasses ripgut (*Bromus diandrus*), red brome (*Bromus madritemnsis* ssp. Rubens), slender wild oats (*Avena barbata*), summer mustard (*Hirschfeldia incana*), field mustard (*Brassica rapa*), red-stemmed filaree (*Erodium cicutarium*), storksbill (*Erodium moschatum*), Bermuda grass (*Cynodon dactylon*), and fennel (*Foeniculum vulgare*)." Two of the vegetation communities mapped on the site, Giant Wild Rye Grassland and Lemonade Berry Scrub, were considered relatively rare and threatened by the Applicant's consulting biologist and one rare plant, California boxthorn (*Lycium californicum*) was identified on the site. Several common species of wildlife were detected on site; no special-status animals were detected, and the site was identified as not supporting habitat capable of supporting special-status animals. The Report states that the site contains trees, shrubs, and ground cover that provide suitable habitat for nesting migratory birds, except raptors.

GLA conducted a recent site visit on May 22, 2023 to evaluate the condition of the biological resources relative to the conditions they reported in 2018. They concluded that the conditions on the site and adjacent areas have not substantially changed relative to conditions in the 2018 report. Additional Giant Wild Rye was observed growing within the Lemonade Berry Scrub; however, no changes to the vegetation mapping were made with one minor, approximately 50 square foot expansion of

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<sup>1</sup> Sawyer, J.O., T. Keeler-Wolf, & J.M. Evens. 2009. A Manual of California Vegetation, Second Edition. California Native Plant Society Press, Sacramento, CA. 1300 pgs.

Lemonade Berry Scrub into an area previously mapped as ruderal. The updated 2023 vegetation map is included as [Exhibit 9](#). The Report stated that the generally flat pad where the development is proposed continues to be subject to regular fuel control maintenance and continues to support a predominance of non-native grasses, forbs, and non-native fig marigold.

### **ESHA Determination**

The Coastal Act refers to areas that are home to rare plants, animals, and habitats that can be easily disturbed or degraded as environmentally sensitive habitat areas, or “ESHA.” Section 30107.5 of the Coastal Act defines ESHA as:

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

The Coastal Commission does not determine what is rare; rather, the Commission relies on rarity rankings determined by agencies such as the CDFW, in partnership with NatureServe, the U.S Fish & Wildlife Service, and the California Native Plant Society (CNPS), who determine the rarity status of plants, animals, and habitats in California, and considers any of these with global and/or state rarity rankings of 1, 2, or 3 to be rare. The Coastal Commission, following CDFW’s lead, considers any area that houses any plant, animal, or habitat with a global or state rarity status of 1, 2, or 3 and that is easily disturbed, to rise to the level of ESHA. When lemonade berry plants are found intermingled with other species, the MCV2 provides standards (known as membership rules) for determining whether the lemonade berry is prevalent enough for the vegetation to be treated as *Rhus integrifolia* Shrubland Alliance (Lemonade berry scrub). The MCV2 membership rule for lemonade berry scrub is greater than 50% relative cover of lemonade berry in the shrub canopy or greater than 30% relative cover of lemonade berry with coastal scrub species as co-dominants in the shrub canopy<sup>2</sup>. Lemonade berry scrub holds a conservation status/rarity ranking of G3S3.<sup>3</sup> The G-rank (global) and S-rank (state) represents the overall status of an element and reflects a combination of rarity, threat, and trend factors. The global G3 ranking and the state S3 ranking both indicate that lemonade berry scrub is vulnerable and at moderate risk of extinction due to a restricted range and relatively few populations. On this site, the lemonade berry patches meet the MCV2 relative cover membership rule for lemonade berry with some patches of toyon and California sunflower, which Sawyer et al. (2009) identify as also occurring within Lemonade Berry Scrub. The patches of Lemonade Berry Scrub on this site are part of a much larger community of Lemonade Berry Scrub

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<sup>2</sup> Ibid.

<sup>3</sup> Sawyer et al. 2009. Op. Cit



found throughout the north and south slopes of Trafalgar Canyon. According to Memorandum dated May 29, 2019, by the Commission's lead ecologist, Dr. Engel, the Lemonade Berry Scrub patches occupying the canyon on the subject site rise to the level of ESHA and must be protected consistent with Section 30240 of the Coastal Act.

The Commission lead ecologist provided an updated memorandum dated November 30, 2023, clarifying that in addition to the lemonade berry patches, giant wild rye grassland patches on the site also have a G3 S3 rarity ranking. As both have G3 S3 rarity rankings and are easily disturbed by human activities such as vegetation clearing and ornamental landscaping, irrigation, and herbicide use, among others, associated with residential development, the identified patches rise to the level of ESHA (both memos are included as [Exhibit 16](#)).

Furthermore, in 2019, enforcement staff confirmed that major vegetation removal has occurred on the site, including in previous years prior to the Applicant's ownership, involving the removal of patches of Giant Wild Rye Grassland from the generally flat pad on the central portion of the site (within the currently proposed development footprint). The removal of these patches of Giant Wild Rye Grassland occurred during episodes of weed and debris removal from the vacant lot typically required by nuisance abatement orders in order to address fire safety. The removal of native vegetation (the patches of Giant Wild Rye Grassland) however, constituted the removal of major vegetation, not subject to the nuisance abatement orders, and without a coastal development permit constituted a violation of the Coastal Act (*refer to [Section J: Unpermitted Development](#) of the staff report for further findings*). Vegetation can qualify as "major vegetation" based on its importance to coastal habitats. Giant Wild Rye is known to grow in nearly pure patches as well as to exist in the herbaceous layer of the natural plant communities in the area (e.g. within Lemonade Berry Scrub). Recently, after additional closer review of scientific literature, the Commission's lead ecologist identified the "major vegetation" that was removed without the benefit of a CDP in fact does rise to the level of ESHA as Giant Wild Rye Grassland has a vegetation rarity ranking of G3S3 in an updated memo dated January 23, 2024.

### **Impacts to ESHA**

Direct impacts are those that involve direct loss, modification, or disturbance of plant communities, and/or the direct loss or removal of individual plants or wildlife. Indirect impacts are those that are both short and long term in duration and involve the effects of increases in human disturbance such as ambient levels of noise or light, traffic, permanent development (i.e., structures, walls, fences), unnatural predators (i.e., domestic pets), competition with exotic plants and ornamental plantings.

The proposed development footprint is within the central-portion of the lot on a generally flat pad described by the consulting biologist as containing disturbed ruderal vegetation.

The Applicant contends that the project has been sited and modified to avoid all direct impact to small patches of native vegetation present on the subject site and that it is the professional opinion of their consulting biologist that none of the vegetation within the site warrants a designation of ESHA. Furthermore, the Applicant proposes to avoid/minimize indirect impacts to the remaining undeveloped portions of the canyon lot by directing exterior lighting away from preserved natural areas, prohibiting the introduction of any invasive non-native plants, and including a solid perimeter wall around the proposed development providing a radiant heat barrier that will preclude the need for fuel modification thinning of the existing native vegetation and deter domestic pets from entering the canyon. However, as stated in the section above, the Commissions staff's lead ecologist has determined that the four patches of Lemonade Berry Scrub and a stand of Giant Wild Rye Grassland at 217 Vista Marina rise to the level of ESHA because it is rare and is easily disturbed by human activities. Several smaller patches of Giant Wild Rye Grassland that persist despite annual 'nuisance abatement' clearing along generally flat pad portion of the lot (within the proposed development footprint) also rise to the level of ESHA due to its rarity and vulnerability.

As proposed, the development would result in direct unavoidable impacts on patches of Giant Wild Rye ESHA located on the proposed development footprint and an indirect impact on the surrounding ESHA by providing no spatial buffer area between the proposed development and that ESHA. Thus, the development is inconsistent with Coastal Act Section 30240, which requires environmentally sensitive habitat areas to be protected against any significant disruption of habitat values, prohibits non-resource dependent development within ESHA, and requires a sufficient separation between development and ESHA to prevent impacts that would significantly degrade the ESHA.

### **ESHA Buffer**

To ensure that potential indirect impacts to ESHA are avoided, the Commission typically requires a 100-foot buffer between development and ESHA. The certified LUP Policy RES-54 also requires a 100-foot buffer around ESHA, however a narrower buffer may be allowed based on site specifics. Section 30240 of the Coastal Act requires that ESHA be protected and buffered to prevent impacts which would significantly degrade those areas. Buffers are important for preserving the integrity and natural function of individual species and habitats. The purpose of a buffer is to create a zone where there will be little or no human activity; to "cushion" species and habitats from disturbance and allow native species to go about their "business as usual." A buffer area is not itself a part of the ESHA, but a "buffer" or "screen" that protects the habitat area from adverse environmental impacts caused by development.

In some cases, a reduced buffer is consistent with Section 30240 because the proposed development will not "significantly degrade" the ESHA or prevent the continuation of the habitat. In this case, the Commissions staff's lead ecologist determined, as explained in her November 30, 2023 memo, that a reduced, minimum 50-foot buffer, along with a 6-foot fire wall surrounding the development, would prevent impacts that would

significantly degrade or disrupt the biological integrity and habitat values of the ESHA on this site. The 50-foot buffer recommended by the Commissions lead ecologist in combination with a 6-foot wall, will provide a sufficient distance between proposed development and the ESHA allowing for “business as usual” for native vegetation reproduction and growth, insect pollinators, and other animal activities such as nesting, foraging, dispersing, and mating. Although the wall provides some additional buffering, it is limited by the fact that the development upper levels tower over the wall, allowing some of the impacts of typical residential development, such as light and noise, to flow freely beyond the wall. Thus, reducing the buffer even further to 25 feet or 15 feet, even along with the 6-foot wall, would not provide a sufficient distance for “business as usual” in the ESHA.

As proposed, the development would be directly adjacent to Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA. [Exhibit 11](#) depicts a 50-foot buffer from individual ESHA stands on the subject site and adjacent properties rendering the entire site undevelopable. In this instance, not even a reduced buffer is possible as the proposed development envelope is entirely within the required reduced 50-foot buffer from the Lemonade Berry Scrub and Giant Wild Rye Grassland ESHA.

Therefore, the Commission finds that the development as proposed would involve non-resource dependent development within ESHA, in violation of Section 30240(a). It would also significantly degrade the surrounding ESHA and would not be compatible with the continuance of those habitat areas and would therefore be inconsistent with Section 30240(b) of the Coastal Act, which requires a sufficient separation between development and ESHA to prevent impacts that would significantly degrade the ESHA, based on the Commission lead ecologist’s determination that the development must at minimum incorporate a reduced 50-ft. buffer from the ESHA, which the proposed development does not include; in fact, it does not propose any meaningful buffer from the Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA at all.

#### **D. HAZARDS**

Section 30253 of the Coastal Act states, in pertinent part:

*New development shall do all of the following:*

*(a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*

*(b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

#### **City of San Clemente LUP Policies**

**HAZ-47 Canyon Setbacks.** *New development or redevelopment, including principal structures and accessory structures with foundations, such as guest houses, pools, and detached garages etc., shall not encroach into coastal canyons. When there are two or more setbacks available in the standards below, the City Planner shall determine which of the setbacks shall be applied to a development based on the criteria below. Coastal Canyon Setbacks shall be set back the greater of either:*

- a. A minimum of 30% of the depth of the lot, as measured from the property lines that abut the bottom of the coastal canyon, and not less than 15 feet from the canyon edge; or*
- b. A minimum of 30% of the depth of the lot, as measured from the property lines that abut the bottom of the coastal canyon, and setback from the line of native vegetation (not less than 15 feet from coastal sage scrub vegetation or not less than 50 feet from riparian vegetation); or*
- c. In accordance with house and deck/patio stringlines drawn between the nearest corners of the adjacent structures (rear corner/side of structure closest to coastal canyon). A legally permitted structure developed prior to the Coastal Act may be considered in the stringline setback when it is in character with development along the coastal canyon that has been approved under the Coastal Act with the benefit of Coastal Development Permits.*
- d. Ancillary improvements such as decks and patios, which are at-grade and do not require structural foundations may extend into the setback area no closer than five (5) feet to the canyon edge (as defined in Chapter 7, Definitions), provided no additional fuel modification is required that may impact native vegetation. No new or redeveloped walkways, stairs or retaining walls shall extend into the canyon beyond the required coastal canyon setback.*

*When selecting the appropriate setback from the above-referenced options, the City Planner shall consider the following factors: geology, soil, topography, existing vegetation, public views, adjacent development, safety, minimization of potential impacts to visual resources, community character, protection of native vegetation and equity. These additional factors may require increased setbacks depending on the conditions of the site and adjacent coastal resources. The development setback shall be established depending on site characteristics and determined after a site visit by a City Planner. If a greater*

*setback is required as a result of the geotechnical review prepared pursuant to policy HAZ-8 or HAZ-9, the greater setback shall apply.*

- HAZ-45 Blufftop/Coastal Canyon Lot Drainage and Erosion.** *New development and redevelopment on a blufftop or coastal canyon lot shall provide adequate drainage and erosion control facilities that convey site drainage in a non-erosive manner away from the bluff/canyon edge to minimize hazards, site instability, and erosion. Drainage devices extending over or down the bluff face will not be permitted if the property can be drained away from the bluff face. Drainpipes will be allowed only where no other less environmentally damaging drain system is feasible, and the drainpipes are designed and placed to minimize impacts to the bluff face, toe, and beach.*
- HAZ-1 Hazards Review.** *Review applications for new development, to determine the presence of geologic, coastal or fire hazards. Geologic hazards include but are not limited to faults, earthquakes, slope instability, landslides, liquefaction, and erosion; coastal hazards include but are not limited to inundation, tidal flooding, storm flooding, wave impacts, elevated groundwater and saltwater intrusion, erosion and changes to these hazards due to sea level rise. If present, ensure hazards are avoided and/or mitigated, as required by the policies in this Section.*
- HAZ-2 Development Near Hazards.** *New development that is in proximity to a geologic, coastal or fire hazard area shall be sited and designed in ways that avoid and/or mitigate risks to life and property, provide for or maintain existing public access and recreation, protect and enhance scenic resources, avoid and/or mitigate adverse impacts to the quality or quantity of the natural supply of sediment to the coastline, control runoff, and account for sea level rise and coastal storm surge projections.*
- HAZ-3 Development Exposure to Hazards.** *Minimize the exposure of new development to geologic, coastal (including inundation from sea level rise, wave up-rush, storm surge, and stream flooding), and fire hazards. Ensure that new bluff, canyon, or shoreline development will be safe from, and will not contribute to, geologic instability, erosion or other hazards over the life of the development, taking into account the effects of sea level rise on all relevant hazards. Ensure that new development does not contribute to the destruction of the site or the surrounding area.*

**HAZ-8 Geotechnical Review.** *A geotechnical review is required for all shoreline/coastal bluff or canyon parcels where new development or major remodel is proposed. If, as a result of geotechnical review, a greater setback is recommended than is required in the policies herein, the greater of the setbacks shall apply. For shoreline/coastal bluff or canyon parcels, geotechnical review shall identify the bluff or canyon edge, provide a slope stability analysis, and a bluff/slope retreat rate analysis. Consideration of the expected long-term average coastal bluff retreat rates over the expected life of the structure (minimum of 75 years unless otherwise specified in the LCP), shall include retreat rates due to expected sea level rise and a scenario that assumes that any existing shoreline or bluff protective device is not in place. The anticipated retreat over the expected life of the structure shall be added to the setback necessary to assure that the development will maintain a minimum factor of safety against land sliding of 1.5 (static) and 1.1 (pseudo static) for the life of the structure. The analysis for shoreline/coastal bluff parcels shall use the best available science on sea level rise and consider a range of scenarios including the high scenario of sea level rise expected to occur over the life of the structure and its effect on long term bluff retreat rates. The City may issue building permits for structures that maintain a different minimum factor of safety against landslides under certain circumstances and conditions, pursuant to the Geotechnical Review specifications in the IP and where alternative stability requirements are approved by the City Engineer.*

**HAZ-10 Applicant's Assumption of Risk.** *A Coastal Development Permit (CDP) for development in a hazardous area shall be conditioned when consistent with Policy GEN-8 to require the property owner to record a document (i.e., deed restriction) that waives and indemnifies the approving entity from liability for any personal or property damage caused by geologic, coastal or other hazards on such properties in relation to any development approved by the CDP and acknowledging that future shoreline protective devices to protect structures authorized by such a CDP are prohibited as outlined in HAZ-18.*

**HAZ-20 Bluff / Canyon / Shoreline Protective Devices.** *Bluff/canyon/shoreline protective devices shall be discouraged due to their coastal resource impacts, including visual impacts, obstruction of public access, interference with natural shoreline processes and water circulation, and effects on marine habitats and water quality. All new bluff/canyon/shoreline development and Major Remodels involving any significant alteration or improvement to a principal existing structure on lots with a legally established bluff/canyon/shoreline protective*

*device, as a condition of development shall trigger review of any associated bluff/canyon/shoreline protective device as prescribed herein.*

**HAZ-21 Restrict Bluff/Canyon/Shoreline Retention Devices.** *When consistent with Policy GEN-8, the construction, reconstruction, expansion, and/or replacement of a bluff/canyon/ shoreline protective device, (i.e. revetments, breakwaters, groins, seawalls, bluff protective devices, deep piers/caissons, or other artificial structures as defined in Chapter 7 that alter natural landforms or alter bluff/canyon/shoreline processes), for coastal erosion control and hazards protection, are prohibited, except pursuant to a CDP where it can be shown that either the device fully complies with all relevant LCP policies and the coastal access and recreation policies of the Coastal Act, or all of the following are met:*

- a. The bluff, canyon or shoreline protective device is required for the protection of coastal-dependent uses, existing structure(s) (including a principal structures or residence or public beaches in danger from erosion,*
- b. Where there is no less environmentally damaging alternative to the bluff, canyon or shoreline protective device,*
- c. The device is sited to avoid sensitive resources,*
- d. The device is designed to eliminate or mitigate adverse impacts on local shoreline sand supply and public access and to avoid or, where avoidance is infeasible, to minimize and mitigate the encroachment on the public beach, and*
- e. The device is designed to minimize adverse visual impacts to the maximum extent feasible.*

**HAZ-29 Avoidance of Geologic and Other Hazards.** *Require applicants for development in bluff, shoreline or canyon areas potentially subject to hazards such as seismic hazards, tsunami run-up, landslides, liquefaction, episodic and long-term shoreline retreat (including beach or bluff erosion), wave action storms, tidal scour, flooding, steep slopes averaging greater than 35%, unstable slopes regardless of steepness, and flood hazard areas, including those areas potentially inundated by accelerated sea level rise, to demonstrate, based on site-specific conditions and using the best available science, that for*

*the expected life of the development (minimum of 75 years unless otherwise specified):*

- e. The area of construction is stable for development based on geologic/geotechnical and coastal hazards review,*
- f. The development will not create a geologic, coastal, or fire hazard or diminish the stability of the area, and*
- g. The development complies with the policies in this chapter.*

**HAZ-30 Development and Uses in Hazard Areas.** *New development or re-development and land uses shall:*

- a. Minimize risks to life and property in areas of high geologic, coastal, and fire hazard.*
- b. Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*
- c. Be consistent with requirements imposed by an air pollution control district or the State Air Resources Control Board as to each particular development.*
- d. Minimize energy consumption and vehicle miles traveled.*
- e. Where appropriate, protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.*

**HAZ-32 New Development in Hazard Areas.** *New development shall only be permitted where an adequate factor of safety can be provided including on sites with ancient landslides, unstable slopes, or other geologic hazards.*

**HAZ-33 Development on Hillsides, Canyons and Bluffs.** *New development shall be designed and sited to maintain the natural topographic characteristics of the City's natural landforms by minimizing the area and height of cut and fill, minimizing pad sizes, siting and designing structures to reflect natural contours, clustering development on lesser slopes, restricting development within setbacks consistent with HAZ-41 and HAZ-47, and/or other techniques. Any landform alteration proposed shall be minimized to the maximum extent feasible. Development partially or wholly located in a coastal canyon or bluff or along the shoreline shall minimize the disturbance to the natural topographic characteristics of the natural landforms.*



**LUP DEFINITION: "CANYON EDGE"** *The upper termination of a canyon: In cases where the top edge of the canyon is rounded away from the face of the canyon as a result of erosional processes related to the presence of the canyon face, the canyon edge shall be defined as that point nearest the canyon beyond which the downward gradient of the surface increases more or less continuously until it reaches the general gradient of the canyon. In a case where there is a step like feature at the top of the canyon face, the landward edge of the topmost riser shall be taken to be the canyon edge. (Refer to Figure 7-1).*

### **Coastal Canyon Edge Determination**

The project site is located on a "bench" or terrace on the southern (northwest-facing) slope of Trafalgar Canyon, approximately 500 feet inland of the mouth of the canyon. The canyon bottom has been extensively modified by the installation of a storm drain culvert by the City circa 1972; fill used to bury the stream culvert has raised the elevation of the canyon bottom by approximately 10 feet. The elevation of the terrace on which the building site is located ranges from approximately 65 to 75 feet above the North American Vertical Datum of 1988 (NAVD88), while the top of the canyon slope extending south of the subject property is at elevations of approximately 100 to 110 feet.

The key geologic question for this site is its location relative to the edge of the coastal canyon, and to what degree the proposed project meets Coastal Act and certified LUP policies addressing hazard avoidance and minimization of landform alteration. The Applicant provided a geotechnical investigation report prepared by Geofirm dated December 11, 2017. The report describes the site as follows:

*Trafalgar Canyon flanks the property to the northwest. The Canyon bottom has been modified by past activities associated with the installation and burial of a 6 foot diameter storm drain pipe. This improvement controls the local drainage and mitigates significant erosion impacting support of the subject lot. To the southeast, the lot is flanked by 40 feet high 2:1 ratio fill slope graded for the residential tract lots fronting Calle Conchita. Based on analyses by prior consultants and confirmed herein, these slopes exhibit marginal stability and will require improvements on site to mitigate a potential offsite stability hazard.*

*These prior grading activities have largely avoided a well-defined canyon edge beginning at the mouth of the canyon and extending inland approximately 200 feet onto the subject site. However, the canyon edge becomes less well defined on a portion of the site where historic photos indicate that grading of an access road down to the canyon bottom occurred during the storm drain installation. The canyon edge becomes readily discernible further to the northeast of the where the access road grading occurred. The southeastern property edge is a straight tract*

*boundary line running along the base of the manufactured fill slope that ascends to residences on Calle Conchita.*

The canyon edge as identified by the Applicant's consultant is depicted on the Preliminary Grading Plan ([Exhibit 6](#)) along with a 15-foot principal structure setback and a 5-foot accessory structure setback. The same canyon edge is also identified on the Geologic Map and Cross Sections updated in July 2023 included as [Exhibit 7](#). However, the canyon edge depicted by the Applicant appears to be that of a downslope step-like, terrace feature, not the "landward edge of the topmost riser" as provided for in the LUP definition of Canyon Edge. Section 13577(h) of the Commission's regulations provides a general bluff edge definition that applies to both coastal bluffs and canyon bluffs where, as here, they converge near the mouth of a canyon. Thus, the bluff edge definition in the Commission's regulations applies to both. Based on the Geofirm cross-sections, it is clear that the "topmost riser", and thus canyon edge per the LUP definition, occurs upslope of the entire building pad and not on the subject parcel. After review of available relevant materials and a site visit on April 17, 2019, the Commission's staff geologist, Dr. Joseph Street, concluded that the subject site and the proposed development footprint is entirely within the coastal canyon slope, with the canyon top/rim located beyond the subject site, along the rear yards of the lots on Calle Conchita (see [Exhibit 17](#), Dr. Street's updated memo for further detail). This canyon edge determination is consistent with the canyon edge as determined in the Commission's recent approval of CDP 5-17-0607(Worthington, 207 Calle Conchita), in May 2018, as well as in several older CDPs, which clearly identify the canyon edge as the topographic break of the *upper* slope, some 30 to 40 feet above the project site, at elevations ranging from 100 to 120 feet NAVD88. As previously noted, the entire proposed project would "encroach into" the coastal canyon, and therefore inconsistent with LUP policy HAZ-47 requiring new development not encroach into coastal canyons.

The City's In-Concept Review Approval for the proposed project identifies the project as "meeting the 15-foot setback from the lower canyon edge." As described above, the Commission is not in agreement with this determination.

### **Slope Stability**

The Applicant's geotechnical report states that the canyon slope is only marginally stable, that gross slope stability is not present on the property, and that the factors of safety (FS) on the building site are below the typically required standards of 1.5 (static)/1.1(seismic). In addition, the report describes the site as underlain by landslide materials and subject to surficial instability/soil creep on the slope and indicates that stabilization devices are necessary to prevent damage to the proposed building foundations. No slope retreat analysis was provided. [Exhibit 7](#) to the staff report provides the geologic mapping of the site and cross-sections depicting the extent of the landslide material. Engineering stability analyses were performed to assess the minimum factors of safety against future movement of the slope located within the subject property. The required factors of safety can only be obtained following

construction of a caisson shear pin system as recommended by the geotechnical consultant.

The Applicant proposes construction of two distinct walls with a retaining function running parallel to the southeastern property line. The first would be set back approximately nine feet from the property line and the south wall of the proposed house. The lower portion of the wall would be partially subterranean and would retain up to 10 feet of soil. This approximately 100-foot-long house wall is needed to support the proposed vertical cut into the terrace floor that would allow for the basement level of the house. The second wall, described variously as a radiant heat barrier wall or privacy perimeter wall, would extend for 170-feet along the foot of the upper canyon slope just to the south of the house, and would be supported by 20, 40-foot-deep caissons ([Exhibit 7](#)). The proposed caisson shear pin system would serve a dual function, both increasing the gross stability of the site, providing the necessary factor of safety for the entire development footprint, and providing necessary foundation support for the radiant heat barrier/privacy perimeter wall.

Coastal Act Section 30253 requires that new development minimize risks to life and property in areas of high geologic, flood, and fire hazard, assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area. Additionally, LUP Policy HAZ-20 states that canyon protective devices shall be discouraged due to their coastal resource impacts, visual impacts, and explicitly prohibits the construction of canyon protective devices (including retaining walls and deep piers/caissons, or other artificial structures as defined in the LUP that alter natural landforms or alter canyon processes and that provide coastal erosion control and hazards protection, except pursuant to a CDP for the protection of coastal-dependent uses or existing structure(s) including a principal structures or residence or public beaches in danger from erosion). In this case, the proposed house retaining wall, would not act as a "canyon protective device" as the basement level of the house would be dug into the somewhat flat terrace portion of the site rather than the steeper upper slope section, and would not prevent or interfere with natural erosion processes on the slope. Additionally, although the proposed 170-foot-long radiant heat barrier/perimeter wall is closer to the toe of the upper slope (see Geologic Cross-Section, [Exhibit 7](#)), and in places would retain several feet of soil, the effect on natural erosion processes would be very minor. As noted above, a row of 20 caissons would be structurally connected to this wall, the caissons have an independent function of providing additional lateral stability for the project site, enough to increase the factor of safety from ~1.3 - 1.4 to over 1.5. The increment of stability provided by the shear pin caissons in this type of situation does not make the caissons retention devices on a stable slope that wouldn't be likely to fail in the absence of the caissons (i.e. when the FS is greater than about 1.3), and where the need for the caissons is driven by code standards (i.e., FS 1.5 standard) rather than by a likely instability hazard.

## **Conclusion**

For the reasons stated above, the proposed development is consistent with Coastal Act Section 30253(a and b) as it is designed to minimize risks to life and property in areas of high geologic, flood, and fire hazard, assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area. However, the proposed project is inconsistent with the certified LUP Policy HAZ-47 that prohibits residential development from encroaching on a coastal canyon slope and require a development setback from the canyon edge, or from native vegetation, or based on a stringline.

## **E. PUBLIC ACCESS AND RECREATION**

Section 30210 of the Coastal Act, Access; recreational opportunities; 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.*

Section 30211 of the Coastal Act, Development not to interfere with access, states:

*Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

Section 30212 of the Coastal Act, New development projects (in part), 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.*

### **City of San Clemente LUP Policies**

**PUB-38 Provision of New Public Access.** *Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where:*

- a. It is inconsistent with public safety, military security needs or the protection of fragile coastal resources;*
- b. Adequate public access already exists nearby; or*
- c. Agriculture would be adversely affected.*

**PUB-39 New Development Public Access Requirements.** *New development proposed on property lying between the first public roadway and the shoreline shall provide both physical and visual public access to the shoreline and along the coast in proportion to the public access impact resulting from the new development. The City is not to exercise its power to grant or deny a permit in a manner that will take or damage private property for public use, without the payment of just compensation or a reasonable nexus between the development and the impact. This policy (1) is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States and (2) requires reasonable justification and proportionality under the U.S. Supreme Court's Nollan/Dolan doctrine and subject to Section 30010 of the Coastal Act.*

Coastal Act Section 30210 and Coastal Act Section 30211 mandate that maximum public access and recreational opportunities be provided and that development not interfere with the public's right to access the coast. Section 30212(a) of the Coastal Act provides that adequate public access to the sea be provided in new development projects. The nearest public access to the beach identified as Access Point 10 in the City's LUP Figure 3-17 is at the mouth of Trafalgar Canyon (~400 feet west) of the site.

**Public Access Point 10: Trafalgar Canyon**

Access to the beach begins off of South Ola Vista along a public easement that follows the bottom of the Trafalgar Canyon down to the beach. At the end of the canyon the beach is accessed under a railroad trestle (Figure 3-17).

Figure 3-17 Trafalgar Canyon



Access to the beach is by means of a culvert railroad underpass through a path along a public drainage easement that follows the bottom of Trafalgar Canyon beginning off of South Ola Vista (1/2 mile east of the site) down to the beach. Public access to the

beach is also available at the nearby Public Access Point 11 at T-Street, approximately 700 feet southwest of the subject site. The means of access is a pedestrian railroad overpass. The proposed development would not result in a direct impact to coastal access. However, as the subject site is a vacant lot at the Marina Vista street-end, the site is used by the public as a vertical short-cut to the Trafalgar Canyon access path from the south side of the canyon and potentially for coastal access at the canyon mouth as depicted in the City's LUP Figure 3-17. In acknowledgement, the Applicant proposes the construction of a trailhead with a few public amenities that would continue to allow for, and even enhance, public use of the existing pioneered unpaved lateral paths on the subject lot that provide a connection from the Vista Marina street-end through the subject private property to an existing Trafalgar Canyon access path at the bottom of the canyon within the municipal drainage easement. Overall, pioneered paths cover approximately 2,441 sq. ft. (8%) of the subject private lot. Although the Applicant is willing to allow for continued public access to the existing Trafalgar Canyon path along the public drainage easement, no actual proposed trail plan or legal restriction on use of a portion of the property for ongoing public coastal access was submitted as part of the CDP application. Therefore, to implement the Applicant's proposal, **Special Condition #1** requires submittal of Final Revised Plans which include a trail construction plan; and **Special Condition #4** requires the Applicant to record a deed restriction against the subject property that allows for ongoing public use of the proposed trail areas on the property in a fashion that would guarantee access across the site along an 8-ft. corridor which accommodates a 4-ft. trail along the general alignment in which it currently exists on the site to connect with the Trafalgar Canyon access path (which provides coastal access).

### **Conclusion**

The project as proposed could potentially result in adverse impacts to public access (through prohibitive signage or fencing), inconsistent with the above-cited Coastal Act and certified LUP policies that protect maximum public access. While these potential inconsistencies could be addressed by conditions of approval, the project is still fundamentally inconsistent with the other aforementioned Coastal Act and LUP policies, as described in the ESHA section above. However, since the proposed development is being approved on a takings basis (discussed below), the approval is conditioned to address the public access concerns as discussed above.

### **F. VISUAL RESOURCES**

The Coastal Act and San Clemente LUP both include strong protections for visual and scenic resources.

Section 30251 of the Coastal Act states, in relevant part:

*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along*

*the ocean and scenic coastal areas, to minimize the alteration of natural landforms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas...*

- VIS-1 Visual Character and Aesthetic Resources Preservation.** *New development shall be designed to preserve the visual character and aesthetic resources of the City's coastal zone including preservation of the physical features of coastal bluffs and canyons, and where feasible, enhance and restore scenic and visual qualities of the coastal zone, including to and along the ocean and coastal bluffs, visually significant ridgelines, and coastal canyons, open spaces, prominent, mature trees on public lands, and designated significant public views (as identified on Figure 6-1 Scenic Gateways and Corridors, Figure 6-2-A Public View Corridors and Figure 6-2-B Public View Corridors). Where protection of visual character and aesthetic resources is not feasible, impacts should be mitigated.*
- VIS-14 Coastal Canyon Visual Resources Restoration.** *Promote the restoration of coastal canyons with native landscaping to enhance visual resources in a manner that is consistent with the goals of the City and the Coastal Act.*
- VIS-15 Preservation of Open Space in Coastal Canyons.** *Preserve the designated undeveloped "natural" coastal canyon areas where appropriate that were originally intended to function as open space (See Figure 4-3 Coastal Canyons General Location Map in Chapter 4).*
- VIS-16 Development Design.** *Development shall be designed and sited to maintain the natural topographic and physiographic characteristics of the project site including the:*
- a. Minimization of the building pad area and height of cuts and fills;*
  - b. Encouragement of the "stair stepping" of structures to conform to slopes (by use of retaining walls and other elements); and*
  - c. Configuration of sites to reflect natural topography, by the clustering of sites and units on lesser slope and avoiding extensive fragmentation of steeper slope and/or other techniques.*

Both the Coastal Act, Section 30251, in particular, and the policies of the certified LUP require that landform alteration be minimized to ensure that the development does not impact scenic and visual qualities of natural landforms. Further, when the Commission has evaluated in the past whether proposed development is visually compatible with the

character of surrounding areas, it has considered (1) past Commission action in the area and (2) the pattern of existing development. First, the Commission has granted coastal permits for residential development atop the Trafalgar Canyon, though none for development of single-family residence without some kind of a canyon setback based on LUP policies at the time. Second, the existing pattern of development is also important here. Single-family residential development along the canyon rim of the southern slope of Trafalgar Canyon in the vicinity of the site are all developed in a manner that does not encroach onto the coastal canyon slope. However, pre-Coastal multi-family development on properties on the north facing canyon slope do involve canyon face development.

The proposed project would not be visible from a public street or public sidewalk. The proposed development would be visible along a section of a trail along the City's drainage easement at the foot of the canyon. The Trafalgar Canyon trail runs along the City's drainage easement extending the length of the Canyon, approximately 1,500-feet, from Ola Vista to the public beach at the mouth of Trafalgar Canyon. The proposed development on this lot would not be visible along the entire stretch of the existing trail but would only be visible when the meandering trail reaches the subject lot. From this vantage point, looking up at the southern side of the canyon slope above the subject lot, the visual impact would be in contrast to the current makeup of the southern side of the canyon as residential development along the southern canyon face is setback from the canyon edge, providing a more natural canyon southern slope face view, free from development. The Commission has previously approved residential development descending down beyond the edge of the coastal canyon. Specifically, in the project vicinity, for example, along the northern slope of Trafalgar Canyon at Cazador Lane and the southern slope at Trafalgar Lane<sup>4</sup>. In these cases, one of the other two possible LUP coastal canyon setbacks was applied (either a stringline setback or a setback from native vegetation) as the minimum 15-ft. setback from the coastal canyon edge was not possible due to a small area of the top of the canyon slope. The subject site is unique compared to the other residential parcels in the vicinity of Trafalgar Canyon in that it is located entirely on the coastal canyon face/slope, the top of canyon is located on an adjacent residential parcel already developed with a single-family residence setback from the canyon edge. As such, though the proposed development may be considered generally compatible with surrounding residential development in terms of size and scope of massing, the project is not compatible with the character of the surrounding area in relation to lack of development on the canyon face/slope, inconsistent with Section 30251 of the Coastal Act and LUP Policy VIS-1.

## **Conclusion**

The proposed project meets the City of San Clemente's height limit of 25-feet for single family structures. The proposed residence is visually compatible with existing

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<sup>4</sup> CDP 5-98-106 approval of a single-family residence on a vacant lot at 222 Trafalgar Lane;  
CDP 5-99-461 approval of a single-family residence on a vacant lot at 226 Trafalgar Lane;  
CDP 5-03-112 approval of a 2-unit condominium on a vacant lot at 315 Cazador Lane



single-family residences in the vicinity. Regardless of height and comparability to adjacent residences, due to the fact that the entire site is within the canyon, there is no place to site development on the canyon face/slope anywhere that will not result in unavoidable impacts to otherwise undeveloped views of the scenic southern slope of the coastal canyon. The project as proposed could potentially result in adverse visual impacts inconsistent with the above-cited Coastal Act and certified LUP policies that aim to protect scenic and visual qualities of coastal areas as a resource of public importance. While these potential inconsistencies could be addressed by conditions of approval, the project is still fundamentally inconsistent with the other aforementioned Coastal Act and LUP policies, as described in the ESHA section above. However, since the proposed development is being approved on a takings basis (discussed below), the approval may be conditioned to address the visual impact concerns. **Special Condition 1(b)** requires the proposed structures to be natural, neutral colors and prohibits white and black tones; requires windows and other surfaces shall be non-glare and non-reflective and all lighting to be minimized to avoid light wash visible from public trails or public vantage points. Thus, as conditioned, the project can be found consistent with Section 30251 of the Coastal Act and the LUP's visual resource protection policies.

## **G. CULTURAL RESOURCES**

Section 30244 of the Coastal Act states:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

The City's certified LUP contains the following relevant language and polices:

**CUL-1 Cultural Resources.** Protect cultural resources, including historical, archaeological, and paleontological features in the Coastal Zone. Where necessary to protect cultural resources, new development shall include an appropriate pre-development investigation to determine, in the least destructive manner, whether cultural resources are present. The pre-development investigation shall include recommendations as to how the site can be developed and designed to avoid or minimize significant impacts to cultural resources. In situ preservation and avoidance are the preferred alternative over recovery and/or relocation in the protection of paleontological and archaeological resources. When in situ preservation or site capping is not feasible, recovery and/or relocation may be considered. Native American tribal groups with cultural affiliation to the project site area as identified by the Native American Heritage Commission shall have the opportunity to review and comment on the pre-development plan as required by AB52 (2014). Archaeologists and representatives from Native American tribal groups shall provide monitoring during grading/excavation and construction activities of any approved

development that has the potential to adversely impact any on-site significant cultural resources.

**CUL-4 Architectural, Historical, and Cultural Resource Preservation and Restoration.** Provide for the identification, preservation and restoration of the sites, structures, districts and cultural landscapes which have architectural, historical, and/or cultural significance.

The project site is a vacant 34,784 sq. ft. lot within Trafalgar Canyon. The Canyon bottom has been modified by past activities associated with the installation and burial of a 6-foot diameter storm drainpipe. Historic photos from the 1960s of this area of Trafalgar Canyon indicate that grading of an access road down to the canyon bottom occurred during the storm drain installation. The proposed project includes new significant grading and ground disturbance in the form of approximately 1,675 cubic yards of cut and 275 cubic yards of fill for the construction of the semi subterranean level and grading associated with the installation of 21, 40-foot-deep caissons underlying the retaining wall for stabilization of the building pad area.

According to historical data, the San Clemente area was inhabited by the Acjachemen for hundreds of years. It is known that the tribal nation was not static for hundreds of years and would have migrated in and around the area for miles. Also, according to the ethnographic evidence, the native nation consisted of permanent villages concentrated near watercourses, and the coast and settlement patterns have shown that village areas were usually concentrated in sheltered coves or canyons, near water sources, in defensive locations and on the sides of slopes in warm zones. Particularly because the subject site is in a canyon, monitoring during ground disturbance is critical for the preservation of any possible discovery of deposits.

The Applicant failed to provide any preliminary information regarding possible cultural or archaeological resources with the CDP application submittal. Regardless of the presence or absence of archeological deposits, the area itself (the surrounding landscape and the area in which the site is located) is a culturally significant area to the Acjachemen Nation.

In past permit actions near or adjacent to known tribal cultural resource sites, the Commission has required applicants to monitor all grading and construction activities with both archeologists and members of the affected Native American tribe onsite as monitors. If cultural resources are discovered, the appropriate Native American representative will decide as to the appropriate treatment method and consistent with the LUP policy, preservation in-situ is the preferred mitigation method.

To ensure that the project is consistent with the protection of any found cultural deposits and past Commission action, the Commission imposes **Special Condition 6**, requiring cultural and archaeological monitoring. The Condition requires that the Applicant submits for review and approval by the Executive Director of an

archaeological/cultural resources monitoring plan prepared by a qualified professional. To assure that the proposed project remains sensitive to the concerns of the affected Native American groups, a Native American monitor shall be present along with an archaeological monitor at the site during excavation activities to monitor the work. The Native American monitor shall meet the qualifications set forth in the NAHC's guidelines. If a site is found to contain significant cultural resources, all construction shall cease within at least 50 feet of the discovery. The permittee shall report all discovered resources as soon as possible, by phone or by email to the Executive Director. If the Executive Director determines that the discovery is significant or that the treatment method preferred by the affected Native American tribe is in conflict with the approved development plan, the permittee shall seek an amendment from the Commission to determine how to respond to the discovery and to protect both those and any further cultural deposits that are encountered.

In the event that grave goods or human remains are found, the Orange County Coroner's Office will be notified in compliance with state law, and they, in turn, will request the Native American Heritage Commission to determine the cultural affiliation. If cultural resources are found onsite by monitors, avoidance of the resources and preservation in situ is the preferred mitigation. If that is not feasible or not preferable to the tribal governments with documented ties to the area, then the other mitigation options may be considered, pursuant to an amendment to this permit. The Commission finds, therefore, that as conditioned, the proposed project is consistent with Section 30244 of the Coastal Act which requires reasonable mitigation measures to offset impacts to archaeological resources and the cultural resource protection policies of the certified LUP.

### **Conclusion**

The proposed development will occur in a location where there is a potential for the presence of cultural resources. To reduce the potential for impacts on any cultural resources, the Commission imposes **Special Condition 6** requiring the Applicant submit a Cultural Resource Treatment and Monitoring Plan. As conditioned, the Commission finds that the development conforms with Section 30244 of the Coastal Act, which requires reasonable mitigation for archaeological and paleontological resources.

## **H. WATER QUALITY**

Section 30230 of the Coastal Act states:

*Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231 of the Coastal Act states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Sections 30230 and 30231 require that the quality of coastal waters be maintained and protected from adverse impacts.

### **Construction Impacts to Water Quality**

Storage or placement of construction materials, debris, or waste in a location subject to erosion and dispersion or which may be discharged into coastal water via rain or wind would result in adverse impacts upon the marine environment that would reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species' ability to see food in the water column.

Given that the proposed development is ultimately being approved on a takings basis (see discussion below), in order to avoid adverse construction-related impacts upon marine resources, the Commission imposes **Special Condition 4**, which outlines construction-related best management practices (BMPs) to provide for the safe storage of construction materials and the safe disposal of construction debris. During construction, the Applicant will be required to implement BMPs designed to minimize erosion and prevent debris from entering the adjacent canyon or storm drain system. In addition, all construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

### **Post-Construction Impacts to Water Quality**

The proposed project involves new development on an undeveloped, fully pervious site. Much of the pollutants entering the ocean come from land-based development. The Commission finds that it is necessary to minimize to the extent feasible within its jurisdiction the cumulative adverse impacts on water quality resulting from incremental increases in impervious surface associated with new development. In order to address post construction water quality impacts, the Applicant has included drainage improvements on the approximately 40% of lot proposed for grading. To minimize any impacts to water quality the proposed project may have after construction of the proposed improvements site runoff is proposed to be directed to area drains and piped directly to a proposed new storm drain at the new cul-de-sac/firetruck turnaround. The new storm drain catch basin will connect via a new 48-ft. long, 12-inch diameter buried

pipe to the existing buried 72-inch diameter reinforced concrete pipe culvert at the bottom of the canyon. **Special Condition 1** requires submittal of final revised plans including submittal of a detailed Drainage and Runoff Control Plan prior to permit issuance.

Combined with the use of non-invasive drought tolerant vegetation, the use of a pervious turf block driveway to reduce the runoff discharged from within the development footprint, and the restoration of native habitat on the remaining undeveloped canyon slope, the project will minimize the project's adverse impact on coastal waters to such an extent that it will not have a significant impact on marine resources, biological productivity or coastal water quality.

Therefore, the Commission finds that the proposed development, as proposed and as conditioned, conforms to Sections 30230 and 30231 of the Coastal Act regarding the protection of water quality to protect marine resources, promote the biological productivity of coastal waters and to protect human health.

## **I. UNPERMITTED DEVELOPMENT**

Development has occurred on the subject site without benefit of the required coastal development permit, including removal of native vegetation. All work occurred on a coastal canyon slope, beyond the edge of the coastal canyon.

Staff has confirmed that major vegetation removal has occurred on the site, including in previous years prior to the Applicant's ownership, consisting of the removal of patches of Giant Wild Rye on the generally flat pad on the central portion of the site (within the currently proposed development footprint). The removal of major vegetation without the requisite Coastal Act authorization constitutes a violation of the Coastal Act. Vegetation can qualify as "major vegetation" based on its importance to coastal habitats.

The Commission's lead ecologist provided an updated memorandum dated November 30, 2023, clarifying that because the lemonade berry and giant wild rye grassland patches both have G3 S3 rarity rankings and are easily disturbed by human activities such as vegetation clearing and ornamental landscaping, irrigation, and herbicide use, among others, associated with residential development, these areas identified on the site rise to the level of ESHA (memos are included as [Exhibit 16](#)). In this case, after additional review of scientific literature, the Commission's Staff Ecologist determined that the "major vegetation" that was removed without the benefit of a CDP, which was limited to Giant Wild Rye, in fact does rise to the level of ESHA as Giant Wild Rye Grassland has a vegetation rarity ranking of G3S3.

It is the Commission's understanding that the City issues nuisance abatement orders for vacant lots requiring removal of weeds, rubbish and refuse, including for the property at issue, and that, according to representations of the Applicant, the City has on occasion undertaken vegetation removal on the property and on adjacent properties. However,

these orders did not direct the removal of, nor authorize removal of the Giant Wild Rye), which is the unpermitted development at issue. In 2019, Commission staff investigated reports that a Coastal Lemonade Berry shrub had also been recently removed from within the proposed development footprint and verified that what had been tentatively identified as Lemonade Berry was in fact Myoporum, and thus removal of the shrub did not constitute removal of Lemonade Berry.

Unpermitted development cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, such development would not be allowed. Thus, an evaluation of a proposed project must consider site conditions as if the unpermitted development had not occurred (i.e., the baseline). The Commission's findings are based on protection of all coastal resources present on the site and consideration of those that would be present on site if unpermitted development had not occurred (i.e., the areas of native vegetation that have been removed without a coastal development permit). To mitigate impacts to these areas that will result from the proposed project, **Special Condition 2** is imposed requiring mitigation for these direct impacts through the restoration of patches of Giant Wild Rye at a 4:1 mitigation ratio which thus effectively restores the removed Giant Wild Rye, mitigates for the removal, and provides additional restoration in order to fully resolve the violation since a 4:1 mitigation ratio exceeds the typical mitigation ratio that would be utilized for impacts to this type of habitat as it existed on the site.

Although development has taken place prior to submission of this permit application, consideration of the permit application by the Commission has been based solely on the consistency of the proposed development with the policies of Chapter 3 of the Coastal Act. The certified San Clemente LUP was used as guidance by the Commission in reaching its decision. Approval of this permit does not constitute a waiver of any legal action with regard to the alleged unpermitted development, nor does it constitute admission as to the legality of any development undertaken on the subject site without a coastal development permit, other than the unpermitted development described herein. Approval of this application pursuant to the staff recommendation, issuance of the permit, and the Applicant's subsequent compliance with all terms and conditions of the permit will result in resolution of the above-described violation.

## **J. CONCLUSION REGARDING CONSISTENCY WITH RESOURCE PROTECTION POLICIES**

As discussed in the previous sections of this staff report, the proposed project is inconsistent with the Coastal Act and certified LUP in certain respects. Most critically, the residence is proposed to be built in and immediately adjacent to ESHA, with no ESHA buffer, inconsistent with Section 30240 of the Coastal Act. Additionally, the residence is proposed to be built within a coastal canyon inconsistent with LUP HAZ-47 (Canyon Setbacks). Thus, any residence proposed on the site would be inconsistent with these Coastal Act and LUP policies as summarized below:

### **ESHA and Sensitive Habitat**

The subject site is a vacant 34,784 sq. ft. lot. The proposed development footprint elements cover an approximate gross area of 12,921 (3,660 sq. ft. paved cul-de-sac, 500 sq. ft. driveway apron area, plus 8,761 sq. ft. development footprint area within perimeter wall) or approximately 37% of the entire lot. Because of its location within the canyon, the site has overall remained undisturbed, and vegetation considered part of coastal sage scrub communities can be found within this parcel. The Commission's lead ecologist has identified the small patches of Giant Wild Rye on the proposed development footprint and the large patches of Coastal Lemonade Berry Scrub and Giant Wild Rye Grassland on the remaining undeveloped areas of the site as ESHA. Thus, as proposed, the project would result in direct impacts (i.e., removal/loss) to Giant Wild Rye Grassland ESHA, and would be constructed immediately adjacent to other ESHA, unable to provide even the minimum 50-ft. buffer, with a radiant heat barrier wall serving as the only buffer. Therefore, the proposed development is inconsistent with Coastal Act Section 30240, requiring protection of ESHA against any significant disruption of habitat values and for development adjacent to ESHA to be sited and designed to prevent impacts which would significantly degrade those areas and is also inconsistent with LUP Policy RES-70 which aims to protect and enhance coastal canyon resources by restricting the encroachment of development, incompatible land uses and sensitive habitat disturbance in coastal canyon areas and LUP Policy RES-54 which requires development to provide a 100-foot buffer from ESHA. The primary intent of this policy is to avoid adverse impacts to ESHA by siting new development away from the biological resources. Although the LUP is not the standard of review, it is worth noting that the project cannot provide the required 100-foot ESHA buffer, as that would cover the entire site. Moreover, even providing a reduced minimum 50-ft. ESHA buffer as recommended by the Commission's lead ecologist would leave no developable area on the lot. As such, the approved project will directly negatively impact ESHA and the continuation of adjacent ESHA inconsistent with the Coastal Act Section 30240 and LUP policies RES-54 and RES-70.

### **Geologic Hazards**

Chapter 3 policies of the Coastal Act and the certified LUP require new development minimize risk to life and property in areas of high geologic hazards and assures stability and structural integrity and does not cause or contribute significantly to geologic instability, hazard avoidance, and minimization of landform alteration. The subject site is located in an area of San Clemente known for overall geologic instability. Results of slope stability analysis indicate that the site does not meet the minimum factors of safety and would require construction of a shear pin caisson system to ensure conformance with Public Resources Code section 30253 requirements that new development minimizes risk to life and property in areas of high geologic hazards and assures stability and structural integrity and does not cause or contribute significantly to geologic instability. In addition, the entire proposed project would "encroach into" the

coastal canyon, and thus would appear to be inconsistent with LUP policy HAZ-47 requiring new development not encroach into coastal canyons.

The shear pin caisson system is necessary to meet the required minimum factors of safety and thus assure stability of the site but would not retain the canyon slope or otherwise prevent erosion or sliding that is otherwise likely to occur. Thus, the shear pin caisson system is not a canyon protective device and does not significantly alter natural canyon processes. The southern house wall does function as a retaining wall for the basement level of the house, but due to its location on the flat mid-slope terrace, does not interfere with natural canyon erosion processes. The radiant heat barrier wall on the southern side of the development retains a few feet of soil in places but does not protect the house from erosion or significantly affect canyon erosion processes. As such, the proposed project is consistent with Chapter 3 policies, however, the proposed project is inconsistent with the certified Land Use Plan policies that prohibit residential development on a coastal canyon slope and that require a development setback from the canyon edge or from native vegetation.

### **Conclusion**

The inconsistencies with the Coastal Act and LUP summarized above cannot be completely remedied by special conditions or siting the development in a different location on this legal lot since the amount of ESHA is so extensive onsite that no meaningful buffer could be provided (e.g., 50-ft as recommended by the Commission's ecologist) that would adequately protect the surrounding ESHA while also allowing for a single-family residence regardless of size (and thus is inconsistent with Coastal Act and LUP ESHA policies); and the entire lot is situated on a canyon slope/face (and thus is inconsistent with LUP development setback policies). In short, no amount or type of special conditions can correct these fundamental inconsistencies. Thus, but for the override provision discussed below, the Coastal Act would direct that the project should be denied.

## **K. TAKINGS**

### **Avoiding a Potential Unconstitutional Taking of Private Property**

As discussed in the previous sections of this staff report, the proposed project is inconsistent with the Coastal Act and the certified LUP in a way that cannot be completely rectified by conditions of approval. Therefore, as a matter of Coastal Act resource protection policy consistency, the project should be denied. However, when the Commission considers denial of a proposed project, a question may arise as to whether the denial would result in an unconstitutional "taking" of an applicant's private property without payment of just compensation.

Coastal Act Section 30010 addresses takings and states as follows:



*“The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore.”*

San Clemente LUP addresses takings and states as follows:

*GEN 8 Taking of Private Property. The City does not have the power to grant or deny a permit in a manner which will cause a physical or regulatory taking of private property, without the payment of just compensation. This policy is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States (Coastal Act Section 30010).*

These policies are not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States. Although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Coastal Act imposes on the Commission the duty to assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that a denial would not constitute a taking, then it may deny the project with some confidence that its actions are consistent with Section 30010. If the Commission determines that a denial could constitute a taking, then the Commission could also find that application of Section 30010 would overcome the presumption of denial. In this latter situation, the Commission seeks to minimize Coastal Act and LCP inconsistencies while still allowing some reasonable amount of development that is designed to avoid coastal resource impacts and LCP inconsistencies as much as possible. For purposes of compliance with Section 30010, denial of *all* development on this single parcel could constitute a taking. As discussed further below, the Commission finds that to avoid a “takings” in compliance with Section 30010, the Commission should allow some reasonable residential development on the subject property.

Because the Coastal Act and LUP policies instruct the Commission to deny non-resource-dependent development in ESHA, or adjacent to ESHA if it would significantly degrade ESHA, and because there is no room on the site for an ESHA buffer from the proposed new development, any development on the site would be inconsistent with the Coastal Act and certified LUP. Additionally, in this case, because the entirety of the site is non-conforming to the LUP coastal canyon setback policy (*i.e.*, the entire site is on the canyon slope/face) there is no new design, smaller footprint, or alternative plan for which the Applicant could apply that would completely eliminate these inconsistencies. However, as discussed further below, the subject property (APN 692-252-01) is a legal lot that was created prior to the passage of the Coastal Act, that is planned and zoned for residential use, and to deny the Applicant a residential use of the parcel would

essentially eliminate the economic use of the property, thus resembling a “denial of all economically beneficial or productive use of land” takings situation. In these circumstances, the Applicant could potentially successfully argue that the Commission has made a final and authoritative decision about the use of the subject property and that the Commission’s denial is a taking.

As a threshold matter, before a taking claim can be analyzed, it is necessary to define the parcel of property against which the taking claim will be measured. In this case, the Applicant owns the subject vacant parcel proposed to be developed with a single-family residence (APN 692-252-01). The Applicant, Graham Property Management, LLC purchased the property for approximately \$1,250,000 and a Grant Deed was recorded on September 22, 2017.

### **Reasonable Residential Development to Avoid a Taking**

#### *Categorical Taking*

Section 30010 of the Coastal Act provides that the Coastal Act shall not be construed as authorizing the Commission to exercise its power to grant or deny a permit in a manner which will take private property for public use. Application of Section 30010 may overcome the presumption of denial in some instances. The subject of what government action results in a “total categorical taking” was addressed by the U.S. Supreme Court in *Lucas*. As quoted in a later decision, *Lucas* explains that a regulation that “denies all economically beneficial or productive use of land” will require compensation. *Palazzolo v. Rhode Island*, 533 U.S. 606, 617, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015.

The Commission interprets Section 30010, together with the *Lucas* decision, to mean that if an applicant demonstrates that Commission denial of the project would deprive his/her/their property of all reasonable economic use, the Commission may be required to allow some development even where a Coastal Act or LUP policy would otherwise prohibit it. In other words, unless the proposed project would be inconsistent with background principles of State property and nuisance law, the applicable provisions of the Coastal Act and certified LUP cannot be read to deny all economically beneficial or productive use of land because these sections of the Coastal Act and the certified LUP cannot be interpreted to require the Commission to act in an unconstitutional manner. In complying with this requirement, however, a regulatory agency may deny a specific development proposal, while indicating that a more modest alternative proposal could be approved, and thus assure the property owner of some economically viable use.

City of San Clemente LUP Table 2-1 Land Use Designations in the Coastal Zone identifies permitted uses in the RL (residential low density) land use category, which includes: 1) single-family detached homes, 2) public open space, 3) recreation, and 4) senior housing.

The Commission finds that in this particular case, none of the other permitted development uses at the subject property that would provide an economically viable use (*i.e.*, senior housing) would avoid development on the coastal canyon slope or avoid impacts to ESHA due to a lack of ESHA buffers. Furthermore, no matter where on the site any size structure is placed, it would not result in ESHA impact avoidance. The Applicant's property is within a coastal canyon, which the City has identified as worthy of protection as open space area. This fact suggests there may be an impetus for a public agency to purchase the Applicant's property. However, there is no evidence in the record suggesting that the State's or the City's purchase of the Applicant's property is an economically feasible option. Other allowed uses (as a matter of zoning) namely senior housing would likely come with the same types of impacts to coastal resources as a single-family residence.

Maintaining the lot as public open space or recreation use would not provide an economically viable use, and the other approved use (senior housing) would not likely have any less impacts than the proposed residential use. The fact that the project site is either ESHA or within ESHA buffer and situated on a coastal canyon slope means that the other allowable housing use, that of senior housing could also not be approved on the site as a matter of Coastal Act and LUP consistency. Thus, the Commission finds that it is reasonable to conclude that denial of any residential use could be determined to deprive the Applicant of all economically viable use of this property and therefore, the Commission finds it necessary to approve some residential use of the property to avoid a categorical *Lucas*-type taking.

#### *Taking Under Penn Central*

Although the Commission has already determined it is necessary to approve some residential use to avoid a categorical taking under *Lucas*, it still must determine the allowable extent of that use. When approving development only to avoid a taking, the development must still be as close to consistent with the resource protection policies as possible, while still avoiding a taking. In making that determination, a court may also consider whether the permit decision would constitute a regulatory taking under the ad hoc inquiry stated in *Penn Central*. This ad hoc inquiry generally requires an examination into factors such as the sufficiency of an applicant's property interest, the regulation's economic impact, and the regulation's interference with reasonable, investment-backed expectations.

In this case, the Applicant ~~may argued~~ <sup>argued</sup> that they had a reasonable investment-backed expectation that the subject property could be developed **not only** with a residence, simply due to the City land use designation of residential low density for the site, **but one of significant size**, and his investment was made under the assumption that the future development of a residential use could be approved on the legal parcel. ~~However, no one could have had a reasonable expectation of being able to build a~~

house of the size and scale as proposed in such a constrained site (especially upon reading the certified LUP policies prior to purchasing the site). To determine whether an expectation to develop a property as proposed is reasonable, the Commission must assess, from an objective viewpoint, whether a reasonable person would have believed that the property could have been developed for the Applicant's proposed use, considering all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired. The Commission is not aware of any single-family residential developments approved under a private-property takings override in the City of San Clemente for comparison. Regardless, there is no City LUP or state-wide standard for what constitutes a reasonable investment-backed expectation in ESHA, and the Commission must rely on a case-by-case review to determine allowable development areas. **Just days prior to the Commission meeting, counsel for the applicant submitted a lengthy analysis arguing that when the applicant purchased the property, they had a reasonable, investment-backed expectation of being able to build a significantly larger house than staff's proposed Special Condition 1 and Exhibit 12 would allow. This was based on a number of factors, including the fact that the version of the City's LUP that was in effect at the time did not include the current version of the ESHA buffer requirement. In fact, it had no ESHA buffer requirement separate from the general canyon setback requirement. This regulatory takings analysis is highly fact-intensive and somewhat subjective, but the applicant proposed a compromise that would involve only a minimal amount of additional development, in two very small areas, totaling about 350 sq. ft. Given the totality of the facts here, including the arguments laid out in the submittal on Friday, February 2, 2024, including the document titled 'Response to Staff Report Discussion of Reasonable, Investment-Backed Expectations', the Commission finds that allowing this minimal additional development is legally warranted and appropriate in order to comply with Public Resources Code section 30010.**

To determine whether the Applicant had a reasonable investment-backed expectation to construct a house on APN 692-252-01, we also consider what the Applicant invested when he purchased the lot. The Applicant purchased the 34,784 square foot vacant lot for approximately \$1,250,000 in 2017. However, it is difficult to compare the price of this large vacant parcel to the significantly smaller parcels (approximately half the size) atop Trafalgar Coastal Canyon which began to be developed in the 1950s and many have since been redeveloped.

Aside from the purchase price itself, we consider the size, shape, and physical orientation of the lot (which slopes down from the top of the canyon as identified along the Calle Conchita lots in prior Commission actions (i.e., 5-17-0607 (Worthington))). When the Applicant purchased the property in 2017, all of the other homes in the

surrounding vicinity had been built or were being built at the canyon top and not within ESHA.

Commission staff also calculated the average square footage of homes, and the average residential lot size of parcels located in the vicinity of Trafalgar Canyon. The square footage of the nearest eight<sup>5</sup> single family residences in the vicinity average around 3,900 sq. ft. They range from 1,566 sq. ft. for residences constructed in the 1950s to 7,829 sq. ft. for recently redeveloped residences. The applicant proposes a 5,389 sq. ft. residence (including attached garages). However, those parcels in the vicinity with the larger square footage were all previously developed or had developable top-of-the-canyon areas and were not covered by ESHA. By contrast, here, the subject lot contains extensive ESHA, is entirely within the ESHA buffer, is entirely undevelopable due to existing ESHA and the lack of ESHA buffers and thus, would be incompatible with the continuance of those habitat areas. In addition, none of the surveyed parcels is entirely within the canyon, as the subject lot is.

The Applicant has referenced the certified Ventura County LUP policy outlining an allowable building site and identifies cases (like in the Santa Monica Mountains or some existing beachfront property communities) where new development may be permitted in ESHA to avoid a taking. In that case, the policy specifies a maximum allowable building site area on residential parcels as 10,000 square feet, or 25 percent of the parcel size, whichever is ~~less~~ more and acknowledges that a smaller building site may be required to avoid impacts to other habitat areas and protect other coastal resources; **in their submittal on the Friday before the hearing**, the Applicant referenced this policy stating that the subject proposed development **not dedicated to a fire turnaround and driveway** utilizes approximately ~~37%~~ **6,873 square feet of the site, which would be less than 20% of the lot and significantly below the 10,000 square-foot figure used in the Ventura County ESHA Update. In fact, the applicant's site plan exhibit indicated (in Exhibit 3) the site coverage area within the perimeter wall would be 8,761 sq. ft. and 25.19%** of the parcel size, **but that would still be** in compliance with this previously certified Ventura County LCP policy, and as approved herein, the allowable development footprint within the perimeter wall would actually be 7,204 sq. ft. and 20.7 %. However, that Ventura County LUP policy also states that in all other areas, the maximum allowable building site shall be limited to that needed to accommodate the minimum amount of development necessary for the property owner to make an Economically Beneficial Use of the subject parcel, as determined on a case-by-case basis using the standards/procedures of their Coastal Zoning Ordinance. This LUP Policy doesn't, even in its jurisdiction, entitle an applicant to the maximum size. Furthermore, there is no such similar policy in the San Clemente LUP, and there's no

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<sup>5</sup> Averages were taken of 350, 352, and 354 W. Paseo de Cristobal; 205, 206, and 207 Calle Conchita; and 405 and 407 Calle Cazador.

reason for the Applicant to expect that a policy that is in one LUP would apply in another LUP that does not have any similar type of policy. The Applicant's arguments for having an expectation of the size of the proposed development have primarily been based not on some other LCP(s) or how we've handled takings overrides in other cases, but on their sense of the non-existence of ESHA and on their sense of the location of the canyon edge on the site, both which have turned out to be counter to the Commission's findings. Furthermore, the Commission is constantly refining its approach to takings analysis on a case-by-case basis according to the particulars of each situation and to match our increased understanding of both the facts and law, so it is not reasonable to assume the Commission would make the same findings in each situation.

**Nevertheless, given the language of the LUP at the time of purchase, the history of Commission actions both in the vicinity and more broadly, the subjective and imprecise nature of the required takings analysis, and the due diligence that the applicant appears to have performed in this case, and as the Commission finds that the applicant may well have had a reasonable investment-backed expectation of a somewhat larger home. Since the applicant's proposed compromise involves a very modest expansion beyond that which staff had recommended, the Commission finds that to be a reasonable approach and finds that the approval of a home of that size may well be necessary to avoid a taking.**

#### *Economic Impact*

In this case, the evidence in the record suggests that Commission denial of any residential development on this parcel would likely have a substantial impact on the value of the subject property. Considering the above, to preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this CDP allows for the construction of a reduced-scale residential development to provide a reasonable economic use of the subject property. This determination is based on the Commission's finding in this report that some form of residential development, though not as large as **originally** proposed by the Applicant, is commensurate with the investment-backed expectations for the property, and that none of the ~~uses~~ otherwise allowable land uses in the certified LUP would provide an adequate economic use.

#### **Takings Conclusion**

To preclude a claim of takings and to assure conformance with California and United States Constitutional requirements, as provided by Coastal Act Section 30010, this CDP approval allows for the construction of a residential development to provide a reasonable economic use of the subject property. In view of the evidence, there is a reasonable possibility that a court might determine that the Commission's denial of a residential use **or limitation beyond what the Commission is allowing**, based on the

inconsistency of this use with the Coastal Act and certified LUP, would constitute a taking (since reapplication would be futile). Therefore, the Commission determines that the inconsistency with the Coastal Act in this case does not preclude a reasonable residential development that is appropriately conditioned to minimize coastal resource impacts and Coastal Act and LUP inconsistencies as much as possible while still providing an economically viable use of the property.

## **L. APPROVABLE PROJECT**

### **Maximizing Coastal Act and LUP Conformity while Avoiding Takings**

Though applicants are entitled under Coastal Act Section 30010 to an assurance that the Commission will not act in such a way as to result in an unconstitutional taking of their property, this section does not authorize the Commission to otherwise abandon application of the policies and standards of the Coastal Act, including consideration of LUP policies related to coastal hazards and ESHA biological resources, which are directly implicated here with respect to project inconsistency. Instead, the Commission is only directed to avoid construing these applicable policies in a way that would unconstitutionally take private property for public use. Aside from this limitation, the Commission is still otherwise directed to enforce the requirements of the Coastal Act. Therefore, in this situation, the Commission must still comply with the Coastal Act and other applicable LUP policies by requiring measures to mitigate adverse impacts due to geologic hazards, fire hazards, ESHA, ESHA buffers, public access, cultural resources, water quality, and scenic views from the development of a single-family residence.

### **Minimizing Adverse Coastal Resource Impacts**

To achieve consistency with the Coastal Act and certified LUP policies in light of constitutional takings issues, the Commission approves development of a single-family residence with special conditions to minimize adverse effects on geologic hazards, ESHA, ESHA buffers, water quality, public access and visual resources. As discussed in previous sections of this report, the proposed residence is inconsistent with the ESHA policies of the Coastal Act. However, the Commission approves a residence on the site in order to avoid a potential constitutional takings claim.

In general, when a project is approved to avoid a taking, the project will still include implementation of mitigation measures necessary to minimize the impacts of development on sensitive coastal resources, such as ESHA, public access, cultural resources, water quality, and scenic views. The siting of the single-family residence close up against the steepest section of canyon slope allows for a reasonable economic use of the property while ensuring the project is as consistent as possible with direct ESHA avoidance and visual protection policies of the certified LUP. Such a residential project that is pulled back off of, and substantially away from, the bottom of the coastal canyon so as to provide at least some visual separation from inland views from the mouth of the canyon with the required colorization of the radiant heat barrier/privacy wall such as might be allowed on nearby residential lots ensures visual quality

protection to the maximum extent possible. However, there is no portion of the lot that is not occupied by ESHA or ESHA buffer, that may be considered developable area. To help identify an appropriate footprint area, Commission staff looked to the surrounding area to understand the relative size and scale of structures in the neighborhood and have applied this to the Applicant's site and its topography in a way meant to respect Coastal Act and LUP objectives, in terms of ESHA and ESHA buffers, coastal hazards, and the enhancing of habitat and visual resources on coastal canyon slopes.

### **Biological Resources**

The Commission's lead ecologist identified the majority of the vegetation mapped on the site as Lemonade Berry Scrub ESHA interspersed with Giant Wild Rye Grassland ESHA and established the need for an absolute minimum acceptable buffer of 50-ft. from the ESHA for this specific site after taking into consideration the protective benefits of the proposed radiant heat barrier wall/perimeter wall. The project would result in direct impacts to small patches of Giant Wild Rye ESHA persisting on the proposed building footprint inconsistent with Coastal Act Section 30240(a), therefore requiring approval of some development to avoid a taking. Furthermore, to ensure compliance with Coastal Act Section 30240(b) and avoid potential indirect impacts to the remaining ESHA on the site, the Commission typically requires a 100-foot buffer between development and ESHA. In some cases, like this one, a reduced buffer of a 50-foot radius from each patch of Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA is consistent with Section 30240(b) because the proposed development will not "significantly degrade" the ESHA or prevent the continuation of the habitat (see [Exhibit 16](#), Staff Memorandum 217 Vista Marina ESHA Determination). [Exhibit 11](#) depicts four patches of Lemonade Berry Scrub ESHA and one patch of Giant Wild Rye Grassland ESHA and a 50-ft. buffer surrounding the ESHA. However, even with a reduced 50-ft., it remains that the entire proposed approximately 12,921 sq. ft. development footprint (e.g., residence and cul-de-sac), the portion of the lot most suited for development, would be within the required ESHA buffer. This also renders the proposed development inconsistent with Coastal Act Section 30240(b) and LUP Policies RES-54, RES-68, RES-69, and RES-70 and undevelopable, therefore requiring approval of some development to avoid a taking.

If approved to avoid a taking, mitigation for the direct loss of Giant Wild Rye Grassland would be required and the development envelope must be revised to consider the possibility of providing a 50-foot buffer from at least one patch of Lemonade Berry Scrub ESHA on the site in order protect it against any significant disruption of habitat values and to be as compatible as possible with the continuance of those habitat areas to the greatest extent possible. [Exhibit 12](#) depicts a 50-foot buffer just from the largest of the four patches of Lemonade Berry Scrub ESHA situated at the easternmost end of the lot (towards the interior end of the canyon) and identifies a development envelope that maintains a 50-foot buffer from that patch. This identified development envelope would minimize adverse impacts to ESHA while still providing an economically beneficial use



of the property. Therefore, consistent with the mandate of Coastal Act Section 30010, and since any economic use of the subject property would likely result in some degree of Coastal Act inconsistency, staff recommends approval of some residential development to provide for an economically beneficial use of the property to avoid a potential unconstitutional taking of private property for public use. Staff is recommending a further reduction in the development footprint in order to minimize the inconsistencies with the ESHA protection policies while still providing enough space for a small home. **Special Condition 1** requires revised plans restricting the residential development envelope (i.e., residence, garage, patios, driveway, and cul-de-sac) to the area identified on [Exhibit 12](#). The Applicant has recently provided additional vegetation information regarding the mapped patch of Lemonade Berry Scrub considered to be the largest and requested that, based on this information, staff reduce the size of the polygon thus pulling back the 50-foot buffer and slightly increasing the size of the allowable development footprint. The Applicant pointed out that a portion of the area within the mapped Lemonade Berry Scrub polygon in the rear of the lot consisted of myoporum and toyon and that this particular portion of the polygon should instead be considered a small grove of myoporum and not Lemonade Berry Scrub as currently mapped. After a site visit to the site on January 12, 2024, the Commission's lead ecologist concurred that the portion of the polygon in question currently mapped as Lemonade Berry bushes was actually a myoporum bush and a *Pittisporum undulatum* bush (another type of non-native species). However, Dr. Engel also determined that no change to the overall Lemonade Berry Scrub polygon was necessary or justified based on her observations of the percent cover of lemonade berry bushes in this patch and her knowledge of the MCV2 membership rules for Lemonade Berry Scrub as well as that non-native shrubs commonly grow within native plant communities. Dr. Engel did not agree that a buffer less than 50 feet from the largest Lemonade Berry Scrub ESHA patch was warranted as myoporum intermingled with lemonade berry and toyon may still be considered within the Lemonade Berry Scrub Shrubland Alliance (as previously explained in Section C of the staff report and in Dr. Engel's November 30, 2023 memorandum).

If approved to avoid a taking, mitigation at a 1.5:1 ratio for to the absence of ESHA buffers from the other remaining patches of Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA is required. To generally illustrate the kind of mitigation that is required, [Exhibit 13](#) generally depicts the portion of the lot for which mitigation would be required. Since the proposed development does not provide the necessary buffers required to avoid impacts to ESHA from numerous adverse anthropogenic impacts, the Applicant will be required to mitigate for those impacts (the area for which mitigation is required does not include the area of the proposed public trail on the site as a public trail is an allowable use within ESHA). Additionally, separate mitigation for the impacts due to past removal of ESHA (Giant Wild Rye Grassland) within the proposed development footprint as documented by Commission staff is also required to resolve unpermitted development. As such, **Special Condition 2** requires submittal of a Coastal Lemonade Berry Scrub and Giant Wild Rye Grassland Restoration and

Monitoring Plan that quantifies the 50-ft. radius buffer area around existing patches of Lemonade Berry Scrub ESHA and Giant Wild Rye Grassland ESHA. A reduced mitigation ratio of 1.5:1 (restoration to impact) for disturbance impacts to existing ESHA surrounding the proposed development due to a lack of spatial buffer, as opposed to the 3:1 mitigation ratio typically required for actual direct loss impacts to ESHA is deemed appropriate.

Furthermore, **Special Condition 2** requires the Applicant to quantify the amount of Giant Wild Rye Grassland that was previously removed from the area of the currently proposed development footprint (during episodes of City required annual removal of weeds and debris to reduce fire potential) and requires mitigation for those impacts. The Applicant estimates that of the roughly 13,000 sq. ft. of area cleared of weeds and debris, approximately 400 sq. ft. of it contained Giant Wild Rye Grassland. A mitigation ratio of 4:1 (restoration to impact) for impacts due to unpermitted removal of the Giant Wild Rye ESHA patches is required to effectively restore the removed Giant Wild Rye, mitigate for its removal and provide additional restoration in order to fully resolve the violation since a 4:1 mitigation ratio exceeds the typical 3:1 mitigation ratio that would be applied for impacts to terrestrial ESHA.

As the mitigation area is much larger than that available for on-site mitigation, mitigation will also be necessary off-site. Off-site mitigation areas should be in the project vicinity, preferably within Trafalgar Canyon, or as close to the impact area as possible; but due to the fact that most of San Clemente coastal canyon open space areas are within privately held parcels, off-site mitigation areas may be necessary from a broader countywide area. The Applicant asserts and the Executive Director agrees, that if viable off-site mitigation areas are not found in the project vicinity, alternative but equivalent mitigation, such as payment into a restoration bank (such as an in-lieu fee payment to a public entity for on-going restoration efforts of Coastal Sage Scrub in Orange County) may satisfy mitigation requirements. The Applicant has raised concerns regarding the challenges of pursuing restoration opportunities on private property within Trafalgar Canyon or other coastal canyons in the vicinity and would prefer to pursue restoration opportunities only on City or State-owned property.

The Applicant has also requested that **Special Condition 2** be modified to allow relief from restoration requirements for Lemonade Berry Scrub ESHA should the California Department of Fish and Wildlife (CDFW) change the plant rarity status of G3S3 for Lemonade Berry Scrub from the current rare ranking to no longer rare before the required restoration commences. The global G3 ranking and the state S3 ranking both indicate that lemonade berry scrub is vulnerable and at moderate risk of extinction due to a restricted range and relatively few populations. However, there is no reason to accommodate this extraordinary request. The CDFW in partnership with NatureServe, the U.S. Fish & Wildlife Service, and CNPS does continually review the rarity ranking of all native plants in California and will eventually re-examine the ranking for Lemonade Berry Scrub as part of its normal course of review, however, as such a review is basic

standard procedure for all vegetation community types, this is no reason to modify **Special Condition 2** requiring a restoration and monitoring plan for lemonade berry scrub and giant wild rye grassland.

Further, to ensure that the existing ESHA on the lot is protected from future development and to conserve the undeveloped portions of the lot that the Applicant proposes to restore, **Special Condition 3** requires restriction of the restored ESHA on-site and undeveloped portions of the lot for open space conservation through a deed restriction.

### **Public Access**

The nearest public access to the beach at the mouth of Trafalgar Canyon (approximately 400 feet west) of the site by means of a culvert railroad underpass through a trail along a public easement that follows the bottom of Trafalgar Canyon beginning off of South Ola Vista (1/2 mile east of the site) down to the beach. The proposed development would not result in a direct impact to coastal access. However, as the subject site is a vacant lot at the Marina Vista street-end, the site is used by the public as a vertical short-cut to the Trafalgar Canyon trail and potentially for coastal access at the canyon mouth. Knowing this, the Applicant proposes to maintain and make available to the public existing unpaved lateral trails (i.e., pioneered foot paths) on the subject private property lot that provide a connection from the Vista Marina street-end through the subject private property to an existing Trafalgar Canyon trail at the bottom of the canyon within the municipal drainage easement. The Applicant is also proposing certain access and recreation improvements. Overall, trails cover approximately 2,370 sq. ft., or approximately 8% of the subject private lot. **Special Condition 4** requires recordation of a deed restriction in order to implement the Applicant's proposal for public access and recreational uses on the property. The condition requires an 8-ft. trail corridor for construction of a 4-ft. wide at-grade decomposed granite footpath providing pedestrian access from the proposed new Vista Marina cul-de-sac through the private property to an existing trail at the toe of the canyon as generally depicted in [Exhibit 14](#). The Commission imposes **Special Condition 4** in order to implement the Applicant's proposal to maintain and continue to make available to the public the existing trail connection access from and across this privately owned lot. Additionally, **Special Condition 1** requires the Applicant to submit a detailed final trail plan to ensure the proposed trail and proposed trail enhancements such as a bench at a public viewpoint at the trailhead are constructed and available for pedestrian use as a condition of CDP approval. No development shall occur within the deed restricted area except for development authorized by this coastal development permit: Construction necessary to complete the public access 4-ft. wide at-grade decomposed granite footpath, installation of storm drain pipe aligned under the public granite footpath, invasive plant removal and planting in accordance with final Coastal Lemonade Berry Scrub Restoration and Monitoring Plan per **Special Condition 2**, access signage, maintenance and repair of approved development within the deed restricted area(s).

### **Geologic Stability**

The site's canyon overall morphology is due to erosion from a previously active stream now in an underground culvert. Landslide debris materials were encountered to a depth of 14 feet. This portion of the City is locally underlain by ancient landslides. Results of slope stability analysis indicate that the site does not meet required minimum factors of safety. The entire site is canyon slope that does not meet minimum factors of safety and the new development on its own does not ensure minimization of risk to life and property due to high geologic risks. Only with the construction of a caisson shear pin system will the site obtain the minimum 1.5 factor of safety for static condition and 1.1 for pseudo-static conditions. And as previously discussed, in this case the caisson shear pin system would not act as a protective device and would therefore be consistent with Section 30253 (a and b) of the Coastal Act. Furthermore, as there is no active stream at the canyon bottom, there is little risk that the caisson system would become exposed in the future due to erosion.

However, while the proposed project remains inconsistent with LUP Policy HAZ-47 prohibiting new development from encroaching into coastal canyons, the project as conditioned can be made more consistent with some aspects of some LUP policies including: HAZ-1 which requires that new development that cannot avoid hazards be mitigated, HAZ-2 and HAZ-3 which require that new development located within close proximity to geologic and fire hazards minimize exposure to hazards and are designed appropriately to mitigate the risk to life and property (the project is designed with a caisson stabilization system and a fire barrier wall in order to mitigate risk to life and property) and to provide public access (the Applicant proposed a public trailhead and trail and the project is conditioned to provide a deed restriction for these). . Lastly, Policy HAZ-33 requires that "*Development ... wholly located in a coastal canyon ... shall minimize the disturbance to the natural topographic characteristics of the natural landforms.*"

So while the project is consistent with Chapter 3 policies of the Coastal Act pertaining to the minimization of adverse impacts due to new development, it is conditioned to be as consistent as possible with the requirement of LUP Policy HAZ-33 to minimize the impacts to the geology of the coastal canyons where development is unavoidable.

**Special Condition 1** requires the Applicant submit final revised plans further reducing the development envelope in order to reduce the project's impacts to ESHA. This action would also result in an overall reduction of the development's disturbance to the natural topographic characteristics of the canyon. The condition for revised plans, in addition to other requirements, also require conformance with geologic/geotechnical recommendations. Furthermore, **Special Condition 9** requires the Applicant acknowledge and agree that the site may be subject to hazards from slope instability, erosion, landslides, and earth movement and assume the risks of development.

### **Cultural Resources**

The San Clemente area has been inhabited by the Acjachemen/Juaneño peoples for hundreds of years. It is known that the tribal nation was not static and would have migrated in and around the area for miles. Also, according to the ethnographic evidence, the native nation consisted of permanent villages concentrated near watercourses, and the coast and settlement patterns have shown that village areas were usually concentrated in sheltered coves or canyons, near water sources, in defensive locations and on the sides of slopes in warm zones. Particularly because the subject site is in a canyon, monitoring during ground disturbance is critical for the protection of any tribal cultural resources onsite.

The Applicant failed to provide any preliminary information regarding possible cultural or archaeological resources with the CDP application submittal. Commission staff reached out to the affected tribal entities on July 6, 2023 and did not receive responses. In past permit actions near or adjacent to known tribal cultural resource sites and areas with potential to contain tribal cultural resources, the Commission has required applicants to monitor all grading and construction activities with both archeologists and representatives of the affected Native American tribes onsite as monitors. If cultural resources are discovered, the appropriate Native American representative will decide as to the appropriate treatment method and consistent with the LUP Policy CUL-1, preservation in-situ is the preferred mitigation method. To ensure that the project is consistent with the protection of tribal cultural resources including any found cultural deposits and past Commission action, the Commission imposes **Special Condition 6**, requiring cultural and archaeological monitoring. The Condition requires that the Applicant submits for review and approval by the Executive Director of an archaeological/cultural resources monitoring plan prepared by a qualified professional.

### **Water Quality**

During construction, the Applicant will be required to implement best management practices (BMPs) designed to minimize erosion and prevent debris from entering the storm drain system leading to the ocean (**Special Condition 7**). Permanent drainage control measures are essential in order to decrease irrigation or rain runoff from flowing over the canyon slope. A new curb is proposed as part of the new cul-de-sac/firetruck turnaround preventing runoff from continuing to sheet flow into the canyon at the street-end. A new storm drain catch basin is also proposed at the cul-de-sac that would connect via a new 48-ft. long, 12-inch diameter buried pipe to the existing buried 72-inch diameter reinforced concrete pipe culvert at the bottom of the canyon. The pipe is proposed to be buried along the existing trail alignment in order to minimize disturbance along the canyon's vegetated areas due to pipe trenching activities. After construction, runoff from new impervious areas will be directed away from the canyon slopes and either directed to landscaped areas or collected via area drains throughout paved areas, or a trench drain in front of the garage. **Special Condition 1** requires submittal of a post-construction Final Drainage and Runoff Control Plan.

### **Future Development**

In order to ensure that development on the site does not occur which could potentially adversely impact the geologic stability and/or environmentally sensitive habitat area concerns expressed in this staff report beyond that for which mitigation is being required, the Commission imposes **Special Condition 8**. This condition informs the Applicant that future development at the site requires an amendment to this permit (5-18-0930) or a new coastal development permit. Future development includes, but is not limited to, foundation or structural additions, hardscape, landscaping and fencing.

The Commission finds that, as conditioned, the project represents a reasonable use of the property (on a site that would otherwise prohibit residential use but which is designated and zoned for residential use by the City) that will avoid an unconstitutional taking of private property for public use, will avoid coastal resource impacts and provide consistency with the LUP and the Coastal Act to the maximum extent feasible, and appropriately responds to the unique circumstances of this case.

### **M. LOCAL COASTAL PROGRAM (LCP)**

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal permit for development in an area with no certified Local Coastal Program (“LCP”) only if the project will not prejudice the ability of the local government having jurisdiction to prepare an LCP that conforms with Chapter 3 policies of the Coastal Act. The Commission certified the Land Use Plan (LUP) for the City of San Clemente on May 11, 1988, and certified an amendment approved in October 1995. On April 10, 1998, the Commission certified with suggested modifications the Implementation Plan (IP) portion of the Local Coastal Program. The suggested modifications expired on October 10, 1998. The City re-submitted an IP on June 3, 1999, but withdrew the submittal on October 5, 2000. In 2018, the City certified an LUP amendment for a comprehensive update of the LUP. The City is currently also working on resubmittal of an IP, however, there is no certified LCP at this time.

As discussed in the above findings, the proposed residential development is inconsistent with multiple policies of the LUP. Acknowledging this in the context of the current development proposal, these inconsistencies help inform the analysis and determination whether the proposed development is inconsistent with Chapter 3 policies of the Coastal Act, which are actually the standard of review, rather than the LUP policies. Still, considering that these LUP policies are not the standard of review due to lack of a fully certified LCP, the Commission must still consider the contents of a certified LUP in making a decision, otherwise, ignoring the LUP may result in the Commission’s decision to be subject to reversal if a reviewing court finds that the decision was arbitrary and capricious. The approval of the project as conditioned will not prejudice the ability of the City to finalize its LCP consistent with the Coastal Act. Rather, the outcome of this proposed development should compel the City to act as

quickly as possible to obtain a fully-certified LCP so that the LUP policies in place are the binding standard of review going forward.

#### **N. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

The City of San Clemente is the lead agency responsible for certifying that the proposed project is in conformance with the California Environmentally Quality Act (CEQA). The City determined that in accordance with CEQA, the project is Categorically Exempt development from provisions of CEQA for new construction. As such, the City determined the project is exempt from CEQA's requirements regarding consideration of mitigation measures and alternatives. However, under Section 15251(c) of Title 14 of the California Code of Regulations, the Commission's CDP regulatory process has been certified as the functional equivalent to the CEQA process. The proposed CDP Applicant requests approval for the construction of new single-family residential development.

Therefore, the Commission's CDP approval is independently supported by the substantial evidence in this Staff Report and all accompanying reports. The Commission has conditioned the proposed project in order to ensure its consistency with Coastal Act and CEQA requirements, particularly regarding those potentially significant impacts to ESHA, coastal hazards, and public access. These special conditions are: 1) final revised plans, 2) coastal lemonade berry scrub and giant wild rye restoration and monitoring, 3) open space/habitat use deed restriction, 4) public access deed restriction, 5) Orange County Fire Authority approval, 6) cultural resource treatment and monitoring plan, 7) construction best management practices, 8) future development, and 9) assumption of risk, waiver of liability and indemnity. Section 13096(a) of the Commission's administrative regulations requires Commission approval of coastal development permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of CEQA. The preceding coastal development permit findings discuss the relevant coastal resource issues with the proposal, and the permit conditions identify appropriate modifications to avoid and/or lessen any potential for adverse impacts to said resources. Public comments received to date have been addressed in the findings above, which are incorporated herein in their entirety by reference.

The Commission finds that only as modified and conditioned by this permit will the proposed project reduce significant adverse effects on the environment within the

meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects which approval of the proposed project, as conditioned, would have on the environment within the meaning of CEQA. Thus, although the proposed project, as conditioned and mitigated, will result in significant and unavoidable impacts to biological and aesthetic resources, all significant environmental impacts have been mitigated to the extent feasible, and the proposed project is being approved despite the remaining impacts for the reasons explained in staff report sections K (Takings) and L (Approvable Project) above. There are no feasible alternatives that would further lessen the impacts of the project as conditioned and mitigated.

## **APPENDIX A - SUBSTANTIVE FILE DOCUMENTS**

City of San Clemente Certified LUP

City of San Clemente Approval in Concept, dated February 26, 2018

*Biological Technical Report, 217 Vista Marina, City of San Clemente, Orange County, California* prepared by Glenn Lukos Associates, July 2018

*Status of Biological Resources Associated with 217 Vista Marina, San Clemente, Orange County* prepared by Glenn Lukos Associates, June 29, 2023

*Further Considerations Regarding Vegetation Alliance Mapping and Buffer Requirements for 217 Vista Marina, San Clemente, California (Piana Residence)*, prepared by Glenn Lukos Associates, December 20, 2023

*Geotechnical Investigation for New Residence, Proposed New Single-Family Residence, 217 Vista Marina, San Clemente, California* prepared by Geofirm dated December 11, 2017

*Updated Evaluation of Slope Stability, Proposed New Single-Family Residence, 217 Vista Marina, San Clemente, California* prepared by Stoney-Miller Consultants, Inc./Geofirm, July 25, 2023 and revised August 23, 2023

## **APPENDIX B – CULTURAL RESOURCES SIGNIFICANCE TESTING PLAN PROCEDURES**

- A. An applicant seeking to recommence construction following discovery of the cultural deposits shall submit a Significance Testing Plan for the review and approval of the Executive Director. The Significance Testing Plan shall identify the testing measures that will be undertaken to determine whether the cultural



deposits are significant. The Significance Testing Plan shall be prepared by the project archaeologist(s), in consultation with the Native American monitor(s), and the Most Likely Descendent (MLD) when State Law mandates identification of a MLD. The Executive Director shall make a determination regarding the adequacy of the Significance Testing Plan within 10 working days of receipt. If the Executive Director does not make such a determination within the prescribed time, the plan shall be deemed approved and implementation may proceed.

1. If the Executive Director approves the Significance Testing Plan and determines that the Significance Testing Plan's recommended testing measures are de minimis in nature and scope, the significance testing may commence after the Executive Director informs the permittee of that determination.
  2. If the Executive Director approves the Significance Testing Plan but determines that the changes therein are not de minimis, significance testing may not recommence until after an amendment to this permit is approved by the Commission.
  3. Once the measures identified in the significance testing plan are undertaken, the permittee shall submit the results of the testing to the Executive Director for review and approval. The results shall be accompanied by the project archeologist's recommendation as to whether the findings are significant. The project archeologist's recommendation shall be made in consultation with the Native American monitors and the MLD when State Law mandates identification of a MLD. The Executive Director shall make the determination as to whether the deposits are significant based on the information available to the Executive Director. If the deposits are found to be significant, the permittee shall prepare and submit to the Executive Director a supplementary Archeological Plan in accordance with subsection B of this appendix and all other relevant subsections. If the deposits are found to be not significant, then the permittee may recommence grading in accordance with any measures outlined in the significance testing program.
- B. An applicant seeking to recommence construction following a determination by the Executive Director that the cultural deposits discovered are significant shall submit a supplementary Archaeological Plan for the review and approval of the Executive Director. The supplementary Archeological Plan shall be prepared by the project archaeologist(s), in consultation with the Native American monitor(s), the Most Likely Descendent (MLD) when State Law mandates identification of a MLD, as well as others identified in the special condition. The supplementary Archeological Plan shall identify proposed investigation and mitigation measures. The range of investigation and mitigation measures considered shall not be constrained by the approved development plan. Mitigation measures considered

may range from in-situ preservation to recovery and/or relocation. A good faith effort shall be made to avoid impacts to cultural resources through methods such as, but not limited to, project redesign, capping, and placing cultural resource areas in open space. In order to protect cultural resources, any further development may only be undertaken consistent with the provisions of the Supplementary Archaeological Plan.

1. If the Executive Director approves the Supplementary Archaeological Plan and determines that the Supplementary Archaeological Plan's recommended changes to the proposed development or mitigation measures are de minimis in nature and scope, construction may recommence after the Executive Director informs the permittee of that determination.
  2. If the Executive Director approves the Supplementary Archaeological Plan but determines that the changes therein are not de minimis, construction may not recommence until after an amendment to this permit is approved by the Commission.
- C. Prior to submittal to the Executive Director, all plans required to be submitted pursuant to this special condition, except the Significance Testing Plan, shall have received review and written comment by a peer review committee convened in accordance with current professional practice that shall include qualified archeologists and representatives of Native American groups with documented ancestral ties to the area. Names and qualifications of selected peer reviewers shall be submitted for review and approval by the Executive Director. The plans submitted to the Executive Director shall incorporate the recommendations of the peer review committee. Furthermore, upon completion of the peer review process, all plans shall be submitted to the California Office of Historic Preservation (OHP) and the NAHC for their review and an opportunity to comment. The plans submitted to the Executive Director shall incorporate the recommendations of the OHP and NAHC. If the OHP and/or NAHC do not respond within 30 days of their receipt of the plan, the requirement under this permit for that entities' review and comment shall expire, unless the Executive Director extends said deadline for good cause. All plans shall be submitted for the review and approval of the Executive Director.