

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
300 Ocean Blvd., Suite 301
Long Beach, CA 90802
(562) 590-5071



Th16a

CDP Denied: 6/14/19
Staff: L. Roman-LB
Staff Report: 11/21/19
Hearing Date: 12/12/19

STAFF REPORT: REVISED FINDINGS

Application No.: 5-18-0930

Applicant: Graham Property Management, LLC

Agent: Mark McGuire

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

Project Description: Construction of a new three-story, 25-ft. tall above natural grade, 5,165 sq. ft. single-family residence, 1,239 sq. ft. garage, 1,931 sq. ft. terrace/deck area, grading and 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 and connection to storm drain system, new landscaping and restoration of native vegetation on a vacant 34,784 sq. ft. coastal canyon lot.

Commission Action: Denied (June 14, 2019)

Commissioners on Prevailing Side: Commissioners Howell, Uranga, Peskin, Brownsey, Turnbull-Sanders, Escalante, Faustinos, Luevano, and Vice Chair Padilla

Staff Recommendation: Adopt Revised Findings

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STAFF NOTE

Staff is recommending that the Commission adopt the following revised findings in support of the Commission's June 14, 2019 denial of Coastal Development Permit application 5-18-0930. Because the Commission's action differed significantly from the staff's recommendation, this report contains revisions reflecting the Commission's action. The findings have been modified throughout from the staff report published on May 31, 2019 and staff report addendum published June 12, 2019; changes are shown in ~~strike through~~ (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 December 2019 Commission hearing. See page 5 for the motion to adopt the revised findings.

SUMMARY OF COMMISSION ACTION

On June 14, 2019, the Coastal Commission (Commission) denied the subject coastal development permit (CDP) application by a vote of 9-0. The Commission found the proposed 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 inconsistent with Coastal Act policies relating to geologic hazards, landform alterations, visual resources, and environmentally sensitive habitat areas (ESHA), using the City's certified Land Use Plan as guidance.

Specifically, the Commission found that, as proposed, the project does not minimize risk to life and property in areas of high geologic hazards, contrary to Coastal Act section 30253(a), and could not assure stability or structural integrity without the need to construct a deepened caisson foundation and retaining walls that would substantially alter natural landforms along bluffs and cliffs, contrary to Coastal Act section 30253(b).

In addition, extensive ESHA exists on the subject site, including coastal lemonade berry scrub and giant wild rye, and the proposed development footprint does not provide an adequate buffer between the proposed development and ESHA located on the applicant's property. The certified LUP requires development to be sited a minimum of 100 feet from known ESHA, however, virtually the entire project footprint would be located within the 100-foot buffer area. In addition, the Commission staff biologist determined that providing a 50-foot buffer between the proposed development and ESHA in the project area would be sufficient to avoid significantly degrading the ESHA. However, the proposed development does not adhere to the reduced buffer determined to be sufficient in this case. Therefore, the project is not consistent with Coastal Act Section 30240.

The Commission also found the project inconsistent with Coastal Act and certified Land Use Plan policies that restrict coastal canyon development. The Coastal Act and the certified Land Use Plan prohibit residential development on a coastal canyon slope and require the minimization of alterations to natural land forms. The certified Land Use Plan specifically requires a development setback of 15 feet from the canyon edge or from native vegetation, and requires canyon development to be safely sited. Because residential development is prohibited on a canyon slope/face and the lot is situated on a canyon slope/face, the proposed development

project is unable to comply with this prohibition, and may be unable to meet the LUP's canyon setback requirements, no matter the size or siting in the canyon lot.

Given the limitations described above, allowing development on the site would violate one or more of the restrictions listed above. In order to avoid an unconstitutional taking of private property, the Commission might have to allow some residential development on the site that is inconsistent with Chapter 3. However, the Commission found that it was not necessary to approve the current 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 the current record. In particular, commissioners recognized the complicated nature of the proposed development, as well as significant deficiencies with the proposed permit, and found that further review of the project by the City at the local level would clarify the scope of the project that would be undertaken by the applicant. In particular, the applicant will have to go through the City's variance process to obtain local approval for its project, and that process could alter the nature and scope of the project from the version presented to the Commission. The applicant remains free to return to the Commission to apply for a coastal development permit after obtaining such a variance from the City, which would provide the Commission with a consistent and more complete record regarding the applicant's proposed development. Because the Commission will have authority at that time to approve a proposed residential development in order to avoid a taking of the applicant's private property pursuant to Section 30010 of the Coastal Act, denial of this permit application does not result in an unconstitutional taking of private property. Therefore, the Commission denied the coastal development permit application to allow for further review by the City.

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Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Vicinity Map
Exhibit 2 – Assessor’s Parcel Map
Exhibit 3 – Architectural Plans
Exhibit 4 – Landscaping Plan
Exhibit 5 – Preliminary Grading Plan
Exhibit 6 – Preliminary Foundation Plan
Exhibit 7 – Geologic Map and Cross-Section
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Exhibit 9 – ESHA Buffer Exhibit
Exhibit 10 – Memorandum: 217 Vista Marina ESHA Determination
Exhibit 11 – Offer-to-Dedicate Trail Area
Exhibit 12 – Open Space Conservation Easement Area
Exhibit 13 – Memorandum: 217 Vista Marina Canyon Edge Determination

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 June 14, 2019 denying Coastal Development Permit Application No. 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: Commissioners Howell, Uranga, Brownsey, Turnbull-Sanders, Escalante, Faustinos, and Vice Chair Padilla.

RESOLUTION TO ADOPT REVISED FINDINGS:

The Commission hereby adopts the findings set forth below for the denial of Coastal Development Permit 5-18-0930 on the ground that the findings support the Commission's decision made on June 14, 2019 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. ~~**Approved Footprint.**~~ All development (including accessory development, e.g., driveway, patio, etc.) on the subject property shall be located within the building footprint as shown on Exhibit 3. No development shall have direct impacts to existing ESHA onsite.
 - 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 colors, white and black tones shall not be used. All windows and other surfaces shall be as non-glare and non-reflective as possible, 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 building footprint (see Special Condition 1(a) above) shall consist of appropriate 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 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 lighting shall be used that is 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 easement area required by Special Condition 3 below and as generally described in Exhibit 11.~~
- ~~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 11. The final trail plan shall show existing vegetation including sensitive habitat areas, and show all development including grading, staging, signage, structures, 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 and enforced, alignment, trail width (i.e., 4-foot wide trail in a 10-foot wide trail easement), 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 the 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 that will be used to facilitate, manage and provide public access to and along the trail. 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. Coastal 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 final revised 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 and the required restoration shall be at a minimum ratio of 3:1 (restoration to impact) for past occurrences of major vegetation removal (i.e., direct impact to Giant Wild Rye vegetation) and mitigation at a 2:1 ratio for development indirect impacts due to a lack of a minimum required 50-ft. buffer around Coastal Lemonade Berry Scrub ESHA. 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 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 Restrictions.** No development, as defined in Section 30106 of the A. Coastal Act shall occur within the open space area within the subject property, as generally shown in Exhibit 12 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 the habitat enhancement/restoration and monitoring 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**.~~

~~B. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the landowner(s) 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.~~

~~C. 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.~~

~~D. 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 Easement.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, and in order to implement the applicant's proposal, the landowner(s) shall execute and record a document(s), in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to a public agency or private entity, approved by the Executive Director, a public access easement for public access and recreational uses in perpetuity. The easement area shall be 10 ft. wide, to allow for construction and maintenance of a 4 ft. wide trail within the easement area. 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. Such easement shall be located from the proposed new Vista Marina cul-de-sac on the subject private property lot and through the private property to an existing trail at the toe of the canyon as generally depicted in Exhibit 11. No development, as defined in Section 30106 of the Coastal Act, shall occur within the easement area except for the following development authorized by this~~

coastal development permit: Construction by the applicant, necessary to complete the public access 4-ft. wide at grade decomposed granite footpath, 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 easement area shall be the responsibility of the public agency or private entity accepting the public easement.

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 easement area prepared by a licensed surveyor based on an on-site inspection of the easement area. The document shall also provide that access shall be uninterrupted at all times.

B. The irrevocable offer to dedicate shall be recorded free of prior liens and any other encumbrances that the Executive Director determines may affect the interest being conveyed. The document shall provide that the offer of dedication shall not be used or construed to allow anyone to interfere with any rights of public access acquired through use which may exist on the property.

C. The offer to dedicate 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, and shall be irrevocable for a period of 21 years, such period running from the date of recording, and indicate that the restrictions on the use of the land shall be in effect upon recording and remain as covenants, conditions and restrictions running with the land in perpetuity, notwithstanding any revocation of the offer.

5. ~~**Orange County Fire Authority Approval.**~~ PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall provide to the Executive Director a copy of a 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 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. ~~**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 storm drain, open ditch or surface water; and~~
- ~~(4) — The applicant shall provide adequate disposal facilities for solid waste, including excess concrete, produced during construction.~~

~~7. **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.~~

- ~~8. **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 consists of a 34,784 sq. ft. (approximately .85 acres) vacant lot with a 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 subject site is located within a portion of Trafalgar Canyon which is in a relatively natural state, close to the mouth of the coastal canyon where it opens into the ocean. 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-story, 25-ft. tall above natural grade, 5,165 sq. ft. single-family residence, 1,239 sq. ft. garage, 1,931 sq. ft. terrace/deck area, retaining wall/solid radiant heat barrier/privacy barrier wall surrounding development, new cul-de-sac/firetruck turnaround and driveway, installation of a new fire hydrant at cul-de-sac, drainage improvements, connection to storm drain system, restoration of remaining open space and an offer-to-dedicate a public trail on a 34,784 sq. ft. lot. The development footprint utilizes approximately 42% of the lot; 10,797 sq. ft. of the lot (31%) lies inside the radiant barrier heat

wall, this includes 12.5% coverage for the footprint of the residence-including decks and terraces with the remainder taken up by landscaped areas and by 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. A paired down minimum size cul-de-sac/firetruck turnaround with new fire hydrant and new trailhead/ocean viewpoint which will benefit the proposed new development and general public takes up 3,660 sq. ft. (10.5%) of the private lot; the applicant also proposes an offer-to-dedicate that covers approximately 2,835 sq. ft. (8%) of the lot for an existing soft-footed lateral trail connection from Vista Marina street-end through the subject private property to an existing Trafalgar Canyon trail at the toe of the canyon within a municipal drainage easement; and finally, the applicant proposes to preserve and restore coastal canyon habitat covering approximately 17,492 sq. ft. (50%) of the lot.

Grading consisting of 2,150 cubic yards of cut and 300 cubic yards of fill for the construction of the semi subterranean level and stabilization of the building pad area with caissons is proposed. **Exhibit 3** of the staff report includes proposed Architectural Plans, **Exhibit 4** is the proposed Landscaping Plan, **Exhibit 5** is Preliminary Grading and Drainage Plan, and **Exhibit 6** is a Preliminary Foundation Plan.

PROJECT HISTORY

The applicant submitted an application to the Commission for construction of the proposed 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 section 17.56.050(D)(2) of the City’s municipal code prohibits development from encroaching into coastal canyons. Friends of Trafalgar Canyon further explained that alternatives to the proposed project existed that 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 based on then-current plans that showed the

residence could be sited at least 15 feet setback from (i.e., landward of) the canyon edge, and “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 the 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 location of the canyon edge and configuration of the proposed project, a local variance would be required because the project violates the City’s rules prohibiting encroachments into the canyon.

For the reasons described in this staff report, the Commission denied the permit application.

B. 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-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-25 *No Bluff/Canyon/Shoreline Protective Devices for Accessory Structures.* No bluff/canyon/shoreline protection device shall be allowed for the sole purpose of protecting a new or existing accessory structure.

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-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.*

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 canyonface, the landward edge of the topmost riser shall be taken to be the canyon edge. (Refer to Figure 7-1).*

Chapter 3 policies of the Coastal Act and the certified LUP require hazard avoidance and minimization of landform alteration for new development in hazardous areas. The subject site is located in an area of San Clemente known for overall geologic instability. Morphology at the subject coastal canyon was shaped due to ancient erosion from a canyon stream from a previously active drainage course 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 is grossly unstable and do not meet the minimum factors of safety. 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. The entire site is canyon slope that does not meet minimum factors of safety to ensure conformance with Public Resources Code section 30253 in regards to ensuring 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.

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 a 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 5**) along with a 15-foot setback structural setback and a 5-foot accessory structure setback. Geofirm (2017) identifies a canyon edge in Plate 1 “Geologic Map and Cross Sections”) included as **Exhibit 7**, but their edge 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. The provided plans and cross-sections do not provide topographic contours of the adjacent parcels and therefore do not provide sufficient information to identify a continuous canyon edge, however, 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, 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 canyon top/rim located beyond the subject site, along the rear yards of the lots on Calle Conchita (*see Exhibit 13*). 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 thus and thus development onsite presents significant geologic hazards risk to both life and property given the morphology of the subject coastal canyon, contrary to the requirements of Public Resources Code Section 30253 (and would also appear to be 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, Staff is not in agreement with this determination.

Slope Stability

Additionally, it is made clear in the submitted geotechnical report that the canyon slope is not globally stable, 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 retention 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. Under existing conditions, gross slope stability is not present on the property; the entire site does not meet the required minimum 1.5 FS for static and 1.1 FS for pseudo-static. The required factors of safety can only be obtained following construction of a caisson shear pin system as recommended by the geotechnical consultant.

~~In order to assure~~ **Here**, the stability of the proposed residence and provision of adequate factors of safety can be provided, but only through the use of the proposed stabilization/retention devices. The applicant proposes installation of 19 caissons along the straight line at southeastern property edge running along the base canyon slope that ascends to the top of canyon on the Calle Conchita lots and a deepened caisson foundation utilizing 18 caissons along the northern perimeter of the residential structure (**Exhibit 6**). Above ground, retaining walls are proposed along the same alignment of the below ground rows of caissons to provide additional support and mitigate against soil erosion and soil collapse. Coastal Act Section 30253(b) requires that new

development not rely on protective devices that would substantially alter natural landforms along bluffs and cliffs, and LUP policies HAZ-20 and HAZ-25 prohibit 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 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). The proposed retaining walls and caisson systems are “canyon protective devices” **according to LUP policy HAZ-21**, in that they are “artificial structures that alter natural landforms or alter canyon processes,” and, contrary to the LUP policies, they are not intended to support a coastal-dependent use or an existing structure.

The upslope retaining wall/caisson system is necessary both to assure stability against deep-seated slope failures and to protect the proposed residence from soil creep and surficial slope movement. The down slope caissons would similarly stabilize the building pad and protect against deep-seated slope failures, while the linked retaining wall will retain the building pad from shallower failure and protecting the home from shallower slope movement. These functions are “protective” of the proposed development, and even more clearly are altering natural canyon processes. The major cut/grading to create the building pad and the upslope wall would also seem to be substantial alterations of the natural landform along the canyon bluff/cliff. And as the site is currently vacant of structures, the proposed residence is new development, not existing development entitled to a canyon protective device per LUP policies.

Conclusion

For the reasons stated above, the proposed project is inconsistent with the above cited Chapter 3 policies due to the fact that the proposed development does not minimize risk to life and property in areas of high geologic hazards, **and does not assure stability and structural integrity without requiring** ~~but for~~ construction of a protective devices (the caissons **and shear pin foundation system/retaining walls**) that would substantially alter natural landforms along bluffs and cliffs, contrary to the requirements of Coastal Act section 30253. Moreover, the proposed project is also inconsistent with the certified Land Use Plan policies that prohibit residential development on a coastal canyon slope, that require a development setback from the canyon edge or from native vegetation, and that require development to be safely sited.

C. BIOLOGICAL RESOURCES

Section 30240~~(b)~~ 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:*

- f. 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.*
- g. Review of current land use and land ownership within the proposed development project vicinity.*
- h. Assessment and mapping of vegetation communities present within the proposed development project vicinity.*
- i. General assessment of potential federal and state jurisdictional areas, including wetlands and riparian habitats*
- j. A base map that delineates topographic lines, parcel boundaries, and adjacent roads.*
- k. A vegetation map.*
- l. A description of the vegetation, including an estimate of the ground cover of the major species and a species inventory*
- m. A soils map that delineates hydric and non-hydric soils, if applicable.*
- n. An inventory of plant and animal species that indicates the potential existence of sensitive species.*
- o. 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-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 9** 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 such, support varying degrees of disturbed and undisturbed native vegetation. Non-native, invasive species that have naturalized in the canyons from ornamental residential backyards 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(b) and those of the certified LUP. Encroachment into the canyon by structures and other appurtenances increases the potential for the introduction of non-native plant species, and predation of native species by domestic animals, and destabilization of the canyon from excess irrigation, and increase necessary 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 the preservation of native vegetation and discourages the introduction of non-native vegetation in coastal canyons. 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.

ESHA Determination

In this case, the proposed development is located within Trafalgar Canyon. The applicant hired Glenn Lukos Associates (GLA) who 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)¹. GLA did not observe any listed plant or animal species on the site. They did observe numerous common species of birds and coyote and raccoon tracks. Of the 0.789 acres of mapped vegetation, 0.211 acres consisted of native lemonade berry (*Rhus integrifolia*) scrub (0.169 acres), giant ryegrass (*Elymus condensatus*) grassland (0.035 acres), and toyon (*Heteromeles arbutifolia*) scrub (0.007 acres). GLA mapped the remaining 0.578 acres as disturbed, ornamental, ruderal, and non-native vegetation areas. **Exhibit 8** includes the GLA vegetation map for the site.

The G-rank (global) and S-rank (state) represent 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. The MCV2 membership rules 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. Lemonade berry scrub is a coastal scrub under the *Rhus integrifolia* Shrubland Alliance, which holds a conservation status/rarity ranking of G3S3.¹ “Lemonade berry scrub” is a common name for the *Rhus integrifolia* Shrubland Alliance, which includes native plant species such as, but not limited to, lemonade berry (*Rhus integrifolia*) and toyon (*Heteromeles arbutifolia*). On this site, the lemonade berry stand consists of greater than 50% relative cover of lemonade berry with some patches of toyon, which Sawyer et al. (2009) identify as occurring within lemonade berry scrub. The lemonade berry scrub on this site is part of a much larger stand of lemonade berry that occurs throughout north and south slopes of Trafalgar Canyon. According to Memorandum dated May 29, 2019 by the Commission’s Senior Ecologist, Dr. Engel, Lemonade Berry Scrub occupying the canyon in this case rises to the level of ESHA and should be protected consistent with Section 30240 of the Coastal Act.

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 applicant submitted a Biological Technical Report dated July 2018 prepared by Glenn Lukos Associates. General site-specific surveys of the project site were conducted May 29 and April 27, 2018 to identify potential sensitive plant habitats, a general habitat assessment, and a wetlands jurisdictional determination. The surveys identified that the upslope to the south support a mosaic of native and non-native ornamental trees, native scrub and non-native herbs; and the downslope to the north supporting a mosaic of non-native grasses and forbs, native and non-native shrubs and patches of giant ryegrass. The vegetation map provided by the applicant is included as **Exhibit 8** of the staff report. Two of the vegetation communities mapped on the site, Giant Wild Rye and Lemonade Berry Scrub, were considered relatively rare and threatened by the applicant’s consulting biologist. 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.

The Biological Technical Report characterizes 0.450 acre of the site as disturbed ruderal vegetation:

The southern edge, extending to the central-portion of the site, covering approximately 0.450 acre consists of a generally flat pad that supports a mosaic of non-native grasses and forbs that do not directly correspond with any of the alliances within the MCVII and thus has been characterized as disturbed ruderal

¹ 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.

vegetation. 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).

The proposed development footprint is within the central-portion 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 the 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 by directing exterior lighting away from preserved natural areas, prohibiting the introduction of any invasive exotic plants, and including a solid perimeter wall along the canyon side of the property 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 Commission's staff ecologist has determined that the lemonade berry scrub at 217 Vista Marina rises to the level of ESHA because it is rare and is easily disturbed by human activities. The certified LUP requires a 100-foot buffer around ESHA, however a narrower buffer may be allowed based on site specifics. The Commission's staff ecologist determined that a reduced 50-foot buffer is deemed as adequate for this site as the site specific biological study did not identify any rare plants or animals that are dependent on the lemonade berry scrub or other habitat in Trafalgar Canyon; and as six foot wall between development and the canyon habitat is proposed that will serve as a radiant heat barrier thus eliminating the need for fuel modification, and will also serve as a disturbance barrier from noise, light, domestic animals, etc. **Exhibit 9** depicts a 25-ft. buffer from ESHA on the subject site, it is easy to see in this exhibit that a minimum 50-ft. ESHA buffer as determined necessary would cover the entire proposed development footprint and render the site undevelopable. However, even with the minimum 50-foot buffer, ESHA is so prevalent on the site that the entire development footprint (approximately 14,457sq. ft.) would require mitigation for impacts to ESHA buffers. As it is not an option to provide restoration in place (in ESHA buffer as the development footprint is in said ESHA buffer), restoration at 1:1 ratio (restoration to impact), plus mitigation at a 2:1 ratio results in a total ratio of 3:1 for impacts to a 50-foot Lemonade Berry Scrub buffer is required. This results in approximately 43,271 sq. ft. of required mitigation. As this is an area larger than the subject lot, mitigation ~~will~~ **would** also be necessary off-site. Off-site mitigation areas ~~should~~ **would need to** be in the project vicinity, preferably within Trafalgar Canyon.

Therefore, the Commission finds that the development as proposed ~~poses potential significant adverse impacts to ESHA vegetation which~~ would significantly degrade habitat **ESHA** and would not be compatible with the continuance of those habitat areas inconsistent with Section

30240(b) of the Coastal Act due to the Commission's staff ecologist's determination that the development **must** incorporate a minimum ~~reduced~~ 50-ft. buffer from the Lemonade Berry Scrub ESHA, which the proposed development does not ~~incorporate~~ **include**; in fact, it does not propose any meaningful buffer from the lemonade berry scrub ESHA at all.

D. 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 in previous years prior to the applicant's ownership, including removal of patches of Giant Wild Rye on the generally flat pad on the central portion of the site (within the proposed development footprint).² The removal of 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 natural plant communities in the area (Lemonade Berry Scrub) however, isolated patches on their own may not rise to the level of ESHA. 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 the City undertook the vegetation removal in question on the property. However, these orders did not direct nor authorize removal of native vegetation (the Giant Wild Rye), the unpermitted development at issue.

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 staff recommendation for the proposed project is~~ **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 for impacts to these areas that will result from the proposed project, staff imposes **Special Condition 2** requiring mitigation for these direct impacts through the restoration of disturbed areas with native vegetation at a 3:1 mitigation ratio.~~

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 Land Use Plan was used as guidance by the Commission in reaching its decision. ~~Approval of~~ **Commission action on** 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~~

² Commission staff investigated reports that Coastal Lemonade Berry had been removed from areas within the proposed development footprint, but could not verify that such removal had occurred.

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 violations going forward. **As the Commission denied the permit application, violations of the Coastal Act that have occurred on this site are not addressed at this time through conditions of approval.**

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.

PUB-43 ***Dedicated Public Access Areas.** The City will pursue dedication and acceptance, where feasible, of beach access and other offers-to-dedicate (OTD) throughout the City. The City shall maintain an inventory of public access and open space dedications or OTDs to ensure that such areas are known to the public and protected through the coastal development permit process. Prior to the City's acceptance and recordation of any legal documents submitted by applicants in compliance with special conditions related to public access OTDs, the City shall comply with Title 14 CCR § 13574.*

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 is available at the "T" Street Public Access Point, approximately 700 feet southwest of the subject site. The means of access is a pedestrian railroad overpass. There is also 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. In acknowledgement, the applicant voluntarily proposes the construction of a trailhead and endorsing for public use existing soft-footed lateral trails 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. Overall, trails cover approximately 2,835 sq. ft. (8%) of the subject private lot. However, without a public access dedication or an offer-to-dedicate for a public access trail, there is no guarantee that existing vertical access across the site to connect with the Trafalgar Canyon trail (which provides coastal access) will remain available to the public.

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 Hazards and ESHA sections 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 land forms, 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 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 involve canyon face development.

Because of its location near the mouth of the Trafalgar Canyon within the canyon slope, the project would be highly visible from public vantage points, including a public trail along the City's drainage easement at the foot of the canyon. The proposed development on this lot would not be visible along the entire stretch of the existing trail (starting at Ola Vista and ending at the public beach, it 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 residential development on the canyon top which is setback from the canyon edge, providing a natural canyon slope view, free from development. This site is unique compared to the other residential parcels in the vicinity of Trafalgar Canyon in that it is located 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. 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 Lane³. In these instances, 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

³ 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

small area of the top of the canyon slope. 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 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. Thus, the project is inconsistent with the Section 30251 of the Coastal Act and the LUP's visual resource protection policies.

G. 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.

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 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. Section 30230 of the Coastal Act requires that marine resources including biological productivity be protected. Section 30231 of the Coastal Act requires that the biological productivity of coastal waters be maintained, and where feasible, restored. In addition, Sections 30230 and 30231 require that the quality of coastal waters be maintained and protected from adverse impacts.~~

~~Therefore, only as conditioned does the Commission find that the proposed project conforms to Sections 30230 and 30231 of the Coastal Act.~~

H. PERMIT DETERMINATION CONCLUSION

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 within a coastal canyon of an area of high geologic hazard requiring the construction

of protective devices (caisson foundation/**retaining walls**) which would alter natural landforms along bluffs/cliffs inconsistent with Section 30253 of the Coastal Act; and adjacent to ESHA with no ESHA buffer inconsistent with Section 30240(b) of the Coastal Act. Thus any residence proposed on the site would be inconsistent with these Coastal Act and LUP policies. In addition, the proposed project is inconsistent with visual resource protection policies of the Coastal Act. These inconsistencies are summarized below:

ESHA and Sensitive Habitat

The subject site is a vacant 34,784 sq. ft. lot. The proposed development footprint elements cover a gross area of 34,784 sq. ft., approximately 40% of the 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 staff ecologist has identified the large patches of Coastal Lemonade Berry Scrub as ESHA. LUP Policy RES-54 requires residential 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 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 ecologist (**Exhibit 9**) would leave a zero development area. As proposed, the project would be constructed immediately adjacent to ESHA, entirely within the 50-ft. ESHA buffer with a barrier wall serving as the only buffer. As such, the approved project will negatively impact the continuation of ESHA inconsistent with the Coastal Act and LUP policies by not providing an adequate buffer from the Coastal Lemonade Berry Scrub taking into account the rarity of the Coastal Lemonade Berry Scrub and the sensitivity to which this ESHA is disturbed and easily degraded by human activity and development.

Geologic Hazards

Chapter 3 policies of the Coastal Act and the certified LUP require hazard avoidance and minimization of landform alteration for new development in hazardous areas. 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 is grossly unstable and do not meet the minimum factors of safety to ensure conformance with Public Resources Code section 30253 in regards to ensuring 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, as previously discussed, the entire proposed project would "encroach into" the coastal canyon, and thus and thus development onsite presents significant geologic hazards risk to both life and property given the morphology of the subject coastal canyon, contrary to the requirements of Public Resources Code Section 30253 (and would also appear to be inconsistent with LUP policy HAZ-47 requiring new development not encroach into coastal canyons). Coastal Act Section 30253(b) requires that new development not rely on protective devices that would substantially alter natural landforms along bluffs and cliffs, and LUP policies HAZ-20 and HAZ-25 prohibit the construction of canyon protective devices, (including deep piers/caissons, or other artificial structures as defined in the LUP that alter natural landforms or alter canyon processes and provide coastal erosion control and hazards protection, except pursuant to a CDP for the protection of an *existing* principal structures or

residence in danger from erosion). The proposed retaining walls and caisson systems are “canyon protective devices”, in that they are “artificial structures that alter natural landforms or alter canyon processes” and contrary to the LUP policies, they are not intended to support an existing structure.

The retaining wall/caisson system is necessary both to assure stability of the site and to protect the proposed new development. These retaining and foundation systems are “protective” of the proposed development, and even more clearly are altering natural canyon processes. The major cut/grading proposed would also seem to be substantial alterations of the natural landform along the canyon bluff/cliff. And as the site is currently vacant of structures, the proposed residence is new development, not existing development entitled to a canyon protective device per LUP policies. As such, the proposed project is inconsistent with Chapter 3 policies due to the fact that the proposed development does not minimize risk to life and property in areas of high geologic hazards but for construction of a protective device (the caissons) that would substantially alter natural landforms along bluffs and cliffs, contrary to the requirements of Coastal Act section 30253. Moreover, the proposed project is also inconsistent with the certified Land Use Plan policies that prohibit residential development on a coastal canyon slope, that require a development setback from the canyon edge or from native vegetation, and that require development to be safely sited.

Public Views

Because of its location near the mouth of the Trafalgar Canyon within the canyon slope, the project would be highly visible from public vantage points, including a public trail along the City’s drainage easement at the foot of the canyon. From this vantage point, the visual impact would be in contrast to the current makeup of residential development on the canyon top which is setback from the canyon edge, providing a natural canyon slope view, free from development. This site is unique compared to the other residential parcels in the vicinity of Trafalgar Canyon in that it is located 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. This site is unique compared to the other residential parcels in the vicinity of Trafalgar Canyon in that it is located on the coastal canyon face/slope, and 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 the lack of development on the canyon face/slope, inconsistent with Section 30251 of the Coastal Act and LUP Policy VIS-1.

Conclusion

The inconsistencies with the Coastal Act summarized above **are significant and raise complicated issues concerning siting of the proposed residence to minimize impacts to coastal resources, including Trafalgar Canyon, and the kind and extent of mitigation that is needed to off-set impacts to ESHA located on the applicant’s property. It is possible that the proposed 5,165 sq. ft. single-family residence with a 1,239 sq. ft. garage and 1,931 sq. ft. terrace/deck area cannot be moved or reconfigured on the lot to be fully consistent with**

Chapter 3 of the Coastal Act or avoid the need for a local variance. However, as proposed, the 8,335 square-foot residence (5,165 sq. ft. single-family residence with a 1,239 sq. ft. garage and 1,931 sq. ft. terrace/deck area) covers 4,628.25 square feet of the lot and 14,457 total square feet including landscaped areas, paved driveway, and new cul-de-sac/firetruck turnaround. A smaller project could reduce impacts to coastal resources and inconsistency with Chapter 3 of the Coastal Act, while still providing an economically viable use of the site. The Commission has authority pursuant to Section 30010 of the Coastal Act to approve development that is not consistent with Chapter 3 in order to avoid an unconstitutional “taking” of private property.⁴ However, the Commission finds that it would be premature at this time to approve the proposed residence and associated development pursuant to Section 30010 based on the current record given the lack of evidence that a development of this scope is necessary to allow for an economically viable use of the site.

Evidence presented to the Commission establishes that the City of San Clemente has 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). Specifically, section 17.56.050(D)(2) of the City’s municipal code prohibits development from encroaching into coastal canyons. 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 finds that a full and complete review of the proposed development by the City at the local level would provide a clearer factual record on which the Commission could base its decision to either approve or deny the project, in order for the project to more fully comply with Chapter 3 of the Coastal Act while also respecting private property interests of the applicant, as reflected in Section 30010 of the Coastal Act.

Because the Commission has not made a “final and authoritative” decision about the extent of development it will permit or the allowable use of the property, the Commission’s denial of this permit application at this time does not result in a “taking” of private property without just compensation. (See MacDonald, Sommer & Frates v. Yolo County (1986) 477 U.S. 340, 348; Knick v. Township of Scott, Pennsylvania (2019) 139. S.Ct. 2162, 2174, 204 L. Ed. 2d 558 [recognizing “settled ground that no taking had occurred because the zoning board had not yet come to a final decision regarding the developer’s proposal”]. Precedents of the U.S. Supreme Court “uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.” (MacDonald, 477 U.S. at 351.) Except in the rare instance where reapplication would be futile, courts generally require that an applicant

⁴ Pursuant to Section 30010 of the Coastal Act, the Commission does not have authority 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.” In prior Commission actions, the Commission has construed Section 30010 to allow the Commission to approve some form of development that is inconsistent with Chapter 3 of the Coastal Act in order to avoid an unconstitutional “taking” of private property for public uses.

resubmit at least one application for a modified project before it will find that the taking claim is ripe for review. (Id.)

Here, submitting a subsequent application to the Commission for some form of residential development after further review of the project by the City would not be a futile endeavor. Given the Commission's authority under Section 30010 to approve development that would otherwise be inconsistent with Chapter 3 of the Coastal Act in order to avoid an unconstitutional taking of private property, a critical question in this case is whether a more modest project would minimize impacts to coastal resources, while providing a reasonable economic use of the property. The City's review of the same development proposal as presented to the Commission would inform the Commission's evaluation of important aspects of the project, including, for example, impacts of development in Trafalgar Canyon and whether a redesigned project could minimize those impacts. This is not a situation where it would be pointless to reapply to the Commission for development on the site; the Commission has authority to approve development, despite potential impacts, if denial would constitute a taking. The applicant has the opportunity to propose development that would cause less severe impacts to ESHA and the coastal canyon and visual resources.

In conclusion, given the significant impacts to coastal resources that would result from approval of the project in Trafalgar Canyon, the inconsistencies with the Coastal Act described above, as well as legitimate questions as to whether there are alternatives to the proposed project currently before the Commission that would minimize impacts to coastal resources, the Commission finds that it is premature to approve this project in order to avoid an unconstitutional taking of private property at this time. The Commission, therefore, denies the proposed project because it is inconsistent with Chapter 3 of the Coastal Act, and denial of this project will not result in an unconstitutional taking of private property. cannot be completely remedied by special conditions siting the development in a different location on this legal lot since: the entire lot is situated on a canyon slope/face (and thus is inconsistent with Coastal Act and LUP hazards policies); 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) which would adequately protect the surrounding ESHA while also allowing for a single-family residence based on reasonable investment-backed expectations (and thus is inconsistent with Coastal Act and LUP ESHA policies); and is the only post-Coastal Act development proposed on the canyon slope/face and thus is not visually compatible with the character of the surrounding area (and thus is inconsistent with Coastal Act and LUP visual resource policies). In short, no amount or type of special conditions can correct these fundamental inconsistencies. Thus, the Coastal Act directs that the project should be denied.

I. — 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 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 the 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 sections 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. Consequently, 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 its action does 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 its action 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 will oftentimes propose modifications to the development to minimize its 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 the 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 will have to allow a reasonable residential development on the subject property.

In this case, and as discussed further below, because the Coastal Act and LUP instructs the Commission to deny any development that would significantly degrade areas adjacent to ESHA, or are incompatible to the continuance of those habitat areas, the Commission’s denial of the single family residence would similarly mean that any subsequent resubmitted application for residential development by the Applicant would be futile because the Coastal Act and certified LUP would again require project denial. Additionally, in this case, because the entirety of the site is non-conforming to the Coastal Act and LUP hazards policies (*i.e.*, the entire site is on the canyon slope/face which, due to the canyon’s morphology is inherently subject to high geologic hazards, and the only way that the development can assure stability and structural integrity is

through construction of protective devices that would substantially alter landforms along bluffs and cliffs) there is no new design or alternative plan for which the applicant could apply that would eliminate these non-conformities. However, as discussed further below, the subject property is a legal lot that was created prior to the passage of the Coastal Act, APN 692-252-01, 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*.

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 or her 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 (*i.e.*, senior housing) would avoid development on the coastal canyon slope and with the required ESHA buffers while at the same time providing the property owner

with a reasonable investment backed and economically viable use. 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.

The Applicant's investment backed expectation when purchasing the property likely was not to maintain the lot as public open space, recreation use, and the other approved use (senior housing) would not likely have any less impacts than the proposed residential use. Finally, as discussed, the fact that the project site is situated on a coastal canyon slope (which precludes any development without reliance on a landform altering protective device besides landscaping given its high geologic risks due to morphology) means that the other allowable housing use, that of senior housing could also not be approved on the site as a matter of LUP consistency. Thus, the Commission finds that it is reasonable to conclude that denial of a 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*, 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 the 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 have had an investment backed expectation and a reasonable expectation that the subject property could be developed with a residence given the purchase price, which is commensurate with the price of surrounding homes around the time that the applicant purchased the property and the zoning of the site as residential low density; however it could be argued that a reasonable person would not have had a reasonable expectation to build a house of the size and scale as that proposed (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, staff 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, taking into account all the legal, regulatory, economic, physical, and other restraints that existed when the property was acquired.

To determine whether the Applicant had an investment backed expectation to construct a house on APN 692-252-01, it is necessary to assess what the Applicant invested when he purchased the lot. The Applicant purchased the 34,784 square foot lot, for approximately \$1,250,000 in 2017. 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, the size, shape, and physical orientation of the lot (which slopes down from the top of the canyon identified along the Calle Conchita lots in prior Commission actions (i.e., 5-17-0607 (Worthington)). There is no evidence that has been provided to date to suggest that the Applicant knew that the property might be undevelopable at the time of purchase. When the Applicant purchased the property two years ago in 2017, other homes had been built or were being built in the surrounding vicinity, albeit at the canyon top. Consequently, the Applicant may have had a reasonable investment backed expectation that he had purchased a lot that could be developed with a residence, simply due to the City land use designation for the site and his investment was made under the assumption that the future development of a residential use could be approved on APN 692-252-01. Given that the property was zoned for residential use, viewed objectively, a reasonable person could thus have had a reasonable expectation that APN 692-252-01 could be developed as a residential parcel.

To assess whether the Applicant had a reasonable expectation to build an approximately 5,430 square foot house on the subject lot, Commission staff 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 eight⁵ single family residences in the vicinity range from 1,566 for residences constructed in the 1950s to 7,829 sq. ft. for recently redeveloped residences, averaging 3,900 square feet. The average lot size of these parcels is 15,246 square feet, (.4 acres) with all of these parcels containing developable top of canyon area. By contrast, here, over half of the subject lot is undevelopable due to lack of ESHA buffers and thus, would be incompatible with the continuance of those habitat areas. None of the surveyed parcels are similar in size to the subject lot. Although the developable areas of these other lots are also restricted, as for many, their property includes the canyon slope and canyon bottom and thus the average size of residences in the vicinity is comparable to that proposed for the subject larger parcel. In other words, the applicant is proposing a house that is similar and not substantially larger than the average home in the vicinity, despite being on a larger lot. Thus, a purchaser of the subject parcel may have a reasonable expectation that he or she could build on or over the canyon slope/face, when no other post-Coastal Act residential structures in the vicinity were built on the canyon slope at the time this property was purchased, particularly considering the land use and zoning designations for the site, which continue to apply to this day.

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, as well as the Applicant's investment backed expectations. 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 based on the applicant's investment backed expectations. This determination

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

is based on the Commission's finding in this report that some form of residential development is commensurate with the investment-backed expectations for the property, and that none of the uses otherwise allowable under the certified LCP 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, 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 residence that is appropriately conditioned to minimize coastal resource impacts and Coastal Act and LUP inconsistencies as much as possible on the basis of potential takings.

J. 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 ESHA, coastal hazards and visual and scenic 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 to geologic hazards, ESHA, ESHA buffers, public access, 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, public access and visual resources. As discussed in previous sections of this report, the proposed residence is inconsistent with the ESHA, geologic hazards, and visual resources 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, minimization of landform alteration (coastal canyon slopes), public access 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 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 colorization of the radiant heat barrier/privacy wall such as might be allowed on nearby residential lots ensures visual policy protection to the maximum extent possible. Because the portion of the lot that is not occupied by ESHA is relatively small (roughly 30-40% of the lot), there is a limited developable area on the lot to achieve separation (buffer) from sensitive vegetation on this and adjacent parcels. 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, including in terms of ESHA buffers, coastal hazards and the enhancing of habitat and visual resources for sites with coastal canyon slopes.

Biological Resources

The applicant has modified the project to avoid all direct impacts to existing ESHA, however Commission Enforcement staff has documented past vegetation removal impacts to Giant Wild Rye patches within the development footprint as an additional development constraint. As part of the development, the applicant proposes a preliminary landscaping plan that enhances existing native vegetation through the removal of invasive plants and planting of native vegetation covering the portion of the lot remaining undeveloped, approximately 17,500 sq. ft. or roughly 50% of the lot. However, as previously discussed, the Commission's staff ecologist identified an absolute minimum acceptable buffer of 50 ft. for Coastal Lemonade Berry Scrub determined as ESHA as acceptable for this specific site after taking into consideration the protective benefits of the proposed barrier wall and the lack of . However even a reduced 50 ft. buffer surrounding ESHA, ESHA is so prevalent on the site, that it remains that the entire development footprint, approximately 14,457sq. ft. would be within the required ESHA buffer. Therefore, mitigation for impacts to ESHA buffers is required. As such, **Special Condition 2** requires submittal of a Coastal Lemonade Berry Scrub and Giant Rye Grass Restoration and Monitoring Plan requiring quantification of the area of proposed development within a 50 ft. buffer from Coastal Lemonade Berry Scrub and Giant Rye Grass and any areas unpermitted removal of major vegetation for restoration and mitigation. A combined restoration and mitigation ratio of 3:1 (restoration to impact) for impacts to the within the 50 ft. ESHA buffer and for impacts due to unpermitted major vegetation removal is required. To this end, **Special Condition 3** requires restriction of the restored ESHA and undeveloped portion of the lot to open space conservation through a conservation easement.

Even with the minimum 50 foot buffer, ESHA is so prevalent on the site, that it remains that the entire development footprint, approximately 14,457sq. ft. would require mitigation for impacts to ESHA buffers. As it is not an option to provide restoration in place (in ESHA buffer as the development footprint is in said ESHA buffer), mitigation at a 2:1 ratio for impacts due to a lack of a minimum 50 foot Lemonade Berry Scrub buffer is required. Previously the Commission has required mitigation/restoration for indirect impacts to wetlands, and ESHA such as development in wetland/ESHA buffer areas, by enhancing all portions of the remaining buffer

area through invasive species removal, native vegetation screening, native species planting, water quality improvements, and sound reduction⁶. 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, 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 instance, not even a reduced buffer is possible as the development pad is entirely within a reduced 50-ft. or even 25-ft. buffer from the Lemonade Berry Scrub ESHA. Therefore, the applicant is required to mitigate for indirect impacts from increased human activity in the buffer area due to a lack of even a reduced 50-ft. buffer from the ESHA surrounding the proposed development. Mitigation is required at a 2:1 (restoration to impact) ratio for indirect buffer impacts, as opposed to the 3:1 mitigation ratio required for direct impacts. This results in approximately 28,914 sq. ft. of mitigation. As this is an area 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. The applicant asserts and the Executive Director agrees, that if viable off-site mitigation areas are not found, the applicant may apply for an amendment to this coastal development permit to provide alternative but equivalent mitigation.

Public Access

The nearest public access to the beach is available at the “T” Street Public Access Point, approximately 700 feet southwest of the subject site. The means of access is a pedestrian railroad overpass. There is also 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 soft-footed lateral trails 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. Overall, trails cover approximately 2,835 sq. ft. (8%) of the subject private lot. **Special Condition 4** requires recordation of a public access easement for public access and recreational uses in order to implement the applicant’s proposal. The condition requires a 10-ft. easement 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 12**. 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 trail is constructed and available for pedestrian use as a condition of CDP approval. No development shall occur within the easement area except for development authorized by this coastal development permit. Construction necessary to

⁶ Staff report for CDP Application 5-17-0537 (County of Los Angeles, Department of Beaches and Harbors); and LCP-4-CPN-15-0018-1 (City of Carpinteria)

complete the public access 4 ft. wide at grade decomposed 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 easement area(s).

Geologic Stability

The site's canyon morphology shape is due to erosion from canyon stream from a previously active drainage course 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 is grossly unstable and do not meet the 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. In this case, the proposed caisson foundation constitutes a protective device. The proposed retaining walls and caisson systems are "canyon protective devices", in that they are "artificial structures that alter natural landforms or alter canyon processes" along the canyon bluffs and cliffs, contrary to Section 30253(b) of the Coastal Act.

While the proposed project is inconsistent with several LUP policies that protect natural geology of the canyons and require siting development outside of hazardous locations (LUP policies HAZ-25, 32, 29), 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 foundation 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 public easement for these). Additionally Policy HAZ-20 states that canyon 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*" however, in this case, the proposed canyon protective devices (caissons and sheerpins) do not have an impact to visual resources, public access, natural shorelines processes or water quality. 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 not consistent with Chapter 3 policies of the Coastal Act and some of the LUP policies, 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.

Furthermore, as there is no active stream at the canyon bottom, there is minimal erosion at the site and thus little risk that the caisson foundation would become exposed in the future due to erosion. **Special Condition 1** requires the applicant submit final plans that in addition to other

requirements, require conformance with geologic/geotechnical recommendations. Furthermore, **Special Condition 8** 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.

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 6**). 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 is also proposed at the cul-de-sac. 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. No canyon disturbance will be permitted, including trenching in the canyon bottom for connection of the new storm drain pipe to the culvert at the toe of the canyon. 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 7**. 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, structural additions, 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 LCP and the Coastal Act to the maximum extent feasible, and appropriately responds to the unique circumstances of this case.

K. 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. Most recently 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 **Commission denied the** proposed residential development **because it** is inconsistent with multiple policies of **Chapter 3 of the Coastal Act and the certified LUP. Therefore, the Commission's action will not prejudice the ability of the City of San Clemente to prepare an LCP that conforms with Chapter 3 of the Coastal Act.** 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, 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.

L. 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 Categorical Exempt development from Provisions of CEQA for new construction. The Coastal Commission's review and approval of land use proposals has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA. **The Commission incorporates its above findings on the project's inconsistencies with Chapter 3 of the Coastal Act and San Clemente's certified LUP at this point as if set forth in full. For the reasons set forth above, the Commission denied the proposed project. Section 21080(b)(5) of CEQA, as implemented by section 15270 of the CEQA Guidelines, provides that CEQA does not apply to projects that a public agency rejects or disapproves. Accordingly, the Commission's denial of this project represents an action to which CEQA, and all requirements contained therein that might otherwise apply to regulatory actions by the Commission, does not apply.** 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. All 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, if so conditioned, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).~~

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, dated July 2018

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