

CALIFORNIA COASTAL COMMISSION

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12/6/2013

Michael A. Mohler
Managing Director
Newport Banning Ranch
1300 Quail Street, Suite 100
Newport Beach, CA 92660

File Copy

Re: **NOTICE OF INCOMPLETE APPLICATION**

Application No. 5-13-032

Site Address: Newport Banning Ranch Site
5100 Block of West Coast Highway, Newport Beach, Orange County

Dear Mr. Mohler:

On February 1st, 2013, our office received the subject coastal development permit application. The proposed project is grading, lot splits, clearance of major vegetation, bluff stabilization, fill of wetlands, construction of 1,375 residential units, 75,000 square feet of commercial space, 75 unit resort inn, and 52 acres of parks, pedestrian bridge, and approval of a Development Agreement.

Commission Staff received letters containing additional information on May 17, 2013, July 8, 2013, and November 8, 2013. After review of the submitted information, Notices of Incomplete Application were sent on March 1, 2013, June 14, 2013, and August 7, 2013.

We have reviewed all of the materials you have submitted and have concluded that additional information needs to be submitted in order to complete your application and schedule it for a public hearing. Please accept this letter as notification that your application is incomplete pending receipt of additional information necessary for a thorough analysis of your project by Commission staff. In order to complete your application, please submit the following:

I. THRESHOLD ISSUES:

Resolution of the Threshold Issues is of primary importance to determining the baseline condition of the site. Analysis of the proposed CDP application cannot begin until it is clear what development is and is not covered by the Exemption.

Any analysis on the proposed project which is undertaken before the resolution of the Threshold Issues may assume the wrong baseline and need to be redone. Each of the questions pertaining to the Threshold Issues raised in the 8/7/2013 letter must be addressed prior to the completion of the file. If you need another copy of that letter, please make that request. We look forward to working with the applicants to come to a resolution on these issues.

Additionally, please respond to the following questions either previously posed or which are raised by new information presented in your latest letter:

1. **Number of Wells.** Please see the questions regarding number of wells posed in staff's 8/7/2013 Notice of Incomplete Application.
2. **Exemption expiration.** In the June 14, 2013 notice, staff raised a question of whether the 1973 Exemption was limited to the end of 1994. The application for Exemption indicates an expectation on the behalf of the applicant that the oil operations would continue through the term of a lease that ended in 1994. That expectation is also indicated in the Resolution, which states: "7. Claimant anticipates to complete the total development on or about 1994."

The submitted 11/8/2013 letter states:

"Based on the progress in our recent meetings on addressing Staff's questions about the 1973 Exemption, it appears that this issue is unrelated to the NBR CDP application."

The questions posed in our 6/14/13 letter regarding whether the Exemption included a limitation on its term have not been resolved. If a term was included on the length of the exemption, that could affect the baseline condition of the site for analysis of the project. Therefore, the following questions should be resolved prior to the completion of the file:

What happened to the lease which anticipates that oil operations would end in 1994?; What has occurred since 1994?; Explain how the continuation of oil production since 1994 is consistent with the 1973 Exemption; and provide copies of records regarding the lease including a copy of the lease and any records of extensions or transfers.

3. **Remediation.** The information on the proposed remediation activities, and the background information necessary to analyze those remediation activities, must be submitted prior to the completion of the file. Please see the questions regarding abandonment and remediation posed in staff's 8/7/2013 Notice of Incomplete Application.
4. **Consolidation.** Sufficient information on what will occur in the consolidation areas or "remainder oil operations areas" has not been submitted. If there is development, as defined by the Coastal Act, which will occur in this area, please submit a description of that development, information necessary to determine the environmental impacts of that development, and a copy of approvals from the respective resource agencies and local entities for that development.
5. **Vegetation and Fuel Modification.** Please see the questions regarding vegetation and fuel maintenance posed in staff's 8/7/2013 Notice of Incomplete Application. Your letter asserts that at the direction of Commission staff the site is in a potentially unsafe condition due to lack of fuel management. The Coastal Commission is sensitive to and concerned about public safety as well as the obligations of property owners to address potential fire hazards on their property. To this end, as you know, in a September 5, 2012 letter to you staff agreed that "appropriate" vegetation management on the site is necessary. The Orange County Fire Authority ("OCFA") Vegetation Management Guidelines prescribe appropriate vegetation management - in order to reduce wildfire threat to homes - including decreasing the amount of vegetation and removing undesirable vegetation species within 100' of homes. It is also our understanding after discussions with staff at the state's oilfield regulatory body, Department of Conservation, that typical maintenance of oilfields for fire safety purposes includes limited clearance of vegetation from active wells sites and active pipelines.

In order to provide for fire safety and to maximize protection of sensitive ecological resources on site, staff states in our September 5 letter that we support immediate measures to reduce vegetation within previously modified areas that are 1) within 25' of any active well; 2) within the minimum distance necessary to provide physical access to any active, above ground pipeline; or 3) within 100' of any home (pursuant to OCFA Vegetation Management Guidelines). We believe this approach addresses fire safety concerns in a manner that is protective of sensitive habitats.

If the applicant wishes to have further discussions regarding the fuel modification procedure currently in practice, please contact Andrew Willis or Karl Schwing in the Commission's South Coast District Office.

6. **LUP/LCP Planning.** In past letters, we have advised the applicant that the proposed project would be better served through processing an LUP amendment / LCP. However, the applicant has asserted that the City of Newport Beach and/or Orange County do not wish or are unable to perform land use planning for the site. Please submit a letter from these agencies to support this assertion.

From the submitted letter, it appears that the applicant has chosen to move forward with the subject CDP application. Questions associated with LUP Planning, whether in a LUP or CDP context, need to be resolved prior to the completion of the subject application.

Please address the following questions:

- 1) Are the type, location, and intensity of development appropriate for the surrounding area?
- 2) Are the proposed land uses compatible with the surrounding land uses?
- 3) Are the proposed land uses consistent with the Coastal Act?
- 4) Are the proposed land uses, and the areas allocated to each use, consistent with the priorities established by the Coastal Act?
- 5) Has adequate area within the potential developable area been reserved for higher priority uses? What portion of proposed commercial development will be primarily visitor serving?

II. OTHER ISSUES

As stated in previous letters, the Threshold Issues should be resolved before the details of the proposed project are analyzed. The baseline of development on the site will affect how the Commission considers the constraints on the site, such as the location of development that might be considered unpermitted, and the location of Environmentally Sensitive Habitat. The latest letter includes new information regarding details of the project which will be affected by the Threshold Issues, such as the location of development on the site, and biological information. Due to the pending Threshold Issues, this submitted information is subject to change, and our review is therefore premature.

Although our review of the material is premature at this time, staff has, where appropriate, responded to the newly presented information with new questions, and has repeated other questions that were not addressed in the latest submittal.

A. ALTERNATIVES.

Thank you for the submittal of the Alternative Plans 1 and 2. The submitted diagrams include the depiction of the proposed development footprints, which are reduced in size compared with the prior proposal. However, the alternative designs do not show the location of the proposed roadway and development in relation to the biological and archeological resources on the site. Please submit a copy of the resource constraints map, and the archeological resources map which have been modified to depict the development shown on Alternative Plans 1 and 2.

The submitted letter states that alternatives that do not include access from West Coast Highway are infeasible. No feasibility analysis for this assertion was provided, except for consistency with local plans which the Commission did not review. Please provide a feasibility analysis for alternative projects without access from West Coast Highway, including alternatives with reduced project densities.

There are a variety of coastal resources present on the site. In order to ensure the protection of these resources, Commission Staff asked the following questions to determine possible alternatives to the proposed project:

Also, if roadway access to the site were limited to just one of the projections from 15th, 16th or 17th streets, what is the maximum amount of development that could occur on the site given circulation and other requirements? In other words, if a roadway from Coast Highway, and/or 19th street is prohibited, and/or access to the site is limited to either 15th, 16th, or 17th streets (and combinations thereof) what is the maximum amount of development that could be accommodated on the site with these constraints?

In response to this question, the submitted letter quotes from the applicant's 5/17/13 letter:

Alternative Development Plans relying on fewer access points to and through the Project site are not preferred because such alternatives would inherently limit opportunities for public use and enjoyment of the site, and because such alternatives would eliminate options for public access to the shoreline.

The submitted response does not answer the question posed. Although the applicant states that the current proposed design and the submitted alternatives provide new coastal access, these alternatives may still be inconsistent with the resource protection policies of the Coastal Act. Therefore, please 1) submit an alternative plan depicting an alternative project design that does not rely on access from West Coast Highway or North Bluff Road and state what alterations would be required to project density, and 2) submit an analysis of why, in the applicant's view, an alternative project without access from West Coast Highway, including alternatives with reduced project densities, would be infeasible.

B. BIOLOGY

To allow the Commission to review development located both within, and outside of the oil field consolidation / oil remainder areas, up to date biological information is required. The provided figures exclude all information within the identified oilfield consolidation areas. This area is located directly adjacent to habitat areas, and sensitive species mapped within oil consolidation areas likely utilize habitat directly adjacent to, and outside of the oil consolidation areas. Therefore, please submit updated figures which include biological information for the entirety of the project site.

Although a formal designation of Environmentally Sensitive Habitat Area is currently being prepared, please note that based upon the information submitted to date, it appears that much of the site would constitute ESHA. Therefore, please note that the developable area on the site may be significantly limited.

1. **HCCMP.** Thank you for the submittal of the Draft HCCMP. However, please note that staff's ability to review the submitted HCCMP is limited, due to two factors: 1) The HCCMP document is incomplete, and is missing key diagrams present on pages 39-50. 2) The HCCMP discusses mitigation for impacts to wetlands and sensitive habitat based on the existing proposed footprint of the development. This development footprint may be subject to significant changes through the discussion of Threshold Issues, and further analysis of the wetlands, sensitive habitat, and archeological resources on the site. The mitigation ratios, methods of mitigation, and other elements of the plan are also likely to change, as the sensitivity of the various resources on the site are determined. Therefore, the Commission's review of the document at this time is premature. Further comments on mitigation plans for the subject site will occur throughout the Coastal Development Permit process.
2. **Vernal Pool Sampling.** As stated in our March 1 and June 14, 2013 incomplete letters, we find that another set of wetland surveys is necessary to complete the USFWS protocol level survey requirements for specific vernal pool/seasonal pond features located on the Newport Banning Ranch (NBR) site. These features were identified in our June 14th letter under the biological resources section, subsection 1a, and are repeated here: features C, D, K, L, M, N, P, R, Q, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP and QQ. The protocol surveys that you refer to in your response letter did not evaluate all the pools and all of the older surveys do not contain adequate data to determine if a protocol survey was conducted. For example, the older surveys may include one survey data sheet for the entire wet season without documenting any other visits to the pool to determine if ponding occurred at other times during the season and many pools have surveys that were initiated mid-way through the season; these examples violate the requirements of USFWS protocol surveys. The Banning Ranch Conservancy has submitted photographs that document ponding on NBR for extended periods when no sampling occurred. Furthermore, the survey protocol does not include provisions for genetic analysis or hatching in the lab as a substitute for wet season sampling.

Christine Medak, USFWS Biologist, sent an email to John Davis, Dudek Senior Biologist, on April 8, 2013, under the subject "Newport Banning Ranch - Cumulative Fairy Shrimp Report" that includes information in support of our request for another set of wet season protocol surveys:

Insufficient information was provided in the 2007/2008, 2009/2010 and 2010/2011 wet season reports to verify that surveys were conducted in accordance with the survey protocol. Wet season surveys require sampling to be conducted once every two weeks, beginning no later than two weeks after their initial inundation and continuing until they are no longer inundated. When the pools dry and then refill in the same wet season, sampling is re-initiated within eight days of refilling every time the pools meet the 3 cm of standing water criteria. The purpose for the repetitive sampling is to maximize the opportunity to detect the listed entities given that not all cysts are expected to hatch out at the same time and given that more than one species of fairy shrimp can occupy the same pool.

Ms. Medak also stated the following in her April 8, 2013 email to John Davis:

Several pools listed as having no fairy shrimp in 2010/2011 (in the cumulative report) were not surveyed in that year (e.g., A, S, U, KK).

Wet season surveys conducted in 2011/2012 were conducted in a below average rainfall year; therefore, many of the pools did not pond sufficiently to complete wet season surveys.

Conclusions regarding many features rely on this wet season survey result, even though ponding was insufficient to conduct the survey (e.g., pools S, Y, Z, DD, EE, FF, LL, MM, OO, PP).

Therefore, in addition to conducting protocol wet season surveys for features C, D, K, L, M, N, P, R, Q, W, X, Y, Z, AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP and QQ, we request that you also conduct protocol wet season surveys for features A, S, and U.

Vernal pools are a type of seasonal pond characterized by unique species of plants and animals and identified as rare by the California Natural Diversity Database. The Coastal Commission considers vernal pools to be environmentally sensitive habitat (ESHA) and as such they are protected under section 30240 of the Coastal Act. It is important to understand that the Coastal Commission considers any seasonal pond that supports species indicative of vernal pools to be ESHA, whether or not the respective plant or animal vernal pool indicator species is state or federally listed. Furthermore, the Coastal Commission protects seasonal ponds (without vernal pool indicator species) under section 30233 of the Coastal Act, if they meet the Coastal Commission one parameter definition of a wetland.

We are pleased to know that you recently authorized your biological consultant to conduct wet season surveys. In order for the wet season surveys to be valid per the USFWS survey protocol requirements, they must be initiated after the first storm event of the season (defined as an event where seasonal ponds hold a minimum of 3 cm of water a minimum of 24 hours after rain). According to weather records, coastal Orange and San Diego Counties received the first significant rainfall on October 9, 2013. You must demonstrate that this rain event did not result in seasonal ponds on the NBR site holding a minimum of 3 cm of water a minimum of 24 hours after the October 9 rainfall by providing rain gauge and/or in-field observation information to demonstrate that you have not missed the first storm of the season.

3. **Vegetation Mapping.** In our June 14, 2013 incomplete letter we asked questions or asked for clarification regarding several vegetation mapping issues. Our first question involved bare ground. We stated that "while bare ground is identified as a factor for determining disturbed areas, a quantitative value for what amount of bare ground relegates a particular area into a "disturbed" category is not provided." You did not provide a quantitative value for what amount of bare ground relegates a particular area as "disturbed". Please provide this value or the value range.

Second we asked for the criteria for determining whether and area is labeled as simply "disturbed" or "disturbed native shrub". There is clearly a difference in habitat value between "disturbed" and "disturbed native shrub" and we want to know the parameters distinguishing these categories. In your response you list the descriptions of the main vegetation categories mapped by Dudek which do not provide the requested criteria. In fact, it appears that the disturbed vegetation categories have been changed to two types of "disturbed (non- vegetation community associated)" and two types of "disturbed

(vegetation community associated). The descriptions of all four of these groups are difficult to follow. Following the list of vegetation categories mapped by Dudek you state the following:

In response to questions related to prior vegetation mapping that arose during the May 2012 site tour conducted (with Coastal Commission Staff and Biologists, representatives from USFWS and ACOE, as well as NBR representatives and biologists), and to subsequent input from USFWS and Coastal Commission biologists related to site maintenance conducted by the oil field operator, Dudek further categorized disturbed areas on the Newport Banning Ranch that contain greater than 10 percent vegetation cover. The result of this effort was the creation of two new categories to describe disturbed areas containing native vegetation: Disturbed-Maintained (D-M-) and Disturbed-Infrequently Maintained (D-I-). The USFWS comment highlighted the potential for Disturbed areas to contain California brittle bush scrub (CBBS). Therefore, the effort focused further categorizing the Disturbed areas as D-I-, D-M-, or remaining as D.

In neither the vegetation category descriptions nor the above paragraph do you provide a discernable answer to our second question.

In our June 14, 2013 letter we had pointed out that the only native shrub currently considered when evaluating disturbed areas is California brittle brush (CBB). We felt that singling out this species results in many areas with native shrubs that are important members of California sage scrub (CSS) habitat, being categorized as "disturbed" when they could be categorized as disturbed habitat that is a particular subset of CSS based on the MCV2 membership rules. We pointed out that the data for running this analysis has been collected; 76 vegetation transects were sampled by Dudek in disturbed areas in the second vegetation mapping pass. The transect data provides the information necessary to determine the particular disturbed native shrub habitat using the MCV2 membership rules. We remain concerned that important areas mapped as "disturbed" on the site are in fact areas with native shrubs and habitat value and we do not understand how your response has addressed this concern. In our June 14, 2013 letter we had provided the following as a potential approach for establishing criteria for discerning between "disturbed" vegetation and "disturbed native scrub" and we continue to believe that it is a viable approach:

According to Sawyer et al. (2009), the criteria for shrub cover to be considered shrub vegetation is that the absolute cover (total cover) must be 20% or greater. We believe that this is a logical criteria for distinguishing "disturbed" from "disturbed native vegetation". In areas where the absolute cover is 20% or greater the MCV2 membership rules can be applied to determine the type of disturbed native shrub cover. Once the 20% absolute cover bar is passed for native shrub vegetation, relative cover must be used for evaluating the type of disturbed native shrub vegetation because the MCV2 membership rules are based on relative cover. We believe that Dudek's practice of using absolute cover when using the MCV2 membership rules in disturbed areas is wrong; the membership rules cannot be applied using a different metric from the one they are designed around.

We continue to be concerned that the mapping method excludes patches of prickly pear cactus (indicator species of coast prickly pear scrub which is a rare plant community) that are located within polygons mapped as "disturbed". Please alter the vegetation maps to show patches of prickly pear cactus below the minimum mapping size.

4. **Gnatcatcher Survey.** In our March 1, 2013 incomplete letter we requested "a new current protocol gnatcatcher survey..." and in our June 14, 2013 incomplete letter we again requested that you "provide the latest gnatcatcher survey in full, including the accompanying report." The 2013 survey that you submitted is a modified protocol survey specifically requested by Christine Medak of the USFWS; we requested a protocol gnatcatcher survey. The USFWS California gnatcatcher survey protocols, published in 1997, require a minimum of six or more surveys covering all potentially occupied habitat areas during the gnatcatcher breeding season which extends from March 15 to June 30^{1,2}. All surveys must take place

¹ U.S. Fish and Wildlife (USFWS). 1997a (February 28). Coastal California Gnatcatcher (*Poliophtila californica californica*) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

during the morning hours and no more than 80 acres of suitable habitat may be surveyed per visit. Typically gnatcatcher survey reports include a compilation of gnatcatcher observations (dot/point locations) in the form of a map of gnatcatcher breeding pair use areas (breeding territories). The modified protocol survey, while consisting of more hours, only occurred on two days. Furthermore, to be effective, the modified protocol survey should occur in January or February when the males are setting up territories and are very noisy. However, the modified protocol surveys took place in April after territories would be expected to have been established and the gnatcatchers would be quieter. More importantly, we requested the protocol surveys, because they are the formal vetted method and in order to compare to the results to the majority of the surveys conducted in the past which have utilized these protocols. Therefore, please conduct protocol gnatcatcher surveys between March 15 and June 30, 2014.

5. **Burrowing Owl.** Thank you for the submitted information. Your response states that there are distinctions between burrowing owls and other migratory bird species. However, the response does not address the consistent pattern of use of the site by the burrowing owl for wintering habitat. Based on the submitted information, it appears that portions of the site may be playing an important role in the migration and wintering habitat for burrowing owls. Therefore, please submit a new protocol wintering season survey to aid in the understanding of the site's current use by the burrowing owl.
6. **Field Lighting.** In addition to the potential impacts of artificial night lighting on migrating birds, the potential impacts of proposed artificial night lighting adjacent to ESHA will also be evaluated. Section 30240, which states the following, is the standard against which the potential impacts of night lighting will be evaluated.
 - 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.*

The pivotal role of light in organismal biology raises the potential that there will be significant impacts on plants and animals from artificial night lights. Light is used by plants and animals to infer a wide range of information from their environment and therefore artificial night lights have the potential to cause adverse impacts. Just as our understanding of the impacts of artificial lighting on organisms (including humans) continues to expand and improve, the policies regarding the limitations and thresholds regulating artificial lighting evolve and improve. You state in your response letter regarding field lighting that you will implement a "dark sky" lighting concept within areas of the project that "adjoin" habitat areas; that light fixtures within these areas will be designed for "dark sky" applications. In addition you state that the lighting design will be "in accordance with the "dark sky" lighting standards as defined by the Illuminating Engineering Society of North American [sic] (IESNA)..." You go on to state that "prior to final inspection, the City shall cause to be performed a photometric field inspection of the approved lighting system for the Community Park."

It is important to bring to your attention that the International Dark-Sky Association (IDA) – Illuminating Engineering Society of North America (IES, formerly IESNA) Joint Task Force has developed a Model Lighting Ordinance³ published in June 2011 which provides environmental lighting standards and a new 5-Zone Lighting System. The most recent version (10th Ed.) of the IES Lighting Handbook⁴ has also adopted the 5-Zone Lighting System. It must be understood that sports field lighting is in a class of its own. The Model Lighting Ordinance puts sports field lighting in the category of "types of lighting that are intrusive or complex in their impacts and need a higher level of scrutiny and/or site sensitivity". Sports lighting is typically 20 to 50 times more light per unit area than any other lighting application and approximately 25% of sports lighting is reflected and contributes to sky glow

² U.S. Fish and Wildlife (USFWS). 1997b (July 28). Coastal California Gnatcatcher (*Poliophtila californica californica*) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

³ International Dark-Sky Association- Illuminating Engineering Society. June 15, 2011. Joint IDA-IES Model Lighting Ordinance (MLO) with User's Guide. 44 pgs.

⁴ Illuminating Engineering Society. 2011. The Lighting Handbook: Reference & Application, Tenth Edition. 1328 pgs.

and glare. The only thing that rivals sports field lights are car dealerships. Prior to approval of night lighting adjacent to ESHA, a lighting analysis that evaluates the potential environmental impacts of the proposed lighting design will be required.

7. **Mitigation Banking.** In our prior letters we have requested additional information about the suggestion that the project include a mitigation bank. Your latest submittal states that a mitigation bank is not part of the current proposal, but may be requested through a subsequent coastal development permit application. With that understanding, no further information about the mitigation bank concept is requested at this time.
8. **Wildlife Mobility.** Thank you for the information supplied. We will analyze this issue using the information submitted and other information available to staff, with request for your assistance as necessary, should your proposal continue to evolve.
9. **Pacific Pocket Mouse Survey.** Thank you for the information supplied.
10. **Known Biological Surveys.** Thank you for the information supplied.
11. **Roadways.** Thank you for the submittal of the Alternative Plan, which eliminates fill of riparian areas at the eastern portion of the property. Detailed plans for the proposed bridge will need to be submitted prior to completion of the application. However, there still appears to be 3 areas of 40-50 foot fill slopes proposed for two arroyos, located on the northern and southern edges of the northern uplands area, near the prolongation of 16th and 17th Streets, for the construction of the perimeter roadway and adjacent parks. Please clarify whether the fill of these areas would be consistent with Coastal Act Section 30236, and submit an alternative road plan which does not require the filling of riparian corridors and/or wetlands.
12. **Storm Water Detention.** Prior to completion of the file, please provide an analysis of whether the proposed stormwater detention structures would be consistent with Coastal Act Section 30231, requiring maintenance of biological productivity of streams and wetlands, Coastal Act Section 30233, regarding diking or filling of open coastal waters and wetlands and movement of sediment, and Coastal Act Section 30236 regarding substantial alterations to streams. Portions of these features appear to overlay existing ESHA. Please note that in similar projects, the CCC has not found that conversion of existing ESHA into water quality treatment facilities is consistent with the Coastal Act.

Please also provide detailed plans for the proposed stormwater detention structures, including depth of the structures, their composition, and important elements such as energy dissipaters, riprap, etc.
13. **Fuel Modification Areas.** Please keep us apprised of any progress toward reduction of proposed fuel modification areas, as was outlined in your letter dated 5/17/2013.

C. GEOLOGY.

1. **Bluff edge delineation.** The submitted bluff edge delineation plans appear to be based on topographic plans which include proposed grading. Listed elevations and elements of the topographic lines are illegible.

Please submit a bluff edge delineation which has been revised to:

- a) be based on a topographic map of existing conditions on the site, rather than proposed conditions
 - b) with legible elevations and symbols,
 - c) be at a suitable scale for evaluation
 - d) show the bluff edge and bluff top setback.
2. **Bluff Retreat Rate.** The submitted analysis relies on the minimum bluff retreat rate experienced in the past, and states that factors which contributed to higher bluff retreat rates would not exist in the

constructed condition. However, the submitted analysis did not appear to incorporate all potential factors which could affect the bluff retreat rate.

Submitted analysis did not appear to incorporate the effects of storm surges as well as sea level rise. The Pacific Institute's sea level rise map shows that the base of the bluffs at the site are subject to inundation for the 100 year storm under current conditions, without taking sea level rise into account.

The submitted letter states that if sea level rise is higher than anticipated, protective devices could be placed at the base of the bluff. Please note that Coastal Act Section 30253 requires that new development assure structural integrity, and not rely on the construction of shoreline protective devices. The analysis of the bluff retreat rate, and the setbacks proposed, should demonstrate that the proposed development will not require shoreline protective devices within its economic life.

Therefore, please revise the submitted bluff retreat rate analysis as follows:

- a) effects of sea level rise and storm surges
- b) demonstrate that anticipated sea level rise and storm surge levels will not require the construction of protective devices to protect the bluff
- c) does not rely on grading of the bluff or other landform alteration.
- d) incorporates a bluff retreat rate based on the average rate of erosion, rather than the minimum.

Although there is no minimum setback requirement for parks and trails, the project should ensure that the proposed public access improvements will be present for its economic life, and the proposed development should ensure stability and structural integrity. Therefore, please submit a plan which details the amount of erosion which can be expected over the economic life of the proposed development, and shows that the proposed improvements are either: a) sited where they will not be threatened, or b) there is sufficient room within the economic life of the development to move the proposed improvements back when the bluff edge retreats, and c) that bluff erosion will not result in a hazardous condition for the public using these improvements.

3. **Alteration of Natural Landforms.** The proposed project does not include sufficient justification for the need to alter existing landforms, including the grading of the bluff face or edge. Therefore, at this time there is not sufficient information to determine that such grading would be consistent with the Coastal Act. Please submit an explanation of the project's consistency with Coastal Act Section 30251, along with '30% grading plans', with legible elevations and symbols, which clearly differentiate areas of cut and fill, for all areas of grading on the site.

D. DEVELOPMENT

1. **Project Heights.** Thank you for the submittal of the Height Vicinity Map. The submitted map indicates that the height of residences in coastal Newport Beach is 35'. This is incorrect. The City's LUP requires that residential height limits in these areas to be no greater than 28 feet. The Height Vicinity Map should be modified accordingly.

The submitted height diagram includes projects that are outside the Coastal Zone (projects in Costa Mesa, Hoag Hospital), or were constructed prior to the Coastal Act / LUP: (Mariner's Mile project). Although the project is in an area of deferred certification, there is an established standard for new development in the City of Newport Beach. The submitted information does not offer sufficient justification for exceeding the 50 foot height limit specified by the LUP for structures outside of the shoreline height limitation zone.

Therefore, to allow Commission staff to analyze whether the project consistent with the visual protection policies of the Coastal Act and LUP, please submit alternative plans which: 1) indicate the heights of all structures on all plans, and 2) do not include any portions of the structure above the relevant LUP height limit.

2. **Pedestrian Bridge.** What is the height of the proposed bridge? Please submit detailed plans and engineering studies prior to the completion of the file.

The submitted Bluff Edge Delineation appears to depict development located on the bluff face. Are there feasible alternative designs which would not result in structures located on the bluff face or within 25 feet of a coastal bluff?

Please note that the method of conveyance of the pedestrian bridge, and documentation of the proposed receiving agency will be required prior to completion of the file.

3. **Takings Information.** Section 30010 of the Coastal Act provides that the Coastal Act does not authorize the Commission, "acting pursuant to the [Coastal Act] to exercise [its] 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 therefor..." To assure compliance with section 30010, the Commission, at times, must adopt findings consistent with section 30010 if the a development application warrant a closer look at the risk of a potential Commission action that may tread close to an unconstitutional taking, in violation of section 30010. In no way is an action by the Commission that includes a regulatory takings analysis a final adjudication of such an issue. Rather, findings that include a regulatory takings analysis is required if the Commission has to permit development notwithstanding the proposed development's inconsistencies with Chapter 3 policies of the Coastal Act because to deny such a proposal may violate section 30010. Therefore, in order to fully assess whether or not the Commission's action may violate section 30010, an application submittal must include the information included in the Takings Form to better assess the risk of whether or not a Commission action would constitute an unconstitutional taking. For more information regarding takings proceedings, please refer to the staff report for CDP No.s 4-10-040 through 045, or A-3-SCO-08-029, which are available on the Commission's website. Please note that submittal of the information identified on the takings information sheet previously attached to our correspondence dated 3/1/2013 will be required prior to completion of the application.

4. **Development Agreement.** Thank you for the statement that the Development Agreement is being submitted as a part of the application. California Government Code Section 65869 states that *"...[a] development agreement shall not be applicable to any development project located in an area for which a local coastal program is required to be prepared and certified pursuant to the requirements of Division 20 (commencing with Section 30000) of the Public Resources Code, unless: (1) the required local coastal program has been certified as required by such provisions prior to the date on which the development agreement is entered into, or (2) in the event that the required local coastal program has not been certified, the California Coastal Commission approves such development agreement by formal commission action."*

Since the City of Newport Beach does not have a certified local coastal program, any development agreement that pertains to property within the coastal zone must be approved by the Commission. In general, the Commission must either approve or deny the development agreement; there is no process by which the Commission can 'condition' an approval of a development agreement.

The proposed project is likely to undergo changes in conjunction with the coastal development permit process. Since the Commission cannot require alterations to the Development Agreement, the Commission's only option at that point would be to recommend denial of the Development Agreement.

Therefore, we recommend that the development agreement be withdrawn from this application, and that it be submitted for review later, after approval of a CDP for a project, or after an LCP has been certified for the area. If the Development Agreement is not withdrawn from the subject CDP, please be aware that the staff recommendation will likely be for denial of the Development Agreement.

5. **Other Agency Approvals:**

The submitted HCCMP states that a streambed alteration agreement is required by CA Fish and Wildlife, a 404 permit is required by ACOE, a 401 WQ certification is required by RWQCB, and a Section 7 consultation is required by USFWS.

No status was listed for approvals from the following agencies:

Caltrans
Orange County Health Care Agency
DOGGR

For CA FW, ACOE, RWQCB, USFWS, Caltrans, OC Health Care, and DOGGR, please: a) State what approvals are required, or if any additional approvals are likely to be required; b) Are any other approvals from other agencies likely to be required? And c) state whether these approvals have been received or when are they anticipated to be received.

Please answer the preceding for both the currently proposed project, and for elements of the project such as remediation, construction of new wells, and abandonment of an oil field which might be incorporated into the project proposal pending resolution of the Threshold Issues.

Depending on the answers to the preceding, evidence of approval may be required prior to completion of the file.

In addition, because the proposed remediation requires a Section 404 permit from the Army Corps of Engineers, you must also submit a federal consistency certification to the Commission for this project. Typically the federal consistency requirements for a project can be met through the Commission's approval of a CDP, and we would work with you in this case to ensure that the CDP would also satisfy the federal consistency requirements.

6. **Co-Applicant Invitation.** Thank you for the submitted explanation. Does that mean that no development would occur on land owned by private property owners other than the applicant? Are any additional City approvals required for off-site improvements?

Proof of the authority to undertake development on off-site locations does not appear to have been submitted for: the footing of the pedestrian bridge on the seaward side of Coast Highway, or CalTrans approval (if required) for encroaching over the highway. Please submit documentation which shows that such authority has been received, or is not required.

7. **Chain of title.** Thank you for submitting the chain of title for the parcels up to May 31, 1977. Please confirm that there have not been any subsequent subdivisions, lot line adjustments or any other parcel alteration to any of the subject parcels after May 31, 1977 that would be regulated under the Subdivision Map Act and/or the Coastal Act. If there have been such alterations to parcels after May 31, 1977, please provide any documentation related to the approval of such alterations.
8. **Parking.** Please clarify whether each of the other dwelling units on site, include 2 parking spaces per unit. Please note that typical parking requirements of 2 parking spaces per unit have the potential to be reduced to below that amount if the project is accompanied by a comprehensive Transit Demand Management Plan. Please see this item later in this letter.
9. **Infiltration.** When the file is completed, Commission staff must have all the information necessary to determine whether the project is consistent with the Coastal Act. Staff has typically required detailed drainage and runoff plans for each project, to ensure that the project will not result in negative impacts to runoff. Although the project is proposing larger scale water quality measures which serve the whole development, lot by lot measures are important as they offer additional room and capacity to infiltrate/filter/detain runoff before discharge to the larger system. Although the submitted geotechnical report (attached to the EIR) does indicate that some types of infiltration should be prohibited, a) it does not indicate to what areas on the subject site this should apply, and b) it explicitly states that shallow infiltration could be used on the project site, as long as a subdrain system is installed as well.

The submitted letter identifies that certain types of features will be used in the final project. Please submit preliminary plans for each type of development on the site, depicting the type of features used,

and amount of runoff which will be treated/filtered/detained by lot-scale improvements. This will allow Commission staff to undertake a thorough review of the submitted water quality information, and ensure that the sizing of both the large-scale and lot-scale water quality measures are appropriate for the anticipated amount of runoff on the site.

10. **Dedication of Preserve Areas.** In order for the Commission to recommend a special condition which requires a property be conveyed to another party, it must first be able to a) identify the anticipated recipient of the conveyance, and b) have evidence that the anticipated recipient is willing to accept the transfer. Therefore, submittal of the information necessary to determine the exact type of conveyance, and information showing that the anticipated recipient would accept the conveyance, will be required prior to completion of the file. Additionally, the Commission's recommendation would likely include a requirement for long term maintenance of areas adjacent to developed areas to ensure that the development does not result in negative impacts to adjacent habitat. For example, the Commission may require that trash collection or other routine maintenance occur throughout the lifetime of the development. Therefore, identification of a funding source and the mechanism of funding should also be included prior to the completion of the file.

11. **Archaeology.**

a. Thank you for the submittal of the Alternative Plan 2. As mentioned above, please revise the cultural resources map to indicate the location of development associated with Alternative Plan

b. The submitted 5/17/13 letter states:

According to the City's consultant, BonTerra Consulting, its work plan for the archaeological investigations that it conducted was not peer reviewed;

Although the City's consultant believes that its study is suitable to address the archaeological resources on the site, the peer review process is designed to ensure that all relevant factors have been considered in the review. To ensure that the submitted archaeological information provides the most accurate depiction of the archaeological resources on the site, a peer review of the archaeological investigation is necessary. Therefore, please submit a peer review of the archaeological investigation. The archaeological investigations on the site proceeded without benefit of a Coastal Development Permit. The proposed project should address the unpermitted development through the enforcement or CDP process prior to the completion of the file. This will ensure that the unpermitted development on the site is resolved, and that the proposed project would not in any way rely on existing unpermitted development.

c. **Remediation Work And Impacts To Archaeological Resources.** As discussed above, remediation work on the site requires a Coastal Development Permit. However, even if some remediation work were included in the scope of the exemption resolution, and thus impacts to sensitive resources associated with the remediation were not subject to Commission review, subsequent development of the site may result in further impacts to archaeological resources. For example, while disturbance associated with oil remediation activities may be relatively shallow, project associated grading or construction of utility trenches may result in significantly deeper disturbance. Please submit a review of the subsurface testing which has occurred on the site to determine whether the subsurface testing has been conducted to a depth necessary to ensure that deep archaeological resources, such as burials, have been detected if they are present.

d. **Archaeological Research Plan.** An ARP must be prepared, approved and implemented prior to consideration of a CDP for development prior to the completion of the file. This is to ensure that the results of the ARP are used to determine the appropriate development footprint that would be proposed in the CDP application. Without an ARP, such footprint cannot be determined, and it cannot be determined whether the project would be the consistent with the protection of coastal resources.

e. Please address the comments included in the June 11, 2013 letter from Dr. Mikel Hogan, and the June 10th letter from Patricia Martz of the California Cultural Resource Preservation Alliance (if you need us to supply another copy of this letter, please make that request).

12. **Trails.** The Notice of Incomplete Application dated 6/14/2013 states:

Please provide analysis of how often trails will be subject to flooding, whether the trails are expected to last at least 75-100 years

Please revise the submitted response to incorporate sea level rise and storm surge estimates, and include an estimate as to how often the trails will be subject to flooding (Once a year? During a 1-, 10-, 100-year rainfall event?) The submitted response recommends rolling easements and landward relocation. How will the stated rolling easements be designed with the property owner? Is landward relocation of trails feasible? Finally, will the stated measures ensure that the trails last for the economic life of the development, and are those measures proposed as part of the CDP application?

13. **TDM.** Thank you for your response regarding Transit Demand Management. The submitted information does not appear to address the same points as a stand-alone transit demand management plan. That is, the number of people who will use TDM strategies, what impact the strategies will have on reducing vehicle trips, and whether the proposed measures will reduce the need for parking for the subject development. Therefore, please submit a Transit Demand Management Plan for the proposed development.

Thank you for the response, stating that the project's conditions and mitigation measures show that the applicant is willing to incorporate transit into the project. However, the details of this transit integration are missing. Where would the bus stops be located? Would grades and other constraints such as ridership levels allow bus service? Please submit a letter from OCTA showing that the transit agency is willing and able to serve the subject site with transit opportunities.

14. **Proposed Commercial Uses.** Please provide an analysis of how the total amount of commercial and visitor serving commercial uses were determined to be appropriate for the amount of residential uses on the site and in the surrounding area, and how the proposed amounts of these uses would be sufficient to reduce vehicle miles traveled. (Page 14, ¶5)

15. **Public Comments.** Staff has reviewed each of the public comments which were attached to the notice of incomplete, and the following reference those comments which have not yet been addressed and which are not addressed by the other questions included in this Notice of Incomplete Application. These include:

- Dr. M. Hogan's letter received on 2/26 regarding existence of archaeological sites not analyzed in the CDP application, including the existence of 'cogged stones'.
- M. and D. Krauss email dated 2/25/2013, regarding consistency of the project with Coastal Act Section 30253 (c)
- S. Forster email dated 2/25/2013 regarding additional fault traces which are not analyzed in the CDP application
- R. Hamilton Letter dated 1/28/2013 requesting an independent third party review

If you need us to supply another copy of these letters, please make that request.

16. **Filing Fees.** Thank you for the submitted filing fee, and letter of credit. The reduction in application filing fees for a project that seeks to achieve a LEED gold standard or equivalent must be for the entire proposed project. In the Attachment 17 (LEED registration form), you have indicated that you are seeking LEED Platinum certification for only two buildings. If you wish to seek a reduction in filing fees, the entire project must be registered for at least LEED Gold certification. Please submit a new LEED registration form that indicates that all of the proposed buildings in your application will seek to achieve the LEED Gold or higher certification.

Alternatively, you may choose to pay the balance due on the regular filing fee. Please note that the filing fee for the subject application is determined at the time of filing of the application. Filing fees are adjusted each year on July 1, according to the California Consumer Price Index.

Please do not limit your submittal to the above mentioned items. You may submit any information which you feel may help Commission staff gain a clear understanding of the scope of your project. Upon receipt of the requested materials we will proceed with determining the completeness of your application.

Thank you for your attention to these matters. If you wish to discuss the requirements above, I can be contacted at (562) 590-5071.

Sincerely,

A handwritten signature in cursive script, appearing to read "John Del Arroz", followed by the word "for" in a smaller, simpler script.

John Del Arroz
Coastal Program Analyst