

April 22, 2024

**VIA ELECTRONIC MAIL ONLY**

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Planning Commission of the City of Dana Point  
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**Re: Comment Letter on Planning Commission April 22, 2024, Public Hearing on  
Agenda Item #2: Headlands Trails Hours - CDP24-0008**

Dear Mr. Johnson:

The Center for Natural Lands Management (CNLM) submits this comment letter in response to the Coastal Development Permit Application, CDP24-0008 (CDP Application) submitted by the City of Dana Point (City) for APN #672-591-11 (Property) and set for hearing by the City Planning Commission as Agenda Item No. 2 on April 22, 2024.

**As owner and manager of the Dana Point Preserve, APN #672-591-11 (Preserve or Property), CNLM strongly opposes the CDP Application, which attempts to establish public access for the Preserve's Trail for year-round use, seven (7) days a week from 7:00 am to "nautical sunset." The City's CDP application and review process is a sham.**

CNLM is a nonprofit tax-exempt organization founded in 1990 in California. CNLM protects sensitive biological resources through professional, science-based stewardship of conservation lands in perpetuity. CNLM protects and manages 93 preserves in the states of California, Oregon, and Washington, owning or holding conservation easements over more than 75,000 acres. All of the preserves provide refuge for threatened or endangered species or protect rare and sensitive habitat such as wetlands. CNLM's focus is perpetual conservation and all of its preserves have enduring legal protections, such as our ownership of the property, deed restriction, conservation easement, and/or perpetual management agreement. CNLM is accredited by the national Land Trust Accreditation Commission, which recognizes land conservation organizations that meet national standards for excellence, uphold the public trust and ensure that conservation efforts are permanent.

As noted above, CNLM owns and manages the Preserve, an incredible natural enclave located within the Dana Point Headlands in the City of Dana Point. The Preserve contains

significant ecological habitat, including critical habitat for the threatened coastal California gnatcatcher, and is a unique habitat for the federally endangered Pacific pocket mouse. CNLM, as owner and manager, is tasked with managing the Preserve for protection of biological and sensitive resources in perpetuity.

CNLM previously submitted two letters, dated April 9, 2024 and April 17, 2024, respectively, to City Attorney Patrick Muñoz with respect to the CDP Application, expressly incorporated herein. CNLM repeats the following requests from those letters:

- **That the CDP Application be withdrawn immediately and not acted upon by the Planning Commission because CNLM objects to the City's attempted "development" of its property without CNLM's permission.** The City has no property interest in the Preserve that allows it to submit the CDP Application and take away CNLM's property rights to the Preserve without CNLM's consent. The CDP proposes to take CNLM's property, convert to public use, and impose significant financial obligations on CNLM, with no prior notice, compensation or opportunity for review.
- **That the City continue the Planning Commission hearing on the City's CDP Application, set for April 22, 2024.** The City deliberately set the hearing for April 22, 2024, the first day of Passover, with limited notice to fast-track its own CDP Application over all other matters, and to deprive CNLM, the relevant agencies, and the public of sufficient opportunity to participate. It then did not provide CNLM and the public with any substantive information on the CDP Application until approximately 4:30 p.m. on Friday, April 19, 2024, posting a 306-page staff report and supporting exhibits. This included, for the first time, the terms of the CDP that the City seeks to impose on CNLM and the Preserve, which, as noted above, takes CNLM's private property and imposes significant financial obligations on CNLM. The City also failed to notify U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Wildlife (CDFW), which are required to be consulted under the entitlements for the Headlands Project. This is not adequate time for CNLM, the wildlife agencies (which were not notified), and the public to review and respond to such materials. The meeting should be continued.
- **That Rutan & Tucker be recused from representing the City, including advising the Planning Commission and City Council, on the City's CDP Application.** Due process requires that the City ensure an internal separation of functions between advisory and advocacy when a matter involves a protectable property interest, such as CNLM's ownership of the Preserve. Accordingly, it is not constitutionally tolerable for Rutan & Tucker to act as both an advocate, in support of the CDP Application, and then as an advisor to the City on whether the CDP Application should be granted despite the deprivation of CNLM's property rights.

CNLM submits this comment letter to further highlight numerous vital concerns to the Planning Commission that require denial of the CDP Application. For these reasons, as discussed in more detail below, the CDP Application should not be granted. Due to the City failing to provide adequate notice and required materials to the public, the concerns stated herein are not exclusive, and CNLM expressly incorporates the comments of others opposing the CDP Application, and reserves its right to continue to supplement this letter with additional comments and supporting materials.

## **I. RELEVANT BACKGROUND OF THE PRESERVE AND TRAIL**

The Preserve, including the Trail, was created as mitigation as part of the land use entitlements that allowed the development of the Dana Point Headlands (Headlands Project). The area of development (including the Preserve) is also part of the Orange County Central and Coastal Subregion Natural Community Conservation Plan/Habitat Conservation Plan (NCCP/HCP), which provides protection for 44 species and habitat. Both the developer and the City are participating landowners in the NCCP/HCP. Under the Implementation Agreement for the NCCP/HCP, the developer had committed to providing 22 acres of habitat at what is now the Preserve to U.S. Fish and Wildlife Service (USFWS) for a temporary Pacific pocket mouse preserve. USFWS would have the option to purchase the area for permanent protection after a specific period of time. USFWS gave up that option due to the commitments by the developer and the City to require the permanent protection of the preserve under CNLM's ownership and management.

The developer, the City, and the Coastal Commission all agreed that the Headlands Project would be subject to the condition that the developer dedicate and preserve in perpetuity a portion of the property (the Preserve) in its natural habitat. (*Headlands Reserve, LLC v. Center For Natural Lands Management* (C.D. Cal. 2007) 523 F.Supp.2d 1113, 1117, 1121-22.) Thus, in connection with the entitlements, the developer sold the land that comprises the Preserve to CNLM, which received funding from the Harry and Grace Steele Foundation for the purchase (\$11.9 million) as well as for an endowment to support management of the Preserve in perpetuity. (*Id.*, at 1119.) The donation from the Harry and Grace Steele Foundation was specifically intended to ensure the protection of this unique Preserve as habitat for endangered and threatened species, including the Pacific pocket mouse and the California gnatcatcher. Around the time of the sale, the appraised value of the Preserve was \$25.9 million dollars. (*Id.*, at 1118.)

A number of governing documents provide a framework for the use of the Preserve with its Trail, including the Headlands Development and Conservation Plan, a Master Coastal Development Permit, and a Conservation Easement between the City and CNLM.

The Headlands Development and Conservation Plan (HDCP), approved in 2004, required the Preserve to be protected, in perpetuity, for the preservation and management of habitat for sensitive species, including the Pacific pocket mouse, and other flora and fauna. The HDCP required that a non-profit trust manage the Preserve in conjunction with USFWS and

California Department of Fish and Wildlife (CDFW). The HDCP also provided for the establishment of the Trail at the Preserve and that the non-profit entity that owns and operates the Preserve will establish hours of operation for the Trail. In multiple places, language in the HDCP provides that the “non-profit entity will establish hours of operation for the bluff top trail” to ensure “[b]alancing the desire for limited public access and views along the perimeter, ....to protect a number of sensitive flora and fauna, including the Pacific pocket mouse....” CNLM is the non-profit entity referred to in the HDCP.

The Preserve is subject to a Master Coastal Development Permit No. 04-23, approved in January 2005, which covers the entire Headlands Project and incorporates the HDCP in full. The CDP required the creation of the Preserve with its Trail, as well as a conservation easement to ensure protection of the natural resources in perpetuity. The Master CDP was issued to allow for the development of the Headlands Project and required that it be “sited and designed to prevent adverse impacts to environmental sensitive habitats.” (Master CDP, p. 4.) The Master CDP provides that “numerous measures to protect and enhance the preserved on-site ESHA [environmentally sensitive habitat area] are part of the project,” including the “provision of controlled access within ESHA.” (*Id.*, p. 4.) As part of its approvals for the Headlands Project, the Coastal Commission made clear it was authorizing development only if it “secures the perpetual preservation and management of retained habitat areas.” (*Headlands Reserve, supra*, 523 F.Supp.2d at 1121.)

The Conservation Easement, entered into between CNLM and the City, was recorded in late 2005 after CNLM acquired the Preserve. The Conservation Easement was to satisfy the HDCP and CDP requirements that the Preserve be protected in perpetuity. Condition 36 of the CDP required that all preserved ESHA areas be “secured through dedication of a conservation easement to the City, Coastal Conservancy, or wildlife agency.” The Conservation Easement’s purpose is “to ensure that biological values and resources in the [Preserve] continue to exist in perpetuity, and to prevent any use of the [Preserve] that will materially impair or interfere with such values and resources.” (Conservation Easement, ¶ 2.2.) Among uses prohibited are “[u]ncontrolled public access and public access during non-daylight hours.” (*Id.*, ¶ 5.1(o).) The Conservation Easement acknowledged that “certain portions” of the Preserve would be “open to the public for scenic enjoyment, education and passive recreation,” but required that “such public access shall be controlled” and made clear that “[n]otwithstanding the foregoing, this Conservation Easement does not convey to the public a general right of access to the [Preserve].” (*Id.*, ¶ 5.2.) The Conservation Easement also does not specify what the hours of access to the Trail should be. Indeed, none of the entitlement documents require “daily” public access to the Trail.

The Trail on the Preserve is a half mile in length, with locking gates at each end. It is approximately four feet wide and is lined with a post-and-cable fence that separates it from the rest of the Preserve. The Trail opened to the public in 2009 with daily hours of operation from 7:00 a.m. to sunset, except during temporary closures for maintenance, inclement weather, and wildlife avoidance measures.

## II. THE CDP SHOULD BE DENIED

### A. The CDP Application Violates the Dana Point Municipal Code and Cannot Be Legally Approved by the Planning Commission

1. The CDP Application Violates DPMC § 9.69.050 Because the City Is Not Authorized by CNLM, Owner of the Preserve, to Apply for a CDP for the Trail

The CDP Application violates Dana Point Municipal Code (DPMC) § 9.69.050. Under DPMC § 9.69.050(a), an application for a CDP “shall be made by the property owner of record, the owner’s authorized agent, or any person with a legal right, interest, or other entitlement to use the property for the proposed development or said person’s authorized agent.” (DPMC § 9.69.050(a).) An applicant must submit an affidavit from the “property owner of record” for “proof” of the legal right to use the property. (DPMC § 9.69.050(a).) In addition, an applicant must submit a “dated signature by or on behalf of each of the applicants, attesting to the truth, completeness and accuracy of the contents of the application.” (DPMC § 9.69.050(b)(5).)

Here, the City is not the owner of the Property. CNLM is the undisputable owner of fee title to the Property and did not consent to the City’s CDP Application. CNLM has held fee title to the Property since 2005. As stated in the November 2005 Conservation Easement, CNLM is the “Grantor” and “is the owner in fee simple of [the Conservation Park] located in the City of Dana Point, County of Orange, State of California.” (Conservation Easement, p. 1.) The Conservation Easement does not convey any “public access rights” to the City. Rather, the plain language of the Conservation Easement states, “this Conservation Easement does not convey to the public a general right of access to the [Preserve] but allows access for passive recreation along the Nature Trail and Overlook Area.” (Conservation Easement, § 5.2(d).) This limited public access is a permitted use, as acknowledged by the Conservation Easement, but not a right granted to the City. This acknowledgment is not a grant or right to public access to the Trail. The City’s right to access the Preserve is specified in the Conservation Easement:

Right of Entry. Grantee shall have the right, in a reasonable manner and at reasonable times, to enter the Conservation Park for the purposes of inspecting the Conservation Park to determine compliance herewith. (Conservation Easement, § 4.1.)

This right of entry is extremely limited, and is not a grant or right to public access to the Trail and does not convey any rights to the City to control the Trail, set the hours, or apply for a development permit.

The Conservation Easement further states “in no event” shall the City “interfere with the Restoration/Revegetation Activities (defined in Section 5.2(b) below) and [CNLM’s] exercise of rights . . . , described in Section 6 below.” (Conservation Easement, § 4.3.) Indeed, the California Coastal Commission has agreed that “the easement cannot confer to the City the authority to set trail hours.” (December 14, 2023, Coastal Commission Letter to City of Dana Point.)

Further, the City does not have a legal right to use the Property under the Local Coastal Program or the Headlands Coastal Development Permit. As stated by the California Coastal Commission’s December 14, 2023, Letter to the City, “[t]he Local Coastal Program identified CNLM, which is the recipient of fee title to the Headlands Conservation Park, as the entity that set the trail hours.” (December 14, 2023, Coastal Commission Letter to City of Dana Point.)

The City has failed to seek an affidavit from CNLM, as owner of the Property, and therefore, the City does not have the requisite proof of the legal right to use the Property pursuant to DPMC §9.69.050(a). Further, to the extent that the City plans to claim that the City is the property owner for purposes of the CDP application, that would be in violation of DPMC §9.69.050(b)(5), which requires the City to attest to the truth and accuracy of their CDP Application.

2. The CDP Application Is Incomplete and Cannot Be Legally Approved by the Planning Commission

Under DPMC § 9.69.070 an application for a CDP can only be approved if found to be in conformity with the City’s certified Local Coastal Program. (DPMC § 9.69.070.) Section 3.2.F of the Local Coastal Program requires an applicant for a discretionary permit application, which includes a CDP, to “follow standardized City submittal requirements.”

The City’s CDP Application clearly fails to follow the City’s submittal requirements. Every line on the City’s CDP application checklist is blank, with the notation “N/A,” with no further explanation. There is no information provided on the proposed “development,” the location of the “development” or the impacts of the “development.” Indeed, the City even decided that no application form was required for the City’s CDP Application. No explanation is provided why the City believes it is wholly exempt from any of the requirements for a CDP application under the DPMC. Accordingly, the Planning Commission cannot reasonably find the CDP Application to be complete for its consideration.

The City’s decision not to follow the mandatory application process for a CDP is not a mere housekeeping error—it means that the Planning Commission does not have the required evidence to consider the CDP Application in the first instance. Indeed, the CDP Application is so devoid of supporting evidence that it cannot legally be approved by the Planning Commission.

DPMC § 9.69.070 states “[a]pproval, conditional approval, or denial of any Coastal Development Permit by the City of Dana Point or the Coastal Commission on appeal shall be based upon compliance with the provisions of the certified Dana Point Local Coastal Program and, for development between the sea and the first public road paralleling the sea, the public access and recreation policies of Chapter 3 of the Coastal Act.” DPMC § 9.69.070(a) goes on to state that “[i]n order for a Coastal Development Permit to be approved, all the following findings must be made, in writing, in addition to the findings required to approve other applications being considered concurrently.” The required findings by the City include that the proposed development: (1) is in conformity with the LCP; (2) is in conformity with the public access and recreation policies of the Coastal Act; and (3) conforms with Public Resources Code Section 21000, et seq., and that “there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the activity may have on the environment. (DPMC § 9.69.070(a).)

Here, the City’s CDP Application fails to provide any evidence on which to make the remainder of the written findings listed under § 9.69.070. The application provides no evidence “[t]hat the proposed development will be sited and designed to prevent adverse impacts to environmentally sensitive habitats and scenic resources located in adjacent parks and recreation areas and will provide adequate buffer areas to protect such resources.” (DPMC § 9.69.070(d).) Likewise, the City has provided no evidence on which to base the required written finding “[t]hat the proposed development will conform with the General Plan, Zoning Code, applicable Specific Plan, Local Coastal Program, or any other applicable adopted plans and programs.” (DPMC § 9.69.070(g).)

As noted above, the CDP Application further violates DPMC § 9.69.050, which states the requirements for an application for a CDP. The application was not made by “the property owner of record,” and no proof of legal right to use the property for the proposed development was provided, in violation of DPMC § 9.69.050(a). Nor was the “minimum” baseline of information required by DPMC § 9.69.050(b), which should have included at least a location map and site plan, among other required information.

Crucially, the City also failed to comply with DPMC § 9.69.050(b)(5), which requires “[a] dated signature by or on behalf of each of the applicants, attesting to the truth, completeness and accuracy of the contents of the application and, if the signer of the application is not the applicant, written evidence that the signer is authorized to act as the applicant's representative and to bind the applicant in all matters concerning the application.” The City provided no such attestation, a testament to the bad faith underlying the CDP application and a further violation of the LCP.

3. Even If the Planning Commission Could Consider the Incomplete CDP Application, It Cannot Make the Required Findings for Approval Under the Municipal Code

Even if the Planning Commission could somehow consider the incomplete CDP Application without any supporting evidence or compliance with the procedural requirements for an application, the Planning Commission cannot make the findings required under the DPMC to grant the CDP Application.

(a) The Planning Commission Cannot Legally Make the Required Findings Related to Public Access Under DPMC § 9.27.030

DPMC § 9.69.070 requires the City to make the “[a]dditional findings for public access ... found in Section 9.27.030(a) of the Zoning Code.” DPMC § 9.27.030 specifically governs the City’s authority to approve coastal development permits in the Coastal Area. DPMC § 9.27.030 requires that findings related to public access “shall be supported by written findings of fact, analysis and conclusions” supporting the matters identified therein. The City provides no evidence to support such findings. Thus, the Planning Commission lacks authority to approve the CDP Application under DPMC § 9.27.030.

DPMC § 9.27.030’s regulations on development within or adjacent to an ESHA provide that such development “shall be required to submit a biological assessment which shall include, at a minimum, a survey of the types and quantities of sensitive species present in the ESHA, the impacts of the development on the ESHA, alternatives to the development, and mitigation measures for unavoidable impacts on the ESHA resulting from the development. Evaluations of the development’s impact to the ESHA shall be sought from appropriate state and federal resources agencies.” The CDP Application does not include any biological assessment or related information. Thus, the Planning Commission lacks authority to approve the CDP Application under DPMC § 9.27.030(d).

Likewise, the CDP Application does contain any of the applicable required information listed under DPMC § 9.69.050(b)(7), which requires, similar to § 9.27.030, a biological assessment for sites adjacent to, containing or potentially containing ESHAs, a geotechnical report prepared by a licensed geologic engineer, or a “plan to mitigate any unavoidable significant adverse impacts to any of the above coastal resources which reasonably would be known to result from the proposed development shall be submitted.” The CDP Application contains none of this essential information, in violation of the LCP. The CDP Application additionally omits the written description of feasible alternatives and mitigation measures available to substantially lessen any significant adverse impact the development may have on the environment, pursuant to DPMC section 9.69.050(b)(8).

The fundamental omissions in the CDP Application, including but not limited to those discussed herein, are particularly glaring in light of the Coastal Commission’s admonishment that the proposed development would actively further impose adverse impacts to ESHA

areas. The City provides no evidence on which to make such a finding, and as such, the application is so fundamentally deficient that its approval would constitute an abuse of discretion as well as a violation of the Coastal Act, the City's zoning code, and the Californian Environmental Quality Act (CEQA).

It is impossible for the Planning Commission to make these findings based on the CDP Application, which, as City staff confirmed in the checklist, is wholly devoid of supporting evidence for such conclusions. Neither can the City attempt to supplement the lack of information in the application in a staff report to the Planning Commission, as this would be a violation of the LCP's requirement to "follow standardized City submittal requirements" and would constitute an abuse of discretion.

(b) The CDP Application Is Inconsistent with the Local Coastal Program And Cannot Be Approved under DPMC § 9.69.070

Under DPMC § 9.69.070, an application for a CDP can only be approved if found to be in conformity with the City's certified Local Coastal Program. (DPMC § 9.69.070.) Section 4.5.1 of the Local Coastal Program states, in part:

The bluff-top trail in the Headlands Conservation Park shall be accessible to the public year-round, except for any specific period determined by the resource agencies to protect on site resources. The recipient public agency or non-profit entity will determine hours of daily operation.

Here, the City is well aware that USFWS and CDFW do not support the hours proposed by the City and are, instead, supportive of CNLM's efforts to manage the Trail for the protection of the Pacific pocket mouse. (See, e.g., May 15, 2023, Letter from USFWS and CDFW.) Indeed, the Coastal Commission expressly informed the City on December 14, 2023, that its proposed "trail hours are inconsistent with this recommendation by the resources agencies to regulate trail use to better protect the pocket mouse, and thus are inconsistent with the Local Coastal Program." (December 14, 2023, Coastal Commission Letter to City of Dana Point.) Therefore, the City lacks authority to issue the CDP because it would be inconsistent with Section 4.5.1 of the LCP.

The lack of approval from USFWS and CDFW for the City's CDP Application also violates other requirements of the DPMC, including the requirement that any CDP Application affecting environmental sensitive habitat areas be evaluated by the appropriate state and federal agencies. (See DPMC § 9.69.050(b)(7)(A); § 9.27.030(d).) The City did not include such evaluation as part of its CDP Application and, on that ground among others, it should be denied.

(c) The CDP Application Ignores the Habitat Management Plan Process and Is Therefore Inconsistent with DPMC § 9.27.030

Further, DPMC § 9.27.030(a)(4)(H) requires a management plan for when public access use is immediately adjacent to areas of sensitive habitats. Consistent with DPMC § 9.27.030(a)(4)(H), Condition No. 38 of CDP No. 04-23 requires the preparation of a habitat management plan for the Preserve.

As the City is well-aware, CNLM has been actively engaged in an update to Habitat Management and Monitoring Plan (HMMP) to establish hours that are consistent with the Local Coastal Program since at least January 2022, pursuant to Condition No. 38 of CDP 04-23. (See, e.g., March 14, 2023, Letter from CNLM to City and Resource Agencies, with 2023 HMMP Update.) The Coastal Commission expressly informed both the City and CNLM that this was a proper process for setting the hours of the Trail consistent with the sensitive habitat areas of the Preserve. (See, September 26, 2022, Coastal Commission Letter to City and CNLM). However, rather than cooperating in an attempt to balance conservation and recreation interests, “the City has rejected CNLM’s attempts to modify trail hours through an amendment to the Habitat Management and Monitoring Program” for over two years. (December 14, 2023, Coastal Commission Letter to City of Dana Point.) Acknowledging the City’s obstinate refusal to engage in the HMMP process, the Commission “suggest[ed] that the City process an application for CNLM’s proposed hours through the CDP process.” (*Id.*) The Commission did not request or suggest that the City submit a CDP application in lieu of engaging in the HMMP process or a CDP application from CNLM. Thus, the City’s failure to engage in the HMMP process violates DPMC § 9.27.030.

4. The City’s Staff Report and Proposed Resolution for the CDP Application Contain Material Misstatements of Fact

The Staff Report and proposed Resolution, supporting approval of the CDP Application, contain numerous misrepresentations of the history of the Headlands Project and creation of the Preserve and Trail, the entitlement documents, the status of the Pacific pocket mouse and California gnatcatcher, and other relevant facts. It is simply not possible to address every misstatement contained in the Staff Report, Resolution and supporting documents, especially because the City has given CNLM and the public limited time to review the materials before the Planning Commission meeting. Below are some, but not all, of the key misstatements that detrimentally impair the Planning Commission’s ability to make an informed decision to approve or deny the application.

(a) Daily Access to the Nature Trail is Not “a Critical Component of the Trail System” under the LCP.

The City claims that daily access to the Nature Trail is a critical component of the trail system, without which the project cannot be connected. Specifically, the City opposes

CNLM's proposed public access hours in part because "the HDCP, EIR and other project entitlements require that Nature Trail, including the scenic outlooks, be available on a *daily* basis as part of the comprehensive trail system connecting all components of the Headlands open space, and providing an otherwise missing link in the California Coastal Trail." (Staff Report, at 6.)

This is simply not true. To be clear, the entitlements do not state or require "daily" access to the Trail. The evidence cited by the Staff Report also do not require the Trail to be maintained as a part of a comprehensive trail system. This is as evidenced by the very figure the City cites to for its position. The EIR limits the linked public trail system to Recreation Open Space designation. (See, e.g., EIR Vol I at pp. 1-3; 3-1; 3-5; 4.10-12; 5-6; 6-2.) Figure 4.12.4 and Figure 4.12.3 of the EIR demonstrates that no offsite trail linkages were contemplated from any access point within the Headlands Conservation Nature Trail to other trails. Rather, the Headlands Trail System is designed such that a central bikeway and pedestrian path links the five parks themselves. To that end, these Figures demonstrate that the five parks remain linked independently of the Headlands Conservation Trail.

At no point does the HDCP reference the Conservation Open Space Nature Trail as an integral component of the interconnected access trail. This goal is explicitly achieved in the LCP by trails that are not the Conservation Open Space Trail. For example, Planning Area 1 includes the Strand Vista Park, which "forms a major component of the integrated trail system designed to link Strand Beach, four additional parks, the open space, and conservation areas." (HDCP at 4-9.) The Planning Area 1 Lateral Accessway Along Strand Beach Park "connects to the Central, North, and South Beach Access paths, forming an integrated design that maximizes public coastal access and passive recreational opportunities, while minimizing potential overcrowding at any single public recreation area. Public access along and recreational use of the lateral accessway shall be secured through the dedication of the lateral accessway or an easement to a public entity (e.g., County of Orange or City of Dana Point)." (LCP, at Table 3.4.5.)

The Mid-Strand Vista Park Access, Central Strand Beach Access in Planning Area 2, and Strand Beach Park in Planning Area 3, Hilltop Park and Greenbelt Linkage in Planning Area 5 similarly "form[] an integrated design that maximizes public coastal access and passive recreational opportunities, while minimizing potential overcrowding at any single public recreation area." Section 4.0 of the LCP, "Development Guidelines," describes each Planning Area in turn, laying out the trails therein and their role in connectivity. When the LCP's discussion turns to "Planning Area 7: Headlands Conservation Park," it contains this discussion of the intended development guidelines:

The 27.9-acre Headlands Conservation Park is designated Conservation Open Space, the most restrictive land use within the project. No development is allowed within this area, except a perimeter trail and ancillary improvements designed to provide coastal access. The park will preserve the "Headlands"

landmark which consists of a sloping mesa that sits atop the Dana Point landform, the surrounding coastal bluffs, and the adjacent rocky beach. The Headlands Conservation Park is detailed in Section 4.4, Park and Open Space Plan.

In conjunction with the U.S. Fish and Wildlife Services (USFWS) and the California Department of Fish and Game (CDFG), the Headlands Conservation Park also provides for the long-term preservation and management of habitat for sensitive species, including the Pacific pocket mouse, and other flora and fauna. The 22.0-acre temporary Pacific pocket mouse preserve established by the NCCP will be expanded by 5.9 acres, and a greenbelt buffer has been designated in adjoining Planning Area 5. A non-profit trust will be established to manage the Park in conjunction with the USFWS and CDFG. The recording of easements, deed restrictions, and additional measures ensure that the Headlands Conservation Park remains permanently designated as conservation open space.”

The LCP’s discussion of Planning Area 7 contains an entirely different tone than those of the other Planning Areas: where the other Areas are zoned for Recreation Open Space, Area 7 is designated “Conservation Open Space.” The LCP goes out of its way to stress this point, explaining that “[t]he 27.9-acre Headlands Conservation Park is designated Conservation Open Space, the most restrictive land use within the project.” In summary, while the Conservation Park is an integral part of the Headlands development, daily access to the Nature Trail at the expense of habitat protection is not. Existing pedestrian and bike trails connect the five parks, as well as the trails in those areas designated as Recreation Open Space. The City’s contention that its proposed hours of access are critical to the overall achievement of LCP goals are false and misleading.

- (b) The City’s Claim that Daily Access for the Trail from 7:00 AM to Nautical Twilight Is Essential to the Public Access Goals of the Headlands Development and California Coastal Trail Is Wrong

The City’s argument that its proposed hours are essential to maintaining a critical linkage in the California Coastal Trail is similarly not supported by the LCP. The City fails to provide support for its assertion that unlimited access hours to all portions of the California Coastal Trail are the remaining factor in actualizing the goal of the California Coastal Trail. The LCP’s discussion of the California Coastal Trail focuses on the significance of the project site, as a whole, to completing the trail. The LCP fails to provide any indication that the California Coastal Trail’s completion hinges on the specific hours proposed by the City.

By the City’s own reasoning, “in light of the significance of this issue,” had daily public access from 7:00 AM until Nautical Twilight been intended or considered essential for upholding these regional and statewide trail systems, “the City Council and/or Coastal Commission would have expressly said as much in approving and certifying the HDCP and related documents such as the EIR.” (Resolution, at pp. 8-9; See also, Staff Report, at p. 3.) Thus, the City’s suggestion that the California Coastal Trail and Headlands trail systems both fail in the event that the Nature Trail is not open every day of the year, 7 am to “nautical twilight,” is “unreasonable” and unsupported.

(c) The Coastal Commission’s Access Plan Does Not Mandate the Completion of the California Coastal Trail at the Expense of Environmentally Sensitive Habitat Areas (ESHA)

The Coastal Commission’s Siting and Design Standards, as well as the Coastal Conservancy’s Coastal Access Project Standards, both require avoidance of ESHA when siting the California Coastal Trail and public access. The significance of the Conservation Open Space’s location does not outweigh the even greater need to protect the special-status species that call it home. The Coastal Conservancy requires coastal access projects to avoid or minimize adverse impacts to ESHAs on or near the site of the coastal access project. (California Coastal Conservancy, Coastal Access Project Standards, December 2, 2021.)<sup>1</sup>

The Coastal Commission’s requirements go even further to protect ESHA from the California Coastal Trail. The Coastal Commission’s Siting and Design standards require the California Coastal Trail to be “***designed and located to minimize impacts to environmentally sensitive habitat areas*** and prime agriculture lands ***to the maximum extent feasible***. Where appropriate, trail access should be limited to pass and repass. Where necessary to prevent disturbance to sensitive species, sections of the trail may be closed on a seasonal basis. Alternative trail segments shall be provided where feasible. For situations where impact avoidance is not feasible, appropriate mitigation measures should be identified, including but not limited to use of boardwalks, reducing width of trails, protective fencing and drainage measures along edges of agricultural land, etc.” (<https://www.coastal.ca.gov/access/ctrail-access.html>)

The Coastal Commission’s standards require every feasible alternative to be exhausted before siting or designing segments of the California Coastal Trail in a manner that would adversely impact ESHA. The City insists on a CDP that would impose hours that multiple state and federal agencies have concluded are harmful to the ESHA. The City has not demonstrated that it has exhausted all feasible methods of mitigating this harm, and in fact actively denies the role of its proposed hours in causing such harm. For these reasons, the City’s arguments that the California Coastal Trail justifies the hours proposed under the CDP is inconsistent with applicable Coastal Commission standards and therefore unreasonable.

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<sup>1</sup> <https://scc.ca.gov/files/2021/12/Coastal-Access-Project-Standards.pdf>

(d) The “Preeminent” Goal of the Creation of the “Conservation Park”—the Preserve—Was Not Public Access, But Protection of Sensitive Species and Habitat.

The Staff Report’s contention that the Preserve and Trail were created to provide coastal access is also without evidentiary support. This is made clear in Table 3.4.5 of the HDCP, which says, in part, with reference to the Headlands Conservation Park: “Conservation of natural resources is of *utmost importance* with limited disturbance along the seaward perimeter for the blufftop trail and overlooks.... The Headlands Conservation Park includes a limited bluff top trail, spectacular views of the ocean, and *limited visitor access* to the coastline and natural environment...” (emphasis added.)

The plain text of the LCP, including the same EIR on which the City now relies, also makes abundantly clear that the Conservation Park was created for the goal of protecting the fragile habitat of endangered species found within the park, while balancing the need for public access in the process.

The EIR states that the purpose of creating the Headlands Conservation Park was to designate a “permanent 24.2 acres of conservation open space [that] excludes development and provides for the long-term preservation and management of habitat for sensitive species, including the Pacific pocket mouse, three California gnatcatcher territories, and other flora and fauna. No development is allowed within this area, except a perimeter trail and ancillary improvements designed to provide coastal access.” (Project Design Feature (PDF) Objective 3-1; see also PDF 12-5.) Specifically, extra acreage was added to the park in order to dedicate 24.2 acres to the specific Pacific Pocket Mouse Preserve area conservation use. (PDF 3-2.) The EIR refers to the Headlands Conservation Park as “the PPM Preserve,” emphasizing that PPM protection has been the central vision for the Preserve from the beginning. (PDF 3.3) While public access is an important component, it is clearly inaccurate for the City to suggest that the LCP approved the creation of the Conservation Park primarily for public access when the opposite is stated in plain language therein.

The Staff Report claims that the EIR “acknowledges that the Conservation Park is ill suited as a successful PPM habitat due to its limited size and predicted that the PPM would not likely survive as a result.” This is not what the EIR says. Page 3.3-20 of the EIR (the page cited by the Staff Report) refers to the “project site”—meaning the entirety of the 121-acre Headlands Project—and states:

The project site was included in the analysis for the NCCP/HCP EIS/EIR as a planning mechanism to determine mitigation requirements for future development on the project site under applicable State and federal law regulating biological resources. The NCCP program determined that the project site was not well-suited as a long-term species and habitat preservation site or as a component of a long-term

habitat/sensitive species reserve system due to the small, fragmented patches of natural vegetation extant on the project site, its significant exposure to existing surrounding urbanization, and the isolation of the project site from areas offering long-term conservation potential for sensitive species and their habitats. With the exception of the Pacific pocket mouse population, no regionally significant core populations of sensitive species occur on the project site; the Headlands' small size and proximity to existing urbanization renders the Headlands ill-suited for the long-term conservation of a Pacific pocket mouse population.

This conclusion means that the Headlands Project site *as a whole* was determined to be ill-suited as a permanent preserve for the species covered by the HCP EIR, which effectively allowed for the Headlands Project to be approved and built. The HDCP EIR plainly did not conclude that the Preserve was not needed or suited for Pacific pocket mouse habitat. It is patently improper for the City to misrepresent the EIR in this manner. (See also, 2022 Declaration of Ed Pert, CDFW.)

Moreover, the fact that the EIR acknowledges that there are factors that may limit the long-term viability of the Pacific pocket mouse (see, e.g., EIR, p. 3.3-33) does not suggest, as the City appears to contend, that any obligations to preserve the existing population can be shrugged off in favor of expanded public access, as proposed by the CDP. As stated, the very purpose of the Conservation Park *is* preservation of the PPM population therein. The HDCP and EIR require all feasible measures to be taken to protect the Pacific pocket mouse and other special status species with habitat in the Conservation Park. (See, Land Use Element Policy 4.4, Conservation/ Open Space Element 2.21, 3.1, 3.7, 3.11 [allowing passive public recreational facilities such as trails “provided those uses do not significantly disrupt habitat values”]; 3.15; EIR, Project Conditions (PC) 3-10, 3.11, 3-12; PC 3-13.) Indeed, the EIR goes as far as to require the USFWS to “take all steps within its legal authority” for continuance of the PPM Conservation Area if “necessary to ensure the survival and recovery of the species.” (PC 3-10.)

The City implies that incidental take of PPM and other special-status species is acceptable or authorized to result from greater public use of the Trail. The City cites no support for this tremendous statement, instead vaguely referencing “the HDCP, EIR and other entitlement documents.” (Staff Report, at p. 4.) The EIR references several requirements before take of special status species may occur, and only discusses these in the context of “residential/commercial development... as described in the NCCP/HCP.” (PC 3-11.) Furthermore, the incidental “take” of species allowed under the federal and California Endangered Species Act (ESA) per the terms of the NCCP/HCP for the Headlands Project was to be mitigated by the Project Conditions requiring the creation and adaptive management of the Preserve under the oversight of USFWS and CDFW (see, EIR, Project Conditions (PC) 3-10, 3.11, 3-12; PC 3-13). This mitigation that has been undermined and modified by the City’s CDP without

any approval of those agencies, resulting in the City facilitating and approving the unlawful take of listed species, including, but not limited to, the Pacific pocket mouse and California gnatcatcher. The City's attempt to paint the HDCP and EIR as prioritizing public access at the expense of special status species is unconvincing and directly contrary to the LCP, the Coastal Act, CEQA, and the federal and state ESA. (See also, 2022 Declaration of Ed Pert, CDFW.)

To that end, the EIR's discussion of the suitability of the Conservation Park as successful PPM habitat is not included as a justification for the City to shrug off Pacific Pocket Mouse fatalities or low numbers. Nor was it intended to lower the threshold of acceptable efforts to preserve the PPM population.

## **B. The City's CDP Application Violates the Conservation Easement**

### **1. The Conservation Easement Does Not Provide the City With The Right To Set Trail Hours**

As noted above, the Preserve was created in 2005 as part of required mitigation for the Headlands Project. As part of the approvals for the Project, the City adopted the HDCP in September 2004. To ensure permanent protection of the Preserve for the preservation and management of habitat for sensitive species, including the Pacific pocket mouse, Coastal California gnatcatcher, and Coastal sage scrub, the HDCP required that a non-profit trust be established to manage the Preserve in conjunction with USFWS and CDFW, and required the recordation of a conservation easement. The HDCP provides CNLM with authority to manage public access hours to the Trail: the "non-profit entity [that owns and operates the Preserve] will establish hours of operation for the bluff top trail." (HDCP, p. 3-37; *see also*, p. 4-49 [CNLM "will determine hours of operation" for the Trail].) CDP No. 04-23 incorporates the HDCP, including its provision that the non-profit owner of the Preserve will establish hours for the bluff-top trail.

Contrary to the City's contention, the Conservation Easement is not identified by the Local Coastal Program (the HDCP) as a mechanism to set Trail hours, nor does the easement purport to set Trail hours. As a result, the Conservation Easement cannot confer to the City the authority to set trail hours. In particular, the Conservation Easement acknowledged that "certain portions" of the Preserve would be "open to the public for scenic enjoyment, education and passive recreation," but required that "such public access shall be controlled" and made clear that "[n]otwithstanding the foregoing, this Conservation Easement does not convey to the public a general right of access to the [Preserve]." The City's interest in the Property is therefore limited to that provided in the Conservation Easement, and nowhere in the Conservation Easement does it provide the City with the unilateral right to control the Trail, its hours or operation, as it proposes to do in the CDP.

## 2. The City's CDP Application Interferes with Implementation of the HMMP, in Violation of the Conservation Easement

Section 5.1 the Conservation Easement requires that the HMMP be updated every five years by CNLM consistent with best adaptive management practices and in consultation and coordination with the USFWS and CDFW. The use of the Preserve shall not prohibit the implementation of the HMMP.

A draft HMMP was prepared by a consultant to Headlands Reserve, LLC in 2005 (CNLM was not an author of this draft HMMP), in association with the City's developmental approval for the HDCP. The City improperly allowed the developer to proceed with the Headlands Project without complying with this condition of approval of the Master CDP. The City never approved the HMMP and never made sure that it had been approved by the other agencies, in violation of the conditions in the Master CDP.

In the beginning of 2022, CNLM prepared a "Draft Update to the Habitat Management Plan for the Dana Point Headlands Biological Open Space" (2022 HMMP Update) based on a rigorous review of new scientific literature, the results of data analysis and experience based on Preserve conditions, and input from wildlife agency personnel and other scientists. The 2022 HMMP Update concluded that setting a policy for public access for the Trail with limited hours and days each week and not during low-light hours of the day was a necessary adaptive action in the best interest of the Preserve. CNLM distributed the 2022 HMMP Update to the USFWS, CDFW and the City for review and comment.

On March 23, 2022, Jonathan Snyder, USFWS, and David Mayer, CDFW, issued a letter to CNLM, regarding CNLM's 2022 HMMP Update, and CNLM revised the 2022 HMMP Update in response to the agencies' comments. (See, March 23, 2022, USFWS/CDFW Letter.) The City did not provide a response to CNLM's request for comments on the 2022 HMMP Update until July 28, 2022. The City continued to assert it would not approve any changes to public access on the Trail.

On September 26, 2022, Andrew Willis, California Coastal Commission, issued a letter to CNLM and Jeff Rosaler, City of Dana Point, regarding operation of the Trail. Mr. Willis' letter was issued to follow-up on the 2021 CCC Letter, in which he identified the coastal development permit process as the path forward for CNLM to set hours of operation for the Trail, and clarified the availability of an alternative mechanism to set the hours of operation through the HMMP update process, with approval by the City, USFWS, CDFW, and the Coastal Commission. The Commission recommended that CNLM consider submitting an updated HMMP to the City, USFWS, CDFW, and the Coastal Commission for review and approval in order to propose new hours of operation.

On March 14, 2023, CNLM submitted a letter to the City, USFWS, CDFW, and the Coastal Commission, accompanying the "Draft Habitat Management Plan for Public Access at Dana Point Reserve" (2023 HMMP Update). The 2023 HMMP Update incorporated feedback

received from the resource agencies and included expanded public access hours for the Trail compared to what CNLM initially proposed in 2022. On August 1, 2023, Brenda Wisneski, Director of Community Development for the City of Dana Point, issued a letter to CNLM regarding the 2023 HMMP Update. The letter claimed to serve as the City's disapproval of the updated 2023 HMMP and asserted that the City is responsible for setting hours for Trail.

On December 14, 2023, the Coastal Commission issued a letter to the City relating to its failure to respond to CNLM's attempts to establish trail hours consistent with the Local Coastal Program and the HMMP process. The City's continued refusal to engage in the HMMP process violates Section 5.2 of the Conservation Easement because its actions are preventing the implementation of the HMMP.

3. The City's CDP Application and Proposed Resolution Violate the Conservation Easement, the Coastal Act, and CEQA

Further, under Section 5.1(o) of the Conservation Easement, uncontrolled public access during non-daylight hours is prohibited without prior USFWS approval. Here, the City's CDP Application requests public access "for year-round use, seven (7) days a week from 7:00 am to sunset." (Notice of Pending Coastal Development Permit, April 1, 2024). However, there are about 28 days each year where sunrise is after 7:00 a.m.,<sup>2</sup> meaning that the CDP's proposed 7:00 a.m. opening time for public access would violate Section 5.1(o) of the Conservation Easement, without USFWS's approval.

Moreover, the City's CDP Application description is inconsistent with the text of the proposed CDP Resolution. The Resolution incorrectly defines "sunset" as Nautical Twilight, which does not take place for anywhere from a half hour to an hour and a half after sunset. Defining "sunset" to mean "twilight" changes the plain meaning of the word, as twilight occurs after the sunset has already occurred. ("Rise, Set, and Twilight Definitions," US Naval Observatory Astronomical Applications Department, accessible at [https://aa.usno.navy.mil/faq/RST\\_defs](https://aa.usno.navy.mil/faq/RST_defs).)

This definition is inapplicable to the need to balance public access and protect habitat values at issue here. The U.S. Naval Observatory explains that Nautical Twilight is not a method of measuring what is conventionally thought of as "daytime" by civilians. Rather, Nautical Twilight marks the latest time at which a portion of the horizon is visible and is a method of measuring time for mariners using the stars to navigate on a moonless night. (*Id.*)

This distinction is not a matter of splitting hairs. The Conservation Easement only grants public access during daylight hours for several reasons, each critical to the conservation effort underway in the Preserve. Visibility is impaired during twilight, such that "artificial illumination is normally required to carry on ordinary outdoor activities." (*Id.*) The City's

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<sup>2</sup> See e.g., <https://savestandardtime.com/chart/?city=5367929&wake=7&work=7&clock=biannual>.

arbitrary selection of Nautical Twilight would degrade habitat values by increasing human presence during the mouse's nocturnal hours of activity. Moreover, by allowing public access to extend past sunset, the City increases the chances of additional Pacific pocket mouse fatalities, as the public's ability to see and avoid stepping on these small, fragile, and camouflaged creatures is impaired when visibility is poor.

Moreover, visitors would be using flashlights, from their phones or another source, to move along the Trail during "nautical twilight," which is inconsistent with HDCP Policy 3.14, which requires that lighting must be directed away from sensitive biological habitat. Also, expanding the hours to the end of nautical twilight significantly expands the intensity of use of the Trail, which was not addressed by the CDP Application, in violation of the Coastal Act and CEQA.

These proposed new hours also violate the terms of the Conservation Easement, which, as the City acknowledges, only allows for public access during daylight hours. (Staff Report, at 4.) The state of California already defines "daytime" as "the period of time between sunrise and sunset." In contrast, "nighttime" is the period of time between sunset and sunrise. (Cal. Gov. Code § 6807.) The City's proposed use of nautical twilight would extend the public access hours beyond sunset in violation of the City's limited interest granted by the Conservation Easement. This presents a more expansive use than the City is allowed pursuant to the preliminary injunction authorizing the current Trail hours. For these reasons, the CDP application inaccurately minimizes the scope of the proposed development.

The City misleads the Planning Commission and the public by claiming "the proposed Project ...merely memorializes the operational hours that have been in place since the Nature Trail was opened to the public in 2009, and thus the Project is consistent with the past history of use of the Nature Trail and involves negligible or no expansion of use." (Resolution, at p. 4.) However, the City's decision to change the meaning of "sunset" to "Nautical Twilight" would add hundreds of public access hours annually. For example, for today's date (April 22, 2024, ironically, Earth Day), the difference between sunset and the end of nautical twilight is 46 minutes. This is a material expansion of use, such that the City's exemption determination is both incorrect and in violation of CEQA.

Moreover, for practical reasons for visitors, nautical twilight is an absurd way to determine the closing time. Most people do not know what this is, and it is hard to find online resources to locate what time nautical twilight is on any particular day. Even the U.S. Naval Observatory website source that the City insists on using requires a user to enter several inputs before getting access to a dense chart that has the end of nautical twilight buried in it. The time of sunset each day can easily be determined and is consistent across any sources that one might consult for those visitors who care to know what time sunset is so that they can ensure they are not trespassing. Sunset is already a hard enough "time" to enforce; nautical twilight is just ridiculous. No one on the Preserve needs to navigate using the horizon while on the Preserve. This is blatant overreach by the City to assume control and management over the Preserve and Trail, which it clearly has no right or authority to do.

### C. The Planning Commission Cannot Approve the CDP Because It Violates the Coastal Act

In authorizing the Coastal Act, the California Legislature found that one of the basic goals of the state for the coastal zone is to “maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone **consistent with sound resources conservation principles and constitutionally protected rights of private property owners**” (Pub. Res. Code § 30001.5 [emphasis added]). As discussed throughout this letter, the proposed CDP maximizes public access to and along the coast and maximizes public recreational opportunities in the coastal zone. Where it fails is the crucial balance that the Coastal Act requires - the CDP is fundamentally **not** “consistent with sound resources conservation principles” or “constitutionally protected rights of private property owners.” For the reasons discussed herein, the CDP violates the Coastal Act, and, as a result, the City lacks authority to approve it.

#### 1. The City’s Actions Violate the Coastal Act By Not Conforming with the Local Coastal Program

The City’s Local Coastal Program is meant to implement the Coastal Act’s “minimum standards for public notice, hearings, and appeals established by the commission.” (Pub. Res. Code § 30600.5.) The HDCP, Section 3, Headlands Planned Development District, at page 3-4, provides, “[t]he standard of review for coastal development permits processed by the City is the certified local coastal program which consists of the Coastal Land Use Plan and the Implementation Plan. For the Headlands, the Coastal Land Use Plan is comprised of the Land Use Element, Urban Design Element, and Conservation Open Space Element of the City’s General Plan; while the Implementation Plan is comprised of the City’s Zoning Code and Section 3.0 (Headlands Planned Development District) and Section 4.0 (Development Guidelines) of the Headlands Development and Conservation Plan.”

These documents are collectively referenced herein as “the Local Coastal Program” or “the LCP.” The City cannot approve the CDP if it is inconsistent with the LCP. The City’s many violations of the LCP include, but are not limited to, those discussed in turn herein.

#### (a) The CDP Application Violates the LCP Because the City Lacks The Power to Set Hours under the LCP

For the Headlands Conservation Park Public Access Program, the LCP states: “The bluff-top trail in the Headlands Conservation Park shall be accessible to the public year-round, except for any specific period determined by the resources agencies to protect on site resources. The recipient public agency or non-profit entity will determine hours of daily operation.” (“Table 4.5.1, Headlands Conservation Park (27.9 Acres) Public Access Program Guidelines,” LCP, at p. 4-49.)

The LCP's use of "recipient public agency or non-profit entity" stands in direct contrast to the similar statements made for the other three non-Headlands Conservation Park public access programs, in which the LCP succinctly states "The City will determine hours of operation."<sup>3</sup> The contrast between the qualified statement made regarding the Headlands Conservation Park hours, and the direct, unqualified statement for the other public access areas, evinces a blatant policy in the LCP that the City is not the entity that sets hours for the trail. This is reinforced throughout the LCP. (See, e.g., Table 3.4.5, Recreational Open Space and Conservation Open Space Designations, Headlands Conservation Park, at 3-37, "The receiving agency or nonprofit entity will establish hours of operation for the bluff top trail.")

By its plain text and when considering the LCP as a whole, the LCP specifies that the City is not authorized to set trail hours. This is emphasized also on page 4-119 of the HDCP, which says "Except for the Headlands Conservation Park and the Strand Beach Park, the City will provide the long-term management of all the public parks and trails. ... The Headlands Conservation Park will be managed through an endowment by a private foundation established for its perpetual protection."

Furthermore, management of the trail and trail hours and determining the hours is an inherent part of the management of the Preserve. The LCP/HDCP is clear that CNLM is the manager of the Preserve, and does so in consultation with the USFWS and CDFW. HDCP 4.4.B.1, the Park Design Guidelines for the Headlands Conservation Park provides that "management and maintenance activities shall be coordinated with U.S. Fish and Wildlife Service and the California Department of Fish and Game." One of the identified Design Concepts for this Park is "Define an appropriate level of public access along a bluff top trail." This directive demonstrates that determining an appropriate level of access is a management task for CNLM, and that the HDCP specifically contemplated that "maximum" public access may not be the "appropriate level" here.

The City makes an argument that it holds a trail easement because the EIR says that the City should hold trail easements required as part of the Headlands Project. That section of the EIR references dedication of trail easements to the City and notes that trail easements would be publicly owned and maintained. The City now argues that this dedication was accomplished for the Nature Trail through the Conservation Easement granted by CNLM to the City. As described above, this is not true; the Conservation Easement does not include a grant of a Trail easement (and the City certainly does not maintain the Trail). Moreover, this contention by the City is contrary to the statements in the HDCP and undermines the City's one-time argument that they are the "receiving agency" under the HDCP. It is not clear how a reading of the HDCP phrase "receiving public agency or non-profit entity" as referring to

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<sup>3</sup> Table 4.5.2, Hilltop Park and Greenbelt Linkages [15.1 acres] Public Access Program Guidelines," LCP, at 4-50, 4-51; Table 4.5.2, Harbor Point Park [10.4 acres] Public Access Program Guidelines, LCP, at 4-52; Table 4.5.4, Strand Vista Park/ Public Access [9.9 acres] Public Access Program Guidelines, LCP, at 4-53.

the entity that receives a trail easement is consistent with the EIR's statement that the trail easements would be publicly owned. The only reasonable interpretation of the "receiving public agency or non-profit entity" in the HDCP is that it refers to the entity that received the property itself. For the Preserve, that entity is clearly CNLM, and as such the HDCP explicitly states in several contexts that CNLM determines the hours for the Trail. Again, this is a blatant overreach by the City to unilaterally rewrite the entitlements and take CNLM's private property.

Therefore, the City lacks authority to submit the CDP Application and the Planning Commission lacks authority to approve the CDP because it would violate the terms of the LCP.

(b) The CDP Application Does Not Contain the Information  
Required by the LCP

Under DPMC § 9.69.070, an application for a CDP can only be approved if found to be in conformity with the City's certified Local Coastal Program. (DPMC § 9.69.070.) Section 3.2.F of the Local Coastal Program requires an applicant for a discretionary permit application, which includes a CDP, to "follow standardized City submittal requirements." In addition, the LCP requires the application to include (1) a detailed Trail Plan, (2) a view analysis, (3) "a wave uprush and impact report and analysis prepared by a licensed civil engineer with expertise in coastal engineering which addresses and demonstrates the effects of said development, over the development's anticipated economic life (no less than 75 years)" on several factors, (4) all of the information identified in Zoning Code Sections 9.27 and 9.69; and (5) "a site map that shows all easements, deed restrictions, or OTD's and/or other dedications for public access or open space and provides documentation for said easements or dedications. dedications. The approved development shall be located outside of and consistent with the provisions of such easement or offers." In addition, where, as here, the development is on a property within or adjacent to identified ESHA, or where an initial site inventory indicates the presence or potential for sensitive species or habitat, the applicant must include in its application "an inventory of the plant and animal species present on the project site, or those known or expected to be present on the project site at other times of the year, prepared by a qualified biologist or resource expert."

This inventory must accompany a "detailed biological study" of the site, which must include (1) "[a] study identifying biological resources, both existing on the site and potential or expected resources"; (2) "Photographs of the site"; (3) "[a] discussion of the physical characteristics of the site, including, but not limited to, topography, soil types, microclimate, and migration corridors"; (4) "[a] map depicting the location of biological resources"; (5) "[a]n identification of rare, threatened, or endangered species, that are designated or are candidates for listing under State or Federal Law, an identification of 'fully protected' species and/or 'species of special concern,' and an identification of any other species for which there is compelling evidence of rarity, for example, plants designated '1B' or '2' by the California Native Plant Society, that are present or expected on the project site"; (6) "[a]n

analysis of the potential impacts of the proposed development on the identified habitat or species”; (7) “[a]n analysis of any unauthorized development, including grading or vegetation removal that may have contributed to the degradation or elimination of habitat area or species that would otherwise be present on the site in a healthy condition”; (8) “[p]roject alternatives designed to avoid and minimize impacts to sensitive resources”; (9) “[m]itigation measures that would minimize or mitigate residual impacts that cannot be avoided through project alternatives”; and (10) “[a]n analysis of project conformance with the ESHA avoidance and buffering requirements identified in the Land Use, Urban Design, and Conservation Open Space Elements of the General Plan/Local Coastal Program and the implementation program.” (LCP, p. 3-5 to 3-8, § 3.2.F.)

As noted above, the CDP Application is completely devoid of any information. As a result, the CDP Application fails to comply with this requirement of the LCP. The City’s checklist review of its own CDP Application claims the “development” is wholly exempt from any requirements, either in the DPMC or the LCP. Far from providing considered and methodical reasoning for the development, the City’s actions (both the submittal of the CDP Application and staff’s review of it) offers no reasoning at all.<sup>4</sup> Therefore, the Planning Commission lacks authority to approve the CDP because it would be inconsistent with Section 3.2.F of the LCP.

(c) The CDP Would Violate LCP Policies that Limit Public Recreational Use Where Those Uses Significantly Disrupt Habitat Values

The LCP provides that, “uses within ESHA within the Headlands area... shall be limited to habitat enhancement and maintenance; passive public recreational facilities such as trails, benches, and associated safety fencing and interpretive/directional signage **provided those uses do not significantly disrupt habitat values.**” (LCP, Conservation/ Open Space Element, Policy 3.11 [emphasis added].) As explained herein, multiple federal and state agencies have informed the City that the current hours being proposed under the CDP significantly disrupt habitat values. CNLM has explained in detail in the draft 2023 HMMP Update, supported by the agencies, how the hours that have been in place (7 am to sunset), significantly disrupt habitat values. (See, e.g., 2022 and 2023 HMMP Updates; 2022 and 2023 Letters from USFWS/CDFW; December 2023 Letter from Coastal Commission.) The

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<sup>4</sup> From the subsequently released Staff Report, the City appears to be relying on the allegations of CNLM’s bad actions to justify the CDP Application, rather than actually providing information that shows that their proposal is consistent with the LCP. There is nothing in the DPMC or the Coastal Act that allows a city or any entity to simply apply for development of another owner’s property because that city does not like that owner or disagrees with the values that owner holds in terms of management of that project.

City is now proposing even greater use and hours, and has done nothing to analyze the effect of such use on habitat values.<sup>5</sup>

In its December 2023 letter to the City, the Coastal Commission emphasized that the City's trail hours are "detrimental to the [Pacific pocket mouse] and inconsistent with the [Local Coastal Program]." (Coastal Commission Letter, at p. 2, original formatting omitted.) "The Local Coastal Program requires that trail hours must be found to be consistent with policies of the Local Coastal Program." (*Id.*) The City was previously apprised of this inconsistency, including by the joint May 15, 2023 letter from the resources agencies, United States Fish and Wildlife Service and California Department of Fish and Wildlife, informing the City that the hours it now proposes to codify in a CDP present a significant and actionable threat to "the smallest and most vulnerable PPM population." (*Id.*, citing May 15, 2023, Letter from Resources Agencies to City.)

The Coastal Commission concluded that the "City's trail hours are inconsistent with this recommendation by the resources agencies to regulate trail use to better protect the pocket mouse, and thus are inconsistent with the Local Coastal Program." As a result, the CDP, which would implement these trail hours, would be inconsistent with the LCP, including but not limited to Policy 3.11 of the LCP. Therefore, the Planning Commission lacks authority to issue the CDP pursuant to Public Resources Code, section 30604(b) and DPMC § 9.69.070.

2. The CDP Further Violates the Coastal Act Provisions Implemented by the LCP

After a local government's local coastal program has been approved by the Coastal Commission, the local government's authority over development permits issued pursuant to the Coastal Act is not absolute. (*Spencer v. City of Palos Verdes Estates* (2023) 88 Cal.App.5th 849, 863.) A CDP issued by a local government is not solely a matter of local law. Rather, the CDP is an embodiment of state policy. (*Wall v. California Coastal Commission* (2021) 72 Cal.App.5th 943, 948; Pub. Res. Code § 30610.8.) While an LCP does not need to be identical to the Coastal Act, it must be consistent, and can be more restrictive. (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 930, fn. 9.)

Based on these principles, the City must interpret its LCP to be consistent with the overarching principles of the Coastal Act. Indeed, in the LCP's Land Use Element and Conservation/ Open Space Element, the LCP policies explicitly reference the Coastal Act statutes which they implement as part of the local coastal program. However, the CDP

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<sup>5</sup> Indeed, the City proposes greater and expanded use than what the agencies previously concluded were disruptive to habitat values because the City seeks the Trail remain open until "nautical twilight."

violates the LCP and the Coastal Act in numerous ways, including, but are not limited to, those discussed below.

(a) The CDP Application Violates the Coastal Act's Natural Conservation Provisions

The Coastal Act requires that “ESHA be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed in those areas. 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.” (Pub. Resources Code, § 30240.)

Implementing this policy, the LCP only allows passive conservation uses in the Headlands promontory and other sensitive lands to the extent these uses are consistent with their preservation. The LCP seeks to “ensure that no future development would occur” on ESHA lands designated as conservation open space. (LCP at 4-4, 5-13.) The LCP further implements section 30240 in its policies, including but not limited to Land Use Element Policies 5.20, 5.29, and 5.33, in addition to Conservation/ Open Space Element Policies 2.21, 3.1, and 3.7. However, as discussed above, the CDP would expand use of the Trail, and, in fact, effectively convert the purpose of the Trail (and the Preserve) into public recreation use, rather than protection of ESHAs. This directly violates the policies of the LCP and the Coastal Act, which prevents the development of ESHAs designated as open space and conserved space (such as the Preserve). Therefore, the City lacks authority to issue the CDP because it would be inconsistent with the policies of the LCP and the Coastal Act, including but not limited to those listed above.

(b) The CDP violates the Coastal Act's Public Access Provisions

The Coastal Act further requires that, “[i]n 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.** (Pub. Res. Code, § 30210 [emphasis added].) This statute is implemented in the LCP's Land Use Element, Policies 5.3 and 5.21, as well as Conservation/Open Space Element Policies 2.14 and 2.21. The proposed CDP is inconsistent with the LCP because it enables the overuse that the LCP aims to prevent. Therefore, the City lacks authority to approve the CDP, because it is inconsistent with the public access provisions of the LCP.

The City violates its duty to implement the public access provisions of the Coastal Act by pursuing the CDP Application. “Every coastal development permit issued for development between the nearest public road and the sea or the shoreline of any body of water located within the Coastal Zone shall include a specific finding that the development is in conformity

with the public access and public recreation policies of the [Coastal Act].” (Pub. Res. Code, § 30604(c).)

The Coastal Act’s public access policy “takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to,” several factors related to the need to balance public access with ecological protection. The public access policy requires the City, in setting the public access schedule, to accommodate “[t]he capacity of the site to sustain use and at what level of intensity” and “the appropriateness of limiting public access ... depending on such factors as the fragility of the natural resources in the area.” (Pub. Res. Code, § 30214(a)(2)-(3).)

The City’s CDP goes beyond merely failing to propose a public access schedule that takes the surrounding fragile ecosystem into account, as required pursuant to the Coastal Act’s public access policy. The City fails to address the intensity of use of the Trail under the proposed CDP at all. The City’s CDP also actively ignores the advice of multiple state and federal agencies that have informed the City that the hours it is proposing are detrimental to the Headlands ecosystem, particularly the endangered species that live therein. For these reasons, the City is unable to make the required finding that the proposed development is in conformity with the public access and public recreation policies of the Coastal Act. Therefore, the City lacks authority to issue the CDP because it would violate Public Resources Code, section 30604.

Moreover, section 30214 is implemented by the LCP. (See, e.g., LCP Land Use Element, Policy 5.20.) Therefore, the City further lacks authority to issue the CDP because it would be inconsistent with the LCP.

(c) The CDP Violates the Coastal Act’s Fairness and Due Process Provisions

The Coastal Act requires that “the public interest and principles of fundamental fairness and due process of law require that the commission conduct its affairs in an open, objective, and impartial manner free of undue influence and the abuse of power and authority... [T]o be effective, California's coastal protection program requires public awareness, understanding, support, participation, and confidence in the commission and its practices and procedures. Accordingly, this article is necessary to preserve the public's welfare and the integrity of, and to maintain the public's trust in, the commission and the implementation of this division.” (Pub. Resources Code, § 30320.) The fairness and due process principles of the Coastal Act extend to local coastal programs. (Pub. Resources Code, § 30321.)

The City has fostered an animosity toward CNLM that erodes public trust, exacerbates trespassing and abuses the Coastal Act’s procedures. Examples abound, but include the City’s large sign placed at the Headlands Trail board, stating “Why is the **CNLM** Headlands Trail Still Closed? Please call the **California Coastal Commission** to make additional complaints: (562) 590-5071.” (BA181648-01, at 113 [original emphasis].) The City’s

weaponization of the CDP process and subversion of Coastal Commission procedures violates the Coastal Act, and Public Resources Code, section 30321.

Moreover, the City's attempt to use CNLM's property without CNLM's consent violates Public Resources Code, section 30601.5, which states that an applicant for a coastal development permit, who is not the owner of a fee interest in the property on which a proposed development is to be located, and who is not joined by the property owner as a coapplicant, must be able to "demonstrate a legal right, interest, or other entitlement to use the property for the proposed development." (Pub. Res. Code, § 30601.5; See also, Cal. Code Regs., tit. 14, § 13053.5, subd. (b) [requiring an applicant to submit "[a] description and documentation of the applicant's legal interest in all the property upon which work would be performed if the application were approved...."])

For the reasons discussed throughout this letter pertaining to violations of fundamental fairness and due process of law, the CDP additionally violates the Coastal Act provisions related thereto.

#### **D. The City's Application and Approval of the CDP Violates the California Environmental Quality Act**

The Planning Commission is also apparently planning to adopt findings under CEQA as part of its intended approval of the CDP. This action under CEQA is not properly noticed in the Agenda as a separate action by the Planning Commission and, on this basis alone, is not a proper action to be taken by the Planning Commission.

Even if the Planning Commission could adopt CEQA Findings, approval of the CDP would violate CEQA.

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment [and] . . . is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 500 [internal citations omitted].)

The City contends that the CDP is covered by the HDCP EIR, which was prepared in 2002 for the Headlands Project. However, as discussed herein, the development proposed by the City under CDP was not contemplated by the 2002 EIR. The CDP proposes new development on CNLM's property, converts it to recreational use, extends the hours of public access, and results in increasing intensity of use, based on the rapidly increasing rates of visitation since CNLM first started tracking visitor use in 2011. This is a major and substantial change to the Trail hours and management, converting to public recreation use instead of open space and conservation purposes, that will require major revisions to the 2002 EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects, particularly with respect to the impacts to the Pacific pocket mouse. (CEQA Guidelines, § 15162(a)(1).) Furthermore

there are substantial changes with respect to the circumstances and new information of substantial importance which require major revisions of the 2022 EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects. (CEQA Guidelines, § 15162(a)(2), (3).) This includes, but is not limited to, the new information and circumstances related to the current condition of and impacts of public recreation on listed species and fragile coastal habitat that the City has in its possession and failed to address in any respect in the Staff Report. (See, e.g., December 2023 Letter from Coastal Commission; 2023 Letter from USFWS and CDFW; 2023 HMMP Update from CNLM; 2022 Letter from Coastal Commission; 2022 Letter from USFWS and CDFW; 2022 HMMP Update from CNLM; Declarations of Deborah Rogers and Korie Merrill).

The Staff Report also claims that the CDP, under which the City is proposing “development” on CNLM’s private property, taking over the management of the Trail, without CNLM’s consent, is exempt as under Class 1 and Class 23 categorical exemptions under CEQA. “Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use.” (CEQA Guideline, § 15301.) Class 23 “consists of the normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose.” (CEQA Guidelines, § 15323.) These exemptions are not applicable here.

The CEQA Guidelines identify 33 classes of exempted activities that generally will not affect the environment and can be safely exempted from CEQA review without compromising environmental quality. (CEQA Guidelines, §§ 15301-15333.) “Because the exemptions operate as exceptions to CEQA, they are narrowly construed.” (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1382.) “[T]he agency invoking the exemption has the burden of demonstrating it applies”—that the facts of the case must support the agency’s reliance on a categorical exemption. (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 386.) “These rules ensure that in all but the clearest cases of categorical exemptions, a project will be subject to some level of environmental review.” (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697.)

Here, the facts in the record do not support the application of either exemption to the City’s CDP. The CDP Application clearly expands the existing use of the Trail—it takes it away from CNLM, converts it to public recreation, and significantly expands the hours of use. It is a fundamental change in use—from passive public access incidental to the primary and predominant use of the Preserve for conservation purposes, under the adaptive management of CNLM, to recreation use per the terms set by the City. This does not qualify under the terms of either Class 1 or Class 23. (CEQA Guideline, §§ 15301, 15323.)

“Even if a project falls within the description of one of the exempt classes, it may nonetheless have a significant effect on the environment based on factors such as location, cumulative impact, or unusual circumstances.” (*Save Our Carmel River*, *supra*, 141 Cal.App.4th at 689.) No categorical exemption can be used where there is reasonable possibility that the project may have significant impacts because of unusual circumstances. (Guidelines, § 15300.2(c).) An “unusual circumstance” is some feature of the project which distinguishes it from others in the exempt class. (*Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal. 4th 1086, 1105-1106.) An exemption is also not applicable “when the cumulative impact of successive projects of the same type in the same place, over time is significant.” (Guidelines, § 15300.2(b).)

Unusual circumstances exception applies here because, among other things, the Preserve is only one of two places in the world where the Pacific pocket mouse is located. The City’s CDP will increase impacts on the Pacific pocket mouse and the hours the City proposes to impose on CNLM and the Trail are not supported by the Coastal Commission, USFWS or CDFW. (See, e.g., December 2023 Letter from Coastal Commission; 2023 Letter from USFWS and CDFW; 2023 HMMP Update from CNLM; 2022 Letter from Coastal Commission; 2022 Letter from USFWS and CDFW; 2022 HMMP Update from CNLM; Declarations of Deborah Rogers and Korie Merrill). The City’s ordinance confirms that the Wildlife Agencies have expert authority over ESHAs and species. (Dana Point Muni. Code, § 9.27.030 (d)(2) [“Evaluations of the development’s impact to the ESHA shall be sought from appropriate state and federal resources agencies.”].) The Staff Report does not even acknowledge that CNLM has prepared the 2023 HMMP Update and that USFWS and CDFW have supported reduced hours for the Trail.

In addition, the Coastal Commission has directly notified the City that it has no authority to seek a CDP for the Trail and that its proposed hours will pose harm to the Pacific pocket mouse. (December 2023 Coastal Commission Letter.) This is truly an unusual circumstance that prevents the City from improperly relying on the Class 1 and 23 exemptions—the expert agency has told the City that its proposal is a violation of the Coastal Act. The City cannot approve the CDP under either exemption.

#### **E. The City’s CDP Application and Review Process Raises Serious Constitutional Issues**

1. The City Has Violated CNLM’s Substantive and Procedural Due Process Rights
  - (a) The City Refused to Provide CNLM with Information on the Proposed Development

CNLM has been attempting to obtain a copy of the CDP Application since April 4, 2024. When the City finally furnished the application to CNLM 14 days later, the application was effectively blank, with the City staff concluding that every requirement was “non-

applicable.” The application contains no information about the proposed development beyond the Notice of Pending Coastal Development Permit (“Permit Notice”). The City’s de facto refusal to furnish CNLM with the requisite information with sufficient time to respond violates CNLM’s rights as the fee simple owner of the property to which the CDP would apply. Specifically, the City’s bad faith weaponization of the CDP process violates principles of due process, government transparency, and fair dealing. The City has informed CNLM, both directly and by implication, that it must rely exclusively on the CDP application process to obtain information regarding the proposed developments on CNLM’s own land.

The City’s refusal to furnish any substantive information to CNLM ahead of the Planning Commission meeting violates CNLM’s due process rights. As discussed herein, the CDP threatens to deprive CNLM of property. Pursuant to both the Coastal Act and constitutional principles, CNLM is entitled to a fair hearing. Inherent in a fair hearing is sufficient notice and an adequate opportunity to be heard. Without any details regarding the proposed development, the City deprives CNLM of its right to a fair hearing.

Moreover, the City’s own admonition in the Notice of Public Hearing (“Hearing Notice”) underscores the gravity of denying CNLM, and the public, of a substantive description of the proposed CDP with sufficient time to process and respond to this information before the hearing. The City’s Hearing Notice warns that “[i]f you challenge the action taken on this proposal in court, you may be limited to raising only those issues you or someone else raised at the public hearing described in this notice, or in written correspondence delivered to the City of Dana Point prior to the public hearing.” It is not only unethical but unconstitutional for the City to simultaneously deprive the public and CNLM the opportunity to review any substantive information on the proposed permit, while in the same breath warning that any issues not raised at the Planning Commission meeting will be considered waived as grounds for subsequent legal challenge. For the reasons discussed herein, the City’s notice in this matter is fundamentally deficient, both substantively and procedurally.

(b) The City’s Substantive Notice Deficiencies Violate DPMC  
§ 9.61.050

The LCP directs the City and applicant to follow notice procedures identified in DPMC § 9.69.060. (LCP, at 3-54.) DPMC § 9.69.060 states that public hearings on coastal development permits must be conducted in accordance with DPMC § 9.61.050. Pursuant to DPMC § 9.61.050, the content of the notice must include (1) the time and place at which the application will be heard; (2) the identity of the hearing body or officer; (3) the nature of the application, including, but not limited to, the date of filing of the application, the name of the applicant, the file number assigned to the application, and a description of the development; (4) a brief description of the general procedure of the City of Dana Point concerning the conduct of hearing and local actions; and (5) the general location of the property under consideration. (DPMC, § 9.61.050.)

The City's Hearing Notice fails to provide even this basic information, omitting the date on which the application was filed as well as, crucially, any cognizable description of the development. The only description provided is that the application aims "[t]o ratify hours allowing public access to the Headlands Conservation Park Trail located within the Headlands Conservation Park." It does not indicate what these hours would be, but rather provides the broadest possible terminology in order to deprive CNLM and the public adequate notice ahead of the hearing. The Hearing Notice thereby fails to meet the already low standard set by DPMC § 9.61.050(c), and thus violates DPMC § 9.61.050, the LCP, and state and federal constitutional due process rights.

(c) Substantive Notice Deficiencies Violate the Coastal Act

The information required by DPMC § 9.61.050 is basic. Several of its terms, such as "the nature of the application" and the "brief description of the general procedure" for permit review, are vague, and do not provide a clear baseline for the required information in the notice. Fortunately, the Coastal Act clarifies the minimum required standards for a local government coastal development permit program's public notice procedure, providing that, "[i]n order to meet the requirements of the California Coastal Act," the LCP must include "[p]rocedures for providing notice to the public...at a minimum equivalent to the notice required by Sections 13054 and 13063." (Cal. Code Regs. tit. 14, § 13302 [emphasis added].)

Pursuant to Public Resources Code, section 13063, the Coastal Act requires the local government's notice to, at a minimum, provide notice that contains (1) the number assigned to the application; (2) a description of the development and its proposed location; (3) the date, time and place at which the application will be heard by the commission; (4) a link to the general procedure of the commission concerning hearings and action on applications; (5) the direction to persons wishing to participate in the public hearing that testimony should be related to the regional and statewide issues addressed by the Coastal Act; and (6) a statement that staff reports will be distributed as set forth in section 13059 and published on the commission's website. (Cal. Code Regs., tit. 14, § 13063(a).)

The City's Hearing Notice makes no mention of the City's general procedure concerning the conduct of hearing and local actions, pursuant to section 13302(d)(1). Nor, as discussed above, does it provide the analogous procedural information required pursuant to DPMC § 9.61.050. The City's Hearing Notice similarly fails to include any directions on the focus of public testimony expected at the hearing. Crucially, the City's Hearing Notice does not make any mention of staff reports, their distribution, or whether they will be published on the commission's website.

For these reasons, the Hearing Notice fails to "provid[e] notice to the public... at a minimum equivalent to the notice required by Section [ ] 13063." (Cal. Code Regs., tit. 14, § 13302.) The Hearing Notice thus violates the Coastal Act's minimum standard for meaningful notice of a coastal development permit hearing. By failing to provide notice that complies with

*either* the applicable content or timing requirements for effective notice, the City has demonstrated its disregard for a fair and open process and deprived CNLM and the public of due process.

(d) Inconsistencies in the Scant Information Provided Deprive CNLM of Due Process

The Hearing Notice contains a different, less detailed project description language than the Permit Notice. The full description of the proposed development in the Hearing Notice reads: “Coastal Development Permit CDP24-0008 Headlands Conservation Park Trail – Public Access Hours: To ratify hours allowing public access to the Headlands Conservation Park Trail located within the Headlands Conservation Park.” This is the description received by CNLM, and other members of the public who were mailed the Hearing Notice or viewed it online.

In contrast, the Permit Notice contains the following description of the proposed development: “Proposed Development: Headlands Conservation Trail- Public Access Hours. A Coastal Development Permit application to establish public access for the Headlands Conservation Park Trail System for year-round use, seven (7) days a week from 7:00 am to sunset.” While still falling short of the information required by due process, the Permit Notice description includes actual details of the proposed public access schedule. Only those who walked by the Permit Notice, posted at the Trail, received this comparatively less deficient project description. Moreover, it is plainly inaccurate, as the actual proposal is setting the hours of the Trail to 7 a.m. to nautical twilight, which is different from sunset. CNLM and the public were not aware of this major change until the Staff Report and proposed Resolution were released at 4:30 p.m. on Friday, April 19, 2024. Accordingly, the only notice CNLM received about the CDP Application contains crucial and material inaccuracies, and did not accurately depict what the City was actually seeking by the CDP Application.

The vast majority of interested parties would have access to the Hearing Notice, which is posted online at the City’s website, rather than to the Permit Notice, which is only posted at the Trail. The City’s choice to only include these schedule details in the Permit Notice further demonstrates the fundamental deficiencies in the notice provided ahead of the Planning Commission’s hearing.

(e) The City Violated Notice Posting Requirement

The City must post three copies of the Hearing Notice at the project site, at least 14 calendar days prior to the hearing date, and “provide visual evidence and a signed affidavit of posting” to that end. (DPMC § 9.61.050(a)(4).) Instead, the Hearing Notice contains a signed affidavit attesting only to a separate, additional requirement that the City post notice at three places in the City outside of the project area. (DPMC § 9.61.050(a)(1).) The inclusion of the unrelated affidavit, and omission of a similar affidavit attesting to compliance with the on-

site posting requirement under DPMC § 9.61.050(a)(4), suggests that the City violated DPMC § 9.61.050(1)(4).

(f) The City Failed to Provide Notice by the Deadline Set By the Conservation Easement

DPMC § 9.61.050 required the City to give notice “[n]o less than 14 calendar days prior to the date of a public hearing on development applications.” (DPMC, § 9.61.050.) Thus, the deadline for serving notice of the April 22, 2024 Planning Commission tolled on April 8, 2024, 14 days earlier. The Conservation Easement, defining the City’s limited possessory interest in the Trail, specifies additional notice procedures when “[a]ny notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other...” (Conservation Easement, page 7.) “Notice shall be deemed effective..., in the case of delivery by first class mail, five (5) days after deposit into the United States mail.” (*Id.* at 8.) This provision of the Conservation Easement reflects that CNLM, as the property owner, is entitled to greater notice of proposed developments on its own property than the public at large is under generally applicable municipal code sections.

Here, the City and CNLM were both parties to the Conservation Easement. The City was required pursuant to DPMC § 9.61.050 to provide CNLM notice. Thus, the Conservation Easement’s notice provision applies. The Hearing Notice that CNLM received was postmarked April 4, 2024. The “effective date” of CNLM’s notice, pursuant to the Conservation Easement, would be five days after the postmarked date. Thus, notice was effectively served on CNLM on April 9, 2024, after the deadline provided in Section 9.61.050 had already passed. Thus, the City’s notice was late, procedurally deficient, and violates the DPMC and the Conservation Easement.

2. The CDP Constitutes an Unconstitutional Taking of Private Property Without Compensation

By applying for the CDP, the City is overreaching its limited legal interest in CNLM’s property. The CDP, if granted, would allow the City to use CNLM’s property for public recreation. This constitutes an unlawful taking of private property for public use without just compensation. (U.S. Const. Amend. 5; Cal. Const. art. 1, § 19.) The Coastal Act explicitly states that it “is not intended and shall not be construed as authorizing the ... 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 therefor. This section 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.” (Pub. Resources Code, § 30010.)

To be clear, the Preserve, including the Trail, is not the City’s property and the City has no rights to it. The City does not spend, nor has spent any money on the Preserve or Trail; it is completely funded by CNLM, a nonprofit. The City did not invest any money in the Trail,

including the signage, the gates and fencing. The CDP Application does not include any funding by the City for the Trail, despite the significant financial obligations imposed by the CDP, including panic buttons, signage, and staffing, as discussed below. The City has unilaterally decided to take CNLM's property, to convert to public use, to demand upgrades and services by CNLM for such public use and has completely failed to compensate CNLM for any of it. This is a clear taking of private property without compensation. The City is constitutionally prohibited from doing this.

The City lacks authority, both as the holder of the conservation easement and as the local government reviewing its own CDP application, to impose public recreation requirements on land that the City does not own, in a manner that would constitute an unconstitutional taking under federal and state law. For these reasons, CDP24-0008 would constitute an unlawful taking and must be withdrawn.

3. The City's Attorneys Are Disqualified from Advising Both the Permit Applicant and the Reviewing Body, Raising Serious Due Process Concerns and Lack of a Fair and Impartial Proceeding

Patrick Muñoz and Rutan and Tucker must be recused from representing the City, including advising the Planning Commission and City Council on the City's CDP Application.

"[T]he constitutional guarantee of due process of law requires a fair tribunal. A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. Violation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation "in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 ["*Morongo*"], quoting *Withrow v. Larkin*, (1975) 421 U.S. 35, 47 [internal citations omitted].)

Mr. Muñoz has developed an "extensive ongoing relationship" with the City Council, particularly as the "sole or primary legal adviser" to it, that blurs the line between Mr. Muñoz's prosecutorial role against CNLM in litigation over this very issue, and his advisory role to the City Council regarding the related current administrative proceeding. (*Drakes Bay Oyster Co. v. California Coastal Com.* (2016) 4 Cal.App.5th 1165, 1176 – 1177 ["*Drakes*"], citing *Morongo*, *supra*, at 740 and *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 816 ["*Quintero*"].) When prosecutorial and advisory roles are blurred during the pendency of an administrative hearing, this creates a "substantial risk that the [Planning Commission]'s judgement in the case before it will be skewed in favor of the prosecution." (*Drakes*, *supra*, at 1177, quoting *Quintero*, *supra*, at 817.)

These circumstances jeopardize the impartiality of the Planning Commission as administrative decisionmaker in this proceeding. "The chance that the [Commission] will show a preference toward [Mr. Muñoz], even 'perhaps unconsciously,' is present and

unacceptable. (*Ibid.*) The fact of the matter is that the hours that the CDP aims to codify are the very hours that Mr. Muñoz and Rutan and Tucker obtained through a preliminary injunction in its litigation against CNLM. Mr. Muñoz’s and Rutan and Tucker’s extensive, primary involvement in this matter presents a due process concern that the impartiality of the City’s administrative decision-making entities is “affected by a prosecuting attorney who also advises the decision maker in the course of the administrative proceeding or has advised the decision maker so frequently in other proceedings as to create an unacceptable risk of bias or actual bias that affects the result of the administrative proceeding.” (*Drakes, supra*, at 1175.)

“Due process in an administrative hearing ... demands an *appearance of fairness* and the absence of *even a probability* of outside influence on the adjudication.” (*Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90 [“*Nightlife Partners*”] [emphasis added].) Courts have held that, where a city attorney played an active and significant part in denying a business’s permit renewal application, and also advised and assisted the hearing officer in reviewing that denial, the attorney’s role as an advisor to the hearing officer “was the equivalent of trial counsel acting as an appellate court’s advisor during the appellate court’s review of the propriety of a lower court’s judgment in favor of that counsel’s client. It requires no citation of authority exactly on all fours with this fact pattern in order to justify the conclusion that [the attorney’s] role as advisor to the decision maker violated petitioners’ right to due process. There was a clear appearance of unfairness and bias. This was sufficient to support the trial court’s ruling.” (*Drakes, supra*, at 1173, quoting *Nightlife Partners, supra*, at 94.)

Here, the same attorney and firm who played an active and significant role in citing and suing CNLM for not maintaining the hours that the CDP now seeks to impose is advising the Planning Commission in reviewing the CDP Application. This alone creates a clear appearance of unfairness and bias. With that said, the administrative record in the ongoing litigation and quotes given in news articles provides “specific evidence demonstrating actual bias or a particular combination of circumstances creating an unacceptable risk of bias.” (*Drakes, supra*, at 1175, quoting *Morongo, supra*, at 741.) Indeed, communications by Mr. Muñoz and Rutan and Tucker to and regarding CNLM have been filled with vitriol towards CNLM, far beyond the level of zealous advocacy for one’s client that can be expected of an attorney. Thus, under the totality of the circumstances, due process demands that Patrick Muñoz and Rutan and Tucker must be recused from representing the City, including advising the Planning Commission and City Council on the City’s CDP Application.

#### **F. The Staff Report and Draft Resolution are Replete with Factual Inaccuracies**

As noted above, the City makes several blatantly false allegations throughout the staff report and draft resolution. Other times the City intentionally fails to cite relevant information in the Staff Report, purposely omitting important information to deprive the public of the

accurate depiction of the impacts of the proposed CDP and to further the City’s objectives to undermine and retaliate against CNLM’s efforts to protect the Pacific pocket mouse and manage the Preserve. As a result, the factual record before the Planning Commission is inherently flawed and lacks substantial evidence for the required findings under the DPMC, the Coastal Act and CEQA, as discussed elsewhere in this letter. The misstatements are too numerous to fully address here. Some, but not all, of these misstatements are addressed herein, throughout this letter and as follows.

1. The City’s Animosity Toward CNLM Continues to Result in Improper Use of Public Funds to Make Ridiculous Accusations in the Recently Issued Notice of Violation

The Staff Report refers to the City’s recently issued Notice of Violation, CE24-0278 (NOV). The NOV was not, as the Report alleges, for failure to manage vegetation or for erosion control sandbags, which the LCP expressly acknowledges as part of erosion control Best Management Practices for use during the rainy season, as it still currently is. (HDCP, at 4-116; 4-118.) Rather, the NOV was based on the ludicrous and bad faith suggestion that papers taped to information boards on the trail constitute “development” that requires its own CDP under the Coastal Act. This is ironic given how the City “notified” CNLM of the NOV—by taping it to a sign on the Trail at the Dana Point Preserve:



The NOV purports to find that CNLM committed a public nuisance and is in violation of the Local Coastal Program due to certain materials that were duct-taped to CNLM’s signage kiosks on the Trail. These materials included a QR Code for visitors to use to determine when sunset occurs (when the Trail is required to be closed and visitors must not be on the Trail) and a press release from CNLM regarding management of the Preserve for the benefit of the Pacific pocket mouse and information about impacts of the public access. The NOV threatens further enforcement actions, including administrative citations and referral to the California Coastal Commission and/or referral to the City Attorney, unless CNLM “abates” these so-called public nuisances.

The QR Code has been posted on the signage for more than 1.5 years, during which time City staff has visited the Trail numerous times and never expressed any issue with its posting. It provides a valuable service to visitors and discourages trespass, which the City has failed to properly address despite numerous requests by CNLM. There are simply no grounds for the City to claim that the QR Code is a “public nuisance” unless the City is attempting to encourage even greater misuse of the Trail and endangerment to the Pacific pocket mouse.

The NOV was also dated the day after CNLM’s April 17, 2024, letter to the City, which, among other things, noted that City staff had engaged in a campaign to stop CNLM from expressing its opinions on the City’s failure to follow the Coastal Commission’s December 2023 directive, including removing and destroying posted press releases on the Preserve. Indeed, CNLM had to use duct tape on the press release depicted in the photograph in the NOV because City staff had removed and destroyed the other copies. CNLM specifically requested that the City refrain from misusing CNLM’s private property.

That the NOV came the day after this letter is no coincidence. The City is impermissibly attempting to suppress signage posted by CNLM on its own property because it disagrees with CNLM’s message. Such viewpoint-based discrimination is never permissible and violates the CNLM’s First Amendment rights. (*Cornelius v. NAACP Def & Educ. Fund* (1985) 473 U.S. 788, 811 [explaining that “regulation that is in reality a façade for viewpoint-based discrimination” is unconstitutional].) Signage is subject to the same First Amendment protections as other forms of speech including the limitations on content-based restrictions and the prohibition on viewpoint-based restrictions. (*Reed v. Town of Gilbert* (2015) 576 U.S. 155 [finding sign code provisions are subject to the same content-based jurisprudence as other forms of protected speech under the First Amendment].) Indeed, there is heightened concern when the government attempts to suppress signage on private property, such as the City is attempting to do here with the Preserve. (*City of Ladue v. Gilleo* (1994) 512 U.S. 43, 56 [striking down as unconstitutional, ordinance that banned most signs on private residential property as it foreclosed an important medium of communication and prevented speakers from effectively reaching their intended audience]; see also, *Riel v. City of Bradford* (3rd Cir. 2007) 485 F.3d 736, 754 [finding city’s sign restrictions for private property passed muster because it allowed all temporary signs and noncommercial signs of a certain size].)

Here, the City has manufactured a purported public nuisance, based on CNLM’s use of duct tape to secure its press release to a sign board it maintains on its own property. The City is attempting to weaponize its code enforcement to suppress CNLM’s disagreement with the City’s disregard for the Coastal Commission’s directive that the City has no rights to set the hours of public access for CNLM’s property and that the City’s tactics are harmful to the Preserve and the Pacific pocket mouse. The Coastal Commission has informed the City that CNLM has the authority to set those hours, not the City. The City has ignored this admonition. Instead, it is impermissibly attempting to secure a CDP from its own Planning Commission to set the hours, and now is also alarmingly attempting to suppress CNLM’s speech rights to speak out against the City’s actions.

It is inconceivable how the City's practice of drafting letters to CNLM making retaliatory and baseless accusations is considered a proper use of public funds and raises serious ethical concerns. As the City is aware, in any 42 U.S.C. § 1983 litigation to protect constitutional rights, the successful plaintiff is entitled to attorneys' fees. CNLM intends to protect its constitutional rights to the fullest. There is no basis for the NOV and the issuance of the NOV infringes upon CNLM's First Amendment rights. The City should immediately retract the unlawfully issued NOV, CE24-0278 and the Planning Commission should disregard any reference to it.

2. The Assertion That CNLM Has Never Documented a Direct Causal Link Between Public Use and Impacts to the PPM Population Ignores the Overwhelming Body of Scientific Literature on this Topic, the Evidence from the Preserve, and Expert Opinions of CNLM, USFWS, CDFW, and Coastal Commission Staff

The City claims CNLM has never documented a direct causal link between public use and PPM impacts. CNLM has repeatedly attempted to explain to the City the scientific information that provides substantial evidence of the harm that is caused to wildlife by public presence in their vicinity. This evidence comes from decades of scientific studies with many wildlife species—including small mammals—and they indisputably show harm from human presence. This evidence is explained in detail in the draft 2022 HMMP Update and the draft 2023 HMMP Update that CNLM has been trying to get the City's cooperation on for over two years. (See, 2022 Draft HMMP Update, 2023 Draft HMMP Update.) It is unclear whether the City reviewed this information. Wildlife professionals with much experience and expertise and familiarity with PPM have also concluded the harm from such intense public use of PPM habitat. USFWS and CDFW also commented on the HMMP Updates, which the City ignored. (See, e.g., March 2022 and May 2023 Letters from USFWS and CDFW.) The Coastal Commission also cited to these letters and HMMP Updates to the City in its December 2023 Letter.

The City has simply chosen to ignore all of these studies, reports, updates and letters—indeed, none of them are referenced in the Staff Report. If the City is looking for a study that shows such a causal link, such a study is not only unreasonable and unnecessary, but not legally required. There is no requirement under the Coastal Act that public access should be *increased* unilaterally by a public entity on private property unless there a “direct causal link” that public access is harming a critically endangered species on the site.

Moreover, this type of evidence is almost impossible to provide as it would require an experiment that was designed to cause harm—something that cannot be done with an endangered species. CNLM has explained to the City, both in communications and in the draft 2023 HMMP Update, the challenges to carrying out such a study. Nevertheless, such a direct causal link *was* provided through the death of a young male PPM on the Dana Point Preserve trail. (See, March 2024 Declaration of Korie Merrill.) The PPM fatality autopsy report provided further demonstrates the causal link in as blunt a manner as possible: a dead

Pacific pocket mouse that had been trampled to death by not one but two trail users. The City simply decided to ignore this evidence, which is an abuse of discretion and a failure to proceed in a manner required by law.

3. The City Improper Relies on a Single Internal USFWS Email from 2020, Ignoring 2022 and 2023 Letters from USFWS in Support of CNLM's Trail Hours and Management

The Staff Report points to internal emails between USFWS staff, apparently in an attempt to claim that USFWS does not believe reducing Trail hours would be protective for the Pacific pocket mouse. The relevance of the internal email is unclear, and the City does not attempt to clarify why the emails have been included in the Staff Report for any reason other than to stoke animosity toward CNLM. It is further worth noting that the internal USFWS emails discussing trail closure are from June 2020, hardly three months after the onset of the COVID-19 pandemic and at a time when public health systems were on the brink of collapse. The Trail is too narrow to facilitate social distancing in the event hikers need to pass by each other, furthering the potential for viral transmission based on the best available science at that time.

The Staff Report does not cite or reference to the two official letters from USFWS, submitted jointly with CDFW, which support CNLM's management of the Trail to protect the Pacific pocket mouse, including reduced hours. (See, e.g., March 2022 and May 2023 Letters from USFWS and CDFW.) The 2022 Letter from USFWS and CDFW stated:

In developing the proposal to reduce public access to benefit sensitive resources within the Preserve, CNLM has considered the monitoring data on public use, the dynamics of the PPM population before and after restriction of public access to the Preserve due to COVID-19, and the growing body of scientific literature that indicates that even passive non-consumptive recreation can have deleterious effects on wildlife individuals and populations.

The 2022 Letter from USFWS and CDFW further concluded that "modification to the HMMP is based on the current status of the Dana Point PPM population and of the species as a whole, which warrants a conservative management strategy within each of the extant populations."

USFWS and CDFW reiterated these conclusions in the 2023 letter, stating:

As relayed in our prior comment letter, the status of each of the extant PPM populations warrants a conservative management approach to safeguard them from extirpation, especially at Dana Point, which supports the smallest and most vulnerable

PPM population to environmental, demographic and genetic threats. Because public access is one of the few threats to the Dana Point population that can be effectively managed and could appreciably influence the size of the Dana Point population, we continue to support the proposal to more closely monitor and manage public access as a component of the adaptive management plan for the Preserve.

This conclusion is repeated by the Coastal Commission in its December 2023 letter to the City. There is no reason why the Staff Report would cite only a 2020 internal USFWS email that does not seem to have any relevance to the City's CDP and ignore this correspondence. This is a plain attempt to mislead the public and misrepresent the record before the Planning Commission.

4. The City Improperly and Irrationally Considers the Coastal Commission's Letters Based on Whether the City Agrees with the Conclusions

The City's bad faith in all manners of dealing with the Preserve is further demonstrated by its oscillating references to letters from the Coastal Commission as a representative opinion of the Commission itself, or, alternately, the opinion of one rogue Coastal Commission Staff member. In the Staff Report alone, the City characterizes the December 14, 2023, letter from the Commission as representing "various positions taken by a member of the Coastal Commission's staff in connection with the proposed CDP, which generally support CNLM's view." In the same argument, the City states that "the California Coastal Commission sent several letters to both CNLM and the City indicating that a CDP is needed to set hours."

The City lacks authority to selectively pick and choose which letters contain direction from "the California Coastal Commission" and which contain "various positions taken by a member of the Coastal Commission's staff." Either the City acknowledges and respects the Coastal Commission's prominent role in enforcing the Coastal Act and protecting coastal resources, or the City does not. It is evident from the reference to "Commission staff" and the condescending tone of the City's April response to a December letter from the Commission that the City does not. The City's disregard for any other agency's opinion that conflicts with its objective of unilateral decision-making demonstrates a concerning contempt for civil procedure, particularly coming from a municipality.

5. CDP 15-021 Does Not, As the City Suggests, Already Apply to the Nature Trail

As the City itself concedes, the Coastal Commission has repeatedly advised that a CDP, or a revised HMMP, is needed to implement trail hours. This direction is premised on the implicit assumption that CDP 15-021 does not already govern Trail hours. This is made clear in the City's Staff Report for the 2015 CDP that shows the City believed it was establishing

hours for all of the City's trails in the Headlands, and the list clearly does not include the Preserve trail. (See, 2015 Staff Report.) This further demonstrates that the Trail is not owned or managed by the City, and never was. This is further supported by the multiple pleadings submitted by the City in the litigation, and in emails in the City's document production showing the City saying to outsiders that they do not own or control the Preserve Trail, all of which are in the City's possession and incorporated by reference here. Accordingly, the City's contention that "arguments exist that CDP 15-021 already applies to the Nature Trail" is not supported by the LCP or the Coastal Act, and therefore fails.

6. The Conservation Easement Does Not Mandate Five Coastal View Outlook Areas, Nor Is the Trail Required to Remain Sited in its Current Location

The City alleges that "[t]he Nature Trail is required to be sited in its current location (along the bluff/perimeter of the "Dana Point") such that it, as well as its 5 mandated coastal view outlook areas, are outside of the PPM habitat that was identified in the HDCP and its EIR." This is false. At the outset, the Trail is (and always was) *within* PPM habitat.

Furthermore, the Conservation Easement and LCP do not mandate any specific coastal view outlook areas. Nor do they mandate that the Trail "be sited in its current location." For example, the LCP authorizes the trail to be relocated in the event that such a relocation is required for conservation purposes. For example, the Master CDP, Condition 50, provides that "[t]he bluff top trail alignment shall be designed to minimize impacts to areas of natural resource value, including coastal bluff scrub habitat. The trail shall be located a minimum of 25 feet from the edge of the Coastal Bluff Scrub habitat. (Master CDP Conditions ¶ 50.)

For these reasons, the City's statements regarding the mandated siting or viewpoints on the Trail is incorrect.

7. The CDP Application Is Not, as the City Alleges "Separate and Apart from Current Litigation"

As discussed herein, adoption of the CDP is improper because it would undermine appropriate judicial resolution of CNLM's Motion to Dissolve the Preliminary Injunction, which is set for hearing by the Court on June 10, 2024. The City's lawsuit against CNLM centers on CNLM's authority to make decisions regarding management of the Preserve. The litigation is not, as the City represents, exclusively related to past actions. In the City's April 15, 2024 Reply to the Coastal Commission's December 14, 2023 letter, the City again attempts to downplay this connection, opining that "the question of who is responsible under the various Entitlement Documents to set hours at the Trail is not particularly significant." If it is "not particularly significant," the City fails to explain its pages upon pages of arguments attempting to contort the language of the underlying entitlement documents to the Preserve ad nauseum during this litigation in an attempt to support its contention that the City is actually the entity with authority to set CDP hours.

For these reasons, the decision on the instant CDP is not, in fact “separate and apart from the current litigation.” Rather, on its face, the CDP seeks to implement the very same hours that the City obtained through a preliminary injunction in that same pending litigation against CNLM. To wit, the hours proposed in the CDP would actually extend the hours allowed under the preliminary injunction, because, as discussed above, the City’s Proposed Resolution would adopt an inapplicable and inappropriate definition of “sunset” that would add hundreds of public access hours annually.

Moreover, the City continues to misrepresent the preliminary injunction as having “conclusively decided [the question of whether the City or CNLM has authority to set Trail hours], as a matter of law.” Contrary to the City’s assertions in its untimely reply to the Coastal Commission, the preliminary injunction ruling does not “conclusively deem” the responsibility for setting hours belongs to the City. Rather, the preliminary injunction, as its name suggests, provides only preliminary equitable relief and does not, as the City suggests, “conclusively decide” the controversy at issue. As discussed further herein, CNLM has brought a motion to dissolve the preliminary injunction, in light of recommendations from state and federal agencies that the preliminary injunction hours are harming the ESHA in violation of the Coastal Act. In sum, the preliminary injunction ruling neither definitively decides the issue, nor is it supported by subsequent agency recommendations.

8. The City’s Allegations Relating to Minimum Necessary Restrictions on Public Access are False, Irrelevant, and Made in Bad Faith

The City repeatedly claims that the Coastal Act requires “any limitation on maximum public access [to] be the minimum necessary to actually promote an important, recognized goal.” This language is not found in the statute which the City cites to in support of this provision, Public Resources Code Section 30001.5. Cases interpreting this statute, however, have stressed that “maximum public access” adjacent to ESHAs cannot come at the expense of “carefully safeguard[ing]” the ESHAs’ “preservation.” (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506, citing *Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 611.) Courts have repeatedly, consistently held that “under both the Coastal Act and CEQA...[t]he highest priority must be given to environmental consideration in interpreting the statute [citation].” (*Id.* at 506, citing *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 537; *See also, Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4th 1577, 1587; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1376.)

Thus, the City’s argument that any actions taken must be “the minimum limitation necessary to protect the PPM” is not supported by statute or by relevant jurisprudence. Simply repeating the same contrived argument does not give it legal force. For these reasons, the City’s arguments related to “the minimum limitation necessary” fail as a matter of law. Nevertheless, the City’s false, defamatory, and libelous accusations are considered in turn as follows.

(a) False Allegation: CNLM Limits Public Access to the Trail to Save Significant Financial Resources

The Staff Report, and the City's April 15 letter to the Coastal Commission (which is included with the Staff Report's supporting materials), make several false and defamatory statements challenging CNLM's financial management of the Preserve. These statements appear to be retaliatory in nature, targeting CNLM because of the filing of the Motion to Dissolve the Preliminary Injunction, which brought the Court's attention to the City's failure to respond to the Coastal Commission December 2023 letter. They are also false.

The Staff Report claims that CNLM is limiting public access to the Trail to reduce costs. There is no evidence for this statement. Supporting Document 9(H) contains a number of emails between various people. None of them indicate that CNLM's rationale for limiting hours is based on saving money. CNLM would not save any money if the hours were more limited. Management of the Preserve would still be occurring on days and hours that the trail is not open. CNLM is required to manage the Preserve according to management and funding agreements and the endowment earnings can only be spent on the Preserve. As such, no money would be "saved," although some might be reallocated to other management and monitoring tasks required on the Preserve. Of the thousands of pages of documents that CNLM has turned over to the City during discovery, the City has been unable to point to a single document that indicates that CNLM's proposal for reduced hours is motivated by money. On the contrary, the emails and other documents all show that CNLM's reasons for its proposal for reduced hours are to protect PPM and other sensitive resources.

The City points to what it apparently believes are CNLM's significant financial resources, without any apparent understanding of the purpose of those funds. The majority of CNLM's funds consist of endowments that CNLM holds for its preserves throughout California. The funds in each endowment that CNLM, or any other organization, holds can only be spent for that particular preserve, and in general only the earnings are spent. The endowment established for the Dana Point Preserve is managed by CNLM as a non-wasting endowment pursuant to UPMIFA, CA Probate Code 18501 et seq., and the terms of CNLM's agreement with the Steele Foundation, which generously provided the endowment.

It is unclear what the City thinks CNLM would do with money purportedly "saved" by limiting the hours of public access. CNLM is not trying to manage the Trail to reduce costs—these costs would be spent on the Preserve no matter what.

(b) False Allegation: CNLM Seeks to Limit Public Access to the Trail Because CNLM Has Failed to Curtail Trespassing

After-hours trespassing is indeed a problem, but it is not the only or the main problem with public access. CNLM has no desire to prohibit public access, but the increasing numbers of visitors on the trail at all times, and the greater opportunity for trespass when the trail is open longer, lead to increased impacts on the species.

The impacts to PPM and other species, as well as the increasing numbers of visitors, are documented in CNLM's draft 2023 HMMP Update, of which the City is well aware. (2022 Draft HMMP Update, 2023 Draft HMMP Update.) Visitation to the Preserve Trail has more than doubled since CNLM installed trail counters in 2011. Rates of visitation continue to increase. There are several ways in which excessive public use can negatively affect the Preserve. First, the time of day that there are Trail visitors is significant. For the Pacific pocket mouse and some other species, low-light times of the day are especially sensitive. Visiting hours that occur early in the morning and late into the day can therefore be more harmful. Second, the number of visitors is significant. The noise, smells, vibrations, and sight of people can be disturbing and disruptive. The more people, the stronger are these stresses. These stresses can disrupt species behavior, including reproduction, foraging, and predator avoidance, all of which are necessary for the population to survive. Third, when people trespass (that is, either go off trail during visitor hours or are on the preserve outside visitor hours), this is also risky for the pocket mouse and other species. In those instances, people can crush pocket mouse burrows and gnatcatcher nests and destroy vegetation on which they rely for food, for example.

With respect to trespass, CNLM spends considerable funds from both its endowment from the Department of Defense (DoD), discussed more below, and from the Steele Foundation on patrols to deter trespass, both by using its own rangers and entering into contracts with a private security company to provide additional patrols. Given that CNLM does not have citation authority, CNLM patrols can only have limited efficacy. Because of the other requirements for managing the Pacific pocket mouse and other species on the preserve, CNLM cannot spend all the Preserve's financial resources on addressing visitors who do not comply with the most basic trail rules. The City provides no evidence that trespass would decrease if there was a more appropriate public access schedule. Much of the trespass, in fact, is from people who come onto the trail during visitor hours and refuse to leave at the designated time, despite being reminded.

Furthermore, regarding the City's questioning of CNLM's reports of trespass, CNLM's statistics are based on direct observations by its private security firm and staff. Most of these trespassers were people who stayed late on the preserve, disregarded signage and reminders from staff, and then were still on the preserve after sunset. Generally CNLM staff or the security company must let these people out of the gates when they are finally willing to leave. Because the Orange County Sheriff's Department (OCSD) typically does not cite people and just lets them out of the gate, and since CNLM has no desire to keep people in the Preserve while waiting for OCSD to arrive, CNLM generally no longer calls OCSD. As a result, OCSD statistics are not representative of the trespass issues at the Trail.

(c) False Allegations: Public Access Should Not Be Limited Because CNLM Has Not Implemented Appropriate Strategies to Promote PPM Population, Including Vegetation Management and Cross-Breeding Populations

The Staff Report's statements are misinformed. CNLM implements vegetation management on a regular basis, using funds from the Preserve endowment, as well as from the additional DoD endowment, and from grants. See, for example, Figure 1 of the REPI work plan for 2024, which shows grids of vegetation management on the Preserve and the timing of such management activities; please see also Annual Work Plan for 2023. (See attached documents.) Vegetation management occurs regularly and according to plans reviewed by USFWS. Also, CNLM's management and monitoring activities occur within permit conditions issued by USFWS, and all of the work must minimize risk to the sensitive species onsite. Vegetation management is a part of annual budgets and is conducted almost exclusively by staff and contractors.

Furthermore, as noted above, the basis of the NOV issued by the City had nothing to do with vegetation management. The retaliatory NOV, instead, alleged CNLM committed a public nuisance by having signs with a QR code telling visitors what time sunset is and copies of a press release posted that describe efforts to protect the natural resources at the Preserve. The City has never before issued a notice of violation to CNLM based on supposedly improper signage or "trail conditions." The City apparently does not understand what is involved with Preserve management. CNLM rangers most recently performed vegetation trimming on March 30, but will not do anymore until gnatcatcher nesting season is done. (See attached documents regarding vegetation trimming earlier in 2024.)

Regarding the Staff Report comment on cross-breeding with other known PPM populations, CNLM has not "refused to implement cross-breeding with other known PPM populations." CNLM has participated in and supported cross-breeding programs with other known PPM populations, in conjunction with experts at the San Diego Zoo (CNLM would not be able to "implement" cross-breeding with other populations itself). Indeed, the San Diego Zoo took four mice in August 2023 for this purpose. (See, e.g., Access Agreement with SDZWA.)

Also, it should be noted that there are several threats and challenges for PPM, including Argentine ants, climate change, drought, and vegetation conditions, and that CNLM works to address the ones that are "controllable." CNLM's activities to support and protect the Pacific pocket mouse as discussed in CNLM's annual reports and other information are included with this Comment Letter.

(d) False Allegation: Public Access Should Not Be Limited Because CNLM Entered an Agreement with the Department of Defense (DoD) to Mitigate Impacts of Camp Pendleton on PPM Population

The Staff Report contends that CNLM has somehow acted improperly or unlawfully by working with the DoD to mitigate impacts of the Marines' activities at Camp Pendleton on the Pacific pocket mouse population. The City seems to completely misunderstand the cooperative agreement between CNLM and the DoD. CNLM has no control or role in activities of the Marines, at Camp Pendleton or anywhere else. USFWS oversees Camp Pendleton's activities with respect to the PPM and reviewed and approved the cooperative agreement, under which the DoD provided an endowment to CNLM, which simply provides additional funds to do the management and monitoring that is already required under the HDCP and other governing documents. Why is the City upset that additional funds are available to protect Pacific pocket mouse? The HDCP and EIR did not put a cap on "PPM enhancement measures" and CNLM's desire to reduce public access to better protect the PPM is not based on its contractual obligation with the DoD, but rather on its mandate to practice adaptive management under the HDCP, EIR, and the Conservation Easement to facilitate the protection of the natural resources.

**G. The City's CDP Review Process Is a Sham and Excuses the Need to Exhaust Administrative Remedies**

1. Application Timing Demonstrates Disregard for Meaningful Participation by CNLM and the Public

The City unjustly streamlined review and consideration of the CDP Application and, in doing so, denied CNLM and the public adequate opportunity to fully participate in the process, including preparing comments.

The City alleges it filed the CDP Application in response to a December 14, 2023, letter from the Coastal Commission. In its letter, the Coastal Commission informed the City that the hours it seeks to codify through the CDP violate the Coastal Act and threaten the Headlands' fragile ecosystem. The letter also informed the City that it had no authority to apply for a CDP to set the hours for the Trail.

The Coastal Commission's letter to the City was sent on December 14, 2023, with a deadline to respond by December 29 "so that Commission staff can consider its options to ensure trail hours that are protective of an endangered species, and consistent with the Local Coastal Program, are established in a timely manner." (Commission Letter, at p. 5.) The City completely ignored this reasonable request to respond in a timely fashion so that the Coastal Commission could plan how to protect the Headlands ecosystem, demonstrating the City's singular focus on public access at the expense of endangered species. To wit, the City took

no further action until five months later, when it filed the CDP without consulting CNLM or any of the resources agencies tasked with protecting the Preserve.

Indeed, the lack of any response by the City to the Coastal Commission's letter necessitated CNLM to file a motion with the Court to ensure that the trail hours are consistent with the Coastal Commission's directive to the City. (See, Motion to Dissolve and/or Modify Preliminary Injunction Order.) In response to CNLM's motion, the City opted to submit the CDP Application to *itself* to set the City's own proposed hours through the CDP process instead, without the consent of CNLM, as the property owner. This deliberate perversion of the Coastal Commission's recommendation evinces a reckless disregard of the uniform recommendation by multiple state and federal agencies to reduce the current trail hours, as well as a blatant indifference to the extirpation of the Pacific pocket mouse population that the City is willfully facilitating. The City alleges it filed the CDP Application in response to the Commission's letter. Rather than working with CNLM in the five months between the Coastal Commission's Letter and the CDP Application filing, the City opted to wait until the last feasible moment, days before a Planning Commission hearing was scheduled, so that the public would have the bare minimum time in which to prepare comments ahead of the hearing on the application.

At this time, adoption of the CDP is improper because it would preempt and undermine appropriate judicial resolution of CNLM's Motion to Dissolve the Preliminary Injunction, which is set for hearing by the Court on June 10, 2024. Proceeding with the CDP Application would be wasteful of judicial resources, as proceeding with the CDP Application will likely lead to further legal complications, such as extending the current lawsuit against the City for improper permitting and other challenges to the City's decision-making process, as discussed in this letter. The City's decision to proceed with the CDP Application is a direct retaliatory action against CNLM's Motion to Dissolve the Preliminary Injunction and intended to disrupt the Court's consideration of CNLM's motion.

## 2. The Blank CDP Application Demonstrates a Disregard for the Coastal Act, CEQA, and the City's Own Municipal Code

The City has weaponized and subverted the CDP application process to circumvent the limited terms of its underlying entitlement, stymie an ongoing effort by CNLM to work with the City to resolve the matter, ignore a letter from the California Coastal Commission informing the City that the current hours are inconsistent with the LCP, and entirely dismiss CNLM's good-faith efforts to obtain the City's approval on the revised HMMP, pursuant to Condition 38 of the HDCP.

The City has steadfastly asserted that the CDP hours are in compliance with the LCP. This is the advice from the City Attorney to City Staff and Staff's recommendation to the Planning Commission in the Staff Report. This presents ethical issues, discussed herein, and suggests that the City's review of the CDP Application is merely intended to check a box on the path to its inevitable approval and implementation.

**Nowhere is this clearer than in the CDP Application itself**, which is effectively blank and concludes that every requirement to disclose any information at all about the proposed development is somehow “non-applicable.” No explanation is provided for how or why this project is exempt from functionally any review, particularly environmental review, given its ecological significance and the presence of endangered species. The City’s blank CDP Application blatantly demonstrates a belief that the City is somehow “above the law.” It is not.

### **III. OBJECTIONS TO THE DRAFT RESOLUTION**

For all the reasons stated in this Comment Letter, CNLM also objects to the draft resolution approving the CDP. Such objections include, but are not limited to, the issues stated below.

#### **A. The Recitals are False, Misleading, Made in Bad Faith, and Unsupported**

The Draft Resolution states that the application was “verified” without indicating what this means. To the extent “verification” means that the City determined the CDP Application, which was essentially blank, constituted a complete application, that verification was deficient, in violation of Dana Point Municipal Code Title 9, and was made in bad faith.

The Draft Resolution references “certain unpermitted closures that a court has determined were illegal and in violation of the Coastal Act.” This statement mischaracterizes the preliminary injunction issued as part of ongoing litigation as a final decision of the Court based on the full trial of the case. The legality of the closures has not been decided by a court, and, as discussed herein, CNLM filed a motion to dissolve the preliminary injunction in light of conclusions by multiple state and federal agencies that the current hours are harmful to resident Pacific pocket mouse populations. Until this matter is resolved, any indications to the contrary by the City are false, misleading, and made in bad faith.

The Draft Resolution states that the Project does not result in changed circumstances, but rather maintains the status quo that has been in place since 2009. As stated herein, the CDP proposes new development on CNLM’s property, converts it to recreational use, extends the hours of public access, and results in an increasing intensity of use, based on the rapidly increasing rates of visitation since CNLM first started tracking visitor use in 2011, as well as the City’s addition of hundreds of hours per year of trail use, due to its proposal to close the Trail at nautical twilight, rather than sunset. Thus, all of the recitals that contend that there is no changed circumstances are fundamental without legal and factual support.

The third recital further states that the City is a grantee of a public access easement. This is not true. The City does not hold any public access easement to the Preserve or Trail, and no such public access easement exists. Indeed, the City has no legal or property interest to apply for a CDP for development of CNLM’s property, as stated throughout this Comment Letter.

The Draft Resolution states that the April 22, 2024, Planning Commission meeting was duly noticed. As discussed herein, it was not duly noticed, in violation of the LCP and the Brown

Act. The City published a 306-page Staff Report at 4:30 on the Friday afternoon before the Monday, April 22 hearing. Comments are due to the Planning Commission by 4:00 PM on Monday, April 22. Thus, the City's distribution of supplementary materials less than 72 hours prior to the deadline to submit written comments is both in bad faith and a violation of government transparency guardrails.

As discussed herein, the Planning Commission lacks authority to find the Recitals to be a true and correct reflection of the circumstances surrounding the CDP Application.

As further discussed herein, the City's Zoning Code provides no avenue for approval of a CDP based solely on information presented at the public hearing, where the application itself was wholly inadequate under the standards provided in the LCP. As discussed, the City must follow the standard application procedure for CDPs in order to comply with the LCP and avoid violating the Coastal Act. The City has not fulfilled its obligations under its own standards. Thus, the Planning Commission lacks the authority to make the required findings.

#### **B. The City Lacks Authority under the LCP, the Coastal Act, and CEQA to Make the Proposed Findings**

Approval of Finding 2.1 would violate the Coastal Act. As discussed herein, the CDP application violates several of the LCP policies listed under Finding 1 because it actively ignores advice from every other interested resource agency not to continue with the current public access hours, let alone expand them as proposed.

Approval of Finding 2.2 would further violate the Coastal Act. As discussed herein, the CDP violates, rather than furthers, the public access policies of the Coastal Act and LCP, as the CDP fails to protect Environmentally Sensitive Habitat Areas as required by Coastal Commission siting and design standards for the California Coastal Trail, by the LCP and by the Coastal Conservancy's Public Access policies. The Public Access policies require balancing the importance of habitat protection with public access, but the City has wholly ignored the former in favor of the latter. The finding also incorrectly states that there would be public access during daylight hours, which the City's CDP includes more than daylight hours.

Approval of Finding 2.3 would violate CEQA and the Coastal Act. The Draft Resolution states that "the Project is consistent and within the scope of the certified EIR." The City does not cite to any support for this false statement, naturally, as the EIR never contemplated the impacts of daily public access, from 7:00 am until Nautical Twilight, in direct contravention of recommendations from state and federal resource agencies advising that doing so is damaging the fragile habitat of the Conservation Park. Contrary to the City's statement, the CDP does, in fact, result in changed circumstances, both from the status quo and from the conditions considered nearly 25 years ago when the EIR was prepared. The "status quo" did not change the definition of "sunset" to "Nautical Twilight," meaning that the CDP's proposed hours would add hundreds of public access hours over the course of a calendar

year, as discussed herein. For these reasons, and, in particular, based on the input from state and federal agencies, the CDP's proposal to not only continue but expand its preliminary injunction hours would both expand the operational hours in place from 2009 through 2020, be inconsistent with the past history of use of the Nature Trail, and present a reasonable possibility - indeed, probability, that the Project will have a significant effect on the environment due to unusual circumstances related to the protection of endangered species on the site, including the documented fatality thereof from public use. Therefore, the CDP is not exempt from CEQA, additional CEQA review is required before the City can legally approve the CDP, and any discretionary action taken to approve the CDP by the Planning Commission or City Council will result in a violation of CEQA that CNLM intends to prosecute to the fullest extent of the law. Moreover, the Planning Commission lacks the authority to make the required finding that there are no feasible mitigation measures or feasible alternatives available which would substantially lessen any significant adverse impact that the CDP would have on ESHA habitat within the Conservation Park, because the City has not prepared the required analysis, or any analysis at all, to support such a conclusion.

Approval of Finding 2.4 would violate the Coastal Act. The proposed CDP is not designed to prevent adverse impacts to ESHA for the reasons discussed herein. Nor would the proposed change in definition of "sunset" to "Nautical Twilight" restrict public access to daylight hours when the PPM is not active. Additionally, while PPM are nocturnal, they can be and have been documented to be active during daylight hours, especially during low-light times. Nor does the Nature Trail's size, as a percentage of the entire Headlands project, mean that the adverse impacts will be any less significant. PPM have been documented in many areas of the Preserve, including on and near the Nature Trail. Nor have the automatic locking gates deterred members of the public from staying on the Trail or venturing into the ESHA after closing, and thereby trespassing. Moreover, the City's statements that the proposed CDP allows for temporary closures to maintain and protect ESHA resources is false, as discussed below, as the City gives itself veto rights to the resource agency's recommendation for temporary closure without any enforceable limitations on what the City considers "reasonable." Finally, the CDP does, in fact, change the current Requirements of CNLM's daily management and control of public access, for the reasons discussed herein and below.

Approval of Finding 2.5 would violate the Coastal Act, as the LCP requires a geotechnical report that was not prepared, along with the dearth of other required analysis that the City excepted itself from complying with without justification. Even if the City believed the CDP was exempt under CEQA, the LCP still imposes technical analysis requirements independently of CEQA that the City simply concluded were "Non-Applicable" with no additional explanation.

Approval of Finding 2.7 would violate the Coastal Act. As discussed herein, the CDP does not comply with the LCP, Zoning Code, and other applicable plans and programs, and exceeds the City's limited property interest granted by the Conservation Easement. The last

paragraph also states “that the nature trail “is the only connection between Strands Beach and Dana Point Harbor.” This is not true. There are other trails that connect those two locations as demonstrated on the City’s own website.

**C. The City Lacks Authority Under the LCP, the Coastal Act, CEQA, and the State and Federal Constitutions to Impose the Proposed Conditions on CNLM**

The City lacks authority to impose Condition 3.1 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act.

The City lacks authority to impose Condition 3.2 for the numerous reasons discussed herein. In particular, Condition 3.2 provided the Director of Community Development unlimited discretion to continue increasing public access hours without any further amendment to the CDP and “without a new public hearing.” This violates the LCP, the Coastal Act, and constitutional takings protections under state and federal constitutions.

The City lacks authority to impose Condition 3.3 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act.

The City lacks authority to impose Condition 3.4 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA, the Coastal Act, and state and federal constitutional protections against government takings.

The City lacks authority to impose Condition 3.5 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act, and state and federal constitutional protections against government takings. These temporary closure proceedings were not agreed to under the Conservation Easement, are not authorized under the LCP, exceed the bounds of the City’s limited Conservation Easement, and were not considered in the underlying EIR. Condition 3.5.a inappropriately gives the City’s Director of Community Development unfettered veto power with no defined or enforceable limitation on what justification the Director considers “reasonable” for the temporary closures. Condition 3.5.b does the same but is entirely counterintuitive as it suggests public access can somehow be maximized during a temporary closure, without any further clarification. Condition 3.5.c similarly gives the Director of Community Development unlimited veto power and constitutes an unconstitutional taking as it effectively requires CNLM to write a letter to the City every time it rains enough to warrant trail closure. This is absurd and an overreach of both the City’s property interest and authority pursuant to the LCP. Furthermore, Condition 3.5.c inappropriately gives the City authority over daily management activities without any constraints on the Director’s determination that “such closure is not reasonable and not consistent with the goal of

maximum public access.” This is yet another expansion of use requiring analysis under CEQA. For these reasons, the City lacks authority to impose Condition 3.5.

The City lacks authority to impose Condition 3.6 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act, and state and federal constitutional protections against government takings. Condition 3.6 would inappropriately give the City authority over daily management activities, as well as unreasonable veto power over the locking mechanism that gates at each end of the Nature Trail may use. Moreover, the City cannot demand access to keys, combinations, codes, or other such applicable devices or information to access the property in the event of some unnamed emergency circumstances during hours when the Nature Trail is closed, and the gates are locked. As the City has repeatedly stated, CNLM is responsible for daily trail management. The City’s request for after-hours access to the trail, without explanation, is highly suspicious in light of the ample acts of bad faith the City has performed over the past month alone that prioritize public access and the City’s unilateral decision making over environmental protections or legal limits on its authority. The LCP does not authorize the City to hold such authority, and as such Condition 3.6 is in violation of the LCP.

The City lacks authority to impose Condition 3.7 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act, and state and federal constitutional protections against government takings. As the City has repeatedly stated, CNLM is responsible for daily trail management. Condition 3.7 would inappropriately, and without authority under the LCP, mandate how the CNLM conducts daily management of the Conservation Park. Moreover, as discussed herein, CNLM staff and security officials regularly let trespassing individuals out once they have agreed to leave the Preserve well after closing. The pictures that the City included as Exhibit F and shared with the Daily Mail of individuals trapped inside the trail are from 13 years ago and are not in fact photos of the Preserve, although the City made no attempt to clarify the year and location. The City has no authority to impose this condition for the reasons stated, as Condition 3.7 violates the LCP.

The City lacks authority to impose Condition 3.8 for the numerous reasons discussed herein, namely, inconsistency with the LCP and the City’s limited property interest, and violation of CEQA and the Coastal Act, and state and federal constitutional protections against government takings. Moreover, the panic hardware, over which, again, the Director of Community Development would have full veto power, creates a material potential for abuse and trespassing that presents an unacceptable threat to the ESHA. As discussed herein, CNLM staff and security officials regularly let trespassing individuals out once they have agreed to leave the Preserve well after closing. The pictures that the City included as Exhibit F and shared with the Daily Mail of individuals trapped inside the trail are from 13 years ago, and are not in fact photos of the Preserve, although the City made no attempt to clarify that fact in either scenario. The statement that “[t]he Director shall collaborate with CNLM to explore methodologies that substantially comply with this condition” provides little

reassurance after the City's open, sustained, and unreasonable animosity toward CNLM. The "panic" button would also allow and lead to uncontrolled access, which is prohibited by the Conservation Easement and the HDCP. Regardless of the caveat Condition 3.8 provides promising collaboration, the City has no authority to impose this condition for the reasons stated, as Condition 3.8 violates the LCP.

\* \* \* \* \*

CNLM thanks the Commission for considering these comments and urges the Commission to deny the CDP Application.

Sincerely yours,



Shaye Diveley

Attachments (see list)

c: California Coastal Commission ([andrew.willis@coastal.ca.gov](mailto:andrew.willis@coastal.ca.gov))  
U.S. Fish & Wildlife Service ([Jonathan\\_D\\_Snyder@fws.gov](mailto:Jonathan_D_Snyder@fws.gov))  
California Department of Fish & Wildlife ([Erinn.Wilson-Olgin@wildlife.ca.gov](mailto:Erinn.Wilson-Olgin@wildlife.ca.gov))

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EXH NO	Date	Document
1	09/22/2004	The Headlands Development and Conservation Plan
2.	02/23/2005	Resolution No. 05-02-23-07 – A Resolution of the City Council of Dana Point California Denying the Appeal of Surfriders Foundation and Upholding the Planning Commissioners Approval of Master Coastal Development Permit CDP04-23
3	04/18/2005	Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space
4	10/12/2005	Email between David Monroe and Jeff Andrews regarding Dana Pt. PPM transmitting (but not attached) Headlands HMMP. (Dana Pt PPM)
5	2007 – 2008	Annual Report for the 2007 – 2008 Fiscal Year on the Dana Point Preserve (S033)
6	03/28/2007	Dana Point Preserve (S033) On Site Trail Alignment Meeting, Meeting Notes (Drafted by Edward Stanton and Lee Ann Carranza)
7	06/15/2007	CDP Request (Improvements within to be Vacated Portions of Scenic Drive) (D. Monroe Comments 061807) (Scenic Drive – Baseline and CDP Discussion ~ 061)
8	06/20/2007	Email between David Monroe and Lewis Bruggeman regarding Scenic Drive - Baseline and CDP Discussion ~ 061507 McGuire Bruggerman with Monroe Comments 061807.pdf transmitting (but not attached) Scenic Drive – Baseline and CDP Discussion ~ 061507 McGuire Bruggerman with Monroe Comments 061807
9	2008 – 2009	Annual Report for the 2008 – 2009 Fiscal Year on the Dana Point Preserve (S033)
10	04/13/2016	California Coastal Commission – Addendum – Addendum to Item No. 7.5 – Settlement Agreement and Settlement Cease and Desist Order No. CCC-16-CD-02 (City of Dana Point) for the Commission Meeting of April 15, 2016, and including documents received: Exhibit 1 – Surfrider Foundation letter dated April 7, 2016. Exhibit 2 – Sierra Club letter dated April 6, 2016. Exhibit 3 – Center for Natural Land Management Letter (“CNLM”) dated April 7, 2016 April 1, 2016, California Coastal Commission Letter to Strand Homeowners Association F7.5 Staff Report: Recommendation and Findings for Issuance of Settlement Agreement and Settlement Cease and Desist Order Exhibit 4 – March 22, 2010, City of Dana Point Staff Report re Urgency Ordinance Declaring Existence of Public Nuisance Conditions (Strand Vista Park) and Amending Chapter 13.04 to adopt Operations Hours (with attachments) Exhibit 5 – Photographs at Strand Beach Access Exhibit 6 – October 22, 2009, letter from the California Coastal Commission to Brad Fowler City of Dana Point regarding Summary of Reconnaissance Survey of Improvements on 10/7/09

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EXH NO	Date	Document
		<p>Exhibit 7 – November 5, 2009, City of Dana Point letter to Karl Schwing, CCC regarding Response to Commission Staff Letter of October 20, 2009</p> <p>Exhibit 8 – November 20, 2009, California Coastal Commission letter to Kyle Butterwick, City of Dana Point regarding Violation V-5-09-026 (Strand Beach)</p> <p>Exhibit 9 – Judgment regarding the Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed by the City of Dana Point against the California Coastal Commission</p> <p>Exhibit 10 – Judgment regarding Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief filed by Surfrider Foundation against the City of Dana Point</p> <p>Exhibit 11 – Order Granting Surfrider’s Request for Declaratory Relief</p> <p>Exhibit 12 – June 17, 2013, Appellate Decision D060260, Fourth Appellate District</p> <p>Exhibit 13 – September 17, 2015, Statement of Decision – City of Dana Point v. California Coastal Commission</p> <p>Exhibit 14 – November 3, 2015, letter from the California Coastal Commission to Patrick Munoz, Ursula Luna Reynosa, City of Dana Point, Headlands Reserve, LL and Stand Homeowners Association regarding Notification of Intent to Commence Cease and Desist Order and Administrative Civil Penalties Proceedings.</p>
11	04/19/2016	Staff Report – Amendments to Coastal Development Permit CDP15-0021 Regulating Hours of Operation of Strand Access Areas, Including Strand Vista Park and the Beach Accessways, located at the Dana Point Headlands and Introduction of an Ordinance Amending Chapter 13.04 Parks and Recreational Facilities Regulations of the Municipal Code to Address City Parks and Facilities and Modify Hours of Use in the Strand Access Areas
12	05/05/2018	S033 Dana Point Preserve Annual Report Introduction Discussion/Revisions
13	03/23/2022	Letter between USFWS and CNLM regarding Update to the Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space, City of Dana Point, California
14	07/28/2022	Letter regarding update to HMMP and purported changes the City does not agree with
15	08/02/2022	<p>Declaration of Deborah L. Rogers, Ph.D. in Opposition to City of Dana Point’s Motion for Preliminary Injunction, with attached:</p> <p>Exhibit A – Deborah L. Rogers – Curriculum Vitae</p> <p>Exhibit B – May 26, 2020, letter from CNLM to Mike Killebrew, City of Dana Point re Trail Closure Response to COVID-19 on CNLM’s Dana Point Preserve (S033)</p> <p>Exhibit C – June 19, 2020 letter from City of Dana Point to CNLM regarding Trail Closure Response to COVID-19 on CNLM's Dana Point Preserve (5033)</p>

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EXH NO	Date	Document
		<p>Exhibit D – October 28, 2020, Email string between City of Dana Point and CNLM regarding (S033) City of Dana Point proposes to undermine CNLM's safe trail use.</p> <p>Plan</p> <p>Exhibit E – February 26, 2021, letter from CNLM to Michael Villar, City Council Member regarding access to the trail</p> <p>Exhibit F – CNLM Public Access Questionnaire regarding the CNLM Dana Point Preserve</p> <p>Exhibit G – January 28, 2022, letter from CNLM to Jeff Rosaler and Bernie Villanueva – Grzecka, City of Dana Point transmitting copy of draft Update to the Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space</p>
16	08/22/2022	<p>Declaration of Ed Pert, Ph.D. in Opposition to Motion for Preliminary Injunction with attached:</p> <p>Exhibit A – March 23, 2022, U.S. Fish and Wildlife and California Department of Fish and Wildlife Letter to Deborah L. Rogers regarding Update to the Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space, City of Dana Point, California</p> <p>Exhibit B: April 15, 2022, Update to the Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space</p>
17	09/06/2022	<p>Further Declaration of Deborah L. Rogers, Ph.D. in Opposition to City of Dana Point Motion for Preliminary Injunction with attached:</p> <p>Exhibit 1 – Cooperative Agreement dated September 2020</p> <p>Exhibit 2 – 2020 – 2030 Pacific Pocket Mouse Enhancement Plan</p> <p>Exhibit 3 – 2022 Update to HMMP</p> <p>Exhibit 4 – Copies of City of Dana Point's Website pages.</p> <p>Exhibit 5 – Photograph of Signage</p> <p>Exhibit 6 - March 23, 2022, letter from US Fish and Wildlife Service and California Department of Fish and Wildlife regarding Update to the Habitat Management and Monitoring Plan for Dana Point Headlands Biological Open Space, City of Dana Point, California</p>
18	09/26/2022	<p>Declaration of Deborah L. Rogers, Ph.D. in Support of Objections to [Proposed] Order Granting Preliminary Injunction, with attached:</p> <p>Exhibit A: September 26, 2022, letter from Andrew Willis, California Coastal Commission to Jeff Rosaler, City of Dana Point and Deborah Rogers regarding Operation of Bluff top trail at Dana Point Preserve.</p>
19	09/26/2022	Letter between CCC and City regarding Operation of bluff top trail at Dana Point Preserve
20	12/05/2022	Weekly Report

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EXH NO	Date	Document
21	03/14/2023	Letter regarding Draft Habitat Management Plan for Public Access at Dana Point Preserve
22.	03/14/2023	2023 Habitat Management Plan for Public Access for the Dana Point Preserve
23	08/01/2023	Letter regarding Draft Updated Habitat Mitigation and Monitoring Plan for Public Access at Dana Point Preserve Dated March 14, 2023
24	08/03/2023	Site Access for Research Agreement between CNLM and the Zoological Society of San Diego (San Diego Zoo) with Exhibit A – Research Description Exhibit B – Access Special Conditions Exhibit C – Special Provisions and Conditions Exhibit D – Release Form
25	12/14/2023	Letter between CCC and City regarding Headlands Conservation Park Trail Hours
26	03/25/2024	Plaintiff and Cross Defendant Center for Natural Lands Management’s Notice of Motion and Motion to Dissolve or, in the Alternative to, Modify the Preliminary Injunction; Memorandum of Points and Authorities
27	03/25/2024	Declaration of Deborah L. Rogers, Ph.D. in Support of Plaintiff and Cross-Defendant Center for Natural Lands Management’s (CNLM) Motion to Dissolve or, in the Alternative, to Modify the Preliminary Injunction: with attached: Exhibit 1 - November 4, 2021, California Coastal Commission letter to CNLM and the City of Dana Point Exhibit 2 - July 28, 2022, letter from City of Dana Point to CNLM Exhibit 3 - September 26, 2022, California Coastal Commission letter to CNLM Exhibit 4 - March 14, 2023, CNLM letter to City, U.S. Department of Fish and Wildlife, California Department of Fish and Wildlife, and California Coastal Committee Exhibit 5 - May 15, 2023, U.S. Department of Fish and Wildlife and California Department of Fish and Wildlife letter to CNLM. Exhibit 6 - August 1, 2023, letter to CNLM from City of Dana Point Exhibit 7 - December 14, 2023, California Coastal Commission letter to the City of Dana Point Exhibit 8 - January 3, 2024, Email from City to California Coastal Commission
28	03/25/2024	Declaration of Korie Merrill in Support of Plaintiff and Cross- Defendant Center for Natural Lands Management’s Motion to Dissolve or, in the Alternative, to Modify the Preliminary Injunction with attached: Exhibit A – Report for Permit TE-221411-6.1 & SCP-013986 Exhibit B – Fish and Wildlife Authorization Exhibit C – June 20, 2023, Email regarding Cause of Death - PPM on Trail at Dana Point Preserve
29	04/01/2023	City of Dana Point’s Coast Development Permit Application Checklist
30		Photos of PPM on or Near Trail

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EXH NO	Date	Document
31		Objective 1
32	2005 – 2006	Annual Report for the Fiscal Year 2006 (October 2005 – September 2006) on the Dana Point Preserve
33	2006 – 2007	Annual Report for the Fiscal Year 2006 - 07 (October 2006 – September 2007) on the Dana Point Preserve
34	2007 – 2008	Annual Report for the Fiscal Year 2007 - 08 (October 2007 – September 2008) on the Dana Point Preserve
		Transmittal Email
35	2008 – 2009	Annual Report for the Fiscal Year 2008 - 09 (October 2008 – September 2009) on the Dana Point Preserve
		Transmittal Email
36	2009 – 2010	Annual Report for the Fiscal Year 2009 - 10 (October 2009 – September 2010) on the Dana Point Preserve
		Transmittal Email
37	2010 – 2011	Annual Report for the Fiscal Year 2010 - 11 (October 2010 – September 2011) on the Dana Point Preserve
		Transmittal Email
38	01/31/2013	CNLM Annual Report of Management Activities for the 2011 – 2012 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
39	01/10/2014	CNLM Annual Report of Management Activities for the 2012 – 2013 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
		Email Transmittal
40	12/15/2014	CNLM Annual Report of Management Activities for the 2013 – 2014 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
41	05/14/2020	Annual Report for the 2014-15 Fiscal Year (October 2014 - September 2015) on the Dana Point Preserve (S033)
42	04/23/2017	CNLM Annual Report of Management Activities for the 2015 – 2016 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
		Transmittal Email
43	05/09/2018	CNLM Annual Report of Management Activities for the 2016 – 2017 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
44	03/04/2019	CNLM Annual Report of Management Activities for the 2017 – 2018 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
		Email transmittal
45	04/13/2020	CNLM Annual Report of Management Activities for the 2018 – 2019 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
46	02/09/2021	CNLM Annual Report of Management Activities for the 2019 – 2020 Fiscal Year on the Dana Point Preserve. Owned and Managed by CNLM (S033)
47	03/09/2022	CNLM's Dana Point Preserve (S033) Annual Report of Management Activities for the 2021 Fiscal Year, Owned and Managed by CNLM
		Transmittal Email

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EXH NO	Date	Document
48	06/16/2023	CNLM's Dana Point Preserve (S033) Annual Report of Management Activities for the 2021 Fiscal Year, Owned and Managed by CNLM
		Transmittal Email
49	11/08/2023	Center for Natural Lands Management Dana Point Preserve (S033), 2023 Pacific Pocket Mouse Survey Results
50	11/08/2023	Letter regarding 2023 Annual Report for Permit ES221411-6.1: Dana Point Preserve (S033) Survey Report
51		20240213 SDZWA PPM Breeding and Reintroduction
52		20240213 SDZWA PPM Genetics2 2024
53		Email USFWS to PPM Working Group presentations Feb 2024
54		Email; PPM trapping CNLM SDZWA
55		N62473-20-2-0018 (CNLM G2036) REPI WP FY2024
56		S033 AR 20006-07
57		Ranger Report 03-24-23 03 29-24
58		Ranger Report 01-28 to 02-03