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February 24, 2025

VIA E-MAIL

City of Dana Point
Planning Commission
33282 Golden Lantern
Dana Point, CA 92629

Re: Agenda Item #6: Center for Natural Lands Management's Appeal of Determination of Incompleteness of Coastal Development Permit Application No. CDP24-0022

Dear Commissioners:

The Center for Natural Lands Management (CNLM) submits this comment letter regarding CNLM's Coastal Development Permit Application, CDP24-0022 (CDP Application), submitted to the City of Dana Point (City) on October 1, 2024, for APN #672-591-11 (Property). This letter pertains to CNLM's January 2, 2025, appeal (Appeal) of the City's December 18, 2024, determination that CNLM's CDP application was incomplete (Incompleteness Determination), set for hearing by the City Planning Commission as Agenda Item No. 6 on February 24, 2025.

In the Planning Commission Agenda Report for Item 6, "Appeal By The Center For Natural Lands Management (CNLM) Of The Director's Incomplete Determination Of Coastal Development Permit Application CDP24-0022" (Staff Report), staff makes two alternative recommendations with respect to CNLM's Appeal. CNLM supports staff recommendation #2, "[t]hat the Planning Commission approve the appeal filed by CNLM and overturn of the Community Development Director's Incompleteness Determination of CDP24-0022." (Staff Report, at 1.) CNLM urges the Planning Commission to grant CNLM's appeal and amend the language of the Draft Planning Commission Resolution No. 25-02-24-XX "A Resolution of the Planning Commission of the City of Dana Point, California, Granting CNLM's Appeal and Overturning the Community Development Director's Incompleteness Determination Related to Coastal Development Permit CDP24-0022 Which Seeks to Reduce the Operational Days and Hours of the Public Nature Trail at the Headlands Conservation Park" (Draft Approval Resolution) to accurately reflect that CNLM's application has been "deemed complete" since October 31, 2024, or not later than November 19, 2024, as discussed below.

For the reasons stated in CNLM's Appeal, incorporated by reference herein, and as stated below, CNLM's Appeal should be granted because CNLM's CDP application is complete as a matter of law under the Permit Streamlining Act (PSA), Government Code § 65920 et seq, and the City is prohibited by the PSA from requiring additional information before finding the CDP Application complete. The Staff Report also contains several misstatements and misrepresentations with respect to CNLM's CDP Application, the City's own CDP for the Property, and other issues that

are unrelated to the Incompleteness Determination, but are necessary for CNLM to address and correct.

CNLM'S APPEAL SHOULD BE GRANTED

The Staff Report Concedes CNLM "Completed" the Only Item in the City's October 9 Email by November 19, 2024

The Staff Report contends that an October 9, 2024, email from City staff, explaining to CNLM that City Council approval is required for CNLM's fee waiver, constituted the City's incompleteness determination. That email said, "The application is incomplete on the basis that the filing fee of $14,468 has not been provided." The filing fee was the only item described as being incomplete. Given the Staff Report's contention that this October 9 email was the City's incompleteness determination, the City has conceded that CNLM's application is now complete, as of November 19, 2024, when the City Council approved the requested fee waiver. As a result, CNLM's Appeal should be granted.

To the extent the City may claim that the October 9 email was only the City's "initial" incompleteness determination, this claim is to no avail. Under the PSA, the initial determination of incompleteness must contain "an **exhaustive** list of items that were not complete." (Govt. Code, § 65943(a), emphasis added.) "In any subsequent review of the application determined to be incomplete, the local agency shall not request the applicant to provide any new information **that was not stated in the initial list of items that were not complete**." (*Id*.) Thus, the Staff Report's claim that the October 9 email serves as an incompleteness determination does not support denying CNLM's appeal for two reasons.

First, "the initial list of items that were not complete" was a list of one: the fee. (See, October 9 email ["The application is considered incomplete **on the basis that the filing fee of $14,648 has not been provided**."].) The five items listed in the December 18, 2024, letter would, as a result, constitute an improper demand for "new information that was not stated in the initial list of items that were not complete." Stated otherwise, the Staff Report's claim that CNLM waived its appeal rights by not appealing the October 9, 2024, email from City staff only serves to preclude the City's later demand for additional information to complete the CDP Application.

Second, if the October 9 email were the City's incompleteness determination, that would still mean that CNLM's application is complete as a matter of law. As stated in the October 9 email, the only item barring completeness of the CDP application was payment of the application fee. The City Council's approval of the waiver of the fee on November 19 thereby resolved the only incomplete item. As there are no outstanding incomplete items from the initial list, CNLM's application is complete under the PSA. CNLM respectfully requests that the Planning Commission grant its appeal in full.

The Draft Resolution Granting CNLM's Appeal Should Be Revised to Find CNLM's Application Complete as of October 31, 2024, or at the Latest, November 19, 2024

Although CNLM supports staff recommendation #2, it requests that the Draft Resolution be revised to accurately state the completeness date for CNLM's CDP Application.

The Draft Approval Resolution states, in paragraph B.4 of the Findings, that the City "finds that CNLM's CDP Application, CDP24-0022 is deemed complete as of the date of adoption of this Resolution."

The City has no authority to arbitrarily set the date of completeness as February 24, 2025. The concept of completeness is exclusively governed by the language of the PSA. The completeness date under the PSA is 30 days after submission of the application, where the City has issued no written completeness determination before the end of the 30 days. The City cannot ignore this rule and randomly set a date upon which CNLM's CDP application is "deemed complete" without regard to the date on which the 30-day time limit tolled.

Moreover, granting CNLM's Appeal would mean that the Planning Commission would be setting aside the Incompleteness Determination, dated December 18, 2024, and finding CNLM's CDP Application complete despite the claims made in that document. The completeness date would therefore be October 31, 2024, if the appeal is granted. The City cannot legally both overturn the December 18 Incompleteness Determination while also setting the completeness date as February 24, because, assuming the completeness determination came on October 9, the City Council approved the fee waiver and resolved the only identified incomplete item on November 19, 2024. Thus, while CNLM maintains that the application was "deemed complete" on October 31, 2024, under the City's own reasoning, the latest date on which the application could be "complete" would have been November 19, 2024.

Therefore, the Draft Approval Resolution should be revised to conclude CNLM's CDP Application was complete as of October 31, 2024, or no later than November 19, 2024.

THE INCOMPLETENESS DETERMINATION DOES NOT COMPLY WITH THE PERMIT STREAMLINING ACT

The City Does Not Get to Determine When the PSA Is Triggered

The Staff Report asserts that "CNLM's CDP Application was not deemed filed or 'received' by the City until the City Council approved its fee waiver request on November 19, 2024." (Staff Report, at 4.) This contention is not supported by the plain language of the City's ordinance and the PSA.

Dana Point Municipal Code Section 9.61.040(c)(2) states:

> **Upon submittal of a development application by an applicant**, in accordance with the Permit Streamlining Act, Government Code Section 65920 et seq., the Director of Community Development shall have 30 days to review the development application to determine if the application is complete pursuant to subsection (d). Prior to the end of that 30-day period, the City shall notify the applicant in writing of any deficiencies in the application which make the application incomplete. This provision shall not apply to legislative actions by the City. (Emphasis added.)

The only possible interpretation of this provision is that the "submittal of a development application by an applicant" is the triggering event for the 30-day completeness-review timeline. The Staff Report's contention to the contrary is without any support.

The Staff Report's argument that completeness review is triggered upon an application being "deemed filed" or "deemed received" is also contradicted by the PSA. The triggering event under the PSA—receipt—involves no action on the part of the City. (See, Govt. Code, § 65943(a) ["Not later than 30 calendar days after any public agency has **received** an application for a development project, the agency shall determine in writing whether the application is complete and shall immediately transmit the determination to the applicant for the development project. … If the written determination is not made within 30 days **after receipt** of the application, and the application includes a statement that it is an application for a development permit, the application shall be deemed complete for purposes of this chapter."].) "Receipt" indisputably occurs when the application is submitted to the City, as the Dana Point Municipal Code acknowledges. If the "received" and "after receipt" language was, as the Staff Report suggests, nullified whenever a public agency charges a filing fee, there would have been no purpose for the Legislature to repeatedly use the word "receipt" instead of "filing."

Furthermore, under the PSA, local governments may not search for loopholes to avoid compliance with the prescribed time limits. (Govt. Code § 65940.5(c) ["[N]o public agency shall require an extension or waiver of the time limits contained in this chapter as a condition of accepting or processing the application for a development project."]) The City here required an extension of the PSA's time limits to process CNLM's application, in violation of the plain language of the PSA.

The Staff Report argues that the CDP Application checklist contains language extending the PSA's time limits from tolling upon an application being "received" to an application being "deemed filed." (Staff Report, at 5.) This, too, is expressly prohibited by the PSA. (Govt. Code, § 65940.5(a) ["No list compiled pursuant to Section 65940 shall include an extension or waiver of the time periods prescribed by this chapter within which a state or local agency shall act upon an application for a development project"].)

In short, the plain language of the law demonstrates that the City failed to act within 30 days of CNLM's submission of its CDP application, thereby waiving any right to demand additional information. CNLM respectfully requests that the Planning Commission grant its appeal in full.

The City Cannot Find CNLM's CDP Application Incomplete Based on Zoning Code Items Not On the City's Application Checklist

Under the PSA, the City cannot allege any information is missing unless that information was specifically required on the Application Checklist. (Govt. Code, § 65943(a) ["If the application is determined to be incomplete, the lead agency shall provide the applicant with an exhaustive list of items that were not complete. That list shall be limited to those items actually required on the lead agency's submittal requirement checklist."].) Requests for information must be made based on information already requested in the application checklist, defined by the PSA as a "list[] that shall specify in detail the information that will be required from any applicant for a development

project." (Govt. Code, § 65940(a)(1).) The PSA further describes the checklist as a compilation of information that "shall also indicate the criteria which the agency will apply in order to determine the completeness of any application submitted to it for a development project." (Govt. Code, § 65941(a).)

The Staff Report claims the City's Zoning Code provides the requirements for the CDP applications. However, the Zoning Code is not the application checklist. If the Legislature intended random sections scattered across a local agency's municipal code to constitute the application checklist, it would not have added three statutes to the Government Code defining the checklist as a distinct, comprehensive compilation of detailed information that will be required for a submittal to be considered complete. The City's suggested approach wholly reads the checklist statutes out of existence without any legal basis, requiring applicants to hunt down requirements from across the municipal code rather than providing all the requisite criteria in one checklist to avoid delay and the need for multiple rounds of review.

The plain language of the law states that the City cannot deny the completeness of an application based on allegedly "missing" information that was not listed in the City's application checklist. The Staff Report concedes that the submittal requirements it lists in the Incompleteness Determination arose from the Zoning Code, not the checklist. Thus, under Government Code, section 65943(a), the five items listed therein cannot be used to deny the completeness of CNLM's application.

Again, CNLM requests that the Planning Commission grant its appeal in full.

The Demanded Items Violate State Law Prohibitions on Completeness and Timing of Environmental Review

The Incompleteness Determination required a mitigation plan, alternatives analysis, and an initial study before determining completeness, in violation of state laws and regulations: Government Code, section 65941(b), and California Code of Regulations, Title 14 ("CEQA Guidelines") section 15060(c).

Pursuant to Government Code, section 65941(b), state law prohibits requiring proof of compliance with CEQA as a prerequisite for completeness. (See, e.g., Govt. Code 65941(b) ["(b) If a public agency is a lead or responsible agency for purposes of the California Environmental Quality Act, Division 13 (commencing with Section 21000) of the Public Resources Code, that criteria shall not require the applicant to submit the informational equivalent of an environmental impact report as part of a complete application, or to otherwise require proof of compliance with that act as a prerequisite to a permit application being deemed complete."].) Preparation of these plans and documents constitute the informational equivalent of an EIR, and otherwise require proof of compliance with CEQA, "as a prerequisite to a permit application being deemed complete." As such, the City's Incomplete Items are unlawful under Government Code, section 65941(b), as stated in CNLM's January 2, 2025, letter.

Furthermore, pursuant to CEQA Guidelines, section 15060(c), CEQA prohibits the City from beginning formal environmental review until after the application has been deemed complete. A lead agency under CEQA cannot even determine whether an activity is subject to CEQA before

an application is deemed complete. (CEQA Guidelines, § 15060(c) ["Once an application is deemed complete, a lead agency must first determine whether an activity is subject to CEQA before conducting an initial study."].) The City is thereby prohibited from conditioning completeness on preparation of an Initial Study, or submission of a $20,000 fee to that end. Incompleteness Item 5 is therefore *ultra vires* and void.

THE CITY IS APPLYING A DOUBLE STANDARD TO IMPOSE MORE ONEROUS REQUIREMENTS AND CEQA REVIEW ON CNLM'S CDP APPLICATION AS COMPARED TO CITY'S OWN CDP APPLICATION

The Information Submitted In Connection With the City's CDP Application is Relevant to the City's Completeness Determination for CNLM's CDP Application

The Staff Report states, on pages 5-6:

> The information submitted in connection with the City's CDP Application in 2024 is not relevant to whether CNLM's current CDP Application is complete, particularly given the fact that City withdrew its CDP application based largely upon comments received during the public process that additional analysis was needed before proceeding with the CDP.

CNLM disputes the contention that "[t]he information submitted in connection with the City's CDP Application in 2024 is not relevant to whether CNLM's current CDP Application is complete…." As written, the double standard promoted in the Staff Report and December 18, 2024, Incompleteness Determination sets a baseline for the degree of analysis required for the completeness determination and CEQA exemptions, as discussed below.

CNLM acknowledges additional analysis may be submitted between the completeness and approval stages. However, the degree of evidentiary support needed to approve a project, and make the requisite approval findings, exceeds the level of analysis needed to make a completeness determination. This is because a completeness determination solely consists of reviewing an application to either confirm or deny that an applicant has provided the information required in the agency's project application checklist. (Govt. Code, § 65943(a).)

The Planning Commission found the information in the City's application to be sufficient to make the required approval findings under DPMC Section 9.69.070. The City's approval and CEQA exemption finding were made despite evidence in the record at the time that the City's CDP would likely cause significant adverse environmental impacts.[1] This information was not, as the Staff Report suggests, submitted after the appeal of the City's CDP by CNLM and Coastal

[1] Indeed, the Planning Commission approved the City's CDP despite having letters from the Coastal Commission, CDFW, and the USFWS advising against approval. Rather than considering the Coastal Commission's feedback regarding impacts to the PPM, inconsistency with the Coastal Act, and the City's lack of authority to set trail hours, the City simply ignored this input when recommending approval of the City's application.

Commissioners, but rather was provided for the City's consideration before the Planning Commission voted to approve the City's CDP.

"The information submitted in connection with the City's CDP Application in 2024" is further relevant here given the City's insistence that CEQA is applicable to CNLM's proposal. The City's CDP expanded hours far beyond what CNLM is proposing and was still found to be exempt from CEQA despite the lack of environmental analysis. If the information in the record at the time of the City's CDP approval was sufficient to support the City's exemption, a level of information that was far less than what is being demanded of CNLM and what CNLM has already provided, then the evidence currently in the record for CNLM's CDP application should be sufficient to similarly conclude that CNLM's CDP is complete and exempt from CEQA.

The scant information in the record at the time of the City's CDP approval is relevant to the completeness determination for CNLM's CDP application, because the City's CDP approval was based on less information than CNLM has provided for its own application, which the City contends is incomplete, and despite greater evidence of environmental impacts from the City's CDP proposal. Accordingly, the degree of information provided for the City's CDP is directly relevant here, where the Planning Commission will again be asked to make the same findings, and where the City must, in short order, determine whether a CEQA exemption applies.

CNLM's CDP Proposal Does Not Require an Initial Study and Should Be Determined to Be Exempt, Like the City's CDP

The Draft Approval Resolution states, in paragraph B.3 of the Findings:

> The deposit requested by City Staff in subdivision (e) above is required to be provided by the applicant (the amount of which depends on the level of environmental review associated with the project) prior to City Staff undertaking the environmental review associated with the project….

The City's demand that an Initial Study is required for CNLM's CDP Application—and that CNLM is required to pay the City $20,000 to prepare it—is without legal and factual support, and stands in stark contrast to the City's treatment of its own CDP application.

The CEQA process begins with a preliminary review of a proposed activity, which includes determining first whether the application is complete. (CEQA Guidelines, § 15060.) Only after an application is deemed complete does the lead agency determine whether CEQA applies to the activity and, if so, what type of review is necessary. (*Id*.) "Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA." (CEQA Guidelines, § 15061.) If the agency determines no exemption applies, then the agency prepares an initial study to determine whether a negative declaration or environmental impact report should be prepared for the project. (CEQA Guidelines, § 15063.)

Here, the City has completely leapfrogged over three decision points—the completeness determination, whether there is a "project" subject to CEQA, and the exemption determination—to go directly to requiring an initial study for CNLM's CDP Application. This makes no legal or

practical sense, especially because the City determined its own CDP Application was exempt from CEQA.

Indeed, as CNLM has already explained to the City, CNLM's CDP Application would qualify for the Class 1 exemption for existing facilities (CEQA Guidelines, § 15301), the common sense exemption (*Id.*, § 15061(b)(3)), and the categorical exemption for habitat restoration. (Pub. Res. Code, § 21080.56.)

The CDP is exempt under the Class 1 categorical exemption because it consists of the operation, repair, and maintenance "of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of existing or former use. …. The key consideration is whether the project involves negligible or no expansion of use." (CEQA Guidelines, § 15301.) As stated, the CDP would only set hours. It would involve "negligible or no expansion of use" because the hours it would set would be less than the hours the trail is currently open. There is no reasonable argument that the proposal would not qualify for the Class 1 exemption. The City has failed to point to any evidence to that end, instead offering contradictory hypotheticals about trail use increasing or decreasing. Trail usage is a social effect that is outside the scope of CEQA. (*Id.,* at 15131(a).) The mere speculation of possible effects of that usage on the physical environment does not rise to the level of substantial evidence required to deny the Class 1 exemption.

The CDP would be exempt under CEQA's exemption for habitat restoration projects, as "[a] project to conserve, restore, protect, or enhance, and assist in the recovery of California native fish and wildlife, and the habitat upon which they depend." (Pub. Res. Code, § 21080.56(a)(1).) The CDP qualifies for this exemption because it would result in long-term net benefits to sensitive species recovery, includes procedures and ongoing management for the protection of the environment, and does not include construction activities. (Pub. Res. Code, § 21080.56.) These conclusions are supported by the substantial evidence provided in CNLM's application submittal. Accordingly, the CDP would be exempt from CEQA under Public Resources Code, section 21080.56.

The CDP is further exempt under the commonsense exemption to CEQA because the CDP would have no direct or reasonably foreseeable indirect physical changes on the environment. (CEQA Guidelines, § 15060(c).)

There is no evidence that CNLM's CDP Application would result in significant adverse impacts to the environment.[2] Moreover, under CEQA, an agency's determination that a project *is not exempt* from CEQA must be based on substantial evidentiary support. (*World Business Academy v. California State Lands Commission* (2018) 24 Cal.App.5th 476, 496.) Here, the City apparently concludes no exemption would apply to the CDP without citing any evidence in support. As there is no evidentiary support, the City cannot conclude that an exemption would not apply and demand preparation of an initial study. As discussed below, CNLM already

[2] Indeed, this lack of evidence is underscored by the variety of hypotheticals presented to justify the City's demands for environmental review, and the City's own concession that the degree of environmental analysis required "is speculative at this point." (Staff Report, at 6, fn. 2.)

provided substantial evidence with its initial submittal in support of finding the CDP would not be subject to CEQA, and, in the alternative, that CEQA exemptions apply.

For these reasons, the City's implied finding that CEQA applies to the CDP, and that the CDP is not exempt from CEQA, is procedurally improper and legally flawed. The City cannot require that CNLM pay for an unnecessary and improper initial study before continuing to process CNLM's CDP Application.

THE STAFF REPORT CONTAINS OTHER MISREPRESENTATIONS THAT MUST BE CORRECTED

The Staff Report misrepresents matters pertaining to CNLM, its CDP application, and ongoing litigation. These misrepresentations are addressed in turn below.

The City Is Not "The Grantee Of The Public Access Easement For The Nature Trail"

The City misrepresents its ownership interest in the Preserve's trail by claiming, under the heading "Owner," that "the City of Dana Point is the grantee of the public access easement for the Nature Trail contained within the Conservation Park that is the subject of CNLM's CDP Application." (Staff Report, at 1.)

This statement is false, and listing the City under "Owner" is misleading because the City has no ownership interest in the Preserve or the Trail. The City was never granted a public access easement. In fact, no public access easement exists. The easement to which the City presumably refers is the 2005 "Conservation Easement," titled as such, and explicitly required to satisfy requirements for the perpetual preservation of habitat values in the Master Coastal Development Permit No. 04-23 and the Headlands Development Conservation Plan (HDCP). Condition 36 of the Master 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.)

The Conservation Easement is not a public access easement, and explicitly "does not convey" any "public access rights" to the City. (*Id.*, ¶ 5.2 ["this Conservation Easement does not convey to the public a general right of access to the [Preserve]."] Rather, the Conservation Easement "*allows* access for passive recreation along the Nature Trail and Overlook Area" subject to limitations that "such public access shall be controlled" and prohibitions against "[u]ncontrolled public access and public access during non-daylight hours." (*Id.*, ¶ 5.1(o); 5.2(d).) The Conservation Easement's acknowledgement of extremely limited public access as a *permitted* use neither grants the City public access to the Trail, nor converts the Conservation Easement into a public access easement.

For these reasons, the Staff Report's claim that the City holds a public access easement for the Trail is incorrect.

The Court Did Not Find CNLM Violated the Coastal Act

The City's claim that the preliminary injunction constitutes the court's finding on the controversy at issue in ongoing litigation between CNLM and the City is false and misleading. (Staff Report, at 1 ["In that suit, the Court issued an injunction finding CNLM violated the Coastal Act by its actions, enjoining the restrictions on access that CNLM unlawfully imposed, and restoring the hours of operation at the Nature Trail to the "status quo" of 7:00 am to sunset, seven days a week"].)

Contrary to the City's assertions, the preliminary injunction ruling does not constitute a "finding" by the Court that "CNLM violated the Coastal Act by its actions," nor a finding "that CNLM unlawfully imposed" restrictions on trail hours. (Staff Report, at 1.)

The current dispute between the City and CNLM began when CNLM modified the hours of operation for the Trail during the pandemic, and subsequently engaged in adaptive management by maintaining reduced hours for better protection of the Pacific pocket mouse. The City responded by, among other things, chaining the Trail gates open, issuing administrative citations against CNLM, claiming CNLM's hours of operation for the Trail were a public nuisance, and later by filing a civil action against CNLM, seeking in excess of $12,420,000 of civil penalties under the Coastal Act against CNLM. On November 3, 2022, the City successfully sought a preliminary injunction order under the enforcement provision of the Coastal Act, Public Resources Code, section 30803, and CNLM was ordered by the Court to keep the Trail open seven days a week, 7 AM to sunset.

The preliminary injunction is not a final decision on the merits of the controversy at issue between the City and CNLM. It is part of ongoing litigation and was issued in reliance on a letter from Coastal Commission staff to CNLM and the City, dated November 4, 2021, advising that a CDP "is required to authorize any hours of operation for the bluff top trail"—indicating hours set by the Preliminary Injunction also require a CDP. The Coastal Commission since clarified its position in a November 26, 2022, letter, stating that a habitat management and monitoring plan could be used to set trail hours[3] and a December 14, 2023, letter stating "CNLM Sets the Hours of Operation" and that the Conservation Easement "cannot confer to the City the authority to set trail hours." The City's lack of authority to set trail hours is further evidenced by the appeal of its CDP approval by not only CNLM, but by two Coastal Commission Commissioners. Accordingly, until the Court has issued its opinion in this case, in consideration of all available evidence, there will have been no determination on the legality of CNLM's alleged actions.

Despite repeatedly correcting the City on this (see, CNLM's April 22, 2024, Comment Letter, 42, 48), the City's continued misrepresentations in the course of its entitlement proceedings raise

[3] CNLM has been trying to establish appropriate hours of public access through a Habitat Management and Monitoring Plan for over three years, with the support of Coastal Commission, U.S. Fish and Wildlife Service and the California Department of Wildlife, but the City has refused to participate in this process.

due process issues for CNLM. The City is effectively denying CNLM its right to judicial review by basing entitlement decisions on incorrect information.[4]

The Issue of the Appropriate Authority to Apply for the CDP to Set Trail Hours is NOT at Issue in the Ongoing Litigation

The Staff Report states, at page 2:

> In order to formally establish daily hours of operation for the Nature Trail as required by the Headlands Development and Conservation Plan ("HDCP"), a CDP is required. However, there is a dispute between the parties as to which entity (CNLM, as the owner, or the City, as the grantee of the public access easement) is the appropriate entity to apply for the CDP. Although this issue is currently before the Court in the litigation described above (and thus, need not be decided by the Planning Commission as this point in time), for purposes of background it is worth noting that in April 2024, the City, as grantee of the public access easement, submitted CDP24-0008 to establish hours of public access from 7am and sunset, seven days a week, except for short-term incidental closures.

The City again misrepresents the ongoing litigation between the parties by claiming that the litigation involves the issue of "which entity (CNLM, as the owner, or the City, as the grantee of the public access easement) is the appropriate entity to apply for the CDP." At no point did the City raise this issue in its Cross-Complaint, or any other pleading nor has CNLM made any such argument in the ongoing proceeding. To wit, the City's Cross-Complaint focuses on CNLM's alleged failure to apply for a CDP to set trail hours. Contrary to its assertion in the Staff Report, neither party has raised any argument regarding "which entity … is the appropriate entity to apply for the CDP" in the litigation. Thus, the statement that "this issue is currently before the Court in the litigation described above" is inaccurate and misleading.

[4] See, e.g., City's April 22, 2024, Agenda Report, at 2 ("In that suit, the Court issued an injunction finding CNLM violated the Coastal Act by its actions, and enjoined the restrictions on access that CNLM unlawfully imposed."); City's April 22, 2024, Draft Resolution Approving CDP ("WHEREAS, since the Nature Trail was opened to the public in or about 2009, it has been available for public access from 7am to sunset, seven days a week, except for … certain unpermitted closures that a court has determined were illegal and in violation of the Coastal Act;"); City Attorney's April 15, 2024, letter to Coastal Commission Enforcement Manager Andrew J. Willis, at 1 ("As you note, to date no CDP has been issued. Indeed, this fact is the reason the Court found CNLM violated the Coastal Act, and hence issued a preliminary injunction ordering it to cease its unlawful restriction of public access to the Nature Trail without a CDP having been issued."); *Id.* at 2 ("Ultimately the Court issued an injunction to cause CNLM to cease its illegal activity in violation of the Act.").

The CDP is Not Reducing Trail Hours Because No Trail Hours Are Set

The City states that, "as part of its CDP Application, CNLM proposes to: (1) reduce the number of days per week that the Nature Trail is open (from 7 days per week to 4 days per week); (2) reduce the number of days per month that the Nature Trail is open (from approximately 30-31 days per month to approximately 14 days per month); and (3) reduce the hours which the Nature Trail is open (from approximately 11-14 hours/day to approximately 8-10 hours/day)."

CNLM is not reducing the number of days or the number of hours the Trail is open. As the City acknowledges, "[i]n order to formally establish daily hours of operation for the Nature Trail as required by the Headlands Development and Conservation Plan ("HDCP"), a CDP is required." (Staff Report, at 2.) No CDP currently sets trail hours. Thus, the statement that CNLM is "reducing" hours is misleading, as no trail hours have been set.

The CDP Does Not Propose Closing The Trail For Two Tuesdays Each Month

The Staff Report states, on page 3:

> Notwithstanding the foregoing hours of operation, CNLM also proposes to close the Nature Trail to the public an additional two days per month (the 1st and 3rd Tuesday of every month) for "special uses" which CNLM describes as those which "serve the purpose of environmental justice, focused educational events, research, or other public interest overseen by CNLM Staff . . ." In other words, as part of its CDP Application, CNLM proposes to: (1) reduce the number of days per week that the Nature Trail is open (from 7 days per week to 4 days per week); (2) reduce the number of days per month that the Nature Trail is open (from approximately 30-31 days per month to approximately 14 days per month); and (3) reduce the hours which the Nature Trail is open (from approximately 11-14 hours/day to approximately 8-10 hours/day).

CNLM is not "propos[ing] to close the Nature Trail to the public an additional two days per month" or to "reduce the number of days per month that the Nature Trail is open (from approximately 30-31 days per month to approximately 14 days per month." As stated in CNLM's CDP Application, the Nature Trail may be closed only in the afternoon on those Tuesdays. The Trail would still be open those mornings from 8:00 AM to 11:59 AM, with those afternoons reserved for the specified uses. CNLM's application explains the possibility that the Trail "may be closed to other members of the public for these events." The proposed hours would thus open the Trail four days a week, for a total of approximately 16 days per month.

Compliance with the PSA when Fee Waivers are Submitted Would not Require Expenditure of "Substantial Amount of Resources … Without Requisite Fees Or Promise of Reimbursement"

The Staff Report states, at page 5:

> CNLM's arguments [that its application is deemed complete by operation of law] suggest that a City could be forced to spend a substantial amount of resources reviewing entitlement applications that are dropped off at the planning counter without the requisite fees or promise of reimbursement. These arguments are contrary to state law and the City's Municipal Code, both of which recognize that cities have the ability to be reimbursed for Staff time associated with development review. (…§ 9.61.040 (e)(1)(B)(5) [""Applications shall be made on a form prescribed by the Director of Community Development and shall contain the following information and other information as requested by the Director ... Evidence that the applicant ... Has paid the required application fees and deposits **or is exempt from such fees and deposits.**"]…)

The quoted portion of the City's Municipal Code demonstrates that the City's claim is inaccurate. The City's argument suggests compliance with the PSA's time limits when a fee waiver has been requested would violate the PSA's fee authorization statute and allow the City to "be forced to spend a substantial amount of resources reviewing entitlement applications that are dropped off at the planning counter without the requisite fees or promise of reimbursement." Neither is the case, as the City's own Code demonstrates.

Municipal Code Section 9.61.040 (e)(1)(B)(5) expressly contemplates fee waivers as an alternative to paying application fees at the time of submittal of an application. The requirement—which CNLM complied with—to provide "[e]vidence that the applicant… is exempt from such fees and deposits" safeguards the City from the feared expenditure of funds without knowing the likelihood of the waiver being granted.

The fee waiver provision in the DPMC lists straightforward "special circumstances" criteria to determine when a fee waiver would likely be granted. Municipal Code Section 9.61.060(b) provides:

> Waiver of Fees. For special circumstances, the City Council may provide for the waiver or reduction of filing fees or deposits that have been established by Resolution of the City Council. The special circumstances may include, but not be limited to, cases of excessive hardship, projects that provide exceptional benefits to the public, projects sponsored by a non-profit applicant, or projects that provide very low, low, or moderate income housing.

Under the City's Municipal Code Section 9.61.040 (e)(1)(B)(5), any applicant seeking a fee waiver would need to include evidence of the special circumstances listed under 9.61.060(b) in its initial submittal. As stated above, Municipal Code Section 9.61.040(c)(2) requires review and a completeness determination within 30 days of submittal in order to comply with the PSA.

Moreover, the scale of the contemplated review is not unprecedented for the City: review of an application to determine whether the application would likely qualify for a fee waiver is less

resource-intensive than the City staff-level preliminary reviews offered at "no fee" for proposed projects. (DPMC § 9.61.100(b).)

Read together, the City's Municipal Code not only contemplates but also requires completeness review of applications within the PSA's time limits, even when a fee waiver has been requested. The City's argument that such review is financially burdensome fails under the language of its own Municipal Code.

Here, CNLM's application contained the requisite evidence that it "is exempt from such [filing] fees and deposits." (DPMC § 9.61.040 (e)(1)(B)(5).) Thus, the City knew from the beginning that CNLM was a non-profit applicant and therefore qualified for a fee waiver under the qualifications listed under DPMC section 9.61.060(b). There was simply no scenario in which the City would have begun reviewing CNLM's CDP application for completeness without an indication that the City Council would approve the fee waiver.

Thus, the review of an application for which a fee waiver has been requested would neither force the City to expend substantial resources without some promise that the fee waiver would be granted, nor would it conflict with the PSA's fee authorization statute.

CNLM is Not Resisting Providing Environmental Data

The City states that CNLM "appears to resist wanting to provide [the information requested of CNLM] as part of its initial application submittal by asserting the application is complete." (Staff Report, at 6.) This is untrue. CNLM objects to the Incompleteness Determination's demands not because it "wants" to withhold information. CNLM's objections are based on all the reasons stated herein and in its January 2, 2025, letter to the City. Namely, CNLM already provided the information requested in the Incompleteness Determination "as part of its application submittal" and the City's demands are untimely. As noted above, the City is free to request additional analyses and information at other points in the process for review of a CDP application. It cannot, however, condition a completeness determination on premature demands for environmental analysis outside the appropriate timelines under the PSA and CEQA. Neither can the City condition its completeness determination on information that was not specified in the Application Checklist. Finally, the City cannot deny a completeness determination based on its refusal to review relevant analyses and data provided in CNLM's application submittal.

Not only did CNLM provide the requested information in its initial submittal, but CNLM's January 2 letter also specifically cites to where in the submittal the City can find the information it is looking for. The City "appears to resist wanting to" actually review the information that CNLM provided on October 1, 2024, preferring instead to continue demanding what is already in its possession nearly five (5) months after receiving it.

The City's characterization of this appeal as being borne from a desire to withhold evidence already provided to it is yet another misrepresentation of the circumstances at issue here.

CONCLUSION

For the reasons discussed above, CNLM urges the Planning Commission to grant CNLM's appeal and amend the Draft Approval Resolution to accurately reflect that CNLM's application has been "deemed complete" as of October 31, 2024, but no later than November 19, 2024.

Sincerely yours,

Sarah E. Mueller

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