

**CALIFORNIA COASTAL COMMISSION**

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September 11, 2017

Dave Kiff  
City Manager  
City of Newport Beach  
100 Civic Center Drive  
Newport Beach, CA 92660

**Subject: Protection of Snowy Plover and dune habitat in the City of Newport Beach**

Dear Mr. Kiff:

Thank you for your continued attention to the issue of protecting Western Snowy Plover habitat in the City of Newport Beach. I appreciate the time you have taken to meet and discuss this issue; it is an exciting opportunity to partner with the City to protect an endangered species in the midst of urban southern California, where remaining open space and habitat areas are especially significant because of their rarity and, consequently, importance to wildlife. We're looking forward to continuing our partnership with the City, both through the City's protection of coastal resources pursuant to the policies of the City Local Coastal Program ("LCP"), and through the processing of two coastal development permit applications (Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515) that the City has submitted to remove plover habitat fencing on a City beach, and a third application to implement a long, term comprehensive management plan for the Western Snowy Plover that the City has indicated is forthcoming.

We're hopeful that these applications can be modified into a comprehensive project to fully protect plover habitat, and dunes habitat as well, on City beaches. Indeed, in response to Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515, in a June 26, 2017 letter to the City, Commission staff noted, first, that we must consider the immediate impacts to sensitive biological resources that are protected by the existing fencing that may occur if the fencing is removed, and, second, the need for any application to remove existing habitat fencing to include a management plan for ongoing protection of existing biological resources in the area of the proposed project. The purpose of this letter is to provide some additional information regarding the incentive for preparing a management plan that protects all habitats on City beaches, and in particular, all environmentally sensitive habitat areas ("ESHA") and to both avoid misunderstandings, and provide information that would help design a plan that would be consistent with the Coastal Act and potentially approvable by the Commission.

ESHA is defined in Coastal Act Section 30107.5 as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Rare plant communities and habitats for protected wildlife species are generally

considered by the Commission to be ESHA. The City LCP (Section 4.1.1.1), which serves as guidance for Commission decisions regarding development activities on City beaches, identifies several potential attributes of ESHA, including the following:

***A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.***

***B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.***

As you know, the Coastal Act and City LCP provide strict protections for ESHA: Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

The Commission has found in a previous action that at least one area of the City beaches is ESHA, and other areas appear to be potentially similar; the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River constitute ESHA because of the presence of dunes and because the dunes are potentially used by a protected bird species, the federally and state listed as endangered California Least Tern. Consequently, the Commission required restoration of the dunes and their preservation.

The extent of ESHA on City beaches is not necessarily limited to the dunes that were the subject of the 2006 Commission action. This simply was the area that was the subject of the enforcement action. In fact, using the same analysis by which the Commission found that the dunes at the Santa Ana River are ESHA suggests that other habitat for protected species and dune habitats on City beaches could rise to the level of ESHA. As you are no doubt aware, Western Snowy Plovers use City beaches for foraging and roosting and the United States Fish and Wildlife Service has identified an area of City beach as Critical Habitat for the Western Snowy Plover because the area is essential to the conservation of the species. Also, again as I'm sure you are aware, the City's beaches are peppered with dunes, including dunes that support native dune plant species. The City LCP (Section 4.1.5) says about dunes that "Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies."

Dunes are also afforded protection under Section 30251 of the Coastal Act, which limits the alteration of natural landforms in order to protect the scenic and visual qualities of coastal areas. Finally, and perhaps most intriguing for low-lying Newport Beach, sand dunes provide protection for inland, low-lying areas from strong storm waves. Dune management, or the construction of "living shorelines" capitalize on the natural ability of these systems to protect coastlines from sea-level rise and storm related hazards while also providing benefits such as habitat, recreation, a more pleasing visual tableau, and the continuation or enhancement of ecosystem services. Indeed Sections 2.8.3-5 and 2.8.3-6 of the LCP encourage, respectively, "the use of sand dunes with native vegetation as a protective device in beach areas" and "the use of

non-structural methods, such as dune restoration and sand nourishment, as alternatives to shoreline protective devices.”

Although some areas of City beach have been fenced and provide some protection for habitat and dunes, in other areas, a lack of protection leaves potential ESHA exposed to trampling and other disturbances that could result in removal of major vegetation, landform alteration that constitutes grading, and change of intensity of use of a sensitive habitat area. The City LCP notes that “Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.” [Section 4.1.5] The trampling and other activities described above constitute development activities under the Coastal Act that require a coastal development permit. No coastal development permit has been issued by the Commission for these activities on City beaches.

Although the purpose of this letter is just to reach out and offer assistance and coordination, we should also point out that there are legal provisions that apply as well. The potential for unpermitted activity resulting in impacts to unprotected areas of ESHA on City beaches creates potential liability (under the Coastal Act at a minimum) for the City, as the property owner, even for actions it may not actually perform. Regardless of who performs unpermitted development, such as landform alteration or removal of major vegetation within a dune habitat, the persistence of the resulting changes in topography or vegetation coverage, etc., constitute continuing violations of the Coastal Act and continuing public nuisances that a property owner is liable for correcting. The Coastal Act represents a legislative declaration that acts injurious to the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 618; *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) In *Leslie Salt* (p. 622), the court held that:

***“...liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”***

Since a property owner is responsible, along with the party that undertook unpermitted development, for unpermitted development that has occurred on the property owner’s property, it is in the interest of the property owner to consider measures to prevent and address such unpermitted development. For that reason, we recommend that the City modify the current applications to incorporate a proposal for a comprehensive habitat protection program that will help ensure impacts to habitat on City beaches are avoided and protect critical resources and, at the same time, reduce the City’s potential exposure to liability for such damage.

We would be happy to meet with City staff to discuss what measures might be appropriate to incorporate into a comprehensive program, be they a combination of retention of existing fencing and installation of new fencing or symbolic fencing around dune areas and wildlife habitat on City beaches, restoration of degraded habitat areas, increased enforcement of dog-leash laws, consideration of beach grooming practices, and installation of information signage, to name a few, and, we look forward to collaborating with the City to ensure protection of habitats on City beaches. Again, we thank you for your cooperation, work, and efforts in seeking protection for

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Western Snowy Plover habitat on City beaches. If you have any questions about this letter, please do not hesitate to call me at 562-590-5071.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Willis', with a stylized, cursive-like script.

Andrew Willis  
Enforcement Supervisor

**cc: Lisa Haage, Chief of Enforcement, CCC  
Karl Schwing, Deputy Director, CCC**