



THE CITY OF SAN DIEGO

MEMORANDUM

DATE: January 30, 2012

TO: Councilmember Zapf and Members of the Land Use and Housing (LU&H) Committee

FROM: Kelly Broughton, Director, Development Services Department

SUBJECT: Wetland Deviations – Report on Meeting with Environmental Groups regarding Proposed Revisions to Land Development Code (LDC) and Land Development Manual (LDM) – Biology Guidelines Amendments

The Environmentally Sensitive Land Regulations (ESL) housed in Chapter 14, Article 3, Division 1 of the Land Development Code (LDC) were adopted to assure that development occurs in a manner that protects the overall quality of the resources consistent with sound resource conservation principles and the rights of private property owners. Currently, impacts to sensitive biological resources wetlands are allowed per the Land Development Code only if an applicant obtains a Site Development Permit (SDP) and the required findings can be made for approval as specified in Sections 126.0504 (a) (b) (c). Specifically, LDC Section 126.0504 (c) requires that two supplemental findings be made to allow for a deviation from the Sensitive Biological Resources regulations. The existing LDC language, however, provides only limited guidance to city staff, the applicant and the decision maker regarding the evaluation of impacts to these resources, under what circumstances it is reasonable to consider and to recommend approval of such a deviation.

The Land Development Code, including Sections 143.0110 – Table 143-01A, 143.0141 and 143.0150 and the Land Development Manual – Biology Guidelines, is being amended to establish the three development scenarios under which a deviation from the sensitive biological resources regulations may be approved outside of the Coastal Zone - Essential Public Project Option (EPP), Economic Viability Option, and Biologically Superior Option.

The Essential Public Project Option (EPP) allows for a wetland deviation to enable the City to implement necessary public facilities and infrastructure projects including: a) specific design/construction projects identified in a community or implementing plan and identified on the Essential Public Projects List, b) linear infrastructure, c) maintenance of existing infrastructure, and d) projects initiated by the City to meet state and federal regulatory

requirements. Potential impacts shall be minimized to the maximum extent practicable and shall be the least environmentally damaging considering all the technical constraints of the project.

The Economic Viability Option would allow a deviation to preserve an applicant's right to an economically viable use of property, only for circumstances not of the applicant's making. It provides criteria for the preparation of an economic analysis to determine the economic viability of a project with and without the deviation.

The Biologically Superior Option would allow a deviation from the LDC to impact wetlands of low quality to achieve a superior biological result through either project design with standard mitigation or extraordinary mitigation. Projects must include a wetland quality assessment prepared in compliance with criteria added as part of these amendments, in the Biology Guidelines.

These amendments establish the only three situations in which a deviation from the sensitive biological resource regulations may be requested. **It does not establish any type of exemption.** Projects making application in these instances must still process a permit to allow for the deviation. This will require extensive analysis, environmental review, public participation, findings, and a public hearing.

At the September 13, 2012 adoption hearing for these amendments, the City Council declined to take action on the proposed amendments due to concerns raised by environmental groups, and directed Development Services (MSCP, Land Development Code; Environmental) and Public Utilities staff to meet with representatives from the environmental groups and return to LU&H to report on the results of that meeting. On November 7, 2011 city staff hosted a meeting between San Diego Coastkeeper, the San Diego Audubon Society, San Diego Canyonlands, Save Wild Santee, the Wildlife Agencies, and representatives from the development community. Council District One and Council District Eight staff representatives and the Deputy City Attorney were also in attendance.

Proposed Revisions

Prior to the meeting, the environmental groups provided a proposed set of revisions to the ordinance and guideline amendments to focus the discussion (Attachment 1 – Letter, Environmental Group Edits to Environmentally Sensitive Lands, Wetland Deviation Amendments, November 1, 2011). Each proposed revision had a substantive discussion; the meeting provided an opportunity for both city staff and the environmental group attendees to provide explanation for their respective positions. Each of the proposals is described below and the city response provided; Attachments 2 – Amendments to the Land Development Code to address Wetland Deviations and 3 – Amendments to the Land Development Manual/Biology Guidelines are revised to include some of the suggested revisions as proposed by the group. The City Attorney also provided additional ordinance language to emphasize the limited scenarios under which deviations to the regulations may be requested and revisions to the Biology Guidelines to further clarify the analysis component for the Economic Viability Option.

Essential Public Projects

Proposed Edits:

Additional language to clarify whether wetland impacts are temporary or permanent to determine the applicability of the Essential Public Project Option

Address the potential that future City Councils could add public projects to the Essential Public Projects List.

Staff Response:

The Biology Guidelines do not distinguish between temporary and permanent wetland impacts and require mitigation at the proscribed ratios for all impacts, nor did the duration of impact factor into development of the Essential Public Projects List.

While the Essential Public Projects list is intended as a final list, it is possible that future City Councils could, within the context of a formal amendment process and at a public hearing, add projects. Based upon the exhaustive process, however, that staff employed to define potential candidates for the list and the subsequent evaluation to produce the final draft, staff believes that all qualified projects are on the list. It is also highly likely that any potential future public projects not on the list would fall within the other categories included in the definition of Essential Public Projects in LDC Section 143.0150(d)(1)(B).

Staff proposes no changes to the Essential Public Projects Option.

Economic Viability

Proposed Edits

Deletion of the Section 143.0150 (d)(2) or

If the proposed project were to remain, add the following language to the Economic Viability Option Section B.3:

Pursuant to the Public Records Act (California Government Code section 6250, et seq.), the full economic viability findings analysis, including the supplemental findings for ESL deviations, City Manager or designee recommendations, and the economic consultants professional opinion, including summary documentation provided by the economic consultant that reveals all calculations and variable assumptions contained therein, and is not proprietary (“trade secret”) shall be available to the discretionary hearing. City Manager or designee recommendations and

professional opinion of the economic consultant shall be provided to the City decision-maker for the discretionary hearing.

Staff Response:

A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining party. When an ordinance contains provisions that allow for administrative relief, a court will presume that the City will exercise its authority in conformity with the Constitution. Therefore, where a potential constitutional challenge could arise, the ESL regulations should provide a procedure for relief from their strict application so as to ensure conformance with the Constitution.

The existing regulations do not include specified procedures to rely upon to assess a claim that strict application of the ESL regulations would result in a taking. By adding specified procedures to the Land Development Code, the City is providing an administrative procedure by which an applicant claiming a taking can pursue relief. It should be noted, however, that the proposed regulations do not grant a deviation simply because an applicant claims a taking will occur. The proposed regulations establish a mechanism for determining if a deviation is warranted due to economic viability.

For those reasons, the proposed project retains the Economic Viability Option. Staff has no issue with adding the proposed language as specified above and it has been incorporated into Attachment 3.

Biologically Superior

Proposed Edits:

The group proposed minor revisions to the Biology Guidelines to address assessment methodology and hydrologic function potential.

Staff Response:

Staff incorporated some of the revisions, primarily the inclusion of the language related to hydrologic function and water quality factors in assessing wetland quality into Attachment 3. After consultation with the Wildlife Agencies, staff declined to include the language requiring the use of the California Rapid Assessment Method (CRAM) for wetland quality assessment. Agency staff is not confident that this methodology would provide the most accurate assessment. During the preparation of these amendments, staff has relied upon the Wildlife Agencies for their expertise in this area; they have extensive experience in evaluating and determining the long term health and viability of wetlands.

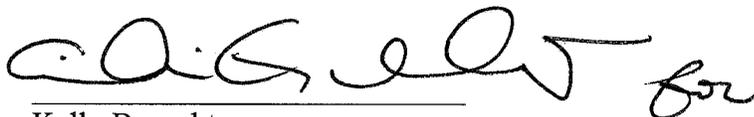
The amended Biology Guidelines, including the Environmental Groups' revisions, will provide comprehensive and detailed direction to project applicants and city staff regarding the

preparation of a Biological Resources Report to assess wetland quality. The report would assist staff in determining if a deviation from the regulations is appropriate based upon the wetland quality assessment. Project approval would require a biologically superior design and all impacts to wetlands would still require mitigation in compliance with the Biology Guidelines.

Conclusion

As a result of the November 7, 2011 meeting, staff made revisions to the amendment language to enhance their utility, further clarify the process, and provide safeguards to ensure that the deviation process will not be misused or misapplied. We believe that the project before LU&H is the most workable compromise that results in a high level of wetland protection while providing a predictable process upon which all participants (applicants, staff, public, and decision makers) can rely. We believe this meets the original direction that the City Council provided a number of years ago, and we respectfully request that the LU&H Committee forward the revised draft to the full City Council for their consideration.

Respectfully submitted:



Kelly Broughton
Director

KB/alm

Attachments:

1. Letter, Environmental Group Edits to Environmentally Sensitive Lands, Wetland Deviation Amendments, November 1, 2011
2. Amendments to the Land Development Code to address Wetland Deviations
3. Amendments to the Land Development Manual/Biology Guidelines (pages with revisions)



November 1, 2011

Via e-mail to MFrick@sandiego.gov

City of San Diego

Development Services Department

Attn: Jeanne Krosch, Development Services Planning

1222 First Avenue, MS 501

San Diego, CA 92101-4155

RE: Environmental Group Edits to Environmentally Sensitive Lands, Wetlands Deviation Amendments

Dear Ms. Krosch:

On behalf of San Diego Audubon Society, San Diego Canyonlands, and San Diego Coastkeeper, thank you for agreeing to meet with environmental groups next week on November 7. We look forward to a productive discussion about the Land Development Code and specific edits to the Wetlands Deviation amendments for Environmentally Sensitive Lands.

We appreciated your January response to our joint environmental letter of November 5, 2010. We understand and value that this issue has been in development for close to 10 years; indeed our groups have participated in the amendment process for much of that time. Approaching the one year anniversary of the Land Use and Housing Committee hearing, we are very gratified to be sitting face to face on this critical issue.

In preparation for our meeting, and with an eye towards using our time most productively, we have identified the key remaining concerns with the amendments and detailed specific strikeout/underline changes that would address those concerns. Our goal in getting these specific edits to you in advance of the meeting is to allow your staff adequate time to consider the corrections, all of which follow (or are tailored from) the concerns raised in our joint November 5, 2010 letter.

Unless otherwise specified, all edits are from the SEIR disk sent to environmental groups this summer. The specific document is Appendix A: Land Development Manual Biology Guidelines with Proposed Revisions. An excerpt with relevant pages is attached to this letter for your convenience.

1. ESSENTIAL PUBLIC PROJECT OPTION

We recommend the addition of language to clarify whether impacts are temporary or permanent to determine the applicability of the Essential Public Project Option. We also suggest language to close a potential loophole for future projects that could be added to the EPP List.

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(1) Essential Public Projects Option

(A) A deviation may only be requested for an Essential Public Project where no feasible alternative exists that would avoid impacts to wetlands.

(B) For the purpose of this section, Essential Public Projects shall include:

(i) Any public project identified in an adopted *land use plan* or implementing document and identified on the Essential Public Projects List adopted by Resolution No [insert No.] as Appendix III to the Biology Guidelines, and the project would result in only a temporary impact to wetlands on the project site, or

(ii) Linear infrastructure, ~~including but not~~ limited to major roads and *land use plan* circulation element roads and facilities including bike lanes, water and sewer pipelines including appurtenances, and stormwater conveyance systems including appurtenances, or

(iii) Maintenance of existing public infrastructure:

(iv) State and federally mandated projects.

(v) Any land use plan or implementing document adopted subsequent to Resolution No. [insert No.] [insert date] must verify that all essential public projects including but not limited to: parks, fire stations, police stations, schools, etc. will have locations that do not cause a permanent impact to wetlands before certification of Environmental Documents and Site Development Permits. Essential linear infrastructure that cannot avoid a permanent impact is excluded from this requirement.

2. ECONOMIC VIABILITY OPTION

We propose striking the entirety of 143.0150 (d) (2), the Economic Viability loophole. We have considered other methods of revising this deviation section, however there are four significant reasons to move forward with the amendments without this section.

Specifically, adding a “no economic viability” loophole needlessly places burdens on the City that takings case law commands private property owners to bear; it creates additional (and potentially costly) work for the City; it

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Environmental Group Edits to Environmentally Sensitive Lands, Wetlands Deviation Amendments

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exposes the City to additional (and potentially costly) legal challenges; and lastly the loophole will undermine the policy of the ESL regulations and will compromise the integrity of our environmentally sensitive lands.

Current state and federal law allows states and municipalities to enact wetlands land-use regulations.¹ A property owner may challenge the constitutionality of a regulation, but the burden rests on the claimant to show that the regulation constitutes a taking as applied to his or her property.² A “no economic viability” loophole will effectively overwrite the order of obligations grounded in the U.S. Constitution and set forth in takings jurisprudence by creating an unnecessary carve-out which allows property owners to petition for a deviation before the City makes a “no economic viability” determination.

It is clear that the role of deciding the constitutionality of a City ordinance should reside with a judge; it should not be one routinely performed by City officials on a case-by-case basis.³

While City staff proposes to include a “no economic viability” deviation ostensibly to avoid “takings” litigation, the proposal, in fact, makes the City more vulnerable to “takings” claims by altering property owner’s existing “investment-backed expectations.”⁴ Even under the total economic wipe-out scenario posed in the U.S.

¹ Case law is replete with examples where courts have rejected takings challenges to wetlands regulations. See, e.g., *Claridge v. New Hampshire Wetlands Board*, 125 N.H. 745, 752, 485 A.2d 287, 292 (1984); *Brotherton v. DEC*, 252 A.D.2d 499, 675 N.Y.S.2d 121 (1998); *Volkema v. DNR*, 542 N.W.2d 282 (Mich. App. 1995), *aff'd*, 457 Mich. 884, 586 N.W.2d 231, *cert. denied*, 119 S. Ct. 590 (1998); *Alegria v. Keeney*, 687 A.2d 1249 (R.I. 1997); *Gazza v. New York State*, 89 N.Y.2d 603, 679 N.E.2d 1035, *cert. denied*, 118 S. Ct. 58 (1997); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n*, 673 N.E.2d 61 (Mass. App. 1996), *rev. denied*, 424 Mass. 1104, 676 N.E.2d 55 (1997); *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 548 N.W.2d 528 (1996); *Mock v. DER*, 154 Pa. Commw. 380, 623 A.2d 940 (1993), *aff'd*, 542 Pa. 357, 667 A.2d 212 (1995), *cert. denied*, 517 U.S. 1216 (1996).

² *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1046 (1992) (J. Blackmun dissenting) (“[C]laimants have the burden of showing a state law constitutes a taking.”) (citing *Keystone Bituminous Coal*, 480 U.S. at 485); *Goldblatt v. Town of Hempstead, N. Y.*, 369 U.S. 590, 594 (noting “the usual presumption of constitutionality” that applies to statutes attacked as takings).

³ Making an economic viability assessment may involve complex legal judgments. In his dissent in *Lucas v. S. Carolina Coastal Council*, Justice Blackmun underscores the difficulty of making a “deprivation of all economically valuable use” determination:

As the Court admits, whether the owner has been deprived of all economic value of his property will depend on how “property” is defined. The “composition of the denominator in our ‘deprivation’ fraction,” ...is the dispositive inquiry. Yet there is no “objective” way to define what that denominator should be.”

Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1054 (1992) (J. Blackmun dissenting).

⁴ Cite to Penn Central. *Claridge v. New Hampshire Wetlands Bd.*, 125 N.H. 745, 751, 485 A.2d 287, 291 (1984) (“A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights.”)

Supreme Court of *Lucas v. S. Carolina Coastal Council*, the Court notes, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."⁵ Here, the "proscribed use interests" would be altered. The ESL regulations aim to protect our region's most sensitive landscapes. Needlessly injecting a loophole into the Land Development Code will dilute the force of the ESL regulations and compromise our region's natural resources.

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~~A deviation may be requested to preserve economically viable use of a property that would otherwise be deprived by a strict application of the regulations. Such a deviation shall be the minimum necessary to achieve economically viable use of the property and shall avoid wetland resources to the maximum extent practicable.~~

3. BIOLOGICALLY SUPERIOR OPTION

We have suggested minor edits to this option to address assessment methodology and hydrologic function potential.

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2. The wetland resources being impacted by the project shall be limited to wetlands of low biological quality and have low potential for restoration. Low biological quality will be specific to the resource type impacted (e.g. vernal pools, non-tidal-salt marsh, riparian, and unvegetated channels). For standardization and accountability, the assessment of low biological quality shall use the California Rapid Assessment Method (CRAM), using the version that is current at the time of the assessment, and shall be determined by include consideration of the factors identified in I and II below:

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f. hydrologic function, considering

- whether the volume and retention time of water within the wetland is sufficient to aid in water quality improvements, and
- whether there is significant flood control value or velocity reduction function, and

⁵ *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027, 112 S. Ct. 2886, 2899, 120 L. Ed. 2d 798 (U.S.S.C. 1992).

- whether there is an opportunity to restore the hydrologic functions of water quality improvements or flood control value;

Page 31 (Mitigation Element)

After subparagraph (2) add an un-numbered paragraph:

If the wetland to be taken provides water quality value, the loss of that value shall be offset by water quality measures in that same reach in addition to the habitat mitigation mentioned above.

CONCLUSION

Thank you for your careful consideration of these comments. Please do not hesitate to contact us prior to the meeting if any of the edits are unclear or raise other issues on which you want additional information. Again, we look forward to a productive discussion on November 7 to position clear forward action from the Land Use and Housing Committee and ultimately the full City Council to better protect our sensitive environmental resources.

Sincerely,

Gabriel Solmer
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gabe@sdcoastkeeper.org

Jim Peugh
Conservation Committee Chair, San Diego Audubon Society
Peugh@sandiegoaudubon.org

Eric Bowlby
Executive Director, San Diego Canyonlands
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§143.0141 Development Regulations for Sensitive Biological Resources

Development that proposes *encroachment* into *sensitive biological resources* or that does not qualify for an exemption pursuant to Section 143.0110(c) is subject to the following regulations and the Biology Guidelines in the Land Development Manual.

(a) General Regulations for Sensitive Biological Resources

(1) ~~(+)~~ All *development* occurring in *sensitive biological resources* is subject to a site-specific impact analysis conducted by a qualified Biologist ~~the City Manager~~, in accordance with the Biology Guidelines in the Land Development Manual. The impact analysis shall evaluate impacts to *sensitive biological resources* and CEQA sensitive species. The analysis shall determine the corresponding mitigation, where appropriate, and the requirements for protection and management. Mitigation may include any of the following, as appropriate to the nature and extent of the impact.

(A) Dedication in fee title to the City of San Diego; or

(B) Dedication of a covenant of easement in favor of the City of San Diego and the Wildlife Agencies either:

~~(1)(i)~~ Acquisition or dedication of another site that can serve to mitigate project impacts, For an off-site location with long-term viability and biological values equal to or greater than the impacted site, and with limited right of entry for habitat management, as necessary, if the site is not dedicated. This site must have long term viability and the biological values must be equal to or greater than the impacted site; or

~~(2)~~ (ii) Preservation or dedication of For on-site sensitive biological resources, creation of new habitat, or enhancement of existing degraded habitat, with limited right of entry for habitat management, as necessary, if the site is not dedicated. The site must have long-term viability and the biological values must be equal to or greater than the impacted area.

~~(3)~~ (C) In circumstances where the area of impact is small, monetary payment of compensation into a fund may be accepted in lieu of other forms of mitigation. The City shall use the fund to acquire, maintain and administer habitat areas pursuant to City Council Resolution No. R-275129, adopted February 12, 1990. Where appropriate, the City Manager is authorized to enter into agreements with public agencies or private non-profit conservancies or foundations to administer the funds and acquire or maintain habitat preservation areas.

- (2) ~~(f)~~ *Grading* during wildlife breeding seasons shall be consistent with the requirements of the City of San Diego *MSCP Subarea Plan*.
- (3) ~~(e)~~ *Sensitive biological resources* that are outside of the allowable development area on a *premises*, or are acquired as off-site mitigation as a condition of permit issuance, are to be left in a natural state and used only for those passive activities allowed as a condition of permit approval. If the land is not dedicated in fee to the City, identification of permissible passive activities and any other conditions of the permit shall be incorporated into a covenant of easement that shall be recorded against title to the property, in accordance with procedures set forth in Section 143.0152. The U.S. Fish and Wildlife Service and the California Department of Fish and Game are to be named as third party beneficiaries to any covenant of easement recorded pursuant to this section.
- (4) ~~(e)~~ Inside and adjacent to the *MHPA*, all *development* proposals shall be consistent with the City of San Diego *MSCP Subarea Plan*.

(5) Projects located Inside the MHPA

~~(d) (A) Inside the MHPA, d~~ *Development* is permitted only if necessary to achieve the allowable development area in accordance with the regulations set forth in the OR-1-2 zone, pursuant to Section 131.0250(b), unless exempted from the development area regulations pursuant to Section 143.0111.

~~(f) (B) Inside the MHPA, a~~ Any change of an agricultural use to a non-agricultural use is subject to the development area regulations of Section 143.0141 ~~(d) (a)(5)(A)~~. Existing agricultural operations that exceed the allowable development area may remain as agricultural use only and do not count as part of the allowable development area.

(6) Projects Located Outside of the MHPA

~~(g) (A) Outside the MHPA, d~~ *Development* of lands that are designated as open space in the applicable *land use plan* and zoned OR-1-1 is permitted only if necessary to achieve the allowable development area, in accordance with Section 131.0250 (a).

~~(h) (B) Outside the MHPA, e~~ *Encroachment* into *sensitive biological resources* is not limited, except as set forth in Section 143.0141 ~~(a)(6)(A) and (b) and (g)~~.

(7) Narrow Endemic Species

Inside the *MHPA*, *development* shall avoid impacts to narrow endemic species. Outside the *MHPA*, measures for protection of narrow endemic species shall be required such as management enhancement, restoration and/or transplantation. A list of narrow endemic species is included in the Biology Guidelines in the

Land Development Manual.

(b) Wetland Regulations

- (a) (1) State and federal law ~~precludes~~ regulates adverse impacts to *wetlands* ~~or~~ and listed ~~non-covered~~ species habitat. The *applicant* shall confer, when as applicable, with the U.S. Army Corps of Engineers, U.S. Fish & Wildlife Service and/or California Department of Fish and Game before any public hearing for the *development* proposal.
- (2) The applicant shall solicit input from the Resource Agencies on impact avoidance, minimization, mitigation and buffer requirements, including the need for upland transitional habitat.
- (3) The applicant shall, to the maximum extent feasible, incorporate the Resource Agencies' recommendations prior to the first public hearing.
- (4) *Grading or construction permits* shall not be issued for any project that impacts *wetlands* or listed ~~non-covered~~ species habitat until all necessary federal and state permits have been obtained.
- (b) (5) ~~Outside and inside the MHPA,~~ Impacts to *wetlands*, including vernal pools in naturally occurring complexes, shall be avoided. A *wetland buffer* shall be maintained around all *wetlands* as appropriate to protect the functions and values of the *wetland*. In the Coastal Overlay Zone the applicant shall provide a minimum 100-foot buffer, unless a lesser or greater buffer is warranted as determined through the process described in 143.0141(a). ~~Mitigation for impacts associated with a deviation shall achieve the goal of no net loss and retain in-kind functions and values.~~

§143.0150 Deviations from Environmentally Sensitive Lands Regulations

Plans submitted in accordance with this section shall, to the maximum extent feasible, comply with the regulations of this division. If a proposed *development* does not comply with all applicable development regulations of this division and a deviation is requested as indicated in Table 143-01A, the Planning Commission may approve, conditionally approve, or deny the proposed Site Development Permit in accordance with Process Four, subject to the following:

- (a) (No Change)
- (b) (No Change)
- (c) (No Change)
- (d) Deviations to the wetland regulations of this division for *development* located

outside of the Coastal Overlay Zone shall not be granted unless the development qualifies to be processed as one of the three options set forth in the following regulations and in accordance with the Biology Guidelines in the Land Development Manual:

(1) Essential Public Projects Option

(A) A deviation may only be requested for an Essential Public Project where no feasible alternative exists that would avoid impacts to wetlands.

(B) For the purpose of this section, Essential Public Projects shall include:

(i) Any public project identified in an adopted land use plan or implementing document and identified on the Essential Public Projects List adopted by Resolution No.[insert No.] as Appendix III to the Biology Guidelines; or

(ii) Linear infrastructure, including but not limited to major roads and land use plan circulation element roads and facilities including bike lanes, water and sewer pipelines including appurtenances, and stormwater conveyance systems including appurtenances; or

(iii) Maintenance of existing public infrastructure; or

(iv) State and federally mandated projects.

(2) Economic Viability Option

A deviation may be requested to preserve economically viable use of a property that would otherwise be deprived by a strict application of the regulations. Such a deviation shall be the minimum necessary to achieve economically viable use of the property and shall avoid wetland resources to the maximum extent practicable.

(3) Biologically Superior Option

(A) A deviation may be requested to achieve a superior biological result which would provide a net increase in quality and viability (functions and value), relative to existing conditions or the project originally proposed by

the applicant, and long term biological benefit.

(B) Wetland resources that would be impacted by the project shall be demonstrated to be of low biological quality.

§143.0110 When Environmentally Sensitive Lands Regulations Apply

**Table 143-01A
Applicability of Environmentally Sensitive Lands Regulations**

<i>Environmentally Sensitive Lands Potentially Impacted by Project</i>						
Type of Development Proposal		Wetlands, listed non-covered species habitat⁽¹⁾	Other Sensitive Biological Resources other than Wetlands and listed nonecovered species habitat	Steep Hillides	Sensitive Coastal Bluffs and Coastal Beaches	Floodplains
1. <i>Single dwelling units on individual lots equal to or less than 15,000 square feet⁽²⁾</i>	R	143.0141(a),(b)	143.0141	143.0142 except (a) ⁽⁵⁾	143.0143, 143.0144	143.0145 143.0146
	P	NDP/ Process Two	NDP/ Process Two	NDP/ Process Two	SDP/ Process Three	NDP/ Process Two
	U	143.0130(d),(e)	--	--	143.0130(a), (b)	143.0130(c)
2. <i>Single dwelling units on lots or multiple lots totaling more than 15,000 square feet</i>	R	143.0141(a),(b)	143.0141	143.0142	143.0143, 143.0144	143.0145
	P	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three
	U	143.0130(d),(e)	--	--	143.0130(a), (b)	143.0130(c)
3. <i>Multiple dwelling unit and non-residential development and public works projects</i>	R	143.0141(a),(b)	143.0141	143.0142	143.0143, 143.0144	143.0145 143.0146
	P	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three	SDP/ Process Three
	U	143.0130(d),(e)	--	--	143.0130(a), (b)	143.0130(c)
4. <i>Any subdivision of a premises</i>	R	143.0141(a),(b)	143.0141	143.0142 ⁽³⁾	143.0143, 143.0144	143.0145 143.0146
	P	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four
	U	143.0130(d),(e)	--	--	143.0130 (a), (b)	143.0130 (c)
5. <i>Project-specific land use plans</i>	R	143.0141(a),(b), 143.0115	143.0141, 143.0115	143.0142, 143.0115	143.0143, 143.0144, 143.0115	143.0115, 143.0145 143.0146
	P	SDP/Process Four/Five	SDP/ Process Four/Five	SDP/Process Four/Five	SDP/ Process Four/Five	SDP/Process Four/Five
	U	143.0130(d),(e)	--	--	143.0130(a), (b)	143.0130(c)
6. <i>Any development that proposes deviations from any portion of the Environmentally Sensitive Lands Regulations</i>	R	143.0141(a),(b), 143.0150	143.0141, 143.0150	143.0142, 143.0150 ⁽⁴⁾	143.0143, 143.0144, 143.0150	143.0145, 143.0146 143.0150
	P	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four	SDP/ Process Four
	U	143.0130(d),(e)-	--	--	143.0130(a), (b)	143.0130(c)
7. <i>Development other than single dwelling units on individual lots, that proposes alternative</i>	R	--	--	143.0142 except (a), 143.0151	--	--
	P	--	--	SDP/	--	--

ATTACHMENT 2

compliance for development area in steep hillsides.				Process Four		
	U	--	--	--	--	--

Legend to Table 143-01A	
R	Development regulation sections (in addition to Section 143.0140) applicable to the <i>environmentally sensitive lands</i> present.
P	Type of Permit/Decision process required. Neighborhood Development Permit (NDP) Site Development Permit (SDP)
U	Regulations that identify permitted uses when they are different than the applicable zone due to the <i>environmentally sensitive lands</i> present.

Footnotes to Table 143-01A

¹ ~~This includes listed species and their habitat not covered by the Take Authorizations issued to the City by the State and Federal governments under the Multiple Species Conservation Program. State and federal laws and regulations regulate adverse impacts to wetlands and listed species habitat. The City does not have incidental take authorization for listed species within jurisdictional waters.~~

Footnotes 2-5 [No change]

Outside the Coastal Overlay Zone

Impacts to wetland habitat require a deviation from the wetland regulations as outlined in Section IV outside of the Coastal Overlay Zone. Wetland impacts may be considered only pursuant to one of the three following options:

A. Essential Public Projects (EPP) Option

Deviations from wetland requirements in ESL will be considered under the EPP Option when a proposed project(s) meets all the following criteria.

The project must be an EPP (i.e., circulation element road, trunk sewer, water main) that will service the community at large and not just a single development project or property. The project must meet the definition of an EPP as identified in Section IV and must be essential in both location and need. If the City has options on the location of an EPP, the City should not knowingly acquire property for an EPP which would impact wetlands.

The proposed project and all biological alternatives, both practicable and impracticable shall be fully described and analyzed in an appropriate CEQA document. Alternatives to the proposed project shall be comprehensively included in the CEQA document (e.g., Mitigated Negative Declaration) and/or the biological technical report for the CEQA document. Alternatives must include the following: 1) a no project alternative; 2) a wetlands avoidance alternative, including an analysis of alternative sites irrespective of ownership; and 3) an appropriate range of substantive wetland impact minimization alternatives. Public review of the environmental document must occur pursuant to the provisions of CEQA. Projects proposing to utilize this deviation section of the ESL after initial CEQA public review must include the new information and recirculate the CEQA document.

The potential impacts to wetland resources shall be minimized to the maximum extent practicable and the project shall be the least environmentally damaging practicable biological alternative considering all the technical constraints of the project (e.g., roadway geometry, slope stability, geotechnical hazards, etc). Recognizing the wetland resources involved, minimization to the maximum extent practicable may include, but is not limited to, adequate buffers and/or designs that maintain full hydrologic function and wildlife movement (e.g., pipeline tunneling, bridging, Arizona crossings, arch culverts). The project applicant will solicit input from the U.S. Fish and Wildlife Service and the California Department of Fish and Game (e.g., Wildlife Agencies) prior to the first public hearing.

All impacts shall be mitigated according to the requirements of Table 2a and the project shall not have a significant adverse impact to the MSCP.

B. Economic Viability Option

Deviation from the Wetland regulations in ESL will be considered under the Economic Viability Option when a proposed project meets all of the following three criteria. However nothing in these Guidelines shall be interpreted to alter proscribed uses that were part of an applicant's title to begin with.

1. Applicant shall disclose and provide all information for the City to determine whether the deviation is necessary to achieve an economically viable use of the property, including all of the following required information:
 - a. A range of biological alternatives that include the no project alternative, a wetlands avoidance alternative, and alternative(s) that show substantive minimization of impacts to wetlands.
 - b. The date the *applicant* purchased or otherwise acquired the property and from whom.
 - c. The purchase price and the documentary transfer tax paid by the *applicant* for the property. The *applicant* must provide for an appraisal to establish whether the purchase price was appropriate given market value at the time of purchase. The appraisal shall be prepared by an outside appraiser with recent experience in the type of appraisal being requested, and supervised by the City of San Diego Real Estate Assets Department. The *applicant* will deposit monies into a special fund established by the City to hire, supervise and pay for the appraisal and associated City staff costs. The City will use a revolving list of qualified outside appraisers to prepare appraisals. All appraisals must be prepared by an appraiser licensed in the State of California and be in compliance with current Uniform Standards of Professional Appraisal Practice. All appraisers considered for selection will be required to fully disclose their employment history prior to selection. Any communication between the *applicant* and the appraiser shall occur only in the presence, which includes conference calls, of designated City staff. City staff shall respond to all third party requests within 30 calendar days. For the purposes of this section, *applicant* shall include the *applicant's* employees and shall not include the *applicant's* consultants, design professionals, contractors, and subcontractors. Comparable land values used for this purpose should have similar restrictions, to the maximum

extent possible, to those on the property as identified in 1(d) below.

The final complete appraisal shall be available to the City decision-maker and interested public prior to the discretionary hearing. An appraisal summary statement shall be provided to the City decision-maker for the discretionary hearing.

- d. The general plan, zoning, or similar land use designations applicable to the property at the time the *applicant* acquired it, as well as any changes to these designations that occurred after acquisition.
- e. Any development restrictions or other restrictions on use, other than government regulatory restrictions described in (d) above, that applied to the property at the time the *applicant* acquired it, or which have been imposed after acquisition.
- f. Any change in the size of the property since the time the *applicant* acquired it, including a discussion of the nature of the change, the circumstances and the relevant dates.
- g. A discussion of whether the *applicant* has sold, leased, or donated a portion of or interest in, the property since the time of purchase indicating the relevant dates, sales prices, rents, and nature of the portion or interests in the property that were sold or leased.
- h. Any title reports, litigation guarantees or similar documents in connection with all or a portion of the property.
- i. Any offers to buy all or a portion of the property which the *applicant* solicited or received, including the approximate date of the offer and offered price.
- j. The *applicant's* costs associated with the ownership of the property, annualized to the extent feasible, for each of the years the *applicant* has owned the property, including property taxes, property assessments, debt service costs (such as mortgage and interest costs), and operation and management costs.
- k. Any rent received from the leasing of all or a portion of the property and any income generated by the use of all or a portion of the property over years of ownership of the property. If there is any such income to report, it should be listed on an annualized basis along with a description of the uses that generate or has generated such income.

- l. Topographic, vegetative, hydrologic and soils information prepared by a qualified professional, which identifies the extent of the wetlands on the property.
 - m. As required per CEQA and/or the 404 b(1) guidelines under the Clean Water Act, an analysis of the economic viability of each of the alternatives required by Section III A.2., and an assessment of the economic viability of the project compared to the alternatives which takes into account all project costs, including mitigation for direct, indirect, and cumulative wetland impacts. The analysis of alternatives shall include an assessment of how each alternative will impact all wetlands and environmentally sensitive lands adjacent to and within the overall project plan area.
1. The economic information shall be reviewed by City staff and outside economic consultant, and the City Council shall consider findings that all economically viable use of a property will be removed with strict application of the ESL.

The application for an economic viability determination shall be reviewed by City Staff, in consultation with a professional outside economic consultant. The economic consultant will provide an opinion to the City on whether any of the CEQA and/or 404 b(1) alternatives that avoid and minimize wetland impacts provide economically viable use of the subject property. The City Real Estate Asset Department will select a qualified outside economic consultant to develop an economic viability analysis. Any communication between the *applicant* and the economic consultant shall occur only in the presence, which includes conference calls, of designated City staff. The *applicant* will deposit monies into a special fund established by the City to hire, supervise and pay for the economic viability analysis and associated City staff costs. All consultants considered for selection will be required to fully disclose their employment history. The economic viability analysis must include an analysis of the project's cost burden (including all mitigation costs associated with the project), a residual land value analysis, market absorption and fiscal impacts analysis. City Manager or designee recommendations to the decision maker shall discuss the economic viability information and professional opinion of the economic consultant, and reflect the independent judgment of the City Manager or designee.

Pursuant to the Public Records Act (California Government Code section 6250, *et seq.*), the full economic viability findings analysis, including the supplemental findings for ESL deviations, City Manager or designee recommendations, and the economic consultant's professional opinion, including ~~summary~~ documentation provided by the economic consultant reveals all calculations and variable assumptions contained therein, and

that is not proprietary (“trade secret”) shall be available to the City decision-maker and interested public prior to the discretionary hearing. A summary report of the economic viability findings, City Manager or designee recommendations, and professional opinion of the economic consultant shall be provided to the City decision-maker for the discretionary hearing. showing that the proposed project has avoided, minimized and mitigated to the maximum extent practicable, given the economic viability of the project.

~~The proposed project has avoided, minimized and mitigated to the maximum extent practicable, given the economic viability of the project.~~

- 3, The project mitigation must conform to Table 2a. While it is not the intent of the wetland deviation process to be used to reduce or eliminate mitigation as required by the City’s Biology Guidelines. Any project that proposes less than full mitigation compliance under this option must include supporting information as part of the economic viability determination and receive written concurrence from the Wildlife Agencies prior to distribution of the projects draft CEQA document. For projects providing full mitigation the project applicant will solicit input from the Wildlife Agencies prior to the first public hearing.

C. Biologically Superior Option

Deviations from the Wetland regulations in ESL will be considered under the biologically superior option when a project meets all the following four criteria.

1. The proposed project, a no project alternative, a wetlands avoidance alternative, and a biologically superior alternative shall be fully described and analyzed in an appropriate CEQA document. The CEQA document must fully analyze and describe the rationale for why the biologically superior option (this could be the proposed project) would result in the conservation of a biologically superior resource compared to strict compliance with the provisions of the ESL. Public review of the environmental document must occur pursuant to the provisions of CEQA. Projects proposing to utilize this option after initial CEQA public review must include the new information and recirculate the CEQA document.
2. The wetland resources being impacted by the project shall be limited to wetlands of low biological quality. The assessment of low biological quality will be specific to the resource type impacted (e.g., vernal pools, non-tidal-salt marsh, riparian, and unvegetated channels), and shall be ~~determined by~~ include consideration of the factors identified in I and II below:

- I. Criteria to determine biological quality of all wetland types include, but are not limited to, the following:
- a. use of the wetland by federal and/or state endangered, threatened, sensitive, rare and/or other indigenous species;
 - b. diversity of native flora and fauna present (characterizations of flora and fauna must be accomplished during the proper season, and surveys must be done at the most appropriate time to characterize the resident and migratory species);
 - c. enhancement or restoration potential;
 - d. habitat function/ecological role of the wetland in the surrounding landscape, considering
 - the current functioning of the wetland in relation to historical functioning of the system, and
 - rarity of the wetland community in light of the historic loss and remaining resource;
 - e. connectivity to other wetland or upland systems (including use as a stopover or stepping stone by mobile species), considering
 - proximity of the wetland resource to larger natural open spaces, and
 - long-term viability of resource, if avoided and managed;
 - f. hydrologic function, considering
 - whether the volume and retention time of water within the wetland is sufficient to aid in water quality improvements, and
 - whether there is significant flood control value or velocity reduction function; and
 - whether there is an opportunity to restore the hydrologic functions;
 - g. status of watershed considering whether the watershed is partially developed, irrevocably altered, or inadequate to supply water for wetland viability; and
 - h. source and quality of water, considering
 - whether the urban runoff is from a partially developed watershed, and
 - whether the water source is in part or exclusively from human-caused runoff which could be eliminated by diversion and
 - whether there is an opportunity to restore the water quality or flood control value;

- II. Additional habitat-specific factors, requirements, and/or examples (by habitat type) to determine biological quality include the following:

Vernal Pools

- a. Characterizations of vernal pool flora and fauna must be accomplished during the proper seasons. Surveys must be done between December and May to ensure adequate characterization of the vernal pools. Adequate surveys should be done to determine ponding and vernal pool flora and fauna. Surveys for fairy shrimp must be done in accordance with current U.S. Fish and Wildlife Service fairy shrimp survey protocol.
- b. Timing of the first rainfall and subsequent filling of the pools should be determined during the evaluation process. Rainfall and ponding should be monitored throughout the wet season.

Endangered, threatened, and sensitive species to consider include: *Brodiaea orcuttii* (when within vernal pools and/or their watershed), *Downingia cuspidata*, *Eryngium aristulatum* ssp. *parishii*, *Myosurus minimus* var. *apus*, *Navarettia fossalis*, *Orcuttia californica*, *Pogogyne abramsii*, *Pogogyne nudiuscula*, *Streptocephalus woottoni*, and *Branchinecta sandiegonensis* (when within vernal pools).

- c. Determination of habitat function can include an assessment of number of pools with a cumulatively small amount of habitat (pool surface area) relative to other nearby vernal pool complexes (i.e., an isolated complex with two small pools would be considered lower quality than a complex adjacent to the MHPA with ten pools).
- d. Restoration potential should include an analysis of compaction of watershed, presence of historic pools, and status of hardpan or clay substrate.

Salt Marsh, Salt Panne, and Mudflats

- a. Wetlands with either surface or sub-surface tidal influence (e.g., coastal salt marsh, salt panne and mudflats) will never be considered

low quality and are excluded from the deviation process for a biologically superior option. A deviation for a biologically superior option must not be granted for tidally influenced wetlands.

- b. Water and soil salinity testing should be conducted in areas of questionable tidal influence. Evaluations of tidal influence must include the highest spring and lowest neap tides.
- c. Low feasibility for restoration of tidal influence should be determined based on distance from existing tidal influence (e.g., > 1/4 mile).
- d. Determine whether there is little or no function as coastal salt marsh, salt panne, or mudflat habitat, including habitat for migratory birds.

Freshwater, Riparian, or Brackish Wetlands

- a. Tidally influenced brackish wetlands will never be considered low quality and are excluded from the deviation process for a biologically superior option.
- b. Hydrologic evaluations of the effects of any impacts on the upstream and downstream biota and flooding must be conducted as part of the review process.

Wetland quality shall be thoroughly analyzed in the project's biological technical report using the criteria listed above and based on best available scientific information. Wetland quality determinations shall be a discretionary action made on a case-by-case basis, with not all low-quality criteria required to make a low quality determination. Alternatively, the presence of any factor to any significant amount or degree may preclude a determination of low quality. All criteria shall be carefully considered when making a wetland quality determination. The City will seek input and concurrence from the Wildlife Agencies on this determination, and will use the input to develop the biologically superior option (this could be the proposed project) described and analyzed in the CEQA document.

During the CEQA process, the City's Wetlands Advisory Board shall review information provided by the applicant and provide an opinion to City staff and the City Manager on whether a wetland is of low quality. The opinion of the Wetlands Advisory Board shall be included in the City Manager report to the City decision maker; however, the project process should not be delayed if the Wetlands Advisory Board does not provide a response or cannot provide a response due to lack of quorum.

- 3. The project and proposed mitigation shall conform to the requirements for this option as detailed in Section III B.

4. The Wildlife Agencies have concurred with the biologically superior project design and analyses. The concurrence shall be in writing and be provided prior to or during the public review of the CEQA document in which the biologically superior project design has been fully described and analyzed. Lack of unequivocal response during the CEQA public review period is deemed to be concurrence.

TABLE 2a:
WETLAND MITIGATION RATIOS
INCLUDING BIOLOGICALLY SUPERIOR PROJECT DESIGN

HABITAT TYPE	MITIGATION RATIO
Coastal Wetlands	
- Salt marsh	4:1
- Salt panne	4:1
Riparian Habitats:	
- Oak riparian forest	3:1
- Riparian forest <u>or woodland</u>	3:1
- Riparian woodland	3:1
- Riparian scrub	2:1
- Riparian scrub in the Coastal Overlay Zone	3:1
Freshwater Marsh	2:1
Freshwater Marsh in the Coastal Overlay Zone	4:1
Natural Flood Channel	2:1
Disturbed Wetland	2:1
Vernal Pools	2:1 to 4:1
Marine Habitats	2:1
Eelgrass Beds	2:1

Notes: Any impacts to wetlands must be mitigated "in-kind" and achieve a "no-net loss" of wetland function and values except as provided for in Section 3B (Economic Viability Option). Mitigation for vernal pools can range from 2:1 when no ~~endangered~~ listed species are present, up to 4:1 when ~~endangered~~ listed species with very limited distributions (e.g., *Pogogyne abramsii*) are present.

