

MEMORANDUM

TO: Mayor Whitaker and Members of the City Council, City of Fullerton
FROM: Jeffrey M. Oderman, Esq., Rutan & Tucker LLP
DATE: September 7, 2017
RE: West Coyote Hills; Impact that Senate Bill 714 Would Have on City's "Path Forward" Efforts

1. **BACKGROUND:** Senate Bill 714 (Newman) ("**SB 714**") is currently pending for third reading in the California Senate.
2. **ISSUE:** If the California Legislature adopts SB 714 in its current form and Governor Brown signs the bill, what are the bill's potential impacts on the City of Fullerton's "Path Forward" efforts for the West Coyote Hills ("**WCH**")?
3. **CONCLUSION:** The potential negative impacts of SB 714 on the City's ability to achieve its "Path Forward" objectives are difficult to predict but they are numerous and significant. See Section 4.C of this Memorandum below for a point-by-point analysis.

4. **ANALYSIS:**

A. **Summary of Current Status of City of Fullerton's "Path Forward" Program for West Coyote Hills.** In July 2011, the City Council certified the West Coyote Hills EIR and approved Pacific Coast Homes' ("**PCH's**") applications for a General Plan Revision, Specific Plan Amendment, Zone Change, Tentative Tract Maps, and Development Agreement for its proposed West Coyote Hills project. The Friends of Coyote Hills filed a lawsuit challenging the City's actions ("**Friends Lawsuit #1**"), which lawsuit was rejected by the Orange County Superior Court. The Friends (and their co-challengers) appealed but later voluntarily dismissed their appeal.

In November 2012, however, the Development Agreement to the WCH Project was overturned by the City's voters in the Measure W referendum election.

In April 2014, the City Council put forth a proposed "Path Forward" partnership for the Friends of Coyote Hills, Open Coyote Hills, PCH, and the City, and PCH submitted its application for approval of a vesting tentative tract map ("**VTTM**") for the WCH Property.

In November 2015, the City Council (on appeal from a similar decision by the Planning Commission) approved the VTTM. The VTTM and the VTTM conditions of approval provide for PCH to provide the following "public benefits," among others:

- Elimination of development in the formerly designated Neighborhood 2 (18.5 acres).
- Dedication to the City of 301 acres (60%) of the 510-acre WCH property for perpetual open space/habitat purposes.

- A public acquisition option for the City to additionally acquire Neighborhoods 1 and 3 (collectively, 24.1 acres) for a negotiated fair market value price, which would result in the elimination of all development east of Gilbert and 217 contiguous acres of open space (including the adjacent Ward Nature Preserve property).
- PCH environmental remediation and clean-up of the entire 510-acre WCH property (including dedicated open space/habitat areas) to current environmental standards, at PCH's cost.
- Habitat preservation, revegetation, and enhancement of coastal sage scrub and other native habitat throughout the entire WCH property at PCH's cost, pursuant to a restoration plan to be reviewed and approved by the U.S. Army Corps of Engineers and U.S. Fish & Wildlife Service.
- PCH's obligation to contract with a responsible management agency and funding of an endowment for the perpetual management of the habitat areas.
- PCH's construction/installation of approximately 10 miles of public trails and several public vista points.
- PCH's funding of the construction of an interpretive center at the Ward Nature Preserve.

PCH's commencement of construction—and the City's and community's realization of the aforementioned public benefits—have been delayed due to the filing of another lawsuit by the Friends of Coyote Hills challenging the Council's approval of the VTTM (“**Friends Lawsuit #2**”). The City and PCH prevailed in Friends Lawsuit #2 at the Superior Court level and that case is currently pending on appeal.

Subsequent to the City Council's approval of the VTTM, the City notified PCH of its intention to purchase Neighborhoods 1 and 3 pursuant to the VTTM conditions of approval and, despite the pendency of Friends Lawsuit #2 the City has been aggressively pursuing various sources of grant funding for that purpose. The deadline under the VTTM for the City to finalize the purchase of Neighborhoods 1 and 3 expires later this year but in light of the delays occasioned by the lawsuit PCH has informally indicated it is willing to agree to an extension. The City's fundraising efforts have been successful, although the City is still short of the total funding amount needed.

The City has also informally indicated a desire to PCH to purchase Neighborhood 4 for similar open space and habitat purposes, which acquisition is not addressed in the VTTM conditions of approval. PCH has informally responded that it is willing to sell Neighborhood 4 as

well, as long as the City pays fair market value and does not hold up PCH's development program for the balance of the WCH property. No purchase price or other terms have been established for the possible purchase of Neighborhood 4 and the City has not yet secured any funding for that purchase.

B. **Summary of SB 714.** Senator Newman introduced SB 714 in February of this year--without prior notice to or consultation with either the City or PCH. The Senate Rules Committee, Office of Senate Floor Analyses, summarizes the current version of SB 714 as follows:

“This bill:

- 1) Establishes the West Coyote Hills Conservancy Program in the [State Coastal Conservancy or ‘SCC’].
- 2) Contains findings and declarations regarding the unique natural resources in the West Coyote Hills and the outdoor recreational needs of this Orange County region.
- 3) Defines the West Coyote Hills as the area surrounding these hills bounded by the Cities of La Habra, Buena Park, and Fullerton.
- 4) Establishes that the conservancy may undertake projects and award grants in the defined region to improve public access consistent with the rights of private landowners and without having an adverse impact on agricultural operations or environmentally sensitive areas. Other authorized objectives include protection and restoration of natural habitat, connecting corridors, and other open-space resources of regional significance, as well as promoting projects that provide nearby urban populations with recreational and educational opportunities.
- 5) Authorizes the use of eminent domain subject to constitutional requirements for just compensation.
- 6) Requires compliance with all laws regarding appraisals and purchases of land by state agencies at fair market value, the clean up of contaminated property, and the preparation of environmental studies and analyses.
- 7) Requires the conservancy to give priority to projects, to the extent feasible, that are supported by local or regional plans, are multijurisdictional

or serve a regional constituency, can be implemented in a timely way, provide opportunities for benefits that could be lost if the project is not quickly implemented, and which includes matching funds from other sources.

- 8) Provides that the SCC is the lead agency for the projects undertaken pursuant to this program and shall develop a plan for this program, based on collaboration with the public, local and regional public agencies, nonprofits, and other interested parties.
- 9) Provides that the California Environmental Quality Act applies, where applicable.
- 10) Creates the West Coyote Hills Conservancy Program Account within the Coastal Trust Fund and allows the fund to receive state, federal, and private funds as well as local government contributions, all of which are subject to appropriation by the Legislature.
- 11) Authorizes the SCC to award grants that include natural resource and wildlife education, local history, or the development of amenities and infrastructure consistent with this chapter.
- 12) Requires the SCC, by December 31, 2026, to arrange for the transition and transfer of its responsibilities for the development and implementation of projects within the program to local and regional public agencies and nonprofit land management organizations.
- 13) Sunsets the Program on January 1, 2028.”

C. Impact of SB 714 (If Adopted) on City of Fullerton’s “Path Forward” Efforts for WCH.

It is difficult to predict precisely how the adoption of SB 714 might impact the City’s accomplishment of its “Path Forward” objectives for the WCH Property, but the potential negative impacts are numerous and significant.

To begin with, SB 714 would *not* invalidate the VTTM or PCH’s vested rights to proceed with development of the WCH Property consistent with the VTTM conditions of approval. PCH could ignore SB 714 and proceed with its development (at least until stopped by an eminent domain action filed by SCC—see below).

In the short term it is reasonable to predict that SB 714 would or could seriously undermine the City's efforts to amass the funds needed to purchase Neighborhoods 1 and 3, and potentially Neighborhood 4. Presumably, the State, regional, and local agencies and non-profits that are potential sources of grant funds for property acquisition would likely be confused at best, and completely unwilling to work with the City at worst, if the State Coastal Conservancy is designated by the Legislature as the "lead agency" to "administer[. . . the natural resource and recreational goals of the West Coyote Hills area" and "undertake projects and award grants in the West Coyote Hills area" for that purpose. (Proposed new §§ 31190, 31193, and 31195 of the Public Resources Code that would be added by the bill.) The City's ability to fund raise could well dry up, in which case the City would be unable to meet the acquisition deadlines in the VTTM conditions of approval for Neighborhoods 1 and 3. PCH has indicated in no uncertain terms that it does *not* support SB 714, so if SB 714 becomes law it is highly doubtful the City could count on PCH to extend the City's deadline for acquiring Neighborhoods 1 and 3 or to cooperate in a potential voluntary sale of Neighborhood 4 (again, assuming the City would have been able to get that far into the acquisition program in the absence of SB 714). If this scenario were to play out, the City and the community would lose the potential benefits of creating the larger contiguous restored habitat area east of Gilbert.

PCH is now a "willing seller"—based on the VTTM conditions of approval and the cooperative relationship the City and PCH have established. If the City is "tossed aside" by SB 714, it is reasonable to predict that PCH would *not* be a willing seller.

SB 714 would authorize the SCC to acquire all or a portion of the West Coyote Hills property through eminent domain, of course, subject to payment of just compensation. (Proposed new Public Resources Code § 31194.) SB 714 does not allocate funds for that purpose, however, and it is highly doubtful that the SCC would be able to secure sufficient funds to risk initiating condemnation of the property (certainly not the entire property). In this regard, based on appraisals prepared by both PCH and the City for purposes of the acquisition options outlined in the VTTM conditions of approval (which appraisals, it should be noted, used dates of value that are approximately 2-4 years old and thereby understate the current property value), I would predict that the fair market value of the entire property would be found to be a minimum of \$150 million. A condemnor in SCC's position cannot be assured what its acquisition price is, however, since the nature of the eminent domain process is that, if the condemnor's determination of fair market value is contested (as it likely would be here), the determination is made by a judge or jury at a valuation trial held for that purpose. If the "trier of fact" decides that the fair market value is higher than the condemnor can afford to pay, the condemnor's only option is to abandon the eminent domain action and pay all of the property owner's litigation expenses and damages, a potentially very large contingent liability here, where SCC's condemnation would be obstructing/delaying a major ongoing development project.

If the SCC ended up realizing it has insufficient funds to condemn the entire WCH Property and it “settles” for a less ambitious acquisition program of condemning only Neighborhoods 1 and 3, it is highly likely the SCC would end up having to pay more for the land than the City was able to “negotiate” through the VTTM conditions of approval.

In addition, even if all or a portion of the WCH property were acquired by the State Coastal Conservancy through the eminent domain process, nothing requires PCH to provide any of the public benefits the City was successful in securing through the VTTM conditions of approval:

- SCC, *not* PCH, would have the obligation to remediate any hazardous materials on the property acquired.¹
- PCH would be released from its obligation to obtain the required Army Corps of Engineers and U.S. Fish & Wildlife Service permits for the preservation, revegetation, and enhancement of the coastal sage scrub and other native habitat on the WCH property and the Ward Nature Preserve, at least the portion acquired by the SCC. Again, the SCC would end up having to assume the burden of obtaining these permits and performing the work (or the work would not be done and the property would sit in the unrestored condition in which the Ward Nature Preserve property has remained for the past several decades)
- PCH would be released from its obligation to contract with a responsible management agency and fund an endowment to ensure perpetual management of the habitat areas on the property acquired. Once again, either this burden would fall upon SCC (and the taxpayers)—or would not be performed at all.
- PCH would be released from its obligation to construct/install the approximately 10 miles of public trails and public vista points that are required by the VTTM. Either SCC (or the

¹ SB 714 has language that “any land acquisition [by SCC]. . . shall comply with all relevant laws governing. . . the clean up of contaminated property. . . .” (Proposed Public Resources Code § 31194(b).) The Constitutional protections afforded a condemnee in an eminent domain action, however, require the condemnor to take the condemned property in an “as is” physical and environmental condition. SCC would be permitted to have its appraiser take into consideration the cost of any environmental remediation that SCC proves it would be required to undertake after the property changes hands in determining the fair market value of the condemned property, but SCC would *not* be in a position to order PCH to perform the clean-up as part of the condemnation. The burden of the clean-up—and the risk of cost overruns in performing the clean-up—would likely fall upon SCC post-closing.

taxpayers) would end up having to assume this burden or the trails and vista points would not be provided.

- PCH would be released from its obligation to pay for and construct the interpretive center at the Ward Nature Preserve.

All of the other public benefits of the VTTM would be lost as well. The list above focuses only on the public benefits dealing with the creation of restored and functioning open space/habitat areas and public recreational opportunities on the WCH Property and adjacent Ward Nature Preserve, the purported justifications for SB 714 in the first place.

Another potential consequence of SB 714 becoming law and the SCC actively pursuing condemnation of the WCH Property is that the City's and community's realization of the public benefits set forth in the VTTM conditions of approval will be delayed for an additional indeterminate period of time. The Ward Nature Preserve remains in a non-restored state and inaccessible to the public several decades after it was dedicated to the City. It is certainly possible that one effect of SB 714 will be to extend the uncertainty over development/acquisition of the WCH Property even longer.

Finally, it must be questioned what benefit the SCC, a non-elected body with offices in Oakland, can add at this late date to the "plan" and "projects" to be undertaken for the WCH Property in the City of Fullerton. The City, together with the property owner and with a massive amount of local public input from a wide array of interested citizens and stakeholders, has already planned the development of the WCH Property, the preservation, restoration, and enhancement of open space/habitat areas, and the provision of public trails, parks, and vista points *over a period of decades*. A full environmental impact report ("EIR") has been prepared for the WCH Project (with multiple revisions) and the EIR has been certified by the City and upheld by the court. It is respectfully submitted that involving the SCC at this late date, an organization which has no history of involvement in any other similar projects in the North Orange County region (well away from the coast), no established expertise to revise or reject the planning efforts the City has undertaken, and no dedicated resources equal to the task, creates a potential for further delay, wasteful and duplicative spending, and diversion of taxpayer resources (including City resources).

cc: City Manager Ken Domer