



DATE: June 27, 2012

TO: Honorable Mayor and City Council Members

FROM: Property Management

SUBJECT: **AMENDMENT 1 TO THE EXCLUSIVE NEGOTIATION AGREEMENT WITH SUDBERRY DEVELOPMENT, INC., TO NEGOTIATE A DEVELOPMENT AND DISPOSITION AGREEMENT FOR THE DEVELOPMENT OF EL CORAZON**

SYNOPSIS

Staff recommends that the City Council approve Amendment 1 to the Exclusive Negotiation Agreement with Sudberry Development, Inc. to extend the negotiating period from July 27, 2012 to September 27, 2012 in order to negotiate a Development and Disposition Agreement for the development of El Corazon, and authorize the City Manager to execute the amendment.

BACKGROUND

On November 30, 2011, City Council approved an Exclusive Negotiation Agreement ("ENA") with Sudberry Development, Inc. ("Sudberry") for the development of El Corazon. The ENA provided for a 180-day period in which to negotiate a Development and Disposition Agreement ("DDA") which would govern the development of the temporary athletic fields, the commercial components of El Corazon, and the remainder of the recreational and habitat areas. The ENA also provided for a 60 day extension of the negotiating period so long as the parties are diligently negotiating in good faith.

Staff has been meeting regularly with Sudberry to negotiate the DDA. Due to the expanding complexity of the transaction (e.g., different financing criteria for recreational development and commercial development), which the parties determined would necessitate a separate DDA for the temporary athletic fields, a lease agreement ("Lease") for the use of the temporary athletic fields, operating agreements with the field users such as "Surf Cup" ("Agreements") and a DDA for the commercial development and the remainder of El Corazon, the negotiations are taking longer than originally anticipated. Although staff and Sudberry have made significant progress in drafting the documents, additional time will be needed to complete the two separate DDAs, the Lease and the Agreements. An amendment to the ENA ("Amendment") is being requested to complete the aforementioned documents.

ANALYSIS

The original 180-day negotiating period in the ENA ended on May 29, 2012. As a result of the diligent negotiations between the parties, the ENA negotiating period was extended 60 days and expires on July 27, 2012. It is anticipated that an additional 60 days will be needed to complete the negotiations of the needed documents. As City Council approval is required for any other extension, staff is requesting an Amendment to extend the negotiation period to September 27, 2012. Notwithstanding the additional time needed to complete the needed documents, staff continues to work diligently so that once the document contingencies are timely satisfied the goal of having a "Surf Cup" tournament at El Corazon in November 2013 can be realized.

As part of Sudberry's responsibilities to develop the temporary athletic fields, Sudberry will be required to prepare and submit an Application for Discretionary Permit for the temporary athletic field improvements ("Development Plan"). In order stay on track for scheduling a "Surf Cup" tournament at El Corazon in November 2013, which is the shared goal of both parties, the Development Plan process needs to begin during the period covered by the ENA. To facilitate this requirement, Sudberry will enter into agreements with consultants to begin providing the requisite Development Plan services.

In addition to an extension of the ENA negotiating period, to expedite the Development plan Process the ENA will also be amended to provide for the City to pay for the costs associated with the Development Plan. However, once the DDA is approved and contingencies therein satisfied, Sudberry will be required to reimburse the City for the costs associated with the Development Plan, which was done to expedite the process. In the event the DDA is not approved or the contingencies therein not satisfied, the City will nonetheless have a Development Plan ready for future recreational development at El Corazon.

FISCAL IMPACT

There are no costs associated with the continued negotiation and preparation of the ENA, which continues to be done internally by staff. The costs associated with the Development Plan incurred by Sudberry's consultants will be on a time-and-material basis in an amount not to exceed \$120,000. Said funds will be expensed out of Capital Improvement Project Account No. 912121700501.5326.10410, which was created to pay for the planning, engineering and related costs associated with the development of El Corazon. The account has sufficient funds to pay for the associated costs.

INSURANCE REQUIREMENTS

Does not apply.

COMMISSION OR COMMITTEE REPORT

Does not apply.

CITY ATTORNEY'S ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

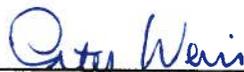
Staff recommends that the City Council approve Amendment 1 to the Exclusive Negotiation Agreement with Sudberry Development, Inc. to extend the negotiating period from July 27, 2012 to September 27, 2012 in order to negotiate a Development and Disposition Agreement for the development of El Corazon, and authorize the City Manager to execute the amendment.

PREPARED BY:



Douglas E. Eddow
Real Estate Manager

SUBMITTED BY:



Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager



Teri Ferro, Financial Services Director



George Buell, Development Services Director



**AMENDMENT NO. 1
TO
EXCLUSIVE NEGOTIATION AGREEMENT**

THIS AMENDMENT NO. 1 TO EXCLUSIVE NEGOTIATION AGREEMENT (the "Amendment") is entered into this 27th day of June 2012, by and between the City of Oceanside, a public body, corporate and politic (the "City"), and SADBERRY DEVELOPMENT, INC., a California corporation (the "Developer"), on the terms and provisions set forth below. The City and Developer may sometimes be referred to herein individually as "Party" and collectively as "Parties."

RECITALS

- A. On November 30, 2011, the City and Developer entered into an Exclusive Negotiation Agreement ("Agreement") to negotiating a Development and Disposition Agreement for the development of El Corazon.
- B. The Agreement provided for a one hundred eighty (180) day period to negotiate the Development and Disposition Agreement and an additional sixty (60) day extension should the parties fail to negotiate a Development and Disposition Agreement but are continuing to negotiate diligently.
- C. In addition to a Development and Disposition Agreement the parties determined that additional documents also needed to be negotiated in conjunction therewith (collectively "DDA").
- D. City and Developer are diligently negotiating the DDA and are desirous of an additional extension in order to consummate the negotiation of the DDA and to provide for additional reimbursement language in order to expedite the development of the Phase 1 temporary athletic field improvements.

IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:

- 1. Section I. NEGOTIATION, B. Period of Negotiations shall be amended by adding the following language as the third paragraph:

"Notwithstanding language above, the Negotiation Period shall be extended to September 27, 2012. If a final DDA has not been approved by the Parties by said date, then this Agreement shall automatically terminate."

- 2. Section IV. PHASE I PLANNING AND GRADING COSTS shall be amended by adding the following language as the third paragraph:

"During the time period covered by this Agreement the Parties also intend to commence preparation and submittal of an Application for Discretionary Permit, together with applicable reports, for the Phase 1 temporary athletic field improvements (the "Development Plan") of the project. Developer shall retain consultants, subject to City's approval, not to be unreasonably withheld, to prepare and submit the Development Plan during the time period covered by the Agreement. City shall reimburse Developer on a time and material basis in an amount not to exceed One Hundred Twenty Thousand and No/100 Dollars (\$120,000) for costs incurred by Developer to pay consultants for the Development Plan, including related environmental studies (i.e., Sowards & Brown Engineering, Affinis, Linscott Law & Greenspan, and Tory Walker Engineering). City shall reimburse Developer on a monthly basis as invoices are submitted, received and approved by the City. In the event a DDA is approved and all contingencies therein are satisfied to require Developer to proceed with the development and construction of the Phase 1 temporary athletic field improvements, Developer shall in return reimburse all amounts that were previously paid by the City in conjunction with the Development Plan. Developer shall pay City in accordance with the approved DDA."

3. Except as set forth in this Amendment all other terms and conditions of the Agreement shall remain in full force and effect. Should there be a conflict between this Amendment and the Agreement the terms of this Amendment shall prevail.

CITY OF OCEANSIDE
a public body, corporate and politic

BY: _____

Peter Weiss
City Manager

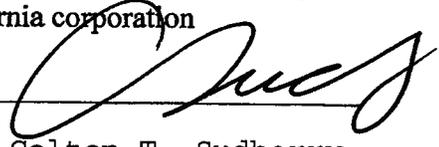
Dated: _____

APPROVED AS TO FORM OCEANSIDE CITY ATTORNEY

JOHN P. MULLEN City Attorney

DEVELOPER:

SADBERRY DEVELOPMENT, INC.
a California corporation

BY: 

NAME: Colton T. Sudberry

TITLE: President

Dated: 6-18-12

NOTARY ACKNOWLEDGEMENT OF DEVELOPER'S SIGNATURE MUST BE ATTACHED

State of California}

County of San Diego}

On June 18, 2012, before me, Jennifer Jones, a Notary Public, personally appeared Colton Thomas Sudberry who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____



EXCLUSIVE NEGOTIATION AGREEMENT

by and between

THE CITY OF OCEANSIDE AND SUDBERRY DEVELOPMENT, INC.

THIS EXCLUSIVE NEGOTIATION AGREEMENT (the "Agreement") is entered into this 30th day of November 2011 ("Effective Date"), by and between the City of Oceanside, a public body, corporate and politic (the "City"), and SUDBERRY DEVELOPMENT, INC., a California corporation (the "Developer"), on the terms and provisions set forth below. The City and Developer may sometimes be referred to herein individually as "Party" and collectively as "Parties."

RECITALS

1. In 1994, the City acquired the approximate 465-acre former sand mining site known as El Corazon, located south of Mesa Drive, east of El Camino Real, west of Rancho del Oro Drive and north of Oceanside Boulevard.
2. The El Corazon site presently includes some existing development, such as a senior center opened in 2009, a green waste composting facility, and reclamation activities with a mine tailings pond.
3. Following a multi-year public planning effort, the City Council adopted the El Corazon Specific Plan ("Specific Plan") and certified a Final Environmental Impact Report ("EIR"). The Specific Plan and EIR contemplate the development of park and recreational uses, commercial uses, a hotel and civic services.
4. On August 31, 2011, the City Council selected Developer as the proposed master developer for the El Corazon project.

IT IS HEREBY MUTUALLY AGREED AS FOLLOWS:

I. Negotiation

A. Good Faith Negotiations

The City and the Developer agree for the period set forth below in Section I.B to negotiate diligently and in good faith to prepare a Disposition and Development Agreement

("DDA") to be entered into between the City and the Developer with respect to that area in the Specific Plan area which is shown on the Site Map attached hereto as Exhibit "A," hereinafter referred to as the "Project Site." The obligation to negotiate in good faith requires the respective parties to communicate with each other with respect to those issues for which agreement has not been reached, and in such communication, to follow reasonable negotiation procedures, including meetings, telephone conversations, and correspondence. The Parties understand that final accord on any or all issues may not be reached. Nothing herein shall obligate the City to approve or execute a DDA. The City expressly reserves its discretion to approve or reject the terms of a future DDA.

The City anticipates that following execution of this Agreement, and through the period of negotiation and preparation of the DDA, the City, as well as certain consultants and attorneys for the City, will devote substantial time and effort in reviewing documents, proposals, plans, and meeting with the Developer, each other, and other necessary third parties. The City acknowledges that the Developer will also expend substantial time and resources hereunder and the Parties are willing to engage in these activities subject to the terms and conditions set forth in this Agreement.

B. Period of Negotiations

The Negotiation Period shall commence upon the date the City approves and executes this Agreement following execution by the Developer (the "Effective Date") and continue for one hundred eighty (180) days. The Parties agree to negotiate in good faith and conduct due diligence activities during the Negotiation Period.

If a final DDA has not been approved by the parties by the expiration of the Negotiation Period, then this Agreement shall automatically terminate. Provided, however, in the event of circumstances beyond the reasonable control of either Party, so long as the Parties are negotiating diligently and in good faith, either of the Parties can request, in writing, an additional sixty (60) day extension of the Negotiation Period. Any other extension beyond the Negotiation Period must be approved by the City Council at a public meeting.

II. TERMS TO BE NEGOTIATED

City and Developer shall meet regularly with each other in order to negotiate a proposed DDA to include, without limitation, the following provisions:

- A. Grading of an approximate sixty (60) acre pad to accommodate twenty (20) temporary multi-purpose athletic fields for field sports use, a detention basin for watering purposes, and an approximate twenty (20) acre decomposed granite or similar parking lot by the City. The sixty (60) and twenty (20) acre sites and the detention basin are referred to herein as the "Pad". The Parties shall negotiate the conditions necessary to commence grading of the Pad.

- B. A master development plan comprised of three phases that is consistent with the Specific Plan and EIR. The parties anticipate that the initial phase (Phase I) of the project will include the development of approximately twenty temporary multi-purpose fields for field sports (e.g. soccer, lacrosse, football, etc.). The development plan for Phase I shall include, but not be limited to, a detailed description of the project, the construction schedule, the commencement of use, and the applicable fair market value of the property for ground lease purposes. Phase II is anticipated to include the development of up to forty-five acres of retail/office, hotel and residential uses in accordance with the Specific Plan. ("Commercial Areas"). The development plan for Phase II will include a breakdown of the Commercial Areas into sub-phases and include a schedule establishing conditions precedent for the construction and leasing of the sub-phases. These conditions shall include, but not be limited to, a fair market value of the land. Phase III includes the development of all remaining components of the Specific Plan, including softball and baseball complexes, a recreation center, a community park and habitat. The Parties anticipate that the timing of the development of Phase III will be extremely difficult to predict. The DDA may generally describe development opportunities for Phase III if certain conditions exist.
- C. A schedule for the Developer to process required entitlements and any necessary environmental review for each of the three anticipated phases. The schedule for Phase I shall include detailed project scheduling for entitlements, environmental review, construction and commencement of use. The schedule of Phase II will need to breakdown the commercial areas into sub-phases as described above. The Parties recognize that the schedule for Phase III will be general in nature as it is difficult to project the timing and scope of development.
- D. The proposed terms, timing and conditions precedent by phases for the leasing or conveyance, if any, of the Project Site, or portions thereof.
- E. A schedule of performance by each phase encompassing appropriate and necessary legal, administrative and financial benchmarks to be met by the appropriate Party and specific deadlines.
- F. The performance guarantees, good faith deposits, and liquidated damages to be required, if any applicable to each phase.
- G. The rights and remedies of the Parties upon termination DDA.

III. DEVELOPER STUDIES AND PRO FORMA

- A. Financial Feasibility Prospectus. For Phase I, Developer shall submit to the City a pro forma showing the fiscal feasibility of all aspects of Phase I development. As for Phase II, Developer shall submit to City a proposed pro forma based on current

market projections as they relate to the proposed schedule of commercial development, which shall be provided in further detail at the time conditions for development have been satisfied. As for Phase II, the parties agree that should conditions be satisfied for the development thereto, prior to proceeding with development of Phase III, a detailed pro forma shall be provided to the City.

- B. Market Feasibility Study. Developer shall submit to Agency a market feasibility study for all aspects of the Phase I development. As for Phase II, Developer shall submit to City a proposed market feasibility study based on current market projections as they relate to the proposed schedule of commercial development, which shall be provided in further detail at the time conditions for development have been satisfied. As for Phase III, the parties agree that should conditions be satisfied for the development thereto, prior to proceeding with development of Phase III, a market feasibility study shall be provided to the City.

- C. Necessary Debt and Equity Financing. Developer shall submit evidence to City including the financial structure and preliminary commitments, demonstrating Developer can and will obtain the necessary debt and equity financing in an amount sufficient to pay for development of Phase I of the Project Site. As for Phase II, Developer shall submit to City a proposed financing plan based on current market projections as they relate to the proposed schedule of commercial development, which shall be provided in further detail at the time conditions for development have been satisfied. As for Phase III, the parties agree that should conditions be satisfied for the development thereto, prior to proceeding with development of Phase III, a debt and equity financing plan shall be provided to the City.

- D. City Right to Additional Information. City reserves the right, during the term of this Agreement to request reasonable additional information and data from Developer necessary for review and evaluation of the proposed project. Developer agrees to provide such additional information or data in a timely manner. All information regarding the Developer's business practices shall remain confidential to the extent allowed by law.

IV PHASE I PLANNING AND GRADING COSTS

During the time period covered by this Agreement, the Parties intend to commence preparation of a grading plan for Phase I of the project. Developer shall retain Soward & Brown, a civil engineering firm to prepare the grading plan during the time period covered by the Agreement. Developer shall prepare the plan to the reasonable satisfaction of the City Engineer. City shall reimburse Developer on a time and material basis in an amount not to exceed Sixty Six Thousand and No/100 Dollars (\$66,000). City shall reimburse Developer on a monthly basis as invoices are submitted, received and approved by the City.

In the event the parties are unable to reach agreement on a DDA, the City shall reimburse Developer for the cost of the grading incurred to date for that portion of the grading plan that has been approved by the City Engineer to said date, which approval shall not be unreasonably withheld. Said grading plan or portion thereof and any other related documentation shall be and remain the property of City.

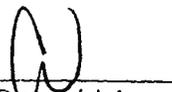
V. LIMITATION ON REMEDIES FOR BREACH OR DEFAULT OF THE AGREEMENT

A. Except as provided in Section IV, neither party would have agreed to any part of this Agreement if it were to be liable to the other party for any amount of monetary damages. Accordingly, both parties acknowledge and agree each party's exclusive remedy upon breach or default of the other party to negotiate in good faith, as set forth in this Agreement, is to terminate this Agreement or seek specific performance regarding this exclusivity provision of this Agreement, as applicable.

B. Each party acknowledges it is aware of the meaning and legal effect of California Civil Code Section 1542, which provides

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM, WOULD HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

C. Civil Code section 1542 notwithstanding, it is the parties intention to be bound by the limitation on remedies set forth in this Section and each party hereby releases any and all claims against the other party for monetary damages or other legal or equitable relief, whether or not such released claims were known or unknown to the releasing party as of its entry into this Agreement. Each party hereby waives the benefits of Civil Code section 1542 and all other statutes and judicial decisions (whether state or federal) or similar effect.


City initials


Developer initials

VI. CITY NOT RESPONSIBLE FOR COSTS

Except as specifically provided in Section IV, the City is not responsible for any costs associated with the planning and development of the Project Site pursuant to or arising from this ENA.

VII. ASSIGNMENT

City is entering into this Agreement based on the prior experience and qualifications of the Developer. Therefore, Developer shall not assign, sell or otherwise transfer any or all of its rights under this Agreement to any party, without the prior written approval of the City, at its sole discretion. Provided however, Developer shall be permitted, without the prior written approval of the City, to assign, sell or otherwise transfer any or all of its rights under this Agreement to an entity or affiliate that is 100% wholly owned by Developer. Developer shall give City thirty (30) days prior notice of such assignment, sale or transfer.

VIII. INDEMNITY

Developer agrees to defend, indemnify and hold harmless the City and each of its elected officials, officers, agents, and employees from any challenge to this Agreement, or any and all of the losses, liabilities, claims or costs, including attorney fees, arising from arising from Developer's negligent acts, errors, or omissions with respect to its obligations under the Agreement or the Project site, excluding any losses arising from the sole negligence or the sole willful misconduct of the City. The indemnity obligation shall survive termination of the Agreement.

IX. ENTIRE AGREEMENT

This Agreement represents the entire agreement of the Parties and supersedes all negotiations or previous agreements between the Parties. This Agreement may not be amended unless agreed to in writing and certified by the authorized representatives of the Parties. No amendment may be enforced against the City unless approved by the City Council.

X. GOVERNING LAW

This Agreement shall be interpreted and enforced in accordance with the provisions of California law.

XI. NO THIRD PARTY BENEFICIARIES

City and Developer expressly acknowledge and agree they do not intend, by their execution of this Agreement to benefit any persons or entities not signatory to this Agreement.

No person or entity shall have any rights or causes of action against the City or Developer arising out of the Parties' entry and/or performance of this Agreement.

XII. COUNTERPARTS

This Agreement may be executed in two counterpart originals which, when taken together, shall constitute one instrument.

XIII. EFFECTIVE DATE

The Effective Date of this Agreement shall be the date signed by the City following execution by the Developer.

XIV. NOTICES

- A. Any formal notice, request, approval or other communication to be provided by either party shall be in writing and dispatched by first class mail, registered or certified mail, postage prepaid, return receipts requested, or by electronic facsimile transmission followed by delivery of a "hard" copy or by personal delivery, to the addresses of the City and Developer set forth below. Such written notices, requests approvals of other communication may be sent in the same manner to such other addresses as either party may from time to time designate.
- B. Any notice that is transmitted by electronic facsimile transmission followed by delivery of a "hard" copy, shall be deemed delivered upon its transmission; any notice personally delivered shall be deemed received on the documented date of receipt; any notice that is sent by registered or certified mail. Postage prepaid, return receipt requested shall be deemed received on the date of receipt.

C. If to City

City of Oceanside
Attn. City Manager
300 North Coast Highway
Oceanside, CA. 92054

With a copy to

John P. Mullen
City Attorney
300 North Coast Highway
Oceanside, CA 92054

D. If to Developer:

Colton Sudberry
Vice-President Development
Sudberry Development, Inc.
5465 Morehouse Drive, Suite 260
San Diego, CA 92121-4714

CITY OF OCEANSIDE
a public body, corporate and politic

BY: *Peter Weiss*

Peter Weiss
City Manager

Dated: 12-1-11

APPROVED AS TO FORM
OCEANSIDE CITY ATTORNEY
John P. Mullen
JOHN P. MULLEN
City Attorney

DEVELOPER:

SADBERRY DEVELOPMENT, INC.
a California corporation

BY: *Colton Sudberry*

NAME: *Colton Sudberry*

TITLE: *President*

Dated: 11/17/11

NOTARY ACKNOWLEDGEMENT OF DEVELOPER'S SIGNATURE MUST BE ATTACHED

State of California}

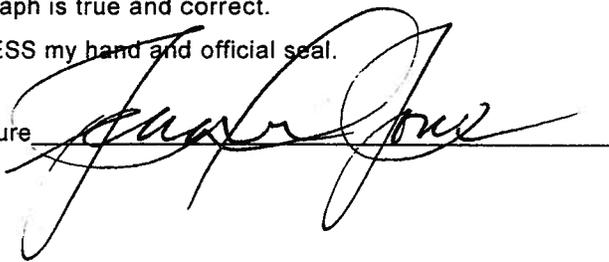
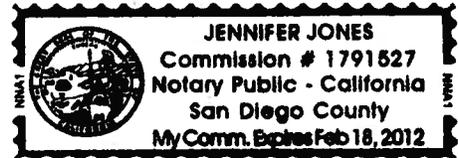
County of San Diego

On November 17, 2011 before me, Jennifer Jones, a Notary Public, personally appeared Colton Thomas Sudberry who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(ies), and that by his/~~her/their~~ signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature

A handwritten signature in black ink, appearing to read "Jennifer Jones", written over a horizontal line.

El Corazon - Specific Plan

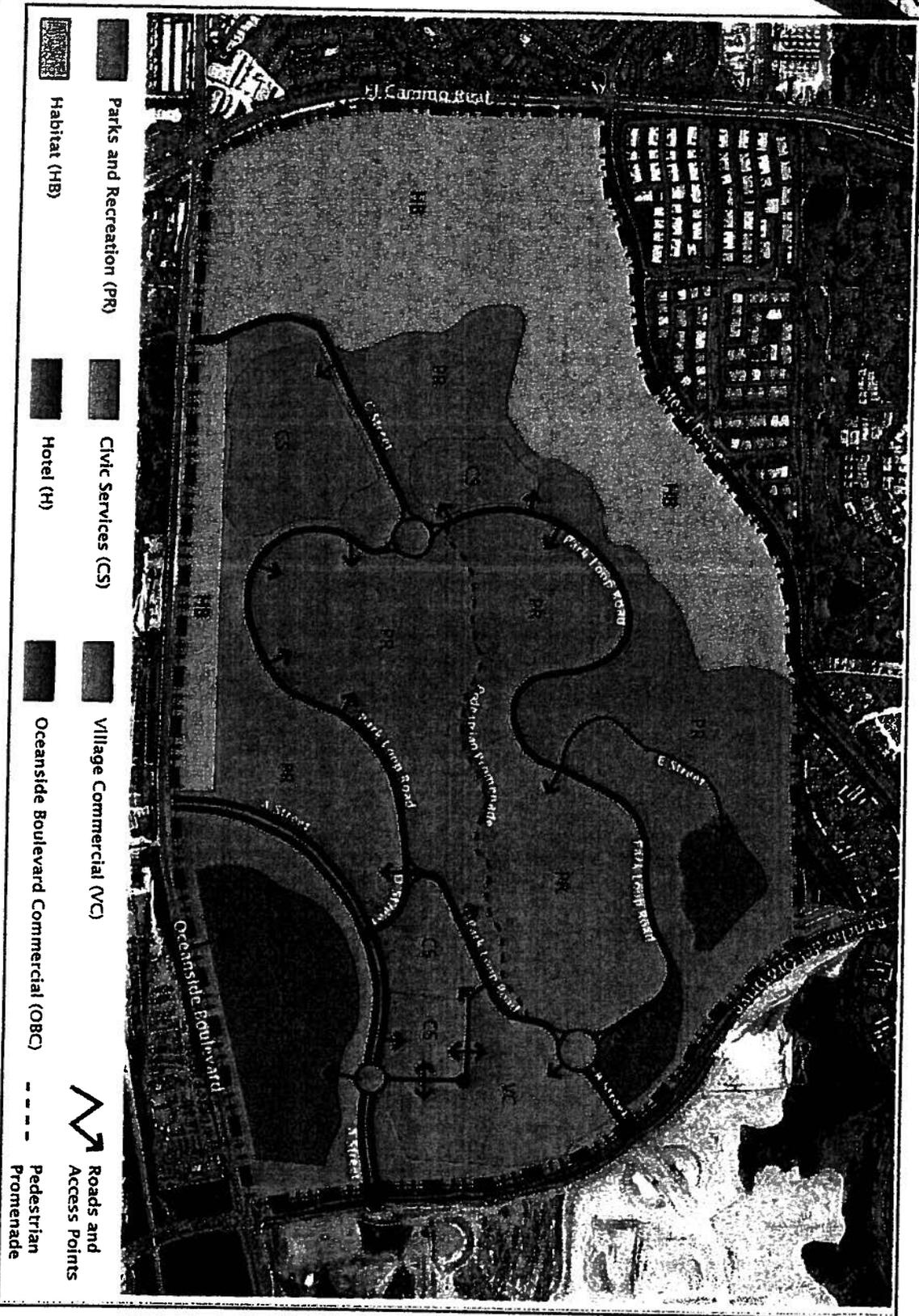


Figure 2-1 District Map