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March 24, 2022
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

Finance Docket No. 36443

**NORTH COUNTY TRANSIT DISTRICT -
PETITION FOR DECLARATORY ORDER**

**REPLY OF DEL MAR RESIDENTS SHIRLI WEISS AND LAURA
SCHAEFER TO NORTH COUNTY TRANSIT DISTRICT'S
SUPPLEMENTAL STATUS UPDATE AND OBJECTION TO ITS
REQUEST TO EXPEDITE PROCEEDINGS**

In its September 23, 2020 Decision of the Surface Transportation Board ("STB"), the STB granted permission for interested persons to reply to the NCTD Petition for Declaratory Order, deciding that "...an extension is warranted to allow any interested person sufficient time to address the significant issues raised in the petition." Shirli Weiss and Laura Schaefer ("Del Mar Residents"), who are residents of the City of Del Mar ("City") and constituents of Respondents North County Transit District ("NCTD") and of the California Coastal Commission ("Coastal Commission") submitted a Reply to the Petition. We each are attorneys and members of the American and California Bar Associations with, respectively, over 40 and 23 years-experience in the practice of law before California and federal courts. We respectfully submit this Reply to NCTD's Supplemental Status Update ("NCTD Update"), to offer the perspective of individuals (representing themselves in this matter), affected by the decisions of the STB as walkers of the Del Mar Bluffs' scenic trails, residents and property owners in Del Mar.

With many citizens protesting NCTD's plans to fence the Del Mar bluffs, we have attended and spoken at public meetings of the Coastal Commission, the San Diego Association of

Governments (“SANDAG”), NCTD, Del Mar’s City Council and the California Transportation Commission (“CTC”) and have studied the related public documents and parties’ media releases. Ours are among the thousands of communications sent to these public agencies by a very concerned and engaged public urging environmental protection of Del Mar Bluffs.

I. This Action Should Be Stayed for Mediation; NCTD’s “Emergency” For Which It Urges A Quick STB Decision in Its Favor Is Manufactured.

As the STB has acknowledged, NCTD’s Petition raises “significant issues.” Due process demands not haste, but a thorough analysis of all issues. In addition, although settlement negotiations without a mediator were unsuccessful, the STB should grant the City’s and the Coastal Commission’s motion for an order directing mediation and we submit that mediation would likely resolve the dispute.¹

II. NCTD’s “Emergency” For Which It Urges A Quick STB Decision in Its Favor Is Manufactured.

The “emergency” that NCTD argues justifies a fast decision, is manufactured. **NCTD’s statements and public record shows that it has neither the intent nor the funding in the next two years to construct a fence at track level in the area where virtually all of the accidents have occurred.** In addition, NCTD fails to make any showing that the single individual’s climbing incident that NCTD pointed to in the NCTD Update to try to justify a fence above track level on Del Mar’s Upper Bluff actually had nothing to do with the upper bluff.

Del Mar is a seaside city of approximately 2.2 square miles with approximately 4,200 residents. Almost 1.6 miles of Del Mar’s coastline consists of coastal bluffs overlooking the Pacific Ocean and beaches. Most of this portion of coastline is terraced like a three-layered cake consisting of (1) a beach layer, (2) an 80-to-100-foot bluff up to a second layer (“Lower Bluff”),

¹ We respectfully submit that settlement negotiations that commenced in November of 2021 were unsuccessful because the parties did not involve a professional (or any) mediator. In addition, as shown below, NCTD had not even identified a “License Area” and other key terms in its proposed License Agreement to Del Mar by the time of its January 20, 2022 vote to approve the Exbon job order to commence fencing, so despite progress, much remained to be negotiated.

and (3) a 30- to 40-foot bluff up to the third layer at street level. ("Upper Bluff"). NCTD operates its railway in a right-of-way on the flat portion of the Lower Bluff layer, while homes, beach parking, and trails are located on the Upper Bluff.

NCTD seeks an expedited preemption decision in its favor purportedly to allow it to erect, without compliance with California's Coastal Act, NCTD's staff's "Fencing Recommendation," which consists of two fencing projects on Del Mar's Bluffs separated into two phases. This specific plan was not introduced to the City and the public until January 14, 2022 when NCTD published its Board packet for its January 20, 2022 meeting, and was approved by NCTD's Board (Del Mar's representative abstaining) at that meeting, as follows:

- Phase 1: calls for fencing to be erected 3 to 4 months from NCTD Board approval on January 20, 2022, specifically, the construction of approximately 3,000 linear feet of 6-foot high black welded wire mesh fencing (colloquially known as agricultural hog-wire fencing), for the entire length of the pedestrian scenic trail on Del Mar's fragile Upper Bluff, where there are no tracks, and no train strikes have ever occurred or could occur and from which no one has ever fallen. A very short length of fencing would also be placed on the Lower Bluff in Phase 1, but it does not include the area between Coast Boulevard and 11th Street where the accidents have occurred according to NCTD's own statistics, and where the City has encouraged fencing.
- Phase 2: calls for track level (Lower Bluff) fence stretching 3,025 linear feet. **NCTD admits it has no current funding for this phase, however, and plans to defer it for more than two years, if such a fence is ever constructed.**

<https://lfportal.nctd.org/WebLink/0/edoc/192486/Board%20Agenda%20Packet%2001202022%20-%20REVISED.pdf>

(See NCTD Staff Power Point dated 1/20/22, Attachment 1, Slide 12)

NCTD's above plan thus *defers* almost all track level fencing for over two years to Phase 2, except for a short length of fence from the crossing that runs south from Coast Boulevard but ends hundreds of feet before 13th street and 11th streets. NCTD admits it has no funding for any other track level fencing. As shown by the City's Reply to NCTD's Update, the City has

encouraged fencing at track level where accidents have occurred. (See, Attachment B, pp. 1, 2, to Reply to Supplemental Status Update of City of Del Mar (“City’s Reply to NCTD Update”). Instead, NCTD has prioritized a highly obtrusive and hazardous type of fencing for the very fragile Upper Bluff (Phase 1) where train strikes are not possible. NCTD has manufactured an “emergency” by pointing to train strikes but seeks to construct fencing that does not address train strikes.

After displaying its staff’s “Fencing Recommendation,” at its January 20, 2022 meeting, NCTD offered Del Mar a “modified plan” for fencing the Upper Bluff. In place of the threatened unsightly, heavy and destructive fence that its staff recommended, NCTD offered to erect a four-foot high linear, post and cable fence, which NCTD Staff said had been developed by the negotiation “working group-including CCC & City of Del Mar.” This offer was open until February 28, 2022 and was conditioned on Del Mar’s acceptance of NCTD’s proposed license agreement (“Proposed License Agreement”).

The NCTD Proposed License Agreement would allow the public to continue to use a “License Area” (which the public had used for over 100 years), with less fencing and without interference by NCTD in return for Del Mar accepting certain terms and conditions. But by January 20, 2022, the day of the NCTD Board vote to give Del Mar an ultimatum and despite over a year of settlement discussions, NCTD had not described or committed to the “License Area” in the Proposed License Agreement, a key term necessary to evaluating the other terms in the Proposed License Agreement.² Nor had NCTD produced engineering or construction plans for any of the proposed fencing (See Attachment B, pp. 2, 3 to City’s Reply to NCTD Update). In addition, the Proposed License Agreement (which at the time, NCTD referred to as its “best and final” offer), was not published so the public could not comment on it before or at NCTD’s January 20, 2022 meeting.³

² The “License Area” could have been comprised of several potential scenic trails on the Del Mar Bluffs, so knowing its location was material to the agreement.

³ NCTD produced the “best and final” Proposed License Agreement electronically to Del Mar Resident Weiss on February 3, 2022 pursuant to Ms. Weiss’s Public Records Request dated January 26, 2022.

After the January 20, 2022 NCTD Board meeting and before the February 28, 2022 Del Mar City Council hearing on NCTD's ultimatum, the "License Area" was finally identified as the Upper Bluff and the Proposed License Agreement as it existed on February 28, 2022, was finally published to the public by the City, not by the NCTD.

<https://www.delmar.ca.us/AgendaCenter/ViewFile/Agenda/02282022-2932>

Upon publication, the public learned that NCTD's offer to change to a "modified fence" for the fragile Upper Bluff came with a very expensive price tag for the City: The Proposed License Agreement required Del Mar to agree to the removal of the License Area (Upper Bluff) if NCTD deemed this was needed in connection with a SANDAG project or presented a "conflict" with SANDAG projects approved under NCTD's "sole and absolute discretion and confirmed consistent with SANDAG." (See Provisions 2 and 15, Proposed License Agreement as of February 28, 2022). It also included provisions whereby Del Mar would have to waive rights under numerous laws, and relinquish any right to sue over the damaging effects of train vibration (NCTD had announced it planned to double the frequency of trains).⁴ Thus, NCTD's bland description in the NCTD Update of the City's obligations under the Proposed License Agreement as "acceptance of liability for use of NCTD's right of way for an upper bluff trail and maintenance" *greatly understates* the impact on Del Mar of the terms and conditions demanded in the Proposed License Agreement.

Though the parties continued to negotiate up until Del Mar City Council's February 28, 2022 meeting, the dispute on certain key terms was not bridged. After voluminous and robust input and comments from Del Mar residents, at the public hearing on February 28, 2022, the Del Mar City Council rejected the Proposed License Agreement.⁵

⁴ NCTD also ironically insisted that Del Mar comply with California's environmental laws and its own local laws which NCTD seeks to escape in this action (Del Mar did not object to this provision).

⁵ As NCTD's Update states, the Coastal Commission sent a letter dated February 28, 2022 supporting the concept of a license agreement. However, this could not have been construed as any comment or imprimatur on the Proposed License Agreement's terms and conditions; the Coastal Commission reiterated that NCTD must still seek a Coastal Development Permit before proceeding with fencing.

There is no emergency to decide this case. NCTD's strategy clearly has been to threaten Del Mar with a maximally environmentally damaging fence on its scenic and fragile Upper Bluff in order to induce it to accept a Proposed License Agreement with terms and conditions Del Mar found to be unacceptable and that a state funded agency should not be attempting to impose on a city. In other words, the NCTD Board voted on January 20, 2022 to proceed with the most environmentally damaging option, to ignore the California Attorney General's warning letter warning it that a vote to proceed with fencing would be in violation of both law and contract, and to refuse compliance with California's environmental laws, if Del Mar did not agree to its terms and conditions. NCTD gave an extension to February 28, 2022 for Del Mar to rethink its position and subject itself to a shorter, less intrusive fence on the Upper Bluff in return for a broad and significant relinquishment of valuable rights.

Thus, while a mediator could possibly bridge the gap in agreement on terms of a license agreement, it is clear that NCTD's "emergency" for fencing against train accidents, on which it bases its plea for an expedited ruling in its favor, is entirely manufactured. As shown above, NCTD has neither intention nor funding to address train strikes with fencing at track level in the area of the accidents, or any significant fencing at track level for more than two years. Rather, it has fabricated an "emergency" to try induce Del Mar to yield to its terms and conditions and is disingenuously arguing that "emergency" to press for a quick decision in a complex matter raising significant issues.

In the NCTD Update, NCTD also pointed to a recent incident where an individual was rescued from a portion of the Bluff in front of private property owned by the Torrey Pacific Corporation ("Torrey Pacific"). NCTD stated: "a person fell from the bluffs at a location where a safety fencing will be located..."(NCTD Update, p.4). This is unsupported and untrue.

The area from which the individual was rescued was on the bluff face in front of private property owned by the Torrey Pacific, south of the Upper Bluff, not on the Upper Bluff or below it. The Torrey Pacific property is entirely fenced on three sides with 6-to-8-foot-high fencing, including the area to its north that abuts the Upper Bluff, except for the portion of that property that faces west to the ocean, which is not fenced. As reported by Del Mar City Councilmember Terry Gaasterland, an NCTD Board member, at the last 10

minutes before the NCTD's March 17, 2022 Board meeting, based on inquiry of rescuers, the individual **climbed up** the Bluff from track level in front of the Torrey Pacific property. The presence or absence of a fence on the Upper Bluff had nothing to do with the climber's self-created predicament.⁶ Notably, the existence of 6-foot-high fencing on the Torrey Pacific property impeded the rescue and had to be partially destroyed to get to the woman. Thus, Upper Bluff fencing would not have prevented the incident and it provides no support for expediting the STB's decision. Moreover, a one-off incident caused by a person intent on undertaking undue risk should not drive any important decision and is no reason to accelerate consideration of this matter.

Nor should the STB expedite this proceeding based on administrative proceedings initiated by the Coastal Commission. NCTD chose to gamble that the Coastal Commission would take no action after the California Attorney General warned the NCTD's Board not to proceed to approve a fencing contract without compliance with California law. NCTD should bear the consequences of that gamble.

Respectfully submitted,

March 23, 2022

Shirli F. Weiss

_____/S_____

Shirli.Weiss@gmail.com

March 23, 2022

Laura Schaefer

_____/S/_____

LS@boyce-schaefer.com

⁶ <https://www.youtube.com/watch?v=YdyeLoAir1s>

I CERTIFY THAT I HAVE ON MARCH 24, 2022, SERVED COPIES OF DEL MAR CITIZENS' REPLY TO NCTD SUPPLEMENTAL STATUS REPORT DOCUMENT UPON ALL PARTIES OF RECORD IN THIS PROCEEDING, BY EMAILING A COPY OF THE DOCUMENT TO ALL PERSONS ON THE SERVICE LIST FOR DOCKET FD 36433.

Dated: March 24, 2022

_____/s/_____
Laura Schaefer

ATTACHMENT 1



Approve Job Order No. 21009-005 to Exbon Development, Inc. for Right-of-Way Fencing Installation in the City of Del Mar

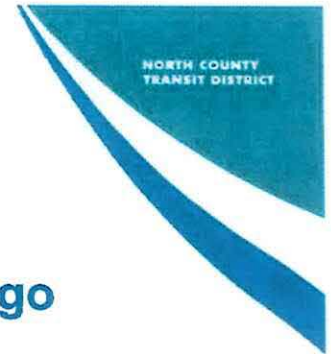
Regular Board Meeting
January 20, 2022

COASTER SPRINTER BREEZE FLEX LIFT

NORTH COUNTY
TRANSIT DISTRICT

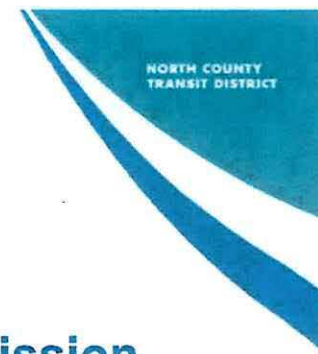
810 Mission Avenue, Oceanside, CA 92054 | (760) 966-6500 | GoNCTD.com

Correspondence Summary



- **January 5, 2022 - California Coast Commission (CCC) to San Diego Association of Governments (SANDAG):**
 - Stated stabilization projects and fencing collectively have the potential to result in significant adverse impacts to coastal access and recreation
 - Requested SANDAG to analyze the fencing in conjunction with the Del Mar Bluffs Stabilization 5 and 6 projects and incorporate the findings of the Coastal Connections Study
- **January 11, 2022 – NCTD to California Coastal Commission:**
 - CCC in coordination with the City of Del Mar continues its efforts to require NCTD to fund costs to create safe and legal crossings that do not currently exist as a condition for NCTD completing maintenance and safety improvements
 - SANDAG does not have the authority to agree that the Del Mar Bluffs Stabilization projects and fencing project be integrated



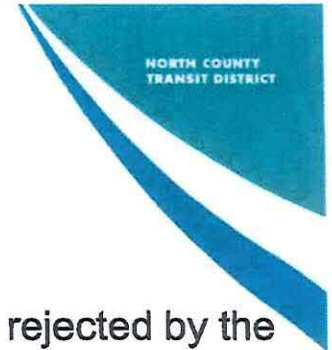


Surface Transportation Board

- **Surface Transportation Board (STB) Settlement Discussion Agreement entered into between NCTD, California Coastal Commission (CCC) or the City of Del Mar in 2020:**
 - The Agreement and term of the stay of the STB matter was extended to December 31, 2021
 - CCC, City of Del Mar and NCTD working group established in February 2021
 - Regular meetings and multiple stakeholder site walks
 - Mapping of fencing with property boundaries and visual impact modeling presented to the City of Del Mar and NCTD Board in October 2021
 - **No agreement reached with the City of Del Mar and CCC for resolution by end of the STB Agreement stay order on December 31, 2021**



Correspondence Summary

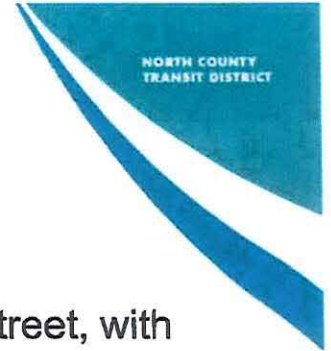


- **January 4, 2022 – NCTD to City of Del Mar:**

- NCTD confirming the offers and negotiated positions from the Working Group are rejected by the City of Del Mar and the matters are closed
- Reiterated the only acceptable offer acceptable to NCTD:
 - Implementation of the modified fencing plan developed in collaboration with the Working Group
 - Cost of construction of the fencing will be funded 100% by NCTD
 - City of Del Mar would be solely responsible for maintenance of the fence and the portions of the right of way covered under the License Agreement
 - City of Del Mar will assume liability for use of NCTD's right of way as originally written in License Agreement
- NCTD staff will move forward with January 20, 2022 Board agenda fencing item



Correspondence Summary



• January 11, 2022 – City of Del Mar to NCTD:

- Proposes limiting the installation of fencing from Coast Boulevard to 13th or 11th Street, with increased safety signage
- Proposes only demarcation fencing and safety signage for the entire upper bluffs
- Defer consideration of fencing beyond 11th street until completion of the SANDAG Coastal Connections Study (Summer 2022)
- City will not agree to accept maintenance responsibilities without additional information:
 - Construction drawings for fencing
 - Material and manufacturer specifications related to fencing
 - Civil or structural engineer design plans for fencing
 - Licensed professional surveys, maps or legal descriptions related to the fencing
- Environmental review and geotechnical analysis



City of Del Mar Information Requests

NORTH COUNTY
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Fencing Design and Construction Plans

Fencing construction to be performed under a job order contract (JOC)

- Does not require engineered drawings for installation
- ROW mapping performed by Civilpros, provides basis for construction
- For areas close to property lines, JOC contractor will complete a field land survey for NCTD right-of-way boundary limits
- Same approach used with Oceanside and Encinitas fencing projects

Fencing Types

Fencing types and material were reviewed at the October Del Mar City Council and NCTD Board meetings

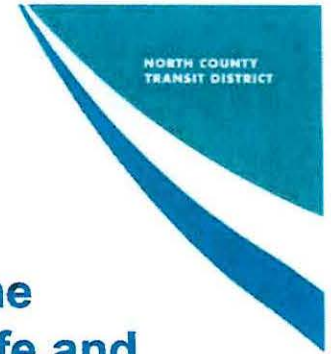
- Detail was also reviewed within the Working Group
- Information has been posted on NCTD's website since October

Geotechnical Analysis

Geotechnical Assessment was performed by Leighton Consulting

- Geotechnical Assessment concludes that fencing:
 - Will not impact the stability of the bluffs or trackbed support
 - Will not promote additional erosion/bluff retreat
- The City of Del Mar provided an opinion report, not based upon any geotechnical analysis of data
- Leighton Consulting has provided further detail that clarifies the in-depth knowledge and analysis completed in support of their original assessment



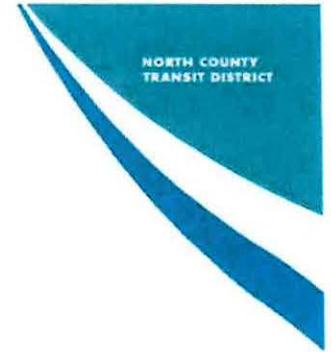


Safe and Legal Access

- **NCTD and the City of Del have had ongoing discussions since the early 1990s about railroad trespassing and the need to create safe and legal access**
 - <https://gonctd.com/wp-content/uploads/2021/02/Summary-of-Historical-Documents-Del-Mar.pdf>
- **NCTD continues to support the SANDAG Coastal Connections study**
 - **The study will deliver:**
 - Summary and map showing each potential conceptual alignment
 - Preliminary cost estimates
 - Alternative evaluation and recommendation
 - **The study is anticipated to be completed Summer 2022**



Safe and Legal Access



- **After completion of the study, the City of Del Mar will need to:**
 - **Secure project funding**
 - **Initiate & complete design**
 - **Secure all regulatory approvals**
 - **Secure agreements from NCTD for use of NCTD right-of-way, assuming all liability and maintenance**
 - **Commence construction**



Safe and Legal Right-of Way Access and Crossings

Agreement Year	Jurisdiction	Improvement Type	Funded By NCTD (Y/N)	Maintenance & Liability Responsibility
2000	Oceanside	Undercrossing	N	City of Oceanside
2013	Encinitas	Undercrossing	N	City of Encinitas
2019	Encinitas	Undercrossing	N	City of Encinitas
2003	Solana Beach	Overhead Crossing	N	City of Solana Beach
2005	Solana Beach	Overhead Crossing	N	City of Solana Beach
2021	Solana Beach	Undercrossing	N	City of Solana Beach
2008	Escondido	Trail with fencing	N	City of Escondido
2009	San Marcos	Trail with fencing	N	City of San Marcos
2016	Vista	Trail with fencing	N	City of Vista
2001, 2006, 2017, 2018	Oceanside	Trail with fencing	N	City of Oceanside
2005, 2010	Carlsbad	Trail with fencing	N	City of Carlsbad
2017, 2020	Encinitas	Trail with fencing	N	City of Encinitas
2001	Solana Beach	Trail with fencing	N	City of Solana Beach



Original Fencing Plan

- **Original Fencing Plan:**
 - 12,960 linear feet of fencing
 - 6' chain link along right-of-way property lines
 - Construction phasing not considered



Modified Fencing Plan

- **Modified Fencing Plan (Developed by Working Group - including CCC & City of Del Mar)**

- 6,748 linear feet of fencing and fall protection
 - Combination of fencing styles & heights
 - 3,163 linear feet of 4 foot high or less
- Adjusted fence locations towards right-of-way to minimize visual impacts
- Implemented in two phases
 - Phase 1
 - 3,723 linear feet (combination of 4' high black vinyl coated chain link fence, 6' high black welded wire mesh fence and 2'8" high single-strand wood post and cable trail guide fence)
 - Construction to commence within 3-4 months from Board approval
 - Phase 2
 - 3,025 linear feet of 6' high black welded wire mesh fence
 - Construction to commence in approximately 2 years following completion of the next phase of bluff stabilization



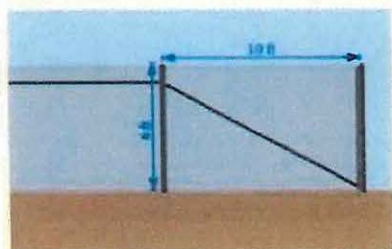
Fencing Recommendation

- **With no agreement reached with the City of Del Mar for acceptance of liability for use of NCTD property along the upper bluffs and alternative fencing types, the recommended Fencing Plan includes:**
 - All 6,748 linear feet of modified fencing plan be 6' black vinyl chain link and welded wire fence, with the exception of 4' black vinyl chain link fence within 150' of a crossing
 - Implemented in two phases
 - **Phase 1**
 - 3,723 linear feet (combination of 4' high black vinyl coated chain link fence and 6' high black welded wire mesh fence)
 - Construction to commence within 3-4 months from Board approval
 - **Phase 2**
 - 3,025 linear feet of 6' high black welded wire mesh fence
 - Construction to commence in approximately 2 years following completion of the next phase of bluff stabilization



6' Fence Types

Black vinyl chain link



Straight-on View

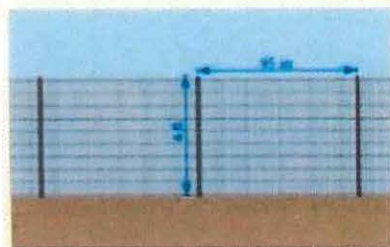


Perspective View



Simulated

Black welded-wire mesh



Straight-on View



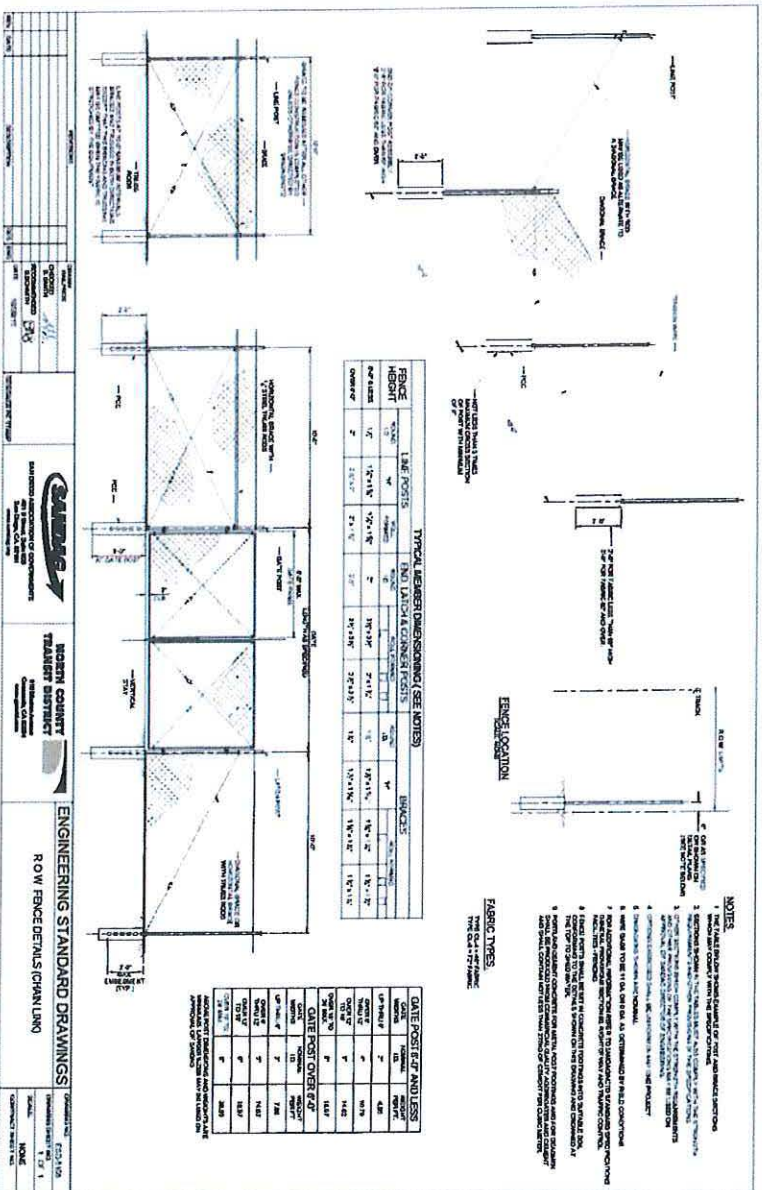
Perspective View



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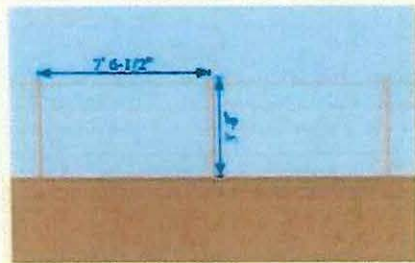


6' Fence Engineering Standard Drawing



Post and Cable Fence Types

Steel posts



Straight-on View

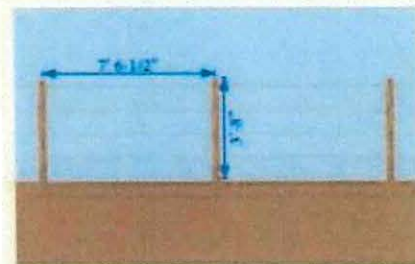


Perspective View



Simulated

Wood posts



Straight-on View



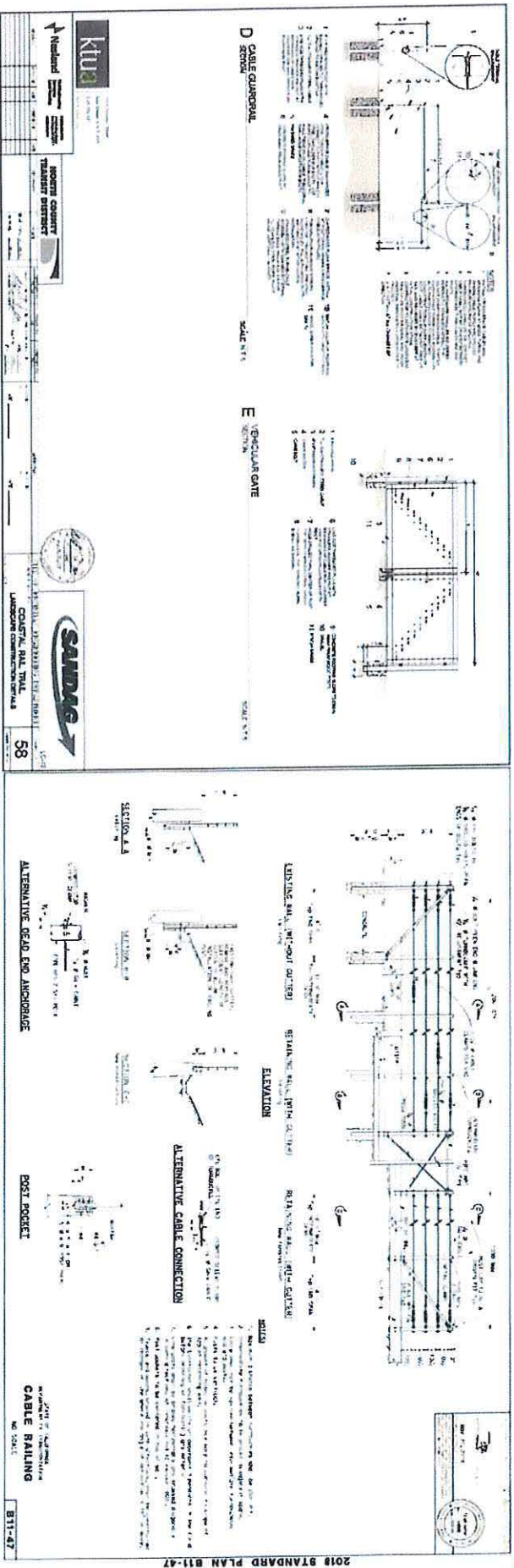
Perspective View



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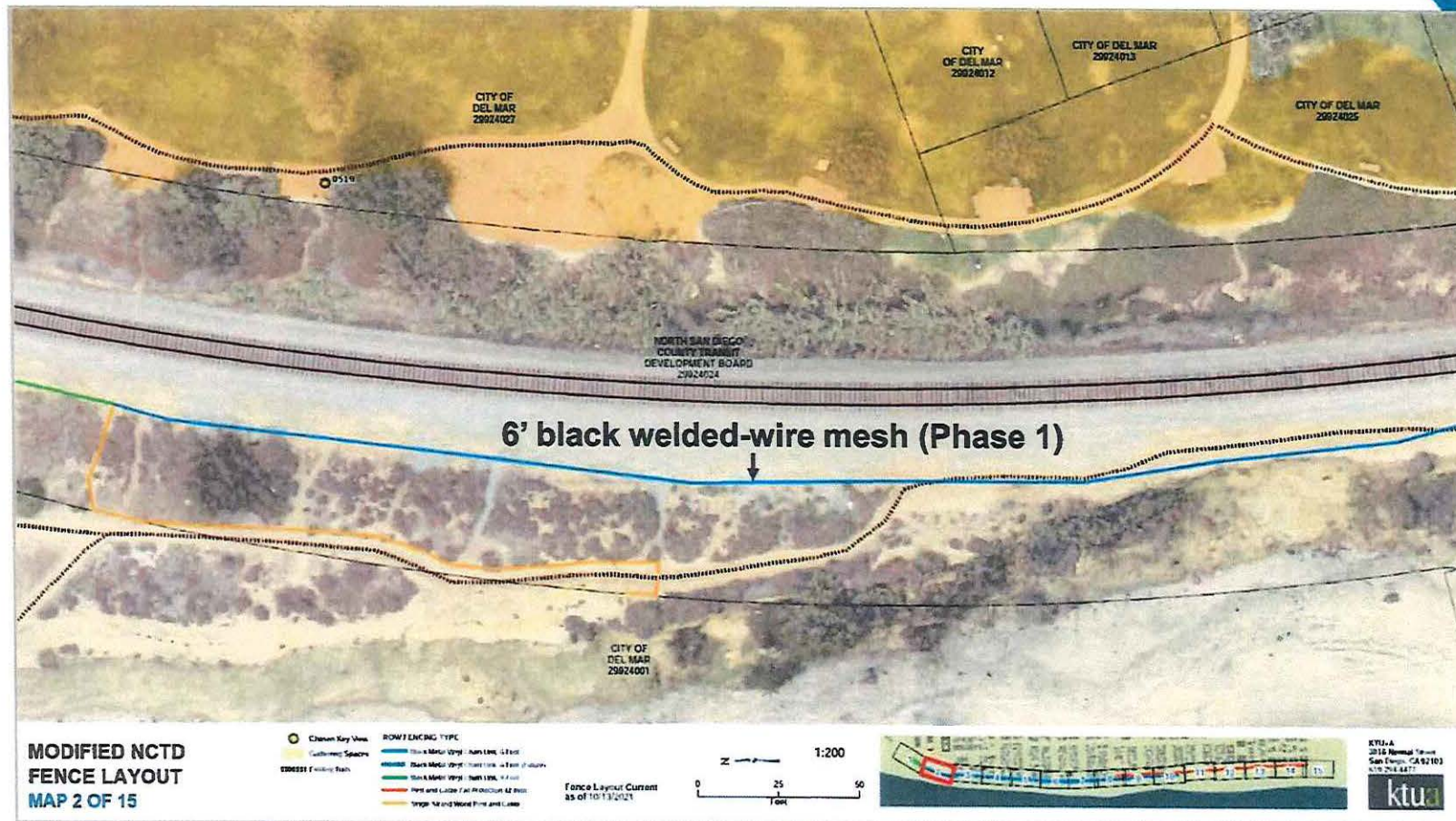


Post and Cable Detail Drawings



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Fence Maps

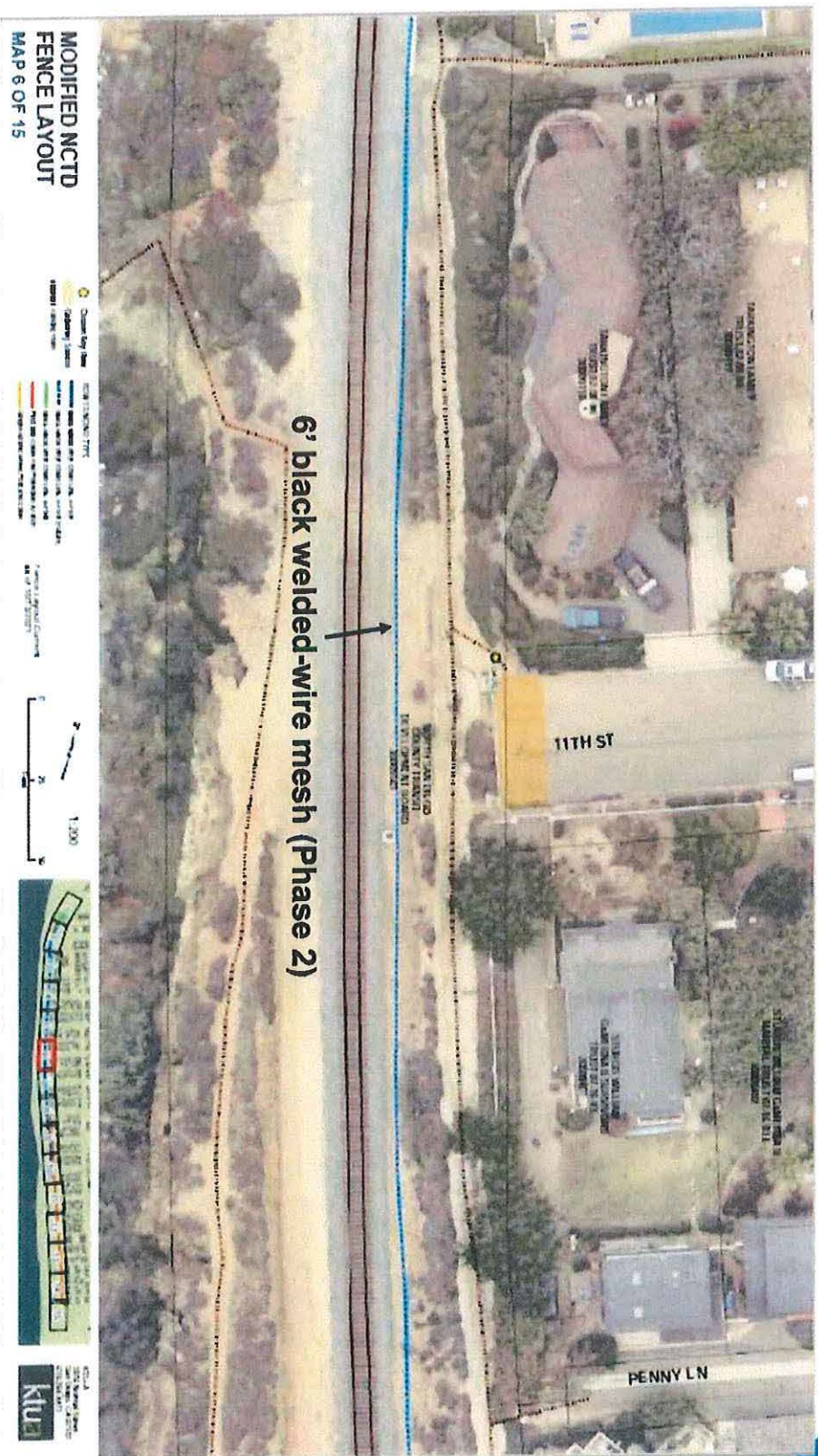


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Fence Maps

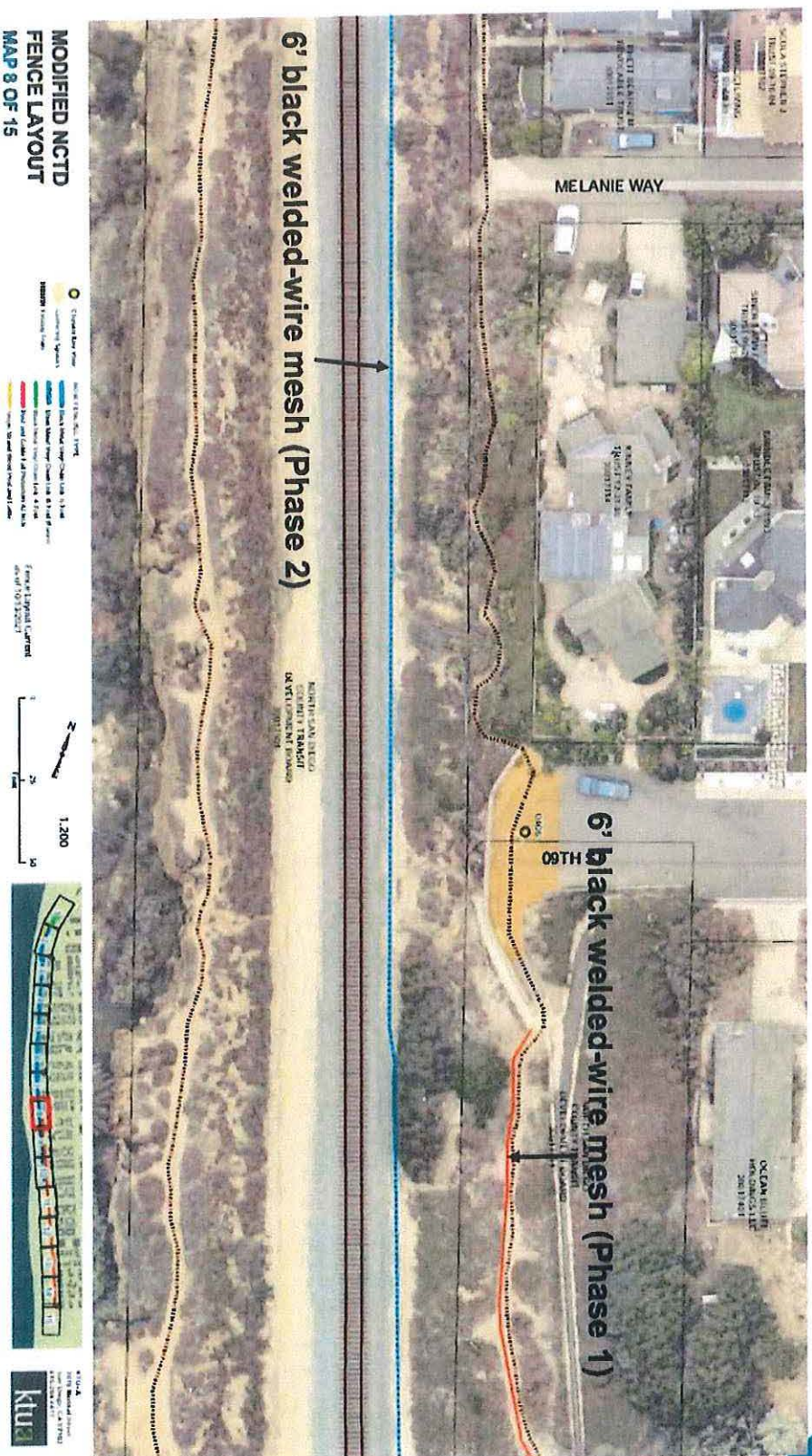
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Fence Maps



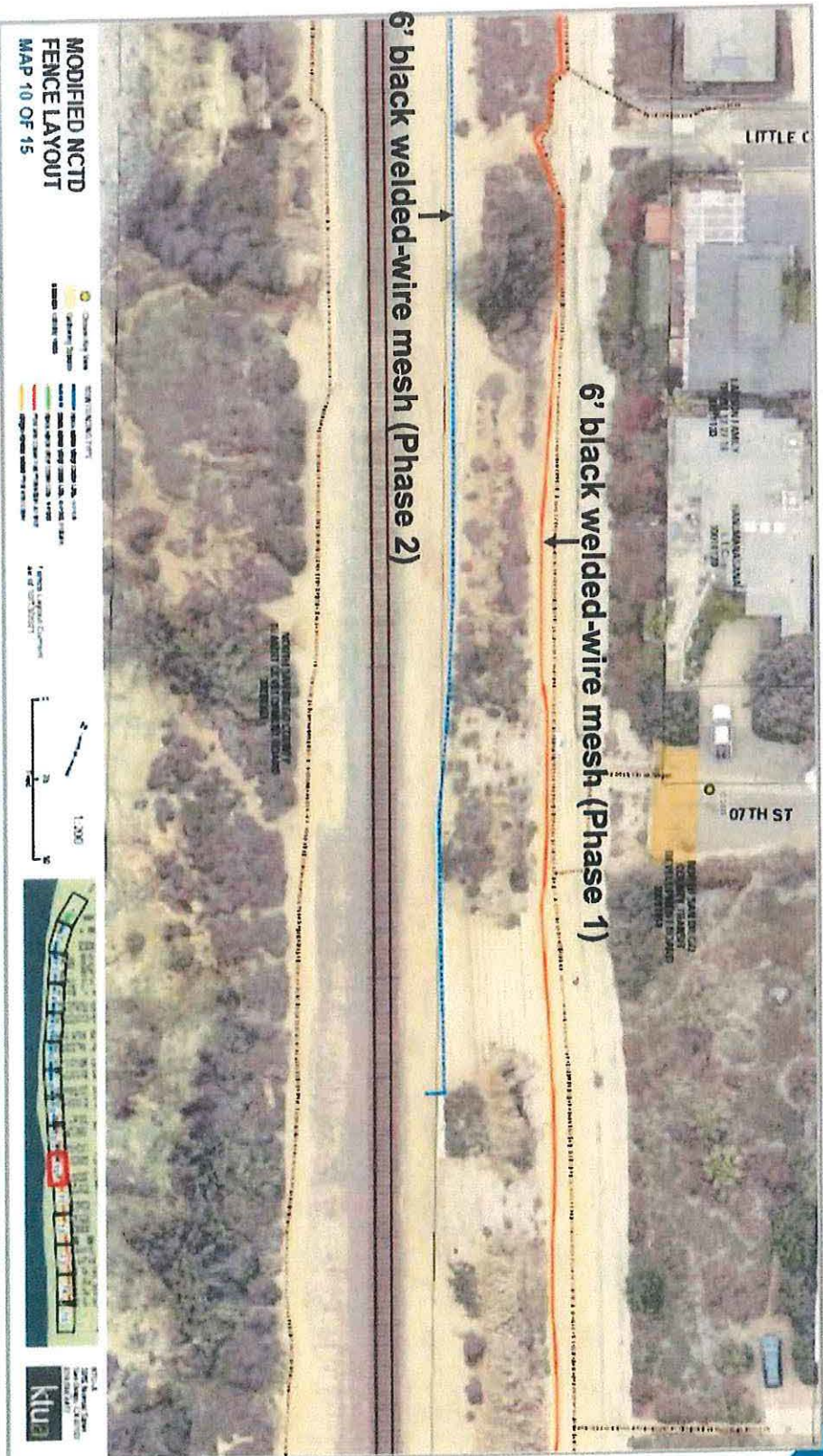
Fence Maps

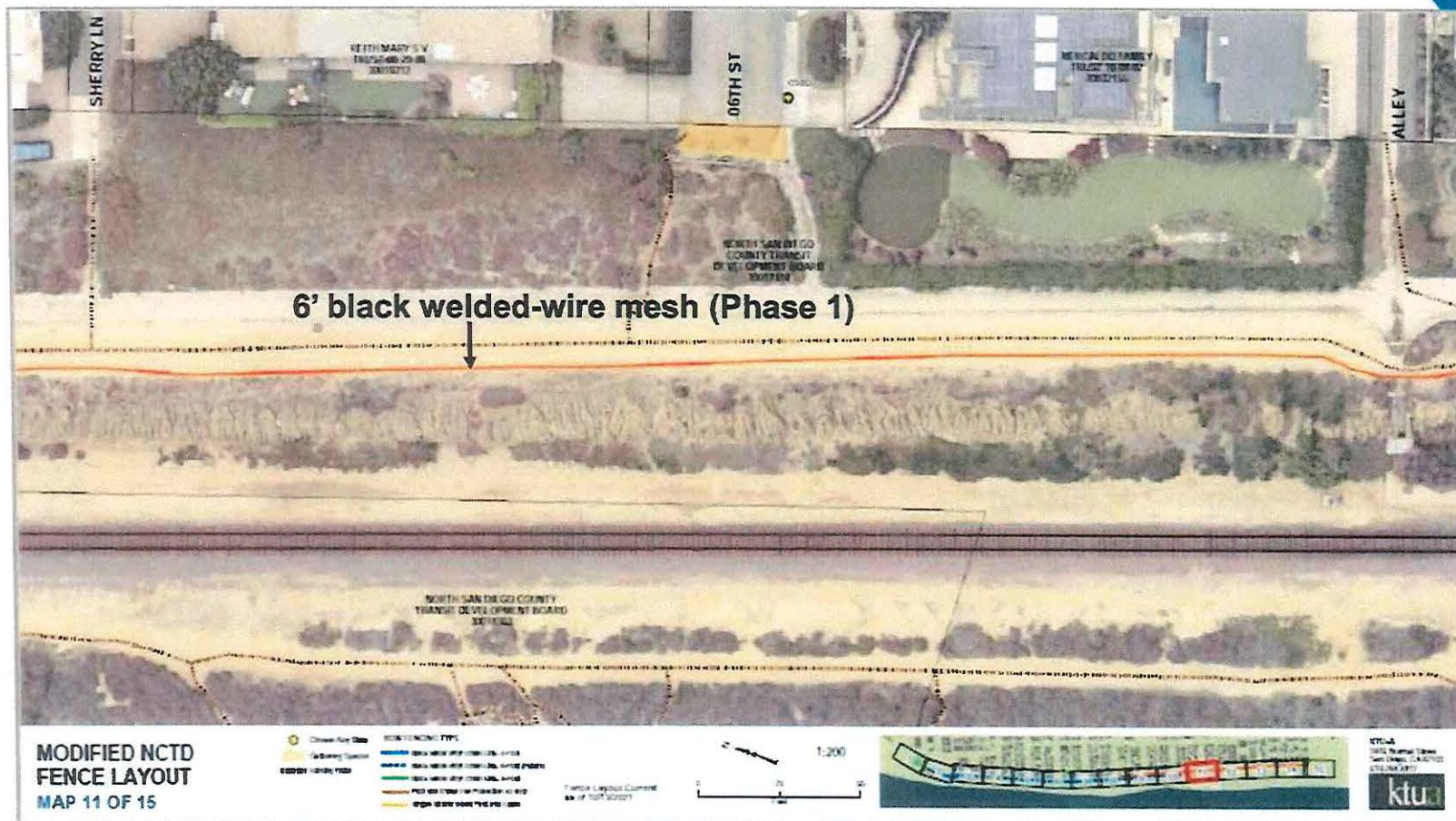


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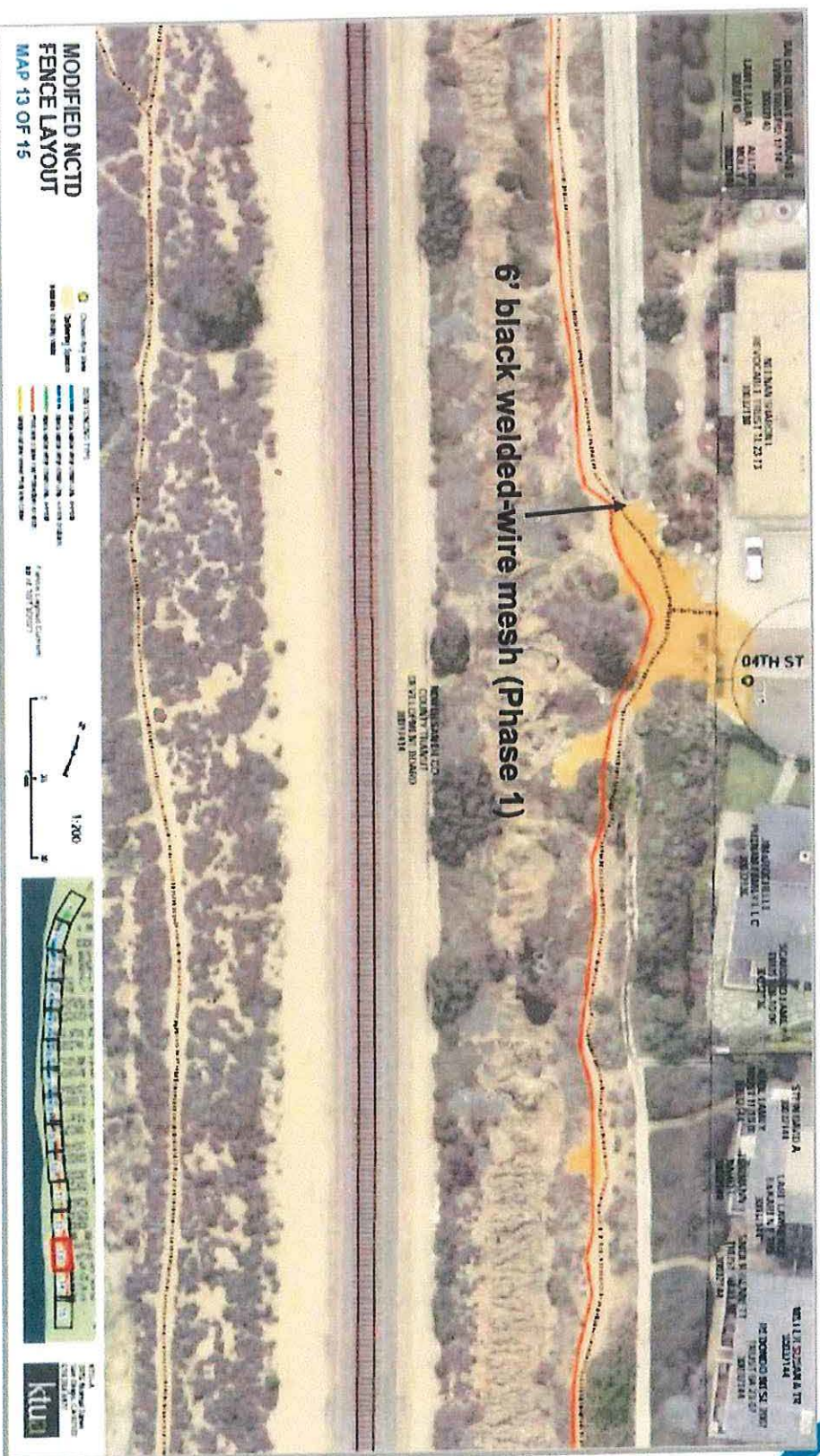


Fence Maps





Fence Maps

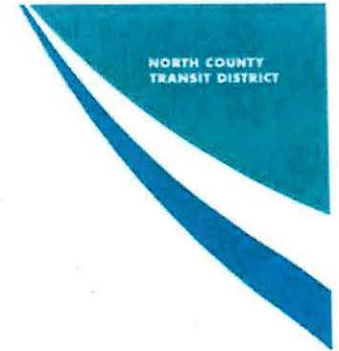


Fence Maps

6' black welded-wire mesh (Phase 1)



Staff Recommendation



- **Staff recommends that the Board of Directors:**

1. Approve Job Order No. 21009-05 to Exbon Development, Inc. for the Phase 1 right-of-way (ROW) fencing installation in the City of Del Mar, which includes a total of 3,723 linear feet (LF) of fencing in an amount not-to-exceed \$1,479,918 as follows:
 - a. 230 LF of 4' high black vinyl coated chain link fence;
 - b. 3,263 LF of 6' high black welded wire mesh fence; and
 - c. 230 LF of 2'8" high single-strand wood post and cable trail guide fence; and
2. Authorize the Executive Director to negotiate and execute an agreement for the Phase 2 ROW fencing installation in the City of Del Mar, which includes a total of 3,025 LF of 6' high black welded wire mesh fence, following review and approval by General Counsel and subject to future funding availability, in an amount not-to-exceed \$1,646,419



Questions?

