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[DRAFT] ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COLTON ESTABLISHING POLICY RELATING TO THE USE OF LAND FOR ENDANGERED SPECIES MITIGATION, REPEALING URGENCY ORDINANCE NO. \_\_\_ AND ADDING CHAPTER 18.31 TO THE COLTON MUNICIPAL CODE ESTABLISHING REQUIREMENTS FOR THE REVIEW OF LAND TO BE USED AS OPEN SPACE MITIGATION FOR SPECIES CONSERVATION**

THE CITY COUNCIL OF THE CITY OF COLTON DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council of the City of Colton hereby adopts this Ordinance based on the following:

1. The Inventory of Natural Resources utilized by the United States Fish and Wildlife Service ("Service"), indicates that certain properties in the City of Colton ("City") may have a soil type that is conducive to habitat for the Delhi Sands Flower Loving Fly ("Habitat"), a federal endangered species. Other land in the City may be habitat for other state and/or federal endangered species, including, but not limited to, the San Bernardino Kangaroo Rat, the Santa Ana Sucker Fish and the Santa Ana River Wooly Star. No habitat area, however, contains as much land for a single species than the habitat area, according to the Service, may be needed for the Delhi Sands Flower Loving Fly ("Delhi Fly").

2. Conservation easements and other contractual mechanisms have been proposed to prevent habitat destruction and thereby enhance protection for the Delhi Fly and other endangered species ("habitat conservation"). Such habitat conservation preserves potential habitat by restricting the use of property to conservation purposes in perpetuity. Habitat conservation often occurs within the context of mitigation for development (including its attendant habitat destruction) elsewhere. (United States Department of the Interior, Fish and Wildlife Service, Pacific Region, Final Recovery Plan for the Delhi Sands Flower-Loving Fly, 1997 ("Recovery Plan"), at pp. 11-12.) As noted above, potential habitat exists within the City. Therefore, habitat conservation may occur within the City.

1           3. Land set aside for habitat conservation requires careful  
2 management and monitoring to provide actual habitat value for endangered species.  
3 According to the Service, in most cases, “listed species and their habitat cannot be  
4 conserved without management of the conservation property.” (United States  
5 Department of the Interior, Fish and Wildlife Service, Guidance for the Establishment,  
6 Use, and Operation of Conservation Banks, May 2, 2003 (“Conservation Bank  
7 Guidance”), at p. 12.) For example, Delhi Fly habitat must be kept free of trash, non-  
8 native vegetation, and trespassers, otherwise damage to the soil or individual flies may  
9 result. (Recovery Plan, at pp. 8-10.) Unfortunately, not all potential habitat is currently  
10 being protected against such threats in the City. City Staff has, in fact, observed  
11 potential habitat that is unmanaged within the City to contain trash, vagrant  
12 populations, unauthorized recreational off-roading, and invasive non-native vegetation.  
13 Therefore, left unmanaged, land ostensibly set aside to preserve endangered species  
14 habitat may in fact not support but instead harm the species and deteriorate to nuisance  
15 conditions.

16           4. While the Service recognizes the need for extensive habitat  
17 management in its Conservation Bank Guidance, the City recognizes that not all habitat  
18 conservation will occur pursuant to the Service’s Conservation Bank Guidance. The  
19 California Civil Code, for example, does not currently require consultation with any  
20 specialized agencies prior to encumbering property with a conservation easement. (Cal.  
21 Civ. Code, § 815 et seq.) The City, therefore, recognizes a need to create a mechanism to  
22 allow the City to regulate the establishment of conservation uses for the benefit of  
23 endangered species.

24           5. Even when proposed habitat conservation involves the appropriate  
25 wildlife agencies, such as the California Department of Fish and Game or the Service,  
26 City involvement may nevertheless be necessary to ensure protection of the species.  
27 According to the Service, “[s]ites that otherwise appear to be good locations for  
28 conservation banks may turn out, on closer examination, to be inappropriate because of  
anticipated land use changes in the surrounding area.” (Conservation Bank Guidance,  
at p. 5.) As an agency charged with land use regulation, the City can offer its expertise  
and information regarding the proper location of proposed habitat conservation.

          6. Just as special management measures may be required to protect  
endangered species, protective measures might also be required to address impacts  
caused by habitat conservation itself. For example, lands set aside for the Delhi Fly may  
require rough grading to loosen compacted soil. (See, e.g., Colton Dunes Conservation  
Bank Agreement, Exhibit F, Habitat Enhancement and Management Plan for Colton  
Dunes Habitat Preserve, San Bernardino County, California, March 23, 2005, at p. 33.)

1 Such grading, by stirring up dust, may cause adverse air quality impacts since the City  
2 lies within a non-attainment area for particulate matter. (South Coast Air Quality  
3 Management District, 2003 Air Quality Management Plan, at pp. 2-14 to 2-17.) Similarly,  
4 removal of non-native vegetation may be required to meet the Delhi Fly's habitat  
5 requirements. (Recovery Plan, at p. 6.) Thinning vegetation in the habitat area may,  
6 however, increase the potential for stormwater erosion and sedimentation, which  
7 adversely affects water quality. (California Regional Water Quality Control Board, Santa  
8 Ana Region, Order No. R8-2002-0012, at p. 53.) While the City regularly addresses  
9 potential air and water quality impacts in performing its land use planning functions,  
10 property owners and wildlife agencies do not.

11  
12 7. The Service recognizes the importance of concurrent local regulation  
13 of conservation activities. According to the Conservation Bank Guidance:

14 Conservation banks covered by this policy are those established to meet  
15 the requirements of the ESA. State or local laws may also impose  
16 requirements that can be met by the measures provided for in a  
17 conservation bank. When that is the case, the Service requires that the  
18 relevant state or local government entity be given an opportunity to  
19 participate in the development of a conservation banking agreement and to  
20 become a party to it. The Service will coordinate its requirements with  
21 those of State or local government entities to the extent possible in order to  
22 minimize expenses, burdens, or duplicative requirements for bank  
23 sponsors, project proponents, and other governmental agencies. Although  
24 the Service will encourage the appropriate State and local governmental  
25 agencies to participate in the development of conservation banking  
26 agreements and to become parties to them, the failure of such other  
27 agencies to participate in developing, or to sign an agreement that  
28 otherwise meets the requirements of this policy and of the ESA, shall not  
preclude the Service from entering into such an agreement.

(Conservation Bank Guidance, at pp. 11-12 (emphasis added).) Thus, federal, state and  
local regulation of conservation activities may properly overlap. Similarly, regulation of  
conservation activities by local government will not interfere with protection of  
endangered species. The City does not desire to, nor could it legally interfere with the  
Service's activities under the Federal Endangered Species Act.

8. In addition to the physical impacts caused by habitat conservation  
and management, habitat conservation may also disrupt land use planning by altering  
the assumptions on which a general plan is based. For example, the City's General Plan

1 must demonstrate that it has sufficient developable land available to satisfy its projected  
2 housing need. (Gov. Code, § 65583, subd. (a)(3).) If the City's Community Development  
3 Department were unaware that a site was encumbered by a conservation easement, a  
4 shortage of developable residential property may result. Conversely, if the City's  
5 Community Development Department learned that a conservation easement was  
6 created on land that was originally designated as residential, it may be appropriate to  
7 allow industrial or commercial uses on adjacent parcels. Another potential planning  
8 challenge posed by conservation easements is their duration. While general plan  
9 designations may be amended to reflect current conditions and community need,  
10 conservation easements limit use of the affected land in perpetuity. (Cal. Civ. Code, §  
11 815.2, subd. (b).) Thus, conservation efforts that occur without a local jurisdiction's  
12 knowledge may severely disrupt its planning activities.

13  
14 9. Property owners and wildlife agencies may currently enter into  
15 conservation agreements without any input from the City, and as a result, the adverse  
16 impacts discussed above may be overlooked in the establishment of habitat conservation  
17 uses. Additionally, no reasonably convenient mechanism currently exists to allow the  
18 City to track the number, size, and length of time that properties are encumbered by  
19 such contracts and conservation easements. While conservation easements must be  
20 recorded at the County Recorder's office, the City's limited resources and limited  
21 searchability of the County's records make regular and frequent records searches  
22 financially infeasible.

23  
24 10. In May of 2004, the City Council directed its Planning Staff to  
25 undertake a comprehensive analysis and revision of the Land Use Element of the  
26 General Plan. Since that time, staff and the City's General Plan consultants have been  
27 working to gather information and prepare development scenarios for consideration by  
28 the Planning Commission and City Council. City staff and the City's General Plan  
consultants are at the stage where they are analyzing data for the development of  
recommendations for proposed development scenarios and land uses. These  
development scenarios include making recommendations about proposed land uses and  
building intensities for proposed land use designations. At the same time, staff has  
learned that property within the City is being set aside as habitat conservation in areas  
that are currently designated for other types of development. For example, more than 60  
acres within the City have been encumbered by a conservation easement in perpetuity  
for Delhi Fly habitat. The City did not learn about the conservation easement until after  
it had already been recorded.

11  
12 11. City staff anticipates that more acreage within the City will be  
13 encumbered by such habitat conservation. In fact, a recent Biological Opinion provided

1 by the U.S. Fish & Wildlife Department notes that “[I]n most cases, substantial  
2 additional land will need to be acquired to ensure long-term conservation of existing  
3 [Delhi-Sands Flower Loving Fly] populations.” (Source: Slover Avenue Biological  
4 Opinion, pp. 11, emphasis added.) For the reasons explained above, habitat  
5 conservation may severely impact the City’s planning efforts at a time when data for  
6 determining appropriate land uses and land use intensity is being gathered and  
considered, unless a mechanism is created to track land that becomes unavailable for  
development due to it being encumbered as habitat conservation.

7 12. The City Council reaffirms its commitment to preserving Habitat for  
8 the Delhi Fly and other endangered species. At the same time, the City Council desires  
9 to reconcile conservation efforts by private individuals with the City’s obligation under  
10 California Planning & Zoning Law to prepare and adopt a comprehensive, long-term  
11 general plan for the physical development of the City containing all of the mandatory  
12 elements required by law (California Government Code, Section 65300 et seq.). The  
13 City’s General Plan is required to include, in part:

14 “A land use element that designates the proposed general  
15 distribution and general location and extent of the uses of the  
16 land for housing, business, industry, open space, including  
17 agriculture, natural resources, recreation, and enjoyment of  
18 scenic beauty, education, public buildings and grounds, solid  
19 and liquid waste disposal facilities, and other categories of  
public and private uses of land. The land use element shall  
include a statement of the standards of population density and  
building intensity recommended for the various districts and  
other territory covered by the plan....”

20 (Cal.Gov. Code, § 65302(a).)

21 13. The City Council is concerned that if private property owners  
22 encumber their properties through habitat conservation easements or other agreements,  
23 the City’s long-term land use planning will be detrimentally affected. Specifically, the  
24 City Council is concerned that without a mechanism that identifies the level and extent  
25 of habitat conservation occurring on property, the City’s General Plan and the  
26 assumptions upon which General Plan decisions are made will be obsolete and  
incorrect.

27 14. The City Council also wants to assure that persons who establish  
28 habitat conservation areas for the purpose of mitigating impacts to endangered species

1 do so in a way that protects the species and its surrounding environment. Similarly,  
2 since habitat conservation is sometimes established to allow destruction of viable habitat  
3 elsewhere, the City Council desires to ensure that only conservation easements that  
4 incorporate the measures necessary to protect the species serve as mitigation for  
development.

5 15. The City Council originally adopted Urgency Ordinance No. O-02-  
6 06 on January 17, 2006 to accomplish the goals discussed above. The City Council found  
7 that ordinance to be exempt from the California Environmental Quality Act ("CEQA")  
8 as an action by a regulatory agency to protect the environment and that involves the  
9 creation of open space, and under the general rule that CEQA does not apply to  
10 activities having no adverse effect on the environment. (State CEQA Guidelines, §§  
11 15064(b)(3), 15308, 15317.) Following a challenge to the City's CEQA determination, the  
12 Superior Court of San Bernardino County concluded that the exemptions on which the  
13 City relied in adopting ordinance No. O-02-06 did not apply. (Calmat v. City of Colton,  
14 et al., San Bernardino County Superior Court, Case No. SCVSS135476.) The court  
15 reached that conclusion in part because it found that the ordinance as drafted could  
16 interfere with efforts to protect the Delhi Fly. Accordingly, the court ordered the City to  
17 rescind the ordinance.

18 16. The City Council finds that the conditions that motivated adoption  
19 of the original ordinance, as described above, continue to exist. In particular, (1)  
20 potential habitat for the Delhi Fly and other endangered species still exists within the  
21 City, (2) careful management of conservation habitat is still necessary to protect  
22 endangered species and the City's natural environment, (3) without a tracking  
23 mechanism, habitat conservation may still interfere with the City's on-going General  
24 Plan Update process, and (4) unsuitable property may still be designated as "habitat" to  
25 mitigate destruction of habitat elsewhere. Therefore, the City Council has revised  
26 Ordinance No. O-02-06 to clarify its intent in adopting this habitat ordinance, and to  
27 clarify the circumstances governing the issuance of a permit for habitat conservation  
28 under the ordinance.

17. Consequently, the City Council finds that this Ordinance is  
necessary to promote the immediate preservation of the public peace, health and safety  
to protect endangered species found in the City, by providing the City with a  
mechanism to discover inconsistencies with its current and long-range planning  
documents and efforts, to immediately preserve the public's interest in the development of an  
accurate general plan document, protect species restoration efforts and the environment in  
general in the City of Colton.

1                    SECTION 2. General Plan Consistency Findings. The City Council of the  
2 City of Colton finds that adoption of this Ordinance is consistent with City of Colton  
3 General Plan and applicable specific plans containing open space land use designations,  
4 including the following policies and goals:

5                    1.        Open Space & Conservation Element General Objective (City of  
6 Colton, General Plan, at p. 6-5): “To establish and maintain an open space and  
7 conservation system which will ensure the conservation and wise utilization of valuable  
8 resources and will meet local and regional open space needs[;]” and

9                    2.        Plan Proposals – 2(a) (Id. at p.6-7): “Regulation shall be used to  
10 maintain open space requiring:

11                    (a)       An amendment to the Colton Zoning Ordinance designating an  
12 Open Space Zone District....”

13                    This ordinance implements these open space and conservation policies by  
14 establishing a regulatory mechanism to track and preserve endangered species habitat  
15 while promoting the City’s interests in a comprehensive general plan complying with  
16 the requirements of state law.

17                    SECTION 3. Policy. The City Council of the City of Colton declares that:

18                    A.        Use of land for endangered species habitat conservation, where  
19 such use requires encumbering property for more than one (1) year and/or where such  
20 use would enable the destruction of habitat elsewhere, within the City of Colton shall be  
21 a consistent land use only on land designated as “Open Space” in the City’s Zoning Map  
22 and General Plan or applicable specific plans and within the Endangered Species  
23 Habitat Conservation Overlay District adopted pursuant to Chapter 18.31 of the Colton  
24 Municipal Code. Use of land for habitat conservation for a period of more than one year  
25 shall be inconsistent with all other General Plan or specific plan land use designations,  
26 except as provided in subsection (B) below.

27                    B.        Any person who wishes to encumber land with a habitat  
28 conservation use for more than one (1) year use must apply to redesignate the general  
plan or specific plan land use designation to “Open Space.” If the City has already  
amended its General Plan four times in that calendar year, and thereafter an applicant  
desires to establish a habitat conservation use, the City may condition approval of that  
use on the applicant processing a General Plan Amendment the following calendar year.



1 endangered species, where such use requires prohibiting other land uses for a period of  
2 more than one (1) year by written agreement, contract, easement, lease, license or  
3 covenant, and/or where such use would serve as “mitigation” to enable the destruction  
4 of habitat elsewhere. “Habitat conservation” shall include the purchase or sale of credits  
5 from any conservation bank located within the City for which a permit has not already  
6 been issued pursuant to this Chapter.

7 “Wildlife Agency” means the California Department of Fish and Game and/or the  
8 United States Fish and Wildlife Service.

9 **Section 18.31.030 Zoning requirements; Conditionally permitted uses.**

10 A. Habitat conservation shall be a conditionally permitted use on land  
11 designated as “Open Space” in the General Plan or applicable specific plan and within  
12 the Endangered Species and Plant Overlay District.

13 B. This zone shall be in the form of an overlay zone and shall be established  
14 only in conjunction with another zone and shall be designated on the official zoning  
15 map with the symbol ESP together with the underlying zone symbol, i.e., R-1/ESP.

16 **Section 18.31.040 Conditional use permit requirements.**

17 A. Habitat conservation shall require the submittal and approval of a  
18 conditional use permit prior to the establishment of such use through the execution of  
19 any written agreement, contract, easement, lease, license or covenant that precludes the  
20 use of property for anything other than habitat conservation.

21 B. All conditional use permits shall be filed and processed in accordance with  
22 Section 18.58.060.

23 C. A conditional use permit for habitat conservation shall not be denied  
24 provided that the proposed habitat conservation satisfies any of the following criteria:

- 25 1. A Wildlife Agency is or will be a signatory participant in the  
26 proposed habitat conservation,
- 27 2. A Wildlife Agency actively participated in the development of the  
28 proposed habitat conservation use, and concurs that the proposed  
habitat conservation use as designed and funded will protect the  
species whose habitat is proposed to be conserved, or

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3. Some other authoritative source, such as a university-affiliated research group, certifies that the proposed habitat conservation use, as designed and funded, will protect the endangered species whose habitat is proposed to be conserved.

If a proposed habitat conservation use does not meet any of the criteria listed above, a conditional use permit may only be denied for reasons relating to protection of endangered species or the environment, and those reasons must be supported with substantial evidence.

D. Any conditions placed on a habitat conservation use must be designed to either protect or enhance the endangered species whose habitat is proposed to be conserved, or to avoid adverse environmental impacts resulting from the habitat conservation use itself. Conditions permissible under this section include, but are not limited to:

1. Monitoring and reporting;
2. Fencing, screening and/or buffer zones;
3. Signage designed to prohibit trespassing, illegal dumping, and/or other disturbances to the species;
4. Adequate funding;
5. Remedial actions designed in conjunction with a Wildlife Agency or some other authoritative source;
6. All measures and conditions included in the proposed habitat conservation use;
7. Prohibition of activities inconsistent with habitat conservation;
8. Implementation of Best Management Practices to reduce or eliminate wind or stormwater erosion;
9. Any other condition consistent with the United States Department of the Interior, Fish and Wildlife Service, Guidance for the Establishment, Use, and Operation of Conservation Banks, May 2,

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2003, or other similar guidance published by a Wildlife Agency.

E. No condition shall be imposed pursuant to subsection (D) that a Wildlife Agency concludes would adversely affect an endangered species or unreasonably interfere with a legitimate habitat conservation use.

F. In the event the proposed habitat conservation is proposed in an area that is not already designated as Open Space in the City’s General Plan, a General Plan Amendment shall be required. If the City has already amended its General Plan four times in that calendar year, and thereafter an application is submitted for a habitat conservation use that would require an amendment of the General Plan, the City may condition approval of that use on the applicant processing a General Plan Amendment the following calendar year.

G. Approval of a conditional use permit for a habitat conservation use, depending on the specifics of the proposal, could potentially result in adverse effects on the environment. If the proposed habitat conservation use is not statutorily, categorically, or otherwise exempt, the City shall conduct any necessary environmental review under the California Environmental Quality Act as provided in its Local CEQA Guidelines and the State CEQA Guidelines. To the extent feasible, where a proposed habitat conservation use requires approval of other agencies, the City will conduct its CEQA review concurrently and in cooperation with other agencies’ planning processes for the proposed habitat conservation use.

**Section 18.31.050 Prospective application.**

The requirements of this chapter shall prospective beginning on the date of adoption. Nothing contained herein shall be deemed to waive compliance with other local, state and/or federal laws, statutes, regulations, codes, ordinances, or policies.”

SECTION 5. Severability. The provisions of this Ordinance are hereby expressly made severable. If any rule, section, sentence, clause, or phrase of this Ordinance or its application to any person or circumstance or property is held to be unconstitutional or invalid, the remaining portions of this Ordinance or the application of these rules and regulations to other persons or circumstances or property shall not be affected. The City of Colton hereby declares that it would have adopted this Ordinance and each and every rule, section, sentence, clause or phrase thereof, irrespective of the fact that any one or more other rules, sections, sentences, clauses, or phrases be declared unconstitutional or invalid.

1                    SECTION 6. The repeal of Urgency Ordinance \_\_\_\_ and adoption of this  
2 Ordinance is exempt from further environmental review under Section 21080(b)(9) of the  
3 California Public Resources Code and Sections 15061(b)(3), 15305, 15307, and 15308 of  
4 the State CEQA Guidelines (California Code of Regulations, title 14, sections 15000 et  
5 seq.). This Ordinance establishes a mechanism to ensure proper management of  
6 endangered species habitat for the protection of those species and their surrounding  
7 environment and to track the use of property for habitat conservation. Therefore, the  
8 City Council concludes that this Ordinance is categorically exempt as a minor alteration  
9 in land use limitations and as an action by a regulatory agency for the protection of  
10 natural resources and the environment. The City Council further concludes that the  
11 Ordinance is exempt under the general rule that CEQA only applies to activities that  
12 may adversely affect the environment; there is no reasonable possibility, however, that  
13 this Ordinance will have any potentially adverse environmental impact. The City  
14 Council adopts the reasoning supporting these conclusions contained in the Staff Report  
15 presented to the City Council with this Ordinance. This determination is supported  
16 with substantial evidence in the administrative record. The City Council further  
17 specifically finds that there is no evidence in the administrative record indicating that  
18 any exception applies which would preclude the application of a categorical exemption  
19 as provided in section 15300.2 of the State CEQA Guidelines.

20                    SECTION 7. City staff is hereby directed to prepare and file a Notice of  
21 Exemption, under the CEQA, within 5 working days of adoption of this Ordinance.

22                    SECTION 8: The City Clerk shall certify to the passage of this Ordinance  
23 and cause the same or a summary thereof to be published within fifteen (15) days after  
24 adoption in a newspaper of general circulation, printed and published in Colton,  
25 California.

26                    PASSED, APPROVED, AND ADOPTED, this \_\_\_\_ day of \_\_\_\_\_,  
27 2007.

28 \_\_\_\_\_  
Kelly J. Chastain, Mayor

ATTEST:

\_\_\_\_\_  
Carolina R. Padilla, City Clerk

1 STATE OF CALIFORNIA )  
2 COUNTY OF SAN BERNARDINO) ss.  
3 CITY OF COLTON )

4  
5 I, CAROLINA R. PADILLA, City Clerk of the City of Colton, do hereby  
6 certify that foregoing Ordinance No. \_\_\_\_\_ was duly and regularly adopted by the City  
7 Council of the City of Colton at a regular meeting thereof on the \_\_\_\_\_ day of  
\_\_\_\_\_ 2007 and that the same was passed and adopted by the following vote, to wit:

8 AYES:  
9 NOES:  
10 ABSENT:  
11 ABSTAIN:

12 \_\_\_\_\_  
13 Carolina R. Padilla, City Clerk