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Staff:	John Del Arroz - LB
Staff Report:	Sept. 23, 2011
Hearing Date:	October 5-7, 2011
Commission Action:	

STAFF REPORT: REGULAR CALENDAR

APPLICATION NUMBER: 5-10-168

APPLICANT: City of Newport Beach

AGENT: Don Schmitz + Associates

PROJECT LOCATION: Intersection of Pacific Coast Highway and Superior Ave, Newport Beach, Orange County

PROJECT DESCRIPTION: Construction of an active recreational park of approximately 18 acres at the northwest corner of the intersection of West Coast Highway and Superior Avenue. Grading consists of approximately 100,000 cubic yards of cut, and 98,000 cubic yards of fill.

LOCAL APPROVALS: City of Newport Beach Approval in Concept No. AIC 2010 043 dated July 13, 2010

SUBSTANTIVE FILE DOCUMENTS: City of Newport Beach certified Land Use Plan
Access Agreement between the City of Newport Beach and Banning Ranch LLC

SUMMARY OF STAFF RECOMMENDATION:

Staff recommends that the Commission **DENY** the proposed active recreational park and proposed access road

The appropriate motion and resolution can be found on Page 7.

Executive Summary:

The City of Newport Beach is requesting a coastal development permit to construct an approximately 18 acre active recreational public park, which includes a parking lot and access road for the park, on vacant land that contains coastal sage scrub (CSS) habitat occupied by California gnatcatcher, as well as wetlands. As part of its 18 acre active park proposal, the City securd an access agreement with the adjacent landowner, Newport Banning Ranch, LLC (NBR), from which it received an easement to build most of the access road and a portion of the parking lot on NBR's property. The gnatcatcher occupied CSS has been identified by the Commission's biologist as environmentally sensitive habitat area (ESHA). Section 30240 of the Coastal Act provides that ESHA shall be protected against any significant disruption of habitat values, and only uses dependent on

those resources shall be allowed in those areas. Also, development adjacent to ESHA shall be sited and designed to prevent impacts which would significantly degrade those areas and be compatible with the continuance of the habitat.

The new road, as proposed to access the park site on the adjacent property not owned by the City, has been the central issue of contention. The general alignment of the access road proposed by the applicant would pass through areas identified as gnatcatcher occupied CSS/ESHA. The threshold issues have been: 1) will the presence of a road in this area be a significant disruption to the suitability of the surrounding ESHA to continue to support gnatcatcher use; and, if not, 2) is there a road alignment and size that would avoid the direct removal of gnatcatcher occupied CSS/ESHA, provide adequate buffers, and allow for the continuance of the surrounding habitat value? Commission staff in consultation with the staff biologist has concluded that a narrow road, with a low intensity of use, could potentially be considered in the proposed revised alignment so long as: a) the use of the road were restricted in perpetuity such that its intensity of use would never increase (i.e. the road will remain a park road, and nothing more); b) the new road alignment would avoid existing native vegetation occupied by gnatcatcher; c) the areas immediately adjacent to the road, some of which may be disturbed by construction/grading, are fully restored to high quality CSS suitable for use by gnatcatcher; and d) the restored areas, as well as the avoided CSS/ESHA areas that would need to be enhanced/expanded, are conserved in perpetuity as habitat and open space through appropriate legal instruments. However, only a park road proposal that incorporates those elements would result in a final design that promotes the continued use of the surrounding habitat areas by gnatcatchers.

Several iterations of a park access road design have been submitted by the City in conjunction with the application. The initial access road designs submitted would have caused direct impacts on gnatcatcher occupied CSS/ESHA. After working with the applicant, an access road design was identified that would avoid direct removal of habitat known at this time to be gnatcatcher occupied CSS/ESHA. That design would necessitate some grading within ESHA buffers, which represents a significant departure from the Commission's typical requirement to avoid such grading in buffers. However, Commission staff was prepared to recommend approval, with agreement by the City and/or the underlying landowner to the restrictions that would prevent use of the road for anything other than a low-intensity park road (i.e. which would foreclose the option of expanding the road to a major arterial road), restore habitat within the ESHA buffers, and secure the buffers and surrounding habitat as open space. At this time, the landowner is not willing to agree to set aside portions of its property for this purpose. In the absence of agreement on the fundamental, threshold question related to the size and intensity of use of the road, as well as a variety of other issues that haven't been fully resolved, Commission staff is recommending DENIAL of the proposed development for the following reasons.

The subject site is located at the northeast corner of the intersection of West Coast Highway and Superior Avenue, in western Newport Beach. The park would include a baseball diamond/soccer fields, pedestrian paths, viewpoint, children's playground, restroom, 111 space parking lot, a new access road and other associated improvements,

landscaping and coastal bluff scrub and coastal sage scrub habitat restoration. The proposed development would occur on two parcels of land. The active park portion of the project would be located on a parcel owned by the City of Newport Beach (formerly owned by CalTrans). The access road to the park, a portion of a parking lot, and landscaping and some habitat restoration would be located on a 6 acre portion of an approximately 500 acre parcel known locally as "Banning Ranch", which is managed by Newport Banning Ranch, LLC (NBR), and owned by Cherokee Newport Beach, LLC and Aera Energy, LLC. The City has an access agreement with NBR to construct the park access road and other improvements on NBR property. The park access road extends approximately 550 feet north of West Coast Highway, and then turns east and south to reach the City parcel.

In a separate action on September 9th, the City of Newport Beach and NBR released a Draft Environmental Impact Report for NBR's development plans for the remainder of the Banning Ranch. Those plans include 1,300+ residential dwelling units, 75,000 sq. ft. of commercial space, a 75-room resort inn, parks and trails. As discussed more fully below, those plans have implications on the use and potential future expansion of the proposed 'park access road'.

California gnatcatcher (*Polioptila californica californica*), a bird species listed as federally threatened by the U.S. Fish and Wildlife Service (USFWS) and by the State of California as a California Species of Special Concern, is present on the subject site. In 2007, the USFWS designated all of the City's subject parcel and all of Newport Banning Ranch as critical habitat for California gnatcatchers. The Commission's biologist has determined that areas of coastal scrub habitat with significant gnatcatcher use perform an important ecosystem function, are increasingly rare, and are easily disturbed and therefore meet the definition of ESHA under the Coastal Act and the City of Newport LUP. The site proposed for Sunset Ridge Park supports a significant cover of coastal sage scrub vegetation, much of it is used by and is suitable for California gnatcatchers, thus, those areas have been identified as ESHA. There are also areas of coastal bluff and maritime succulent scrub that rise to the level of ESHA whether or not they support gnatcatchers due to the rarity of these habitat types. Other wildlife, including raptor bird species, coyote, and possibly borrowing owls, need to be addressed as well.

In her review of biological information currently submitted, Dr. Jonna Engel delineated two areas of ESHA within the footprint of the proposed Sunset Ridge Park. One area, which she identifies as "ESHA West", is west of the proposed park access road. The other area, "ESHA East", is east of the proposed park access road. A third area known as the "disturbed encelia scrub", would be ESHA unless it is legally mowed, as discussed further below.

The construction of a new road between two blocks of ESHA will divide the area by development and introduce a greater intensity of use in that area. Currently, that area is infrequently disturbed by vehicles (perhaps a few vehicular passages a day). The new access road for the park is anticipated to have 173 vehicle trips per day. Studies have shown that the California gnatcatcher can become accustomed to some disturbance by vehicles. That disturbance is best accommodated in situations where the bird can easily

fly over the disturbed area (i.e. narrow roads), and where there is appropriate habitat immediately on either side of the road. The presence of additional improved habitat in and around the newly disturbed area would further serve to offset the increased level of activity in the area. While an increase from a few vehicle trips per day to 173 trips per day is significant, the Commission's biologist, in consultation with other experts, has concluded that the increase would be within the tolerance levels of the California gnatcatcher. Particularly if the road is narrow, there is appropriate habitat on each side of the road, and additional habitat restoration is proposed in the area which improves the overall quality and quantity of the habitat. However, an increase above the proposed 173 vehicle trips per day, would have a significant adverse impact on the gnatcatchers use of the habitat area. Thus, Commission staff has concluded that 1) the access road must remain narrow; 2) the areas on each side of the road must be restored with habitat appropriate to the California gnatcatcher; 3) the quality of existing habitat must be improved, and expanded where feasible; and 4) legal restrictions must be in place to assure the road remains just a park road (no increase to the intensity of use) and the surrounding habitat areas are preserved in perpetuity. However, in this case, as stated above, Commission staff has learned that the applicant and underlying landowner will not agree to comply with these criteria.

Upon review of the content of the access agreement between the City and NBR, regarding the City's use of NBR land for the proposed access road, and review of the recently released DEIR for the Banning Ranch project, it is clear that agreeing to the conditions outlined above would significantly impact future implementation of the Banning Ranch project as it is currently envisioned under the DEIR. To implement the Banning Ranch project, the proposed 'park access road' would need to be expanded by several lanes, as it would serve as the main entryway to the Banning Ranch development. Furthermore, the road would need to accommodate thousands of vehicle trips per day. Based on preliminary plans in the DEIR, expansion of the road would require direct impacts on areas identified as ESHA in conjunction with this park proposal. Additional ESHA likely exists that hasn't yet been identified that would also be impacted by the expanded road. Furthermore, the increased width and intensity of use of the road would very likely exceed gnatcatcher tolerance for disturbance, rendering much of the habitat in that area unusable by the California gnatcatcher.

Several other key issues remain to be resolved as well, described in greater detail below. These include the size of the required buffers between development and gnatcatcher CSS/ESHA; the kinds of activities allowed in that buffer (e.g. grading?); the size of buffers between development and existing degraded wetlands located on site (mostly along Superior Avenue); whether or not vernal pools exist in an area the City proposes to deposit soil exported from grading operations; whether fencing proposed to separate the park site from the remainder of NBR will adversely impact the circulation of large mammals that play an important predation role within the CSS/gnatcatcher ecosystem; and whether or not the degraded encelia scrub habitat located on site (within the footprint of the proposed park) is legally mowed, or if that area, which would qualify as ESHA if not mowed, is being mowed illegally.

From the time the Commission began recognizing coastal scrub habitat occupied by gnatcatchers as ESHA, many of the Commission's past permit actions have required 100 foot buffers between gnatcatcher ESHA and development to adequately protect gnatcatchers and their habitat from human disturbance. In some cases a reduced buffer, usually no less than 50 feet at select locations, has been authorized based on site specific circumstances. Significant grading within those buffers is usually prohibited. Some temporary grading has been allowed, but only in cases where the graded areas would be fully restored with appropriate habitat, and where the grading itself wouldn't have adverse impacts on the ESHA. In this case, the applicant is proposing a 50 foot wide buffer between the edge of the road (and other development like the parking lot and children's play area) and existing CSS/ESHA. But, in order to construct the park access road alignment as proposed, grading would be required inside the proposed 50 foot buffer. Again, graded buffers have only been allowed where the buffer would be fully restored. In this case, the applicant has declined to restore those graded buffer areas with native vegetation appropriate to support gnatcatchers and instead insists the area be replanted with non-native, ornamental vegetation. The City asserts that replanting with native vegetation is inconsistent with the 'agreement' it has with NBR, which owns the land where the City has proposed to build most of the access road for this project..

The subject site contains wetland habitat in several locations. One is seeps along a slope next to Superior Avenue. Vegetation within the seeps is hydrophytic, but generally non-native. The City's initial plans included grading out this area, but the project has been revised to avoid grading directly in that habitat. Nevertheless, grading occurs within 50 feet of the wetland, and generally the Commission requires 100 foot buffers from wetlands. Another wetland feature is located to the west of the proposed access road, within an area designated as CSS/ESHA. Grading, again, would be within 50 feet of that wetland feature. Last, it has been alleged that vernal pools exist in an area on NBR property, to the north of the proposed access road, where the City plans to dispose of graded soils. Some preliminary, but inconclusive analysis has been done to address whether such vernal pools exist. Commission staff's biologist believes additional surveys, consistent with scientific protocols, are required.

State law requires fencing around oil field operations like those occurring on NBR. Presently, that fencing envelops both the NBR and City owned lands. With implementation of the project, the City proposes fencing to separate the park site from the remainder of NBR. That fencing will isolate ESHA that is presently inside the fencing. Once fenced, the circulation of large mammals that play an important predation role within the CSS/gnatcatcher ecosystem would be severely curtailed, and perhaps eliminated. The loss of those predators could impact that long term health of the CSS/ESHA. Without large predators, like coyote, that prey on smaller mammals, like feral cats and opossums, those smaller mammals will consume gnatcatcher eggs and young, causing the loss of gnatcatcher fecundity.

Last is the issue regarding the mowed encelia scrub. Mowing occurs on both the City and NBR properties. The mowing is purportedly for fire hazard and weed control. The Commission's biologist has determined that were it not mowed, the encelia scrub would

qualify as ESHA, as California encelia is strongly associated with California gnatcatcher use. The City and NBR have alleged that the mowing has occurred for decades, and began prior to the passage of the Coastal Initiative (i.e. Prop 20) and the Coastal Act. However, although requested on many occasions, neither the City nor NBR have attempted to document that claim. Unless a vested rights claim is reviewed and approved by the Commission, the legality of that mowing remains an issue, particularly since, if it is not legally mowed, the area would be considered ESHA, and all of the requirements of Section 30240 of the Coastal Act would apply. A substantial redesign of the park would be required to avoid that ESHA.

To summarize, staff has been working earnestly with the City to identify a project that could be approved pursuant to modifications and special conditions to bring it into compliance with the Coastal Act. However, after further review, and after further communication with the City and with Newport Banning Ranch, LLC, it has become clear that they cannot address the threshold issue of foreclosing future expansion of the park access road, so that ESHA, buffers, and the California gnatcatcher that relies on them, are permanently protected in conjunction with this project, which is creating the impact. Compromises on the widths and kinds of uses within buffers would also be required, that could only be offset by revegetating the buffers with CSS suitable for use by gnatcatchers, and permanently preserving those areas. Certain issues remain unresolved related to vernal pools and the legality of mowing habitat that would otherwise be ESHA. Therefore, in our final analysis based on the information now before us, staff determined that the proposed project is not consistent with the Coastal Act, and the proposed project must be denied. If the City and underlying land owner anticipate a larger road than that proposed to serve the park will be proposed to serve future development on the Banning Ranch property, all impacts associated with a road in this location should be reviewed in the context of the larger development it will ultimately serve. Approval of a smaller road and its associated impacts is premature at this time.

LIST OF EXHIBITS:

Click on the link at left
to go to the exhibits

1. Vicinity Map
2. Reference Plan
3. Planting Plan
4. Grading Plan
5. Site Plan
6. Ex-parte forms on file
7. Letters in opposition of the project
8. Letters of support for the project
9. Supplemental letter from Schmitz + Associates
10. Dry Season Fairy Shrimp Survey
11. Access Alternative Analysis by Tom Brohard and Associates
12. Biological Memorandum from Dr. Jonna Engel, Staff Ecologist

STAFF RECOMMENDATION:

I. STAFF RECOMMENDATION OF DENIAL

Staff recommends that the Commission **DENY** the Coastal Development Permit application by voting **NO** on the following motion and adopting the following resolution.

A. MOTION

I move that the Commission approve Coastal Development Permit No. 5-10-168 for the development proposed by the applicant.

B. STAFF RECOMMENDATION OF DENIAL

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

C. RESOLUTION TO DENY THE PERMIT

The Commission hereby **DENIES** a Coastal Development Permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act and will prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. FINDINGS AND DECLARATIONS:

A. PROJECT LOCATION & DESCRIPTION

Project Vicinity

The project site is located at the western end of Newport Beach, at the intersection of Pacific Coast Highway and Superior Avenue. The project site is composed of 13.7 acres of property owned by the City of Newport Beach (the City parcel), and 6.3 acres for the access road and 4.1 acres for the fill deposition site in unincorporated Orange County owned by Newport Banning Ranch, LLC (the NBR parcel)(Exhibit 2). The City has entered into an access agreement with Newport Banning Ranch LLC to use a portion of its property for vehicular access to the project site. A letter inviting the owners of the NBR parcel to be coapplicants for the project was sent on September 15, 2011 and was declined.

The City parcel is zoned as Parks and Recreation and has a land use designation of Parks and Recreation. The NBR property is located in unincorporated Orange County and does

not have a City zoning designation, but in the City's General Plan the site is designated as Open Space as the primary use and Residential Village as an alternative use. The NBR parcel is designated in the City's certified Land Use Plan as an area of deferred certification.

Residential uses are located to the northeast of the site, at the Newport Crest housing development, and to the southwest, at the existing developed single family residential neighborhood. Hoag hospital is located to the east of the site, and to the west are the Newport Banning Ranch property and Semeniouk Slough.

History & Current Planning

The project site was historically occupied by a mesa which extended continuously across the subject site. However, excavation and use of the site as a borrow area has significantly modified the site. The majority of the City parcel now lies at a lowered elevation of approximately 44 feet, with the remnant portions of the mesa on the north eastern corner of the City parcel, and in the eastern portion of the NBR at the historical elevation of 76 feet above sea level. The EIR for the project states that the project site is subject to regular maintenance activities for fuel modification and weed abatement.

The City parcel was acquired by CalTrans in the 1960s in anticipation of an expansion of Coast Highway, which did not occur. The City of Newport Beach approved a number of general plan amendments between 1988 and 1994, which allowed a park use, multi-family residential, and single family residential use on the site. In 1998, the City adopted a general plan amendment, which designated the site for use as a neighborhood and view park. In 2001, Senate Bill 124 directed CalTrans to transfer the property to the City, and in 2006 the City purchased the 13.7 acre City parcel. Terms of the sale included a restriction to those uses on the site allowed under the Open Space – Active zoning designation (a designation which has since been eliminated in the 2010 zoning update approved by the City), and a requirement for a scenic easement along the 4.5 acre portion of the site adjacent to Coast Highway which prohibits permanent structures or pavement.

The proposed access road to the park is located on a portion of the property owned by Newport Banning Ranch, LLC. The City's certified Land Use Plan does not include the Banning Ranch Property, but instead designated it as an Area of Deferred Certification due to unresolved land use and resource protection issues. The LUP describes Banning Ranch as follows:

> *Banning Ranch consists of 505 acres located north of the Semeniuk Slough and Coast Highway West and east of the Santa Ana River. Nearly all of Banning Ranch (454 acres) is located within the City's sphere of influence in unincorporated Orange County. Oil and gas operations are conducted throughout the County portion of the property (West Newport Oil Field) pursuant to California Coastal Commission Exemption E-144. These operations consist of 483 producing, idle, injection, and abandoned well sites and related service roads, pipelines, storage, and other facilities. The property contains a number of sensitive habitat types, including*

southern coastal bluff scrub, alkali meadow, southern coastal salt marsh, southern black willow forest, coastal brackish marsh, and vernal pools. The property also contains steep coastal bluffs along the southern and western edges of the mesa. The bluff faces have been eroded in some areas to form a number of gullies and ravines. Future land uses for Banning Ranch are currently under review as part of a comprehensive update of the City of Newport Beach General Plan.

Banning Ranch shall remain a deferred certification area until such time as the future land uses for the property are resolved and policies are adopted to address the future of the oil and gas operations, public access, and the protection of the coastal resources on the property.

Active oil operations occur on the larger Newport Banning Ranch property, and have occurred on a portion of the subject site as well. The area of Newport Banning Ranch subject to the access agreement has four abandoned well sites, two near West Coast Highway, and two in the vicinity of the fill deposition site. Oil operations on the subject site have ceased, and the NBR parcel is currently used for access to the larger Newport Banning Ranch property from Coast Highway.

The Draft Environmental Impact Report for development of commercial and residential uses on Newport Banning Ranch was released on September 9, 2011, and is in the public review phase. The preferred alternative identified by the EIR includes 1,375 residential dwelling units, 60,000 sq. ft. of neighborhood commercial space, 282 acres of open space, and 34 acres of parks. Future development of the Newport Banning Ranch property would require local approvals, certification of a Local Coastal Program, and would require a Coastal Development Permit.

The DEIR for Newport Banning Ranch indicates that the project would include the widening of the access road proposed for Sunset Ridge Park. The access road proposed for the park, with two 14 foot wide lanes, does not meet the Commission's typically applied requirement of 50 to 100 feet wide buffers from ESHA with no grading or permanent development allowed. Widening of the proposed access road for Sunset Ridge Park would result in elimination or significant degradation of buffers to ESHA or direct impacts to ESHA. A reduction in buffers would result in a significant reduction of the ability of the buffer to reduce the impacts to adjacent ESHA. Therefore, widening of the proposed access road for future development would result in significant deleterious impacts to ESHA, which would be inconsistent with Coastal Act Section 30240 regarding preservation of Environmentally Sensitive Habitat Areas.

Past Commission Action

The subject site includes the sites where a violation of the Coastal Act occurred between April and October of 2004. The violation consisted of unpermitted development including removal of major vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher; placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading. The violation occurred on three

'polygons' on the subject site (Figure 3 of Exhibit 12). On April 14, 2011 the Commission issued Consent order CCC-11-CD-03 and Restoration order CCC-11-RO-02, imposing monetary penalties for violation of the Coastal Act, and requiring removal of unpermitted development, restoration of the northwest and southeast polygons with coastal sage scrub for use of the California gnatcatcher, and mitigation offsetting the temporal loss of habitat that resulted from the violation. The Commission found that the Southeast and Northwest polygons are considered to be ESHA at the time the development took place, and required the two polygons to be restored to support the California Coastal Gnatcatcher. Therefore, these two polygons are considered to be ESHA.

Land Use Plan Amendment 1-06, part B was approved by the Commission on July 12, 2006 and changed the land use designation on the City parcel from Planned Community (a residential land use) to Open Space. LUP Amendment NPB-MAJ-1-06 Part B states in part:

> No biological survey was conducted during the City's consideration of the land use change, nor was a discussion of potential habitat provided.… The subject site is located directly adjacent to Banning Ranch, a 505-acre undeveloped area known to support a number of sensitive habitat types, including coastal bluff scrub. There is a potential biological connection between the two sites that will need to be addressed when specific development is contemplated at the Caltrans West property... Section 4.1.1 contains policies to identify and protect ESHA through avoidance and proper siting. The Commission notes that the developable area of the site may be restricted by the existence of habitat and associated setbacks/buffers….
>
> The proposed land use change will ensure the preservation of the site for an open space use that will allow for some form of public viewing toward the coast. In that respect, the proposed amendment is consistent with Section 30251 of the Coastal Act. However, the City's intent to develop the site as an active park may necessitate a substantial amount of grading to create large level areas for playing fields. The Commission notes that the extent of grading may need to be limited to avoid substantial landform alteration.

The Commission found that potential issues associated with development of an active park on the site include biological resources and the potential for substantial landform alteration.

Description of Project:

The proposed project is the creation of an active recreational park. A baseball diamond which overlaps in area with two soccer fields would be created on the western portion of the City parcel. Passive elements for the park include pedestrian paths around the perimeter of the park, and a view station, shade structure, and butterfly garden proposed for the north eastern section of the City parcel. A children's playground is proposed at the western portion of the City parcel, south of the proposed 111 space parking lot, and to the west of the ball fields. A 1300 sq. ft. restroom/storage facility with a maximum height of 20 feet is proposed between the parking lot and the ball fields. Adjacent to the residential

complex at the northern boundary of the project site, the applicant proposes to install a 4 to 10 foot high retaining wall and landscaped berm to serve as a barrier between the park and the adjacent residential use.

The applicant proposes building a two lane access road to the City parcel on NBR's parcel includes a two lane access road to the project site. The entrance to the proposed park would be 54 feet wide, with a 24 foot wide, two lane exit lane, a 12 foot wide median, and an 18 foot wide entrance lane. The entrance than expands to 80 feet wide to allow for a wide turning radius for drivers which enter the park entranceway when the access road is closed. The access road then narrows to a 28 foot wide access road with two 14 foot wide lanes, and extends approximately 550 feet north of West Coast Highway, and then turns east and south to reach the City parcel and the proposed parking lot. The NBR parcel also contains an area of Coastal Bluff Scrub and Coastal Sage Scrub which will be restored as part of the park project. Also proposed is the widening of Coast Highway to create a right turn entrance lane into the park, elimination of the median on Coast Highway to accommodate a left turn lane, and installation of crosswalks and a traffic signal. Installation of both native and non-native landscaping is proposed (Exhibit 3). The park would not include any lighting of sports fields, and, as proposed, would be open from 8 AM until dusk each day.

Grading required for creation of the access road and contouring of slopes will result in 109,963 cubic yards of cut. 101,698 cubic yards of fill would be placed on the Newport Banning Ranch property to the north of the access road at an existing artificial canyon created as a result of a roadcut. Opponents to the proposed development have alleged that vernal pools exist in the area of the proposed fill deposition. A total of 8,265 cubic yards of soil would be exported to a fill site located outside of the Coastal Zone.

The applicant proposes the installation of a rock drainage device adjacent to the access road and a vegetated swale adjacent to the parking lot to collect runoff. The existing concrete V-ditch located just north of West Coast Highway, and just south of the Southeast NOV polygon would be removed and replaced with an underground drainage pipe and a treatment and flow control water quality structure. These areas would drain into an existing box culvert which drains to Semeniouk Slough. An existing drainage ditch located near the western boundary of the City parcel is proposed to be removed, the water diverted to an underground drainage pipe, and a public sidewalk leading from West Coast Highway to the sports fields installed.

B. BIOLOGICAL RESOURCES

Coastal Act Section 30107.5 states:

> *"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Coastal Act Section 30240 states:

> *(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
> *(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

The City's certified Land Use Plan Section 4.1.1 states the following policies regarding Environmentally Sensitive Habitat Areas:

> *Another important habitat within the City of Newport Beach is coastal sage scrub (CSS). Although CSS has suffered enormous losses in California (estimates are as high as 85%), there are still thousands of acres in existence and this community type is no longer listed as rare by CDFG. Nevertheless, where CSS occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher, it meets the definition of ESHA because of its especially valuable role in the ecosystem. CSS is important transitional or edge habitat adjacent to saltmarsh, providing important functions such as supporting pollinators for wetland plants and essential habitat for edge-dependent animals like several species of butterflies that nectar on upland plants but whose caterpillars require wetland vegetation. CSS also provides essential nesting and foraging habitat for the coastal California gnatcatcher, a rare species designated threatened under the Federal Endangered Species Act.*
>
> ***4.1.1-1.** Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:*
> *A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.*
> *B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.*
> *C. The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society.*

…
E. The degree of habitat integrity and connectivity to other natural areas. Attributes to be evaluated when determining a habitat's integrity/connectivity include the habitat's patch size and connectivity, dominance by invasive/non-native species, the level of disturbance, the proximity to development, and the level of fragmentation and isolation. Existing developed areas and existing fuel modification areas required by the City of Newport Beach Fire Department or the Orange County Fire Authority for existing, legal structures do not meet the definition of ESHA.

4.1.1-4. *Protect ESHAs against any significant disruption of habitat values.*

4.1.1-6. *Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.*

4.1.1-7. *Limit uses within ESHAs to only those uses that are dependent on such resources.*

4.1.1-9. *Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation.*

4.1.1-10. *Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible. Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance.*

4.1.1-11. *Provide buffer areas around ESHAs and maintain with exclusively native vegetation to serve as transitional habitat and provide distance and physical barriers to human and domestic pet intrusion.*

4.1.1-12. *Require the use of native vegetation and prohibit invasive plant species within ESHAs and ESHA buffer areas.*

4.1.1-15. *Apply the following mitigation ratios for allowable impacts to upland vegetation: 2:1 for coastal sage scrub; 3:1 for coastal sage scrub that is occupied by California gnatcatchers or significant populations of other rare species; 3:1 for rare community types such as southern maritime chaparral, maritime succulent scrub; native grassland and1:1 for southern mixed chaparral. The ratios represent the acreage of the area to be restored/created to the acreage impacted.*

4.1.1-17. *In conjunction with new development, require that all preserved ESHA, buffers, and all mitigation areas, onsite and offsite, be conserved/dedicated (e.g. open space direct dedication, offer to dedicate (OTD), conservation easement, deed restriction) in such a manner as to ensure that the land is conserved in perpetuity. A management plan and funding shall be required to ensure appropriate management of the habitat area in perpetuity.*

4.2.2-3. *Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall*

have a minimum buffer width of 100 feet wherever possible. Smaller wetland buffers may be allowed only where it can be demonstrated that 1) a 100-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the wetland given the site-specific characteristics of the resource and of the type and intensity of disturbance.

The two properties that comprise the proposed Sunset Ridge Park site support a number of important and sensitive habitats and plant and animal species. There are several types of coastal scrub communities on the property including coastal sage, coastal bluff, and maritime succulent scrub. Other habitats occurring in large swaths are disturbed encelia scrub, disturbed mulefat/goldenbush scrub, non-native grasslands, and ruderal and ornamental areas. Also, there are several small wetland seeps along the slope bordering Superior Avenue. All the native plant communities are invaded by non-native plants to a greater or lesser extent.

California gnatcatcher (*Polioptila californica californica*), a bird species listed as federally threatened by the U.S. Fish and Wildlife Service (USFWS) and by the State of California as a California Species of Special Concern, is present on the subject site.

1. Designation of Environmentally Sensitive Habitat Areas

Coastal sage scrub" is a general vegetation type characterized by special adaptations to fire and low soil moisture. In addition to twenty or so species of perennial shrubs, such as California sage brush, CSS is home to several hundred species of forbs and herbs, such as the California poppy. For convenience in mapping and management, CSS periodically has been divided into many types and sub-types, such as "southern coastal bluff scrub" and "Diegan sage scrub," based on geographic location, physical habitat, and species composition.

It is important to recognize that coastal sage scrub, as a habitat type, can qualify as ESHA regardless of the presence of California gnatcatchers. Indeed, if the gnatcatcher became extinct, CSS could still be ESHA. Section 30107.5 of the Coastal Act states, "'Environmentally sensitive area' means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." It is probably universally accepted among specialists that CSS is easily degraded and in fact has been destroyed by development over large areas of the state. About 2.5% of California's land area was once occupied by CSS. In 1981, it was estimated that 85% to 90% of the habitat type had been destroyed state-wide and, in 1991, it was estimated that San Diego, Orange, and Riverside counties had lost 66% of their CSS. Current losses in these counties are higher and losses in the coastal zone have undoubtedly been much higher. Compared to its natural distribution and abundance, CSS is in decline and it is in decline because it has been destroyed by human activities.

In the heart of urban environments, CSS may still support many bird species when there is sufficient open space to include coyotes in the system. Specifically, coyotes prey on those

predatory animals that prey on bird eggs and young, which enhances the survival rate of bird species in areas when coyotes are present in a biological system. CSS within urban environments can also provide refuges for sensitive bird species, such as the gnatcatcher, that may repopulate larger preserves nearby that may be severely impacted by events such as fires that reduce or destroy that preserve's population (i.e. 'rescue effect'). High quality coastal sage scrub also may be of significant value in heavily urbanized areas by contributing to the local diversity of vegetation, even if it is so isolated as to lose much of its wildlife value. In addition, some categories of coastal sage scrub, such as southern coastal bluff scrub, are so rare that they may be inherently deserving of protection wherever they are found.

Aside from being a rare habitat in and of itself, coastal bluff scrub on the project site is associated with the coastal California gnatcatcher, a sensitive species listed as 'threatened' under the Federal Endangered Species Act. A stand of coastal sage scrub provides an especially valuable ecosystem when occupied by the coastal California gnatcatcher. As Dr. Engel, staff ecologist notes, while surveys on the project site have recorded sitings of the coastal California gnatcatcher, "it s important to note that specific observations of gnatcatchers within any particular area are not necessary in order to conclude that the area is 'occupied' by gnatcatchers. If gnatcatcher foraging or nesting is observed in the general proximity of a site, [the site] is considered 'occupied'." Therefore, if a stand of coastal sage scrub is habitat to listed species, the presumption should generally be that the habitat is ESHA in the absence of compelling evidence to the contrary.

It is evident that California coastal sage scrub is a habitat that could qualify for the designation as ESHA under the Coastal Act, regardless of the on-site presence of the California gnatcatcher or any other particular species. However, that fact does not imply that every particular stand of vegetation designated as "coastal sage scrub" is ESHA. Section 30240 of the Coastal Act protects ESHA from any significant disruption of habitat values and confers considerable protection to adjacent areas. Given the far reaching implications of designating an area as ESHA, it is incumbent upon the Commission to use this designation with regard to a general category of habitat, such as coastal sage scrub, only where the local habitat itself meets the test of being rare or especially valuable because of its special nature or role in an ecosystem. However, in this context, it is important to remember that the meaning of the word "ecosystem" does not contain any guidance as to the portion of the biosphere included. An ecosystem is simply the combination of a biotic community and its environment. It is up to the practitioner to define the boundary of any "ecosystem" under consideration. It could encompass the world or only the locally important area. Therefore, a local area could certainly be an ESHA if it provides an important function in a local ecosystem, regardless of its regional significance. In summary, a case-by-case analysis is required, which has always been the Commission's approach.

The Commission's staff ecologist, Dr. Jonna Engel, visited the project site on September 15, 2010, December 15, 2010, and June 7, 2011, and has written a Memorandum (Exhibit 12) regarding the site which states that the site contains ESHA:

Areas of coastal scrub habitat with significant gnatcatcher use perform an important ecosystem function, are increasingly rare, and are easily disturbed and therefore meet the definition of ESHA under the Coastal Act and the City of Newport LUP. In general, relatively pristine coastal sage scrub, scrub vegetation with significant coastal California gnatcatcher use, and appropriate gnatcatcher habitat in "occupied" areas[1] are increasingly rare in coastal California and meet the definition of ESHA. However, all ESHA determinations are based on an analysis of site-specific conditions. Since the entire Newport Banning Ranch and City property have been identified by the USFWS as California gnatcatcher critical habitat the determination of ESHA is appropriately based on both observations of gnatcatcher use, which is assumed in "occupied" areas, and on the presence of vegetation that constitutes suitable habitat.

…

ESHA Determination

I delineated two areas of ESHA within the footprint of the proposed Sunset Ridge Park. These areas consist of habitat that supports the federally threatened California gnatcatcher. One area, "ESHA West", is west of the proposed entrance road. The other area, "ESHA East", is east of the proposed entrance road (Figure 12).

...

Based on the historical and current vegetation and ESHA maps, the site proposed for Sunset Ridge Park supports a significant cover of coastal scrub vegetation, much of it suitable for California gnatcatchers. There are areas of coastal bluff and maritime succulent scrub that rise to the level of ESHA whether or not they support gnatcatchers due to the rarity of these habitat types. It happens that in the case of the proposed park property, the mapped coastal bluff and maritime succulent scrub habitats are within the boundaries of ESHA West and/or ESHA East (Figure 12) because they also have a history of gnatcatcher use.

…

<u>ESHA West</u>

Between 1992 and 2009 gnatcatchers have been documented during eight surveys on the western boundary of the proposed Sunset Ridge Park project (Figure 18). In 1992 LSA mapped a gnatcatcher use area and six gnatcatcher observations along the western boundary of the proposed park property (Figures 19a and 19b; from Figure 1, December 9, 2010 LSA memorandum and from LSA map submitted by the Newport Banning Ranch Conservancy, respectively). In 1993 LSA mapped a very large gnatcatcher use area that contains a wide swath of vegetation along the western boundary of the proposed park (Figure 20; from Figure 2, December 9, 2010 LSA memorandum). In 1994 LSA mapped a large gnatcatcher use area that encompasses a large amount of habitat along the western boundary of the proposed park (Figures 21a and 21b; from LSA map submitted by the Newport

[1] An area is considered "occupied" by gnatcatchers if they have been observed nearby in easy flight distance regardless of whether gnatcatchers have been observed to use a particular plot of ground.

Banning Ranch Conservancy). In 1996, LSA mapped a gnatcatcher use area about three times the size of the area mapped in 1996 that overlaps all of the 1996 gnatcatcher use area and extends eastward (Figures 22a and 22b; from Figure 5, December 9, 2010 LSA memorandum). In 1998 PCR Services mapped point observations for two breeding pairs along the western boundary of the proposed park (Figures 23a and 23b; from Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy).

In 2000 a gnatcatcher use area was mapped that covers a small area adjacent to the western boundary of the proposed park (Figure 24; from gnatcatcher use map I believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy). In 2002 two breeding pairs were mapped in the same general location as the use area that was mapped in 2000 (Figures 25a; from Exhibit 3, September 24, 2009 Glenn Lukos Associates memorandum - and 25b; from Exhibit 2, October 14, 2002 Glenn Lukos Associates memorandum). The City submitted a letter from Glenn Lukos Associates biologist Tony Bomkamp addressed to Christine Medak on June 14, 2011, that states that the pair of gnatcatchers within the 0.08 acre patch of California sunflower scrub was mapped incorrectly and should have been mapped approximately 200 feet west which would place it in the area I have identified as “ESHA West”. In 2006 and 2007, gnatcatcher observations for breeding pair and an unpaired male sightings, respectively, were mapped by Glenn Lukos Associates along the western boundary of the park in the area mapped as disturbed encelia scrub in the Glenn Lukos Associates 2008 vegetation map and identified as ESHA in the Glenn Lukos Associates 2008 ESHA map (Figures 26 and 27; from Exhibit 3, July 19, 2007 Glenn Lukos Associates memo). In 2009 BonTerra mapped a gnatcatcher breeding pair observation on the western side of the proposed park in disturbed goldenbush scrub (Figure 28; from Exhibit 3b, July 25, 2009 BonTerra memorandum).

Based on the vegetation and ESHA maps, the vegetation I observed during my site visits, and the gnatcatcher survey data, I have delineated an area I have labeled “ESHA West” on the western boundary of the proposed park that rises to the level of ESHA because it provides an especially valuable ecosystem service by providing critical habitat that is utilized by the California gnatcatcher for nesting, breeding, foraging and dispersal; the critical habitat is also easily disturbed by human activities as evidenced by bare areas (road), imported fill, and graded areas on the property and therefore meets the definition of ESHA in the Coastal Act.

ESHA East

A second area of ESHA, “ESHA East”, occurs east of the ESHA West, on the other side of an access road that serves oil operations on Newport Banning Ranch. Between 1992 and 2009, gnatcatchers have been documented during six surveys in this area (Figure 18). The ESHA East includes a bluff with slopes that support coastal sage, coastal bluff, and maritime succulent scrub habitat. In 1993 LSA mapped a very large gnatcatcher use area that includes the entire bluff area (Figure

20; from Figure 2, December 9, 2010 LSA memorandum). In 1996, LSA mapped another very large gnatcatcher use area that includes most of the bluff area (Figures 18a and 18b; from Figure 5, December 9, 2010 LSA memorandum). In 1997 PCR Services mapped a gnatcatcher use area that covers the entire bluff (Figure 29a; from PCR use area map submitted by the Newport Banning Ranch Conservancy). In 1997 PCR also mapped point observations for two breeding pairs; one of the breeding pairs was located on the bluff in maritime succulent scrub while the second pair was located on a slope above PCH in disturbed California sunflower scrub (Figures 29c and 29b; from Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy). PCR Services conducted another survey in 1998 and mapped an observation of a gnatcatcher pair in maritime succulent scrub on the bluff (Figures 23a and 23b; from Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy).

In 2000, a gnatcatcher use area was mapped on the bluff (Figure 24; from gnatcatcher use map I believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy). In 2006 Glenn Lukos Associates mapped a gnatcatcher breeding pair observation on the bluff in maritime succulent scrub (Figure 26; from Exhibit 3 July 26 2006 Glenn Lukos Associates memorandum). In addition to Newport Banning Ranch's and the City of Newport Beach's biological consultant's surveys, Mr. Hamilton mapped gnatcatcher use areas in 2009 and 2010. He mapped two gnatcatcher pair use areas outside the breeding season on November 4, 2009; one in the disturbed California sunflower scrub above PCH and one to the northeast in mulefat near the proposed parking lot (Figure 30; from Figure 8, December 11, 2010 Hamilton Biological
letter). Mr. Hamilton also mapped a gnatcatcher male use area during the breeding season above PCH in the disturbed California sunflower scrub on June 3, 2010 (Figure 30; from Figure 8, December 11, 2010 Hamilton Biological letter). Mr. Hamilton's 2009 gnatcatcher observations indicate that the area around the disturbed area identified as the southeast polygon in the NOV continues to be utilized by gnatcatchers outside the breeding season. Between 1993 and 2009, seven gnatcatcher use areas and four dot/point gnatcatcher observations were mapped (Figure 18). I believe that had gnatcatcher use areas been mapped for the gnatcatcher observations, they would overlap most of the area I have mapped as ESHA east. I base this on the documented minimum gnatcatcher breeding territory size (2.5 acres)[2,3] (Figure 31).

Based on the vegetation and ESHA maps; the vegetation I observed during my site visits, and the gnatcatcher survey data, I have delineated an area of ESHA that I call "ESHA East". From the extensive history of gnatcatcher survey data it is clear that the disturbed coastal sage, coastal bluff, and maritime succulent scrub within the area provide an especially valuable ecosystem service by furnishing critical habitat utilized by the California gnatcatcher for nesting, breeding, foraging, and

[2] Atwood et al. (1998) op. cit.
[3] Preston et. al. (1998) op. cit.

dispersal; the critical habitat is also easily disturbed by human activities, as evidenced by bare areas (road), imported fill, and graded areas, and therefore meets the definition of ESHA in the Coastal Act.

The Commission's staff ecologist has determined that the areas designated as ESHA West and ESHA East on Figure 12 of Exhibit 12 qualify as ESHA. The Commission finds that the areas of ESHA West and ESHA East rise to the level of ESHA because they provide an especially valuable ecosystem service by providing critical habitat that is utilized by the California gnatcatcher, a federally threatened species and California Species of Special Concern, for nesting, breeding, foraging and dispersal; the critical habitat is also easily disturbed by human activities as evidenced by bare areas (road), imported fill, and graded areas on the property and therefore meets the definition of ESHA in Section 30107.5 of the Coastal Act.

2. Intensity of Use

The existing site is currently vacant, with little human activity or disturbance. Currently, the disturbance on the site includes occasional truck trips, pedestrian and vehicle use on the adjacent roadways, and the clearing activities which occur on the site. The proposed development would result in the creation of an active park, with an estimated 173 daily vehicle trips. This represents a significant increase in the intensity of use on the site. In other words, the development would result in a higher level of human activity on the site and a corresponding increase in the impacts associated with such activity. The proposed project would result in a significant increase in effects associated with the use of the site by people, many of which are associated with the urban/native interface. Examples of these impacts include noise from vehicular traffic and the active sports fields (i.e. cheering, game whistles), pollutants such as trash, alteration of habitat types, and the impacts from passage through and around habitat areas.

The proposed access road would result in fragmentation of the two areas of ESHA. Vehicles using the road introduce noise to the site, and the vehicles and the road itself create obstacles to the movement of gnatcatchers between the two ESHA areas on the site. Small habitat fragments can only support small populations of plants and animals and small populations are more vulnerable to extinction. Minor fluctuations in resources, climate, or other factors that would be trivial in large populations can be catastrophic in small, isolated populations. Habitat fragmentation is an important cause of species extinction[4] and given the importance of the proposed park site to the survival of California gnatcatchers, habitat fragmentation must be avoided to the greatest extent possible.

Development on the site will lead to an increase in the levels of trash (i.e. plastic, paper, and food debris) on the site. Due to wind and animal dispersion, some amount of this trash will end up in sensitive habitat areas. Trash may also be used as a food source for

[4] Rosenzweig, M. L. 1995. Species Diversity in Space and Time. Cambridge, Cambridge University Press.

species not appropriate to the habitat type, such as crows, seagulls, and rodents, which may increase the prevalence of non-native species on the site. Development of an active sports field will attract of species associated with urban development to the project site, such as crows, cowbirds, raccoons, rats, and skunks. Introduction of these species has the potential to displace native species from the site due to elimination of foraging material on the adjacent disturbed grasslands and competition with the introduced species. Irrigation associated with the sports fields and landscaping encourages invasive ants which prefer wetter soil conditions. Argentine ants are documented predators on gnatcatcher nestlings and their presence can also alter the native arthropod community by reducing their diversity and abundance, potentially reducing or altering the food source of a Federally threatened species.

The increase in the amount of people using the site would result in an increase of people who, for one reason or another, enter or pass through sensitive habitat areas. Use of sensitive habitat areas or buffers to sensitive habitat areas by humans or domestic pets has the potential to flush wildlife from habitat areas and disrupt breeding and foraging activities. Additionally, sustained levels of disturbance would result in elimination of vegetation, compaction of soils, and creation of trails, which eliminate habitat for native species and make the disturbed habitat vulnerable to colonization by non-native or invasive species.

In order to address the impacts associated with the development and ensure the long term preservation of habitat, a project on the site would require a variety of mitigation measures. Development of the park entrance road will further fragment the two patches of ESHA on the Sunset Ridge Park site. Restoring the existing ESHA to higher quality coastal sage scrub and vegetating the buffers, which currently consist of bare dirt or ruderal habitat, with coastal sage scrub species, provides improved and new suitable gnatcatcher habitat that to some degree offsets any loss in connectivity between the two ESHA areas.

The entire project site – the City parcel and NBR easement parcel - has been identified by the USFWS as critical habitat for the California gnatcatcher and is also within the boundaries of a CDFG NCCP which recognizes the importance of the site for gnatcatchers. The site is the only immediately coastal critical California gnatcatcher habitat in Orange County. Three breeding pairs are known to use the property proposed for the park project. The minimum breeding territory for gnatcatchers is 2.5 acres and when habitat is less than premium breeding territories necessarily increase. In addition, non-breeding season territories are much larger; by as much as 80 percent. In order to ensure that three gnatcatcher pairs are able to persist on the site, the site must be designed to support a minimum of 7.5 acres of high quality coastal sage scrub. This can be accomplished by creating or restoring to high quality coastal sage scrub habitat in all suitable areas of the property not proposed for formal park development and that are not currently non-native grassland. In addition, to ensure that the 7.5 acres is able to support three breeding pairs, high quality coastal sage scrub creation and/or restoration must occur in the ESHA areas, ESHA buffer areas, and all suitable areas adjacent to the ESHA. To ensure that the created habitat areas persist on the site for the long term preservation of the gnatcatcher, ESHA areas, ESHA buffer areas, and areas of created habitat must be

preserved in perpetuity with an appropriate legal instrument (i.e. an open space deed restriction or an offer to dedicate).

A habitat maintenance and management plan designed to ensure that the coastal sage scrub habitat remains healthy and robust in perpetuity should be developed. The habitat management plan should include measures to prevent or limit invasive ants including using low-water use turf and/or artificial turf on all playing fields and playground areas, maintaining drainage best management practices, maintaining a clean, trash free park, and planting high quality coastal sage. Park monitoring plans should include cowbird monitoring and provisions for implementation of a cowbird trapping program.

The construction of a new road between two blocks of ESHA will divide the area by development and introduce a greater intensity of use in that area. Currently, that area is infrequently disturbed by vehicles (perhaps a few vehicular passages a day). The new access road for the park is anticipated to have 173 vehicle trips per day. Studies have shown that the California gnatcatcher can become accustomed to some disturbance by vehicles. That disturbance is best accommodated in situations where the bird can easily fly over the disturbed area (i.e. narrow roads), and where there is appropriate habitat immediately on either side of the road. The presence of additional improved habitat in and around the newly disturbed area would further serve to offset the increased level of activity in the area. While an increase from a few vehicle trips per day to 173 trips per day is significant, the Commission's biologist, in consultation with other experts, has concluded that the increase would be within the tolerance levels of the California gnatcatcher. Particularly if the road is narrow, there is appropriate habitat on each side of the road, and additional habitat restoration is proposed in the area which improves the overall quality and quantity of the habitat. However, an increase above the proposed 173 vehicle trips per day, would have a significant adverse impact on the gnatcatchers use of the habitat area. Thus, it is important that 1) the access road remain narrow; 2) the areas on each side of the road must be restored with habitat appropriate to the California gnatcatcher; 3) the quality of existing habitat be improved, and expanded where feasible; and 4) legal restrictions must be in place to assure the road remains just a park road (no increase to the intensity of use) and the surrounding habitat areas are preserved in perpetuity. However, in this case, as is discussed more fully below, the applicant and underlying landowner will not agree to comply with these criteria. Therefore, the proposed project would result in impacts to ESHA areas, and, without appropriate mitigation, is inconsistent with Coastal Act Section 30240 regarding protection of ESHA from disruption that will degrade the resource and protection of ESHA from adjacent development.

3. Inadequate buffers.

To ensure compliance with Section 30240 of the Coastal Act, development (aside from resource dependent uses) must be located outside of all environmentally sensitive habitat areas and must not cause significant disruption of the habitat values within those areas. Further, development adjacent to an ESHA must be sited to prevent impacts to the ESHA that would significantly degrade those areas, in part through the provision of a setback or buffer between the ESHA and the development. Buffer areas are not in themselves a part

of the environmentally sensitive habitat area to be protected. Buffers and development setbacks protect biological productivity by providing the horizontal spatial separation necessary to preserve habitat values and transitional terrestrial habitat area. Spatial separation minimizes the adverse effects of human use and urban development on wildlife habitat value through physical partitioning. The width of such buffers would vary depending on the type of ESHA and on the type of development, topography of the site, and the sensitivity of the resources to the particular kind of disturbance. Buffers may sometimes allow limited human use such as low-impact recreation, and minor development such as trails, fences and similar recreational appurtenances when it will not significantly affect resource values. Buffers may also provide ecological functions essential for species in the ESHA.

The Commission has typically imposed buffers of 50-100 feet for gnatcatcher occupied ESHA (e.g. CDP 5-03-013, MT No. I, LLC, 5-92-188-A4, CPH Resorts). The Commission has typically not allowed significant grading or significant permanent development within buffers in order to prevent temporary and long term impacts to the adjacent ESHA. When required to offset the impacts of adjacent development and increase habitat values, these buffers have also been restored or vegetated with native species.

The proposed project includes permanent and temporary impacts in close vicinity to ESHA. The entire site of the proposed Sunset Ridge Park is gnatcatcher critical habitat and therefore protective ESHA buffers are essential. The Commission's staff ecologist, Dr. Jonna Engel, recommends 100 foot buffers between the eastern boundary of "ESHA East" and the proposed parking lot and children's playground in order to best protect gnatcatchers from human disturbance. The proposed project doesn't comply with this requirement. However, Dr. Engel, did find that a 50 foot minimum buffer between the park entrance road and the "ESHA West" and "ESHA East" areas would appropriate, so long as the buffer areas are restored with habitat appropriate for use by gnatcatchers, and the areas permanently preserved. The memorandum states:

> The park entrance road is located in a canyon with slopes on either side which enable gnatcatchers to fly over it with ease. Studies have shown that the California gnatcatcher can become accustomed to some disturbance by vehicles. That disturbance is best accommodated in situations where the bird can easily fly over the disturbed area (i.e. narrow roads), and where there is appropriate habitat immediately on either side of the road. Car trip estimates for the park are 173 per day which is a low impact traffic pattern; the use intensity of the road will be comparatively less than with most other types of development (e.g. housing, commercial, etc.). This low level of impact is a key factor in my determination that reducing the buffer from 100 feet to 50 feet along the entrance road is acceptable in this particular case. If the anticipated traffic estimates were larger, or were to increase, I believe that this would constitute a significant impact on the gnatcatcher habitat and a reduction to a 50 foot buffer along the proposed park entrance road would no longer be appropriate. …… My 50 foot buffer recommendation for the road is contingent on the entirety of all the buffers and the adjoining ESHA being re-vegetated or restored to high quality coastal scrub habitat specifically designed to

> be attractive to gnatcatchers. This will help minimize habitat fragmentation caused by the development.

As proposed, the access road meets a 50 foot buffer to permanent development, such as pavement or structures, with a few exceptions, such as a rock drainage device adjacent to the proposed access road within 30 feet of ESHA, and a point on the western area of the access road where the proposed road would come within 47 feet of ESHA. However, buffers for the proposed project would include grading within the buffers, in contrast with the Commission's typically applied requirements.

In order to construct the park access road alignment as proposed, significant grading within the buffer would be required. Near the intersection of the access road and West Coast Highway, the ground would be lowered by between 12 and 6 feet within Nine feet of ESHA East. In other areas, grading is proposed within the buffers where such grading in close proximity to ESHA could be easily avoided, such as Grading consisting of between 0 and 6 feet of cut within one or two feet of ESHA at the northern boundary of ESHA East. Regarding grading the Commission's staff ecologist states:

> The park development plans include grading within the buffer along the road which is an activity the Commission typically does not allow. The only use the Commission typically allows in buffers is restoration. However, in this instance, the buffer area along the road is either bare dirt or highly impacted ruderal vegetation. Therefore, I feel that grading is acceptable provided the grading does not occur within 20 feet of the ESHA and provided that after grading is finished the buffer is restored to high quality coastal sage scrub habitat. To mitigate potential negative impacts on gnatcatchers grading must occur outside gnatcatcher breeding season and construction noise must be minimized to the greatest extent possible. During construction, gnatcatcher habitat must be shielded from sight and sound by 8-foot high, solid 1-inch thick barriers. A biological monitor must be on site daily during construction to insure that the construction activities are having no negative impact on gnatcatchers. Immediately following grading the buffer must be restored to coastal sage scrub suitable for gnatcatchers. Planting high quality coastal sage scrub in the buffers will be a significant benefit to gnatcatchers and other species and will increase the effectiveness of the buffers.

Therefore, grading within buffers could be allowed based on the specific circumstances on the project site, but only if adequate mitigation measures to reduce the effects of the grading were allowed. Specifically, planting of Coastal Sage Scrub within buffer areas to increase the effectiveness of the buffer would be required in order to mitigate for the impacts of development on the site. However, the access agreement which allows the City to install an access road on Newport Banning Ranch property does not allow native vegetation to be placed adjacent to the proposed access road. Rather, the proposed project includes the installation of non-native species within buffers.

Although a non-native species may be considered non-invasive, non-native species will still propagate into new areas. Non-native species can replace native species, resulting in

elimination of native habitat. Therefore, the proposed project would not result in the restoration of buffers with native habitat. Instead, the proposed project would result in the introduction of non-native, non-invasive, drought tolerant species into buffer areas, which would result in the degradation of ESHA located directly adjacent to the buffers.

Any impacts to the proposed buffers would result in the degradation of the ability of the buffers to mitigate impacts to ESHA. The Commission has typically required buffers to be protected in perpetuity to prevent future development from impacting the ability of the buffer to protect adjacent ESHA. For example, the Marblehead project (CDP 5-03-013) required dedication of an easement for buffers and ESHA to an appropriate entity, and required the buffers and ESHA to be restricted to Open Space. The City's certified Land Use Plan is similar to the Commission's typically applied requirement, and requires ESHA, buffers, and mitigation areas to be conserved or dedicated to ensure long-term protection of the land. The City's certified LUP states:

> ***4.1.1-17.*** *In conjunction with new development, require that all preserved ESHA, buffers, and all mitigation areas, onsite and offsite, be conserved/dedicated (e.g. open space direct dedication, offer to dedicate (OTD), conservation easement, deed restriction) in such a manner as to ensure that the land is conserved in perpetuity. A management plan and funding shall be required to ensure appropriate management of the habitat area in perpetuity.*

The proposed project does not include a plan for conservation of ESHA and buffers, and the City has stated that the landowner would not agree to preserve these habitat areas in perpetuity. As stated above, a buffer width is designed based on the specific circumstances of the habitat which is being protected and the impact of the development. The proposed buffers can only be found to be consistent with Coastal Act Section 30240 if the buffers are vegetated with Coastal Sage Scrub and at least 50-100 feet in width, and with a low intensity of use on the road. A change in the width, vegetation types, or intensity of use of the access road would result in an altered buffer requirement. Without adequate protection, future development on the site may result in inadequate buffer widths and degradation to adjacent ESHA. Therefore, the proposed project would not provide adequate buffers between areas of proposed development and ESHA. The project would therefore not be able to ensure that the proposed development does not result in impacts to adjacent Environmentally Sensitive Habitat Areas. Therefore, the project can not be found consistent with Coastal Act Section 30240 regarding protection of ESHA from adjacent development and the Coastal Development Permit must be denied.

4. Development Within ESHA

The proposed development would include permanent development within ESHA. A concrete sidewalk which leads from West Coast Highway to the park site is proposed within ESHA East. The Commission has approved interpretive public access trails and pathways in ESHA as resource-dependent developments where they do not result in impacts to ESHA (CDP 2-07-018 (Sonoma County Regional Parks – multi-use path consisting of crushed rock, located in coastal scrub habitat containing sensitive plant

species); CDP A-3-SLO-04-035 (PG&E Spent Fuel Storage – unpaved paths through coastal terrace prairie habitat); CDP A-1-MEN-06-052 (Redwood Coast Public Access Improvements – unpaved paths through rare plant habitat and riparian habitat). These trails are usually composed of dirt or decomposed granite, and offer natural settings and recreational opportunities for visitors. However, the proposed sidewalk would be a primary, paved walkway to access the park, rather than a public interpretive or recreational trail and could be located outside of ESHA. The level of improvements to the pathway, and the areas to which that pathway lead (i.e. childrens playground and soccer/baseball fields, indicate a high intensity of use by individuals and groups of pedestrians, and perhaps bicyclists. Additionally, the proposed plans include grading and removal of vegetation within an area of ESHA. The presence of this development will significantly disrupt habitat values. Furthermore, the purpose of the pathway is not for observation and enjoyment of the habitat, but as a throughway to the active park areas. Thus, the pathway is not dependent on the presence of the resource. Therefore, the proposed sidewalk is incompatible with Coastal Act Section 30240 regarding protection of ESHA due to the disruption of habitat values and introduction of uses not allowed within ESHA.

5. Mobility of Wildlife

The access agreement between the City and Newport Banning Ranch requires the placement of a security fence along the edge of the project site to separate the project site from the rest of the Newport Banning Ranch property. The City states that California Code of Regulations, Title 14, Division 2, Chapter 4, Section 1778, regarding Development, Regulation, Conservation of Oil and Gas Resources requires the active oil operations on the Newport Banning Ranch property to be surrounded by chain-link, 5 foot high fencing which has “no aperture below the fence large enough to permit any child to crawl under”.

However, the installation of fencing which prohibits human passage would also prevent mobility of terrestrial wildlife. Mobility of wildlife to the project site is important for the health of the ecosystem on the site, not just for the continuance of the usage of the site as habitat for larger mammals. Species that dwell off-site but periodically visit the site are important to maintaining the current balance of wildlife on the site. For instance, the EIR notes that coyote are present on the project site. Larger predators, such as the coyote, are important in controlling the presence of smaller predators that prey on avian species, such as cats, skunks, and opossums. In order for any of the natural habitats to maintain their existing biodiversity, it is important to maintain coyotes in the system. In the absence of coyotes, these habitats would be subject to heavy predation from domestic and feral cats and other small predators causing avian diversity to plummet[5]. The proposed fencing would therefore result in significant degradation to Coastal Sage Scrub habitat which supports the California gnatcatcher. Therefore, the proposed project cannot be found

[5] Crooks, K.R. and M.E. Soulé. 1999. Mesopredator release and avifaunal extinctions in a fragmented system.

consistent with Coastal Act Section 30240 requiring the protection of environmentally sensitive habitat areas from any significant disruption of habitat values.

6. Inability to ensure compliance with Special Conditions

Coastal Act Section 30601.5 states:

> *Where the applicant for a coastal development permit is not the owner of a fee interest in the property on which a proposed development is to be located, but can demonstrate a legal right, interest, or other entitlement to use the property for the proposed development, the commission shall not require the holder or owner of any superior interest in the property to join the applicant as coapplicant. All holders or owners of any other interests of record in the affected property shall be notified in writing of the permit application and invited to join as coapplicant. In addition, prior to the issuance of a coastal development permit, the applicant shall demonstrate the authority to comply with all conditions of approval.*

The Commission's staff ecologist has reviewed the habitat on the park site, and has reviewed the available biological information. If appropriate mitigation were proposed, and if the habitat and the buffers for the project were sufficiently protected to ensure the continuance of the habitat, a low-impact park access road could be consistent with the continuance of the adjacent ESHA. However, the access road agreement which gives the City the authority to undertake development on land owned by Newport Banning Ranch also gives the landowner discretion over the types of mitigation which would be required by a regulatory agency, such as restoration of habitat adjacent to the proposed access road. The landowner, however, has unequivocally expressed that it is unwilling to set aside portions of its land for the staff-suggested mitigation purposes. Without the requisite mitigation, the project is also not consistent with the City's certified LUP, which states:

> ***4.1.1-11.*** *Provide buffer areas around ESHAs and maintain with exclusively native vegetation to serve as transitional habitat and provide distance and physical barriers to human and domestic pet intrusion.*
>
> ***4.1.1-12.*** *Require the use of native vegetation and prohibit invasive plant species within ESHAs and ESHA buffer areas.*

The Commission has typically required buffers to be protected in perpetuity to prevent future development from impacting the ability of the buffer to protect adjacent ESHA. The Marblehead project (CDP 5-03-013) required dedication of an easement for buffers and ESHA to an appropriate entity, and required the buffers and ESHA to be restricted to Open Space. The City's certified Land Use Plan is similar to the the Commission's typically applied requirement, and requires ESHA, buffers, and mitigation areas to be conserved or dedicated to ensure long-term protection of the land. The City's certified LUP states:

> ***4.1.1-17.*** *In conjunction with new development, require that all preserved ESHA, buffers, and all mitigation areas, onsite and offsite, be conserved/dedicated (e.g. open space direct dedication, offer to dedicate (OTD), conservation easement, deed restriction) in such a manner as to ensure that the land is conserved in perpetuity. A management plan and funding shall be required to ensure appropriate management of the habitat area in perpetuity.*

Therefore, the project is not consistent with the City's certified Land Use Plan, and is not consistent with the Commission's typically applied requirement for protection of ESHA from adjacent development. Inconsistency of the project with the certified Land Use Plan would serve as precedent when the City applies for certification of the Land Use Plan for Newport Banning Ranch. Therefore, the proposed project may prejudice the certification of the Land Use Plan for Newport Banning Ranch.

Coastal Act Section 30601.5 requires the applicant to provide proof of the applicant's ability to carry out the conditions of a Coastal Development Permit prior to the issuance of a coastal development permit. The City has stated in their September 12, 2011 letter that the owner of the adjacent property would not agree to a condition requiring restriction of buffer areas. Furthermore, the applicant is unable to ensure that the adjacent landowner would agree to the Commission's typically applied requirement for a deed restriction which informs future property owners of the requirements of the Special Conditions placed upon the use of the property. Although the Coastal Development Permit and the restrictions contained therein transfers along with the property, without a deed restriction future owners of the property may claim that they were unaware of the restrictions placed on the property. Therefore, the applicant will be unable to carry out the conditions of the permit required to ensure consistency with the habitat protection policies of the Coastal Act and unable to ensure adequate protection of Environmentally Sensitive Habitat Areas on the site. Without such protection, the ESHA on site may be subject to future degradation. Therefore, the project cannot be found consistent with Coastal Act Sections 30501.5, and 30240.

C. DEVELOPMENT

1. Mowing

Coastal Act section 30106 defines the term "development" as:

> "Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, and … the removal or harvesting of major vegetation other than for agricultural purposes…

Coastal Act section 30600 states:

> (a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit.

Section 30608 of the Coastal Act states:

> *No person who has obtained a vested right in a development prior to the effective date of this division or who has obtained a permit from the California Coastal Zone Conservation Commission pursuant to the California Coastal Act of 1972 (commencing with Section 27000) shall be required to secure approval for the development pursuant to this division; provided, however, that no substantial change may be made in any such development without prior approval having been obtained under this division.*

The applicant states that mowing of vegetation for fuel modification and weed abatement purposes has occurred regularly on the City parcel since the parcel was obtained by Caltrans in the 1960s, and has been continued since the City purchased the property in 2006. The mowed area includes an area mapped by Bon Terra as "Disturbed Encelia Scrub." Page 14 of Appendix E, Sunset Ridge Park Draft EIR states:

> *The 3.64 acres of disturbed Encelia scrub is regularly mowed for fuel modification and weed abatement purposes and contains a high percentage of non-native weeds; therefore, it is not considered special status.*

Sawyer & Keeler-Wolf (1995) divide coastal sage scrub communities into series including California sunflower (*Encelia californica*), California buckwheat (*Eriogonum fasciculatum*), and coast prickly-pear (*Opuntia litteralis*) series[6]. California sunflower scrub ("Encelia scrub") is a coastal sage scrub series dominated by California sunflower. California gnatcatcher are often associated with California sunflower. The Commission's staff ecologist has reviewed the "disturbed encelia scrub" on the site, and has determined that although the area appears to be regularly mowed, it would rebound relatively quickly and would provide habitat and foraging material for the gnatcatcher. The biological memorandum regarding the project states:

> BonTerra mapped 0.53 acres of "Encelia Scrub", 3.64 acres of "Disturbed Encelia Scrub", and 0.21 acres of "Encelia/Ornamental Scrub (Figure 3). The western-most area that BonTerra mapped as "Encelia Scrub" is an area that has a history of California gnatcatcher use and is an area I include in my "ESHA East" delineation (see ESHA discussion below and Figure 12). In addition to the "Encelia Scrub" patch that is included in my "ESHA East" delineation, there are several patches of "Encelia Scrub" along West Coast Highway and Superior Avenue (Figure 7; BonTerra Exhibit 2, Detailed vegetation types and other areas). All of these patches are adjacent to or very close to the large patch (approximately 3.3 acres) of "Disturbed Encelia Scrub" (Figure 3). The patches of "Encelia Scrub" (Figure 7) along the slope are within areas where foraging gnatcatchers have been observed by Robb Hamilton (Figure 30).
>
> California sunflower is one of the dominant native scrub species found in the coastal scrub communities on the City and Newport Banning Ranch property. Weaver (1998) found that gnatcatcher densities in northern San Diego County were highest in areas where California sunflower or California buckwheat were co-dominate with sagebrush[7]. Both areas mapped as "Disturbed Encelia Scrub" by BonTerra are areas routinely mowed once or twice a year to ground level by the City and Newport Banning Ranch.

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[6] Sawyer, J. and T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society.

[7] Weaver, K.L. 1998. Coastal sage scrub variations of San Diego County and their influence on the distribution of the California gnatcatcher. Western Birds, Vol. 29: 392-405.

Page 14 of Appendix E, Sunset Ridge Park Draft EIR states:

> *The 3.64 acres of disturbed Encelia scrub is regularly mowed for fuel modification and weed abatement purposes and contains a high percentage of non-native weeds; therefore, it is not considered special status.*

I disagree with this statement and believe that in absence of the routine mowing, the areas identified as "Disturbed Encelia Scrub" would become dense stands of robust, nearly pure, California sunflower. California sunflower is a fast growing shrub and if it wasn't mowed it would reach heights of two to three feet over one growing season. During my site visits I have seen these areas numerous times and have observed how closely spaced the mowed individual California sunflower plants are to each other. I have also reviewed the photographs of fresh growth during the growing season in Robb Hamilton's December 10, 2009 memorandum to Janet Johnson Brown, City of Newport Beach, "Review of Biological Resource Issues, Sunset Ridge Draft EIR" and I have no doubt that these areas would be dominated by California sunflower suitable for gnatcatcher foraging and possibly nesting without continued mowing. If the periodic mowing is legal, this area would not be ESHA, however, if the mowing is not legal, the area would be ESHA.

The disturbed encelia scrub would be used as foraging and potentially breeding habitat by the California Gnatcatcher if mowing of the vegetation were not occurring. The area of Disturbed Encelia Scrub would provide important natural resources and provide necessary ecological services for the California gnatcatcher if mowing of vegetation were not to occur. Based on this finding of biological significance, the "Disturbed Encelia Scrub" is major vegetation.

Coastal Act Section 30106 states that development, including the removal of major vegetation, requires a Coastal Development Permit and Coastal Act Section 30600 states that development within the Coastal Zone requires a Coastal Development Permit. No Coastal Development Permit has been issued for the regular mowing of major vegetation on the project site. As noted above, it is the City's position that they are exempt from permit requirements because they are continuing the maintenance activities which have occurred on the site since the early 1970s. In other words, the City has suggested that they have a 'vested right' to the regular clearing of vegetation on the site, and that the regular mowing activities do therefore not require a Coastal Development Permit.

One exception to the general requirement that one obtain a coastal development permit before undertaking development within the coastal zone is that if one has obtained a 'vested right' to undertake the development prior to enactment of Proposition 20 or the Coastal Act, a permit is not required. Under Proposition 20, if property is within 1000 feet landward of the mean high tideline, then that property is subject to the permit requirements of Proposition 20. (former Pub. Res. Code, Section 27104) From aerial images, it appears that the subject parcel may have been subject to Proposition 20's permitting requirements when it became effective on February 2, 1973. Coastal Act Section 30608 exempts development subject to vested rights from permit requirements.

In addition, the California Coastal Zone Conservation Act of 1972 (aka Proposition 20, "the Coastal Initiative") had its own vested rights provision, former PRC section 27404, which stated, in relevant part:

> If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; providing that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights if prior to November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor.

The procedural framework for Commission consideration of a claim of vested rights is found in Sections 13200 through 13208 of Title 14 of the California Code of Regulations. These regulations require that the individual(s) or organization(s) asserting the vested right, make a formal 'claim' with the Commission, that staff prepare a written recommendation for the Commission and that the Commission determine, after a public hearing, whether to acknowledge the claim. If the Commission finds that the claimant has a vested right for a specific development, the claimant is exempt from CDP requirements to complete that specific development only. Any substantial changes to the development after November 8, 1972 will require a CDP. If the Commission finds that the claimant does not have a vested right for the particular development, then the development is not exempt from CDP requirements.

There has been no Coastal Development Permit issued for the mowing on the site, the applicant has not submitted a vested rights claim for the mowing of major vegetation on the site, and the Commission has not found that the City has a valid vested rights claim for mowing of vegetation. Therefore, until such time that a vested right claim is found to exist at the site, the regular mowing of major vegetation on the site should be viewed as unpermitted development.

When the Commission considers evidence of resources existing on a proposed project site where unpermitted development has taken place, it evaluates the extent of the resources on a subject site as though the unpermitted development had not occurred. (*See, e.g., LT-WR v. Coastal Commission* (2007) 152 Cal.App.4th 770, 796-797.) As noted above, the Commission's staff ecologist has found that in the absence of mowing of vegetation, the "Disturbed Encelia Scrub" would provide foraging and potentially nesting habitat for the California gnatcatcher. Additionally, if the mowing on the site is considered as unpermitted development, the mowed Encelia would qualify as ESHA. The proposed project would result in the elimination of the mowed Encelia Scrub on the site, and its replacement with a sports field, sidewalk, and ornamental vegetation. Therefore, development of the project site would potentially result in the development of ESHA. The proposed project is

therefore inconsistent with Coastal Act Section 30240 regarding preservation of environmentally sensitive habitat areas.

2. Access Road – Alternatives

The proposed project includes an access road to the City parcel on property owned by Newport Banning Ranch. The access road would go north from west coast highway, and then come back south to reach the parking lot, and would support an estimated 173 car trips per day.

According to the applicant, there are significant constraints associated with an entrance road for the project site. These include: 1) A scenic easement which prohibits pavement on 4.5 acres of the City parcel adjacent to Coast Highway (Exhibit 2) ; 2) an intersection of two major streets adjacent to the site; 3) Environmentally Sensitive Habitat Areas on West Coast Highway on the NBR parcel and a portion of the City parcel; 4) a wetland on the slopes of the property adjacent to Superior Avenue; 5) Steeply sloping, curved Superior Avenue; and 6) a large difference in elevation between adjacent roadways and average elevation of project site.

The City has submitted an analysis of alternatives to the proposed access road. The alternatives considered include: an access road from Superior Avenue, access from West Coast Highway directly onto City property, and pedestrian access from the City parking lot located on the east side of Superior Avenue. No alternative was considered to access the site from the residential development located on the north side of the project site as the streets in that development are not public, but privately owned by the residents of that community. The City's analysis found that the alternative access locations they did consider do not present feasible alternatives due to a) traffic constraints, including inadequate line of sight, deceleration distances, and existing turn and merging lanes; b) reduction in park space; c) dramatic increases in grading amounts and project costs; and d) conflicts with pedestrian safety or walking distances required to access the park.

The City's alternatives analysis indicates that an access road from Superior Avenue is not feasible due to inadequate deceleration distances, line of sight, and stacking distances. The proposed alternative provides a deceleration distance of 208 feet, instead of the 480 feet that the City determined is required for the measured average speed of 46 miles per hour. The descending and curving Superior Avenue and the adjacent condominium complex also reduce the visibility of an entrance to the park, creating a hazard for drivers entering or leaving the park. Finally, the analysis indicates an access from Superior Avenue would not provide a sufficient distance for vehicle stacking during peak periods.

The City's alternatives analysis indicates that access from West Coast Highway on City property is not feasible due to restrictions on the use of the property, the adjacent intersection, and inadequate deceleration distance. The City parcel was transferred to the City along with a restriction that prohibited pavement or structures within a scenic easement area that was imposed by CalTrans located along West Coast Highway. The

City has argued that removal of the restriction would result in re-assesment of the value of the property and potentially require additional payment to the state if the property is re-assessed at a higher value. The City has also argued that traffic constraints create a safety hazard with an entrance from Superior Avenue. The City says an entrance road from West Coast Highway would conflict with the two existing right turn lanes leading from Superior Avenue onto West Coast Highway, and a merge lane where West Coast Highway narrows to three lanes. The property, at 350 feet long, also does not meet the required stopping distance of 500 feet.

Finally, the City considered usage of a parcel owned by the City on the east side of Superior Avenue. There is a parking lot on Superior which was required to mitigate for the loss of parking along West Coast Highway in a highway expansion. The City didn't consider using the existing parking lot as they say such usage wouldn't be consistent with the purpose of that parking lot. Instead, the City considered an alternative that would install a new parking garage on the east side of Superior Avenue to the north of the existing parking lot, and would create a raised pedestrian bridge over Superior Avenue to create a direct connection between the new parking structure and the park. Constraints associated with this alternative include a walking distance of 0.24 miles to reach the main area of the park, obstruction of ocean views for drivers descending Superior Avenue, and additional costs. The alternative would also require the creation of a road onto Superior Avenue for emergency and maintenance vehicles.

The Commission has also received a review of potential park access roads from the Banning Ranch Conservancy dated September 16, 2011, prepared by Mr. Tom Brohard, a licensed traffic engineer. The analysis contradicts the City's analysis, and states that an accessway on the City's property on West Coast Highway would meet the required safety standards. Specifically, Mr. Brohard states that an alternative accessway on West Coast Highway on the City's parcel would meet required stopping distances. It remains that the proposed alternative would not be consistent with the scenic easement/deed restriction imposed by CalTrans on the City parcel which prohibits pavement. The Banning Ranch Conservancy argues that the City could likely successfully petition CalTrans to modify that easement/restriction in a way that wouldn't change the value of the property. However, the analysis does indicate that the traffic safety constraints on the property are less severe than initially indicated. Therefore, there may be alternative park designs or access road locations which may provide an active park on the subject site but with fewer impacts to coastal resources.

3. Growth Inducing Development

The proposed project would result in the expansion of a roadway, a public works facility, into a new area. Therefore, Section 30254 is applicable. Section 30254 of the Coastal Act states in part:

> *New or expanded public works facilities shall be designed and limited to accommodate needs generated by development or uses permitted consistent with the provisions of this division;*

Coastal Act Section 30254 states that new public works facilities shall not create capacity above and beyond what is required to support the development, to avoid encouraging further development in the future. Opponents to the project have argued that the proposed access road would result in result in further development of the larger Newport Banning Ranch property. In conversations with staff, the City has repeatedly emphasized that the proposed access road for the park is not a precursor for future development on the Newport Banning Ranch property. However, the documentation which is available at this time does not support that conclusion. The City's access agreement with Newport Banning Ranch specifies, by reference to NBR's development proposal, that the originally submitted design for the access road would serve as two of the four lanes necessary for a four-lane arterial road. A four lane arterial road leading from West Coast Highway, roughly in the location of the proposed access road, is the listed preferred alternative in the Draft Environmental Impact Report which was released on September 9, 2011 for the Newport Banning Ranch development. Furthermore, as discussed above, the applicant is unwilling or unable to ensure that buffers and ESHA adjacent to the road are preserved to ensure protection of habitat, or to ensure that the proposed park access road remains a park road. Therefore, it appears that although the City states that the proposed park access road is the minimum required for the proposed park, the owner of the land on which the proposed access road is located is fully intending to expand the access road in the future. Therefore, the proposed access road would result in development which would facilitate development of an access road for the larger Newport Banning Ranch development. The project is therefore inconsistent with Coastal Act Section 30254 regarding growth inducing impacts.

D. ALTERNATIVES TO PROPOSED PROJECT

Alternatives must be considered to determine if there are any different projects that would lessen or avoid significant environmental impacts to coastal resources, in this case primarily ESHA and visual resources. An alternative is a description of another activity or project that responds to the major environmental impacts of the project identified through the Commission's analysis. In this case, as discussed above, the proposed active recreational park, access road, and fill site would result in significant disruption of habitat values within ESHA and are not uses that are dependent on the resource, which makes them inconsistent with Section 30240 of the Coastal Act and the applicable ESHA protection policies of the LUP, used by the Commission as guidance.

As proposed, the active recreational park with access road is not the least environmentally damaging alternative. Alternatives do exist that would lessen or avoid significant impacts to coastal resources. Among those possible alternative developments include the following (though this list is not intended to be, nor is it, comprehensive of the possible alternatives):

a. Active recreational park revised to ensure habitat protection

A project that was designed to protect and enhance gnatcatcher use on the site to mitigate for impacts resulting from intensification of use could be compatible with the resource protection policies of the Coastal Act. Components of such a project might include protection and restoration of ESHA, long-term protection of ESHA with buffers which include native habitat through the imposition of open space restrictions, expansion of Coastal Sage Scrub to enhance habitat, mitigation for loss of grasslands, and restoration of areas of unpermitted development.

b. Lesser Intensity of Use

Reducing the intensity of use on the site would reduce the impacts on adjacent ESHA, and the amount of mitigation necessary to offset the impacts of development. Projects with lesser intensity on the site could include a passive park or an active park with a smaller amount of active uses. A Passive park would include trails, benches, and picnic areas, but would not include active sports fields. An active sports park with a reduced number of sports fields would be redesigned to reduce the number of active sports fields on the site and increase the amount of passive use. Either the passive or reduced active alternative would reduce required parking amounts, and may be able to utilize existing parking resources and not require construction of an access road. A park with increased amount of passive uses could also include resources which would serve to enhance wildlife habitat, such as additional forage and nesting areas for the California gnatcatcher, to offset impacts associated with the development.

c. Active park with alternative access

There may be park design or vehicular access improvements which would result in lesser impacts to sensitive habitat on the site. For instance, a park with an access road on-site would not result in adverse impacts to sensitive habitat on the property owned by Newport Banning Ranch, such as ESHA East and ESHA West. Elimination of the access road on the Newport Banning Ranch property would also eliminate the need for a security fence on the property, and would ensure the continued access of larger mammals such as the coyote to California gnatcatcher occupied habitat. Elimination of improvements located outside of City property would ensure the City's ability to carry out the Special Conditions of a Coastal Development Permit, and increase the types of mitigation measures which could be carried out. The alternative access analysis submitted by the Banning Ranch Conservancy state that there may be less constraints regarding traffic safety on the site than originally thought, which may mean that there are feasible alternatives for access with fewer impacts to coastal resources.

Conclusion

In sum, feasible alternatives exist to accommodate development while minimizing impacts to biological resources. The Commission could approve a variety of alternatives (e.g. passive park, a park with an alternative accessway, or a park with a lesser intensity of use) that lessen or avoid significant adverse effects on coastal resources.

To conclude, the proposed development does not protect ESHA from significant disruption of habitat values. There are project alternatives that could reduce adverse impacts. Therefore, the proposed development is inconsistent with Sections 30230, 30233, 30240, and 30254 of the Coastal Act, and must be denied.

E. VISUAL RESOURCES

Section 30251 of the Coastal Act states, in relevant part:

> The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas...

Land Use Plan policy 4.4.1-1 states:

> Protect and, where feasible, enhance the scenic and visual qualities of the coastal zone, including public views to and along the ocean, bay, and harbor and to coastal bluffs and other scenic coastal areas.

The proposed project would result in 109,963 cubic yards of cut, 101,698 cubic yards of fill, and 8,265 cubic yards of soil exported off-site. The grading amounts are shown in the following chart, and a grading map can be found at Exhibit 4.

	CUT	FILL	EXPORT	IMPORT
ENTRY	52,148	4,432	47,716	0
PARK	57,627	27,951	29,676	0
FILL SITE	188	69,315	0	69,127
TOTAL	109,963	101,698	8,265	0

Grading on the City parcel would primarily result from cut to create gentler slopes on the property, particularly at the northeast of the site to create a more gradual slope between the northeastern and middle sections of the property. Fill on the City parcel would be placed at the northern edge of the property to create a retaining wall and raised buffer between the project site and the condominium project to the north.

Grading on the NBR parcel would primarily result from cut required for creation of the proposed access road. The initial design for the road was more aligned with the topography on the site and required approximately 9500 cubic yards of grading less than the proposed road. Once the plans were changed to ensure that the access road would not result in direct impacts to ESHA the required grading amounts increased. Some fill will be placed on the NBR parcel to create a berm between the park and the condominium complex, however most of the cut generated from the entry road would be placed at the fill deposition site, which is located approximately 0.2 miles north of West Coast Highway, or

approximately 400 feet north of the northern edge of the access road. The fill placed at the deposition site would result in the filling of an artificial canyon that was created due to grading which previously occurred on the site.

While the project would result in a large amount of grading, the grading would not significantly impact the visual and scenic qualities of the site. The proposed project would result in the creation of a park that would offer additional opportunities for visitors to view scenic views of the ocean. Therefore, the project can be found consistent with Coastal Act Section 30251 and Land Use Policy 4.4.1-1. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

F. MARINE RESOURCES

Section 30230 of the Coastal Act states:

> *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231 of the Coastal Act states:

> *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Section 30233 of the Coastal Act states, in relevant part:

> *(a) The diking, filling or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*
>
> > *(l) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.
(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.
(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.
(6) Restoration purposes.
(7) Nature study, aquaculture, or similar resource dependent activities.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

1. Vernal Pools

Section 30233 prohibits the dredging, diking, or fill of wetlands. Section 30240 of the Coastal Act states that environmentally sensitive habitat areas (ESHAs) shall be protected and that only uses dependent upon such resources shall be allowed in such areas. Section 30240 also requires that development in areas adjacent to ESHA shall be sited and designed to prevent impacts that would significantly degrade such areas. ESHAs are defined as areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Vernal pools are shallow ponds which contain rainwater for a portion of the year, and therefore qualify as wetlands. Vernal pools may also qualify as wetlands due to the presence of wetland indicator species or hydric soils. Vernal pools also often qualify as ESHA, as vernal pools are rare and valuable habitats in Orange County.

The Banning Ranch Conservancy has alleged that four vernal pools exist on the proposed park site at the fill area to the north of the access road, and states that these pools could contain the endangered San Diego Fairy Shrimp. They submitted a powerpoint presentation titled “Complete Banning Ranch Mesa Vernal Pools/Wetlands First Edition 6-7-11” on June 30, 2011 in which they assign the potential vernal pools numbers “34”, “35”, “36”, and “39” (Figure 9). In response to the vernal pool allegation, BonTerra consulting

biologist Allison Rudalevige revisited these areas along with BonTerra consulting biologist Jeff Crain and Glenn Lukos Associates biologist Tony Bomkamp. They observed three areas of cracked soil, a potential indicator of ponding water, but state that "it is clear that none of the four features are vernal pools as all of the features lack vernal pool indicator plant species and all of the features occur on previously graded areas and exhibit a predominance of upland plant species." They conclude that "Therefore, due to the lack of plant species characteristic of vernal pools, lack of sustained/observable ponding over multiple years of surveys onsite, the project site does not contain vernal pools.[8]" Regarding the Banning Ranch Conservancy's powerpoint presentation BonTerra states "The BRC PowerPoint does not utilize any appropriate vernal pool identification protocol for this resource issue, as it does not document ponding duration, soil types present, plant indicator species, invertebrate activity, and other necessary parameters.[9]"

Commission staff requested to visit the site with USFWS vernal pool experts to examine these areas but, to date, that request has not been fulfilled by the City or the property owner. In the absence of an onsite survey, USFWS biologist Christine Medak reviewed the powerpoint submitted by the Banning Ranch Conservancy and provided a detailed review via an email sent to Commission Staff ecologist Jonna Engel on September 13, 2011 (Appendix 1) and concluded the following:

> *After reviewing the available information we conclude that all four areas (VP 34, 35, 36, and 39) could potentially support San Diego fairy shrimp if ponding sufficient to support the species happens at a time when cysts are present. Extensive vernal pool habitat once occurred on the coastal plain of Los Angeles and Orange counties (Mattoni and Longcore 1997) and soils over the majority of Banning Ranch are likely suitable. However, the probability that ponding will be adequate to support the species is low in VP 34, 35, and 36 because the "pools" are located in a drainage and hydrological processes (including erosion and water flow) are not currently impeded by substantial alterations in the natural topography. In the absence of maintenance these ponds are unlikely to persist or to support the species over time. Vernal pool 39 has a higher probability of supporting the species because fill deposited in the drainage is likely contributing to longer periods of ponding. The rings of vegetation around the pool are another indication that ponding may occur at a freqency [sic] and for a length of time sufficient to support San Diego fairy shrimp. In the absence of maintenance we expect VP 39 will continue to pond (and pond for longer periods over time as silts collect in basin), unless the roadway fill is removed. To ensure the proposed project does not result in unintended impacts to listed species, we recommend protocol surveys for San Diego fairy shrimp are conducted in VP 39 prior to filling the pool.*

[8] Johnston, A.M. (BonTerra Consulting). September 9, 2011. Supplemental Biological Resource Information for the Sunset Ridge Park Project. Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

[9] Ibid.

The Commission's staff ecologist has reviewed BonTerra's vernal pool analyses and the Banning Ranch Conservancy powerpoint, and found that both are inconclusive regarding the existence or non-existence of vernal pools. Comprehensive vernal pool protocol surveys require two full wet season surveys done within a 5-year period or two consecutive seasons of one full wet season survey and one dry season survey (or one dry season survey and one full wet season survey**).** In addition, as BonTerra points out, appropriate vernal pool identification protocol includes documentation of ponding duration, identification of soil types and plant species present, invertebrate activity, and other necessary parameters. Neither BonTerra nor the Banning Ranch Conservancy have submitted the full complement of information necessary to make a firm conclusion regarding the existence of vernal pools on the proposed Sunset Ridge Park site. Furthermore, based on the photographs of ponded water on the site, and a report by the applicant that states that both upland and facultative wetland plants exist on the site, the alleged vernal pool areas could qualify as wetlands. However, there has not been adequate analysis of whether wetlands exist on the subject site, including tests for the presence of hydric soils, or whether there is sufficient wetland vegetation on the site.

Therefore, based on the available evidence, there is the potential for vernal pools to exist on site, but there is currently inadequate information to conclude whether the alleged features qualify as vernal pools. Furthermore, although there is evidence that the alleged vernal pools could contain fairy shrimp, there is inadequate information to tell whether the vernal pools would qualify as ESHA. Finally, although there is some evidence that the alleged vernal pools may qualify as wetlands, there is inadequate evidence to determine whether wetlands exist at the fill site. Therefore, the proposed project must be denied to ensure that the project does not result in impacts to ESHA, as required by Coastal Act Section 30240, and to ensure that degradation of wetlands does not occur, as required by Coastal Act Section 30230, nor fill for a non-permitted use as required by 30233.

2. Wetlands and Wetland Buffers

Aside from the potential vernal pools, two wetlands are located on the property. An area with riparian vegetation and hydric soils is located within ESHA West, and has been mapped by Bon Terra as containing 'Willow Scrub' vegetation. The second wetland is located on the slope of the City parcel adjacent to Superior Avenue. The biological memorandum regarding the project states:

> There are several areas on the slope along Superior Drive with water seeps. Several of the plants associated with these seeps are wetland species including narrowleaf cattail (*Typha angustifolia*), spike-rush (*Eleocharis* sp.) growing in mud and standing water, spike bentgrass (*Agrostis exarata*), rabbitfoot grass (*Polypogon monspeliensis*), marsh fleabane (*Pluchea odorata*), and seaside heliotrope (*Heliotropium curassavicum*). In addition, Mediterranean tamarisk (*Tamarix ramosissima)*, a non-native species with wetland plant status, also occurs in this area. Pampas grass, another non-native species, is abundant in this area. While the federal government has yet to assign pampas grass a wetland indicator status,

this species grows in damp soils along river margins in its native range in South America[10]. In coastal California it is an insidious invader colonizing disturbed areas including moist slopes in urban centers. Robb Hamilton reports that examination of 82 records of Pampas Grass in California showed that 32 percent were from wetlands[11]. Upon my request, BonTerra mapped in detail the slope along the southern perimeter of the proposed park site (Figure 7; BonTerra Exhibit 2, Detailed vegetation types and other areas). The wetland seeps occur in the areas mapped "Cattail" and "Tamarisk" and within some of the areas mapped "Pampas Grass".

In many areas the soils in these moist areas have a salt crust and/or what appear to be oxidation stains. BonTerra dug two soil pits in the seep areas and in both cases found hydric soils (Figure 8; BonTerra Exhibit 1, Detailed vegetation types and other areas, soil sample sites). BonTerra has maintained that the seep areas are not wetlands for numerous reasons including their determination that the water source is artificial[12], the presence of non-native species, and that the seeps are "small areas of low function/value hydrophytic vegetation".

I disagree with this conclusion. In fact, the small seeps and surroundings supporting a preponderance of hydrophytic plants, or hydric soils, or wetland hydrology meet the definition of wetlands in the Coastal act and the Commission's regulations. Whether or not wetland plants are non-native, or wetlands are degraded, or residential development contributes to wetland hydrology is not germane.

The Commission has typically required buffers of at least 100 feet for development adjacent to wetlands. The proposed project would not meet the Commission's typically applied buffer requirement of 100 feet. The wetland within ESHA West would be within approximately 30 feet of grading limits for the road, and within approximately 55 feet of the proposed access road. The wetland located along Superior Avenue would be located approximately 40 feet from the edge of grading. The hydrological changes to the wetlands that would occur as a result of the grading were not identified by the applicant. The proposed buffers may not be adequate to protect the wetlands adjacent from impacts associated with the development. Therefore, further investigations on the hydrological and resource impacts associated with development of the park need to be considered.

Therefore, the project cannot be found to be consistent with Coastal Act Section 30230 regarding maintenance of marine resources, Coastal Act Section 30231 regarding

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[10] Connor, H.E. and D. Charlesworth. 1989. Genetics of male-sterility in gynodioecious *Cortaderia* (Gramineae). Heredity, Vol. 63: 373–382.

[11] Hamilton, R. (December 10, 2009) op. cit.

[12] Leighton Consulting's geotech report, found in the project DEIR states that "Our exploration showed that the site is underlain by marine terrace deposits over bedrock. The subsurface materials at the site were found to consist of medium dense to dense silty sand and stiff to very stiff clay. Groundwater was encountered within two of our borings during our exploration. Seepage was noted within all borings along a sand and clay layer interface. The seepage was very likely generated from surface runoffs within the site and from the residential developments north of the site".

maintenance of biological productivity, Section 302333 regarding the filling, diking and/or dredging of wetlands, and Coastal Act Section 30240 regarding protection of Environmentally Sensitive Habitat Areas and the project must be denied.

3. Water Quality

Runoff from the proposed project would be routed to an assortment of water quality features, a concrete box culvert, and ultimately flow to Semeniouk Slough. Semeniouk Slough is designated as an Environmentally Sensitive Area in the City's certified Land Use Plan. The proposed project would result in approximately 3 acres of impermeable surfaces on the site. The addition of new impermeable surfaces may result in a potential increase in polluted runoff to nearby coastal waters due to the resultant decrease in stormwater infiltration. Pollutants commonly found in runoff associated with the proposed use include petroleum hydrocarbons including oil and grease from vehicles; heavy metals; synthetic organic chemicals; dirt and vegetation; litter; fertilizers, herbicides, and pesticides. These pollutants would have deleterious effects on the Semeniouk Slough. The proposed project would include water quality measures to mitigate for the addition of impermeable surfaces on the site. The proposed water quality measures would address both flow and treatment of runoff through the use of vegetated swales, interceptor drains, flow basins, detention systems, gravel subdrains, and an underground filter facility. However, it is unclear from the submitted information whether the proposed measures would ensure an adequate treatment of runoff. If the water quality measures proposed were sized to ensure that runoff from the site would be adequately treated prior to discharge into the Semeniouk Slough, the project would not result in degradation of water quality in the adjacent Semeniouk Slough. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

G. PUBLIC ACCESS / RECREATION

Section 30210 of the Coastal Act states:

> *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Coastal Act Section 30213 states (in relevant part):

> *Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided.*

Coastal Act Section 30223 states:

> *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

Coastal Act Section 30210 requires the provision of maximum access and recreational opportunities, Coastal Act Section 30213 states that lower cost visitor and recreational facilities shall be protected and provided, and Coastal Act Section 30223 requires the provision of coastal recreational uses on upland areas where feasible.

The proposed park would include both passive and active elements, including sports fields, children's playground, walking paths, picnic spots, and view garden. These elements would result in additional low-cost recreational opportunities for visitors and residents. The sports fields are proposed to be primarily used for youth sports leagues, which would primarily benefit residents from the surrounding areas; however the passive elements on the park could be utilized by both residents and visitors to the area.

The proposed park would be open during daylight hours from 8 AM until dusk each day. No lighting is proposed on the site, and the proposed project would not allow for use of the sports fields at night. A project located on the site should make provisions to ensure that maximum access, in accordance with Coastal Act Section 30210, is provided on the site; therefore the proposed hours may need to be revisited. Low-intensity lighting along pathways may be appropriate for the site and could extend the public's ability to access the site, provided the lighting would not result in impacts to habitat areas on the site. Therefore, if modified to address the above concerns, the proposed project would be consistent with Coastal Act Sections 30210, 30213, and 30223. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

H. GEOLOGY / HAZARDS

Coastal Act Section 30253 states in part:

> *New development shall:*
>
> *(1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.*
>
> *(2) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

The proposed project would result in the creation of engineered slopes, a restroom / storage building, and open space. The proposed project has been reviewed by Leighton Consulting Inc., which states that the proposed project would be considered feasible from a geotechnical standpoint. The applicant's geotechnical report states that the North Branch Splay fault, which is part of the Newport-Inglewood zone of deformation, is inferred

to be located underneath the subject site. However, the splay fault located on the site would not qualify as an active fault according to the criteria set by the State of California. Additionally, the proposed restroom/storage facility would be located approximately 200 feet to the northeast of the fault. Therefore, there are no active or inactive faults which would impact structures on the site. Therefore, with conditions, the proposed project could be found to be consistent with Coastal Act Section 30253 regarding minimization of hazards. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

I. ARCHEOLOGY

Coastal Act Section 30244 states:

> *Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.*

The EIR for the project states that three known archeological sites are known on the site: CA-ORA-1600, containing lithic fragments, CA-ORA-1601H and CA-ORA-1602H, containing 20th century trash fragments, and CA-ORA-1610H, which contained a gun emplacement during World War II, which has since been removed. Archaeological testing was conducted on the three known sites by Bon Terra Consulting, who determined that there are no known significant historical resources on the site. The gun emplacement site (CA-ORA-1610H) has been removed from its former location by grading of the mesa top on which it stood. CA-ORA-1600, CA-ORA-1601H and CA-ORA-1602H were tested and determined to not be significant or eligible for listing on the National Register of Historic Places or the California Register of Historic Resources. However, historical and archaeological sites are known to exist in the City. Therefore, there is a potential for disturbance of undiscovered resources during grading activities.

Given the level of soil disturbance which is planned for the site, the project should include provisions for a grading monitor to ensure the protection of cultural and paleontological resources which may occur on site. If archeological or paleontological resources were discovered on site during grading, all efforts should be made to avoid further disturbance, where feasible. Recovery of the resources should only be considered after all in-situ preservation options are exhausted. If development on the site is appropriately monitored, and resources encountered appropriately addressed, the project could be found to be consistent with Coastal Act Section 30244. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

J. LOCAL COASTAL PROGRAM (LCP)

Section 30604(a) of the Coastal Act provides that the Commission shall issue a Coastal Development Permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program that conforms with the Chapter 3 policies of the Coastal Act.

The City of Newport Beach Land Use Plan (LUP) was certified on May 19, 1982. At the October 2005 Coastal Commission Hearing, the certified LUP was updated. In addition, the certified LUP was updated at the October 2009 Coastal Commission Hearing. The City's certified Land Use Plan did not designate a Land Use for Newport Banning Ranch, but instead listed it as an Area of Deferred Certification. Since the City only has an LUP, the policies of the LUP are used only as guidance. The following Newport Beach LUP policies: 4.1.1-1 through 4.2.2-3, and the other resource protection policies of the LUP, relate to development at the subject site.

The preceding sections provide findings that the proposed project will not be in conformity with the provisions of Chapter 3. The proposed development will create adverse impacts and is found to be inconsistent with the applicable policies contained in Chapter 3. There are equivalent policies in the City's certified land use plan with which the proposed development would be inconsistent. Therefore, the Commission finds that approval of the proposed development would prejudice the City of Newport Beach's ability to prepare a Local Coastal Program for this area consistent with the policies of Chapter 3 of the Coastal Act, as required by Section 30604(a).

K. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The City of Newport Beach is considered the Lead Agency for the purposes of CEQA, and has issued an Environmental Impact Report for the project. Significant environmental impacts were identified for the construction of the project. The mitigation measures imposed for the project includes mitigation in the areas of Land Use, Aesthetics, Transportation and Circulation, Air Quality and Climate Change, Noise, Cultural and Paleontological Resources, Geology and Soils, Hazards and Hazardous Materials, Hydrology and Water Quality, Public Services and Utilities,

Significant effects which were found to not be sufficiently mitigated include air quality and noise impacts, which indicates that there are significant negative impacts which result from the project which can not be completely mitigated.

While the City of Newport Beach found that the development, with mitigation measures, could be found consistent with CEQA, the Commission, pursuant to its certified regulatory program under CEQA, the Coastal Act, has found the proposed development would have adverse environmental impacts. There are feasible alternatives or mitigation measures available, such as alternative park and road designs. Therefore, the proposed project is not consistent with CEQA or the policies of the Coastal Act because there are feasible alternatives, which would lessen significant adverse impacts, which the activity would have on the environment. Therefore, the project must be denied.