**CALIFORNIA COASTAL COMMISSION**
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| Filed: | 12/16/12 |
| 180th Day: | 6/13/12 |
| 207th Day: | 9/11/2012 |
| Staff: | J. Del Arroz-LB |
| Staff Report: | 6/21/12 |
| Hearing Date: | 7/12/12 |

## STAFF REPORT: REGULAR CALENDAR

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| **Application No.:** | **5-11-302** |
| **Applicant:** | **City of Newport Beach** |
| **Agent:** | Don Schmitz + Associates |
| **Location:** | Northwest Corner of the Intersection of Pacific Coast Highway and Superior Ave, Newport Beach, Orange County (APN 424-041-08, -10, -11, -13 and 424-042-03) |
| **Project Description:** | Construction of an active recreational park of approximately 13.7 acres. The park would include a baseball diamond/soccer fields, pedestrian paths, viewpoint, children's playground, restroom, and landscaping. Grading consists of approximately 57,223 cubic yards of cut, and 36,559 cubic yards of fill. The proposed development would be located on a vacant 13.7 acre parcel owned by the City of Newport Beach (formerly owned by Caltrans). |
| **Staff Recommendation:** | Denial |

## SUMMARY OF STAFF RECOMMENDATION:

The proposed project is the creation of an active recreational park and the second coastal development permit application that the Commission has reviewed for the subject site. The previous coastal development permit application, 5-10-168, proposed an active recreational park located on the parcel that is the subject of the current application, and on an easement area on the adjacent Newport Banning Ranch property. The previous application proposed a two lane access

road leading from West Coast Highway on the Newport Banning Ranch property to the subject site. Major concerns raised at the hearing regarding the project included the impact of the proposed access road on the adjacent Newport Banning Ranch property, impacts to ESHA and wetlands, and whether the project was the least environmentally damaging alternative. The application was withdrawn by the applicant prior to Commission action at the November 2011 hearing.

The currently proposed project, CDP Application No. 5-11-302, has revised the park plan to eliminate the two lane park access road present in CDP application 5-10-168, and utilize an existing parking lot located on Superior Avenue for public parking and an existing gravel road for access to the site by maintenance vehicles and potentially shuttles. The proposed project includes development on Newport Banning Ranch consisting of deposition of gravel on the existing access road and a low treated wood curb to separate the existing road from the adjacent habitat area. However, the project no longer includes significant new development on the Newport Banning Ranch property such as construction of an access road or grading.

Construction of the proposed park would rely on the elimination of a 3.3 acre patch of Disturbed Encelia Scrub. The Disturbed Encelia Scrub is located on the southern half of the property and has been subject to disturbance including pre-Coastal Act grading and mowing of vegetation by Caltrans since the 1960s and mowing of vegetation by the City of Newport Beach since 2007. The City states that such mowing on the site predates the Coastal Act and does not require a coastal development permit.

Staff has reviewed numerous photographs and documentation for disturbance on the site, the habitat requirements of the federally threatened California gnatcatcher, and the biology of California Encelia. Based on this information staff finds that the Disturbed Encelia Scrub provides valuable ecological services for the California gnatcatcher during the period of time that the vegetation is present, including foraging and potentially nesting habitat. Therefore, although the site has been subject to disturbance, staff finds that the vegetation constitutes 'Major Vegetation' due to its special ecological role in supporting the federally threatened California gnatcatcher. Section 30106 of the Coastal Act defines 'development', in part, as '…removal or harvesting of major vegetation…'. Thus, the mowing of the Disturbed Encelia Scrub requires a coastal development permit and is subject to the requirements of the Coastal Act. In this case, no coastal development permit has been granted for the mowing of the Disturbed Encelia Scrub.

The site has been subject to clearance of major vegetation without a permit and therefore the site has been subject to unpermitted development. In a memo dated September 22, 2011, the Commission's ecologist Dr. Jonna Engel determined that "…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 site must therefore be viewed as though the unpermitted clearing did not occur, i.e. a mature stand of Encelia Scrub which would qualify as ESHA. The proposed project would rely on the elimination of ESHA for the construction of active sports fields, a non-resource dependent use, and therefore will be entirely degraded by the proposed development and the eventual human activities on the subject site. The proposed project is therefore inconsistent with Coastal Act Section 30240 and must be denied.

Commission staff recommends **denial** of coastal development permit application 5-11-302.

# TABLE OF CONTENTS



## APPENDICES



## EXHIBITS

Exhibit 7 - Biological Memorandum from Dr. Jonna Engel, Staff Ecologist
Exhibit 8 - AG Opinion No. SO 77/39
Exhibit 9 - May 22 Letter from City of Newport Beach
Exhibit 10 - May 30 Letter from City of Newport Beach
Exhibit 11 - List of Fire Resistant Species
Exhibit 12 - Selected Photographs of Site
Exhibit 13 – Additional Public Comment Letters

# I. MOTION AND RESOLUTION

**Motion:**

*I move that the Commission **approve** Coastal Development Permit No. 5-11-302 for the development proposed by the applicant.*

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.

**Resolution:**

*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

### 1. 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 a 13.7 acre parcel northwest of Superior Avenue owned by the City of Newport Beach (this area will be referenced as the Park Site), and a 1.5 acre City owned public parking lot (this area will be referenced as the Parking Lot) located on the southeastern side of Superior Avenue.

Developed areas ring the Park Site on three sides. Residential uses are located adjacent to the Park Site to the northeast at the Newport Crest housing development, and across the highway to the southwest at the existing developed single family residential neighborhood. Hoag Hospital is

located to the east of the Park Site and the Parking Lot. Adjacent to the Park Site on the west is the Newport Banning Ranch property which is located in unincorporated Orange County and within the sphere of influence of the City of Newport Beach. Newport Banning Ranch is designated in the City's certified Land Use Plan as an area of deferred certification. Further to the west, beyond Newport Banning Ranch, is the Semeniouk Slough.

**2. Project Description:**

The proposed project is the creation of an active recreational park. A baseball diamond that overlaps in area with two soccer fields would be created on the center of the Park Site. A children's playground and grass warm up field is proposed 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 grass warm up field and the ball fields. Passive elements 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 site. At the northern boundary of the project site, the City 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 (Exhibit 2).

The project includes installation of landscaping, which would consist of predominantly native landscaping with some non-native drought tolerant non-invasive species (Exhibit 2). Grass lawn would be installed at the center of the Park Site for the proposed active sports fields. 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 contouring of slopes on the site will result in 57,223 cubic yards of cut, 36,559 cubic yards of fill on the site, and 20,664 cubic yards of export to a fill site located outside of the Coastal Zone.

The applicant proposes to relocate and reconstruct the existing concrete drainage channel located along Pacific Coast Highway and a portion of Superior Avenue. These areas drain into an existing box culvert which drains to Semeniouk Slough. An existing drainage ditch located near the western boundary of the subject site is proposed to be removed and replaced with an underground drainage culvert and an above ground infiltration swale.

City maintenance vehicles and shuttles would access the site through the existing unimproved access road which bisects the Southeast Polygon, on the west portion of the subject site. The existing unimproved access road would be improved through the addition of gravel and a low treated wood curb to separate the existing road from the adjacent habitat area. The City proposes to utilize the existing chainlink fence with locked gate located adjacent to Pacific Coast Highway to restrict vehicular access to the site. The access road leads to a gravel turnaround located approximately 120 feet east of the western boundary of the park, and from the turnaround a decomposed granite road leads to the north to access an existing manhole located just to the north of the subject site.

The previous application for an active recreational park at the site, coastal development permit application 5-10-168, included a proposal for a two lane access road sited mostly on the adjacent property owned by Newport Banning Ranch to a proposed parking lot on the Park Site, consistent with the terms of an easement agreement between Newport Banning Ranch and the City. This

access road has been eliminated from the revised project proposal. Instead, the City proposes to use the existing 64 space parking lot located on the eastern side of Superior Avenue. The parking lot at Superior Avenue was established by coastal development permit number 5-88-255 and subsequent amendments to mitigate for the loss of street parking resulting from the expansion of Pacific Coast Highway from 4 to 6 lanes. The parking lot is currently used by the public, including use as beach parking to access the beach located approximately 950 feet to the southwest of the lot. The lot is underutilized for the majority of the year, but does receive heavy usage during some holidays and weekends in the peak summer period. The City plans to manage scheduling of games to ensure that adequate parking is provided for games, and to ensure that parking for the proposed active recreational park does not conflict with the parking needs of other uses in the area, such as parking for beach access.

**3. History & Current Planning**

Caltrans graded the 13.7 acre Park Site heavily at some point prior to the Coastal Act, resulting in significant alterations to the topography of the site. The topography of the Park site historically consisted of a mesa which extended continuously across the site. However, excavation and use of the site as a source of soil for other Caltrans projects has significantly modified the Park Site, resulting in the two artificial terraces present on the east and west portions of the site present today. The majority of the subject site now lies at a lowered elevation of approximately 44 feet, with the remnant portions of the mesa on the north eastern corner of the Park Site and the eastern portion of the Park Site at the historical elevation of 76 feet above sea level.

The Environmental Impact Report (EIR) for the project states that the Park Site has been mowed historically and continues to be mowed frequently and routinely for fuel modification and weed abatement purposes. The clearance of vegetation on the site will be covered below in Section C, Historical and Existing Vegetation Patterns.

The subject site 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 would allow 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 Park 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 parcel. Terms of the sale included a restriction to those uses on the subject 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 a 4.5 acre portion of the Park Site adjacent to Coast Highway which prohibits permanent structures or pavement.

The Draft Environmental Impact Report for development of commercial and residential uses on the adjacent property known as Newport Banning Ranch was released on September 9, 2011, and the Response to Comments made on the EIR was released on March 16, 2012. 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 (if the local jurisdiction is to have permit authority), and would require a coastal development permit.

**4. Past Commission Action**

a. Violation and Enforcement

The Park Site includes an area where some of the Coastal Act violations that were the subject of Commission Cease and Desist Order CCC-11-CD-03 and Restoration Order CCC-11-RO-02 ("Enforcement Orders") occurred in 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 violations occurred in three distinct areas identified and subsequently referred to as 'polygons,' located on the subject site and the adjacent Newport Banning Ranch property. The Northeast and Northwest polygons are located approximately 300 feet to the west of the subject site, on the Newport Banning Ranch property. The Southeast Polygon is located at the western portion of the subject site, and is located on both the City of Newport Beach and Newport Banning Ranch property(See Exhibit 2), On April 14, 2011, after reaching agreement with the violators on the terms of the Enforcement Orders, the Commission issued them as "Consent Orders," requiring payment of monetary penalties for violation of the Coastal Act, and requiring removal of unpermitted development, restoration with coastal sage scrub for use of the California gnatcatcher, and mitigation offsetting the temporal loss of habitat and loss of habitat fitness that resulted from the violation. The Commission found that the Southeast and Northwest polygons were considered to be ESHA at the time the development took place, and required the two polygons to be restored to support the California gnatcatcher. In the Enforcement Orders, the Commission stated that a separate "analysis will be done by the Coastal Commission for any future coastal development permit or other proceeding before the Coastal Commission on the subject properties." The analysis for whether the Southeast polygon is ESHA can be found below in Section E, Environmentally Sensitive Habitat Areas.

b. LUP Amendment NPB-MAJ-1-06

The City of Newport Beach 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 Park Site 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 impacts to biological resources and the potential for substantial landform alteration, and that any future development should address these potential impacts.

c. Coastal Development Permit Application 5-10-168

On November 2, 2011 the Commission held a hearing on CDP Application 5-10-168, in which the City proposed an active recreational park on the subject site and an access road and habitat restoration areas on the adjacent property owned by Newport Banning Ranch. Major concerns raised at the hearing regarding the project included the impact of the proposed access road on the adjacent Newport Banning Ranch property, impacts to ESHA and wetlands, and whether the project was the least environmentally damaging alternative. The application was withdrawn by the applicant at the hearing, prior to Commission action.

## B. OTHER AGENCY APPROVALS

In the preparation of these Findings, the Commission staff consulted with the US Fish and Wildlife Service's Carlsbad office. The US Fish and Wildlife Service has reviewed the proposed project and has determined that the project would not result in harm or take of the California gnatcatcher (Exhibit 9, page 3). The FWS letter included recommended mitigation measures, including the removal of invasive species, and alteration of the proposed landscaping plan.

## C. HISTORICAL AND EXISTING VEGETATION PATTERNS

### 1. Description of Disturbed Encelia Scrub

a. Introduction

The EIR for the project describes the vegetation on the Park Site as consisting of: Ornamental, Encelia Scrub, Encelia Scrub/Ornamental, Disturbed Encelia Scrub and Ruderal vegetation (Exhibit 7, Figure 8). The Park Site has been subject to recurrent clearance of vegetation, which has not received a coastal development permit. The clearance has included mowing of a 3.3 acre area located in the center of the Park Site, which is mapped in the EIR as Disturbed Encelia Scrub. The City has taken the position that the clearing of vegetation on the Park Site which has occurred has not required a coastal development permit because the activity has taken place since before the effective date of the Coastal Act. Encelia scrub is a type of coastal sage scrub community that serves as habitat for the federally threatened California gnatcatcher, which, as discussed below, is known to occur on the Park Site and on the adjacent Newport Banning Ranch property. Clearance

of vegetation known to serve as habitat and provide important ecological functions for a listed species would qualify as Major Vegetation and could also qualify as ESHA. Therefore, at issue is the question of whether the Disturbed Encelia Scrub serves as important ecological habitat for the California gnatcatcher.

If clearance of the Disturbed Encelia Scrub did not qualify as clearance of major vegetation, the clearance would not qualify as development under the Coastal Act, and the Commission must evaluate the impacts of the proposed development on the site in its current condition. However, if the vegetation does qualify as major vegetation, the clearance of the Disturbed Encelia Scrub which has occurred over the Park Site's history should be treated as unpermitted development, and the Park Site should be treated as if the unpermitted development did not occur; that is as if a mature stand of encelia scrub that would potentially qualify as ESHA existed on the site. Therefore, it is necessary to assess the historic clearance of the Disturbed Encelia on the Park Site and whether the clearing required a coastal development permit. The following paragraphs will state what is known regarding the Disturbed Encelia Scrub. Analysis of the information and a conclusion regarding whether the vegetation constitutes major vegetation can be found in Section D, Determination of Major Vegetation.

b. Clearance of Vegetation

The City states that regular, ongoing maintenance and weed abatement has occurred annually on the Park Site by Caltrans since prior to the enactment of Proposition 20 and the Coastal Act, and continued when the City purchased the Park Site in 2006. Specifically, the City states that Caltrans undertook weed abatement on the Park Site by disking until 2001, when Caltrans began mowing the Park Site for weed abatement instead of disking. In support of the claim, the City has submitted aerial photography, signed letters from City staff, and copies of complaints regarding high vegetation on the Park Site. Commission staff has contacted Caltrans for more specific information regarding the purpose and extent of clearing activities which were carried out on the Park Site; however, to date, Caltrans has not submitted such information.

The available aerial photography which has been reviewed by staff includes photos of the Park Site from Caltrans archives submitted by the applicant, photographs from the California Coastal Record project, and aerial photography from Google Earth. For the years where Caltrans appears to have cleared vegetation on the site, staff used satellite imagery and aerial photography showing the site's condition on one day, each image taken on various dates of the year, in the following years: 1965, 1968, 1972, 1973, 1974, 1975, 1977, 1979, 1982, 1983, 1986, 1987, 1989, 1991, 1993, 1994, 1995, 2002, 2003, 2004, 2005, and 2006.

After Caltrans transferred the Park Site to the City, the City has stated that mowing of the Park Site and related maintenance was done at least once each year, and typically twice, since April 2007. The available aerial photography of the Park Site which has been reviewed by staff include photos from the California Coastal Record project and Google Earth. Aerial photography for this period is available for the years of 2007, 2008, 2009, 2010, 2011.

In general, each photograph shows evidence that the Park Site has been subject to mowing within the recent past. The record of aerial photographs includes periods where photographs are not available, including a seven-year period between 1995 and 2002; however, photographs before and

after this seven-year period depict evidence of recent mowing. There are two aerial photographs within this record which show green vegetation on the Park Site with increased heights and which suggest that vegetation on the Park Site may reach a high level (dated April 14, 1993, and March 27, 2005). However, the photographs are taken directly above the vegetation and the type or height of the vegetation cannot be determined.

Documentation regarding the history of mowing on the Park Site consists of two letters from fire officials from the City of Newport Beach, a copy of complaint reports regarding weeds on the property, and documentation for work orders for clearance of vegetation. The City has submitted two letters from a retired fire inspector, Russell Cheek, and Fire Marshal Steve Bunting, both alleging that Caltrans and the City have abated weeds on the property from 1979 to present. The letters claim that "since the early 70s", Caltrans "was very good about 'disking' the property at the beginning of fire season each year and never had to be asked." and that the City's Fire Department has "physical record of abatement at the site dat[ing] back to 1997." However, the City has not submitted this "physical record of abatement" to the Commission nor explained what it may contain. Although the City states that the mowing occurred because of weed abatement activities, the submitted materials do not indicate that the City declared either a public nuisance to abate a fire hazard on the Park Site or a designation of the Park Site as a high fire hazard zone. Additionally, the mowing activities extended beyond 100 feet from a structure, the area typically subject to fuel modification activities. Further the cleared vegetation, California encelia, is listed on the City of Newport Beach Fire Department's website as a fire-retardant species, which also states that "[f]ire restistant plants can act as a *firebreak and protect your home."* (emphasis added). The Disturbed Encelia Scrub is composed primarily of California encelia. Thus even if flammable species were present, the California encelia would act to suppress the spread of the fire. In sum, while the submitted letters may be adequate to show the City's claimed justification for clearing the Disturbed Encelia Scrub area of the Park Site over time, they are not sufficient to support the City's claim that the mowing activities have historically occurred on an annual basis.

The City submitted two "Newport Beach Fire and Marine Department Complaint Report[s]". In 1997, the complainant, "Georgia," complained that the Park Site was "overgrown, dead brush and weeds." In 1999, the complainant, Vivian Cellni, complained that "the lot is a fire hazard - high weeds present." These complainants are not known to be qualified biologists and thus likely not qualified to determine whether or not their observations of the overgrown weeds and brush were healthy stands of vegetation, but the complaints are suggestive that vegetation on the Park Site has reached large heights over the period in which Caltrans mowed the site.

Records consisting of work orders and invoices were submitted by the City for clearance of vegetation on the Park Site by Southland Vegetation Maintenance during City ownership of the Park Site between 2007 and 2011. The invoices show that the City cleared the Disturbed Encelia Scrub on the Park Site between once and twice a year, and that in later years the vegetation clearance included the use of herbicides.

Photographs taken of the Park Site from ground level were received from various sources. Some of the photos were those taken by Robb Hamilton of Hamilton Biological, in an email dated March 23, 2010, and letters dated December 10, 2009, May 25, 2010, and December 11, 2010. Photos dated February 6, 2012 showing clearance by the City of vegetation at the Park Site were presented to the

Commission by the Banning Ranch Conservancy at the Commission's February meeting in Santa Cruz. Other undated photographs of growth of California encelia on the Park Site were shown at the Commission's October 6, 2011 meeting in Huntington Beach. The ground level photos of the Park Site which have been reviewed by staff show that the area of Disturbed Encelia Scrub and the patch of Encelia Scrub along Superior Avenue can grow to a height of 2-3 feet within a growing season, and that the vegetation is composed of Encelia Scrub, some native species such as deerweed, and non-native species. The available photographs show that California encelia can reach dense shrub coverage levels, but is sparsely covered after mowing events.

From the available evidence, there may have been a year-long period between mowings during Caltrans ownership, though this is not conclusive since there are gaps in evidence to support a finding that the mowing occurred every year during its ownership. Although the vegetation does grow to a height of a few feet during the winter growing season, the vegetation is brought back to ground level, with the root system remaining intact, when mowing later occurs. For the time in which the City has owned and maintained the property, it appears that the City mowed the Park Site annually or twice per year. Thus, the available evidence suggests that mowing events have occurred on the Park Site since before passage of the Coastal Act but there is insufficient evidence to conclude that the mowing events regularly occurred on an annual or semi-annual basis since before passage of the Coastal Act.

c. Description of Vegetation in EIR

The EIR for the project was prepared by the City of Newport Beach and Bon Terra Consulting. The EIR maps an area of Ruderal vegetation which is located primarily along the northeastern boundary of the Park Site, and extends, on average, approximately 270 feet from the northeastern boundary of the Park Site. The EIR maps an area of Encelia Scrub about 200 feet long and 60 feet wide along Superior Avenue, and another area of Encelia Scrub of triangular shape located at the western boundary of the Park Site. An area mapped as Encelia Scrub / Ornamental is located on the Park Site just up slope from the intersection of Pacific Coast Highway and Superior Avenue. Ornamental vegetation is located along the majority of the Park Site's slopes that are adjacent to Coast Highway and Superior Avenue and is also located at the northwest corner of the Park Site.

The EIR describes a 3.3 acre area in the center of the project site as Disturbed Encelia Scrub. The EIR states that the vegetation within the area of Disturbed Encelia Scrub is "dominated by bush sunflower [*Encelia californica*] and deerweed (*Lotus scoparius*). The understory consists of non-native grasses and forbs, including black mustard (*Brassica nigra*), foxtail chess (*Bromus madritensis* ssp. *rubens)*, Russian thistle (*Salsola tragus*), and tocalote (*Centaurea melitensis*). Shrub cover of this area is approximately 50 to 60 percent overall." The EIR concludes that the Disturbed Encelia scrub is not special status due to regular mowing for fuel modification and weed abatement purposes, high percentages of non-native weeds, fragmentation from high value areas, presence of trash, proximity to high foot/bicycle, and vehicle traffic. The EIR states that the area is not expected to support gnatcatchers during the nesting season.

d. Assessment by Commission Staff

Gnatcatchers typically occur in or near coastal sage scrub, which is composed of relatively low-growing, dry-season deciduous and succulent plants. Coastal sage scrub on Newport Banning Ranch and the Park Site is best characterized as California encelia series because it is dominated by California encelia. California encelia is a fast growing species, with growth rates that vary between 1 to 4 feet during the growing season[1,2]. Weaver (1998) found that gnatcatcher densities in northern San Diego County were highest in areas where California encelia or California buckwheat were co-dominant with sagebrush. This provides additional evidence that California encelia is one of the California sage scrub species most favored by the gnatcatcher. Gnatcatchers may also use chaparral, grassland, and riparian plant communities where they occur adjacent to or intermixed with coastal sage scrub, especially during the non-breeding season (Campbell *et al.* 1998), but are usually closely tied to coastal sage scrub for reproduction (Atwood 1993).

California gnatcatcher breeding season territories range in size from less than 2.5 acres to 25 acres[3,4], with a mean territory size generally greater for inland populations than coastal populations[5]. During the non-breeding season, gnatcatchers have been observed to expand their use area to an area approximately 78 percent larger than their breeding territory (Preston *et al*. 1998). Preston *et al.* (1998) postulated that gnatcatchers expand their use area outside of the breeding season to pursue supplemental foraging resources in non-scrub habitats, including weedy areas (e.g., non-native grasslands). The Disturbed Encelia Scrub area, at 3.3 acres in size, meets the minimum size of a breeding territory for the gnatcatcher.

According to the record of vegetation maintenance, brush/non-native flush cutting and herbicide application occurred in January of 2009. About three months later, a protocol gnatcatcher survey was conducted between April 1st and May 15th, 2009 by Bon Terra, that identified one gnatcatcher pair on the adjacent Newport Banning Ranch property, but did not identify any gnatcatchers within the area of Disturbed Encelia Scrub or on the rest of the Park Site. Since there is photographic evidence showing significant growth of California encelia on the Park Site, it is unclear whether BonTerra conducted the protocol gnatcatcher survey after a mowing event on the site or when there was significant growth on the Park Site. If the conditions were the former, the survey likely did not reflect the gnatcatcher's actual use of the area of Disturbed Encelia Scrub throughout the year. Protocol surveys that have been conducted since 1992 on the Newport Banning Ranch site show that gnatcatcher nesting territory locations shift from year to year. Given the close proximity of the Disturbed Encelia Scrub to mapped gnatcatcher territories on Newport Banning Ranch, the growth rate of California encelia, and the fact that we have only one protocol survey for the subject site, it is likely that the recorded data does not capture actual use of the site by gnatcatchers and it is likely gnatcatchers utilize the Disturbed Encelia Scrub between mowings for the following reasons.

[1] Pers. Com. J. Evens, Senior Botanist, CNPS. Jan 19, 2012.
[2] Landis, B. Aug. 2011. Native Plants for School and Urban Gardens. CNPS
[3] Atwood, J.L., S.H. Tsai, C.H. Reynolds, J.C. Luttrell, and M.R. Fugagli. 1998. Factors affecting estimates of California Gnatcatcher territory size. Western Birds, Vol. 29: 269-279.
[4] Preston, K.L., P.J. Mock, M.A. Grishaver, E.A. Bailey, and D.F. King. 1998. Calfornia Gnatcatcher territorial behavior. Western Birds, Vol. 29: 242-257.
[5] Ibid.

The Disturbed Encelia Scrub is located directly adjacent to identified gnatcatcher nesting territory. Multiple protocol gnatcatcher surveys (1992 to 2009) have occurred on the adjacent Newport Banning Ranch property. Exhibit 7 to the staff report, the biological memorandum by Dr. Jonna Engel includes Figure 18, a compilation of the available data regarding gnatcatcher presence on the adjacent property. The 3.3 acre Disturbed Encelia Scrub area on the Park Site is 80 feet east of an area of Encelia Scrub located partially on and partially adjacent to the Park Site, and about 160 feet east of an area on Newport Banning Ranch identified by the applicant as Southern Coastal Bluff Scrub where gnatcatchers have been mapped in protocol surveys. The area is also directly adjacent to areas near Pacific Coast Highway where foraging gnatcatchers have been observed outside of the breeding season by Robb Hamilton of Hamilton Biological.

In addition to mowing disturbance and level of invasion by non-native species, the EIR cites trash and noise disturbance from the adjacent road as factors for why the Disturbed Encelia Scrub is not special status. However, immediately adjacent to the Disturbed Encelia Scrub is an area with a long history of documented gnatcatcher use, so it is not likely that trash and noise on the subject site play a significant role in whether the Disturbed Encelia Scrub is utilized by gnatcatchers.

The mowing that has occurred on the site prevents the Disturbed Encelia Scrub from establishing into a mature coastal sage scrub community. However, photographs of the Disturbed Encelia Scrub show that encelia can reach heights of two to three feet over one growing season. According to the EIR the shrub cover of the 'Disturbed Encelia Scrub' area is 50 to 60 percent. This percent cover is well within the range of cover documented to support gnatcatcher foraging and potentially activities. Nesting territories typically have between 20 to 60 percent shrub cover and an average shrub height of 2.3 ft; average nest height is 2.7 feet above the ground with a range of 30-292cm [6,7]. There are accounts in scientific literature of gnatcatchers successfully nesting at first-year post burn sites and foraging in rapidly re-growing burn sites(Beyers and Wirtz 1997). Beyers and Wirtz's research focused on gnatcatcher utilization in areas immediately post wildfire rather than the effects of mowing; however fire and mowing both result in the removal of the majority of vegetation.

Although the City's EIR states that the Disturbed Encelia Scrub is regularly mowed and has a high percentage of non-native weeds and therefore is not valuable habitat, the Commission's staff ecologist, Dr. Jonna Engel, disagrees. The Commission's staff ecologist has evaluated the area of Disturbed Encelia Scrub, and has determined that the Disturbed Encelia Scrub would qualify as ESHA if the area was not mowed. From the Biological Memorandum:

> *I … 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.*

[6] Bontrager 1991, Mock and Bolger 1992, Grishaver et al. 1998.

[7] Beyers, J.L. and W.O. Wirtz. 1997. Vegetative characteristics of coastal sage scrub sites used by California gnatcatchers: Implications for management in a fire-prone ecosystem. In Greenlee, J. M. (ed.), Proceedings: First conferenc on fire effects on rare and endangered species and habitats, Coeur d'Alene, Idaho, November 1995. International Association of Wildland Fire, Fairfield, Washington. pp. 81-89.

> *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.*

In summary, the Disturbed Encelia Scrub on the Park Site is immediately adjacent to an area with a long history of supporting nesting gnatcatchers and is one of the three main sage scrub types (along with California sage and California buckwheat) preferred by gnatcatchers[8]. If not for the clearance of the Disturbed Encelia Scrub, this scrub community would develop into a stand dominated by California encelia and suitable for gnatcatcher for foraging and nesting. Therefore, as noted in Dr. Engel's Biological Memorandum, if the Park Site was not mowed, the Disturbed Encelia Scrub would qualify as ESHA.

e. Adjacent Property

The property adjacent to the Park Site is known as Newport Banning Ranch. Newport Banning Ranch covers 401 acres and supports a variety of habitat types, including different varieties of coastal sage scrub, grassland and ruderal habitat, vernal pools, marshes, and riparian scrub. The Draft Environmental Impact Report (DEIR) for Newport Banning Ranch identifies the following sensitive species that are mapped on the site in 2009 and 2010: burrowing owl, the California gnatcatcher, cactus wren, least Bell's vireo, San Diego fairy shrimp, and southern tarplant. The Newport Banning Ranch property is subject to periodic mowing activities. The DEIR states that such activities are required for oilfield maintenance and fuel modification. The Commission will be analyzing the mowing activities on Newport Banning Ranch in review of any development on the site.

**2. Existing Environmental Designations**

a. Critical Habitat

The Fish and Wildlife Service (FWS) designated all of the Park Site and all of Newport Banning Ranch as critical habitat for California gnatcatchers in 2000 (Exhibit 7, Figure 10). In determining areas to designate they "consider the physical and biological features (primary constituent elements (PCEs)), that are essential to the conservation of the species". Primary constituent elements define the actual extent of habitats that contribute to the primary biological needs of foraging, nesting, rearing of young, intra-specific communication, roosting, dispersal, genetic exchange, or sheltering. Primary constituent elements for California gnatcatcher critical habitat include not only intact sage scrub habitats, but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in

[8] Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica). In* The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

proximity to sage scrub habitats that provide space for dispersal, foraging, and nesting." The FWS defines sage scrub as a broad category of vegetation that includes coastal sage scrub, coastal bluff scrub, and maritime succulent scrub in their extensive list of the various sage scrub plant communities.

In designating the Park Site and Newport Banning Ranch as critical habitat, FWS noted that the area was occupied by gnatcatchers at the time of listing and at the time of designation of critical habitat and the area "contains all the features essential to the conservation of the coastal California gnatcatcher." This block of land is the only immediately coastal land mapped as critical gnatcatcher habitat in Unit 7 in Orange County (Exhibit 7, Figure 11). FWS pointed out in the final rule that the critical habitats in northern Orange County "may require special management considerations or protection to minimize impacts associated with habitat type conversion and degradation occurring in conjunction with urban and agricultural development."

b. Past Considerations of ESHA on the Park Site

As noted above in Section A, Part 3, Past Commission Action, the Commission issued Consent Order CCC-11-CD-03 and Restoration Order CCC-11-RO-02 on April 14, 2011 for unpermitted development on a portion of the Park Site and on the property owned by Newport Banning Ranch. The violation occurred on three 'polygons,' located on the subject site and the adjacent Newport Banning Ranch property. The Northeast and Northwest polygons are located approximately 300 feet to the west of the subject site, on the Newport Banning Ranch property. The Southeast Polygon is located at the western portion of the subject site, and is located on both the City of Newport Beach and Newport Banning Ranch property (See Exhibit 2). As part of the Consent and Restoration Orders, the Commission found that the Southeast and Northwest polygons were considered to be ESHA at the time the development took place, and required the two polygons to be restored to support the California gnatcatcher. In the Enforcement Orders, the Commission stated that a separate "analysis will be done by the Coastal Commission for any future coastal development permit or other proceeding before the Coastal Commission on the subject properties." This analysis can be found in Section E, Environmentally Sensitive Habitat Areas, below.

c. Review by the Fish and Wildlife Service

The City of Newport Beach has requested technical review of the proposed project from the Fish and Wildlife Service(FWS). FWS has written a letter dated April 27, 2012 which reviewed whether the project would result in harm to or take of the California gnatcatcher (Exhibit 9, Page 3).

The FWS found that the project would not result in harm to the gnatcatcher. Although impacts to 3.95 acres of foraging and sheltering habitat are proposed, the project would result in creation or restoration of 4.4 acres of gnatcatcher foraging habitat, would include measures to minimize impacts, and would not result in temporary displacement of birds due to habitat availability on the adjacent Newport Banning Ranch property. The FWS further found that operation and maintenance of the park would not result in long term impacts to habitat or gnatcatchers due to measures incorporated into the City's proposal, such as signs, fencing, and non-native plant removal. However, it is important to note that the Fish and Wildlife Service reviews whether projects will result in a reduction in the abundance of a listed species, and allows for mitigation of impacts to sensitive habitats if they determine that a particular project will not jeopardize the persistence of the respective species. This stands in contrast with the requirement for protection of environmentally

sensitive habitat where it is located, as mandated by Coastal Act Section 30240 (Bolsa Chica Land Trust v. Superior Court of San Diego (1999)71 Cal.App.4th 493, 507.)

## D. DEVELOPMENT

Coastal Act section 30106 states (in relevant part) :

> *"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 in relevant part:

> *(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.*

### 1. Introduction

As described above, mowing of the Disturbed Encelia Scrub has occurred repeatedly over the site's history without a coastal development permit. During mowing events, the Disturbed Encelia Scrub is mowed to within a few inches of ground level. In the interim period between clearings, the vegetation can reach heights of two to three feet.

Coastal Act Section 30600 states that development within the Coastal Zone requires a coastal development permit. Coastal Act Section 30106 states that development includes the removal of major vegetation. Therefore, whether the clearance of vegetation on the Park Site requires a permit depends on whether the vegetation which is being cleared qualifies as major vegetation. The term major vegetation is not defined in the Coastal Act or the Commission's Code of Administrative Regulations. In general, the Commission has typically interpreted major vegetation to consist of vegetation which is ecologically significant. A more in-depth discussion of the criteria for major vegetation is found in the Attorney General's Office Opinion No. SO 77/39.

### 2. Attorney General's Opinion

The Attorney General's Office issued Opinion No. SO 77/39 on April 6, 1978 in response to a question from Executive Director Joseph Bodovitz regarding the interpretation of Coastal Act Section 30106 and how it applied to various agricultural activities(Exhibit 8). In answering the question, the Opinion includes an analysis of the meaning of the term 'major vegetation.'

The opinion concludes that the term 'major' in 'major vegetation' refers to the size and importance of the vegetation. A determination of major vegetation can rely on a vegetation's size, importance, uniqueness, its relation to the environment in which it is located, or a combination of those factors. Some examples of factors that could be considered include: the absolute size of a particular specimen, the relative size of a specimen in relation to the average of the species, the total size or extent of a number of specimens of a particular variety growing together regardless of the size of the individual specimen, the uniqueness of a particular specimen to a certain area, and whether the vegetation was a necessary part of a scenic landscape or a wildlife habitat or in some other way part of an integrated environment that depended on its presence to preserve other coastal resources. Finally, the Opinion states that in close cases, the definition of major vegetation should be interpreted broadly to ensure the habitat protection goals of the Coastal Act are carried out.

**3. Analysis of Factors: Size and Importance/Uniqueness**

a) Size

The first criteria listed by the Attorney General's Opinion is the size of the vegetation. As described above in Section C, the Disturbed Encelia Scrub is subject to recurrent mowing activities and appears to grow to maximum heights of two to three feet between mowings. A height of two to three feet for each plant is not a particularly notable size when compared to coastal sage scrub in other areas. Coastal sage scrub in other areas of Orange County that are not subject to clearing support larger, more robust, and older individual shrubs than the plant specimens on this site. However, the extent of the area of the Disturbed Encelia Scrub on the Park Site could potentially be significant. Although the vegetation is subject to regular disturbance, the Disturbed Encelia Scrub is still a continuous patch of relatively pure California encelia which covers 3.3 acres. Much of the area that was historically covered by coastal sage scrub in coastal Orange County has been eliminated by development. The Disturbed Encelia Scrub on the Park Site is one of the very few stands of coastal sage scrub remaining in coastal Orange County of substantial size, and as such, the size of the 3.3 acre patch is significant.

b) Importance / Uniqueness

The Disturbed Encelia Scrub fits the description of "California encelia scrub alliance" (32.050.00) defined by Sawyer, Keeler-Wolf, and Evens (2009) in the 2nd Edition of "A Manual of California Vegetation"[9]. The membership rule applied by the 2009 manual for this alliance is dominance or co-dominance of California sunflower with "at least 30% relative cover in the shrub canopy". The EIR states that the vegetation within the area of Disturbed Encelia Scrub is "dominated by bush sunflower [i.e. California encelia, *Encelia Californica]* and deerweed (*Lotus scoparius*). The understory consists of non-native grasses and forbs, including black mustard (*Brassica nigra*), foxtail chess (*Bromus madritensis* ssp. *rubens)*, Russian thistle (*Salsola tragus*), and tocalote (*Centaurea melitensis*). Shrub cover of this area is approximately 50 to 60 percent overall." California encelia scrub alliance has a conservation status rank of G4S3, indicating that it is sensitive and "vulnerable to extirpation or extinction" within the state of California.

[9] Sawyer, J., T.Keeler-Wolf, and J. Evens. 2009. A Manual of California Vegetation, 2nd Edition. California Native Plant Society.

The Park Site's Disturbed Encelia Scrub vegetation is dominated by California encelia but also includes both other native species such as deerweed as well as non-native species such as black mustard and thistle as described in the project EIR. The site has been subject to large amounts of disturbance over the years, including a major grading event which removed thousands of cubic yards of earth from the site. Additionally, the site has been subject to mowing activities which have occurred since prior to the Coastal Act. There is an extensive record of mowing on the site, but it does not include a clear record for every year. From the available evidence, the period between mowings during Caltrans ownership appears to be around once a year. For the time in which the City has maintained the property the period between mowings appears to be between once and twice a year. Mowing of vegetation on the site prevents the development of the variation of species or maturity that is present within what would be considered higher quality California sunflower coastal sage scrub series.

In 2000 the US Fish and Wildlife Service determined that the block of land which includes the Park Site and the adjacent Newport Banning Ranch property constitutes critical habitat for the California gnatcatcher. One protocol gnatcatcher survey was conducted in 2009 on the Park Site. This survey did not result in a sighting of gnatcatchers within the Disturbed Encelia Scrub. However, previous protocol surveys on the Newport Banning Ranch property have identified gnatcatchers within vegetation located 80 and 160 feet from the Disturbed Encelia Scrub. Additionally, non-protocol sightings have identified gnatcatchers utilizing vegetation surrounding the Disturbed Encelia Scrub on the slopes of the Park Site adjacent to West Coast Highway and Superior Avenue. Therefore, the Disturbed Encelia Scrub vegetation on the Park Site is directly adjacent to habitat which is documented to be utilized by the gnatcatcher.

The mowing of vegetation on the site temporarily eliminates the ability of the vegetation to serve as gnatcatcher habitat during the time in which the vegetation is mowed to ground level. However, the scientific literature and photographic record suggests that between mowings the vegetation can grow to a point where it provides valuable ecological services to the California gnatcatcher in the form of foraging and potential nesting habitat. Individual plants have been observed to reach a size between mowings that is suitable for supporting the insect species gnatcatchers forage on and that meets the average size that gnatcatchers use for nesting. The extent of the vegetation (3.3 acres) exceeds the minimum breeding territory size requirement for gnatcatchers (2.5 acres). The Commission's staff ecologist has determined that if the disturbance of the vegetation were to cease, the vegetation would be used by the federally threatened California gnatcatcher as foraging and potential nesting habitat. Therefore, although there has been a large degree of disturbance to the site, the Disturbed Encelia Scrub vegetation on the Park Site plays a significant ecological role in the surrounding area in that it serves as habitat for a federally listed species.

**4. Conclusion**

Regarding the factor of vegetation size, the size of individual plants in the Disturbed Encelia Scrub area is not significant, as the individual plants are prevented from reaching full stature and robustness and the plant community is prevented from attaining the level of species diversity that would exist in a mature stand of coastal sage scrub. However, the extent of vegetation is significant in that the Disturbed Encelia Scrub covers an area of significant size. While mowing of vegetation

temporarily eliminates the habitat value of the Disturbed Encelia Scrub, the Disturbed Encelia Scrub still provides an important ecological role in the time in which it is present.

The site has been subject to large amounts of disturbance, including grading of thousands of cubic yards of export material from the site, and a history of recurrent mowing activities. Although neither Caltrans nor the City of Newport Beach requested a determination from staff, it is likely that, prior to the designation of the gnatcatcher as a species threatened by extinction, Commission staff would have determined that no CDP would be required for the clearance of vegetation due to the disturbed nature of the site. However, the gnatcatcher is now a listed species and more is now known regarding its habitat requirements. The available information shows that the vegetation on the site meets its habitat requirements. Although no gnatcatcher has been sighted within the vegetation, it is reasonable to infer that the gnatcatcher utilizes the Disturbed Encelia Scrub due to protocol surveys and non-protocol sightings which have identified gnatcatchers in directly adjacent habitat, and photographic evidence which shows that the vegetation meets the species' habitat requirements. Finally, pursuant to the AG Opinion, in close cases the definition of major vegetation should be interpreted broadly to ensure the habitat protection goals of the Coastal Act are carried out. Therefore, the habitat plays a significant ecological role in its support of a federally listed species even with the degree of disturbance that has occurred on the site. The area of Disturbed Encelia Scrub rises to the level of Major Vegetation due to its significant ecological role, and pursuant to Coastal Act Section 30600, the removal of the Disturbed Encelia Scrub requires a coastal development permit.

The Commission has not authorized a coastal development permit for the clearance of major vegetation on the Park Site and the clearance of vegetation on the site which has occurred has been unpermitted. When considering new development on the site, the site should be viewed as though the unpermitted development did not occur. As further explained in Section E, below, pursuant to the biological memo from Dr. Jonna Engel, the Disturbed Encelia Scrub constitutes ESHA.

**5. No Vested Rights Claim Application From the City**

No coastal development permit has been issued for the removal 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.

Coastal Act Section 30106 defines the definition of development to include the removal of major vegetation and Coastal Act Section 30600 states that development within the Coastal Zone requires a coastal development permit. As noted above, the subject site contains major vegetation and, thus, pursuant to the Coastal Act, any removal of the major vegetation requires a property owner to apply for and obtain a coastal development permit from the Commission before such removal.

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 yards landward of the mean high tideline, then that property is subject to the permit requirements of Proposition 20 (former Pub. Res. Code, Section 27104). The entire site is within 1000 yards of the mean high tide line and was therefore subject to Proposition 20's permitting requirements.

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.

Although Section 30608 provides an exemption from the permit requirements of the Coastal Act if one has obtained a vested right in a development, neither the Coastal Act nor the Commission's regulations articulate any standard for determining whether a person has obtained such a right. Thus, to determine whether the Coastal Act's vested rights exemption applies, the Commission relies on the criteria for acquisition of vested rights as developed in the case law applying the Coastal Act's vested right provision, as well as in common law vested rights jurisprudence. The burden of proof is on the claimant to substantiate the claim of vested right. (14 CCR § 13200).

Based on these cases, the standard of review for determining the validity of a claim of vested rights is summarized as follows:
1. The claimed development must have received all applicable governmental approvals needed to undertake the development prior to January 1, 1977. Typically this would be a building permit or other legal authorization, and
2. The claimant must have performed substantial work and incurred substantial liabilities in good faith reliance on the governmental approvals. The Commission must weigh the injury to the regulated party from the regulation against the environmental impacts of the project and ask whether such injustice would result from denial of the vested rights claim as to justify the impacts of the activity upon Coastal Act policies. (See, Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal.App.3d 965, 975-976).

If the Commission finds that a claimant has a vested right for a specific development, that 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 a claimant does not have a vested right for the particular development, then the development is subject to coastal development permit requirements pursuant to the Coastal Act and a claimant must submit a coastal development permit application to seek approval for its development.

For the present matter, there is major vegetation on the subject site and any removal of this vegetation constitutes development which triggers the requirement for the City to seek approval of a coastal development permit application for the removal of the vegetation. To date, the Commission has not issued any coastal development permits for mowing of the major vegetation at the subject site. Further, the City of Newport Beach has not submitted a vested rights application, and, additionally, prior to the City's ownership, Caltrans never applied for a vested rights determination from the Commission which is required to establish a vested right in development. Thus, since the Commission has not approved any vested rights claim for mowing of the major vegetation at the subject site, the City cannot maintain it has a vested right to mow the major vegetation on the subject site. Even if the City applies for a vested rights determination, it is unclear if periodic mowing would even qualify as an activity that would merit the evaluation of a vested rights determination because a party does not typically perform substantial work and incur substantial liabilities when engaging in annual or semi-annual mowing on a parcel. Moreover, mowing of a site's major vegetation is likely not an activity that would qualify for a vested rights determination because the City's claim that it has authority to mow the site in perpetuity is one that has no defining point of completion while a vested right typically applies in situations where there is a beginning and an end to a government-approved construction project. (See, *Avco Community Developers, Inc. v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 791; see, also, *Billings v. California Coastal Commission,* (1980) 103 Cal.App.3d 729, 735.) Therefore, it is the Commission's position that neither Caltrans nor the City has established a vested right for the ongoing mowing of major vegetation at the site, and that activity is subject to coastal development permit requirements pursuant to the Coastal Act.

## E. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

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 includes the following policies regarding Environmentally Sensitive Habitat Areas (in relevant part):

*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.*

Environmentally Sensitive Habitat Areas (ESHA) are 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. Coastal Act Section 30240 states that ESHA shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

The City's certified Land Use Plan also contains policies regarding protection of ESHA. These include limitation of areas adjacent to ESHA to low impact land uses(Policy 4.1.1-9), requirements for buffers vegetated with native vegetation (Policies 4.1.1-10, 4.1.1-11), a ratio of 2:1 mitigation for impacts to non-ESHA upland vegetation (Policy 4.1.1-15), and conservation in perpetuity of ESHA and ESHA buffers (Policy 4.1.1-17).

**1. Coastal Sage Scrub**

Coastal sage scrub (CSS) 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." 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[10]. 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.

It is evident that 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

[10] Westman, W.E. 1981. Factors influencing the distribution of species of California coastal sage scrub. Ecology 62:439-455; Michael Brandman Assoc. 1991. A rangewide assessment of the California gnatcatcher. A report to the Building Industry Association of Southern California cited by J.E. O'Leary, et al. 1994, Bibliographies on coastal sage scrub and other related malascophyllous shrublands of Mediterranean-type climates. California Wildlife Conservation Bulletin No. 10.

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. 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.

**2. ESHA Determination**

The Commission's staff ecologist, Dr. Jonna Engel, visited the Park Site on September 15, 2010, December 15, 2010, and June 7, 2011. The Commission's staff ecologist has written a Biological Memorandum for the previous Sunset Ridge Park Project(CDP 5-10-168). The staff ecologist has reviewed the current, revised Sunset Ridge Park project (CDP 5-11-302) and has found that although portions of the project have changed, the Biological Memorandum is still appropriate to describe the habitat on the Park Site.

The Commission's ecologist has visited the site, reviewed vegetation data for the site, and reviewed protocol gnatcatcher surveys between 1992 and 2009, and nonprotocol observations by Hamilton Biological. The Memorandum (Exhibit 7) states that the site contains ESHA:

> *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" (Figure 12). 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 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 prepared the above memo for coastal development permit No. 5-10-168. However, the Commission's staff ecologist has reviewed the materials for the currently proposed project and finds that the Biological Memorandum which was previously prepared is suitable to address the areas of ESHA for the currently proposed project. The Commission's staff ecologist has determined that the area designated as ESHA on Figure 12 of Exhibit 7 qualifies as ESHA. The Commission finds that the area of ESHA rises to the level of ESHA because it provides an especially valuable ecosystem service by providing critical habitat that may be 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.

The Commission's staff ecologist has also determined that the Disturbed Encelia Scrub qualifies as ESHA. From the Biological Memorandum (Exhibit 7):

> *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. 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.*

*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 Commission's staff ecologist has found that, in the absence of disturbance, the area of Disturbed Encelia Scrub would become a dense stand of relatively pure California encelia that would be suitable for gnatcatcher foraging and potentially nesting and would qualify as ESHA. As described in Section D, above, the Disturbed Encelia Scrub qualifies as major vegetation. Therefore, the clearance of the Disturbed Encelia Scrub which has occurred on the Park 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.) In this case, the proposed project would rely on the unpermitted mowing of the Disturbed Encelia Scrub. Therefore,

the site should be treated as though the mowing did not occur, i.e. the Disturbed Encelia Scrub should be treated as though it is a mature stand of encelia scrub.

The federally listed California gnatcatcher has been mapped within close vicinity to the Disturbed Encelia Scrub. A mature stand of encelia scrub would be utilized by the gnatcatcher for foraging and potentially nesting. The vegetation, at 3.3 acres, is within the range of minimum breeding territory sizes for the gnatcatcher. The vegetation is easily degraded by human activity and development, as is seen by the areas of cleared vegetation on the Park Site and on adjacent areas. Therefore, the Disturbed Encelia Scrub serves as a habitat for a federally listed species and plays a special role in the ecosystem which could easily be degraded by human activity. Therefore, the Disturbed Encelia Scrub qualifies as ESHA.

As proposed, the project would result in the complete elimination of the Disturbed Encelia Scrub and its replacement with the southern soccer field, a portion of the baseball field, children's playground, concrete sidewalks, manufactured slopes, and native and non-native landscaping. Therefore, development of the Park Site would result in development within ESHA. The proposed development is not a resource dependent use. The proposed project is therefore inconsistent with Coastal Act Section 30240 regarding preservation of environmentally sensitive habitat areas and the project must be denied.

**3. Potential Impacts from Development Adjacent to ESHA**

In Sections E.1 through E.2 above, the Commission has explained the rationale for concluding that ESHA is present on the subject site in the areas labeled ESHA East and ESHA West, and that the area labeled as Disturbed Encelia Scrub is also ESHA. Aside from the fact that the proposed project would directly impact the Disturbed Encelia Scrub, there are other issues related to protecting the other ESHA areas located on site and adjacent to the site. These issues are described below.

a. Maintenance Access Road

An existing maintenance access road is located partly off and partly on the Park Site. The road runs from approximately 260 feet west of the subject site, through the Southeast Notice of Violation polygon, and onto the subject site. This access road is currently used by the City to access the Park Site for maintenance of the site. The Commission found in Consent order CCC-11-CD-03 and Restoration order CCC-11-RO-02 that the existing maintenance road has historically existed on the site, that the areas located immediately to the north and south of the access road are considered to be ESHA, and required the vegetation to be restored to support the California Coastal Gnatcatcher.

Coastal Act Section 30240 requires that development in areas adjacent to ESHA shall be sited and designed to prevent impacts which would significantly degrade ESHA, and shall be compatible with the continuance of ESHA. The proposed project would result in replacement of gravel on the road and the continued use of the access road to allow City maintenance vehicles, emergency vehicles, and shuttles for disabled members of the public to access the site. 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. As proposed, usage of the road for the park would continue to be infrequent and would therefore not pose impacts to adjacent habitat.

However, future increases in the frequency of use of the access road could result in additional noise or disturbance impacts which could be inconsistent with the continuance of the adjacent ESHA areas. Maintenance of a low level of use of the access road is necessary in order to ensure in order to find that usage of the access road is consistent with Coastal Act Section 30240. If conditioned to ensure that the usage of the access road would not result in a level of use which would impact the adjacent ESHA, such usage would be consistent with Coastal Act Section 30240 regarding development in areas adjacent to ESHA.

b. Intensity of Use

The project would result in a significant change in the type of vegetation and the level of human activity on the site. If not properly mitigated, these changes have the potential to cause significant impacts to adjacent ESHA. The most common cause of gnatcatcher nest failure is predation which accounts for up to 66 percent of nest failures in some areas. Predation is more prevalent where native habitat edges up against urban or urban/rural development. Development of an active sports field will attract species associated with urban development to the project site, such as crows, cowbirds, raccoons, rats, and skunks. Additionally, development on the site will lead to an increase in the levels of trash (i.e. plastic, paper, and food debris) on the site. Numerous nest predators such as raccoons, rats, and skunks thrive along the edges of development where trash and debris are often accessible. Introduction of these species has the potential to displace native species from the site due to competition with the introduced species and increased risk of predation. One way to minimize gnatcatcher predation is to encourage coyote foraging on the property. Coyotes are known to reduce gnatcatcher predator populations and to decrease the intensity of gnatcatcher predation. However, as proposed, the project includes property fencing along the western edge of the property which may be inadequate to ensure adequate access of large predators such as the coyote to the site.

The proposed construction of a park on the site would result in landscaping requiring increased irrigation which could encourage the spread of invasive species on the site. Irrigation associated with the sports fields and landscaping encourages the replacement of native ants with the Argentine Ant, an invasive species which prefers wetter soil conditions. Invasive ants such as the Argentine ant (*Linepithema humile*) can be abundant in landscaped areas and can move up to 1400 feet toward native habitat from an urban or urban/rural boundary. Argentine ants are both documented predators of gnatcatcher nestlings and a species that results in alterations to the native arthropod community by reducing their diversity and abundance. Alterations in the composition of the native arthropod community may potentially result in a reduction or alteration of the food source of a federally threatened species.

The proposed project would result in alterations to adjacent habitat which would result in impacts to the ability of the adjacent ESHA to support the California gnatcatcher. As proposed, the project would therefore be inconsistent with Coastal Act Section 30240. However, if conditioned to include measures to prevent impacts to adjacent habitat, these impacts may be mitigated. Measures that can be taken to limit the presence of introduced species and nest predators on the site, include the use of 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, a revised fencing plan to allow for adequate access of coyotes to the site, and a monitoring plan to monitor the presence of predators on the site. Additionally, planting high quality coastal sage scrub would expand habitat available to native species to mitigate for any residual effects of the park development on ESHA. If appropriately conditioned, the proposed project would ensure that development of the park will not result in the exclusion of native species from the site or the introduction of species which would have negative effects on adjacent ESHA. However, as described above, the project must be denied because it proposes extensive non-resource dependent development in ESHA.

c. Proposed Landscaping

Landscaping proposed on the site includes a mix of grass turf, species native to southern California, and non-native drought-tolerant, non-invasive species. The proposed landscaping plan includes 5 landscaping palettes: Water Infiltration/Native Buffer, Residential Buffer, Streetscape slope, Butterfly Garden, and Active area (Exhibit 2). Expanded coastal sage scrub, which is also listed on the landscaping plan, was previously authorized by Consent Order CCC-11-CD-03 and Restoration Order CCC-11-RO-02. All species proposed in the Water Infiltration/Native Buffer palette are native, and a majority of those species are species native to coastal sage scrub. The Residential Buffer and Streetscape Slope palettes proposes mostly native species, with many of the native species being native to coastal sage scrub, and some ornamental species. The Active palette and the Butterfly Garden palette are primarily composed of non-native species, but do include some native species and some coastal sage scrub species. The proposed landscaping plan would result in a majority of native species and species native to coastal sage scrub along the boundaries of the park. The interior of the park and the butterfly garden would consist primarily of turf and ornamental species, with a few native species.

The proposed landscaping plan does not include the installation of plant species which are invasive; however the plant palette does include plant species which could result in future impacts to ESHA. Specifically, the applicant is proposing the installation of 1) native species hybridized with ornamental species, 2) non-invasive varieties of species which look similar to invasive species, and 3) non-invasive species that have the propensity for dispersal. Native species hybridized with non-native species may result in the spread of non-native genetic material to areas vegetated with native species, resulting in alterations to the genetic diversity of native habitat. Non-invasive varieties of a particular vegetation family that looks similar to invasive varieties could be inadvertently replaced with those invasive varieties at some point in the future, which would result in the spread of invasive species into areas of native vegetation. Non-invasive species which have a propensity for dispersal can result in the spread of those species into areas of native vegetation, resulting in replacement of native vegetation. Therefore, the proposed planting plan could result in non-native species expanding into ESHA and reducing the ability of ESHA to serve as habitat for native species, including the federally threatened California gnatcatcher. The applicant has only provided lists of plant species to be utilized in specified areas; they have not yet specified detailed plant locations. Without adequate planting plans, it cannot be assured that the proposed landscaping plan will be consistent with the continuance of ESHA.

The landscaping plan also indicates large areas on the western and eastern boundaries of the park as Existing, Not To Be Disturbed. These areas are located outside of the grading boundaries for the

project, and are not proposed to be altered. The eastern area includes a wetland (see Section H, below), and also includes species designated by the California Invasive Pest Council as Invasive, such as pampas grass (*Cortaderia selloana*), tamarisk (*Tamarix sp.*) and ice plant (*Carpobrotus sp.*). If invasive species on the site are retained, invasive species could spread from their existing locations to other areas on the Park Site, including into ESHA.

Coastal Act Section 30240 requires that development adjacent to ESHA be sited and designed to prevent impacts which would significantly degrade ESHA and that such development be compatible with the continuance of habitat areas. The proposed planting plan would result in reductions in the ability of ESHA to serve as habitat. Therefore the planting plan, as proposed, would be inconsistent with Coastal Act Section 30240. Modifications to the proposed planting plan, including the removal of species that may impact adjacent ESHA, specification of a detailed planting plan (to ensure the arrangement and quantity of native plants is appropriate for continuance of the adjacent habitat), and removal of invasive species would ensure that landscaping on the site does not result in impacts to adjacent ESHA. However, as described above, the project must be denied because it proposes extensive non-resource dependent development in ESHA.

**4. Buffers**

a. Introduction

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. A buffer, in the context of the Coastal Commission, is a barrier, "safe zone", or bordering strip of natural habitat or land between ESHA and development or human disturbance. 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. Buffers are important for preserving the integrity and natural function of individual species and habitats. The purpose of a buffer is to create a zone where there will be little or no human activity. The purpose of a buffer is to "cushion" species and habitats from disturbance and allow native species to go about their "business as usual". 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.

b. Proposed Buffers

As stated above, the Commission has typically required buffers to gnatcatcher-occupied ESHA with widths between 50 and 100 feet. These buffers have typically excluded both permanent development and temporary impacts such as grading. As proposed, the project includes both permanent impacts and temporary impacts within buffers to ESHA.

The applicant proposes to install a 6 foot high fence near the western boundary of the park, within a few feet of ESHA East, and would continue the use of an existing access road that is located between and adjacent to the SE polygon and an existing concrete drainage channel is located on the slopes of the Park Site adjacent to Coast Highway. Another existing open concrete drainage channel is located near the western boundary of the Park Site. The applicant proposes to remove this existing drainage channel and grade the area to allow for the installation of a vegetated water infiltration swale. Grading is also proposed outside of the areas required for the construction of the swale, to the north and south of the drainage swale. As proposed by the applicant, within 50 feet to ESHA East, landscaping for the project would consist of only native species with a majority of species native to Coastal Sage Scrub, and between 50 and 100 feet from ESHA East landscaping would consist of native species, species native to coastal sage scrub, ornamental species, and grass turf.

c. Permanent Impacts

The proposed project would, with three exceptions, comply with a buffer of 50 feet between ESHA East and areas of permanent impacts (i.e. permanent structures, paved surfaces, active areas). The three exceptions are: 1) a proposed fence between the active portion of the subject site and the Newport Banning Ranch property, 2) an existing maintenance access road, 3) an existing open concrete drainage ditch. Both the drainage ditch and access road are existing structures that would continue in their existing configuration after construction of the project and which would not pose new impacts.

However, the fence is a new structure proposed in close vicinity to ESHA (approximately 4 feet from ESHA at the closest point). As described above, buffers are areas designed to allow native wildlife to go about business as usual, and to prevent impacts from the adjacent development from causing significant disruption of habitat values. Fences of the proposed type typically require concrete foundations and would require disturbance in close vicinity to ESHA. At the proposed location, the fence would separate the ESHA from the ESHA buffer, presenting an impediment to the ability of native wildlife to cross between the buffer and ESHA. The proposed location of the fence would not serve as a barrier for impacts of the project (i.e. people, sports balls, trash) from reaching the buffers. Therefore, the proposed location of the fence is inconsistent with the purpose of the buffer, and may negatively affect the ability of the buffer to prevent impacts to ESHA. The proposed location of the fence is inconsistent with Coastal Act Section 30240, which requires development adjacent to ESHA to be consistent with the continuance of ESHA areas.

d. Temporary Impacts

Grading proposed for the project would be located within close vicinity of ESHA, at its closest point located approximately 4 feet from ESHA. Due to the potential for temporary impacts associated with grading activities (i.e. noise, dust), and the potential for long term impacts associated with changing grades adjacent to ESHA (i.e. changes in runoff direction), the Commission has typically excluded grading activities from buffer areas. However, where there are unique site specific circumstances which exclude room for a normal buffer width to grading, grading has been allowed within buffers, provided that such grading was limited to the least extent possible and that mitigation measures were taken.

The proposed project includes the elimination of an existing concrete drainage swale which carries runoff from adjacent residential development, and its replacement with an undergrounded drainage pipe, detention system, and a drainage swale vegetated with native species. The existing drainage channel currently outlets to the Semeniouk Slough, an area identified as an Environmentally Sensitive Area in the City's certified Land Use Plan. Construction of the swale would result in detention and infiltration of runoff which would improve water quality in the adjacent slough. Construction of the drainage swale requires grading to create the topography required for swale, and as such some grading is necessary within close vicinity of ESHA. Due to existing elevation levels for the pipe which carries the drainage at the north of the site, and the existing open drainage channel located on the adjacent Newport Banning Ranch property, the drainage swale and the grading associated with the drainage swale can not be located farther from ESHA.

However, the proposed project also includes grading within 50 feet of ESHA East that is not necessary for the construction of water quality improvements. Specifically, the project includes grading to the north of the swale related to the construction of the grass warmup field and gravel maintenance access road, and grading to the south of the swale related to regarding of the slope adjacent to Coast Highway and a proposed pedestrian walkway. This grading would result in impacts to the adjacent ESHA that could be avoided. Therefore the proposed grading would be inconsistent with Coastal Act Section 30240 requiring protection of ESHA from impacts of adjacent development.

e. Protection of 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.*

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. Without adequate protection of buffers, future development may impact the ability of the buffer to protect ESHA from impacts associated with adjacent development. Such impacts would be inconsistent with Coastal Act Section 30240 regarding protection of environmentally sensitive habitat areas.

The Commission has typically required buffers between 50 and 100 feet for gnatcatcher occupied ESHA in order to protect the ESHA from impacts from adjacent development. The proposed project includes only native vegetation within 50 feet of ESHA. However, the proposed project also includes both grading and permanent development within buffers. In areas where these impacts are necessary for improvements to drainage and water quality, such development can be found consistent with Coastal Act Section 30240 because the impacts are limited to the minimum amount necessary and cannot be located any further from ESHA. However, at the northernmost and southernmost areas of the project, the buffers include development such as fencing and grading which is not necessary for water quality improvements and would result in avoidable impacts to ESHA. If conditioned to revise the proposed project to eliminate avoidable temporary impacts to ESHA, and to permanently restrict buffer areas, the project could be found consistent with Coastal Act Section 30240 regarding protection of ESHA from adjacent development. However, as described above, the project is inconsistent with the resource protection policies of the Coastal Act and must be denied because it proposes extensive non-resource dependent development in ESHA.

## F. 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 ESHA. 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 would result in significant disruption of habitat values within ESHA and are not uses that are dependent on the resource. Therefore, the proposed project is inconsistent with Section 30240 of the Coastal Act and the applicable ESHA protection policies of the LUP, used by the Commission as guidance.

The EIR for the project includes an analysis of alternatives to the project which was originally proposed. The EIR considered alternative park designs consisting of an access road from Superior Avenue, a no project alternative, an alternative site for the park located on Newport Banning Ranch, a passive park alternative, and an alternative park design to reduce grading amounts. The City also submitted an alternatives analysis for the subject CDP application 5-11-302 which considered an access road from Superior Avenue and an access road from West Coast Highway directly onto the Park Site. Finally, the Banning Ranch Conservancy has submitted an alternative design with a reduced number of sports fields.

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. Passive Park

One of the alternatives identified by the EIR for the project is a passive park on the site. The City's EIR states that construction of a passive park would have impacts similar to those associated with the proposed development, but would not achieve the project goals of construction of an active recreational park. The passive park would only include passive uses, such as landscaping, pedestrian paths, restroom facilities, and picnic areas, and would not include active uses such as ball fields. A passive park would result in reduced impacts to ESHA as a passive park would not require clearance of ESHA on the site. Rather, a passive park could result in an improvement to ESHA through additional resources such as additional forage and nesting areas for the California gnatcatcher. Some passive park uses are resource dependent uses and therefore, some development, such as trails or interpretive signs, could be constructed within ESHA located on the site.

b. Reduced Number of Sports Fields

The Banning Ranch Conservancy has submitted a drawing (Exhibit 5, page 52) which suggests that a park with a reduced number of active sports fields would not require elimination of ESHA. The letter states that it there is sufficient room on the Park Site to allow for one to two soccer fields without resulting in direct impacts to the Disturbed Encelia Scrub on the site. The letter includes a depiction of the area required for two soccer fields, to the north of the Disturbed Encelia Scrub, and indicates that such area would be sufficient to include at least one sports field to the north of the Disturbed Encelia Scrub.

However, the letter does not include an analysis of whether the alternative would be consistent with grading or engineering requirements. The grading plan for the currently proposed project shows that there is currently between 6 feet of cut to 6 feet of fill proposed in the area to the north of the Disturbed Encelia Scrub, 6 to 30 feet of cut to transition from the lower center portion of the project to the higher eastern portion, and 6 to 27 feet of fill to create the residential buffer area located at the northern boundary of the site. The low amounts of grading for the northern portion of the currently proposed project indicates that there may be sufficient room to accommodate grading and other engineering constraints necessary to create one to two ball fields. However, further study would be required to ensure that this alternative is consistent with required grading and engineering practices. This alternative would allow for minimal room for development associated with sports fields, such as sidewalks and ornamental landscaping. The reduced number of fields alternative would result in the preservation of the Disturbed Encelia Scrub, but would also provide only minimal buffers between sports fields and the ESHA.

c. Alternative Site

The EIR identified an alternative site located to the north of the subject site and the Newport Crest residential development, on the Newport Banning Ranch property. The placement of an active recreational park at an alternative location would preserve vegetation located on the subject site. Development in an alternative location may result in improvements to public access and public

recreation in the alternative location, but would not result in improvements to public access and recreation in the subject site. Feasibility of the alternative site would depend on the City's ability to purchase the area from the property owner, and on the habitat resources located in that area. The City's EIR states that the development of a park in the chosen alternative location would result in fewer environmental impacts. However, Newport Banning Ranch also includes significant ecological resources, and any proposal for development of an active recreational park would require additional review of ecological resources to ensure consistency with the Coastal Act.

d. No Project Alternative

The no project alternative would not result in development on the subject site. The no project alternative would not result in impacts to ESHA on or adjacent to the site. However, the no project alternative, would also not result in improvements to public access, scenic views, recreation, and water quality, and would not result in the installation of additional native species or the removal of invasive species.

## G. 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 57,223 cubic yards of cut, 36,559 cubic yards of fill, and 20,664 cubic yards of soil exported off-site. A grading map can be found at Exhibit 3. Cut on the Park Site would primarily result from the creation of a pedestrian ramp adjacent to West Coast Highway and to create a more shallow slope between the higher northeastern portion and the lower middle portion of the property. Fill on the Park Site would be placed at the northern edge of the property to create a level grass warmup field at the northwest, and to create a retaining wall and raised buffer between the project site and the condominium project to the north.

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.

## H. 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. Wetlands and Wetland Buffers**

A wetland is located on the slope of the Park Site adjacent to Superior Avenue. The biological memorandum prepared by Dr. Engel 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[11]. 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[12]. 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[13], 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*

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

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

[13] 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".

*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 located along Superior Avenue would be located approximately 40 feet from the edge of grading. The applicant has submitted a letter dated October 18, 2011 from the applicant's geotechnical engineer, Leighton Consulting, stating that observed water flow to the Superior Avenue wetland will not be disrupted as a result of the proposed project. Additionally, the applicant has agreed to remove invasive Pampas Grass from the Superior Avenue wetland. Based on the available documentation indicating that the wetland is degraded, and that grading associated with the project will not impact the Superior Avenue wetland, a reduction in buffers from 100 feet may be appropriate. If appropriately conditioned to ensure that the proposed project did not result in adverse impacts to the wetland at Superior Avenue, the proposed development adjacent to the Superior Avenue wetland may be consistent with the wetland protection policies of the Coastal Act. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

**2. Water Quality**

Runoff from the proposed project would be routed to existing drainage channels and a new water infiltration area, 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 the addition of new impermeable surfaces on the site, consisting of the proposed restroom facility, tot lot, and sidewalks. 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. According to the EIR for the project, 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.

## I. 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. 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.

The proposed park project relies on the usage of an existing 64 space public parking lot located on the northeast corner of the intersection of Superior Avenue and West Coast Highway. The parking lot at Superior Avenue was established by coastal development permit No. 5-88-255 and subsequent amendments to mitigate for the loss of street parking resulting from the expansion of Pacific Coast Highway from 4 to 6 lanes. The parking lot is currently used by the public, including use as beach parking to access the beach located approximately 950 feet to the southwest of the lot. The lot is underutilized for the majority of the year, but does receive heavy usage during some holidays and weekends in the peak summer period (as do all parking areas near the beaches). The City plans to manage scheduling of games to ensure that adequate parking is provided for games, and to ensure that parking for the proposed active recreational park does not conflict with the parking needs of other uses in the area, such as parking for beach access. If conditioned to ensure that operation of

the Park Site does not result in impacts to the public parking supply in the area, the proposed project could be found to 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.

## J. 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 , preliminary grading plan, and the cut and fill slopes proposed have 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 active Newport-Inglewood - Rose Canyon Fault Zone, is located beneath 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 (i.e., showing evidence of movement during the Holocene, the past ~11,700 years). 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. To assure geologic stability, any project on the site should be reviewed for consistency with the report prepared by the applicant's geotechnical engineer, and a geotechnical engineer should review final plans for a project on the site. Therefore, if conditioned, the proposed project could be found to be consistent with Coastal Act Section 30253 regarding minimization of geologic hazards. However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.

## K. UNPERMITTED DEVELOPMENT

Development has occurred on the Park Site without the required coastal development permit, including, but not limited to, mowing and discing of major vegetation consisting of Disturbed Encelia Scrub. Were it not for this unpermitted development, the area of Disturbed Encelia Scrub on the Park Site would be a nearly pure stand of Encelia Scrub that would constitute ESHA, as described in this staff report and Dr. Engel's Biological Memorandum. Unpermitted development cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, such development would not be allowed. Thus, consideration of appropriate development must consider site conditions as if the unpermitted development had not occurred.

Therefore, the area of Disturbed Encelia Scrub is considered ESHA. The project proposes non-resource dependent development that would eliminate ESHA, and, thus, is not consistent with Section 30240 of the Coastal Act.

Commission staff will evaluate further actions to address this issue. Although unpermitted development has taken place on the Park Site, consideration of this application by the Commission has been based solely upon the Chapter Three policies of the Coastal Act. Review of this permit application does not constitute a waiver of any legal action with regard to the alleged violations nor does it constitute an admission as to the legality of any development undertaken on the Park Site without a coastal development permit.

## L. 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).

## M. 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, 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 that are inconsistent with the Coastal Act, 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 designs. Therefore, the proposed project is not consistent with 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.

## Appendix A. Substantive File Documents

- City of Newport Beach certified Land Use Plan

- Environmental Impact Report for Sunset Ridge Park

- Attorney General Opinion No. SO 77/39

- City of Newport Beach Fire Resistive Plant List

- US Fish and Wildlife Service Gnatcatcher Critical Habitat designation 3/30/1993

- US Fish and Wildlife Service Gnatcatcher Critical Habitat designation 10/24/2000

- US Fish and Wildlife Service Gnatcatcher Critical Habitat designation 4/24/2003

- US Fish and Wildlife Service Gnatcatcher Critical Habitat designation 12/19/2007

- Atwood, J.L. 1993. California Gnatcatchers and coastal sage scrub: the biological basis for endangered species listing. Pages 149-169 in J.E. Keeley (ed.) Interface between ecology and land development in California. Southern California Academy of Science, Los Angeles.

- Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica). In* The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

- Atwood, J.L., S.H. Tsai, C.H. Reynolds, J.C. Luttrell, and M.R. Fugagli. 1998. Factors affecting estimates of California Gnatcatcher territory size. Western Birds, Vol. 29: 269-279..

- Beyers, J.L. and W.O. Wirtz. 1997. Vegetative characteristics of coastal sage scrub sites used by California gnatcatchers: Implications for management in a fire-prone ecosystem. In Greenlee, J. M. (ed.), Proceedings: First conferenc on fire effects on rare and endangered species and habitats, Coeur d'Alene, Idaho, November 1995. International Association of Wildland Fire, Fairfield, Washington. pp. 81-89.

-Bontrager 1991, Mock and Bolger 1992, Grishaver et al. 1998.

-Campbell, K.F., R.A. Erickson, W.E. Haas, and M.A. Patten. 1998. California Gnatcatcher use of habitats other than coastal sage scrub: conservation and management implications. Western Birds 29: 421-433.

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

- Hamilton, R. (December 10, 2009) op. cit.

- Landis, B. Aug. 2011. Native Plants for School and Urban Gardens. CNPS

- Preston, K.L., P.J. Mock, M.A. Grishaver, E.A. Bailey, and D.F. King. 1998. Calfornia Gnatcatcher territorial behavior. Western Birds, Vol. 29: 242-257.

- Sawyer, J., T.Keeler-Wolf, and J. Evens. 2009. A Manual of California Vegetation, 2nd Edition. California Native Plant Society.

Westman, W.E. 1981. Factors influencing the distribution of species of California coastal sage scrub. Ecology 62:439-455; Michael Brandman Assoc. 1991. A rangewide assessment of the California gnatcatcher. A report to the Building Industry Association of Southern California cited by J.E. O'Leary, et al. 1994, Bibliographies on coastal sage scrub and other related malascophyllous shrublands of Mediterranean-type climates. California Wildlife Conservation Bulletin No. 10.

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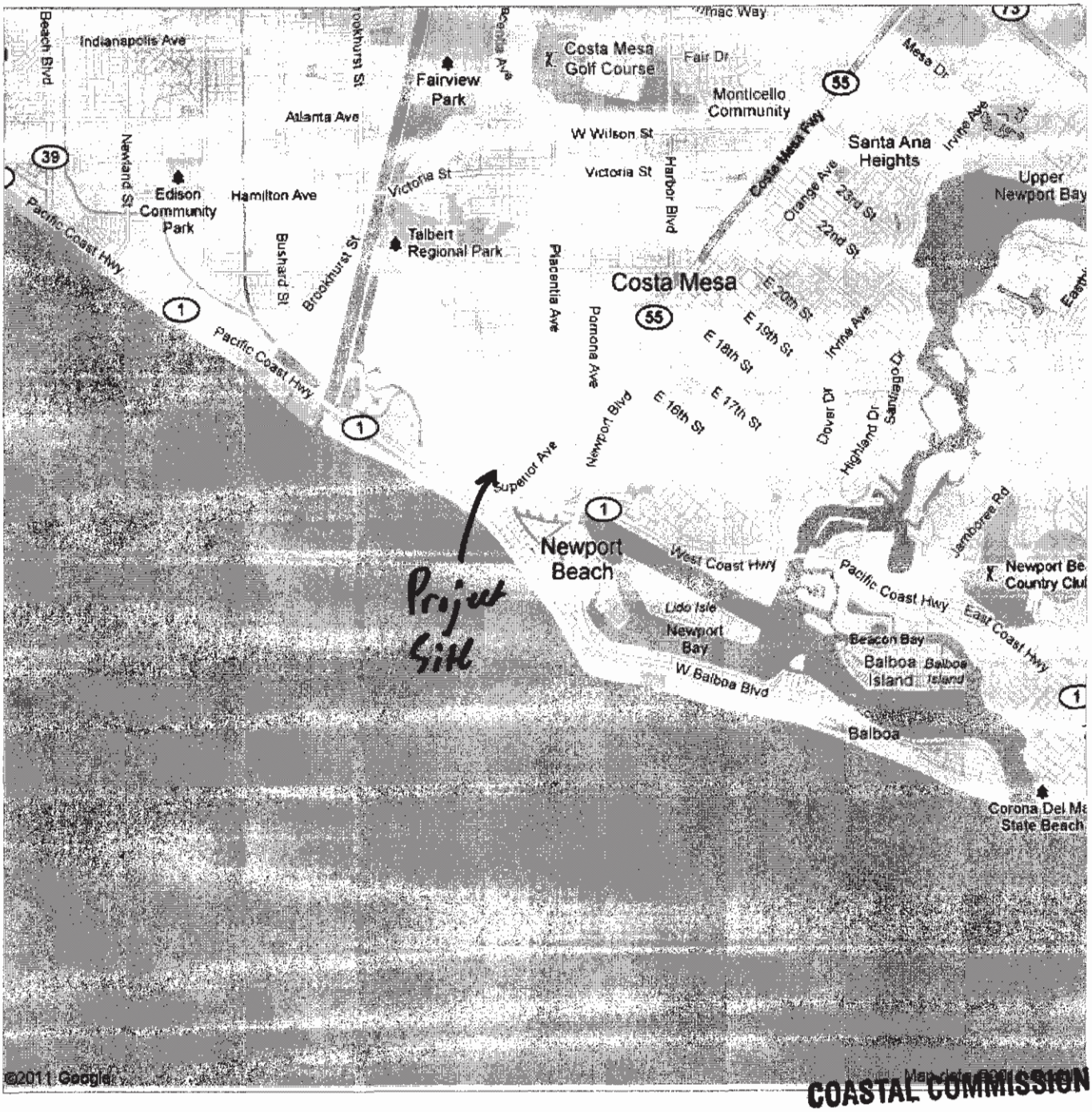


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PAGE 1 OF