

**CALIFORNIA COASTAL COMMISSION**

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# Th16a

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Hearing Date:	6/13/2013

## STAFF REPORT: REVISED FINDINGS

**Application No.:** 5-11-302

**Applicant:** City of Newport Beach

**Agent:** Don Schmitz and 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). Also proposed is the creation or restoration of 1.5 acres of Coastal Sage Scrub habitat at an off-site location.

**Date of Commission Action:** 8/9/2012 – Approval with conditions

**Commissioners on Prevailing Side:** Commissioners Blank, Bloom, Bochco, Brennan, Burke, McClure, Mitchell, and Zimmer

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## **SUMMARY OF STAFF RECOMMENDATION:**

On August 9, 2012 the Commission found that, as conditioned, Coastal Development Permit Application No. 5-11-302 is consistent with the Coastal Act. Discussion at the hearing focused primarily on whether clearance of a 3.3 acre area of Disturbed Encelia Scrub, native vegetation composed of primarily California Encelia, to construct the proposed park would be consistent with the ESHA protection policies of the Coastal Act. The Commission found that the Disturbed Encelia Scrub within the footprint of the proposed park does not constitute ESHA at this point in time due to the following site specific circumstances: 1) the Encelia Scrub (a subgroup of coastal sage scrub) that is present on the subject site is predominantly composed of Encelia californica, and that plant, in and of itself does not necessarily qualify as ESHA in coastal Orange County; 2) furthermore, in this case, there is no documentation of usage of the Disturbed Encelia Scrub by sensitive species, including the California gnatcatcher, for foraging or nesting habitat, or evidence that such habitat sufficiently developed on the site; 3) the vast majority of the site was subject to intense levels of disturbance and elimination of the site's natural topography by extensive pre-Coastal Act grading; 4) the vast majority of the site was graded and consistently maintained in a disturbed condition through consistent, recurrent mowing of vegetation since before the Coastal Act until now, first by Caltrans and then by the City, after purchase by such; and 5) required fuel modification to protect existing adjacent residential development from fire hazards involves regular disturbance over much of the project site and significantly reduces overall vegetation coverage on the subject site adjacent to the Disturbed Encelia Scrub area. Therefore, the Commission found that, as conditioned, the proposed development is consistent with Chapter 3 of the Coastal Act.

Staff is recommending that the Commission, after a public hearing focused exclusively on whether the findings support and accurately reflect the decision made by the Commission, adopt the following revised findings in support of the Commission's August 9, 2012 approval with conditions of Coastal Development Permit 5-11-302.

Commissioners who voted on the prevailing side for Coastal Development Permit No. 5-11-302 are: Blank, Bloom, Bochco, Brennan, Burke, McClure, Mitchell, and Zimmer. At least three of the prevailing members must be present. A vote by the majority of the Commissioners on the prevailing side that are present at the current hearing is necessary to adopt the revised findings. See Page 5 for the motion and resolution to adopt the revised findings.

## TABLE OF CONTENTS

<b>I. MOTION AND RESOLUTION:</b> .....	<b>5</b>
<b>II. STANDARD CONDITIONS:</b> .....	<b>5</b>
<b>III. SPECIAL CONDITIONS:</b> .....	<b>6</b>
<b>IV. FINDINGS AND DECLARATIONS:</b> .....	<b>23</b>
A. PROJECT LOCATION & DESCRIPTION.....	23
1. Project Vicinity .....	23
2. Project Description: .....	24
3. History & Current Planning.....	25
4. Past Commission Action.....	27
B. OTHER AGENCY APPROVALS .....	29
C. HISTORICAL AND EXISTING VEGETATION PATTERNS .....	29
1. Description of Disturbed Encelia Scrub .....	29
2. Existing Environmental Designations.....	35
D. DEVELOPMENT.....	37
1. Introduction.....	37
2. Attorney General’s Opinion.....	37
3. Analysis of Factors: Size and Importance/Uniqueness.....	38
4. Conclusion .....	40
5. <del>No Vested Rights Claim Application From the City</del> .....	41
E. ENVIRONMENTALLY SENSITIVE HABITAT AREAS .....	46
1. Coastal Sage Scrub .....	48
2. ESHA Determination .....	49
3. Potential Impacts from Development Adjacent to ESHA .....	53
4. Buffers.....	57
<del>F. ALTERNATIVES TO PROPOSED PROJECT</del> .....	60
F. VISUAL RESOURCES.....	62
G. MARINE RESOURCES.....	63
1. Wetlands and Wetland Buffers .....	64
2. Water Quality .....	65
H. PUBLIC ACCESS / RECREATION .....	66
I. GEOLOGY / HAZARDS .....	67
<del>K. UNPERMITTED DEVELOPMENT</del> .....	68
J. LOCAL COASTAL PROGRAM (LCP) .....	68
<del>M-K.</del> CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).....	69

### APPENDICES

Appendix A - Substantive File Documents

## **EXHIBITS**

**Staff Note: The following exhibits have been omitted in the print version of the staff report. They have been included in the online version of the staff report available at <http://www.coastal.ca.gov/mtgcurr>**

- Exhibit 1 - Vicinity Map
- Exhibit 2 - Planting Plan
- Exhibit 3 - Grading Plan
- Exhibit 4 - Site Plan
- Exhibit 5 - Letters in opposition to the project dated May 17-30, 2012
- Exhibit 6 - Letters in support of the project dated May 29, 2012
- 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 – Newport Beach List of Fire Resistant Species
- Exhibit 12 - Selected Photographs of Site
- Exhibit 13 - Public Comment Letters Dated June 5, 2012 to June 17, 2012
- Exhibit 14 - Director's Deed of Property to City
- Exhibit 15 - Senate Bill 124
- Exhibit 16 - Letter from City dated 10/14/2011 re SB124
- Exhibit 17 - Excerpts from OCFA Guideline c-05: Vegetation Management Technical Design Guideline
- Exhibit 18 - Public Comment Letters dated June 28 to July 24, 2012
- Exhibit 19 - Letter from City of Newport Beach dated July 9, 2012
- Exhibit 20 - Letters from City of Newport Beach dated July 11, 2012
- Exhibit 21 - Letter from City of Newport Beach Fire Chief Scott Poster dated July 17, 2012
- Exhibit 22 - Letter from City of Newport Beach Recreation Dept. dated July 20, 2012
- Exhibit 23 - Letter from Newport Beach City Manager Dave Kiff dated July 23, 2012
- Exhibit 24 - Extension of 180 day Permit Streamlining Act Deadline and associated letters
- Exhibit 25 - Ex-Parte Declarations
- Exhibit 26 - Potential Special Conditions of Approval
- Exhibit 27 - Letter from City of Newport Beach dated August 2, 2012
- Exhibit 28 - Correspondence in Opposition dated 7/29/2012 to 8/6/2012

**I. MOTION AND RESOLUTION:**

**Motion:**

*I move that the Commission adopt the revised findings in support of the Commission's action on August 9<sup>th</sup>, 2012 concerning Coastal Development Permit Application No. 5-11-302.*

Staff recommends a **YES** vote on the motion. Passage of this motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side present at the August, 2012 hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

Commissioners eligible to Vote on Revised Findings for Coastal Development Permit No. 5-11-302 are: Blank, Bloom, Bochco, Brennan, Burke, McClure, Mitchell, and Zimmer.

**Resolution:**

*The Commission hereby adopts the findings set forth below for its approval of Coastal Development Permit Application No. 5-11-302 on the ground that the revised findings support the Commission's decision made on August 9, 2012 and accurately reflect the reasons for it.*

[**Staff Note:** These revised findings include all of the staff's recommended findings that were set forth in the July 27, 2012 staff report for the Commission's August 9, 2012 hearing for the coastal development permit. The portions of those findings that are being deleted are crossed-out in the following revised findings: ~~deleted findings~~. The supplemental findings being added in support of the Commission's action are identified with underlined text.

**II. STANDARD CONDITIONS:**

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a

diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

### **III. SPECIAL CONDITIONS:**

*(Staff Note: The Commission's approval of Coastal Development Permit on August 9, 2012 included the list of Potential Special Conditions of Approval contained in Exhibit 26 to the staff report, with one additional special condition (#17) added at the hearing to require a Habitat Management Plan for the City's proposed off-site mitigation area.*

#### **1. Open Space Restriction**

A. No development, as defined in section 30106 of the Coastal Act, shall occur in Environmentally Sensitive Habitat Areas and 50-ft. buffers to Environmentally Sensitive Habitat Areas located on the subject site as described and depicted in the Memorandum by Dr. Jonna Engel attached as Exhibit 7 to the staff report dated July 27, 2012 except for the following development as described and shown on the final plans approved by the Executive Director pursuant to Special Condition 6:

- 1) Restoration activities, including removal of non-native vegetation, installation of native vegetation, installation and removal of temporary irrigation devices;
- 2) One-time and temporary grading activities within buffers necessary for the proposed construction of the water infiltration trench and underground drainage culvert;
- 3) Removal of non-native species, in accordance with Special Condition 2;
- 4) The one-time installation of gravel and low curb to the existing maintenance access road, as shown on Exhibit 4 to the staff report dated July 27, 2012
- 5) The following development, if approved by the Coastal Commission as an amendment to this coastal development permit:  
Activities necessary for restoration of native habitat, maintenance or repair of water quality management features or drainage devices, in-kind repair or replacement of existing maintenance access road, or construction of pedestrian paths.

B. PRIOR TO ISSUANCE BY THE EXECUTIVE DIRECTOR OF THE NOTICE OF INTENT TO ISSUE PERMIT (NOI) FOR THIS PERMIT, the permittee shall submit for the review and approval of the Executive Director, and upon such approval, for attachment as an Exhibit to the NOI, a formal legal description and graphic depiction of the portion of the subject property affected by this condition, as generally described above and shown on Exhibit 7 attached to the staff report.

C. PRIOR TO ANY CONVEYANCE OF THE PROPERTY THAT IS THE SUBJECT OF THIS COASTAL DEVELOPMENT PERMIT, the applicant shall execute and record a deed restriction, in a form and content acceptable to the Executive Director: (1) indicating that, pursuant to this permit, the California Coastal Commission has authorized development on the subject property, subject to terms and conditions that restrict the use and enjoyment of that property (hereinafter referred to as the “Standard and Special Conditions”); and (2) imposing all Standard and Special Conditions of this permit as covenants, conditions and restrictions on the use and enjoyment of the Property. The restriction shall include a legal description of the applicant’s entire parcel or parcels. It shall also indicate that, in the event of an extinguishment or termination of the deed restriction for any reason, the Standard and Special Conditions of this permit shall continue to restrict the use and enjoyment of the subject property so long as either this permit or the development it authorizes – or any part, modification or amendment thereof - remains in existence on or with respect to the subject property.

**2. Landscaping Plan.**

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, in a form and content acceptable to the Executive Director, two (2) full size sets of revised final landscaping plans prepared by an appropriately licensed professional that meet the following requirements:

1) The plan shall demonstrate that:

- a) The revised final landscaping plans shall be in substantial conformance with the plan received in the Commission’s office on March 13, 2012, but shall have been modified to 1)Remove invasive species (e.g., Cortaderia sp., Carpobrotus edulis) from all areas on the subject site, including those areas outside the grading limits (i.e. those marked as Existing - Not to Be Disturbed on the landscaping plan attached to the staff report); 2) Remove non-native species that are similar in appearance to invasive species (e.g., Pennisetum sp.) from the plant planting list to avoid inadvertent replacement with invasive varieties in the future; 3) Remove non-native species from the planting list that have a propensity for dispersal (e.g., Acacia sp.); 4) Create 5.15 acres of superior high quality native vegetation with coverage of primarily CSS, that is suitable for foraging habitat for the CAGN; 5) Remove the area known as the Southeast Polygon, which was subject to Commission Cease and Desist Order CCC-11-CD-03 and Restoration Order CCC-11-RO-02, from the landscaping plan, as such landscaping has already been authorized by such orders. The applicant shall comply with the requirements of the Cease and Desist and Restoration Orders in those areas.

- b) All planting shall provide 85 percent coverage within 90 days and shall be repeated if necessary to provide such coverage, unless the Executive Director determines that such a requirement would result in adverse impacts to areas of native habitat on the site and establishes a different coverage requirement.
- c) All plantings shall be maintained in good growing condition throughout the life of the project, and whenever necessary, shall be replaced with new plant materials to ensure continued compliance with the landscape plan.
- d) Each landscaped area on the site, except for the area designated as Turf Area on the landscaping plan submitted to the Commission's office on March 13, 2012, shall be suitable to provide foraging habitat for the California gnatcatcher. The majority of the species used shall be consistent with the Coastal Sage Scrub vegetation community type.
- e) No plant species listed as problematic and/or invasive by the California Native Plant Society (<http://www.CNPS.org/>), the California Invasive Plant Council (formerly the California Exotic Pest Plant Council) (<http://www.cal-ipc.org/>), or as may be identified from time to time by the State of California shall be employed or allowed to naturalize or persist on the site. No plant species listed as a 'noxious weed' by the State of California or the U.S. Federal Government shall be utilized within the property. With the exception of the proposed Turf Area, all plants shall be native to coastal Orange County and appropriate to the habitat type and be low water use plants as identified by California Department of Water Resources (See: <http://www.owue.water.ca.gov/docs/wucols00.pdf>). The Turf Area shall consist of either artificial turf or a species that minimizes the amount of irrigation required.
- f) No irrigation, except for temporary irrigation necessary to establish plantings, shall occur within ESHA and 50 foot buffers to ESHA. Temporary irrigation lines within ESHA and buffers to ESHA shall be either removed or capped in place once plants have been established. Irrigation on areas of the site other than ESHA and buffers to ESHA shall be limited to the minimum amount necessary to maintain active growth of plant species while preventing creation of a severe fire hazard.

2) The plan shall include, at a minimum, the following components:

- a) A map showing the type, size, quantity and location of all plant materials that will be on the developed site, the irrigation system, topography of the developed site, and all other landscape features
- b) A schedule for installation of plants.



3) The landscaping plan shall include the following requirements printed on the plans:

- a) The permittee shall be responsible for ensuring that non-native landscaping within the park is maintained to prevent spill-over into ESHA or buffers to ESHA.
- b) The permittee shall be responsible for ensuring that no non-native or invasive species persist within ESHA or buffers to ESHA. Within the first 5 years since commencement of use of the park facility by the public, the permittee shall be authorized to remove non-native or invasive species from ESHA and buffers to ESHA. Such removal shall occur a minimum of once per year. After this period, the permittee shall submit an application for an amendment to this permit or for a new Coastal Development Permit for the removal of vegetation within ESHA.
- c) After 5 years since the public has been allowed access to park facilities, the removal or trimming of vegetation within buffers to ESHA or ESHA, including but not limited to removal or trimming for fire hazard management purposes, shall require an amendment to this coastal development permit or a new coastal development permit.
- d) No removal, pruning or other maintenance of vegetation, other than in the proposed "Turf" area, shall occur during the breeding season of the California gnatcatcher, which is between February 15 and August 31.
- e) Five years since commencement of use of the park facility by the public the applicant shall submit for the review and approval of the Executive Director a landscape monitoring report, prepared by a licensed Landscape Architect or qualified Resource Specialist, that certifies the on-site landscaping is in conformance with the landscape plan approved pursuant to this Special Condition. The monitoring report shall include photographic documentation of plant species and plant coverage.

If the landscape monitoring report indicates the landscaping is not in conformance with or has failed to meet the performance standards specified in the landscaping plan approved pursuant to this permit, the applicant, or successors in interest, shall submit a revised or supplemental landscape plan for the review and approval of the Executive Director. The revised landscaping plan must be prepared by a licensed Landscape Architect or a qualified Resource Specialist and shall specify measures to remediate those portions of the original plan that have failed or are not in conformance with the original approved plan.

- B.** The permittees shall undertake development in accordance with the approved plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**3. Parking Management Plan**

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for the review and approval of the Executive Director, two (2) full sized copies of a Parking Management Plan. The plan shall be prepared by a qualified professional and shall include the following:

- 1) A schedule for management of games/use of the ball fields, to ensure that adequate parking is provided for the park use and for the existing uses of the public parking lot. Games shall be scheduled to avoid peak beach use periods such as summers and holidays to the extent possible as proposed in City of Newport Beach letter dated July 20, 2012, attached as Exhibit 22 to the staff report.
- 2) Provision of a signage plan that shall include, at a minimum, the following components: a sample of each sign and/or stencil and a site plan depicting the location of each sign and/or stencil. Signage shall be posted that specifies allowable use of each parking space (including day and time of availability) and applicable restrictions.
- 3) Provisions to limit the usage of the maintenance access road to only City maintenance vehicles and City operated shuttles as a reasonable accommodation for members of the public with impaired mobility consistent with applicable ADA requirements.
- 4) Provisions to reduce the number of shuttle trips to the park site to the minimum necessary to allow members of the public with impaired mobility to access the park site.

B. The permittees shall undertake development in accordance with the approved final plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved final plan, including any change in the intensity of use of the access road, shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**4. Lighting**

A. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for the review and approval of the Executive Director, revised plans to protect landscaped and habitat areas from light generated by the project. The lighting plan to be submitted to the Executive Director shall be accompanied by an analysis of the lighting plan prepared by a qualified biologist which documents that the lighting plan is effective at preventing lighting impacts upon adjacent environmentally sensitive habitat. The proposed lighting plan shall include, but not be limited to, the following elements: lighting on the site shall be limited to the minimum amount necessary to light accessways and for security and

be designed to avoid impacts to native habitat areas on the site; lighting will be limited to 3.5 foot bollards within areas of walkways with cut-off louvers and will be positioned, directed or shielded so as to minimize artificial lighting from reflecting into native habitat; no skyward-casting lighting or portable light generators shall be used on the site; the lowest intensity lighting shall be used that is appropriate to the intended use of the lighting.

B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**5. Fencing and Signage Plan. PRIOR TO ISSUANCE OF THE COASTAL**

DEVELOPMENT PERMIT, the permittee shall submit a final fencing and signage plan showing the location, design, height and materials of all walls, fences, gates, safety devices and boundary treatments for the review and approval of the Executive Director. The fencing and signage plan shall incorporate the following requirements:

A. Fencing on the project site shall be located where it will not result in adverse impacts to ESHA.

B. To the maximum extent feasible, all fencing on the site shall be designed to allow the unimpeded ingress, egress and traversal of wildlife, including the coyote.

C. If state requirements regarding oil field security prevent traversal of wildlife, including the coyote, across the proposed oil field security fence separating the park site from Newport Banning Ranch, the permittee shall enact measures to exclude nest predators from the subject site, specified in Special Condition 7.

D. The proposed oil field security fence between the park site and Newport Banning Ranch shall be removed at the time the fencing is no longer required by state law.

E. The fencing plan shall include provisions for signing and fencing to discourage human intrusion into ESHA and buffers to ESHA. The fencing shall be designed in a manner that creates a delineation between areas of native habitat and the public areas of the park.

F. Signs prohibiting entrance of the public into the native habitat areas and identifying their sensitive nature shall be posted at reasonable intervals and likely points of entry along the west side of the park. The plan shall include samples of such signage.

G. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**6. Final Project Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit for the review and approval of the Executive Director, two (2) copies of final project plans. The final set of plans shall include:

- 1) Final Grading and Site plans which are in substantial conformance with the plans received in the Commission's office on March 13, 2012, but which have been revised to comply with a 50 foot buffer from areas of ESHA which excludes grading activities, except in areas where the applicant has demonstrated to the Executive Director's satisfaction that such grading is necessary for the construction of the proposed water infiltration swale and undergrounded drainage culvert.
- 2) Final detailed planting plans, consistent with the requirements of Special Condition 2
- 3) All locations of utilities on the project site
- 4) Plans showing park improvements, such as the public restroom, benches, tables, walkways, ball field and associated structures
- 5) Drainage Plans, which show flow lines and the water quality management features required on the site, as required in Special Conditions 8
- 6) Fencing and Signage Plan, as required in Special Condition 5
- 7) Plans showing areas subject to Open Space Restriction as required in Special Condition 1
- 8) Construction Staging and Fencing Plans as required in Special Condition 10

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

**7. Habitat Impact Management Plan**

A. Avoidance of Listed Species. The permittee shall staff a qualified monitoring biologist on-site during all CSS clearing and any other project-related work with the potential to impact sensitive species. The biologist must be knowledgeable of the biology and ecology of sensitive species with the potential to occur on the project site and wetland ecology. The following measures shall be taken prior to and during construction:

- 1) Pre-construction surveys shall be conducted within 10 days of the start of construction by a qualified biologist to determine the presence of any sensitive species with the potential to occur on the project site.
- 2) A qualified biologist shall be present daily during construction in locations with the potential to support sensitive species, and to monitor for these species. The biologist will be authorized to stop work if threats to any sensitive species are identified during monitoring.
- 3) Construction shall be scheduled to avoid the breeding seasons of special status species that are found to be present in the construction area, including, but not limited to, the California gnatcatcher.

- 4) If any burrowing owls, cactus wrens, or other federally or state listed species are discovered on or near the project site, all work in the area shall cease and Fish and Wildlife and the Executive Director of the Commission shall be contacted to assess any potential risk of significant adverse effects to listed species and the possible need for further coordination. No construction shall continue until both Fish and Wildlife and the Executive Director of the Commission have determined that further coordination of construction activities are sufficient to avoid potential effects to listed species. If the Executive Director of the Commission determines that an amendment to this coastal development permit is legally required to address the potential risk of significant adverse effects to listed species, the permittee agrees, by acceptance of this permit, to comply with the Executive Director's determination and apply for an amendment to this coastal development permit.
- 5) Prior to and during the clearing of any CSS or other suitable gnatcatcher habitats outside the gnatcatcher breeding season, the biologist shall locate any individual gnatcatchers on-site and direct clearing to begin in an area away from birds. In addition, the biologist shall walk ahead of clearing equipment to flush birds towards areas of habitat that will be avoided. It shall be the responsibility of the permittee to assure that gnatcatchers shall not be directly injured or killed by the clearing of CSS.
- 6) Prior to initiating clearing and/or project construction during the gnatcatcher breeding season, the biological monitor shall meet on-site with the construction manager and/or other individual(s) with oversight and management responsibility for the day-to-day activities on the construction site to discuss implementation of the relevant avoidance/minimization/mitigation measures for gnatcatcher. The biologist shall meet as needed with the construction manager (e.g., when new crews are employed) to discuss implementation of these measures.
- 7) The permittee shall submit weekly reports (including photographs of impact areas) to the Executive Director and the Wildlife Agencies during initial clearing of CSS and/or project construction within 100 feet of avoided CSS during the gnatcatcher breeding season. The weekly reports shall document that authorized CSS impacts were not exceeded, work did not occur within the 100-foot setback during the gnatcatcher breeding season except as approved by the Executive Director, and general compliance with all conditions. The reports shall also outline the duration of gnatcatcher monitoring, the location of construction activities, the type of construction which occurred, and equipment used. These reports shall specify numbers, locations, and sex of gnatcatchers (if present), observed gnatcatcher behavior (especially in relation to construction activities), and remedial measures employed to avoid, minimize, and mitigate impacts to gnatcatchers. Raw field notes shall be available upon request by the Executive Director. If the Executive Director of the Commission determines that the report indicates the construction activities are causing a potential risk of significant adverse effects on the environment and determines that an amendment to this coastal development permit is legally required to address these effects, the permittee agrees, by acceptance of this permit, to comply with the Executive Director's determinations and apply for an amendment to this coastal development permit.

- 8) The limits of vegetation removal will be delineated in all areas adjacent to preserved vegetation by bright orange plastic fencing, stakes, flags, or markers that are clearly visible to personnel on foot and in heavy equipment.

B. Park Operations.

- 1) Trash cans located in the park shall contain closed lids sufficient to prevent trash from escaping due to wind or animal dispersion.
- 2) No human intrusion into habitat areas shall occur within the breeding season of the California gnatcatcher.
- 3) Access Road. No impacts to ESHA resulting from usage of the maintenance access road are authorized by this Coastal Development Permit. It is the City's responsibility to ensure that usage of the maintenance access road does not result in impacts to ESHA areas. The City shall monitor usage of the maintenance access road to ensure that no impacts occur as a result of usage of the access road. Upon discovery of any impacts to ESHA, the City shall submit an application for a new Coastal Development Permit or an amendment to this Coastal Development Permit for restoration of the affected area.
- 4) Special Events. The only development authorized by this permit is the use of the park for ball fields. Any other use of the park, such as the use of the park for temporary special events, may require a Coastal Development Permit. At least 180 days in advance of a temporary special event which is planned to occur on the site, the permittee shall submit a written letter with a description of the proposed temporary event to inquire whether a Coastal Development Permit is required.
- 5) No amplified speakers shall be allowed on the site.

C. Monitoring Plan. PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT, the permittee shall develop, in consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service as appropriate, and submit for review and written approval of the Executive Director, a final monitoring plan which includes, but is not limited to, the following requirements:

- 1) During the first five years since commencement of use of the park facility by the public, human intrusion into habitat areas shall be assessed annually and submitted for the review of the Executive Director. If the Executive Director determines that the sign and fencing plan approved by the Executive Director is not effective at preventing human intrusion into sensitive habitat areas, the permittee shall submit a request for amendment to this Coastal Development Permit proposing additional measures to prevent intrusion into sensitive areas. The amendment request shall include a report by a qualified biologist describing the assessments performed, the problems encountered, and whether the suggested strategies will be effective at preventing human intrusion. A copy of this report shall also be sent to the Carlsbad office of the US Fish and Wildlife Service. Six years after commencement of use of the park facility by the public, the permittee shall submit a summary of the assessments performed and a record of their implementation to the Executive Director and the Carlsbad office of the US Fish and Wildlife Service.

- 2) Provisions for monitoring of the impact of predation by domestic pets on the California gnatcatcher. A qualified biologist shall monitor the presence of domestic and feral cats on the subject site, and submit annual monitoring reports for 5 years after completion of grading documenting the degree of usage of the site by domestic and feral cats.
- 3) Provisions for implementation of a Cowbird monitoring and eradication program. The site shall be surveyed annually for the presence of the brown-headed cowbird (*Molothrus ater*) on the project site.

D. Nest Predator Exclusion Program. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, a program for the removal of nest predators, including the brown-headed cowbird and domestic and feral cats from the project site shall be submitted for the review and approval of the Executive Director. A qualified biologist shall design the eradication program. The program shall be designed to reduce the prevalence of nest predators on the project site to reduce potential impacts to the California gnatcatcher. The program shall include, but shall not be limited to, provisions for trapping, public education, and installation of additional fencing, if consistent with the Fencing and Signage Condition, above. Any development, as defined in Section 30106 of the Coastal Act, which is required to enact the Nest Predator Exclusion Program shall require an amendment to this Coastal Development Permit, unless the executive director determines that no permit is required.

The Nest Predator Exclusion Program shall be enacted if either:

- 1) upon review of the final fencing plan, the Executive Director determines that fencing on the site will not allow wildlife, including the coyote, sufficient mobility to the park site, or;
- 2) Upon review of the reports from the monitoring program, the Executive Director determines that cowbirds or domestic or feral cats are posing a significant risk to the California gnatcatcher or other sensitive species on the project site

The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

8. **Drainage And Polluted Runoff Control Plan. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit for the review and approval of the Executive Director, two (2) copies of a final Drainage and Runoff Control Plan for the post-construction project site, prepared by a licensed civil engineer or qualified licensed professional. The Plan shall include detailed drainage and runoff control plans with supporting calculations. The plan shall incorporate Best Management Practices (BMPs) including site design, source control and treatment control measures designed to reduce, to the maximum extent practicable, the volume, velocity and pollutant load of stormwater and dry weather runoff leaving the developed site. The consulting licensed civil engineer or**

qualified licensed professional shall certify in writing that the final Drainage and Runoff Control Plan is in substantial conformance with the following minimum requirements:

- 1) The plan shall demonstrate the use of distributed small-scale controls or integrated Best Management Practices (BMPs) that serve to minimize alterations to the natural pre-development hydrologic characteristics and conditions of the site, and effectively address pollutants of concern.
- 2) Post-development peak runoff rate and average volume from the site shall be maintained at levels similar to pre-development conditions.
- 3) Selected BMPs shall consist, or primarily consist, of site design elements and/or landscape based systems or features that serve to maintain site permeability, avoid directly connected impervious area and/or retain, infiltrate, or filter runoff from rooftops and hardscape areas, where feasible. Examples of such features include but are not limited to porous pavement, pavers, vegetated swales, and infiltration trenches.
- 4) Landscaping materials shall consist primarily of native or other low-maintenance plant selections which have low water and chemical treatment demands. An efficient irrigation system designed based on hydrozones and utilizing drip emitters or micro-sprays or other efficient design should be utilized for any landscaping requiring water application. To the maximum extent feasible, the irrigation system must be capable of matching the water demand of the vegetation with the quantity of water delivered to the vegetation.
- 5) All slopes should be stabilized in accordance with provisions contained in the Landscaping and/or Interim Erosion and Sediment Control Condition for this Coastal Development Permit.
- 6) Runoff shall be discharged from the developed site in a non-erosive manner. Energy dissipating measures shall be installed at the terminus of outflow drains where necessary.
- 7) Post-construction structural BMPs (or suites of BMPs) shall be designed to treat, infiltrate or filter the amount of stormwater runoff produced by all storms up to and including the 85th percentile, 24-hour storm event for volume-based BMPs, and/or the 85th percentile, 1-hour storm event, with an appropriate safety factor (i.e., 2 or greater), for flow-based BMPs.
- 8) All BMPs shall be operated, monitored, and maintained in accordance with manufacturer's specifications where applicable, or in accordance with well recognized technical specifications appropriate to the BMP for the life of the project and at a minimum, all structural BMPs shall be inspected, cleaned-out, and where necessary, repaired prior to the onset of the storm season (October 15<sup>th</sup> each year) and at regular intervals as necessary between October 15<sup>th</sup> and April 15<sup>th</sup> of each year. Debris and other water pollutants removed from structural BMP(s) during clean-out shall be contained and disposed of in a proper manner.



- 9) For projects located on a hillside, slope, or which may otherwise be prone to instability, final drainage plans should be approved by the project consulting geotechnical engineer.
- 10) Should any of the project's surface or subsurface drainage/filtration structures or other BMPs fail or result in increased erosion, the permittee /landowner or successor-in-interest shall be responsible for any necessary repairs to the drainage/filtration system or BMPs and restoration of the eroded area. Should repairs or restoration become necessary, prior to the commencement of such repair or restoration work, the permittee shall submit a repair and restoration plan to the Executive Director to determine if an amendment or new coastal development permit is required to authorize such work.
- 11) The final Drainage and Runoff Control Plans shall be in conformance with the site/development plans approved by the Coastal Commission. Any changes to the Coastal Commission approved site/development plans required by the consulting civil engineer/water quality professional or engineering geologist shall be reported to the Executive Director. No changes to the Coastal Commission approved final site/development plans shall occur without an amendment to the coastal development permit, unless the Executive Director determines that no amendment is legally required.

**9. Storage Of Construction Materials, Mechanized Equipment And Removal Of Construction Debris**

**A. The permittee shall comply with the following construction-related requirements:**

- 1) No construction materials, debris, or waste shall be placed or stored where it may be subject to water, wind, rain, or dispersion;
- 2) Any and all debris resulting from construction activities shall be removed from the project site within 24 hours of completion of the project;
- 3) Construction debris and sediment shall be removed from construction areas each day that construction occurs to prevent the accumulation of sediment and other debris which may be discharged into coastal waters;
- 4) Erosion control/sedimentation Best Management Practices (BMP's) shall be used to control dust and sedimentation impacts to coastal waters during construction. BMPs shall include, but are not limited to: placement of sand bags around drainage inlets to prevent runoff/sediment transport into coastal waters; and
- 5) All construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible.

**B. Best Management Practices (BMPs) designed to prevent spillage and/or runoff of construction-related materials, sediment, or contaminants associated with construction activity shall be implemented prior to the on-set of such activity.**

Selected BMPs shall be maintained in a functional condition throughout the duration of the project. Such measures shall be used during construction:

- 1) The permittee shall ensure the proper handling, storage, and application of petroleum products and other construction materials. These shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. It shall be located as far away from the receiving waters and storm drain inlets as possible;
- 2) The permittee shall develop and implement spill prevention and control measures;
- 3) The permittee shall maintain and wash equipment and machinery in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems. Washout from concrete trucks shall be disposed of at a location not subject to runoff and more than 50-feet away from a stormdrain, open ditch or surface water; and
- 4) The permittee shall provide adequate disposal facilities for solid waste, including excess concrete, produced during construction.

**10. Construction Staging and Temporary Construction-Fencing Plan:**

A. All construction plans and specifications for the project shall indicate that impacts to wetlands and environmentally sensitive habitats shall be avoided and that the California Coastal Commission has not authorized any impact to wetlands or other environmentally sensitive habitat. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit a final construction staging and fencing plan for the review and approval of the Executive Director which indicates that the construction in the construction zone, construction staging area(s) and construction corridor(s) shall avoid impacts to wetlands and other sensitive habitat consistent with this approval. The plan shall include the following requirements and elements:

- 1) Wetlands and any other environmentally sensitive habitats shall not be affected in any way, except as specifically authorized in this permit.
- 2) Prior to commencement of construction, temporary barriers shall be placed at the limits of grading adjacent to ESHA. The barriers shall be a minimum 8 feet tall and one-inch thick in those areas adjacent to occupied gnatcatcher habitat. Solid physical barriers shall be used at the limits of grading adjacent to all other ESHA. Barriers and other work area demarcations shall be inspected by a qualified biologist to assure that such barriers and/or demarcations are installed consistent with the requirements of this permit. All temporary barriers, staking, fencing shall be removed upon completion of construction.
- 3) No grading, stockpiling or earth moving with heavy equipment shall occur within ESHA, wetlands or their designated buffers, except as noted in the final habitat management plan approved by the Executive Director.

- 4) No construction materials, debris, or waste shall be placed or stored where it may enter sensitive upland habitat or wetlands, storm drain, receiving waters, or be subject to wind erosion and dispersion;
- 5) No construction equipment shall be stored within any ESHA, wetlands or their buffers.
- 6) The plan shall demonstrate that:
  - a. Construction equipment, materials or activity shall not occur outside the staging area and construction zone and corridors identified on the site plan required by this condition; and
  - b. Construction equipment, materials, or activity shall not be placed in any location which would result in impacts to wetlands or other sensitive habitat;
- 7) The plan shall include, at a minimum, the following components:
  - a) A site plan that depicts:
    - i. limits of the staging area(s)
    - ii. construction corridor(s)
    - iii. construction site
    - iv. location of construction fencing and temporary job trailers with respect to existing wetlands and sensitive habitat

B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

## **11. Final Plans Conforming To Geotechnical Recommendations**

A. All final design and construction plans shall be consistent with all recommendations contained in Geotechnical Study For The Proposed Sunset Ridge Park Project For The Environmental Impact Report (EIR), Superior Avenue And Pacific Coast Highway, City Of Newport Beach, California, dated August 19, 2009. No changes to the approved plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

B. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall submit, for the Executive Director's review and approval, two full sets of plans with evidence that an appropriately licensed professional has reviewed and approved all final design and construction plans and certified that each of those final plans is consistent with all the recommendations specified in the above-referenced report.

C. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment unless the Executive Director determines that no amendment is legally required.

- 12. Assumption Of Risk, Waiver Of Liability And Indemnity.** By acceptance of this permit, the permittee acknowledges and agrees (i) that the site may be subject to hazards from landslide, erosion, and earth movement; (ii) to assume the risks to the permittee and the property that is the subject of this permit of injury and damage from such hazards in connection with this permitted development; (iii) to unconditionally waive any claim of damage or liability against the Commission, its officers, agents, and employees for injury or damage from such hazards; and (iv) to indemnify and hold harmless the Commission, its officers, agents, and employees with respect to the Commission's approval of the project against any and all liability, claims, demands, damages, costs (including costs and fees incurred in defense of such claims), expenses, and amounts paid in settlement arising from any injury or damage due to such hazards
- 13. Other Agency Approvals.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall provide to the Executive Director a copy of a permit, or letter of permission, or evidence that no permit or permission is required for the project by the following entities:; California Department of Fish and Game; U.S. Fish and Wildlife Service; Regional Water Quality Control Board, City of Newport Beach Fire Authority. The applicant shall comply with the recommendations provided by the USFWS in their April 27, 2012 letter. The permittee shall inform the Executive Director of any changes to the project required by the City of Newport Beach Fire Authority; California Department of Fish and Game; U.S. Fish and Wildlife Service; Regional Water Quality Control Board. Such changes shall not be incorporated into the project until the permittee obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.
- 14. Future Development Restriction.** This permit is only for the development described in Coastal Development Permit No. 5-11-302. Pursuant to Title 14, California Code of Regulations, section 13253(b)(6), the exemptions otherwise provided in Public Resources Code, section 30610(b) shall not apply. Accordingly, any future improvements the proposed park access road, ball fields, grass warm-up field, landscaped areas, children's playground, restroom, and other structures described in this permit, including but not limited to repair and maintenance identified as requiring a permit in Public Resources Code, section 30610(d) and Title 14, California Code of Regulations, sections 13252(a)- (b), or the intensification of use of the maintenance access road, shall require an amendment to Permit No. 5-11-302 from the Commission or shall require an additional coastal development permit from the Commission or from the applicable certified local government, unless the Executive Director of the Commission determines that no amendment or new permit is required.
- 15. Proof of Legal Ability to Comply With Conditions.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the permittee shall demonstrate the permittee's legal ability or authority to undertake development located on the adjacent property known as Newport Banning Ranch.
- 16. Liability for Costs and Attorneys Fees.** By acceptance of this permit, the Applicant/Permittee agrees to reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys fees -- including (1) those charged by the Office of the

Attorney General, and (2) any court costs and attorneys fees that the Coastal Commission may be required by a court to pay -- that the Coastal Commission incurs in connection with the defense of any action brought by a party other than the Applicant/Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this permit. The Coastal Commission retains complete authority to conduct and direct the defense of any such action against the Coastal Commission.

**17. Off-Site Habitat Enhancement.**

A. PRIOR TO ISSUANCE OF THIS COASTAL DEVELOPMENT PERMIT, the applicant shall develop, in consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service as appropriate, and submit a final detailed habitat restoration and monitoring program to create or enhance 1.5 acres of coastal sage scrub (CSS) that provides foraging and breeding opportunities for the California gnatcatcher located at either: Upper Buck Gully Canyon, Big Canyon, or John Wayne Gulch, for review and written approval of the Executive Director. A qualified restoration biologist shall design the restoration and monitoring program.

1) The plan shall include, at a minimum, the following components:

- a) Evidence that the City has the authority to carry out the restoration activities at the restoration site and to ensure its permanent protection through utilization of an open space deed restriction, open space easement, or other form of legal protection over the property that runs with the land found acceptable by the Executive Director unless the area is already subject to legal protection over the property that runs with the land that the Executive Director determines is equivalent.
- b) Plans depicting existing vegetation, topography, and any existing structures in the area.
- c) Plans for site preparation and preservation of native seed bank;
- d) Plant palette, coastal sage scrub habitat design that includes location of individual plant species, source of plant material (must consist of locally derived native stock), plant installation methods, erosion control plans, soil fertilization plans if necessary, and weed abatement. If temporary irrigation is required, the method and time of watering should be described. All irrigation infrastructure must be removed by the end of the monitoring period.
- e) Success criteria based on quantitative sampling of an appropriate (relatively undisturbed) Orange County CSS reference site (s).
- f) Plans for maintenance and quantitative and qualitative monitoring.
- g) Plans for annual reports and a final report at the end of five years.

2) The restoration and monitoring program shall at a minimum include the following requirements:

- a) Creation or enhancement of breeding and foraging habitat for the California gnatcatcher through: a) elimination of existing invasive or non-native species; and b) installation of plant species that are appropriate Orange County CSS community members and which serve as important foraging and nesting habitat for the California gnatcatcher.
- b) The designated restoration site shall be located in an area of existing degraded CSS. The restoration site shall be located where it will not be subject to fuel modification activity or other disturbance.
- c) The restoration program shall include, at a minimum, the following long-term maintenance requirements: periodic site inspections, eradication of non-native and invasive plant species, weed control, implementation and maintenance of erosion control measures, trash and debris removal, and/or replacement plantings as necessary.
- d) Initial planting on the restoration site shall be completed no later than 180 days since commencement of use of the park facilities by the public.
- e) Within 60 days of completion of initial planting of the restoration site, the City shall submit for the review and approval of the Executive Director a report assessing the initial biological and ecological status of the “as built” restoration site prepared by a qualified biologist. The assessment shall include an analysis of the attributes that will be monitored pursuant to the program, with a description of the methods for making that evaluation. The report shall include a summary of dates when work was performed and photographs that show full implementation of the restoration and monitoring program.
- f) The restoration will be considered successful if the overall species composition and vegetative cover of CSS species are similar to a relatively undisturbed nearby CSS reference area (s) occupied by gnatcatchers. Species composition shall be considered similar if all the major native shrub species (e.g., California sagebrush and California encelia) and a similar number of native herbaceous species at the reference site (s) are present at the restored site. The vegetative cover of shrub species and herbaceous species at the restoration and reference sites will be compared with an appropriate statistical test. Spatially stratified, random sampling of the restoration and reference sites will be done with sufficient replication to detect a 10% absolute difference in cover with 90% power with  $\alpha=0.10$ . The cover of shrub species and herbaceous species will be considered similar if there is no statistical difference ( $P>0.10$ ) in the average cover of each dominant species between the two sites; or, if there is a statistically significant difference, it is no greater than 10% absolute cover. In addition, in order to be considered successful, the restored CSS site must meet the success

criteria without having received any supplemental irrigation for a minimum of two years.

g) The City shall submit annual reports prepared by a qualified biologist for the review and approval of the Executive Director for the five year monitoring period, beginning the first year after submission of the “as-built” assessment. Project monitoring shall occur between February 15 and May 15 of each year and reports shall be submitted within 60 days of monitoring program completion. The reports shall include: 1. summary of previous reports, 2. description of restoration program’s progress toward meeting success criteria based on monitoring results, and 3. photographs documenting the condition of the restoration taken from the same fixed points in the same directions.

h) At the end of the five year monitoring period, the City shall submit a final report prepared by a qualified biologist for the review and approval of the Executive Director. The report must evaluate whether the restoration site conforms to the goals, objectives, and success criteria set forth in the approved final restoration program. The report must address all of the monitoring data collected over the five-year period.

If the final report indicates that the restoration project has been unsuccessful, in part, or in whole, based upon the approved success criteria, the applicant shall submit within 90 days a revised or supplemental restoration program to compensate for those portions of the original program that were necessary to offset project impacts which did not meet the approved success criteria. The revised restoration program, if necessary, shall be processed as an amendment to this coastal development permit.

3) The permittee shall monitor and remediate the restoration site in accordance with the approved restoration and monitoring program, including any revised restoration and monitoring program approved by the Commission or its staff. Any proposed changes to the approved restoration and monitoring program shall be reported to the Executive Director. No changes to the approved restoration and monitoring program shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

#### **IV. 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 Semeniuk Slough.

The proposed off-site mitigation area is located at either Big Canyon or John Wayne Gulch, located adjacent to Upper Newport Bay, or Upper Buck Gully Canyon – located southeast of Newport Bay.

## **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 in the center of the Park Site (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 Semeniuk 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 (Exhibit 22).

The City also proposes to mitigate for impacts to native vegetation on the Park Site through the creation or restoration of 1.5 acres of coastal sage scrub which provides foraging and breeding opportunities for the California gnatcatcher at an off-site mitigation area.

### **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.

In its letter, dated July 9, 2012, the City argues that the statutory transfer, Senate Bill 124 (2001) (“SB 124”) (Exhibit 15), of the subject site dictated that the City could only build an active park on the site. In a letter, dated October 14, 2011, from the Newport Beach City Attorney’s office, the City argues that legislative history further bolsters this position. (Exhibit 16) The City’s position is not supported by the plain meaning of the statutory language of the legislative transfer. In cases of statutory interpretation, the fundamental task is to determine the Legislature’s intent. (*Baker v. Worker’s Comp. Appeals Bd.* (2011) 52 Cal.4<sup>th</sup> 434, 442.) The text of the statute is the “best indicator of legislative intent” and the courts may “reject literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results.” (*Ibid.*) Thus, the court’s “first task is to look to the language of the statute itself. When the language is clear and there is not uncertainty as to the legislative intent, [the court] look[s] no further and simply enforce[s] the statute according to its terms.” (*Ibid.*) Given this judicial method for statutory interpretation, it is clear that the language of SB 124 does not explicitly prohibit the development of a passive park. Rather, the legislature simply transferred the subject property to the State Parks (structured in a manner where State Parks took title under SB 124 with the City managing it) for state park purposes. There is no other conditional language indicating that the park shall be active or otherwise. Thus, the statutory language is clear that there is no limiting language regarding the type of park contemplated under SB 124. As such, there is no need to resort to legislative history to interpret the statute.

Even if the City were correct that SB 124 should be subject to interpretation using legislative history, the City mischaracterized the legislative history of SB 124. The only reference in the Bill Analysis to an active park is a statement that it is the *City’s intent*, not the Legislature’s intent, to build baseball and soccer fields. There is nothing in the referenced legislative history (see Exhibit 16) mandating that the City has to build an active park on the transferred property.

Finally, the City claims that the Sunset Ridge property must be used for an active park because it alleges that the purchase and sale agreement between the City and the State, when the State decided to sell the property to the City instead of having the City manage the property for State Parks, dictated as much. The Grant Deed (Exhibit 14) which includes a City Council resolution authorizing the purchase of the subject property, dated September 26, 2006, states that the purchase and sale agreement provides, among other things, that “[t]he property must be used as a park consistent with the current Open Space-Active (OS-A) zoning.” The OS-A zoning designation is no longer part of the City’s zoning code, so it is unclear upon which standard the City could even rely on to comply with the purchase and sale agreement condition. Moreover, at the July 2006 hearing, prior to the City’s resolution, dated September 26, 2006, regarding the purchase of the subject property and the City’s acceptance of the subject site deed on November 16, 2006, the Commission certified a land use plan amendment, as submitted, for the subject property, with the designation of the site going from Medium Density Residential to Open Space. (NPB-MAJ-1-06 Part B (Caltrans West)) In the findings, the Commission notes that the Open Space designation is “intended to

provide areas for a range of public and private uses to meet the recreation needs of the community and to protect, maintain, and enhance the community's natural resources." The Commission's findings also noted that a detailed natural resource analysis must be conducted when the City proposes a project and "that the developable area of the site may be restricted by the existence of habitat and associated setbacks/buffers." Given that the Commission certification of this LUP amendment, changing the land use designation of the subject site to Open Space, happened before the City's resolution authorizing the purchase of Caltrans West subject to the condition that the City build a park consistent with a designation not assigned to the property, OS-A, it is illogical that the City agreed to a condition in the purchase and sale agreement contrary to the existing zoning at the time.

Moreover, even if the purchase and sale agreement contemplated an active park, the Commission was not a party to this agreement and is not bound by its terms. Further, the City's argument that it must build an active park fails because parties to a contract may be excused from performing under the terms of the contract where the performance is prevented by operation of law. (See *National Pavements Corp. of Calif. V. Hutchinson Co.* (1933) 132 Cal.App. 235, 238.) In this vein, the City entered into the purchase and sale agreement in 2006, well after the effective date of the Coastal Act which contains policies to protect coastal resources in the coastal zone and after the effective date of the subject site's land use designation as Open Space, not Open Space-Active. Thus, any conditions in the purchase and sale agreement would likely be excused as impossible to perform by operation of laws existing at the time of the agreement, including the Coastal Act and its own zoning designation of the site. Therefore, the City cannot support its position that it must build an active park because the purchase and sale agreement between it and the State said so.

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. LUP Amendment NPB-MAJ-1-07

Although the City of Newport Beach Land Use Plan (LUP) Amendment 1-06 Part B, which was approved on July 12, 2006, designated the site as Open Space, the Commission later approved LUP amendment 1-07 on February 6, 2009. LUP Amendment 1-07 created a new land use designation of Parks and Recreation (PR), and the new PR designation was applied to the subject site. The PR category is applied both to areas where no sensitive resources exist, and those areas where sensitive resources may exist, such as beaches and Upper Castaways Park. The PR category allows for active

and passive parks, and the designation was used in areas where some recreational activity was anticipated. In sum, the PR designation does not indicate that a whole site was intended for active recreation. Furthermore, the policies of the LUP are applicable to all properties, no matter their LUP designation. Therefore, regardless of whether a site is designated as PR or Open Space, the policies provided in the LUP still apply.

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 and the history of disturbance.

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 resistant 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.~~ Although there are gaps in evidence to support a finding that the mowing occurred every year during its ownership, there is a long history of repeated mowing events which suggest that the site was consistently cleared. 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 and grading events have occurred on the Park Site since before passage of the Coastal Act for the purposes of the expansion of Coast Highway that ultimately was never built. The state consistently maintained the site during its ownership such that it is not conclusive that especially valuable habitat established on site in between maintenance mowing. The City thus purchased a site for the purpose of constructing a park that had been consistently and demonstrably cleared of vegetation since before the Coastal Act by the state. ~~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~~ Disturbed Encelia Scrub and the California Gnatcatcher

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<sup>1,2</sup>. 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 (along with California sage and California buckwheat) most favored by the gnatcatcher<sup>3</sup>. 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<sup>4,5</sup>, with a mean territory size generally greater for inland populations than coastal populations<sup>6</sup>. 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 1<sup>st</sup> and May 15<sup>th</sup>, 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 Bon Terra 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.~~

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

<sup>1</sup> Pers. Com. J. Evens, Senior Botanist, CNPS. Jan 19, 2012.

<sup>2</sup> Landis, B. Aug. 2011. Native Plants for School and Urban Gardens. CNPS

<sup>3</sup> Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Poliophtila californica*). In The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

<sup>4</sup> 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.

<sup>5</sup> Preston, K.L., P.J. Mock, M.A. Grishaver, E.A. Bailey, and D.F. King. 1998. California Gnatcatcher territorial behavior. *Western Birds*, Vol. 29: 242-257.

<sup>6</sup> Ibid.

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<sup>-7,8</sup>. 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.~~*

*~~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~~*

<sup>7</sup> Bontrager 1991, Moek and Bolger 1992, Grishaver et al. 1998.

<sup>8</sup> 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 conference 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.

~~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<sup>9</sup>. 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 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. The Disturbed Encelia Scrub area and the rest of the subject site have been subject to substantial disturbance over its history, including large-scale changes in topography due to pre-Coastal Act grading and recurrent mowing. As discussed further in Section D, below, based upon the facts in this case and in this circumstance the Commission finds the significant disturbance which has occurred on the site and in the Disturbed Encelia Scrub area which has prevented the establishment of high quality coastal sage scrub or documented California gnatcatcher habitat, should not be considered unpermitted development.~~

#### 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

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<sup>9</sup> Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Poliophtila californica*). In *The Birds of North America*, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

scrub habitats, but also “non-sage scrub habitats such as chaparral, grassland, riparian areas, in 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 2<sup>nd</sup> Edition of "A Manual of California Vegetation"<sup>10</sup>. 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.

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

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<sup>10</sup> Sawyer, J., T.Keeler-Wolf, and J. Evens. 2009. A Manual of California Vegetation, 2<sup>nd</sup> Edition. California Native Plant Society.

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.~~

Although the Disturbed Encelia Scrub grows in the intervals between mowings, there has been significant disturbance on the site. This includes thousands of cubic yards of grading and subsequent mowing of vegetation that has occurred on the site since prior to the Coastal Act. This historic disturbance has likely reduced the suitability of the vegetation to provide valuable ecological services to the California gnatcatcher and no usage of the Disturbed Encelia Scrub for foraging or breeding has been observed. As stated, based upon the facts in this case and in this circumstance, the Commission finds the past disturbance should not be considered unpermitted development and, as discussed further in Section E below, the vegetation therefore does not rise to the level of ESHA.

#### 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~~ The gnatcatcher is now a listed species and more is now known regarding its habitat requirements. Encelia Scrub could qualify as ESHA, despite the absence of the gnatcatcher or other sensitive species, if its habitat value warranted such a determination. However, due to the following site specific reasons, the Disturbed Encelia Scrub within the footprint of the proposed park does not qualify at this time as ESHA: 1) the Encelia Scrub (a subgroup of coastal sage scrub) that is present on the subject site is predominantly composed of Encelia californica, and that plant, in and of itself does not necessarily qualify as ESHA in coastal Orange County; 2) furthermore, in this case, there is no documentation of usage of the Disturbed Encelia Scrub by sensitive species, including the California gnatcatcher, for foraging or nesting habitat, or evidence that such habitat sufficiently developed on the site; 3) the vast majority of the site was subject to intense levels of disturbance and elimination of the site's natural topography by extensive pre-Coastal Act grading; 4) the vast majority of the site was graded and consistently maintained in a disturbed condition through consistent, recurrent mowing of vegetation since before the Coastal Act until now, first by Caltrans and then by the City, after purchase by such; and 5) required fuel modification to protect existing adjacent residential development from fire hazards involves regular disturbance over much of the project site and significantly reduces overall vegetation coverage on the subject site adjacent to the Disturbed Encelia Scrub area. Due to these circumstances, the vegetation does not reach the level of significance necessary to qualify as ESHA and does not qualify as major vegetation. Therefore, the Commission must evaluate the impacts of the proposed development on the site in its current condition and without reference to Section 30240. 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, an applicant claiming a vested right in certain development must submit a vested rights claim application to the Commission before the applicant can establish a legal vested right in development in the coastal zone. (See, *LT WR v. Coastal Commission* (2007) 152 Cal.App.4<sup>th</sup> 770, 783-786.) 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, as noted above, 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, *Aveo 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 since neither Caltrans nor the City ever applied for a vested right in the mowing, neither can claim it 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. The Commission cannot consider and decide a matter which has not been applied for, presented and noticed and as such cannot consider this implicit claim for a vested right within a permit application.~~

~~In a letter, dated July 9, 2012, the City argues that "[t]he City's ongoing maintenance activities pre-date the Coastal Act and, in any event, the City has a vested right to continue that ongoing pre-Coastal Act use." The City seems to be making two different arguments, a claim that the mowing is exempt maintenance and a claim that the City has a vested right to continue mowing.~~

~~The City claims its mowing activities are maintenance activities which pre-date the Coastal Act and, as such, it never needed a CDP to conduct maintenance on the subject site. In other words, the City claims its mowing activities constitute exempt maintenance. As the staff report notes, below, the subject site contains extensive areas of ESHA within the proposed active park. Pursuant to section 30610(d) of the Coastal Act, certain maintenance activities are exempt from CDP requirements except methods of maintenance that involve a risk of substantial adverse environmental impact as dictated by the Commission's regulations. Under section 13252 of the Commission's regulations, the exemption does not apply when the maintenance activity involves the use of mechanized equipment within ESHA. Therefore, the City's "ongoing maintenance" is not exempt maintenance, constitutes development and is unpermitted development because the City has never acquired a CDP for its mowing activities in ESHA.~~

~~As noted above, the City is required to submit a vested rights claim application to the Commission before it can claim it has established a vested right. Therefore, it cannot claim it has a vested right unless the Commission has already acted on a vested rights claim by the City. The City relies on an appellate court case, *Monterey Sand Company v. CCC* (1987) 191 Cal.App.3d 169 ("*Monterey Sand Co.*"), for the general proposition that it doesn't need a CDP for its ongoing mowing activities because it has a vested right to continue these activities under the premise that the mowing is a "continued operation," with Caltrans having started the operations before Prop. 20. In *Monterey Sand Co.*, the plaintiff challenged the *Commission's denial of a vested rights application* and the court held that the plaintiff had established a vested right in its continued operation of sand extraction from Monterey Bay because it established it had all the requisite permits from governing regulatory agencies before passage of Proposition 20. (*Id.* at pp 175-179.) In stark contrast, the City has never applied for a vested rights determination, and thus stands inapposite to the plaintiff in *Monterey Sand Co.* Moreover, since neither the City nor Caltrans has ever applied for a vested rights claim determination, the City cannot use this coastal development permit application process as a forum to assert its mowing activities on the subject property is a type of activity that would qualify for a vested rights claim. Rather, the Commission may only make this determination during a properly noticed and scheduled hearing that clearly indicates that the Commission will be~~

~~considering a vested rights application on its agenda. (14 CCR §§ 13059, 13200-13204.) Therefore, since the City has not applied for a vested rights claim determination, there has been no noticing or scheduling of such a vested rights claim, thus the Commission cannot consider the merits of such a claim at this time.~~

~~*Monterey Sand Co.* also establishes why a vested rights claim would be unlikely to succeed. The court explained that “[t]he foundation of the vested rights doctrine is estoppel which protects a party that detrimentally relies on the promises of the government.” (*Id.* at 177.) Unlike in *Monterey Sand Co.*, where the State had approved a lease prior to enactment of the Coastal Act and the mining company had made significant investments in reliance on that lease, the City has not identified any past promises by the state regarding the mowing activity nor has it identified any significant investments that it made in order to continue the mowing activity.~~

#### ~~6. City’s Nuisance Abatement Goes Beyond What is Necessary to Abate the Newport Beach Fire Department’s Declared Nuisance~~

~~In its letter, dated July 9, 2012, the City argues that its “on-going maintenance activities are legal because they constitute nuisance abatement which is not subject to coastal development permit requirement.” To support its position, the City has submitted a “Notice of Nuisance,” dated June 8, 2012, issued by the Newport Beach Fire Marshal likely in response to the Commission’s prior staff report on this project, for the November 2011 Commission meeting, which noted that the City could not rely on a claim of nuisance abatement of the Sunset Ridge property when it never followed its own abatement procedures, as dictated in Newport Beach Municipal Code section 10.48.030 “Notice of Nuisance.” The City’s Notice of Nuisance on June 8, 2012 does not have retroactive effect and As noted in Sections D above and E below, the Disturbed Encelia Scrub vegetation present on the subject site does not rise to the level of ESHA and does not qualify as major vegetation on this site. Therefore, argument related to nuisance abatement is entirely irrelevant to the mowing activities that have occurred on the subject site. The proposed removal of the Disturbed Encelia Scrub does not qualify as development because it is not considered the removal or harvesting of major vegetation and thus did not require a coastal development permit. occurred prior to June 8, 2012.~~

~~Pursuant to Newport Beach Municipal Code section 10.48.020, the Fire Marshal may declare and abate a public nuisance under limited circumstances including the following:~~

- ~~A.—Weeds growing upon highways, streets, sidewalks, parkways or private property in the City.~~
- ~~B.—Dry grass, stubble, brush, garden refuse, litter or other flammable material which constitutes a fire hazard or which, when dry, will in reasonable probability constitute a fire hazard.~~
- ~~C.—Poison oak and poison ivy when the location of such plants constitutes a menace to the public health.~~
- ~~D.—All rubbish, refuse and dirt upon parkways or sidewalks and all rubbish and refuse upon private property in the City. (Ord. 2001-2 § 2, 2001: Ord. 1194 § 2 (part), 1966)~~

In its Notice of Nuisance, the Fire Marshal appeared to rely on subsection (B) as grounds for requiring the City to abate the nuisance on the subject site. The Notice of Nuisance findings conclude that “the property will need to be cleaned of all dry grass, stubble, brush, garden refuse, litter, or other flammable material that constitutes a fire hazard or that will when dry.” The City’s nuisance abatement, however, is subject to coastal development permit requirements because the Fire Marshal’s recommended abatement activities go beyond what is necessary to abate a nuisance. Notably, the Fire Marshal did not include the qualifying language in Newport Beach Municipal Code section 10.48.020(B) which allows for clearing if the vegetation will, “in reasonable probability,” constitute a fire hazard when the vegetation is dry.

In *Citizens for a Better Eureka v. Coastal Commission* (“CBE”) (2011) 196 Cal.App.4<sup>th</sup> 1577, the court established the following “workable rule” when evaluating activities targeted at abating a city or county declared nuisance: “[W]here a local government properly declares a nuisance and requires abatement measures that are narrowly targeted at abating the declared nuisance, those measures do not require a [CDP]. On the other hand, a CDP is required if the development “activity exceeds the amount necessary” “simply to abate the nuisance.” (*Id.* at p. 1585.) In *CBE*, the court upheld the Commission’s findings that the plaintiff’s abatement activities to allegedly comply with the City of Eureka’s nuisance declaration to clean up contaminated soils, cut weeds and pick up litter on plaintiff’s project site, went beyond what was necessary to abate the nuisance. (*Id.* at p. 1586.) The court agreed with the Commission’s position that plaintiff’s proposed abatement which incorporated a wetland fill and restoration aspect of development involved “environmental and regulatory issues significantly beyond those presented in the ‘site remediation’ portion of the development in which the nuisances identified by the City—contaminated soil, rubbish, and overgrown vegetation—would be abated.” (*Id.* at p. 1587.) As such, the court concluded that the plaintiff needed to attain a CDP for any activity that goes beyond what is necessary to abate a nuisance. (*Ibid.*)

Similarly, the Newport Beach Fire Department, in its Notice of Nuisance goes beyond what is necessary to abate the nuisance on the subject property when it declared that the City must clean the subject property “of all dry grass, stubble, brush, garden refuse, litter, or other flammable material that constitutes a fire hazard or that will when dry.” Without more direction, the abatement procedures will exceed what is necessary to abate the nuisance. Generally, the Commission does not require a property owner to seek a CDP for fuel modification activities within a certain distance, usually 100 feet, of structures consistent with local government fire codes. The City has a similar provision in its Municipal Code. Any clearing beyond the generally allowed fuel modification area close to structures requires a coastal development permit. In cases where a local government has declared a nuisance due to fire hazards on a site and required abatement of the entire site, going beyond the typically allowed clearing of vegetation within 100 feet from a structure, the Commission would look at the habitat of the site to determine which species on the site do not present a fire hazard and work with the local government in the CDP context to create a detailed, narrowly tailored fuel management plan that does not have significant adverse effects on coastal resources. Dr. Engel, contrary to the City’s allegation<sup>44</sup>, characterizes the subject site, in particular

<sup>44</sup> The City is completely in error when it declared, in its letter, that “Dr. Engel further states that but for the City’s mowing, the disturbed vegetation would be closely spaced and include highly flammable and undesirable plant species, such as black mustard and thistle.” The City does not cite to a specific document to support its assertion that Dr. Engel made such a statement. And, in fact, the City cannot support this position because Dr. Engel never made this statement.

~~the Disturbed Encelia area, as containing extensive areas of ESHA since the Commission, as noted below, considers the subject site condition as though the unpermitted mowing did not occur, with the primary species in that area being the fire resistant plant species, Encelia californica. The 3.3-acre Disturbed Encelia area on the subject site also consists of fire resistant, and native, deerweed (Lotus scoparius). The Newport Beach Fire Department (See Exhibit 11) and the Orange County Fire Authority<sup>42</sup> (Exhibit 17) both list the Encelia californica and deerweed as fire resistant species. The Orange County Fire Authority states that Encelia californica is “[a]cceptable in all fuel modification wet and dry zones in all locations” where a fuel modification zone is defined as a “strip of land where combustible native or ornamental vegetation has been modified and partially or totally replaced with drought tolerant, fire resistant, plants.” Based on this, Orange County essentially advises its residents to plant Encelia californica in all fuel modification zones throughout the county. Thus, the City’s suggestion that abatement of the nuisance on the subject site requires complete clearing of the property goes beyond what is required to eliminate fire hazards on the subject site since a majority of the Disturbed Encelia area on the subject site contains fire resistant plant species, like Encelia californica and deerweed (Lotus scoparius). Therefore, while the Coastal Act recognizes the City’s power to declare, prohibit, and abate a nuisance as provided in section 30005, its abatement activities go beyond what is required to abate the declared nuisance and, thus, those activities are not exempt from permitting requirements and the City must apply for a CDP if it wishes to abate a nuisance by clearing areas beyond the areas 100 feet from structures on the subject site.~~

## **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*

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<sup>42</sup> [http://www.ocfa.org/\\_uploads/pdf/guiddec05.pdf](http://www.ocfa.org/_uploads/pdf/guiddec05.pdf)

*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 and 1:1 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<sup>13</sup>. 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 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

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<sup>13</sup> 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 malacophyllous shrublands of Mediterranean-type climates*. California Wildlife Conservation Bulletin No. 10.

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 would qualify ~~qualifies~~ as ESHA if it were not subject to disturbance. 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-dominant 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.

Although The the federally listed California gnatcatcher has been mapped within close vicinity to the Disturbed Encelia Scrub, no one has documented the California gnatcatcher using the Disturbed Encelia Scrub area for foraging or nesting. Although this alone is not dispositive, it is one salient factor in the ESHA assessment. 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. Encelia Scrub could qualify as ESHA, despite the absence of the gnatcatcher or other sensitive species, if its habitat value warranted such a determination. However, due to the following site specific reasons, the Disturbed Encelia Scrub within the footprint of the proposed park does not qualify at this time as ESHA: 1) the Encelia Scrub (a subgroup of coastal sage scrub)

that is present on the subject site is predominantly composed of Encelia californica, and that plant, in and of itself does not necessarily qualify as ESHA in coastal Orange County; 2) furthermore, in this case, there is no documentation of usage of the Disturbed Encelia Scrub by sensitive species, including the California gnatcatcher, for foraging or nesting habitat, or evidence that such habitat sufficiently developed on the site; 3) the vast majority of the site was subject to intense levels of disturbance and elimination of the site's natural topography by extensive pre-Coastal Act grading; 4) the vast majority of the site was graded and consistently maintained in a disturbed condition through consistent, recurrent mowing of vegetation since before the Coastal Act until now, first by Caltrans and then by the City, after purchase by such; and 5) required fuel modification to protect existing adjacent residential development from fire hazards involves regular disturbance over much of the project site and significantly reduces overall vegetation coverage on the subject site adjacent to the Disturbed Encelia Scrub area. Due to these circumstances, the vegetation does not reach the level of significance necessary to qualify as ESHA. Therefore, the impacts of development on the site should be considered under the site's current condition— i.e. an area of native vegetation which has not been documented to support native species and without reference to Section 30240. 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.

In its letter, dated July 9, 2012, the City argues that since the Commission did not comment on its draft EIR when the City circulated it for the Sunset Ridge project then the Commission is precluded from claiming that the Disturbed Encelia area constitutes ESHA. While the Commission makes every effort to submit comments to a lead agency on its draft EIR findings as the findings relate to the Coastal Act policy considerations, due to severe Commission staff time restraints, staff cannot always submit written comments to a lead agency before the end of the draft EIR comment period. The conclusions of the EIR, however, do not in any way limit the Commission's evaluation of the project's consistency with Coastal Act requirements. Coastal Act section 30621 requires the Commission to review CDP applications de novo. The City's argument that the EIR limits the Commission's review is inconsistent with this requirement. Further, Public Resources Code section 21174 provides that where CEQA and the Coastal Act conflict, the Coastal Act controls. Therefore, the City's position that the Commission cannot make an ESHA finding that differs from the City's certified EIR is incorrect.

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.

Although the Disturbed Encelia Scrub on site does not rise to the level of ESHA, it does have some biological significance. Although the project would impact 3.3 acres of Disturbed Encelia Scrub, the City has proposed measures to mitigate this impact, including: 1) the installation of native landscaping on the site to create 5.15 acres of superior high quality native vegetation with coverage of primarily coastal sage scrub that is suitable for foraging habitat for the California gnatcatcher, and 2) the creation or restoration of 1.5 acres of Coastal Sage Scrub to provide foraging and breeding habitat for the California gnatcatcher. The proposed installation or restoration of 6.65 acres of coastal sage scrub is consistent with policy 4.1.1-15 of the City's certified Land Use Plan, requiring 2:1 mitigation for allowable impacts to coastal sage scrub.

However, the City has not submitted a restoration plan for the off-site mitigation or a final landscaping plan for the native habitat to be created on site. As proposed, the project cannot be found consistent with Coastal Act Section 30240, as it cannot be ensured that the proposed installation of landscaping and methods of habitat restoration would be consistent with the protection of ESHA. Therefore, the Commission imposes Special Condition 2, requiring final revised landscaping plans, and Special Condition 17, requiring submittal of a final detailed habitat restoration and monitoring program. As conditioned, the project will ensure the protection of Environmentally Sensitive Habitat Areas.

As conditioned, the proposed project would not result in direct impacts to ESHA, but would instead expand the area of habitat available for use by sensitive species. Therefore, as conditioned, the proposed project is consistent with Coastal Act Section 30240, and section 4.1.1 of the City's certified Land Use Plan. 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 does not qualify as ESHA. Aside from the fact that the proposed project would directly impact the Disturbed Encelia Scrub,~~ However, 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. Therefore, the Commission imposes Special Condition 3, requiring submittal of a parking management plan, which includes provisions to limit the usage of the maintenance access road to only City maintenance vehicles and City operated shuttles, and to reduce the number of shuttle trips to the minimum necessary to allow members of the public with impaired mobility to access the park site. ~~If~~ As conditioned to ensure that the usage of the access road would not result in a level of use which would impact the adjacent ESHA, the Commission finds that such usage would be ~~is~~ 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. Therefore, the Commission imposes Special Condition 7, requiring the applicant to comply with requirements during project construction and operation to minimize impacts to adjacent habitat, including monitoring during construction, reduction in trash and human intrusion, monitoring after construction of the impacts of the proposed development, and provisions to remove predators of nesting birds from the site.

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. Therefore, the Commission imposes Special Condition 5 requiring a fencing plan designed to allow movement of wildlife to and across the site, and to discourage human intrusion into ESHA.

Lighting of paths on the park could result in impacts to sensitive species, or other negative impacts to adjacent ESHA. Therefore, the Commission imposes Special Condition 4 requiring submittal of a lighting plan which documents that the lighting plan is effective at preventing impacts to sensitive habitat.

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. Therefore, to reduce the potential for disruption to sensitive habitat, the Commission imposes Special Condition 2, requiring that no permanent irrigation occurs within ESHA and 50 foot buffers to ESHA, and Special Condition 8, requiring that irrigation in the park be designed to use the least amount of irrigation necessary. Finally, the Commission imposes Special Condition 13 which requires the applicant to comply with the requirements of other agencies. As conditioned, the project will ensure compliance with the requirements designed to protect native habitat on the site.

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 as conditioned to include measures to prevent impacts to adjacent habitat, these impacts may be mitigated. The Special Conditions listed above include measures ~~Measures~~ that can be taken to limit the presence of introduced species and nest predators on the site, include including 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. As proposed and conditioned, the project would result in the installation of native landscaping on the site to create 5.15 acres of superior high quality native vegetation with coverage of primarily coastal sage scrub that is suitable for foraging habitat for the California gnatcatcher. Additionally, the project proposes the creation or restoration of 1.5 acres of off-site Coastal Sage Scrub habitat at either Upper Buck Gully, Big Canyon, or John Wayne Gulch, to provide foraging and breeding habitat for the California gnatcatcher.

Although as conditioned, the proposed project is consistent with the Coastal Act, future improvements to the site could result in development which could result in negative impacts to habitat on the site. Therefore, Special Condition 14 requires future development on the site to obtain an amendment to this Coastal Development Permit, or a new Coastal Development Permit, unless the Executive Director determines that no permit is legally required.

~~If appropriately~~ As 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. Therefore, the Commission finds that the proposed project is consistent with Coastal Act Section 30240. 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 ~~is~~ primarily composed of non-native species, but does include some native species and some coastal sage scrub species. The proposed landscaping plan would result in the installation of 5.15 acres of superior high quality native vegetation with coverage of primarily coastal sage scrub that is suitable for foraging habitat for the California gnatcatcher. 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. Therefore, the Commission imposes Special Condition 2, requiring final detailed landscaping plans for the review and approval of the Executive Director. As conditioned, the proposed project will ensure that proposed landscaping would not have negative impacts on adjacent 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. Therefore, the Commission imposes



Special Condition 2, requiring that the final landscaping plans include provisions to remove invasive species from the subject site.

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. However, as conditioned to modify 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, the project 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. Therefore, the Commission finds that the proposed project, as conditioned, is consistent with Coastal Act Section 30240.

#### **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. Therefore, the Commission imposes Special Condition 5 and 6, requiring the submittal of a final fencing plan which is consistent with the protection of ESHA.

#### 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 Semeniuk 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 Commission imposes Special Condition 6, requiring final project plans which have been revised to eliminate grading within 50 feet of ESHA, except in areas where the applicant has demonstrated to the Executive Director's satisfaction that such grading is necessary for the construction of the proposed water infiltration swale and undergrounded drainage culvert. Therefore the proposed grading, as conditioned, 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. Therefore, the Commission imposes Special Condition 1, requiring the imposition an open space restriction allowing only certain allowable uses within ESHA areas, and 50 foot buffers to ESHA.

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 As 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 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.~~

## **F. 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.~~

## G. 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:*

- (1) 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<sup>14</sup>. 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<sup>15</sup>. 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<sup>16</sup>, the presence of non-native species, and that the seeps are "small areas of low function/value hydrophytic vegetation".*

*I disagree with this conclusion. In fact, the small seeps and surroundings supporting a preponderance of hydrophytic plants, or hydric soils, or wetland hydrology meet the definition of wetlands in the Coastal act and the Commission's regulations. Whether or not*

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<sup>14</sup> Connor, H.E. and D. Charlesworth. 1989. Genetics of male-sterility in gynodioecious *Cortaderia* (Gramineae). *Heredity*, Vol. 63: 373–382.

<sup>15</sup> Hamilton, R. (December 10, 2009) op. cit.

<sup>16</sup> 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".



*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 could be found consistent with Coastal Act Sections 30230 and 30231 if it was ensured that construction would not result in impacts to wetland habitat. ~~may be appropriate.~~ Therefore, the Commission imposes Special Condition 2, requiring revised landscaping plans which include the removal of invasive species from wetland areas, and Special Condition 10, requiring construction staging and fencing plans to avoid impacts to wetlands. ~~If appropriately~~ As conditioned to ensure that the proposed project ~~did~~ does not result in adverse impacts to the wetland at Superior Avenue, the proposed development adjacent to the Superior Avenue wetland ~~may be~~ is therefore 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 Semeniuk Slough. Semeniuk 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 Semeniuk 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. Therefore, the Commission imposes Special Condition 8, requiring final drainage and runoff control plans, and Special Condition 9, regarding best management practices to protect water quality during construction. ~~If the~~ As conditioned to ensure that water quality measures proposed ~~were~~ are sized to ensure that runoff from the site would be adequately treated prior to discharge into the Semeniuk Slough, the project would not result in degradation of water quality in the adjacent

Semeniuk Slough. ~~However, as described above, the project must be denied due to conflicts with other resource protection policies in the Coastal Act.~~

## **H. 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. To ensure that adequate parking is provided for the park use and for the existing uses of the public parking lot, the Commission imposes Special Condition 3, requiring the submittal of a parking management plan for the review and approval of the Executive Director. ~~If~~ As 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~~ is 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.~~

## I. 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, the Commission imposes Special Condition 11, requiring that an appropriately licensed professional certifies that final plans are consistent with the recommendations included in the project's geotechnical report. Although adherence to the geotechnical consultant's recommendations will minimize the risk of damage from seismic hazards or landsliding, the risk is not eliminated entirely. Given that the applicant has chosen to implement the project despite potential risks from seismic hazards and landslides, the applicant must assume the risks. Therefore, the Commission imposes Special Condition 12 requiring the applicant to assume the risk of the development. In this way, the applicant is notified that the Commission is not liable for damage as a result of approving the permit for development. Therefore, if as

conditioned, the proposed project ~~could be found to be~~ is 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.~~ J. Local Coastal Program (LCP)**

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

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

The proposed development, as conditioned, is consistent with Chapter 3 policies of the Coastal Act and with the LUP. Therefore, approval of the proposed development will not prejudice the City's ability to prepare a Local Coastal Program for Newport Beach that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

~~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-K. California Environmental Quality Act (CEQA)**

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

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

The proposed project has been conditioned in order to be found consistent with the resource protection policies of the Coastal Act. As conditioned, the proposed project has been found consistent with the marine resources, sensitive habitat, water quality and public access policies of the Coastal Act. Mitigation measures to minimize adverse effects include: 1) open space restriction of ESHA and buffers to ESHA; 2) submittal of a final revised landscaping plan; 3) Submittal of a parking management plan; 4) submittal of a lighting plan; 5) submittal of a fencing and signage plan; 6) submittal of final project plans; 7) compliance with measures during and post construction to avoid impact to habitat; 8) submittal of a drainage and runoff control plan; 9) compliance with construction best management practices; 10) submittal of a construction staging and fencing plan; 11) certification that final plans conform to geotechnical recommendations; 12) assumption of risk for the development; 13) compliance with other agency approvals; 14) future development requires a permit; 15) proof of the permittees legal ability to undertake development; 16) liability for costs and attorneys fees; and 17) submittal of a plan for off-site habitat restoration.

As explained in the findings, the proposed project, as conditioned, is the environmentally preferable alternative. As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, which would substantially lessen any significant adverse effect which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified effects, is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

~~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 Resistant Plant List
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