

**CALIFORNIA COASTAL COMMISSION**

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**W16a****ADDENDUM**

**TO:** Commissioners and Interested Persons

**FROM:** South Coast District Staff

**SUBJECT:** Application No. 5-10-168 (City of Newport Beach), Item No. W16a, Scheduled for hearing on Wednesday, November 2, 2011 in Oceanside.

**LETTERS OF SUPPORT RECEIVED**

Please find attached 2 letters of support

**LETTERS OF OPPOSITION RECEIVED**

Please find attached 7 letters of opposition

**EX- PARTE COMMUNICATION DECLARATIONS**

Please find attached additional ex-parte communication forms.

**MODIFICATIONS TO STAFF REPORT****1. Buffers:****REVISIONS TO STAFF REPORT**

Deletions are marked in ~~strike-out text~~. Additions are marked in **bold, underlined text**. Modify the second paragraph on page 22 of the staff report as follows:

To ensure compliance with Section 30240 of the Coastal Act, development (aside from resource dependent uses) must be located outside of all environmentally sensitive habitat areas and must not cause significant disruption of the habitat values within those areas. Further, development adjacent to an ESHA must be sited to prevent impacts to the ESHA that would significantly degrade those areas, in part through the provision of a setback or buffer between the ESHA and the development. Buffer areas are not in themselves a part of the environmentally sensitive habitat area to be protected. Buffers and development setbacks protect biological productivity by providing the horizontal spatial separation necessary to preserve habitat values and transitional terrestrial habitat area. Spatial separation minimizes the adverse effects of human use and urban development on wildlife habitat value through physical partitioning.

**The purpose of a buffer is to create a zone where there will be little or no human activity, to “cushion” species and habitats from disturbance, and to allow native species to go about their “business as usual”. A primary function of a buffer zone or setback is to protect against human, domestic animal, and introduced species disturbance, that is, to keep disturbance at a**

distance. Human activity can produce disturbance in the form of vehicle and foot traffic, noise, artificial lighting, and application of herbicides or pesticides for landscaping or building maintenance. All of these may negatively impact California gnatcatchers, coastal scrub communities, native pollinators, and other organisms that are members of the coastal scrub community. Dogs can impact environmentally sensitive habitats in numerous ways including barking at, chasing, and hunting native species. Domestic and feral cats are keen predators and can pose a significant negative impact on native bird and reptile populations through predation.

Buffers also protect against invasive plant and animal species that are often associated with humans and development. Buffers may enable invasive species detection and eradication before they invade sensitive habitats. Irrigation associated with development landscaping is also harmful to drought tolerant plants such as coastal scrub species and a buffer zone provides a barrier to excess water. The buffer zone also provides ecosystem services including soil stabilization, interception of eroded materials, runoff and pollutants absorption, treating runoff, fixing nitrogen, and storing nutrients. Buffers also reduce habitat fragmentation. Many organisms have minimum density and proximity requirements, such that habitat fragmentation should be avoided to the greatest extent possible.

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.

Insert the following before the first full paragraph on page 25 of the staff report:

The City's October letters inaccurately state: "No development is proposed within CCC-designated ESHA." As noted on page 25 of the staff report, the proposed project includes construction of a sidewalk and grading at the southern end of ESHA East.

The City's letter states that vegetation of buffers and restoration of habitat is not appropriate because: 1) the buffers would attract gnatcatchers closer to the impact area, 2) other areas on the park site could be more effective mitigation sites, 3) the City's biological consultants do not believe that the road would have impacts on the gnatcatcher.

The City's response does not take into account that the primary purpose of buffers is not to mitigate for impacts of the development, but to avoid significant disruption of ESHA areas. As stated in the staff report, disturbance resulting from the intensification of use of the site includes, addition of domestic and feral cats to the property, additional irrigation, additional non-native species, pollutants such as trash, pesticides, and fertilizers.

Buffers do not put endangered species at further risk; rather they protect the native vegetation within the ESHA areas, and help to ensure that development adjacent to ESHA does not lead to fragmentation of habitat. Buffers are designed to protect the ESHA from disturbance caused by adjacent development. Therefore, buffers must be located between the ESHA and the new development. Mitigation located away from the source of disturbance would not be able to reduce impacts from that disturbance.

The City's letter also states that requiring vegetation of buffers would require improvement of habitat in excess of what existed prior to disturbance, which is not supported by Commission precedent. The City references several Commission actions to support their conclusion, however, those actions are not substantively similar to the Sunset Ridge Park project.

Coastal Development Permit 3-04-059 (Oceano Community Services District), cited by the City, proposed the removal of an existing water main and installation of temporary access roads and a new water main in order to protect essential public services. CDP 3-04-059 proposed only temporary impacts during construction, and did not include any permanent impacts to habitat areas. The proposed Sunset Ridge Park project includes permanent development. Although special status species were known to occur in areas nearby, no special status species had been identified at the project site. The permit required the restoration of dune contours and vegetative cover to a pre-project condition to ensure that the temporary impacts associated with construction of the project were consistent with continuance of the habitat areas.

Consistency Certification 006-11 (North County Transit District), cited by the City, involved the removal and replacement of rip-rap upstream of a bridge abutment. The project involved temporary impacts to a riparian ecosystem. No special status species or ESHA were identified on site. The resource impacts associated with the project were temporary grading and replacement of rip-rap. The project did not result in any additional permanent impacts to ESHA; rather the project improved habitat conditions by elimination of scattered rip-rap fragments.

Coastal Development Permit 1-09-033, cited by the City, for authorization of two 245 foot tall radio towers, and antenna foundation work within an area of seasonal wetlands. The project resulted in 8 square feet of permanent impacts from the placement of concrete and rebar jackets, and temporary impacts to 108 square feet from grading activities. The project proposed a return to pre-project conditions for temporary impacts, and created new wetland habitat to mitigate for the permanent loss of 8 sq. ft. of wetlands.

In contrast to the cases cited by the City of Newport Beach, the proposed Sunset Ridge Park project would result in permanent impacts to ESHA, at a site that has significant and continual usage of habitat by a special status species, the federally threatened California gnatcatcher. Restoration of the project site to a pre-project condition is not appropriate, as the proposed project would result in new, continual impacts associated with usage of the site as an active recreational park. Without additional measures to protect the ESHA on the site from these impacts, the project can not be found to be consistent with Coastal Act Section 30240.

Therefore, staff has recommended that the ESHA adjacent to the proposed park road be protected through the use of buffers vegetated with Coastal Sage Scrub. As stated in the staff report, vegetated buffers have been used to protect ESHA from impacts from adjacent development when required to offset the impacts of adjacent development and increase habitat values, and the usage of vegetated buffers is included as a requirement in the City of Newport Beach's certified Land Use Plan (Land Use Plan Policy 4.1.1-11, 4.1.1-12). Therefore, there is substantial precedent for the usage of vegetated buffers to offset impacts to ESHA.

The proposed project does not include a plan for conservation of ESHA and buffers, and the City has stated that the landowner would not agree to preserve these habitat areas in perpetuity....

## **2. Wildlife Mobility**

### **REVISIONS TO STAFF REPORT**

Deletions are marked in ~~strike-out text~~. Additions are marked in **bold, underlined text**:

Modify the second paragraph of page 6 as follows:

State law requires fencing around oil field operations like those occurring on NBR. Presently, that fencing envelops both the NBR and City owned lands. With implementation of the project, the City proposes fencing to separate the project site

from the remainder of the larger Newport Banning Ranch property. **The City has proposed to install 24” diameter culverts below the fence to allow for migration of wildlife to and from the project site. However, the City has not submitted substantial evidence supporting its contention that this newly proposed fencing will allow wildlife migration or, specifically, coyote migration between the subject property and Newport Banning Ranch and beyond. Further, the City has not submitted detailed plans that enable staff to make a determination of whether or not the proposed** That fencing will isolate ESHA that is presently inside the fencing. Once fenced, the circulation of large mammals that play an important predation role within the CSS/gnatcatcher ecosystem would be severely curtailed, and perhaps eliminated. The loss of those predators could impact ~~that~~ **the** long term health of the CSS/ESHA. Without large predators, like coyote, that prey on smaller mammals, like feral cats and opossums, those smaller mammals will consume gnatcatcher eggs and young, causing the loss of gnatcatcher fecundity. **There are alternatives to the proposed fence design that would substantially lessen any significant adverse effect that the fencing will have on coyote mobility, including building fencing around individual oil sumps on the Newport Banning Ranch property instead of erecting a fence along the entire boundary between the proposed project and Newport Banning Ranch.**

Modify the second paragraph of page 26 of the staff report as follows:

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

**The applicant has proposed the use of 24” diameter culverts beneath the proposed oil field fencing. Although the suggested installation of culverts and 12 inch arched openings may very well allow some wildlife to traverse the fence line, the City has not presented enough evidence to support its conclusion that it will enable unfettered coyote travel between Newport Banning Ranch and the subject parcel—a valuable factor for healthy coastal sage scrub habitats.**

The applicant has stated in their October letter that they propose the use of culverts below the fencing to allow for wildlife to travel to the project site. As Dr. Engel noted in her memo, the subject site contains ESHA, particularly in that it contains habitat for the federally threatened gnatcatcher. Dr. Engel noted that 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, as is the case on the subject site. Numerous nest predators such as raccoons, rats, and skunks thrive along the edges of development where trash and debris are often accessible. These animals along with domestic pets may opportunistically prey on gnatcatchers in adjacent habitat. In addition, nest-predator species such as corvids and raptors do well in urban and urban/rural areas. 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. As noted by the California Department of Fish and Game, coyotes are present in and around Upper Newport Bay, an area just south of the subject site and an area easily accessible to coyotes.<sup>1</sup> The Newport Bay Conservancy also notes that coyotes are prevalent predators in the area.<sup>2</sup> The Draft EIR for the Newport Banning Ranch project notes that coyotes are present on its property. Therefore, property fencing must include adequate coyote access. If coyote friendly fencing is not used, the City will have to implement a predator monitoring and exclusion program. Although the suggested installation of culverts and 12 inch arched openings may very well allow some wildlife to traverse the fence line, the City has stated that the proposed culverts will be consistent with design guidelines given by the US Department of Transportation's Handbook for Design and Evaluation of Wildlife Crossing Structures in North America. However, it has not been shown that the proposed culverts would be adequate to ensure that predation of gnatcatchers at the site is not affected, which is a valuable factor for healthy coastal sage scrub habitats. Also, the City has not submitted any design plans to staff to analyze whether or not such a proposal would lessen the adverse effect that the fencing may have on the environment. Rather, it is clear that there are alternatives to this proposed fencing that would allow greater mobility of wildlife in and around the subject easement area.

As noted, the City argues that it must erect a fence along the boundary between the easement parcel and the rest of Newport Banning Ranch's property. It maintains that the requirement is dictated by 14 CCR 1778—regulations governing the construction and maintenance of oil fields. On separate grounds, it argues that to disallow the construction of fencing along

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<sup>1</sup> <http://www.dfg.ca.gov/lands/articles/upnewpbay01.html>

<sup>2</sup> <http://newportbay.org/wildlife/mammals/>

the property line would be a regulatory taking because it will deny the owner of property his or her right to exclude uninvited visitors. On this point the Commission's findings do not claim to disallow all types of fencing to "exclude uninvited visitors," rather it finds that fence designs that negatively impact wildlife mobility are not consistent with the Coastal Act. For reasons stated below, the City's proposed fence is not the alternative that would lessen the adverse effect that the fencing may have on the environment.

The City's proposal to install fencing along the boundary of Newport Banning Ranch's property and the easement parcel used for the City's access road is inconsistent with 30240, because the fence would impede wildlife mobility—specifically large predator mobility—in the area, which would significantly disrupt habitat values in environmentally sensitive habitat areas. Citing 14 CCR 1778, Division of Oil, Gas & Geothermal Resources regulations, the City argues that it is required to construct a 5-foot high chain link fence adjacent to the access road to ensure that no one wanders onto Newport Banning Ranch's active oil fields. The City proposes to address the Commission's concern by redesigning the fence to incorporate a fence design that includes a "crawl space underneath the fence (as suggest[ed] by U.S. Fish and Wildlife Services staff as sufficient to enable wildlife mobility) and/or install a 24" diameter culvert which will facilitate wildlife passage from the rock ditch located on the east side of the proposed Park access road to the westerly side."

The City's revised proposal to build a fence along the western perimeter of the easement parcel boundary is not the feasible alternative that would substantially lessen the significant adverse effect on wildlife mobility, specifically coyote mobility between the easement parcel and the rest of the Newport Banning Ranch property and beyond. In fact, it is not the City's duty to build the fence pursuant to the regulatory requirements under the Division of Oil, Gas and Geothermal Resources but, rather, Newport Banning Ranch's obligation or its lessees or operators, if any, as the fee title holder of the active oil sumps to build the fence. Nonetheless, the cited authority to support the City's position that the proposed fence is mandatory requires a closer look to determine the minimum requirements to satisfy the regulations while still ensuring that the fencing will be the alternative that substantially lessens significant adverse effects of the fencing on coyote passage and, more importantly, on gnatcatcher survival rates.

Pursuant to Title 14 of the California Code of Regulations, section 1770, property owners who operate oilfield sumps must follow certain construction requirements. Under section 1770, "sumps in urban areas shall be enclosed in accordance with Section 1778 (a) or (e) and (c)." A "sump" is defined as "an open pit or excavation serving as a receptacle for collecting and/or storing fluids such as mud, hydrocarbons, or waste waters attendant to oil and gas field drilling or producing operations." (14 CCR § 1760(o).) While

Title 14 CCR, section 1778(b)(4) provides that an oil field owner/operator may erect a perimeter fence to comply with the public safety requirements, it is only an option, not a requirement. Under Title 14 CCR, section 1778, which delineates the proper construction methods for the sump fences, there is no requirement that the fence run along the perimeter of the property upon which there are sumps. Furthermore, in Public Resources Code section 3781 the Legislature found and declared that “it is essential in order to protect the wildlife resources of California that all hazardous exposed oil sumps in this state be either screened or eliminated.” Given the foregoing, Newport Banning Ranch can comply with the regulatory framework regarding fencing around sumps by simply erecting fencing around individual sumps to protect wildlife from the sumps and to ensure that there is no impediment to the wildlife corridor between the proposed park and the Newport Banning Ranch property. This would be the feasible alternative potentially available which would substantially lessen any significant adverse effect that the fencing will likely have on the environment.

In sum, the City, as the easement holder for the use of Newport Banning Ranch property has no statutory and regulatory obligation to construct a fence to protect people and wildlife from the dangers inherent in oil sumps. Rather, it is generally the property owner, operator or lessee of the oil-producing property that holds the duty to comply with the statutory and regulatory requirements to erect fencing around oil sumps. Notwithstanding these matters of duty to erect the fencing, the proposed revision to the fence is not the feasible alternative that substantially lessens any significant adverse effect that the fencing may have on the environment. Rather, constructing fencing around individual oil sumps would be the alternative that would substantially lessen these effects on the environment. Understanding that the City does not currently have the authority to erect fencing on the oil sumps on Newport Banning Ranch’s property, it is advisable that if the City is bound under its easement agreement to build a fence along the easement parcel boundary, it should consult with Newport Banning Ranch to determine if it, instead of the proposed fencing, can pay to erect fencing around individual sumps on Newport Banning Ranch property.

Therefore, at this time it cannot be assured that the proposed project would provide adequate mobility of wildlife to the site, and it cannot be assured that the proposed project The proposed fencing would therefore would not result in significant degradation impacts to Coastal Sage Scrub habitat which supports the California gnatcatcher. Therefore, the proposed project cannot be found consistent with Coastal Act Section 30240 requiring the protection of environmentally sensitive habitat areas from any significant disruption of habitat values.

### 3. Historical Mowing



Revise the third paragraph of page 30 of the staff report as follows:

One exception to the general requirement that one obtain a coastal development permit before undertaking development within the coastal zone is that if one has obtained a 'vested right' to undertake the development prior to enactment of Proposition 20 or the Coastal Act, a permit is not required. Under Proposition 20, if property is within 1000 ~~feet~~ **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) ~~From aerial images, it appears that the subject parcel may have been subject to Proposition 20's permitting requirements when it became effective on February 2, 1973~~ **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.

Revise the Substantive File Documents on page 1 of the staff report as follows:

SUBSTANTIVE FILE DOCUMENTS: City of Newport Beach certified Land Use Plan Access Agreement between the City of Newport Beach and Banning Ranch LLC  
Cal.Atty.Gen., Indexed Letter, No. SO 77/39, (April 6, 1978)

Revise page 28 of the staff report as follows:

**1A. Mowing Background**

Insert the following section after the second paragraph of page 31 of the staff report:

**1B. Response to City letters submitted in October 2011**

**The City argues that it has been legally mowing the subject site for fuel modification and that it never needed a permit to do so. Caltrans owned the subject City parcel from 1966 until 2006. Sometime in the mid 1960s and early 1970s, Caltrans significantly graded the site, cutting an extensive notch into the existing bluff almost the width and depth of the City parcel. The City claims that Caltrans had disked the entire City parcel once per year from 1966 through 2001. Thereafter, the City claims that Caltrans mowed the parcel until it sold the parcel to the City in 2006. The City has apparently used weed wackers since 2006 for its weed abatement activities on the parcel for fuel modification purposes. In light of these alleged activities, the City claims that since the parcel had been annually cleared since 1966, it never needed a coastal development permit subsequent to Prop 20 and/or the Coastal Act becoming effective because there was no major vegetation on the site (as a result of the disking/mowing) and thus there was no removal of major vegetation, precluding a finding that the mowing constituted development**

under section 30106 of the Coastal Act<sup>3</sup>. For the following reasons, the Commission finds that there is not substantial evidence to support the City's position.

The Commission, in its staff report, considers the City's mowing activities on the subject parcel to constitute unpermitted development. First, as noted in the staff report, the City has not submitted a claim of vested rights that it did not need permits to mow the City parcel and, as such, the Commission has not made a determination of such a claim to resolve the question of unpermitted development. Thus, since the City has not gone through the proper avenues, this application for a coastal development permit is not the appropriate procedure for the City to obtain a vested rights determination.

Second, assuming that Caltrans had obtained the proper legal authority to complete the grading on the subject site in the mid 1960s and early 1970s, the subsequent maintenance activities of disking were subject to CEQA, passed in 1970, and later The California Coastal Zone Conservation Act of 1972 (Prop 20), effective Feb. 1, 1973, and the Coastal Act, effective January 1, 1977. CEQA required that state agencies, like the City of Newport Beach, Caltrans or Orange County, prepare and certify an environmental impact report on any project—defined, in relevant part, in the 1972 statutory language as “directly undertaken by a public agency”— which it proposes to carry out or approve that may have a significant effect on the environment. (Pub. Res. Code, §§ 21065 (“project” defined) (effective Dec. 5, 1972), 21100 (effective 1971).) Effective February 1, 1973, Prop 20 required that any person wishing to remove major vegetation must obtain a permit from a Regional Commission for such development. (former Pub. Res. Code, §§ 27103, 27400.) Effective January 1, 1977, the Coastal Act continued the general requirement of Prop 20 that a person wishing to remove major vegetation must obtain a coastal development permit from the Coastal Commission, or local government, if applicable, for such development. (Pub. Res. Code, §§ 30106, 30600.)

The relevant exceptions to permit requirements also do not apply to this case. While there is an exemption in CEQA for the removal of flammable vegetation for fuel management within 30 feet of structures or 100 feet of a structure if the area is deemed to be within an extra hazardous fire area, this exemption did not become effective until October 26, 1998, well after the application of the Coastal Act. Also, section 30610, subsection (d) of the Coastal Act provides that certain types of development do not require a CDP, including:

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<sup>3</sup> Section 30106 of the Coastal Act provides, in relevant part:

“Development” means... the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly forest Practice Act of 1973 (commencing with Section 4511).

“[r]epair or maintenance activities that do not result in an addition to, or enlargement or expansion of, the object of those repair or maintenance activities; provided, however, that if the commission determines that certain extraordinary methods of repair and maintenance involve a risk of substantial adverse environmental impact, it shall, by regulation, require that a permit be obtained pursuant to this chapter.” Interpreting section 30610(d) of the Coastal Act, Section 13252(a)(3) of the Commission’s regulations provides, in relevant part, that a coastal development permit is required for “[a]ny repair or maintenance to facilities or structures or work located in an environmentally sensitive habitat area...[or] within 50 feet of the edge of a[n] coastal environmentally sensitive habitat area...” Furthermore, in the exemptions under “Repair, Maintenance and Utility Hookups”, adopted by the Commission on September 5, 1978, section II(B)(4) provides that “a permit is required for... clearing more than 500 sq.ft. of brush or other vegetation unless the Executive Director... determines the activity does not involve the removal of major vegetation.” The “Repair, Maintenance and Utility Hookups” exceptions don’t apply, however, if “a proposed activity will have a risk of substantial adverse impact on ...[an] environmentally sensitive habitat area.” Therefore, even removal of less than 500 square feet may constitute removal of major vegetation if there is a risk of substantial adverse impacts on ESHA which would trigger the requirement to apply for a permit.

Given the regulatory landscape at the time Caltrans allegedly last graded the bluff on the subject site sometime in the early 1970s, any further maintenance, including disking, mowing or weedwacking would have required review under Prop 20 or the Coastal Act. If the maintenance occurred prior to 1973, at least CEQA review would have been required to determine if the maintenance activities would have had a significant effect on the environment. Later, under Prop 20 or the Coastal Act, review would have been required to determine if the site generated major vegetation in the growing season such that removal of the vegetation would constitute development under the Coastal Act, thereby requiring application for and approval of a CDP. Based on the biological data, there is substantial evidence, including photographic evidence (e.g. letters from Hamilton Biological dated December 10, 2009, May 25, 2010, and December 11, 2010), to support the conclusion that coastal sage scrub grows back to a level of 2-3 feet within each growing season—approximately from late fall through spring. The Commission’s staff ecologist, Dr. Engel, has concluded that the regrowing Encelia scrub would be utilized by gnatcatchers for foraging, and potentially nesting, especially if the vegetation were not mowed (See biological memorandum). In an Attorney General Opinion, dated April 6, 1978, the Attorney General found that coastal sage scrub is considered major vegetation because “it is part of a vegetative community which provides habitats for certain plant and animal species found only in certain coastal areas of Southern California.” (Cal.Atty.Gen., Indexed Letter, No. SO 77/39,

page 8 (April 6, 1978) (hereafter IL 77/39)). Therefore, it is apparent that the vegetation on the site, even when mowed annually, rises to the level of major vegetation.

The City has not submitted any evidence that suggests that major vegetation never existed on the site from 1973 to the present day. It has submitted aerial images from February 1965, August 1968, January 1973 and November 1974, which depict the site as practically barren. The City also 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. Mr. Cheek claims that his mentor, Al Haskell, who was responsible for the weed abatement program in Newport Beach “since the early 70s”, told him that Caltrans “was very good about ‘disking’ the property at the beginning of fire season each year and never had to be asked.” Mr. Cheek did not provide a precise date as to when his mentor began his duties under the weed abatement program, so it is not clear whether his knowledge extended to activities that occurred prior to the effective date of Prop 20. Mr. Bunting also claims that the City’s Fire Department has “physical record of abatement at the site dat[ing] back to 1997.” The City has not submitted this “physical record of abatement” to the Commission nor explained what it may contain. Mr. Bunting also noted “that [he] never needed to worry about the site because ‘Caltrans always took care of it’ [quoting Mr. Cheek, his predecessor].” The City has not submitted a log (physical record) or other documentation that indicates the Fire Department ever actually checked the subject site when it was allegedly disked, mowed or weed wacked. To the contrary, the City has submitted evidence that suggest that the site supported major vegetation in 1997 and 1999. The City submitted two “Newport Beach Fire and Marine Department Complaint Report[s]”. In 1997, the complainant, “Georgia,” complained that the subject site was “overgrown, dead brush and weeds.” In 1999, the complainant, Vivian Cellni, complained that “the lot is a fire hazard—high weeds present.” While these complainants are likely not qualified to determine whether or not their observations of the overgrown weeds and brush were healthy stands of vegetation, it is definitely suggestive that the vegetation could very well reach the level of major vegetation, especially when the site supports gnatcatcher foraging and/or nesting. Therefore, given the foregoing, the City has not submitted substantial evidence that no major vegetation ever existed on site since the effective date of Prop 20 or the Coastal Act.

The City argues that the weed abatement activities on the subject property are necessary to abate a nuisance and that the Commission, pursuant to Section 30005 of the Coastal Act, the Commission is precluded from limiting the power of any city or county to declare, prohibit, and abate a nuisance. The City of Newport Beach Municipal Code, section 10.48.020, authorizes the Fire Marshal to declare a public nuisance and abate when a fire hazard is present

on property within the city. The Fire Marshal, however, must follow specific procedures when it declares a public nuisance, including the following:

10.48.030 Notice of Nuisance.

A. Notice of Nuisance. The Fire Marshal shall give written notice to the owner of record to abate the nuisance within thirty (30) days. The notice of nuisance shall state that the property owner is required to abate the nuisance, shall state the nature of the nuisance to be abated, what is required to abate it, and that if the nuisance is not abated the City may take further action which may include: (1) the City, or its contractor, may enter upon the parcel of land and remove or otherwise eliminate or abate the hazard; (2) that upon completion of such work the cost thereof, including Nuisance Abatement Services, can be billed to the property owner or can become a special assessment against that parcel; and (3) that upon City Council confirmation of the assessment and recordation of that order, a lien may be attached to the parcel to be collected on the next regular property tax bill levied against the parcel.

B. Notice of Abatement Proceedings. Whenever the Fire Marshal or a designee determines that a nuisance exists and the owner of a property fails to properly abate the nuisance, the Fire Marshal is ordered to take appropriate correction actions based upon those findings. The Fire Marshal shall notify the owner of affected properties, as shown on the latest equalized tax assessment roll, by mail, of intention to abate the nuisance.

C. Service of Notice. Notices shall be mailed by certified and regular first class mail to the address of the property owner not less than fifteen (15) days prior to the date of the proposed abatement. Failure of any owner, or any party concerned to receive a notice shall not affect the validity of any proceeding taken, if the procedure for service of notice has been followed.

D. Appeal. The property owner may appeal the decision of the Fire Marshal requiring the abatement of the nuisance by sending a written appeal to the Fire Chief requesting a hearing with the City Manager within ten days of the notice. (Ord. 2001-2 § 3, 2001; Ord. 1194 § 2 (part), 1966)

While the City submitted letters from a retired Fire Inspector and the Current Fire Marshal, neither letter cites to actual nuisance declarations, nor did the City submit evidence that it followed the proper nuisance declaration procedures applicable to the Fire Marshal. Assuming, for the sake of argument, that the City followed the proper procedures to declare and abate a nuisance, its weed abatement activities exceed what is necessary to abate the

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” (*Citizens For A Better Eureka v. California Coastal Commission* (2011) 196 Cal.App.4<sup>th</sup> 1577, 1585.) The following analysis illustrates that the City’s mowing of the entire subject site did not comply with the City’s own requirements and exceeds the amount of abatement activity necessary to abate the alleged nuisance.

Without evidence that the Fire Marshal ever declared a public nuisance on the subject site, the City could potentially be entitled to weed abate without a CDP—depending on whether or not such abatement follows the proper regulatory protocols—consistent with the maximum allowance under its Municipal Code and the California Fire Code (Fire Code), which the City adopted, and incorporated by reference into its own Municipal Fire Code (Newport Beach Municipal Code, § 9.04.010). The City asserts that the subject parcel has recently been designated as a “High Fire Hazard Severity Zone,” consistent with Government Code sections 51175 through 51189 and as mandated by SB 1595.<sup>4</sup> The City also claims that the subject property is a “Special Fire Protection Area” pursuant to Chapter 49 of the Fire code because the vegetation abuts the adjacent condominium development. To qualify as a “High Fire Hazard Severity Zone,” the City must designate the area as such a zone by ordinance (either 120 days after the Director of Forestry and Fire Protection so designates such a zone in a city or when the city designates the zone under its own discretion, supported by substantial evidence in the record that the zone is necessary for effective fire protection within the area) and post a notice at the office of the county recorder, county assessor, and county planning agency identifying the location of the map provided by the director or, if a city designates a zone without the director’s finding, then identify the location of the amended map. (Govt. Code, § 51179.) To date, the City has not submitted materials to the Commission illustrating statutory compliance with Government Code section 51179 that support its claim that the subject property is a “High Fire Hazard Severity Zone” subject to different fuel modification standards. In fact, Mr. Bunting, the Fire Marshal, indicates in his letter that the Fire Department does not apply the Hazard Reduction and Fuel Modification regulations enforced throughout the City’s Special Fire Protection Areas for the subject property. Nonetheless, even if the City’s subject parcel is designated a “High Fire Hazard Severity Zone,” the

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<sup>4</sup> Effective January 1, 2009, SB 1595 amended existing Public Resources Code sections 4202 and 4291 and existing Government Code sections 51175, 51177, 51178, 51182, 51183 and 51189.

relevant Municipal Fire Code Ordinance provisions dictate the following (emphasis (bold) added):

9.04.120 Amendments to Chapter 49 Requirements for Wildland-Urban Interface Fire Areas.

Chapter 49 has been deleted and amended to read as follows:

SECTION 4901 CLEARANCE OF BRUSH FROM STRUCTURES

4901.1 General. Each person or entity who owns, leases, controls, operates, or maintains any parcel of land within or adjacent to a designated Special Fire Protection Area(s) or Very High Fire Hazard Severity Zone shall comply with the requirements of Chapter 49 to maintain a defensible space to protect structures within Special Fire Protection Area(s).

Persons owning, leasing, controlling, operating, or maintaining buildings or structures requiring defensible spaces shall be responsible for modifying or removing non-fire resistive vegetation.

These regulations apply to all parcels of land within the City of Newport Beach Special Fire Protection Areas, which directly abut wildland space or a designated fuel modification zone on one or more sides.

4903.2 Shrubs and bushes. All shrubs and bushes located within 100 feet (30.48 m) of any portion of a building shall comply with the following guidelines:

(For Fuel Modification Zones: All shrubs and bushes located between a structure and the edge of the "A" Zone proximal to the structure.)

A. All dead and dying growth shall be removed from shrubs and bushes.

B. All shrubs and bushes not on the fire resistive plant list shall have a minimum separation of ten feet apart branch tip to branch tip.

C. One to three shrubs and bushes together in a small group can be considered a single bush if properly maintained.

D. All shrubs and bushes that are listed on the fire resistive plant list need not be separated if properly maintained as determined by the fire code official.

E. For the purpose of firefighter entrance and egress, a minimum of three feet of access shall be provided along both sides of any structure.

4903.3 Ground cover. All ground cover located within 100 feet (30.48 m) of any portion of a structure shall comply with the following guidelines:

(For Fuel Modification Zones: All ground cover located between a structure and the edge of the “A” Zone proximal to the structure.)

A. Ground cover that is properly planted, irrigated, and maintained is permitted within the defensible space.

B. Non-planted areas may be covered with a maximum of five inches (127 mm) of chipped biomass or its equivalent.

C. All ground cover that is either dead and/or dying shall be removed.

Considering the foregoing Municipal Ordinance provisions, the City could potentially be entitled to clear within 100 feet of any portion of a structure with such clearance subject to the foregoing restrictions. Notably, only “ground cover that is either dead and/or dying shall be removed” while only “dead or dying growth shall be removed from shrubs and bushes.” The Municipal Fire Code does not allow for removal of vegetation in “High Fire Hazard Severity Zones” unless that vegetation is dead or dying. These fuel modification measures in these high fire hazard zones are narrowly tailored to address fire suppression. The City cites to Sections 304.1.1 and 304.1.2 of the Fire Code to support its claim that its weed abatement activities are consistent with the Fire Code. These provisions, however, don’t apply to the City’s claimed “High Fire Hazard Severity Zone” designation for the subject city parcel. Section 304.1.1 doesn’t apply because that section addresses removal of waste or rubbish from vacant lots, a situation that is not present on the subject site. Section 304.1.2, which addresses removal of growth that is capable of being ignited on a vacant lot, also doesn’t apply here because the City must adhere to fuel modification standards consistent with the City’s claimed “High Fire Hazard Severity Zone” designation for the subject city parcel—the provisions noted above apply to such zones. Clearly, if the City has established strict guidelines for fuel modification in “High Fire Hazard Severity Zones” that minimize severe fire hazards, then abatement of a nuisance that presents a fire hazard for the public would logically follow a similar fuel modification path. Thus, the City has not narrowly or carefully tailored its activity of nuisance abatement on the subject property through mowing and/or weed wacking the vegetation throughout most of the subject property, well beyond the 100 feet from the condominium structures adjacent to its parcel and not limited to just dead or dying growth on shrubs and bushes or dead and/or dying ground cover. Therefore, any mowing/weed abatement beyond what is necessary to abate the nuisance requires a coastal development permit if such mowing/weed abatement removes major vegetation.

In sum, staff finds that (1) the subject site supports the existence of major vegetation during the growing season, (2) the City has not submitted substantial evidence to indicate that the subject site does not support the



existence of major vegetation, (3) the City has not submitted documentation that shows that it has followed proper nuisance declaration and abatement procedures for weed abatement on the subject property and (4) even if the City properly declared a nuisance on the subject property, the City's alleged weed abatement nuisance activities are not narrowly or carefully tailored to abate the alleged nuisance. Thus, based on evidence currently available to staff, it appears that the City's mowing activities constitute unpermitted development.

#### 1C. Mowing Conclusion

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....

#### 4. Alternatives:

#### REVISIONS TO STAFF REPORT

Deletions are marked in ~~strike-out text~~. Additions are marked in **bold, underlined text**.

Revise the last paragraph of page 31 as follows:

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

Revise the second paragraph on page 32 as follows:

The City's alternatives analysis indicates that access from West Coast Highway on the City parcel is not feasible due to restrictions on the use of the property, the adjacent intersection, and inadequate deceleration distance. The City parcel was transferred to the City along with a restriction that prohibited pavement or structures within a scenic easement area that was imposed by CalTrans located along West Coast Highway, **and a prohibition on abutter's rights of access from West Coast Highway**. The City has argued that removal of the restrictions would result in re-assessment of the value of the property and potentially require additional

payment to the state if the property is re-assessed at a higher value. The City has also argued that traffic constraints create a safety hazard with an entrance from Superior Avenue. The City has stated that an entrance road from West Coast Highway would conflict with the two existing right turn lanes leading from Superior Avenue onto West Coast Highway, and a merge lane where West Coast Highway narrows to three lanes. The City parcel is 350 feet long, and would therefore not be able to meet a stopping distance of 500 feet, which the City states is necessary in order to ensure traffic safety.

Revise the second paragraph on Page 33 of the staff report as follows:

The Commission has also received a review of potential park access roads from the Banning Ranch Conservancy dated September 16, 2011, prepared by Mr. Tom Brohard, a licensed traffic engineer. The analysis contradicts the City's analysis, and states that an accessway on the City's property on West Coast Highway would meet the required safety standards. Specifically, Mr. Brohard states that an alternative accessway on West Coast Highway on the City's parcel would meet required stopping distances. It remains that the proposed alternative would not be consistent with the scenic easement/deed restriction imposed by CalTrans on the City parcel which prohibits pavement. The Banning Ranch Conservancy argues that the City could likely successfully petition CalTrans to modify that easement/restriction in a way that wouldn't change the value of the property. **The City and the Banning Ranch Conservancy have submitted letters from licensed engineers which come to different conclusions regarding whether an alternative accessway directly from Coast Highway to the City parcel would meet traffic safety requirements. The difference in opinions between licensed professionals indicates that the identified alternative accessway may be a feasible alternative, and merits further investigation.** However, the analysis does indicate that the traffic safety constraints on the property are less severe than initially indicated. Therefore, **depending on whether the city is able to establish a right to have undertaken clearing of vegetation on the property,** there may be alternative park designs or access road locations which may provide an active park on the subject site but with fewer impacts to coastal resources.

#### **Legislative Intent of SB 124**

Insert the following passage immediately preceding the Conclusion section of page 35:

**The City has stated that creation of a passive park on the site "would be in direct contravention of the State Legislature's intent as per SB 124." The only reference in the Bill Analysis to an active park is a statement that it is the City's intent to build baseball and soccer fields, etc. There is no indication that the legislature itself based its decision to allow the transfer because an active park was proposed. Rather, the main concern was that the City was**

going to preserve the area as parkland for public benefit and that they weren't going to use it for anything other than a park.

In cases of statutory interpretation, the court's fundamental task is to determine the Legislature's intent to determine the purpose of a law. (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, in its statutory transfer under SB 124, transferred the property to the City 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 use statutory interpretation using legislative history to interpret the statute. Therefore, the City's position that the legislative history informs the statutory interpretation regarding the use of the property is an entirely unnecessary application of statutory construction/interpretation.

Even if the City was correct in its assertion that SB 124 should be subject to interpretation using legislative history (implying that the plain language of the text was ambiguous), the City mischaracterized the intent of SB 124. While the City is correct that the legislative history is informative, perhaps determinative, when a court interprets a statute, there is nothing in the referenced legislative history mandating that the City has to build an active park on the transferred property.

### **Reduced Intensity of Use**

The City's letter states that a reduced intensity of active uses on the site would not result in lower impacts on the site.

Revise the last paragraph of page 34 of the staff report as follows:

Reducing the intensity of use on the site would reduce the impacts on adjacent ESHA, and the amount of mitigation necessary to offset the impacts of development. Projects with lesser intensity on the site could include a passive park or an active park with a smaller amount of active uses. A Passive park would include trails, benches, and picnic areas, but would not include active sports fields. Depending on whether the city is able to establish a right to have undertaken

clearing of vegetation on the property, the City may also be able to consider  
Aan active sports park with a reduced number of sports fields ~~would be redesigned~~  
to reduce the number of active sports fields on the site and increase the amount of  
passive use. A park that was instead designed for a lower intensity of active  
use, such as unscheduled sports activities by members of the community,  
might also result in a lower parking requirement. Either the passive or reduced  
active alternative would reduce required parking amounts, and may be able to  
utilize existing parking resources, such as the existing parking lot and the at-  
grade pedestrian crossing located on Superior Avenue, and not require  
construction of an access road. Existing gravel roads on the NBR parcel, or new  
gravel roads on the City parcel may be able to serve maintenance vehicles for  
the park, and avoid the construction of a new paved access road. A park with  
increased amount of passive uses could also include resources which would serve  
to enhance wildlife habitat, such as additional forage and nesting areas for the  
California gnatcatcher, to offset impacts associated with the development.

5. 30254 Growth Inducing Development/Piecemealing

Eliminate Section 3. Growth Inducing Development, on page 33 of the staff report. Insert  
the following section into Section K., CEQA, on page 45 of the staff report, before the last  
paragraph:

**Piecemealing**

The City argues that the Commission cannot consider Newport Banning Ranch's  
proposed access road, Bluff Road, as delineated in its Draft Environmental Impact  
Report (DEIR), in the Commission's review of the City's proposed access road. That  
proposal, however, is a reasonably foreseeable consequence of the proposed  
access road easement parcel, such that the Commission may not disregard it in its  
review. As a responsible agency under the California Environmental Quality Act  
(CEQA), the Commission is required to make specific findings that evaluate the  
conformity of proposed development with the requirements of Public Resources  
Code, section 21080.5(d)(2)(A)—a provision governing a responsible agency's  
duties as a certified agency. Under section 21080.5(d)(2)(A) of the Public Resources  
Code, the Commission must ensure that "an activity will not be approved or  
adopted as proposed if there are feasible alternatives or feasible mitigation  
measures available that would substantially lessen a significant adverse effect that  
the activity may have on the environment." While the CEQA guidelines do not  
directly apply to the Commission's review of a project, the Commission,  
nonetheless "is subject to the broad policy goals and substantive standards of  
CEQA" when it conducts its environmental review and prepares its staff report.  
(California Sportfishing Protection Alliance v. State Water Resources Control Bd.  
(2008) 160 Cal.App.4<sup>th</sup> 1625, 1643.)

CEQA requires project proponents to submit a project in its entirety, rather than in a piecemeal manner. The Commission must review a project in a manner that requires an evaluation of all environmental impacts. Without a full picture of the environmental impacts in its review, the Commission cannot determine whether or not proposed feasible alternatives or mitigation measures will adequately lessen any significant adverse effect that the proposed project may have on the environment. Consistent with substantive standards under CEQA, the Commission's staff report "must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376, 397.) First, the City's next door neighbor and the party who has granted the access agreement, Newport Banning Ranch, has submitted an application for a significant residential/commercial/open space development project on its property, including an access road on the Newport Banning Ranch parcel subject to the access agreement. All of the Newport Banning Ranch property is within the Coastal Zone and its proposed project is subject to the Commission's jurisdiction. The City has already circulated a DEIR on September 9, 2011 for the proposed Newport Banning Ranch development. Newport Banning Ranch has submitted plans that show that its access road, a four-lane thoroughfare with a bike lane in each direction, will be aligned with the City's proposed access road for the park. The following is the summary of the project's extent as provided on the Office of Planning and Research's CEQA Clearinghouse website:

Note: Review per lead The Project would allow for the development of the approximately 401.1-acre site with 1,375 residential dwelling units (du); 75,000 s.f. of commercial uses, a 75-room resort inn with ancillary resort uses, and approximately 51.4 gross acres for active and passive park uses including 26.8-gross-acre public Community Park. Approximately 252.3 gross acres would be retained in permanent open space. The project site's existing surface oil production activities located throughout the site would be consolidated into approximately 16.5 acres. The remaining surface oil production facilities would be abandoned/re-abandoned, remediated for development, and/or remediated and restored as natural open space. The proposed Project includes the development of a vehicular and a non-vehicular circulation system for automobiles, bicycles, and pedestrians, including a pedestrian and bicycle bridge from the project site across West Coast Hwy.

Furthermore, the City and Newport Banning Ranch's easement agreement requires that the City proposes and builds its access road on the easement parcel in alignment with Newport Banning Ranch's proposed access road for its development project. Specifically, section 3.4 of the easement agreement states:

3.4 Access Road Improvements. In general, City will design and construct the Access Road Improvements from West Coast highway to SRP [Sunset

Ridge Park] to match the proposed vertical and horizontal alignment of the east side of the proposed Bluff Road [for the Newport Banning Ranch development]....

While not explicit, it is apparent to staff that the City's proposed active park and access road are integral components for the proposed Newport Banning Ranch development, which is immediately adjacent to the proposed park and some of which is proposed to be sited on the City's proposed access road. Therefore, the proposed Newport Banning Ranch road is a reasonably foreseeable consequence of the City's proposed access road to the park.

Second, the proposed future expansion, by Newport Banning Ranch, of the City's proposed access road will be significant because it will likely change the scope or nature of the initial project and its environmental effects. The current proposed access road alignment would be sited adjacent to ESHA on each side of the road. The Commission has typically imposed buffers of 50-100 feet for gnatcatcher-occupied ESHA and generally imposed restoration conditions in the buffer area if the buffer distance from ESHA is 50 feet to minimize habitat fragmentation caused by the development. In consideration of the resources along the access road, the expansion of the roadway to accommodate Newport Banning Ranch's proposed "Bluff Road" would create another two lanes along the west side of the City's proposed access road and bike lanes for each direction. This road expansion would result in a significant increase in the intensity of use of the road of the City's proposed road and reduce or eliminate any buffer area between the expanded road and the adjacent ESHA or possibly travel through ESHA, likely changing the scope and nature of the road's environmental impacts. Therefore, since the Commission doesn't have the Newport Banning Ranch development proposal in front of it for consideration, the Commission cannot find that the City's proposed access road is consistent with CEQA and the Coastal Act because the entirety of the environmental impacts cannot be determined and thus the Commission cannot assess whether any proposed feasible alternatives or mitigation measures are adequate to address the incomplete assessment of environmental impacts.

## 6. Marine Resources

### REVISIONS TO STAFF REPORT

Deletions are marked in ~~strike-out text~~. Additions are marked in **bold, underlined text**:

Revise the first paragraph of Section 2, Wetlands and Wetland Buffers, on page 40 of the staff report, as follows:

Aside from the potential vernal pools, ~~two~~ **several** wetlands are located on the property. **An area with hydric soils has been identified outside of the footprint**

**of the project, to the west of ESHA West.** An area with riparian vegetation and hydric soils is located within ESHA West, and has been mapped by Bon Terra as containing 'Willow Scrub' vegetation **that passed the prevalence and dominance tests for wetland vegetation at point 2 on Figure 8 of the Biological Memo.** **A series of wetland seeps are** located on the slope of the City parcel adjacent to Superior Avenue. **The applicant has submitted a letter from Leighton Geotechnical regarding the Superior Avenue wetlands stating that based on their current understanding of the grading, the seepage of water to the Superior Avenue wetland will not be impacted by the proposed development.**  
The biological memorandum regarding the project states:

Revise the third and fourth paragraphs of page 41 as follows:

The Commission has typically required buffers of at least 100 feet for development adjacent to wetlands. The proposed project would not meet the Commission's typically applied buffer requirement of 100 feet. The wetland ~~within~~ **at the northern portion of** ESHA West would be within approximately 30 feet of grading limits for the road, and within approximately 55 feet of the proposed access road.

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

The hydrological changes to the wetlands **at the northern portion of ESHA West** that would occur as a result of the grading were not identified by the applicant. The proposed buffers may not be adequate to protect the wetlands adjacent from impacts associated with the development. Therefore, further investigations on the hydrological and resource impacts associated with development of the park need to be considered.

7, 8.. Expansion of ESHA, Deed Restrictions,

The City states in its letter that the conditions recommended for the proposed project are unrelated to the proposed project, and represent an effort to preclude future development of Newport Banning Ranch. As stated in the staff report, the proposed project will result in impacts relating to: habitat fragmentation, increased levels of pollutants, increases in non-native species, increases in predation of the gnatcatcher, disturbance of ESHA, elimination of gnatcatcher and raptor foraging habitat. To ensure the continuance of ESHA, buffers should be provided around the ESHA identified on the site.

The staff report and biological memorandum states that the buffers should also be restricted to ensure that the buffers are sufficient to protect adjacent ESHA. The biological memorandum states:

Car trip estimates for the park are 173 per day which is a low impact traffic pattern; the use intensity of the road will be comparatively less than with most other types of development (e.g. housing, commercial, etc.). This low level of impact is a key factor in my determination that reducing the buffer from 100 feet to 50 feet along the entrance road is acceptable in this particular case. If the anticipated traffic estimates were larger, or were to increase, I believe that this would constitute a significant impact on the gnatcatcher habitat and a reduction to a 50 foot buffer along the proposed park entrance road would no longer be appropriate.

As stated in the staff report, the Commission has typically required buffers to be restricted against future development, and has required those buffers to be vegetated when required to offset the impacts of adjacent development and increase habitat values. The City's certified Land Use Plan, which has not been certified for Newport Banning Ranch, also requires buffers to be conserved or dedicated to ensure that the land is conserved in perpetuity.

Insert the following as the first full paragraph of page 25:

**The City has stated that they believe the landowner would agree to expand CSS habitat and impose an Open Space Deed Restriction on an area located to the north of ESHA East, but not adjacent to the proposed roadway. However, the habitat and deed restriction in this area would not be able to protect the western boundary of ESHA East, and would therefore not be sufficient to avoid significant disruption of the Environmentally Sensitive Habitat located in ESHA East.**

#### 9. Foreclosing of the Circulation Plan for the County and Surrounding Cities

The staff report for the proposed project does not require the elimination of Bluff Road arterial from the County's Master Plan of Arterial Highways. Consideration of the construction of the larger Bluff Road, or the alteration of the circulation element of Newport



Beach should be evaluated via an LCP Amendment, rather than a Coastal Development Permit, to adequately consider regional implications.

#### **10. 5<sup>th</sup> Amendment Takings Allegations**

**Insert the following sections on page 34 of the staff report, after the first paragraph but before Section D. Alternatives to Proposed Project**

##### **4. Regulatory Takings Allegation**

**The City argues that the Commission's consideration of conditions, had it decided to approve the project, related to deed restricting the adjacent areas along the access road to ensure that there is an adequate buffer from the adjacent ESHA constitutes an unconstitutional regulatory taking as dictated under case law, commonly referred to as *Nollan* and *Dolan*. Under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374, if a governmental agency requires exaction of a property interest as a condition of approval of a project, then (1) the exaction must have a "nexus" with the government purpose relied upon for the exaction and (2) the exaction must be roughly proportional "in nature and extent to the impact of the proposed development." (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 837; *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391.) As noted, these principles only apply to situations where a governmental agency is requiring an exaction as a condition for approval of a project. Here, the Commission is recommending denial of the City's proposed project. Therefore, the *Nollan* and *Dolan* principles are inapplicable to the present case.**

##### **5. Physical Takings Allegation**

**The City argues that "the Commission's suggested alternative of a narrower road...that would require the city, in effect, to condemn NBR's underlying fee interest in the property subject to the access easement." The Fifth Amendment of the U.S. Constitution and Article 1, section 19 of the California Constitution provide that private property may not be taken for public use without just compensation. The Coastal Act, section 30010 prohibits the Commission from granting or denying a project in a manner which will take or damage private property for public use, without the payment of just compensation for the taking. Before one can make a claim that his or her private property has suffered a taking for public use, there must be an action imposed by the government that effectuates a physical taking. The City argues that imposition of a condition requiring a deed restricted area adjacent to the proposed access road and that the area be planted with coastal sage scrub species would constitute a physical taking of Newport Banning Ranch's property. Here, the Commission is recommending denial of the project and**

**thus is not imposing any conditions on the project applicant. Therefore, there is no governmental action that would result in the physical taking of private property for public use without just compensation.**

RICHARD RICHARDS  
(1916-1988)

GLENN R. WATSON  
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October 28, 2011

**W16a**

Mary K. Shallenberger, Chair  
and Honorable Commissioners  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 91405

Re: Sunset Ridge Park Project (City of Newport Beach)  
Application No. 5-10-168  
Agenda Item: 16a  
Hearing Date: Wednesday, November 2, 2011

Dear Chair Shallenberger and Members of the Commission:

This firm has been engaged as special counsel to represent the City of Newport Beach ("City"). The City appreciates the Commission's consideration of its application for a Coastal Development Permit for the Sunset Ridge Park Project ("Project"). As the Commission is aware, the Sunset Ridge Park Project, the product of years of community and City planning efforts, is designed to add desperately needed park facilities for the youth of the City of Newport Beach, while providing significant coastal access and substantial habitat enhancement. Notably, the Project will provide both an active park and passive park, along with nearly three acres of new Coastal Sage Scrub (CSS). This letter is in addition to the October 19, 2011 letter from Schmitz & Associates Inc., which responds to the Staff Report and explains why the Project fully complies with the Coastal Act.

**The Development of Banning Ranch is Not Before the Commission**

In the staff report, the Commission has been advised that it is Staff's recommendation to deny this Project, primarily based on the fact that the City has not agreed to conditions of approval designed to prohibit future development of the Banning Ranch site, a project that is not before the Commission nor implicated by the City's project. If the Commission elects to follow Staff's recommendation, this would have the unfortunate effect of resulting in a regulatory and physical taking of both the City's and NBR's property and a decision that is unsupported legally or factually on the key issues discussed.

With respect to the regulatory takings issue, if the Commission determines that the City's application should be denied, this would constitute a regulatory taking,

A copy of this letter has been provided by hand delivery to the South Coast District staff

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in violation of the Fifth Amendment to the U.S. Constitution and article 1, section 19 of the California Constitution. Specifically, the City has an easement for road access under its agreement with the neighboring property owner, Newport Banning Ranch (NBR). In denying the road access proposed, but suggesting that a narrow road could be approved if the adjacent non-road areas owned in fee by NBR are planted with habitat appropriate to the gnatcatcher and protected in perpetuity by recording a suitable legal instrument, the Commission's decision would operate, in effect, as an exaction. As such, it would lack the "essential nexus" required between the suggested mitigation and resource sought to be protected, in violation of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825. Moreover, it would in no way be "roughly proportional" to impacts of the City's project, in violation of *Dolan v. City of Tigard* (1994) 512 U.S. 374.

Simply put, the Commission could approve the City's narrower, realigned road, without the CSS planting or conservation easement requirements. The resource would be fully protected because, as the Commission and Staff know, the City would be limited by the CDP issued to build strictly in accordance with the plans approved by the Commission. The only real purpose for the additional requirements that Staff suggests is to foreclose access to a future NBR development, which, again, is not before the Commission and which the Commission obviously would separately address later when and if a CDP application is filed by NBR to develop its property.

The Staff Recommendation would also work a physical taking, again in violation of the Fifth Amendment to the U.S. Constitution and article 1, section 19 of the California Constitution. (*E.g., Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 432 [a permanent physical invasion of property, however slight, eviscerates owner's right to exclude others from entering and using the property – the most fundamental of all property interests].) Specifically, the Commission's suggested alternative of a narrower road has two components that would require the City, in effect, to condemn NBR's underlying fee interest in the property subject to the access easement. First, the requirement that the adjacent non-road area within the easement be planted with CSS would create an ESHA. Under Section 30240 of the Coastal Act, that would foreclose any future development in that area. Second, the requirement that a conservation or similar easement for habitat or open space be recorded over that area in perpetuity would similarly take NBR's fee interest in the property and preclude development in that area.

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Again, it is readily apparent from the Staff Report that these restrictions are aimed at NBR's proposed development (currently in the environmental review process before the City), rather than the Sunset Ridge Park Project, and the restrictions suggested have been crafted in a way that would foreclose future access over the easement area to Banning Ranch. Otherwise, it would make no sense for the Executive Summary in the Staff Report to conclude: "If the City and underlying land owner anticipate a larger road than that proposed to serve the park will be proposed to serve future development on the Banning Ranch property, all impacts associated with a road in this location should be reviewed in the context of the larger development it will ultimately serve." (Staff Report, p. 6.) Yet, if Staff views as essential permanently extinguishing NBR's ability to use the balance of the easement for access to its property, why suggest that it could be reviewed later in the context of the future development of Banning Ranch?

Section 30010 of the Coastal Act provides:

"The Legislature hereby finds and declares that this division [the Coastal Act] is not intended, and shall not be construed as authorizing the commission . . . to exercise [its] power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation thereof."

Applying this provision, the Commission in other contexts has approved, for example, proposed residences that lie wholly *within* an ESHA. Indeed, under the Malibu LCP, which the Commission drafted and then certified, a residential development wholly within an ESHA is still entitled to 10,000 square foot development footprint, plus fuel modification, to avoid a taking. (Malibu LUP Policy 3.12 and LIP section 4.7.1.) The same could be said here if the Commission approves a narrower, realigned road, but *without* the suggested CSS planting requirement or conservation easement that would force the City to take, or condemn, NBR's fee interest underlying the easement area.

Again, if and when NBR applies to this Commission to develop its property – and if and when NBR wishes to develop road access to its property in this area, the Commission will have the unfettered opportunity to adjudge whether that road access conforms with the policies of the Coastal Act. But, to do so here, unnecessarily forces a physical taking, and that would violate state and federal constitutional requirements, as well as, importantly, the prohibition in Section 30010 of the Coastal

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Act that your power to grant or deny a permit under the Coastal Act not be exercised in a manner that will take private property.

Based on the foregoing, we respectfully urge the Commission to approve the Project without the suggested CSS planting requirement or conservation easement, both of which are designed to address the potential development of the NBR site, a project not before the Commission.

**Mowing of Vegetation on the Sunset Ridge Park Site**

The Staff Report further suggests that annual mowing of the City's property – ongoing weed abatement which predates either the 1972 or 1976 Coastal Act – requires Commission review and approval of vested rights claim. The Staff Report recommends a finding that “until such time that a vested rights claim is found to exist at the site, the regular mowing of major vegetation on the site should be viewed as unpermitted development.” (Staff Report, p. 30.) This finding is not supported as a matter of law, and we urge the Commission to not be distracted by this issue.

First, a vested right applies to a development that has been commenced but *not* completed prior to the effective date of either the 1972 or 1976 Coastal Act. (Former Pub. Res. Code § 27404; Pub. Res. Code § 30608.) The question is whether the development should be permitted to proceed to completion without first obtaining a coastal development permit. It does *not* apply to a development completed before the effective date of the Act. (56 Ops.Cal Atty.Gen. 200, 209 [“If the project is completed prior to either November 7, 1972, or February 1, 1973, no permit would be required from a regional coastal zone conservation commission since section 27400 requires a permit be obtained for development on and after February 1, 1973, but not before.”] Neither does it apply to a use that was *ongoing* at the time the 1972 or 1976 Coastal Acts took effect.

For example, in 56 Ops.Cal.Atty.Gen. 85 (1973), the Attorney General addressed a vested rights issue under the 1972 Coastal Act in the context of oil field development located on tide and submerged lands within the City of Long Beach. The Attorney General opined that no coastal permit was required for the conduct of *continued* operations through then existing wells and facilities, while a permit would be required for any new or redrilled wells or intensification of use. (*Id.* at 91-92.)

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Here, the mowing of the City's property does not involve a development partially constructed or undertaken at the time either the 1972 or 1976 Coastal Act took effect. It concerns development *ongoing* at the time both Acts became effective and regularly performed since. The incontrovertible evidence presented by the City and noted in the Staff Report demonstrates that "mowing of vegetation for fuel modification and weed abatement purposes has occurred regularly on the City parcel since the parcel was obtained by Caltrans in the 1960s, and has been continued since the City purchased the property in 2006." (Staff Report, p. 28.) Further support for this is set forth in the expanded discussion in the October 19, 2011 letter from Schmitz & Associates Inc. concerning the mowing history of the site.

Second, it bears emphasis that the mowing activity here has been for the sole purpose of conducting necessary weed abatement. As to Caltrans, this is and always has been an essential function in its maintenance of the State highway system and its adjacent properties, both within and outside the coastal zone. As to the City – a those commissioners who represent cities and counties well know, weed abatement is an essential municipal function, especially for unimproved properties with ruderal vegetation immediately adjacent to existing residential development, as here. This need is driven by safety concerns, such as minimizing fire potential by reducing vegetative biomass.

Moreover, the necessity here for regular and ongoing weed abatement is real and cannot be overstated. A vegetative fire actually occurred on this property sometime in the early 80's and spread from the field to the adjacent condominiums, causing damage to structures. (Exhibit 1 [9/13/10 Letter from Russell Cheeks to Mike Sinacori, City Public Works Department, provided to Staff].) Further, the California Department of Forestry and Fire Protection ("Cal Fire") is now issuing revised fire hazard maps for Newport Beach, which identify areas in the City considered to be Very high, High, or Moderate Hazard Severity Zones. Importantly, these maps officially designates the Sunset Ridge Park property as a "High Fire Hazard Severity Zone," consistent with Government Code sections 51175 through 51189 and as mandated by SB 1595 (Stats. 2008). Still further, this property is deemed a "Special Fire Protection Area" pursuant to Chapter 49 of the California Fire Code because the vegetation abuts the adjacent condominiums. (Exhibit 2.) The Fire Division Chief of the City's Fire Prevention Unit advises that the light flashy fuels in this area could cause the structures in the adjacent condominium complex to ignite with either radiant or direct flame contact and the flowing embers could ignite other structures a few blocks in the development when the firebrands contact roofs, attic

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vents, decks or other combustible fuels in the fire's path. As a result, the City has eliminated this life safety and property hazard through weed abatement for many years.

The Legislature expressly carved out nuisance abatement from the permit requirement in the Coastal Act. In Section 30005 of the Coastal Act, the Legislature has expressly provided:

“No provision of this division [the Coastal Act] is a limitation on any of the following: . . . (b) On the power of any city or county or city and county to declare, prohibit, and abate nuisances.”

It has long been recognized that weed abatement is classically the type of nuisance that falls *outside* of the Commission's permit jurisdiction. Attached, for example, is a letter dated March 3, 2009 from Commission Staff to the Orange County Fire Authority (“OCFA”), which advised correctly that under Section 30005 of the Coastal Act no CDP is required in the instance where OCFA “finds vegetative clearance is required to abate a nuisance.” (Exhibit 3.)

Here, the City of Newport Beach applies the California Fire Code, and specifically Sections 304.1.1 and 304.1.2, which require weed abatement. (Exhibit 4.) As in other cities, the City's Fire Department is delegated this responsibility pursuant to California Fire Code section 1.11.2 and the City of Newport Beach Municipal Code section 2.12.050. (Exhibit 5.) And, the materials that the City has provided to Staff reflect that the Fire Department has discharged that obligation on an ongoing basis and will continue to do so. Under Section 30005, so long as the scope of the City's activity is narrow and carefully tailored to address only the specific weed abatement nuisance on this property, that necessary municipal activity may continue without the need to obtain a CDP. (*See Citizens for a Better Eureka v. California Coastal Com.* (2011) 196 Cal.App.4<sup>th</sup> 1577.)

#### **The Staff Recommendation for Denial**

In support of its recommendation for denial, Staff has raised several issues that it contends support a recommendation for denial. However, Staff's concerns are not supported by substantial evidence in the record.



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**1. The Perimeter Fence.**

The Staff Report recommends a finding that the fencing proposed to separate the City's property from NBR's property "would result in significant degradation to Coastal Sage Scrub habitat which supports the gnatcatcher," and "therefore, the proposed project cannot be found consistent with Coastal Act Section 30240 requiring the protection of environmentally sensitive habitat areas from any significant disruption of habitat values." (Staff Report, pp. 25-26.)

The fence would be required, however, as a matter of law. The Staff Report explains that "California Code of Regulations, Title 14, Division 2, Chapter 4, Section 1778, regarding Development, Regulation, Conservation of Oil and Gas Resources requires the active oil operations on the Banning Ranch property to be surrounded by chain-link, 5 foot high fencing which has 'no aperture below the fence large enough to permit any child to crawl under.'" (Staff Report, p. 25.)

Chapter 5 of the Coastal Act, commencing with section 30400, seeks to minimize conflicts between the Commission and other State agencies. Section 30418(a) provides:

"Pursuant to Division 3 (commencing with Section 3000) of the Division of Oil and Gas of the Department of Conservation is the principal state agency responsible for regulating the drilling, operation, maintenance, and abandonment of all oil, gas, and geothermal wells in the state. *Neither the commission . . . shall establish or impose such regulatory controls that duplicate or exceed controls established by the Division of Oil and Gas pursuant to specific statutory requirements or authorization.*" (Italics added.)

Under Section 30418(a), the Commission may not deny a fence here without exceeding the protective safety fence requirements established by DOG.

Second, case law involving the Commission underscores that inherent in one's ownership of real property is the right to exclude uninvited visitors. (*LT-WR L.L.C. v. California Coastal Com.* (2007) 152 Cal.App.4<sup>th</sup> 770, 806.) Denial of the right to fence property, at least in the case of NBR, would arguably take one of the key strands in the bundle of rights enjoyed by NBR as the owner its property, and thus constitute a regulatory taking.

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Third, although the Staff Report makes general statements about how a fence would impede the mobility of wildlife to the project site, and thus results in significant degradation to the CSS habitat which supports the gnatcatcher, the conclusion is not supported by substantial evidence in the record. The City has presented site-specific biological evidence to the contrary. Moreover, the October 19, 2011 letter from Schmitz & Associates Inc. and the accompanying letter from Bonterra Consulting provide a solution to the mobility of wildlife issue. These include arched openings underneath the security fence in several locations and a 24" diameter culvert to facilitate wildlife passage.

## **2. CSS Planting and Conservation Easement**

The Staff Report indicates that the City and Commission staff have reached agreement on realignment of the access road. (Staff Report, p. 2.) Two key findings recommended in the Staff Report, however, are not supported by substantial evidence in the record.

First, the Staff Report includes a recommended finding that "[t]he proposed buffers can only be found to be consistent with Coastal Act Section 30240 if the buffers are vegetated with Coastal Sage Scrub and at least 50-100 feet in width, and with a low intensity use of road." (Staff Report, p. 24.) This finding, based on the recommendation of the Commission's biologist, is not supported by substantial evidence.

The Commission's biologist notes that "in this instance, the buffer area along the road is either bare dirt or highly impacted ruderal vegetation." (Staff Report, p. 23.) In other words, it is currently not CSS or ESHA. Further, the purpose of the buffer is not to provide gnatcatcher habitat, but rather to provide spatial distance between the road and the ESHA. As the Staff report explains:

"Buffer areas are not in themselves a part of the environmentally sensitive habitat area to be protected. Buffers and development setbacks protect biological productivity by providing the horizontal spatial separation necessary to preserve habitat values and transitional terrestrial habitat area. Spatial separation minimizes the adverse effects of human use and urban development on wildlife habitat value through physical partitioning." (Staff Report, pp. 21-22.)

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Non-native vegetation or native vegetation that does not constitute ESHA would amply serve the buffer function stated. Instead, contrary to the above explanation, the Commission's biologist recommended that the buffer be planted with CSS, thus creating ESHA and an environment for the gnatcatcher which would move the habitat closer and adjacent to the road -- the exact opposite of a buffer. Thus, it is not supported by substantial evidence.

Second, the Staff Report includes a recommended finding that "[w]ithout adequate protection, future development on the site may result inadequate buffer widths and degradation to adjacent ESHA." (Staff Report, p. 24.) This finding, too, is not supported by substantial evidence. The adequate protection referred to is a legal instrument that would conserve in perpetuity the adjacent non-road areas within the easement as habitat and open space. (Staff Report, p. 2.) That type of protection, however, is not necessary in connection with this permit.

If the City's application is approved, then the City would be required to develop in strict conformity with the plans approved by the Commission. If the Commission were to approve the revised road alignment agreed to by Staff and the City, that is the full extent of development that could be performed under the permit. If the underlying owner, NBR, later sought to widen the road to reach the Banning Ranch development, that similarly would be evaluated by the Commission in the context of some other permit application under the policies of the Coastal Act. Neither the City nor NBR could develop outside of the approved road alignment without first seeking review and approval of the Commission. Thus, a conservation or other similar easement would serve no purpose here beyond the limits of the approval granted to the City.

### **3. Presence of Vernal Pools**

The staff report includes a finding that "there is the potential for vernal pools to exist on site, but there is currently inadequate information to conclude whether the alleged features qualify as vernal pools." (Staff Report, p. 39.) Based on "inadequate information," the finding states that "the proposed project must be denied to ensure that the project does not result in impacts to ESHA, as required by Coastal Act section 30240, and to ensure that degradation of wetlands does not occur, as required by Coastal Section 30230, nor fill for a non-permitted use as required by 30233." (*Id.*)

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These findings are based on speculation and are not supported by substantial evidence because the “powerpoint” presentation provided by the Banning Ranch Conservancy, as explained by biologists with Bonterra Consulting, was not based on protocol surveys, “as it does not document ponding duration, soil types present, plant indicator species, invertebrate activity, and other necessary parameters.” (Staff Report, p. 38.) By contrast, the October 19, 2011 letter from Schmitz and Associates Inc. includes a further report from Bonterra that “includes analysis and findings prepared through established and recognized professional protocol from established experts in the assessment of vernal pools” and “it is their collective conclusion that there are no vernal pools located within the Sunset Ridge Park project proposal, and specifically the subject spoils site.” (10/19/11 Letter from Schmitz & Associates Inc., p. 9.) The site-specific evidence presented trumps any generalized evidence or other speculation offered on this particular issue.

#### **4. Adequacy of Wetland Buffers**

The staff report also includes a finding that “the Commission has typically required buffers of at least 100 feet for development adjacent to wetlands. The proposed project would not meet the Commission’s typically applied buffer requirement of 100 feet. The wetland within ESHA would be within approximately 30 feet of grading limits for the road, and within approximately 55 feet of the proposed access road.” (Staff Report, p. 40.) The staff report then finds the project to be inconsistent with Sections 30230, 20231, 30233, and 30240 of the Coastal Act without further investigation on the hydrological and resource impacts association with the park development. (*Id.*, pp. 40-41.)

This finding relates to what the Commission “typically” requires in terms of wetland buffers. It is, however, completely arbitrary in the context of this particular property. The finding is countered by substantial, site-specific biological evidence from Bonterra that opines that the buffer setbacks proposed are sufficient to protect these particular wetland features. In addition, the October 19, 2011 Schmitz letter submits further hydrological and resource impact analyses from Bonterra and the geotechnical engineer, Leighton Consulting. Indeed, here, we have a marginal wetland along Superior Avenue, eight feet from pedestrians, bikes and four lanes of vehicular traffic at the base of a steep bluff that bear no topographic, hydrologic or resource relation to the park property above. The other wetland, within the “ESHA West” area, is within 60 feet of six-lane traffic on West Coast Highway and within 25 feet of dirt slopes, drainage ditches, and vegetation maintained by Caltrans.

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This is a classic instance where a generalized standard is necessarily trumped by site-specific evidence. (*Surfside Colony Ltd. v. California Coastal Com.*, *supra*, 226 Cal.App.3d 1260, 1268, 1271 fn. 22.) For this reason, the Commission's additional finding regarding the adequacy of wetland buffers is unsupported by substantial evidence.

#### 5. Growth Inducement

The Staff Report also includes a finding that "the proposed project would result in the expansion of a roadway, a public works facility, into a new area that "would facilitate development of an access road for the larger Newport Banning Ranch development." (Staff Report, p. 33.) But, this finding, too, is wholly unsupported by substantial evidence. The City's development of the park access road would be limited under the permit granted by this Commission to the road alignment and width approved. A larger or different road for the larger NBR development could in no way be developed without this Commission's approval of an amendment to the permit for this Project or a future permit for the NBR project.

#### 6. Alternatives

Finally, the Staff Report concludes that feasible alternatives exist to accommodate development of the City's property without impacting biological resources. These include a (1) passive park, (2) a less intense active park, and (3) an active park with alternative access suggested by the Banning Ranch Conservancy. The findings reach no definitive conclusions as to whether these alternatives are truly feasible, but use terms like "might" or "may." (Staff Report, p. 34.) The findings additionally note other "potential park access roads" but, again, do not articulate any definitive conclusion, stating only "there may be alternative park designs or access road locations which may provide an active park on the subject site but with fewer impacts to coastal resources." (Staff Report, p. 31-32.)

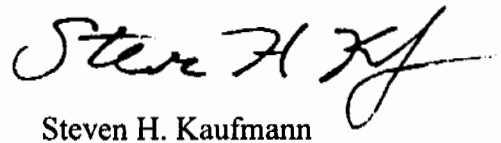
This recommended finding is not supported evidence as it is refuted by an alternatives analysis submitted by the City and the further analysis set forth in the October 19, 2011 letter from Schmitz and Associates Inc. This includes the discussion in the Schmitz letter and additional correspondence from the City's Traffic Engineer explaining why the alternative access road off of West Coast Highway, proposed by the traffic engineer for the Banning Ranch Conservancy, is not feasible, owing to traffic, circulation and design constraints.

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**Conclusion**

The Sunset Ridge Park Project has been carefully planned for years and has overwhelming support in the community. The active and passive parks proposed will provide substantial new coastal access and recreation and the Project will result in greatly enhanced habitat benefits. The fundamental legal problem with Staff's present recommendation is that it is, for the most part, misdirected to an unrelated project on another property, Newport Banning Ranch, that is not before the Commission but which the Commission will have the full opportunity to review if and when that project ever comes before the Commission. Viewed on its own, the Project complies with the applicable policies of the Coastal Act, and we respectfully urge the Commission to approve it.

Very truly yours,



Steven H. Kaufmann

Ccs (w/exhibits):

Charles Lester, Executive Director, CCC-SF  
John Ainsworth, Deputy Director, CCC-Ventura  
Sherilyn Sarb, Deputy Director, CCC-LB  
John Del Arroz, Coastal Program Analyst, CCC-LB  
Hope Schmeltzer, Chief Counsel, CCC-SF  
Jamee J. Patterson, Supervising Deputy Attorney General, SD  
Don Schmitz, Schmitz & Associates Inc.  
Mayor Michael F. Henn and Councilmembers, City of Newport Beach  
Aaron C. Harp, City Attorney, City of Newport Beach  
Leonie Mulvihill, Assistant City Attorney, City of Newport Beach  
Dave Webb, Deputy Public Works Director, City of Newport Beach  
Michael J. Sinacori, P.E., City of Newport Beach

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September 13, 2010

Russell Cheek  
1406 Clay St.  
Newport Beach, CA 92663

Mr. Mike Sinacori, P.E.  
City of Newport Beach  
Public Works Department  
3300 Newport Blvd.  
Newport Beach, CA 92658

Dear Mr. Sinacori:

This letter is in response to your inquiry regarding the annual clearance of dead and dying vegetation at the property located on the North West corner of Coast Highway and Superior Ave.

I began working for the Newport Beach Fire Department in 1979. I was promoted to Fire Inspector in 1983. One of my responsibilities as Inspector was the management of the City's annual weed abatement program.

I received my training for this program from my predecessor in the position, Inspector Al Haskell who was responsible for the weed abatement program since the early 70's. During my training, Inspector Haskell and I discussed among many other things, the state owned property at the North West corner of Coast Highway and Superior Ave. Inspector Haskell told me the property was owned by the state and that the California Department of Transportation was very good about "disking" the property at the beginning of fire season each year and never had to be asked. This was indeed my experience with the Department of Transportation during my employment with the City until I retired in December of 2001.

Despite the Department of Transportation's diligence in clearing this lot each year, there was a vegetation fire on the property sometime in the early 80's. The fire spread from the vegetation in the field to the adjacent condominiums and caused significant damage to a wooden deck and sidewalk of the structure.

I hope this letter is of assistance to you. Please call me if you have any further questions.

Sincerely,

  
Russ Cheek

**EXHIBIT 1**

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- B. Any portion of any tree, bush or shrub, which is located within ten feet of the outlet of a chimney, shall be removed.
- C. All chimneys attached to any appliance or fireplace that burns solid fuel shall be equipped with an approved spark arrester constructed in accordance with the California Building Code.

Nothing contained in this section shall be deemed to preclude the fire code official from requiring more than the minimum specific requirements set forth above when the fire code official determines that conditions exist, which necessitate greater fire protection measures.

#### **SECTION 4904 MAINTENANCE OF FUEL MODIFICATION ZONES**

**4904.1 General.** All elements of the fuel modification plan shall be maintained in accordance with the approved plan. Fuel modification zones not in compliance with their fuel modification plan constitute a fire hazard.

#### **SECTION 4905 CONSTRUCTION REQUIREMENTS FOR STRUCTURES ADJACENT TO SPECIAL FIRE PROTECTION AREAS**

**4905.1 General.** In addition to the regulations found in Chapter 7A of the California Building Code and other relevant sections of the California Building Code, all new construction, re-construction and additions to structures located on parcels of land adjacent to the City of Newport Beach Special Fire Protection Areas, which directly abut wildland space OSFM designated Local Responsibility Areas, or a designated fuel modification zone on one or more sides shall be built in accordance with the regulations found in Section 4905 of the Fire Code.

**4905.2 Definitions.** For the purpose of this section, certain terms are defined as follows:

**EXPOSED SIDE:** The exposed side of the structure is defined as the exterior wall or walls which face adjoining wildland space or a designated fuel modification zone.

**RECONSTRUCTION:** Any building undergoing construction within any 2-year period, in which the floor area of reconstruction is 50 percent or more prior to the submittal of a building permit application, shall comply with the Building and Fire Code provisions for new construction.

**SPECIAL FIRE PROTECTION AREA:** Any geographical area, designated by the Fire Chief, in which structures directly abut wildland space or a fuel modification zone on one or more sides. Special Fire Protection Areas include, but are not limited to, Very High Fire Hazard Severity Zones.

**UNENCLOSED STRUCTURE:** Includes structures with a roof and no more than one side enclosed.

**VERY HIGH FIRE HAZARD SEVERITY ZONE:** A geographical area designated in accordance with the California Government Code, Section 51178, which contains the type and condition of vegetation, topography weather and structure density which potentially increases the possibility of wildland conflagration fires.

## **EXHIBIT 2**



STATE OF CALIFORNIA - NATURAL RESOURCES AGENCY

ARNOLD SCHWARZENEGGER, Governor

**CALIFORNIA COASTAL COMMISSION**

South Coast Area Office  
200 Oceanside, Suite 1000  
Long Beach, CA 90802-4382  
(562) 590-9071



March 3, 2009

Bryan Healey, Assistant Fire Marshall OCFA  
1 Fire Authority Road, Building A  
Irvine, CA 92602

Dear Mr. Healey,

This letter is in response to your inquiry regarding the requirement for homeowners to obtain a coastal development permit (CDP) from the California Coastal Commission prior to vegetation/brush clearance and related activities in the City of San Clemente coastal canyons. The City has identified all seven of its coastal canyons as environmentally sensitive habitat in its certified Land Use Plan.

Pursuant to Section 30106 of the Coastal Act (Cal. Public Resources Code § 30106), except in certain situations relating to agriculture, kelp harvesting, and timber operations, "removal or harvesting of major vegetation" constitutes "development" for purposes of the Coastal Act, and thus requires a CDP unless exempt. However, a CDP is not required in the instance that OCFA finds that vegetation clearance is necessary to abate a nuisance.

The course of action that OCFA requires of San Clemente coastal canyon property owners (i.e., provide a "defensible space" on the canyonward portion of the property that meets the minimum fire safety standards) is consistent with the course of action that is statutorily mandated under Government Code Section 51182 and Public Resources Code 4291.<sup>1</sup> Moreover, failure to comply with the statutory mandate in Government Code § 51182 "may be considered a nuisance pursuant to Section 38773" Cal. Government Code § 51187. Thus, the failure to comply is, in effect, declared a nuisance by the statutes. Because the Coastal Act expressly states that it does not create any limitation on "the power of any city or county or city and county to declare, prohibit, and abate nuisances," Cal. Public Resources Code § 30005(b), the recommendations in your notices to San Clemente canyon property owners are beyond the Coastal Commission's jurisdiction in this case.

To ensure proper protection of the coastal canyon resources, homeowners should be encouraged to trim, prune, remove dead/dry plant litter and overall maintain vegetation on canyon slopes to avoid removal of major vegetation.

Sincerely,

  
Liliana Roman  
Coastal Program Analyst

<sup>1</sup> Although we have not verified that the requirements are identical, they are clearly substantially the same.

## GENERAL PRECAUTIONS AGAINST FIRE

stacks, flues or chimneys necessary to provide combustion air and permit the escape of exhaust gas are open.

**PORTABLE OUTDOOR FIREPLACE.** A portable, outdoor, solid-fuel-burning fireplace that may be constructed of steel, concrete, clay or other noncombustible material. A portable outdoor fireplace may be open in design, or may be equipped with a small hearth opening and a short chimney or chimney opening in the top.

**POWERED INDUSTRIAL TRUCK.** A forklift, tractor, platform lift truck or motorized hand truck powered by an electrical motor or internal combustion engine. Powered industrial trucks do not include farm vehicles or automotive vehicles for highway use.

**RECREATIONAL FIRE.** An outdoor fire burning materials other than rubbish where the fuel being burned is not contained in an incinerator, outdoor fireplace, portable outdoor fireplace, barbecue grill or barbecue pit and has a total fuel area of 3 feet (914 mm) or less in diameter and 2 feet (610 mm) or less in height for pleasure, religious, ceremonial, cooking, warmth or similar purposes.

### SECTION 303 ASPHALT KETTLES

**303.1 Transporting.** Asphalt (tar) kettles shall not be transported over any highway, road or street when the heat source for the kettle is operating.

**Exception:** Asphalt (tar) kettles in the process of patching road surfaces.

**303.2 Location.** Asphalt (tar) kettles shall not be located within 20 feet (6096 mm) of any combustible material, combustible building surface or any building opening and within a controlled area identified by the use of traffic cones, barriers or other approved means. Asphalt (tar) kettles and pots shall not be utilized inside or on the roof of a building or structure. Roofing kettles and operating asphalt (tar) kettles shall not block means of egress, gates, roadways or entrances.

**303.3 Location of fuel containers.** Fuel containers shall be located at least 10 feet (3048 mm) from the burner.

**Exception:** Containers properly insulated from heat or flame are allowed to be within 2 feet (610 mm) of the burner.

**303.4 Attendant.** An operating kettle shall be attended by a minimum of one employee knowledgeable of the operations and hazards. The employee shall be within 100 feet (30 480 mm) of the kettle and have the kettle within sight. Ladders or similar obstacles shall not form a part of the route between the attendant and the kettle.

**303.5 Fire extinguishers.** There shall be a portable fire extinguisher complying with Section 906 and with a minimum 40-B:C rating within 25 feet (7620 mm) of each asphalt (tar) kettle during the period such kettle is being utilized. Additionally, there shall be one portable fire extinguisher with a minimum 3-A:40-B:C rating on the roof being covered.

**303.6 Lids.** Asphalt (tar) kettles shall be equipped with tight-fitting lids.

**303.7 Hi-boys.** Hi-boys shall be constructed of noncombustible materials. Hi-boys shall be limited to a capacity of 55 gallons (208 L). Fuel sources or heating elements shall not be allowed as part of a hi-boy.

**303.8 Roofing kettles.** Roofing kettles shall be constructed of noncombustible materials.

**303.9 Fuel containers under air pressure.** Fuel containers that operate under air pressure shall not exceed 20 gallons (76 L) in capacity and shall be approved.

### SECTION 304 COMBUSTIBLE WASTE MATERIAL

**304.1 Waste accumulation prohibited.** Combustible waste material creating a fire hazard shall not be allowed to accumulate in buildings or structures or upon premises.

*[California Code of Regulations, Title 19, Division 1, §3.07(a)] Clearances.*

*(a) General. No combustible material shall be placed or stored within 10 feet (3048 mm) of any building or structure.*

**304.1.1 Waste material.** Accumulations of wastepaper, wood, hay, straw, weeds, litter or combustible or flammable waste or rubbish of any type shall not be permitted to remain on a roof or in any court, yard, vacant lot, alley, parking lot, open space, or beneath a grandstand, bleacher, pier, wharf, manufactured home, recreational vehicle or other similar structure.

**304.1.2 Vegetation.** Weeds, grass, vines or other growth that is capable of being ignited and endangering property, shall be cut down and removed by the owner or occupant of the premises. Vegetation clearance requirements in urban-wildland interface areas shall be in accordance with Chapter 49.

*[California Code of Regulations, Title 19, Division 1, §3.07(b)] Clearances.*

*(b) Ground Clearance. The space surrounding every building or structure shall be maintained in accordance with the following:*

*Any person that owns, leases, controls, operates or maintains any building or structure in, upon, or adjoining any mountainous area or forest-covered lands, brush covered lands or grass-covered lands, or any land which is covered with flammable material, shall at all times do all of the following:*

*(1) Maintain around and adjacent to such building or structure a firebreak made by removing and clearing away, for a distance of not less than 30 feet (9144 mm) on each side thereof or to the property line, whichever is nearer, all flammable vegetation or other combustible growth. This section does not apply to single specimens of trees, ornamental shrubbery, or similar plants which are used as ground cover, if they do not form a means of rapidly transmitting fire from the native growth to any building or structure.*

*(2) Maintain around and adjacent to any such building or structure additional fire protection or firebreak made*

by removing all bush, flammable vegetation or combustible growth which is located from 30 feet (9144 mm) to 100 feet (30 480 mm) from such building or structure or to the property line, whichever is nearer, as may be required by the enforcing agency if he finds that, because of extra hazardous conditions, a firebreak of only 30 feet (9144 mm) around such building or structure is not sufficient to provide reasonable fire safety. Grass and other vegetation located more than 30 feet (9144 mm) from such building or structure and less than 18 inches (457 mm) in height above the ground may be maintained where necessary to stabilize the soil and prevent erosion.

(3) Remove that portion of any tree which extends within 10 feet (3048 mm) of the outlet of any chimney or stovepipe.

(4) Cut and remove all dead or dying portions of trees located adjacent to or overhanging any building.

(5) Maintain the roof of any structure free of leaves, needles, or other dead vegetative growth.

(6) Provide and maintain at all times a screen over the outlet of every chimney or stovepipe that is attached to any fireplace, stove, or other device that burns any solid or liquid fuel. The screen shall be constructed of non-flammable material with openings of not more than 1/2 inch in size.

(7) Vegetation around all applicable buildings and structures shall be maintained in accordance with the following laws and regulations:

(A) *Public Resources Code Section 4291.*

(B) *California Code of Regulations Title 14 - Natural Resources, Division 1.5 - Department of Forestry and Fire Protection, "General Guideline to Create Defensible Space."*

(C) *California Government Code Section 51182.*

(D) *California Code of Regulations, Title 24, Part 9.*

**304.1.3 Space underneath seats.** Spaces underneath grandstand and bleacher seats shall be kept free from combustible and flammable materials. Except where enclosed in not less than 1-hour fire-resistance-rated construction in accordance with the *International Building Code*, spaces underneath grandstand and bleacher seats shall not be occupied or utilized for purposes other than means of egress.

**304.2 Storage.** Storage of combustible rubbish shall not produce conditions that will create a nuisance or a hazard to the public health, safety or welfare.

**304.3 Containers.** Combustible rubbish, and waste material kept within or near a structure shall be stored in accordance with Sections 304.3.1 through 304.3.4.

*[California Code of Regulations, Title 19, Division 1, §3.19(b) and (c) Housekeeping.]*

*Every building or portion of a building governed by California Code of Regulations, Title 19, Division 1 regulations shall be maintained in a neat orderly manner, free from any condition that would create a fire or life hazard or a condition which would add to or contribute to the rapid spread of fire. Provi-*

*sions shall be made for the proper storage and disposal of waste materials and rubbish consistent with the following:*

(b) All combustible waste material and rubbish shall be stored in approved containers or shall be stored in a manner approved by the enforcing agency as being consistent with standard fire prevention practices until such waste material and rubbish is removed from the premises or otherwise disposed of in a proper manner.

(1) Containers with a capacity exceeding 5.33 cubic feet (40 gallons) (0.15 m<sup>3</sup>) shall comply with the provisions of California Code of Regulations, Title 24, Part 9, Section 304.3.

(2) Wastebaskets and linen containers in Group I-2 and I-3 occupancies shall comply with the provisions of California Code of Regulations, Title 24, Part 9, Section 808.

(c) Approved self-closing metal containers or listed disposal containers by an approved testing or listing agency shall be provided and maintained in all rooms or locations where oily rags, oily waste, paint rags, or similar materials subject to spontaneous ignition are used, or are stored temporarily. Contents of such containers shall be removed and disposed of daily.

**304.3.1 Spontaneous ignition.** Materials susceptible to spontaneous ignition, such as oily rags, shall be stored in a listed disposal container. Contents of such containers shall be removed and disposed of daily.

**304.3.2 Capacity exceeding 5.33 cubic feet.** Containers with a capacity exceeding 5.33 cubic feet (40 gallons) (0.15 m<sup>3</sup>) shall be provided with lids. Containers and lids shall be constructed of noncombustible materials or of combustible materials with a peak rate of heat release not exceeding 300 kW/m<sup>2</sup> when tested in accordance with ASTM E 1354 at an incident heat flux of 50 kW/m<sup>2</sup> in the horizontal orientation.

**Exception:** Wastebaskets in Group I-3 occupancies shall comply with Section 808.1.

**304.3.3 Capacity exceeding 1.5 cubic yards.** Dumpsters and containers with an individual capacity of 1.5 cubic yards [40.5 cubic feet (1.15 m<sup>3</sup>)] or more shall not be stored in buildings or placed within 5 feet (1524 mm) of combustible walls, openings or combustible roof eave lines.

**Exceptions:**

1. Dumpsters or containers in areas protected by an approved automatic sprinkler system installed throughout in accordance with Section 903.3.1.1, 903.3.1.2 or 903.3.1.3.

2. Storage in a structure shall not be prohibited where the structure is of Type I or IIA construction, located not less than 10 feet (3048 mm) from other buildings and used exclusively for dumpster or container storage.

**304.3.4 Capacity of 1 cubic yard or more.** Dumpsters with an individual capacity of 1.0 cubic yard [200 gallons (0.76 m<sup>3</sup>)] or more shall not be stored in buildings or placed within 5 feet (1524 mm) of combustible walls, openings or combustible roof eave lines unless the dumpsters are constructed of noncombustible materials or of combustible materials

## SCOPE AND ADMINISTRATION

### **Large family day-care homes.**

**Authority cited**—Health and Safety Code Sections 1597.46, 1597.54 and 17921.

**Reference**—Health and Safety Code Section 13143.

### **Residential facilities and residential facilities for the elderly.**

**Authority cited**—Health and Safety Code Section 13133.

**Reference**—Health and Safety Code Section 13143.

### **Any state institution or other state-owned or state-occupied building.**

**Authority cited**—Health and Safety Code Section 13108.

**Reference**—Health and Safety Code Section 13143.

### **High-rise structures.**

**Authority cited**—Health and Safety Code Section 13211.

**Reference**—Health and Safety Code Section 13143.

### **Motion picture production studios.**

**Authority cited**—Health and Safety Code Section 13143.1.

**Reference**—Health and Safety Code Section 13143.

### **Organized camps.**

**Authority cited**—Health and Safety Code Section 18897.3.

**Reference**—Health and Safety Code Section 13143.

**Residential.** All hotels, motels, lodging houses, apartment houses and dwellings, including congregate residences and buildings and structures accessory thereto. Multiple-story structures existing on January 1, 1975, let for human habitation, including and limited to, hotels, motels and apartment houses, less than 75 feet (22 860 mm) above the lowest floor level having building access, wherein rooms used for sleeping are let above the ground floor.

**Authority cited**—Health and Safety Code Sections 13143.2 and 17921.

**Reference**—Health and Safety Code Section 13143.

**Residential care facilities.** Certified family care homes, out-of-home placement facilities, halfway houses, drug and/or alcohol rehabilitation facilities and any building or structure used or intended for use as a home or institution for the housing of any person of any age when such person is referred to or placed within such home or institution for protective social care and supervision services by any governmental agency.

**Authority cited**—Health and Safety Code Section 13143.6.

**Reference**—Health and Safety Code Section 13143.

### **Tents, awnings or other fabric enclosures used in connection with any occupancy.**

**Authority cited**—Health and Safety Code Section 13116.

**Reference**—Health and Safety Code Section 13143.

### **Fire alarm devices, equipment and systems in connection with any occupancy.**

**Authority cited**—Health and Safety Code Section 13114.

**Reference**—Health and Safety Code Section 13143.

### **Hazardous materials.**

**Authority cited**—Health and Safety Code Section 13143.9.

**Reference**—Health and Safety Code Section 13143.

### **Flammable and combustible liquids.**

**Authority cited**—Health and Safety Code Section 13143.6.

**Reference**—Health and Safety Code Section 13143.

### **Public School Automatic Fire Detection, Alarm and Sprinkler Systems.**

**Authority cited**—Health and Safety Code Section 13143 and California Education Code Article 7.5, Sections 17074.50, 17074.52 and 17074.54.

**Reference**—Government Code Section 11152.5, Health and Safety Code Section 13143 and California Education Code Chapter 12.5, Leroy F. Greene School Facilities Act of 1998, Article 1.

### **Wildland-Urban Interface Fire Area.**

**Authority cited**—Health and Safety Code Sections 13143, 13108.5(a) and 18949.2(b) and (c) and Government Code Section 51189.

**Reference**—Health and Safety Code Sections 13143, Government Code Sections 51176, 51177, 51178 and 51179 and Public Resources Code Sections 4201 through 4204.

**1.11.1.1 Adopting agency identification.** The provisions of this code applicable to buildings identified in this Subsection 1.11.1 will be identified in the Matrix Adoption Tables under the acronym SFM.

### **1.11.2 Duties and powers of the enforcing agency.**

#### **1.11.2.1 Enforcement.**

**1.11.2.1.1 The responsibility for enforcement of building standards adopted by the State Fire Marshal and published in the California Building Standards Code relating to fire and panic safety and other regulations of the State Fire Marshal shall except as provided in Section 1.11.2.1.2 be as follows:**

**1. The city, county, or city and county with jurisdiction in the area affected by the standard or regulation shall delegate the enforcement of the building standards relating to fire and panic safety and other regulations of the State Fire Marshal as they relate to Group R-3 occupancies, as described in Section 310.1 of Part 2 of the California Building Standards Code, to either of the following:**

**1.1. The chief of the fire authority of the city, county or city and county, or an authorized representative.**

**1.2. The chief building official of the city, county, or city and county, or an authorized representative.**

**2. The chief of any city or county fire department or of any fire protection district, and authorized representatives, shall enforce within the jurisdiction the building standards and other regulations of the State Fire Marshal, except those described in Item 1 or 4.**

**3. The State Fire Marshal shall have authority to enforce the building standards and other regulations of the State Fire Marshal in areas outside of corporate cities and districts providing fire protection services.**

**4. The State Fire Marshal shall have authority to enforce the building standards and other regulations of the State Fire Marshal in corporate cities**

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**2.12.050 Fire Department.**

The Fire Department shall be under the supervision of the Fire Chief. The term "Marine Director" as used in this Code shall be deemed hereafter to refer to the Fire Chief. The functions of the Fire Department shall include:

**A. Administration.**

1. Ensure fulfillment of the Fire Department mission through planning, preparation, designation of funding, and securing of equipment and materials required to support personnel, operations, and programs.

**B. Prevention.**

1. Identify and prevent hazards to life, health, property and the environment.
2. Apply and enforce California State laws and local ordinances.
3. Plan and prepare City staff and residents to address potential disasters.

**C. Operations.**

1. Respond to and mitigate all threats to life, health, property and the environment.
2. Provide training and education to support expertise and safe operations.
3. Monitor for quality assurance.

**D. Lifeguards.**

1. Respond to and mitigate all threats to life and health on the City beaches and waterways.
2. Provide training and education to support expertise and safe operations.
3. Plan and prepare residents to assist emergency responders through community preparedness programs.

**E. Collaborate with the Orange County Harbor Patrol and/or the U.S. Coast Guard to prevent and/or respond to accidents of a marine nature within the City limits or contiguous unincorporated territory under County contractual agreements.**

**F. Such other functions as may be delegated by the City Manager or the City Council.  
(Ord. 2011-17 § 1 (part), 2011)**

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**2.12.060 Human Resources Department**

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October 31, 2011

Client-Matter: 28934-030

Mary K. Shallenberger, Chair  
And Honorable Commissioners  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 91405

**Re: Sunset Ridge Park (City of Newport Beach)  
CDP Application No. 5-10-168  
Wednesday, November 2, 2011 – Item 16a**

Dear Chair Shallenberger and Coastal Commissioners:

This letter is respectfully submitted on behalf of Newport Banning Ranch LLC (NBR), the representative of the landowners of an approximately 400-acre property located adjacent to the City of Newport Beach's Sunset Ridge Park project. At the outset, we wish to express our support for the City's project, and its importance to the Newport Beach community. Our comments regarding the Staff Recommendation pertain solely to those statements that affect NBR's property and project, and not the merits of the Sunset Ridge Park project.

The 400-acre Banning Ranch property is an operating oil field that has been in production since the 1940's. NBR is processing an application for future development of this property before the City of Newport Beach, and anticipate this project being before the Coastal Commission within a year. We are very concerned that Coastal Commission staff is attempting to impose restrictions on our property through conditions on the City's permit that would effectively prohibit development of our proposed project. For the reasons set forth in the City's own correspondence to you (see Letter from Steven H. Kaufmann, Richards Watson & Gershon to Mary K. Shallenberger and Commissioners, dated October 28, 2011), the City's park project can be approved without imposing any conditions affecting the NBR property. The Coastal Commission is not foreclosing any opportunities to analyze, regulate, or impose conditions on NBR's project when the matter comes before you in a future coastal development permit application.

On September 16, 2011, Coastal Commission staff – after having over a year reviewing and processing the City's CDP application – asked NBR to join as a “co-applicant” on the City's CDP application. We assume having prepared its staff report and rendering findings that would severely limit any proposed use of NBR's property and its project, staff realized that it could not legally do so if the property or project was not the subject of the application, and thus requested

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NBR to join as co-applicant. By letter dated October 4, 2011, to South Coast Deputy Director Sharilyn Sarb, NBR responded to this request and confirmed that it will not be a co-applicant on the City's CDP application. A copy of this letter is enclosed, and we request that it be made a part of the administrative record for the City's CDP. (We note that although this letter was received before the release of the Commission's Staff Report on October 20, 2011, it was not included in the correspondence that was attached to the Staff Report.)

Despite the fact that neither NBR, nor the Banning Ranch landowners, are applicants for Coastal Development Permit Application No. 5-10-168 (the "CDP"), Commission staff has used the CDP Staff Report to regulate and limit development on the Banning Ranch property which has effectively resulted in an anticipatory regulatory taking. The Staff Report is replete with unsupported findings regarding the Banning Ranch property and NBR's proposed development project currently being processed by the City of Newport Beach. As NBR's proposed project is not before the California Coastal Commission at this time, and has no connection with the City's Sunset Ridge Park Project, the Coastal Commission cannot legally adopt findings that would effectively prohibit development on private property when that property is not the subject of any action before them. For the reasons set forth below, we request that the before any findings are adopted by the Coastal Commission – whether to approve or deny the City's permit - that all references to the Banning Ranch property and NBR's project be deleted from the final set of adopted findings.

**1. NBR's Banning Ranch Project is Not Pending Before the Coastal Commission, and All Findings Concerning NBR's Project Must Be Excised from Any Adopted Findings.**

NBR has submitted an application to the City for the limited development of its property consistent with the City's General Plan. NBR's proposal includes oil field clean up and remediation, protection and habitat restoration of more than 220 acres, provision of more than 50 acres of public parks, and limited commercial and residential development on less than 25% of the project site. NBR's project is currently under environmental review at the City; a Draft EIR for the proposed NBR project having been published by the City on September 9, 2011. This project has not been approved by the City, nor is it the subject of an application before the Coastal Commission. Despite these facts, the Staff Report not only discusses but evaluates and recommends findings regarding the merits of the proposed NBR project. All statements regarding NBR's proposed project must be deleted from any adopted Commission findings. For example, the Staff Report at page 9 discusses the Draft EIR for NBR's project, and states "Therefore, widening of the proposed access road for future development would result in significant deleterious impacts of ESHA which would be inconsistent with Coastal Act Section 30240 regarding preservation of Environmentally Sensitive Habitat Areas." [Emphasis added.]



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This statement together with other similar statements and recommended findings throughout the Staff Report must be removed as it bears no relationship to the permit application pending before you.

The Coastal Commission should not include in its findings for the Sunset Ridge Park project, findings or conclusions that reflect pre-determination of an application that is not before them. Just as the courts have been critical of agencies that pre-judge projects without completing the CEQA process in a manner that pre-determines a particular outcome (generally taking a discretionary action to approve a project component before the entire project is before the agency), agencies should also avoid rendering findings that pre-determine an outcome (i.e., inconsistent with the Coastal Act) for a project that is not before them.

The imposition of conditions that would limit the ability of NBR to use its property – whether for its proposed development or any other activities – is also contrary to the agreement between the City and NBR. As described in the Staff Report, the City and NBR entered into an Access Agreement whereby the City would be permitted – subject to certain conditions – to construct an access road to and a portion of a parking lot for its proposed Sunset Ridge Park on NBR property. Although NBR has agreed to grant an easement to the City, subject to the provisions of the Access Agreement, conveyance of the easement has not yet occurred, and pursuant to the Access Agreement, any improvements on its property would be subject to receipt of final approval from NBR. Clearly, conditions that prohibit the future use of its property will not be acceptable to any landowner.

Because NBR has not agreed to these conditions, the Staff Report is recommending that the City's permit application be denied. First, as noted previously, we believe that the City's permit can be approved without the imposition of these recommended conditions, and are therefore, unnecessary. Second, even if the Coastal Commission were to deny the City's application, any findings with respect to NBR's property, its proposed project, or future use of the site should be deleted from the adopted findings. Should the Commission fail to do so, they would be making binding determinations and findings on property and a project not before them, in violation of Constitutional principles, and NBR will pursue its opposition to these findings legally if necessary.

For these reasons, any statements or findings pertaining to NBR's property and proposed project must be removed from the adopted findings on the City's Sunset Ridge Park project, and considered only in the context of an application for its project, and not the City's Park project.

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**2. Imposition of Conditions Requiring Restrictions in the Form of Easements and Deed Restriction on NBR's Property is Unconstitutional, Unsupported and Unwarranted.**

The Staff Report states that it must recommend denial of the City's Sunset Ridge Project because the City has not and cannot agree to conditions that require the imposition of a conservation easement and deed restriction over property it does not own. First, no substantial evidence is identified in the Staff Report that would support the need for these legal restrictions on NBR's property. The area is currently highly disturbed and does not constitute ESHA. Yet, the Commission staff recommends that restrictions be placed over the areas adjacent to the proposed park access road in order to support revegetation of the area despite the fact that (1) there is no nexus that would justify the revegetation or the imposition of a deed restriction or easement over this area in violation of the principles set forth in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; and (2) the permanent restriction of NBR's property for a small, limited purpose park access road in order to prevent future development of NBR's proposed project bears no proportionality – rough or otherwise – between the impact of the park road and the exaction being attempted by the Commission staff in violation of *Dolan v. City of Tigard* (1994) 512 U.S. 374.

The imposition of these conditions is also unsupported as it is allegedly based assumptions not supported by any cited facts or studies. One of the concerns expressed in the staff report is that the use of the park access road must be limited to park traffic only (estimated to be approximately 173 trips per day) because “the Commission's biologist, in consultation with other experts, has concluded that . . . an increase above the 173 vehicle trips per day would have a significant adverse impact on the gnatcatchers use of the habitat area.” Staff Report at 22. No studies are cited and the experts that were consulted are not identified. There is nothing in the record to support a statement that trips beyond 173 would significantly affect the gnatcatcher. This statement is especially devoid of support when not 500 feet away, gnatcatchers are occupying coastal sage scrub vegetation that lies immediately adjacent to West Coast Highway which experiences well over 50,000 trips per day. There is no scientific support for using 173 daily trips as any form of cut off or limitation. It is an arbitrary number that was selected to justify approving the park entry road, but not any other use of the road. It is also a number that is not supported by other areas of the coastal zone in which gnatcatchers and their habitat co-exist with major arterials and adjacent development without any significant impacts.

In summary, the proposed restrictions are not only unconstitutional, but devoid of any support in the record that would justify the need for these restrictions and are wholly unwarranted.

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### **3. The Staff Report Mischaracterizes the Habitat Areas on NBR Property.**

The Staff Report identifies two areas on NBR's Property subject to the Access Agreement with the City as ESHA East and ESHA West because they allegedly are vegetated with "mapped coastal bluff and maritime succulent scrub habitats" and are have a history of gnatcatcher use. In reality, a substantial portion of the area subject to the Access Agreement is comprised of a barren land resulting from prior pre-Coastal Act grading of this area for a future freeway. This area has been highly disturbed and heavily populated with non-native and invasive species. Contrary to the Staff Report's characterization, a substantial portion of ESHA West is comprised of mostly non-native invasive species including fig marigold (aka freeway iceplant) and myoporum. Non-native vegetation covers the majority (over 75%) of this area. Quite simply, the designation of this site as ESHA is not warranted due to the high levels of degradation of this area. Similarly, ESHA East is an isolated, highly degraded area due to historic oil field production activities and the prior mass grading of the site for freeway development (subsequently abandoned), and subject to increased edge effects. Neither of these areas would support a finding of ESHA.

The Commission's Staff Report also supports imposition of restrictions on NBR's property because the City's park access road would result in the fragmentation of two areas of ESHA. Again, this too is wholly unsupported by the facts. In reality, the area where the road is proposed to be constructed is already a dirt road used for oil operations with large adjacent bare areas. The City's park project, contrary to the finding in the Staff Report, would not create obstacles to the movement of gnatcatchers or other wildlife in this area.

Staff further obfuscates the conditions on NBR's property by implying that habitat fragmentation is an important cause of extinction, and that construction of the park access road could lead to extinction of the gnatcatcher. The Staff Report also implies that the NBR property is the only immediately coastal critical California gnatcatcher habitat in Orange County. This too is misleading as it implies that there are no other areas in Orange County considered critical gnatcatcher habitat. In reality, the majority of areas are protected through the NCCP program, and therefore protections for these areas are not duplicated by designating them as critical habitat. The NBR property was not included in the NCCP, and therefore was designated critical habitat.

Despite protocol surveys and confirmation from the U.S. Fish and Wildlife Service, the Commission staff refuses to acknowledge evidence in the record, and absent any contrary evidence of its own, makes unsupported assumptions regarding the potential presence of vernal pools and vernal pool species on the NBR Property. NBR's biological consultant, Glenn Lukos Associates, have submitted reports to the U.S. Fish and Wildlife Service and Coastal

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Commission documenting the results of dry season surveys in which it was undisputedly concluded that no fairy shrimp cysts were present within the fill site on NBR's property.

Staff's blatant attempt to limit a full and fair consideration of NBR's proposed project by pre-emptively designating these areas ESHA, and recommending the imposition of conservation deed restrictions, is made even more egregious when this very small area is considered in the context of the whole 400-acre NBR project site. Adopting findings for a very small degraded area that can serve as precedent when the entire project is before you for consideration impermissibly limits the ability of the Coastal Commission to render a full, fair and impartial analysis of the NBR project when its application is submitted within the next year.

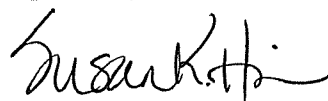
For all the reasons set forth above, the Coastal Commission should not make any determinations as to the presence of ESHA on NBR's property at this time or its effect on future use and development of NBR's property, and all such statements and findings should be deleted from the final adopted findings – whether in support of approval or denial -- for the City's Sunset Ridge Park application.

#### **4. Conclusion.**

In conclusion, a number of highly misleading, inaccurate and unsupported statements regarding the character of the habitat on the NBR property and the impacts of future development are made throughout the Staff Report. As NBR is not an applicant for this project, any statements regarding the future use of the Property, any limitations proposed for the NBR property (such as a deed restriction or conservation easement) and the mischaracterization of the degraded nature of the existing vegetation on the NBR property must be removed from the Staff Report and Findings before they are adopted - whether in connection with an approval or denial of the proposed Project.

While NBR remains wholly supportive of the City and its Sunset Ridge Park project, regardless of the Coastal Commission's decision on the City's application, NBR will continue to assert its rights and challenge any findings that adversely affect its property and that would preclude full, fair and impartial consideration of its proposed project and permit application in the future.

Respectfully submitted,



Susan K. Hori

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Enclosure: Letter from Michael A. Mohler, dated October 4, 2011

cc w/enclosure:

Charles Lester, Executive Director  
Sherilyn Sarb, Deputy Director  
Teresa Henry, South Coast District Manager  
Karl Schwing, Supervisor, Regulation & Planning  
John Del Arroz, Coastal Program Analyst  
Hope Schmeltzer, Chief Counsel  
Jamee J. Patterson, Supervising Deputy Attorney General  
Aaron C. Harp, City Attorney  
Leonie Mulvihill, Assistant City Attorney  
Dave Webb, Deputy Public Works Director

300936049.1



## NEWPORT BANNING RANCH

October 4, 2011

Ms. Sherilyn Sarb, South Coast Deputy Director  
Ms. Teresa Henry, South Coast District Manager  
California Coastal Commission  
South Coast Area Office  
200 Oceangate, Suite 1000  
Long Beach, CA 90802-4302

**Re: Sunset Ridge Park CDP Process**

Dear Ms. Sarb and Ms. Henry,

On September 14, 2011, a representative of Newport Banning Ranch (NBR) reached out to Coastal Commission staff after hearing from the City of Newport Beach that staff would be recommending conditions to the City's Sunset Ridge Park CDP application that would likely affect the future use of NBR property.

Subsequently, on September 16, 2011 we received a letter from John Del Arroz of your staff indicating a "notice of application submittal and invitation to join as co-applicant" for Coastal Development Permit Application No. 5-10-168 (City of Newport Beach's proposed Sunset Ridge Park). This letter is a formal response confirming that NBR will not join as a co-applicant for this application. Staff has been in receipt of the City's application for over one year (August 2, 2010) and has only sent NBR this co-application letter after having already having made certain conclusions about NBR's property without any consultation or discussion with us.

Shortly after receiving this letter, a staff report was issued that recommended the imposition of significant restrictions on the future use of our property and recommended certain biological determinations on our property. Staff is aware that Newport Banning Ranch is currently processing entitlements for this property and that the City has recently released a Draft Environmental Impact Report (DEIR) for public review and that the NBR project will be the subject of a coastal development permit application with the Commission in the near future.

While we understand the intent of Section 30601.5 of the Coastal Act, we are aware of no instances where the staff has sought to apply such restrictive conditions on a neighboring property when an application for that property is imminent. As a matter practice, staff's application of Section 30601.5 has typically been for relatively incidental requirements and not specifically designed to inhibit future use or access to a neighboring property.

**Newport Banning Ranch LLC**

1300 Quail Street, Suite 100 | Newport Beach, CA 92660 | T 949.833.0222 | F 949.833.1960  
3030 Saturn Street, Suite 101 | Brea, CA 92821 | T 714.577.9154 | F 714.577.9149  
newportbanningranch.com

Sherilyn Sarb and Teresa Henry  
Re: Sunset Ridge Park CDP Process  
October 4, 2011

The subject of such conditions is not appropriate for a right of access to the City's proposed park. Any conditions ought to be considered in the future coastal development permit application for Newport Banning Ranch, which will be before the Commission at the conclusion of the City's review process and certification of the environmental document.

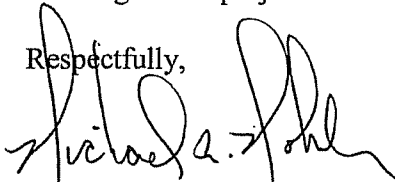
Most concerning in Mr. Del Arroz's letter was the notion that if we do not join as co-applicants we will be compelled to comply with the terms and conditions of any coastal development permit issued for the Sunset Ridge Park property even if what is proposed is well beyond the scope of the park project, and well beyond the scope of what may be necessary to address potential impacts both in terms of nexus and rough proportionality.

In order to facilitate timely approval and eventual public use of the proposed Sunset Ridge Park, Newport Banning Ranch entered into an access agreement with the City of Newport Beach so that access could be achieved off of Coast Highway. In this access agreement, Newport Banning Ranch retained final approval on the proposed access and specifically called out that no future restrictions on our property would be acceptable. This continues to be our position.

We believe it is in the public's interest to have the immediate benefit of the Sunset Ridge Park, but the imposition of conditions on our property should be considered only as part of our coastal development permit application and not on the back of the City's park proposal. The recommendations of staff in the report have gone well beyond the scope of the City's proposed park and are creating significant confusion over the process whereby one component of the NBR project (entrance off of Coast Highway) is being considered in isolation in advance of an application for the entire NBR project. This is especially troublesome given that a draft environmental impact for our project is currently circulating for public review.

We understand that the City has postponed consideration of the City's application in order to facilitate additional discussion. We are more than willing to participate in any discussions, but we believe any conditions that restrict our property must be taken up in the context of our coastal development permit application for our proposed Newport Banning Ranch project.

Respectfully,



Michael A. Mohler  
Newport Banning Ranch LLC

Cc: See Following Page

Sherilyn Sarb and Teresa Henry  
Re: Sunset Ridge Park CDP Process  
October 4, 2011

California Coastal Commission  
Chair Shallenberger and Commissioners  
Dr. Charles Lester  
Karl Schwing  
John Del Arroz

City of Newport Beach  
David Webb  
Leonie Mulvihill

NBR – Other  
Jared Ficker  
Ralph Faust  
Susan Hori



**From:** Penny Elia [greenp1@cox.net]  
**Sent:** Tuesday, October 25, 2011 1:25 PM  
**To:** John Del Arroz  
**Cc:** Karl Schwing; Sherilyn Sarb; Teresa Henry; Jonna Engel; John Dixon  
**Subject:** Sunset Ridge Park - Response to Schmitz 10/19/11 letter

Good afternoon, John -

The Banning Ranch Conservancy has reviewed the letter prepared by the City of Newport Beach's agent re: the Sunset Ridge Park application. We submit the following as rebuttal and ask that it be included in the file and forthcoming addendum. We are confident that you have already indentified the inconsistencies and flat out contradictions contained in the agent's 10/19/11 letter, but we submit this as further support for your already legally and factually sound conclusions regarding the City's SRP CDP application.

Under a separate email I will be sending a yousendit link containing Tom Brohard's comments on the traffic portions of the agent's letter. We request that this document also be included in the file and addendum.

Thank you for your time and consideration of our submittals.

Penny Elia

### **ESHA Buffer Dedication**

On Pg. 13, the letter confronts the Commission Staff's condition to permitting the SRP's construction that is the central "deal breaker" to the City. That being, the refusal of NBR to agree to preserve adjacent areas as permanent ESHA buffers. Doing this would obviously forestall the construction of the Bluff Rd system needed to support and service the NBR Project. The City states:

"Asking the City and the owner of the adjacent private property to agree to land use restrictions solely to control future projects is *unrelated* to the legitimate land use regulatory ends required to be considered by the Commission in terms of its decision on the City's Park application. Staff's suggestion that these conditions are necessary to "promote the continued use of surrounding habitat areas by gnatcatchers" are unsubstantiated (Staff Report, p. 2.). However, even more important, is that Dr. Engel's analysis, relied on entirely by Commission staff to support its findings for denial with complete disregard to the analysis supplied by the City's biological analysis, clearly suggests otherwise."

As to Commission Staff relying on Dr. Engel's conclusions, the Coastal Commission may choose which expert to rely on and a court may not substitute its judgment. LTWR, LLC v. California Coastal Commission (2007) 152 Cal. App. 4th 770, 791. The City then claims this condition violates the US Supreme Court's holdings in the Nollan-Dolan cases regarding land permit conditions. In brief, these cases hold that a permit condition must have a nexus, that is, a link with the project impact that is sufficiently connected in nature and extent. In addition, it must be "roughly proportional" between a

condition and extent of the impact it is supposed to mitigate." Ocean Harbor House Homeowners Assoc. v. California Coastal Commission (2008) 163 Cal. App.4th 215.

Whether the land use restriction requirement meets the Nollan-Dolan tests is ably demonstrated in the Commission Staff's own Report. Just as important, the Report shows the condition is consistent with the City of Newport Beach's own Coastal Land Use Plan. On Pg. 24 of the Staff Report it states:

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

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

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

In short, the City of Newport Beach in its 1019/11 letter to the Commission ignores its own CLUP 4.1.1-7 policy regarding ESHA buffer dedication/preservation and requests the Commission do the same. The absurdity of the City's position should be self-evident.

#### **Growth Inducing Development - Coastal Act Section 30254**

On Pg. 8 of the letter, the City complains:

"[T]he park road is not a "precursor" to the Newport Banning Ranch arterial, and is designed in a minimalist fashion to meet only the basic access requirements for the Park. For the staff report to assert that the park road exceeds that required for the park is baseless and

inconsistent with the engineered plans submitted by the City. Therefore, the designed park road is "designed and limited to accommodate needs" of only the Park, and is consistent with Section 30254 of the Coastal Act."

Yet, in the very next Pg.9, the City as much admits the park road is designed so as to "share access" with the intended Bluff Road servicing NBR. On Pg. 9 the letter states:

"Section 3 of Coastal's Landform Alteration Policy Guidance (LCP Review Relating to Land for Alteration), provides that LCP's *"should remove barriers to concentrated development. If there are any areas where higher density development or cluster development might be appropriate and useful, the LCP should encourage this development with options for reducing front and side yard setbacks and for **providing shared access**, common open space and recreation areas. The LCP should lay out all the procedures for processing a cluster development, insuring that all impediments are removed."* (emphasis added)

To that end, specific CCC-certified LCP's have included **provisions for promoting shared access**. For example, in the Malibu LCP, for Site BMPs (Appendix A), hillside development (LIP 6.5(C)) and land division projects (LIP 15.2) specifically, there are provisions which advocate shared access roads and driveways. Similar, the County of San Mateo's LCP (8.18) calls for roads and driveways to "be shared where feasible, to reduce the amount of grading, cutting and filling required to provide access."

The above "shared access" admission by the City regarding the park access road and Bluff Rd. simply helps prove the conclusion reached by Commission Staff. That being as stated on Pg. 33 of the Staff Report:

"The City's access agreement with Newport Banning Ranch specifies, by reference to NBR's development proposal, that the originally submitted design for the access road would serve as two of the four lanes necessary for a four-lane arterial road. A four lane arterial road leading from West Coast Highway, roughly in the location of the proposed access road, is the listed preferred alternative in the Draft Environmental Impact Report which was released on September 9, 2011 for the Newport Banning Ranch development. Furthermore, as discussed above, the applicant is unwilling or unable to ensure that buffers and ESHA adjacent to the road are preserved to ensure protection of habitat, or to ensure that the proposed park access road remains a park road. Therefore, it appears that although the City states that the proposed park access road is the minimum required for the proposed park, the owner of the land on which the proposed access road is located is fully intending to expand the access road in the future. Therefore, the proposed access road would result in development which would facilitate development of an access road for the larger Newport Banning Ranch development. The project is therefore inconsistent with Coastal Act Section 30254 regarding growth inducing impacts."

# Tom Brohard and Associates

October 25, 2011

Mr. Steve Ray, Executive Director  
Banning Ranch Conservancy  
PO Box 16071  
Newport Beach, CA. 92659-6071

**SUBJECT: Sunset Ridge Park – Rebuttal to City’s October 19, 2011 Letter**

Dear Mr. Ray:

As requested, I, Tom Brohard, P.E., have reviewed the traffic portions of the October 19, 2011 Schmitz & Associates letter regarding Sunset Ridge Park submitted to the California Coastal Commission on behalf of the City of Newport Beach. The October 12, 2011 letter from the City’s Traffic Engineer enclosed as Pages 44 through 46 of the City’s submittal has also been reviewed. Several comments made on Pages 6 and 7 of the Schmitz & Associates letter either directly contradict other materials submitted with the letter, such as the City’s alternative access plan (Page 43), or continue to distort the issues, as follows:

- 1) Deceleration Distance Is NOT “Deficient” – Page 6 of the letter states “... enclosed an alternative access plan for a driveway directly onto the City property which illustrates the inadequate and deficient lines of sight for deceleration and stopping for safe entrance into the City Park property.” The “Traffic Safety Legend” at the lower right corner of the City’s Plan, Page 43 of the submittal, indicates 500 feet is required for deceleration to make a right turn into the park driveway, that 500 feet is the distance provided, and that Safety Compliance is N/A. Stated differently, the calculated deceleration distance for 60 MPH is equal to the deceleration distance that would be provided at a driveway 265 feet west of the west curb of Superior Avenue. Since the deceleration distance meets this requirement, **deceleration distance is adequate**, not “deficient”. In addition, it is likely that a right turning motorist into the park driveway would be closer to the north curb and would use a portion of the bicycle lane for deceleration rather than make a wide right turn from the center of the outside westbound travel lane on West Coast Highway as depicted on Page 43.

Point #4 in the City Traffic Engineer’s letter is directly quoted on Page 6 with a lead in stating “As Mr. Brine cautions...” While I agree with Mr. Brine that “...the advance visibility of the driveway for westbound traffic prior to the Superior Avenue intersection is limited”, it is adequate according to the City’s “Traffic Safety Legend” on Page 43. Stated somewhat differently, the distance for deceleration is not unlimited or unrestricted. The quote from Mr. Brine appears to have been taken out of context to incorrectly lead a casual reader to believe the deceleration distance is not adequate. However, **it does meet**

**Mr. Steve Ray**  
**Sunset Ridge Park – Rebuttal to City’s October 19, 2011 Letter**  
**October 25, 2011**

**the required deceleration distance as shown on the City’s Exhibit of 500 feet for 60 MPH (10 miles per hour over the posted 50 MPH speed limit).**

- 2) Coast Highway Traffic Collision Rate Is Average – Page 6 of the letter states “As noted in Mr. Brine’s statement, in the past two years alone, there have been a total of 24 vehicular accidents for westbound WCH traffic in BRC’s proposed access road area.” While Point #7 of the City Traffic Engineer’s letter indicates these collisions have occurred “...in the area of the proposed driveway access location”, no details or listings are provided as to the precise location of these collisions or the circumstances involved in each collision.

The number of traffic collisions is a direct function of the traffic volume on the particular roadway segment so the higher the traffic volume, the greater the number of traffic collisions. Traffic collision rates expressed as collisions per million vehicles are the true measure of whether a location is experiencing a rate that is higher than expected.

According to traffic count data compiled by Caltrans for Year 2009 (the most recent available), the traffic volume on West Coast Highway west of Superior Avenue is about 42,500 vehicles per day. When the 24 collisions are taken with half of this volume over two years to represent only westbound traffic, the collision rate experienced has been 1.55 collisions per million vehicles. From their publication 2008 Collision Data on California State Highways (the most recent available), Caltrans calculated a collision rate of 1.59 collisions per million vehicles for 4+ lane divided roadways in urban areas. While 24 collisions may seem like a high number, the collision rate on this portion of West Coast Highway is at the same level as the average for nearly 600 miles of similar roadways across the state. **The addition of 173 daily trips to and from the Sunset Ridge Park alternate access driveway would not be expected to significantly change the average rate of 1.55 collisions per million vehicles** that has been experienced over the last two years by 21,250 daily westbound vehicles on West Coast Highway.

- 3) Right Turn Only Access Will Not Create Other Impacts – Page 7 of the letter indicates that right turn only access to Sunset Ridge Park “...can create hazardous stacking conditions...” at other intersections “...since the left turn lanes at these lawful U-turn points were not designed to accommodate more than several waiting vehicles.” Mr. Brine’s letter did not identify this as a concern, most likely because stacking is not an issue.

From the Traffic Impact Study for Sunset Ridge Park, three of the 29 PM peak hour vehicles entering the Park will originate from the west. Only these three vehicles would be required to make a U-turn on their way to the Park, and the other 26 vehicles would not be affected by the right turn only limitation. Existing left turn storage at the adjacent intersections for traffic going to the

**Mr. Steve Ray**  
**Sunset Ridge Park – Rebuttal to City’s October 19, 2011 Letter**  
**October 25, 2011**

Park from the west includes 140 feet on southbound Balboa Boulevard at River Avenue (sufficient for seven cars), 160 feet on northbound Superior Avenue at Ticonderoga Street (sufficient for eight cars), and 280 feet on eastbound Coast Highway at Hoag Hospital (sufficient for 14 cars). The addition of three vehicles to any one of these intersections, **one vehicle every 20 minutes over the PM peak hour, will not create “hazardous stacking”**.

From the Traffic Impact Study for Sunset Ridge Park, 12 of the 13 PM peak hour vehicles exiting the Park will be required to make a U-turn at Prospect Street to return to their origins to the east, north, or south. Existing left turn storage on westbound Coast Highway at Prospect Street is 160 feet in length (sufficient for eight vehicles). The addition of an average of **one vehicle every five minutes over the PM peak hour will not create “hazardous stacking”**.

- 4) Driveway Can Be Relocated Further West and Narrowed – Page 43 of the City’s submittal conceptually shows driveway access to Sunset Ridge Park 265 feet west of the west curb line of Superior Avenue. The City’s drawing provides separate 18 foot wide lanes, one for entering and one for exiting, separated by a raised median about 12 feet wide. **The entry and exit lanes are wider than necessary and the raised median is not needed.** Providing a 13 foot wide lane for entry and a 13 foot wide lane for exit, together with elimination of the raised median, would reduce the roadway width from about 48 feet to 26 feet. In addition, **the roadway could be shifted to the west** closer to the environmentally sensitive habitat area (ESHA) without impacting it and by eliminating the outbound jog to the east at the exit. In total, exiting traffic from the Park could be moved westerly by about 75 feet (including reducing the ESHA separation by 23 feet, moving the exit 46 feet further west to eliminate the outbound exit jog, and narrowing the outbound lane by five feet). This would involve **reconfiguration of the very wide turnaround area** just north of West Coast Highway which appears to be designed to accommodate U-turns by trucks rather than a “design” passenger vehicle with 24 foot wide outside radius. As an additional design consideration, **the access gates could be brought forward close to the back of the sidewalk** on West Coast Highway to make the access less inviting and more like a park access driveway.
- 5) Sight Distance for Exiting Is Adequate for Urban Conditions – Narrowing and relocating the driveway as discussed above would provide an additional 75 feet of stopping sight distance for exiting traffic from Sunset Ridge Park, increasing the distances shown on the “Traffic Safety Legend” from 442 feet to about 515 feet. This would be about 65 feet less than the 580 foot distance for a vehicle traveling at 60 MPH in the outermost lane of West Coast Highway, the “worst case condition” that could occur at this location.

**Mr. Steve Ray**  
**Sunset Ridge Park – Rebuttal to City’s October 19, 2011 Letter**  
**October 25, 2011**

**Traffic engineering involves balancing numerous factors.** There are a number of considerations and judgments that must be made on a daily basis by the City Traffic Engineer. Listed below are several factors that apply directly to installing direct driveway access further to the west as described above:

- From my previous report, westbound traffic on West Coast Highway will receive a green light about 46 percent of the time. Traffic volumes are heavier at the beginning of each green signal display and will be traveling at or below the posted speed limit of 50 MPH after accelerating from Superior Avenue at the beginning of a green light.
- From my previous report, westbound traffic on West Coast Highway will likely be looking for the Park at slow to moderate speeds and proper guide signing will direct them to be in the lane nearest the north curb as they approach the Park. Busses stop once per hour for less than 60 seconds at the bus stop.
- Stopping sight distance is greater than 580 feet for the three of the four westbound lanes on West Coast Highway and is adequate for 60 MPH. Stopping sight distance for traffic in the fourth lane can be increased to about 515 feet by shifting the driveway to the west and by narrowing it as discussed above. The resulting stopping sight distance is adequate for 56 MPH. In addition, traffic in the fourth lane nearest the curb will also be merging into the third westbound lane in the area of the proposed driveway in the 22 foot wide merge area beyond the 8 foot wide bicycle lane, moving further away from right turning traffic exiting the driveway.
- California Vehicle Code Section 22450 requires that traffic facing a “Stop” sign (such as when exiting the Park) must stop at the limit line or before entering the crosswalk on the near side of the intersection. At the Park exit, the limit line would likely be located at the back of the 11 foot wide sidewalk, placing the driver’s eye 8 feet into Park property. Stopping sight distance from this point is what has been depicted on the City’s Exhibit.
- After stopping, California Vehicle Code Section 21802(a) requires that traffic “...yield the right-of-way to any vehicles which have approached from another highway, or which are approaching so closely as to constitute an immediate hazard, and shall continue to yield the right-of-way to those vehicles until he or she can proceed with reasonable safety.” This requires that a vehicle exiting the Park must wait for approaching westbound traffic on West Coast Highway, perhaps even stopping a second time before turning right onto West Coast Highway.



**Mr. Steve Ray**  
**Sunset Ridge Park – Rebuttal to City’s October 19, 2011 Letter**  
**October 25, 2011**

- While design guidelines do indicate that stopping sight distance should be free and clear, this condition rarely if ever occurs in an urban environment that includes street light poles, traffic signal poles, bus shelters, sign posts, and other similar items.
- 6) Other Items Identified by the City Traffic Engineer – Mr. Brine’s letter referenced several of the other items listed in my September 16, 2011 report as not being the main factors of consideration, and I generally agree. The discussion of various items such as the trip generation rates, game schedules, peak arrival volumes, and signal timing were meant to put the more important issues in sharper focus and to rebut certain comments (such as “high speed right turns” from Superior Avenue to West Coast Highway) that were previously made on behalf of the City by Schmitz & Associates.

In summary, **it is my professional opinion** as both a Registered Traffic Engineer and a Civil Engineer in California with over 40 years of experience **that the direct driveway connection between Sunset Ridge Park and West Coast Highway will not create adverse traffic safety impacts.** It should be narrowed and located further to the west to provide additional sight distance of traffic exiting the Park.

If you have questions regarding these comments, please call me at (760) 398-8885 at your convenience.

Respectfully submitted,

Tom Brohard and Associates

*Tom Brohard*

Tom Brohard, PE  
Principal





Christy Schmitz  
11 Summerwind Court  
Newport Beach, CA 92663

October 28, 2011

Re: Coastal Commission Hearing November 2, 2011

I would like to make it clear that as a resident of Newport Crest I am not in support of the proposed road or roads for access to build Sunset Ridge Park to be on Banning Ranch Property in front of homes. In time, roads will also be in proposal for access to the Banning Ranch proposed building of homes, hotel and shopping area. I have been a long time resident of Newport Beach attending the schools and being a proud citizen. Los Angeles was always a place to visit but everyone wanted to live by the beach and enjoy the wonderful scenery and air quality. Over the years, Catalina Island is not a clear view with the haze that makes it unable to see a clear island and Casino. This is not what I want for my hometown and this is just one part of the destruction to come.

Yes, I do have a beautiful ocean view but that is only one asset that I truly want to save.

Please take the blinders off and ask yourselves the questions I pose.

Would you want to see wildlife destroyed on Banning Ranch if you were a resident?

Would you want to be unable to enjoy the beauty of the wildlife and their habitats due to development?

Would you want your property value devaluated due to development?

**Would you want to live in a high-risk area for Lung disease and other health concerns that will also shorten the life of others including children?**

**Would you want to put monies into making the inside of your home the only livable area due to air and noise pollution?**

**Would you want to be responsible for destroying the health and life of residents and future families?**

Would you want to give up an ocean view and an enjoyable peacefulness of the evenings and wonderful days?

Would you want to live in fear of proven unstable land that will occur if disturbed for development?

Would you want to see the crime rate increase due to the added access to residences that will occur because of development?

Would you be willing to have noise and dirt in your backyard during and after completion?

Unfortunately, after completion the noise and dirt levels will always be high along with smog levels.

Would you want to be responsible for destroying the wild life and vegetation of a peaceful and learning environment for years to come and future families?

I have posed these questions to you. For me and other residents and homeowners in Newport Crest along with resident friends of Newport Beach, the answer is **NO** to all!

Why make Newport Beach like the city of Los Angeles who is on the top 25 list of most polluted air quality cities in the US.

From the American Lung Association Page.

"Science shows that people who live or work near highways or busy roads bear a disproportionate health burden from air. Breathing polluted air can seriously harm your health and even shorten your life. **State of the Air** is a report card on air pollution in communities across the nation. The more you learn, the more you can protect your health and take steps to make our air cleaner and healthier.

- **FACT:** Breathing in particle pollution can increase the risk of early death, heart attacks, strokes and emergency room visits for people with asthma, cardiovascular disease and diabetes.

CHRISTY ANN SCHMITZ  
11 Summerwind Court  
Newport Beach, CA 92663  
949-548-5931

## John Del Arroz

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**From:** Ted Mumm [ted@3mumms.org]  
**Sent:** Thursday, October 27, 2011 1:41 PM  
**To:** John Del Arroz; Karl Schwing  
**Subject:** Sunset Ridge Park in Newport Beach - Item for CC meeting Nov. 2

Dear Coastal Commission:

I am writing to express my opinion about what I understand to be the current plans for the Sunset Ridge Park in Newport Beach. I request that these comments be part of the record when the item comes up for a vote.

Like everyone I've talked to, I'm in favor of the park concept. It would be a great asset to the area. However, I am forced to come out against it for one simple reason.

I think it was a mistake from the outset to build the park's access road on the Banning Ranch property, even with the approval and cooperation of the Banning Ranch owners.

Making construction of Sunset Ridge Park contingent on construction within an adjacent property simply makes no sense. If I were to remodel my house, I would not require my neighbor to make modifications to their property to benefit my remodeling job - neither should Sunset Ridge.

Sunset Ridge should be a self-contained, separate project with access road, parking, playing fields, etc., all contained strictly within the boundaries of the park itself.

If it had been planned this way from the outset, all the controversy and legal wrangling would have been avoided, and construction on the park would have started long ago, perhaps even nearing completion by now.

The only way the current plans for Sunset Ridge Park seem to make sense is in the context of aiding Newport Banning Ranch LLC by completing the first section of their "Bluff Road."

And this is REALLY wrong. Just as with Sunset Ridge, Banning Ranch should stand or fall on its own merits.

Co-mingling the two was never a good idea and never will be.

Thus, it is my sincere hope that the Coastal Commission will see new plans for Sunset Ridge at the meeting in Oceanside next Wednesday that show ALL of the access and other facilities for the park CONTAINED WITHIN THE PARK ITSELF.

If not, I strongly urge the Coastal Commission members to vote against the project.

Sincerely,

Carl W. Mumm  
319 Cedar Street  
Newport Beach, CA 92663

**John Del Arroz**

---

**From:** RODGER hageman [evenkeel4@sbcglobal.net]  
**Sent:** Saturday, October 29, 2011 2:36 PM  
**To:** Jonna Engel; John Del Arroz; Karl Schwing; Sherilyn Sarb; Teresa Henry; Peter Douglas  
**Subject:** 5-10-168 Sunset Ridge Park  
**Follow Up Flag:** Follow up  
**Flag Status:** Red

Hopefully, the following will be a meaningful contribution.

29 October 2011

CALIFORNIA COASTAL COMMISSON / E mail Transmission

45 Fremont St Suite 2000

San Francisco, CA 94105

Re: SUNSET RIDGE PARK, NEWPORT BEACH

Permit for Sunset Ridge Park, No 5-10-168

Dear Commissioners,

This note is a new viewpoint by the writer established subsequent to the CCC staff denial of the captioned permit application.

Referring to the Commission's internet site, Program Overview, "The mission of the Coastal Commission is to Protect, conserve and enhance .....for **environmentally sustainable** and **prudent** use by current and future generations."

Prudent can apply in many ways. This view asks whether a special coastal permit for approval of valuable coastal land by City of Newport Beach fulfills the prudence criterion. The purported usage seems to be limited to a few athletes and a handful of spectators who might arrive in around one hundred autos - perhaps 300 persons. Of course, more could walk up the steep slope from the busy highway, U.S. 1. In any event the usage doesn't lend itself to any o'l kid who wants to bike up after school for a pick up game in the afternoon.

Thus, there are a limited number of beneficiaries for this expensive project, not to mention including a major highway revision to U.S. 1 to handle this 100 or so cars!! What does the **feasibility study** and **cost benefit analysis** say?

Sustainability is a second issue for doesn't the actual landowner of adjoining land, Exxon and affiliates, tell us that they absolutely have no interest in, or willingness to set aside contiguous portions of it's land for mitigation purposes. This was unequivocally expressed! Will Exxon or their successors be totally reliable to sustain the requirements? Their maintenance just allowed a break in a petroleum line under the Yellowstone River at Billings, Montana. headwaters of the Mississippi. My home town. But we know they can always afford the cleanup. Didn't they just report earnings of \$33 billion for 3 months!

Newport Beach is pretty good to them.

Perhaps as many as several thousand residents and modest homeowners will be grossly impacted, both in the quality of lifestyle and financially by a use permit road approval.

Thank you for the opportunity to present this viewpoint.

r. hageman

Item W16a  
Application number 5-10-168  
Sunset Ridge Park  
Dean Reinemann  
Opposed

Dean Reinemann  
1877 Parkview Circle  
Costa Mesa CA 92627-4536  
949-548-2059  
[sapience@pacbell.net](mailto:sapience@pacbell.net)

James Wickett, Commissioner, California Coastal Commission  
45 Fremont St, Suite 2000  
San Francisco, CA 94105

October 24, 2011

Dear Commissioner Wickett:

I am opposed to the Sunset Ridge Park application.

There are, I believe, many valid reasons that support my position. Such as severe damage to endangered flora and fauna by elimination and disruption. These endangered species have been identified by appropriate governmental agencies.

There will be large amounts of excavation for roads and leveling which will disrupt animal pathways, uprooting plants and frightening animals and reptiles. Neighbors living in the surrounding area will also be disturbed.

The access road has excessive capacity.

The report by the Commission's staff does a much better job at describing the many problems this project would create point by point than I ever could.

Because of the problems that this project would create, the staff overwhelmingly recommends this project be denied.

Please heed the facts gathered, studied and given unbiased appraisal by the Commission staff and deny the project.

Sincerely,



Dean Reinemann

OCT 28 2011

Cheri Johnston  
480 62<sup>nd</sup> Street  
Newport Beach, CA 92663  
(949) 631-3061

October 25, 2011

California Coastal Commission  
South Coast District  
200 OceanGate, 10<sup>th</sup> Floor  
Long Beach, CA 90802-4416

Dear Commissioners:

I am writing to you with concern for the potential development of Banning Ranch, as well as the proposed signal on Pacific Coast Highway tied to the development. I strongly oppose any new signal and any development of Banning Ranch.

I have lived in Southern California all of my life, and have watched field after field leveled for homes, hotels and commercial use. My husband and I moved to Newport Shores because of the lack of development behind our home. We currently live on the canal which backs up to the Banning Ranch property. The amount of wildlife existing on the Banning Ranch property, as well as the abundance we enjoy daily along the canal, will not survive the development proposed by the City of Newport Beach. At what point do we say "enough is enough"? Open, undeveloped space is something to be treasured, not destroyed. Again.

Please deny the City of Newport Beach's application for development of this project.

Thank you very much.

Respectfully,

  
Cheri Johnston

I originally sent this letter for consideration at your Oct. 6, 2011 meeting. I have not seen or heard of any positive actions from the City of Newport Beach to find an acceptable alternative to the intrusive / unacceptable proposed road and signaled intersection to the proposed Sunset Ridge Park. My stance is more intense then a month ago. Please do not allow it to happen.  
Respectfully Gerard Proccacino, Newport Beach, CA

Permit (application) # 5-10-168

Agenda (item) # W16a

Gerard Proccacino

I am strongly opposed to the  
proposed Major intersection  
for Sunset Ridge Park, I am in  
favor of a more passive Park.

10/26/2011

Dear California Coastal Commission members,

I am a proud resident of Lido Sands, Newport Beach Ca. The proposed major, signaled entrance intersection for Sunset Ridge Park will be right in front of my home of 40 years. I am extremely concerned that this major signaled intersection will adversely affect not only my quality of life but that of most West Newport Beach residents and the life of the rare habitant of Banning Ranch.

The added grid lock and environment impact will make a hornets nest of what is already a traffic nightmare area. Cal Trans has been public of their disapproval due to the intersections unacceptable close proximity to Superior Ave. The park entrance road, which is proposed to be built on borrowed land from Banning Ranch owners, is exactly in the boulevard entrance footprint of their proposed mega development. I still question how this was included in the Park EIR when it is a separate property. The rare habitant in the path of the road has already been recently violated by a contractor construction staging area. There is no need for a road and intersection for the community to enjoy the park. The City of Newport Beach claims they have no other plans nor are there any other ways but for the road and major intersection to be built, I disagree. I have not seen any documented evidence that the City of Newport Beach has investigated all engineering possibilities to avert the access road. We West Newport Beach residents have recently spent hundreds of thousands of dollars of tax money to complete a "traffic calming" project for River Ave.

I originally sent this letter for consideration at your Oct. 6, 2011 meeting. I have not seen or heard of any positive actions from the City of Newport Beach to find an acceptable alternative to the intrusive / unacceptable proposed road and signaled intersection to the proposed Sunset Ridge Park. My stance is more intense then a month ago. Please do not allow it to happen.  
Respectfully Gerard Proccacino, Newport Beach, CA

which run less then 100 yards parallel to West Coast PCH. The major signalized intersection proposed on PCH will greatly negate that effort. We individually spent thousands of dollars of our own money to underground utilities. And now we are looking to possibly driving into Lido Sands Court seeing ugly bare steel poles with hanging black light boxes, seems a contradiction to me. There is a parking lot directly across from the proposed park on Superior Ave that is lightly used. A pedestrian over pass could be erected or the existing crosswalk modified to get people across. The lot could also be enlarged if necessary. The road, intersection and proposed 75 car, plus, parking lot in the park could all be eliminated. The parking lot space and the part of the road on park land could be put to much better use, another playing field, swimming pool etc. I urge you, please, to strongly encourage the City of Newport Beach to deliberately and sincerely investigate this and other alternatives. If, God forbid, the road gets built the signaled intersection is not needed. There are safe and signaled U turns just blocks from the proposed entrance which would require only a right turn in, right turn out from the park. I have heard, read about the road/ intersection making it convenient for the park patrons. It is only making it convenient for motor vehicles. Accommodating cars again, where does it stop? It must stop here. How many more are going to be greatly inconvenienced by the negative impact of the road and intersection? The people are going to a park, not work. A little walking to get there should only entice the experience. Please, please, no road and major signaled intersection on West Coast Highway. No road, no major intersection, no motor vehicles, more Park! Please do not Los Angelize Newport Beach. I strongly support The Banning Ranch Conservancy professional stance on this issue.

Respectfully submitted and thank you for your consideration.



Gerard Proccacino  
5105 Lido Sands Drive  
Newport Beach, CA 92663  
714-914-5078  
Gravytrain1@roadrunner.com





# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Ecological Services  
Carlsbad Fish and Wildlife Office  
6010 Hidden Valley Road, Suite 101  
Carlsbad, California 92011



In Reply Refer To:  
FWS-OR-09B0310-12TA0011

OCT 28 2011

Mr. Michael J. Sinacori, PE  
Assistant City Engineer  
City of Newport Beach, Public Works Department  
3300 Newport Boulevard  
Newport Beach, California 92658-8915

Subject: Request for Technical Assistance for Sunset Ridge Park Project, City of Newport Beach, Orange County, California

Dear Mr. Sinacori:

Following extensive coordination with our office, the City of Newport Beach (City) has committed to implement significant measures to avoid and minimize impacts to the federally threatened coastal California gnatcatcher (*Poliophtila californica californica*, "gnatcatcher") as part of the proposed Sunset Ridge Park Project in the City of Newport Beach, Orange County, California (Enclosure, Part I). This letter is in response to your written request received October 11, 2011, for our agency to confirm that the City has addressed compliance with the Endangered Species Act of 1973 (Endangered Species Act), as amended (16 U.S.C. 1531 *et seq.*), with regard to potential project-related effects to gnatcatcher. In previous correspondence, the City provided information concerning potential habitat for federally listed vernal pool species at the project site and is also requesting concurrence that additional protocol surveys for federally listed vernal pool species are not warranted. Finally, you requested our concurrence that no protocol surveys are required for burrowing owls (*Athene cunicularia*), a species protected under the Migratory Bird Treaty Act (16 U.S.C. 703-712).

The proposed project is the construction and operation of a recreational park on 13.65 acres. The park will include ball fields, a butterfly garden, playground, and parking area (Figure 1). A portion of the project will impact property owned by Newport Banning Ranch LLC (Banning Ranch) for construction of the park access road (6.37 acres) and to accommodate stockpiles of excess fill material generated from grading the park site (4.10 acres). However, the park project is not dependent on the proposed Newport Banning Ranch Project described in a Draft Environmental Impact Report, dated September 9, 2011 (SCH No. 2009031061) (i.e., the City intends to build the park regardless of the outcome of the pending project approval for the Newport Banning Ranch Project). Chain link fencing topped with barbed wire will be installed along the west side of the access road and will tie into the wall surrounding residential

### Gnatcatcher

The proposed project site is occupied by gnatcatchers and is located within Unit 7 (Central-Coastal NCCP Subregions of Orange County) of designated critical habitat for the gnatcatcher (72 FR 72010). This area was designated because it is contiguous with the 400-acre Banning Ranch property, which contains high quality habitat and a dense population of gnatcatchers. Unit 7, as a whole, serves to link populations of gnatcatchers located in southern Orange County with those in northern Orange County and Riverside County. The number of gnatcatcher territories documented on or directly adjacent to the park site has ranged from 0 to 2 each year (Enclosure Part II). Based on our review of the project and the City's commitment to implement specific measures to avoid and minimize impacts to gnatcatchers, we do not expect construction or operation of the Sunset Ridge Park Project to "harm" gnatcatchers<sup>1</sup>. In addition, the project site will continue to support gnatcatcher habitat and to maintain connectivity with gnatcatchers on the Banning Ranch property. Thus, the ecological role and function of designated critical habitat will not be precluded by the project<sup>2</sup>.

The project avoids the primary breeding season use areas where gnatcatchers have been observed since 1992. Project impacts to foraging and sheltering habitat that are primarily used outside of the breeding season are temporary and sufficient habitat is available adjacent to the project site to allow gnatcatcher pairs located in the project vicinity to compensate for the temporary loss of habitat through minor adjustments to their non-breeding season use areas. Proposed habitat restoration/enhancement will improve the quality and quantity of breeding habitat and will increase the likelihood of a breeding pair becoming re-established on the project site in an area that has not been used for breeding by gnatcatchers since 2006. Re-vegetation of a portion of the park landscaping with native scrub species will provide supplemental foraging habitat for gnatcatchers. The proposed access road, as designed, will allow gnatcatchers to continue to disperse between habitat within the project site and habitat on the Banning Ranch property, and management of all gnatcatcher habitat areas within the site will maintain the quality of habitat over the long term and support recovery of the species (Enclosure Part III). Consequently, when considering potential impacts to gnatcatcher, we have determined that the proposed project is in compliance with the Endangered Species Act.

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<sup>1</sup> Section 9 of the Endangered Species Act prohibits the take of endangered and threatened species without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. Harm is further defined by the Fish and Wildlife Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.

<sup>2</sup> The Endangered Species Act requires consultation with our agency to address potential impacts on critical habitat for projects carried out, funded, or authorize by a Federal agency to ensure that their actions will not destroy or adversely modify critical habitat. A critical habitat designation generally has no effect on situations that do not involve a Federal agency such as this project that involves no Federal funding or permit. Our conclusion in this letter concerning potential effects of the project on critical habitat is provided for information purposes only and does not address a regulatory requirement.

We recommend the City include the following additional measures to further discourage non-natives from encroaching into surrounding native vegetation and to increase the quality and quantity of gnatcatcher habitat on the project site:

- Remove invasive species (e.g., *Cortaderia sp.*, *Carpobrotus edulis*) from areas outside the grading limits (Figure 1, “Existing – Not to Be Disturbed” and “Existing – Disturbed, Non-Native”).
- 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.
- To reduce maintenance costs associated with maintaining gnatcatcher habitat areas, remove non-native species from the planting list that have a propensity for dispersal (e.g., *Acacia sp.*).
- Reseeding or replant graded areas adjacent gnatcatcher habitat areas (e.g., Figure 1, “Entry Area”) with appropriate native species (e.g., coastal sage scrub and native grassland in upland areas or mulefat and willow cuttings in areas with sufficient water).

#### Vernal Pools

We have reviewed information regarding potential vernal pools within the project area provided by the Banning Ranch Conservancy and Bonterra Consulting (Enclosure, Part IV). Four potential vernal pools have been identified on the site (VP 34, 35, 36, and 39). A dry season survey was conducted in VP 39, and no cysts of any fairy shrimp species were detected in the samples collected. Based on our review of available information, we have determined that, given the apparent lack of vernal pool indicators in these pools, protocol surveys would not normally be conducted for federally listed fairy shrimp at this site; therefore, we do not recommend additional surveys.

#### Burrowing Owls

Burrowing owls are not federally listed under the Endangered Species Act but are protected under the Migratory Bird Treaty Act, which prohibits killing or injuring adults and destroying active nests. No wintering or breeding burrowing owls were detected on the project site during surveys conducted in 2009 in accordance with the California Burrowing Owl Consortium recommended guidelines (Bonterra Consulting 2009a). However, given the presence of suitable habitat on project site, the City will conduct pre-construction surveys for burrowing owls to ensure no adults and/or active burrows are impacted by construction activities (Bonterra Consulting 2009b). Because focused surveys have been completed and measures are in place to

ensure no adults and/or active burrows are impacted by construction activities (Bonterra Consulting 2009b). Because focused surveys have been completed and measures are in place to ensure compliance with the Migratory Bird Treaty Act, we do not recommend additional surveys for burrowing owls.

In summary, we appreciate the City's efforts to coordinate with our agency to ensure regulatory compliance with the Endangered Species Act and Migratory Bird Treaty Act and your commitment to implement measures in support of gnatcatcher recovery. Should you have any questions regarding this letter, please contact Fish and Wildlife Biologist Christine Medak of this office at 760-431-9440, extension 298.

Sincerely,

A handwritten signature in black ink, reading "Karen A. Goebel". The signature is fluid and cursive, with the first name "Karen" and last name "Goebel" clearly distinguishable.

Karen A. Goebel  
Assistant Field Supervisor

cc:

Jonna Engel, California Coastal Commission

Terry Welsh, Banning Ranch Conservancy

Matt Chirdon, California Department of Fish and Game

**Enclosure**  
**Sunset Ridge Park Project, City of Newport Beach, California**

Part 1 Project Design and Avoidance Measures

In coordination with the U.S. Fish and Wildlife Service's Carlsbad Fish and Wildlife Office (CFWO), the City of Newport Beach (City) has committed to implement the following design features and avoidance measures as part of the Sunset Ridge Park Project to avoid and minimize impacts to the Federal listed coastal California gnatcatcher ("gnatcatcher").

*Project Design (refer to Figure 1):*

1. The City will restore 1.90 acres of coastal sage scrub (Expanded CSS) and enhance 0.80 acre of degraded coastal sage scrub through the removal of non-native plants (Existing Disturbed CSS) within the project area.
  - a. Prior to initiating impacts to gnatcatcher habitat, the City will submit and obtain approval from the CFWO of a coastal sage scrub restoration and enhancement plan addressing a minimum of 2.70 acres. The plan will include a description and map of the habitats to be created, methods of site preparation and planting, a plant palette, and a 5-year monitoring and maintenance plan with specific quantitative performance criteria for evaluating the progress of the habitat creation efforts. Maintenance and monitoring will continue until the 2.0 acres include: a) greater than 75 percent absolute cover by native species, b) 0 percent non-native invasive species, and c) a species diversity greater than or equal to the baseline condition.
  - b. The restoration area will be without irrigation for a minimum of 1 year and the irrigation system will be removed prior to determining that success criteria have been met.
  - c. Implementation of the restoration and enhancement plan will be initiated concurrently with construction of the park.
2. The City will provide additional foraging habitat for the gnatcatcher within approximately 4.65 acres of landscaped park areas. Revisions to the proposed plant pallet in these areas will be reviewed and approved by the CFWO prior to the initiation of construction.
  - a. The 1.60-acre Streetscape Slope will be minimally irrigated and consist primarily of native plants of the coastal sage scrub vegetation community (e.g., *Encelia californica*, *Artemesia californica*, *Eriogonum fasciculatum*, *Rhus integrifolia*, *Isocoma menziesii*).



- b. The 0.5-acre Water Infiltration Area will include mulefat scrub (*Baccharis salicifolia*).
  - c. The 2.55-acre Residential Buffer located along the northern boundary of the park will include native scrub species compliant with the Orange County Fire Authority OCFA fuel modification plant palette (e.g., *Baccharis pilularis*, *Opuntia littoralis*, *Encelia californica*, and *Lotus scoparius*).
3. Plants identified by the California Invasive Plant Council as an invasive risk in southern California will be excluded from all landscaping within the park.
4. A portion of the park access road will be constructed at a lower elevation than adjacent slopes, providing a clear line of site for gnatcatchers to cross from the Existing CSS and Expanded CSS to undisturbed habitats west of the project area.
5. Park lighting will be limited to 3.5 foot bollards with cut-off louvers and will be positioned, directed or shielded so as to minimize artificial lighting from reflecting into preserved habitat.
6. Human intrusion into preserved habitat within the park will be discouraged through the use of signs and fencing. Signs identifying the native habitat areas (such as “No Trespassing Habitat Area Do Not Enter”) will be posted at reasonable intervals and likely points of entry.
7. Fencing (e.g., rope and post) will be installed, as necessary, to discourage unauthorized access into native habitat areas.
8. To reduce potential impacts to gnatcatcher from domestic/feral animals and wildlife adapted to urban development and to retain ecological processes in habitat east of the access road, the proposed project includes two wildlife underpasses that will be constructed in a manner that will allow coyotes to continue to move safely through sections open space that will be bisected by access road.

*Construction of the Project:*

9. Vegetation removal and clearing for the proposed project will occur between August 1 and February 14, outside the gnatcatcher breeding and nesting season.
10. 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.

11. A qualified biologist<sup>3</sup> will be present during all vegetation removal and clearing and will have the authority to halt activities that might result in harm to the gnatcatcher or result in impacts beyond the grading limits as depicted in Figure 3.
12. Construction activities that occur within 200 feet of gnatcatcher habitat during the breeding and nesting season will be conducted in the presence of a qualified biologist. Construction activities will not occur within 200 feet of an active gnatcatcher nest. The qualified biologist will provide, on a weekly basis to the CFWO, a summary (including photos) of project activities completed during the breeding and nesting season.

*Park Operations:*

13. Vegetation clearing/tree trimming/pruning within the Streetscape Slope and will occur between September 1 and February 14, outside the gnatcatcher breeding season.
14. As part of the annual operations budget for the park, the City will dedicate adequate funding to ensure:
  - a. During the first 5 years following public access to park facilities, human intrusion into the habitat areas will be assessed on a regular basis. If signs and fencing are not effective, the City's landscape contractor (or qualified biologist) will recommend additional strategies. These recommendations and a record of their implementation will be submitted to the CFWO within 6 years of public access to the park.
  - b. Non-native landscaping within the park will be maintained to prevent spill-over into gnatcatcher habitat.
  - c. All non-native landscape plants that have been inadvertently introduced into gnatcatcher habitat areas will be removed a minimum of once per year, as necessary. Habitat maintenance will be conducted outside of the gnatcatcher breeding season.

Part II. Status of the Gnatcatcher and its Habitat in the Project Area

The proposed project is located within Unit 7 (Central-Coastal NCCP Subregions of Orange County) of designated critical habitat for the gnatcatcher (72 FR 72010). This area was designated because it is contiguous with the 400-acre Banning Ranch property, which contains high quality habitat and a dense population of gnatcatchers. Unit 7, as a whole, serves to link populations of gnatcatchers located in southern Orange County with those in northern Orange County and Riverside County.

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<sup>3</sup> The qualified biologist will hold a 10(a)(1)(A) permit for the gnatcatcher.

Surveys for the gnatcatcher have been conducted on the Banning Ranch property since 1992 and were completed on the Sunset Ridge Park project site in 2009 (Table 1). Based on available survey information, the number of gnatcatcher territories documented on or directly adjacent to the park site has ranged from 0 to 2 each year. Territories have generally been located on the bluff between the proposed access road and proposed turf area and in the drainage to the west of the proposed access road (Figure 2, CAGN use areas 1 and 2, respectively). A breeding pair was last observed on the bluff in 2006 (Glenn Lukos Associates 2009). An additional territory was observed during the 2011 breeding season in a patch of disturbed scrub located directly north of the proposed access road<sup>4</sup>. Gnatcatchers have also been observed foraging outside of the breeding season along the slopes facing Coast Highway 101 and Superior Avenue (Hamilton Biological 2009).

Gnatcatchers typically occur in or near coastal sage scrub, which is composed of relatively low-growing, dry-season deciduous and succulent plants. They 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). The project area consists of 5.42 acres of native scrub vegetation (i.e., areas mapped as coastal bluff, encelia, mulefat/goldenbush, and willow scrub by Bonterra Consulting 2009b, Appendix E and 2011a), 5.16 acres of non-native grassland, 13.08 acres of ruderal/ornamental/disturbed vegetation, and 0.46 acre of developed area (flood control channel).

The gnatcatcher habitat is of variable quality due to regular disturbances (e.g., oil operations and regular mowing) that have likely contributed to the introduction of non-native plants and concurrent reduction in native plants within the project area. Approximately 3.46 acres of native scrub dominated by *Encelia californica* (mapped as encelia scrub) are regularly mowed. Native scrub in the project area is intermixed with ornamentals such as myoporum (*Myoporum laetum*), hottentot fig (*Carpobrotus edulis*), and pampas grass (*Cortaderia sellonana*). Conversely, areas mapped as non-native grassland that are also regularly mowed, include remnant patches of native scrub vegetation.

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<sup>4</sup> C. Medak (CFWO) observed a gnatcatcher family group on June 14, 2011, with T. Bombkamp (Glenn Lukos Associates). C. Medak also observed a territorial male on June 22, 2011, in scrub and willow vegetation with A. Johnston and G. Medeiros (Bonterra Consulting).



**Table 1.** Gnatcatcher territories in the vicinity of the project

<b>Estimated Gnatcatcher Territories</b>			
Year	Banning Ranch portion of Sunset Ridge Park	Banning Ranch Total	Reference
1992	1	19	Glenn Lukos Associates 2010
1993	1	20	Glenn Lukos Associates 2010
1994	1	29	LSA 1994
1995	0	16	LSA 1995
1996	1	17	LSA 1996
1997	2	18	PCR 1997
1998	2	19	Glenn Lukos Associates 2010
2000	1	19	PCR 2000
2002	1	15	Glenn Lukos Associates 2002
2006	1	21	Glenn Lukos Associates 2009
2007	0	18	Glenn Lukos Associates 2009
2009	1 <sup>a</sup>	17	Bonterra Consulting 2009c
Average	1	19	

<sup>a</sup> Protocol surveys conducted on entire project site.

### Part III. Analysis of Potential Project Impacts on Gnatcatchers

#### *Disturbance and Habitat Loss Associated with Project Construction*

The project avoids the primary breeding season use areas where gnatcatchers have been observed since 1992. Within the project area, a total of 1.23 acres mapped as coastal bluff scrub, mulefat, encelia, and non-native grassland will be protected in place. This area includes the bluff where a gnatcatcher pair was last observed in 2006 (Figure 2, CAGN use area 1) and some of the foraging areas where gnatcatchers were observed along Coast Highway 101 and Superior Avenue outside of the breeding season. In addition, the proposed access road and stockpile were shifted from originally proposed locations (Bonterra Consulting 2009b) to avoid habitat to the west of the project area where gnatcatcher pairs have been consistently observed (Figure 2, CAGN use area 2) and habitat to the north of the proposed access road were a potential territory was observed during the 2011 breeding season.

The proposed project will impact a total of 21.4 acres, including 9.35 acres mapped by Bonterra Consulting (2009b, Appendix E and 2011a) as gnatcatcher foraging and sheltering habitat (0.11 acre coastal bluff scrub, 0.04 acre mulefat/golden bush scrub, 4.05 acres encelia scrub, and 5.15 acres non-native grassland with remnant patches of coastal sage scrub). Because of regular mowing activities and the presence of non-native plants that do not support gnatcatcher foraging (e.g., hottentot fig), substantially less than 9.35 acres of mapped gnatcatcher foraging habitat are likely suitable for gnatcatcher foraging (e.g., Bonterra Consulting 2011b).

The direct injury or mortality of eggs and nestlings will be avoided because the primary use areas where nesting gnatcatchers have been observed will not be impacted and vegetation removal will occur outside the breeding season for the gnatcatcher. Although construction may occur during the breeding season, a buffer of at least 200 feet from active nests, established by a qualified biologist, will minimize the noise levels in occupied habitat and avoid impacts to nesting gnatcatchers. In some cases 300 foot buffers and greater are recommended to avoid disturbance to nesting gnatcatchers (e.g., Service 2010); however, we consider a 200 foot buffer to be adequate because gnatcatchers on this site are habituated to noisy conditions given the location, directly adjacent to Coast Highway.

Gnatcatcher breeding season territories range in size from less than 2.5 acres to 25 acres (Atwood *et al.* 1998, Preston *et al.* 1998), with mean territory size generally smaller for coastal populations than inland populations (Preston *et al.* 1998). 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 proposed project will initially impact 9.35 acres of mapped gnatcatcher foraging and sheltering habitat that gnatcatchers are likely using primarily outside of the breeding season. Although sheltering and foraging resources will be temporarily reduced because of the time necessary to re-establish vegetation within the graded areas, we do not expect this reduction in foraging and sheltering habitat to result in the loss of pairs or the reduction in productivity of any pairs established in the project vicinity. Immediately adjacent to the project site, the Banning Ranch property contains approximately 212 acres of potential gnatcatcher foraging habitat (e.g., coastal sage scrub, riparian, and grassland vegetation communities) (BonTerra Consulting 2011c). Given an annual average of 19 gnatcatcher pairs (Table 1), approximately 11 acres of breeding/foraging and sheltering habitat are available on the site to support each pair. Accordingly, we anticipate there is sufficient remaining habitat in the immediate project vicinity to allow gnatcatcher pairs located in the project vicinity to compensate for the temporary loss of habitat through minor adjustments to their non-breeding season use areas.

Following completion of the project, we expect the 4.10-acre fill area on the Banning Ranch property will quickly re-colonize with non-native grasses, intermixed with some native scrub from local seed sources. Although this area will likely continue to be mowed by the property owners, it will again provide supplemental foraging habitat for the gnatcatcher of equivalent

quality to the habitat that was present prior to implementation of the project. In addition, 2.7 acres of coastal bluff scrub will be restored or enhanced and 4.65 acres of park landscaping will be revegetated with native scrub on the project site as part of the project.

The restoration and enhancement of 2.7 acres of gnatcatcher breeding habitat east of the access road will improve the quantity and quality of breeding habitat for the gnatcatcher and support recovery of the species. Coastal bluff scrub will increase from 1.15 acres to 2.70 acres. The restoration and enhancement efforts will increase the density of native scrub by removing non-native species and planting native scrub as necessary to reach 75 percent cover. The relative density of scrub cover influences gnatcatcher territory size with territory size increasing as scrub cover decreases (Beyers and Wirtz 1997). Although the bluff area has not supported a breeding pair since 2006, we expect the improvements in the quality and quantity of breeding habitat will increase the likelihood of a breeding pair becoming re-established on the bluff.

Revegetation of 4.65 acres of park landscaping with native scrub vegetation will supplement available foraging and sheltering habitat for gnatcatchers in the project vicinity and allow for territory expansion outside of the breeding season. However, because these areas will be located adjacent to active park use areas and will be subject to maintenance and irrigation, we don't expect the habitat to support gnatcatcher nesting. Wetter soil conditions associated with regular irrigation create more favorable conditions for invasive ant species (Suarez *et al.* 1998, Holway and Suarez 2006). Argentine ants are documented predators on gnatcatcher nestlings (Sackman 1997, Atwood and Bontrager 2001) and can reduce food resources for the gnatcatcher by displacing the native arthropod community (Bolger *et al.* 2000). In addition, nesting territories typically have greater than 50 percent shrub cover (Beyers and Wirtz 1997). Per the requirements of the local fire authority, the Residential Buffer will be well irrigated and planted at a density that is not expected to support nesting gnatcatchers (i.e., less than 50 percent cover). The Streetscape slope will have a density of vegetation that could support nesting but will be trimmed and minimally irrigated for aesthetic purposes. In the event that habitat within the Streetscape Slope supports gnatcatcher breeding, maintenance of this area outside of the breeding season will avoid the potential for disruption of active nests. Low level watering during drought conditions is less likely to attract and maintain high numbers of Argentine ants. In addition, gnatcatchers may benefit from having some irrigated vegetation during drought conditions due to the increase in abundance of insects and seeds from the higher water availability (Patten and Rotenberry 1999).

#### *Habitat Degradation and Disturbance Associated with Project Operation and Maintenance*

In addition to removing foraging habitat, the project could result in disturbance to gnatcatchers and/or degradation of remaining undisturbed habitat due to increased human-generated disturbances associated with operation of the park, including authorized and unauthorized recreational use, waste dumping, night lighting, exotic plant invasion, and an increase in predators.

Long-term management of gnatcatcher habitat, as part of park operations, will ensure the project area will continue to provide habitat for the gnatcatcher and that this habitat will not be permanently compromised by human-generated disturbances associated with park activities. Disturbances will be minimized by maintaining appropriate signs and fencing to discourage unauthorized entry into habitat. The quality and extent of habitat will be maintained by the removal of non-native landscape plants from gnatcatcher habitat areas annually. Numerous nest predators (i.e., raccoons, rats, and skunks) thrive on the edges of developed areas where poorly stored trash and debris are available. To avoid an increase in predation associated with the project, night lighting will be shielded to prevent illumination of habitat areas and coyotes will continue to have access to habitat within the park, east of the park access road.

#### Part IV. Analysis of Potential Impacts on Federally Listed Vernal Pool Species

We received information regarding potential vernal pools within the project area from the Banning Ranch Conservancy on June 30, 2011. The information (an electronic presentation titled Complete Banning Ranch Mesa Vernal Pools/Wetlands First Edition 6-27-11) includes photographs taken between February 2009 and March 2011 of four ponds within the project area (VP 34, 35, 36, and 39). Several vernal pools on the Banning Ranch property are occupied by the federally endangered San Diego fairy shrimp (*Branchinecta sandiegonensis*); therefore, in response to this information, two field surveys were initiated by the City to evaluate vernal pool indicators in the areas where water had ponded and determine if protocol surveys for listed fairy shrimp were warranted (Bonterra Consulting 2011b). The biologists, permitted by the Service to conduct protocol surveys for listed fairy shrimp, determined that areas VP 34, 35, 36, and 39 were not vernal pools, based on a lack of plant species characteristic of vernal pools, and lack of sustained/observable ponding over multiple years of surveys onsite. In addition, all four ponds were located within ephemeral drainage areas. The probability that ponding would occur for an adequate period of time to support San Diego fairy shrimp is low in VP 34, 35, and 36 because hydrological processes (i.e., the flow of water downhill and associated erosion) are unimpeded by alterations in the natural topography. The drainage below VP 39 has been blocked by roadway fill to the west of the pool, which could result in longer periods of ponding. Nevertheless, a dry season survey was conducted in VP 39 in September 2011, in accordance with the Service's dry season protocol guidelines (Service 1996) and no cysts of any species were detected in the samples collected (Glenn Lukos Associates 2011). Given the apparent lack of vernal pool indicators in VP 39, protocol surveys would not normally be conducted; therefore, we do not recommend additional surveys.

## EX-PARTE COMMUNICATIONS DISCLOSURE

Person(s) initiating communication: Penny Elia - Sierra Club  
Person(s) receiving communication: Commissioner Bloom  
Location of communication: Telephone  
Time/Date of communication: October 31, 2011 – 11:35 AM  
Type of communication: Teleconf

Name or description of the project(s)/topics of discussion:

W15b. **City of Laguna Beach LCP Amendment No. LGB-MAJ-2-10 (7 Changes)**. Public hearing and action on request by City of Laguna Beach to amend the certified Implementation Plan to change provisions related to 1) setbacks on split zoned parcels, 2) reasonable accommodation, 3) definitions, 4) the type of local action required for short-term lodging permits, 5) establishing time limits by which requests for disaster replacement authorization must be made, 6) establishes new limitations on the types of local ministerial actions that can be appealed, and 7) new rules related to appeals of design review board denials. The LCPA affects only the Implementation Plan portion of the certified LCP. (MV-LB)

- Request support of staff's recommendations

W16a. **Application No. 5-10-168 (City of Newport Beach Sunset Ridge)** Application of City of Newport Beach to construct, on vacant land, active recreational park (Sunset Ridge Park) of approximately 18 acres at northwest corner of intersection of West Coast Highway and Superior Ave, including access road, parking lot, public restroom, playground, sports fields, paths, viewpoint, retaining wall, landscaping, and coastal sage scrub habitat enhancement. Grading consists of approximately 110,000 cu.yds. of cut, and 102,000 cu.yds. of fill, at 4850 West Coast Highway and on portion of Banning Ranch, Newport Beach, Orange County. (JDA-LB)

- The planned Sunset Ridge Park entrance road encroaches upon Environmentally Sensitive Habitat Area (ESHA).
- Banning Ranch Conservancy has long supported a public park, but opposes the current project as proposed.
- The planned Sunset Ridge Park entrance road, built on the adjacent Banning Ranch, is intimately connected to the planned Banning Ranch development.
- Alternatives to the planned Sunset Ridge Park entrance road exist. Note Tom Brohard's alternative submitted on behalf of Banning Ranch Conservancy.
- Any new proposal from the City should require a new application and staff and the Commission should have an opportunity to review in detail via a new staff report that would allow for careful analysis and public input.
- Request support of staff recommendation for denial.
- Comments to Schmitz 10-19-11 letter and Access Agreement provided via email.

## EX-PARTE COMMUNICATIONS DISCLOSURE

Person(s) initiating communication: Steve Ray – Banning Ranch Conservancy  
Penny Elia - Sierra Club

Person(s) receiving communication: Commissioner Kram

Location of communication: Telephone

Time/Date of communication: October 31, 2011 – 10 AM

Type of communication: Teleconf

Name or description of the project(s)/topics of discussion:

W15b. **City of Laguna Beach LCP Amendment No. LGB-MAJ-2-10 (7 Changes)**. Public hearing and action on request by City of Laguna Beach to amend the certified Implementation Plan to change provisions related to 1) setbacks on split zoned parcels, 2) reasonable accommodation, 3) definitions, 4) the type of local action required for short-term lodging permits, 5) establishing time limits by which requests for disaster replacement authorization must be made, 6) establishes new limitations on the types of local ministerial actions that can be appealed, and 7) new rules related to appeals of design review board denials. The LCPA affects only the Implementation Plan portion of the certified LCP. (MV-LB)

- Request support of staff's recommendations

W16a. **Application No. 5-10-168 (City of Newport Beach Sunset Ridge)** Application of City of Newport Beach to construct, on vacant land, active recreational park (Sunset Ridge Park) of approximately 18 acres at northwest corner of intersection of West Coast Highway and Superior Ave, including access road, parking lot, public restroom, playground, sports fields, paths, viewpoint, retaining wall, landscaping, and coastal sage scrub habitat enhancement. Grading consists of approximately 110,000 cu.yds. of cut, and 102,000 cu.yds. of fill, at 4850 West Coast Highway and on portion of Banning Ranch, Newport Beach, Orange County. (JDA-LB)

- The planned Sunset Ridge Park entrance road encroaches upon Environmentally Sensitive Habitat Area (ESHA).
- Banning Ranch Conservancy has long supported a public park, but opposes the current project as proposed.
- The planned Sunset Ridge Park entrance road, built on the adjacent Banning Ranch, is intimately connected to the planned Banning Ranch development.
- Alternatives to the planned Sunset Ridge Park entrance road exist. Discussion of Tom Brohard's alternative submitted on behalf of Banning Ranch Conservancy.
- Any new proposal from the City should require a new application and staff and the Commission should have an opportunity to review in detail via a new staff report that would allow for careful analysis and public input.
- Request support of staff recommendation for denial.
- Comments to Schmitz 10-19-11 letter provided.

**FORM FOR DISCLOSURE  
OF EX PARTE  
COMMUNICATIONS**

Name or description of project, LCP, etc.:	Application No. 5-10-168 (City of Newport Beach)
Date and time of receipt of communication:	10/26/11 9:10 am
Location of communication:	Board of Supervisor's Office, Santa Cruz, CA
Type of communication:	Teleconference
Person(s) initiating communication:	Don Schmitz
Person(s) receiving communication:	Mark Stone

Detailed substantive description of content of communication:  
(Attach a copy of the complete text of any written material received.)

He raised two issues with respect to the Sunset Ridge park. He said that the city council approved an option b that would eliminate the access road and use parking across the street. This is not favored because people would need to walk a quarter of a mile to use the park. They do understand that this option would solve the issue with the Banning Ranch road. As to option a, he said that the city is not in a position to agree to the deed restriction that would preclude the Bluff Road from ever being built. He said that the Bluff Road is identified on the County's Master Plan of Arterial Highways as an arterial. He said that if the city were to do anything unilaterally that would preclude Bluff Road from becoming an arterial, then they would be putting \$1.5M in transportation funds in jeopardy.

Date: 10/26/11 Signature of Commissioner: Mark Stone

If the communication was provided at the same time to staff as it was provided to a Commissioner, the communication is not ex parte and this form does not need to be filled out.

If communication occurred within seven or more days in advance of the Commission hearing on the item that was the subject of the communication, complete this form and transmit it to the Executive Director within seven days of the communication. If it is reasonable to believe that the completed form will not arrive by U.S. mail at the Commission's main office prior to the commencement of the meeting, other means of delivery should be used; such as facsimile, overnight mail, or personal delivery by the Commissioner to the Executive Director at the meeting prior to the time that the hearing on the matter commences.